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Institutional investors can face parental liability in the EU, just like other corporate parents

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On 12 July 2018, the EU's General Court handed down 12 judgments relating to the power cables case. Among these was a judgment which confirmed that a parent company able to exercise all the voting rights in a subsidiary is presumed liable for any infringement of the EU competition rules by that subsidiary. The Court held that this also applies to institutional investors, such as private equity companies, in relation to their portfolio companies. Institutional investors should therefore conduct a careful due diligence focused on antitrust issues when acquiring a controlling stake in companies.

The EU's General Court ("**GC**") has extended the presumption of the exercise of decisive influence laid down in *Akzo*[1] from cases where the parent holds 100% of the subsidiary's *shares* to cases where a parent company exercises **all the voting rights** in the subsidiary, even without owning all (or practically all) of the subsidiary's shares. Both presumptions apply equally to all parent companies, including to financial investors.

The GC confirmed the rule that "pure financial investors" cannot be attributed parental liability for infringement of antitrust rules by the companies in which they are invested.[2] However, it clarified that "pure financial investor" was not a formal or legal category that acted as a "get out of jail for free" card: investors have to *demonstrate* in each case that they were genuine financial investors with no actual influence over the management of the subsidiary.

The judgment thus confirms that investors, such as banks and private equity companies, can be held liable for the EU antitrust fines incurred by their portfolio companies even if they see themselves as "financial investors" whose main mission is not to manage the portfolio companies. If their grip on the company is strong enough, liability could be presumed.

Investment in a company involved in an antirust infringement

On 2 April 2014, the European Commission ("**Commission**") fined more than a dozen European and Asian power cable producers. The Commission found that companies allegedly allocated markets and customers for high

1 C-97/08 P *Akzo Nobel and Others v Commission*.

2 T-392/09 *1. garantovaná v Commission.*

voltage submarine and underground cables to specific producers by means of a network of multilateral and bilateral meetings held from February 1999 to January 2009.[3]

The Commission imposed a fine, among others, on Prysmian SpA and its subsidiaries ("**Prysmian**") – a supplier of submarine and underground power cables globally. For part of the duration covered in the Commission decision , The Goldman Sachs Group, Inc. ("**Goldman Sachs**" or **"the Parent"**) was the indirect parent company of Prysmian. Funds affiliated with Goldman Sachs had acquired a controlling stake in Prysmian in 2005. Apart from 41 days when its shareholding in Prysmian was 100%, the Parent's shareholding varied between 84.4% and 91.1%. In May 2007, Prysmian's shares were offered to the public in an initial public offering ("**IPO**") on the Milan Stock Exchange, after which Goldman Sachs' shareholding dropped further.

As a parent company, the Commission held Goldman Sachs jointly and severally liable for the part of Prysmian's fine corresponding to the duration of Goldman Sachs' investment in Prysmian. Goldman Sachs appealed the decision, but the GC dismissed the appeal.[4] The company announced that it will appeal the judgment to the European Court of Justice, offering it another chance to defeat the Commission's views.

Extended presumption of decisive influence

The GC reaffirmed the settled EU case law[5] that the conduct of a subsidiary can be imputed to the parent company under EU antitrust fining law, where the latter is (i) able to exercise decisive influence over the conduct of the subsidiary and (ii) does in fact exercise such decisive influence. This is particularly the case when the subsidiary carries out, in all material aspects, the instructions given to it by the parent company, rather than deciding its own market conduct independently. In making this assessment, the Commission must normally analyze economic, organizational and legal links between the parent and the subsidiary.

However, according to the GC, the Commission is entitled to *presume* that a parent exercises decisive influence over a subsidiary if it holds 100% of the share capital. This presumption also applies when a parent holds a subsidiary indirectly, through intermediate holding companies. While the presumption is rebuttable, it has in practice never been rebutted.

In the present case, the Commission extended this presumption by concluding that the Parent could be *presumed* to have exerted a decisive influence over Prysmian until the date of the IPO, even though it did not hold 100% of the shareholding. Goldman Sachs argued that the presumption was not warranted because:

- it held much less than 100% of Prysmian's share capital;
- holding 100% of voting rights cannot be equated to holding 100% of share capital;
- it had divested a part of its shareholding in Prysmian to minority shareholders with their own interests; and
- in any case, it rebutted the presumption of decisive influence.

The GC upheld the Commission's position that holding **100% of voting rights** puts a parent in essentially the same situation as that of a sole owner of a subsidiary, in particular if the voting rights are combined "*with a very high majority stake in the share capital of that subsidiary*". The GC therefore extended the applicability of the presumption beyond situations in which the parent company owns 100% of the share capital. It at the same time confirmed that the presumption applies also to financial investors, such as investment banks or private equity companies.

The GC also held that the existence of **minority shareholders without any voting rights** will not have an impact on the applicability of the presumption. Such minority shareholders will be pure passive investors who will have no influence over the conduct of the subsidiary and will not be able to impose their interests. In this case, the Parent's divestments of shareholding to a third party and to Prysmian's management were subject to conditions ensuring that the new shareholders' voting rights in Prysmian were relinquished to Goldman Sachs, who therefore continued to exercise 100% of the voting rights.

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3 Decision C(2014) 2139 final of 2 April 2014 in Case AT.39610 – *Power cables*.

4 T-419/14 *The Goldman Sachs Group, Inc. v Commission*.

5 C-97/08 P *Akzo Nobel and Others v Commission*.

For the Parent to rebut this presumption, it would have had to show concrete evidence that Prysmian determined its commercial strategy independently. The GC rejected the Parent's reliance on the minutes of Prysmian's Board of Directors, public statements by Prysmian's directors, the provisions of Italian law, and Prysmian's responses to the Commission's request for information. None of these, according to the GC, formed sufficient evidence to show that the subsidiary acted independently.

Relevant factors when analyzing decisive influence

After the IPO, the Parent's share in Prysmian dropped and the Commission could no longer rely on the presumption of decisive influence to establish its liability for Prysmian's fines. Rather, it had to conduct an actual analysis of all the relevant factors related to the economic, organizational and legal links between Prysmian and the Parent to show that the latter exerted a decisive influence over Prysmian. The Commission does this type of analysis on a case-by-case basis, with different factors being relevant in different circumstances. In the present case, the GC considered that the Commission correctly took account of the following objective factors, taken as a whole, to find that the Parent actually continued to exercise decisive influence over the subsidiary:

- its power to appoint the members of the various boards of directors of Prysmian;
- its power to call shareholder meetings;
- its power to propose the revocation of directors or of entire boards of directors;
- its actual level of representation on Prysmian's board of directors;
- the management powers of the Parent's representatives on the board of directors;
- the important role played by the Parent on the committees established by Prysmian;
- the Parent's receipt of regular updates and monthly reports;
- the measures to ensure continuation of decisive control after the IPO date; and
- evidence of behavior typical of an industrial owner.

The fact that, at the date of the Commission's decision, the Parent was no longer invested in Prysmian, had no relevance for its parental liability, according to the GC.

Finally, the GC confirmed that the Commission was not required to apportion the fine between the subsidiary and its parent company by taking into account their internal relationship. According to the ruling, the Commission is free to hold the parent company liable for the subsidiary's entire fine.

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