Parent company liability for antitrust infringements by subsidiaries
– an economic analysis of the single economic entity doctrine
in EU competition law

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Abstract:

According to established case-law of the European Court of Justice, in the European Union, parent companies can be fined for antitrust infringements by their subsidiaries. Furthermore, under a new EU Directive, signed into law on November 26, 2014, parent company liability is likely to be extended to private antitrust damages actions. In the United States, in contrast, courts are very reluctant to hold parent companies liable for antitrust infringements by their subsidiaries, whether criminally or in private suits. Against this background, I explore in this paper whether parent company liability in the antitrust context is justified from an economic perspective. After briefly introducing case-law and doctrine with regard to parent company liability for antitrust infringements by subsidiaries both in the European Union and in the United States, I build on existing works dealing with the economic analysis of antitrust enforcement, corporate torts, vicarious liability, criminal penalties, and limited as well as unlimited shareholder liability to assess the efficiency of parent company liability in the antitrust context. Based on a thorough analysis of both the legal framework and the economic situation, I explain under what circumstances it is justified to hold parent companies liable and how parent company liability relates to other antitrust enforcement instruments, in particular to the individual liability of executives and employees.

TABLE OF CONTENTS

Introduction ......................................................................................................................... 1

I. Parent company liability doctrine and case law ......................................................... 7
   1. European Union ......................................................................................................... 7
   2. United States ........................................................................................................... 11

II. Distinctive features of EU and US antitrust enforcement ........................................ 17
    1. Public and private enforcement ............................................................................. 17
    2. Civil and criminal liability ..................................................................................... 21
    3. Individual and corporate liability .......................................................................... 23

III. Lessons from the classic deterrence model ............................................................... 25
    1. The discussion about optimal antitrust sanctions .............................................. 28
    2. No justification for parent company liability in the classic model ................. 31
    3. Parent company liability and the problem of too low fines ......................... 31

IV. Assessing parent company liability in reality ............................................................ 35
    1. Wealth restraints ..................................................................................................... 35
    2. Imperfect information ............................................................................................ 44
    3. Enforcement costs .................................................................................................. 45

V. The limits of limited liability ........................................................................................ 47

VI. Parent company liability and individual liability ........................................................ 54

VII. Parent company liability beyond antitrust law .......................................................... 60

Conclusion ........................................................................................................................ 63
INTRODUCTION

For many years, well-known legal scholars have argued that parent companies should be liable
for torts committed by their subsidiaries. Yet, in both the United States and the European Union, par-
ent companies, like every other shareholder, are protected by the principle of limited liability. Courts
routinely hold that the law permits the incorporation of a business for the purpose of enabling its pro-
prietors to escape personal liability, and they extend this privilege not only to natural persons, but also
to corporate shareholders. As a general rule, courts on both sides of the Atlantic disregard the legal
entity only under exceptional circumstances, for example if a sole owner uses a corporation as a mere
“instrumentality” to commit a fraud or other wrong, or if assets of the corporation and its shareholders
are so commingled that they cannot be separated. But this “piercing of the corporate veil” is rare and
has been criticized as unpredictable, costly and dysfunctional. At any rate, piercing accomplishes
shareholder liability only on a case-by-case basis and is thus considered inadequate by most propo-
nents of unlimited shareholder liability for torts.

There is, however, one important real-life example where parent company liability is the gen-
eral rule and limited liability is the exception. Under the “single economic entity doctrine”, the Euro-
pean Court of Justice holds parent companies liable for antitrust infringements by their subsidiaries
and allows the European Commission to fine them accordingly. Under the EU Directive on Antitrust
Damages Actions, signed into law on November 26, 2014, the single economic entity doctrine is like-

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2 See e.g. Bartle v Home Owners Co-op., 309 N.Y. 103, 106 (1955); Walkowsky v Carlton, 18 N.Y.2d 414, 417 (1966). For US cases see e.g. Wm. Passalacqua Builders, Inc. v Resnick Developers South, Inc., 933 F.2d 131, 139 (1991); American Protein Corp. v AB Volvo, 844 F.2d 56, 60 (1988); Van Dorn Co. v Future Chemical and Oil Corp., 753 F2d 565, 570 (1985); Minifie v Rowley, 202 P. 673, 676 (1921); Sea-Land Services, Inc. v Pepper Source, 941 F.2d 519 (1991); Associated Vendors, Inc. v Oakland Meat Co., 26 Cal. Rptr. 806, 816 (1962). For EU cases see e.g. Autokran, ECLI:DE:BGH:1985:160985UIIZR275.84.0; Bremer Vulkan, ECLI:DE:BGH:2001:170901UIIZR178.99.0; TRIHOTEL, ECLI:DE:BGH:2007:160707UIIZR3.04.0; Adams v Cape Industries plc [1990] Ch 433; Prest v Petrodel Resources Ltd [2013] UKSC 34. Consider also Idryma Typou, C-81/09, ECLI:EU:C:2010:622, ¶ 42 (stating that, while it is apparent from an examination of the law of the EU Member States that in the majority of cases shareholders are not liable for the debts of a company having limited liability, “it cannot be concluded therefrom that this is a general principle of company law applicable in all circumstances and without exception”.

3 Stephen M. Bainbridge, Abolishing Veil Piercing, 26 J. Corp. L. 479 (2001); see also Henry Hansmann & Reinier Kraakman, supra note 1, at 1931 (stating that the doctrine is vague and largely unprincipled).

4 E.g. Henry Hansmann & Reinier Kraakman, supra note 1, at 1931-1932.

ly to be extended to civil liability. This approach toward parent company liability in EU competition law presents a stark contrast to US antitrust law, where fines are only imposed on the subsidiary itself unless the parent was actively involved in the infringement, and where courts are usually very reluctant to pierce the corporate veil in private antitrust damages actions.⁷

Against this background, I explore in this paper whether parent company liability for antitrust infringements by subsidiaries is justified from an economic perspective. This subject is closely related to the more general question under what circumstances parent companies should be liable for torts and crimes committed by their subsidiaries. Although many scholars have written about the single economic entity doctrine in EU competition law, its economic justification has never been assessed.⁸ This disregard is surprising given that the doctrine is primarily based on economic reasoning. It is my objective in this paper to fill the unexpected gap in the existing literature.

Although the European Court of Justice has never explicitly specified the idea behind the single economic entity doctrine, it can be deduced from case-law that the doctrine’s main purpose is to deter antitrust violations. I therefore apply classic deterrence theory to the single economic entity doctrine and explore the doctrine’s effects on the behavior of both the parent company and its subsidiary. I show that parent company liability cannot be assessed separately, but must be considered in connection with other enforcement instruments that have a deterrent effect, such as the subsidiary’s own civil and criminal liability and the individual civil and criminal liability of managers and employees.

On the basis of this analysis, I come to the surprising conclusion that parent company liability is important for effectively deterring antitrust infringements in the European Union, but that parent company liability may not be necessary for achieving the same purpose in the United States. I explain this disparity with differences in the respective enforcement regimes, most importantly the greater availability of criminal penalties for executives and employees in the United States.⁹ I demonstrate that there is a significant overlap between the functions served by parent company liability in EU competition law and individual criminal liability in US antitrust law. They both aim, inter alia, at ensuring

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⁸ Although there is a huge body of literature dealing with the single economic entity doctrine in general, the doctrine has so far not been thoroughly analyzed from an economic perspective. Most legal writing on the doctrine is rather critical, see e.g. infra note 30. At least some economists see the doctrine more positively, see e.g. Damien Geradin, Anne Layne-Farrar & Nicolas Petit, EU Competition Law and Economics, 2012, ¶ 6.65 (stating that the notion of parent company responsibility has strong economic and legal support).

⁹ For a general discussion about individual criminal liability see e.g. Parker Beaton-Wells, Justifying criminal sanctions for cartel conduct: a hard case, 1 Journal of Antitrust Enforcement 198 (2013); Peter Whelan, The Criminalization of European Cartel Enforcement, 2014, passim; Wouter Wils, Efficiency and Justice in European Antitrust Enforcement, Chapter 6 (2008); and infra Part VI.
effective deterrence in cases where the primary target of liability, i.e. the corporation in the course of whose business the antitrust violation was committed, is underdeterred. The main reason for such underdeterrence is that the subsidiary lacks sufficient assets to pay for a fine or damages.

The paper consists of seven material parts. In Part I, I introduce doctrine and case-law dealing with parent company liability for antitrust infringements by subsidiaries in both the European Union and the United States. EU competition law applies to “undertakings”, and, according to the European Court of Justice, the concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons. On this basis, it is settled case-law that the conduct of a subsidiary may be imputed to the parent company, in particular where the subsidiary does not decide independently upon its own conduct on the market, but carries out the instructions given to it by the parent company.

In the United States, in contrast, the approach toward parent company liability for antitrust infringements by subsidiaries is very different. There is no special doctrine for parent liability in antitrust cases. Instead, courts follow the lead of the US Supreme Court’s decision in Bestfoods v United States (1998), according to which it is hornbook law that the exercise of control from stock ownership will not create liability beyond the assets of the controlled firm. It follows from long-established precedents that, in the United States, parent companies are civilly liable for antitrust infringements by their subsidiaries only (1) if they themselves actively participated in the antitrust violation (direct liability), or (2) if the plaintiff succeeds in meeting the stringent requirements for piercing the subsidiary’s corporate veil (indirect liability). In criminal cases, demonstrating an active involvement of the parent company in antitrust infringements is the only way to establish its liability.

In Part II of the paper, I then compare antitrust enforcement in the European Union and the United States. The objective is to generate awareness for important differences between the two legal regimes that significantly affect the subsequent economic analysis. The first difference is that antitrust enforcement in the European Union is primarily public enforcement conducted by the European Commission and the national competition agencies of the 28 EU Member States, whereas in the United States, private enforcement of antitrust rules through private litigation plays a much bigger role.

The second difference is that there is no criminal liability for antitrust infringements in the European Union, whereas in the United States, criminal penalties are a significant aspect of antitrust en-
forcement. But this difference is less severe than it might seem at first glance. Competition agencies in the European Union can impose heavy fines just like their US counterparts, and although these fines are considered to be of administrative rather than of criminal nature, from an economic perspective, this does not matter much for the affected firms.

For this reason, it is actually the third difference that is more important. Whereas the individual liability of managers and employees (both criminally and under private law) plays an important role in US antitrust enforcement, this is generally not the case in EU competition law, which is exclusively addressed to firms.¹³ This absence of individual liability is crucial for explaining the single economic entity doctrine because it means that competition agencies cannot address incentives for effective deterrence to natural persons, but must address them to legal entities. As I argue in Part VI, the lack of individual liability of managers and employees is in fact the most important reason why parent company liability is currently essential for achieving effective deterrence in EU competition law.

In Part III, I begin the economic analysis of the single economic entity doctrine in EU competition law by applying the classic model of deterrence. I show that, under certain, commonly used “perfect-world” assumptions (no wealth constraints; no costs for imposing sanctions; rational and perfectly informed actors; no transaction costs; and a positive probability of imposing sanctions), parent company liability cannot be justified from an economic perspective. If monetary sanctions are optimal¹⁴ and wealth is not restrained, the subsidiary itself will be sufficiently deterred and there is no need for holding the parent liable as well.

It is in particular not convincing to impute liability to a parent company merely because this would allow for a higher fine and the fine to be imposed on the subsidiary alone would be too low to achieve effective deterrence. Even if it is true that antitrust fines are in reality lower than they optimally should be, there is no need to resolve this by multiplying the number of liable parties. Instead, the natural solution would be to simply increase the upper limit for the permissible fine.

In Part IV, I relax the assumptions of the classic model and demonstrate that parent company liability can be justified where the subsidiary itself is insufficiently deterred, in particular because it has not enough assets to pay for a fine. Both the European Commission’s Fining Guidelines and the US Federal Sentencing Guidelines allow for a reduction of the fine to be imposed if the infringing firm

¹³ Some EU Member States have adopted national laws that impose civil or criminal liability on individuals who infringe the antitrust laws. But there is no universal rule on individual liability on the European level.

¹⁴ It is controversially debated whether antitrust sanctions should optimally equal the perpetrator’s gain or the harm that was caused by the antitrust violation, see e.g. William M. Landes, supra note 14; Richard Posner, Antitrust Law, 2nd edition, Chapter 10 (2001); Wouter P.J. Wils, Efficiency and Justice in European Antitrust Enforcement, Chapter 3 (2008), and infra Part III.1.
would otherwise face bankruptcy ("inability-to-pay rules"). These rules have the same negative effect on deterrence as the so-called judgment-proof problem. If the infringing firm has insufficient assets, it will anticipate a lower-than-optimal fine, and will thus be underdeterred.

One way to overcome this obstacle and to restore effective deterrence is to hold the parent company liable in addition to the subsidiary. If the parent has sufficient assets, and knows that it will be liable for infringements by its subsidiary, it has a strong incentive to closely monitor the subsidiary’s actions and induce it to comply with the antitrust laws. As owners, parent companies can exercise their influence over the subsidiary’s management, establish reporting obligations, and, if necessary, replace acting directors and officers. The lack of deterrence for the subsidiary is thus supplemented by additional incentives targeted at the parent company.

Moreover, I discuss how the case for parent company liability is further strengthened by the fact that, due to superior information and readily available monitoring and control mechanisms, parent companies are often in a better position than competition agencies and even subsidiaries themselves to monitor and ensure antitrust compliance at lowest costs.

As I then describe in Part V, there is, however, one significant difference between parent company liability and other forms of vicarious liability. Parent companies are generally protected by limited liability, and the limited liability principle serves a number of vital economic functions.¹⁵ Many courts and scholars in both the United States and the European Union are therefore reluctant to allow for exceptions from limited liability.

On the other hand, it has been argued for many years now that it is difficult to justify corporate limited liability toward involuntary creditors, in particular tort victims.¹⁶ Upholding limited liability in corporate group structures enables firms to behave opportunistically to the detriment of tort victims, which will often be socially undesirable. This justification for parent company liability and shareholder liability in general also applies to the antitrust context because most antitrust infringements are by their nature intentional torts.¹⁷ Against this background, I exemplify with reference to the seminal works in the field that the economic benefits of limited liability do not necessarily preclude the single economic entity doctrine in EU competition law from being justified.

In Part VI, I compare parent company liability to the individual liability of managers and employees because both enforcement instruments overlap with regard to one important function. They both aim, inter alia, at maintaining incentives for efficient behavior where the primary target of lia-

¹⁷ William M. Landes, supra note 14, 653.
ity, i.e. the corporation in the course of whose business the antitrust violation was committed, is underdeterred. The main reason why such underdeterrence occurs is that the subsidiary will sometimes lack sufficient assets to pay for a fine or damages.

There are, however, central differences between the two enforcement instruments. Individual criminal liability will often lead to higher enforcement costs, in particular when it includes prison sentences, as under US antitrust law. On the other hand, individual liability has the benefit of taking care of agency problems that arise when the interests of employees are not fully aligned with the interests of the corporation or its shareholders. Parent company liability makes use of the internal monitoring and control mechanisms of corporate groups and is thus relatively inexpensive. On the other hand, it is obvious that parent company liability can only contribute to deterrence where a parent company actually exists. This will often not be the case, especially in the United States where corporate group structures are less common than in Europe.

In Part VII, I leave the antitrust context behind and generalize the findings of the paper to explore how they apply to parent company liability for corporate torts in general. I demonstrate that, where a parent company exists, holding it liable for torts committed by its subsidiaries can fulfill a similar function as, for example, holding an employer liable for torts committed by an employee \((\text{respondeat superior})\),\(^{18}\) or holding parents liable for torts committed by their children. The economic logic behind all forms of vicarious liability is the same – restoring optimal deterrence by targeting the supervisor where the supervisee is underdeterred.

I show that parent company liability is in fact particularly suited to fulfill this function because of the many formal monitoring and control mechanisms that are in place between parent companies and their subsidiaries and that can easily be used for ensuring subsidiaries’ compliance with the law. Although this is not news, parent company liability is thus far often neglected in discussions about how best to deter corporate torts. Scholars have been much more concerned with the delimitation of corporate liability on the one hand, and with the individual liability of managers and employees, on the other.\(^{19}\) Building on arguments developed in previous parts of this paper, I assert that this is a mistake. Because parent company liability serves a function similar to individual liability, but often has lower social costs, it deserves a greater role in the deterrence of corporate torts and crimes.

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I. PARENT COMPANY LIABILITY DOCTRINE AND CASE-LAW

I begin by outlining how courts actually put parent company liability for antitrust violations by subsidiaries into practice. The single economic entity doctrine evolved in EU competition law during the 1970s and has grown stronger ever since. The doctrine is unique in EU law; thus far it has never been applied beyond the antitrust context. It originates in a textual interpretation of the relevant provisions of EU competition law, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Recent case-law works a lot with presumptions, which makes it increasingly difficult for parent companies to evade liability.

The doctrine is not only exceptional among the many fields of EU law, but also in comparison to other jurisdictions. Notably, parent company liability for infringements by subsidiaries is basically unknown to US antitrust law, which is all the more remarkable because there is otherwise a strong convergence between the substantive concepts of US and EU antitrust law.20 Interestingly, however, the effects-based rationale of the single economic entity doctrine is by no means foreign to the thinking in US antitrust law. To make this comparative argument, I not only shed light on the European approach to parent company liability in antitrust, but also address similar ideas in US antitrust law that developed around the US Supreme Court’s decision in *Copperweld v Independence Tube* (1984). As will be seen, the Supreme Court’s reasoning in this case is strikingly similar to the theoretical conceptions that underlie the single economic entity doctrine in EU competition law. Nevertheless, on the basis of *Copperweld* and other case-law, it is almost certain that the US Supreme Court would reject the idea of holding a parent company directly liable for an antitrust infringement by a subsidiary.

1. European Union

Under the “single economic entity doctrine”, the European Court of Justice holds parent companies liable for antitrust infringements by their subsidiaries and allows the European Commission to fine them accordingly. EU competition law refers to “undertakings”,21 and the Court has consistently

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20 There are much more difference with regard to procedure, see e.g. Wernhard Möschen, *US versus EU Antitrust Law*, 5 Zeitschrift für Wettbewerbsrecht (ZWeR – Journal of Competition Law) 261 (2015); Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement*, 2011, Chapter 10.

21 The European Court of Justice has emphasized on several occasions that “[t]he authors of the [European] Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law [...] and not other concepts such as the concept of a company or firm or of a legal person”, although these other concepts were used in other provisions of the European Treaties; see *Commission v Siemens Österreich and Others*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, ¶ 42; see also *Total v Commission*, C-597/13 P, ECLI:EU:C:2015:613, ¶ 32; *Schindler Holding and Others v Commission*, C-501/11 P, ECLI:EU:C:2013:522, ¶ 102.
held that the concept of an undertaking “must be understood as covering an economic entity, even if, from a legal perspective, that unit is made up of a number of natural or legal persons”.

Already in *Imperial Chemical Industries v Commission* (1972) – an early case given the relative youth of EU competition law – the Court held that “[t]he fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.”

