Directors’ Personal Liability for Cartel Activity under UK and EC Law—A Tangled Web

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Introduction

Contributions by lawyers in the United Kingdom to the debate regarding personal liability for cartel activity have tended to focus on dishonest behaviour under s.188 of the Enterprise Act 2002 or liability under s.1 of the Sherman Act. However, there are aspects of the English common law, statutory and EC Treaty measures which are relevant to directors who infringe competition law and which do not appear to have been subject to collective scrutiny. They possess quite different aims and features but nevertheless constitute a credible threat to a director’s position. They can give rise to personal liability or may deny a director his or her capacity to represent a company. This law has developed in a piecemeal fashion and without any unifying policy goal. Some of the laws under consideration are in a state of flux, others have only partially been used by regulators or tested by the courts and some have only very recently been used. All of them raise the issues of the precise degree of individual responsibility attributable to a director and the willingness of the law to disregard corporate personality before individual liability will arise.

Directors’ liability at common law for deceit

There are clearly discernable tensions between a director’s possible liability for breaches of competition law and general corporate law principles. This tension can be found in the tort of deceit where that deception underpins collusive activity. The development of the company as a separate legal entity and the protection of investors through the concept of limited liability have been credited with underpinning modern economic development. The concepts of limited liability and separate corporate personality are national constructs. They have been considered by the English courts over many years and remain in good health. Directors are merely the agents of the companies whose interests they serve, with the company being vicariously liable for their acts. However, recent judgments have affirmed that the human agent of a company, the director, will face personal exposure for certain tortious acts, even where the wrongdoing was ostensibly on behalf of the company.

A director will be personally liable if he or she dishonestly or recklessly misleads a third party into believing that the company which the director represents is not involved in anti-competitive behaviour, where the third party is intended to rely upon that statement and it induces the party to enter into a transaction. The misrepresentation need not be the only factor influencing that third party to enter into a transaction. The misrepresentation need not be the only factor influencing that third party to enter into the transaction, but it...
must have a real or substantial effect. In *Edgington v Fitzmaurice* the directors falsely stated in a prospectus that subscriptions for debenture bonds were invited to develop the company’s business through the acquisition of transport when the money was really required to “meet the pressing liabilities of the company”. This statement by the defendant directors misled the claimant, who was also labouring under the further misapprehension that his debenture would be secured. His claim against the directors succeeded, since he was misled by the statement in the prospectus, even though this was not the sole reason for his subscription for debentures in a company which subsequently became insolvent.

Where deceit occurs, the third party is entitled to be compensated for all losses flowing from that deceit. It has been argued in the context of deceit that the claimant should be entitled to an account of profits, although the availability of such a remedy remains in doubt. It has recently been held that losses for deceit can include losses for lost opportunity, namely the opportunity to purchase from someone other than the tortfeasor. The opportunity to purchase from others may be merely theoretical if the whole sector is cartelsed.

In deceit cases, the allegation of fraud need only be demonstrated to the civil standard of probability, although as Irwin J. remarked in *Contex Drouzbba v Ronald Wiseman* (citing *Hornal v Neuberger Products*), “... the Court should in practice require more convincing evidence to establish fraud” as compared “with other types of allegation”.

At common law it has been possible for a director to be guilty of the tort of deceit for many years. In the case of *Derry v Peek*, investors had acted in reliance upon a company prospectus which falsely claimed that the company in which they acquired their shares would have the right to use steam rather than horse power to drive its trams. The investors sued the directors personally for the tort of deceit, the only legal ground on which action might be then be taken for a pre-contractual statement which did not become a term of the contract. Their action was successful before the Court of Appeal, but the defendants won their appeal to the House of Lords. Both courts accepted the principle that the directors might have been liable had they been dishonest or reckless in making the statement in the prospectus. The House of Lords held that they had an honest (but misplaced) belief that the necessary Board of Trade consent (to use the more efficient and economic steam power) was a mere formality and thus were not liable. Lord Herschell explained that the requirements of the tort of deceit were as follows:

“...fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. ...”

This does not require dishonesty to the criminal law standard required by the Enterprise Act 2002. The expansion of tortious liability to include negligent misstatements in *Hedley Byrne v Heller* caused judicial confusion in the context of director liability for misrepresentations made when acting on behalf of the company. The key elements of liability for negligent misstatement are the possession of special skill and the assumption of liability for statements made. In principle, this has now been extended to include statements made by directors who hold themselves out as having special experience or skill and who assume personal liability for the veracity of those statements. In *Williams v Natural Life Health Foods Ltd*, the claimant was a prospective franchisee intending to set up a health food store in Rugby. The defendant company had supplied franchise material which included a brochure and financial information. The financial information was based on the managing director’s experience of

5 *Edgington v Fitzmaurice* (1885) L.R. 29 Ch. D. 459.
6 *Edgington v Fitzmaurice* (1885) L.R. 29 Ch. D. 459 per Cotton L.J. at 480.
8 An account of profits for fraudulent misrepresentation was sought in *Murad v Al-Saraj* at first instance and considered a possibility by Etherton J. ([2004] EWHC 1235 (Ch)) but strongly doubted by Arden L.J. on appeal ([2005] EWCA Civ 959). Its availability must be in doubt following *Devenish Nutrition Ltd v Sanoff-Aventis SA* [2007] EWHC 2394 (Ch).
9 *Hew Ltd v Harper* [2008] EWHC 915 (Ch), a case where the deceit led a purchaser to acquire a company where it would have bought another more profitable company but for the seller’s false representations.
10 *Contex Drouzbba v Wiseman* [2006] EWHC 2708 at [55].
12 *Edgington v Fitzmaurice* (1885) L.R. 29 Ch. D. 459.
13 *Derry v Peek* (1889) L.R. 14 App. Cas. 337.
14 *Derry v Peek* (1888) L.R. 37 Ch. D. 541.
15 *Derry v Peek* (1889) L.R. 14 App. Cas. 337.
16 *Derry v Peek* (1889) L.R. 14 App. Cas. 337 at 374.
17 See Evans L.J. in *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)* [2000] 1 Lloyd’s Rep. 218 at [27] who remarked that the terms “dishonesty” and “fraudulent” employed in *Derry v Peek* do not indicate conduct or a state of mind which has a criminal sense or intent.
19 *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830.
running a health food franchise in Salisbury. The managing director was also the principal shareholder in the company. The information was incorrect. Since the company had been dissolved the claimant sued the managing director personally for negligent misstatement. The Court was prepared to accept in principle that the managing director might have been liable. The company had held itself out as having commercial expertise and used information supplied by the director. However, the director had no personal liability for this false information. There had been no communication between the director and the claimant and the director had not assumed any personal liability towards him.

In *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)*, the Court of Appeal mistakenly assumed that this requirement of assumption of personal liability was also necessary for directors to be liable for fraudulent or deceitful misstatements. Mr Mehra had been the Managing Director of Oakprime Ltd, the beneficiary of a letter of credit. He backdated bills of lading in order to deceive Standard Chartered Bank into paying under the letter of credit. The Court of Appeal concluded that Mr Mehra was not personally liable. Evans L.J. referred to *Williams v Natural Health Life Foods Ltd* and concluded that the case:

“...appears to exclude, however, any suggestion that the director is necessarily personally liable whenever his acts are sufficient to make the company liable in tort.”

