



Punishing Parents for the Sins of their Child

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**Punishing Parents for the Sins of their Child:
Extending EU Competition Liability in Groups and to Sub-Contractors**

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ABSTRACT

The current state of EU law is that parent company liability for its subsidiaries' competition infringements rests on the degree of control that the parent can exercise over the subsidiary. A related antitrust problem when a sub-contractor engages in anticompetitive activity which benefits the contractor. Again, EU jurisprudence looks at the control which the contractor can exercise. This current state of law is unsatisfactory.

There are at least three convincing grounds to use negligence in supervision of the subsidiary's (or sub-contractor's) conduct as an alternative basis for liability. First, Regulation 1/2003 frames liability for competition infringements in terms of an undertaking's intentional activities or its negligence. Second, as the legal systems of principle of domestic systems to use negligence to found criminal liability, the extension of liability for negligent oversight of a subsidiary's affairs is not inconsistent with the general principles of European law. Third, there is a substantial argument for the extension based on efficiency reasons. We construct such an argument in the article. This argument parallels arguments for vicarious corporate liability.

We conclude that the extension of EU parental and contractor liability in competition matters to include liability for negligent oversight of subsidiaries provides for more effective regime for the prevention of antitrust violations.

JEL CLASSIFICATION: K21, K43, L23, L40, L43

KEY WORDS: Undertaking, Single Economic Entity, Group Liability, Sub-Contractor Liability

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INTRODUCTION

The relationship between parent and subsidiary companies belonging to the same undertaking is of significance to EU competition matters. Article 101 TFEU prohibits anticompetitive arrangements between *two or more* undertakings. Article 102 prohibits a dominant undertaking from engaging in abusive practices. The Merger Regulation¹ restricts anticompetitive concentrations *between undertakings*. Further Articles 23 and 24 of Regulation 1/2003² permit the Commission to mete out fines based on an undertaking's turnover. Members of corporate groups, while they may be legally separate, may be part of the same undertaking.

Further, EU law permits the Commission wide discretion in allocating fines among companies which, though legally distinct, belong to the same undertaking. As such, the Commission can and will make parent companies financially liable for the anti-competitive (in particular, cartel) activities of their subsidiaries. Mitigating what might be an otherwise

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¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L-24/1.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L-1/1.

unfettered ability to allocate fines within corporate groups is the notion that personal responsibility must underlie any attribution of a fine.³ “Personal responsibility” in this context includes a high degree of positive control exercised by the parent over the activities of the subsidiary. To facilitate proof of positive control, the Commission and Courts have developed a rebuttable presumption that a high degree (approaching 100 per cent) of parental ownership is evidence of sufficient positive control to serve as a foundation of liability for the subsidiary’s activities.

A related issue arises when a firm engages the services of another firm. Rather than vertically integrating and keeping the relevant activities “in house,” a contracting firm outsources the activities to another entity. A competition problem arises when the subcontractor engages in anticompetitive activity which benefits the contracting firm. It would be incongruous if European law treated this situation differently from a situation where the relevant firms are vertically integrated. Differential treatment would establish different incentives to use particular corporate or contractual structures. If the contractual situation is treated more leniently by antitrust regulation, this incentivises the use of that arrangement to facilitate “contracting out” of antitrust liability. The ECJ dealt with this issue in the July 2016 case of *Remonts*.⁴

In scrutinising parental-subsidary conduct, the main focus of the Commission and the EU Courts to date has been on positive control (i.e., the parent’s ability to compel the subsidiary to act in a given way). Negative control (i.e., the parent’s ability to prevent its subsidiary from action) is much ignored. This focus on positive control has resulted in an unsatisfactory state of affairs for at least three reasons. First, Article 23(1) and (2) of Regulation 1/2003 frames liability for competition infringements in terms of an undertaking’s intentional activities or its negligence. As such, attributing liability on the basis of negligence is not only consistent with the existing state of EU secondary legislation, but is also consistent with those provisions of merger law which restrict concentrations if one entity can exercise negative control over another. Second, as the legal systems of principle of domestic systems to use negligence to found criminal liability, the extension of liability for negligent oversight of a subsidiary’s affairs is not inconsistent with the general principles of European law. Third, there is a substantial argument for the extension based on efficiency reasons. In a

³ C-98/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, para 56.

⁴ C-542/14 *SIA ‘VM Remonts’ and Others v Konkurences padome* (judgement: 21 July 2016: ECLI:EU:C:2016:578; opinion: 3 December 2015: ECLI:EU:C:2015:797).

very real way, the relationship of a parent and subsidiary is a further instance of the principal-agent relationship (with attendant moral hazards) endemic in corporate control.

In this article, we argue that an extension of EU parental liability in competition matters is appropriate. Our suggestion is to include liability for negligent oversight of subsidiaries and sub-contractors which will provide for a more effective antitrust compliance regime. Incentivising parental firms to oversee their subsidiaries (irrespective of their actual ownership level of them and including liability for failure in control) will enhance antitrust enforcement. This is done by establishing incentives to internalise much of the costs of antitrust enforcement, in the same way that attributing liability to undertakings for the antitrust violations of their employees enhances such compliance. Though there may be some related case law,⁵ the paucity of litigated matters may reflect the Commission's enforcement policy. If indeed this is the case, we submit, this policy needs to be reconsidered.

This article is structured in five parts. In the first part arraigned in two sections, we examine the present understanding of “undertaking” in EU competition law within the context of the corporate group. The first section of this part is primarily descriptive. It shows that individual firms and groups of firms consisting of several legally distinct entities have been regarded as (single) undertakings in EU competition law; and the unifying concept in this understanding of “undertaking” is control. In 101 and 102 matters, the focus has been on the ability to control decisions in a positive way: to direct a certain course of conduct. Although this positive conception of control is also present in the merger context, that context adds a negative element to its understanding: the ability to prevent or block certain courses of action. In the second section of part one, we briefly relate this understanding of control and its relationship to an undertaking to the theoretical understanding of a firm, showing the consistency of this description of EU law with this understanding. Issues of control within a firm lead to a principal-agent problem, in which the agent's conduct may not coincide with the principal's interests. This is the genesis of much corporate delinquency. The third section of this part thus introduces principal-agent analysis, which is used as the analytic tool in the remainder of the article.

In part two, we examine failure of the principal to control the activities of its agent as a basis for antitrust liability. We propose that a failure by the principal (e.g. a parent firm) to exercise negative control over its agents (subsidiaries) can be a sufficient ground on which to

⁵ See e.g., Case T-132/07 *Fuji Electric v Commission* [2011] ECR II-4091, paras 173–185.

base antitrust liability. we argue that not only is this position consistent with existing EU law, since it is justified first by the wording of Article 23 of Regulation 1/2003 which frames liability for competition infringements in terms of an undertaking's intentional activities *or its negligence*. As such, attributing liability on the basis of negligence is consistent with the existing state of EU secondary legislation. Second, it is also justified in terms of common European legal principles. As European legal systems in general use negligence to found criminal liability, the extension of liability for negligent oversight of a subsidiary's affairs is not inconsistent with the general principles of European law. Moreover, this sort of negligence, we argue, is a sufficient basis for the "personal responsibility" required to found European antitrust liability.

In part three, we develop an argument for founding liability of failure to exercise control. This argument uses an explicit law and economics methodology based upon our earlier principal-agent analysis. Our argument proceeds on the basis that a corporate liability regime should achieve two goals. First, it should internalise compliance and social costs to the organisation, but should do so without requiring that organisation to incur wasteful expenditures. A strict liability regime would accomplish the former, and a negligence-based regime achieves the latter. However, neither of these two goals is sufficient to ensure that all wrongdoing will be captured. With a negligence regime, there will always be a residual quantity of harm which is inefficient to prevent (as the prevention of this harm requires wasteful expenditure of resources). A strict liability regime may set up a perverse incentive to avoid the detection of significant harms, to avoid the enhanced liability which may ensue if it attempted to eradicate all harms. With this in mind, we suggest a regime which uses strict liability to attribute conduct to organisations, but includes a negligence-based "defence" to ensure efficient use of resources.

This focus of this model is to shift the focus of legal analysis to the links by which a parent can (or should) exercise control over its subsidiary the degree of ownership becomes less relevant than at present. A consequence of this is investment on compliance by the parent. By internalising these costs, the public authorities need to expend less on investigation to achieve the same overall level of antitrust enforcement. Accordingly, the test for parental liability should not be "decisive influence" but rather should focus on the efforts that the parent did, did not, or could have undertaken to influence its subsidiary's conduct. This fourth section concludes with an examination of the consistency of the developed model with the existing state of EU law. This provides for not just an assessment of the model, but also a basis for suggested improvements to the state of the law.

Part four applies the above model of liability to the current state of EU competition law. It critically examines three sets of cases: parental liability for the conduct of subsidiaries; the liability which contractors have for the anti-competitive conduct of their sub-contractors; and potential liability which financial companies may have for their pure passive holding of companies which may be “parked” with them. The results of this examination show that the suggested model would attribute liability to parents and contractors in slightly more cases than is the case under present EU law. In the case of pure passive holdings, the proposed model would not attribute liability for the “parked” firm’s conduct, thereby being consistent with existing law and recognising the benefits obtained through non-attribution.