It is the economic entity (as opposed to legal and natural persons therein) that is considered to infringe the competition rules, and is thus to be held accountable. It follows that “a legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalized for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute the undertaking.” On this basis, it is settled case-law that “the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.” In other words, if the parent company controls the conduct of the subsidiary, both the parent and the subsidiary constitute a single economic entity and thus a single undertaking for the purpose of EU competition law.

Doctrinally, the European Court of Justice’s approach of holding parent companies liable for antitrust infringements by their subsidiaries is not entirely clear. On the one hand, the Court continuously emphasizes that it is the economic entity (including, by definition, the parent company) that commits the infringement and must therefore be held accountable. This kind of reasoning could be understood as indicating that the parent company itself is considered to be the perpetrator (next to its subsidiary, and, potentially, other companies involved in the antitrust violation). The parent’s liability would then be original, primary and independent of that of its subsidiary.

On the other hand, the Court consistently speaks of the conduct of the subsidiary being “imputed” to the parent company. Furthermore, in recent decisions dealing with the reduction of fines, the

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22 Total v Commission, supra note 21, ¶ 33; see also Commission v Siemens Österreich and Others, supra note 21, ¶ 43; Confederación Española de Empresarios de Estaciones de Servicio, C-217/05, ECLI:EU:C:2006:784, ¶ 40.

23 Imperial Chemical Industries v Commission, 48/69, ECLI:EU:C:1972:70, ¶ 132.

24 Total v Commission, supra note 21, ¶ 34; see also Commission v Siemens Österreich and Others, supra note 21, ¶ 45.


26 See references supra note 22. For a similar clear statement by the General Court consider Shell v Commission, T-11/89, ECLI:EU:T:1992:33, ¶ 311 (stating that Article 85 EEC [= now Article 101 TFEU] is aimed at economic units which consist, *inter alia*, of a unitary organization of personal, tangible and intangible elements).

27 See references supra note 25.
Court has explained that the parent’s liability is “purely derivative and secondary and thus depends on that of its subsidiary”\(^{28}\) and has held that, on this basis, “the liability of that parent company cannot exceed that of its subsidiary”.\(^{29}\) Thus, the language used by the European Court of Justice is ambiguous. It can be understood as holding the parent company liable for having infringed the antitrust laws itself (this is sometimes referred to as “direct liability”), or for simply being the parent of the infringing subsidiary (“indirect liability”).

What is clear, however, is that it will do the parent company no good to argue that it did nothing wrong. Direct or indirect, the one thing that seems to be settled for the Court is that the liability is strict, and not based on fault.\(^{30}\) It does not matter if the parent company was in any way involved in the antitrust infringement, if it could have prevented it, or if it knew or could have known about it.\(^{31}\) What

\(^{28}\) Commission v Tomkins, C-286/11 P, ECLI:EU:C:2013:29, ¶ 39; see also Total v Commission, supra note 21, ¶ 38; Roca Sanitario v Commission, T-408/10, ECLI:EU:T:2013:440, ¶ 201; Tomkins v Commission, T-382/06, ECLI:EU:T:2011:112, ¶ 38.

\(^{29}\) Total v Commission, supra note 21, ¶ 38, 41; see also Commission v Tomkins, supra note 28, ¶ 39; Roca Sanitario v Commission, supra note 29; Tomkins v Commission, supra note 28, ¶ 38.

\(^{30}\) The parent company’s strict liability is probably the most important reason why the single economic entity doctrine is almost without exception condemned by lawyers and legal academics, see e.g. Stefan Thomas, Guilty of a Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law, 3 Journal of European Competition Law & Practice 11 (2012); Julian Joshua, Yves Botteman & Laura Atlee, “You can’t beat the percentage” – The Parental Liability Presumption in EU Cartel Enforcement, The European Antitrust Review 2012, 3; Simon Burden & John Townsend, Whose fault is it anyway? Undertakings and the imputation of liability, 3 Competition Law Journal 294 (2013); Bettina Leupold, Effective Enforcement of EU Competition Law Gone Too Far?: Recent Case Law on the Presumption of Parental Liability, 34 European Competition Law Review 570 (2013). Whereas strict liability for torts is universally accepted in both the European Union and the United States, strict liability for crimes is a distinctive feature of the US legal system, see for example Joshua D. Greenberg & Ellen C. Brotman, Strict Vicarious Liability for Corporations and Corporate Executives: Stretching the Boundaries of Criminalization, 51 American Criminal Law Review 79 (2014). In the European Union, any form of no-fault criminal liability is generally considered to be incompatible with the principle of personal responsibility, the nulla poena sine culpa principle, and the presumption of innocence, which is embodied, inter alia, in Article 48(1) of the Charter of Fundamental Rights of the European Union. The European Court of Justice tries to solve this problem by arguing that the principle of personal responsibility does not only allow parent company liability but even requires it because it is the economic entity (including the parent company) that infringes the competition rules and must therefore be accountable for the infringement. This reasoning is not convincing because the principle of personal liability follows from fundamental rights, and these rights are borne by natural or legal persons rather than by economic entities. Thus, it is the parent company as a legal person that has a fundamental right not to face liability unless it did something wrong (through the natural persons acting on its behalf). It may be more convincing to argue that EU competition fines are not “of a criminal law nature”, as it is explicitly stipulated in Article 23(5) of Regulation (EC) 1/2003, and therefore not subject to the principle of personal liability. Yet, such a reasoning could also prove to be a dead end road since it has been argued quite convincingly that “the regime of European competition law has criminal characteristics in that it is intended to impose a high level of moral condemnation and disapproval, to inflict severe punishment, to deter future wrongdoing by others, and to unravel unlawful conspiracies.”, see Ian S. Forrester, A Challenge for Europe’s Judges: The Review of Fines in Competition Cases, 36 European Law Review 185, 200 (2001) (footnotes omitted).

\(^{31}\) In the words of the European Commission, “a parent company can be held liable for the conduct of its subsidiaries, if it exercised or is presumed to have exercised (and the presumption is not reversed) decisive influence over the general commercial policy of the latter (i.e. if the parent company determines or is presumed to have determined the basic orientation of the commercial strategy and operations of the subsidiary), regardless of whether such influence consisted specifically in encouraging the illegal behavior or in imposing such behavior upon the subsidiaries. For the same reasons, when the said presumption applies, the undertaking concerned cannot reverse it by simply stating that the parent
matters is not the parent’s relationship to the antitrust violation, but its relation to the subsidiary. The parent is liable solely by virtue of its “decisive influence”, or “control”, over the subsidiary during the infringement period. Thus, the only way for the parent to escape liability is to prove that at the relevant time it did not control the subsidiary.

The decisive question then becomes: When does a parent company control a subsidiary? Or, in other words, when is a parent company a parent company? In *Imperial Chemical Industries*, already mentioned above, the European Court of Justice held that the conduct of the subsidiary may be imputed to the parent company where the subsidiary “does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.” To prove this, the competition agency (or, potentially, a private plaintiff) has to establish that, during the time of the infringement, (1) the parent was in a position to exert a decisive influence over the conduct of the subsidiary, and (2) the parent actually made use of this power.

In *Akzo Nobel v Commission* (2009), the Court specified for the particular case in which a parent company has a 100 percent shareholding in a subsidiary (which is then adequately termed a “wholly owned subsidiary”) that there is “a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary”. Thus, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market, it will be regarded as jointly and severally liable for the payment of any fine imposed on the subsidiary. This *Akzo* presumption has been confirmed in a number of recent cases and is now firmly established, despite allegations that it is in fact not rebuttable, and thus infringes upon fundamental procedural rights.
Under the single economic entity doctrine in EU competition law, parent company liability has thus far been a matter of fines. The relevant legal provisions are primarily enforced by the European Commission and the competition agencies of the 28 EU Member States. Private antitrust litigation is far less important than in the United States. Yet, in recent years, there has been an increasing effort to strengthen the private enforcement of EU competition law, which culminated in the adoption of the EU Directive on Antitrust Damages Actions. This Directive, which was signed into law on November 26, 2014, contains primarily procedural rules that aim at reducing the evidentiary obstacles that have in the past impeded private suits for antitrust damages.

More important in the context of this paper, the Directive also describes the substantive cause of action for antitrust damages claims, and specifies the party liable. According to its Article 1(1), the Directive “sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association”. The highlighted part of this sentence is often understood as referring to the commonly-used definition of an undertaking as an economic rather than a legal entity, and would thus allow for private antitrust suits against parent companies under the single economic entity doctrine.

The Directive is, however, not directly applicable, but must first be transposed by the EU Member States into their national laws. The transposition is currently in process and must be completed by December 27, 2016. It is not yet clear how the national rules will look like exactly, but in light of the unambiguous wording of Article 1(1) of the Directive and the widely-acknowledged goal of consistency, it is likely that, in the near future, parent company liability will be the general rule in EU competition law not only with regard to fines, but also in the context of private antitrust suits.

2. United States

In the United States, in contrast, the approach toward parent liability for antitrust infringements by their subsidiaries is very different. Whereas EU competition law refers to “undertakings”, the Sherman Act refers to “persons”, which seems to suggest a legal rather than an economic understand-
ing. This difference may in part explain why something like the European Court of Justice’s single economic entity doctrine has not evolved in US antitrust law.

Traditionally, courts in the United States are very reluctant to extend antitrust liability to parent companies or other legal entities that are only collaterally connected to the infringement of the antitrust laws. As a general rule, in private antitrust suits, courts hold parent companies liable only if (1) the parent itself actively participated in the antitrust violation (direct liability), or (2) if the plaintiff succeeds in meeting the stringent requirements for piercing the subsidiary’s corporate veil (indirect liability). In criminal cases, demonstrating an active involvement of the parent company in the antitrust infringement is the only way for the government to establish the parent’s liability.

There is no special doctrine for veil piercing in private antitrust suits, which is why the courts apply the general veil piercing doctrines as they have been developed in state corporate law. As summarized by Professor Stephen Presser, the corporate veil will generally be pierced “when a court determines that the debt in question is not really a debt of the corporation, but ought, in fairness, to be viewed as a debt of the individual or corporate shareholder or shareholders”.44

The exact test for when the corporate veil can be pierced differs from state to state, but typically involves two prongs.45 Courts first look at the relationship between the shareholder and the corporation and are generally inclined to pierce the corporate veil only when the shareholder did not respect corporate formalities, for example by commingling personal assets and those of the corporation. In a second step, courts focus on the relationship between the corporation and the plaintiff and assess if honoring the limited liability principle would produce an inequitable result. All courts seem to agree that piercing should be done reluctantly. In the vast majority of liability cases, courts strictly honor the legal separation between the corporation and its owners.

US courts apply a less formalistic approach when they assess whether separate legal entities of the same corporate group are capable of entering into an anticompetitive agreement. The US Supreme Court held in Copperweld that a parent company and its wholly owned subsidiary are “incapable of conspiring with each other for purposes of §1 of the Sherman Act”.46 Chief Justice Burger explained for the Court’s majority that a parent and its wholly owned subsidiary have “a complete unity of interest” and that their “general corporate actions are guided or determined not by two separate corporate consciousnesses, but one”.47 He then dismissed the “intra-enterprise conspiracy doctrine”, which would have allowed for applying §1 Sherman Act to agreements between parents and their wholly

45 See the cases supra notes 2 and 3.
47 Id., 771.
owned subsidiaries, on the grounds that the doctrine “looks to the form of an enterprise’s structure and ignores the reality”.

According to Chief Justice Burger, “[a]ntitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary”. Although this last statement, considered separately, could be understood as calling for a functional approach whenever courts deal with antitrust cases involving corporate groups (potentially allowing for parent company liability), the majority in Copperweld was very careful to restrict its holding to the conspiracy issue at hand. At one point, the justices even say explicitly that they are not deciding anything else: “We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of §1 of the Sherman Act.” Nowhere in the opinion has Chief Justice Burger indicated that a parent company and its subsidiary could be considered as a single entity for any other purpose than assessing an alleged conspiracy. The US Supreme Court has never expressly addressed the issue of whether an antitrust infringement by a subsidiary may be imputed to its parent company, neither in Copperweld nor in any subsequent decision.

From a European perspective, the limited extent of the US Supreme Court’s Copperweld doctrine must seem peculiar. In EU competition law, the inability of a parent company and its wholly owned subsidiary to enter into an anticompetitive agreement, and the imputation of the subsidiary’s antitrust violations to the parent, are considered to be two sides of the same coin. Both doctrines are based on the idea that the competitive effects of corporate group behavior can only be assessed correctly if a functional rather than a formalistic approach is taken. It is exactly the “complete unity of interests”, described so vividly by Chief Justice Burger in Copperweld, that leads the European Court of Justice to consider a parent company and its wholly owned subsidiary as a “single economic unit” not only with regard to their capability of conspiring with each other, but also with regard to the parent’s responsibility for antitrust infringements committed by the subsidiary.

In Viho Europe v Commission (1996), which could be considered as the EU equivalent to Copperweld, the European Court of Justice described Parker Pen Ltd. and its subsidiaries, which allegedly had engaged in unlawful geographic market division, as “a single economic unit within which the

48 Id., 772.
49 Id., 772.
50 Id., 767.
51 See e.g. Damien Geradin, Anne Layne-Farrar & Nicolas Petit, supra note 8, ¶ 6.56 (stating that the Akzo presumption is in full congruence with the Viho ruling); Vivien Rose & David Bailey (Ed.), Bellamy & Child, European Union Law of Competition, 7th edition 2013, ¶ 2.024 (stating that the principles established by the case law seem to apply without distinction to intra-enterprise agreements and attribution of liability).
subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them”\(^{53}\) and held that they were incapable of entering into an anticompetitive agreement. The Court expressly referred to Imperial Chemical Industries v Commission (1972), the first and long-time leading case on parent company liability, in which it had held that “[i]n view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances be attributed to the parent company”\(^{54}\).

It is apparent from this case-law that the European Court of Justice considers the incapability of entering into anticompetitive agreements and the imputation of liability as closely-related since both ideas follow inevitably from the functional approach the Court takes toward corporate groups under its single economic entity doctrine. In comparison to this judicature, it becomes even more evident that the US Supreme Court’s holding in Copperweld is relatively narrow and does in no way suggest that the single economic entity doctrine could be applied in any other context than the conspiracy issue discussed by the Court.

Nevertheless, lower courts have relied on Copperweld in order to establish parent company liability in antitrust cases. The US District Court for the District of Colorado held in Nobody in Particular Presents v Clear Channel Communications (2004)\(^{55}\) that “[w]hen the parent controls, directs, or encourages the subsidiary’s anticompetitive conduct, the parent engages in sufficient independent conduct to be held directly liable as a single enterprise with the subsidiary under the Sherman Act”\(^{56}\). Interestingly, the court cited a passage from Copperweld where the US Supreme Court stated in dictum that after the parent’s initial acquisition of control over the subsidiary “the enterprise is fully subject to §2 of the Sherman Act”\(^{57}\). The District Court judge apparently interpreted the Supreme Court’s use of the term “enterprise” as referring to both the parent company and its subsidiary and indicating that they can be liable as a single enterprise for the same infringement. The judge in Clear Channel also relied on Reading International v Oaktree Capital Management (2003),\(^{58}\) an earlier decision by the US District Court for the Southern District of New York. In this decision, the Court had reasoned that a parent may be liable under the antitrust laws if it stands “as the decision-making entity” behind the subsidiary, “calling the shots on its daily decisions and deriving benefit from its activities”\(^{59}\).

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\(^{53}\) Id., at ¶ 16.

\(^{54}\) Imperial Chemical Industries v Commission, supra note 23, at ¶ 134.


\(^{56}\) Id., at 1070.

\(^{57}\) Copperweld, supra note 46, at 777.


\(^{59}\) Id., 325.
Although the language in these two cases sounds similar to the one used by the European Court of Justice, there is one significant difference. The District Courts clearly distinguish between direct and indirect liability and leave no doubt that they would not impose indirect liability unless the requirements for piercing the corporate veil were met. What makes the decisions distinctive is the apparent willingness of the judges to lower the burden for direct parent liability. Language in both decisions indicates that it could be sufficient for imposing direct liability that the parent directs and controls the policies and behavior of its subsidiaries. This would significantly expand direct liability because it is almost unthinkable that a parent company does not exercise control over its subsidiaries, at least if they are wholly owned. Yet, there remains some doubt whether the judges really wanted to promote such an expansive idea of direct parent liability. In both cases, there was evidence that the parent was actively involved or at least encouraged the anticompetitive behavior. Thus, it seems plausible that, in the end, it was the parents’ entanglement in the alleged infringements rather than the control over the subsidiary that induced the Courts to let the cases against the parents go forward.

A brief look beyond the scope of antitrust law makes it clear that an expansive approach to direct parent liability on the lines of the language used in Clear Channel and Oaktree would be very likely to be opposed by the US Supreme Court. In its unanimous decision in United States v Bestfoods (1998), the Court held that “it is hornbook law that the exercise of the ‘control’ which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary [...]”. On this basis, the Court dismissed the “actual control” test according to which several lower courts had

60 See e.g. Nobody in Particular Presents v Clear Channel Communications, supra note 55, at 1069 and 1072.
61 Reading International v Oaktree Capital Management, supra note 58, at 325: “If Oaktree in fact stands as the decisionmaking entity behind Regal, calling the shots on its daily decisions and deriving benefit from its activities, then it may be understood as a “competitor in the market.” [...] If this is indeed the case, an attempt to bring the competing entities Regal and Loews under common control would clearly pose a dangerous probability of monopolization under [§2 Sherman Act].”; Nobody in Particular Presents v Clear Channel Communications, supra note 55, at 1072: “Because a reasonable jury could conclude, based on the evidence in the record, that Clear Channel Communications operates as an operating company, controlling and managing the conduct of its subsidiaries, rather than as a holding company, summary judgment is inappropriate on the issue of Clear Channel Communications’ potential direct liability.”
62 In Nobody in Particular Presents v Clear Channel Communications, supra note 55, it was alleged that Clear Channel Communications had used the position of some of its subsidiaries in rock-format radio to intimidate and coerce rock artists and their record labels into signing with two other of Clear Channel’s subsidiaries for promotion of the artists’ concerts. Clear Channel argued it was merely a holding company and filed a motion for summary judgment. The Court, however, held that the record supported a finding that Clear Channel directed and controlled the policies and behavior of its subsidiaries, and rejected the motion. The Court relied, inter alia, on documents indicating that leading employees of Clear Channel had instructed radio stations operated by Clear Channel’s subsidiaries to reduce air play of artists that refused to sign concert promotion contracts with another subsidiary of Clear Channel. In Reading International v Oaktree Capital Management, supra note 58, the plaintiffs contended that Oaktree (the parent company) had attempted to use its power as a shareholder in Loews and Regal (the subsidiaries) and as a holder of board seats in both corporations to coordinate the activities of the two competing entities with the aim of excluding the plaintiffs from the market, thus creating a monopoly. Here, the court denied the relevant part of a motion to dismiss.
64 Id., at 61-62.
previously imposed operator liability under §107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) on parent companies that “actually operated the business” of their subsidiaries.\textsuperscript{65}

The Supreme Court criticized that the “actual control” test led to “a fusion of direct and indirect liability” because it was “administered by asking a question about the relationship between the two corporations (an issue going to indirect liability) instead of a question about the parent’s interaction with the subsidiary’s facility (the source of any direct liability)”.\textsuperscript{66} If direct and indirect liability were to be kept distinct, the question would not be “whether the parent operates the subsidiary, but rather whether it operates the facility – and that operation is evidenced by participation in the activities of the facility, not the subsidiary.”\textsuperscript{67} The Court concluded that, by focusing on the relationship between parent and subsidiary (rather than parent and facility), the trial court “erroneously […] treated CERCLA as though it displaced or fundamentally altered common-law standards of limited liability.”\textsuperscript{68}

It is not difficult to imagine how these findings would transfer to parent company liability in antitrust. Here as well, the Court would presumably require for direct liability that the parent does not only control the subsidiary, but rather that it controls the anticompetitive behavior. Against the background of \textit{Bestfoods}, it seems almost unthinkable that the Court would consider the parent’s control over the subsidiary sufficient to establish direct parent liability in antitrust cases. Thus, the parent itself would need to be involved in the antitrust infringement. In the absence of such a direct involvement, liability can only be derived from the subsidiary according to the piercing the corporate veil doctrine. But as was pointed out above, this as well would require that the parent did something wrong, e.g. that it commingled its own assets and those of the subsidiary, or engaged in fraudulent transfer. It can therefore be concluded that, under US law, parent companies may only be liable for antitrust infringements by their subsidiaries if they themselves engage in some kind of wrongdoing. Thus, in stark contrast to EU competition law, a parent company will not be held strictly liable for anticompetitive acts by a subsidiary merely because it controls the subsidiary by means of ownership.