This confusion was addressed on appeal by the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)*. Lord Hoffmann clarified the point trenchantly:

“20. My Lords, I come next to the question of whether Mr. Mehra was liable for his deceit. To put the question in this way may seem tendentious but I do not think it is unfair. Mr. Mehra says, and the Court of Appeal accepted, that he committed no deceit because he made the representation on behalf of Oakprime and it was relied upon as a representation of Oakprime. That is true but seems to me irrelevant. Mr. Mehra made a fraudulent misrepresentation intending SCB to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representation and his knowledge...”

The House of Lords has therefore affirmed the principle that directors can be personally liable for deceit where the element of that tort are made out. Deceit does not require any assumption of personal responsibility for the statements made. Personal liability for deceit is distinguishable from any liability directors may have for negligent misstatement where they hold themselves out as having a special skill and accept responsibility to third parties for their statements.

The concept of deceit can be relevant in cartels and price fixing in particular. In *Norris v USA* the Queen’s Bench Division, on appeal from the judgment of the district judge regarding the extradition of Mr Norris to the United States to face prosecution under the Sherman Act, considered that cartels involved *covert* deceit with those engaged in price fixing taking advantage of the mistaken assumptions of third parties. The Queen’s Bench Division considered that secrecy was enough to give rise to a dishonest offence meriting extradition to the United States under the Extradition Act 2003.

Hearing Mr Norris’s further appeal, the House of Lords Appellate Committee concluded that:

“17. ...The common law recognized that an agreement in restraint of trade might be unreasonable in the public interest, and in such cases the agreement would be held to be void and unenforceable. But unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, such agreements were not actionable or indictable.”

And later the Committee said:

“23. At no time up to the present has anyone, whether an individual or a company, been successfully prosecuted for

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22 *Standard Chartered Bank v Pakistani National Shipping Corp (No.2)* [2003] 1 A.C. 959 at 968-969.
being party to or giving effect to a price-fixing agreement without aggravating features. .""

Thus, price fixing had never been a common law offence unless accompanied by the aggravating features referred to in paragraph [17] of its opinion.

This opinion is no doubt welcome to Mr Norris and to directors who engaged in price fixing before June 20, 2003 when it became a criminal offence under the Enterprise Act. As the reference to "aggravating features" makes clear, however, directors may yet face personal liability where (whether before or after June 20, 2003) they were involved in overt deception. As McKendrick has pointed out:

"As a general rule, however, English law does not recognize the existence of a duty to disclose material facts known to one party but not to the other (Keates v Cadogan (1851) 10 CB 591). As Viscount Maugham stated in Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205, 211 'mere silence, however morally wrong, will not support an action of deceit'. The word 'mere' is important. Something more than silence is therefore required to constitute a representation of fact. But that 'something more' can take many different forms. English law does not require that the representation take the form of words. .""

He cites a number of cases as authority for the proposition that a misrepresentation can arise from conduct and circumstances, half truths and concealment. Recent judgments also make it clear that the line between covert and overt deception is not as clear cut as it may at first seem.

In Renault UK Ltd v FleetPro Technical Services Ltd, Mr Thoms was the sole director and shareholder of the defendant company, FleetPro, which managed an "affinity scheme" for the British Airline Pilots Association. FleetPro purchased cars from Renault at discounted rates but then resold them online as a broker, in breach of the scheme. By using affinity scheme purchase codes and signing orders on behalf of FleetPro designed to trigger affinity scheme discounts, Mr Thoms made himself personally liable for deceit. As Richard Seymour Q.C. (sitting as a judge of the High Court) concluded:

"118. There was, of course, no argument but that a misrepresentation was made by Mr. Thoms on behalf of FleetPro by completing the form of order in relation to each vehicle sought to be purchased under the terms of the BALPA scheme so as to indicate a Fleet Code of 'BALPA' or '46172'. It was accepted that Mr. Thoms knew that a representation in respect of each vehicle that the end purchaser of it was entitled to the terms in the BALPA Scheme was untrue. .""

The claimant sought the difference between the full retail price and the discounted price received, or alternatively an account of profits to reflect unjust enrichment. The judge found that Renault had turned a "blind eye" to the misuse of the BALPA Scheme and was only misled for a limited period. Moreover, the claimant had made profits on vehicles that would not otherwise have been manufactured and sold. On the issue of an account of profits, the judge referred to the apparent availability of an account at first instance in the case of Murad v Al-Saraj. There, damages had been awarded because of breaches of fiduciary duty as well as fraudulent misrepresentation. He noted that the Court of Appeal, when dealing with the appeal against the judgment in that case, had not wholly addressed the issue of whether the equitable remedy of an account was available for the common law tort of deceit (with the exception of Arden L.J., who had doubted its availability). He concluded, however, that:

"158. The remedy of an account is, on any view, an equitable remedy. If technically it were available in this case, the question would arise whether, in the discretion of the court, that remedy should be afforded. The circumstances of the case are singular. One does not normally find a willing victim of a fraudulent misrepresentation who has actually profited from being deceived . . In my judgment it would not be appropriate, in the exercise of my discretion, to afford the remedy of an account . . in this case, even if technically such a remedy were available.""

In Contex Drouzhba v Wiseman, Mr Wiseman was the director responsible for the activities of Scott

26 Spice Girls Ltd v Aprilia World Service BV [2002] EWCA Civ 15; [2002] E.M.L.R. 27 where the Court of Appeal held that the Spice Girls had misled the sponsors of their world tour into believing the group was still intact by turning up to a promotional photo shoot after Geri Halliwell had informed the group she was leaving.
27 Peek v Gurney (1873) 8 L.R. 6 H.L. 377 where Chelmsford L.C. referred (at 392) to a "half truth" in a prospectus as sometimes amounting to "a real falsehood".
28 Gordon v Selico Ltd (1985) 275 EG 841 where Gouding J. and the Court of Appeal (1986) 18 H.L.R. 219 held that covering up dry rot in a flat prior to sale amounted to a misrepresentation.
30 Murad v Al-Saraj [2004] EWHC 1235 (Ch).
Daniel Ltd. Scott Daniel Ltd shipped cloth to the claimant which in turn produced finished garments and dispatched the clothing to England for Scott Daniel Ltd to sell on to retailers. The latter was habitually late in paying the claimant. In order to regularise its business arrangements, improve cash flow and business planning, the representatives of the claimant met Mr Wiseman in London in January 1998. Mr Wiseman, as Managing Director of Scott Daniel Ltd, signed an agreement which provided that all payments would be made within 30 days of shipment by the claimant. Irwin J. found that at the time that Mr Wiseman signed this agreement, he had no real belief in the truth of this representation and knew Scott Daniel’s “days were numbered.” He found Mr Wiseman liable personally for an implied fraudulent misrepresentation:

“96. . . it cannot ever have been the policy of the law that a director of a company who commits acts amounting to deceit by the company of which he is a director, should be able to claim exemption from tortious liability by reason of his status as a director. On the contrary, the clear policy of the law must be—and must always have been—in favour of a remedy for fraud. It is in my view inconceivable, where fraud is proved, that the status of director could act as an effective shield from personal liability by a director.”

