SHOULD HAVE SCOLDED YOUR KIDS!:

HOLDING FOREIGN-PARENT CORPORATIONS RESPONSIBLE FOR THEIR SUBSIDIARIES' PRICE-FIXING BEHAVIOR IN THE UNITED STATES, CANADA, AND THE EUROPEAN UNION

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ABSTRACT

As multinational corporations continue to globalize and take over established companies in other markets, some merging corporations, accidentally or purposefully, develop cartels through mergers and acquisitions. Each country's statutory scheme for antitrust violations varies and has different exterritorial applications. The disparity between these countries antitrust regimes fails to protect consumers worldwide and does not offer corporations predictability in avoiding antitrust liability. A uniform antitrust law would prevent corporations from hiding in countries with liability-shielding rules to avoid price-fixing liability. Additionally, uniformity encourages governments to create a fair profit cultures without promulgating leaner laws to attract businesses in a "race to the bottom."

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INTRODUCTION

Multinational corporations continue to expand globally and take over established companies in other markets.[1] Corporations move into other markets to take advantage of vibrant economies, possible growth opportunities, and tax advantages; mergers have become prominent. Some merging corporations, accidently or purposefully, develop cartels through mergers and acquisitions ("M&A").[2] The parent corporation or

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[1] *See, e.g.*, *Brian Roach, Corporate Power in a Global Economy*, GLOB. DEV. & ENVTL. INST., TUFTS UNIV., http://www.ase.tufts.edu/gdae/education_materials/modules/corporate_power_in_a_global_economy.pdf (last visited Apr. 9, 2016); DEBORAH PHILLIPS & GARRY WHANNEL, THE TROJAN HORSE: THE GROWTH OF COMMERCIAL SPONSORSHIP 245 (2013) ("Major corporations are also able to expand into this field through take-over, acquiring smaller companies who have established a track record in a particular field.").

[2] Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST 343, 361 (2011) (citing Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962) (noting that it is difficult to deprive oligopolists of their position if they have achieved it through accidental events)).

its subsidiary sometimes collude and fix prices.[3] Because a subsidiary can price-fix with or without direction from a foreign-owned corporation, which entity is liable for the antitrust violation? This Note will call this liability "corporate-subsidiary liability."

Each country's statutory scheme for antitrust violations varies and has different extraterritorial applications.[4] Most developed countries have a long-standing set of antitrust laws to combat antitrust violations. Although developed with a similar purpose, mature legal regimes have inevitably diverged because countries' policy priorities and political agendas vary.[5] This Note analyzes the differences in antitrust laws in three mature legal regimes and suggests uniform antitrust guidelines to protect consumers worldwide and to offers corporation predictability.

The United States,[6] Canada,[7] and the European Union[8] are heavily involved with M&A activity[9] and, as a result, have developed

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[3] *See* DAVID MEDHURST, A BRIEF AND PRACTICAL GUIDE TO EU LAW 152 (2008).

[4] For example, in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), the court assessed the "jurisdictional rule of reason," whether the exercise of extraterritorial jurisdiction is considered reasonable must be determined by evaluating several factors, including (1) the degree of conflict with foreign law or policy, (2) the nationality of the parties, (3) the relative importance of the alleged violation in the United States compared to that abroad, (4) the availability of a remedy abroad, (5) the existence of intent to harm or affect American commerce and its foreseeability, (6) the possible effect upon foreign relations if the court exercises jurisdiction and grants relief, (7) whether a party will be forced to perform an act illegal in either country or be under conflicting requirements, (8) whether the court can make its order effective, (9) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances, and (10) whether a treaty with the affected nation has addressed the issue. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979) (citations omitted). Antitrust law, however, spreads across countries' lines. Instead, "England, France, Canada, and Australia are among the countries that have passed blocking legislation at least in part in response to perceived abuses by the United States in the extraterritorial application of its antitrust laws." *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 LAW & CONTEMP. PROBS. 197, 198 (1987), *available at* http://scholarship.law.duke.edu/lcp/vol50/iss3/13.

[5] INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 8 (J. W. Rowley & Donald I. Baker eds., London, Sweet & Maxwell 1996).

[6] *See generally id.*

[7] *See* Julius Melnitzer, *Canada First in Global Inbound Mergers and Acquisitions Volume*, FIN. POST (Oct. 22, 2014), http://business.financialpost.com/2014/10/22/canada-first-in-global-inbound-mergers-and-acquisitions-volume/.

[8] *See* Klaus Regling, *Mergers and Acquisitions Note*, EUROPEAN COMM'N (Apr. 2007), http://ec.europa.eu/economy_finance/publications/publication6414_en.pdf.

[9] In 2014 alone, companies brokered $2.2 trillion in deals; a sixty-seven percent increase from the year before. Peter Eavis & David Gelles, *Stampede of Mergers Could Mean Growth, or Irrationality, Ahead*, N.Y. TIMES (Aug. 7, 2014), http://dealbook.nytimes.com/2014/08/07/stampede-of-mergers-could-mean-growth-or-irrationality-ahead/?_php=true&_type=blogs&_php=true&_type=blogs&ref=business&_r=1.

robust antitrust laws. Government agencies use antitrust laws as a "crucial guarantor of the integrity of free markets."[10] Government agency investigations often involve assessing a corporation's stock return,[11] market dominance,[12] and ability to price-fix.[13] Agencies target everything from telecommunications[14] to candy manufacturers[15] to consumer electronics manufacturers.[16] Additionally, the three regions boast well-developed antitrust laws to prevent price-fixing but varied approaches to "corporate-subsidiary liability."[17]

In the fictional case below, changes in facts alter "corporate-subsidiary liability" in the four scenarios. Is the government agency disciplining the correct entity? Will a government hold a foreign parent corporation liable for its subsidiary antitrust violation? This Note will answer these questions.