The article concludes by showing that our suggestions are not just “ivory tower” theorising. Rather the proposals we develop can readily be imported into the existing EU competition enforcement system. All that is lacking is the will to do so.

At the outset, we make a definitional point. In the course of this article we will use the term “vicarious liability.” We use this to describe the attribution of liability of the sort which takes place when a firm is responsible for the actions of its employees. In other words, the actions of one party are attributed to another party, with the latter being responsible for them. We will also use the phrase “absolute liability” to connote the circumstances where the commission of the act alone is sufficient for blame and hence legal responsibility to attach to the act.

1. THE UNDERSTANDING OF “UNDERTAKING” IN EU LAW

(a) Undertakings and Control: The Case Law

As a jurisdictional concept in EU competition law, one of the first lines of inquiry in any antitrust matter will be on the nature of the undertakings involved. It is also trite to note that in EU competition law, an undertaking is any “entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed.”⁶ The legal personalities of members of corporate groups are irrelevant. A corporate group will be a single undertaking if subsidiary companies do not have the ability to pursue an independent course of action on the market, due to the control which the parent company exerts over the

⁶ C-41/90 *Höfner and Eisner v Macrotron* [1991] ECR I-1979, para 21.

subsidiaries. In the context of 101 and 102 analysis, the focus has been on positive control, i.e. the extent to which a parent can direct the conduct of a subsidiary.

Positive control and hence its implication for viewing a corporate group as a single entity/undertaking is vividly seen in *Viho*.⁷ At issue was Parker Pen's strategy of partitioning the internal market through the use of wholly owned subsidiaries. These subsidiaries in turn took instructions from the parent company in their market conduct.⁸ As a result of the subsidiary's lack of independence, they were found to be part of the same undertaking as their parent, thus there could be no breach of Article 85 (now 101). Similarly, in *Arkema* the ECJ indicated that if a subsidiary "carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities"⁹ then "the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC...".¹⁰

To facilitate proof of control, the Court in its case law accepts a rebuttable presumption of control when a parent company holds 100% of the shares of the subsidiary.¹¹ Adducing evidence of the subsidiary's independent conduct on the market rebuts the presumption of control.¹² Further subsequent case law has shown that the presumption of 100% ownership can be relaxed. In *Arkema*, the percentage was 98, and neither the lawfulness nor the applicability of the presumption was disputed in that case.¹³ On the other

⁷ C-73/95 P *Viho Europe BV v Commission of the European Communities* [1996] ECR I-05457.

⁸ *Ibid* paras 15–17

⁹ C-520/09 P *Arkema SA v Commission* (ECLI:EU:C:2011:619, 29 September 2011) para 38.

¹⁰ *Ibid* para 39.

¹¹ C-98/08 P *Akzo Nobel*, para 60; see also C-90/09 P *Generial Química* para 39.

¹² C-90/09 P *Generial Química* para 40.

¹³ *Arkema*, para 42, see C-508/11 P *Eni v Commission* (ECLI:EU:C:2013:289, 8 May 2013), paras 46–52 (99.77% ownership), C 93/13 P and C 123/13 P *Versalis and Eni v Commission* ("Chloroprene Rubber Cartel") (ECLI:EU:C:2015:150, 5 March 2015), paras 40–48 (between 99.93% and 100% ownership).

hand, where the “subsidiary” is parked with a pure financial holding company, the presumption is rebutted.¹⁴

This positive conception of control is seen in *Chloroprene Rubber*,¹⁵ in which Dow and du Pont both held equal shares in a joint venture, DDE. The joint venture became involved price-fixing and market-sharing. At issue there was the imputation of DDE’s liability to its parents, given parental shareholdings. The ECJ upheld both the Commission’s finding that Dow, du Pont and DDE were a single entity; and the Commission’s imposition of a fine on a joint and several basis. The key finding was that the “Commission ... demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture... .”¹⁶ Thus all three formed a single undertaking, and each was jointly and severally liable.

Positive control, in the sense of one entity’s ability to instruct and thereby determine another entity’s conduct on the market, underlies the understanding of “undertaking” which prevails in the understanding of Articles 101 and 102 TFEU.¹⁷ However, with respect to merger control, a slightly different understanding exists.

European merger control is concerned with concentrations among undertakings (or parts of undertakings).¹⁸ A concentration arises when two or more previously *independent* undertakings (or parts of an undertaking) merge; or where one or more persons who control at least one undertaking, obtain direct or indirect control of another undertaking¹⁹ on a lasting

¹⁴ See e.g., T-24/05 *Alliance One International v Commission* [2010] ECR II-5329, paras 195–196, the ECJ upheld the GC on this point: C-628/10 P and C-14/11 P *Alliance One and Others v Commission* (ECLI:EU:C:2012:479, 19 July 2012), paras 47–67.

¹⁵ C-172/12P *EI du Pont de Nemours v Commission* (ECLI:EU:C:2013:601, 26 September 2013) and C-176/12P *Dow Chemical v Commission* (ECLI:EU:C:2013:605, 26 September 2013).

¹⁶ C-176/12P *Dow*, para 58.

¹⁷ See Wouter P J Wils, “The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons” (2000) 25 *European Law Review* 99.

¹⁸ Merger Regulation (n 1), Arts 1–3.

¹⁹ *Ibid* Art 3(1).

basis.²⁰ “Control” involves the holding of rights or the power to exercise rights²¹ which “confer the possibility of exercising decisive influence on an undertaking.”²² Control is thus opposed to independence.

The Merger Regulation (like the 101/102 case law) excludes situations of temporary control by banks, other financial companies, bankruptcy trustees and similar arrangements.²³ Similarly, where strengthening of pre-existing control of the sort found within internal reorganisation of a corporate group is not a change of control for the purposes of this regulation.²⁴ As the Merger Regulation’s focus is on the *ability*²⁵ of one undertaking to exercise decisive influence, this influence can be both positive and negative, and no threshold of ownership is determinative of the presence or absence of the possibility or control.

The presence of control can be found in: the ability to obtain the majority of votes in a shareholder’s meeting,²⁶ possession of a “Golden Share,”²⁷ or a minority shareholding when

²⁰ Ibid. This is due to the effect on market structure which a permanent change of control would bring about. See Commission Consolidated Jurisdiction Notice under Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings [2008] OJ L-95/1, point 28.

²¹ Ibid Art 3(3).

²² Ibid Art 3(2).

²³ Ibid Art 3(5).

²⁴ See e.g., *Pechiney/Usinor* (24 June 1991) M.27, and *CEA Industrie/France Telecom/SGS-Thomson* (22 February 1993) M.216.

²⁵ Which requires that there be a possibility for this influence to be used (and not that it is in fact actually used), see T-282/02 *Cementbouw Handel & Industrie BV v Commission* [2006] ECR II-319, para 58.

²⁶ Commission Decision of 22 January 1997 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.794 - *Coca-Cola/Amalgamated Beverages GB*) [1997] OJ L-218/15 points 5–13; *Mannesmann/Vallourec* (3 June 1997) M.906, points 11–20.

²⁷ *Magnetti-Marelli CEAC* (29 May 1997) [1997] OJ L-222/38, *Credit Lyonnaise/BFG* (11 January 1993) M.296; *Tractebel/Distrigas* (1 September 1994) M.493.

other shareholdings are diffuse or these minority shareholdings have voting rights or other provisions for board representation attached to them.²⁸

Significantly, in merger matters, control can be negative. Negative control is illustrated by joint control situations, where “two or more undertakings or persons have the possibility of exercising decisive control over another undertaking,”²⁹ which includes the power to block “strategic commercial behaviour of an undertaking.”³⁰

Given possible veto rights, joint control does not require equal (or near equal) shareholdings.³¹ Rather, the veto rights need to be such as to enable one undertaking from exercising an influence on the “strategic business behaviour” of the jointly controlled undertaking.³² Such strategic behaviour includes matters such as multi-year business plans, annual budgets, “important investments, the ‘overall programming concept’ and the appointment and dismissal of the programme directors and of the Director/Secretary-General.”³³ Strategic decisions do not require influence over “day-to-day running of an undertaking.”³⁴ However, what is of significance in determining negative control is the relationships that the veto rights held by one undertaking have with each other, and how these rights interact as a whole in the governance of the jointly run undertaking.³⁵

Accordingly, there exists a common core which unifies the understanding of “undertaking” in 101, 102 and merger matters—this core is the ability of an entity to influence

²⁸ See e.g. *Ajomari/Wiggins Teape* (10 December 1990) M.25 (39%); *Mannesmann/Vallourec* (3 June 1997) M.906 (21%); *Anglo American Corp/Lonrho* (23 April 1997) [1998] OJ L-149/21 (27.5%); *Pirelli/Edizione Olivetti/Telecom Italia* (20 September 2001) M.2574 (27%).

