Dutch Authority Follows EU by Finding Private Equity Firms Liable for Antitrust Violations of Minority Held Companies

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The Dutch competition authority (the Authority for Consumers and Markets, or ACM) has issued two decisions imposing fines on private equity firms for the participation of their portfolio company in the so-called flour cartel. The ACM's decisions apply EU competition law in imposing parental liability for infringements of Article 101 of the Treaty on the Functioning of the European Union (TFEU) on entities that are considered to exercise "decisive influence" over the subsidiary that is alleged to have infringed Article 101. In particular, the decisions confirm, following the EU Commission's decision in relation to the power-cables cartel that for the first time extended parental liability to a private equity firm, that private equity firms are not exempt from parental liability, fines can be imposed on the basis of a minority shareholding and exposure can exist long after the minority interest in the relevant portfolio company has been sold.

Under EU competition law, liability for fines in relation to antitrust law infringements by a subsidiary extends to parent companies when they are considered to exercise "decisive influence" over the subsidiary concerned. This is the case when a subsidiary does not autonomously determine its conduct on the market but instead mostly applies the instructions given to it by the parent company. This is particularly true for instructions regarding the economic, organizational and legal links that unite parent and subsidiary. When a parent company has a 100 percent (or nearly 100 percent) stake in its subsidiary, a rebuttable presumption applies that the parent company does in fact exercise decisive influence.

The recent ACM decisions demonstrate that the ACM takes a broad approach in attributing parental liability following the EC's example. The relevant portfolio company, Meneba, had participated in the flour cartel from 2001 to 2007 without the private equity funds' knowledge or involvement. Capital Investments Group Limited (CIGL) held 41 percent of Meneba's shares for a period of time that included September 2001 to November 2004. The ACM ruled that, despite CIGL's minority share, it exercised decisive influence over Meneba during this time period, based on the fact that it had veto rights over important strategic decisions of Meneba, including the adoption of Meneba's business plan and the appointment of board members. CIGL subsequently sold its shares to Bencis Capital Partners (BCP), which held a total of 92 percent of Meneba's shares and appointed two of the four members of Meneba's supervisory board between November 2004 and March 2007. The ACM's decisions followed a plea from Meneba that the two private equity funds should share in the liability.

There are a few important takeaways from the ACM´s decision:

- **The general principles of parental liability apply to private equity firms.** The ACM expressly stated that for purposes of parental liability, private equity firms cannot be distinguished from other types of corporate groupings.
- **Minority shareholdings can be a sufficient basis for liability.** With its 41 percent participation in Meneba, CIGL had a veto right over important strategic decisions, including the adoption of the business plan and the appointment of Meneba board members, which was considered sufficient to attribute liability.
- **Liability may exist even if the portfolio company is no longer held by the private equity firm at the time of the imposition of the fine.** The ACM's decisions highlight that fines for antitrust violations of a portfolio company can be imposed long after the company has been sold by the private equity firm. A parent company's liability will extend to the time period during which it had decisive influence over the portfolio company.
- **The portfolio entity concerned may have an interest in having the competition authority establish shared liability with the parent entity and provide the authority with the requisite evidence.**

However, the rules for parental liability may differ in other member states. In Germany, for example, there is no general rule of parental liability. Under German law, sanctions can directly be imposed only on an individual committing the infringement. The infringement is then attributed to the undertaking for which the individual acted. If the relevant individual was only acting for the portfolio company, the infringement cannot be attributed to the parent. However, parent companies have a supervisory duty over their group companies to make sure that adequate measures are taken to avoid cartel law infringements. If individuals acting for the parent company violate these supervisory duties, the parent company can be held liable for its own lack of supervision.

Private equity firms are well advised to take into account their options for controlling the abovementioned liability risks. These options include the following:

- Completing a thorough antitrust due diligence prior to the acquisition of new companies;
- Structuring the transaction to reduce or control the transfer of liabilities where possible;
- Including indemnification clauses and rights of information and/or participation with respect to potential administrative fine proceedings; and
- Introducing a proactive compliance program post-acquisition.