Electrocorp, a foreign corporation, purchases a domestic subsidiary, Microsub. Prior to the purchase, Microsub colluded with many microchip manufacturers to raise the prices on microchips in the market. As a result, Microsub and its "cartel" cornered the market and prevented new smaller corporations from entering. The cartel charged everyday consumers high prices, passing the cost of the parent

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[10] Anne K. Bingaman, Assistant Attorney Gen., Antitrust Div. of U.S. Dep't of Justice, International Cooperation and The Future of U.S. Antitrust Enforcement, Address before the American Law Institute 72nd Annual Meeting (May 16, 1996), *available at* http://www.justice.gov/atr/public/speeches/0656.htm.

[11] B. Espen Eckbo, *Mergers and the Value of Antitrust Deterrence*, 47 J. FIN. 1005, 1007 (1992).

[12] *See* Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control*, 11 J. FIN. ECON. 5, 28 (1983).

[13] *See generally* European Commission, *Cases > Commission decision*s, EUROPEAN COMM'N, http://ec.europa.eu/competition/sectors/media/cases.html (last visited Oct. 26, 2014).

[14] *$50M Comcast Consumer Antitrust Class Action Settlement Approved*, BIG CLASS ACTION (Dec. 17, 2014), http://www.bigclassaction.com/settlement/50m-comcast-consumer-antitrust-class-action.php.

[15] Gina Kashuk, *Hershey Price-Fixing Fine Costs $4* Million, INQUISITR (July 9, 2014), http://www.inquisitr.com/838891/hershey-price-fixing-fine-costs-4-million.

[16] *LCD Makers Agree $37M Settlement in Canadian Price Fixing Class Action Lawsuit*, BIG CLASS ACTION (Oct. 24, 2014), http://www.bigclassaction.com/settlement/lcd-makers-agree-37m-settlement-in-canadian-price.php.

[17] Antitrust law has developed because of the increase of foreign-owned subsidiaries had risen in these countries. *See* Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (2004); *see* Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27, 29 U.S.C §§ 52–53 (2014); *see also* Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012–13); *see* Competition Act, R.S.C. 1985, c. C-34 (Can.); *see* Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (L 115) 51, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2008:115:TOC; *see also* The Merger Regulation: Council Regulation 139/2004 EC, Jan. 29, 2004, 2004 O.J. (L24) 1–24, *available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0139.

corporation's inaction to consumers. With a small increase in the microchip's price, the subsidiary's revenue increased by billions of dollars. When the government discovered the price-fixing, government agencies fined Microsub but discovered that the subsidiary was undercapitalized. Electrocorp escaped investigation because it was not directly involved with price-fixing. Worse, the "cartel" controlled political decision-making through lobbying efforts made possible by undue profits, and investigations slowed.

Consumers, business entities, and the government begin to notice the collusion. The government filed a lawsuit against each individual company within the cartel. Who is liable for any damages, fines, or costs from price-fixing: Electrocorp or Microsub? In Scenario 1, Electrocorp wholly owns[18] Microsub. After Electrocorp gained control of Microsub, Electrocorp discovered Microsub's price-fixing activities. Electrocorp managed most of the day-to-day operations of Microsub. Electrocorp profited considerably from the lucrative purchase of Microsub. What if, in Scenario 2, Microsub is bankrupt or undercapitalized and cannot pay the government agency's fine? What if, in Scenario 3, Electrocorp owned Microsub but had no control over Electrocorp's day-to-day activities and no knowledge of the price-fixing? Finally, what if, in Scenario 4, Electrocorp owned less than fifty percent of Microsub?[19]

Both corporations and government agencies are concerned with antitrust laws. Before entering a market, corporations are forced to carefully analyze the jurisdiction specific law[20] and create corporate subsidiary structures that reduces "corporate-subsidiary liability."[21] On the other hand, a country must exert some control on these entities, as

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[18] "When a subsidiary company . . . is owned entirely (100%) by its parent company." *Wholly Owned Subsidiary*, TRANSLEGAL (Nov. 19, 2009), https://www.translegal.com/common-mistakes/wholly-owned-subsidiary.

[19] These four scenarios only modify one variable but could impact a corporation's liability variably. Scenario 1 is the base scenario where the corporation has a majority ownership in the subsidiary with a well-capitalized subsidiary. The foreign corporation knows about the price-fixing violation and has full control over the day-to-day activities. Scenario 2 involves an undercapitalized subsidiary. Scenario 3 involves a corporation with no day-to-day control over the activities of its subsidiary. Scenario 4 is a corporation that owns less than 50% of the subsidiary. This Note, however, does not intend to explain or reconcile these differences. Rather, this Note will use the fictional scenarios to underscore the varied application of law.

[20] Realistically, the corporation's legal counsel is faced with the expensive, extensive task of summarizing a countries' antitrust law and identify potential legal conflicts.

[21] *See* Jeffrey S. Tenenbaum, *Forming and Operating Subsidiaries and Related Entities: Maximizing the Benefits and Minimizing the Risks*, VENABLE LLP, https://www.venable.com/forming-and-operating-subsidiaries-and-related-entities-maximizing-the-benefits-and-minimizing-the-risks-01-01-1999/ (last visited June 28, 2015).

their conduct can be destructive to consumers. Government agencies may use "corporate-subsidiary liability" to hold corporations accountable for encouraging anticompetitive behavior from its subsidiary, which increases the day-to-day prices for consumers. A government agencies' enforcement, however, lacks consistency because regulatory bodies issue fines at their own discretion.[22] In response, a uniform antitrust regime, based on current antitrust statutes and already-developed case law, allows corporations to predictably define "corporate-subsidiary liability."