Irwin J. held that Mr Wiseman was personally liable for deceit, a judgment against which Mr Wiseman appealed. He also held that the placing of orders by Scott Daniel amounted to separate false representations as to its creditworthiness.34

The Court of Appeal dismissed the appellant’s argument that the existence of the remedy of fraudulent trading under s.213 of the Insolvency Act 1986 meant that there was no necessity to find against him on the grounds of deceit when misleading company creditors. Waller L.J. said:

“14. . . it seems to me the position is now clear, following the decision of the House of Lords in Standard Chartered Bank v Pakistan National Shipping Corporation [2003] AC 959. Even if the company would be liable for the deceit carried out by its director, the director has a personal liability for his own fraud.”

The Court of Appeal then proceeded to uphold the judgment of Irwin J.

In the context of tenders for public authority work, directors almost invariably sign certificates confirming that there has been no collusion between bidders. In the light of these cases they are vulnerable to actions for deceit. There may be more nuanced situations where directors impliedly mislead the buyer that the prices of products or services are competitive.

Where prices have initially been set competitively, any director who represented that they were set at competitive levels will need to correct this if they are subsequently set through collusion between competitors.36

Can an implied obligation of good faith extend the scope of liability for covert deception?

Good faith in English law

There is no general duty of good faith under English contract law.37 The House of Lords has held that the “concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position” of negotiating parties.38

In normal commercial negotiations, no such obligation will exist and even though the parties intend some degree of co-operation, the contractual language employed may be inadequate to create one. In National Westminster Bank v Rabobank Nederland,39 a collateral agreement, entered into as part of a bank debt recovery arrangement in respect of a troubled debtor company, required documentation acceptable to both banks and the debtor company to “be negotiated in good faith”. Rabobank claimed National Westminster Bank had failed honestly to disclose material information in breach of its good faith obligation. It was held that this wording was inadequate to impose “a general disclosure obligation”.40 The phraseology was directed to agreeing wording or documentation and, even if wide enough to require the full disclosure of material information, the language would, in principle, be unenforceable under Walford v Miles.41

33 Contex Drouzhba v Wiseman [2006] EWHC 2708 at [62].
34 Contex Drouzhba v Wiseman [2006] EWCH 2708 at [97].
38 Walford v Miles [1992] 2 A.C. 128 per Lord Ackner at 137.
In *Walford v Miles* it was held that an obligation to use best endeavours to negotiate has the requisite certainty and is enforceable. However, in *Beta Investment SA v Transmedia Europe Inc*\(^{42}\) it was held that an obligation to use:

“... best endeavours to negotiate and agree a settlement agreement may itself be a contractual obligation but it does not commit a party to reach a specific outcome or indeed any outcome at all.”\(^{43}\)

However, a good faith obligation will exist in a fiduciary context such as partnership,\(^{44}\) some joint ventures\(^{45}\) and the director’s fiduciary duty to the company.\(^{46}\) It also arises in the context of commercial agency\(^{47}\) and consumer sales.\(^{48}\) Apart from these limited circumstances, there is no obligation to make full disclosure in contractual negotiations in English law.

**Good faith in Scots law**

A duty of good faith may arise in other jurisdictions and as a consequence there may be scope for greater liability to arise once a contract has been entered into following a silent deception.\(^{49}\) There appears to be no common position among the civil law states as to whether an obligation of good faith extends to the pre-contract period and as to whether it imposes a disclosure requirement on the parties.

As Hector MacQueen has remarked when analysing the existence of an underlying obligation to act in accordance with good faith and fair dealing in Scots law\(^{50}\):

“Where the great Continental civil codes all contain some explicit provision to the effect that contracts must be performed and interpreted in accordance with the requirements of good faith, English and Irish law are almost equally explicitly opposed to such broad concepts.”

He goes on to conclude that “... if there is a general principle of good faith in Scots contract law, it has been mostly latent and inarticulate until now.” He notes that in the main, there is no liability in Scottish law for pre-contractual negotiations, unless a misrepresentation or breach of trust occurs:

“... the authorities, while by no means uniform, are on the whole against the idea of liability arising if I know that the other party is labouring under some misapprehension of which I take advantage although without misrepresentation... the courts are suspicious of attempts to undermine contracts by attaching significance to the preceding negotiations.”

**Good faith in US law**

In the United States, the Uniform Commercial Code imposes an obligation of good faith and fair dealing in the performance or enforcement of a contract.\(^{51}\) Good faith is “honesty in fact in the conduct or transaction concerned”\(^{52}\) and “the observance of reasonable standards of fair dealing in the trade”.\(^{53}\) The Restatement (Second) of Contracts 1981 provides that “every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement”.\(^{54}\)

These provisions do not, however, give rise to an obligation of disclosure in the context of contractual negotiations. In the United States, an obligation to disclose has been rejected in relation to patents and standard-setting, both as a question of misrepresentation and more lately under antitrust law.

In *Rambus Inc v Infineon Technologies AG*,\(^{55}\) the Federal Circuit held that Rambus had not fraudulently failed to disclose its patents when involved in industry standard setting. In order to prove fraud under Virginian law, a claimant needed to show, by clear and convincing evidence, that there had been a false representation or...

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42 Beta Investment SA v Transmedia Europe Inc [2003] EWHC 3066 (Ch).
43 Beta Investment SA v Transmedia Europe Inc [2003] EWHC 3066 (Ch) per Mr Justin Fenwick Q.C. (sitting as a Deputy High Court judge) at [45].
44 Beddow v Cayzer [2007] EWCA Civ 644,
45 Ross River Ltd v Cambridge City Football Club Ltd [2007] EWHC 2115 (Ch).
51 Uniform Commercial Code § 1–203.
52 Uniform Commercial Code § 1–201(19)
53 Uniform Commercial Code § 2–103(1)(b)
54 The Restatement (Second) of Contracts 1981 § 205.
omission of a material fact in the face of a duty to disclose and that this had been intentional and done knowingly with the intention to mislead. There must also have been reasonable reliance by the misled party and resultant loss to it. Any misrepresentation must be as to an existing or pre-existing fact, rather than a statement as to unfulfilled promises or future events. A misrepresentation as to a party’s present intentions could also amount to fraud in some cases. However, the Court held that:

“The . . . Rambus’s duty to disclose extended only to claims in patents or applications that reasonably might be necessary to practice the standard. . . .”

“To hold otherwise would contradict the record evidence and render the . . . disclosure duty unbounded.”

The duty of a participant in an industry open standards committee to disclose only arose when formal consideration of the standard began. Rambus, having withdrawn before this stage, was held not to have fraudulently failed to disclose its patents to the standard-setting committee.

The members of the standard-setting committee who were subsequently ambushed by Rambus and obliged to enter into patent licences did not seek to plead the Virginia Commercial Code in respect of pre-contractual obligations. As with the Uniform Commercial Code, this imposes good faith obligations on parties to an agreement on a mandatory basis. The Virginia Commercial Code introduces into all contracts an express obligation of good faith, again defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”

The Virginia Commercial Code allows evidence of the parties’ course of dealing, and the custom and practice of the industry to explain and, in some circumstances, to modify the parties’ concluded agreement.