\textsuperscript{65} \textit{CPC International v Aerojet-General}, 777 F.Supp. 549, 573 (1991); see also \textit{United States v Kayser-Roth}, 910 F.2d 24, 27 (C.A.1 1990), (stating that operator liability “requires active involvement in the affairs of the subsidiary”); \textit{Jacksonville Electric Authority v Bernuth}, 996 F.2d 1107, 1110 (C.A.11 1993) (stating that operator liability can be assumed if parent “actually exercised control over, or was otherwise intimately involved in the operations of, the [subsidiary] corporation immediately responsible for the operation of the facility” (internal quotation marks omitted)). Note that the lower US courts’ approach to create parent company liability by broadly interpreting the term “operator” in CERCLA resembles the method used by the European Court of Justice of conceiving the single economic entity doctrine from a broad interpretation of the term “undertaking” in Articles 101 and 102 TFEU.

\textsuperscript{66} \textit{United States v Bestfoods}, supra note 63, at 67.

\textsuperscript{67} Id., at 68.

\textsuperscript{68} Id., at 70.
II. DISTINCTIVE FEATURES OF EU AND US ANTITRUST ENFORCEMENT

Before I begin with the economic analysis of parent company liability in EU competition law, I briefly summarize three important differences between EU and US antitrust law. The objective is to utilize the comparative perspective to illustrate some distinctive features of EU competition law that may help with understanding and explaining the European Court of Justice’s single economic entity doctrine. I first compare the relevance of public and private antitrust enforcement in the United States and the European Union. In this context, I also explain how fines and damages are calculated according to the two different regimes.

I then address the issue of criminal liability. It is often said that criminal liability for antitrust violations is a distinctive feature of US antitrust law that has no equivalent counterpart in EU competition law. I do not reject this statement, but argue that it is less relevant than it is often thought. In my opinion it is the distinction between individual and corporate liability that matters more. Whereas §1 and §2 of the Sherman Act apply similarly to both firms and individuals, EU competition law is generally only addressed to firms. Some EU Member States supplement the EU rules with national provisions on individual liability, but their relevance so far is low. It seems fair to say that individual liability contributes much more to deterrence in the United States than in the European Union.

1. Public and private enforcement

As already mentioned in the introduction, there are huge differences between the enforcement of EU competition law and US antitrust law. EU competition law is primarily enforced by the European Commission and the national competition agencies of the 28 EU Member States. Their enforcement powers are described in Regulation (EC) No. 1/2003, which is specifying how the substantive rules in Articles 101 and 102 TFEU are to be implemented.\(^69\) Fines are by far the most important penalty, and their magnitude can be very substantial. In 2014, the European Commission adopted 28 antitrust and cartel enforcement decisions with fines totaling EUR 2.2 billion.\(^70\)

The imposition of fines is described in Article 23 of the aforementioned Regulation, and, in much more detail, in the European Commission’s Fining Guidelines.\(^71\) The starting point for the calculation of the fine is a percentage of the undertaking’s annual sales of the product concerned by the anti-

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\(^70\) European Commission, Annual Activity Report 2014, DG Competition, p. 12.

\(^71\) European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2.
trust infringement.\textsuperscript{72} The exact magnitude of this percentage, which can be as high as 30 percent, depends on the seriousness of the infringement. For cartels, it tends to be in the range of 15-20 percent.\textsuperscript{73} Horizontal agreements are considered to be particularly harmful and are therefore penalized with an additional one-time surcharge of 15-25 percent of the value of annual sales (so-called “entry fee”). In a second step, the identified percentage of the value of annual sales is multiplied with the number of years the infringement lasted.\textsuperscript{74} The result is generally considered to be a good indicator of the damage that was caused to the economy by the antitrust violation.\textsuperscript{75}

The basic amount of the fine can be increased or decreased if there are aggravating or mitigating factors.\textsuperscript{76} Settlement is encouraged by a flat reduction of 10 percent.\textsuperscript{77} Full immunity or reductions of up to 50 percent may be granted under the European Commission’s Leniency Notice\textsuperscript{78} to undertakings that provide information about a cartel in which they participated. The final amount of the fine must not exceed 10 percent of the undertaking’s total turnover in the preceding business year. In exceptional cases, the Commission may reduce the fine in order to take account of the undertaking’s inability to pay.\textsuperscript{79} Consider the footnote for an example.\textsuperscript{80}

In contrast to fines imposed by the European competition agencies, private antitrust litigation based on infringements of EU competition law is thus far only of minor importance. It is hoped that this will change under the new EU Directive on Antitrust Damages Actions, which was adopted on November 26, 2014.\textsuperscript{81} The Directive proclaims in its Article 3(1) the “right to full compensation”, on

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\textsuperscript{72} EU Fining Guidelines (supra note 71), ¶ 13-23.
\textsuperscript{73} European Commission, Fines for breaking EU Competition Law, Factsheet, November 2011, p. 1.
\textsuperscript{74} EU Fining Guidelines (supra note 71), ¶ 24-25.
\textsuperscript{75} European Commission, Factsheet (supra note 73), p. 1.
\textsuperscript{76} EU Fining Guidelines (supra note 71), ¶ 27-31.
\textsuperscript{77} European Commission, Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C 167/1, amended by European Commission, Amendments to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 in cartel cases, OJ 2015 C 256/1.
\textsuperscript{78} European Commission, Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/17.
\textsuperscript{79} See in this regard infra Part IV.1.
\textsuperscript{80} The following example is loosely inspired by the European Commission’s Decision of April 2, 2014, AT.39610 – Power Cables: High Voltage, Inc. (HV) produces and sells large-scale electrical equipment including submarine power cables. In 2012, HV entered into a price fixing agreement with its major competitor, Trust No One, Corp. (TNO), stipulating for a 20 percent price increase with regard to all sales of submarine power cables on the European market. After two and a half years, TNO reveals the cartel to the European Commission and receives full immunity. HV realizes the hopelessness of its position and agrees to settle. In the preceding business year, HV sold submarine power cables at a total value of EUR 160 million, and made a total turnover of EUR 400 million. If we assume the Commission sets the relevant percentage at 20 percent, the basic fine will amount to EUR 80 million (20 percent × EUR 160 million × 2.5 years). Absent any other aggravating or mitigating factors than the settlement, the final amount of the fine would be EUR 72 million (EUR 80 million – 10 percent of EUR 80 million). Since this would however exceed 10 percent of HV’s total turnover in the preceding business year (= EUR 40 million), the fine will be capped at this amount. Thus, the Commission will impose a fine on HV in the amount of EUR 40 million.
\textsuperscript{81} Supra note 6.
the basis of which any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. According to Article 3(2) of the Directive, full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of EU competition law not been committed. Thus, full compensation encompasses any actual loss and loss of profit, plus the payment of interest.

Damages must, however, not be higher than the harm that has been caused by the infringement. Any overcompensation, whether by means of punitive, multiple or other types of damages, is expressly excluded by Article 3(3) of the Directive. This is a clear distinction from US antitrust law, where successful antitrust plaintiffs are typically awarded treble damages.\(^\text{82}\) The unwillingness of EU Member States to provide for more than compensatory damages goes back to the legal tradition in continental European jurisdictions, where punitive damages are generally unknown. It has been criticized as a missed opportunity to incentivize private damages actions.\(^\text{83}\)

In the United States, public enforcement of the antitrust laws plays an equally important role as in the European Union, but private enforcement is more advanced. Violations of §1 and §2 of the Sherman Act are criminal offenses and punishable by imprisonment up to ten years and fines up to $1,000,000 for individuals and up to $100 million for corporations.\(^\text{84}\) Alternatively, fines can be set up to twice the gain derived from the infringement or twice the loss caused by the infringement.\(^\text{85}\) In 2014, the US Department of Justice filed criminal charges against 18 corporations and 44 individuals, imposing fines and penalties in the amount of $1.3 billion.\(^\text{86}\) In 2015, the total amount of fines and penalties rose to a record high of $3.6 billion.\(^\text{87}\) The average prison term following a criminal conviction was 24 months in 2010-2015, compared to 20 months in 2000-2009 and 8 months in 1990-1999.\(^\text{88}\)

Sentencing of individuals and corporations is guided by §2R1.1. of the Federal Sentencing Guidelines Manual.\(^\text{89}\) The starting point for corporate fines is a base fine amount of “20 percent of the

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\(^\text{85}\) 18 U.S.C. §3571(d)
\(^\text{87}\) Id.
\(^\text{88}\) Id.
The volume of affected commerce". This is, similar to the “value of sales” used according to the European Commission’s Fining Guidelines, a proxy for the loss that was caused by the antitrust violation. The purpose is “to avoid the time and expense that would be required for the court to determine the actual gain or loss”. The volume of affected commerce is defined in the Guidelines Manual as “the volume of commerce [...] in goods or services that were affected by the violation”.

Next, the base fine is then subjected to a minimum and a maximum multiplier based upon the corporation’s “culpability score”, which is determined by a number of factors including the size of the corporation, its prior history of criminal conduct, the implementation of an effective compliance and ethics program, and the corporation’s cooperation and acceptance of responsibility. The multipliers may range from 0.75 to 2.00 (minimum multiplier), and 0.75 to 4.00 (maximum multiplier), respectively. The court may set the fine in the range between the two products resulting from the application of both the minimum and the maximum multiplier to the base fine. Under certain aggravating or mitigating circumstances, the court is allowed to depart up or down from the fine range.

Courts have even more discretion in setting fines for individuals, which may be set in a range between 1 and 5 percent of the volume of affected commerce, but not lower than $20,000. The duration of prison sentences is to be determined according to multiple offense levels depending again primarily on the volume of affected commerce. Consider again the footnote for an example.

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90 USSG §2R1.1.(d)(1). The Guidelines Manual defines the volume of affected commerce as “the volume of commerce [...] in goods or services that were affected by the violation”, see USSG §2R1.1.(b)(2).
91 Supra note 71.
92 Comment 4 to USSG §8C2.4.
93 Comment 3 to USSG §2R1.1.
94 USSG §2R1.1.(b)(2).
95 USSG §8C2.5.
96 USSG §8C2.6 and USSG §2R1.1.(d)(2).
97 USSG §8C4.
98 USSG §2R1.1.(c)(1).
99 USSG §2R1.1.(b)(2).
100 The following example refers to the same facts that were used in the first example supra note 80. Assume that the volume of commerce affected by the cartel over the 2.5 years of its duration is $300 million. The basic fine will then be $60 million ($300 million × 20 percent). Further assume that the culpability score is low because of HV’s cooperation, and multipliers are set at 0.80 and 1.60, respectively. The fine range will then be $48 million – $96 million ($60 million × 0.80; $60 million × 1.60). If the district judge strikes the happy medium, she will impose on HV a final fine of $72 million. In addition, she may impose monetary sanctions between $3 million and $15 million on each of the acting individuals ($300 million × 1 percent; $300 million × 5 percent), and/or sentence them to prison for 41-51 months (base offense level 12 + 10 for volume of commerce above $250 million; assuming they have no prior record). This example is of course too simple to be realistic, because it leaves out all kinds of aggravating and mitigating factors that would be present in a typical case. Note that even with numbers like the ones used here, the penalties imposed in a real case would presumably be less severe than indicated by the numerical example because the competition agencies and the courts tend to apply the Guidelines cautiously, see e.g. Beryl H. Howell, Sentencing of Antitrust Offenders: What Does the Data Show?, available online at http://www.uscc.gov/sites/default/files/pdf/about/commissioners/selected-articles/Howell_Review_of_Antitrust_Sentencing_Data.pdf (visited 02/18/2016).
As a practical matter, the differences in the private enforcement of EU and US antitrust laws are more substantial than those in public enforcement, which are primarily of a technical nature. Whereas private enforcement is still underdeveloped in the European Union, it plays an important role in enforcing the antitrust laws in the United States. The treble damage remedy provides a powerful financial incentive to initiate private antitrust actions.\(^{101}\) According to § 4 of the Clayton Act, any person who is injured by reason of an antitrust infringement “shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”\(^{102}\)

In particular with regard to local or less severe antitrust violations, private lawsuits contribute to the detection and penalization of unlawful conduct.\(^{103}\) Furthermore, all private antitrust actions resulting in damages contribute to deterrence and thus help with discouraging anticompetitive behavior. As the US Supreme Court stated in *Mitsubishi Motors v Soler Chrysler-Plymouth* (1985), “[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”\(^{104}\) Procedural devices like contingent fees, pre-trial discovery and class actions, which are not universally available in European jurisdictions, also help to create a promising environment for private antitrust suits in the United States.\(^{105}\)

According to the Administrative Office of the US Courts, private plaintiffs filed 844 antitrust cases in federal district courts in 2014.\(^{106}\) Over the preceding ten years, the number of private cases filed each year varied from under 500 to over 1,300.\(^{107}\) Many private actions are follow-on cases relying on prior government litigation.\(^{108}\) Overall, it seems fair to say that public and private enforcement successfully fulfill complementary roles in US antitrust law.

2. **Civil and criminal liability**

A stark contrast between the antitrust regimes in the European Union and the United States seems to be revealed when the nature of liability is considered. The Sherman Act is a criminal statute.

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101 Phillip Areeda, Louis Kaplow & Aaron Edlin, supra note 84, ¶ 143; *Hawaii v Standard Oil Company of California*, 405 U.S. 251, 262 (1972) (“By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”)


103 Phillip Areeda, Louis Kaplow & Aaron Edlin, supra note 84, ¶ 143.


Draft, April 29, 2016
§1 and §2 of the Act expressly say that every person who violates these provisions, “shall be deemed guilty of a felony”. At the same time, every violation of the antitrust laws that injures another person will also give cause for damages. In many regards, antitrust infringements are akin to intentional torts. Thus, antitrust liability in the United States is by its nature both criminal and civil liability. While it is true that violations of the Clayton Act and the Federal Trade Commission Act are not crimes and only the most egregious violations of the Sherman Act will lead to criminal indictments, there can be no doubt that criminal liability is a distinctive feature of US antitrust law.

At first glance, this seems to be a crucial difference to EU competition law. Article 23(5) of Regulation (EC) No. 1/2003 expressly says that fines imposed for violations of the antitrust laws “shall not be of a criminal law nature”. Instead, fines imposed by the European Commission and the competition agencies of the EU Member States are described as “administrative”. A closer look, however, reveals that it makes no substantial difference whether fines are by their nature considered as “criminal” or “administrative”. With respect to corporate antitrust defendants, criminal punishment is not necessarily more severe than administrative fines or damages. Although this is ultimately an empirical question, it does not look like fines imposed by the European Commission are conceived as less significant than fines imposed by the US Department of Justice, e.g. with regard to a firm’s reputation, only because they are not considered to be of a “criminal” nature. The moral condemnation that is said to accompany a criminal conviction is presumably less relevant to a corporation than it would be to an individual. The corporation, or rather its management, will likely be more impressed by the sheer amount of the fine than by its “criminal” or “administrative” nature. From the standpoint of the firm, being primarily concerned with the economic rather than the moral consequences of the infringement, it is the monetary value of the expected sanctions that matters, and not their nature.

This does not mean, of course, that the criminal nature of the Sherman Act does not matter at all. The point is that it matters primarily for individuals and not for corporations. Antitrust penalties in the United States are distinctive from those in the European Union not because they are of a criminal nature, but because they can be imposed on individuals. In fact, it has even been argued that EU com-

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109 William M. Landes, supra note 14, 653, 672.
110 See e.g. Peter Whelan, supra note 9, p. 3 with further references.
111 See however Samuel W. Buell, The Blaming Function of Entity Criminal Liability, 81 Ind. L.J. 473 (2006) (pointing to the importance of reputational effects and arguing that entity blame is important to send a message to an institution’s members and urge them to change their behavior individually and as a group).
112 Daniel R. Fischel & Alan O. Sykes, Corporate Crime, 25 J. Legal Stud. 319, 332 (1996) (arguing that criminal convictions against corporations do not serve any useful function that could not be achieved with civil judgments). Note that Professors Fischel and Sykes do not doubt that reputational effects exist but merely question that criminal convictions will have greater effects than civil judgments.
petition law has “criminal characteristics” in its infliction of severe punishment.\footnote{Ian S. Forrester, \textit{A Challenge for Europe’s Judges: The Review of Fines in Competition Cases}, 36 European Law Review 185, 200 (2011) (stating that the regime of European competition law “has criminal characteristics in that it is intended to impose a high level of moral condemnation and disapproval, to inflict severe punishment, to deter future wrongdoing by others, and to unravel unlawful conspiracies.” (internal footnotes omitted)).} What it does not have, however, is a general rule of imposing individual liability on the managers and employees who contrived an antitrust infringement. This individual liability, and not the criminal nature of penalties, seems to be what is really distinctive about antitrust sanctions in the United States compared to the respective sanctions in the European Union.

3. **Individual and corporate liability**

In the United States, the individual liability of managers and employees plays an important role in antitrust enforcement. As it was once put by a Senior Counsel of the US Department of Justice’s Antitrust Division, it is “well known that the Division has long advocated that the most effective deterrent for hard core cartel activity [...] is stiff prison sentences.”\footnote{Belinda A. Barnett, \textit{Criminalization of Cartel Conduct – The Changing Landscape}, Address to the Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop, Adelaide (Australia), April 3, 2009, p. 1.} §1 and §2 Sherman Act authorize the courts to impose prison sentences up to ten years. In addition, and as a practical matter probably even more important, fines are frequently imposed on individuals, and their dollar amounts are rising.\footnote{Richard A. Posner, \textit{Antitrust Law}, 2nd edition 2001, p. 44-45.} Furthermore, managers and employees who contrived or executed the antitrust violation are often named as defendants in private antitrust actions. It thus seems fair to say that individual liability is a prominent feature of US antitrust enforcement.

