

Competition Law Enforcement and Corporate Group Liability—Adjusting the veil

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☞ Cartels; Competition law; Corporate governance; Corporate personality; Enforcement; EU law; Groups of companies; Limited liability; Tortious liability

Introduction

Recent English and European Court judgments have highlighted how tortious liability may erode the protection afforded by the twin notions of separate legal personality and limited liability in the context of corporate groups. This judicial erosion reflects the differing efficiency claims of corporate structures on the one hand and, on the other, the markets within which corporate groups operate. The scope of this tortious liability hinges on differing concepts of corporate control under EU and English law. These judgments make a significant contribution to the academic debate as to whether notions of fairness or wider public policy goals should render a parent company liable for the acts of its subsidiary.

The impact of these judicial developments will be analysed in the context of the exposure faced by members of a corporate group, should a member of that group engage in anti-competitive practices in breach of either EU or UK competition law.¹ This article assesses the increasingly urgent need to ensure full compliance with competition law on a group-wide basis and the resultant impact on corporate group liability and corporate governance arising from those compliance efforts.

The judicial developments under consideration appear to be at odds with the long-standing concept of separate corporate personality² and the principle of limited

liability,³ namely that shareholders (whether corporate or individual) are shielded from the debts and liabilities of the company in which they have invested, for which that company alone is responsible. The EU and English judgments under consideration indicate that shareholders (in particular corporate shareholders) in companies that fail to comply with EU or UK competition law may see a significant erosion of the benefits afforded by these principles. The cases demonstrate the capacity of EU competition law to impose much greater risks on a corporate shareholder where the latter exercises control or decisive influence over a subsidiary and a concomitant need for direct oversight by the parent of that subsidiary's activities. Recent English cases indicate that, the more parent companies seek to ensure group-wide compliance in order to avoid fines, the greater the risk at common law that a duty of care may have been assumed by the parent to ensure the efficacy of that compliance programme. Where a shareholder or director procures a breach of competition law, tortious liability can be direct.

EU and UK competition law

The two principal EU competition law provisions of the Treaty on the Functioning of the European Union (TFEU), arts 101 and 102, prohibit “undertakings” (an entity “engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”)⁴ from entering into anti-competitive agreements or abusing a position of dominance.⁵ Whilst the term “undertaking” was not defined in the original EEC Treaty (or in any successor Treaties), the Court of Justice of the European Union (CJEU) has defined the term as an “economic unit” that can consist of natural or legal persons.⁶ As Wils has pointed out, “the concept of [an] undertaking is an economic one.”⁷

EU competition law acknowledges that companies within a corporate group may, in reality, comprise a single enterprise. The CJEU has ruled that undertakings can comprise a single economic entity if they:

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¹ This article will not address the issue of potential criminal liability arising from competition law violations. For instance, an employee who dishonestly engages in the “hard core” cartel offence of bid-rigging price fixing, customer or market sharing risks a custodial sentence of up to five years and an unlimited fine under s.188 of the Enterprise Act 2002; Section 188 has been amended by the Enterprise and Regulatory Reform Act 2013 so as to remove the dishonesty requirement, subject to potential defences relating to the disclosure of relevant arrangements.

² Incorporation pursuant to an enabling statute was first introduced in England by the Joint Stock Companies Act 1844, with limited liability following under the Limited Liability Act 1855; prior to these legislative developments corporate recognition in England generally required the conferral of a charter from the Crown or an Act of Parliament.

³ *Salomon v Salomon and Co Ltd* [1897] A.C. 22 upheld the concept of separate legal personality, distinct from that of the shareholders under English law and this has been reaffirmed in numerous cases such as *Lee v Lee's Air Farming* [1961] A.C. 12 and *Adams v Cape Industries Plc* [1990] Ch. 433.

⁴ *Höfner v Macrotron* (C-41/90) [1991] E.C.R. I-1979 at [21].

⁵ The term “undertaking” has the same meaning under both arts 101 and 102 TFEU: *Societe Italiano Vetro SpA v Commission of the European Communities* (T-68/89) [1992] E.C.R. II-1403 at [357]–[358].

⁶ *Hydrotherm Geratebau GmbH v Compact de Dott Ing Mario Andreoli & CSAS* (170/83) [1984] E.C.R. 2999; an undertaking comprises “... a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long term basis ...”: *Shell v Commission* (T-11/89) [1992] E.C.R. II-757 at [312].

⁷ Wouter P.J. Wils, “The undertaking as subject of EC competition law and the imputation of infringements to natural or legal persons” [2000] E.L.Rev. 99.

“... form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.”⁸

In *Viho v Commission*⁹ the CJEU explained the concept of the “single economic unit” as being based on the lack of autonomy enjoyed by a wholly-owned subsidiary, the commercial behaviour of which is directed by its parent. The EU Commission’s guidance relating to horizontal co-operation agreements¹⁰ emphasises that a company exercising decisive influence over another (and all other companies over which such influence is exercised by that parent) form a single economic unit and hence comprise one undertaking. Agreements entered into between such controlling and controlled companies, as a single undertaking, are not subject to art.101 TFEU. However, any anti-competitive agreement entered into with a third party by any such companies (or, where the companies in question enjoy dominance, any abuse practised by such a company) are ones for which each such controlled and controlling company is jointly and severally liable under the same doctrine. Thus, a parent company which enjoys “decisive influence” over a subsidiary is at appreciable risk of being deemed at fault for competition law breaches engaged in by that subsidiary and hence jointly and severally liable with it for the consequent administrative fines that the latter incurs.

There is a resultant issue, namely the degree of exposure to civil actions faced by members of a corporate group in respect of breaches of competition law. This question is gradually being determined through an evolving and crab-like movement by the English judiciary towards acceptance of the EU single economic unit doctrine, with its attendant group liability. Pursuant to these judicial developments, a member of a corporate group (where that group relationship falls within the single economic unit concept) will seemingly be liable in tort¹¹ for breaches of EU and UK competition law

whenever it implements a group company-initiated anti-competitive arrangement, notwithstanding that it may not have explicit knowledge of any underlying illegality.

Under a different concept of parent company control, the English courts may conclude that group policy-setting and compliance arrangements constitute an assumption of liability to third parties. This may expose the parent company to tortious claims at common law from those to whom it has assumed this responsibility if those group policies or compliance programmes prove defective.

The nature of English tortious liability for breaches of EU and UK competition law

Both the EU Commission and the United Kingdom Office of Fair Trading (OFT)¹² enjoy the power to impose fines on undertakings (most commonly companies)¹³ in breach of competition law of up to 10 per cent of group global turnover.¹⁴

In addition to the imposition of administrative fines by the EU Commission or OFT, under English law any violation of arts 101 and 102 TFEU¹⁵ will be regarded as a statutory tort.¹⁶ Section 2(1) of the European Communities Act 1972 provides that all “rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Treaties”, are “in accordance with the Treaties ... without further enactment to be given legal effect ...” in the United Kingdom. The House of Lords held in *Garden Cottage Foods Ltd v Milk Marketing Board*,¹⁷ that a remedy in damages is available to compensate those individuals who have suffered losses by virtue of a breach of EU competition law. This principle was reaffirmed in *Crehan v Inntrepreneur Pub Co CPC*¹⁸ and in a subsequent High Court judgment, *Provimi Ltd v Aventis Animal Nutrition SA*.¹⁹

Articles 101 or 102 TFEU confer directly effective rights on individuals²⁰ and the CJEU confirmed, in its judgment in *Courage Ltd v Crehan*,²¹ that damages must be available for breaches of EU competition law. The

⁸ *Bodson v SA Pompes Funèbres des Régions Libérées SA* (30/87) [1988] E.C.R. 2479 at [19].

⁹ *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457.

¹⁰ Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para.11.

¹¹ In *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.7)* [2001] 1 W.L.R. 942 John Toulmin QC defined a tort as “a breach of non-contractual duty which gives rise to a private law right to the party injured to recover compensatory damages at common law from the party causing the injury”.

¹² Established as a corporate body responsible for competition law enforcement under s.1 of the Enterprise Act 2002. The OFT is to be abolished under Pt 4 of the Enterprise and Regulatory Reform Act 2013 (it will be replaced by the Competition and Markets Authority established under the 2013 Act).

¹³ Although individuals can also be undertakings where they engage in independent commercial activity: see for instance Case IV/28.996 *Reuter/BASF* [1976] OJ L254/40.

¹⁴ Council Regulation of 16 December 2002 (EC) 1/2003 [2003] OJ L1/1, art.23 of which enables the EU Commission to fine companies up to 10% of worldwide group turnover for breaches of the principal competition law prohibitions, arts 101 and 102 TFEU; ss.36 and 38 of the Competition Act 1998 together with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 ((SI 2000/3090 (as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)) specify that the OFT may impose penalties of up to 10% of group worldwide turnover in respect of violations of either arts 101 and 102 TFEU or the Chs I and II prohibitions contained in the 1998 Act.

¹⁵ Which have been held to be directly enforceable Treaty provisions in *Belgische Radio en Televisie v SABAM SV* (127/73) [1974] E.C.R. 313.

¹⁶ Namely tortious liability arising under obligations imposed by statute, rather than the civil courts. In *London Passenger Transport Board v Upson* [1949] A.C. 155, Lord Wright observed that a breach of statutory duty “... is a common law action based on the purpose of the statute ...”. In *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.7)* [2001] 1 W.L.R. 942 the judge held that the combination of a breach of an EU Treaty provision relating to freedom of establishment (which had direct effect) and s.2(1) of the European Communities Act 1972 was a breach of statutory duty. As regards the categorisation of forms of English statutory tort, in *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 it was held that breaches of statutory duty are divisible into four categories. These categories comprise statutory strict liability, a right arising from the careless performance of a statutory duty (existing independently of a common law right), a statutory duty giving rise to a common law right of action and misfeasance in public office. In categorising the duty much will depend on the purpose of and language used within the statute.

¹⁷ *Garden Cottage Foods Ltd v Milk Marketing Board* [1983] 3 W.L.R. 143.

¹⁸ *Crehan v Inntrepreneur Pub Co CPC* [2004] EWCA Civ 637 at [156].

¹⁹ *Provimi Ltd v Aventis Animal Nutrition SA* [2003] E.C.C. 29 at [23].

²⁰ *Belgische Radio en Televisie* [1974] E.C.R. 313.

²¹ *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297.

CJEU held in *Manfredi v Lloyd Adriatico*²² (citing its decision in *Crehan v Courage*) that art.101(1) TFEU has direct effect and creates rights for individuals harmed by any infringement of its provisions, which a national court must safeguard. The CJEU observed in the *Manfredi* case that art.101(2) TFEU renders any agreements prohibited pursuant to art.101 automatically void and that the prohibition on anti-competitive agreements is absolute.²³ Thus, any individual can rely on a breach of art.101 TFEU before a national court and seek compensation for losses caused by an anti-competitive agreement, including economic loss,²⁴ where the agreement restricts EU inter-state trade by object or by effect and does not merit an exemption under art.101(3).²⁵

Section 60 of the Competition Act 1998 further requires English courts to apply EU legal principles (including that of the single economic unit) when applying the similar prohibitions relating to anti-competitive agreements or abuse of dominance (having a territorial impact restricted to the United Kingdom) contained in Chs I and II of the Competition Act 1998.²⁶ A further effect of s.60 is to import the EU right to damages into the UK competition law regime.