A uniform antitrust regime creates a predictable set of rules for corporations to follow. In fact, legislatures and commentators suggested a uniform system of laws in several other fields.[23] A uniform antitrust law would prevent corporations from hiding in countries with liability-shielding rules to avoid price-fixing liability. For example, some states create unfavorable laws for labor unions to attract corporations.[24] Additionally, uniformity encourages governments to create a fair profit cultures without promulgating leaner laws to attract businesses in a "race to the bottom."[25] Lastly, simplifying the law or summarizing the risks will help corporations shift their focus from risk and legal assessment to financial assessment.

This Note will proceed in three parts. Part I describes the governmental agencies, regulators, and the goals for preventing price-fixing of foreign-owned subsidiaries and their treatment of parent corporations in the United States, Canada, and the European Union. Part

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[22] *See generally* Abbott Lipsky et al., *Cartel Enforcement and Litigation in the EU and the USA*, LATHAM & WATKINS 13, http://www.lw.com/presentations/cartel-enforcement-and-litigation-in-us-and-eu (last visited Oct. 21, 2014). As a result, an antitrust analysis becomes a very fact intensive process. U.S. DEP'T. OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, sec. 1 (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[23] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 2 (3d ed. 1999), *available at* http://www.cisg.law.pace.edu/cisg/biblio/honnold.html; *see, e.g.*, Kurt H. Nadelmann, *The United States and Plans for a Uniform (World) Law on International Sales of Good*, 112 U. PA. L. REV. 697, 698 (1964); *but see* Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 175 (2005) ("The growing call by regulators and scholars to widen and deepen international cooperation in competition policy should be resisted.").

[24] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 432 (2011) (discussing states competing to attract corporations by writing corporation charters for labor unions that provide inadequate protections to creditors).

[25] Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking The "Race-to-the-Bottom" Rationale For Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 (1992).

II discusses how the courts and governmental agencies[26] in the United States, Canada, and the European Union enforce "corporate-subsidiary liability." Part III applies the law to the four scenarios described above, compares the enforcement of price-fixing between these three regions, and suggests a uniform approach to preventing this behavior.

I. BACKGROUND

The United States, Canada, and the European Union developed divergent antitrust laws on "corporate-subsidiary liability," each originating from varied historical origins. But each region's antitrust statutory construction involved a careful balance of sometimes-conflicting policies: fair profit, competition, liberty, equality, and encouraging business.[27] These policies contributed to the divergent antitrust laws that riddle the United States, Canada, and European Union.[28] Understanding the history of antitrust law in different countries is the first step to developing and identifying a convergent international goal in antirust policymaking.

A. THE UNITED STATES ANTITRUST LAW: THE THREE ACTS

In the United States, the first antitrust law—the Sherman Antitrust Act ("Sherman Act")—was passed in 1890,[29] but it grew from other statutes during earlier periods of US history.[30] The main goal of US policymakers was to create a comprehensive charter of economic liberties aimed at preserving free and unfettered competition.[31] In 1914,

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[26] This Note will exclude private plaintiffs who file antitrust claims. *See* ANTITRUST, INNOVATION AND COMPETIVENESS 32–34 (Thomas M. Jorde & David J. Teece eds., Oxford University Press, 1992). These actors tend to be clouded by their own interest. *See id.* at 32. In fact, there has been greater trust in courts than in administrators of antitrust law, like the FCC and the DOJ. *Id.* ("[O]ur welfare is, in great measure, left to private actors pursuing their own interest.").

[27] Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 266 (1990).

[28] Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 424, 443 (2005) (noting the difference between European insiders' views and American antitrust lawyers, practitioners, and policymakers' views on the convergence of antitrust law. The author also discusses the desire for convergence for merger evaluation standards.).

[29] *The Antitrust Laws*, FED. TRADE COMM'N, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

[30] Eleanor M. Fox, *US and EU Competition Law: A Comparison*, *in* GLOBAL COMPETITION POLICY 339, 340 (Edward M. Graham & J. David Richardson eds., 1997).

[31] *The Antitrust Laws*, *supra* note 29.

Congress passed two additional antitrust laws, the Federal Trade Commission Act ("FTCA") and the Clayton Antitrust Act ("Clayton Act").[32] With some revisions, these three core federal antitrust laws are still in effect today.[33] Prior to passing these Acts, Congress debated their underlying policy considerations.[34]

Congress' first attempt to craft a hallmark antitrust law was the Sherman Act; the US Supreme Court, however, subdued the Sherman Act's purpose. The Sherman Act successfully made government attorneys and district courts responsible to pursue trusts, companies, and organizations suspected of antitrust violations.[35] The Sherman Act disallowed conspiracies to restrain trade and create any monopoly over the market.[36] Yet, during the Sherman debates in the Senate, some considered the Sherman Act "an instructive lesson on the failure of legislation to control monopolistic and anticompetitive tendencies."[37] After Congress passed the Sherman Act, it faced problems. In *United States v. E.C. Knight Company*, the Supreme Court severely curtailed the Sherman Act by excluding it from the manufacturing sector.[38]

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[32] *Id.*

[33] *Id.*

[34] Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 263, 264–65 ("What constitutes 'fair competition'? Is ruthless efficiency, which drives competitors to extinction, 'fair'-or 'the sole engrossing to a man's self by means which prevent other men from engaging in fair competition'?"). One of the political concerns, behind the Sherman Act was the theme of "fair profit." Congress argued that:

> [E]very man in business . . . has a right, a legal and moral right, to obtain a fair profit upon his business and his work; and if he is driven by fierce competition to a spot where his business is unremunerative, I believe it is his right to combine for the purpose of raising prices until they shall be fair and remunerative.

