European Union: how competition law applies to joint ventures

Richard Pepper, Christophe Humpe and Louis Delvaux
Macfarlanes LLP
24 June 2022

This is an Insight article, written by a selected partner as part of GCR's co-published content. Read more on Insight ›

In summary

This article provides an overview of the application of EU competition law to joint ventures as relates to the EU Merger Regulation and article 101 TFEU.

Discussion points

- Application of the EU Merger Regulation to the creation of joint ventures
- Assessment of joint ventures under article 101 TFEU
- Consequences of the breach of article 101 TFEU

Referenced in this article

- EU Merger Regulation
- Article 101 TFEU
- The European Commission's consolidated jurisdictional notice
- The European Commission's guidelines on the applicability of article 101 TFEU to horizontal cooperation agreements and a proposed update of 2022
- European Commission's block exemption regulations on research and development agreements and specialisation agreements, and proposed updates of 2022
- Case C-588/15, *LG Electronics Inc. and Koninklijke Philips Electronics NV*, judgment of 14 September 2017
- Case C-248/16, *Austria Asphalt*, judgment of 7 September 2017
- Case T-399/16, *CK Telecoms*, judgment of 28 May 2020
- Case C-724/17, *Skanska*, judgment of 14 March 2019
- Case C-882/19, *Sumal v Mercedes Benz Trucks España*, judgment of 6 October 2021

Introduction

Joint ventures take a wide range of forms, from structural arrangements comprising the transfer by parents of assets or businesses into a commonly owned legal entity, to looser forms of cooperation that seek to achieve more discrete goals.

Within the context of European competition law, the structure chosen will determine whether the creation of a joint venture is subject to mandatory notification and review under the EU Merger Regulation (EUMR) or to ongoing assessment under article 101 of the Treaty on the Functioning of the European Union (TFEU).

In both cases, any substantive review will assess the consequences of the combination of the contributed resources on competition, and the scope for any anticompetitive implications outside the joint venture:

- Will any combination of resources distort competition? The European Commission will assess the implications for competition from the aggregation of any assets being contributed to the joint venture . Conversely, where the contributed resources are complementary, there may be less scope for adverse effects on competition and/or greater scope for efficiencies that ultimately benefit consumers.
- Will the parents' participation in the joint venture distort broader competition between them? In some circumstances, the collaboration may reduce the ability or incentive of the parents to meaningfully compete or even provide a forum for coordination between their other activities (known as spill-over effects).
- Will the joint venture generate efficiencies that may benefit consumers?

- What would have happened absent the joint venture? Would the contributed resources have been viable on a stand-alone basis or would it have been possible for any efficiencies to have been achieved in other ways?

Many of these considerations are addressed elsewhere in this review. Nevertheless, a range of issues warrant more specific consideration here. The remainder of this article first considers the jurisdictional and substantive assessment of joint ventures under the EUMR in light of the Commission's recent decisional practice and judgments of the European Courts. It also addresses the increasing prominence of foreign direct investment regimes that assess whether inbound investments raise national security issues. Finally, it considers the assessment of joint ventures under article 101 TFEU, including as regards the attribution of liability, and reflects on proposed updates to the European Commission's guidelines and block exemptions regarding horizontal cooperation.

Appraisal of joint ventures under the EUMR

The EUMR[1] requires that concentrations with an EU dimension are notified to, and approved by, the European Commission prior to implementation. Reflecting an aim of providing a 'one-stop shop' system of review at the European level, the EUMR's application to a transaction has the effect of automatically disapplying the national merger control rules at the member state level, as well as article 101 TFEU and its national equivalents.

