Feature

**KEY POINTS**

- European competition law attributes liability for infringements to every company in the same "undertaking". An undertaking is made up of every company in a "single economic unit".
- Recent cases suggest that the courts are willing to take an expansive approach to identifying the relevant undertaking, increasing the chances that group companies will be found liable for each other's wrongdoing.
- Whilst there are obvious policy attractions to this approach, there is a danger that the pendulum may swing too far. There is little to be gained by making companies liable for conduct which they have nothing to do with.

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# EU competition law: the liability of group companies for each other's wrongdoing

The General Court of the European Union recently upheld a €7.3m fine on Goldman Sachs in respect of a cartel infringement by the Prysmian group of companies, which was at the relevant time owned by one of Goldman Sachs's investment funds. The court's reasoning was that Goldman Sachs and Prysmian were part of the same "undertaking", such that they were jointly liable for the breach. Its analysis indicates a growing willingness to find group companies liable for each other's conduct.

Between July 2005 and January 2009 Goldman Sachs was the indirect parent company, through one of its investment funds and other intermediaries, of the Prysmian group of companies, a leading supplier of power cables. On 2 April 2014 the European Commission decided that Prysmian had been in decade-long cartel with other power cables suppliers. In deciding who to fine, the Commission held that Goldman Sachs was, for the period when it was Prysmian's indirect parent, part of the same undertaking as Prysmian. Therefore, the Commission reasoned, Goldman Sachs was also liable for the cartel during that period, and it was made jointly and severally liable for a fine of €37.3m. In July 2018 the EU's General Court rejected Goldman Sachs's appeal: *The Goldman Sachs Group Inc v European Commission*, Case T-419/14. That decision is currently subject to a further appeal but it has already caused consternation among investors.

The concept of companies being treated collectively as a single undertaking is the solution adopted by European competition (or antitrust) law to the problem which arises when different people in a corporate group act in concert to commit a wrong. The problem, to put it somewhat bluntly, is that if one takes too purist a view of legal personality then one might find that no single company can be held responsible for what has happened. English law has tended to deal with this problem through the gradual development of the rules of attribution, and on occasion by entitling the court to "pierce the corporate veil" to peer at the murky reality lying beneath. But by and large English judges have been reluctant to stray far from the legal fiction that each company is a distinct person responsible only for its own thoughts and actions.

European competition lawyers have had no such qualms. No doubt influenced by the dominance of economic thought in this sphere, the focus of competition law has long been on the economic reality rather than the legal form. If a group of companies act together as a "single economic unit" then they comprise one undertaking. If that undertaking infringes competition law, then each of its legal entities will have joint liability for the breach. On this approach, it is nothing to the point that one of the companies did not directly participate, or did not know that it was participating, in the breach.

Most lawyers will know of examples of wrongdoing being hidden behind complex legal structures, and there is undoubtedly something refreshing in the European legislator's willingness to look at the reality of how commercial units are organised. However, there comes a point at which this simpler approach becomes too blunt. The Goldman Sachs case may herald our arrival at that point.

## GOLDMAN SACHS'S LIABILITY

Before turning to the detail of the Goldman Sachs case, it is important to emphasise that undertakings should be identified by reference to economic reality rather than legal form. Thus, it is not the case that every company in a corporate group is necessarily in the same undertaking: rather, one needs to establish whether the companies in question act on the market as a single economic unit. In parent/subsidiary relationships that tends to be established by showing that the parent exercises a "decisive influence over the commercial policy" of the subsidiary.

When the parent is a 100% owner of the subsidiary there is a rebuttable presumption that it exercises such decisive influence. One interesting feature of the General Court's decision was its willingness to apply that presumption to a situation where, although Goldman Sachs's shareholding fell as low as 84.4%, it held 100% of the voting rights. That is an important development of the law which will make it more likely that parents are found to be in the same undertaking as their subsidiaries, but it should be kept in mind that this is only a presumption and that it could, at least in theory, be rebutted with evidence. Thus, the more interesting part of the General Court's judgment is its treatment of the evidence which, even for the period when the Commission could not rely on any presumption, established that Goldman Sachs exercised a decisive influence over the commercial policy of Prysmian.

