Shareholder Liability for Joint Venture Infringements in the European Union

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Abstract

Part I of this Essay briefly addresses the legal basis for attribution of liability as established by the CJ in Akzo Nobel. Part II discusses the Commission’s new attribution policy for joint venture infringements and its compatibility with EU case law. Part III discusses the application of the concept of joint and several liability in joint venture situations.
SHAREHOLDER LIABILITY FOR JOINT VENTURE INFRINGEMENTS IN THE EUROPEAN UNION

Jolling K. de Pree and Stefan C.H. Molin *

INTRODUCTION

Until recently, the European Commission (“Commission”) generally did not attribute liability to shareholders for infringements committed by a joint venture. The Commission argued that a joint venture over which none of the shareholders has sole control can be presumed to be autonomous from its shareholders and therefore an independent undertaking for the purpose of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”). There are a few case law precedents in which liability was attributed to shareholders of joint ventures that were clearly not independent undertakings but merely vehicles or agencies of their parent companies. Since 2007, the Commission has embarked on a new policy regarding attribution of liability for infringements committed by joint ventures. In various decisions, particularly Gas Insulated Switchgear and Chloroprene Rubber, liability is attributed to shareholders for

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infringements of joint ventures, most of which would have easily qualified as independent undertakings under the Commission's previous approach toward joint ventures, and some of which have even been explicitly qualified as independent undertakings by the Commission under the European Merger Regulation ("ECMR").

This Essay argues that this approach is not in line with the fundamental principles underlying the system of European competition law. The 2009 judgment by the Court of Justice ("CJ") in *Akzo Nobel* confirms that it is ultimately the fact that a parent company and its infringing subsidiary constitute a single economic unit (a single undertaking) that enables the Commission to hold the parent company liable for infringements of the subsidiary. Joint ventures that have been set up and function as undertakings independent from their shareholders, however, do not constitute a single economic unit with their shareholders. Therefore, shareholders should not be held liable for infringements committed by such joint ventures.

Part I of this Essay briefly addresses the legal basis for attribution of liability as established by the CJ in *Akzo Nobel*. Part II discusses the Commission's new attribution policy for joint venture infringements and its compatibility with EU case law. Part III discusses the application of the concept of joint and several liability in joint venture situations.

I. LEGAL BASIS FOR ATTRIBUTION OF LIABILITY: SINGLE ECONOMIC UNIT

It is a fundamental principle of the laws of the Member States of the European Union that a legal entity is an autonomous legal subject having its own structure and its own rights and liabilities distinct from the rights and liabilities of other entities. Attribution of liability to a parent entity for infringements of competition law committed by another legal entity with a distinct corporate form is a derogation from this principle. The justification for such derogation lies in the fact

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that competition law provisions are addressed to "undertakings." Although the term "undertaking" is not defined in the TFEU or the ECMR, the CJ has ruled that the concept of undertaking in EU competition law covers any entity engaged in economic activity, regardless of its legal status, and that the concept of undertaking must be understood not in the sense of a legally separate entity but as a single economic unit to which several persons, natural or legal, can belong. The concept of a single economic unit ("SEU") must be understood as a unitary organization of personal, tangible, and intangible elements that pursues a specific economic aim on a long-term basis. If such an economic unit infringes competition law, the economic unit (which may encompass more than one legal entity) can, according to the principle of personal responsibility, be held liable for the infringement.

In the context of the application of Article 101 TFEU, the CJ established in Akzo Nobel that the conduct of a subsidiary (which participated in an infringement) may be attributed to the parent company (which did not participate in the infringement) where, although having a separate legal personality, the parent company, "having regard in particular to the economic, organizational, and legal links" between the parent company and the subsidiary, exercises decisive influence over the subsidiary's market conduct, which therefore does not independently decide its own conduct in the market. The CJ made clear that this is the case because, in such situations, the parent company and its subsidiary form an SEU and therefore form a single undertaking: "Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 101 TFEU] enables the Commission to address a decision.

imposing fines to the parent company." It follows that in a situation in which the parent company is not itself involved in the infringement—and can therefore not directly be held liable for the infringement—it is ultimately the fact that the parent company and its infringing subsidiary constitute an SEU that enables the Commission to address a decision imposing fines to the parent company for the conduct of its subsidiary.

