

Substantive: The Court of Justice confirm General Court Judgement and Commission Decision that rebuttable presumption of single economic unit applies in cases in which parent company owns 100% of voting rights of the subsidiary. There is nothing to prevent the Commission from establishing that a parent company actually exercises decisive influence over its subsidiary by means of a combination of that presumption and other evidence. The existence of an economic entity formed by the parent company and its subsidiary may be based not only on the formal relationship between the two, but also on informal relationships, consisting inter alia in personal links between the legal entities comprising such an economic unit.

Procedural: The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and that evidence does not, therefore, save where they have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal. The jurisdiction of the Court of Justice to review the findings of fact by the General Court extends, inter alia, to the question whether the rules relating to the burden of proof and the taking of evidence have been observed. (JIRP)

Tags: Single economic unit doctrine, economic entity, parent liability, rebuttable presumption, informal relationships, personal links, appraisal of the facts, review of the finding of facts.

Judgment of the Court (Second Chamber) of 27 January 2021, in Case C-595/18 P, *The Goldman Sachs Group Inc. v European Commission.*, in Case C-301/19 P. ECLI:EU:C:2021:73

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### **Context:**

The Goldman Sachs Group Inc. appealed the judgment of the General Court of the European Union of 12 July 2018, *The Goldman Sachs Group v Commission*, Case T-419/14, ECLI: EU:T:2018:445 by which the General Court dismissed its action seeking, first, the annulment of Commission Decision C(2014) 2139 final of 2 April 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39610 – Power cables) in so far as it concerns the appellant. The appellant was held liable by the Commission Decision for the infringement of its subsidiaries Prysmian and PrysmianCS that had participated in a cartel from 2005 to 2009 in the sector for (extra) high voltage underground and/or submarine power cables. The appellant's holding in Prysmian was initially 100% of the shares. The level of that holding decreased, following two divestments made on 7 September 2005 and 21 July 2006, initially to 91.1% and then to 84.4% until 3 May 2007. Date in which some of the shares in Prysmian were offered to the public in an initial public offering ('the IPO') on the Milan Stock Exchange. It was distinguishing between a pre-IPO period and a post-IPO period in the analysis. The Commission imposed on the appellant a fine of EUR 37 303 000, jointly and severally with Prysmian and PrysmianCS.

The General Court held, in essence, that the Commission was fully entitled to rely, as regards the period from 29 July 2005 to 3 May 2007, on a presumption that the appellant actually exercised decisive influence over the market conduct of Prysmian and Prysmian Cavi e Sistemi Energia.

According to the General Court, where a parent company holds all the voting rights associated with its subsidiary's shares, in particular in combination with a very high majority stake in the share capital of that subsidiary, as in the present case, that parent company is in a similar situation to that of the sole owner of that subsidiary, since that parent company is able to determine the economic and commercial strategy of the subsidiary concerned, even if it does not hold all or virtually all the share capital of that subsidiary.

The General Court further held that the Commission had been entitled to consider, without making any error, that the appellant had exercised decisive influence over the market conduct of Prysmian and Prysmian Cavi e Sistemi Energia throughout the entire infringement period, relying, first, on the power held by the appellant to appoint the members of the various boards of directors of Prysmian, secondly, on the appellant's power to call Prysmian shareholders to meetings and to propose the revocation of directors or of entire boards of directors of Prysmian, thirdly, on the delegated powers of the directors of the Principal Investment Area ('the PIA') of the Merchant Banking Division of the appellant on the boards of directors of Prysmian and their participation in Prysmian's Strategic Committee, fourthly, on the fact that the appellant received regular updates and monthly reports from Prysmian, fifthly, on the measures listed by the Commission in the decision at issue to ensure continuation of decisive control by the appellant after the IPO and, sixthly, on the evidence that the appellant had acted as an industrial owner.

### **Doctrine of the Court of Justice**

*29... as the General Court found in paragraphs 48 and 64 of the judgment under appeal, in the decision at issue, the Commission relied on a presumption that the appellant actually exercised a decisive influence over the conduct of Prysmian and, indirectly, of PrysmianCS, by relying not on the level of the appellant's indirect holding in Prysmian's capital, but on the finding that the appellant controlled all the voting rights associated with Prysmian's shares.*

*31... it is settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (judgment of 24 June 2015, Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 75 and the case-law cited).*

*32 It is also settled case-law that, in the particular case in which a parent company holds, directly or indirectly, all or almost all of the capital in a subsidiary which has committed an infringement of the competition rules, the parent company is able to exercise decisive influence over the conduct of the subsidiary and there is a rebuttable presumption that the parent company does in fact exercise such influence. In those circumstances, it is sufficient for the Commission to prove that the entire capital, or virtually the entire capital, of a subsidiary is held by its parent in order for it to be presumed that the parent exercises decisive influence over the commercial policy of that subsidiary. The Commission will*

*then be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (judgment of 28 October 2020, *Pirelli & C. v Commission*, C-611/18 P, not published, EU:C:2020:868, paragraph 68 and the case-law cited).*