EU competition law, in contrast, does not impose liability on individuals. Whereas §1, 2 of the Sherman Act refer to “every person”, EU competition law refers to “undertakings”.\footnote{The European Court of Justice has emphasized on several occasions that “[t]he authors of the [European] Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law [...] and not other concepts such as the concept of a company or firm or of a legal person”, although these other concepts were used in other provisions of the Treaties; see \textit{Commission v Siemens Österreich and Others}, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, ¶ 42; see also \textit{Total v Commission}, C-597/13 P, ECLI:EU:C:2015:613, ¶ 32; \textit{Schindler Holding and Others v Commission}, C-501/11 P, ECLI:EU:C:2013:522, ¶ 102.} It is settled caselaw that the notion of an undertaking encompasses “every entity engaged in an economic activity, re-
gardless of the legal status of the entity and the way in which it is financed”.\(^\text{117}\) Individuals are generally only considered as such entities if they are self-employed entrepreneurs. As hired managers or employees, in contrast, individuals “do not [...] in themselves constitute “undertakings” within the meaning of [EU] competition law”.\(^\text{118}\) Instead, they are considered part of the economic entity that constitutes the undertaking they are working for. Against this background, the European Commission imposes fines only on corporations, and not on individuals. This is generally considered to follow from Article 23(2) of Regulation (EC) No. 1/2003, according to which the Commission is empowered to “impose fines on undertakings and associations of undertakings”.

That the European Commission cannot impose fines on individuals does not mean, however, that individual liability is completely unknown to competition law enforcement in Europe. In many EU Member States, individuals can be sanctioned for infringing EU as well as national competition law. In Germany, for example, individuals who intentionally or negligently violate Articles 101 or 102 TFEU or the respective provisions of the German Competition Act, may be fined up to EUR 1 million by the Federal Cartel Office.\(^\text{119}\) Individuals involved in bid-rigging can be sent to jail in Germany and Austria, but rarely are. In France, fines up to €75,000 and imprisonment up to four years can be imposed on “any natural person [who] fraudulently takes a personal and decisive part in the conception, organization or implementation of [anticompetitive] practices”.\(^\text{120}\) The Dutch competition authority may fine individuals up to €450,000,\(^\text{121}\) and in the United Kingdom, individuals face up to five years imprisonment and/or a fine if they participate in price-fixing.\(^\text{122}\)

Yet, though gradually increasing, the practical relevance of these provisions has been low. What is worse, it looks as though national competition agencies impose individual fines only in proceedings where they themselves have run the investigations. Not a single case is known in which a national competition agency imposed a fine on an individual following a prohibition decision by the European Commission. Because the Commission typically invokes its competence whenever an al-


\(^{119}\) §81(1) and (4)(1) of the German Competition Act. An English version is available at http://www.gesetze-im-internet.de/englisch_gwb/english_gwb.html (visited 02/19/2016).

\(^{120}\) Article L420-6 of the French Commercial Code. An English version is available at https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (visited 02/19/2016).


\(^{122}\) Sections 188 and 190 of the Enterprise Act 2002.
leged anticompetitive act affects markets in more than one Member State, the agencies’ reluctance toward such “follow-on” proceedings leads to the puzzling result that individuals may go unpunished in some of the biggest antitrust cases. Thus, it is frequently argued that the Commission itself should be equipped with the competence to impose individual sanctions. It is, however, heavily disputed whether this competence should also include the power to impose prison sentences. Despite these debates about future reform, it seems fair to say for the time being that individual liability does not play a major role in the EU competition law enforcement.

In conclusion, EU competition law is primarily enforced by the European Commission and the national competition agencies of the 28 EU Member States. Private antitrust litigation is still of relatively minor importance, but is promoted, inter alia, through the EU Directive on Antitrust Damages Actions that must be transposed by December 27, 2016. Individual liability exists in some EU Member States, but not on the EU level, which means that the European Commission cannot impose fines on individuals (not to mention prison sentences). In contrast, US antitrust enforcement is more diverse. Public and private enforcement are both important, and the US Department of Justice can impose sanctions not only on corporations, but also on individuals. Sanctions for individuals can be monetary or nonmonetary, and include imprisonment up to ten years for the most egregious violations.

III. LESSONS FROM THE CLASSIC DETERRENCE MODEL

Even though the European Court of Justice has never clearly explained the purpose of holding parent companies liable for antitrust infringements by their subsidiaries, existing case-law shows that the liability dimension of the single economic entity doctrine is primarily about deterrence. In Elf Aquitaine v Commission (2011), the Court explained with regard to the rebuttable Akzo presumption that a parent exercises decisive influence over a wholly owned subsidiary that the purpose of the presumption is “to strike a balance between, on the one hand, the importance of the objective of combating conduct contrary to the competition rules, in particular to Article 101 TFEU, and of preventing a repetition of such conduct, and, on the other hand, the importance of the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that

123 EU competition law is enforced by the European Commission and the national competition agencies of the 28 EU Member States, see Articles 4 and 5 of Regulation (EC) No. 1/2003. If the Commission initiates a proceeding for the adoption of a prohibition decision, the national competition agencies are, however, relieved of their competence to do the same, see Article 11(6) of Regulation (EC) No. 1/2003.
124 See e.g. Peter Whelan, supra note 9, passim. The President of the German Federal Cartel Office, Andreas Mundt, has spoken out against criminalization of antitrust violations: “In Europe, there’s simply no consensus that something like this should be punished as a crime. […] A cartel violation is rarely a crystal clear matter like a theft — the lines are often blurred, so that’s not something where we should use the severe weapons of criminal law”, see https://competitionpolicy.wordpress.com/2014/11/24/ (visited 04/20/2016).
penalties should be applied solely to the offender, the principle of legal certainty and the principle of the rights of the defense, including the principle of equality of arms.” The General Court emphasized in Dow Chemical v Commission (2011) that “the parent company has a responsibility to ensure that its subsidiary complies with the competition rules” and may be presumed “to have the possibility of establishing a policy aimed at compliance with competition law and to take all necessary and appropriate measures to supervise the subsidiary’s commercial management”. It follows from these and similar remarks, that, by imposing liability on parent companies, courts primarily seek to engage them in ensuring the antitrust compliance by their subsidiaries. Incentivized through the threat of becoming liable themselves, parent companies are supposed to use their ability to control the behavior of their subsidiaries to prevent them from engaging in anticompetitive acts. Put differently, the goal of parent company liability is to deter subsidiaries from engaging in socially harmful conduct by subjecting them to the internal monitoring and enforcement mechanisms of the corporate group.

In the remainder of this paper, I analyze the deterrence objective of the European Court of Justice’s single economic entity doctrine from an economic perspective. I take as a starting point the classic deterrence model that is known from the economic analysis of torts and the public enforcement of law. The deterrence model is based on the idea that the primary goal of damages and penalties is to deter socially undesirable conduct. Individuals are assumed to be rational utility-maximizers who take into account expected liabilities whenever they weigh the costs and benefits of engaging in a certain behavior. If the goal of a legal rule is to deter, it must create an expected liability that weighs so heavily on the cost-side of the balancing that the total costs outweigh the total benefits. The expected liability is a product of the magnitude of the damages and/or penalties to be imposed and the probability of their imposition. If the expected liability is sufficiently high, a rational individual will abstain from engaging in the behavior in order to avoid suffering a net loss. The deterrence model is also applied to

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126 Dow Chemical v Commission, T-77/08, ECLI:EU:T:2012:47, ¶ 101. In the next sentence, the General Court goes on to argue that, “since any gains resulting from illegal activities accrue to the shareholders, it is only fair that that those who have the power of supervision should assume liability for the illegal business activities of their subsidiaries.” (emphasis added). This statement is very interesting because, if one assumes it is true, there is no reason why it should be valid for antitrust infringements but not for other kinds of “illegal business activities”. On the other hand, it goes without saying that the General Court’s reasoning at this point is in tension with the principle of limited liability. A detailed assessment of the fairness of parent company liability is beyond the scope of this paper and must be reserved for future works.
127 The former Competition Commissioner Neelie Kroes is quoted in the Press Release accompanying the Commission’s Rubber Chemicals decision (supra note 31) as having said „With this latest decision, I am sending a very strong message to company boards that cartels will not be tolerated, and to shareholders that they should look carefully at how their companies are being run.” (emphasis added), see Press Release IP/05/1656 of December 21, 2005.
for-profit corporations, with the only distinction that corporations and persons acting on their behalf are assumed to maximize profits rather than utility.

The deterrence model has in the past been applied in the antitrust context with regard to fines and damages in general, and to explain the need for prison sentences, in particular.\(^\text{129}\) It has, however, thus far not been applied to assess parent company liability in EU competition law.\(^\text{130}\) This is surprising, given that the main objective of the European Courts of Justice’s single economic entity doctrine is to deter anticompetitive behavior. In the following, I first apply a classic version of the deterrence model based on several assumptions that are idealistic, but help to illustrate some important points. In Part IV, below, I then assess a more realistic setting. The assumptions in this section are:

1. Neither parent companies nor subsidiaries have wealth constraints.
2. Sanctions (or damages) can be imposed without costs.
3. All parties are rational profit-maximizers.\(^\text{131}\)
4. All parties are perfectly informed.
5. The probability that anticompetitive acts will be sanctioned is positive.

I generally focus on monetary sanctions imposed by competition agencies, rather than on damages, because fines are practically still more relevant in EU competition law, and, with regard to deterrence, there is no substantial difference between fines and damages. Rational actors will always be concerned with the total amount of expected liability rather than with its components. I comment, however, on the interdependencies between fines and damages in Part IV.1 below. I also assume that antitrust liability arises only in one jurisdiction, although, in practice, the same behavior may in fact be subject to administrative proceedings and lawsuits in more than one country, which can lead to the imposition of unadjusted and potentially excessive sanctions.


\(^{130}\) See however Damien Geradin, Anne Layne-Farrar & Nicolas Petit, supra note 8, § 6.65 (stating that the notion of parent company responsibility for antitrust infringements by subsidiaries has strong economic and legal support because parent companies are arguably best placed to establish company-wide rules and reporting mechanisms to oversee the actions that their subsidiaries take and because corporate culture, in particular tolerance for legally risky behaviors, is generally determined at the corporate level).

\(^{131}\) It has been pointed out that this assumption may not be true for many individuals because they are at least equally concerned with social or reputational objectives (see e.g. Wouter P.J. Wils, supra note 129, p. 51). I agree, and certainly do not intend to suggest that all employees and managers involved in anticompetitive acts are pursuing their own personal benefit. The assumption is made for the sake of simplicity.
1. The discussion about optimal antitrust sanctions

No consensus exists regarding the optimal level of antitrust sanctions. In his seminal article on “Optimal Sanctions for Antitrust Violations” (1983), William Landes argued on the basis of Gary Becker’s famous model of crime and punishment that one has to distinguish efficient and inefficient antitrust violations. Inefficient antitrust violations cause harm to the victim that exceeds the gain to the offender. On the whole, these violations are welfare-diminishing and therefore socially undesirable. This reflects the general intuition about anticompetitive behavior and is hardly surprising. But, according to Landes, there are also efficient antitrust violations where the gain to the offender exceeds the harm to the victim. If that is true, these violations are welfare-increasing and therefore socially desirable. On the basis of this distinction, Landes argues that only inefficient antitrust violations should be deterred, whereas efficient antitrust violations should go unsanctioned.

It follows from this view that there can only be one optimal level for antitrust sanctions. If the sanction is too low, some inefficient antitrust violations will not be deterred, which would be socially undesirable. On the other hand, if the sanction is too high, some efficient antitrust violations will be deterred, which would also be a socially undesirable result. There is both a problem of overdeterrence and a problem of underdeterrence in this theory. According to Landes, the optimal sanction creates an expected liability that is just right to deter inefficient offenses, but not efficient ones.

Landes’ notion of an efficient antitrust violation has been challenged by other authors. In particular, it has been doubted that efficiency is or should be the only goal of antitrust law. Leaving it up to the perpetrator to decide whether to abstain from an antitrust violation or to engage in it and pay the fine, would ignore legislators’ decisions to make such violations illegal. It would also infringe upon the freedoms of other market participants, in particular consumers. It can be argued that a private right not to be harmed through antitrust violations follows from the illegality of antitrust violations in the same way as a private right not to be punched follows from the prohibition of battery. The law does not allow perpetrators to dispose of the private rights of other individuals on the grounds that they gain more than the victim loses.

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132 William M. Landes, supra note 14, 653.
133 Id. 655.
134 §1(1) Sherman Act: „Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” (emphasis added); Article 101(1) TFEU: “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market [...].” (emphasis added); Article 102 TFEU: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. [...]” (emphasis added).
Against this background, it has been argued that sanctions should not be seen as prices, but as a normatively distinctive legal consequence. As Robert Cooter put it, a sanction is “a detriment imposed for doing what is forbidden” whereas a price is “money extracted for doing what is permitted”. The distinctive character of sanctions has been described as seeking to completely deter behavior that has been defined as illegal. In the words of Judge Richard Posner, “sanctions are not [...] designed to ration the activity; the purpose so far as possible is to extirpate it”. Another way to put it is that the utility from illegal activities is considered to be zero. The private benefits of such activities are simple not recognized as social benefits and thus irrelevant for social welfare optimization. Understood this way, illegal activities only have costs. If one followed this way of thinking, overdeterrence would not be a problem of antitrust sanctions. This is a clear distinction from Landes’ theory, according to which overdeterrence and underdeterrence are equally problematic.

But even if one follows Landes’ critics and sees as the purpose of sanctions the elimination of the sanctioned behavior, this would not mean that sanctions should be infinitely high. The main reason becomes apparent if we step for a moment out of the perfect world model with its idealistic assumptions. In reality, imposing infinitely high sanctions would almost inevitably not only deter illegal behavior, but would also curtail legitimate business activities. It goes without saying that antitrust laws and their interpretation are often ambiguous. Their application involves the analysis of pro- and anti-competitive effects, and the weighing of both. If firms are uncertain how competition agencies might assess a certain business practice under the antitrust laws, but face draconic sanctions if the practice is found to be unlawful, they may shy away from behavior that would be socially desirable.

Even if the antitrust laws were perfectly clear, in the real world, there is always a risk of error. Agency officials, prosecutors and judges can make mistakes in assessing the facts or in interpreting the law. If sanctions were infinitely high, firms could not take the risk of being fined erroneously and would abstain from many desirable business activities. Another reason why antitrust sanctions can be too high even if one does not follow Landes’ theory of efficient antitrust violations is that sanctions can have undesirable social and economic consequences. The imposition of a fine will likely affect all constituencies of the corporation. Suppliers and employees may suffer from cost-

139 Wouter P.J. Wils, supra note 131, 63-64.
cutting campaigns, and tax revenues may decrease. And in imperfect markets, there is always the danger that the costs of a fine will be passed through to consumers by means of higher prices. Thus, imposing an excessively high fine could in the end produce substantially more harm than good.

It looks as though everyone agrees that, on the other side of the scale, sanctions can also be too low. This would result in underdeterrence. Now, how should optimal sanctions look? If one follows Landes’ theory of internalization, the sanction should equal the net harm caused by the antitrust violation to persons other than the offender.\textsuperscript{140} When the probability of apprehension and conviction is less than one, and enforcement costs are positive (which is inevitably the case in reality), the net harm should include enforcement costs per case and should be divided by the probability of apprehension and conviction.\textsuperscript{141} If the harm is $100, and the probability of being caught is 20 percent, effective deterrence requires the sanction to be set at $500. If one follows instead the full deterrence theory of Landes’ critics, the sanction should at least equal the perpetrator’s gain from the antitrust infringement.

The difference between the two approaches is not only theoretical. The perpetrator’s gain can both exceed and fall short of the harm caused by the antitrust infringement. An example for the former is the efficient antitrust violation described by Landes.\textsuperscript{142} To establish the latter it is enough to refer to what is known in antitrust economics as the “deadweight loss”. If a monopolist or a cartel increases a price above the competitive level, the result is not only that consumers have to pay the higher price. A second effect is that, because they are unwilling to pay the elevated price, some consumers will completely abstain from buying the product. Whereas losses from the first effect are mirrored by proportionate gains of the monopolist or cartel, losses from the second effect are not (hence the fitting name “deadweight loss”). It can thus make a difference for deterrence if sanctions are based on the perpetrator’s gain or on the harm caused by the antitrust violation. For the purpose of this paper, however, this difference does not matter. The important lesson from this section is simply that, notwithstanding the ongoing controversy about the details, everyone agrees that antitrust sanctions can be both too high and too low, or, in other words, that both overdeterrence and underdeterrence are a problem. As we will see further below, this must be kept in mind when different sanctions are combined.

\textsuperscript{140} William M. Landes, supra note 14, 656.

\textsuperscript{141} Id., 657.

\textsuperscript{142} Landes’ view has been opposed, \textit{inter alia}, by the Antitrust Division of the US Department of Justice, which argues that there is no such thing as an efficient antitrust violation, see e.g. Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, \textit{Deterrence and Detection of Cartels: Using all the Tools and Sanctions}, Presentation at the 26th Annual National Institute on White Collar Crime, 03/01/2012, p. 2 (stating that cartels have no legitimate purpose and serve only to rob consumers of the tangible blessings of competition and that, like other serious crimes, cartels are never socially desirable and that US antitrust law therefore seeks to deter them completely rather than merely tax them). It would thus be too easy to characterize the debate about efficient antitrust violations as an EU-US divide.
2. No justification for parent company liability in the classic model

Is parent company liability necessary for ensuring effective deterrence in the classic deterrence model with its idealistic perfect-world assumptions? The answer is clearly negative. If subsidiaries have unlimited resources and perfect information, and if enforcement costs are zero, it will always be possible to deter subsidiaries from infringing the antitrust laws by addressing sanctions to the subsidiaries alone. The competition agencies will be able to set the sanction at the socially optimal level (whether based on the harm caused by the infringement or the perpetrator’s gain). They will have all the necessary information and they will not have to face any problems occurring with regard to the practical aspects of enforcement.

At the same time, the subsidiary will take full account of the sanction and will be perfectly able to compare the costs and benefits of infringing the antitrust laws. By assumption, the subsidiary will have all the information it needs, i.e. it will know about the level of the sanction, the harm that would be caused by infringing the antitrust laws, and the gain from the infringement. Also by assumption, the subsidiary will have enough money to pay for the sanction. Since the level of the sanction will be optimal, and the subsidiary will be neither imperfectly informed nor wealth-restrained, the subsidiary will be induced to behave in the socially desirable way. Deterrence will be optimal, and holding the parent company liable in addition to the subsidiary would serve no additional purpose. Thus, under the assumptions of the classic deterrence model, parent company liability cannot be justified. It would simply be unnecessary to achieve effective deterrence.

