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Client Alert

Competition Law

2 April 2014

Private Equity comes under fire from the EC

In today's decision to sanction makers of high voltage power cables, the European Commission ("EC") has extended the reach of its competition enforcement to private equity firms.

When fining companies for breaking EU competition rules, the EC typically attributes liability to the parent company, enabling it to impose fines of up to 10% of the parent's worldwide turnover. The EC now appears to be extending this approach to private equity firms, with the potential for even bigger fines.

Italian power cable maker Prysmian - formerly part of the Pirelli group – has been held to have participated in a bid-rigging and market-sharing cartel between 1999 and 2009. The Goldman Sachs Group, Inc. ("Goldman Sachs") has been held jointly and severally liable with Prysmian for the period during which it is deemed to have held a controlling interest in the company through its direct private investment fund. There is no allegation that Goldman Sachs was even aware of the cartel: its liability is based only on its controlling interest in Prysmian.

EC competition fines are based on the value of relevant sales, multiplied to reflect the gravity and duration of the conduct, as well as any aggravating or mitigating factors. They are then capped at 10% of the company's worldwide turnover. The fine imposed on Goldman Sachs was just over EUR 37 million.

Today's decision can now be challenged before the EU General Court. If Goldman Sachs appeal, this case could clarify the parameters for the Commission's jurisdiction over private equity firms.

The exposure of private equity to EU competition fines flows from rules which attach strict liability to any controlling stake in an infringing company. Investment funds are at risk whenever they hold a controlling stake, directly or indirectly, in a company that has infringed EU competition rules, irrespective of whether they were involved in, or even aware of, the infringement.

A latent risk also exists in respect of investments which were once controlled by an equity fund, but which but have since been divested. The EC can impose fines for conduct spanning many years or even decades.

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The risks are all the greater for private equity firms with stakes in many portfolio companies, since EC competition fines can be dramatically increased for repeated infringement within the same economic unit. Furthermore, private equity firms could potentially attract an additional deterrence uplift under EC fining rules, as undertakings with particularly large turnover beyond the sales of goods or services to which the infringement relates.

The case underscores the importance for private equity firms to consider carefully the degree of control they have over their portfolio companies, and to ensure that these implement rigorous antitrust compliance programmes.

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

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