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GCR's *Europe, Middle East and Africa Antitrust Review 2020* is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific, this book provides an unparalleled annual update from competition enforcers and leading practitioners, on key developments in both public enforcement and private litigation.

In addition to updates on the European Commission, Cyprus, Denmark, France, Germany, Greece, Norway, Romania, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Israel, Mauritius and Mozambique, this edition features a chapter on Angola, which launched its Competition Regulatory Authority in early 2019.

In preparing this report, *Global Competition Review* has worked with leading competition lawyers and government officials. The latter group provides crucial perspective on the thinking behind cutting-edge matters such as the intersection of privacy, data and antitrust; 'phygital' retail distribution that combines brick-and-mortar with online sales; screening tools to detect collusion in public procurement; and much more.

The lawyers' and officials' knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

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European Union: Joint Ventures

Catriona Hatton and David Cardwell
Baker Botts LLP

This article reviews the application of EU merger control rules to joint ventures (JVs) including recent developments. It also looks at new developments in the application of article 101 of the Treaty on the Functioning of the European Union (TFEU) to JVs, in particular recent judgments of the European courts regarding parental liability for cartel infringements by JVs.

JVs and EU merger control

The EU Merger Regulation (EUMR) applies to the creation of any JV that is considered to be 'concentrative' rather than 'cooperative'. JVs are considered 'concentrative' and may be subject to a filing requirement under the EUMR when they meet each of the following three key criteria:

- joint control: two or more undertakings are in a position to exert decisive influence over the JV;
- full functionality: the JV will perform all of the normal sort of activities carried out by an autonomous economic entity, on a lasting basis; and
- EU dimension: two or more undertakings have sufficient revenues in the EU to meet one of the two sets of EUMR filing thresholds.

Joint control

When two or more undertakings are able to exert decisive influence over a JV, they are considered to be in a position of 'joint control' under the EUMR. A key indicator of decisive influence in the context of a JV is the right to veto important decisions that affect the strategic commercial behaviour of the JV Examples of such veto rights include decisions on the adoption of the JV's annual budget, its business plan, and appointment of directors and other senior management of the JV[1]

1 Joint control is also considered to arise where the mutual approval of both or all parent companies is required in order to take decisions on these sorts of issues. The fact that a permanent stalemate would arise otherwise is taken as an indication that the jointly controlling parent companies must therefore cooperate permanently in order for the JV to operate.

A joint control analysis can take on greater complexity in certain situations. Joint control may also be found to exist even in situations where no single undertaking has the power to veto strategic decisions, but where two or more minority shareholders have common interests such as to mean that they would not exercise their voting rights against each other – a situation known as de facto joint control.[2] Such situations, however, are considered to arise only exceptionally.

The 'quality' of control is not a static concept, meaning that an entity that was previously subject to sole control might become subject to joint control, or the identity of undertakings that were originally in joint control of a JV changes. Notification obligations can arise in either of these situations. Joint control can also be acquired passively, meaning that an undertaking may be found to be in joint control despite the absence of any declared intention to take control. Such situations can arise where, for example, one JV shareholder sells a part of its shareholding, leading to another shareholder's existing shareholding taking on a more significant, controlling, role in the operation of the JV.

Significant time can be taken in analysing joint control scenarios and assessing whether or not a JV is actually subject to joint control, with such analyses sometimes being finely balanced.

Full functionality

The 'full function' requirement under the EUMR is designed to ensure that notifications are required only for JVs that lead to a permanent change in market structure, the principle being that a JV must have a sufficient degree of autonomy in order to conduct itself independently on the market in much the same way as any other autonomous economic entity.

The main criteria for a JV to be seen as full function are:

- a management dedicated to the day-to-day operation of the JV;
- access to sufficient resources (including finance, staff and other assets) to allow it to operate independently; and
- the ability and intention to operate on a lasting basis.