3. Parent company liability and the problem of too low fines

It is frequently argued that the fines that are actually imposed for violations of EU competition law are too low to achieve effective deterrence. The same argument is made for antitrust fines in the United States. Assuming this is true and fines are indeed too low – can parent company liability be justified to elevate sanctions to the socially optimal level? It seems to be a prevailing view about the fining practice of the European Commission that parent company liability leads to higher fines, and

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143 Mario Mariniello, Do European fines deter price fixing?, Research paper, http://voxeu.org/article/do-european-fines-deter-price-fixing (visited 04/20/2016) (stating that cartel fines in the European Union are very far from their optimal level and arguing that they should be increased); John M. Connor & Robert H. Lande, The size of cartel overcharges: Implications for U.S. and EU fining policies, 51 The Antitrust Bulletin 983, 1020-1021 (2006) (stating that cartel fine levels in both the United States and the European are far too low but that unfortunately the EU fine levels are even lower on average than the US levels); Peter Whelan, supra note 9, p. 50 with many further references.

144 John M. Connor & Robert H. Lande, Cartels as Rational Business Strategy: Crime Pays, 34 Cardozo L. Rev. 427, 476-477 (2012) (stating that the overall level of anti-cartel sanction is far too low and that the collective level of existing sanctions should be multiplied by a factor of five); Richard A. Posner, supra note 115, p. 271.
that achieving these higher fines is exactly what motivates the Commission to hold parents liable in the first place. Experienced antitrust lawyers have argued that the purpose of the single economic entity doctrine is to “secure effective deterrence by maximizing the pain of the fines imposed on transgressors”. This assertion raises two questions. Can the Commission actually use parent company liability to increase the level of fines that would otherwise be too low to achieve socially optimal deterrence? And would this be a convincing approach from an economic perspective?

There are several reasons why antitrust fines in reality could indeed be lower than would be socially optimal. The harm caused by antitrust violations as well as the resulting gain to the perpetrators is often very substantial. The US Sentencing Guidelines assume that the average gain from price-fixing is 10 percent of the selling price, and that the harm caused is even higher because of the deadweight loss. The volume of affected commerce is in many cases considerable, depending on the markets and products concerned, and the duration of the anticompetitive practice. Empirical studies suggest an average cartel lifespan of more than six years.

These numbers can sum up to huge amounts. If we assume a price-fixing cartel affecting sales worth $200 million per year, a price-fixing premium of 10 percent, and a cartel duration of six years, the gain from the cartel already amounts to $120 million ($200 million × 0.1 × 6). But effective deterrence would also have to take into account the probability that the cartel is detected and that the perpetrators are convicted, which is said to be rather low for antitrust violations (as well as for many other

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145 See e.g. John Temple Lang, How can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary be Resolved?, 37 Fordham Int'l L.J. 1481, 1487-1488 (2014) (stating that the historical development of parent liability cases suggests that the European Commission gradually moved towards “a more easily applied rule that would justify higher fines”).

146 Julian Joshua, Yves Botteman & Laura Atlee, supra note 30, p. 4.

147 Assessing these questions requires of course already a deviation from the perfect-world model, in which it is assumed that competition agencies have perfect information and set sanctions at the optimal level. I nevertheless discuss this explanation for parent company liability in the present context because it asserts that parent company liability aims at restoring the optimal level of sanctions and can thus be considered as accommodating for the assumptions of the model rather than contradicting them.

148 See Peter Whelan, supra note 9, p. 47-50 (pointing, inter alia, to the following facts: (1) cartel overcharges tend to be relatively high; (2) the time value of fines that are often imposed many years after the harm is done is often ignored; (3) the deadweight loss is also often ignored if the focus is on the gain; (4) the probability of detection tends to be low; (5) legal rules restrain the fining discretion of competition agencies).

149 Supra Part III.1.

150 Emmanuel Combe & Constance Monnier, Fines against hard core cartels in Europe, The myth of overenforcement, 56 The Antitrust Bulletin 235, 243 (2011) (finding an average cartel duration of seven years and a median of 5.6 years based on a sample of 64 cartel decisions by the European Commission from 1975 to 2009); John M. Connor, Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement, November 2003 (analyzing economic data on 167 international cartels that were discovered between 1990 and 2003, and stating that these cartels lasted on average nearly six years with average durability declined by more than 60 percent from the early 1990s to the early 2000s); John M. Connor & Robert H. Lande, How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines, 80 Tul. L. Rev. 513, note 28 (2005); Robert H. Lande, Are Antitrust “Treble” Damages Really Single Damages, 54 Ohio St. L.J. 115, 131 (1993) (summarizing the results of three older studies as indicating an average cartel lifespan of “probably between seven and eight years”).
torts and crimes). A comprehensive study published in 1991 established the rate of price-fixing cartel detection at between 13 and 17 percent.\textsuperscript{151} It has been suggested that the rate would be somewhat higher today because of improvements in antitrust enforcement, including, in particular, the more prevalent use of leniency rules.\textsuperscript{152} If we generously assume a cartel detection and conviction rate of 1/3, as other authors have,\textsuperscript{153} the fine should at least equal three times the gain. In the given example this would elevate the fine to $360 million. As a matter of fact, fines of this magnitude can be imposed by competition agencies both in the United States and the European Union, as is illustrated by the examples in Part II.1 and is well-known from the actual practice of public antitrust enforcement. There is, however, strong empirical evidence that antitrust fines rarely reach the optimal level.\textsuperscript{154}

It is often argued that the single economic entity doctrine in EU competition law does not only shift liability to parent companies, but also leads to higher fines.\textsuperscript{155} This may indeed be true. One reason is that, according to ¶ 28 of the 2006 Fining Guidelines, the Commission can increase the basic amount of the fine by up to 100 percent if the “undertaking” has been fined before for “the same or a similar infringement” (“recidivism”). This naturally becomes more likely if not only prior infringements by the subsidiary are taken into account, but also the infringements by other members of the same corporate group.

Even more important, according to ¶ 30 of the Fining Guidelines, the Commission may increase the fine to be imposed if the “undertaking” has “a particularly large turnover beyond the sales of goods or services to which the infringement relates”. The purpose of this “specific increase for deterrence” is to make sure that fines do not lose their deterrent effect to large conglomerates that could pay the regular fine out of the “petty cash”. Particularly large turnovers beyond the sales of goods and services to which the infringement relates are much more likely if the turnovers of the parent company and other entities in the same corporate group are taken into account in addition to those of the subsidiary. In fact, the European Commission has invoked a specific increase for deterrence along these lines in many cases involving parent company liability.\textsuperscript{156}

\textsuperscript{152} Wouter P.J. Wils, \textit{Is Criminalization of EU Competition Law the Answer?}, 28 World Competition 117, 139-140 (2005) with further references.
\textsuperscript{153} Peter Whelan, supra note 9, p. 47-48; Wouter P.J. Wils, \textit{Is Criminalization of EU Competition Law the Answer?}, 28 World Competition 117, 139-140 (2005).
\textsuperscript{154} Supra note 150.
\textsuperscript{155} Supra note 145.
A third reason why parent company liability can lead to higher fines is that Article 23(2) of Regulation (EC) No. 1/2003 limits the maximum amount of the fine to 10 percent of the total turnover in the preceding business year of the “undertaking”, and here again the Commission may refer to the turnover of the corporate group rather than to the subsidiary’s turnover alone. Indeed, one can find examples in the Commission’s practice in which fines have not been capped only because of parent company liability. But even if one agrees that fines are currently set at suboptimal levels, extending liability to parent companies seems an odd way to increase them. First of all, even if an optimal level of fines could be achieved through this approach, the result would be arbitrary because fines would only be optimal where parent companies are involved, but would remain suboptimal where this is not the case. If fines are currently indeed suboptimal, they are suboptimal for every perpetrator and should accordingly be raised for everyone, and not only for those businesses that are organized in corporate groups. Relying on parent company liability to achieve higher fines does not only seem methodologically unsound, but also bears the risk of increasing enforcement costs because the competition agencies must explore facts that would otherwise be irrelevant for the imposition of fines. Furthermore, as a matter of fact, the fines that are actually imposed are in most cases far below the legal maximum, i.e. the competition agencies generally do not exhaust their fining powers. Put differently, it is far from evident that parent company liability is actually necessary to elevate fines toward the optimal level of sanctions. And even if the competition agencies had already exhausted all others means to impose higher fines, the plausible solution would simply be to amend the Fining Guidelines and, if necessary, Article 23(2) of Regulation (EC) No. 1/2003 in order to increase the legal

157 Akzo Nobel and Others v Commission, T-112/05, ECLI:EU:T:2007:381, ¶ 90 (“The maximum amount of 10% of turnover [...] must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 81 EC, since only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question [...].”); HFB and Others v Commission, T-999, ECLI:EU:T:2002:70, ¶ 528-529.  

158 See e.g. European Commission, Decision of March 11, 2008, Case 38.543 – International removal services (imposing a fine exceeding 60 percent of the subsidiary’s turnover but keeping below 10 percent of the parent’s turnover); affirmed by Team Relocations and Others v Commission, T-204/08, ECLI:EU:T:2011:286, ¶ 137-154, 161 (stating that the fact that the amount of the fine imposed on the subsidiary exceeds 10% of its turnover is irrelevant since that amount is still well below the 10% ceiling of the parent’s turnover); affirmed by Team Relocations and Others v Commission, C-444/11 P, ECLI:EU:C:2013:464, ¶ 170-179; see also Trioplast Wittenheim v Commission, T-26/06, ECLI:EU:T:2010:387, ¶ 105-118. It should be noted that, if the basic amount of the fine is indeed a proxy to the harm (supra Part II.1), any cap is generally undesirable from a deterrence perspective because it prevents that the fine from mirroring the harm. This raises the question what is the purpose of the cap. It cannot be to prevent firms from sliding into bankruptcy because this is already prevented by the inability-to-pay rules. Instead, it seems like the European legislator was worried that higher fines may have adverse effects to the economy, e.g. through higher product prices, lower wages or decreased tax receipts, see Wouter P.J. Wils, supra note 129, p. 65.
maximum. This would be much more coherent and efficient than trying to use parent company liability as a faulty workaround.

IV. ASSESSING PARENT COMPANY LIABILITY IN REALITY

In this part of the paper, I leave the classic deterrence model with its perfect-world assumptions behind and explore possible justifications for parent company liability in more realistic settings. I relax some of the assumptions one by one and demonstrate that parent company liability can under certain circumstances indeed be justified from a deterrence point of view. I start by relaxing the assumption that both parent companies and their subsidiaries are unrestricted in their wealth. As will be seen, wealth restrictions can in fact be a severe problem for the imposition of antitrust fines. This may justify extending liability to other parties, including parent companies. I then relax the assumption that all parties are perfectly informed, which is also often not met in reality. If parent companies have better information than their subsidiaries, it can be economically efficient to involve them in the monitoring and prevention of corporate torts and crimes, including antitrust violations. Lastly, I relax the assumption that enforcement costs are zero in order to consider the effects of positive enforcement costs.

1. Wealth restraints

It was assumed in Part III that all parties have unlimited wealth, which is obviously not true in reality. Firms and individuals have only limited assets. Wealth restraints significantly affect the capability of being deterred by monetary sanctions. This was first analyzed in detail by Professor Steven Shavell in his seminal paper on “The judgment proof problem” (1986).\(^{159}\) If a perpetrator has insufficient assets to pay for the full sanction, his expected liability will be limited to the value of his assets. In other words, as far as a monetary sanction exceeds the value of the perpetrator’s assets, it will not enter his calculus of costs and benefits, but will rather be ignored. Thus, even if the sanction is set at the optimal level, deterrence will be suboptimal where wealth restraints are a problem. It is the imbalance between the available assets and the expected liability which causes the judgment proof problem. Thus, if expected damages and monetary sanctions are sufficiently high, even parties with quite substantial assets may be underdeterred (imagine a catastrophic accident that may be unlikely, but would cause enormous liabilities if it actually happened).\(^{160}\)


\(^{160}\) Steven Shavell, supra note 128, p. 231.
A classic solution to the judgment proof problem is vicarious liability. If another person has some control over the party whose assets are limited, the former person (the principal) may be held vicariously liable to make up for the suboptimal deterrence of the latter (the agent). Vicarious liability addresses the judgment proof problem by putting the principal’s assets at stake in addition to the agent’s.161 As far as the principal can observe and control the behavior of the agent, the principal will compel the agent to be cautious and obey the law because this will reduce the principal’s expected liability. Wherever that is possible, the principal will simply direct the agent to follow the rules. Furthermore, the principal may use private incentives and penalties to induce the agent to behave optimally — though these may need to be nonmonetary to evade the judgment proof problem.

The benefit of vicarious liability depends on the respective assets of the principal and the agent, and the principal’s ability to control the agent’s behavior. The positive effect of vicarious liability on incentives will be greater the lower the agent’s assets are, and the higher the principal’s assets are, each relative to the expected liability.162 If the agent has sufficient assets, vicarious liability is not needed, because the judgment proof problem does not occur. On the other hand, if both the principal and the agent have insufficient assets, vicarious liability will hardly make a difference because the principal’s incentives are equally diluted by the judgment proof problem. It follows that vicarious liability will be most effective where the principal has significantly more assets than the agent. Furthermore, the principal’s ability to control the agent is essential because only if the principal can actually induce the agent to obey the law, the principal will be able to reduce its expected liability.

A typical example for a relationship in which vicarious liability can be effective is that of a large firm and its employees. The assets of the firm usually clearly exceed the assets of its employees, and, at the same time, the firm is capable of observing and controlling the employees’ behavior. In many industries employees can cause harm that would result in liabilities exceeding their personal assets by far. Because the employees thus have insufficient incentives to take adequate care, it makes economic sense to hold firms vicariously liable. If their own assets are at stake, firms are induced to use their ability to monitor and control employee behavior, and induce their employees to take adequate care and obey the law.

As it happens, the relationship between a parent company and its subsidiary is in principle equally suited for vicarious liability. The assets of the parent, which indirectly controls the assets of all of its subsidiaries, typically exceed the assets of each single subsidiary. Subsidiaries are often created (or acquired) to operate a certain business line, or the business on a certain geographic market. Thus,

161 Id., p. 233.
162 Id., p. 234.
they usually only represent a smaller part of the firm’s total activities. Furthermore, parent companies are by definition able to exercise control over their subsidiaries. The term “parent company” usually refers only to companies that own enough voting stock in another firm to elect and control the other firm’s management. This firm is then considered as a controlled or even wholly owned subsidiary. The control over the management allows the parent to induce the subsidiary to behave as desired because the managers of the subsidiary certainly know who is deciding their fate.

This distribution of assets and power makes the parent-subsidiary relationship a perfect fit for vicarious liability. If the subsidiary is underdeterred because it lacks sufficient assets to pay for the expected liability from fines and damages, it makes sense to hold the parent vicariously liable to restore deterrence. The incentives created by the expected liability are thus passed through to the parent company. When the parent’s own assets are at stake, the parent will use its power to monitor and control the subsidiary and induce it to behave in a way that no liability will arise. The directions given by the parent, and the additional incentives the parent creates for the subsidiary, may very well offset the lack of incentives from underdeterrence. Thus, notwithstanding the judgment proof problem, the subsidiary will be induced to take adequate care and obey the law.

In exercising its control over the subsidiary, the parent company may of course face agency problems. The parent is to a certain degree dependent on the cooperation of the subsidiary’s management. If the executives or the employees of the subsidiary pursue their own agendas and seek illicit personal benefits, it may be difficult for the parent company to intervene immediately. To a certain extent, this is the same problem that all shareholders face with monitoring their corporation and its management. But there are also particular challenges. The flow of information between the subsidiary and the parent may be imperfect, especially where subsidiaries enjoy substantial autonomy or where the corporate group’s structure consists of more than two levels. Individual executives or employees may have a personal interest in concealing information from the parent company. Furthermore, if the subsidiary was acquired rather than formed, the parent may be unfamiliar with the subsidiary’s corporate culture and may not be able to exercise full control from the outset.

In sum, there is a wide range of individual behaviors and group dynamics as well as organizational barriers that can make it difficult for parent companies to exercise effective control over their subsidiaries. This is particularly true for large, multinational corporations with dozens or hundreds of subsidiaries in many different countries.

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On the other hand, parent companies are nothing like dispersed shareholders. They face no collective action problem, and they are not simply investors. Parent companies are often very much involved in the business of their subsidiaries.\footnote{Phillip I. Blumberg, supra note 1, at 623 (stating that the parent as sole shareholder is almost invariably engaged in the managerial functions of establishing policy, determining budget, providing administrative support, and participating in the decision-making of the subsidiary corporation and pointing out that the business of the parent is often integrated economically with the business of the subsidiary).} As controlling shareholders, they dominate the subsidiary’s board of directors and are able to appoint and remove the subsidiary’s management.\footnote{Lucian A. Bebchuk & Assaf Hamdani, \textit{The Elusive Quest for Global Governance Standards}, 157 U. Pa. L. Rev. 1263, 1283 ("[...] it is reasonable to assume that controllers will make significant use of their formal power to advance the course of action that they prefer").} Executives in subsidiaries are typically far less independent than executives in unaffiliated corporations. They are often loyal employees and sometimes hold other positions elsewhere in the group at the same time. Furthermore, parent companies can establish strict reporting obligations and decrease the autonomy of subsidiaries in other respects. They are far less dependent on the subsidiary’s management than ordinary shareholders in public corporations with a dispersed ownership are.

As a practical matter, there is often little difference between subsidiaries and unincorporated divisions of corporate groups. Thus, although agency problems certainly limit parent companies’ influence over their subsidiaries’ employees, parents are still in a good position to ensure their subsidiaries’ compliance with the law. Institutional arrangements and corporate culture play an important role in deterring or encouraging individual employees’ wrongdoing and it is the group management’s responsibility to define them appropriately.\footnote{See Samuel W. Buell, \textit{The Blaming Function of Entity Criminal Liability}, 81 Ind. L.J. 473 (2006).}

There is no reason why this should not be true in the antitrust context. In fact, there are many examples of large corporate groups that have set up compliance programs stretching over the entire group, including all subsidiaries. Corporate group managements have the necessary powers to create and enforce effective mechanisms to prevent, detect and respond to antitrust violations anywhere in the group.\footnote{See e.g. Damien Geradin, Anne Layne-Farrar & Nicolas Petit, supra note 8, ¶ 6.65 (stating that parent companies are arguably best placed to establish company-wide rules and reporting mechanisms to oversee the actions that their subsidiaries take and that corporate culture, in particular tolerance for legally risky behaviors, is generally determined at the corporate level).} In particular, they can establish a thorough compliance risk assessment, ensure that all employees receive the necessary training and information, protect and incentivize the reporting of antitrust violations by internal and external whistle-blowers, and create compensation and promotion schemes – including for subsidiary managers and leading employees – that discourage any engagement
in illegal behavior. Where it seems necessary, corporate group managements can also rely on outside counsel. There are also in a good position to police antitrust violations ex post and cooperate with competition agencies to mitigate the harm and potentially negotiate a settlement.

