

Sie-Mens sana: Contribution between jointly and severally liable companies, and contribution between jointly and severally liable undertakings

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Overview

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- II. Contribution/Claim Reduction in the EU
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 2. Fines
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I. Background: (No) Contribution / Claim Reduction in the US

Background: general US rule “no contribution”

- Debate in the US esp. since the late 1970s (Circuit split).
- ***Texas Industries v. Radcliff Materials***, 451 US 630 (1981):
 - no federal right to contribution
 - for Congress to establish such a right
 - based on the formal argument that Congress had conferred no power to develop such a right:
 - Neither did Congress explicitly or implicitly confer a right to contribution in the antitrust laws,
 - nor was it possible to establish such a right as part of the “federal common law”.
 - SCOTUS largely avoided the policy discussion.

Background: US rule “limited claim reduction”

- In addition to the no-contribution rule: only **limited “claim reduction”**
 - only the *actual* amount of settlements is deducted from the treble damages award against the non-settling defendant(s).
 - Where settlements are lower than the “fair” share of the settling defendant(s): bad luck for the remaining defendant(s), whose share increases accordingly.

Background: US policy discussion

- Policy arguments made before and after *Texas Industries* have fallen largely into two categories:
 1. **Deterrence-based arguments**, generally *favouring* (or at least *not disfavoured*) the no-contribution rule because of the higher settlement values that can be extracted (assuming risk aversion).
 - E.g., Easterbrook, Landes & Posner (1980) (deterrence served *at least* as well by no-contribution as by contribution rule; possibly over-deterrence); see also Leslie (2009); AAI (Foer (2006))
 - but see Polinsky & Shavell (1981), favouring a contribution rule
 2. **“Fairness”-based arguments**, generally favouring a contribution rule.
 - E.g., Antitrust Modernization Commission 2007; Angland (2010)
 - but see Dillbary (2011) (actors behind the ‘veil of uncertainty’ would choose a no-contribution rule, not only in antitrust but generally)

Background: no-contribution serves deterrence

- Argument that no-contribution rule serves deterrence:
 - **Deterrence depends on the *expected* liability (*ex ante*)** (not the actual liability *ex post*) eg Easterbrook, Landes & Posner (1980)
 - **Where firms are risk neutral, the expected liability (and hence deterrence) under contribution and no-contribution are the same** (eg, where two firms conspire: probability of 1 of a 50% liability under contribution or 0.5 probability of 100% liability under no-contribution) eg Easterbrook et al (1980); Polinsky & Shavell (1981)
 - **Where firms are risk averse, deterrence under a no-contribution rule is greater** (because a probability of 1 of 50% liability is preferred to a 0.5 probability of 100% liability) eg Easterbrook et al (1980), Polinsky & Shavell (1981)
 - The deterrence rationale (only expected sanction is relevant to deterrence) ultimately is an **extension of the old Gary Becker argument**: deterrence may more cheaply be served by increasing the severity of the sanction and reducing the probability of punishment.

Background: no-contribution serves deterrence

- Additionally, the no-contribution, limited claim reduction rule leads to **quick settlements adding up to more than the expected liability under litigation** (because of a race to the negotiating table to avoid being the only remaining defendant; whipsaw settlements) eg Easterbrook et al (1980)
- **Incentive for settling defendants to reveal information**
Hviid & Medvedev (2010)

Background: caveats

- Greater deterrence is not always better – question of **over-deterrence** (Easterbrook et al (1980))
- Individual decisionmakers' exposure (eg termination, demotion/non-promotion, salary deduction) is likely to depend on the *if* of the firm's *ex post* liability, but not so much on the *amount* of this liability, so that “the **certainty of liability will be more of a deterrent to the decisionmakers than the magnitude of that liability.**” (Polinsky & Shavell (1981))

Background: caveats

- Argument that *ex post* liability does not matter for *ex ante* deterrence only holds if *ex ante* there is no reason to expect the distribution to be biased; however, the **choice of defendants may be biased in *ex ante* predictable ways** (e.g.: deep pockets favoured by plaintiffs; or: deep pockets disfavoured b/c of greater ability to spend resources on defence; plaintiffs' business relationship with some defendants but not others etc) (Polinsky & Shavell (1981))
 - but see Easterbrook et al (1980): **unravelling effect**: [10] the “most-favoured” of all remaining defendants would be deterred, leaving only the less-favoured ones, [20] go to 10
- **Impact on leniency programmes?**

(Hviid & Medvedev (2010); but: arg ex ACPERA 2004 and 2011 GAO Report: leniency applicants apparently not in great rush to make use of ACPERA benefits for cooperation)