To date, English civil claims have been relatively few in number, with most private damages cases²⁷ being “follow-on” ones, namely cases filed in the aftermath of a decision by the EU Commission or OFT.²⁸ An example is that of *Devenish Nutrition v Sanofi-Aventis*,²⁹ where damages were sought in a follow-on action subsequent to the EU Commission’s finding that an infringement of art.101(1) TFEU had occurred (in its decision in the vitamins cartel case).³⁰ In *Devenish*, the English High Court³¹ and Court of Appeal³² confirmed that damages awarded for violations of EU competition law are tort-based compensatory damages which should restore the claimant to the position it would have been in “but

for” the infringement. The English High Court noted in *Arkin v Borchard Lines (No.4)*, when considering allegations that a liner conference had operated a price fixing cartel in breach of art.101 TFEU, that the issue of causation should be approached:

“...on the basis of commonsense, there being ... an overarching concept that the chain of causation can be broken only if it is concluded that the claimant’s own conduct displaced that of the defendant as the predominant cause of the claimant’s loss.”³³

The informational asymmetries, legal costs, risks and procedural hurdles which claimants must surmount are significant,³⁴ aspects acknowledged by the EU Commission, which has been seeking to encourage a greater use of private actions by third parties whose interests have been harmed by violations of EU competition law.³⁵ Currently, competition law actions are usually brought by large companies that have suffered losses through being charged cartelised prices by their suppliers. Despite existing procedural difficulties, civil claims are on the increase. Thus, an errant subsidiary company can expose its corporate group to significant regulatory fines and the prospect of civil litigation, financial risks which directors of English companies have a duty to avoid.³⁶

These risks may become even more pronounced in the future, as the UK Government has recently published a draft Consumer Rights Bill designed to assist consumers and businesses, in bringing competition law claims.³⁷ Whether these reforms will bring about the desired result and expand the number of English civil actions brought by less well-funded claimants is, as yet, uncertain.

²² *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2006] E.C.R. I-6619.

²³ *Manfredi* [2006] E.C.R. I-6619 at [56] and [57].

²⁴ *Manfredi* [2006] E.C.R. I-6619 at [58]–[60].

²⁵ Article 101(3) exempts agreements that might otherwise infringe art.101(1) where they promote distribution or technological advancement, benefit consumers, contain proportionate restrictions and do not substantially eliminate competition.

²⁶ Section 60 Competition Act 1998 provides that, in order to achieve consistency in the manner in which competition law issues are addressed where there is an impact on trade within the UK the English courts must have regard to “the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law” relating to competition within the EU. The court must, in addition, have regard to any relevant decision or statement of the EU Commission.

²⁷ See Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Brussels, 2004, p.1; and Centre for European Policy Studies, Erasmus University Rotterdam and LUISS Guido Carli University, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, Brussels, Rotterdam and Roma, 2007.

²⁸ Section 58A of the Competition Act 1998 stipulates that decisions of the OFT and the Competition Appeal Tribunal (a specialist body created by the 1998 Act to hear appeals from decisions of the OFT) are binding on English courts in the context of damages actions. Section 47A of the Competition Act 1998 establishes a statutory procedure that allows the Competition Appeal Tribunal to determine the quantum of monetary claims arising from decisions reached by the EU Commission or OFT that breaches of the Competition Act 1998 or arts 101 and 102 TFEU have occurred. This statutory procedure is in addition to the jurisdiction of the English courts to determine damages arising from any such breaches.

²⁹ *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086.

³⁰ EU Commission decision of 10 January [2003] OJ L6/1.

³¹ *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 (Ch).

³² *Devenish* [2008] EWCA Civ 1086.

³³ *Arkin v Borchard Lines (No.4)* [2003] EWHC 687 (Comm) at [536].

³⁴ See, the weaknesses in the judicial procedures of Member States identified in the study “Collective Redress in Antitrust” released on June 13, 2012 by Paolo Buccirossi and Massimo Tognoni (both of LEAR SAS) and Michele Carpagano, law professor at Trento University available at: <http://www.europarl.europa.eu/committees/en/econ/home.html> [Accessed November 26, 2013].

³⁵ See the EC’s *Green and White Papers on damages actions for breach of the EC antitrust rules* (respectively COM(2005) 672 final December 19, 2005 and COM/2008/0165 final April 2, 2008) respectively available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF> [Accessed November 26, 2013] and Proposal for a Directive on certain rules governing actions for damages under national law for competition law infringements Strasbourg June 11, 2013 Com(2013) 404 Final.

³⁶ Under their statutory duty of care: see s.174 Companies Act 2006.

³⁷ The draft Bill is available at: <https://www.gov.uk/government/publications/draft-consumer-rights-bill> and the Consultation Response to “Private Actions in Competition Law” is available at: <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> [Accessed November 26, 2013].

Corporate governance

Given the danger of administrative fines, together with the associated prospect of damages actions, compliance with competition law is an increasingly urgent preoccupation at board level for English companies. UK legislation and the enforcement activities of the OFT require directors to secure compliance with competition law. The risks faced by directors should be reflected in their approach to governance, with these fears at board level liable to spur directors to introduce corporate compliance programmes. However, governance models must result in effective compliance, since the EU General Court (GCEU) has stressed that effective compliance with EU competition law is more important than compliance with corporate governance rules and that compliance with national governance rules offers no defence to the risk of group-based competition law liability.³⁸

The pressure created by this external regulatory threat and the legislative moves designed to facilitate civil action reinforcing its potency, is underpinned by the Parliamentary attention being paid to governance. The UK Government, in the context of its recent scrutiny of the significant failures in oversight within the banking sector, has observed that effective governance has important societal benefits. Good governance is perceived to be “a critical characteristic of a business environment that promotes sustainable growth and makes the UK an attractive place for business investment.”³⁹

In general terms, in a common law context, it is for the directors of a company to manage its affairs. As is well known, Berle and Means⁴⁰ identified the problems associated with the separation of ownership and control, particularly in companies with a large capital base and dispersed shareholdings.⁴¹ Corporate governance has often been regarded as a means of addressing the problem of principal and agent, with its attendant risk that directors may advance their own interests at the expense of those of the shareholders.⁴² This perspective has been challenged, for instance by Bainbridge,⁴³ who argues that

shareholder apathy, collective action problems, the lack of sufficient economic benefit to justify shareholder monitoring costs and the problem of free riding by passive shareholders all render that separation an “essential economic characteristic” of the corporation and the creation of “a central decision-making body vested with the power of fiat” an efficient solution. Freeman et al.⁴⁴ adopt a more nuanced approach, placing the agency problem in its historical and societal context. Their in-depth analysis of early forms of corporate governance leads them to conclude that:

“... the social and political context in which a firm operates plays an important role in creating the conditions for the emergence of particular governance forms. This is was as true in 1800 as it is today.”⁴⁵

Corporate governance is a combination of a state’s legal framework and voluntarily introduced corporate practices, designed to ensure director accountability and avert risk whilst still encouraging entrepreneurial activity. The EU Commission’s approach to corporate governance (in its 2003 Action Plan)⁴⁶ acknowledges the unique and path-dependent nature of Member State models and the need to respect their differences under the principles of proportionality and subsidiarity. The EU Commission has recoiled from seeking to introduce the concept of group liability,⁴⁷ whilst endeavouring to strengthen the rights of shareholders.⁴⁸ Conversely, the EU competition law developments under consideration move entirely in the opposite direction. They impose corporate group liability, show no deference to the importance attached to adherence to national corporate governance rules and leave open the prospect of a greater focus on a wider range of stakeholder interests.

It is not possible to review the concept of corporate governance comprehensively in the context of this article and, in particular, it will not address the specific

³⁸ *Dow Chemical Co v European Commission* (T-77/08) [2012] 4 C.M.L.R. 19.

³⁹ The Government’s response to the Parliamentary Commission on Banking Standards Cm 8661 July 2013, para.3.6 available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211047/gov_response_to_the_parliamentary_commission_on_banking_standards.pdf [Accessed November 26, 2013].

⁴⁰ Berle and Means, *The Modern Corporation and Private Property*, 2nd edn (New York: Harcourt, Brace and World, 1967).

⁴¹ The ubiquity of which among UK listed companies is referred to by John Armour, Simon Deakin, and Suzanne Konzelmann, “Shareholder Primacy and the Trajectory of UK Corporate Governance” (2003) 41(3) *British Journal of Industrial Relations* 513.

⁴² Andrei Shleifer and Robert W. Vishny, “A Survey of Corporate Governance” (1997) 52(2) *The Journal of Finance* 737.

⁴³ Stephen M. Bainbridge, “Shareholder Activism in the Obama Era” in F. Scott Kieff and Troy A. Paredes (eds), *Perspectives on Corporate Governance* (Cambridge University Press, 2013).

⁴⁴ Mark Freeman, Robin Pearson and James Taylor, *Shareholder Democracies? Corporate Governance in Britain & Ireland before 1850* (University of Chicago Press, 2012).

⁴⁵ Freeman, Pearson and Taylor, *Shareholder Democracies? Corporate Governance in Britain & Ireland before 1850* (2012), p.7.

⁴⁶ Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward COM/2003/0284 final of 21 May 2003 available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0284:EN:NOT> [Accessed November 26, 2013].

⁴⁷ The EU Commission circulated a draft “Ninth Company Law Directive on the Conduct of Groups containing a Public Limited Company as a Subsidiary” among Member States in December 1984 for consultation. The Directive would have applied when a public limited was a subsidiary of another undertaking (either another public limited company or a natural or legal person). It contained detailed rules as to the conduct of a “parent undertaking” towards a public limited company subsidiary (including the liability of the parent undertaking for damage to that subsidiary and for its debts). There was very little support for such a group liability law and it was withdrawn.

⁴⁸ The EU Commission has sought to strengthen shareholder’s rights through the adoption of Directive 2007/36/EC of the European Parliament and of the Council on the exercise of certain rights of shareholders in listed companies, implemented in the United Kingdom by the Companies (Shareholders’ Rights) Regulations 2009 (SI 2009/1632); the EU Commission has also adopted Recommendations aimed at promoting the role of independent, non-executive, directors and on directors’ remuneration — see Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC); Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC) [2004] OJ L38/55; Commission Recommendation complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies Brussels, 30/4/2009 C(2009) 3177; the focus of the EU Commission has principally been on governance within companies whose shares are listed on regulated markets.

governance rules applicable to public companies. Nonetheless, certain key relevant elements will be highlighted.

Corporate governance, in very broad terms, relates to management accountability. The EU Commission has indicated that:

“Corporate governance, which can be defined in many ways, is usually understood as the system by which companies are directed and controlled ...”⁴⁹

The OECD⁵⁰ has identified governance as the relationships between a “company’s management, its board, its shareholders and other stakeholders”⁵¹ and as comprising

“... elements of legislation, regulation, self-regulatory arrangements, voluntary commitments and business practices that are the result of a country’s specific circumstances, history and tradition.”⁵²

In addition to theories which emphasise the role of governance in protecting the interests of shareholders, stakeholder theory has focused on a wider range of constituents, although defining the exact parameters of the stakeholder constituency is a far from certain exercise⁵³ and embracing too broad a range of stakeholders has been criticised as undermining the relevance of stakeholder theory.⁵⁴

The regulatory environment can contribute to good governance. Deakin has observed that:

“Employment law, insolvency law and tax law ... interface with company law at numerous points, and the law of the business enterprise cannot be viewed in the round unless the interactions between these areas of law are taken into account.”⁵⁵

Recently, the regulatory focus has been firmly on the banking sector. The UK Government has emphasised the relationship between governance and competition in its response to the Parliamentary Commission on Banking Standards.⁵⁶ It has proposed that the Prudential Regulation Authority should have a secondary competition objective in order to improve banking standards. It describes

governance as being “... not just about process, but about how management exercise judgement, the practicalities of risk management, and behaviour of the wider organisation.”⁵⁷

The significant economic harm that poor banking governance can inflict on society at large highlights the need to identify those for whose benefit corporate governance should operate. Freeman and McVea⁵⁸ recognise that stakeholders have been divided into those whose interests are societal and environmental in nature and those where the company has a commercial relationship. They call for a pragmatic, strategy-based approach that is focused on the analysis of “concrete business situations” and which pays regard to “the operating environment of a firm.” Thus, for them, the categorisation of stakeholders whose interests should be recognised by directors is a fluid exercise, based on company strategy and can be corporate value-based.