Thus, even though it is an essential characteristic of antitrust violations that they tend to take place in secrecy, corporate law puts group managements in a good position to ensure antitrust compliance on all corporate levels. It usually requires substantial effort to set up and uphold anticompetitive practices like price-fixing agreements, and, once such practices are established, they often endure several years. Thus, if the full machinery of corporate monitoring and control mechanisms is sensibly employed, it seems not impossible to ensure effective antitrust compliance.

Another question is, of course, how relevant the judgment proof problem actually is in the antitrust context. In general, it can be assumed that the antitrust laws are violated by wealthy and impecunious corporations alike. That many anticompetitive practices require a certain degree of market power may indicate that antitrust violators rarely possess any assets at all. On the other hand, some of the best known antitrust cases involved companies that apparently resorted to anticompetitive behavior because they were no longer able to compete on the market by ordinary means. However, any assumption on the aforementioned grounds would necessarily be speculative. A comprehensive empirical study of the average wealth of antitrust violators has never been conducted.

Nevertheless, two more general observations are worth mentioning. First, as stated before, antitrust fines can be extraordinarily high. Over the last decade, the European Commission fined ten undertakings more than EUR 300 million each. The average fine per firm imposed by the Commission in cartel cases between 2000 and 2011 amounted to roughly EUR 35 million. The Antitrust Division of the US Department of Justice lists on its website 129 incidents in which corporations have been

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168 Parent companies can essentially use all the instruments that corporations generally use in the light of entity liability to induce their employees to behave optimally, see Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 693 (1997).

169 It has been pointed out that strict corporate liability can discourage policing measures because the corporation would inevitably contribute to its own conviction and that mixed regimes combining duty-based and strict liability elements will therefore be desirable in many circumstances, see Jennifer Arlen & Reinier Kraakman, supra note 168.

170 It should be noted, however, that agency problems can complicate the monitoring and control of subsidiaries, see Damien Geradin, Anne Layne-Farrar & Nicolas Petit, id. (stating that subsidiaries often profit from imperfect information in particular in major multinational undertakings organized on local distribution structures, “where agents’ incentives are often well hidden from the eyes of management”).


fined more than $10 million, with record fines amounting to $500 million (in the LCD panels case, and the Vitamins case).\textsuperscript{174} It is not difficult to imagine that sanctions of this magnitude would exceed the assets of some firms. Second, as was also already mentioned, anticompetitive behavior often endures several years. Thus, the monetary gains from the anticompetitive practice may have been re-invested or distributed to the firm’s owners a long time before the liability arises. It seems rather unlikely that, at the time a fine is imposed or damages are awarded, the firm can still dispose of whatever has been gained from the antitrust violation. Antitrust liabilities can be significant and are often not fully budgeted for due to the low probability of detection. Thus, it is plausible that they would threaten the financial stability of many firms.

The plausibility of these general observations is underlined by a particularity of public antitrust enforcement known as “inability-to-pay rules”. Both the European Commission’s 2006Fining Guidelines and the most recent US Sentencing Guidelines allow for reducing the fine if otherwise the continued existence of the perpetrator could be substantially jeopardized.\textsuperscript{175} More specifically, according to ¶ 35 of the EU Fining Guidelines, the Commission may, upon request, grant a reduction “on the basis of objective evidence” that imposing the regular fine “would irrevocably jeopardize the economic viability of the undertaking concerned and cause its assets to lose all their value.”\textsuperscript{176} In §8C3.3. of the US Sentencing Guidelines, two separate cases are distinguished. On the one hand, the fine may be reduced to the extent that imposition of the regular fine would impair the perpetrator’s “ability to make restitution to victims”.\textsuperscript{177} On the other hand, the fine may also be reduced if the sentencing court is convinced that the firm “is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine” as required by the Guidelines.\textsuperscript{178}

Both the EU and the US rules are based on the notion that, notwithstanding the perpetrator’s violation of the antitrust laws, it would do a disservice to competition to push the perpetrator out of the market. It is obviously not the purpose of antitrust fines to destroy business and further deteriorate market structure, but rather to deter future violations of the antitrust laws and to make sure that firms engage in competition on the merits. If the regular fine is so high that it would drive the perpetrator into bankruptcy, the number of firms on the market would be reduced and competition would likely suffer. In the end, this could lead to higher prices for consumers, and the objectives of antitrust law

\textsuperscript{174} https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more (visited 04/21/2016).
\textsuperscript{175} USSG (supra note 89) §8C.3.3; EU Fining Guidelines (supra note 71), ¶ 35.
\textsuperscript{176} Supra note 71, ¶ 35.
\textsuperscript{177} USSG §8C3.3(a).
\textsuperscript{178} USSG §8C3.3(b).
would be undermined rather than furthered. It is the main objective of inability-to-pay rules to prevent this from happening.

Although inability-to-pay rules essentially eliminate the threat of “bankruptcy by fines”, they do not solve the judgment proof problem. From a deterrence perspective, it does not matter if a sanction falls short of its intended effect because the addressee lacks sufficient assets, or because the addressee knows the sanction will be reduced on the basis of inability-to-pay rules. In both cases, the expected liability is lower than it would be if the perpetrator actually faced the optimal sanction. If the optimal sanction is $100, but the perpetrator’s assets are only worth $50, it makes no difference whether the competition agency imposes a fine of $100 or whether the agency reduces the fine to $50 on the basis of the perpetrator’s inability to pay. The perpetrator will value the fine at $50, anyway, because this is the maximum that he can pay. Thus, inability-to-pay rules generally do not alter the perpetrator’s calculus of costs and benefits. They force competition agencies to take into account limited assets already in the calculation of fines, but they do not change the fact that optimal deterrence is impossible to achieve where significant wealth restraints exist. As far as the optimal sanction exceeds the perpetrator’s assets, the sanction will simply not be taken into account, and the perpetrator will be underdeterred to this extent.

The inability-to-pay rule of the EU Fining Guidelines has been applied repeatedly in recent years, indicating that wealth restraints are a relevant factor in antitrust enforcement and that the underdeterrence problem is real. In *Heat Stabilizers* (2009)\(^{179}\), *Prestressing Steel* (2010)\(^{180}\), *Animal feed phosphates* (2010)\(^{181}\), *Bathroom fittings* (2010)\(^{182}\), *Refrigeration Compressors* (2010)\(^{183}\) and *Window Mountings* (2010)\(^{184}\), the European Commission granted fine reductions between 25 and 95 percent to several firms.\(^{185}\) Even more recently, the Commission rejected reducing the fines in *Lundbeck* (2013)\(^{186}\) and *Shrimps* (2013)\(^{187}\), but granted unspecified fine reductions in *Envelopes* (2014)\(^{188}\). It seems that inability to pay is nowadays frequently claimed and that pertinent submissions are taken seriously by the European Commission.

\(^{179}\) European Commission, Decision of November 11, 2009, COMP/38589 – *Heat Stabilizers*.


\(^{186}\) European Commission, Decision of June 19, 2013, AT.39226 – *Lundbeck*.

\(^{187}\) European Commission, Decision of November 27, 2013, AT.39633 – *Shrimps*.


Draft, April 29, 2016
Similarly, the inability-to-pay rules of the US Sentencing Guidelines are also regularly invoked. An illustrative example is a 2011 price-fixing case involving the shipping company Horizon Lines LLC. In February 2011, the US Department of Justice filed conspiracy charges against Horizon, who had allegedly fixed rates and surcharges for water transportation of freight between the continental United States and Puerto Rico between May 2002 and April 2008. Based on Horizon’s estimated Puerto Rico freight revenue of $1.4 billion in the relevant timeframe, the Justice Department argued that the US Sentencing Guidelines called for a criminal penalty of $336 million to $672 million. Nonetheless, Horizon was allowed as part of a plea agreement to pay only $45 million in installments over five years after an independent forensic accountant had assessed that amount was “the most Horizon could afford to pay without substantially jeopardizing its continued viability and its ability to pay restitution.” In April 2011, the fine was reduced to $15 million to prevent Horizon from defaulting on a loan and possibly having to file for bankruptcy. In November 2014, Horizon announced that it would terminate its Puerto Rico operations and sell its other operations to Matson, Inc., another shipping company. Although Horizon is certainly an extreme example, it is by far not the only case in the practice of US antitrust law in which inability to pay played a role.

The aforementioned case-law is naturally only indicative and cannot substitute an empirical assessment of the extent of the judgment proof problem in the antitrust context. The cases illustrate, however, that underdeterrence due to insufficient assets is not only a theoretical problem, but actually occurs. Put differently, the judgment proof problem is a genuine challenge for antitrust law enforcement that must be taken seriously. Against this background, it seems not only theoretically plausible, but also sufficiently justified by facts to extend liability to parent companies in order to confront the problem of underdeterrence that arises when subsidiaries are significantly wealth-restrained. When the

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192 Id.
perpetrator lacks sufficient assets and is therefore not optimally deterred, parent company liability can help to restore efficient incentives and ensure subsidiaries’ compliance with the antitrust laws.

Of course, parent company liability can only contribute to deterrence where a parent company actually exists – it will not solve the underdeterrence problem with regard to publicly held corporations that do not have a controlling shareholder. Yet, at least in the European Union, the number of companies that are part of a corporate group structure seems sufficiently high to acknowledge that parent company liability can make a substantial contribution to antitrust deterrence. Thus, it seems plausible that parent company liability in the antitrust context can indeed fulfill the function that is promised by vicarious liability in light of the judgment proof problem – to restore the incentives for optimal behavior where such incentives are lacking because of wealth restrictions.

As a final note, it should be mentioned that the judgment proof problem affects incentives from public and private enforcement alike. Firms (as well as individuals) must be assumed to take into account all liabilities that can follow from a certain behavior, including both fines and damages. It is the combined expected liability from all possible sources that determines a firm’s decisions, and guides its behavior in the antitrust context. Interestingly, inability-to-pay rules exist only for the calculation of fines. Damages awards, in contrast, are not reduced even if they may exceed the injurer’s ability to pay. It is up to the creditors to decide whether they want to forgo parts of their claims or push the injurer into bankruptcy and try to satisfy their claims from the estate. Thus, in private antitrust suits the judgment proof problem occurs in its classic form.

In any case, the expected liability of a firm will never exceed the firm’s assets because these assets are everything the firm can lose. A firm’s maximum penalty consists of liquidation and dissolution. Thus, the problem of underdeterrence because of the judgment proof problem is equally relevant with regard to private damages actions as it is with regard to the imposition of monetary sanctions by competition agencies. As a consequence, it is justified to hold parent companies liable not only for fines imposed on their subsidiaries, but also for damages their subsidiaries have been ordered to pay. It would be inconsistent to consider parent company liability a necessary supplement to deterrence with regard to monetary sanctions, but not with regard to private damages claims. This finding is important in light of the recently adopted EU Directive on Antitrust Damages Actions that must be transposed by the EU Member States into their national laws by 27 December 2016.196

196 Supra note 6.
2. **Imperfect information**

In the framework of the classical deterrence model used in Part III it was assumed that all parties possessed perfect information. The managements of both the parent company and the subsidiary knew the exact harm that would be caused by an antitrust violation, the gain that could be derived from such a violation, the magnitude of the sanction that would be imposed, and the probability of being caught. They could perfectly assess the costs and benefits of any given behavior, and were guided by optimal sanctions to behave in the socially desirable way.

It is, however, evident that the assumption of perfect information does not hold true in reality. The information of both the parent and the subsidiary will almost certainly be imperfect, and it may very well be the case that one of them has better knowledge than the other. For example, the management of the subsidiary may be better informed about the subsidiary’s potentially anticompetitive practices, and their effects on customers and competitors. On the other hand, the management of the parent company may have better knowledge about the antitrust laws, compliance, and enforcement efforts by the competition agencies.

In general, vicarious liability is more desirable where the principal has better knowledge than the agent about the risks following from a certain behavior, or if the principal can take precautionary steps that are not available to the agent.\(^\text{197}\) Where this is the case, vicarious liability will cause the principal to exercise its influence over the agent in order to make the agent behave in the optimal way. Furthermore, the principal may take additional measures of its own to reduce the risk of liability. In particular, the principal may share its better knowledge with the agent and educate the agent on the risk of liability and on how the risk can be reduced or even eliminated. The principal may also direct or incentivize the agent to take adequate measures. Without vicarious liability, on the other hand, the principal would have no incentive to use its better knowledge to reduce the liability risk because the risk would be attributed to the agent alone.

Along these lines, the case for parent company liability is particularly strong where parents have better knowledge than their subsidiaries. This may well be the case with regard to antitrust violations. Consider the example of a distribution company that was established as a subsidiary and is responsible for the marketing and sales of a certain product. The workforce of this subsidiary may consist of salespeople, advertisers, accountants and so forth, but may lack lawyers and compliance experts. Because their job is to raise profits, the subsidiary’s employees may be tempted to enter into a price-fixing agreement with the only other supplier on the market. This act would be in violation of the anti-

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\(^{197}\) Steven Shavell, supra note 128, p. 235.
trust laws and could create substantial liabilities, including both fines and damages. The experts in the legal department of the parent company would realize this on the spot, but let us assume they are not involved in the sales activities of the subsidiary. And why should they? The risk of the parent company is limited. It may not receive a dividend from the subsidiary or, in the worst case, may lose the subsidiary itself if it falls into bankruptcy. But the parent’s assets are generally not at stake.

In this situation, parent company liability would alter the incentives and induce the parent’s management to closer monitor and control activities by the subsidiary that could create antitrust liabilities. The parent’s legal department could be instructed to scrutinize the subsidiary’s sales contracts and keep an eye on the subsidiary’s coordinated activities with the sole competitor. The parent’s management could also ensure that the subsidiary’s employees are educated and trained in antitrust compliance and that effective reporting mechanisms are installed. In a nutshell, liability can be a compelling incentive to make use of the parent’s better knowledge and its superior monitoring and control powers wherever they exist.

3. Enforcement costs

In Part III, it was assumed that enforcement costs were zero and that the competition agencies could manipulate both the magnitude of the sanction and the probability of its imposition in whatever way they liked. In reality, this is certainly not the case. Antitrust enforcement comes at substantial costs and the resources of competition agencies are limited. Their budgets are generally defined by legislators together with the budgets of other agencies and alongside all kinds of other public expenditures. Because of their limited means, competition agencies are constantly forced to prioritize and focus their investigative powers on those cases that seem most important for achieving the goals of competition policy. This can lead to low probabilities of detection and conviction in areas that are not considered as priorities. If the magnitude of fines is not increased accordingly, underdeterrence will result. Furthermore, even if enforcement and deterrence were socially optimal, society would still have to bear the administrative costs incurred by competition agencies in the course of their work.

Parent company liability can lower these administrative costs by shifting monitoring and enforcement responsibilities from the public to the private sphere. For many situations, it can be assumed that parent companies are capable of ensuring antitrust compliance of their subsidiaries at lower costs than public agencies could. Most corporate groups have reporting and control mechanisms in place that can be used efficiently for preventing, detecting and responding to antitrust violations anywhere in
the group. Using these internal control mechanisms will often be less expensive than relying on external investigations by competition agencies.

To be sure, using the using internal monitoring and control mechanisms for ensuring antitrust compliance will only work where the group management opposes antitrust violations and takes the necessary steps whenever such violations are discovered. Self-enforcement will not be successful where the top-management approves of unlawful behavior, and this will sometimes be the case. But it is certainly not true that the top-management is always involved in antitrust violations. Often enough have anticompetitive practices in the past been initiated by rank-and-file employees or managers of relatively independent subsidiaries without the knowledge and approval of their superiors. In these constellations specifically, parent company liability can help to activate internal control mechanisms for ensuring effective compliance with the antitrust laws. Where the costs of this kind of “private enforcement” are lower than the costs that would otherwise be incurred by public agencies, unnecessary expenses can be prevented and the overall result will be socially desirable.

In conclusion, the analysis in this part has shown that holding parent companies liable for antitrust infringements by their subsidiaries will often lead to efficient results. In particular, parent company liability takes care of the incentive problems that arise when subsidiaries lack sufficient assets to be effectively deterred by fines and damages. By putting the parent’s assets at stake, parent company liability induces the parent’s management to monitor and control what executives and employees at the subsidiary are doing. The parent company can use its power as a controlling shareholder to urge the subsidiary’s management to install compliance programs, offer compulsory education and training, and shape compensation and promotion schemes in a way that deters unlawful behavior. In larger corporate groups, most incentive schemes will be stretched across the entire group, anyway.

Like other forms of vicarious liability, parent company liability is most effective where the principal (the parent) can effectively monitor and control the agent (the subsidiary) and where the principal is itself not wealth-restrained. The preceding analysis has also shown that parent companies sometimes have superior knowledge about the risks following from antitrust infringements and possi-

198 See e.g. European Commission, Decision of March 11, 2008, COMP/38543, ¶ 471 – International removal services (parent companies claimed that they were not aware of their subsidiary’s unlawful activities and that the subsidiary conducted its business as an autonomous entity and itself largely determined its commercial strategy); European Commission, Decision of December 21, 2005, COMP/F/38443 – Rubber Chemicals (parent company claimed that it had nothing to do with its subsidiary’s commercial policy because it only acquired the subsidiary, which by the way accounted for merely 0.2% of the group’s annual turnover, as a necessary part of a larger package rather than for interest in its business and has since attempted to sell subsidiary several times without success).

199 This argument builds on the desirability of entity liability in general, see Jennifer Arlen & Reinier Kraakman, supra note 168, at 692 (stating that entity liability can reduce enforcement costs by inducing firms to sanction wrongdoers in those circumstances where firm-level sanctions are cheaper (or more accurate) than government-imposed sanctions and have the equivalent deterrent effect).
ble ways to reduce them. Executives and employees at the subsidiary may on occasion fail to see the “big picture” and might therefore engage in undesirable behavior if the management of the parent company does not interfere. Furthermore, parent company liability will often lead to lower enforcement costs because it makes use of the existing monitoring and control mechanisms of corporate groups. Parent companies will often be able to induce antitrust compliance by their subsidiaries at relatively low costs. In particular, it will often be cheaper and more effective to employ the internal control mechanisms of corporate groups than to involve the government, which is typically in a less suitable position to monitor and control a subsidiary’s conduct.

V. THE LIMITS OF LIMITED LIABILITY

As the preceding part has shown, parent company liability for antitrust infringements by subsidiaries can under certain circumstances indeed be justified. The arguments are basically the same as those justifying other forms of vicarious liability, like, for example, the liability of employers for wrongdoing of their employees under *respondeat superior*. There is, however, one significant difference between parent company liability and other forms of vicarious liability. Parent companies are generally protected by limited liability, and the limited liability principle serves a number of vital economic functions. In their seminal article *Limited Liability and the Corporation* (1985), Judge Frank Easterbrook and Daniel Fischel summarized six major economic functions of limited liability.201

First, limited liability decreases shareholders’ need to monitor the management. The separation of ownership and control generally leads to a classic principal-agent problem. The management can make decisions on the shareholders’ behalf, but may often be tempted to act in their own best interest rather than to the benefit of the shareholders. The shareholders can prevent this from happening if they pay close attention to what the management is doing, but such monitoring is costly. Limited liability reduces the stakes by enjoining the firm’s creditors from asserting claims to the shareholders’ personal assets, thereby restricting liability to the assets of the firm. This restriction substantially reduces share-

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201 Frank H. Easterbrook & Daniel R. Fischel, supra note 15. Many authors have repeated, qualified and extended these justifications, and although there is much consensus, the discussion about the advantages and disadvantages of limited liability seems set to endure, cf. for example the relatively recent debate about piercing the veil of limited liability companies (LLCs).