See, e.g., Peritz, *supra* note 27, at 266.

[35] *Sherman Anti-Trust Act of 1890*, SOC'Y FOR HUMAN RES. MGMT., http://www.shrm.org/legalissues/federalresources/federalstatutesregulationsandguidanc/pages/shermananti-trustactof1890.aspx (last updated Dec. 3, 2008).

[36] *The Antitrust Laws*, *supra* note 29. The Sherman Act's major influence stemmed from English law that attempted to control monopolies. The Sherman Act's major influence stemmed from English law that attempted to control monopolies. Peter R. Dickson & Philippa K. Wells, *The Dubious Origins of the Sherman Antitrust Act: The Mouse that Roared*, 20 J. PUB. POL'Y & MARKETING 6, *available at* http://peterdickson.org/ShermanActDubiousOrigins.pdf.

[37] Dickson & Wells, *supra* note 36, at 6.

[38] *See* United States v. E.C. Knight Co., 156 U.S. 1, 15 (1895) [hereinafter *Knight*]. Manufacturing was not commerce; and a congressional law can never regulate monopolization of manufacturing because Congress did not have the power under the Commerce Clause to do so. *Id.* at 17. The Commerce Clause was placed in the Constitution to create uniformity and allow the federal government to create trade uniformity between nations. Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 753 (2007) (citing Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *in* 3 *The Records of*

The next stage in American antitrust history was spurred by President Theodore Roosevelt in 1901,[39] and often called the "Trust Busting" Era.[40] His political methodology was a sharp turn from the previous laissez-faire[41] approach to big businesses and corporate power.[42] His term was marked with an increase in antitrust litigation.[43] The case later provided antitrust law reform through the Clayton Act and the FTCA.[44]

Because of *Knight* and other perceived weaknesses within the Sherman Act, the US legislature passed the Clayton Act in 1914 to strengthen the Sherman Act. The Clayton Act specifically prohibited practices that the Sherman Act did not prohibit.[45] The Clayton Act deterred the formation of certain business practices that were conducive to the formation of monopolies.[46] The Clayton Act prohibited four

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the Federal Convention of 1787, at 478 (Max Farrand ed., rev. ed. 1966)). Congress, however, requires power under the Clause to promulgate some laws otherwise it encroaches on state's rights. *Id.* at 766–67. Therefore, even though American Sugar controlled over ninety-eight percent of sugar refineries throughout the United States, the Court found no violation of the Sherman Act. *See Knight*, 156 U.S. 18. The thrust of the Sherman Act was subdued. Some may argue that the Supreme Court distanced themselves from this decision. However, *Knight* was never expressly overturned. Yet, the Court's interpretation of the Commerce Clause was heavily criticized. *See* Wickard v. Filburn, 317 U.S. 111, 122 (1942). But addressing the flaws and impact of the Supreme Court's interpretation of the Commerce Clause is probably better suited for an American constitutional law note.

[39] *Theodore Roosevelt*, WHITE HOUSE, https://www.whitehouse.gov/1600/presidents/theodoreroosevelt (last visited Mar. 24, 2015).

[40] *See* Laurel Click, *Trust Busting and Government Regulations on Economy & Industry in Progressive Era*, EDUCATION PORTAL, http://education-portal.com/academy/lesson/trust-busting-and-government-regulations-on-economy-industry-in-the-progressive-era.html (last visited Mar. 17, 2015).

[41] There is no express formulation of the principle of laissez faire. *See* Jacob Viner, *Adam Smith and Laissez Faire*, 35 J. POL. ECON. 198, 206 (1927). However, it is implied to involve natural matters, with no explicit governmental interference. *Id.*

[42] Click, *supra* note 40. The president was heavily opposed to trusts that he considered bad. Click, *supra* note 40 ("'We do not wish to destroy the corporations,' Roosevelt said, 'but we do wish to make them serve the public good.'").

[43] *See Sherman Anti-Trust Act of 1890*, SOC'Y FOR HUMAN RES. MGMT., https://www.shrm.org/legalissues/federalresources/federalstatutesregulationsandguidanc/pages/shermananti-trustactof1890.aspx (last updated Dec. 3, 2008). This included one of the most pivotal cases in American History – *Standard Oil Company v. United States*. ANDREW P. NAPOLITANO, THEODORE AND WOODROW: HOW TWO AMERICAN PRESIDENTS DESTROYED CONSTITUTIONAL FREEDOM 148 (2012). *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 51, 81 (1911).

[44] Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 364, 367–68 (1965).

[45] Christopher H. Benbow, *Crossover Activity by Banks and Bank Holding Companies: Do Current Federal Statutes Address the Problem Adequately?*, 33 N.Y.L. SCH. L. REV. 47, 60 (1988).

[46] *Id.* at 60–61.

specific types of monopolistic practices: (1) price discrimination, (2) exclusive-dealing contracts, (3) acquisition of competing companies, and (4) interlocking directorates among companies within the same industry.[47] The legislation was focused in three areas: agriculture, large manufacturing companies with dominant market shares, and small manufacturing companies with limited market shares.[48] Congress did not focus on the international antitrust problems.[49] Yet, the Clayton Act still continues to constrain the organization and structure of American corporations.[50]

Also in 1914, Congress promulgated the FTCA.[51] The FTCA established the Federal Trade Commission ("FTC"), which was authorized to issue cease and desist orders to large corporations to curb unfair trade practices.[52] Through the FTCA, Congress "sweepingly forbade 'unfair methods of competition.'"[53] The FTCA also gave the FTC flexibility on judicial matters involving both Section 5 and the Clayton Act.[54] The FTC then served as another court[55] and attempted to play a role in a more "effective" prevention of antitrust violation.[56] Unlike the Sherman Act and the Clayton Act, the FTCA did not allow the FTC to impose a criminal penalty for violations.[57]

US antitrust law is derived from a combination of historical laws that were enacted nearly a century ago but not designed to tackle intricate, complex problems. The key question rests on whether the US antitrust laws effectively prohibit price-fixing behavior of multinational corporations with diversified subsidiaries. On its face, US antitrust law

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[47] Carlos D. Ramírez & Christian Eigen-Zucchi, *Understanding the Clayton Act of 1914: An Analysis of the Interest Group Hypothesis*, 106 PUB. CHOICE 157, 159 (2001).

