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Client Alert

A reminder of antitrust risks for private equity firms

January 2015

Pontus Lindfelt
Partner, Brussels
plindfelt@whitecase.com

Mark Powell
Partner, Brussels
mpowell@whitecase.com

Axel Schulz
Partner, Brussels
aschulz@whitecase.com

Jean-Paul Tran Thiet
Partner, Paris
jptranthiet@whitecase.com

Jérémie Jourdan
Local Partner, Brussels
jeremie.jourdan@whitecase.com

Pascal Berghe
Associate, Brussels
pberghe@whitecase.com

In two decisions adopted in November 2014 but only recently published, the Dutch competition authority (ACM) fined three private equity firms for the involvement of one of their former portfolio companies in the so-called "flour" cartel during the time of their respective ownership.[1] The two decisions – the first time the ACM ever imposed fines on private equity firms – follow an earlier decision by the European Commission in April of last year to hold Goldman Sachs jointly and severally liable with one of its portfolio companies for its involvement in the "power cable" cartel (see our previous report here).[2]

In 2010, the ACM had imposed a total of more than EUR 80 million in fines on Meneba and 13 other flour producers for having entered into a market sharing arrangement between 2001 and 2007. The two new decisions target the private equity ("PE") firms that were Meneba's ultimate parent companies during the infringement period, namely the CVC group (Capital Investors Group Limited (CIGL), CVC European Equity Limited (CEEL) and CVC Capital Partners Europe Limited (CCPEL)) until November 2004, and then the BCP group (Bencis Capital Partners (BCP) and Bencis Buyout Fund II General Partner (BBOF II GP)). The CVC group held approximately 40% in Meneba during the relevant period, whereas the BCP group held over 90%.

The decisions imposed a fine of approximately EUR 1 million jointly and severally on BCP and BBOF II GP. CIGL/CEEL and CCPEL, which were no longer part of the same undertaking at the time of the decisions, are fined EUR 450,000 each. While the fines appear modest, they correspond to the statutory maximum applicable under Dutch law in light of the PE firms' turnover at the time of the decision (the detail of the PE firms' turnover is not available).[3]

In its decisions, the ACM found the two PE firms liable for Meneba's misconduct since they exercised decisive influence over Meneba during the time of their respective ownership. This conclusion was based on the existing organisational, economic and legal links between Meneba and the PE firms:

- As regards the CVC group, the ACM found that its approx. 40% shareholding gave it a veto right over important strategic decisions, such as the adoption of the business plan and the appointment of Meneba's Board. Moreover, the CVC group had a representative on Meneba's Supervisory Board who simultaneously held a position at another CVC wholly-owned portfolio company.
- As regards BCP, the ACM found that it had an absolute majority at Meneba's shareholders meetings due to its shareholding of over 90% through an intermediate holding company. BCP also indirectly appointed two of the four

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[1] Decision of the ACM of 20 November 2014, 6306_20/217_OV, addressed to Bencis Capital Partners NV and Bencis Buyout Fund II General Partner NV; Decision of the ACM of 20 November 2014, 6306_20/216_OV, addressed to Capital Investors Group Limited, CVC Capital Partners Europe Limited and CVC European Equity Limited.
[2] Decision of the Commission of 2 April 2014 in Case COMP/39.610 – *Power Cables*.
[3] BCP and BBOF II GP benefitted from a 10% discount under the leniency programme.

members of Meneba's Supervisory Board, including the Chairman with casting vote, which had the power to appoint Meneba's management and approve Meneba's business plan. The ACM relied on minutes of the Supervisory Board meetings to show that Meneba's overall strategy, budget and even pricing policy had been discussed at these meetings and thus influenced by BCP.

The ACM's reasoning is overall in line with the current practice of the European Commission, according to which parent companies may be held liable for infringements committed by their subsidiaries if the parent companies have decisive influence over the commercial policy of their subsidiaries. Lack of awareness of the cartel by the PE firm is not a valid defence to avoid liability. The decisions also confirm that the PE firm can be held liable for the conduct of portfolio companies divested many years ago.

The decisions confirm the trend in Europe to hold PE firms liable for the misbehaviour of their portfolio companies. In the BCP decision, the ACM expressly dismissed an argument suggesting that private equity be distinguished from "normal" corporate holding. The ACM considered that the fact that a PE firm does not intend to keep the investment on a long term basis, but intends to realise a capital gain at short or medium term does not exclude control during the time of ownership.

Notably, the CVC decision also shows that minority shareholdings (here 40%) may attract liability. Only pure financial investments with no controlling rights would seem to be off the radar of competition authorities at the moment.

The case underscores the importance for private equity firms to consider carefully the degree of control they have over their portfolio companies. It is also a reminder of the importance of thorough due diligence in the acquisition process and of having rigorous antitrust compliance programmes in place during the ownership period to prevent or detect illegal behaviour in the portfolio companies.

White & Case has extensive experience in advising private equity firms on EU competition law, including regulatory reviews, compliance and merger control.