Kluwer Competition Law Blog

Private equity investors held liable for cartels in the Netherlands

Mariska van de Sanden (Bird & Bird, The Netherlands) · Thursday, April 4th, 2019

Introduction

On 19 March 2019, the highest administrative court in the Netherlands (*het College van Beroep voor het bedrijfsleven,* “CBb”) ruled that the Dutch Competition Authority (“the ACM”) can hold private equity investors liable for cartel infringements committed by their portfolio companies.[1] According to the ACM, and now confirmed by the CBb, the private equity investor exercised decisive influence over its portfolio company. This followed not only from the economic links, but in particular also from the personal and legal links. For example, one of the founders and managing partners of the private equity investors was also the chairman of the supervisory board of its portfolio company, giving him veto rights on important strategic decisions.

The ruling confirms that the ACM can apply the European case-law on parental liability to private equity investors. Private equity investors are therefore advised to consider their options for controlling their liability risks.

In this blog, we set out in more detail the underlying reasons for the ACM to fine the private equity investors and explore what this means for private equity investors.

Background: the flour cartel

On 16 December 2010, the ACM fined fifteen flour producers roughly €80 million for infringement of Article 6 of the Dutch Competition Act (“DCA”) and/or Article 101 TFEU. In short, these flour producers agreed on a non-compete pact, paid competing flour producers lump-sums for lost sales, purchased a competitor who sold flour for (too) low prices and dismantled a bankrupt flour mill in order to prevent competition.

Following the objections of two of the fined flour producers and the advice of the (former) Advisory Committee, the ACM decided to not only fine Meneba, one of the flour producers, but also its private equity investors:

- From 2001-2004: Capital Investors Group Limited and CVC Capital Partners Europe Limited for an amount of in total €900.000
- From 2004-2007: Bencis Capital Partners B.V. and Bencis Buyout Fund II General Partner B.V. (together “Bencis”) for an amount of €900.000

Only Bencis appealed the ACM's decision.

Ruling of the highest administrative court: liability private equity investors

Arguments Bencis

On (administrative) appeal, Bencis argued that it cannot be held liable for the cartel infringement of its portfolio company. The main arguments raised by Bencis in relation to its liability were – amongst others – that:

- Bencis cannot be held liable as a parent company as it is 'only' a private equity investor; any rights Bencis has are only meant to secure its investments, not to influence the commercial strategy of the portfolio company
- The facts that the ACM has put forward that would point to decisive influence should be assessed on their own; not as a whole, and
- The ACM should proof of those indications of decisive influence, *quod-non,* that Bencis has actually used these powers in practice.

The ACM rejected the administrative appeal on 11 September 2015. Subsequently, the District Court of Rotterdam confirmed the liability of Bencis in its judgment of 26 January 2017 and, finally, on 19 March 2019, the CBb agreed with the ACM's position as well.

Ruling CBb

According to the CBb, the ACM could indeed hold Bencis liable for the cartel infringement of its portfolio company Meneda. Although the CBb agrees that the attribution of liability for an infringement does not apply to purely financial investors, it also concludes this that is not the case here. Bencis did not refrain from all involvement in the management and control of its portfolio company. Instead, there were several indications pointing to decisive influence of Bencis on Meneba. For example:

- One of the founders and managing partners of Bencis was appointed as the chairman of the supervisory board of Meneba immediately after Bencis had invested in Meneba.
- The chairman of the supervisory board had a decisive vote, while many important strategic decisions required the approval of the supervisory board in any case (e.g. business plans, important transactions, investments exceeding €100.000).
- One of the powers immediately used after the investment of Bencis in Meneba was the appointment of new members of the executive board of Meneba.
- Furthermore, a subsidiary of Bencis had a priority share in Meneba which give it decisive influence on important strategic decisions of Meneba, like acquisitions, and
- Via this subsidiary, Bencis (indirectly) held 92% of Meneba's shares.

Based on the combination of these economic, organizational and legal links, the CBb ruled that Bencis had decisive influence over Meneba and dismissed the appeal of Bencis.[2] Unlike Bencis argued, there is thus no need to determine of each indication in itself that it led to decisive influence; account should be taken of all relevant factors concerning the economic, organizational and legal links as a whole.

Moreover, according to the CBb there is no need to demonstrate that concrete powers have been used or that concrete instructions or guidelines on market behaviour have been given. In the end, the decisive factor is whether the private equity company exercised an influence that is sufficient to direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit.

Commentary: parental liability also applies to private equity investors

With this ruling, the CBb basically reiterates settled European case-law (e.g. case T-451/14 *Fujikura, case T-419/14 Goldman Sachs* and C-293/13 *Fresh Del Monte)*. The ruling is nevertheless interesting, because it shows that the general principles of parental liability apply to private equity investors. It was expressly stated by the ACM that for the purposes of parental liability, private equity firms cannot be distinguished from other types of corporate groupings.

Private equity investors are advised to take this (and the ruling in general) into account when investing in a company. In addition to an in-depth due diligence, a private equity investor might also want to reduce or control the transfer of its liability where possible. Trying to ensure compliance by the portfolio company with competition law is, of course, in the end the best solution.

Interested in the exact corporate structure of this case? Just send me a message.

[1] On 19 March 2019, the CBb also gave an interlocutory ruling in another appeal in the flour cartel. This concerned the liability of the managing partners of a German kommanditgesellschaft (comparable to a limited partnership) for participation in the Dutch flour cartel. According to the CBb, the ACM made an error by attributing liability to these managing partners without establishing decisive influence on the KG. The ACM is now ordered to demonstrate this influence within a period of three months after the ruling. If the ACM fails to do so, the imposition of the fine on the managing partners will be revoked. See CBb, 19 March 2019, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CBB:2019:121.

[2] This also goes for the other arguments raised by Bencis, like a violation of the *ne bis in idem* principle, because Meneba was already fined by the ACM, and the (lack of the) application of the joint and several liability.

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This entry was posted on Thursday, April 4th, 2019 at 4:00 pm and is filed under Source: OECD“>Cartels, Source: OECD“>Competition, Netherlands, Parental liability
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