Background: caveats

- Flipside of the argument by Easterbrook et al. that deterrence of the no-contribution rule is greater than that of a contribution rule under the assumption of risk aversion is that the **deterrence under no-contribution is lower under the assumption that the antitrust infringers are risk seeking.**
- While we are usually right to consider firms as either risk neutral or risk averse, is it out of the question that an actor that decides to enter into a cartel is risk seeking?
 - One of the explanations for the persistence of cartels despite severe sanctions is that the decisionmakers who enter into the cartel suffer from **self-serving/overconfidence bias** and therefore assign too great a weight on the possibility that the cartel will not be detected.
 - If that is the case, the **possibility that the firm could avoid both (criminal/civil) fines and damages claims entirely even if detected** may be a further incentive for these overconfident decisionmakers

Background: Is there a no-contribution rule?

- Does the no-contribution rule prevail in the “law in action”?
 1. **Contribution rules under state law** for indirect-purchaser actions? (cf Foer & Stutz (2012) *at* 316)
 2. Ronald Coase may have died, but Coasean bargaining is live and kicking: **Judgment-Sharing Agreements** between co-defendants lead to ***contractually agreed***
 - a. **rights to contribution** and/or
 - b. **full claim reduction** (through obligation that settling defendants seek plaintiffs’ agreement that sales of the settling defendants are “removed” from the damages claim),

Judgment sharing agreements seek to counteract the whipsaw effect of playing defendants off against each other in settlements (Foer & Stutz (2012) *at* 316 and Leslie (2009))

II. Contribution in the EU

1. Following Damages Claims

Contribution following EU Damages Claims

- Up to now: every MS decides on their own, e.g.
- England & Wales: Civil Liability (Contribution) Act 1978 (see, eg, Dunleavy (2009))
 - s. 1(1): “[A]ny person liable in respect of any damage suffered by another person **may recover contribution** from any other person liable in respect of the same damage (whether jointly with him or otherwise).”
 - s. 2(2): “Subject to subsection (3) below, in any proceedings for contribution under section 1 above **the amount of the contribution recoverable** from any person shall be such as may be found by the court to be **just and equitable** having regard to the **extent of that person’s responsibility for the damage** in question.”
- Germany: Civil Code
 - § 426 (1) Joint and several debtors are obliged in **equal proportions** in relation to one another **unless otherwise determined**. [...]

Contribution following EU Damages Claims

- DCFR (an attempt at a “European Restatement”):

III. – 4:106: Apportionment between solidary debtors

[...] (2) If two or more debtors have solidary liability for the same damage, their **share of liability as between themselves is equal unless different shares of liability are more appropriate having regard to all the circumstances of the case** and in particular to **fault or to the extent to which** a source of danger for which one of them was **responsible** contributed to the occurrence or extent of the damage.

III. – 4:107: Recourse between solidary debtors

(1) A solidary debtor who has performed more than that debtor’s share has a **right to recover** the excess from any of the other debtors to the extent of each debtor’s unperformed share, together with a share of any costs reasonably incurred. [...]

III. – 4:109: Release or settlement in solidary obligations

(1) When the creditor releases, or reaches a **settlement** with, one solidary debtor, **the other debtors are discharged of liability for the share of that debtor.** [...]

Contribution following EU Damages Claims

- Article 11 of the Damages Directive (as of 9 April 2014):
 - Art 11(1): **General rule of joint and several liability**
 - Art 11(2): Limited **exception for SMEs** (joint and several liability generally only vis-à-vis its direct and indirect purchasers) where
 - market share below 5% “at any time during the infringement” (stop selling for a day?)
 - application of the normal rules would “irretrievably jeopardize its economic viability and cause its assets to lose all their value”
 - SME was not a leader or coercer or recidivist
 - Art. 11(3): Limited **exception for immunity recipient** (joint and several liability generally only vis-à-vis its direct and indirect purchasers/providers; to others only as a last resort)

Contribution following EU Damages Claims

- Article 11 of the Damages Directive (as of 9 April 2014):
 - Art. 11(4), first sentence: “Member States shall ensure that **an infringing undertaking may recover a contribution** from any other infringing undertaking, the **amount of which** shall be **determined in the light of their relative responsibility for the harm caused** by the infringement of competition law.”
 - Second sentence: limit on contribution owed by immunity recipient
 - Art. 11(5): limit on contribution owed by immunity recipient to victims other than direct/indirect purchasers or providers of the infringers (eg umbrella pricing victims, *cf Kone Judgment*; competitors)
- Side note: **Inconsistencies in the SME exception** (eg: “at any time” below 5%; limitation to direct/indirect purchasers, not providers (contrast Art. 11(3)); no limitation for contributions by other infringers (contrast Art. 11(4), second sentence))
- Note: terminology of “undertaking” in Art. 11(4) – **undertaking ≠ legal entity** → **who exactly owes contribution?** See below on *Siemens Österreich*.

