CLIENT UPDATE

PRIVATE EQUITY SPONSOR FINED FOR CARTEL ACTIVITY OF PORTFOLIO COMPANY

NEW YORK
Gary W. Kubek
gwkubek@debevoise.com

Michael Schaper
mschaper@debevoise.com

LONDON
Timothy McIver
tmciver@debevoise.com

FRANKFURT
Daniel Wiedmann
dwiedman@debevoise.com

The European Commission (the "Commission") recently fined a private equity sponsor €37.3m for antitrust violations by a former portfolio company. This decision highlights the importance for private equity firms and other financial investors of (1) undertaking pre-purchase antitrust due diligence and (2) ensuring that robust antitrust compliance procedures are in place at private equity firms and their portfolio companies. The decision also illustrates that liability can arise years after a portfolio company has been sold.[1]

WHAT THE DECISION DID

The decision involved a cartel by 11 Asian and European companies that produce underground and submarine high-voltage power cables. From 1999 onwards, and for almost ten years, these companies had agreed not to compete in each other's home territories and to allocate projects among themselves on a nearly worldwide scale. The total fine imposed by the Commission on all participants was €302m.

1 Private equity firms or funds have also been held responsible for portfolio company liabilities in certain other limited contexts where the firm or fund exerts influence on the portfolio company. The recent *Sun Capital* case in the U.S., for example, addressed this risk in the benefit plan context. *See* http://www.debevoise.com/clientupdate20130729a/

The €37.3m fine was imposed on a joint and several basis on both Prysmian, the portfolio company, and its private equity owner. According to Joaquín Almunia, the Commission's Vice President responsible for Competition policy, the private equity firm had exercised "decisive influence" on the portfolio company for several years during the period when the infringement was committed. The private equity fund bought Prysmian in 2005, took the cablemaker public in 2007, reducing its stake to 43%, and had sold the entire remainder of its interest by 2010.

The Commission imposed the fine on the private equity firm despite the absence of evidence that it had participated in or even been aware of the anticompetitive conduct by its portfolio company. Nevertheless, the Commission reasoned that the firm had decisive influence, and was not merely a financial investor, because it held all the voting power for two years, could and did nominate individuals to the board of Prysmian and participated in the company's strategic decisions. The EU courts have, in the past, held that a showing of decisive influence requires only an ability to influence high-level strategy or commercial policy and activities.

WHAT THE DECISION MEANS FOR PRIVATE EQUITY AND OTHER INVESTORS

While the Commission's application of the parent company liability doctrine is well established, this decision is one of only a few where it has been applied to a primarily financial investor on the basis of actions taken by a portfolio company. It has additional implications in that a Commission decision is binding proof that the behaviour took place and was illegal for purposes of follow-on damages claims before national courts in the EU.

This decision illustrates that EU caselaw on joint and several parental liability treats PE firms and other financial investors no differently in imputing the conduct of subsidiaries to their parents. It therefore highlights the need (in the words of the Commission) for PE firms, and other financial investors such as sovereign wealth funds, to "take a careful look at the compliance culture of the companies" that they invest in and own. Although U.S. regulators generally do not impose this kind of parental liability for criminal antitrust fines, last year's *Sun Capital* decision in the ERISA context confirms the importance of paying close attention to a wide range of activities of portfolio companies.

Because unlawful competitive activities can be difficult to uncover and prevent, financial investors, like all parent companies, should undertake pre-acquisition due diligence of a target's antitrust compliance program and ensure that comprehensive antitrust compliance and reporting procedures are in place to prevent and detect anticompetitive conduct that could lead to liability. If unlawful conduct nevertheless occurs, a robust antitrust compliance program could result in a reduction in antitrust liability in some jurisdictions, including the United States, the UK, Australia and Canada.

* * *

Please do not hesitate to contact us with any questions.

April 10, 2014