²⁹ Consolidated Jurisdiction Notice (n 20) point 62; see also T-221/98 *Endemol Entertainment Holding v Commission* [1999] ECR II-1299, para 161–164, and T-282/02 *Cementbouw v Commission* [2006] ECR II-319, paras 42, 52 and 67.

³⁰ Consolidated Jurisdiction Notice *ibid*, Commission’s footnote reference to *Cementbouw* omitted.

³¹ *Ibid* point 65, the Commission cites T 2/93, *Air France v Commission* [1994] ECR II-323, and Case IV/M.010–*Conagra/Idea* 3 May 1991.

³² *Ibid* point 67, see T-221/98 *Endemol Entertainment Holding* para 161.

³³ T-211/98 *Endemol Entertainment Holding* para 161.

³⁴ Consolidated Jurisdiction Notice (n 20) point 67.

³⁵ *Ibid* point 73.

the conduct of another with respect to a given economic goal. Control is essential, as mere commonality of economic interests among entities ought not to be the unifying concept which unites entities into undertakings, as cartel members share a common economic interest³⁶ (Indeed, so do members of non-cartelised industries.) The difficulty with the present state of EU law rests in its inconsistent use of negative control. In 101 and 102 matters positive control—the ability to direct activity—is paramount. Indeed this paramountcy is often to the exclusion of negative control, or the ability to prevent a particular course of activity. In merger matters, the existence of a situation of negative control is important with its significance equal to that of positive control. This neglect of positive control in 101 and 102 matters is, in our view, a shortcoming with the law’s present state of affairs.

(b) The Firm and Control

There is a link between the nature of the firm and control. One leading textbook describes firms as “single decision making units that maximize profits.”³⁷ Although its emphasis on singularity in the definition begs our question of when two entities belong to the same undertaking/firm, the shift to profit maximisation yields a clue as to firm unity. This clue is found in the element of control and the ability to implement a profit maximising strategy.

While a survey of theories of the firm is beyond our present scope,³⁸ it should be noted that a classical theory of the firm views a “firm [as] a set of feasible production plans [with] a manager presid[ing] over this production set.”³⁹ Control is, of course, manifested in the manager’s ability to determine, and put into place, the profit-maximising production plan.

³⁶ As is recognized by US law, see e.g., *Los Angeles Memorial Coliseum Commission v NFL* 726 F 2d 1381, 1389 (CA9 1984).

³⁷ Paul Belleflame and Martin Peitz *Industrial Organization: Markets and Strategies* (CUP; second edition, 2015) 16.

³⁸ See e.g., Oliver Hart, “An Economist’s Perspective on the Theory of the Firm” (1989) 89 *Columbia Law Review* 1757 for a concise survey, on which the present discussion draws.

³⁹ *Ibid* 1758.

In a more sophisticated version of the classical theory, the principal-agent analysis of the firm⁴⁰ explains divergence of ownership and management interests. Under this analysis, the firm is a set of production plans. However, in contrast to the classical theory, principal-agent analysis focuses on the misalignment of interest between owners and managers. This analysis holds that owners cannot implement their profit maximising strategy directly, but require the intermediation of management. Given that managers have their own utility functions which differ from the owners', and that managers will satisfy these functions to the extent that they can get away with,⁴¹ an inevitable conflict between ownership and management will arise. As with the classical theory of the firm, the notion of control underlies principal-agent analysis. In contrast to the classical theory, the focus of control in the principal-agent analysis is in the ability of management to control (or divert) the firm's resources to satisfy managements' utility function as opposed to the owners' demands to profit-maximise.

Similar principal-agent issues arise when the firm is analysed from a Coasian transaction costs perspective.⁴² The usual application of this analysis is in regard to vertical integration, which views a firm as a means of minimising the transaction costs involved in the "make or buy" decision. Consider a party which produces widgets. It requires input for the widgets and needs to market these products. It can choose to produce or purchase raw materials for widgets. Likewise, it can market the widgets itself, or pay others to do so. "Buying" or outsourcing any element of the production of the widget involves transaction costs, in particular negotiating the terms of the contract and monitoring the other party's compliance with these contractual terms. Accordingly the solution to the "make or buy" decision will be made in the interests of reducing transaction costs, and involves dictating the terms of the transaction. There is no need to restrict this analysis to vertical arrangements, as similar considerations may be found horizontally. A firm may choose to enter a new market, and in the absence of doing that itself, may, inter alia, use a subsidiary or a franchisee, sub-contract this process or hire a commercial agent to represent it in the new market. The

⁴⁰ See *ibid* 1758–60, in the context of antitrust, see Massimo Motta *Competition Policy: Theory and Practice* (Cambridge: Cambridge University Press, 2004) pp 47–48.

⁴¹ The seminal work on point is Harvey Leibenstein "Allocative Efficiency vs. X-inefficiency" (1966) 56 *American Economic Review* 392.

⁴² See Ronald Coase, "The Nature of the Firm" (1937) 4 *Economica* 386; see also Hart (n 38) 1760 – 63.

relative cost of each alternative will drive the choice of arrangement. But in each of these arrangements (with the exception of the firm doing it itself) principal-agent tensions arises, as the parties' interests may not be perfectly aligned.

By isolating the tension between ownership and managerial interests, principal-agent analysis of the firm is a useful diagnostic tool to study corporate misdeeds, including those incentives which promote management's willingness towards corporate delinquency.⁴³ Additionally, principal-agent analysis can provide a useful prophylactic to aid in proposing means by which managerial misdeeds can be constrained by appropriate alignment of the interests of the principals (owners) and agents (management, subsidiaries, subcontractors, etc.). Given this latter feature, we use this as our analytic tool in the remainder of this article.

In the competition law context, the misalignment of interests characteristic of principal-agent problems arises in three significant relationships:

- (1) the employee-employer context;
- (2) the parent-subsidiary context; and,
- (3) the contractor-subcontractor context.

The first relationship is not of great concern for our present purposes. Responsibility and liability for EU competition violations rests with the undertakings involved, the activities of the undertaking's employees are attributed to the undertaking, which in turn will be liable for any penalties arising from the employee's misdeeds.⁴⁴ Given that EU law imposes no personal liability on the employees, this regime leads to a classic divergence of interest between the employees (who can reap the benefits which accrue from cartelised activity,⁴⁵ without fear of public sanction⁴⁶) and the undertaking (which is liable for the consequences of any competition violation). The threat of significant penalties being imposed on the undertaking for such employee misconduct (with provisions for fine reduction or immunity in

⁴³ See e.g., Cindy R. Alexander and Mark A. Cohen, "Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost" (1999) 5 *Journal of Corporate Finance* 1.

⁴⁴ See, e.g. *T-Mobile Netherlands BV, and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECJ I-4529.

⁴⁵ Leberstein's X-inefficiencies, see note 41, above.

⁴⁶ The imposition of individual sanctions may prevent this divergence of interests, see Steven Shavell, "The Optimal Use of Nonmonetary Sanctions as a Deterrent"(1987) 77 *American Economic Review* 584.

cases of self-reporting of violations⁴⁷) establishes an incentive for undertakings to engage in employee monitoring (compliance programmes) in an effort to deter and/or detect and report such conduct by (rogue) employees.

The other two relationships are our focus. From the perspective of principal-agent analysis, these two relationships are structurally identical to the undertaking-employee paradigm. Both involve a principal (a parent firm or a contractor) and an agent (subsidiary or subcontractor) with incompletely aligned interests, and a varying degree of control that the principal can exercise over the agent. And both involve a different solution to the Coasian “make or buy” decision described above. The case law on an undertaking’s responsibility for its employees is clear; but there is confusion—and hence room for improvement—in its treatment of parental liability for the competition infractions of its subsidiaries. And, in spite of (or due to) the recent judgement in *Remonts*⁴⁸ is somewhat more muddled, thus clamouring for further refinement. We explain and explore this below.

2. FAILURE TO EXERCISE NEGATIVE CONTROL AND ANTITRUST LIABILITY

(a) Presumptions and the Nature of Control

In competition matters control is everything. Control, we noted, drives liability under Articles 101 and 102 the restrictions on undertakings’ ability to merge and form joint ventures. As indicia of control the sorts of characteristics identified by the Commission are of varying probative value, and always remain rebuttable. Even a 100% shareholding is—in theory—rebuttable.⁴⁹ However, it must be noted that notwithstanding this theoretical nature,

⁴⁷ Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17; Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.

⁴⁸ **Case C-542/14 SIA “VM Remonts” (formerly SIA “DIV un KO”) and Others v Konkurences padome** (ECLI:EU:C:2016:578, 21 July 2016).