Jurisdictional considerations

The EUMR applies to acquisitions of sole control and mergers with an EU dimension.[2] It also covers two categories of joint venture: transactions that result in the acquisition of joint control over a business; and the creation of joint ventures that 'perform on a lasting basis all the functions of an autonomous economic entity',[3] generally known as 'full-function joint ventures'.[4]

Joint control

In both cases, the application of the EUMR requires that two or more shareholders enjoy joint control. The EUMR defines control as 'the possibility of exercising decisive influence'.[5] The Commission's Consolidated Jurisdictional Notice[6] provides further guidance, noting that joint control arises where 'shareholders must reach a common understanding in determining the commercial policy of the joint venture and . . . are required to cooperate',[7] which will be the case in the following circumstances:

- Equality in voting rights. The clearest form of joint control exists where two parents equally share the voting rights in the joint venture.[8] No further agreement is necessary, though any agreement that does exist should not depart from this principle of equality.[9]
- Vetoes. Joint control may also arise where minority shareholders have additional rights allowing them to veto decisions that are essential for the joint venture's strategic commercial behaviour.[10] These rights must go beyond typical minority protection rights, and relate to strategic decisions on the business policy of the joint venture (eg, the budget, the business plan, the appointment or dismissal of senior management, or material investments).[11] A shareholder need not have all of these vetoes; only some or even one such right may be sufficient subject to its nature and its importance in the context of the joint venture's business.[12]
- Joint exercise of voting rights. Two or more minority shareholders may also obtain joint control where they together have a majority of voting rights and can be expected to act together, either through a legally binding agreement or (less commonly) on a de facto basis where they have sufficiently strong common interests.[13]

Full-functionality

This concept is intended to limit the application of the EUMR to transactions that bring about lasting changes in market structure. The Consolidated Jurisdictional Notice provides detailed guidance, structured around the following tests:

- Does the joint venture have sufficient resources to operate independently? A full-function joint venture should 'operate on a market, performing the functions normally carried out by undertakings operating on the same market', with a dedicated management and access to sufficient resources, including financing, staff and assets.[14]
- Does the joint venture undertake activities beyond one specific function? A full-function joint venture should not be limited to one function of its parents' activities (eg, R&D or production) but should rather have its own access to, or presence on, the market.[15]
- Are there substantial sales or purchases between the joint venture and its parents? Significant sales to the parents may undermine the idea that a joint venture is geared to play an active market role, while significant purchases may suggest that the joint venture is merely playing the role of a joint sales agency.[16]
- Is the joint venture intended to operate on a lasting basis? This will not be the case for joint ventures that are established for a short duration (eg, to construct a plant), or where there are outstanding third-party decisions that are 'of an essential

core importance for starting the joint venture's business activity' (eg, access to property, contract awards or licences). Conversely, joint ventures with an unlimited duration or that are created for a sufficiently long period 'to bring about a lasting change in the structure of the undertakings concerned' will satisfy this criterion.[17]

The Commission applies these tests strictly and does decline jurisdiction where the threshold is not met. There is little public record of those cases, but a recent transaction where the test was satisfied related to the creation of a Belgian video-on-demand joint venture between Liberty Global and DPG Media. The Commission concluded that it was full-function because:

- the parents would contribute certain content agreements and staff to allow the business to be financially and operationally self-sustaining through its own revenues and borrowing capacity;
- the joint venture would not be limited to the distribution or sale of its parents' products, but would supply its own product to third parties, while dealings with its parents would be on an arm's-length basis;
- the joint venture would not only purchase from and supply its parents, but would have direct contractual relationships with third-party licensors; and
- the joint venture was intended to operate on a lasting basis.[18]

The relevance of the full-functionality test has increased in recent years following a preliminary ruling by the European Court of Justice in the *Austria Asphalt* case.[19] This concerned a request from the Austrian Federal Cartel Court as to whether the full-functionality requirement also limits the application of the EUMR in transactions that do not relate to the creation of a greenfield venture, but where a sole shareholder sells a jointly-controlling interest in an existing business to a third party. To the surprise of many, the Court held that it does, making the full-functionality requirement a prerequisite to the Commission's jurisdiction in these circumstances.

EU Dimension

Finally, the EUMR only applies where the parties generate sufficient turnover in the European Union. This is assessed through the concept of an EU dimension, which is satisfied where the 'undertakings concerned' meet either of two thresholds:

- the undertakings concerned jointly generate worldwide revenues of €5 billion and at least two generate EU turnover of €250 million (unless they all generate more than two-thirds of their EU turnover in the same member state);[20] or
- the undertakings concerned jointly generate worldwide revenues of €2.5 billion, and in at least three member states they generate combined revenues of €100 million and at least two undertakings each generate €25 million (unless they all generate more than two-thirds of their EU turnover in the same member state).[21]

These tests are defined with reference to the concept of an undertaking concerned. In the context of a joint venture, each of the jointly controlling parents is an undertaking concerned, but the joint venture is not, except where it comprises a business that is acquired by an entirely new set of controlling shareholders.[22] One consequence of this rule is that the EUMR applies each year to a host of transactions between two large jointly controlling shareholders that satisfy the thresholds without recourse to the quantum or location of the turnover of the joint venture itself.