II. Contribution in the EU

2. Following Fining Decisions

Contribution Following Fining Decisions

- Under substantive EU competition law, the infringer is the “undertaking”
- **undertaking ≠ legal entity**; undertaking: **single economic unit** that may consist of several legal or natural persons
- Decision has to be addressed to a legal entity
- Practice: usually fining decisions are addressed
 - (1) to the actually infringing subsidiary; and
 - (2) to those parents (etc), that exercised decisive influence over the subsidiary (such exercise being rebuttably presumed where all or nearly all of the shares are owned by the parent)

and these legal entities within an undertaking are **jointly and severally liable**

Contribution Following Fining Decisions

- The question is what the rules are on the **internal allocation between the several legal entities that are, or were at the time of the infringement, part of one and the same undertaking**
- Where these legal undertakings are still part of the same group of companies, this will usually not be a problem (profit/loss shifting within the group easily done – ask Starbucks...)
- The question of the internal allocation becomes practically relevant
 - (a) where interests of **minority shareholders** may be implicated, or
 - (b) where a legal entity has been acquired by another undertaking

Contribution Following Fining Decisions

- This was the Problem in the Gas-Insulated Switchgear Cartel: several restructurings had led to the (simplified) **question to what extent the old parent of an infringing subsidiary had a right to contribution from the subsidiary.**
- One might very well think that the Commission could be satisfied with recovering the fine from one of the jointly and severally liable companies (and it was!)....

Contribution Following Fining Decisions

- ... but the General Court in *Siemens Österreich* (Joined Cases T-122/07 to T-124/07) disagreed: it considered that
 - the concept of joint and several liability for the payment of fines was an **“autonomous concept which must be interpreted by reference to the objectives and system of competition law** of which it forms part and, where necessary, to the general principles deriving from the national systems as a whole” (para. 155)
 - while the nature of this joint and several liability for fines “differs from that of joint debtors of a private-law obligation”, it was “appropriate to seek guidance” from these private-law rules (ibid.)

Contribution Following Fining Decisions

(General Court cont'd)

- it was **exclusively for the Commission to determine the internal allocation of the fine, not for national courts** (para. 157)
- legal entities that are jointly and severally liable for a fine and have paid more than their share have **claims for contribution** against the others (para 158)
- and that, in the absence of an explicit determination, the Commission decision was to be interpreted as imposing **equal shares** in the internal relationship; while the General Court considered private law (para 159)

Contribution Following Fining Decisions

- On appeal, AG Mengozzi largely disagreed with the GC (Joined Cases C-231/11 P to C-233/11 P):
 - While the **Commission has the *power*** to fix the internal allocation where this is necessary for the attainment of the objectives of effective enforcement (paras 54, 59), it generally **does not have an obligation** to do this (paras 56, 58-59) (exception: where the legal entity do)
 - where the Commission does not determine the internal allocation, the **national courts** have the competence to do this (para 64);
 - however, the GC was right that “the concept of joint and several liability for the payment of fines is an **autonomous concept**” (para. 66)

Contribution Following Fining Decisions

- AG Mengozzi cont'd
 - The **right to contribution** “arises logically [!] from the payment by just one person of a debt for which that person is jointly and severally liable ...”
(quaere: Does this mean that Americans defy logic?)
 - However, “the **existence and the exercise of that right are not ... governed by EU law but fall within the scope of national law**” and it falls to the national courts to determine the internal allocation to the extent this has not yet been done by the Commission (paras. 68-70)

Contribution Following Fining Decisions

- AG Mengozzi cont'd
 - **Where the legal entity** at the time of the Commission decision is **no longer part of the same undertaking** as during (part of) the infringement, the **Commission must determine the internal allocation** to provide legal certainty (paras 85-86, 91)
 - For this internal allocation, AG Mengozzi
 - **rejects the GC default rule of equal shares** because (1) rules on obligations in civil law are not applicable without more, and (2) there is no rule of equal shares common to the MS
 - **requires a case-by-case determination of relative fault**, for which he considers relevant factors such as lack of the parent's knowledge of the infringement, instructions not to infringe competition law, its interest in the sector affected by the infringement etc. (para. 87)

