LEGAL ALERT

LIABILITY OF INVESTMENT FIRMS DUE TO BREACHES OF COMPETITION LAW BY THEIR SUBSIDIARIES

THE JUDGEMENT OF THE CJEU C-595/18 P – GOLDMAN SACHS/EUROPEAN COMMISSION

I. Introduction

On 27 January 2021, the Court of Justice of the European Union ("**CJEU**") adopted a judgement confirming a fine of EUR 37 million applied to Goldman Sachs Group ("**Goldman Sachs**") for the participation of one of its former indirectly owned subsidiaries in the power cable cartel during the period it was under Goldman Sachs' control.

This judgement is also a warning to companies whose business mainly consists of buying and selling stakes in other companies under an investment perspective (hereinafter referred to, for ease of reference, as "investment firms"), which must ensure that their portfolio companies comply with competition law.

II. Facts

Between 29 July 2005 and 28 January 2009, Goldman Sachs was the parent company, indirectly through GS Capital Partners V Funds and other intermediary companies, of Prysmian SpA ("**Prysmian**") and its wholly-owned subsidiary Prysmian Cavi e Sistemi Srl ("**Prysmian CS**"), world leading players in the submarine and underground power cables sector.

Although Goldman Sachs initially held 100% of the shares in Prysmian, its holding was gradually reduced, first on 7 September 2005 and then on 21 July 2006 to 91.1% and 84.4% respectively. On 3 May 2007, a part of Prysmian's shares was offered on the Milan Stock Exchange through an initial public offering ("**IPO**"). After the IPO, the Prysmian Board of Directors appointed by Goldman Sachs on 28 February 2007 remained in office until the date the infringement ceased (*i.e.*, 28 January 2009).

On 2 April 2014, the European Commission ("**EC**") issued the Decision C (2014) 2139 final, in which it found Prysmian and Prysmian CS, among others, liable for the infringement of Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") for their involvement in a cartel in the power cables sector.

Taking into account the facts above, Goldman Sachs was held jointly and severally liable for the infringement between 29 July 2005 and 28 January 2009. The EC based its decision on the following grounds: *(i)* a presumption that Goldman Sachs exercised a decisive influence over Prysmian's and, thus, Prysmian CS's behaviour on the market; and *(ii)* according to the analysis of the economic, organisational and legal links with these companies, Goldman Sachs indeed exercised a decisive influence over Prysmian's behaviour on the market and, consequently, over Prysmian CS.

In this context, the EC imposed a fine of EUR 37,303,000 on Goldman Sachs, jointly and severally with Prysmian and Prysmian CS.

III. The judgement of the GCEU of 12.07.2018 (T-419/14)

Goldman Sachs has brought an appeal against the EC's decision before the General Court of the European Union ("**GCEU**"), seeking its annulment and/or a reduction of the fine.

Nevertheless, the GCEU dismissed the appeal, concluding that the EC was right to presume that Goldman Sachs effectively exercised a decisive influence over Prysmian and Prysmian CS's conduct on the market, in the period between 29 July 2005 and 3 May 2007.

Although Goldman Sachs' holding in Prysmian was not 100% during the whole of the relevant period (in fact this was only the case for 41 days), the GCEU held that the position of a parent company that holds all the voting rights attached to the shares of its subsidiary, combined with a very high majority holding in its subsidiary's capital, as is the case here, is similar to the position of a single shareholder of that subsidiary. Therefore, it could be presumed that the parent company determines the economic and business strategy of the subsidiary, even if it does not hold all or almost all of the subsidiary's share capital.

In addition, the GCEU found that Goldman Sachs effectively exercised decisive influence over the market conduct of Prysmian and Prysmian CS throughout the entire duration of the infringement, as it had the power to: *(i)* appoint the members of Prysmian's boards of directors; *(ii)* to call Prysmian's shareholder meetings; *(iii)* proposing the removal of board members or of all boards of directors of Prysmian; as well as it have been; *(iv)* playing a relevant role in the boards of directors and the strategic committee; and *(v)* receiving regular updates and monthly reports from Prysmian, in addition to the measures put in place to ensure Goldman Sachs' continued decisive control after the IPO.

