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Parent liability and claims for recovery between joint and several debtors according to EU antitrust law 594

At the moment, European antitrust law deals with the hot topic of parent companies' liability for the misconduct of their subsidiaries which infringed antitrust law, in particular violations of the cartel ban. While it is settled case law of the European Courts that, in principle, a parent company can be held liable to pay a fine to the European Commission and/or to national antitrust agencies for an antitrust infringement of one of its subsidiaries, the Court of Justice of the European Union (ECJ) now was asked to decide upon the question of which company internally will ultimately be responsible for fines imposed on a parent and its subsidiary jointly and severally. This question is of particularly significant importance in cases in which the parent and the subsidiary belonged to the same group during the period in which the infringement was committed but the subsidiary is sold during or after the cartel infringement or fine decision. Recent judgments rendered by the ECJ indicate that it will be up to the national courts to deal with the specifics of every individual case and to decide on internal liabilities. Still, various questions remain in this context. The author argues that the question of internal liability has to be answered, in particular by taking into account principles of European law, which ultimately could prevent parent companies from (entirely) recovering payments made to the European Commission for antitrust fines from their former subsidiaries simply by arguing that it was their subsidiaries' fault that an infringement of European antitrust law was committed. To solve the question of internal liability, one could rather argue that the specific company of the joint and several debtors which (potentially) profited from the cartel infringement committed by the former economic unit is ultimately responsible. A practicable solution could be to (rebuttably) presume that this is the parent company, since it is typically in a position to exercise decisive influence over its subsidiary, also regarding profits (presumption of parent's profit). The recent developments will also have a substantial impact on firms abroad which are exposed to antitrust risks in Europe or which even already face cartel allegations by European authorities. This article will summarize the European legal principles and give an overview of the ECJ's case law and the possible outcome of the pending proceedings on the issue of internal liability.

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