Investment firms can be sanctioned for cartel conduct by former portfolio companies

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For the first time in its history, the Dutch regulator ACM imposed fines on a number of investment companies because their former portfolio company engaged in cartel conduct. The ACM seems to follow the European Commission's approach of holding private equity funds liable for cartel infringements by current or former subsidiaries. But the ACM also appears to introduce a new element by imposing individual fines on the investment companies, rather than fining them jointly with the portfolio company. Forewarned is forearmed: investment companies should not only carry out a thorough due diligence on anti-trust risks before acquiring a business as a potential investment, but they should also have an effective compliance programme in place at all levels of their organisation to mitigate the risk of liability for their subsidiaries' anti-competitive conduct.

In 2010, the ACM imposed fines totalling EUR 81 million on 15 flour producers for participating in a cartel. Flour producer Meneba was fined EUR 9 million for its alleged cartel involvement. During the cartel infringement, Meneba had successively been held as a portfolio company by investment firms CVC and Bencis. In the objections proceedings, a number of flour producers argued that the ACM should have attributed Meneba's infringement to its parent companies instead of only sanctioning Meneba.

According to settled EU case-law, the conduct of a subsidiary may be imputed to a parent company where that subsidiary does not decide independently on its own market conduct, but carries out the parent company's instructions in all material respects. As to wholly owned subsidiaries, the EU Court of Justice has gone one step further by establishing a rebuttable presumption that the parent company exercises a decisive influence over the subsidiary.

Having examined the organisational, legal and economic links between Meneba and its former parent companies, the ACM concluded in December 2014 that CVC and Bencis did have decisive influence on Meneba and were liable for Meneba's anti-competitive conduct while it was part of their portfolio.

In calculating the fines for the investment companies, the ACM used Meneba's fine and adjusted it to reflect how long the respective investment companies had owned Meneba. The ACM then applied the statutory ceiling of 10% of turnover achieved in the financial year preceding the decision to determine the actual fines to be imposed. In this context, the ACM referred to earlier EU case law: where two separate legal entities, such as a parent company and its subsidiary, no longer constitute an economic entity on the date of the decision to fine them for breach of the competition rules, each legal entity is entitled to have the 10% ceiling applied individually. As a result, the fines imposed on the investment companies remained relatively low.

Even so, the ACM's fines as well as those recently imposed by the European Commission for anti-competitive behaviour of a portfolio company serves as a clear warning for investment companies to beware of what they buy. Investing in a thorough due diligence prior to acquisition and carrying out an effective compliance programme after acquisition may go a long way in avoiding hefty penalties.