IV. The judgement of the CJEU of 27.01.2021 (C-595/18 P)

In its appeal to the CJEU, Goldman Sachs claimed that: *(i)* the GCEU incorrectly applied Article 101 TFEU when found Goldman Sachs liable for an infringement committed by Prysmian and Prysmian CS between 29 July 2005 to 3 May 2007; *(ii)* it failed to exercise decisive influence within the meaning required by EU case-law between 3 May 2007 and 28 January 2009 (post-IPO period); and *(iii)* the CJEU should extend to Goldman Sachs the benefit of any fine reduction granted to Prysmian and Prysmian CS as a result of their appeal.

The CJEU dismissed Goldman Sachs' appeal in its entirety.

Regarding the first argument, the one with the most significant practical impact, the CJEU recognised that even though Goldman Sachs did not hold 100% of Prysmian's capital during the entire period before the IPO, according to the relevant case-law the presumption of effective exercise of decisive influence is not based on the mere holding of all or almost all of the subsidiary's capital per se, but on the degree of control that the parent company exercises over its subsidiary.

By controlling all the voting rights in Prysmian, Goldman Sachs was in a position similar to that of a parent company that holds all or nearly all the capital of a subsidiary and can therefore determine the subsidiary's economic and commercial strategy.

Hence, the CJEU concluded that the GCEU was correct in upholding that the EC could rely on a presumption that Goldman Sachs actually exercised decisive influence over the conduct of its subsidiary in the market. It also reaffirmed that the burden of rebutting this presumption fell on Goldman Sachs, which, however, had failed to do so.

V. Implications of the CJEU's judgement

This judgment of the CJEU could have serious implications for investment firms in the future in cases where one of their subsidiaries has been involved in and found liable for infringements of competition law during the period in which it was controlled by the investment firm.

By upholding the EC's and CJEU's decisions, the CJEU reaffirms the principle of responsibility of the parent companies for the conduct of their subsidiaries, but it also appears to expand the presumption of decisive influence over their conduct. The exercise of decisive influence over the market conduct of a subsidiary may be presumed not only in cases where the investment firm holds all, or almost all, of the shares of its subsidiary, but also if it exercises all of the subsidiary's voting rights, even if it does not hold the entire share capital. Even though they are rebuttable, these presumptions are extremely difficult to rebut.

Moreover, the CJEU confirmed that the EC, when concluding whether the parent company has control over the subsidiary, may rely on factors such as the power to appoint members of the board of directors of the subsidiary or to propose their dismissal, to call shareholders' meetings, the role played on the boards of directors and the strategic committee, and the provision of regular updates and reports on the business.

It may also be inferred from this ruling that investment firms will be held liable for the infringement of competition law by their subsidiaries even if they did not hold 100% of their

shares throughout the entire period of the infringement and did not directly participate in, or have knowledge of, the infringing conduct.

VI. Practical recommendations

In order to prevent the risk of liability for anti-competitive behaviour of their subsidiaries, investment firms, as parent companies, should at least:

a) Ensure that their subsidiaries respect the applicable rules of competition law and that they have in place compliance programmes and clear rules of conduct prohibiting anti-competitive conducts, and that all the employees of the acquired companies are duly informed of such rules and, preferably, have access to training on the subject;
b) Conduct due diligence on potential competition law risks, with advice from specialised lawyers, before signing transaction documents or agreeing to any evaluations;
c) Examine its standard M&A language to ascertain how group-level liability for the misconduct of an individual investment firm is addressed;
d) Consider warranties to face possible fines;
e) Conduct audits, if possible on a regular basis, after the acquisition of new companies, in order to identify and put an end to any anti-competitive behaviour.

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