Good faith in US antitrust law

Despite this judgment, the Federal Trade Commission (FTC) opted to sue Rambus under s.5 of the Federal Trade Commission Act (FTCA), which prohibits “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce.” The FTC contended that Rambus had deliberately misled the industry-wide standard-setting organisation, the Joint Electron Device Engineering Council (JEDEC), with anti-competitive consequences. In the 1990s the computer hardware industry faced a “memory bottleneck” with memory development lagging behind the development of faster central processing units, with resultant loss of overall computer performance. The deception was alleged to relate to the development of technologies designed to rectify this. Those technologies were dynamic random access memory (DRAM), more specifically synchronous DRAM (SDRAM) and double data rate (DDR) SDRAM standards. As Joseph J. Simons, Director of the FTC Bureau of Competition said in a press release of June 19, 2002 regarding the FTC case:

“By issuing this complaint, the Commission is sending a signal not only to Rambus but also to other companies. The message is this: If you are going to take part in a standards process, be mindful to abide by the ground rules and to participate in good faith.”

Unfortunately for the FTC, its complaint was dismissed by Chief Administrative Law Judge Stephen J. McGuire on February 23, 2004. The FTC case was not helped by factual findings which showed that Rambus had sent a letter to the standard-setting committee stating:

“At this time Rambus elects to not make a specific comment on our intellectual property position . . . Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee’s consideration nor does it make any statement constituting an endorsement of any proposal under the committee’s consideration nor does it make any statement...”

And so the litigation continued.

63 See Virginia Commercial Code § 8.2–103(1)(b); see also Virginia Commercial Code § 8.1–201(19) (defining good faith as “honesty in fact in the conduct or transaction concerned”).
64 See Virginia Commercial Code at §§ 8.1–205, 8.2–208.
regarding potential infringement of Rambus intellectual property.”

The judge’s grounds for dismissing the FTC complaint included the following:

“(1) the EIA/JEDEC patent policy encouraged the early, voluntary disclosure of essential patents and Respondent did not violate this policy;

(3) Respondent’s conduct did not amount to deception and did not violate any ‘extrinsic duties,’ such as a duty of good faith to disclose relevant patent information;

(4) Respondent did not have any undisclosed patents or patent applications during the time that it was a JEDEC member that it was obligated to disclose;

(5) amendments to broaden Respondent’s patent applications while a member of JEDEC were not improper, either as a matter of law or fact;

(7) Respondent did not intentionally mislead JEDEC by knowingly violating a JEDEC disclosure rule;

(9) members of JEDEC did not rely on any alleged omission or misrepresentation by Respondent and, if they had, such reliance would not have been reasonable;

(10) the challenged conduct did not result in anticompetitive effects. . .”

He held that even if Rambus had disclosed all the information it was allegedly required to disclose, there was insufficient evidence that JEDEC would have standardised an alternative technology.

Following an appeal by the FTC against the Administrative Judge’s opinion, on August 2, 2006, the FTC (by a unanimous vote) determined that Rambus had unlawfully monopolised the markets for four computer memory technologies incorporated into industry standards for DRAM chips. The Commission held that Rambus had engaged in acts of deception which constituted exclusionary conduct under s.2 of the Sherman Act and breached s.5 of the FTCA.

The Commission regarded Rambus as having adopted:

“... a course of conduct [which] constituted deception under Section 5 of the FTC Act. Rambus’s conduct was calculated to mislead JEDEC members by fostering the belief that Rambus neither had, nor was seeking, relevant patents that would be enforced against JEDEC-compliant products . . . Under the circumstances, JEDEC members acted reasonably when they relied on Rambus’s actions and omissions and adopted the SDRAM and DDR SDRAM standards.”

On April 22, 2008 the Washington DC Court of Appeals overturned the Commission’s decision. It concluded that the Commission had found Rambus’s non-disclosure of its patents violated antitrust law in the alternative. The Commission had found that non-disclosure by Rambus had prevented JEDEC from adopting other, non-proprietary, technologies into its standards. Alternatively, this non-disclosure had prevented JEDEC from extracting a commitment from Rambus that it would licence its technologies on reasonable and non-discriminatory (RAND) terms, with an opportunity for ex ante licensing negotiations.

The Court of Appeals noted that Rambus did not deny that its patent rights conferred monopoly power in the four relevant technologies and that these were relevant markets for antitrust purposes. It referred to its decision in Microsoft and concluded that the mere possession of monopoly power was not an infringement of s.2 of the Sherman Act. There must be exclusionary conduct having an anti-competitive effect. The latter required harm to the competitive process and consequent harm to consumers. The Commission had found that Rambus, having made misrepresentations during the standard-setting process, had engaged in exclusionary conduct. Had Rambus fully disclosed its proprietary technology, that technology would have been excluded from the standard or a RAND assurance would have been obtained.

The Court of Appeals held that both alternative grounds must constitute violations of s.5 of the FTCA. As to the first ground, assuming that it was exclusionary, there was insufficient evidence to support a finding that, even with complete disclosure, JEDEC would have standardised other technologies. The Court then went on to reject the proposition that Rambus’s non-disclosure and consequent prevention of JEDEC from extracting a commitment from Rambus to license its

72 United States v Microsoft Corp (2001) 253 F.3d 34 (D.C. Cir.).
It cited NYNEX Corp v Discon Inc,75 where the Supreme Court had held that deceptive conduct on its own without harm to the competitive process was an insufficient basis for a claim under s.5 of the FTCA. The Court of Appeals thus held that preventing JEDEC from securing a RAND commitment from Rambus did not constitute harm to the competitive process. Tellingly, it stressed76 the need for clear disclosure requirements in standard setting where non-disclosure might constitute an antitrust violation:

"One would expect that disclosure expectations ostensibly requiring competitors to share information that they would otherwise vigorously protect as trade secrets would provide 'clear guidance' and 'define clearly what, when, how, and to whom the members must disclose'. Infineon, 318 F.3d at 1102. This need for clarity seems especially acute where disclosure of those trade secrets itself implicates antitrust concerns . . . . In any event, the more vague and muddled a particular expectation of disclosure, the more difficult it should be for the Commission to ascribe competitive harm to its breach. See 2 IP & Antitrust § 35.5 at 35-51 ("Although antitrust can serve as a useful check on abuses of the standard-setting process, it cannot substitute for a general enforcement regime for disclosure rules.")."

The Court of Appeals chose not to follow its decision in Microsoft77 where it had concluded that Microsoft had deceived independent software developers into believing that Microsoft’s software development tools could be used to design cross-platform Java applications when they were limited to Windows-specific ones. The Court had held that:

"Microsoft’s conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, Microsoft offers no procompetitive explanation for its campaign to deceive developers. Accordingly, we conclude this conduct is exclusionary, in violation of s 2 of the Sherman Act."

This deception was held to harm competition.

