Published on *The National Law Review* https://natlawreview.com

Parental liability in EU cartel enforcement: has the presumption of decisive control become irrebuttable?

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Does the General Court's recent ruling in *Goldman Sachs/European Commission* provide new guidance on the parent liability of financial investors in cartel cases? Yes and no. Yes, because it shows what will not suffice to avoid parental liability. No, because it is silent as to whether in fact and if so how a financial investor can be distinguished from an "industrial" shareholder, and what criteria have to be met to escape parent liability.

Goldman Sachs ("GS") was a majority shareholder in Prysmian for some of the time Prysmian participated in the underground and submarine power cables cartel. In 2014, the Commission imposed a fine of approx. € 104.6 million on Prysmian. Goldman Sachs was held jointly and severally liable for approximately € 37.3 million (*Power Cables*).

In its appeal, GS argued that it could not be held liable as a parent since it was a pure financial investor, namely one " who holds shares in a company in order to make a profit, but who refrains from any involvement in its management and in its control".

How does the concept of parent liability work?

According to established EU case law, a parent company and its fully owned subsidiary form one economic entity. (CJEU in *Akzo Nobel/Commission*, para 58.)

If a parent company has, directly or indirectly, a shareholding of 100% (or close to 100%) in the cartelist subsidiary, EU case law lays down a presumption that the parent actually exercised a decisive influence over the conduct of its subsidiary (Goldman Sachs, paras 44, 46). This presumption is rebuttable – which is in practice a very difficult exercise for parent companies concerned.
GS held 91.1-84.4% of the equity in Prysmian during the relevant period and 100 % of the voting rights.

Influence by voting rights

Since GS was not a 100% shareholder, the Commission based its decision on the fact that GS controlled 100% of the voting rights. The Court confirmed the correctness of this approach since “the company [was] in a similar situation to that of a sole owner as regards its power to exercise a decisive influence over the conduct of its subsidiary” in that it had no need to take into account the interests of minority shareholders when adopting strategic decisions or in the day-to-day business of the subsidiary (Goldman Sachs, paras 49-51).

It acknowledged, however, that, in such a scenario, minority shareholders without voting rights may still exercise certain rights that enable them to influence the conduct of the subsidiary. Nevertheless, like a 100% shareholder, the majority shareholder controlling the voting rights must adduce “evidence capable of showing that it does not determine the commercial policy of the subsidiary concerned on the market” if it wants to rebut the presumption and escape parent liability (Goldman Sachs, para 52).

Rebutting the presumption?

GS sought to argue it was a pure financial investor and put forward a number of arguments to try to rebut the presumption that it actually exercised decisive influence. However, the Court agreed with the Commission that this evidence was inadequate:

- Minutes of the board of directors should have shown that the management team directed Prysmian’s policy independently – but specific emails or minutes to substantiate this claim had not been submitted (Goldman Sachs, paras 70, 71).
- Board meetings were held quarterly; the absence of evidence showing that the management was independent from the board in its day-to-day decision making was fatal to this leg of the argument (Goldman Sachs, para 101).
- Board members had stated publicly that Prysmian was not managed nor coordinated by any other company – the Commission took the view that there was no evidence supporting the veracity of the statement (Goldman Sachs, para 72).

Although according to the Court the presumption was not rebutted, it dealt with each of the objective factors relied on by the Commission to justify their finding of parental liability. In particular (Goldman Sachs, paras 86 et seq)

- GS had the power to appoint members of the board and had exercised that power;
- GS had the power to call shareholder meetings;
- GS had the power to propose the removal of directors;
- GS’ representatives on the board of directors had management power;
- GS had a role on the committees established by Prysmian;
- GS received regular updates and monthly reports;
- GS had implemented measures to ensure (continued) control after the IPO of Prysmian;
- There was evidence that GS had engaged in behaviour typical of an industrial owner (e.g. acting as interlocutor in relation to the Prysmian group).

Although the Court takes the view that the objective factors will vary from case to case and cannot be set out in an exhaustive list (Goldman Sachs, para 82), the above forms a useful checklist for other cases.

The Court consequently concluded that Goldman Sachs could not be considered as a pure financial

investor. In doing so, it confirmed that the “pure financial investor” is not a legal criterion (which would shift the burden of proof back to the Commission) but an example of a situation in which it is open to the parent company to rebut the presumption of decisive influence (Goldman Sachs, para 151).

Conclusion

To date, no 100% parent has been able to rebut the presumption of parental liability – and the question legitimately arises whether the presumption is, in practice, irrebuttable. An irrebuttable presumption is not wholly without EU precedent: in the 2012 Total appeal in *Hydrogen Peroxide*, the ECJ refused to hear Total’s arguments why the parental liability presumption should be disapplied and simply dismissed the appeal as manifestly unfounded.

National Law Review, Volume VIII, Number 213