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April 9, 2014

Antitrust Litigation Alert

Parent Companies Remain Rich Targets as EC Allocates Antitrust Liabilities in Cartel Case

The European Commission's recent decision to impose a €301.7 million fine on a cartel of high-voltage power cable producers highlights the Commission's determined efforts to hold investment firms and parent companies liable for the antitrust conduct of their portfolio companies.

The European Commission fined a group of underground and submarine high-power cable producers a total of €301.7 million (US $416 million) on April 2, 2014. According to the Commission, the group—six European, three Japanese and two Korean manufacturers—operated as a cartel from 1999 until 2009, when the Commission conducted unannounced raids of their businesses. Underground and submarine high-voltage power cables are typically used to connect generation capacity to the electricity grid, to interconnect different power grids or to connect renewable energy projects such as offshore wind farms.

The European Commission was informed about the group's activities by Swiss ABB, which blew the whistle on the operation and received full immunity, avoiding a fine of €33 million for its own participation in the cartel. Two of the world's biggest cable producers, Prysmian and Nexans, were among the European manufacturers fined, with Prysmian receiving the highest fine—€104.6 million—of any cartel member.

With this decision, the European Union's antitrust watchdog fired a warning shot at private equity firms, hedge funds and other firms that purely invest but also "control" businesses. Besides these cable companies and some of their current and former shareholders, the Commission also sanctioned Goldman Sachs with €37.3 million ($51 million) because its private equity fund Goldman Sachs Capital Partners bought Prysmian in 2005, held all the voting rights

in the portfolio company for about two years and was involved in making strategic decisions for the company until 2010, at which time it began to sell down its shares.

Before Goldman acquired Prysmian, the company was part of Pirelli, which was also sanctioned by the Commission. The Commission saw Pirelli and Goldman Sachs as being jointly liable for Prysmian's fines, first calculating an amount based on Prysmian's own conduct and then apportioned the resulting €104.6 million fine between the two former parents based on their respective periods of control over Prysmian. As a result, Pirelli was found to be jointly and severally liable with Prysmian for two-thirds of the fine (€67.3 million), while Goldman Sachs was found responsible for the remaining third of the fine (€37.3 million).

One of the key issues under European competition law is the question of which company in a group is liable for an infringement. Under EU competition law, liability is imposed on "undertakings". In accordance with the Commission and the European courts, an "undertaking" is an entity or group of entities which effectively function as a "single economic unit". A holding or parent company and its subsidiaries form such a unit when the holder is in a position to exercise control over the conduct of such subsidiary. Control simply means "decisive influence". Usually it does not even matter whether such decisive influence was actually exercised; what matters is the *possibility* of exercising that influence. Decisive influence can be established where an affiliate, despite having its own and separate legal personality, does not decide independently its own market conduct and behavior and is considered to operate in accordance with the will of its parent company. Additionally, a parent does not need to have "sole control" to assess parental liability, "joint control" may also lead to liability and significant fines.

The fining decision regarding Goldman's investment and its "decisive influence" over its former portfolio company is not the first wake-up call from the European antitrust watchdog. In 2007, the Commission imposed fines of €243 million on six companies, including E.I. DuPont and Dow, for participating in an illegal price-fixing and market-sharing cartel in relation to chloroprene rubber. Both Dow and DuPont were held to be jointly and severally liable for the conduct of their 50-50 joint venture, DuPont Dow Elastomers LLC (DDE). The Commission concluded that both parents exercised "decisive influence" on the commercial conduct and policies of DDE, and therefore could be held jointly liable for DDE's anti-competitive conduct. In September 2013, the Court of Justice of the European Union issued two judgments confirming both the fining decision and the finding that a parent company can be held liable and fined by the European Commission for the antitrust infringements of its 50-50 joint venture in the EU.

These decisions endorse the European Commission's current hardened approach of attributing antitrust liability, wherever possible, to parent companies. Most importantly, this approach maximizes antitrust fines by enabling the Commission to avail itself of a higher maximum fine limit based not just on the turnover of the portfolio company or subsidiary itself, but of the entire corporate group of the parent, regardless of whether the parent is active in the same industry or not.

This development demonstrates the limits of "limited liability" in relation to investments made by financial investors, private equity funds, hedge funds or any other parent company in a business. Companies have to consider this growing risk associated with being hit by heavy EU antitrust fines along with the increased possibility of private enforcement actions in the courts of the EU Member States. Before investing in a business, a potential parent company should ensure it conducts a thorough antitrust and competition due diligence. Equally important, it should also have an effective compliance program in place, which is implemented throughout both the corporate group and the lifetime of the investment, including its exposure through all portfolio companies, joint ventures and even certain minority shareholdings.

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