[48] *Id.*

[49] *Id.*

[50] *Id.* at 177.

[51] Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 49 (1969).

[52] *Id.*

[53] *Id*.

[54] *Id.*

[55] *Id.* at 52.

[56] *Id.* The effectiveness of the FTC is a hotly contested issue. Posner states the FTC does not serve as a superior kind of court. A major case takes longer to try before the FTC and has displayed no comparative advantage to ordinary courts.

[57] *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited Apr. 20, 2016) (noting in Appendix A that criminal penalties should referred to the Department of Justice) [hereinafter *Overview of the FTC*].

does not explicitly create a cause of action for a foreign-owned corporation whose subsidiary has violated antitrust laws.

B. CANADA'S ANTITRUST LAW: THE FIRST MODERN COMPETITION LAW

Canada relies on an antitrust statute[58] that is even older than the Sherman Act. The Competition Act was enacted in 1889, one year before the Sherman Act.[59] The Competition Act is "the first competition statute of modern times."[60] Even so, legislation has amended the Competition Act multiple times.[61] The Competition Act contained numerous provisions:

> The [Competition] Act prohibits certain criminal offences (such as price-fixing and bid-rigging conspiracies, resale price maintenance, price discrimination and predatory pricing). The Act also contains noncriminal provisions which allow the Competition Tribunal . . . to review mergers and certain business practices . . . and, in certain circumstances, to issue orders prohibiting or correcting the conduct so as to eliminate or reduce its anti-competitive impact.[62]

Canadian antitrust law is at first blush exclusively federal in Canada, but the Regulated Conduct Doctrine[63] allows provinces to create their own competition law.[64] Price-fixing enforcement, however, centers on the federal regulation under the Competition Act.[65]

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[58] Yves Bériault & Oliver Borgers, *Overview of Canadian Antitrust Law*, THE ANTITRUST REV. OF THE AMERICAS 76, 76 (2004).

[59] 1 H. STEPHEN HARRIS, JR., ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES 10 (2001) ("Canada enacted its first competition legislation in 1889."); 1 H. STEPHEN HARRIS, JR., ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES 10 (2001) ("Canada enacted its first competition legislation in 1889.").

[60] John Pecman, Comm'r of Competition, Canada Competition Bureau, Remarks at the Indian Institute of Mgmt. (Nov. 20, 2013), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03630.html.

[61] *See* Jeffrey Church & Roger Ware, *Abuse of Dominance Under the 1986 Canadian Competition Act*, 13 REV. INDUS. ORG. 85, 87 n.5 (1998).

[62] Bériault & Borgers, *supra* note 58, at 76.

[63] The Legislature must balance between competitive and regulatory pricing faced and must weigh the interest of the consumer against those of the producers. Legislators and judges attempt to balance the application of the provisions within the Competition Act. *The Regulated Conduct Doctrine: Canadian Competition Law and the Politics of Undueness* at 7, http://www.cba.org/cba/cle/PDF/COMP10_Mysicka_paper.pdf.

[64] *See generally* Janet Bolton & Lorne Salzman, *The Regulated Conduct Doctrine and the Competition Bureau's 2006 Technical Bulletin: Retrospective and Prospective* at 27-28, *available at* www.mccarthy.ca/pubs/salzmanbolton.pdf.

[65] Stephen Krebs, *Top Ten Things to Know About the Canadian Competition Act*, ASS'N OF CORP. COUNS. (Oct. 1, 2010), http://www.acc.com/legalresources/publications/topten/canadian-

The newest version of the Competition Act came into effect in June 1986.[66] The modern version of the Competition Act recognized the role of international trade and acknowledged the role of foreign competition in Canada.[67] Within the Competition Act, Section 46 specifically forbids foreign corporations from influencing a Canadian company's policies to unduly prevent or lessen competition of a product.[68] Also, recent amendments to the Competition Act guidelines created competition Tribunals to evaluate whether antitrust liability existed.[69] The guidelines provide non-exhaustive lists and prevents decisions based solely on market share.[70]

The Canadian legislature directly addressed how agencies and courts should approach "corporate-subsidiary liability." The Competition Act provides direction and methods for agencies to extraterritorially enforce Canada's antitrust law.

C. EU ANTITRUST LAW: TWO CENTRAL RULES

The European Union developed an equally robust antitrust law to the United States and Canada, despite being a much younger jurisdiction.[71] The member states each monitor violations of competition rules *within their state*.[72] But the European Commission ("Commission") monitors EU-wide markets and effects on cross-border trade.[73] With the input the European Council and the European Parliament, the Commissioner for Competition upholds policy based on the European

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competition-act.cfm (identifying the Competition Act as the only federal source of antitrust law in Canada).

66 Calvin S. Goldman, *Competition, Anti-Dumping, and the Canada-U.S. Trade Negotiations*, 12 CAN.-U.S. L.J. 95, 95 (1987).

67 *Id.*

68 Krebs, *supra* note 65, at 13, 15.

69 Gordon E. Kaiser & Ian Nielsen-Jones, *Recent Developments in Canadian Law: Competition Law*, 18 OTTAWA L. REV. 401, 473 (1986).

