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Buying a Pig in a Poke: Financial Investor Antitrust Liability on the Rise

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On 5 September 2018, the District Court for the Southern District of California ruled that private equity firm Lion Capital must face trial in class action litigation alongside its portfolio company Bumble Bee Seafoods, in a case alleging price-fixing in the market for canned tuna. In the wake of the European Court's judgment in the *Power Cables* cartel saga over the summer, the trend that a financial investor (be it a bank or a private equity company) may be held liable for the behaviour of its portfolio company now seems to be of transatlantic proportions.

Plaintiffs in the *Canned Tuna* litigation claim that Lion Capital had discovered Bumble Bee's role in the price-fixing conspiracy during its acquisition of the company in 2010, but nevertheless proceeded with the transaction in an attempt to reap supra-competitive profits. They further claim to have detailed evidence of the investor's direct involvement in the conspiracy. Lion Capital argued the implausibility of that theory, stating that the benefits it would gain from an illegal cartel could never economically offset the reputational harm it would suffer as a private equity firm. However, Judge Janis Samartino agreed with the plaintiffs that it was economically conceivable, in light of the downward trend in demand for canned tuna in the US, that *"Bumble Bee, and thus Lion, needed the artificially inflated* *prices to maintain its market value and eventual resale value. Otherwise, as Plaintiffs allege, the natural market forces would drive prices down, drive Bumble Bee's value down, and thus drive Lion investors' profits down.*" (Court Order, Analysis Section V.D.1). Lion Capital's attempt to qualify itself as a pure financial investor did not suffice to escape the claim.

Although the ultimate fate of Lion's possible liability remains unresolved, the decision sounds the alarm for private equity firms, and in fact any financial institution, who should be fully conscious that they are not necessarily immune from liability for the alleged anticompetitive conduct of their portfolio companies. A similar concern already has been a cause for attention in Europe, following the European General Court's decision affirming Goldman Sachs' liability in the *Power Cables* case.

In its judgment, the General Court ("GC") upheld the European Commission's decision holding Goldman Sachs ("Goldman") jointly and severally liable for the behaviour of its portfolio company, the Prysmian group. Prysmian had been found by the Commission to have had actively participated in a cartel lasting more than a decade. Although Goldman did not hold 100% of Prysmian's shares, the GC found that Goldman's ability to fully control Prysmian's voting rights was sufficient to treat Goldman as the sole owner, triggering a presumption that Goldman had decisive influence under EU law (*Goldman Sachs*, paras 49-51). The decision signals that a private equity firm, which can exercise decisive influence over its portfolio company, is presumed to in fact exercise such influence and may be held liable for its behaviour. The judgment's novelty is the similar treatment of financial and institutional investors in cases where the financial investor exercises decisive influence through its voting rights. For a more detailed analysis, please refer to our recent blog post on the case.

Those two cases illustrate a perceived trend in EU competition law, and now also in US antitrust, whereby a deeper analysis of the type and quality of the management of the portfolio company may lead to a finding of antitrust liability for private equity investors. Although the US Department of Justice has not adopted the European Commission's more aggressive approach to pursue financial investors, the risk is posed by a very active private plaintiff's bar. Plaintiffs in US class actions are now expected to consider naming as defendants any major financial investors they can identify.

The rulings are a wake-up call for investors, who should be aware that any involvement beyond mere financial investment in a company may come with unexpected and undesired consequences. Therefore, in addition to conducting a detailed due diligence to verify a potential target's antitrust compliance, financial investors should also think carefully about the optimal management structure of their portfolio companies.

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