201 Another argument that has been made in favor of limited liability is that it helps to overcome risk aversion, see Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 Harv. L. Rev. 986, 995 (1986). Yet, it has been put forward as a counterargument that limited liability is not reducing risk but shifting it to tort victims, see Nina A. Mendelson, supra note 1, at 1220-1227 (criticizing the shift of risk toward tort victims as inefficient on the grounds that tort victims will often not be better risk bearers than shareholders).
holders’ risk and thus the need for monitoring. Limited liability makes it more rational to hold diversified and passive investments and so reduces the costs of operating the corporation.\footnote{Frank H. Easterbrook & Daniel R. Fischel, supra note 15, at 94. See also Nina A. Mendelson, supra note 1, at 1217 (“[...] limited liability efficiently enables individuals with money, but with neither the skill nor the information needed for business management, to invest in the enterprises of others.”).}

Second, limited liability eliminates the need to monitor other shareholders. Under a regime of unlimited shareholder liability, the probability that any one shareholder’s assets would be needed to satisfy a creditor’s claim would depend on the wealth of the other shareholders.\footnote{Frank H. Easterbrook & Daniel R. Fischel, supra note 15, at 95.} It would then be rational for shareholders to monitor other shareholders to prevent them from transferring assets. Limited liability makes the wealth of other shareholders irrelevant and avoids the costs of this kind of monitoring.

Third, limited liability promotes the free exchange of shares and thereby induces managers to act efficiently. Limited liability reduces the costs of purchasing shares by making their value independent from the wealth of shareholders and thus creating fungible securities. The fungibility of shares makes them easily tradable and so creates a market for corporate control.\footnote{Id., at 95-96.} Expectations of a low income stream will decrease share prices, which in turn will attract investors who think they can make the firm more profitable by installing a different management. Given this potential for replacement, incumbent managers will be in constant fear about their positions and always strive for the best possible results in their business decisions.

Fourth, limited liability leads to reliable and “fair” share prices. This point is closely related to the fungibility argument. By detaching share prices from the wealth of individual shareholders, limited liability allows shares to be traded at a single market price. The share price embodies all available information about the firm’s prospects and makes it unnecessary for investors to expend resources on gathering information.\footnote{Id., at 96.} They can instead rely on the market price as an indicator for the firm’s expected future income stream.

Fifth, limited liability allows more efficient diversification. Under a rule of unlimited liability, diversification would increase rather than reduce risk because every single investment would put an investor’s personal wealth at stake.\footnote{Id., at 96-97.} This threat would incentivize investors to minimize the number of securities held. Limited liability, in contrast, makes it a rational strategy to invest in many firms at the same time and thereby reduces both investors’ risk and firms’ costs of raising capital.
Sixth and last, limited liability facilitates optimal investment decisions. Managers will invest the firm’s capital in any project with a positive net present value. They do not need to shy away from risky projects because the investors’ risk is already reduced by limited liability. This protection makes it easier to raise capital for entrepreneurial ventures that may benefit society as a whole. Under a rule of unlimited liability, the management had to reject projects as “too risky” although they would produce a positive net present value. Because of these and other benefits of limited liability, courts and scholars in both the United States and the European Union are generally reluctant to allow exceptions from this principle.

One major detriment of limited liability is, however, that it allows opportunistic behavior toward tort victims. When shareholders want to invest in an activity that may cause harm to third parties, they can make use of limited liability and “hide” behind a thinly capitalized corporation. If everything goes well, the corporation will make a profit and will be able to pay a dividend to the shareholders. But if something bad happens, like a major catastrophic incident, shareholders will pull back from the company and leave creditors with only the corporation’s own assets.

While contract creditors can protect themselves against such risk by insisting on additional safeguards like guarantees, tort creditors cannot because they neither chose their injurers nor negotiate with them ex ante. Thus, limited liability allows shareholders to externalize the costs of risky activities to third parties, in particular tort victims and insurance systems. Creditors can only go after the corporation, and, if the corporation’s assets are exhausted at some point, will have to bear a substantial amount of their losses themselves. Shareholders, on the other hand, reap the benefits of their investments, but do not have to bear any losses beyond their capital contribution.

This imbalance of power leads to a classic moral hazard problem. Because shareholders do not personally have to bear all losses, they may urge the management to pursue overly risky projects, i.e. projects that are profitable only because some expected losses are externalized to third parties. Considering their net effect, such projects are welfare decreasing and thus socially undesirable. They would not be pursued absent limited liability because all expected losses had to be incurred internally and combined with other costs would outweigh the benefits.

Shareholders may even go further and deliberately form or operate a corporation in a way that effectively renders it judgment proof, leaving the corporation with only nominal assets and making it almost impossible for tort victims to recover damages. The most extreme forms of such welfare de-

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207 Id. 97.
208 E.g. Henry Hansmann & Reinier Kraakman, supra note 1.
creasing opportunistic behavior can be prevented by courts piercing the corporate veil, but this does not solve the more general problem of excessive risk taking. It follows that limited liability is not universally beneficial. Protecting shareholders from personal liability has many virtues, but it also incentivizes behavior that is socially not desirable.

Because of its ambiguous effects limited liability must be assessed in context. Not all justifications for limited liability are equally important under all circumstances. The same is true for the negative effect of allowing opportunistic behavior. In fact, it can be shown that some of the aforementioned arguments are less relevant with regard to parent company liability for antitrust violations by subsidiaries than they would be in other contexts. This is primarily for two reasons. Parent companies are no ordinary shareholders, and antitrust violations are no ordinary business activities.

The first point was already acknowledged by Judge Frank Easterbrook and Daniel Fischel in their aforementioned article defending limited liability. As they put it, “[a]llowing creditors to reach the assets of parent corporations does not create unlimited liability for any people”. A parent corporation is a corporation that owns a corporation. Its shareholders are twofold protected by limited liability: they are not liable for the parent, and the parent is not liable for the subsidiary. Holding the parent corporation liable for debts of the subsidiary will eliminate the latter protection, but not the former. Many of the benefits of limited liability will still be achieved because only one layer of liability protection is pierced while the other remains intact. This is in particular true for the benefits of risk diversification, liquidity, and monitoring by the capital market.

On the other hand, the problem of opportunism is said to be even greater in parent-subsidiary constellations than in publicly held corporations. Managers have less incentive to abstain from risky behavior or insure against potential losses because, in case the subsidiary falls into bankruptcy, they will likely find shelter at the parent company. And a parent may be particularly tempted to capitalize the subsidiary thinly and treat it as a field of experimentation. If things go well, the parent reaps the benefits. If they do not, the parent can abandon the subsidiary and invoke limited liability. A parent corporation is usually in an ideal position to make use of the asymmetry between costs and benefits because it fully dominates the subsidiary and thus easily controls decisions on capitalization and risk-taking. Thus, parent companies may be particularly prone to the opportunistic behavior described above.

Holding parent companies liable for debts of their subsidiaries eliminates the incentives for parents to behave opportunistically. If creditors can reach the parent’s assets, it will no longer be a via-

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211 Id.; see also Phillip I. Blumberg, supra note 1, at 624; David W. Leebron, supra note 1, at 1649.
212 Id.

Draft, April 29, 2016
ble strategy for the parent to use undercapitalized subsidiaries to externalize costs to third parties. Without the protection of limited liability, parent companies will no longer be able to entangle their subsidiaries in high risk activities and hide behind the subsidiaries’ veils if things go sour. The problem of moral hazard disappears.

All expected liabilities will be internalized and the company will be deterred from engaging in socially undesirable behavior. The parent company will not induce the subsidiary to engage in overly risky activities, but rather use its monitoring and control powers to prevent this from happening. As described above in Parts IV.2 and IV.3, parent company liability can induce parents to install compliance programs, conduct internal investigations or procure liability insurance for their subsidiaries (although probably not for antitrust violations). It is the major benefit of vicarious liability that the vicariously liable party is induced to prevent the primary wrongdoer from causing injury.

Does this mean that parent companies should generally be liable for debts of their subsidiaries? Well, maybe. But there is one major threat that has not been mentioned so far. Unlimited parent company liability could create incentives for disintegration. Take the example of a multinational oil and gas company that ships crude oil in tankers. Without parent company liability, the company may organize the oil shipping through subsidiaries, effectively limiting its liability in case a tanker runs aground. Each tanker could be owned and operated by a different subsidiary with only few other assets. This tactic would be a typical example of the opportunistic behavior described above.

Unlimited parent company liability for debts of their subsidiaries would render the aforementioned approach obsolete because it would stop parents from invoking limited liability to protect their assets. Would the parent now internalize all expected losses from potential oil spills and buy more insurance? That would be one option. Yet, another option would be to find an independent contractor (i.e. a completely unaffiliated legal entity) and commission it with shipping the oil. In fact, many oil and gas companies today do not own and operate tankers, but rather charter them (releasing them from liability in some cases, but not in others, depending on the exact terms of the contract).

Who would be the independent contractor? It could be a small, truly independent company, or another corporation with a dispersed ownership. The likelihood is that it would only have limited assets, enabling it to externalize the risk of an accident. The independent contractor could even be owned by the same investors as the oil and gas company. As this example illustrates, parent company liability can lead to another form of opportunistic behavior. Instead of creating corporate groups with parents

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213 See e.g. Nina A. Mendelson, supra note 1, (arguing that shareholders with a capacity to control corporate activity should be held fully responsible for corporate torts and statutory violations).

and subsidiaries, investors could set up formally unrelated corporations that interact through contracts, and would still be able to limit investor liability.

When the law holds a certain type of shareholders liable for the debt of a corporation – for example parent companies or controlling shareholders in general – while other types of shareholders are protected by limited liability, there is a strong incentive to become part of the latter group, but not the former. As illustrated by Figure 1 above, investors may, for example, simply resort to horizontal corporate structures in order to avoid falling into the trap of parent company liability. The possibilities for such restructurings are virtually limitless. Whatever the law sets as a criterion for unlimited shareholder liability, investors will be incentivized to search a way around it. In fact, the potential for evading liability through corporate reorganization is one of the main reasons why Professors Henry Hansmann and Reinier Kraakman have argued that all shareholders should be liable pro rata for torts committed in their corporation’s course of business.215 In the these scholars’ view, a general rule of unlimited shareholder liability is the only way to prevent corporations from engaging in the costly evasion tactics that would almost certainly follow from any partial rule.

How does this analysis play out in the antitrust context? First of all, most antitrust infringements are by their nature intentional torts.216 In the United States, the most egregious forms of violating the antitrust laws, like price-fixing, are also considered crimes. Like other torts and crimes, antitrust violations produce involuntary creditors who do not choose their debtor and thus cannot negotiate for additional safeguards ex ante. Antitrust violations are difficult to detect, but once they are revealed and litigated, antitrust fines and damages tend to be high. This situation seems quite susceptible to the opportunistic behavior described above.

Consider the example of a vertically integrated consumer products company that seeks to fix some retail prices with its major competitor on a certain geographic market. Assume that almost all business activities are operated by the parent, which also owns the production facilities and most of the

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215 Henry Hansmann & Reinier Kraakman, supra note 1, 1931.
216 William M. Landes, supra note 14, 653.
other major assets. A number of subsidiaries with basically no assets are responsible for distributing
the company’s product in different countries. Should the parent enter the price-fixing agreement itself,
or should the agreement be entered into by a subsidiary?

In the absence of parent company liability, the preferred option would be the latter because the
subsidiary’s lack of assets would effectively limit the potential for antitrust liability. If the price-fixing
agreement remains undetected for a long time, driving the potential liability higher and higher, it will
become more and more likely that the subsidiary will not be able to pay for all antitrust fines and dam-
ages. While the company will capture the benefits from the price-fixing agreement, its potential liabili-
ity will be limited to the subsidiary’s assets. Thus, the parent company will benefit from limited liabili-
ity while the victims of the antitrust violation – mainly customers paying higher prices – will inevita-
ably have to bear the externality of uncompensated losses. This illustration is of course only an example
and no proof that limited liability indeed induces companies to behave opportunistically in the antitrust
context. But given that most antitrust violations are committed intentionally and many of them involve
sophisticated schemes, it seems not entirely implausible that companies might occasionally try using
the opportunities provided by corporate law to limit their potential antitrust liability.

On the other hand, if parent companies are liable for antitrust infringements by their subsidiar-
ies, the same logic makes it plausible to imagine that companies will try to engage in socially undesir-
able disintegration to evade antitrust liability. This may, however, prove difficult. While it is certainly
possible to commission an independent contractor with shipping crude oil from Alaska to California, it
seems absurd to imagine that the same could be done with an antitrust violation. These violations are
so closely related to the company’s core business activity that it seems impossible to outsource them to
third parties – think about predatory pricing, tying and the like. Of course, a company might be able to
spin off an entire area of operations, transferring this part of its business into a separate legal entity and
protecting itself from liability. But by ceding any form of corporate control, the company would also
lose its possibility to facilitate the anticompetitive practice. A contract would not be an option because
such an agreement would itself be unlawful under §1 Sherman Act or Article 101 TFEU.

Against this background, it seems rather unlikely that parent company liability in antitrust will
lead to socially undesirable disintegration. The relatively rare occurrence of antitrust infringements
further strengthens this conclusion. Only few companies have a record of multiple antitrust violations.
Thus, on the whole it seems rather far-fetched that a company would engage in a costly and socially
undesirable restructuring to avoid parent company liability for antitrust infringements.
In conclusion, it seems fair to say that the undisputable benefits of limited liability do not necessarily preclude the single economic entity doctrine in EU competition law from being justified. To be sure, limited liability plays a major role in reducing monitoring costs, facilitating efficient capital markets and creating important incentives for managers. But limited liability also has negative effects, in particular with respect to involuntary creditors. Being protected from personal liability can induce investors to behave opportunistically and externalize liability risks to third parties. The result is a classic moral hazard problem. This argument applies with particular force to the parent-subsidiary context because subsidiaries are often used for purely instrumental reasons. Holding parent companies liable for debts of their subsidiaries is an efficient means to avoid opportunism and prevent the externalization of risks. These are important objectives that are also valid in the antitrust context. On the other hand, parent company liability may also induce investors to engage in socially undesirable reorganization efforts. But it seems doubtful that this effect will play a major role in antitrust.

VI. PARENT COMPANY LIABILITY AND INDIVIDUAL LIABILITY

To round out the assessment of economic justifications for holding parent companies liable for antitrust infringements by their subsidiaries, I compare in this section the virtues of parent company liability with those of holding managers and employees individually liable.\(^{217}\) Both forms of liability overlap with regard to at least one of their functions, but substantially differ in other respects. A full assessment of the advantages and disadvantages of individual liability for antitrust violations is of course beyond the scope of this paper.\(^{218}\) But comparing parent company liability and individual liability of managers and employees from a functional perspective helps to understand why the single economic entity doctrine is now well-established in EU competition law whereas no comparable doctrine has evolved in US antitrust law. Comparing parent company liability with individual liability also helps to illustrate what exactly can be achieved with parent company liability, and where the boundaries of the single economic entity doctrine lie.

When a comparative analysis brings to light a huge discrepancy, such as the one between EU and US antitrust law with respect to parent company liability, one usually expects that one approach turns out to be inferior to the other, potentially revealing a need for changing the law. Surprisingly, this

\(^{217}\) There is a huge body of literature on individual liability of managers and employees and its relationship to corporate liability, see e.g. Alan O. Sykes, supra note 19; A. Mitchell Polinsky & Steven Shavell, supra note 19; Jennifer Arlen, *Corporate criminal liability: theory and evidence*, in: Alon Harel & Keith N. Hylton (eds.), *Research Handbook on the Economics of Criminal Law*, p. 144 (2012).

\(^{218}\) Specifically for individual liability in the antitrust context see for example Peter Whelan, supra note 9, passim; Wouter P.J. Wils, *Is Criminalization of EU Competition Law the Answer?*, 28 *World Competition* 117 (2005).
is not the case here. As will be seen from the following analysis, it cannot be said that either the existence of parent company liability in EU competition law or its absence in US antitrust law are necessarily inefficient and therefore socially undesirable. In contrast, given the many differences in the respective enforcement regimes, and in particular the greater availability of individual liability in US antitrust law, both approaches may be justified in their respective context.

One point must be clarified at the outset. Throughout this paper, I have talked about parent companies being liable for antitrust infringements by their subsidiaries. This attribution is of course a blatant simplification. Being legal rather than natural persons, corporations are unable to act. To enter into contracts or to acquire property, corporations must be represented by individuals, specifically their executives and authorized employees. Correspondingly, antitrust violations are not committed by parent companies or subsidiaries, but by executives or employees working for these corporations. Their acts become acts of the corporation only by means of agency law.

As a consequence, deterrence must always reach individuals in order to be effective. This result can be achieved through either of the following two ways.

The first option is to address a sanction directly to the individual. Executives and employees typically strive for personal benefits when they engage in anticompetitive acts. They may hope for a bonus or a promotion in return for their outstanding effort to make the corporation more profitable. Or they may just want to secure their positions. A sanction can take away the personal benefits and make a behavior unattractive. The individual will take the sanction into account and, if the sanction is set at the optimal level, will abstain from socially undesirable antitrust infringements.

The second option is to address sanctions to the corporation. The corporation’s management will then use its influence over the employees to induce them to behave optimally. It can deter antitrust violations ex ante by adopting measures that reduce the benefits to wrongdoers and increase the

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219 See supra, Part II.
220 Consider the following statement by Justice Alito, writing for the majority of the U.S. Supreme Court in Hobby Lobby: “Corporations, separate and apart from the human beings who own, run, and are employed by them, cannot do anything at all.”, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2768 (2014) (internal quotation marks omitted).
221 Under the common law doctrine of respondeat superior employers are strictly liable for actions performed by their employees within the course of their employment. Similar doctrines exist in all EU Member States, but the European Courts rarely even mention them. They simply refer to the “undertaking” as a whole and usually do not bother to explain how they impute the individual acts of certain employees. Yet, it is important to keep in mind that antitrust violations are technically not committed by corporations, but rather by individuals.
222 A. Mitchell Polinsky & Steven Shavell, supra note 19, 240 (stating that if firms are made strictly liable for their harms, they will design rewards and punishments for their employees that will lead employees to reduce the risk of causing harm, since firms will want to reduce their liability payments).
costs of anticompetitive acts. The management can, for example, change the corporation’s compensation and promotion policies in a way that makes antitrust violations unattractive, set up and enforce compliance programs and closely monitor the employees. Thus, even though the sanction is targeted at the corporation, it will ultimately reach the acting individuals. This indirect way of deterring individual wrongdoing will often be efficient since corporations can provide many vital forms of prevention and policing at lowest costs. Where corporations are able to induce their employees to behave optimally, there is no need for the state to impose additional individual liability.

