

Conditions for qualifying as a serial cartel offender clarified

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Parent companies may pay more dearly for their subsidiaries' cartel crimes than they may have expected. The European Court of Justice has clarified that a parent company can be considered a serial cartel offender for earlier infringements by its subsidiaries, even without it having been an addressee of the earlier infringement decisions. To prevent cartel infringements of times past from coming back to bite, parent companies should not only implement an effective competition compliance programme at subsidiary-level, but should also keep track of their subsidiaries' earlier cartel infringements.

In December 2007, the [European Commission](#) imposed a fine on energy company Eni for its participation in a cartel in the chloroprene rubber sector. The Commission increased Eni's fine based on the aggravating circumstance of recidivism because two of its subsidiaries had already been addressees of previous Commission cartel decisions in 1986 and 1994. According to the [General Court](#), Eni's rights of defence would be violated if it were held liable for a previous infringement for which it had not been penalised by the Commission or in the administrative proceedings leading up to the decision. The General Court felt that Eni had not been given an opportunity to dispute that it exercised decisive influence over its subsidiaries at the time of the earlier infringements.

The [European Court of Justice](#) overturned the General Court's ruling on this point. It agreed with the Commission that in order to qualify as a repeat offender, it was not necessary for parent company Eni to have been the addressee of the earlier cartel decisions, as long as it could defend itself at the time that the allegations of repeated infringements were made against it.

Consequently, where the Commission intends to impute a cartel infringement to a parent company and invoke repeated infringement against it, the statement of objections must contain all the information necessary for that parent company to defend itself. This includes information proving that the parent company formed, at the time of the first infringement, a single undertaking with the subsidiary found to have committed the first infringement. The Commission must prove that the parent company involved in the second infringement had already exercised, at the time of the first infringement, a decisive influence over the subsidiary involved in the first infringement. According to the Court of Justice, it does not matter whether the cartel infringements were committed decades apart, as long as the EU courts take into account the possible difficulties to provide evidence caused by the time lapsed between the first and subsequent infringement.

To avoid the Commission from applying a recidivism multiplier to a cartel fine, parent companies should not only have effective

compliance programmes to prevent subsidiaries from engaging in cartel infringements, but they should also keep track of their subsidiaries' past cartel infringements.