JVs that are created with the intention that they should take over a specific function of the parent companies (eg, a distribution function), but without a permanent staff or independent management structure, will not be considered to be full function. Likewise, a JV that is largely or entirely dependent on its parent companies for purchases (or supplies) may not be considered to be sufficiently independent to meet the full function criterion.

JVs that begin life as non-full function entities may nevertheless become full function at some point in the future, meaning that a notification obligation might be triggered.[3]

2 Consolidated Jurisdictional Notice, paragraph 77.

3 Consolidated Jurisdictional Notice, paragraph 109. See for example the clearance decision from the Commission in *American Express/Fortis/Alpha Card JV* Case COMP/M.5241, 3 October 2008): Alpha Card was a pre-existing JV that had been in operation for some time. The parent companies decided to give the JV greater autonomy, and by doing so triggered a notification obligation.

Full function analyses can take significant work and the Commission regularly engages in detailed discussions with parties as to the full function nature of JVs.[4]

EU dimension

Once it is confirmed that the creation or alteration of a JV is a 'concentration' for EUMR purposes, one final revenue-based test is applied in order to determine whether or not the JV is actually subject to notification. There are two sets of alternative revenue-based thresholds set out in the EUMR. If the JV meets the first set (designed to capture large-scale transactions) or the second set (intended to catch transactions that have a significant cross-border impact between EU member states), then the JV is notifiable. For the purpose of assessing whether the thresholds are met, the revenues of any jointly controlling entity will be taken into account.[5]

Full functionality and changes in quality of control

In a preliminary ruling in September 2017, the Court of Justice of the European Union (CJEU) held that the full functionality requirement is a prerequisite to the application of the EUMR to JV transactions, not only for jointly-controlled undertakings which are newly-created, but also for transactions where an existing undertaking moves from sole to joint control. The case involved an asphalt plant located in Austria, which was previously wholly-owned by an Austrian construction company (Teerag-Asdag). Under the proposed transaction, Teerag-Asdag and another construction company (Austria Asphalt) agreed to establish a 50/50 JV and to transfer ownership of the existing plant to the new JV Prior to the deal, the plant had not had any meaningful, independent presence on the market, since most of its output was for internal use by the owner. The parties to the deal agreed that output from the plant would continue to be (mostly) for captive use by the parent companies – meaning that the JV would not be considered to be full function for EUMR purposes. The parties therefore did not notify the transaction to the Commission but instead notified it in Austria as Austrian merger control captures non full function JVs. The transaction was referred to a national court, which declined to examine the application on the grounds that the transaction fell under the jurisdiction of the EUMR. That decision was appealed to the Austrian Supreme Court, which in turn sought a preliminary ruling from the CJEU on the point.

In its decision, the CJEU held that it was apparent from the EUMR's general purpose and structure that the regulation was meant to cover joint ventures 'only in so far as their creation provokes a lasting effect on the structure of the market'. That would not be the case when the resulting JV did not qualify as fully functional, regardless of whether or not that undertaking, now jointly controlled, existed before the transaction. To hold otherwise would lead to an unjustified difference in treatment between, on the one hand, undertakings newly created as a result of the

4 See, for example, Case COMP/M.6800 *PRSfM/STIM/GEMA JV*, 16 June 2015, paragraphs 54–64 for a typical assessment of joint control and full function factors in a merger decision.

5 In a situation where joint control is established over a pre-existing business, the revenues of that pre-existing business will also be taken into account; where there is a change in the quality of joint control (eg, a new shareholder with joint control enters a pre-existing JV), the revenues of the JV will also be included in the revenues threshold assessment.

transaction, which would be covered by the EUMR only if they met the criteria, and, on the other, undertakings existing before the transaction, which would be caught even if they did not qualify as fully functional JVs post transaction.

Substantive assessment of JVs under the EUMR

There are two main substantive tests applied to JVs when being assessed under the EUMR:

- whether the JV will lead to a substantial impediment of effective competition (known as the SIEC test); and
- whether the JV will facilitate anticompetitive coordination between the parent companies.