Care must be taken where a joint venture itself acquires a business. In that circumstance, the General Court recently confirmed that it may be appropriate to look through the acquiring joint venture and identify the shareholders as the undertakings concerned either where the joint venture is a shell company or where the shareholders are 'the real players behind the transaction'.[23]

Substantive assessment

Simplified cases

As noted above, the broad scope of the EUMR's turnover thresholds triggers notification obligations for many joint venture transactions that have no or only limited European nexus. In particular, the creation of a full-function joint venture or the acquisition of joint control of an undertaking based anywhere in the world is notifiable under the EUMR where the jointly-controlling parents generate sufficient turnover.

Recognising that such transactions will rarely (if ever) raise substantive issues in Europe, the Commission encourages the use of its 'simplified procedure'[24] for acquisitions of joint control of an undertaking with no, or negligible, activities within the European Economic Area (assessed with respect to €100 million turnover and asset thresholds).[25]

The simplified procedure materially reduces the quantity of information that needs to be provided in a notification, which can simplify filing preparation and curtail the length of pre-notification discussions. In addition, the Commission does not undertake proactive market outreach or write reasoned decisions in simplified cases, which often reduces the typical Phase I

review timeline (eg, from the statutory deadline of 25 working days to fewer than 20 working days).

Nevertheless, the Commission has been criticised for the continued burden that the EUMR imposes on these transactions. This led to the introduction of a 'super-simplified' process in 2013 that in theory allows parties to proceed without engaging in any pre-notification process.[26] However, very few transactions have made use of this process in practice (likely out of fear of a filing being rejected for incompleteness).

To further alleviate the burden on business, the Commission has recently proposed further amendments to its simplified and super-simplified review processes.[27] These re-emphasise that acquisitions of joint control over a joint venture with no activity or assets in the EEA do not require pre-notification contacts between the parties and the Commission, and seek to simplify the notification form through increased use of multiple-choice style questions.

Business combinations

Where a joint venture combines two or more sets of businesses with activities in Europe, the Commission's focus will often be similar to other types of transaction, namely, whether that combination would significantly impede effective competition.

For example, in 2019, the Commission prohibited a proposed joint venture between Tata Steel and Thyssenkrup that would have combined their respective European steel businesses.[28] In doing so, the Commission identified concerns that the merged business might enjoy a dominant position in the supply of metallic coated and laminated steel for packaging applications. The Commission also objected in relation to supplies of galvanised flat carbon steel to the automotive industry; the joint venture would not have had a dominant position in that area, but the Commission was nevertheless concerned about the consequences of the removal of an 'important competitive constraint' on the merged business.

A recent General Court judgment in *CK Telecoms* may make it more difficult for the Commission to found prohibition decisions on this second theory of harm.[29] The case related to an attempted merger between two UK telecommunications providers (Three and O2) that the Commission had similarly prohibited on the basis that it would have eliminated an important competitive force. The General Court overturned the prohibition, holding that: (1) the Commission needed to establish that a deal would eliminate an important competitive constraint on one of the merging parties; and (2) that this required a more detailed assessment of the constraints that the merging parties actually exerted on each other.[30] The Commission has appealed this judgment, but in the meantime it has likely increased the threshold for the Commission to prohibit transactions in oligopolistic markets.

Spill-over effects

In addition to considering the impact of the combination of the businesses or assets contributed to the joint venture, the Commission will consider whether there is any potential for an adverse effect on the competitive behaviour of the parents' stand-alone business interests (spill-over effects).