Nevertheless, the individual liability of executives and employees can be necessary to overcome a lack of incentives in one of the following two situations. First, individual liability can mitigate the problem of underdeterrence that arises when the corporation has insufficient assets. If the corporation is judgment proof and therefore not sufficiently deterred by corporate liability, the management’s efforts to induce employees to behave optimally will also be less than optimal. Thus, the above described mechanism of indirectly deterring individual wrongdoing through corporate liability will in this situation not lead to optimal deterrence and the result will therefore be inefficient. To prevent a lack of incentives under such circumstances, additional sanctions can be addressed directly to the acting individuals. These employees will then receive their incentives to behave optimally not from their employers, but directly from the state. Although involving the state may lead to higher enforcement costs, the result will still be efficient as long as the additional costs of enforcement are lower than those of the undesirable behavior that will now be deterred.

Second, individual liability can be necessary when the corporation’s management cannot be expected to induce executives and employees to behave optimally because of agency costs and related problems. It may well be the case that those who are in charge of prevention and policing are themselves complicit in the wrongdoing. Imagine a price fixing agreement contrived by a senior manager. If managers cannot be trusted to do the right thing for the corporation because they have conflicting

223 The firm can also investigate ex post and cooperate with the government in order to increase the probability that the wrong will be detected, see Jennifer Arlen, Corporate criminal liability: theory and evidence, in: Alon Harel & Keith N. Hylton (eds.), Research Handbook on the Economics of Criminal Law, p. 144, 145 (2012).

224 Jennifer Arlen, Corporate criminal liability: theory and evidence, in: Alon Harel & Keith N. Hylton (eds.), Research Handbook on the Economics of Criminal Law, p. 144, 145 (2012); Reinier Kraakman, Corporate Liability Strategies and the Costs of Legal Control, 93 Yale L.J. 857, 867 (1984) (stating s that enterprise liability is the normal form of corporate liability in the prescriptive as well as the descriptive sense, and that managerial liability should be viewed as an ancillary form – as a kind of backstop for occasions when enterprise liability is likely to fail).

225 See e.g. Reinier Kraakman, supra note 224, at 869.

226 There seems to be a general consensus that agency problem frequently arise in the context of antitrust violations, see e.g. Damien Geradin, Anne Layne-Farrar & Nicolas Petit, supra note 8, ¶ 6.65 and note 88 (stating that given the principal-agent relationship, parent companies cannot know all of the actions that their subsidiaries take and pointing in particular to the case of “major multinational undertakings organized on local distribution structures, where agents’ incentives are often well hidden from the eyes of management”).

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personal interests, it may be necessary to create additional incentives for socially optimal behavior by imposing individual liability.

The same will be true if the corporation is for other reasons unable to induce its employees to behave optimally. This may, for example, be the case where even the highest sanction imposed by a corporation is insufficient to deter an employee’s wrongdoing, for example because the employee has limited assets. In such cases, it will be in the best interest of the corporation, its shareholders, and society as a whole if the state addresses additional incentives directly to the acting individuals. If executives and employees face individual liability, their incentives will no longer depend on internal prevention and policing measures of the corporation.

This short overview illustrates that the functions of parent company liability and individual liability overlap to a certain extent. Both aim, *inter alia*, at maintaining effective incentives for socially optimal behavior in case the subsidiary is underdeterred. If the subsidiary lacks sufficient assets, its management will partially disregard sanctions addressed to the corporation and can therefore not be expected to induce the employees to behave optimally.

Parent company liability solves this problem by inducing the management of the parent company to monitor and control the subsidiary’s activities. Due to its position as a controlling shareholder, the parent can induce the subsidiary’s management to adopt such prevention and policing measures as are needed to keep the subsidiary’s employees from engaging in unlawful behavior. If necessary, the parent’s management will also be able to address incentives directly to the subsidiary’s executives and employees. This situation is where parent company liability comes closest to individual liability, which also solves the problem of insufficient corporate assets by addressing incentives directly to the acting individuals. The major difference is that the incentives are imposed by the parent company in the first case, but imposed by the state in the second case.

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227 A. Mitchell Polinsky & Steven Shavell, supra note 19. It should be noted that Professors Polinsky and Shavell also argue that, to the extent that employees face public sanctions, the firm’s liability should be reduced because otherwise the prices of the firm’s products will exceed the social costs of production, id.

228 There is usually no need for the state to resort immediately to nonmonetary sanctions, in particular imprisonment. As Professors Polinsky and Shavell rightly point out (id., 240), the state will often be able to collect monetary sanctions from individuals even though firms are no longer able to do so. The reason is that individuals tend to prioritize the payment of criminal fines because the state usually imposes a jail sentence in lieu of the fine if the fine is not paid.
The preceding comparison does, of course, not suggest that parent company liability and individual liability are complete substitutes. Far from it. Both overlap only to a certain extent and differ in many other respects. Parent company liability makes use of the internal monitoring and control mechanisms of corporate groups. It incentivizes the parent’s management to use the parent company’s controlling stake in the subsidiary to induce the subsidiary’s executives and employees to behave optimally. In this way, parent company liability solidly takes care of the underdeterrence problem that arises when a subsidiary has insufficient assets.

Because the parent’s management is usually in a good position to monitor the subsidiary, parent company liability is a relatively inexpensive enforcement instrument. It is particularly effective when the parent company possesses superior information about antitrust compliance and enforcement. On the other hand, parent company liability can of course only contribute to deterrence where a parent company actually exists, which will often enough not be the case. This drawback makes parent company liability a somewhat arbitrary enforcement instrument that effectively targets corporate groups, but does not otherwise contribute to solving the underdeterrence problem.

Holding executives and employees individually liable for antitrust violations is equally suited to maintain deterrence even if a corporation is underdeterred because of insufficient assets. Individual liability has the big advantage that it can be employed universally and does not only work in parent–subsidiary constellations. Furthermore, individual liability does not only take care of the underdeterrence problem, but it is also well suited to provide effective incentives to employees where the corporation will be unable to do so because of agency costs and related problems. In many cases, some
employees will simply be beyond the corporation’s reach, for example because they do not care sufficiently for monetary incentives.\textsuperscript{229}

On the other hand, individual liability will often lead to higher enforcement costs, especially when it involves imprisonment as it does in the United States where prison sentences of up to ten years can be imposed for certain antitrust violations.\textsuperscript{230} There are of course situations in which individuals are simply immune to monetary sanctions because they themselves are judgment proof and do not care for pecuniary incentives.\textsuperscript{231} Corporations will in these situations not be able to incentivize their employees to behave optimally which is why it may be necessary for the government to impose nonmonetary individual sanctions, including prison sentences, as “deterrents of last resort”.\textsuperscript{232}

The point of all this is not to argue that either parent company liability or individual liability is superior in the antitrust context. Both are quite distinct enforcement instruments that share certain functions, but differ substantially in other respects. Pointing out the overlap did not serve the purpose of making a policy argument about either of the two enforcement instruments. A broad analysis of both instruments is far beyond the scope of this paper and would certainly need to involve some kind of empirical assessment. Until such study is conducted, nothing more can be concluded than that both parent company liability and individual liability can be justified under certain circumstances.

The overlap with regard to the problem of underdeterrence when a subsidiary has insufficient assets only means that parent company liability reduces the need for individual liability, and individual liability reduces the need for parent company liability. It does not mean, however, that one of the enforcement instruments is unnecessary, or that they should never be combined. Neither can it be said that one of the two instruments would be preferable in case a combination is not wanted. As the preceding analysis has shown, parent company liability and individual liability are partial rather than complete substitutes. Thus, there may well be need for both.

The partial overlap of the functions of parent company liability and individual liability may, however, explain why there is no equivalent to the European Court of Justice’s single economic entity doctrine in US antitrust law. The individual liability of executives and employees has always been an important instrument in US antitrust enforcement. Given the opportunity of holding individuals liable

\begin{itemize}
\item \textsuperscript{229} Id., 240. One reason why the corporation may be unable to effectively incentivize its employees is that the corporation can only impose monetary sanctions, which will have little effect if employees are judgment proof or are have only limited assets. Another reason is that employees are usually not fully dependent on the firm that employs them and might be able to escape punishment by seeking alternative employment, or retiring.
\item \textsuperscript{230} Supra, Part II.3.
\item \textsuperscript{231} Steven Shavell, supra note 128, p. 509-512.
\item \textsuperscript{232} This is not the place to discuss the virtues of sending people to prison for antitrust violations. Let me just mention that it has been argued that nonmonetary sanctions are more effective deterrents than monetary sanctions because they cannot be indemnified by firms. Imprisonment is said to be the only penalty that reaches the wrongdoer with certainty.
\end{itemize}
both criminally and in private antitrust actions, US courts may never have experienced a lack of deterrence that could have caused them to consider extending liability to parent companies. And even if they have, corporate group structures are traditionally less common in the United States than in Europe,\(^{233}\) which means that parent company liability may simply not have been an option in many cases.

In contrast, individual liability for antitrust violations played practically no role in the European Union when the European Court of Justice contrived the single economic entity doctrine in the 1970s. Underdeterrence was a real problem for antitrust enforcers at that time, and corporate groups were quite common in Europe (as they still are). Against this background, it was plausible and appropriate from an economic perspective to use the broad wording of the European Treaties to extend antitrust liability to parent companies.

Furthermore, given that individual liability is until today more commonly accepted in the United States than in Europe, it may well be the case that parent company liability is still necessary for achieving effective antitrust deterrence in Europe, but that it is dispensable in the United States. It remains to be seen if a need for parent company liability will at some point arise in US antitrust enforcement. Similarly, future cases will illuminate if the increasing spread of individual liability in Europe will have a bearing on the relevance of the single economic entity doctrine.

![Figure 3: Vicarious antitrust liability in the United States (US) and the European Union (EU)](image)

**VII. PARENT COMPANY LIABILITY BEYOND ANTITRUST LAW**

In this last part, I leave the antitrust context behind and briefly explore what can be inferred from my findings about parent company liability for corporate torts in general. Many of the things that have been said in previous parts of this paper, and in particular in Parts IV and V, apply to a certain extent to all parent-subsidiary constellations.

Parent company liability is a form of vicarious liability and shares many of its justifications. It solves the problem that occurs when an agent (the subsidiary) is underdeterred because of insufficient

\(^{233}\) See supra note 195.
assets to pay a fine or damages. It maintains incentives for efficient behavior by putting the assets of the principal (the parent) at stake in addition to those of the agent. Parent company liability induces the management of the parent company to monitor and control executives and employees at the subsidiary, and to prevent them from engaging in unlawful behavior. This supervision can be done by installing compliance programs, through education and training, and by adopting compensation and promotion schemes that incentivize employees to take adequate precautions and obey the law.

The mechanics of holding a parent company liable for torts or crimes committed by its subsidiaries do not differ from those of holding an employer liable for the acts of her employees (respondeat superior), holding parents liable for acts of their children, or holding a car owner liable for acts of the driver. The economic logic behind all forms of vicarious liability is the same – restoring optimal deterrence by targeting the supervisor where the supervisee is underdeterred.

Two aspects distinguish parent company liability from other forms of vicarious liability. The first is that the relation between a parent company and a subsidiary is not based on contract (as in case of employer and employee), family (parent and child) or favor (car owner and driver), but rather follows from corporate law. And corporate law puts the parent’s management in a unique position to monitor and control the subsidiary. The parent can use its controlling stake in the subsidiary to induce the subsidiary’s executives and employees to behave optimally. It can make use of the subsidiary’s reporting obligations, and set up the necessary monitoring and control mechanisms, and incentives schemes. Where the parent’s management lacks formal power to make decisions for the subsidiary, it can use the parent’s position as a controlling shareholder as leverage to induce the subsidiary’s management to make the right decisions on its own. The subsidiary is typically fully dependent on its parent company and will react to the signals it receives.

The parent company’s power to elect and replace the subsidiary’s management is particularly important in this respect. That the parent could even dissolve the subsidiary further illustrates how corporate law and economic realities provide parent companies with almost universal control over their subsidiaries. Against this background, the parent-subsidiary constellation seems particularly suited for vicarious liability. Besides being in a good position to monitor and control their subsidiaries, parent companies typically have more assets and can thus be expected to react to incentives that, because of the judgment proof problem, fail to reach the subsidiary.

Furthermore, parent companies will often have superior knowledge that puts them in a better position to take precautions and prevent unlawful behavior than even the subsidiary itself. Last but not least, using already existing mechanisms of corporate monitoring and control makes parent company
liability relatively inexpensive to enforce – especially compared to enforcement instruments like the individual criminal liability of managers and employees that rely more on the state, which is usually in a less suitable position to monitor and control subsidiary behavior.

The second aspect that distinguishes parent company liability from other forms of vicarious liability is that parent company liability “pierces the corporate veil” and thus means an exemption from the well-established principle of limited liability.

But, as I described in Part V under reference to the seminal works in the field, limited liability is difficult to justify where it is used to fend off tort victims. Limited liability allows shareholders to “hide” behind the corporation and can induce them to behave opportunistically. Because they are protected by limited liability, shareholders may urge the corporation’s management to engage in overly risky activities. They may in effect use the corporate form to externalize accident risks to tort victims while gaining all the benefits from a successful business.

These problems are particularly acute where a corporation is dominated by a controlling shareholder as it is always the case in parent-subsidiary constellations. Parent companies may be tempted to use their controlling stake in a subsidiary to induce the subsidiary’s management to engage in high risk activities even if this may lead to the commission of torts and crimes. Because such behavior is, of course, socially undesirable, there is a strong case for holding parent companies liable for all debt their subsidiaries incur toward involuntary creditors. Limited liability is not justified where it is used to externalize costs to tort victims and insurance systems. Thus, the economic justifications for limited liability do not argue against parent company liability where involuntary creditors are affected.

In conclusion, parent company liability can contribute to deterrence wherever the following four conditions are met: (1) a parent company and a subsidiary exist; (2) the subsidiary is underdeterred because of wealth restrictions; (3) the parent has more assets than the subsidiary; (4) the parent is in a good position to monitor and control the subsidiary. These prerequisites may be fulfilled quite frequently, in particular where parent companies use undercapitalized subsidiaries to avoid liability from high risk activities. Environmental harms, hazardous technologies, and product liability are fields where parent company liability could be employed to cope with the problem of underdeterred subsidiaries.

Holding parent companies liable for wrongs by their subsidiaries will generally require clear statutory provisions because courts will otherwise not be inclined to do anything more than occasionally pierce the corporate veil. But EU competition law and the debate about CERCLA before Bestfoods
show that the use of vague terms like “undertaking” and “operator” may already be enough to induce interpretations that look beyond the legal entity.\footnote{See supra note 65 and the accompanying text.}

In the end, it will depend on courts and legislators to figure out in which situations parent company liability must be imposed in order to maintain effective deterrence of corporate torts and crimes and to prevent parent companies from behaving opportunistically. The preceding analysis has shown that parent company liability can be an effective enforcement instrument because parent companies are in a good position to oversee their subsidiaries’ behavior. They can use the many formal monitoring and control mechanisms that are in place between parents and their subsidiaries and that can easily be used for ensuring subsidiaries’ compliance with the law.

Although this is not news, parent company liability is so far often neglected in discussions about how best to deter corporate torts. Scholars have been much more concerned with the delimitation of corporate liability on the one hand, and the individual liability of managers and employees, on the other.\footnote{See e.g. Alan O. Sykes, supra note 19; A. Mitchell Polinsky & Steven Shavell, supra note 19; Jennifer Arlen, \textit{Corporate criminal liability: theory and evidence}, in: Alon Harel & Keith N. Hylton (eds.), \textit{Research Handbook on the Economics of Criminal Law}, p. 144 (2012).} This disregard for parent company liability is a mistake. Because it serves a function similar to individual liability, but often has lower social costs, parent company liability deserves a greater role in the deterrence of corporate torts and crimes.

**CONCLUSION**

The analysis in this paper has shown that it can indeed be economically justified to hold parent companies liable for antitrust infringements by their subsidiaries as the European Court of Justice has done since its landmark decision in \textit{Imperial Chemical Industries}. Parent company liability serves an important function when the subsidiary has insufficient assets and is therefore not adequately deterred by antitrust fines and damages. Parent company liability puts the parent’s assets at stake in addition to those of the subsidiary and thereby induces the parent’s management to exercise its influence over the subsidiary to prevent it from infringing the antitrust laws.

The many formal monitoring and control mechanisms that are in place between the parent and its subsidiary put the parent in a particularly good position to induce the subsidiary’s executives and employees to obey the law. The parent’s management can, among other things, adopt compliance programs, educate and train the subsidiary’s personnel and set up compensation and promotion schemes that create the right incentives. Because of these and other readily available monitoring and control...
mechanisms, the parent will often be in a much better position than the government to induce the subsidiary’s employees to behave in the desired way. This benefit makes parent company liability relatively inexpensive compared to other enforcement instruments like individual criminal liability of managers and employees that rely more on the state. The case for parent company liability is further strengthened by the fact that parent companies often have superior information and can sometimes ensure antitrust compliance at lower cost than the subsidiary itself.

Although parent company liability is in conflict with the principle of limited liability, holding parent companies liable for antitrust infringements by their subsidiaries can still be expected to promote efficiency. The many virtues of limited liability lose much of their normative force when limited liability is used to shield against involuntary creditors. Limited liability allows parent companies to behave opportunistically and use subsidiaries to externalize liability risks. Against this background, it has been argued that parent companies should generally not be allowed to invoke limited liability to protect themselves against involuntary creditors of their subsidiaries. Given that the economic justification for limited liability is weak when involuntary creditors are concerned, limited liability does not detract much from the attractiveness of parent company liability in the antitrust context. Instead, the prospect of preventing parent companies from engaging in opportunistic behavior and externalizing antitrust losses to third parties makes it even more desirable to engage them in the supervision of their subsidiaries and hold them jointly liable where infringements nonetheless occur.

It has been seen from the comparison between US and EU antitrust enforcement that the appeal of holding parent companies liable for antitrust infringements by their subsidiaries very much depends on the context, particularly on the existence of other enforcement instruments. The greater availability of individual criminal liability, including prison sentences of up to ten years, may well be the reason why an equivalent to the European Court of Justice’s single economic entity doctrine has never evolved in US antitrust law. This insight could have a bearing on future developments in EU competition law enforcement because individual liability seems to be on the rise in some EU Member States, and private antitrust enforcement is currently strengthened through the EU Directive on Antitrust Damages Actions. The justification for parent company may decrease in the future when other enforcement instruments with overlapping functions become more important.

Although overdeterrence of antitrust violations is currently not a problem, legislators and competition agencies must be aware that many enforcement instruments serve similar functions. The multitude of tools available for enforcing the antitrust laws may raise practical questions, for example about the magnitude of fines and damages when firms increasingly have to pay both. Future research will
need to deal with the growing interdependencies between different enforcement instruments, and it may be that parent company liability will at some point become obsolete.

As it stands today, however, holding parent companies liable for antitrust infringements by their subsidiaries is an efficient way to approach the problem of underdeterred subsidiaries and thus a valuable contribution to EU competition law enforcement.