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EU COMPETITION & REGULATORY | BRUSSELS | 2 APRIL 2014

ANTITRUST LIABILITY FOR FINANCIAL INVESTORS

EUROPEAN COMMISSION: FINANCIAL INVESTORS ARE JUST AS LIABLE FOR ANTITRUST INFRINGEMENTS OF THEIR SUBSIDIARIES AS INDUSTRIAL INVESTORS…. ARE THEY?

The European Commission ("EC") today ruled in a decision that Goldman Sachs was jointly liable with the former subsidiary of one of its funds, Prysmian, for the payment of the fine imposed on Prysmian for its involvement in the high voltage power cable cartel. It is the first time that the EC has levied a cartel fine on a financial investor of the size and financial strength of Goldman Sachs. In so doing, the EC signals willingness to sanction financial investors - and to do so again.

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FACTS

Today's decision of the EC sanctions a cartel amongst the world's largest high power voltage cable producers which shared markets and allocated customers between themselves for almost ten years between 1999 and 2009. All in all, the EC levies 301 639 000€ in fines in total. In its decision, the EC holds Goldman Sachs jointly liable for the conduct of the company Prysmian, a former subsidiary of one of its funds, for the period between 2005 and 2009, during which it was invested in Prysmian. This is because the EC considers that Goldman Sachs exercised "*decisive control*" over its subsidiary during that period. As a result, Goldman Sachs is jointly liable for 37 303 000€ of a total amount of 104 613 000€, i.e. for about a third of the fine imposed on its subsidiary. The remainder is shared between Prysmian and its other former parent, Italian tyre maker Pirelli.

RECAP: PARENTAL LIABILITY UNDER EU ANTITRUST RULE

European antitrust law operates a broad concept of parental liability. In fact, each member of a group of undertakings is liable for an infringement of competition law committed by one member of that group. This is not because of its own involvement but because they are considered as one single undertaking the members of which are not acting independently of one another.

> "It is not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking for the purposes of Article 81 EC [now Article 101 TFEU] that the Commission is able to address a decision imposing fines to the parent company."[1]

[1] Judgment of the General Court of 12 October 2011, *Alliance One*, Case T-41/05, paras 92-93.

To establish liability of the parent company, the EC must, in principle, establish that the parent company has actually exercised "decisive influence" over the subsidiary.[2] In such a situation, parent and subsidiary are deemed to form a so-called "single economic unit".

> "The conduct of a subsidiary may be attributed to the parent company in particular where that subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities. In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking."

Generally, the existence of decisive influence of the parent over the conduct of its subsidiary is presumed in case of a 100% shareholding.

The concept of economic unit also means that a possible antitrust fine will be determined at the level of the ultimate parent company of the group of companies concerned.

THE EC DECISION: A WARNING TO FINANCIAL INVESTORS?

To date, there have only been rare cases in which the Commission applied the principles of parental liability to investment funds or similar parent companies. The only publicly available decision of the Commission holding financial investors liable for the cartel infringement of its subsidiary is the Calcium Carbide Cartel Decision[3], which has been upheld by the European Courts in this regard)[4].

Organisational and structural links

In that case the Commission fined a German investment fund described as "an undertaking with restructuring expertise which focuses on the acquisition of companies in special situations"[5] for participation in the cartel by one of the companies it had acquired. In order to do so the EC relied on the following number of factual elements to prove decisive influence of Arques (now Gigaset) on the subsidiary:

- A newly created intermediary holding was set up by Arques with the aim to "manage" the newly bought subsidiary;
- Detailed information and reports were regularly transmitted by the executive director of the intermediary holding company to the parent company[6];
- Documents proved that the executive director of the intermediary holding company needed the approval of the CEO of Arques for strategic decisions;
- There were close contacts between the executive director of the subsidiary and a member of the Board of Directors of Arques, who met competitors together;
- The turnovers of the subsidiary and Arques were consolidated.

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2 Opinion of AG Kokott of 12 January 2012 in Joined Cases C-628/10 P and C-14/11 P Alliance One v. Commission, para. 145.