70 *Id.*

71 BARRY E. HAWK, INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM CORPORATE LAW 203 (2002) ("[A]ntitrust authorities must approach their assumptions of what types of efficiencies should count and what burdens should be imposed with caution . . . .") "[T]he EU appears to have recognized the advances made in economic and financial theory during the latter half of the 20th century in the drafting European Community Merger Regulation ('ECMR') . . ."*Id.* at 204.

72 *See, e.g.*, CARL MICHAEL QUITZOW, STATE MEASURES DISTORTING FREE COMPETITION IN THE EC 122 (2001).

73 European Parliamentary Research Serv., EU competition policy: key to a fair Single Market, 140814REV1, at 6-9 (Marcin Szczepański, Feb. 6, 2014) *available at* http://www.europarl.europa.eu/EPRS/140814REV1-EU-Competition-Policy-FINAL.pdf.

Competition Network[74] that helps divide competition related work and apply rules consistently across the European Union.[75]

EU antitrust policy is developed from two central rules in the Treaty on the Function of the European Union ("TFEU"),[76] ratified in 2007,[77] in Article 101 and Article 102.[78] First, Article 101 prohibits pricing agreements between two or more independent market operators.[79] The provision covers both horizontal agreements and vertical agreements.[80] The most flagrant example of infringing on Article 101 is to create a cartel between competitors, which may involve price-fixing and/or market sharing.[81]

With Article 101, the Commission attempted to "modernize" competition law. [82] The reform involved a novel approach to protecting competition in the marketplace. Rules shifted from form based to rules focused on the economic effects of the conduct at issue.[83] Prior to this new approach, the Commission received criticism on the formulistic interpretation of the Articles.[84] Article 101's modernized approach called for the courts to focus on the economic effects of the entity—not the formation of the entity—to control antitrust violations.

Article 102 prohibits firms who hold a dominant position on a given market to abuse that position.[85] For example, a violation of Article

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[74] *See European Competition Network Overview*, EUROPEAN COMM'N, http://ec.europa.eu/competition/ecn/index_en.html# (last visited Jan. 5, 2016).

[75] Szczepański, *supra* note 74, at 4–5.

[76] *Antitrust Overview*, EUROPEAN COMM'N, http://ec.europa.eu/competition/antitrust/overview_en.html (last updated Nov. 21 2014) [hereinafter *Antitrust Overview*].

[77] Treaty on European Union and the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 337.

[78] *Antitrust Overview*, *supra* note 77.

[79] *Id.*

[80] *Id.* Horizontal agreements refer to agreements between actual or potential competitors. European Union, *Guidelines on Horizontal Cooperation Agreements*, EUROPA, http://europa.eu/legislation_summaries/competition/firms/l26062_en.htm (last updated Dec. 5, 2011). On the other hand, vertical agreement refers to agreements for the sale and purchase of goods or services which are entered into between companies operating at different levels of the distribution chain. European Union, *Exemption for Vertical Supply and Distribution Agreements*, EUROPA, http://europa.eu/legislation_summaries/competition/firms/cc0006_en.htm (last updated Nov. 24, 2010).

[81] *Antitrust Overview*, *supra* note 77.

[82] Alison Jones, *Left Behind by Modernisation? Restrictions by Object Under Article 101(1)*, 6(3) EUR. COMPETITION J. 649, 649 (2010).

[83] *Id*.

[84] *Id.* at 650.

[85] *Id.*

102 includes charging unfair prices, limiting production, or refusing to innovate to the prejudice of consumers.[86] Unlike Canada's antitrust regime, the European Union does not offer laws, which hold the foreign corporation liable for antitrust violations of its domestic subsidiary.[87]

The varying political agendas and antitrust laws, however, may confuse companies that want a uniform approach to antitrust law. For example, Canada offers a direct cause of action, when the United States and the European Union do not offer a statutory framework to pursue foreign corporations that own antitrust violators. A corporation could have a duty to its shareholders to maximize profits and therefore has to stay up-to-date on current antitrust laws.[88] A corporation should toe antitrust behavior to maximize profit, but not violate these same laws to make a profit. However, the mismatch between countries' antitrust regimes offers no clear-cut approach. Agencies' enforcement strategies require even further analysis.

II. ANALYSIS

A. THE RESPONSE OF AGENCIES AND COURTS IN THE UNITED STATES, CANADA, AND THE EUROPEAN UNION

Enforcement depends on (1) the antitrust agency's policies and (2) how agencies and courts respond to antitrust violations. First, government agencies directly enforce the antitrust laws. Choices to pursue litigation or administrative alternatives help shape how a country treats the foreign corporation behind the subsidiary's price-fixing behavior.[89] Unfortunately, these three regions of the world do not share a single cohesive approach because of their varied political priorities. But these regions do display some cooperative behavior. The United States,

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[86] *Id.*

[87] *Id.*

[88] Amanda P. Reeves, *Behavioral Antitrust: Unanswered Question on the Horizon*, THEANTITRUSTSOURCE 2 (June 2010), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun10_Reeves6_24f.authcheckdam.pdf.

[89] *See, e.g.*, Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present and Future*, 71 ANTITRUST L. J. 319, 322, 326-27 (2003) (discussing the creation of "administrative litigation at the Commission" that combines aspects of trial and appellate litigation. The FTC refocused on administrative litigation spurred by guidelines from the Department of Justice.).