Although the Commission routinely undertakes this assessment in joint venture cases, no transaction has ever been prohibited on this basis. Neither have there been many controversial examples in recent years in this area, as the Commission has taken account of several factors that could prevent the parties from coordinating their behaviour. For example, in *Sky/Viacombs* and *Liberty Global/DPG Media*, the Commission took account of the presence of several efficient competitors that would disrupt any coordination.[31] In *Omers/Aimco/Vue/Dalian Wanda Group/UCI Italia*, the Commission focused on the low revenues generated by the joint venture relative to those of its parents.[32] And in *Sky/Viacombs*, *Liberty Global/DPG Media* and *EQT/Widex*, the Commission considered that the complex nature of the relevant market (including evolving demand, opacity and intense competition) would frustrate coordination.[33]

Ancillary effects

Finally, parents may need to restrict their freedom to ensure that their joint venture functions properly. Ancillary restraints of this nature will be covered by Commission approvals under the EUMR when they are directly related and necessary for the implementation of the joint venture.[34] Restraints that do not meet this criterion are assessed under article 101 TFEU.

The Commission's Ancillary Restraints Notice comments that non-compete obligations between parents and a joint venture will generally benefit from the ancillary restraints doctrine, where they are limited to the joint venture's field of activities, as will many licence agreements and supply and purchase relationships between a joint venture and its parents.[35] Indeed, these types of restrictions simply reflect that the parents have withdrawn from the joint venture's field of operation.

Foreign direct investment review

Finally, while outside the scope of the EUMR, investments made in the context of joint ventures may be increasingly subject to rules that scrutinise foreign direct investments. Several EU member states[36] have recently adopted new or enhanced mechanisms to screen investments on grounds of security or public policy, partly in response to encouragement from the European Commission through the adoption of the EU Foreign Direct Investment (FDI) Regulation.[37] The FDI Regulation seeks to facilitate (and oblige) cooperation between member states and the Commission, and imposes a minimum set of standards on national regimes. However, the regimes are not harmonised across the European Union, so their rules, procedure and substance vary by member state. Accordingly, their potential application to joint ventures will vary by country, but a broad range of acquisitions (as low as 10 per cent in some countries) may be caught by national FDI regimes, potentially bringing into scope a wide range of investments in the context of joint ventures.

Appraisal Of joint ventures under article 101 TFEU

To the extent that the creation of a joint venture does not fall under the EUMR, the arrangement may be assessed under article 101 TFEU, which prohibits agreements, decisions by associations of undertakings and concerted practices that may affect trade between member states and that have as their object or effect the prevention, restriction or distortion of competition.

An assessment under article 101 requires two steps: first, to establish for the purposes of article 101(1) whether an arrangement has an anticompetitive object or effect; second, to establish for purposes of article 101(3) whether any pro-competitive benefits may outweigh any restriction of competition. The latter step requires that the arrangement:

- contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- allow consumers a fair share of the resulting benefit;
- not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives; and
- not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Relationship between a joint venture and its parents

Before considering how the Commission undertakes its substantive assessment, it is useful to consider the scope of the article 101 TFEU prohibition as it applies to joint ventures and their parents.

Article 101 does not apply to the relationship between companies that form part of a 'single economic unit'. This is the case when one company exercises 'decisive influence' over another. A series of rulings from the European Courts[38] has resulted in a (near irrebuttable) presumption that a parent with a 100 per cent interest in a subsidiary satisfies this standard, so arrangements within corporate groups are typically not subject to the article 101 prohibition.[39]

The situation as regards the relationship between joint ventures and their parents is more complex. The European Court of Justice held in 2013 that parents and joint ventures do form part of a single economic unit where the parents exercise decisive influence over the joint venture.[40] However, this led to some uncertainty as to the scope of the single economic unit doctrine, in particular as to how it applied to the relationship between the parents. This was partially resolved by the European Court of Justice's 2017 judgment in *LG Electronics*, which held that it did not prevent the parents from being independent (and therefore subject to article 101) on other markets.[41]

The Commission is updating its guidelines on horizontal cooperation agreements (the Horizontal Cooperation Guidelines), which reflect that principle in commenting that the Commission will not apply article 101 TFEU to the relationship between parents and their joint venture concerning activities in the relevant markets where the joint venture is active. But they also note that this will not shield the parties as regards arrangements:

- between the parents to create the joint venture (or to alter its scope);
- between the parents and the joint venture outside the product and geographic scope of the joint venture's activity; and
- between the parents without the joint venture's involvement, even concerning the markets where the joint venture is active.