The analysis conducted when applying the SIEC test is the same as would be done for any merger assessed under the EUMR, where horizontal overlaps and vertical and conglomerate links between the parties (including the JV) are assessed in order to determine to what degree the JV might eliminate significant competitive constraints.[6]

For JVs, the Commission also conducts an analysis of the potential for the JV to facilitate coordination between the parent companies. JVs by their nature tend to involve some degree of coordination between the parents, and when that is the case such coordination is assessed under article 101 TFEU. Issues in relation to coordination might arise where the parent companies retain activities in the same or related or vertically linked markets as the JV In such a situation, issues might arise in respect of sharing of confidential information, for example. The assessment of the potential for anticompetitive coordination is conducted in line with a normal article 101-type analysis, where the Commission determines whether the parents have the ability and incentive to coordinate activities, with the possibility of providing justification for potentially anticompetitive coordination under article 101(3).

A recent example of the Commission examining potential spill-over or coordinated issues is the decision in *ASL/Arianespace*.[7] In that case, the Commission was concerned that the acquisition of Arianespace by Airbus Safran Launchers (ASL), a JV between Airbus and Safran, might have led to exchanges of confidential information between the JV and Airbus regarding activities of satellite manufacturers competing with Airbus and those of launch service providers competing with Arianespace. As part of the commitments offered and accepted in that case, the parties undertook to implement firewalls between Airbus and Arianespace to prevent information flows that could harm competitors. In particular, the companies committed not to share information about third parties with each other, save for what is normally required for the everyday operation of the business, and to put in place measures restricting employees' mobility between the companies.

6 For a recent example, see the Commission decision in *Daimler/BMW* (Case COMP/M.8744) of 7 November 2018, approving with conditions the establishment of a jointly controlled JV comprising the parties' car-sharing services and related mobile phone application for on-demand mobility services.

7 Case COMP/M.7724 *ASL/Arianespace*,, 20 July 2016. Also see COMP/M.7353 *Airbus/Safran JV*, 26 November 2014, raising similar spill-over issues.

Non-EUMR JVs

JVs that meet the joint control and full function requirements of the EUMR – but not the EU dimension test – may still be notifiable in individual EU member states. Most jurisdictions use a similar joint control/full function analysis and, if the JV or its parent companies meet the relevant filing thresholds in any of the individual EU member states, then the JV will be notifiable in such countries.

A JV that does not meet the EUMR full function criteria may nonetheless still be potentially reportable in several member states: each of Austria, Germany, Lithuania, Poland and the UK maintain merger filing regimes that do not have full functionality tests.

Finally, even if a JV does not meet the joint control criterion under the EUMR – for example, because the transaction involves a party acquiring a minority shareholding without 'decisive influence' – this may still be caught in Austria, Germany or the UK. Each of these jurisdictions applies variable 'control' tests, based, for example, on level of shareholding (25 per cent threshold in Austria), or on materiality (the UK applies a 'material influence' test while in Germany a 'competitively significant influence' test is applied).

JVs and article 101 TFEU

Recent developments in application of article 101

In addition to the potential application of EU merger control rules to the formation of a JV or changes in its structure, the general competition rules set out in article 101 (prohibition of anti-competitive agreements) and article 102 (abuse of a dominant position) can apply to a range of aspects of the formation of a JV company and its subsequent conduct on the market (see also above in relation to substantive assessment under the EUMR). The following section focuses on recent developments in article 101 case law that have wide-ranging implications for parent companies of JVs.

The application of the article 101 prohibition on anticompetitive agreements to JVs has given rise to a series of recent cases focused on liability of a parent company for competition infringements of its JV The European Commission and EU courts are taking a tough stance and a parent company does not need to be involved in, or even aware of the JV's infringing conduct to incur liability. Furthermore, the parent can be liable even if it was not involved in day-to-day management of the JV and even where it holds only a minority shareholding. In a recent case, (*Goldman Sachs*), parental liability was extended to investment banks in relation to the behaviour of their portfolio companies.