Canada, and the European Union form programs,[90] make cooperation agreements,[91] and participate in international organizations, such as the Competition Committee of the Organization for Economic Cooperation and Development[92] and the International Competition Network.[93]

Second, the government agencies' and the courts' response to antitrust violations is the other key element.[94] A government agency's level of antitrust enforcement activity and penalties may deter future adverse behavior.[95] On the other hand, a lack of response to antitrust violations may reflect a discretionary choice from the agency.[96] The enforcement responses reflects the scope of how courts treat parent companies when their subsidiaries violate antitrust.

To analyze the nature of "corporate-subsidiary liability," first, this section of the Note discusses the outcome of the Four Scenarios

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[90] *See* Bériault & Borgers, *supra* note 58, at 76; *International Program*, U.S. DEP'T JUSTICE, http://www.justice.gov/atr/public/international/index.html (last visited Dec. 28, 2015).

[91] *See* Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, U.S.-Can., U.S. DEP'T JUSTICE (Aug. 1995), http://www.justice.gov/atr/public/international/docs/0316.pdf; Agreement between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws, U.S.-Can., Oct. 5, 2004, *available at* http://www.justice.gov/atr/public/international/docs/205732.htm; Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, U.S.-Eur., 1998 O.J. (L 173) 28, *available at* http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=752.

[92] *About the OECD*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/about/ (last visited Jan. 3, 2015).

[93] *About*, INT'L COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/about.aspx (last visited Dec. 24, 2015).

[94] Both the agencies' and the court's approaches may even conflict. *See generally* Thomas A. Lambert, *Respecting the Limits of Antitrust: The Roberts Courts Versus the Enforcement Agencies*, HERITAGE FOUND., http://www.heritage.org/research/reports/2015/01/respecting-the-limits-of-antitrust-the-roberts-court-versus-the-enforcement-agencies (last updated Jan. 28, 2015) (discussing the conflict between the Department of Justice and the Supreme Court).

[95] Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27, 40 (2003) (discussing how antitrust violation may deter cartel activity or may deter cartel formation. "If antitrust enforcers uncover and prosecute a cartel engaged in price fixing, bid rigging or market allocation, does that suggest that antitrust is a success for stopping future harm or a failure for not deterring cartel formation?").

[96] Cantor v. Detroit Edison Co., 428 U.S. 579, 599 n.39 (1976) ("It is this concern which has repeatedly prompted the introduction of bills which, if adopted, would make the award of treble damages in antitrust litigation discretionary rather than mandatory."); United States v. Loew's Inc., 783 F. Supp. 211, 214 (S.D.N.Y. 1992) ("The Court recognizes that the Department of Justice has broad discretion in controlling government antitrust litigation."); E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L. Q. 997, 1005 (1986) (citing multiple sources).

presented in the introduction.[97] Next, this section analyzes government policies for "corporate-subsidiary liability" in the three regions. Finally, this section discusses relevant enforcement actions and legal outcomes of the three regions.

1. United States

Reflecting on the four Scenarios introduced in this Note's Introduction, [98] the United States does hold a foreign corporation liable for its subsidiaries' antitrust violation. Only the Department of Justice ("DOJ") actively investigates and enforces antitrust laws; the FTC, generally, does not investigate antitrust violations.[99] Further, the DOJ has displayed the aggressiveness and willingness to hold a parent corporation liable. But the DOJ's avenues of pursuit are fairly limited. In Scenario 1, Electrocorp can hide behind the *Copperweld* shield through restricting their liability by creating a separate subsidiary and corporation.[100] If, however, Electrocorp's involvement in Microsub's day-to-day conduct is substantial, the DOJ may pursue litigation by "piercing the corporate veil."[101]

In Scenario 2, Microsub's undercapitalization may result in fines imposed on Electrocorp for price-fixing violation.[102] The undercapitalization may suggest that Electrocorp is using Microsub as a shield to avoid price-fixing violations.[103] In both Scenario 3 and 4, Electrocorp is not liable for Microsub's price-fixing violation under the "piercing the corporate veil" factors, as Electrocorp does not exert control over Microsub.[104] Therefore, the DOJ and US courts may not be able to "pierce the corporate veil" to hold Electrocorp liable for

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[97] *See supra* Introduction.

[98] To recap, the four scenarios as summarized *supra* note 19 were as follows: Scenario 1 is the base scenario where the corporation has a majority ownership in the subsidiary with a well-capitalized subsidiary. The foreign corporation knows about the price-fixing violation and has full control over the day-to-day activities. Scenario 2 involves an undercapitalized subsidiary. Scenario 3 involves a corporation with no day-to-day control over the activities of its subsidiary. Scenario 4 is a corporation which own less than 50% of the subsidiary.

[99] Federal Trade Commission Strategic Plan for Fiscal Years 2014 to 2018, FED. TRADE COMM'N 13–14, *available at* http://www.ftc.gov/system/files/documents/reports/2014-2018-strategic-plan/spfy14-fy18.pdf.

[100] *See infra* Part I.A.1.a.

[101] *See infra* Part I.A.1.b.

[102] *See infra* Part I.A.1.b.

[103] *See infra* Part I.A.1.b.

[104] *See infra* Part I.A.1.b.

Microsub's price-fixing in the latter two scenarios.[105] The discussion below includes the analysis.

a. US Antitrust Governmental Agencies: DOJ & FTC

The two governmental agencies that enforce US antitrust laws are the DOJ and FTC.[106] Both the DOJ and FTC share the authority to enforce the Clayton Act.[107] The agencies divide their enforcement according to their respective areas of expertise and regulate different industries variably.[108]

The Antitrust Division of the DOJ and FTC uses criminal and/or civil enforcement actions to protect against antitrust violations.[109] The DOJ initiates enforcement in federal district court[110] and has limited rule-making authority.[111] On the other hand, the FTC uses only civil enforcement actions.[112] The FTC's first step is to use a consent order, where the company does not admit to violating the law but stops the disputed practices outlined in the complaint.[113] If the first step does not work, the FTC issues an administrative complaint and/or seeks injunctive relief from a federal court.[114] An accused party can appeal decisions by the FTC to an administrative law judge or the federal court.[115] The FTC

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[105] *See infra* Part I.A.1.b.

