Group Briefing

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EU General Court clarifies parental liability of financial investors for competition breaches

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On 12 July 2018, the EU's General Court handed down an important judgment which clarified the basis on which the European Commission can impose antitrust fines on financial investors for the activities of their subsidiaries, even if the investment is largely passive in nature.

BACKGROUND

The case concerned a cartel in the power cables market. From February 1999 until January 2009, European, Japanese and South Korean producers of submarine and underground power cables participated in a network of multilateral and bilateral meetings and established contacts aimed at restricting competition for their products in specific territories, by allocating markets and customers, thereby distorting the normal competitive process.

The European Commission imposed a fine of €104.6 million on Prysmian, the world's largest cable maker, for its participation in the cartel. At the relevant time, a Goldman Sachs-managed fund, GS Capital Partners, owned a significant majority stake in Prysmian, through a number of managed funds. During the period of infringement, Goldman Sachs' ownership interest in Prysmian fluctuated between 84% and 91%. Leaving aside 41 days when its shareholding was 100%, Goldman Sachs' holding in Prysmian was no more than between 84.4% and 91.1% until 3 May 2007, the date on which shares in Prysmian were offered to the public in an initial public offering on the Milan Stock Exchange.

Although the investment bank did not hold 100% of the shares, it indirectly controlled all the voting interests associated with Prysmian's shares up to the date of the IPO. Following this date, although Goldman Sachs no longer had absolute control over the voting rights, it continued to exercise control over the board of directors (evidenced by the fact that that board continued to have the same composition). Notwithstanding its substantial equity interest, Goldman Sachs maintained that its investment in Prysmian was essentially financial in nature and that Goldman Sachs was not, in any commercial sense, Prysmian's "parent".

The European Commission found that, as a result of its ownership interest, Goldman Sachs had "decisive influence" over Prysmian for a substantial period during which the infringement occurred. Applying the long-established principle that one undertaking may be held jointly and severally liable for the anti-competitive conduct of another where those undertakings form part of a "single economic unit", the Commission held Goldman Sachs' to be jointly and severally liable for the

Prysmian's conduct and imposed a fine on Goldman Sachs of €37.3 million. The Commission based this decision on two grounds: (i) a presumption arising from EU case law that Goldman Sachs had exerted a decisive influence over Prysmian due to its shareholding; and (ii) an analysis of Goldman Sachs' economic, organisational and legal links with its subsidiaries which demonstrated that it did in fact exert a decisive influence over the market conduct of Prysmian. Goldman Sachs appealed the Commission's decision to the General Court.

THE GENERAL COURT DECISION

The General Court upheld the Commission's decision and dismissed Goldman Sachs' appeal. Central to the appeal being rejected was the level of general influence which the Court and the Commission found that Goldman Sachs held over Prysmian.

The General Court referred to the decision of the Court of Justice in *Akzo Nobel v Commission*[1], and noted that the conduct of a subsidiary may be imputed to the parent or investor company where, although having a separate legal personality, the subsidiary does not decide upon its own conduct on the market, but follows the instructions of the parent company in all material respects. Where this is the case, the parent company and its subsidiary form a single undertaking within the meaning of Article 101 TFEU. On this basis, the Commission may impose fines on the parent without having to establish its personal involvement in the conduct in question or the infringement. Where a parent company has a 100% shareholding in a subsidiary, this is sufficient to presume that the parent exercises a decisive influence over the subsidiary. Where a company holds almost all of the capital of a subsidiary of its group, there is a rebuttable resumption that the company exercises a decisive influence over the conduct of the subsidiary. In order to be able to impute the conduct of a subsidiary to the parent company, it must further be established that the decisive influence was actually exercised over the subsidiary, not just that the parent was merely in a position to do so.

DECISIVE INFLUENCE

In the present case, the application of the presumption of actual exercise of decisive influence was not based on the level of Goldman's holding, but on the fact that it controlled 100% of the voting rights associated with the company's shares, giving it comparable ability to that which it would have enjoyed as sole owner. The General Court recognised other factors relating to the economic, organisational and legal links between Goldman Sachs and Prysmian to support the finding of decisive influence, including the power to appoint the members of the various boards of directors of Prysmian, the power to call shareholder meetings and to propose the revocation of directors or of entire boards of directors, Goldman Sachs' actual level of representation on Prysmian's board of directors, management powers of Goldman Sachs' representatives on the board of directors, the receipt of regular updates and monthly reports, the measures to ensure continuation of decisive control after the IPO date, and evidence of behaviour typical of an industrial owner.

The General Court noted that it is possible to rebut the presumption that a parent company had decisive interest by providing evidence that the subsidiary acted independently of the parent company. However, the Court found that the presumption had not been rebutted in this case.

ANALYSIS

The *Prysmian* case reaffirms the well-established principle in EU case law that parent companies can be found liable for the anti-competitive behaviour of their subsidiaries. However, the decision of the Commission, affirmed by the General Court, has highlighted that institutional investors may also be held liable for the conduct of companies in which they have invested, event where that investment is relatively passive or where the investor has limited direct involvement in the actual operation of the subsidiary in question. As the European Commission noted in its response welcoming the General Court's ruling, the case recognises that institutional investors are treated "*like other corporate parents, by attributing parental liability to them in exactly the same way*" and the legal and factual analysis will turn on whether the parent/investor is capable of exercising decisive influence over the subsidiary. The nature of the investment, whether financial or more strategic, is not relevant in this regard.

CONCLUSION

The case highlights the importance for investors and parent companies generally in ensuring that their subsidiaries comply with applicable competition law rules, and that subsidiaries have robust policies in place to minimise the risk of infringement arising. In addition, the case provides further impetus for acquiring parties to conduct relevant due diligence in relation to competition law risk and to obtain appropriate protection from vendors in transaction agreements (through warranties/indemnities etc.) to address potential historic competition law liabilities that may arise.

For further information, please contact a member of the Competition and Regulated Markets group.

1 *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536.

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