⁴⁹ In particular see C-625/10 P and C-14/11 P *Alliance One*, see also 107/82 *AEG[-Telefunken] v Commission* [1983] ECR 3151, para 50, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Maatschappij and Others v Commission* (‘PVC II’) [1999] ECR II-931, paras 961 and 984; T-71/03, T-74/03,

the Commission's practice makes it difficult for parent companies which own 100 % (or close to that percentage) of the subsidiary's equity to rebut this presumption of control.⁵⁰ The sole exceptions to this are situations where a firm is "parked" with a bank or financial holding company, and as a result the "parked" firm is intentionally and clearly left to its own devices.⁵¹

As noted, the bulk of the Commission's focus has been on positive control, i.e., identifying indicia (primarily share ownership) which are used to point to characteristics of a firm being able to direct its subsidiary. This is of course consistent with the presumption that ownership of this degree entails "actual exercise of decisive influence" over the subsidiaries.⁵² A condition for control is thus decisive influence of the positive sort. However, it is not clear whether this condition is a necessary or sufficient condition. It is certainly the latter, and with the exception of paragraph 259 in the Commission's decision in the Rubber Chemicals cartel⁵³ all case law on point is concerned with positive control. It may therefore be tempting to read into this that positive control is thus what is required, and thus regard positive decisive influence to be a necessary condition.

We suggest that reading the case law in such a manner is a mistake. To read the law in this way does not give any significance to the Commission's remarks about a parent's influence over the subsidiary's antitrust compliance. Antitrust compliance appears significant, and it may well be merely a matter of case selection, or the fact that this point has

T-87/03 and T-91/03 *Tokai Carbon and Others v Commission* [2005] ECR II-0010 , para 59; T-314/01 *Avebe v Commission* [2006] ECR II-3085, para 136, C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925 ("Stora"), para 29; para 60; C-97/08 P *Akzo Nobel*, para 60; C-90/09 P *General Química*, para 39.

⁵⁰ This has been noticed in the literature, see e.g., Julian Joshua, Yves Botteman and Laura Atlee, "'You Can't Beat the Percentage'—The Parental Liability Presumption in EU Cartel Enforcement" [2012] *European Antitrust Review* 3 who argue that there is circularity of reasoning present in the Commission's presumption.

⁵¹ See e.g., T-24/05 *Alliance One*, paras 195–196, the ECJ upheld the GC on this point: Joined C-628/10 P and C-14/11 P *Alliance One*, paras 47–67.

⁵² See Commission Decision of 21 December 2005 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/F/38.443—Rubber Chemicals) para 256 and C-90/09 P *General Química*, para 39.

⁵³ *Ibid.*

yet to be argued before the Courts, that little emphasis has been placed on it as a ground of EU antitrust liability. Nevertheless, as will be next seen, there are cogent reasons to use failure to exercise control over a subsidiary's anticompetitive practices to ground parental liability

(b) Negative Control and Antitrust Liability

In contrast with positive control, that is the ability of one entity to *direct* another entity's actions, negative control is the ability of one entity to *prevent* another's actions. But for possibly the Commission's decision in the Rubber Chemicals Cartel the focus of the European authorities has been on the former type of control. This is short-sighted, as there are at least three cogent reasons to use negative control to ground antitrust liability for parental companies.

First, Article 23(2) of Regulation 1/2003 provides for negligence, or failure to act in the face of a duty to act, as a basis for antitrust liability. While the clear wording of this Article identifies "negligence" as such a ground, the specific legal content of "negligence" is undefined. The paucity of case law—perhaps reflecting the authorities' enforcement priorities—is of little help. The one exception to this, the Commission's decision in Rubber Chemicals, indicates that at a 100% shareholding of a subsidiary, there is some parental obligation to ensure the antitrust compliance of the subsidiary. Failure to prevent a wholly-owned subsidiary from engaging in anticompetitive conduct will, based on the Commission's reasoning in this decision, result in parental liability.

Second, negligence is a common principle on which liability, both civil and criminal, is based. Indeed, such a ground of liability is common to all European legal systems⁵⁴ and is found in both civil (tort/involuntary obligations) and criminal liability (criminal negligence in gross cases). As a principle common to all Member States' legal systems, a compelling argument can be made that negligence-based liability is a rule of EU law.⁵⁵ From a

⁵⁴ See e.g., George P. Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971) 119 *University of Pennsylvania Law Review* 401.

⁵⁵ The (somewhat precarious) Treaty basis for this rests in Articles 263 and 340(2) TFEU and 19 TEU. However, in spite of this precarious base, see Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575 and Cases 46/87 and 227/87 *Hoechst v Commission* [1989] ECR 2859 in which the ECJ reasons to principles of EU law through the use of Member State law as a source.

theoretical perspective, the potential difficulty of using negligence to ground liability rests in the degree of moral culpability which a negligent entity may be held to possess given the consequences which may follow a finding of negligence.⁵⁶ Where civil liability for negligence is premised on a principle of compensation,⁵⁷ the requisite degree of moral turpitude should be less than a criminal finding of negligence where incarceration may be a realistic end result.

There is a need for some degree of moral turpitude to be present before an undertaking can be punished for a violation of EU competition law. Personal criminal sanctions are not an option in the European system of competition enforcement; rather administrative sanctions (primarily in the form of fines against undertakings) are meted out. In spite of this, given the apparent⁵⁸ size of the fines, the ECJ has held that competition enforcement proceedings are of a quasi-criminal nature and which thus require appropriate human rights protection.⁵⁹ Such protection, and (or, perhaps, including) the requirement of “personal responsibility”⁶⁰ of the parental undertaking demands that there be a requisite degree of culpability before sanctions can be meted out.

⁵⁶ Ibid at 407–410.

⁵⁷ See e.g., Lord Bingham’s speech in *Fairchild v Glenhaven Funeral Services Limited and Others* [2003] 1 AC 32 at [9]: “The overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another.” If, however, the objective of tort law is different (e.g., to deter conduct of a certain sort in the future), the analysis may be different.

⁵⁸ While EU Competition fines can appear to be significant, it is an open question as to whether they are sufficiently large to have a Beckarian deterrent effect. See Gary S Becker, “Crime and Punishment: An Economic Approach” (1968) 76 *Journal of Political Economy* 169; and compare e.g., Emmanuel Combe and Constance Monnier, “Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement” *Cahiers de Recherche PRISM-Sorbonne* June 2009, available at SSRN=1431664, and Marie-Laure Allain, Marcel Boyer, Rachidi Kotchoni, and Jean-Pierre Ponsard, “Are Cartel Fines Optimal? Theory and Evidence from the European Union” (2015) 42 *International Review of Law and Economics* 38

⁵⁹ See e.g., *C-199/92 Hüls v Commission* [1999] ECR I-4287, at para 150: “... [the] fundamental rights applicable to criminal law... apply to proceedings culminating in competition law fines.”

⁶⁰ *C-97/08 P Akzo Nobel*, para 56: “When such an economic entity infringes the competition

It should be noted that natural persons may be considered undertakings for the purposes of EU competition law.⁶¹ It may be suggested that natural persons facing sanctions deserve an even greater degree of human rights protection than corporate persons. But this is not a concern for our present purposes. Our concern is with regard to parental liability of corporate subsidiaries. In all cases we consider, our “parents” are corporate entities of one form or another, and not natural persons.

Third, a system whereby parental entities are held to be responsible (and hence liable) for the misconduct of their subsidiaries provides not just an efficient means of controlling corporate conduct, but parental liability is also consistent with our normative intuitions surrounding both “who gains, pays” and our views regarding a principal’s duty to supervise their agents. This argument is parallel to arguments surrounding corporate liability for the actions of their employees. The principal-agent model of the firm clearly exhibits the nature of the tension which leads to corporate delinquency: the misalignment of incentives of ownership and management and the inability (or unwillingness) of ownership to effectively monitor management’s conduct, allow for situations in which management “does its own thing” contrary to the wishes of ownership.

The situation where a parental corporation exercises ownership (and thus at least the potential for control) over a subsidiary is comparable. There are many reasons why this may occur, these may include desire to realise tax efficiencies, to use limited liability as a shield to reduce exposure to litigation, to joint ventures in order to exploit complimentary advantages in talent or intellectual property. In every instance the subsidiary acts as the parent’s agent;

rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement”

⁶¹ See e.g., Commission Decision of 26 May 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.559 - RAI/UNITEL) [1978] OJ L-157/39 and Commission Decision of 30 January 1995 relating to a proceeding under Article 85 of the EC Treaty (IV/33.686 - Coapi) [1995] OJ L-122/39, para 32: “Industrial property agents constitute undertakings within the meaning of Article 85 (1) of the EC Treaty where they practise their profession as self-employed persons. Such agents provide their services on a long-term basis and for consideration. The fact that they constitute a regulated profession for the purposes of Spanish law and Council Directive 89/48/EEC (1), that the services are of an intellectual, technical or specialized nature and that they are provided on a personal and direct basis does not alter the nature of the economic activity.”

or more precisely put, the subsidiary's management acts as agents of the parent's owners (possibly mediated through the further agency of the parent's management). As the same issues arise in the control of both individual and corporate agents, the resolution to these two issues is identical. Accordingly, in the next part we craft an argument for parental liability based on the insights which vicarious corporate liability provide.

