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The ECJ expands the presumption of decisive influence (C?595/18 P – Goldman Sachs v Commission)

Lena Hornkohl (Deputy Editor) (University of Vienna, Austria) · Wednesday, January 27th, 2021

In today's judgment in the case C?595/18 P – Goldman Sachs v Commission, the European Court of Justice (ECJ or Court) expanded the rebuttable presumption of decisive influence relating to the parental liability doctrine. According to the parental liability doctrine, a parent company can be liable for anti-competitive conduct of its subsidiary when the parent exercises a decisive influence over its subsidiary. Previous case law had established a rebuttable presumption in case a parent company holds, directly or indirectly, all or almost all of the capital in a subsidiary that has committed an anti-competitive infringement.

For the first time, the ECJ applied this presumption in a case where the parent company held all the voting rights instead of all or almost all of the share capital in a subsidiary. The Court made clear that it is the degree of control of the parent company over its subsidiary that is relevant for the presumption. This judgment was certainly not surprising but brought along necessary clarifications.

The parental liability doctrine and the presumption of decisive influence

The parental liability doctrine has a long history in EU competition law. Early on, the ECJ already held that the conduct of a subsidiary could be imputed to the parent company. Even though the subsidiary has a separate legal personality, in case it does not decide independently but carries out the instructions of the parent company, the latter can be held responsible. In that regard, the ECJ always stressed the importance of the economic, organisational and legal links between the parent and subsidiary company.

Even though it has been indicated in previous judgments, the ECJ fully developed the parental liability doctrine and the corresponding presumption in its current form in the 2009 Akzo Nobel decision. In this judgment, the Court used the famous and often discussed "decisive influence" criterion. The ECJ based the parent company's liability for the subsidiary's conduct on the decisive influence the parent company exercised over its subsidiary. Moreover, the Court held that:

> "where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a

> decisive influence over the conduct of the subsidiary […] and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary […].”

This principle has been repeated in many of the following judgments that refined the parental liability doctrine and the presumption of decisive influence during the last ten years. Instead of relying on the 100% shareholding in a subsidiary, the formula of the ECJ lately has been that a parent company must hold “directly or indirectly, all or almost all of the capital in a subsidiary”. Concerning the evidential threshold for the presumption, according to the Court, it is up to the Commission to prove that a parent company holds all or almost all of its subsidiary’s capital. The parent company can rebut the presumption by providing sufficient evidence to show that its subsidiary behaves autonomously and independently on the market.

Background of the case

Goldman Sachs, the appellant in the present case, is a US investment bank who was the indirect parent company, through the GSCP V Funds and other intermediate companies, of Prysmian SpA and of a wholly-owned subsidiary of that company, Prysmian Cavi e Sistemi Srl. Both Prysmian SpA and Prysmian Cavi e Sistemi Srl (Prysmian) are Italian companies active in the submarine and underground power cables sector who participated in the power cables cartel. The Commission eventually fined Prysmian SpA and Goldman Sachs jointly and severally roughly € 37 million in 2014.

Goldman Sachs was held liable as parent company during the period from 29 July 2005 to 28 January 2009. The Commission divided this period into a period prior to an initial public offering (IPO) on 3 May 2007 and the remaining time (pre- and post-IPO periods).

Especially relevant to the present analysis is the pre-IPO period. In the pre-IPO period, the Commission relied, first, on the above mentioned *Akzo Nobel*-presumption based on the ground that Goldman Sachs held all the voting rights in Prysmian. While Goldman Sachs’s indirect holding through the GSCP V Funds was initially 100% of the shares in Prysmian following an investment on 28 July 2005, the level of that holding decreased during the infringement period to 84.4% on 21 July 2006 following two divestments. Nevertheless, Goldman Sachs held 100% of the voting rights up until the IPO, which the Commission found equal to the situation in which a company holds 100% of the shares.

Second, in the pre-IPO period, the Commission also held that Goldman Sachs had actually exercised a decisive influence over Prysmian. Here the Commission considered the organisational, economic and legal links between Goldman Sachs and Prysmian, such as the possibility of Goldman Sachs to appoint the respective Boards of Directors, the power to call for shareholder meetings, to propose to revoke Directors and much more (see paras 758 – 765 of the Commission Decision).

