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EU Court of Justice: Financial Investors Liable for Anticompetitive Conduct of Portfolio Companies

The European Court of Justice has confirmed that financial investors can incur parental liability for the anticompetitive practices of portfolio companies, even after an IPO that left the investor holding only a minority stake in the company, provided that they still have sufficient representation at the board of directors. This judgment is of major interest to private equity funds and other financial investors, demonstrating the need to balance their desire to closely oversee the portfolio companies' strategies with the risk of being found liable for any anticompetitive practices implemented at a lower level in these companies.[1]

Key Aspects and Consequences

- The Court extends for the first time the presumption of liability for antitrust infringements applicable to parent companies that hold 100% (or close to) of the share capital of their subsidiaries to all investors holding 100% of the voting rights, irrespective of their actual percentage in the share capital.

- This finding is also applicable to investors that control, as the General Manager of one or several private equity funds, 100% of the voting rights in a portfolio company.

- The fact that a financial investor divests its shares and voting rights in the company through an IPO is not necessarily sufficient to prevent continued liability, if the composition of the board of directors remains unchanged after the IPO.

- Private equity owners and financial investors with large ownership stakes should include parental liability for portfolio company actions in balancing the risk and rewards associated with board representation and other forms of involvement in their portfolio companies.

- Financial investors that want to remain involved at board level should also consider adopting antitrust best practices at their portfolio companies, such as conducting antitrust due diligence at the time of acquisition and implementing strict compliance programs.

Case Background

The European Commission imposed in April 2014 fines totaling almost €302 million on producers of underground and high-voltage power cables, for engaging in illicit market sharing and customer allocation over a period of almost ten years beginning in 1999[2].

The entities fined by the Commission included Goldman Sachs Group, Inc. (the "Investor"), which, through private equity funds managed by one or more of its subsidiaries, held an indirect interest in a stake in one of the cartel participants, Prysmian (the "Company"). While the Investor held, indirectly, over 80% of the share capital in the Company between 2005 and 2007, that percentage dropped below 32% after an IPO in May 2007. Despite this change in ownership, the Commission found the Investor liable for the infringement committed by the Company for the whole 2005-2009 period.

In a judgment dated 12 July 2018, the General Court confirmed the liability of the Investor both for the period prior and after the IPO. As regards the pre-IPO period, the General Court relied on a rebuttable presumption that the Investor actually exercised decisive influence considering that it held all the voting rights in the Company. As regards the post-IPO period, the General Court found that the Investor was able to exert decisive influence over the Company, based mainly on the fact that the board of directors appointed by the Investor – prior to the IPO – remained in office until 2009. The Investor appealed the judgment to the Court of Justice.

Court of Justice Findings

On 27 January 2021, the Court of Justice dismissed the appeal brought by the Investor in its entirety, upholding the liability of the Investor both for the pre-IPO and the post-IPO periods.

As regards the pre-IPO period, the Court first rejected the Investor's argument that the Company was held through a group of private equity funds in which the Investor's share was only approximately 33%, with the balance owned by unaffiliated third-party investors. The Court found that although its investment in the relevant private equity funds remained below 50%, the Investor nevertheless controlled, through these funds – for which it was the Managing General Partner, General Partner or Managing Limited Partner – all the voting rights associated with the Company's shares.

Second, the Court of Justice held that the funds' 80% share of the Company's capital, did not mean that the Investor held "*almost all*" of the Company's capital, and was therefore insufficient, in and of itself, to create a presumption of liability against the shareholder for its portfolio company's behavior. However, the Court found that in the specific case where the financial investor also holds "*all the voting rights associated with its subsidiary's shares*", the parent company is able to determine the

subsidiary's economic and commercial strategy, and the presumption of liability may be considered equivalent to the one that would exist if it held all the capital share. This therefore extends the presumption of liability, which was initially applied in the 2009 *Akzo* ruling[4] to a 100%-owned subsidiary, to shareholdings significantly below 100%.

As regards the post-IPO period, the Court confirmed that even though the Investor's share in the Company dropped below 32%, the fact that the composition of the board of directors remained the same until 2009 should be considered sufficient to demonstrate that the Investor still exercised decisive influence over the Company. In this respect, the Court recalled in particular that the existence of an economic entity formed by the parent company and its subsidiary may be based not only on the formal relationship between the two, but also on informal relationships, consisting in personal links between the legal entities[5]. Such personal links may be characterized even when the directors who sit on the board of a company are not employees of the shareholder, but only connected to the latter by means of previous advisory services or consultancy agreements.

In addition, the Court of Justice refused to examine again the Investor's arguments that the directors of the Company were considered independent under Italian law; in doing so, it *de facto* upheld the General Court's finding that "*informal*" links can be sufficient to characterize decisive influence under EU antitrust rules, irrespective of their interpretation by the national courts.

Practical implications

This decision confirms that the parental liability is attributed to financial investors the same way as other corporate parents, even when the portfolio company is held through private equity funds in which other investors participate. The practical implications of such a solution include:

- Participation held by investment funds and private equity firms should be structured and managed taking into account the antitrust risk borne by the General Manager of the fund(s).

- More generally, all financial investors should be mindful of the increasing extension by the Courts of the antitrust liability applicable to parent companies, even when they are minority shareholders, as long as they are involved at the board level.

- Financial investors should consider adopting the kinds of best practices that have become increasingly frequent in the context of industrial mergers (antitrust audits, compliance programs).

- Minority investors should carefully evaluate the risks and rewards of continued board representation, and at a minimum ensure that their board presence accurately reflects their minority participation.

Footnotes

1) Case C-595/18 P, The Goldman Sachs Group, Inc. v. Commission, January 27, 2021.

2) Case AT/39.610, Power Cables, April 2, 2014

3) CaseT-419/14, The Goldman Sachs Group, Inc. v. Commission, July 12, 2018

4) Case C-97/08, Akzo Nobel and Others v. Commission, September 10, 2009.

5) See C-440/11 P, Commission v. Stichting Administratiekantoor Portielje, July 11, 2013.