KNOW-HOW

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COMPLIANCE & INVESTIGATIONS

ON THE LIABILITY OF FINANCIAL AND PRIVATE EQUITY INVESTORS FOR ANTITRUST VIOLATIONS BY THEIR PORTFOLIO COMPANIES

By judgment of 12 July 2018, the General Court of the European Union took a position for the first time on the liability of financial and private equity investors for antitrust violations by their portfolio companies (Case T-419/14 – The Goldman Sachs Group v European Commission). In the view of the Court, the European Commission can also impose joint and several fines on financial investors if they have exerted a decisive influence over the market conduct of their portfolio companies. If a financial investor holds virtually all of the shares or voting rights of the portfolio company, the actual exercise of decisive influence will be rebuttably presumed. In the case before the Court, the European Commission had imposed a fine of EUR 37,303,000 jointly and severally on Prysmian S.p.A. – an Italian manufacturer of high voltage and extra-high voltage submarine and underground power cables – and the United States investment bank The Goldman Sachs Group, Inc.

On the joint and several liability of group companies in European competition law

If employees of a group company violate European competition law, the Commission can impose fines not only on the company directly involved in the infringement, but also on other companies of the group (typically parent companies and in particular the ultimate parent company of the group). The penalised group companies are jointly and severally liable for the payment of the fine.

Prerequisite: existence of an economic unit

This is subject to the existence of an economic unit between the company directly involved in the infringement and the other group company.

- According to the case law, an economic unit exists be-tween a group parent company and its subsidiary which is directly involved in the infringement where “although having a separate legal personality, that subsidiary 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”.
- This is the case if the parent company is first of all in a position to exert a decisive influence over the market conduct of the subsidiary, and second of all actually exerted this decisive influence at the time of the infringement.
- Whether or not a subsidiary is under the decisive influence of its parent company must be determined in the specific case involved, taking into account all of the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to the parent company.
- It is of no relevance whether or not the parent company was involved in the infringement by the subsidiary.
- If the parent company holds virtually all of the shares or voting rights of its subsidiary, it is not necessary to pro-vide concrete proof of an actual exercise of decisive influence. Rather, its actual exercise of decisive influence will be inferred from its ability to do so by way of a rebuttable presumption. Although the “virtually all presumption” is rebuttable according to the case law, to date no parent company has successfully rebutted it in practice. If personal links additionally exist, or if representatives of the parent company are represented in decision-making bodies or advisory boards, a rebuttal of the presumption can be virtually ruled out.

Consequences: impact on the amount of the fine

If an economic unit exists between the parent company and the subsidiary, not only will the number of potential addressees of a Commission decision be expanded and thus the number of the potential debtors of a fine increased, but the existence of an economic unit will have a substantial effect on the amount of the fine. Accordingly, when calculating the fine (in particular when applying the 10% cap pursuant to Article 23(2) of Regulation 1/2003), the EU institutions do not base themselves on the sales of the company directly involved in the infringement, but rather on the sales of the undertaking which is deemed to comprise an economic unit and thus, as a rule, the consolidated group-wide aggregate sales on the level of the parent company.

Applicability to financial and private equity investors

This case poses the question of whether the concept of joint and several liability of group companies – and thereby in particular the "virtually all presumption" – can be applied to financial and private equity investors. In the assessment of the Court, the European competition law does not distinguish between whether the undertaking whose liability for an infringement of European competition rules is to be established is, at least according to its abstract business model, a financial investor (such as a private equity investor, an insurance company or a company which is the trustee of a pension scheme). The Court stresses that "pure financial investor" does not constitute a legal criterion, but is an example of a circumstance in which it is open to a parent company to rebut the presumption of actual exercise of decisive influence. The Court understands a "pure financial investor" to be an investor who holds shares in a company in order to make a profit, but not for the purpose of managing or controlling it.

Criteria which, in the assessment of the Court, could indicate in a specific case that an investor is not a "pure financial investor" are:

- The financial investor has the ability to determine alone the composition of the decision-making bodies;
- the financial investor has the right to call shareholder meetings and to propose the revocation of directors or of entire boards of directors, and in this way decisively influence the decisions made by these bodies;
- the financial investor is represented in the decision-making bodies with more than 50% of their members;
- the delegated members receive regular updates and monthly reports and are informed about all business areas and activities.

Conclusion and consequences in practice

The Court's judgment underscores the importance of compliance measures in connection with transactions. According to the practice of the authorities and courts to date, the existence of a group-wide compliance programme does not have the effect of reducing fines and can – on the contrary – even be included as a factor to substantiate a parent company's actual exercise of decisive influence on the market conduct of its subsidiary. Nonetheless, in view of the existing liability risks, financial and private equity investors should not only identify possible antitrust risks in advance of a transaction by way of a compliance due diligence, but also minimise them for the duration of their participation by setting up an effective com-pliance organisation on the level of their portfolio companies.

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