The application of article 101 TFEU to all of these categories is not explicitly supported by the Court's case law so there is room for further development in this area. In the meantime, it remains clear that there is significant scope for Commission scrutiny in the relationship between joint venture partners.

Substantive assessment

Since 2004 (with the advent of Regulation 1/2003), parties have not generally been able to notify proposed arrangements to the Commission for review.[42] Rather, parties must self-assess their compliance, and article 101 TFEU can be enforced not only by the Commission, but also national competition authorities and the courts of the member states.

There has not been a great deal of enforcement in the area of joint ventures in recent years. Nevertheless, significant guidance on how the Commission is likely to assess cooperative arrangements is available through its Horizontal Cooperation Guidelines, which stand alongside two block exemption regulations, exempting categories of agreements from article 101 TFEU that are particularly relevant to joint ventures as they relate to research and development (the R&D Block Exemption Regulation) and specialisation (the Specialisation Block Exemption Regulation).

The current versions of all these materials will expire on 31 December 2022, so the Commission is undergoing a public consultation of its proposed revisions. While the documents remain in draft form, this consultation already provides an important insight into how these areas may develop. An overview of the sections that are most likely to be relevant to joint ventures is set out below.

R&D	
Existing rules	The R&D Block Exemption Regulation and accompanying commentary in the Horizontal Cooperation Guidelines recognise that R&D cooperation may bring benefits that could not have been achieved unilaterally, especially where firms have complementary skills, know-how or assets. However, they cite several potential concerns, especially where the parties have market power, including: (1) the possibility that R&D cooperation limits or restricts competition or facilitates a collusive outcome; and (2) the potential foreclosure of third parties Balancing these considerations, the R&D Block Exemption Regulation currently exempts R&D agreements to the extent they fulfil several criteria, including that: (1) the parties have a combined market share at the product and technology level of 25% or less; (2) all parties have full access to the results of the collaboration; and (3) the arrangement not contain any 'hardcore' restrictions (eg, restrictions on R&D in unrelated fields, and price fixing and output limitation except under certain circumstances where the results of the collaboration are jointly exploited).

Proposed changes	The Commission plans to adjust the methodologies used to calculate market shares for the R&D Block Exemption Regulation, including by using three-year averages where appropriate, and simplifying a grace period where the parties' shares change during the collaboration. More controversially, the Commission plans to complement the market share methodology with product market concentration analysis resulting in a potentially more restrictive approach to technology markets. Specifically, R&D cooperation would only be block exempted if there are at least three competing R&D efforts in addition to, and comparable with, those of the collaborators.
Specialisation	
Existing rules	The Specialisation Block Exemption Regulation and accompanying commentary in the Horizontal Cooperation Guidelines recognise that joint production or subcontracting can result in the better allocation of resources, cost savings, pooling of complementary skills or know-how, increased product variety and quality, and preventing shortages. They may however pose problems, in particular if the parties have market power, where: (1) they limit competition, especially in industries where production is an important parameter of rivalry; (2) they lead to collusive outcomes; or (3) they have the potential to foreclose third parties. Balancing these considerations, the Specialisation Block Exemption Regulation currently exempts agreements where several conditions are met, including: (1) the parties must have a combined market share of 20% or less; and (2) the arrangement does not contain any hardcore restrictions (eg, price-fixing except under certain circumstances in the context of a joint distribution arrangement).

Proposed changes	The Commission plans to adjust the methodologies used to calculate market shares for the Specialisation Block Exemption Regulation, including by using three-year averages where appropriate, and simplifying a grace period where the parties' market shares change during the collaboration. The Horizontal Cooperation Guidelines also address mobile infrastructure sharing agreements for the first time. They recognise that these arrangements can generate cost reductions or quality improvements, though can also restrict competition by limiting infrastructure competition. However, they flag potential concerns in limiting the deployment of infrastructure that could take place absent the arrangements, which could, in turn, affect competition at the wholesale or retail levels. They note that passive sharing is unlikely to restrict competition, whereas active RAN sharing and even more spectrum sharing agreements present relatively higher risks, and
Purchasing	
Existing rules	The Commission accepts that joint purchasing agreements can enable the participants to procure goods more cheaply, which can lead to lower downstream prices. However, they can raise concerns where the participants have a significant degree of market power on the purchasing market, if competitors purchase a significant part of their products together, or the arrangement forecloses access to rivals. Balancing these considerations, the current Horizontal Cooperation Guidelines note that the Commission will typically not consider that a joint purchasing agreement restricts competition if the participants have a combined market share of 15% or below (on both the relevant purchasing and selling markets) and remain free to procure from elsewhere. That said, they note the risk of a collusive outcome if they can facilitate downstream coordination (eg, if the parties achieve a high degree of cost commonality through the joint purchasing arrangement).
Proposed changes	The new guidelines focus on a distinction between legitimate purchasing arrangements and buyer cartels, which have been a source of significant Commission scrutiny in recent years.
Commercialisation	