The key to a finding of parental liability is a determination that the parent actually exercised 'decisive influence' more generally over the JV's conduct on the market and not whether the parent was in any way involved in the infringing conduct. In determining whether a parent exercised decisive influence over its JV, the Commission will look at a range of economic, legal and organisational factors (eg, level of shareholding; nature of the voting rights; composition of boards; reporting lines; and management instructions relating to the JV's commercial policies).

In circumstances where parent companies actually exercise decisive influence over their JV, the parents and the JV are considered a single economic entity for the purposes of antitrust liability and the companies are jointly and severally liable for infringements of article 101.

'Decisive influence' test

The Dow judgment

In September 2013, the CJEU upheld the European Commission's decision finding Dow Chemical Company's (Dow) and EI du Pont de Nemours jointly and severally liable for their 50/50 JVs (DuPont Dow Elastomers LLC (DDE)) participation in the chloroprene rubber cartel.[8] To establish that Dow and EI du Pont de Nemours actually exercised decisive influence over DDE's commercial conduct, the Commission relied, among other things, upon:

- the parent companies' representation (50/50) on the Members' Committee, which was formed to supervise the business of DDE and could appoint the board members and officers of DDE;
- the fact that the Members' Committee appointed senior people from the parent companies to top management posts within the JV;
- an internal investigation ordered by the parent companies to examine potential cartel activities of DDE; and
- through the Members' Committee, the parents had approved the closure of a production plant in the UK.

The EU courts also confirmed that where a parent company only has 'negative joint control' (ie, only the ability to veto decisions), this is not sufficient to preclude the exercise of decisive influence.[9] Furthermore, parental liability can be triggered even if the JV is autonomous from an operational point of view, namely it is a 'full function' JV for purposes of EU merger control law (EUMR), performing on a lasting basis all the functions of an autonomous economic entity.[10]

Two key points emerge from this case on liability for full function JVs:

- '. . . decisive influence is not necessarily tied in with the day-to-day running [of a JV]'; and
- '. . . the autonomy which a [JV] enjoys [under the EUMR] does not mean that that [JV] also enjoys autonomy in relation to adopting strategic decisions, and that it is therefore not under the decisive influence of its parent companies for the purposes of article [101 TFEU].'[11]

In more recent decisions, such as *LG* [12] and *Fujikura*,[13] the EU courts followed a similar approach to that taken in the *Dow* judgment in reaching the conclusion that parent companies actually exercised decisive influence over their JV.

8 Case C-179/12 P, *Dow Chem. Co v Comm'n* (European Court of Justice, 26 September 2013).

9 Judgment of the General Court, paragraph 92; *Dow* judgment, paragraphs 60–61.

10 In 1996, Dow acquired joint control over DDE together with EI du Pont de Nemours. As DDE qualified as a concentrative JV, the acquisition was notified and cleared by the Commission under the EUMR.

11 Judgment of the General Court, paragraph 93; *Dow* judgment, paragraphs 64–65.

12 Joined Cases C-588/15 P and C-622/15 P, *LG Electronics Inc, Koninklijke Philips Electronics NV v Comm'n* (European Court of Justice, 14 September 2017).

13 Case T-451/14, *Fujukura Ltd v Comm'n* (General Court, 12 July 2018).

The Toshiba judgment

In January 2017, the CJEU upheld the European Commission's decision finding Toshiba Corporation and Panasonic jointly and severally liable for the participation of their 35.5 per cent to 64.5 per cent JV (MTPD) in the CRT cartel.[14] The CJEU confirmed that, where it follows from statutory provisions or contractual stipulations that the commercial policy of a joint subsidiary is determined jointly by two parent companies, it may reasonably be concluded that that policy was indeed determined jointly. This implies that, in the absence of evidence to the contrary, the parent companies must be regarded as having exercised decisive influence over their joint venture and can therefore be held liable for its conduct. To establish that Toshiba, a minority shareholder, actually exercised decisive influence over MTPD together with Panasonic, the Court mainly relied on the following factors:

- Toshiba's right of veto over MTPD's business plan for the entire duration of its existence (regardless of the fact that such right was never actually exercised);
- Toshiba's ability to prohibit MTPD from taking decisions involving expenditures appearing relatively modest in light of that subsidiary's capital; and
- Toshiba's appointment of one of the two directors entitled to represent MTPD (namely the vice president of that undertaking).

