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European Commission Holds Private Equity Owner Liable for Portfolio Company's Cartel Fine

By Andrew J. Nussbaum, Nelson O. Fitts and Franco Castelli
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On April 2, 2014, the European Commission ("EC") announced a decision to impose total fines of approximately €302 million on a number of manufacturers of underground and submarine high voltage power cable for their participation in an alleged unlawful bid-rigging scheme. According to the EC, for almost ten years, from 1999 until January 2009, when the EC launched its investigation, the companies involved agreed to allocate customers among themselves, with the European participants refraining from bidding for projects in Asia, and vice versa. Under its leniency program, the EC granted immunity to one of the companies involved for revealing the existence of the alleged collusion.

The EC held several parent companies jointly and severally liable for the fines imposed on their respective subsidiaries, even though those parents were not involved directly in the cartel. In a significant expansion of the EU's "parental liability" doctrine, a private equity firm was held liable for part of the fine imposed on Prysmian, a power cable manufacturer that it purchased in the midst of the alleged anticompetitive conduct.

The private equity fund acquired Prysmian from Pirelli in 2005. Two years later Prysmian went public through an IPO and the private equity firm's ownership dropped below 50%; by 2010, the firm had completely divested its equity interest. The EC did not allege that the private equity owner had any involvement in, or even knowledge of, Prysmian's claimed misconduct – only that it exercised a decisive influence on the company through voting rights and board representation for several years, including when it no longer held a majority interest.

The EC has traditionally taken the position that parent companies are responsible for their subsidiaries' antitrust violations, even if they are not directly involved in the subsidiaries' business decisions or anticompetitive activity. EU courts have generally upheld the extension of liability to parent companies when they have the power to exercise decisive influence over their subsidiaries' conduct. In the *Akzo* decision, for example, the European Court of Justice ("ECJ") held that it is "settled case-law that the conduct of a subsidiary may be imputed to the parent company," and it went on to establish a rebuttable presumption that a parent company exercises decisive influence over the conduct of its wholly owned subsidiaries. See *Akzo Nobel v. Commission*, Case C-97/08 (2009).

In the case of non-wholly owned subsidiaries, such as joint ventures controlled by two or more parents, there is no such presumption, and the EC must prove that each parent does in fact exercise decisive influence. However, in the *du Pont* and *Dow* decisions from September 2013, the ECJ held that the mere presence of a parent's representatives on the subsidiary's board or the ability to appoint the subsidiary's senior managers are sufficient for the EC to satisfy its burden of proof. See *EI du Pont de Nemours v. Commission*, Case C-172/12 (2013), and *Dow Chemical v. Commission*, Case C-179/12 (2013).

While parent companies have previously shared liability in the context of industrial groups, the EC's recent decision in the power cable cartel marks the first time that it has extended liability to a private equity firm itself. As indicated by Commissioner Almunia in a recent speech, "the responsibility of groups of companies, up to the highest level of the corporate structure . . . is the same for investment companies, who should take a careful look at the compliance culture of the companies they invest in."

The Commissioner's comments appear at odds with the structure of private equity firms and their investment mandate — which is to make investments but generally does not include the management or operation of businesses. The comments highlight the importance of thorough regulatory diligence by private equity firms before entering into acquisition agreements. At least when the target is a privately held company, investors should negotiate appropriate representations and warranties from the seller — and possibly indemnification and escrow arrangements — to cover the risk that a target may later be found liable for EU antitrust law violations.

The EC's perspective on governance, control and derivative liability for private equity owners echoes to some extent the *Sun Capital* decision interpreting owner liability in the ERISA context. See *Sun Capital Partners III, LP v. New England Teamsters*, 724 F.3d 129 (First Cir. 2013). Both situations serve as reminders to financial sponsors that portfolio company capital structure and governance are not one-size-fits-all, and traditional models of control should be examined in the context of a specific transaction.