Existing rules	Joint commercialisation involves cooperation between companies in selling their respective products and services. The current Horizontal Cooperation Guidelines raise caution that such arrangements may mask restrictive anticompetitive practices such as price-fixing, market partitioning or output limitation. Arrangements between non-competitors should fall outside of the scope of article 101 TFEU entirely. Agreements between competitors can would also do so where the combined market share of the participants is below 15% and the agreement does not involve price-fixing. Above this threshold, the parties must assess whether their arrangements may benefit under article 101(3).
Proposed changes	The revised draft Horizontal Cooperation Guidelines stays within the same general parameters, while providing further guidance on the distinction between bidding consortia and illegitimate bid-rigging arrangements.
Sustainability	
Existing rules	The current guidelines only address this issue in passing as part of a broader discussion of standardisation.

Proposed changes	The Horizontal Cooperation Guidelines include significantly more detail as regards arrangements that pursue sustainable development goals. First, they note that cooperation may not be necessary where there is demand for sustainable products, or where EU or national law requires the relevant action. However, in other circumstances, they acknowledge that 'a sustainability agreement may be necessary to avoid free-riding on the investments required to promote a sustainable product and to educate consumers'. Second, they provide detail on the categories of benefit that may be taken into account under article 101(3). They argue that only 'in-market' benefits (ie, those experienced by the customers that suffer from the anticompetitive effect) are relevant but nevertheless seek to bring a range of benefits into scope: (1) consumers may directly benefit from product improvements or price decreases; (2) consumers may benefit from their perception of the positive impact of consuming the relevant products; and (3) 'collective benefits' that accrue to a larger part of society may be taken into account provided there is a 'substantial overlap' between the affected consumers and the beneficiaries, and the benefits are significant enough to compensate the affected consumers. Finally, they propose a 'soft' safe harbour for sustainable standardisation agreements where certain conditions are met (including that participants should remain free to unilaterally adopt a higher standard, third-parties are not obliged to comply with the standard, and it does not lead to a significant increase in price or reduction of choice).

Consequences of breach

There are three main consequences of breaching article 101 TFEU that may be particularly important for joint ventures and their parents.

Voidness

First, agreements that infringe article 101 TFEU are not legally enforceable.[43] This can have profound implications in the context of a joint venture, especially if parents have contributed significant resources to the collaboration.

Fines

Second, the Commission can impose fines on undertakings that infringe article 101 TFEU of up to 10 per cent of the worldwide turnover of the undertaking concerned, though they rarely reach this limit. As set out in the Commission's fining guidelines,[44] to calculate the basic starting point for a fine, the Commission uses the value of sales of the relevant undertaking that relate to the infringement, which it multiplies by the duration of the infringement.

We discussed above the single economic unit doctrine in the context of the relationship between joint ventures and their parents. This can also play an important role in fine calculation. Where a joint venture is found to have infringed article 101 TFEU, its parents will be jointly and severally liable if they have exercised decisive influence over the joint venture. In addition, their turnover will be taken into account for two purposes: the 10 per cent statutory cap; and the value of sales that is used as the starting point for fine calculation.