The following Part elaborates on when a joint venture can be considered to constitute an SEU with (any of its) shareholders, as a result of which infringements committed by the joint venture may be attributed to the shareholders.

II. JOINT VENTURE + SHAREHOLDERS = SINGLE ECONOMIC UNIT?

In its current decisional practice regarding joint venture infringements, the Commission attributes liability to shareholders for infringements by joint ventures without distinguishing between full-function joint ventures ("FFJV"), which have been declared independent by the Commission under the ECMR, and other types of joint ventures. However, in determining whether a joint venture constitutes an SEU with any of its shareholders, it is of fundamental importance to distinguish between FFJVs and joint ventures that are not full function. FFJVs do not form an SEU with their shareholders and therefore liability for infringements cannot be attributed to the shareholders; however, non-FFJVs at times do form an SEU with their shareholders, and thus attribution of liability is possible.

A. Full-Function Joint Ventures

An FFJV is a joint venture performing on a lasting basis all the functions of an autonomous economic entity. A joint venture is considered an FFJV if it has a "management dedicated to its day-to-day operations and has access to sufficient resources including finance, staff and assets... in order to conduct on a lasting basis its business activities" as defined in the joint venture

13. Id. ¶¶ 58–59.
14. See ECMR, supra note 5, art. 3(4), at 7.
agreement, and is considered to be economically autonomous in respect of its market conduct.\(^{15}\)

Once an FFJV has been implemented, it is independent vis-à-vis its shareholders and does not form an SEU with any of those shareholders. Upon implementation of the FFJV, the market structure has changed for good, and the joint venture constitutes a separate undertaking (SEU) in the sense of Articles 101 and 102 TFEU. This follows not only from the contents of the ECMR and the relationship between the ECMR and Articles 101 and 102 TFEU, but also from accompanying notices (e.g., Ancillary Restraints Notice\(^{16}\)) and the Commission’s decisional practice in merger cases and, until recently, in antitrust cases.

In particular, with respect to the application of Article 101 TFEU to (contractual) arrangements between an FFJV and one or more of its shareholders, the Commission has consistently held that they are not part of the same undertaking. For example, the Ancillary Restraints Notice assumes that a wide variety of arrangements between shareholders and FFJVs, including non-competition clauses, are subject to Article 101 TFEU, thereby excluding the possibility that the shareholders and the joint venture are part of an SEU. If the shareholder and the joint venture are considered part of an SEU, Article 101 TFEU would not apply to their agreements. In antitrust cases, the Commission’s approach to the relationship between an FFJV and its shareholders was consistent with its merger control approach until 2007.

In Gosme/Martell, the Commission assessed the applicability of Article 101 TFEU to an agreement between a joint venture, DMP, and its shareholders, Martell and Piper-Heidsieck. The Commission determined:

DMP and Martell are independent undertakings within the meaning of Article [101] (1). At the relevant time, Martell was not in a position to control the commercial activity of DMP because:

— the parent companies each held 50% of the capital of DMP and the voting rights,

\(^{15}\) Commission Notice, 2008 O.J. C 95/1, at 24 [hereinafter Jurisdictional Notice].

— half the supervisory board members represented Martell shareholders and half [represented] Piper-Heidsieck shareholders,

— DMP also distributed brands not belonging to its parent companies,

— Martell and Piper-Heidsieck products were invoiced to wholesalers on the same document [which meant that the joint venture sold to customers in its own name and not on behalf of its parents],

— DMP had its own sales force and it alone concluded the conditions of sale with [customers].

In short, the fact that none of the shareholders had sole control over the joint venture and the joint venture enjoyed operational autonomy (i.e., the joint venture was an FFJV) meant that the joint venture was not part of an SEU with any of its shareholders but was instead an independent undertaking. As a result, the Commission concluded that Article 101 TFEU applied to the agreement between the joint venture and one of its shareholders.

