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Cartel Liability of Financial Investors

Thomas Wilson (Kirkland & Ellis, Belgium) · Wednesday, August 1st, 2018

The EU General Court recently upheld an infringement decision of the EU Commission (EC), in which the investment bank Goldman Sachs (GS) was found jointly and severally liable for violating Article 101 TFEU as a result of indirectly owning / holding a stake in Prysmian, a company who participated in cartel activities relating to high voltage underground and submarine power cables.

The facts

- From 1999-2009 a number of producers of underground and submarine voltage power cables, including Prysmian, were involved in cartel activity relating to customer allocation and market sharing agreements in breach of EU antitrust rules.
- In July 2005, a GS-owned fund acquired 100% of the capital in Prysmian from Pirelli. This shareholding level decreased shortly thereafter following shares divestments to Apollo and the Pyrsmian management team. Until the IPO in May 2007 the GS shareholding was between 84-91% of the Prysmian equity. According to the EC, the GS fund controlled 100% of the voting rights in Pyrsmian during this period.
- In May 2007, 46% of Prysmian's shares were floated through the IPO; additional disposals of 12.3% and 9.9% of the shares in Pyrsmian followed.
- After the infringement ended (in April 2009) the GS fund held 31.69% of the shares in Prysmian.
- GS gradually sold off its remaining stake in Prysmian and exited the investment altogether in May 2010.

Parent liability – general principles

There is established case law with regard to parent liability:

- The parent company can be held responsible where its *subsidiary does not decide independently* upon its own conduct on the market but carries out, in all material aspects, the instructions given by the parent company. The *concept of parent liability is a broad one* – it has, for instance, been established in cases where the parent held a 50% interest in largely independent and market-facing joint venture.
- The EC needs to establish that the parent company *actually exercises decisive influence* over the commercial conduct of the subsidiary, i.e. it is not sufficient that the parent is in a position to exercise such conduct. There is not a single factor to prove decisive influence – rather the EC relies on a number of *legal and economic links* when finding a parent company jointly and severally liable with its subsidiary.

- However, if the subsidiary is wholly owned, a *presumption* arises that the parent company does in fact exercise decisive influence over its subsidiary. This can be rebutted on the basis that the subsidiary acts autonomously. The presumption has also been applied in cases where the parent holds nearly 100% (e.g. 98%). In practice the presumption is *very difficult for the parent to rebut*.
- A pure financial investor can *avoid liability for a cartel infringement* of its subsidiary, so long as it *refrains from any involvement in its management and its control*.

Liability for Prysmian's fine

The General Court confirmed the EC's decision:

- **For the period of July 2005 – May 2007**: The court found that the EC could presume that the GS had the possibility to exercise decisive influence over the subsidiary where it is able to *all the voting rights* associated with the subsidiary shares. It was in a situation that was comparable to that of a *sole owner* of the subsidiary business. It is, according to the General Court, not relevant that the GS fund *did not hold all of the share capital* in the subsidiary (here: 84-91% for most of the relevant period). GS was not able to rebut the presumption of having exercised decisive influence during this period.
- **For period of May 2007 – January 2009**: For this period the EC could not rely on the presumption that the GS fund exercised decisive influence (as the shareholding was much lower than 100%). As mentioned, the shareholding of the GS fund gradually dropped and was only at *31.69% at the end of the infringement period*. The EC *did nonetheless find that GS exercised decisive influence* as:
    - GS had the power to appoint various board members of Prysmian;
    - It had the power to call shareholders meetings and to propose the revocation of directors (or the board as such);
    - GS's actual representation in the Prysmian board of directors;
    - The important role played by GS on the committees (relating to internal controls and compensation) established by Prysmian;
    - The receipt of regular updates and monthly reports regarding the development of Prysmian's business;
    - Measures to ensure continuation of decisive control post-IPO (GS changed the Prysmian by-laws in a way that it could appoint 5 of the 6 Prysmian board of directors in the future and GS appointed the board of directors of Pyrsmian until April 2009); and
    - Evidence of behaviour typical of an industrial owner as it favoured cross-selling between Prysmian and other GS entities.

Conclusion

The judgment shows that the concept of parental liability in EU competition law is applied broadly and that there is only limited scope for financial investors to "escape" a fine based on a financial investor defense. In particular, a financial investor may be held liable even in case of a minority shareholding *if they hold certain rights* (e.g. veto rights relating to senior management), giving them the possibility to intervene with the company business. For any such investment that is not a purely financial one, a *thorough due diligence* of the target business should be conducted beforehand, including involving specialized antitrust lawyers.

The views expressed in this blog post are the author's personal views and do not necessarily reflect those of Freshfields Bruckhaus Deringer.

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