The American Antitrust Institute has filed a motion and amicus curiae brief petitioning for a rehearing by the FTC of the Rambus case.78 It argues that the Court of Appeals decision is in conflict with its decision in Microsoft, seriously undermines the standard setting process, imposes “a wholly unreasonable causation burden” on standard setting organisations and “will cause untold harm to consumers whose interests depend on the standard setting process that protects the competitive process.”

The FTC has now issued a petition79 for the rehearing en banc of the Rambus case on the grounds that the decision is in conflict with the Court of Appeals decision in Microsoft,80 imposes “a nearly insurmountable burden of reconstructing the hypothetical but for ‘marketplace’” and improperly extends the Supreme Court’s decision in NYNEX Corp v Discon Inc81 and, in so doing, protects deception that facilitates the acquisition of monopoly power.

77 United States v Microsoft Corp (2001) 253 F.3d 34 (D.C. Cir.).
78 Available at: http://www.antitrustinstitute.org/archives/files/Rambus%20Brief%206.11.08%20brief%201108F31120081325.pdf [Accessed August 28, 2008].
80 United States v Microsoft Corp (2001) 253 F.3d 34 (D.C. Cir.).
Good faith in EC competition law

There is no infringement under EC competition law comparable to a complaint under s.5 of the FTCA, hence the EC Commission’s Statement of Objections issued to Rambus on July 30, 2007\(^{82}\) alleges that the firm had claimed “unreasonable royalties” for the use of certain DRAM chip patents and states that it abused a dominant position through engaging:

“[...] in intentional deceptive conduct in the context of the standard-setting process, for example by not disclosing the existence of the patents which it later claimed were relevant to the adopted standard.”

The EC Commission’s proposed remedy is that Rambus should charge a reasonable and non-discriminatory rate for its licences.

Whilst only able to impose such an obligation obliquely, the EC Commission does plainly consider that good faith obligations are important, at least in the context of standard-setting. In its notice relating to the European Telecommunications Standards Institute (ETSI),\(^{83}\) it adopted a favourable view of ETSI’s standard-setting policy. This obliged each ETSI member to use its reasonable endeavours to inform ETSI in a timely manner of essential intellectual property rights and in particular, when submitting a technical proposal for the standard, to inform ETSI on a bona fide basis of any of the member’s intellectual property rights that might be essential to the proposed standard.\(^{84}\) This was buttressed by a concomitant obligation on the disclosing member to grant an irrevocable licence on fair, reasonable and non-discriminatory terms.\(^{85}\)

On February 27, 2008, the EC Commission imposed\(^{86}\) a total periodic penalty payment of €889 million on Microsoft. This was for Microsoft’s failure to comply with the EC Commission’s original Decision of March 24, 2004,\(^{87}\) in which Microsoft was held to have abused its dominant position by withholding the proprietary information from Sun Microsystems Inc necessary to allow the latter’s work group servers to interoperate with the Microsoft operating system. The EC Commission Decision, fixing the periodic penalty payment for non-compliance with the March 2004 Decision, outlines the sequence of negotiations with Microsoft regarding compliance.\(^{88}\) In a letter of May 2, 2005,\(^{89}\) Microsoft had agreed eight framework principles for its prospective licences, the seventh of which was that:

“Microsoft will discuss in good faith with prospective licensees how best to craft agreements in accordance with these principles and the terms of the Decision, subject to review by the Trustee”.

Also in May 2005, Microsoft warranted that it applied its work group server protocol programme pricing principles in good faith.\(^{90}\) According to a letter of October 3, 2005\(^{91}\) from Microsoft’s General Counsel to the Director General of DG Competition, he assured the latter that:

“[...] We have endeavoured, in good faith, to establish royalty levels that conform to the agreed Pricing Principles.”

Clearly, good faith intentions and obligations were not enough to ensure timely agreement of licences on terms which were commercially acceptable and satisfactory from a regulatory perspective. The use of good faith obligations in the context of EC competition law seems unlikely to evolve as an exact tool. Perhaps the English courts are right to view an “agreement to agree” as too uncertain to be enforceable.

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83 Notice pursuant to Art.19(3) of Regulation 17 concerning case IV/35.006-ETSI interim IPR policy [1995] OJ C76/5.
84 Notice pursuant to Art.19(3) of Regulation 17 concerning case IV/35.006-ETSI interim IPR policy [1995] OJ C76/5 at para.11(i).
85 Notice pursuant to Art.19(3) of Regulation 17 concerning case IV/35.006-ETSI interim IPR policy [1995] OJ C76/5 at para.11(ii).
89 COMP/C-3/37,792-Microsoft, para.32.
90 COMP/C-3/37,792-Microsoft, para.113.
91 COMP/C-3/37,792-Microsoft, para.115 and fn.139 of the Decision.
Director disqualification orders and a director’s duty of care

Since the advent of the Enterprise Act 2002, it has been possible for the Office of Fair Trading (OFT) (and certain other regulators\(^{92}\)) to apply to the court for a director disqualification order where a director has been involved in a breach of UK or EC competition law. This legislative power remained unused until very recently.

On June 11, 2008, Bryan Allison, David Brammar and Peter Whittle were disqualified from acting as company directors for periods from between five and seven years for their role in the marine hose cartel case.\(^93\) That case involved the first criminal convictions under the Enterprise Act 2002.\(^94\)

The issue of whether disqualification orders will be made in the context of less flagrant breaches of competition law infringement remains unexplored. When asked whether the OFT is considering seeking disqualification orders in other “high profile” cases, Simon Williams, head of cartel investigations, was reported as saying that:

“In all the cases we investigate, [we] keep an eye on the appropriateness of the director disqualification provisions.”\(^95\)

Section 204 of the Enterprise Act 2002 amended the Company Directors Disqualification Act 1986 (CDDA) 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 EC competition law and whose conduct renders him “unfit” to act as a director.

An order, if made, must be for a minimum of two years and can last for up to 15 years. Any breach of an order or an undertaking can result in criminal proceedings and may result in fines and imprisonment for up to two years.\(^96\) Anyone acting as a director when disqualified, or who is involved in the management of a company and who acts on the instructions of a disqualified director, will be personally liable for the debts of that company.\(^97\)

If the court is satisfied that the conduct of a director renders that director unfit, it must make a disqualification order. Sections 9A(5)–(7) of the CDDA provide guidance as to unfitness. Under s.9A(6)(a), the court must consider whether the director’s conduct contributed to the breach. If it did not, under s.9A(6)(b) the court must consider whether the director had reasonable grounds for suspecting that the conduct of the company was in breach of competition law and whether the director took steps to prevent any infringement. Finally under s.9A(6)(b), if the director did not know of the breach, the court must assess whether the director ought to have known that the conduct of the company amounted to a breach of EC or UK competition law.

Under s.9C of the CDDA, where the OFT or a specified regulator has reasonable grounds for suspecting that a breach of competition law has occurred, they may use all the powers of investigation available under ss.26–30 of the Competition Act 1998. Failing to comply with investigatory requests for information, non-disclosure of documents, or intentionally obstructing an inquiry conducted under ss.26–28 of the Competition Act 1998 is itself an offence, punishable by fines and (where the investigation was pursuant to a court warrant) by imprisonment for up to two years.\(^98\)

Section 9A(6) therefore refers to actual knowledge, but also imports the notion of a director having constructive notice of whether competition law breaches have occurred. It echoes the subjective and objective test of a director’s duty of care and the concept of taking steps to prevent infringement which was first employed in s.214 of the Insolvency Act 1986\(^99\) in the context

\(^{92}\) The Director General of Telecommunications, the Gas and Electricity Markets Authority, the Director General of Water Services, the Rail Regulator and the Civil Aviation Authority specified in s.9E of the Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002.