Regarding attribution of liability for cartel infringements of Article 101 TFEU committed by a joint venture, the Commission decided in PVC:

DSM transferred its PVC activity to LVM (a joint venture with SAV) at the beginning of 1983 but itself continues in existence as an undertaking. The same considerations apply to the other parent, SAV. The Commission therefore considers that DSM and SAV each remain responsible for their participation in the cartel up to the creation of LVM. After the formation of LVM that undertaking participated in the cartel in its own right. 18

Also, in a more recent case, the Commission clearly established that an infringement of Article 101 TFEU committed by an FFJV cannot be attributed to any of its shareholders. In Rubber Chemicals, the Commission assessed a cartel, the participants of which included an FFJV (Flexsys):

Flexsys N.V. (hereinafter “Flexsys”) is a joint venture currently owned 50/50% by Solutia Inc. (USA) and Akzo

18. PVC, 1994 O.J. L 239/14, ¶ 42.
Nobel N.V. (Netherlands), with headquarters in Brussels. Flexsys was formed on 1 January 1995 between Monsanto Company (USA) and Akzo Nobel N.V. as a concentrative full-function joint venture, which was approved by the Commission on 19 January 1995 under the Community merger control rules. The parent companies transferred all their relevant assets to the joint venture on 1 January 1995 and withdrew entirely from the rubber chemicals market. In 1997, Monsanto placed the assets of its chemical division, and the shares of stock or equity interests of Flexsys, into a new entity, Solutia Inc., which replaced Monsanto as the parent company of Flexsys. Flexsys performs its functions as an autonomous economic entity on the market.¹⁹

One of the addressees of the Statement of Objections (Repsol) complained to the Commission that it was held liable for the infringements committed by its wholly owned subsidiary, whereas the shareholders of the Flexsys joint venture were not held liable for the joint venture’s participation in the infringement. The Commission responded:

Finally, the Commission points out that, contrary to what Repsol contends, the situation of Flexsys with regard to its parent companies is radically different from that of Repsol with regard to [its subsidiary] GQ. In the case of a joint venture, jointly owned by its parents (and over which none of the parents has de facto or de jure sole control) the joint venture can be presumed to be autonomous from its parent companies (i.e. can be presumed to constitute a separate undertaking with respect to its parents). In contrast, a parent company and its wholly owned subsidiary (such as Repsol and GQ) can be presumed to form a single undertaking for the purpose of Article [101] of the Treaty.²⁰

This is where the Commission touches upon the fundamental (or “radical,” as the Commission puts it) difference between sole and joint control. The concepts of both sole and joint control relate to the ability to exercise decisive influence over another entity.²¹ However, unlike sole control, which confers upon one single shareholder the power to take strategic decisions and determine the entity’s market conduct, joint

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¹⁹. Rubber Chemicals, slip op. ¶ 12.
²⁰. Id. ¶ 263.
²¹. See ECMR, supra note 5, art. 3(2), at 7.
control is characterized by negative control of two or more shareholders that can at best block strategic decisions but none of which is able alone to determine the joint venture's market conduct.\textsuperscript{22} Therefore, the ECMR establishes that a joint venture over which no one has sole control and which enjoys operational autonomy qualifies as an FFJV and is an autonomous economic entity (a separate undertaking with respect to its shareholders).\textsuperscript{23} The fact that shareholders are \textit{jointly} able to exercise decisive influence does not deprive an FFJV of its autonomy.

Also in legal doctrine, it continues to be common understanding that it is inappropriate to treat a jointly controlled FFJV and one or more of its shareholders as an SEU:

Further, no economic entity will be deemed to exist between companies by virtue of joint control over another enterprise, as is ordinarily the case with joint ventures which are autonomous and independent undertakings. It follows that agreements concluded between one parent and the joint venture may be caught by Article [101](1).\textsuperscript{24}

Despite its clear reasoning in \textit{Rubber Chemicals} on why an FFJV is an independent undertaking separate from its shareholders to which infringements by the FFJV therefore cannot be attributed, the Commission in \textit{Chloroprene Rubber} attributed liability for infringements by an FFJV to two of its shareholders.\textsuperscript{25} The precise grounds on which the Commission attributed liability are yet unknown—a public version of the decision is not yet available in full—but the Commission had previously established that the joint venture was full function and therefore an independent undertaking.\textsuperscript{26} Therefore, the authors find it difficult to comprehend how this joint venture can constitute a single undertaking with its shareholders. The Commission's previous finding that the joint venture was an independent undertaking should have prevented the Commission from attributing liability to the shareholders.