This was confirmed in the Commission's *Cathode Ray Tube* cartel decision and subsequent judgment by the European Court of Justice in *LG Electronics*. The Court held that LGE and Philips constituted an economic unit together with their jointly controlled joint venture (the LPD Group) and that the Commission could aggregate the value of sales of the cartelised products (the cathode ray tubes commercialised by LPD Group) and the final products commercialised by LGE and Philips (the TVs that incorporated the cathode ray tubes) for purposes of the fine calculation.[45]

Private damages

Finally, victims of article 101 TFEU infringements can claim damages from national courts for harm they have suffered. This right was confirmed by the European Court of Justice over 20 years ago.[46] More recently, the 2014 Damages Directive sought to facilitate the process of claiming damages in Europe.[47]

There is a huge growth of activity in this area, which is addressed elsewhere in this review. Nevertheless, two points bear emphasis in the context of joint ventures in light of the single economic unit doctrine.

- The European Court of Justice's recent *Skanska* judgment confirmed the application of the single economic unit doctrine with respect to private damages.[48] Accordingly, victims can sue parent companies for the harm caused by their controlled subsidiaries. This presumably could apply to parents of joint ventures.
- Just last year, the European Court of Justice extended that doctrine in *Sumal*,[49] in holding that a subsidiary can be held liable for the harm caused by its controlling parents, provided it sells the products affected by the infringement. Again, although there is not yet any explicit case law on the point, this principle could presumably be extended to joint ventures.

Notes

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[2] EUMR, articles 3(1)(a) and 3(1)(b), respectively.

[3] ibid., article 3(4).

[4] If a joint venture does not have an EU dimension but is still full-functional, the parents may nevertheless be obliged to make filings at the member state level, depending on whether any national notification thresholds are met. In some member states, such as Germany, Poland and Austria, non-full function joint ventures may also require notification.

[5] EUMR, article 3(2).

[6] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the Consolidated Jurisdictional Notice).

[7] ibid., paras. 62–88.

[8] ibid., para. 64.

[9] For example, the Commission recently reviewed the creation of a joint venture between IHS Markit and CME Group. The Commission noted that IHS Markit and CME would each hold 50 per cent of the joint venture, each would have the right to appoint an equal number of directors to the board, a quorum would require at least one CME and one IHSM director to be present, and the positive consent of each of CME and IHSM would be required to approve all strategic matters. See Case M.10158, *IHS Markit/CME Group/JV, Commission* decision of 20 July 2021, para. 6.

[10] Consolidated Jurisdictional Notice, paras. 65–73.

[11] For example, in its recent review of the creation of a joint venture between Natixis Investment Managers and La Banque Postale, the Commission established joint control despite an unequal ownership structure because La Banque Postale (the minority owner) had veto rights over the annual budget, business plans, and decisions relating to the IT environment (an

essential feature of the joint venture). See Case M.9810, *Natixis Investment Managers/La Banque Postale/JV*, para. 6.

[12] Consolidated Jurisdictional Notice, paras. 68–73.

[13] ibid, paras. 74–80.

[14] ibid, para. 94.

[15] ibid, paras. 95–96.

[16] ibid, paras. 97–102.

[17] ibid, paras. 103–105.

[18] Case M.9802, *Liberty Global/DPG Media/JV*, Commission decision of 12 August 2020, paras. 8–12.

[19] Case C-248/16, *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, judgment of 7 September 2017.

[20] EUMR, article 1(2).

[21] ibid, article 1(3).

[22] Consolidated Jurisdictional Notice, paras. 139-144.

[23] Case T-380/17, *HeidelbergCement and Schwenk Zement v Commission*, judgment of 5 October 2020, paras. 123–125. This position was already reflected in the Consolidated Jurisdictional Notice, at paras. 145–147.

[24] Commission Notice of 14 December 2013 on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (the Simplified Procedure Notice). A significant number of joint ventures cases benefit from the Simplified Procedure Notice each year. Recent examples include Case M.10596, *OTPP/KKR/Greencollar*, Commission decision of 9 February 2022; Case M.10625, *Carlyle Group/Macquarie Group/HYCC*, Commission decision of 15 March 2022; Case M.10541, *Goldman Sachs/Grupo Visabeira/Constructel Visabeira*, Commission decision of 8 March 2022; and Case M.10605, *Macquarie Real Estate/CPG Van Oostrom BeheerEdge*, Commission decision of 8 March 2022.

[25] Simplified Procedure Notice, para. 5(a).

[26] See ec.europa.eu/commission/presscorner/detail/en/MEMO_13_1098.