\(^{93}\) See the article “Oil industry executives jailed for price-fixing”, *Financial Times*, June 12, 2008, p.3.

\(^{94}\) *The Times* reported on August 8, 2008 that the Office of Fair Trading had brought proceedings against three former executives and one current employee of British Airways. The defendants are charged with criminal price fixing under the Enterprise Act for their involvement in the illegal agreement with Virgin Atlantic to pass on increased fuel costs in the form of a passenger surcharge. Whether they are subsequently involved in director disqualification proceedings remains to be seen; see article “British Airways four charged with criminal price-fixing”, *The Times*, August 8, 2008 (available at http://business.timesonline.co.uk/tol/business/industry_sectors/transport/article4481554.ece [Accessed September 24, 2008]).

\(^{95}\) See the article “Business urged not to resist crackdown on price-fixing”, *Financial Times*, June 23, 2008, p.3.

\(^{96}\) Section 13 of the CDDA.

\(^{97}\) Section 15 of the CDDA.

\(^{98}\) Section 42 of the Competition Act 1998.

\(^{99}\) Section 214(1) provides that a court may make a person (who is or has been a director of a company which enters insolvent liquidation) liable to make such contribution to the company’s assets as the court thinks proper where the director should
of a director’s responsibility for wrongful trading. The objective and subjective test was subsequently adopted as the appropriate standard for judging a director’s common law duty of care by Hoffmann J. (as he then was) in D’Jan of London Ltd, Re[100] and Norman v Goddard.[101] This standard has now been codified by the requirement of s.174 of the Companies Act 2006 that a director should show the general knowledge, skill and experience that that director actually has and which may reasonably be expected of a person performing the functions conferred on the director.

Taking steps to prevent reckless trading (once a director was or ought to have been aware insolvency proceedings would become inevitable with continued trading) also constitutes a defence to a director’s personal liability for company debt under s.214 of the Insolvency Act. The requirement to take such steps reinforces the director’s obligation to remain informed and puts a firm onus on a director to take proactive steps to prevent or rectify competition law infringements once they have (or ought to have) been detected.

Sections 6 and 8 of the CDDA provide that disqualification orders may be made in the context of insolvency or in the light of material obtained from an inspection under the Companies Act or Criminal Justice Act 1987. When considering making a disqualification order other than on competition grounds, the court must have regard to the factors referred to in Sch.1 of the CDDA. Part I of Sch.1 is applicable in all cases. It refers to matters such as misfeasance and any failure to prepare annual accounts, maintain the company’s accounting records, registers of directors and members and to file particulars of charges and the annual return. Part II is applicable when disqualification is being considered where the company has become insolvent. It lists matters such as the director’s responsibility for the insolvency, any failure to pay suppliers and the director’s responsibility for transactions which have been set aside or rectified.

When considering unfitness in the context of competition law breaches, s.9A(5)(c) of the CDDA provides that the court must not have regard to the matters referred to in Sch.1. Thus, the court must have regard to a director’s responsibility for competition law breaches, but only considering the actual and constructive knowledge attributable to him pursuant to s.9A(6). Dishonesty is not required.

In cases decided under s.6 of the CDDA, it has been held that the purpose of a disqualification order is to protect the public. In Sevenoaks Stationers (Retail) Ltd, Re[102] the Court held:

“It is beyond dispute that the purpose of CDDA, s.6, is to protect the public, and in particular potential creditors of companies from losing money through companies becoming insolvent when the directors of those companies are people unfit to be concerned in the management of a company.”

In Secretary of State for Trade and Industry v Ettinger,[103] Nicholls V.C. said that a further purpose was to raise standards of responsibility among directors. In Blackspur Group Plc, Re the Court held[104]:

“The purpose of the Act is the protection of the public, by means of prohibitory remedial action, by anticipated deterrent effect on further misconduct and by the encouragement of higher standards of honesty and diligence in corporate management, from those who are unfit to be concerned in the management of a company.”

The OFT has published guidelines[105] regarding the grounds on which it will consider seeking a disqualification order or undertaking. The guidelines indicate that no application will be made for a disqualification order unless there has been a breach of UK competition law or of EC competition law with UK effect. The OFT guidelines state that no action will be taken against a director unless the company has been fined.

A number of the factors outlined by the OFT seem focused on administrative convenience. For instance, no order will be sought where the company has sought leniency, although the OFT may proceed against a director who has been removed from the board due to their involvement in the breach or where they opposed the leniency application. The OFT will also not proceed against a director who is the beneficiary of a no action letter in cartel cases. Obviously, the OFT does not

100 Sevenoaks Stationers (Retail) Ltd, Re [1991] Ch. 164 per Dillon L.J. at 176.
102 Blackspur Group Plc (No.2), Re [1998] 1 W.L.R. 422 at 426.
wish to undermine its leniency programme. Similar sentiments have led the courts to refrain from awarding exemplary damages where fines had already been levied or leniency obtained.\textsuperscript{106}

Mitigating factors include whether the company was the subject of coercion, or whether:

“... the director was himself or herself under severe internal pressure such as from controlling shareholders of the company or directors of a parent company. ...to be involved in the breach or to allow it to occur.”

It is not clear how some of these factors are relevant to a director’s fitness or are consistent with the CDDA’s aim of protecting the public from corporate mismanagement.

According to its guidelines, the OFT will have regard to the degree to which a director was responsible for any breach by the company. It will pay regard to the director’s role and responsibilities and whether the director had any direct involvement in the infringement. Where the director was directly involved, the OFT is “likely to apply” for an order; where the director failed to take corrective action, an application is “quite likely”; and where a director failed to keep himself or herself informed sufficiently, this is “not ruled out”. If a director authorised expenditure, when he or she had reasonable grounds for suspecting the funded activity was a breach, this will also be taken into account. In accordance with s.9A(6), constructive knowledge attributed to a director may be enough, but the OFT’s gradation of likelihood does not seem consistent with s.9A(6), which does not make such fine distinctions between these types of involvement as grounds for unfitness. Nor is this approach consistent with that adopted by the courts under s.6 of the CDDA. When debating the Enterprise Bill’s disqualification provisions, Melanie Johnson, Parliamentary Under-Secretary at the Department of Trade and Industry (now the Department for Business and Enterprise) (now the Department for Business, Innovation and Skills), remarked that its proposals had been amended to make it clear that when considering whether to accept a competition disqualification undertaking from an individual, the OFT:

“... would have to take into account the same considerations in relation to a director’s conduct that a court would have to do.”\textsuperscript{107}

There does not appear to have been a Parliamentary expectation that the factors considered by the court or the OFT would differ when a disqualification order was made or an undertaking accepted on competition law infringement grounds.