One factor relevant to the issue of how shareholders or stakeholders can be assured of benefiting from a governance regime is the degree of legal protection afforded to their rights. As Vives has noted, “[l]egal protection measures the equality of corporate governance in at least three ways...” namely, shareholder rights (such as voting rights on mergers and board appointments), the rights of creditors and the “level and quality of law enforcement”.⁵⁹ Although the EU Commission would like to see greater convergence between Member States in the field of corporate governance, as noted earlier, it has largely focused on strengthening shareholders rights,⁶⁰ whilst leaving the general design and enforceability of governance frameworks as a matter to be determined by national law.

Johnston believes that the route out of historic path dependency and divergence in national governance models is the nature of corporate decision taking and that the governance focus should be on actors and their interests,⁶¹ a position to some degree echoed by relatively recent English company law reforms. Under the Companies Act 2006, the United Kingdom has opted for the retention of shareholder primacy in specifying the scope of directors’ legal obligations, albeit in

⁴⁹ Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward COM/2003/0284 final of 21 May 2003, p.10, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0284:EN:NOT> [Accessed November 26, 2013].

⁵⁰ The OECD Principles of Corporate Governance, first issued in 1999 and revised in 2004, available at: <http://www.oecd.org/corporate/corporateaffairs/corporategovernanceprinciples/oecdprinciplesofcorporategovernance.htm> [Accessed November 26, 2013].

⁵¹ The OECD Principles of Corporate Governance, first issued in 1999 and revised in 2004, p.11, available at: <http://www.oecd.org/corporate/corporateaffairs/corporategovernanceprinciples/oecdprinciplesofcorporategovernance.htm> [Accessed November 26, 2013].

⁵² The OECD Principles of Corporate Governance, first issued in 1999 and revised in 2004, p.29, available at: <http://www.oecd.org/corporate/corporateaffairs/corporategovernanceprinciples/oecdprinciplesofcorporategovernance.htm> [Accessed November 26, 2013].

⁵³ See Andrew Keay, *The Corporate Objective* (Edward Elgar, 2011), p.139.

⁵⁴ Simon Deakin, and Alan Hughes (eds), *Enterprise and Community: New Directions in Corporate Governance* (Blackwell, 1997), p.4.

⁵⁵ S. Deakin, “Corporate governance and the financial crisis” in C. Williams and P. Zumbansen (eds), *The Embedded Firm: Corporate Governance, Labor and Finance Capitalism* (Cambridge University Press, 2011), p.21.

⁵⁶ The Government’s response to the Parliamentary Commission on Banking Standards Cm 8661 July 2013, p.6, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211047/gov_response_to_the_parliamentary_commission_on_banking_standards.pdf [Accessed November 26, 2013].

⁵⁷ The Government’s response to the Parliamentary Commission on Banking Standards Cm 8661 July 2013, para.3.5, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211047/gov_response_to_the_parliamentary_commission_on_banking_standards.pdf [Accessed November 26, 2013].

⁵⁸ Edward R. Freeman and John McVea, “A Stakeholder Approach to Strategic Management”, Darden Graduate School of Business Administration University of Virginia Working Paper No.01-02, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=263511 [Accessed November 26, 2013].

⁵⁹ Xavier Vives (ed.), *Corporate Governance: Theoretical and Empirical Perspectives* (Cambridge University Press, 2000), pp.3–4.

⁶⁰ Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward COM/2003/0284 final of 21 May 2003, p.11–13, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0284:EN:NOT> [Accessed November 26, 2013].

⁶¹ Andrew Johnston, *EC Regulation of Corporate Governance* (Cambridge University Press, 2009).

circumstances where the interests of shareholders must be assessed by reference to the possible impact of company behaviour on a wider range of constituents. Section 172 of the Companies Act 2006 imposes a duty on directors to act in a way they consider, in good faith, would be most likely to promote the success of the company. In doing so they are required to have regard to the long-term consequences of their decisions, the interests of the company's employees, relationships with suppliers and with customers and the impact of the decision on the community and environment and the desirability of maintaining a reputation for high standards of business conduct.⁶²

Competition law can create a considerable impact on board decision taking. European Union competition law is concerned with a business's relationships with customers, suppliers, consumers and competitors, but only to the extent that any harmful behaviour is injurious to "consumer welfare".⁶³ The risk of fines and corporate civil liability are significant and thus are factors which should weigh heavily on board deliberations. As to individual liability, a director is not normally regarded as an undertaking if employed⁶⁴ and thus is not directly subject to sanction under arts 101 and 102 TFEU. However, a director can be disqualified under the Company Directors Disqualification Act 1986 (as amended by the Enterprise Act 2002), which provides for the disqualification of a director who is demonstrated to be "unfit" in the context of company breaches of UK or EU competition law.⁶⁵ In addition, the United Kingdom has opted to create the hard-core cartel offence, for which executives can be criminally liable under s.188 of the Enterprise Act 2002.⁶⁶ These measures should incentivise directors to be vigilant in seeking to avoid adopting any market foreclosing or anti-competitive practices that are harmful to corporate customers, suppliers and competitors and thus have a tendency to embed compliance within governance. All this suggests that, the more actively competition law is enforced, both publicly and privately, the more the directors will need to bear in mind the

potentially harmful impact of non-compliance with competition law on those with whom the company interacts commercially.

The interaction of governance with compliance

Governance operates as a mechanism for increasing director accountability and, at the same time, envisages the introduction of systems of control and risk avoidance. Corporate compliance programmes seek to minimise corporate risk more specifically. Such programmes are designed to safeguard a company from administrative sanctions or civil actions arising from breaches of the regulatory environment in which it operates. However, there is an increasing recognition that the two overlap significantly. For instance, prospective directors, unfamiliar with the operational history of a company, may well be unwilling to accept an appointment to the board unless they receive assurances regarding the company's attitude to compliance. This is particularly true of non-executive directors, who have a monitoring rather than an operational role. The Institute of Chartered Secretaries has issued a Guidance Note for prospective directors which, whilst principally concerning itself with governance issues, also draws the incoming director's attention to matters such as the company's competitive position, its market share, whether it undertakes activities in a regulated sector, its relationship with any regulator, the company's culture and values and the principal risks it faces.⁶⁷

An undertaking is vulnerable to competition law challenge where employees engage in activities that are in breach of the prohibitions contained in arts 101 and 102 TFEU whilst acting within the scope of their employment. This is the case even if these actions by the employee are against company policy, since any "... action by a person who is authorised to act on behalf of the undertaking suffices ..." to create this regulatory exposure.⁶⁸ There may be little prospect of recouping the regulatory fines that the corporate employer has incurred from the employees who have transgressed since, under

⁶² Section 172 of the Companies Act 2006 (which specifies the director's legal duty to promote the success of the company) provides that:

"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company."

This obligation is, however, ultimately only enforceable by one of the stakeholders, namely the shareholders.

⁶³ "Economic welfare is the standard concept used in economics to measure how an industry performs. It is a measure which aggregates the welfare (or surplus) of different groups in the economy... In each given industry, welfare is given by total surplus, that is the sum of consumer surplus and producer surplus...": Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), p.18. The fact that on a perfectly competitive market the market price equals the marginal cost is said to maximise consumer welfare by leading to allocative and productive efficiency, see A. Jones and B. Sufrin, *EC Competition Law: Text, Cases and Materials*, 3rd edn (Oxford University Press, 2008), p.8.

⁶⁴ "Dependent" labour is not considered to be an undertaking: see *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) [1999] E.C.R. I-5751 and *Criminal proceedings against Becu* (C-22/98) [1999] E.C.R. I-5665.

⁶⁵ Section 204 of the Enterprise Act 2002 amended the Company Directors Disqualification Act 1986 by adding ss.9A-E. Section 9A allows the court to make a disqualification order against and s.9B allows regulators to seek a voluntary undertaking from any director whose company was involved in any breach of UK or EU competition law and whose conduct renders him "unfit" to act as a director.

⁶⁶ As indicated earlier (see fn.1 above) this article will not address the issue of potential criminal liability arising from competition law violations.

⁶⁷ The Guidance was formerly available at: <http://www.icsaglobal.com/policy-guidance/guidance-and-reports/guidance-notes-form?doc=4072> and is now referred to at: <https://www.icsaglobal.com/about-icsa/latest-from-icsa/article/ddpress/> [Accessed November 26, 2013].

⁶⁸ *Musique Diffusion Française SA v Commission of the European Communities* (100/80) [1983] E.C.R. 1825 at [97].

the English doctrine of *ex turpi causa*, these must remain with the fined entity if competition law enforcement policies are to be effective.⁶⁹

Compliance programmes are directed at all those employees operating within the company whose operational activities may expose the company to risk. They tend to be delivered on a “top-down” basis, with senior executives and directors publicly expressing their support for the corporate compliance programme. The OFT has stressed the responsibilities of directors for ensuring effective compliance in the following terms:

“The OFT considers that directors play a key role in establishing and maintaining an effective competition law compliance culture within their company. Without the full commitment of individual directors to compliance with competition law, any compliance activities undertaken by the company are unlikely to be effective.”⁷⁰

Compliance programmes are not aimed expressly at directors, nor are they generated specifically in order to accomplish greater shareholder accountability. They are designed to minimise risk to the companies in respect of which they have been implemented and to protect the assets and profits of those companies. Since company shareholders and creditors ultimately rely on these corporate profits and assets for their return on investment, and employees for their continued employment, they all benefit from compliance programmes designed to safeguard these corporate assets.

The attitudes of the OFT and of the EU Commission to corporate compliance

The OFT has published guidance designed to assist companies in their efforts to comply with competition law.⁷¹ This guidance stresses that each compliance programme needs to be tailored to the market in which a company operates, its commercial practices, market power and concomitant regulatory risk. Appropriate policies, procedures and training should be implemented in order to mitigate this risk effectively. These compliance programmes should be reviewed regularly and, where

adequate steps have been put in place, the OFT will be prepared to contemplate reducing any competition law fine to which the company is ultimately exposed by up to 10 per cent.⁷²

The EU Commission’s current guidance on compliance⁷³ stresses⁷⁴ that the involvement of senior executives is vital. However, whilst the EU Commission encourages the establishment of competition compliance programmes, it does not regard the mere existence of compliance programmes as being a mitigating factor if violations occur and fines are imposed. The Commission made this explicit in its decision in relation to the *Professional Videotape* cartel.⁷⁵ Wils has argued that companies are profit-maximisers who are best placed to prevent competition law infringements. In his opinion, the onus for competition law compliance should lie squarely on the company and its compliance programme, which must be fully effective. Companies (and not the EU Commission) are best placed to determine whether a corporate programme represents a genuine effort at compliance and the only reward for its introduction should be its effectiveness.⁷⁶

Wils’ arguments stress (and the guidance issued to directors by both the OFT⁷⁷ and the Institute of Chartered Secretaries⁷⁸ underline) the importance of engendering a culture of corporate compliance in the context of governance. The EU Commission, whilst not offering any mitigation of fines for the introduction and operation of compliance programmes, also plainly sees a culture of compliance as being important. It is clear that both regulators and industry are increasingly aware of the need for businesses to inculcate a culture of competition law compliance.⁷⁹

Compliance programmes are significant, not only in seeking to avert competition law breaches, but also in ensuring prompt detection of any such breaches should they occur and of then providing the company with the opportunity to seek leniency from fines⁸⁰ and directors with the possibility of avoiding disqualification, since whether a company has sought leniency is a factor the OFT will take into account when assessing whether to apply for a disqualification order.⁸¹

⁶⁹ In *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm) it was held that a carteliser could not pass on the fines it had suffered to the employees who had caused them (in breach of their duties to the employer, Safeway) as this would allow Safeway to avoid the consequences of its own egregious behaviour.

⁷⁰ “Company directors and competition law” OFT Guidance June 2011 (OFT1340) at para.1.2, available at: <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/guidance-for-directors/> [Accessed November 26, 2013].

⁷¹ “How your business can achieve compliance with competition law” OFT Guidance, June 2011 (OFT1341) available at: <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/?sessionid=A3A926198C30D1C017FC1708A8F4426A> [Accessed November 26, 2013].