3. VICARIOUS LIABILITY AND DUE DILIGENCE

In this part, we develop a model for corporate liability for subsidiaries and sub-contractors.⁶² This model is based on a model of corporate liability which attributes conduct of employees to their firm, and extends that model to situations where the actions of subsidiaries and contractors are also attributed to the parental or contracting firm. The insight driving this model is control, and holding those entities which had the ability to exercise control (over employees, subsidiaries or sub-contractors) responsible for their failure to exercise control, in appropriate circumstances. The appropriate circumstances, we suggest, are when the parental or contracting entity had the ability to implement cost-effective monitoring and compliance measures, yet failed to do so.

(a) *The Goals of Corporate Liability*

Our earlier, discussion of the nature of the firm yielded two observations. First, given the structure of corporate conduct, the behaviour of two parties must be considered: the owners and their subordinates, the latter of whom are entrusted with carrying out decisions made by the former. And, second, corporate wrongdoing will frequently emanate from the instructions or decisions of the owners or this wrongdoing can be the result of actions taken by subordinates. These observations provide justification for a principled attribution of

⁶² This model is based upon, and extends, an earlier argument which we made in *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge: Cambridge University Press, 2014) pp. 79 – 87 which in turn is based on Jennifer Arlen and Reiner Kraakman, “Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes” (1997) 72 *New York University Law Review* 687 and Jennifer Arlen, “The Potentially Perverse Effects of Corporate Criminal Liability” (1994) 23 *Journal of Legal Studies* 833.

liability to the corporate actor: to obtain the benefits of the subordinate's or agent's activities gives rise to the imposition of a correlative duty to monitor these activities in order to effectively internalise these costs to the greatest degree possible. The attribution of responsibility for an agent's actions to the principal, when the principal reaps the benefits (or at least is the intended beneficiary of some of the benefits), satisfies our intuitive moral view that "he who gains, should pay—or at least be responsible."

This norm is consistent with (and is a consequence of) the basic tenets of both deontological and consequentialist ethical philosophies. A moral actor, who fails to bear the costs of their own actions thereby imposing them on others, runs afoul of the Kantian proscription not to use others as means. Likewise, the internalisation of responsibility and costs of an action to the benefitting actor underlies most of the thinking on consequentialist-based views of risk bearing and spreading.

(b) Corporate Liability: Strict versus Negligence-Based

An adequate and principled system of corporate liability will have the effect of deterring malfeasance of both the principals and agents, and will do so in a manner where the costs and responsibility of such deterrence falls as much as possible upon the principal. This distribution of costs fulfils the above described normative desiderata. Strict liability has the advantage that when the interests of the agents are aligned with those of the principal, it induces the agents to avoid misbehaviour. This is easily seen, as in a situation when principals' and agents' interests are aligned, any costs—financial or otherwise—are borne by both, and hence both have an incentive to avoid these costs. Provided that the costs of monitoring are less than the costs of (prevented) misbehaviour, there is an incentive for the principal to engage in monitoring activity to avoid the costs of the agent's misbehaviour.⁶³ However, this cost proviso—as we will see below⁶⁴—has significant implications for the choice of rules governing the corporate liability regime.

A negligence regime lies in contrast to a strict liability regime. In a negligence regime, the conduct of the principal is under a duty of care to supervise for the agent's conduct; and the principal is liable for breaches of this duty. It is a defence for the principal to suggest that it had no duty to monitor the agent's conduct at the level in question. In a

⁶³ See Arlen and Kraakman, and Arlen *ibid*.

⁶⁴ See text accompanying notes 68 to 77.

strict liability regime, on the other hand, the principal is responsible (liable) for all harms occasioned by its agent, irrespective of how “well” the principal monitors and controls its agent. A defence based on cost (or “duty of care”) is unavailable.

There is a significant amount of literature which attempts to assess the relative efficacy of these regimes which demonstrates neither is strictly preferable over the other.⁶⁵ The reason for this lack of dominance of one regime rests in the two goals inherent in a system of corporate liability (the activity level goal and the enforcement goal), which imposes conflicting ends for the system of liability as a whole.

(i) Strict Liability

The activity level goal is to ensure that an entity engages in an appropriate amount of an activity, in a market system this is the amount that would be produced when the cost of the product reflected its full cost of production, including all social costs. Accordingly, if this were the sole goal, a corporate liability regime would insist on the internalisation of all costs, and in particular those social costs (including costs of sanctions) of criminal activity, to the product. This ensures optimal production of the product.⁶⁶ This goal is satisfied through a strict liability regime⁶⁷

But strict liability can create perverse incentives for monitoring. Monitoring activities will deter (and hence reduce) misconduct, though they will not completely eliminate *all* misconduct: residual wrongdoing will still occur and will be uncovered by an effective

⁶⁵ See the bibliography to A Mitchell Polinsky and Steven Shavell “Public Enforcement of Law” in Boudewijn Bouckaert and Gerrit De Geest (eds.) *Encyclopedia of Law and Economics* (Cheltenham and Northampton MA: Edward Elgar, 1996-2000).

⁶⁶ See Arlen and Kraakman (n 63) at 692.

⁶⁷ Ibid citing Arlen (n 63); A Mitchell Polinsky & Steven Shavell, “Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?” (1993) 13 *International Review of Law and Economics* 239; Kathleen Segerson and Tom Tietenberg, “The Structure of Penalties in Environmental Enforcement: An Economic Analysis” (1992) 23 *Journal of Environmental Economics and Management* 179, Steven Shavell, “Strict Liability versus Negligence” (1980) 9 *Journal of Legal Studies* 1, 2; and Alan O Sykes, “The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines,” (1988) 101 *Harvard Law Review* 563, 579–81.

programme.⁶⁸ Transmitting information regarding residual wrongdoing to the authorities (which is the goal of the system of liability) enhances the firm's exposure to liability. Where additional monitoring enhances liability, a firm has little incentive to engage in such monitoring. Consequently, should enhanced liability be significant, a firm may choose to forego an internal policing system and expend the foregone costs of monitoring and compliance on satisfying penalties (or litigation in an attempt to reduce penalties).

(ii) Negligence-Based Liability

The solution to this problem may be to adopt a fault-based system of "optimal" or "efficient" monitoring. In such a system, a standard of care for monitoring is important. The standard which ought to be required is that the firms are to monitor their agents until that point where the marginal cost of additional monitoring exceeds the marginal cost of the (undetected and) unprevented social harm. Under this standard, firms will have the incentive to efficiently motor their agent's activities, and their agents will comprehend that the firm has this incentive, thereby guaranteeing the credibility of the monitoring programme.⁶⁹

The standard we suggest is nothing more than Hand J's formula in *U. S. v Carroll Towing Company*,⁷⁰ in which the court was asked to consider the standard of care to be taken to avoid liability for damages for a vessel breaking its moorings. The Court developed the following algebraic formulation:

Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B;

⁶⁸ See *ibid* 707–9 and Arlen (n 63) at 842–3.

⁶⁹ See Arlen and Kraakman *ibid* 712–7.

⁷⁰ 159 F 2d 169 (CA2 1947).

liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.⁷¹

The Hand formula imposes duty to expend efficiently in harm prevention.

This formula requires expenditure in harm prevention up to the amount equalling the expected cost of the harm (i.e., the Probability of Harm multiplied by the Cost of Harm). Accordingly, the rule imposes liability in cases where the defendant under-invested in harm prevention. More significantly, however, the formula does not require wasteful over-investment in safety, which would occur where the expenditure in safety would exceed the expected loss. As such, this formula is consistent with our moral beliefs regarding not wasting resources.⁷² The expenditure in harm prevention is the cost of the firm's compliance programmes, with the harm to be prevented consisting of the economic harm (in particular, appropriated consumer surplus and deadweight losses⁷³) resulting from the firm's participation in the cartel.

However, a rule of liability which mandates that a firm only incur costs which would be efficiently expended in thwarting wrongdoing, fails to require a firm to internalise all social costs of its activities. As a fault-based system of policing requires the corporation to be responsible only in the event that it failed to detect (and prevent) wrongdoing that it could

⁷¹ Ibid at 173.

⁷² On this point see, e.g., Richard A. Posner, "A Theory of Negligence," (1972) 1 *Journal of Legal Studies* 29, 33:

Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the accident. Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.

⁷³ An appropriate proxy for this may be the aggregate sum of damages which would be awarded in North American style litigation (without any Clayton Act §4 multiplier) which would ensue after the discovery of the anticompetitive practices. This would include all (opt-out) class action damages and any other damages or settlements which would hypothetically arise from related litigation.

efficiently prevent, such a system recognizes that the firm will not be responsible for those costs of its activities which it could not efficiently detect (and prevent). In other words, where the costs of preventing the harm exceed the expected costs of the harm itself, the Hand formula recognises that such expenditure is a waste of resources. Accordingly, the rule does not impose liability when the prevention of harm is wasteful.

The result is thus: a negligence-based rule requiring principals to monitor their agent's conduct will ensure efficient expenditure on monitoring costs, and should prevent social harms the expected costs of which do not exceed their monitoring costs. We recognise there will be residual social harm, the prevention of which would have requires an inefficient expenditure of resources (i.e., the cost of preventing such harms exceeded their expected costs). However, this is not unique to corporate monitoring. Uneconomically preventable harm is a consequence of every potentially harmful activity.

