European and Competition Law: Overview of the latest case law

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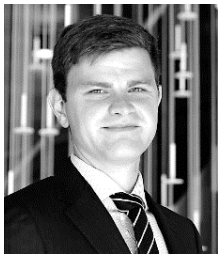

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Introduction

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Agenda

- Liability for the wrongdoing of portfolio companies – the **Goldman Sachs case**
- Retail price maintenance in Luxembourg – learnings following the **Bahlsen decision**
- The new Commission guidance under Art. 22 EU Merger Control Regulation – the **Illumina/Grail challenge**
- State Aid Round-Up – recent CJEU guidance concerning **taxation**

Goldman Sachs

The concept of parental liability for portfolio companies in Case T-419/14 and Case C-595/18

Background – parental liability in competition law (I)

General Rule

- Conduct of a subsidiary is imputable to a parent company, where the subsidiary does not decide independently on its conduct on the market

Presumption

- Where the capital of a subsidiary is (almost) fully owned by a parent entity → **Presumption** of decisive control & exercise of that control

Rebuttal

- Parent company can **rebut** the presumption by "*adducing sufficient evidence in this regard during the administrative procedure*"

Background – parental liability in competition law (II)

- No *presumption* if opinions of other shareholders have to be taken into account
- **However**: single economic entity can be *proven* by showing up decisive control over commercial conduct via organisational and legal links, such as:
  - Appointing members of the board
  - Being informed of commercial strategy
  - Overlap of senior management personnel
  - Oversight / involvement via committees

Goldman Sachs & Prysmian – background

- In 2014, the European Commission issued a decision imposing fines on participants of the Power Cable Cartel
- Goldman Sachs was – for four years – the indirect parent company of Prysmian SpA, a participant to the cartel
- The Commission held Goldman Sachs jointly and severally liable for EUR 37.3 million of a total fine of EUR 104.6 million for Prysmian

Goldman Sachs – findings of the General Court (I)

- Despite Goldman Sachs holding at times only 84.4% of the capital of Prysmian, it controlled for the most part 100% of the voting rights – the GC held that the EC was right to rely on the presumption of control
- Goldman Sachs tried to rebut the presumption:
  - Board minutes showed that the management team directed Prysmian's commercial policy independently
  - Board meetings were only held quarterly, management team was in charge
  - Public statements by board members that Prysmian was independent
- GC held that none of this is concrete and sufficient evidence

Goldman Sachs – findings of the General Court (II)

- GC confirmed objective factors that underpinned (as subsidiary evidence) the finding that Goldman Sachs had sufficient links to control Prysmian:
  - Power to appoint board members and exercise of that power
  - Power to call shareholder meetings – connected power to remove directors
  - (Appointed) board members had actual management powers
  - Receipt of regular updates and monthly reports of Prysmian
  - Implementation of control mechanisms after an IPO of the company in 2007 and divestments of share capital

Goldman Sachs – findings of the CJEU

- The CJEU confirmed that holding all (or almost all) **voting rights** in a company is sufficient to establish a presumption of control
- The CJEU confirmed that the evidence put forward by Goldman Sachs was **not sufficient** to rebut the presumption of control
- The CJEU also engaged on the (subsidiary) individual factors of control:
  - The exercise of decisive influence can be inferred from a **body of consistent evidence**, even if some of this evidence in isolation is insufficient to prove control
  - The GC did take into account different levels of shareholdings throughout the infringement period – the GC was in this respect not wrong **to rely on factors *outside* the infringement period for proving control *during* the infringement period**
  - Links between Goldman Sachs and Prysmian do not need to be legal or formal – even **informal relationships** such as personal links between parent and subsidiary can support a single economic entity finding

The GC concept of “(in)dependent directors”

- Even where a parent company does no longer hold all voting rights – the fact that the **composition of the board stays the same** is proof that the parent entity exercised control (GC §93)
- Power to hold shareholders meetings and to ***propose*** **revocation of directors** – proof of control (GC §94)
- The fact that directors were employed by a **company “affiliated” to the parent entity**, does not impact the finding of control (GC §105)
- Even **informal links** to directors that are not appointed/employed by parent company can lead to / substantiate a finding of control (GC §107)

Goldman Sachs – key takeaways

- A presumption of decisive control exists for the holding of (almost) all share capital **and/or** voting rights
- Even in the absence of a presumption of direct control, parent liability may be established by a series of factors which can – as a whole – prove control over a subsidiairy
- Once presumed or established, the single economic entity concept is difficult (if not impossible) to rebut

CONTROL OVER (INDIRECT) SUBSIDIARIES IS EASLIY ESTABLISHED
-- AND CAN BE COSTLY --

Bahlsen Decision

The Competition Council closing in on resale price maintenance in Luxembourg

"The Luxembourg consumer has the highest consumption level of Bahlsen biscuits all over the world"

(Bahlsen internal document seized during investigation)

Facts of the case

- Competition Council initiated investigation after noticing "*surprising price parity*" of Bahlsen products in different supermarkets
- Dawn raids revealed retail price maintenance practices from 2011 to 2015
- Supermarkets were rewarded financially (by the granting of wholesale discounts) for respecting "recommended" retail prices
- Hard-core vertical restriction by object
- Aggregate fine of 3,3 million – largest portion for Bahlsen, multiplication of the fines for Auchan and Delhaize due to "global size"

Background – the Bahlsen decision

Bahlsen

→ Sharing "**recommended**" retail prices
→ Overseeing / controlling abidance by recommended retail prices
→ Informing supermarkets where price is not aligned

Auchan | Delhaize | Cactus

→ Receiving recommended retail prices
→ Respecting recommended retail prices / aligning prices following request by Bahlsen
→Receiving wholesale discounts

Consumers

→ pay the same (or very similar) price for Bahlsen products across all supermarkets
→ No extraordinary promotions / discounts for specific supermarkets

How to prove agreements for RPM violations?