The case confirms that a minority investor may be liable for infringements of the entity in which it holds a stake (in this case Toshiba held a 35.5 per cent shareholding). This will be the case if the minority investor is able to actually exercise decisive influence on that entity through rights that are greater than those normally given to minority shareholders to protect their investment.

The Goldman Sachs decision

The most recent case relating to decisive influence has extended the above-described concepts of liability to institutional investors, such as private equity firms, in relation to their portfolio companies. In the 12 July 2018 *Goldman Sachs* decision,[15] the General Court confirmed a 2014 Commission decision holding Goldman Sachs (GS) jointly and severally liable for the payment of a fine of €37 million, for the unlawful participation in the Power Cables cartel by a group of companies (Prysmian SpA and its subsidiaries) in which GS had an investment.[16] GS had an indirect controlling interest in Prysmian through a series of affiliated funds (gradually decreasing from 100 per cent to 84 per cent). In May 2007, the shares of Prysmian were offered to the public in an initial public offering, which further reduced GS' shareholding to 31.8 per cent. Two years later, on the very day that the European Commission carried out a dawn raid at the premises of Prysmian, GS sold all of its remaining interests in the company.

14 Case C-623/15 P, *Toshiba Corp v Comm'n* (European Court of Justice, 18 January 2017).

15 Case T-419/14, *The Goldman Sachs Goup, Inc v Comm'n*, (Gen. Ct., 12 July 2018) [hereinafter *GS Judgment*].

16 On 21 September 2018, Goldman Sachs lodged an appeal before the CJEU against the ruling of the General Court.

In its decision, the General Court agreed with the Commission's determination that GS had exerted a decisive influence over the conduct of Prysmian, *both* during the period when GS had a majority interest and in the post-IPO period when GS only held a minority stake. According to the Court, the relevant factors that could be taken into account included:

- GS' power to appoint, indirectly through its affiliated funds, the members of the various boards of directors of Prysmian, the power to call shareholders meetings and to propose the revocation of directors or entire boards of directors;
- GS' actual level of representation on Prysmian's board of directors (GS had links with at least 50 per cent of the directors of the successive boards of directors of Prysmian throughout the entire infringement period);
- the broad management powers vested in GS' representatives on the board of directors;
- GS received regular updates and monthly reports on the commercial strategy of Prysmian (supporting the existence of an economic unit between them, as per the General Court);
- GS took a series of measures in order to ensure the continuation of its decisive control over Prysmian after the IPO (ie, after it no longer held the majority of voting rights), including measures enabling it to maintain its control over Prysmian's board of directors; and
- some evidence of behaviour typical of an industrial owner, which GS continued to exhibit after the IPO. In particular, a representative of GS acted as an interlocutor in the pursuit of cross-selling opportunities between Prysmian and other companies held by GS.

Finally, the General Court also rejected GS' argument that its investment in Prysmian was that of a pure financial investor, which according to case law could not attract parental liability. GS based this claim on a number of factors, including the following: its investment funds neither had the expertise or resources to determine the conduct of Prysmian in the market; the Prysmian management team that existed at the time when GS invested in Prysmian continued to direct business activities; and the representatives of GS on the board of directors were investment professionals whose role was simply to monitor investments. However, the General Court dismissed all of these points as irrelevant for the purposes of determining whether decisive influence was actually exercised. The General Court found that these claims were contradicted by the objective factors and indicia (discussed above) put forward by the Commission. Further, the General Court held that in order to succeed in rebutting the presumption of actual influence by invoking its 'pure financial investor' status, GS would have had to establish that it had refrained from any involvement in the management and control of its subsidiary, which had not been the case.