⁷² “How your business can achieve compliance with competition law” OFT Guidance, June 2011 (OFT1341), para.7.4 available at: <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/?sessionid=A3A926198C30D1C017FC1708A8F4426A> [Accessed November 26, 2013].

⁷³ Available at: http://ec.europa.eu/competition/antitrust/compliance/index_en.html [Accessed November 26, 2013].

⁷⁴ Available at: http://ec.europa.eu/competition/antitrust/compliance/index_en.html, p.16 [Accessed November 26, 2013].

⁷⁵ Case COMP/38.432 — *Professional Videotape* [2008] OJ C57/10 when the EU Commission observed that: “(241) Sony has further argued that it should receive a reduction of the fine for having introduced a compliance programme and a series of measures to increase staff awareness in respect of competition law in 2005. Whilst the Commission welcomes measures taken by undertakings to avoid the recurrence of cartel infringements in the future, such measures cannot change the reality of the infringement and the need to sanction it in this Decision, the more so as the infringement concerned is a manifest breach of [Article 101 TFEU].”

⁷⁶ See Wouter Wils, “Antitrust Compliance Programmes & Optimal Antitrust Enforcement” (2013) 1(1) *Journal of Antitrust Enforcement* and available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176309 [Accessed November 26, 2013].

⁷⁷ See fnn.70 and 71 above.

⁷⁸ See fn.67 above.

⁷⁹ See, for instance Anne Riley and Margaret Bloom, “Antitrust Compliance Programmes — Can Companies and Antitrust Agencies Do More?” [2011] *Comp Law* 21.

⁸⁰ For instance under the EU Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.

⁸¹ “Director disqualification orders in competition cases” an OFT guidance document, June 2010, para.4.2(3) available at: http://www.of.gov.uk/shared_of/business_leaflets/enterprise_act/of1510.pdf [Accessed November 26, 2013].

Separate corporate personality and limited liability

The principle of separate corporate legal personality has been a foundation stone in the development of corporate law in common law countries, with investors being protected by the concept of limited liability. The evolution of the limited liability company as a vehicle for investment has been credited by some with underpinning modern economic development.⁸² As Keay has noted:

“All companies, whether they are large or small, multinational or local, play a fundamental, multidimensional and evolving role in promoting economic growth ...”⁸³

Easterbrook and Fischel have advanced a number of economic justifications for limited liability.⁸⁴ They have argued that limited liability is efficient, since it reduces the need for shareholders to monitor managers. It reduces the shareholders’ cost of monitoring the wealth of other shareholders. It also induces managers to direct their companies’ activities efficiently, since any inefficiency will be punished by the shareholders, who will sell their shares. The transfer of those shares is facilitated by limited liability, which protects incoming shareholders and allows them to gauge the worth of the company on the basis of its performance, rather than the net worth of other shareholders (to whom recourse might be necessary, absent limited liability). Limited liability allows shareholders to diversify their investments, rather than limit them to a few companies they would need to monitor closely. It also allows shareholders to demand lower returns, since they do not need compensating for personal risk. Lastly, limited liability allows managers to engage in higher risk ventures, such as the development of new products “without exposing the investors to ruin”.⁸⁵ This is socially useful and a beneficial deployment of capital.

Muscat⁸⁶ and Blumberg⁸⁷ have argued that the extension of limited liability from the “one-man company situation” evident in *Salomon v A. Saloman and Co Ltd*⁸⁸ to control by a parent company was both accidental and unwitting.⁸⁹ They contend that, in order to foster investment, it was less necessary to confer limited liability on corporate shareholders, since individual shareholders in a parent company would be protected by limited liability.⁹⁰ Muscat argues that “the absence of control justifies limited

liability”, whereas the presence of corporate control will ensure that parent companies are not deterred from making investments in their subsidiaries.⁹¹ Dignum and Lowry believe that allowing corporate groups to benefit from limited liability “represents an enormous extension of the Salomon principle”, the appropriateness of which the judiciary should question.⁹²

Muscat argues that much of the debate concerning limited liability has related to its legitimacy based on the ability of third parties to protect themselves by contractual means when dealing with a company. However, he asserts that “[l]imited liability ... conflicts with some fundamental objectives of tort law ...” through undermining the latter’s compensatory and deterrent goals by allowing a company to “... externalize the risks of its more hazardous ventures by establishing subsidiaries.”⁹³ Limited liability unfairly shifts the risk onto consumers and away from the entity with the resources available to remedy the wrongdoing. A similar stance is taken by Blumberg, who argues that the use of limited liability in a tortious context is inefficient, because it can lead to excessive risk taking and can cause unacceptable externalities.⁹⁴

Henderson⁹⁵ has argued that public interest-based regulation is misguided and “pre-economic”.⁹⁶ He contends that governments which apply public welfare criteria in regulating companies are seeking to “internalise externalities” and that corporate profitability is explained by and the chief badge of corporate efficiency. He accepts the role of competition in this equation (his notions of profitability assume the existence of rivalry and the possibility of market entry). Nonetheless, there must also be limits to the externalisation of risk by corporate groups in the interests of efficiency. Whilst the corporate form benefits society through inducing investment and, as Coase has demonstrated,⁹⁷ the internalisation of functions within companies (rather than the execution of transactions on the market) will be undertaken only when this is efficient, the abuse of limited liability wrongly shifts costs onto the public. In the case of anti-competitive practices, that wrongdoing subverts the operation of market rivalry and the generation of consumer-beneficial efficiencies. In addition to the protection of involuntary creditors such as tort victims, it is also fair that competition law should protect those voluntary creditors who have suffered an involuntary risk, for instance

⁸² John Micklethwait and Adrian Wooldridge, *The Company: a Short History of a Revolutionary Idea* (London: Phoenix, 2005).

⁸³ Keay, *The Corporate Objective* (2011), p.3.

⁸⁴ Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1996), pp.41–44.

⁸⁵ Easterbrook and Fischel, *The Economic Structure of Corporate Law* (1996), p.44.

⁸⁶ Andrew Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (Dartmouth, 1996).

⁸⁷ Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press, 1993).

⁸⁸ *Salomon v A. Saloman and Co Ltd* [1897] A.C. 22.

⁸⁹ See Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (1996), pp.155 and 156 and Blumberg, *The Multinational Challenge to Corporation Law* (1993), pp.58–59.

⁹⁰ See Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (1996), pp.62–176 and Blumberg, *The Multinational Challenge to Corporation Law* (1993), pp.123–124.

⁹¹ See Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (1996), p.164.

⁹² Alan Dignum and John Lowry, *Company Law*, 7th edn (Oxford University Press, 2012), p.50.

⁹³ Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries* (1996), pp.180–181.

⁹⁴ Blumberg, *The Multinational Challenge to Corporation Law* (1993), pp.134–135.

⁹⁵ David Henderson, *The Role of Business in the Modern World: Progress, Pressures and Prospects for the Market Economy* (The Institute of Economic Affairs, 2004).

⁹⁶ Henderson, *The Role of Business in the Modern World* (2004), p.176.

⁹⁷ R.H. Coase, “The Nature of the Firm” (1937) 4(16) *Economica* 386.

customers dealing with a cartel, as the customer is suffering from the informational disadvantages inherent in transacting with an entity engaged in covert price-fixing.

The EU single economic unit doctrine adopts the approach espoused by Muscat. It does so in the interests of ensuring that anti-competitive activity, harmful to rivalry and economic efficiency, is deterred and punished. The English courts, whilst struggling with the erosion of limited liability required by the single economic unit doctrine, have nevertheless been prepared to make parent companies directly liable for tortious injury on a statutory basis. A common law liability may also arise from that parent company's influence over its subsidiary's policy-making, on the grounds that such liability has been assumed. This approach is not based on arguments of efficiency, but rather on a judicial acceptance that there are limits to the externalisation of risk through the use of limited liability.

A general feature of the agency problem that corporate governance seeks to address is the assumption that, not only do shareholders lack control over day-to-day management decisions, but the benefits of limited liability disincentivise them from exercising a more active monitoring role. Wittman has indicated that directors enjoy "a comparative advantage in decision making" and shareholders "in risk-taking".⁹⁸ Shareholders are likely to focus on diversifying their share portfolio in order to hedge their investment risks, rather than on challenging the directors, despite recent protests over executive pay in shareholder general meetings (the so-called "shareholder spring"), the much-trumpeted impact of which seems to have been overstated.⁹⁹

One issue is whether individual shareholders might constitute undertakings. As indicated earlier,¹⁰⁰ it is clear that this is legally possible. For instance, in *Hydrotherm Geratebau GmbH v Andreoli*¹⁰¹ it was held by the CJEU that an economic unit can consist of several persons, natural or legal. In that case an engineer, who was an individual controlling member with personal liability in respect of a limited partnership, comprised a single undertaking with the partnership for the purposes of the then applicable block exemption regulation relating to exclusive dealing.¹⁰²

However, there is little evidence that the EU Commission is seeking to target individual shareholders, as is evident from the decision in the *Pre-insulated Pipe Cartel* case. In that case,¹⁰³ the Henss family controlled a number of companies involved in the manufacture and sale of pre-insulated pipes. The Henss companies and

Isoplus were deeply involved in a very serious cartel. Although the EU Commission contended that the Henss/Isoplus companies formed a single undertaking, it was not able to identify a group holding company. It was at least a possibility that the EU Commission might have sought to categorise the principal Henss shareholders as undertakings, given the key role the corporate owners played in the Henss companies' activities. At [157] of its Decision, the EU Commission asserted:

"It is apparent from the fact that it was Dr. W. Henss who always attended the directors' club meetings that he was the person who exercised management and control over Isoplus and that the Henss and Isoplus companies together formed a de facto group. It was common knowledge in the industry that Henss was the power behind Isoplus."

Nevertheless, the EU Commission balked at reaching this conclusion and did not categorise Dr Henss as being an undertaking subject to fines.

In line with the *Hydrotherm* case,¹⁰⁴ direct involvement by a shareholder in management can result in the relevant shareholder being categorised as indirectly involved in economic activity and thus itself an undertaking. As the CJEU held in the *Cassa di Risparmio di Firenze* case¹⁰⁵ (a case involving state aid):

"111. ... it must be pointed out that the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset.

112. On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking."

In order to confer the status of an undertaking on the relevant shareholder, the controlling stake must be accompanied by direct or indirect involvement in corporate management. The controlling shareholder can also comprise a single economic unit with the company over which that control is exercised.

⁹⁸ Donald Wittmann, *Economic Foundations of Law and Organization* (Cambridge University Press, 2006), p.314.

⁹⁹ See the article in the *Financial Times* August 26, 2012 "'Shareholder spring' muted" available at: <http://www.ft.com/cms/s/0/0a1e41c4-ed42-11e1-95ba-00144feab49a.html#axzz2eV8FN8uV> [Accessed November 26, 2013].

¹⁰⁰ See fn.13 above.

¹⁰¹ *Hydrotherm Geratebau GmbH v Andreoli* (170/83) [1984] E.C.R. 2999.

¹⁰² Regulation 67/67 of the Commission of 22 March 1967 on the application of art.85(3) EC Treaty (now art.101(3) TFEU) to certain categories of exclusive dealing agreements [1967] OJ 57/849, which was only applicable to exclusive dealing arrangements to which no more than two undertakings were parties (see art.1(1)(a)).

¹⁰³ Decision 1999/60 relating to a proceeding under art.85 of the EC Treaty (IV/35.691/E-4: Pre-Insulated Pipe Cartel) [1999] OJ L24/1 upheld on appeal in *LR AF 1998 A/S (formerly Logstor Ror A/S) v Commission* (T-23/99). 132 IV/35.691/E-4: Pre-Insulated Pipe Cartel at [15].

¹⁰⁴ *Hydrotherm Geratebau GmbH* [1984] E.C.R. 2999.

¹⁰⁵ *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* (C-222/04) [2006] E.C.R. I-289.