As Mayson, French and Ryan have remarked,\textsuperscript{108} the standard of probity and competence required in order to avoid a finding of unfitness under the CDDA has been held\textsuperscript{109} to be based on the dual objective and subjective standard of care which was established in D’Jan of London Ltd, Re\textsuperscript{110} and which is now codified in the Companies Act 2006. Section 172 of the Companies Act 2006 requires a director to act in a way which the director considers, in good faith, is most likely to promote the long term success of the company having regard, among other interests, to relationships with suppliers and customers. Clearly the director cannot in good faith believe that price fixing satisfies this test. The OFT guidelines state that all directors will be presumed to know that cartel activity is unlawful.

Where a company is engaged in collusion it is feasible that its accounts show artificial profits achieved through supra-competitive prices. This could raise the spectre of disqualification under the CDDA and personal liability under s.214 of the Insolvency Act.

In Westmid Packing Services Ltd (No.2), Re,\textsuperscript{111} two directors had been deceived by their co-director over the true accounting position of the company. Two-year disqualification orders were imposed as they had failed to ensure that the accounts were properly prepared and had not kept themselves adequately informed about the company’s true financial position.

The possibility of personal liability for company debts arose in Continental Assurance Co of London Plc, Re.\textsuperscript{112} Inappropriate accounting policies had masked the company’s insolvency. Had the accounts shown the correct financial position, its insolvency would have been apparent. Parke J. did not impose personal liability under s.214 of the Insolvency Act since he considered that the directors only needed to display a basic rather than a sophisticated knowledge of accounts.

\textsuperscript{106} Devenish Nutrition v Sanofi-Aventis [2007] EWHC 2394 (Ch), where the Court ruled that imposing exemplary damages would undermine the EC Commission’s leniency policy.
\textsuperscript{107} Hansard, HC Vol.391, col.942 (October 30, 2002).
\textsuperscript{109} Secretary of State for Trade and Industry v Ball (In Liquidation of Lenard’s Plc, Re) [1999] 1 B.C.L.C. 286 per Hart J., at p.344.
\textsuperscript{111} Westmid Packing Services Ltd (No.2), Re [1998] 2 B.C.L.C. 646.
\textsuperscript{112} Continental Assurance Co of London Plc, Re [2001] All E.R. (D) 229.
Where directors are aware (or ought to have been aware) that the company’s profits are only attributable to a cartel, then even the “intelligent laymen” referred to by Parke J.113 must appreciate that the profits are not “real”; the accounts do not show a true view of the company’s financial position; and (if adjusted to the correct level and a loss-making position is shown) personal liability under s.214, as well as disqualification under ss.6 or 9 of the CDDA, is surely a real rather than merely a fanciful prospect.

It is not clear why the OFT seems willing to circumscribe its potential use of the director disqualification procedure for competition law infringements. Its guidelines seem inconsistent both with the textual content and general aims of the CDDA and with the duty of care which may be expected of a director under English company law. Fuller use of the CDDA where competition law breaches have occurred could affect perceptions of the director’s general duty of care, perhaps requiring a greater respect for competition law compliance. The director’s common law duty of care has been enhanced by the English courts in the light of insolvency legislation. As has been acknowledged,114 it made little sense to impose a general duty of care which did not reflect the level of competence expected if a director was to avoid an allegation of wrongful trading or a finding of unfitness resulting in a director disqualification order.

The combined effect of s.9A of the CDDA and s.172(1)(c) and (e) of the Companies Act 2006115 suggests that directors must in future show a greater respect for competition law and the effects of their trading practices on suppliers and customers when considering their corporate strategies. The obligation imposed by s.172(1) must at least require the board to make an assessment, acting in good faith, of whether a particular commercial arrangement has a known anti-competitive implication which may be unenforceable or expose the company to the risk of fines. Under s.172(1)(a), directors have a duty to promote the success of the company, having regard to its long-term interests, presumably long-term increase in shareholder value. In these circumstances, any anti-competitive arrangement can hardly be in the long term interests of the company. In Regentcrest Plc v Cohen116 the Court adopted a subjective test in determining if the director had adopted an honest view of whether a commercial arrangement benefited the company:

“... the question is whether the director honestly believed that his act was in the interests of the company... No doubt, where it is clear that the act or omission resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company’s interest. ...”117

This judgment would indicate that a director will struggle to demonstrate that his duty of care has been discharged in the case of blatant competition law breaches.

Greater use of the CDDA may reinforce and enhance boardroom compliance with the requirements of company and competition law. Since directors will now face the prospect of a possible derivative action under s.260 of the Companies Act 2006 if they breach their duties, this may also enhance compliance.118 Finally, it should not be forgotten that as employees they could still face liability for negligence if they breach their duties in circumstances where that breach is not one for which the company is, at common law on policy grounds, expected to indemnify the tortfeasor employee. Thus, the greater the standard of care expected, then the greater the risk that a non-compliant director may face liability under the principles of Lister v Romford Ice and Cold Storage Ltd.119

“Follow the money”120

Proceeds of crime

If the knowledge of directors and their possible personal exposure is receiving greater attention, any profits from hardcore cartel activity may be in direct jeopardy.

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113 Continental Assurance Co of London Plc, Re [2001] All E.R. (D) 229 at [238].
115 A director must have regard to the need to foster business relationships with suppliers and customers under sub-section (c) and under sub-section (e) the desirability of the company maintaining a reputation for high standards of business conduct.
117 Regentcrest Plc [2001] 2 B.C.L.C. 80 per Jonathan Parker J. at [120].
120 The advice given by the Whitehouse insider to Woodward and Bernstein in the film of the Watergate scandal, All the President’s Men.
Sections 328 and 338 of the Proceeds of Crime Act 2002 require corporate advisers to notify the authorities where they know or suspect that a client is in possession of, or seeking to transfer, the proceeds of crime. The latter is defined widely and would encompass profits derived from hardcore price fixing, whether or not the client has been successfully prosecuted for the offence. Sections 241 and 242 of the Act define such proceeds as being acquired through any conduct which is criminal in the United Kingdom.

The duty to report is extensive and is not limited to particular types of criminal activity. A solicitor, for instance, may have greater knowledge or suspicion than other professionals when engaged in due diligence on behalf of a purchaser or disclosure on behalf of a vendor in a corporate share or asset sale. The Act provides for civil recovery of the proceeds of unlawful conduct, with ss.304–307 enabling property obtained through unlawful conduct to be traced, including admixed property and profits accrued. Sections 243, 266 and 267 also set out recovery procedures and provide for orders vesting recoverable property in trustees for civil recovery.

Proceedings have been brought against two of the marine hose cartel executives to “seize wealth allegedly obtained illegally through the conspiracy.” On July 1, 2008, The Times reported that two of the individuals involved in the marine hose cartel had been ordered to surrender £1,000,000 worth of assets at a confiscation hearing. The consultant who had orchestrated the cartel, Peter Whittle, was ordered to pay £649,636 within six months or have his existing three-year jail sentence extended by another four years. The Sales Director of Dunlop Oil & Marine, David Brammar, was ordered to pay £366,354 within 28 days or face an extra three years on top of his 30-month sentence. Bryan Allison, the former Managing Director of Dunlop Oil & Marine was not made the subject of a confiscation order, as the judge concluded that he had not personally benefited from the cartel.

