

# INVESTMENT BANKS AND PRIVATE EQUITY MAY BE LIABLE FOR ANTI-COMPETITIVE CONDUCT BY THEIR PORTFOLIO COMPANIES

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Legal Briefings

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The General Court's [ruling](#) in Goldman Sachs' appeal in the power cables cartel confirms that the bank was jointly and severally liable for the conduct of Prysmian, one of the cartelists, because of the nature of its investment in the company. The General Court confirmed that the Commission was right to attribute liability on the basis of Goldman Sachs' shareholding in Prysmian, which was between 84% and 91%, but with Goldman Sachs holding 100% of the voting rights. In addition de facto decisive influence was established on the basis of the organisational, economic and legal links between the two companies.

The General Court accepts that parental liability does not extend to purely financial investors who are not involved in the management or control of the company, but concluded that this will depend on the facts and circumstance of each case. In this case Goldman Sachs was found to have decisive influence over Prysmian's commercial conduct so that its investment in the company did not qualify as a 'purely financial' investment.

The case provides an important reminder for investment businesses of the risk of liability for competition breaches by portfolio companies over whose commercial conduct they have decisive influence. It is also worth noting that in this context the issue of decisive influence is not about whether or not the parent was aware of the infringing behaviour of its subsidiary, but the extent of the autonomy of the subsidiary over its commercial policy.

## **BACKGROUND TO THE CASE**

In April 2014 the EU Commission imposed total fines of €302 million on a number of producers of high voltage power cables for having participated in a worldwide market and customer sharing cartel. A fine of €37.3 million was imposed on Goldman Sachs jointly and severally with Prysmian, one of the cartelists, because one of its funds, GS Capital Partners V Funds (GSCP V Funds), had a majority shareholding in Prysmian at the time the infringement took place. The Commission held Goldman Sachs liable for the conduct of its subsidiary on the basis of its decisive influence by virtue of:

- the level of shareholding held in the company, and
- its economic, organisational and legal links which resulted in decisive influence over Prysmian's conduct between July 2005 and January 2009.

## **PRESUMPTION OF DECISIVE INFLUENCE**

In the Akzo case (case C-97/08) the Court of Justice of the EU (CJEU) confirmed that a 100% shareholding by a parent company in a subsidiary creates a rebuttable presumption that the parent company exercises decisive influence over the commercial policy of the subsidiary and thereby enables the Commission to hold the parent company liable for the infringement committed by the subsidiary. Although this presumption is rebuttable, it has always been accepted that in practice this will be difficult, and there have to date been no cases where a parent company successfully managed to so (although the CJEU in *Elf Aquitaine* (Case C-521/09) held that the Commission needs to provide adequate reasons where it decides that the facts or legal arguments relied on by the parent company are not sufficient to rebut the presumption).

Between July 2005 and May 2007 Goldman Sachs' shareholding in Prysmian was below 100% (between 84% and 91%) but it held 100% of the voting rights in Prysmian, which the Commission held to be equivalent to a situation in which a company holds 100% of the shares, under which the Akzo presumption of the wholly owned subsidiary applies.

## **DE FACTO OR LEGAL DECISIVE INFLUENCE**

Where decisive influence cannot be presumed it must be demonstrated on the basis of factual evidence, in particular relating to the management powers of the parent company over the subsidiary. Such powers can be found directly, from the parent's specific instructions, guidelines or influence over the subsidiary's commercial policy, but can also be inferred from the economic, organisational and legal links between the parent and subsidiary.

The Commission concluded that, between July 2005 and January 2009, Goldman Sachs exercised de facto decisive influence over Prysmian in view of the organisational, economic and legal links between the two companies. These included:

- the power to appoint the Prysmian board of directors;
- the power to call for a shareholders meeting and propose the revocations of directors or the entire board of directors;
- representation on strategic committees;
- receipt of regular updates and monthly reports;
- a range of measures to ensure control over Prysmian's board members; and
- a number of measures taken in order to ensure that, after the IPO (when its shareholding in Prysmian went down to 31.6%) Goldman Sachs would remain in a position to exercise decisive influence.

## **GENERAL COURT RULING**

Goldman Sachs challenged the Commission's decision holding it jointly and severally liable for the fine imposed for Prysmian's participation in the cartel on the basis of its investment in the company.

Firstly, Goldman Sachs argued that the Commission was wrong to apply a presumption of decisive influence by reference to its voting rights as opposed to the level of its shareholding, an approach it argued was not supported in the EU case law.

The General Court agreed with the Commission that, where a parent company is able to exercise all the voting rights associated with its subsidiary's shares, in particular when combined with a high majority stake in the share capital, the parent company is in a similar position to that of the sole owner of that subsidiary, even if it does not hold all of the share capital of that subsidiary. The presumption of exercise of decisive influence over Prysmian's conduct could therefore be applied for the period between July 2005 and May 2007 (during which Goldman Sachs' shareholding was between 84% and 91% with 100% of the voting rights). Contrary to Goldman Sachs' claims, it had not succeeded in rebutting this presumption to demonstrate that Prysmian acted independently on the market.

Secondly, Goldman Sachs argued that the Commission had failed to establish to the requisite legal standard its ability to exercise de facto decisive influence over Prysmian's market conduct and the fact that decisive influence was actually exercised. The Court considered the merits of each of the factors on which the Commission relied to substantiate its claim and concluded that the Commission was entitled to consider, without making any legal error, that Goldman Sachs exercised decisive influence over Prysmian, including after the IPO in May 2007 when its shareholding in the company was below 50%.

Finally, the General Court also dismissed Goldman Sachs' arguments that its investment in Prysmian was one of a 'pure financial investor' that made a temporary financial investment in Prysmian.

Parental liability does not extend to purely financial investors who hold shares in the company in order to make a profit but are not involved in its management or control, but whether or not an investment is purely financial depends on the facts and circumstances of each case. In light of its findings on decisive influence the General Court held that Goldman Sachs had failed to demonstrate that its shareholding in the Prysmian group had been a purely financial investment and that it had no involvement in the management and control of the company.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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