\begin{footnotes}
\item[22] See Jurisdictional Notice, \textit{supra} note 15, 2008 O.J. C 95/1, at 17, ¶ 62.
\item[23] See ECMR, \textit{supra} note 5, art. 3(4), 2004 O.J. L 24/1, at 7.
\end{footnotes}
In a subsequent case, *Candle Waxes*, the Commission made clear that it had indeed changed its policy regarding the autonomy of an FFJV with respect to its shareholders. The Commission stated:

In the case of a joint venture, it is possible to find that the joint venture and parents together form an economic unit for the purposes of the application of Article [101] of the Treaty if the joint venture has not decided independently upon its own conduct on the market. Whether or not the joint venture is to be regarded as a full-function joint venture in the sense of [the ECMR] is irrelevant in this context as there is, as shown above, factual evidence demonstrating decisive influence.\(^{27}\)

This is quite the opposite of what the Commission stated in *Rubber Chemicals*. And it is incorrect. As the Commission itself explained in *Rubber Chemicals*, there is a major difference between a parent solely exercising decisive influence over a subsidiary and two or more shareholders that are only *jointly* able to exercise decisive influence. As explained above, the fact that an FFJV is under joint control does not deprive it of its autonomy.\(^{28}\) To the contrary, the fact that control is divided between two or more undertakings co-determines the joint venture's independence.

The Commission's new approach goes against the fundamental principle of the laws of the Member States that a legal entity has its own rights and liabilities distinct from the rights and liabilities of other entities. As set out in *Akzo Nobel*, the fact that a parent company and its subsidiary constitute a single undertaking justifies an exception to this fundamental principle.\(^{29}\) Such a justification is not available in the case of FFJVs. An FFJV constitutes a separate economic unit and does not belong to the SEU of its parents. There is, therefore, no basis to deviate from the fundamental principle that legal entities belonging to the FFJV are separate from those of its parent companies.

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This is also the approach followed in various Member States including France, Germany, Italy, the Netherlands, Spain, and the United Kingdom. In these countries, there is no derogation from the fundamental principle of distinct legal personality in the form of attribution of liability to shareholders of an FFJV; shareholders are not held liable for competition law infringements committed by an FFJV. Similarly, in jurisdictions outside the EEA, for example Japan and the United States, liability for infringements of a joint venture can generally not be attributed to a joint venture shareholder.

The Commission’s statement in *Candle Waxes* seems to suggest that there are two different concepts of “undertaking,” one for the ECMR and another for Article 101 TFEU. The authors think that such an approach is fundamentally wrong. The concept of an undertaking is such an essential notion of competition law that there should not be any ambiguity in this concept. Also the EU courts have always referred to the concept of undertaking as a singular one in competition law. The importance of having a single concept of undertaking in view of the overall structure and internal consistency of competition law has also been stressed in literature.

Contrary to the Commission’s suggestion in *Candle Waxes*, there is only one concept of undertaking in EU competition law. An FFJV that is a separate undertaking under the ECMR is a separate undertaking under Article 101 TFEU. Article 101 TFEU is addressed to undertakings, and, as decided by the CJ in *Akzo Nobel*, shareholders that have not themselves committed an infringement cannot be held liable for infringements by a joint venture with which they do not form a single undertaking.

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30. See, e.g., Rechtbank Rotterdam 2 February 2010, LJN BN2968 (Lavaredo Holding/Nederlandse Mededingingsautoriteit) (Neth.). The court, referring to the fact that control over the joint venture was divided fifty-fifty between two shareholders, decided that the Dutch competition authority was correct in not attributing liability to the shareholders for the joint venture’s infringement. *Id.*


B. Other Joint Ventures

While FFJVs do not form an SEU with their shareholders, non-FFJVs at times do form an SEU together with their shareholders so that attribution of liability is possible. The following Section deals with the standard applied by the EU courts for determining whether a non-FFJV forms an SEU with any of its shareholders.

1. Legal Standard for Attribution of Liability for Non-FFJVs

For joint ventures that are not full function, the EU courts have—in a limited number of cases—established the conditions under which a non-FFJV forms an SEU with any or each of the joint venture partners, as a result of which liability can be attributed to the joint venture partners. In each of these cases, the courts established that the joint venture partner(s) in fact exercised decisive influence over the joint venture by directly interfering with the joint venture’s market conduct. This is somewhat different from the way in which exercise of decisive influence was established by EU courts in the case of wholly owned subsidiaries.

