Decisive influence can create parental liability for cartel wrongdoing of ‘subsidiary’

By now, holding companies know that they can be held liable for their subsidiaries’ cartel wrongdoings. But what might not be on every company’s radar is that the EU’s rebuttable presumption of parental liability was recently extended. According to the General Court, this presumption not only applies to conduct by wholly-owned subsidiaries, but also to actions of entities that are not wholly owned but are in practice being controlled by another company. Investing in a thorough due diligence before acquiring a company, and carrying out an effective compliance programme after the acquisition, may mitigate a buyer’s risk of being held liable for a subsidiary’s anti-competitive conduct.

In July 2014, the Commission imposed fines totalling EUR 302 million on a number of producers of underground and submarine high voltage power cables for having participated in a cartel. The Commission held investment bank Goldman Sachs liable for the conduct of Prysmian, one of the power cable producers, because Goldman Sachs had exercised decisive influence on Prysmian as a parent company. According to settled case law, the conduct of a subsidiary may be imputed to a parent company where, although having a separate legal personality, that subsidiary does not decide independently on its own conduct in the market, but in all material respects carries out the instructions it receives from the parent company. This applies because the parent company and its subsidiary form a single economic unit, and thus form a single undertaking within the meaning of the cartel prohibition set in Article 101 TFEU. In terms of wholly-owned subsidiaries, the EU Court of Justice has taken this one step further by establishing a rebuttable presumption that the parent company exercises a decisive influence over the subsidiary. To rebut the presumption, the parent company must provide “sufficient evidence” that its subsidiary acts independently in the market.

On appeal at the General Court, Goldman Sachs argued that the Commission had interpreted the rebuttable presumption of parental liability rather creatively. The Commission based this presumption on the fact that Goldman Sachs held 100% of the voting rights associated with Prysmian’s shares, instead of relying on the level of Goldman Sachs’ holding in Prysmian’s share capital. However, the General Court agreed with the Commission’s interpretation and ruled that where a parent company is able to exercise all the voting rights associated with its subsidiary’s shares, particularly in combination with a high majority stake in the subsidiary’s share capital, that parent company is in a similar situation as a subsidiary’s sole owner. The parent company will be equally able to determine the economic and commercial strategy of the subsidiary concerned, even
without holding all (or virtually all) of the subsidiary’s share capital. The General Court furthermore clarified that the exercise of decisive influence can also be demonstrated by looking at other objective factors, such as the parent company’s power to: (i) appoint members of the subsidiary’s board of directors, (ii) call shareholder meetings, or (iii) propose the removal of the members of the board of directors. In addition, the role that the parent company’s directors play on the subsidiary’s strategic committee, or the frequency in which the parent company receives regular updates and monthly reports on the subsidiary’s business, may be relevant too.

To prevent parent companies from paying for the wrongs of subsidiaries, it is advisable to ensure that these subsidiaries are included in their parent competition compliance programmes.