*33 Unless it is rebutted, such a presumption therefore implies that the actual exercise of decisive influence by the parent company over its subsidiary is considered to be established and entitles the Commission to hold the parent company liable for the conduct of the subsidiary without having to produce any additional evidence. The implementation of the presumption of actual exercise of decisive influence is thus not conditional upon the production of additional indicia relating to the actual exercise of influence by the parent company (judgment of 26 October 2017, *Global Steel Wire and Others v Commission*, C-457/16 P and C-459/16 P to C-461/16 P, not published, EU:C:2017:819, paragraphs 85 and 86 and the case-law cited).*

*35 It is apparent...from the case-law cited in paragraphs 31 to 33 above that it is not the mere holding of all or virtually all the capital of the subsidiary in itself that gives rise to the presumption of the actual exercise of decisive influence, but the degree of control of the parent company over its subsidiary that this holding implies. Consequently, the General Court was entitled, without erring in law, to consider, in essence, in paragraph 50 of the judgment under appeal, that a parent company which holds all the voting rights associated with its subsidiary's shares is, in that regard, in a similar situation to that of a company holding all or virtually all the capital of the subsidiary, so that the parent company is able to determine the subsidiary's economic and commercial strategy. A parent company which holds all the voting rights associated with its subsidiary's shares is able, like a parent company holding all or virtually all the capital of its subsidiary, to exercise decisive influence over the conduct of the subsidiary.*

*36 It follows that, contrary to what the appellant claims, the General Court did not err in law in finding that, where a parent company holds all the voting rights associated with its subsidiary's shares, the Commission is entitled to rely on a presumption that the parent company actually exercises decisive influence over its subsidiary's market conduct.*

*40 Moreover, it should be borne in mind that the Commission is not in any way bound to rely exclusively on that presumption. There is nothing to prevent the Commission from establishing that a parent company actually exercises decisive influence over its subsidiary by means of other evidence or by a combination of such evidence and that presumption (judgment of 26 October 2017, *Global Steel Wire and Others v Commission*, C-457/16 P and C-459/16 P to C-461/16 P, not published, EU:C:2017:819, paragraph 88 and the case-law cited).*

*48... The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and that evidence does not, therefore, save where they have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (judgment of 26 September 2018, *Philips and Philips France v Commission*, C-98/17 P, not published, EU:C:2018:774, paragraph 40 and the case-law cited).*

*49... However, the jurisdiction of the Court of Justice to review the findings of fact by the General Court extends, inter alia, to the question whether the rules relating to the burden of proof and the taking of evidence have been observed (judgments of 18 January 2017, *Toshiba v Commission*, C-623/15 P, not*

published, EU:C:2017:21, paragraph 39, and of 14 June 2018, *Makhlouf v Council*, C-458/17 P, not published, EU:C:2018:441, paragraph 57). Same argument in paragraph 97 of the Court of Justice judgement.

67...it is settled case-law of the Court that, in examining whether the parent company is able to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, account must be taken of the economic reality. Moreover, the actual exercise of decisive influence by a parent company over its subsidiary's conduct may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such influence (judgment of 18 January 2017, *Toshiba v Commission*, C-623/15 P, not published, EU:C:2017:21, paragraphs 46 and 47 and the case-law cited). Same argument in paragraph 90 of the Court of Justice judgement.

68 It is also apparent from the case-law that, as part of that review, it is for the General Court to carry out an assessment of the facts which are contemporaneous with the period of the infringement, but without prejudice to the possibility of relying on elements relating to a prior period, in so far as it is able to establish the relevance of those elements to the period of the infringement and it does not automatically apply to the period of the infringement the conclusions stemming from the assessment of elements prior to that period. (judgment of 16 June 2016, *Evonik Degussa and AlzChem v Commission*, C-155/14 P, EU:C:2016:446, paragraph 34).

93...it is apparent from the case-law, as the General Court observed, in paragraph 107 of the judgment under appeal, that the existence of an economic entity formed by the parent company and its subsidiary may be based not only on the formal relationship between the two, but also on informal relationships, consisting inter alia in personal links between the legal entities comprising such an economic unit (see, to that effect, judgment of 11 July 2013, *Commission v Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraph 68).

94...The relevance of...personal links lies in the fact that they may suggest that a person, although active for a given company, actually pursues, in view of his or her links with another company, the interests of the latter. That may also be the case where a person who sits on the board of directors of a company is connected to another company by means of 'previous advisory services' or 'consultancy agreements', as the General Court noted in paragraph 106 of the judgment under appeal.

95 It follows that the General Court did not err in law in holding that such personal links may, in principle, be relevant for the purpose of establishing whether a parent company is able to exercise decisive influence over the market conduct of its subsidiary.

98 The Court of Justice has also stated that, where an appellant alleges distortion of the evidence by the General Court, he or she must indicate precisely the evidence alleged to have been distorted by that Court and show the errors of appraisal which, in his or her view, led to that distortion (judgment of 28 November 2019, *Brugg Kabel and Kabelwerke Brugg v Commission*, C-591/18 P, not published, EU:C:2019:1026, paragraph 63 and the case-law cited).

100 It should be borne in mind that, in that regard, the General Court held, in paragraph 108 of the judgment under appeal, that the mere fact that that board of directors evaluated some of its directors as

*independent, or that it published such an evaluation in its corporate governance reports, is not, in itself, capable of calling into question the Commission's finding that those directors did not in fact cease to have links with the appellant.*

**The Court dismisses the appeal.**