The General Court treated the following factors as being of particular significance:

- Goldman Sachs had the power to appoint the members of Prysmian's boards of directors and the power to call shareholder meetings.

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- Goldman Sachs had links with around half of the Prysmian directors which it appointed. Some of them, the "PIA Employee Directors," were employed by Goldman Sachs.
- Four of the PIA Employee Directors were vested with broad day-to-day management powers.
- The PIA Employee Directors received regular updates and monthly reports on Prysmian's business.
- Goldman Sachs also took steps to ensure that it remained in control even after an initial public offering in May 2007.

## WHAT ABOUT COMMERCIAL POLICY?

The most striking feature of the list of factors set out above is how far removed most of them are from Prysmian's "commercial policy", which is after all what Goldman Sachs has been found to exercise a "decisive influence" over. There is, for example, no mention of Goldman Sachs influencing Prysmian's pricing policy, the manner in which it negotiated power cable sales or projects, its production and distribution activities, sales objectives, margins, costs, or indeed anything that comes close to touching on any of the activities which were actually relevant to the cartel.

It is true that the third feature mentioned above, namely the fact that four of the PIA Employee Directors had broad day-to-day management powers, suggests that Goldman Sachs was rather more enmeshed in Prysmian's management than it might now like to admit. But on the other hand, the only examples given by the General Court of managerial decisions being taken by those individuals are of such things as a decision to open a new branch in Qatar, and decisions on employment issues. The picture which is painted is very much that of an investor taking an active interest in its investment, not of two companies working hand-in-glove as a single unit.

The EU Court of Justice has previously recognised that, when deciding whether a parent exercises decisive influence over the commercial policy of its subsidiary, it is relevant to consider not only direct evidence, such as of the parent influencing the subsidiary's pricing policy, but also other evidence of the financial and organisational links between the two companies (see *Akzo Nobel NV v European Commission*, Case C-97/08 P, [2009] 5 CMLR 23, para 74). But it is one thing to say that evidence of financial and organisational links may be sufficient, *together with other evidence*, to show that the parent exercises a decisive influence over its subsidiary's commercial policy. It is another thing entirely to focus on the financial and organisational links to such an extent that the analysis loses any clear connection to the commercial policy in question.

## ATTRIBUTION TO SUBSIDIARIES

The discussion thus far has focused on the possibility that a subsidiary's wrongdoing might be attributed to its parent. But there is an equally important question to be asked about the circumstances in which a parent's wrongdoing might be attributed *to its subsidiary*. This may be of equal practical significance to investors keen to know whether a company which they acquire may be weighed down by liability for infringements committed by its former parent.

The General Court recently considered this issue for the first time in the case of *Biogaran v European Commission* Case T-677/14. The court confirmed that the single undertaking analysis works in both directions, both up and down the corporate chain. Accordingly, if a subsidiary is in the same undertaking as its parent then the parent's wrongdoing is also the subsidiary's wrongdoing. Thus, Biogaran's complaint, that it was wrongly being held liable for an infringement carried out by its parent (the French pharmaceutical giant Servier), was rejected.

On the other hand, it is worth noting that the *Biogaran* judgment is somewhat unclear, and at one point (para 225) the court appears to suggest that it was relevant to the analysis that Biogaran had itself participated in the infringement, even if "in a subordinate, accessory or passive manner". That is a tantalising suggestion, because it at least hints at a recognition that there must be sensible limits on the doctrine of attribution of liability between members of the same undertaking.

One way of imposing a limit would be to insist that companies should only be found to be in the same undertaking if there is at least some evidence of them acting together in pursuit of the same commercial policy with some connection to the infringement in question. Mere evidence of financial and organisational links, such as were present in the *Goldman Sachs* case, should not suffice. An alternative solution would be to say that, whilst one might take an expansive approach to the identification of an undertaking, the legal entities within that undertaking will only be liable if they played at least some active role in the infringement. But what is far harder to justify is an approach which takes a very expansive approach to the identification of an undertaking and then says that every member of the undertaking, whatever its own role, is responsible for the wrongs of the others. ■

*Further Reading:*

- LexisPSL: Overviews: Banking & Finance: Acquisition finance and private equity: cross-border guides – overview.
- LexisPSL: Banking & Finance: Practice note: Private equity guide to acquiring and managing distressed portfolio companies.