Where shareholders are not undertakings, the latter may be targeted more indirectly, by exposing the company in which they have invested and its group to the risk of fines, with a resultant loss of shareholder value. Former EU Competition Commissioner Neelie Kroes regarded this loss of value as sufficient incentive to enhance shareholder monitoring. As she observed in her press release announcing the EU Commission Decision which fined participants in a rubber chemical cartel €75.86 million in 2005:

“Cartels are a scourge. I will ensure that cartels will continue to be tracked down, prosecuted and punished. With this latest decision, I am sending a very strong message to company boards that cartels will not be tolerated, and to shareholders that they should look carefully at how their companies are being run.”¹⁰⁶

For shareholders lacking control (and the value of whose shares will be affected by regulatory fines), the agency problem will persist. Good governance and the associated task of ensuring compliance should therefore be crucial preoccupations.

The single economic unit doctrine and its application in the context of liability for fines

As indicated earlier, two or more undertakings can be treated as a single undertaking if the undertakings “form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market”.¹⁰⁷ Any agreement into which such a company and its controlling shareholder enter will not be subject to scrutiny under art.101 TFEU¹⁰⁸ (although it may still be subject to the prohibition contained in art.102 TFEU). In *Viho Europe BV v Commission*,¹⁰⁹ the GCEU treated a parent company and its 100 per cent subsidiary as a single entity for competition law purposes in the following terms:

“... for the purposes of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities.”¹¹⁰

As regards lesser interests, members of a group of companies have been held only to form part of a single economic unit if it can be established that:

“... the undertakings pursue the same market strategy, which is determined by the parent company ... The mere fact that [companies] belong to the same group of undertakings is not decisive in that regard. Account must be taken of the nature of the relationship between the undertakings belonging to that group.”¹¹¹

Substantial minority participations have been held not to render members of a group part of a single economic unit. In *Gosmel/Martell-DMP*,¹¹² the EU Commission did not accept that the 50 per cent interest which Martell enjoyed in DMP rendered Martell and DMP part of a single economic unit. Whilst each of Martell and Piper-Heidsieck had 50 per cent of DMP’s share capital and could appoint half its supervisory board, Martell was not able to control the commercial activities of DMP.

In *Irish Sugar v Commission*¹¹³ the EU Commission was reluctant to conclude that a 51 per cent shareholding by Irish Sugar in the intermediate holding company Sugar Distribution (Holding) Ltd (where there was also a lack of management control over its downstream commercial subsidiary Sugar Distributors Ltd) was sufficient to confer control. This obliged the EU Commission to assert that the three entities engaged in the manufacture and distribution of sugar were in a position of joint vertical dominance (rather than being a single dominant undertaking) in order to prohibit the market foreclosing practices which they were pursuing under art.102 TFEU.

By way of contrast, in the *Commercial Solvents* case,¹¹⁴ the CJEU held that where a parent held a 51 per cent shareholding in its subsidiary (which was listed as its subsidiary in the parent’s audited accounts) and where 5 out of 10 of the subsidiary’s directors were senior executives of the parent (including the president and chief executive of the parent), this was sufficient to render them part of the same economic unit and hence one “undertaking”. Thus the parent was jointly and severally liable for the subsidiary’s refusal to supply an essential ingredient to a customer as part of a market-foreclosing strategy that violated art.102 TFEU.

The above law also needs to be examined in the light of the expansion of the notion of a single economic unit in the context of liability for fines imposed by the EU Commission.

In both the *Stora*¹¹⁵ and *Akzo Nobel* cases¹¹⁶ the CJEU held that there is a rebuttable presumption that a parent company and a subsidiary in which it has a 100 per cent shareholding are part of a single economic unit. In the latter case, Akzo Nobel’s wholly-owned subsidiaries had

¹⁰⁶ “Competition: Commission fines four firms €75.86 million for rubber chemical cartel” (IP/05/1656 of December 21, 2005), available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1656&format=PDF&aged=1&lang=en&guiLanguage=en> [Accessed November 26, 2013].

¹⁰⁷ *Bodson* [1988] E.C.R. 2479 at [19].

¹⁰⁸ *Bodson* [1988] E.C.R. 2479 at [21].

¹⁰⁹ *Viho Europe BV v Commission of the European Communities* (T-102/92) [1995] E.C.R. II-17.

¹¹⁰ *Viho Europe BV* [1995] E.C.R. II-17 at [50].

¹¹¹ *Bodson* [1988] E.C.R. 2479 at [20].

¹¹² [1991] OJ L185/23.

¹¹³ *Irish Sugar v Commission of the European Communities* (T-228/97) [1999] E.C.R. II-2969; upheld on appeal by the CJEU in (C-497/99 P) [2001] E.C.R. I-5333.

¹¹⁴ *Istituto Chemioterapico Italiano SpA v Commission of the European Communities* (6/73) [1974] E.C.R. 223.

¹¹⁵ *Stora Kopparbergs Bergslags AB v Commission of the European Communities* (C-286/98 P) [2000] E.C.R. I-9925.

¹¹⁶ *Akzo Nobel NV v Commission of the European Communities* (C-97/08 P) [2009] E.C.R. I-8237.

all been involved in a cartel in the choline chloride market. The group had been held jointly and severally liable for the infringement, with the fines being calculated by reference to group turnover. The CJEU cited lengthy passages from the judgment of the GCEU¹¹⁷ (whose judgment it approved) holding, in very similar language to that of the GCEU:

- “60. In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first the parent company can exercise a decisive influence over the conduct of the subsidiary ... and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary ...
61. In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent company exercises decisive influence over the commercial policy of the subsidiary. The Commission will 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 (see, to that effect, *Stora*, paragraph 29).”

This reference to presumptive control of a subsidiary's commercial policy, based on group structure, has been described by Joshua et al. as making the Commission's task of proving the existence of decisive influence (and hence a single economic unit for competition law purposes) a “walkover”.¹¹⁸ Certainly this presumption will be hard to rebut with a shareholding of this magnitude, given the weight attached by the CJEU to economic and legal links in its judgment.

A number of commentators¹¹⁹ have criticised the apparent element of strict liability involved, a line of criticism that the CJEU sought to reject when reaching its judgment in the *Akzo Nobel* case, on the grounds that

the capacity to influence the subsidiary gave rise to the requisite level of fault if that influence was not exercised so as to ensure compliance:

- “77. ... Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit ... the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability.”

Advocate General Kokott was equally trenchant in her view, stating that parent company liability did not comprise strict liability and did “not in any way constitute an exception to the principle of personal responsibility, but [was] the expression of that principle...”.¹²⁰ She went on to give a very strong view of the two entities as inherently one for these purposes, attributing fault to the parent since “mere membership of a group may influence”¹²¹ a subsidiary's conduct, emphasising the capacity of the parent to influence the subsidiary “to such an extent that the two must be regarded as one economic unit”¹²² and that the parent and its wholly-owned subsidiaries were “the legal embodiment of the undertaking which negligently or intentionally infringed the competition rules.”¹²³ As Joshua et al. put it “the premise [is] that it is the undertaking that commits the infringement, not its individual component companies ...”¹²⁴

Thomas has strongly argued that the logic of the Commission's argument (which he regards as absurd) should lead it to examine the influence of all those elements, such as employees and directors, which make up an “undertaking”.¹²⁵ However, for the purposes of this article it is sufficient to note that a parent of a 100 per cent subsidiary will struggle to displace the presumption that the two constitute a single economic unit. This would

¹¹⁷ In *Akzo Nobel NV v Commission of the European Communities* (T-112/05) [2007] E.C.R. II-5049.

¹¹⁸ Julian Joshua, Yves Botteman and Laura Atlee, ““You can't beat the percentage” — The Parental Liability Presumption in EU Cartel Enforcement” in *The European Antitrust Review 2012*, Global Competition Review Special Report, p.5.

¹¹⁹ See for instance Stefan Thomas, “Guilty of a Fault that one has not Committed: The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law” (2012) 3(1) *Journal of European Competition Law and Practice* 11 and Alison Jones, “The Boundaries of an Undertaking in EU Competition Law” (2012) 8(2) *European Competition Journal* 301.

¹²⁰ *Akzo Nobel NV* [2009] E.C.R. I-8237 at para.97 of her Opinion.

¹²¹ *Akzo Nobel NV* [2009] E.C.R. I-8237 at [92].

¹²² *Akzo Nobel NV* [2009] E.C.R. I-8237 at [93].

¹²³ *Akzo Nobel NV* [2009] E.C.R. I-8237 at [98].

¹²⁴ See fn.118 above; the EU Commission has the power to impose fines on “undertakings” under art.23(2) of Regulation 1/2003.

¹²⁵ See Thomas, “Guilty of a Fault that one has not Committed: The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law” (2012) 3(1) *Journal of European Competition Law and Practice* 11, 14 and 15.

require the parent to behave towards the subsidiary with such remoteness that it would undermine the benefits of possessing a controlling stake.

The concept of a single economic unit has been extended to encompass joint, as well as sole, control for the purposes of attribution of liability. In *Avebe*,¹²⁶ the GCEU concluded that Akzo and Avebe, as companies which each had a 50 per cent shareholding in a jointly-controlled subsidiary and which collectively controlled its marketing policy, formed a single economic unit with the subsidiary over which they had control. It held that:

“138 ... joint management power and the fact that Akzo and Avebe each held a 50% stake in Glucona and, therefore, controlled all of its shares jointly ... is analogous to that in Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, in which a single parent company held 100% of its subsidiary, for the purpose of establishing the presumption that that parent company actually exerted a decisive influence over its subsidiary’s conduct.”

In the *Dow* case,¹²⁷ the GCEU relied on the Commission’s Consolidated Jurisdictional Notice¹²⁸ relating to the then applicable Merger Regulation¹²⁹ in order to conclude that the parent companies of a jointly controlled joint venture (*Dow and Du Pont*),¹³⁰ which exercised decisive influence over the joint venture company’s behaviour on chloroprene rubber market, were jointly and severally liable for its conduct. The ability to exercise (and the actual exercise) of influence amounting to joint control meant that the parent companies and their jointly-controlled subsidiary formed a single economic enterprise.

In the *Dow* case the EU Commission had relied on the appointment of high-level executives of the parent companies to the joint venture’s Members Committee under powers reserved to the parents in an agreement relating to the joint venture company. An additional factor indicating the exercise of control was that the relevant personnel had participated in a decision of the joint venture to close a production plant in the United Kingdom. The EU Commission had also relied on the fact that the parent companies had ordered that an investigation should take place to discover whether the joint venture had participated in the cartel for which it was ultimately fined.

The GCEU has extended the notion of the single economic unit beyond the possession of positive control to the ability to forestall harmful anti-competitive behaviour. It stressed that the joint control necessary to find joint and several liability could be negative, in the sense that the parent in question could only prevent, rather than insist on, the subsidiary adopting certain business decisions.¹³¹ The conclusion by the EU Commission that the parent “must have been aware of the existence of the cartel” was a further element (but not “an essential factor”) indicating that it enjoyed decisive influence over the subsidiary.¹³² If the parent could “by reason of the intensity of its influence ... direct the conduct of the subsidiary”, this rendered them part of the same economic unit. The issue was whether it had the capacity to give “specific instructions or guidelines on individual elements of commercial policy.”¹³³ This judicial approach was anticipated by Wils,¹³⁴ who regards the discretion allowed to subsidiaries as “just another way of exercising” the parent company’s “power of control”, an approach which assumes that the underlying power, rather than its habitual exercise, suffices.

The GCEU placed a heavy emphasis on compliance with EU competition law, rather than with national rules of corporate governance. It dismissed out of hand the applicant’s argument that the parent could not be held jointly and severally liable for the breaches of the subsidiary, where its behaviour had complied with the laws of US corporate governance.¹³⁵

The GCEU directly linked the concept of control to compliance. It regarded the attribution of liability to a parent company as just, recognising the potential for shareholder gain from profits generated unlawfully due to lax supervision of an investee company:

“101. Moreover, the Court considers that as a result of the parent company’s power of supervision, the parent company has a responsibility to ensure that its subsidiary complies with the competition rules. An undertaking which has the possibility of exercising decisive influence over the business strategy of its subsidiary may therefore be presumed, in the absence of proof to the contrary, to have the possibility of establishing a policy aimed at compliance with competition law and to take all necessary and appropriate measures to supervise the subsidiary’s commercial management. Mere failure to do so by the

¹²⁶ *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities* (T-314/01) [2006] E.C.R. II-3085.