Compliance burden on the parent company

In the *Dow* judgment, the General Court outlined the parents' heavy duty of responsibility as regards ensuring their JV's compliance with competition rules, notwithstanding that the parents may not be involved in the day-to-day management of the JV.

The General Court expressed its view that '. . . the parent company has a responsibility to ensure that its subsidiary complies with the competition rules. An undertaking that has the possibility of exercising decisive influence over the business strategy of its subsidiary may therefore be presumed, in the absence of proof to the contrary, to have the possibility of establishing a policy aimed at compliance with competition law and to take all necessary and appropriate measures to supervise the subsidiary's commercial management.'

In the *LG* judgment, the General Court considered that even though the JV had been liquidated, LG Electronics should have ensured proper maintenance of records enabling details of its activities to be retrieved in the event of legal or administrative proceedings and the parent company should have records that will enable it to defend itself if it is personally implicated as part of a single economic entity with its JV.

Amount of the fines

As the parent is exposed to joint and several liability for infringements of its JV, it faces a high level of exposure and the Commission in setting fines will typically take into account sales in the EEA of the cartelised product and products incorporating the cartelised product by the JV and the parent company concerned.

In the *LG* judgment, for instance, the CJEU upheld the Commission decision finding LG Electronics and Koninklijke Philips Electronics jointly and severally liable for participation of their 50/50 JV in the cathode ray tube (CRT) cartel. In setting the fines on LG Electronics, the Commission, consistent with previous decisions, took into account direct sales of the cartelised products in the EEA (CRTs sold directly to customers in the EEA) as well as sales of 'transformed products' in the EEA (CRTs incorporated into a final computer monitor or TV). However, it went a step further and took into account not only sales by the JV of the cartelised products and by LG Electronics itself of transformed products, but it also calculated LG Electronic's fine based on Philips' sales of transformed products. This was upheld on appeal by the General Court, and more recently by the CJEU, on the basis of joint and several liability of the parent companies as part of the same economic unit with their JV A company with a shareholding in a JV can therefore find itself in a situation where it is exposed to significant fines for EU competition law infringements committed by its JV of which it may not even be aware, and where its level of exposure is based also on the success of an entirely independent company (the other parent company) in a downstream market involving the cartelised product.

Conclusion

The Commission's hardened approach towards parental liability, so far upheld by the courts, can have broad commercial implications for parent companies with potential parental liability arising from transactions involving the acquisition of less than full ownership. Some practical steps that companies may want to consider include the careful scrutiny of post-sale integration of an acquired business into the group; inserting contractual protection (sufficient antitrust warranties, indemnities, etc) in transaction documents; and tailoring due diligence to detect potential anticompetitive behaviour.

However, the Commission's and EU courts' message on parental liability is stronger than any potential liability risks related to new transactions: parent companies have to assess carefully their potential exposure based on their involvement in their JVs. It may be practically very difficult and may not make business sense, particularly in the case of a 50/50 JV, to structure the business in such a way as to avoid the parent company being considered as exercising decisive influence over the JV for liability purposes. Therefore, the main focus needs to be on tailored and effective compliance programmes, applicable throughout the group, and assessed for all levels of investment.

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Catriona Hatton is the partner in charge of the firm's Brussels office and co-chair of the firm's global antitrust and competition law group. Her practice focuses on EU competition law. Catriona has extensive experience advising on EU and national competition law aspects of international mergers, including filings under the EU Merger Regulation and coordinating global merger filings. Catriona is co-chair of the International Bar Association's merger working group.

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Catriona is recommended in *Chambers Europe* (2019) as a business-oriented practitioner. Clients describe her as 'exceptionally pragmatic and sensitive to the commercial balances that (they) need to achieve, with the ability to communicate in a non-confrontational way'. She is also recommended in *Chambers Global*, where she is particularly praised for her commercial acumen and her work in international merger control.

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