Goldman Sachs appealed the Commission decision with the General Court in 2014. The bank primarily disputed the fact that the Commission hold it jointly and severally liable for the infringement committed by Prysmian. The General Court dismissed the appeal in its entirety and backed the European Commission. The General Court especially held that where a parent company

holds all the voting rights associated with its subsidiary's shares, in particular in combination with a very high majority stake in the share capital of that subsidiary, as in the present case, that parent company is in a similar situation to that of the sole owner of that subsidiary.

Goldman Sachs did not rest and further appealed with the Court of Justice. Concerning the pre-IPO period, Goldman Sachs did not deny that it held 100 % of the voting rights. It denied that the presumption could be based on the voting rights and accordingly that the bank was under an obligation to rebut the presumption.

The judgment of the ECJ and its implications

The judgment of the ECJ entirely dismissed the appeal. While the Court dealt with all the grounds of appeal in-depth, the first regarding the rebuttable presumption of decisive influence based on 100% of the voting rights is the most interesting for practice (and the blogpost will thus focus solely on this).

The Court reiterated the general parental liability doctrine that parents can be liable for their subsidiaries (para 31). The ECJ further recalled its above-mentioned standard case law on the rebuttable presumption that a parent company exercises decisive influence over a subsidiary in cases where a parent company holds, directly or indirectly, all or almost all of the capital in a competition-law infringing subsidiary (para 32).

The Court then acknowledges that, during the pre-IPO period, Goldman Sachs did not hold all of Prysmian's capital, as, neither approximately 91% nor approximately 84% amount to "all or almost all capital". However, the ECJ also underlined, that the Commission did not consider that such a holding meant that the appellant had owned almost all of Prysmian's capital (para 34).

The decisive part of the judgment followed. The Court held that:

> "It is apparent, however, from the case-law cited […] above that it is not the mere holding of all or virtually all the capital of the subsidiary in itself that gives rise to the presumption of the actual exercise of decisive influence, but the degree of control of the parent company over its subsidiary that this holding implies. Consequently, the General Court was entitled […] to consider […] that a parent company which holds all the voting rights associated with its subsidiary's shares is […] in a similar situation to that of a company holding all or virtually all the capital of the subsidiary, so that the parent company is able to determine the subsidiary's economic and commercial strategy. A parent company which holds all the voting rights associated with its subsidiary's shares is able, like a parent company holding all or virtually all the capital of its subsidiary, to exercise decisive influence over the conduct of the subsidiary." (para 35)

According to the Court, it is precisely the parent company's degree of control over its subsidiary that is relevant for the rebuttable presumption. Through both all or almost all of the shares but also all (and almost all) of the voting rights, the parent company is usually able to determine the subsidiary's behaviour on the market. Moreover, according to the ECJ, particularly the principle of

legal certainty does not stand in the way. While it may, in some circumstances, be more challenging to identify the persons who hold the votes associated with the shares in a company than to determine the persons to whom those shares belong, those difficulties do not undermine legal certainty (para 39). Especially in the present case, the Commission had demonstrated in a clear cut fashion that 100% of the voting rights belonged to Goldman Sachs.

This judgement has important implications as now it is clear that the rebuttable presumption of decisive influence also covers 100% of the voting rights held by a parent company. Just as with the *Akzo Nobel*-presumption regarding share capital, the presumption relating to voting rights is expected to not only encompass "all" (so 100% of the voting rights) but also "almost all" of the voting rights (whatever that may mean). It will be interesting to see which combination of a (high) majority stake in the share capital of a subsidiary and degree of voting rights, the ECJ still accepts for this presumption. In any case, companies who invest have to be careful if they want to have a say in their investment projects as well. The more they want to influence their subsidiaries, the higher the chance of liability for anti-competitive conduct. This judgment will therefore also have implications on acquisitions.

With regard to the parental liability doctrine, it has also been debated, to what degree companies are liable for sister companies conducts or whether an innocent subsidiary may be liable for the parent. In that regard, this judgment has been of little help, and further guidance by the EU courts will be needed.

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