¹²⁷ *Dow Chemical* [2012] 4 C.M.L.R. 19.

¹²⁸ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, [2008] OJ C95/01.

¹²⁹ Regulation 4064/89 [1989] OJ L395/1, December 30, 1989 (as amended by Council Regulation 1310/97 [1997] OJ L180/1, July 9, 1997); the current applicable EU Merger Regulation is Regulation 139/2004 [2004] OJ L24/1, January 29, 2004.

¹³⁰ Joint control had been established at the time of the joint venture’s approval under the then applicable Merger Regulation in Case IV/M.663 (see also [83] of the GCEU’s judgment).

¹³¹ *Dow Chemical* [2012] 4 C.M.L.R. 19 at [92].

¹³² *Dow Chemical* [2012] 4 C.M.L.R. 19 at [105].

¹³³ *Dow Chemical* [2012] 4 C.M.L.R. 19 at [107].

¹³⁴ Wils, “The undertaking as subject of EC competition law and the imputation of infringements to natural or legal persons” [2000] E.L.Rev. 99, 103.

¹³⁵ *Dow Chemical* [2012] 4 C.M.L.R. 19 at [102].

shareholder with a power of supervision over such matters cannot in any event be accepted as a ground on which he can decline his liability. Accordingly, since any gains resulting from illegal activities accrue to the shareholders, it is only fair that those who have the power of supervision should assume liability for the illegal business activities of their subsidiaries.”

In the *Fuji* case,¹³⁶ Fuji had a 30 per cent shareholding in a joint venture company (JAEPS), with Hitachi Ltd and Meidensha Corporation holding 50 per cent and 20 per cent respectively. Fuji also enjoyed rights under a Master Agreement and was held jointly and severally liable with Hitachi for the participation of JAEPS in a cartel. In addition to its equity participation and contractual rights, the senior management of Fuji and JAEPS overlapped and those management personnel were “a conduit of information” for Fuji “on matters discussed” at meetings of JAEPS and which related to JAEPS’ business.¹³⁷ It was demonstrated that Hitachi had actually exercised management power over JAEPS and had had a decisive influence over its market conduct. Meidensha’s 20 per cent participation in JAEPS was too low to trigger joint and several liability.

The approach of the English courts to the single economic unit doctrine

In England, there has been a historic tendency for companies to take advantage of the concept of separate corporate liability in order to arrange their group affairs so as to compartmentalise liabilities. As the Court of Appeal noted in *Adams v Cape Industries Plc*,¹³⁸ under English company law it is entirely open to a company to arrange its group affairs so that business liability falls on a subsidiary rather than a parent company. Slade L.J. concluded that:

“... Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to such separate legal entities.”¹³⁹

English courts will “pierce” the corporate veil and so render the underlying shareholders liable for the acts of the company in very limited circumstances, for instance where the subsidiary is a vehicle for fraud or a mere

façade.¹⁴⁰ The judgment of the court of Appeal in *Adams v Cape Industries Plc*¹⁴¹ severely circumscribed the circumstances in which it would be appropriate to undertake this exercise, namely when the court is interpreting a statute, on grounds that the company is a sham or façade, or where it can be shown that the subsidiary is the express or implied agent of the parent. Agency will be hard to demonstrate, as *Adams v Cape Industries Plc* demonstrates. In *Millam v Print Factory (London) 1991 Ltd*¹⁴² the Court of Appeal held that a subsidiary’s mere lack of independence, described as being typical of a subsidiary relationship, was not enough for the veil to be pierced, nor was the fact that the two companies’ businesses were run in a closely interlinked way.

In *Adams v Cape Industries Plc*, the claimant did not plead the direct tortious liability of the parent company. However, the English Court of Appeal was asked to recognise the single economic unit doctrine in determining whether Cape Industries Plc was present in the United States (for the purposes of an enforcement action relating to damages awarded to workers affected by asbestosis) through companies present in the United States in which it had an interest. Slade L.J. held:

“There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that ‘each company in a group of companies ... is a separate legal entity possessed of separate legal rights and liabilities’: *The Albazero* [1977] A.C. 774, 807, per Roskill L.J.”¹⁴³

Counsel for the claimants had invited the Court of Appeal to adopt the approach taken by Advocate General Warner in the *Commercial Solvents* case¹⁴⁴ when considering whether a parent company and subsidiary were separate “undertakings” within the meaning of arts 85 and 86 EC Treaty (now arts 101 and 102 TFEU). This step the Court of Appeal declined to take.

Slade L.J. distinguished the *Commercial Solvents* case as having been interpreted on the basis of a particular Treaty provision. In his opinion, Lord Denning had used an analogous approach (by relying on a specific statutory provision) when ignoring the corporate veil in *DHN Food Distributors Ltd v Tower Hamlets LBC*.¹⁴⁵ Thus, the single economic unit doctrine was held not to be applicable, despite the fact that “a degree of overall supervision and, to some extent control, was exercised by Cape” over the entities present in the United States, as was “common in the case of any parent-subsidiary relationship”. However,

¹³⁶ *Fuji Electric Co Ltd v European Commission* (T-132/07) [2011] 5 C.M.L.R. 21.

¹³⁷ *Fuji Electric* [2011] 5 C.M.L.R. 21 at [199].

¹³⁸ *Adams v Cape Industries Plc* [1990] Ch. 433.

¹³⁹ *Adams* [1990] Ch. 433 at 536.

¹⁴⁰ *Jones v Lipman* [1962] 1 W.L.R. 832 and *Trustor v Smallbone (No.2)* [2001] 2 B.C.L.C. 436.

¹⁴¹ *Adams* [1990] Ch. 433.

¹⁴² *Millam v Print Factory (London) 1991 Ltd* [2007] EWCA Civ 322.

¹⁴³ *Adams* [1990] Ch. 433 at 532.

¹⁴⁴ *Istituto Chemioterapico Italiano SpA* [1974] E.C.R. 223.

¹⁴⁵ *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 W.L.R. 852, where a transport business and the premises from which it operated were owned by separate companies within a group in a manner that meant that neither was entitled to compensation payable following a compulsory purchase of land under the Land Compensation Act 1961; Lord Denning M.R. held that (at 860) “[t]hey should not be treated separately so as to be defeated on a technical point...”.

in the context of claims for civil damages against groups of companies for breaches of EU competition law, the meaning of an “undertaking” under arts 101 and 102 TFEU is indeed a “statutory” and specific one, the interpretation of which is subject to the exclusive jurisdiction of the CJEU.¹⁴⁶ This approach of the Court of Appeal has caused problems for courts grappling with civil law claims for breaches of competition law, as this article will now explore.

English companies as “anchor” defendants in cartel damages claims

The English courts’ aversion to the single economic unit doctrine is one that is unlikely to withstand the “incoming tide” of EU law.¹⁴⁷ In a number of relatively recent cases, the English courts have had to consider whether an English company which implemented an agreement found to have been in breach of art.101(1) TFEU was tortiously liable, simply by being part of an “undertaking” for the purposes of EU law, or whether some greater culpability or fault was required if tortious liability was to ensue. The claimants in these cases, in order to bring themselves within the jurisdiction of the English courts and so avail themselves of attendant procedural advantages, had sought to argue that English companies operating within a larger group were liable for the cartelised prices charged by the group, irrespective of fault or knowledge on the part of the defendant companies.

Article 2 of the Brussels Regulation¹⁴⁸ provides that persons domiciled in a member state are to be sued in that state. Article 6(1) provides that, where that person is one of a number of defendants, he may also be sued in the courts of the place where any one of them is domiciled if the relevant claims are so closely connected that it would be expedient to determine them together (in order to avert the risk of irreconcilable judgments arising from separate proceedings). Companies incorporated in England are domiciled there for the purposes of legal action and an English domiciled defendant (where the claimant is seeking to bring all the group companies, wherever incorporated, within the jurisdiction of the English courts) is here referred to as an “anchor defendant”.

At first instance in both *Provimi Ltd v Aventis Animal Nutrition SA*¹⁴⁹ and *Cooper Tire & Rubber Company v Shell Chemicals UK Ltd*,¹⁵⁰ the English High Court concluded that there were adequate grounds to establish a claim against those English companies which had implemented a cartel (in which other group companies had been involved), whether or not the defendant English

companies had had knowledge of the cartel. Kennelly has suggested¹⁵¹ that the *Wood pulp* case¹⁵² “provides support for” the proposition that mere implementation without knowledge is sufficient to demonstrate a breach of art.101(1), in that case with a resultant liability to fines.

In *Provimi*, Aikens J. explained that the implementing subsidiary was liable since it was part of the same “undertaking” (as defined under EU competition law) as the group companies against which the original infringement decision had been issued:

“... There is no question of having to ‘impute’ the knowledge or will of one entity to another, because they are one and the same.”¹⁵³

On appeal in the *Cooper Tire* case, the Court of Appeal¹⁵⁴ cast some doubt on the position taken by the High Court in both these cases. It questioned whether mere implementation of a cartel, without knowledge of the underlying illegality, sufficed. It queried whether subsidiaries should be liable for the acts of their parent companies purely as a consequence of their being subject to levels of control that brought those companies within the concept of an undertaking under EU law. On the basis of the parties’ pleadings, it concluded that it did not need to decide the matter. However, it observed that, had a decision on the point been necessary at that stage in the proceedings, it would have referred the matter to the CJEU.

The Court of Appeal returned to the issue in *KME Yorkshire v Toshiba Carrier UK Ltd*.¹⁵⁵ Etherton L.J. considered that the issue of lack of knowledge did not arise:

“37. The *Provimi* point does not arise in the present case because, for the reasons I have given, the respondents have made a stand-alone claim against KME UK clearly alleging that it participated in, and implemented, the cartel arrangements with knowledge of the cartel agreement.”

As regards the issue of fault, he noted that counsel for Toshiba and the other claimant companies accepted that the claimants were obliged to prove that KME UK and the other defendants had had knowledge of the cartel agreement and practices. There was therefore an acceptance that unknowing implementation of the cartel did not trigger liability under art.101 TFEU. As to whether knowledge of the cartelised nature of the pricing could be imputed, Etherton L.J. concluded, obiter, citing the *Akzo Nobel* case¹⁵⁶ as authority:

¹⁴⁶ Under art.19(1) TEU the CJEU has the responsibility “in the interpretation and application of the Treaties” to ensure that “the law is observed”.

¹⁴⁷ The colourful expression used by Lord Denning M.R. in *Bulmer (HP) Ltd v J Bollinger SA* [1974] Ch. 401 at pp.418–419 to describe the impact of EU law in England.

¹⁴⁸ Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

¹⁴⁹ *Provimi* [2003] E.C.C. 29.

¹⁵⁰ *Cooper Tire & Rubber Company v Shell Chemicals UK Ltd* [2009] EWHC 2609 (Comm).

¹⁵¹ B. Kennelly, “Antitrust Forum-Shopping in England: Is *Provimi Ltd v Aventis* Correct?” (2010) 2 *The CPI Antitrust Journal* 7.

¹⁵² *Ahlstrom Osakeyhtiö v Commission of the European Communities* (C-89/85) [1993] E.C.R. I-1307.

¹⁵³ *Provimi* [2003] E.C.C. 29 at [31].

¹⁵⁴ *Cooper Tire & Rubber Europe v Shell Chemicals UK Ltd* [2010] EWCA Civ 864.

¹⁵⁵ *KME Yorkshire v Toshiba Carrier UK Ltd* [2012] EWCA Civ 1190.

¹⁵⁶ *Akzo Nobel NV* [2009] E.C.R. I-8237.