(c) *Conclusion: A System of Liability with a Negligence-Based Defence*

Given the conflicting goals of full cost internalisation and cost-efficient monitoring, there can be no resolution to the dilemma which arises from the existence of an activity level goal (ensuring that the actor engages in the correct amount of an activity) and an enforcement goal (ensuring that an optimal level of expenditure on enforcement). If, however, the requirement for full cost internalisation is relaxed and thus the enforcement goal is preferred over the activity level goal, an alternative system of legal liability may be proposed. This system recognises the social value which results when firms both police their agents and reports their agents' misdeeds. This system would impose vicarious liability on the firm for its agents' misdeeds, and attribute these misdeeds to the firm on the basis of a strict liability regime. However, a defence will be provided. The defence will be the existence of a cost-efficient (from the perspective of the Hand formula) monitoring and compliance programme.⁷⁴

⁷⁴ This is similar (but not identical) to the US Federal Sentencing Guidelines' provisions regarding corporate compliance programmes as a mitigating factor in sentencing (see the Sentencing Guidelines §§ **8B2.1** and 8C2.5). However, in the US "due diligence" mitigates the punishment; in our model, a cost-effect compliance programme acts as a complete defence.

The advantages of this proposed system are clear. The use of vicarious liability to attribute an agent's actions absolutely to the firm provides an incentive for the firm to prevent its agents' misbehaviour. This use of vicarious liability for attributing conduct (and hence responsibility) also satisfies our intuition that the beneficiary of an activity (here, the firm) pays for the costs of that activity (here, the agents' misdeeds). However, by providing a defence of "efficient monitoring," the model incentivises optimal expenditure on antitrust compliance.

But beyond satisfying the "who gains, pays" intuition, there is a broader social appeal to the proposed model, given its incentive for optimal private expenditure in antitrust compliance. The argument for this is as follows. The level of antitrust enforcement in a jurisdiction is obtained through an expenditure of both private and public resources. We assume first that the same amount of compliance in a can be "bought" for the same sum of money (whether or not the source of the funds is private or public); and second, that the present system results in suboptimal private investment in compliance. The proposed system of liability will incentivise additional private spending on compliance, achieving the same social level of enforcement with less public funds. The "left over" public funds can be diverted elsewhere either within the relevant competition agency (e.g. to expedite merger decisions or advocacy work) or to other governmental expenditure.

But it may be the case that our first assumption is incorrect. It is possible that public expenditures purchase more compliance than private expenditures, or vice versa. To the extent that the former case is correct, then our model has the merit of not requiring private expenditure in compliance at a super-optimal level, and thereby waste resources. On the other hand, if it is the case that a greater level of compliance can be privately purchased, then the same level of enforcement can be obtained with less total (public plus private) expenditure.

Alternatively, it may be the case that in at least some antitrust matters, private measures and investment may be more efficient in securing compliance, as it is likely to be less costly for firms to monitor themselves than to be subject to external monitoring. Firms have informational advantages over public authorities regarding their workings, their employees and subsidiaries, and the market environment in which their activities occur. While public agencies may have access to some of this information, relative to the firms themselves they operate at a disadvantage. As such, it is a very reasonable assumption that private (internal) monitoring may well achieve the same level of compliance at a reduced cost.

Central to the inquiry mandated by the suggested model of parental liability for the competition infringements of its subsidiaries is whether or not the subsidiary's anticompetitive activities could have been prevented by the parent through (cost) efficient exercise of control. Cost-efficiency is in turn defined by the Hand-formula, which—in the antitrust case—focuses on the costs of preventing the anticompetitive activity relative to the harm occasioned by this activity. So the additional element demanded by the model is whether the parent could have efficiently made an additional investment in monitoring activity (e.g. compliance or corporate control programmes) which would have prevented the subsidiary's anticompetitive conduct. The model rewards efficient (thus targeted) investment in compliance and monitoring efforts, and penalises failure to monitor and control. It thus incorporates the missing element of negative control as a principle of liability.

This inquiry as to whether or not adequate measures could have been put into place to prevent the anticompetitive conduct would examine not just the existing links (both legal and operational) within the corporate group, but also the links which could have been established to ensure that this sort of activity did not occur. This sort of inquiry is entirely analogous to those inquiries that are undertaken in a negligence trial in order to determine if the defendant breached its duty of care.⁷⁵ Rather than asking the question, “How could the accident have been prevented?” our inquiry asks, “How could the anticompetitive conduct been prevented?” In a negligence matter if the defendant can show that the accident could not have been prevented by reasonable means, then the defendant will have a defence against the allegations of negligence. Similarly, under the above model, if the parental firm can establish that the anticompetitive conduct could not have been prevented through cost-effective measures, then it will have an analogous defence.⁷⁶

The administrative and judicial costs of determining whether or not the firm met the standard of care need not be expensive: the inquiry should only be directed at determining whether or not an obvious means of monitoring was omitted by the firm, and not—except in the hardest of cases (or “at the margin”)—directed to a cost benefit analysis of the monitoring

⁷⁵ See, for instance *Morris v West Hartlepool Steam Navigation Co* [1956] AC 552, 574; *Latimer v AEC* [1953] AC 643; *Morris v Luton Corporation* [1946] 1 All ER 1, 4; *Christmas v General Cleaning Contractors* [1952] 1 KB 141, 149, aff'd [1953] AC 180.

⁷⁶ Needless to say, this must be done without the benefit of “hindsight bias,” but this is a caveat which is applicable to negligence law generally: see *Marks and Spencer PLC v Palmer* [2004] EWCA Civ 1528 at [27].

programme. This is a similar inquiry to the standard inquiry in a tort safety/negligence case, whereby the omission of an obvious precaution will justify a prima facie finding of negligence.⁷⁷

Finally, the proposed model of liability, by using the Hand formula, incorporates an explicit cost/benefit analysis to determine the appropriate level of investment in antitrust compliance to accord a defence to the parental firm. We view this as entirely appropriate. Given the rational, profit-maximising nature of corporate entities, if any entities act on cost-benefit calculations, it is these which do. Indeed this insight motivates much of the analysis of how corporate malfeasance, particularly in antitrust matters,⁷⁸ should be contained.

4. CORPORATE LIABILITY: APPLICATION TO ANTITRUST MATTERS

The above suggested means of attributing liability in subsidiary and other agency situations is of little practical utility if it is significantly inconsistent with the present state of the law. Likewise, if the model is entirely consistent with the existing state of the law, our results would be trivial and uninteresting. In this part of the article, we examine the implications our suggestion have for the present state of EU law. In particular, we examine the implications our model has for the attribution of liability in three situations: parent/subsidiary conduct, contractor/sub-contractor relationship, and situations in which a firm is “parked” with a financial institution where that institution passively holds the firm. We find that in the first two cases, our model slightly diverges from the existing state of the law, and is consistent in the latter case. The variance between our model and the existing state of law thus shows room for reform.

(a) Implications for Corporate Liability: Parental Liability

Our proposed model of liability mandates an inquiry into the actual and potential links between the parental and subsidiary entities to determine if the subsidiary’s anticompetitive activities could have been prevented by the parent’s exercise of control. If the parent could have prevented the activity in question through cost-effective (in the sense of the Hand-

⁷⁷ See Arlen and Kraakman (n 63) 732–5.

⁷⁸ See e.g. A. Mitchell Polinsky and Steven Shavell, “The Optimal Tradeoff between the Probability and Magnitude of Fines” (1979) 69 *American Economics Review* 880.

formula) measures liability will ensue. The immediate implication is this is that any antitrust investigation is slightly broadened.

*BMW Belgium*⁷⁹ serves as an illustration of how our suggested approach would differ from the existing approach. The case concerned with cross-border sales of BMW cars, which were priced considerably lower in Belgium than in in remainder of the internal market. As a result of the price differential, sales from Belgium increased, and there was a corresponding drop in sales in other parts of the internal market (in particular in The Netherlands and Germany). In response to this, BMW Munich (the parent company) wrote to BMW Belgium in an effort to remind Belgian dealers of their contractual obligation not to sell to unauthorised dealers, although sales to non-Belgian domiciled individuals were permitted. Ultimately, BMW Belgium sent its dealers instructions. These included, inter alia, the following direction:

Our view is therefore that in the present situation there is only one solution: henceforth no BMW dealer in Belgium will sell cars outside Belgium or to firms who propose to export them. Our solidarity and the protection of our network are at stake. This absolute solidarity of the BMW network and strict compliance with this sales policy should be convincing and will help to restore confidence in the Belgian BMW network. We therefore ask you to agree to the above proposals by signing the attached copy.⁸⁰

BMW Belgium's actions have been called the actions of a rogue subsidiary.⁸¹

The Belgian subsidiary's actions may have been contrary to the instructions of the parent, as the parent informed the subsidiary that no action should be taken against Belgian dealers who have merely exported cars (but not sold to other dealers) or who were otherwise not proven to have violated their dealership agreements.⁸² Nevertheless, it is also evident that

⁷⁹ C-32, 36-82/78 *BMW Belgium v Commission* [1979] ECR-2436, and Commission Decision 78/155/EEC of 23 December 1977 relating to a proceeding under Article 85 of the Treaty (IV/29.146/BMW) [1978] OJ L-46/33.