With wholly owned or nearly wholly owned subsidiaries, the courts have established that the parent company is able to exercise decisive influence over the market conduct of its subsidiary with which it forms a single economic unit and that it can be presumed to have in fact exercised that influence. In Akzo Nobel, the CJ held that the relevant subject matter over which decisive influence is to be exercised is not only “commercial policy” in the narrow sense such as pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks, and marketing, but also “commercial policy” in the broader sense: corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources, and legal matters, as these may have indirect effects on the market conduct of the subsidiaries and of the whole group. This is in line with the concept of SEUs as it applies to subsidiaries that are part of a group and are under the single control of a parent entity.

35. Id. ¶¶ 42-51, 67-78.
In the cases that involved non-FFJVs, Metsä Serla and Avebe, the factual exercise of decisive influence by the joint venture partners was established differently. This can be explained by the fact that no shareholder has single control over the activities of the joint venture and that the conduct of the joint venture cannot necessarily be assumed to have been committed within the economic unit of either of the joint venture partners, even if the joint venture is not an FFJV. In both cases, it was established that the joint venture partners exercised decisive influence over the joint venture by directly determining the joint venture's market conduct.

In Metsä Serla, member companies of a trade association named Finnboard (the joint venture) marketed their products through the joint venture. From the facts of the case, it was clear that the joint venture merely acted as an auxiliary body of each of those companies. This followed, for instance, from the fact that the member companies were jointly and severally liable for liabilities of the joint venture as if it were their own debt. Furthermore, even though the joint venture was authorized to negotiate prices and other conditions of sale with end customers in accordance with the guidelines set by the members, a sale could not be made unless the member company concerned had first approved the price and other conditions of sale. Finally, it was also common ground that title passed directly from the member company to the end customer.

Avebe involved a fifty-fifty joint venture, named Glucona, between Avebe and Akzo for the manufacture, sale, and marketing of certain products. The joint venture was created as a purely contractual entity without separate legal personality from its parents Akzo and Avebe. The Court found that only the joint venture partners (and not the joint venture itself) could act on behalf of the joint venture and bind it to third parties. The joint venture partners did so through their representatives and directors appointed by them, which representatives and directors were employees of the joint venture partners and devoted only part of their time to the joint venture. Accordingly, the joint venture could not act independently on the market as the joint

venture partners directly and through their own employees determined the joint venture’s market conduct.  

In both Metsä Serla and Avebe, the joint venture was merely a vehicle through which the joint venture partners coordinated their businesses and market conduct. The respective businesses that were coordinated through the joint venture were therefore part of, and constituted an SEU with, the respective undertakings of the joint venture partners. On this basis, infringements by the joint ventures could be attributed to the joint venture partners.  

The doctrine of attribution of liability as applied to joint ventures in Metsä Serla and Avebe was applied by the General Court ("GC") most recently in Spanish Raw Tobacco. 39 In this case, the companies SCC and SCTC—parent companies of TCLT—were held liable for an infringement committed by WWTE, a joint venture by TCLT and the president of WWTE, because SCC and SCTC directly interfered with WWTE’s market conduct. TCLT did not, and was therefore not liable for WWTE’s infringements. On the basis of the following elements, the GC concluded that SCC and SCTC in fact exercised decisive influence over WWTE’s market conduct: (1) one of the four members of the board of directors of WWTE was at the same time a senior executive of the SCC group and could be regarded as being part of the SCC group management40; (2) the members of the board of directors of WWTE appointed by the SCC group had stressed that WWTE could not act independently of SCTC, and that although WWTE had its “own identity/entity,” it was “also a subsidiary of SCTC” and should therefore “fall in the line of the SCTC culture”; it appeared that the board of directors of WWTE had no real decisional freedom but had to consult in many occasions with upper levels of SCTC41; (3) on a whole series of issues concerning its commercial policy, WWTE had to consult SCTC and in fact obtained its prior approval, including on matters as sales (contracts), long-term financing, investment projects, and small expenditure as low as US$4,800  