- “37. ... Since the point was argued ... I will express my own view that it is clear that, save in a case where the parent company exercises a decisive influence” (in the language of EU jurisprudence) over its subsidiary or the same is true of a non-parent member of the group over another member, there is no scope for imputation of knowledge, intent or unlawful conduct.
38. The jurisprudence on this aspect is, in my view, plain and settled ... Where, for example, a company does not decide independently on its own conduct on the market, but in all material respects carries out the instructions given to it by its parent company, having regard to the economic, organisational and legal links between them, the unlawful conduct of the subsidiary will be imputed to the parent company. In such a situation, in the language of EU jurisprudence, the parent exercises a “decisive influence” over its subsidiary. The subsidiary is not absolved from its own personal responsibility, but its parent company is liable because in that situation they form a single economic entity for the purposes of Article 101 [TFEU] ...”.

Thus, knowledge of illegality would need to be demonstrated, save where a parent enjoys decisive influence over a subsidiary company when such knowledge could be imputed, because this level of control renders the two companies part of the same undertaking. As indicated above, decisive influence can occur at relatively low levels of equity participation and, in these circumstances, knowledge will be imputed between “parent” and subsidiary companies. It also leaves open the possibility that, even where decisive influence does not exist, actual knowledge may be shown to be present.

Accordingly, where a group company unwittingly implements a cartel in circumstances where it forms part of a single “undertaking” with the cartelists within the group, it is liable to find itself a defendant in a tort action.

The approach of some of the English courts in anchor defendant cases shows confusion regarding the nature of a single economic unit. There will be one undertaking, the component companies within which will incur joint and several liability, once the necessary control required to constitute the companies a single economic unit has been established. The requirement that some degree of knowledge and blameworthiness on the part of the subsidiary be established, even where control and hence a single economic unit exists, is alien both to the concept

of an undertaking’s liability and to the notion of joint and several liability, as espoused by the CJEU and GCEU. Control, and the ability to exercise it in a way that prevents the violation of EU competition law, is all the fault that is required.

Possible liability where a parent company takes control of a subsidiary company’s compliance strategy

Does English common law expose a parent company to potential tortious liability based on its control of members of a corporate group? If so, is this on the basis of a different degree of control and influence from that which is capable of creating a single economic unit under arts 101 and 102 TFEU? What is the scope of any such common law liability and might a parent company, in seeking to impose a compliance programme (but one which is faulty), be liable for any harm caused by its deficiencies?

*Chandler v Cape Plc*¹⁵⁷ concerned the issue of whether Cape, the parent company of Mr Chandler’s employer, Cape Products Ltd (Cape Products), had created a direct duty of care to Mr Chandler through an assumption of liability, inferred in law. The Court of Appeal held that the parent company was directly liable in tort to its subsidiary’s employee for the harm caused by a defective group safety policy.

Before reviewing the case in detail, it is worth noting the grounds on which a tortious duty has been held to arise through an assumption of liability. As Banakas has pointed out,¹⁵⁸ the notion of tortious liability through assumption of liability was first developed in the context of economic loss. In *Hedley Byrne v Heller*,¹⁵⁹ where a bank gave a reference as to the credit-worthiness of a customer to the latter’s advertising agency, Lord Morris of Borth-y-Gest stated:

“... if someone possessing special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise ...”¹⁶⁰

In *Henderson v Merrett Syndicates Ltd*¹⁶¹ Lord Goff elaborated on the concept of assumption of responsibility:

“Where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct.”¹⁶²

¹⁵⁷ *Chandler v Cape Plc* [2012] EWCA Civ 525.

¹⁵⁸ Stathis Banakas, “Voluntary Assumption of Tort Liability in English Law: a Paradox?” InDret 4/2009 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499089 [Accessed November 26, 2013].

¹⁵⁹ *Hedley Byrne v Heller* [1964] A.C. 465.

¹⁶⁰ *Hedley Byrne* [1964] A.C. 465 at 502–504.

¹⁶¹ *Henderson v Merrett Syndicates Ltd* [1994] 3 All E.R. 506.

¹⁶² *Henderson* [1994] 3 All E.R. 506 at 520.

Lord Goff concluded that the concept of a “special skill” (a requirement of *Hedley Byrne*) “must be understood broadly, certainly broadly enough to include special knowledge.” Assumption of liability “in a situation ‘equivalent to contract’” would be determined applying an objective test and that, once a case was categorised

“as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further inquiry whether it is ‘fair, just and reasonable’ to impose liability for economic loss ...”¹⁶³

Steele has observed that:

“... *Hedley Byrne* has been extended to cases that involve one or more party, including some that do not rely on the statement at all ... liability has been found outside the area of negligent statements, including cases of professional services more generally ...”¹⁶⁴

Steele has noted that the concept of assumption of liability is elusive and interacts with the “broader idea of proximity”¹⁶⁵ employed in *Caparo Industries Plc v Dickman Plc*,¹⁶⁶ a case involving the possible liability of auditors for audited accounts prepared for the company and relied on by a bidder. In *Caparo*, the House of Lords relied on the threefold test of foreseeability of harm, proximity and the fairness, justice and reasonableness of imposing liability in denying the claim.

Banakas has described the English courts’ approach to assumption of liability as “lurking behind ... the threefold test of the Duty of Care, and the incremental approach ...” to expanding tortious liability¹⁶⁷ and as having the potential to treat “claims arising out of direct dealings between the parties” fairly.¹⁶⁸ In *Williams v Natural Life Health Foods Ltd*,¹⁶⁹ for instance, it was accepted that a prospective franchisee, intending to set up a health food store, might have been able to bring a claim against a director, if that director had assumed direct liability for the accuracy of financial information supplied to the franchisee by the defendant corporate franchisor.

Turning once more to *Chandler v Cape*, the factual background to the case was that Mr Chandler had been employed by Cape’s subsidiary, Cape Products, at a site where asbestos was produced. His exposure to asbestos and subsequent illness were a direct consequence of asbestos dust migrating into the area where he worked.

Cape had acquired a majority of the shares in Cape Products in 1945. Cape Products was ultimately integrated into the Cape group of companies, with one or more Cape directors being on the board of Cape Products at all material times for the purposes of Mr Chandler’s claim. The Cape board took an interest in management issues at Cape Products, seeking to help solve Cape Products’ production difficulties. Health and safety issues were dealt with both at subsidiary and parent company level. Whilst Cape Products had its own works doctor, Cape appointed a group medical adviser who was responsible for the health and welfare of all companies within the group of which Cape was the parent company and who carried out research into the connection between asbestos and lung disease.

Counsel for the defendant parent company argued that in determining whether there had been an assumption of responsibility for the faulty group health and safety policy imposed by the parent, the court should only have regard to behaviour and to matters “not being normal incidents of the relationship between a parent and subsidiary company” (including the fact that “the parent controlled certain aspects of the subsidiary’s activities”),¹⁷⁰ an argument which Arden L.J. roundly dismissed. She rejected the notion that the court must analyse in detail the varied ways in which parent-subsidiary relationships were organised.¹⁷¹

Arden L.J. indicated that the acceptance of responsibility for harm was linked to control. Thus “the court had to be satisfied that there was relevant control of the subsidiary’s business” and it was “necessary to look at the scope of the policy to see the extent of any intervention”.¹⁷² Arden L.J. referred¹⁷³ to *Smith v Littlewoods*¹⁷⁴ and to the observation of Lord Goff that, whilst there is no general duty to prevent third parties (e.g. a subsidiary company) causing harm to others, there were exceptions, for instance where there existed “a relationship between the parties which gives rise to an imposition or assumption of responsibility ...”¹⁷⁵

Arden L.J. indicated that the question was “whether what the parent did amounted to taking on a direct duty to the subsidiary’s employees”.¹⁷⁶ This was not necessarily an overt and voluntary assumption, but was a question of law, the legal “‘attachment’ of responsibility”.¹⁷⁷ She stressed that, in finding Cape liable for the harm caused to Mr Chandler, the court was not engaged in:

¹⁶³ *Henderson* [1994] 3 All E.R. 506 at 521.

¹⁶⁴ Jenn Steele, *Tort Law: Text Cases and Material* (Oxford University Press, 2007), p.342.

¹⁶⁵ Steele, *Tort Law: Text Cases and Material* (2007), p.342.

¹⁶⁶ *Caparo Industries Plc v Dickman Plc* [1990] 2 A.C. 605.

¹⁶⁷ Banakas, “Voluntary Assumption of Tort Liability in English Law: a Paradox?” InDret 4/2009, p.4, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499089 [Accessed November 26, 2013].

¹⁶⁸ Banakas, “Voluntary Assumption of Tort Liability in English Law: a Paradox?” InDret 4/2009, p.3, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499089 [Accessed November 26, 2013].

¹⁶⁹ *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830.

¹⁷⁰ *Chandler* [2012] EWCA Civ 525 at [44] and [45].

¹⁷¹ *Chandler* [2012] EWCA Civ 525 at [67].

¹⁷² *Chandler* [2012] EWCA Civ 525 at [46].

¹⁷³ *Chandler* [2012] EWCA Civ 525 at [63].

¹⁷⁴ *Smith v Littlewoods* [1987] A.C. 241.

¹⁷⁵ *Smith* [1987] A.C. 241 at 270.

¹⁷⁶ *Chandler* [2012] EWCA Civ 525 at [70].

¹⁷⁷ *Chandler* [2012] EWCA Civ 525 at [65].

“[69] ... piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.”

Given the knowledge Cape had about the site at which Mr Chandler was employed and recognising “its superior knowledge about the nature and management of asbestos risks,” Cape had “assumed a duty of care” to advise Cape Products on the steps it should take in order to provide the latter’s employees with a safe system of work.¹⁷⁸

Her judgment indicated the circumstances in which a parent company would be deemed responsible for the health and safety of its subsidiary’s employees. The relevant circumstances included a situation, such as that in issue, where:

- “(1) the businesses of the parent and subsidiary are in a relevant respect the same;
- (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and
- (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection.

For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.¹⁷⁹

Arden L.J. determined that, by its intervention in taking control over group safety, Cape had assumed a legal responsibility for the safe operation of that policy by the subsidiary. Where the employees had been harmed by the faulty group safety policy it was liable to them for their related physical injury.

Arden L.J. did not determine the issue of liability by reference to the proximity test (used for imposing liability in *Caparo Industries Plc v Dickman Plc*)¹⁸⁰ but instead employed the “assumption of liability” test, linking it to corporate control. This leaves open the possibility of an assumption of responsibility by parent companies in a wider range of circumstances. It might be that liability is assumed directly, in line with *Williams v Natural Life*

Health Foods Ltd,¹⁸¹ or it could be imputed by the court through the presence of parental control, manifesting itself through interventions in subsidiary policies.

This assumption of responsibility test based on control was specific to its facts, namely the field of personal injury. Could this include a wider range of matters, such as group competition compliance policies and programmes? Whilst these would be economic losses, rather than claims for physical injury of the type involved in *Chandler v Cape*, there is sufficient precedent in tort law for such economic loss claims to succeed where a liability has been assumed.

A separate question is whether third parties, such as customers, harmed by the violations of competition law arising from defective group-wide compliance, might be able to sue a parent company which had established a defective group-wide compliance programme at common law. It is hard to see how such losses might have been avoided, given that any cartel will have been undertaken covertly and it must be most efficient for the compliance obligation and any tortious claim to fall upon the non-compliant corporate group.

Where the parent had “decisive influence” over the subsidiary, then both should be treated by the English courts as being a single economic unit which has committed a statutory tort. Absent this level of control, the matter would depend on the degree of parental “intervention” in establishing the subsidiary’s policy and on whether tortious concepts of fairness (underlying the concept of the assumption of liability) necessitate the extension of that principle to those third parties who have dealt directly with the subsidiary in reliance on the group policy, but where the subsidiary is unlikely to be able to meet their claims. This would require the English courts to apply the judicial notion of “control” and extend the range of parties able to bring claims at common law in a manner that underpins the idea of enterprise liability inherent in the statutorily applicable concept of a single economic unit. In the interests of consistency, plainly levels of control which have been exercised (in the form of group policy-setting) give rise to a common law claim against the group parent. The allocation of tasks within a group and utilisation of group expertise should generate tortious liability where those internal responsibilities are performed in a manner that leads to third party losses through the harmful subversion of markets.