⁸⁰ BMW Belgium Decision, *ibid*, at p 35.

⁸¹ Richard Burnley, "Group Liability for Antitrust Infringements: Responsibility and Accountability" (2010) 33 *World Competition* 595, 607.

⁸² BMW Belgium Decision (n 79) at p 37.

BMW Munich felt that it could influence (if not determine) BMW Belgium's course of conduct, as is shown by the former's instructions issued to the latter.⁸³ In deciding the case, it appears that the Commission gave great weight to the fact that the subsidiary's actions were contrary to the parent's direction; as a result, it did not impose a fine on the parent.⁸⁴

Under our proposed system, the Commission's inquiry would have been different. Our system recognises that the parent's ability to issue instructions to the subsidiary is indicative of a parental assumption of an ability to control the subsidiary's conduct. Rather than excusing the parent firm from liability as a result of the subsidiary's disobedience (or "rogue behaviour"), our model would ask whether the parent could have cost-effectively prevented this sort of activity by the subsidiary. We suggest that obvious cost-effective measures could have been implemented (e.g. vetting—or even writing for BMW Belgium—the proposed correspondence to dealers), and in these circumstances liability would attach to BMW Munich's conduct.

(b) Implications for Corporate Liability: Third-Party Agents

A system which attributes liability for the actions of subsidiaries to parental entities should be compared the attribution of liability in situations where a firm engages another firm to act as its agent. Ideally, the regime by which liability is attributed should treat this principal-agent case identically to a parent-subsidiary case. To do otherwise would establish incentives to choose a particular organisational structure to minimise antitrust liability. In particular, if it were more difficult for a firm to be held liable for the anticompetitive activities of its agents than its subsidiaries, then this provides incentives for firms to use agents as a means of "contracting out" of antitrust liability.

In C-542/14 *VM Remonts*, the ECJ had an opportunity to consider the liability of a contractor for the anticompetitive conduct of its sub-contractor. The undertaking in question engaged the services of a sub-contractor to assist it in the preparation of a bid. The subcontractor, in turn, engaged in prohibited information-sharing with other undertakings involved in the same tender process. This situation is structurally identical to the principal-agent situations exemplified in both the parent-subsidiary and employer-employee

⁸³ See Burnley (n 81) at 607.

⁸⁴ *Ibid.*

relationships; and, as in the latter two cases, there is varying opportunity for the principal to exercise control over its agent.

In his Opinion, AG Wathelet explicitly considered an undertaking's responsibility to supervise its sub-contractor to ensure that it would not engage in anti-competitive conduct while performing its contractual duties, and argued that negligent supervision should found an infringement of Article 101 TFEU. As such, the AG suggested, EU law should establish a rebuttable presumption of liability for acts contrary to competition law committed by third parties whose services the undertaking in question has contracted.⁸⁵

As the Advocate General maintained, such a rebuttable presumption achieves the appropriate balance between ensuring the effectiveness of competition law while at the same time protecting the fundamental rights of the undertaking in question.⁸⁶ The assumption can be rebutted by the undertaking in question proving that it knew nothing of the anticompetitive behaviour of the third party, and that it took all necessary precautions to ensure the contractor's compliance with competition law.⁸⁷ Whether or not the undertaking in question has acted in a manner that is appropriate to rebut the presumption is a matter for the national court (in the instant case) to determine.⁸⁸

AG Wathelet's insight in this case is that an undertaking should not be able to "subcontract" itself out of liability under the competition laws. Clearly, had the undertaking engaged in the sort of conduct performed by its sub-contractor, the undertaking would itself have been immediately (and unquestionably) in breach of competition law. If the

⁸⁵ C-542/14 *VM Remonts and Others*, Opinion of AG Wathelet, para 63.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, para 65, see also para 72. In paragraphs 66 – 68 AG Wathelet identifies three aspects of the sub-contractor's engagement where this monitoring is necessary: (1) at the time of engagement, choosing the contractor and defining its tasks (in a way to ensure compliance with competition law); (2) monitoring the sub-contractor to ensure compliance with the terms of the contract; and, (3) if the undertaking discovers that its sub-contractor is in breach of the competition law, the undertaking must not stand silent, but must publically renounce the sub-contractor's activities, prevent any reoccurrence and/or terminate its relationship with the sub-contractor.

⁸⁸ *Ibid.*, paras 73 and 74. Presumably this is because assessing such evidence is a matter for the finder of fact.

undertaking is not held responsible for the activities of its sub-contractor, the effect of the competition laws would be diminished through the use of this means to escape liability.

Disappointingly, the Court did not follow the AG on this point. Rather the Court's primary focus was on the contractor's awareness and intention in its relationship with its sub-contractor.⁸⁹ This is somewhat tempered by a recognition that the principal will be liable in cases where the sub-contractor's anticompetitive conduct was foreseeable and the principal accepted this risk of anticompetitive conduct.⁹⁰ Thus the Court:

[T]he answer to the question is that Article 101(1) TFEU must be interpreted as meaning that an undertaking may, in principle, be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services only if one of the following conditions is met:

- the service provider was in fact acting under the direction or control of the undertaking concerned, or
- that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or
- that undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed.⁹¹

The obvious problem with the Court's holding is its reliance on foreseeability. In English law, foreseeability of consequences is used to limit responsibility and hence liability for damages.⁹² The difficulty is that foreseeability is ultimately an arbitrary classification requiring an additional ingredient in order to permit principled attribution of liability.⁹³

⁸⁹ C-542/14 *VM Remonts and Others*, para 30.

⁹⁰ *Ibid* para 31.

⁹¹ *Ibid* para 33.

⁹² *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound No 1)* [1961] AC 388 (PC Aust).

⁹³ See e.g. *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 80 (HL) per Lord Keith:

Magnitude of risk has been used in English Law as a means of achieving principled attribution.⁹⁴ Further, the Court's use of acceptance of risk as a necessary condition for liability to be founded on this branch is also problematic. "Acceptance" is a vague term, with meanings which could include "(contractual) agreement," "acquiescence," and "wilful blindness."

As problematic as the language chosen by the Court may be, the key to how this new rule fits into the EU's competition regime will be in how the rule's two branches mutually operate to ensure an appropriate level of enforcement (which includes monitoring). The test for principal's liability for the anti-competitive activities of should: (1) (at minimum) be consistent with the test of parental liability for the anti-competitive activities of their subsidiaries; and (2) (ideally) provide an incentive for principals to optimally monitor their sub-contractors to deter anti-competitive conduct.

Consistency should be the minimum standard expected of the legal rule in its operation. Should the principal/sub-contractor rule vary from the parent/subsidiary rule this will set up differing incentives to opt for a particular legal relationship. In particular should it be more difficult to attribute liability in a principal/sub-contractor case than in a parent/subsidiary case, this sets up incentives to use sub-contractors as a means of avoiding (or contracting out of) antitrust liability. Similarly, if the required standard of monitoring in principal/sub-contractor relationships exceeds the standard expected in parent/subsidiary relationships, this will impose additional transaction costs in engaging subcontractors with a consequent reduction in the efficiencies which could be generated through this practice.

It appears that under the Court's rule in *Remonts*, there is a functional divergence between the two standards, as well as between the standards and the rule governing the attribution of employee conduct. The rule governing parent/subsidiary liability focuses upon

It has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present.

⁹⁴ See e.g. *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound No. 2)* [1967] 1 AC 617, 643 (PC Aust), see also *Bolton v Stone* [1951] AC 850 (HL).

the positive control that the parent exercised over its subsidiary and uses rebuttable presumptions of share ownership to establish proof of control. As seen above, there is little focus on negative control, i.e. the parent's ability to prevent the anti-competitive conduct.⁹⁵ In principal/sub-contractor matters, the keys for the Court are the foreseeability of the sub-contractor's anticompetitive conduct and the principal's subsequent acceptance of the risk of the sub-contractor's conduct. Here there is little concern with control in either the positive or negative sense, the concern is merely with acceptance of foreseen consequences. Finally, in the case of employees, their conduct is immediately attributed to their employer: control (of either a positive or negative nature) and foreseeability is irrelevant.

(c) Implications for Corporate Liability: "Parking" and Pure Passive Holdings

The inquiry suggested above does not automatically entail that parental entities which have pure passive holdings in a firm (which is in turn involved in anticompetitive activity) will be liable for the latter's anticompetitive activity. Given the need to prevent harmful effects to competition which may result from amalgamation, there is a need for means by which assets can be divested to prevent such effects, and that such divestiture can be achieved with as little cost as possible. "Parking" an asset with an investment bank or insurance company is frequently the most cost-effective means for a merging undertaking to rid itself of an asset. However, the firm with which the asset is parked has no interest in either running the parked firm as a long-term proposition. Rather, that firm is merely holding onto an asset until it can then dispose of it. It is a pure passive owner, with its ownership of the parked firm is analogous to holding the parked firm as inventory, rather than incorporating it into its existing structure as a going concern.