42; and (4) the representatives of SCC on the board of directors of WWTE were

38. Id. ¶¶ 135–41.
40. Id. ¶¶ 173–80.
41. Id. ¶ 182.
42. Id. ¶¶ 183–88.
informed of the practices of the cartel in WWTE board meetings, and the member of the SCC group management who was at the same time a director of WWTE was also personally informed of certain aspects of the cartel. The GC held that it could reasonably be inferred from this that SCC tacitly approved WWTE's involvement in the cartel, which amounted to additional evidence that SCC exercised decisive influence over the conduct of WWTE.43

In respect of the GC's considerations regarding the relevance of awareness of the cartel, it must be noted that the GC had previously indicated that the question of decisive influence relates to the level of autonomy of the subsidiary's market conduct and not to the parent company's awareness of the infringing behavior of the subsidiary. It held that attribution of liability to a parent company flows from the fact that the two entities constitute a single undertaking and not from proof of the parent's awareness of the infringement.44 The judgment has been appealed and it is yet uncertain whether the GC's decision will be upheld by the CJ.

Conclusion

It follows from these precedents that in the case of a non-FFJV, over which none of the joint venture partners has sole control, the courts attributed liability by establishing that the joint venture partners in fact exercised decisive influence over the joint venture by directly being involved in and determining the joint venture's market conduct. As a result, the joint venture was not an independent undertaking but formed an SEU with each or any of the joint venture partners.

2. Standard Applied by the Commission for Attribution of Liability for Non-FFJVs

When determining whether parent companies of a non-FFJV are liable for infringements committed by the joint venture, the Commission recently created an alternative formula for attributing liability. The standard applied by the Commission in

43. Id. ¶¶ 189-93.
these recent cases deviates from the one established by the CJ in Metsä Serla and Avebe.

In Gas Insulated Switchgear ("GIS"), the Commission stated that the parent companies Fuji and Hitachi were able to exercise decisive influence and had actually exercised decisive influence over the joint venture, which was not full function. In support of this conclusion, the Commission referred to several "objective factors" demonstrating that the joint venture partners had a supervisory and management role in the joint venture: that they had been previously involved in the cartel infringement and that there were overlapping/consecutive positions of senior employees/cartel participants in the joint venture and the parent companies. As a result, the parent companies were assumed to have been aware of the joint venture's infringement and that they could have prevented on account of their supervisory role and responsibility for the management of the joint venture's affairs.45

Regarding the supervisory and management roles and responsibilities, it must be noted that in nearly every joint venture, the joint venture partners have supervisory and management roles and responsibilities. Together with the joint venture partners' equal shareholdings, this typically constitutes joint control, i.e., the ability to exercise decisive influence. Referring to supervisory and management roles and responsibilities of joint venture partners is in fact nothing more than referring to the fact that the joint venture is under joint control. The Commission has yet to demonstrate whether joint venture partners in fact exercised decisive influence over the joint venture's market conduct, as required in Metsä Serla and Avebe. In Avebe, the Court clearly pointed out that "the Commission cannot merely find that an undertaking 'was able to' exert decisive influence over the other undertaking, without checking whether that influence actually was exerted."46

Although the Commission in Gas Insulated Switchgear states that the parent companies "actually exercised a decisive influence,"47 it does not appear from the decision that the

45. Gas Insulated Switchgear, slip op. ¶ 391–403.
47. Gas Insulated Switchgear, slip op. ¶ 389.
Commission established that the parent companies in fact did so. Instead, the Commission focused on the joint venture partners' previous involvement in the infringement and assumed that after their involvement had ended they were aware of the joint venture's involvement: "[They] should have known as they were ultimately responsible for [the joint venture's] management" and "[they] must have been fully aware of the existence of the cartel and must have known of the participation of [the joint venture] in the cartel."48

During the hearing of the GIS case before the GC, the Commission explained how it constructed the finding that decisive influence had been exercised by the parent companies:

As a shareholder in [the joint venture], over which it was able to exercise supervision, [the parent company] can be held responsible for the fact that the joint venture continued with the infringement in which it had itself participated beforehand. By refusing to intervene, [the parent company] exercised decisive influence over the joint venture and thus ensured the continuation of the cartel.49