Tortious liability by a director or shareholder procuring a breach of competition law

One issue that merits consideration is the potential tortious liability of a shareholder or director (de jure or de facto) who the exercises unconstitutional control over a company. English tort law has long recognised the

¹⁷⁸ *Chandler* [2012] EWCA Civ 525 at [78].

¹⁷⁹ *Chandler* [2012] EWCA Civ 525 at [80], the points have been expressed in separate paragraphs in the above text for additional clarity.

¹⁸⁰ *Caparo Industries* [1990] 2 A.C. 605 at 166.

¹⁸¹ *Caparo Industries* [1990] 2 A.C. 605 at 169.

possibility of joint liability in tort where a wrongful act has been performed in the context of a “concerted enterprise”¹⁸² and this is the basis on which shareholders and directors, acting unconstitutionally, have found themselves exposed to civil claims.

The Court of Appeal¹⁸³ has recognised the concept of joint tortious liability where the tort is not the result of independent acts of negligence, but part of “a concerted action to a common end”.¹⁸⁴ In *Said v Butt*¹⁸⁵ it was held that a director alleged to have induced a breach of contract, but who was clearly acting bona fide and within the scope of his authority, was not personally liable. McCordie J. refrained from expressing any opinion as to the position should a director become tortiously liable for inducing a breach of contract when acting “wholly outside the range of his powers.”¹⁸⁶ In *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd*¹⁸⁷ Lord Buckmaster considered that a director will not normally be liable for the company’s torts, merely by reason of being a director. However, he held that there may be liability where those in control expressly direct that a tort be committed.¹⁸⁸ He regarded this liability as being tortious in nature and a form of liability that did not involve piercing the corporate veil.

Joint tortfeasor liability has been explored in the context of a number of intellectual property cases. An infringement of English patent and copyright legislation is accepted as giving rise to a tortious claim and hence the possibility of joint tortfeasor liability.¹⁸⁹ In *MCA Records Inc v Charly Records Inc*,¹⁹⁰ MCA claimed to be entitled to the copyright in certain recordings being marketed unlawfully by Charly Records Ltd (CRL). CRL, an English company, had been set up by Charly Holdings Inc (Holdings), a Panamanian company, the identity of whose shareholders was unknown. Mr Young had assisted Holdings in establishing CRL and was a director of Holdings.

CRL had not contested MCA’s claim and, having become insolvent, had entered administrative receivership. The flagrancy of its breach of copyright and the bogus quality of its defence led Jacob J. to conclude that there should be an award of additional damages¹⁹¹ in the original proceedings in which MCA had sought redress against CRL.¹⁹² Following the receivership of CRL, the claimant took action against Mr Young, adding him as a defendant to the proceedings. It was alleged by the claimant that Mr

Young had “personally authorised, procured and directed” the wrongful acts of CRL and that he should be “personally liable for” its acts.¹⁹³ On the issue of Mr Young’s liability, at first instance, Rimer J. held¹⁹⁴:

“185. ... Mr Young ... was, I find, Holdings’ nominee director of CRL, albeit only a de facto or shadow director. There is, in my judgment, no doubt that he was part of the corporate governance of CRL and that he exercised the ultimate influence over it. I fully accept that CRL was run on a day to day basis by its managing directors. But I do find that decisions as to strategy and policy — and the overall ultimate control of the company — were his and that it was those decisions which ultimately carried the day. In this context it matters not whether or not Mr Young was the beneficial owner of Holdings. Even assuming that he was not, he was Holdings’ man in ultimate charge of CRL.”

On appeal to the Court of Appeal Chadwick L.J. concluded that:

“[53] ... in order to hold Mr Young liable as a joint tortfeasor for acts of copying, and of issuing to the public, in respect of which CRL was the primary infringer and in circumstances in which he was not himself a person who committed or participated directly in those acts, it was necessary and sufficient to find that he procured or induced those acts to be done by CRL or that, in some other way, he and CRL joined together in concerted action to secure that those acts were done.”

The Court of Appeal held, on the basis of Mr Young’s extensive involvement in CRL’s breach of copyright and the control he exerted as Holdings’ nominee director, which “was not exercised through the constitutional organs of CRL”,¹⁹⁵ that he was personally liable as a joint tortfeasor with CRL and his appeal was dismissed. As Chadwick L.J. put it:

¹⁸² *Brooke v Bool* [1928] 2 K.B. 578, where the defendant, the owner of premises at which there was a suspected gas leak, undertook an examination of the gas pipe at the premises in conjunction with a lodger and was jointly liable with the latter when the lodger examined part of the pipe with a naked flame, causing an explosion.

¹⁸³ *The Koursk* [1924] P 140 where a vessel had been sunk following a collision caused by two other ships’ negligent manoeuvres whilst taking part in a convoy

¹⁸⁴ *The Koursk* [1924] P 140 at 156 per Scrutton L.J., citing *Clerk and Lindell on Torts*, 7th edn (London: Sweet & Maxwell, 2006) with approval.

¹⁸⁵ *Said v Butt* [1920] All E.R. Rep 232; [1920] 3 K.B. 497.

¹⁸⁶ *Said* [1920] All E.R. 232 at 241.

¹⁸⁷ *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 A.C. 465.

¹⁸⁸ *Rainham Chemical Works* [1921] 2 A.C. 465 at 475, 476.

¹⁸⁹ See for instance *Morton-Norwich Products Inc v Intercen Ltd* [1978] R.P.C. 501 where the claimants successfully argued that an English company importing chemicals (which infringed the claimant’s patent) had infringed that patent in pursuance of a common design with the Dutch exporter and that the defendant and the English company were joint tortfeasors; the Dutch company was held liable as a joint tortfeasor (even though it had committed no wrongful act within the United Kingdom).

¹⁹⁰ *MCA Records Inc v Charly Records Inc* [2001] EWCA Civ 1441.

¹⁹¹ Under s.97 of the Copyright, Designs and Patents Act 1977.

¹⁹² *MCA Records Inc v Charly Records Inc* unreported, April 18, 1996.

¹⁹³ *MCA Records* unreported, April 18, 1996 at [16].

¹⁹⁴ *MCA Records Inc v Charly Records Inc* [2000] All E.R. (D) 370.

¹⁹⁵ *MCA Records* [2001] EWCA Civ 1441, per Chadwick L.J. at [55].

“If the judge’s findings of fact are accepted, Holdings and Mr Young chose to exercise control over CRL otherwise than through its constitutional organs.”

A similar case is that of *Boegli-Gravures SA v Darsall-ASP Ltd*,¹⁹⁶ where the High Court ruled that a director was personally liable for a patent infringement by his company. He had engineered the infringement (by negotiating the sale of infringing goods knowing this violated the claimant’s rights) whilst acting outside his constitutional role and so exposed himself to liability as a joint tortfeasor.

Thus, although individual directors (de jure or de facto) were the focus of the proceedings in the *MCA* and *Boegli-Gravures* cases, the clear inference from the above is as follows. Where either a shareholder (whether or not itself an undertaking capable of forming a single economic unit with its investee company) or a director takes charge of the strategy of a subsidiary, otherwise than through exercising their constitutional rights (e.g. where that shareholder exercises its right to vote in general meeting or where the director is part of the board of the subsidiary and merely participates in that board’s deliberations), either may incur liability in respect of harm caused to third parties if that strategy amounts to a statutory tort, such as procuring or inducing breaches of EU or UK competition law. A deliberate breach, such as procuring that a company engages in a cartel, is highly unlikely to be effected pursuant to formal steps adopted by the company’s administrative organs. A director, for instance, procuring such a breach would be directly liable to third parties, thus circumventing the ruling in *Safeway v Twigger*.¹⁹⁷ This emphasises the need for the observance of governance mechanisms, if personal liability is to be avoided.

There is also a degree of convergence between the principles developed under common law and EU competition law in this area. Any shareholder which intervenes in management (and which otherwise might not have been regarded as an undertaking) may find that this act of intervention characterises the shareholder as an undertaking (in accordance with the *Cassa di Risparmio di Firenze* case¹⁹⁸) with painful consequences both in terms of potential liability to any fines that may subsequently be incurred and in respect of civil claims in respect of statutory tortious liability.

Conclusions

The concept of decisive influence enjoyed by a parent company that renders it and the subsidiary over which that influence is exercised a single economic unit embraces the notion of negative control. Matters such as parent company involvement in production plant closures

and investigations into competition law infringements and the ability to give “specific instructions on individual elements of commercial policy” have been treated as indicative of decisive influence in the context of a deadlocked joint venture.¹⁹⁹

The control on which Arden L.J. relied in the *Chandler v Cape* case requires that there should be a practice of intervention in trading operations, coupled with the utilisation of superior knowledge by a parent company and reliance on this by a subsidiary, perhaps through the provision of group-wide policies, e.g. group compliance schemes.

Thus, a parent company that either fails to seek to attain group compliance at all or attempts to do so, but implements a manifestly defective policy, either will be statutorily tortiously liable for the subsidiary’s transgressions as a single economic entity or should be directly tortiously liable at common law pursuant to *Chandler v Cape* to those to whom it has assumed liability for the effectiveness of the compliance policy.

The above developments indicate the somewhat diverse routes by which EU and English courts have rendered liable controlling corporate shareholders (under arts 101 and 102 TFEU), parent companies with the ability to set group policies that prove defective (*Chandler v Cape*) and shareholders (perhaps not otherwise constituting undertakings) (*MCA Records v Young* and the *Cassa di Risparmio di Firenze* cases) and individuals (*MCA Records v Young*) involved in management who ride roughshod over constitutional mechanisms to procure the commitment of a statutory tort. These cases are justifiable on fairness and policy grounds and strongly suggest the need for effective compliance with competition law. Through different concepts of control and influence the courts have recognised that, in certain circumstances, the concept of separate corporate personality and limited liability will prove inadequate defences to tortious claims.

It is unlikely ever to be efficient to undertake compliance otherwise than on a group-wide basis. However, the freedom that a group enjoys to organise itself as it thinks fit and the efficiency which this internal allocation of group tasks represents must give ground to competition law compliance in order to generate the efficiencies offered by an effective market, undistorted by anti-competitive behaviour.

Finally, it is generally recognised that, in order for compliance regimes to be truly effective (and thus avoid the regulatory risks outlined above), directors should inculcate a corporate culture of compliance. Top-down compliance of this nature requires boardroom initiation and commitment. This in turn suggests that certain stakeholder interests (e.g. those of suppliers, customers and consumers capable of being harmed by anti-competitive conduct) may be embraced more fully

¹⁹⁶ *Boegli-Gravures SA v Darsall-ASP Ltd* [2009] EWHC 2690 (Pat).

¹⁹⁷ In *Safeway Stores* [2010] EWHC 11 (Comm) it was held that a carteliser could not pass on the fines it had suffered to the employees who had caused them (in breach of their duties to the employer, Safeway) as this would allow Safeway to avoid the consequences of its own egregious behaviour.

¹⁹⁸ *Cassa di Risparmio di Firenze* [2006] E.C.R. I-289.

¹⁹⁹ *Dow Chemical* [2012] 4 C.M.L.R. 19.

and (as proposed by Freeman and McVea²⁰⁰) more strategically, than s.172 of the Companies Act 2006 might otherwise have accomplished. Indeed, recognising that the Court of Appeal in *Chandler v Cape Plc* and in the *MCA Records* case did not limit tortious liability to situations where control is exercised by an English parent company and that the GCEU in the *Dow* case rejected

compliance with US governance rules, there is scope for both the single economic unit doctrine and English tort liability to impact on a wide range of corporate governance rules. Stakeholders whose welfare is at the heart of competition law should therefore find that their interests resonate more vigorously in boardroom deliberations in the future.

²⁰⁰ Freeman and McVea, "A Stakeholder Approach to Strategic Management", Darden Graduate School of Business Administration University of Virginia Working Paper No.01-02, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=263511 [Accessed November 26, 2013].