[27] Commission consultation on merger simplification of 6 May 2022. See ec.europa.eu/competition-policy/public-consultations/2022-merger-simplification_en.

[28] Case M.8713, *Tata Steel/ThyssenKrupp/JV*, Commission decision of 11 June 2019. The Commission decision is under appeal at the General Court in Case T-584/19, *Thyssenkrupp v Commission*.

[29] Case T-399/16, *CK Telecoms UK Investments Ltd v Commission*, judgment of 28 May 2020.

[30] ibid, judgment of 28 May 2020, paras. 157–176.

[31] Case M.10456, *Sky/Viacombs / JV* (2021), Commission decision of 1 December 2021, para. 182 and Case M.9802, *Liberty Global/DPG Media/JV* (2020), Commission decision of 12 August 2020, para. 333.

[32] Case M.8431, *Omers/Aimco/Vue/Dalian Wanda Group/UCI Italia / JV* (2017), Commission decision of 18 May 2017, par. 69. See also Case M.10456, *Sky/Viacombs/JV*, Commission decision of 1 December 2021, para. 189 and Case M.9802, *Liberty Global/DPG Media/JV* (2020), Commission decision of 18 August 2020, para. 341.

[33] Case M.8941, *EQT/Widex/JV* (2019), Commission decision of 13 February 2019, para. 530. See also Case M.10456, *Sky/Viacombs/JV*, Commission decision of 1 December 2021, para. 192.

[34] Commission Notice on restrictions directly related and necessary to concentrations, para. 7.

[35] ibid, paras. 36–44.

[36] As of May 2022, 18 EU member states have notified screening mechanisms to the European Commission under the EU FDI Regulation: Austria, Czech Republic, Denmark, Finland, France, Germany, Italy, Latvia, Lithuania, Hungary, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, the Slovak Republic and Spain.

[37] Regulation (EU) 2019/452 of the European Parliament and Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

[38] Case C-97/08 P, *Akzo Nobel v Commission*, judgment of 10 September 2009; Joined Cases C-628/10 P and C-14/11 P, *Alliance a.o. v Commission*, judgment of 19 July 2012; Case C-595/18 P, *The Goldman Sachs Group*, judgment of 27 January 2021; Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai a.o. v Commission*, judgment of 27 January 2021.

[39] Case C-73/95 P, *Viho v Commission*, judgment of 24 October 1996; Case T-77/92, *Parker Pen Ltd v Commission*, judgment 14 July 1994.

[40] Case C-172/12P, *EI du Pont de Nemours and Company*, judgment of 26 September 2013.

[41] Case C-588/15, *LG Electronics Inc. and Koninklijke Philips Electronics NV*, judgment of 14 September 2017, paras. 78–79.

[42] The Commission can still provide informal guidance on novel questions raised under article 101 TFEU (and article 102 TFEU); see the Commission Notice on informal guidance relating to novel questions concerning articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters). This process has, however, been used relatively infrequently, though the Commission was at pains to make clear during the high-water mark of the covid crisis that it remained available to provide guidance on 'cooperation initiatives with an EU dimension, that need to be swiftly implemented in order to effectively tackle the covid-19 outbreak, especially where there is still uncertainty about whether such initiatives are compatible with EU competition law' (Commission Communication on a Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current covid-19 outbreak).

[43] Article 101(2) TFEU.

[44] See Commission Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003.

[45] Joined Cases C-588/15 P & C-622/15 P, *LG Electronics v Commission*, judgment of 14 September 2017.

[46] Case C-453/99, *Courage and Crehan*, judgment of 20 September 2001; Case C-295/04, *Manfredi*, judgment of 13 July 2006.

[47] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union.

[48] Case C-724/17, *Skanska*, judgment of 14 March 2019.

[49] Case C-882/19, *Sumal v Mercedes Benz Trucks España*, judgment of 6 October 2021.

Richard Pepper

Author | Partner

richard.pepper@macfarlanes.com

Macfarlanes LLP

Christophe Humpe

Author | Partner

christophe.humpe@macfarlanes.com

Macfarlanes LLP

Louis Delvaux

Author | Associate

louis.delvaux@macfarlanes.com

Macfarlanes LLP

Unlock unlimited access to all Global Competition Review content

Subscribe Now