However, proof that a parent company was able to exercise decisive influence and that it—while possibly being aware of the joint venture's infringement—did not prevent the joint venture from committing the infringement is not the same as the actual exercise of decisive influence as established in Avebe and Metsä Serla. The Commission essentially states that the parent company is liable because it did not use its ability to exercise decisive influence while assuming that it was aware that infringements were occurring. However, regarding the element of awareness, it must be noted that the GC in Spanish Raw Tobacco established that the joint venture partner had in fact been aware of the joint venture's infringements. Its awareness was not assumed. Moreover, the GC merely considered awareness to be "additional evidence" of the exercise of decisive influence, i.e., additional to a whole body of evidence that the joint venture partner had in fact directly determined the joint venture’s market conduct. In the authors' view, merely establishing that a shareholder was

48. Id. ¶¶ 398, 405.
aware of its joint venture committing infringements cannot replace the requirement to establish, on the basis of a coherent and consistent body of evidence, that the joint venture partner in fact exercised decisive influence on the joint venture’s market conduct.

Apart from the fact that there is no basis in the precedents mentioned above that awareness by a parent company can be assumed, it must be noted that the transfer of a business into a joint venture typically includes relevant employees (and therefore the company’s “knowledge” of the infringement). Therefore, an assumption that a joint venture partner is aware or that it should be deemed to be aware of subsequent infringements of the joint venture is, in the authors’ view, a questionable basis for attribution of liability.

Conclusion

Since 2007 the Commission has applied an alternative method of attributing liability to shareholders of a non-FFJV that deviates from the case law established in Metsä Serla and Avebe. The Commission seems to have limited itself to establishing that the joint venture partners had the ability to exercise decisive influence over the joint venture and to assuming that they were aware of the joint venture’s infringement, which they could have prevented on account of their joint control. However, there is no basis in the case law for attribution of liability on the basis of assumed awareness. In any event, in view of the GC’s judgment in Spanish Raw Tobacco, any evidence of actual awareness alone cannot release the Commission from its obligation to establish, on the basis of a coherent and consistent body of evidence, that the parent company in fact exercised decisive influence on the joint venture so that they form an SEU, which is the ultimate and only basis for attribution of liability.

III. IMPOSITION OF FINES/JOINT AND SEVERAL LIABILITY

The previous Part argued that in its recent cases, when attributing liability in joint venture situations, the Commission departed from the case law established by the EU courts. When it comes to imposing fines on those entities held liable for the infringement and when applying the instrument of joint and several liability, the Commission also seems to have departed from case law.
Both in *Gas Insulated Switchgear* and *Chloroprene Rubber*, the Commission imposed a fine for which the shareholders and the joint venture were held jointly and severally liable.\(^{50}\) However, the Court in *Metsä Serla* indicated that the basis for holding entities jointly and severally liable for the same fine is that they belong to the same SEU.\(^{51}\) Each of the parent companies was held jointly and severally liable with the joint venture for only a certain amount of the total fine (corresponding with its share of supplies through the joint venture), and the joint venture was held liable for the total amount.\(^{52}\) The parent companies were not held jointly and severally liable with each other, as they did not form an SEU with each other but only with the joint venture, and then only for a part corresponding to their share of supplies, i.e., their economic interest in the joint venture.

In *HFB Holdings*, the GC once more explained the reason that, in *Metsä Serla*, the parent companies of the joint venture were not held jointly and severally liable with each other:

In that regard, the applicants are incorrect to claim that the solution adopted in *Metsä-Serla and Others v Commission*, where each applicant was held jointly and severally responsible, up to a certain amount, for the fine imposed on the association of undertakings, should be applied to them. That solution may be explained by the fact that in that situation the association Finnboard formed an economic entity with each of its member companies, taken individually. In the present case, on the other hand, there was only one single economic entity to which [the applicants] belonged.\(^{53}\)

Also in *Avebe*, the joint venture partners Akzo and Avebe were not held jointly and severally with each other; instead the Commission imposed fines on each joint venture partner separately.\(^{54}\)

As explained in the previous Part, the Commission can attribute liability to joint venture partners if it establishes that the

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52. See Commission Decision No. IV/C/33.833 (Cartonboard), O.J. L 243/1, ¶ 174.
joint venture could not act independently on the market but was merely a vehicle through which the joint venture partners coordinated their businesses and market conduct. In such cases, the respective businesses that were coordinated through the joint venture were therefore part of, and constituted an SEU with, the respective undertakings of the joint venture partners. Clearly, the joint venture partners do not constitute an SEU with each other. As such, in GIS, after establishing that the joint venture was merely a vehicle through which the joint venture partners coordinated their business and market conduct, the Commission should have established that the joint venture constituted an SEU partly with Hitachi and partly with Fuji. In any event, there is no basis for finding that Hitachi and Fuji constitute an SEU with each other. Accordingly they should not have been held jointly and severally liable with each other. Instead, the joint venture should have been held liable for the total amount, and each joint venture partner should have been held jointly and severally liable with the joint venture for the proportion of the fine that corresponded with its economic interest in the joint venture.