Traditional agreement / concerted practice

- **Agreement**: explicit or implicit concurrence of wills (formal or informal)
- **Concerted practice**: act of coordination between undertakings without formal agreement

The French test – inferred RPM agreement

- **(A)** Communication of (recommended) retail prices
- **(B)** Prices are applied significantly by retailer (>80%)
- **(C)** Manufacturer has put in place pricing policy to avoid deviation / exercise oversight

Bahlsen – key takeaways

- Resale price maintenance is a hard-core competition violation and can lead to significant fines
- It is not always required to have an explicit agreement for competition law violations – for resale price maintenance, a strict and effective pricing policy may suffice
- Global company groups with regional distribution presence in Luxembourg need to ensure competition law compliance – fine multiplications due to global size of the companies are applied

THE LUXEMBOURG COMPETITION COUNCIL IS INCREASINGLY ACTIVE AND CAPABLE TO ENFORCE COMPETITION LAW

The Illumina Grail developments

Enforcement of the new EU Commission referral guidance under Art. 22 EUMR

Background – EU & national merger control obligations

- Merger control thresholds are typically **turnover** thresholds
- If a transaction is of a certain size, it has to be **notified** and the merging parties have to **await approval**
- If transaction closes without (required) approval, competition authorities can impose significant **fines**
- **Multi-jurisdictional analysis** are carried out to assess EU or national filing obligations
- Until March 2021: « **Yes** or **No** analysis »

The rediscovery of the “Dutch Clause”

- EU merger control is regulated by the EU Merger Control Regulation (“**EUMR**”)
- Art. 22 EUMR has initially been designed for Member States that **do not feature a merger control regime**
- The article allows Member States to **refer a transaction** to the EU Commission for review, where – independently of the turnover of the companies involved – the transaction:
  - **Affects trade** between Member States, and
  - Threatens to significantly **affect competition** within the Member State making the referral
- Before March 26, 2021, the EU Commission **did not accept** such referrals where national turnover thresholds were not met
- On March 26, 2021, the EU Commission **changed course** and decided to encourage referrals for certain transactions

Which transactions are (likely) targeted by the new guidance?

Turnover of the parties to the transaction is not "**representative**" of competitive potential				
Promising start ups	Important innovators	Actual or potential important competitive forces	Access to competitively significant infrastructure	Provision of key inputs for other industries

Focus on digital & pharma sector but also regulated markets – including finance, healthcare, and telecommunication

Case Study – the Illumina Grail transaction (I)

- Illumina is a company active in genomic sequencing technology
- Grail is a company active in early cancer detection tests, building up on genomic sequencing technology
- In the US, the FTC is concerned about the transaction and risks of foreclosure – current court action to block the deal
- In the EU, Grail has no revenues – the transaction was not notifiable and the parties did not have to wait for merger control approvals to close the transaction

The Illumina Grail transaction (II)

- **March 26, 2021** → EU Commission issues new Art. 22 EUMR guidance
- **April 19, 2021** → EU Commission accepts referral requests from inter alia the French, Belgian, and Dutch competition authority
  - → Transaction now notifiable to the EU Commission
  - → Standstill obligation applies as the transaction has not yet closed
- **April 28, 2021** → Illumina appeals Commission decision to accept referral to the GC
- **June 16, 2021** → Illumina & Grail notify transaction to the EU Commission
- **July 22, 2021** → EU Commission opens in-depth investigation into transaction – standstill obligation is extended to February 2022

The Illumina Grail transaction (III)

- **August 18, 2021** → Illumina & Grail close transaction despite ongoing review by EU Commission
- **September 20, 2021** → EU Commission issues “Statement of Objections” in response to the breach of the standstill obligation
- **October 29, 2021** → EU Commission imposes – for the first time in its history – interim measures to force Illumina to keep companies separate
  - Possibility impose fines of up to 10% of annual turnover for (i) breach of standstill obligation, and (ii) breach of interim measures

Implications – European Union

- **M&A documentation.** Conditions precedent should reflect potential consequences of a referral request – questions of liability / risk allocation
- **Substantive competition law assessments.** Merger control assessments can no longer merely rely on turnover thresholds. Certain transactions should be analyzed as to their local impact in EU Member States
- **Proactive engagement with authorities.** Where potential competition law concerns arise, it may be necessary to proactively approach national competition authorities in order to exclude, or at least minimize, the risk of a referral

Significant increase in legal uncertainty & transaction risks

Implications – Luxembourg

- Luxembourg continues to be the only EU Member State without merger control regime
- The Luxembourg Competition Council reacted with an official statement on 29 April 2021:

  "*The Competition Council is now more encouraged to use Art. 22 of the EU Merger Regulation when there is an effect on trade between Member States and a threat of a significant effect on competition in the country*

- Effective means for the Competition Council to trigger merger control review procedure

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State Aid Round-Up

State Aid & Taxation

EU State Aid round up – recent developments concerning taxation

- **Spanish tax amortization rules** – “The mere fact that a tax measure is of general nature does not mean that it cannot be selective” (Case C-50/19 P & others)
- **Polish & Hungarian progressive tax systems** – “Taking into account the fiscal autonomy which the Member States are recognised as having outside the fields subject to harmonisation under EU law, they are free to establish the system of taxation which they deem most appropriate and to adopt, as required, progressive taxation.” (Case C- 562/19 & C 596/19)

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