

EU General Court Confirms Institutional Investors Face Parental Liability for Antitrust Fines

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The EU General Court (the “Court”) recently handed down its [judgment](#) rejecting the appeal of a fine imposed by the European Commission (the “Commission”) based on a private equity firm’s indirect ownership of a portfolio company that was found to have participated in price fixing. This recent decision is significant for antitrust and private equity practitioners alike as it reaffirms the EU law on parental liability as it applies to institutional investors.

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Background. In 2014 the Commission [fined](#) a group of (extra) high-voltage power cable producers €302 million for taking part in an anticompetitive price-fixing cartel. The Prysmian Group (“Prysmian”), an Italian multinational cable producer, received the largest fine of €104.6 million. Prysmian’s private equity investor, The Goldman Sachs Group, Inc. (“GS”), was held jointly and severally liable for €37.3 million.

The Commission found that GS had exercised “decisive influence” over Prysmian for several years during the period when the infringement was committed. GS acquired Prysmian through GS Capital Partners V Funds, LP and other intermediate companies in 2005, took the cable-maker public in 2007, reducing the GS ownership stake to 43%, and sold the remainder of its interest by 2010, shortly after the cartel ended.

The Commission imposed the fine despite the cartel predating the GS investment, and the absence of any allegation that GS had any knowledge of, or involvement in, the anticompetitive behaviour. GS had appealed the Commission’s decision.

Presumption of parental liability. It is an established principle in EU law that the actions of a subsidiary in a cartel may be ascribed to its parent where the parent exercises “decisive influence”. In such case, the two entities are considered a “single undertaking” and may consequently be held jointly and severally liable for the antitrust violation and the imposed fine.

Such decisive influence is presumed to have been exercised in the case of a wholly owned subsidiary unless the parent company provides evidence that the subsidiary has “*decided independently upon its own conduct on the market*”. The parent company’s stake

in the subsidiary does not need to be direct; indirect ownership through an intermediary company is sufficient. Full ownership is also not required, as the presumption can be triggered where the parent company's shareholding is close to but below 100%.

Minority investors may also be held responsible for their subsidiaries' anticompetitive acts where they have the ability to exercise "decisive influence" over their conduct and have actually exercised such influence. That is for the Commission to demonstrate "*on the basis of factual evidence, including, in particular, any management power*" exercised by the parent company over the subsidiary.

Appeal rejected. GS appealed the Commission's decision and fine, arguing that it did not operate as Prysmian's parent company but instead was merely a financial investor through a private equity vehicle. GS sought to distinguish between potential influence (as a result of having a majority shareholding) and actual influence (resulting from playing a role in the commercial management and strategic direction of a company). The Court rejected this argument and upheld the Commission's decision to find GS jointly and severally liable for Prysmian's actions.

In its judgment the Court distinguished between an initial period from 2005 until the IPO in May 2007, when GS indirectly held 84–91% of the equity and 100% of the voting rights in Prysmian, and a subsequent period from 2007 to 2008 in which GS did not hold a majority of either.

The Court found that during the initial period the ability to exercise all of the voting rights associated with the shares was, on the facts, comparable to GS being the sole owner. The Court further held that there was not sufficient evidence to rebut the presumption of control.

For the subsequent period after the IPO the Court looked to what it described as *objective factors* supplementing the presumption outlined above. The Court pointed to the following as evidence of decisive influence: (i) the ability to appoint and to propose the removal of members of the various boards of Prysmian and the power to call shareholder meetings; (ii) the level of representation on Prysmian's boards, taking into account those directors with links to GS; (iii) the management powers of the representatives; (iv) the role played on committees; and (v) the receipt of regular updates and monthly reports. The Court also referred to factors that the Commission had concluded ensured continuity of control after the IPO, such as the board composition staying the same.

Finally, the Court emphasised that decisive influence is itself not a matter of strict liability and that the presumption could be rebutted by evidence produced by the parent,

but the Court left open the test as to what a purely financial investment that would not result in parental liability would be.

Conclusion. The Court's decision serves as a reminder for investors that the EU presumption of parental liability is very difficult to rebut, and that the Commission and the Courts continue to take a hard line even in the absence of any blame on the part of the parent. Thus, in the area of anticompetitive conduct and specifically cartels, parent companies and private equity investors should be aware of their potential liability and take steps to tailor their governance role accordingly.

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