3 EC Decision of 22 July 2007, Case COMP/39.396, Calcium carbide. See esp. paras 222 and 252 et seq.

4 see Judgment of the General Court of 23 January 2014, Gigaset AG, formerly Arques Industries AG v Commission, Case T-395/09

5 Ibid., para. 29.

6 The information transmitted included inter alia the development of turnover and result, cash-flow and liquidity planning, budget planning, but also about the progress of the restructuring of the subsidiary and its future development

In the same case it also fined 1. Garantovaná, a small Slovak investment fund. Despite only 8 million € in equity the fund was held jointly liable with its subsidiary, that had been actively involved in the calcium carbide cartel and in which it held a 70% share, for the payment of a fine of 19.6 million €. The Commission argued that it steered the conduct of its subsidiary through a range of key executives and should still be fined even though it had started selling of assets two years before the decision.

- The General Assembly elected by a majority of 70% the Board of Directors of the subsidiary.
- The Chairman of the Board of Directors of the subsidiary was at the same time the Vice-Chairman of the Board of Directors of 1. Garantovaná and the Vice-Chairman of the Board of Directors of the subsidiary was at the same time the Chairman of the Board of Directors of 1. Garantovaná.
- During the duration of the cartel, 9 out of the eleven different members serving the Board of Directors were representatives of 1. Garantovaná.
- The vast majority of members of the supervisory board of the subsidiary consisted of representatives of 1. Garantovaná
- The turnovers of the subsidiary and 1. Garantovaná were consolidated.

Decisive influence over indirect shareholding

In the case decided today, the full text of which is not yet published, we understand that the EC also traced links between Goldman Sachs and the management of its indirect subsidiary, with a view to establishing that Goldman Sachs was able to exercise decisive influence over Prysmian's commercial policy. It appears that the EC notably took account of similar facts:

- Individual's on the subsidiary's Board were from Goldman Sachs itself and not just from the Goldman Sachs fund
- Goldman Sachs held, for almost two of the four years, 100% of the voting rights
- Goldman Sachs could nominate and revoke the board of directors at any time
- Goldman Sachs was regularly updated on the subsidiary's business through monthly reports

The Commission apparently took no account of the fact that Goldman Sachs had reduced its investment over the three and a half years it held a shareholding.

Explicit statement on investment companies

On the face of it therefore, Goldman Sachs was fined on the very same basis as other financial investors before. However, it is the first time that a financial investor of the size and financial strength of Goldman Sachs has been fined for the cartel involvement of a subsidiary that was an indirect shareholding and the stake of it had been gradually reduced over time. In addition, European Commissioner Almunia explicitly warned investment companies at the press conference:

> "Th[e] responsibility is the same for investment companies, who should take a careful look at the compliance culture of the companies they invest in".

THERE IS STILL A CASE FOR FINANCIAL INVESTORS

Despite the clear warning to financial investors there may still be a case for financial investors when it comes to parental liability of antitrust infringements. At today's press conference Commissioner Almunia stated, commenting on the fine imposed on Goldman Sachs: "This was [not] the normal involvement of a financial investor." Arguably this means that in case the involvement is that of a financial investor some arguments may be made to escape parental liability.

"Normal involvement of a financial investor?"

The distinct role of purely financial investors had already been admitted by the EC in the Raw Tobacco Spain cartel case, where it concluded that where it does not have sufficient evidence showing that the interest of a parent company went beyond a mere financial participation, it will not hold the parent or intermediate company liable for the conduct of its subsidiary, despite a shareholding as high as 90% or 100%.[7] This conclusion was also upheld by the General Court in its judgement in the same case.[8]

Upcoming litigation will show the red line

When looking at the "checklist" of organizational and structural links between parent and subsidiary that has been taken into account above to establish parental liability for investors which arguably were more involved than financial investors should normally be, there is still room to structure a financial investment in a way that leaves some of the boxes unticked.

Regardless of a possible defence, though, the warning of the EC should not be left unheard: **Managing antitrust compliance across the portfolio is of the essence more than ever.**

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[7] See Judgment of the General Court of 27 October 2010, *Alliance One International and Others v. Commission,* Case T-24/05, paras. 143 and 195

[8] *Ibidem*