Contribution Following Fining Decisions

- CJEU (Joined Cases C-231/11 P to C-233/11 P)
10 April 2014:
 - Principle that the fine has to be specific to the offender and the offence applies only to undertakings in the external perspective, and not to the legal entities making up the undertaking (paras 52-57)
 - The Commission has **no power to determine the internal relationship**: the Commission has no interest in this internal dispute and “neither Regulation 1/2003 **nor EU law in general contain rules for the resolution of such a dispute**” (paras 58-61; see also para. 74)

Contribution Following Fining Decisions

- CJEU (Joined Cases C-231/11 P to C-233/11 P)
10 April 2014:
 - Where there is no contractual arrangement, “it is **for the national courts to determine those shares, in a manner consistent with EU law, by applying the national law** applicable to the dispute.” (para. 62: similarly, para. 70)
 - Para 63 implies that the “EU law” mentioned in para. 62 is restricted to (a) the identity of those jointly and severally liable and (b) the amount owed jointly and severally by each legal entity
 - Accordingly, the General Court committed errors in law when stating that
 - (a) it was for the Commission to determine the internal allocation;
 - (b) “joint and several liability for the payment of fines is an autonomous concept”;
 - (c) there is a presumption of equal shares

Contribution Following Fining Decisions

- CJEU (Joined Cases C-231/11 P to C-233/11 P)

10 April 2014:

- As mentioned above, there is an indication that the “EU law” to be observed by the national courts are **only the identity of those jointly and severally liable and of the maximum amount to which each legal entity is liable** (para. 63).
- However, para. 74 states: “**in principle [?], EU law does not preclude the internal allocation** of such a fine in accordance with a rule of national law which determines the individual shares of those held jointly and severally liable by taking account of their **relative responsibility or culpability** for the commission of the infringement [...], as well as, **where appropriate [?], a rule applicable by default, under which, if [!] it cannot be shown by the companies claiming that there should not be equal shares that some companies have a greater degree of responsibility** than others [...], the companies concerned must be considered to be **equally liable**.”

Contribution Following Fining Decisions

- CJEU (Joined Cases C-231/11 P to C-233/11 P)
10 April 2014:
 - First, the entire paragraph 71 would be completely unnecessary if the Court wanted to restrict the EU principles to be obeyed by the national courts to the identity and the maximum amount.
 - Secondly, the paragraph contains various qualifiers (“in principle” default rule acceptable “if” it cannot be shown that there are different degrees of responsibility etc).

Contribution Following Fining Decisions

- CJEU (Joined Cases C-231/11 P to C-233/11 P)
10 April 2014:
 - Thirdly, the options considered not to be precluded “in principle” in the paragraph are not comprehensive. Not mentioned are, for example:
 - the **no-contribution rule**;
 - a consideration of **who profited from the infringement** (cf. German Federal Court of Justice in *Gigaset*: the lower court considered that the infringement, though committed by the subsidiary, largely benefitted the parent, either through profit-shifting or at least by increasing the share price).
 - And, as the Supreme Court noted in *Texas Industries*:
“damages may be allocated according to **market shares, relative profits, sales to the particular plaintiff, the role in the organization and operation** of the conspiracy, **or simply *pro rata***, assessing an equal amount against each participant”

Contribution Following Fining Decisions

- The General Court's judgment had irritated the German Federal Court of Justice, which was seised of a similar case (in the Calcium Carbide cartel)
- Before the CJEU had ruled on the appeal in *Siemens Österreich*, the German Federal Court of Justice made a preliminary reference request to the CJEU (Case C-451/13 (*Gigaset*)), asking
 1. Is the GC assumption of the Commission's exclusive competence for the determination of the internal allocation (and of equal shares if not exercised) correct?
 2. Even if this is not the case: Does European Union law contain provisions as to how a fine should be apportioned among joint and several debtors?
- In light of the CJEU judgment in *Siemens Österreich*, the first question is clearly "no"; but the response to the second question will be interesting.

III. Questions in Lieu of a Conclusion

Questions in Lieu of a Conclusion

- Will the same principles be applied for contribution actions following fines and damages claims?
- Are there EU principles in the fines scenario (see *Gigaset*), or are MS free to use, eg, a “no-contribution rule”? Would this be advisable (esp. in the light of the Polinsky & Shavell considerations of systematic bias, and the incentive for an undertaking to pay the full fine voluntarily)?
- How will the “relative responsibility” in Art. 11(4) Damages Directive be determined? Relative market shares? Profits? Culpability? ...