Accordingly, the organisational links between the firms are minimal to non-existent; hence there is little opportunity to exercise control of either the positive or negative sort. Additionally, one can also reasonably assume the expense of developing antitrust compliance measures to be put in place for the short period that the undertaking is parked with the financial holding company would impose significant transaction costs on any such proposed arrangement. Hence the non-imposition of liability in these circumstances is consistent with what we have determined to be the fundamental focus of inquiry in this model of

⁹⁵ This is in contrast to the AG's proposal, which explicitly considered opportunities for (and failures in) monitoring; see n 87.

responsibility: the ability of the parent to prevent the subsidiary's activity through cost-efficient exercise of control.

(d) The Consistency of the Theoretical Model with EU Law

Testing the theoretical model described above against existing EU law serves at least two purposes. First, to the extent that there is divergence between the model and the existing law, the extent of this divergence is telling. If it is great, then the model may not be anchored in reality; if it is non-existent, then the model may be trivial: it describes reality, and not an optimal institution. Second, to the extent there is an acceptable divergence between the model and the state of the law, this is suggestive of a direction for reform.

As remarked upon earlier, Regulation 1/2003 provides for antitrust liability for both actively and negligently engaging in anti-competitive conduct. The case law, however, is focused on active participation in such conduct, with control being the marker of undertaking unity. There is a gap with negligent conduct,⁹⁶ with the Commission partially filling this in through its mention of parental responsibility for the antitrust compliance of its (entirely-owned) subsidiary.⁹⁷

The Commission's Fining Guidelines⁹⁸ also shows divergence from the model outlined in this article. Point 23 of those Guidelines indicates that the Commission may reduce the amount of a fine "where the undertaking provides evidence that the infringement has been committed as a result of negligence;" Although the burden of production placed on the undertaking is consistent with the model (and general principles of law regarding production of a defence or mitigating circumstances), the extent that negligence could serve

⁹⁶ Compare the Decision of 18 November 2014 KZR 15/12 ("Calcium Carbide Cartel II") paras. 56 – 58 of the (German) Bundesgerichtshof available (in German) at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=41b7cd3bc7185d8371bba3843792db6f&nr=69838&pos=13&anz=18> (accessed 21 October 2016) and Jonas von Kalben and Alexander Sekunde, "Relative Responsibility of Jointly and Severally Liable Units in Public and Private Enforcement of EU Competition Law—What Role for Economic Criteria?" (2016) 37 *European Competition Law Review* 1, 4.

⁹⁷ Rubber Chemicals Decision (n 52), para 259.

⁹⁸ Guidelines on the method of setting fines imposed (n 47).

as a basis for a reduction of a fine is undefined. There is no case law defining negligence. The Opinions of AG Wathelet in *VM Remonts* and AG Mayras in *General Motors* can provide some assistance. In the latter, AG Mayras opined, “the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them... .”⁹⁹ These understandings of “negligence” certainly capture negligence in the sense of failure of supervision.

Nevertheless, a reduction of a fine in those circumstances in which the offence was negligently committed is contrary to ensuring cost-efficient internal monitoring of the activities of subsidiaries by their corporate parents. In the absence of an (inefficient) rule which imposes strict liability on a corporate parent, negligent supervision of a subsidiary occurs precisely because the parent has underinvested in monitoring and compliance. To subsequently discount the sanctions imposed on an undertaking because activities which ultimately resulted from underinvestment, perversely rewards this underinvestment.

The EU provisions surrounding leniency and confidentiality are somewhat consistent with the model. The first undertaking which self-reports and provides the Commission with specific and value-added¹⁰⁰ evidence of its participation in a cartel is entitled to immunity from fines, subject to a duty of on-going cooperation with the Commission’s investigation.¹⁰¹ This is subject to the proviso that an applicant for complete immunity cannot have coerced other undertakings to join or remain in the cartel.¹⁰² To the extent that this policy encourages undertakings to implement a credible (in the eyes of its employees, subsidiaries or other agents) policy of self-monitoring, EU law is consistent with our proposed regime.

The efficacy of a self-monitoring regime may be somewhat reduced by the 2014 Damages Directive.¹⁰³ The goal of that Directive is to ensure the effective exercise of the

⁹⁹ Case C-26/75 *General Motors v EC Commission* [1975] ECR 1367, 1389.

¹⁰⁰ That is, beyond what the Commission (or other public enforcement authorities) may already have in its possession.

¹⁰¹ Commission Notice on Immunity from Fines (n 47) points 8 – 12.

¹⁰² *Ibid*, point 13.

¹⁰³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of

right to claim compensation by victims of anti-competitive conduct,¹⁰⁴ which includes the right to disclosure of evidence which may be held by a defendant or third-parties.¹⁰⁵ As such there is a limited right of access to National Competition Authorities' files¹⁰⁶; however, such access does not extend to leniency statements and settlement submissions.¹⁰⁷ Insofar as information contained in these sorts of documents is protected, provision of this in the context of self-reporting the results of internal monitoring will not enhance the civil liability of the undertaking in question. However, if undertakings believe that the self-monitoring and subsequent reporting process could place liability-enhancing evidence into plaintiff's counsel's hands via a disclosure process, this disclosure process becomes a disincentive to effective self-monitoring and hence internalising the costs of antitrust enforcement.

With main one exception, the model we have described in this section does not diverge significantly from the present state of EU law. The exception is the treatment of negligence in competition infringements. The Fining Guidelines allows for the possibility of a reduction in these sorts of cases, which is exactly the wrong response. As negligence arises from underinvestment in care, to reduce a penalty in these circumstances further rewards such underinvestment. Given that the wording of the Guidelines permits—rather than mandates—such a fine reduction it is to be hoped that this discount will be used sparingly—if at all.

CONCLUSION

The suggestions made in this article are not merely “ivory tower” theorising. A system where liability is imposed on parental corporations for the anti-competitive activities of their subsidiaries is consistent with European case law and secondary legislation. Such a system also has sufficient fault-based justification to enable it to pass the Courts' test for “personal responsibility” antecedent to the imposition of quasi-criminal liability inherent in European antitrust enforcement.

the competition law provisions of the Member States and of the European Union [2014] OJ L-349/1. Member States are required to implement the Directive by 26 December 2016.

¹⁰⁴ Ibid, Article 1(1).

¹⁰⁵ Ibid, Article 5.

¹⁰⁶ Ibid, Article 6(5).

¹⁰⁷ Ibid, Article 6(6).

In addition to this, parental negligence as a means of antitrust liability is workable under the present regime. A finding of an antitrust infringement by a subsidiary should trigger an inquiry about parental (non-)involvement. Where the parent holds 100 % (or close thereto) the existing case law, and resulting means by which parental liability is established, is adequate. Where there is a lesser shareholding, a sliding-scale rebuttable presumption of control can be used: the greater the shareholding, the greater the presumption of control and the greater the presumption that the parent could have acted in a manner to ensure antitrust compliance on the part of its subsidiary. Further, other indicia could and should be adopted as rebuttable presumptions of both positive and negative control.

The corollary of this rebuttable presumption is that the lower the shareholding, the easier the presumption should be to rebut. Indeed, not only does the requirement of “personal responsibility” demand this, but also imposing an excessively high of threshold on parents would compel an over-expenditure on monitoring costs. Such over-expenditure would in turn detract from a regime of socially optimal enforcement costs.

However, once control—either positive or negative—has been established, a due diligence defence may be available to the parental undertaking. If that undertaking can establish that it took sufficient precautions to ensure the antitrust compliance of its subsidiaries, this should either serve as a defence to the complaint, or alternatively as grounds for a reduction of any fine.¹⁰⁸ Accordingly this defence ties the personal responsibility of the parental entity to a duty of oversight of the activities of its subsidiary or contractor. This tie, in a very real way, serves to address any human rights considerations raised by liability without responsibility.

The extension of EU parental liability in competition matters to include liability for negligent oversight of subsidiaries thus provides for more effective regime for the prevention of antitrust violations. Incentivising parental firms to oversee their subsidiaries (irrespective of their actual ownership level of them) enhances antitrust enforcement by internalising such enforcement efforts, in the same way that attributing liability to undertakings for the actions of their employees enhances such efforts. While there is some related case law,¹⁰⁹ the paucity of litigated matters may reflect the Commission’s enforcement policy. If indeed this is the case, it is submitted, this policy needs to be reconsidered. This reconsideration is particularly

¹⁰⁸ Guidelines on the Method of Setting Fines (n 47), point 29.

¹⁰⁹ See e.g., T-132/07 *Fuji Electric v Commission* [2011] ECR II-4091, paras 173–185.

pressing in light of the extensive body of European law, of which EU law is a part that constructs liability on the basis of negligence, and thus negligence in supervision.