### The single economic unit doctrine

Articles 81 and 82 of the EC Treaty only apply to “undertakings”. Undertakings are individuals or legal entities engaged in economic activity. As the European Court of Justice (ECJ) observed in Höfner v Macrotron GmbH:

“It must be observed . . . that the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.”

Thus, the German Ministry of Employment was an undertaking when engaged in executive recruitment.

EC competition law is prepared to view a corporate group through the lens of economic reality and group companies are frequently treated as a single economic entity and thus as one undertaking. Where a company is controlled as to 100 per cent, there is often a presumption of influence and a lack of subsidiary autonomy which it will be hard to rebut. Whether levels of control indicative of a single economic unit exist with lesser shareholdings may be harder to determine.

However, “dependent” labour is not considered to be an undertaking and accordingly it is frequently assumed that a company director does not constitute an undertaking. The basis for each of these rules is the lack of competitive behaviour which can be expected from enterprises which do not enjoy autonomy and from officers who are not active on an independent commercial basis.

Yet, if the single economic entity doctrine is followed through to its logical conclusion then any individual who is engaged in economic activity can be an undertaking, either separately from or as part of other corporate or individual entities.

In Reuter/BASF Dr Reuter was held to be an undertaking, as he engaged in economic activity through the companies he controlled. Dr Reuter was a research chemist who specialised in polyurethanes with control over the Elastomer group, which he also managed. He


122 “Jailed marine hose executives ordered to repay £1m”, The Times, July 1, 2008.
was held to be an undertaking and, following the sale of his interest in the group, the restrictive covenant to which he was subject was held to be void under Art.81 of the EC Treaty due to its excessively long period.

In *Hydrotherm Geratebau GmbH v Andreoli*[^129^] it was held by the ECJ that an economic unit can consist of several persons, natural or legal. Mr Andreoli was an engineer and a member with personal liability of a limited partnership which he controlled. He and the partnership comprised a single undertaking for the purposes of the then applicable block exemption regulation relating to exclusive dealing[^130^].

In the *Pre-insulated Pipe Cartel* case[^131^], the Henss family controlled a number of companies involved in the manufacture and sale of pre-insulated pipes. The EC Commission concluded that the:

> “Henss and Isoplus companies together formed a de facto group although according to public company registers there was no link of ownership between them.”[^132^]

Although the EC Commission had argued that the Henss/Isoplus companies formed a single undertaking, it was not able to identify a group holding company. Accordingly, it addressed its Statement of Objections to the Henss and Isoplus companies separately and they were separately represented in the EC Commission proceedings. Isoplus denied that it formed part of a group or had any links of ownership with the Henss companies.

The Henss companies and Isoplus were clearly deeply enmeshed in the cartel. As privately-owned companies it was at least a possibility that the EC Commission might have sought to categorise the principal Henss shareholders as undertakings, given the pivotal role the corporate owners played in the Henss companies’ activities. At para.157 of its Decision, the EC Commission said:

> “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.”

However, the EC Commission did not do so. It seemed more concerned with the search for a unifying parent company in order that it could attribute the fine on a group basis. It abandoned this effort, despite finding a strong level of influence by Dr W. Henss and evidence of shares being held on trust for him in order to ensure his retention of corporate control. It ultimately fined the Henss and Isoplus corporate vehicles ECU 4,950,000. This was reduced from its initial fine of ECU 8,125,000, so as not to exceed the maximum of 10 per cent of the turnover of the undertakings it had established had participated in the infringements and did not reflect the higher figure it might have imposed had a unifying group structure been established.

It is arguable that the EC Commission faced genuine difficulty in tracing control through to the individual who had masterminded the collusion engaged in by the Henss companies and that evidence of this control emerged late in the investigation. Nevertheless, failing to hold individual shareholders (who are commercially active) to account when they provide resources to, obtain benefits from and control corporate entities which have infringed EC competition law, leaves the single economic entity doctrine looking partial in its application and lacking logical coherence.

With corporate governance models placing an increasing emphasis upon the employment of independent directors, the risk also remains that directors (acting alone or through companies they control) may yet constitute undertakings when they supply goods or services on the market independently from the company on whose board they serve.

Shareholders are currently being exhorted by EC Competition Commissioner Neelie Kroes to hold their directors to account. In the press release announcing the EC Commission Decision which fined participants in a rubber chemical cartel €75.86 million in 2005, Commissioner Kroes said[^133^]:

> “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


[^130^]: Regulation 67/67 of the Commission of 22 March 1967 on the application of Art.85(3) of the Treaty 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)).


[^132^]: IV/35.691/E-4; Pre-Insulated Pipe Cartel, para.15.

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.”

However, Commissioner Kroes has separately been reported as saying that, whilst cartel fines are increasing, she does not believe they should be specifically aimed at hurting shareholders and considers that they should have an “indirect effect”.134

Private limited companies are frequently controlled by individuals who are both shareholders and directors. Many such individuals are active in a number of professional and commercial activities, not all of which are undertaken through just one group of companies under their control. Where directors or individual shareholders are themselves undertakings, why should they not also be held to account directly for infringements of EC competition law? In Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis135 Mrs Schillgalis had carried on business in Hamburg under the name Pronuptia de Paris as a franchisee personally. When she sought to avoid her obligation to pay to the franchisor arrears of royalties, it was not contested that she was an undertaking for the purposes of Art.81 of the EC Treaty. Where an “´eminence grise’, such as Dr W. Henss, merely uses a corporate vehicle to achieve his anti-competitive aims, surely he should be subject to the fines that follow?

Conclusions

The judgments and statutes considered in this article are driven by an array of different policy considerations. Some are designed to compensate, others to deter and punish. They are based on different standards, often imposing lower legal hurdles than the test of dishonesty under the Enterprise Act 2002.

The tort of deceit requires dishonesty or recklessness, proved on a balance of probabilities. Directors of English companies who misrepresent collusively set prices as competitive ones will be personally liable for all the losses flowing from their deceit. However, the tort of deceit requires some conduct or statement which amounts to fraudulent misrepresentation. There seems little imminent prospect of the English courts or competition law authorities developing good faith obligations which would oblige a director to disclose or deceive in a manner that would enhance the likelihood of the director being held liable for deceit.

Unfit conduct under the CDDA connotes blameworthiness, the precise extent of which has yet to be fully tested in a competition law context. The levels of attentiveness required of a director by the CDDA seem wholly in tune with their general duty of care. A more vigorous application of the CDDA could raise competition law compliance levels and help to create acceptance that such compliance is inherent in the director’s duty of care. The threat of disqualification (and risk of personal liability should a disqualification order or undertaking be flouted) is a powerful potential tool which has yet to be fully used by the regulators.

The Proceeds of Crime Act 2002 is clearly available in criminal cartel cases and the authorities are now exercising their powers to recover profits made for the first time.

The single economic entity doctrine is at variance with the separate personality which companies enjoy under English law. However, it is not always applied with complete logic or rigour, otherwise individuals who are independent economic operators and who control enterprises would face greater exposure than would appear currently to be the case.