Apart from being in line with the case law established in Metsä Serla, this solution would also avoid practical difficulties that would otherwise arise when calculating the fine. Some of the factors that determine the amount of the fine, for example the deterrence factor or the statutory fine maximum, relate to the size of the group (turnover) of the undertaking concerned. When the size of the groups to which the joint venture partners belong differs significantly, it may be impossible to calculate one single fine for which the joint venture and both joint venture partners can be held jointly and severally liable (consider Avebe, where a deterrence multiplier was applied to Akzo’s fine but not to Avebe’s fine).

In conclusion, entities can only be held jointly and severally liable for a fine if they form one SEU with each other. A joint venture may form an SEU with each of its parent companies, or any of them, so that such parent company or companies can be held jointly and severally liable with the joint venture. However, even if a joint venture forms an SEU with its parent companies,

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56. Sodium Gluconate, slip op. ¶ 388.
those parent companies do not form an SEU with each other. The Commission should therefore impose the total amount of fine on the joint venture and hold each of the joint venture partners jointly and severally liable with the joint venture for a proportion of the fine that corresponds with its economic interest in the joint venture.

CONCLUSION

Until 2007, the Commission generally did not attribute liability to shareholders for infringements committed by their joint venture because joint ventures generally do not form an SEU with any of their shareholders. Since 2007, however, the Commission has issued several decisions in which it did attribute liability to shareholders for infringements by joint ventures. It has done so without distinguishing between joint ventures that were full function and joint venture that were not. The test applied by the Commission, simply phrased, is about establishing that shareholders were able to exercise decisive influence over the joint venture’s market conduct and that they refused to intervene in order to prevent or stop their joint venture’s infringements of which they were assumed to be aware.

In its 2009 Akzo Nobel judgment, the CJ explicitly confirmed that it is the fact that an infringing entity and its parent company constitute an SEU that enables the Commission to attribute liability to the parent company. In light of this judgment, it is clear that shareholders cannot be held liable for infringements committed by an FFJV, which, under EU competition law, is an independent undertaking and does not form a single economic unit with any of its shareholders. The Commission’s statement that the fact that an FFJV is an independent undertaking under the ECMR does not prevent the Commission from finding that it is not an independent undertaking under Article 101 TFEU would create different concepts of the notion “undertaking,” which would go against one of the fundamental principles of EU competition law established by the courts, i.e., that there is one concept of “undertaking.”

For joint ventures that are not full function, such as those in Metsä Serla and Avebe, the Commission is required to establish that the joint venture partners to which it seeks to attribute liability in fact exercised decisive influence over the joint venture
by directly determining the joint venture’s market conduct. In such a case, the joint venture is not an independent undertaking but forms an SEU with each of the partners.

In its recent decisions in which liability was attributed to shareholders of non-FFJVs, the Commission merely established that the joint venture partners had the ability to exercise decisive influence over the joint venture and—while assuming that the joint venture partners were aware of the joint venture’s infringement—that they could have prevented the infringement on account of their joint control. However, the courts have established that the Commission should demonstrate that decisive influence was in fact exercised (not merely that they had the ability to do so). Furthermore, although the GC has taken into account proof of actual awareness—not assumed awareness—as additional evidence of the exercise of decisive influence, it did not decide that awareness alone would be sufficient to establish that decisive influence was in fact exercised.

The decisions in which the Commission attributed liability to shareholders of joint ventures have been appealed and are currently pending before the GC. The authors’ opinion is that the Commission has overstepped in applying the doctrine of attribution of liability to shareholders of FFJVs, and that when applying that doctrine to non-FFJVs, it has strayed from the case law established by the courts in Metsä Serla and Avebe.