[106] Todd N. Hutchinson, *Understanding the Differences Between the DOJ and the FTC*, AM. BAR ASS'N, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/understanding_differences.html (last visited Mar. 11, 2015).

[107] *Id.* (citing 15 U.S.C. § 21 (2014) (FTC authority); *id.* § 25 (DOJ authority)).

[108] The DOJ has "sole antitrust jurisdiction in certain industries, such as telecommunications, banks, railroads, and airlines." *The Enforcers*, FED. TRADE COMM'N, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers (last visited Mar. 11, 2015). The FTC devotes most of its resources to certain segments of the economy, including those where consumer spending is high: health care, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and Internet services." *Id.*; *see also Guide to Antitrust Laws*, WASH. STATE OFFICE OF THE ATTORNEY GEN., http://www.atg.wa.gov/antitrustguide.aspx#.VLxtrkfF_DY (last visited Jan. 3, 2015) (explaining federal antitrust law).

[109] Hutchinson, *supra* note 106; *see also The Enforcers*, *supra* note 108.

[110] Hutchinson, *supra* note 106.

[111] *Id.*

[112] *Overview of the FTC*, *supra* note 57.

[113] Hutchinson, *supra* note 106.

[114] *The Enforcers*, *supra* note 108.

[115] *Id.*

also has the power to enact trade regulation rules regarding unfair or deceptive practices.[116]

Both agencies have different enforcement methods and respond to antitrust violations differently. The DOJ actively and aggressively pursues foreign entities involved in price-fixing activity.[117] The DOJ has held a foreign corporation liable for its subsidiary's actions.[118] They often find liability based on the foreign corporation's role in its subsidiaries' actions.[119] Sometimes, the DOJ extends the scope of the victim's claim to extract appropriate fines.[120] As a result, the DOJ identifies a range of US subsidiaries and foreign corporate entities as parties.[121] Further, DOJ's Antitrust Division has specifically outlined a corporate defendant's obligation to cooperate with any plea/cooperation agreement. The

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[116] 15 U.S.C. § 57a (2014).

[117] DAVID L. BAUMER & JULIUS CARL POINDEXTER, LEGAL ENVIRONMENT OF BUSINESS IN THE INFORMATION AGE 618 (2003); DOUGLAS F. BRODER, U.S. ANTITRUST LAW AND ENFORCEMENT: A PRACTICE INTRODUCTION 6 (2d ed. 2012) ("The DOJ did continue to heavily prosecute international price-fixing cartels . . .").

[118] Philip Mattera, *LG: Corporate Rap Sheet*, CORP. RESEARCH PROJECT, http://www.corp-research.org/LG (last updated Dec. 4, 2013); *see also* Shearman & Sterling LLP, *TFT-LCD*, CARTEL DIGEST, http://www.carteldigest.com/cartel-detail-page.cfm?itemID=23 (last visited Jan. 12, 2014) (holding a corporation and its American subsidiary liable for conspiring to fix prices); *cf.* Douglas Jehl, *Four Top Soft-Drink Executives Charged in Price-Fixing Case*, L.A. TIMES, Oct. 15, 1987, http://articles.latimes.com/1987-10-15/business/fi-14397_1_price-fixers. In 1987, the DOJ showing a lack of willingness to pursue a foreign-based corporation whose subsidiaries was involved in price-fixing. *Id.* "[T]he Justice Department emphasized that it alleged no wrongdoing by the parent companies, which in some cases did not acquire the bottling firms until after the alleged price fixing took place. Coca-Cola Co. and Pepsico Inc. issued statements distancing themselves from the charges." *Id.*

[119] Mattera, *supra* note 118 (alleging that LG carried out the conspiracy by (1) participating in meetings, conversations, and communications in Taiwan, Korea and the United States to discuss the prices of TFT-LCD panels, (2) agreeing during those meetings, conversations and communications to charge prices of TFT-LCD panels at certain pre-determined levels, (3) issuing price quotations in accordance with the agreements reached; and (4) exchanging information on sales of TFT-LCD panels, for the purpose of monitoring and enforcing adherence to the agreed upon prices).

[120] *U.S. Law Implications of International Cartel Enforcement Activity*, HUGHES HUBBARD & REED LLP 2 (Sept. 2002), http://www.hugheshubbard.com/PublicationDocuments/Antitrust_Ad_US_Law_Implications_Sept_2002.pdf [hereinafter HUGHES]. The DOJ's goal is to partially modify the perception about antitrust crimes. Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Div. of U.S. Dep't of Justice, The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game, Address before National Institute of White Collar Crime 11th Annual Meeting (Mar. 7, 1997), *available at* http://www.justice.gov/atr/speech/trend-towards-higher-corporate-fines-its-whole-new-ball-game. ("A number of factors are responsible for the increasingly heavy sentences for Sherman Act violations . . . The factors include: **. . .** the change in perception by judges as to the seriousness of antitrust crimes.").

[121] HUGHES, *supra* note 120, at 2.

Division's model language for defining a corporate defendant's cooperation obligations is:

> The defendant, including its parents, subsidiaries, affiliates, predecessors and partnerships that are engaged in the sale of [insert generic description of industry, e.g., widgets] or have an ownership interest in a company engaged in such a business . . . , will fully and truthfully cooperate with the United States in the prosecution of this case, the conduct of the current federal investigations of violations of the federal antitrust and related criminal laws in the [widgets] industry, any other federal investigation . . . to which the United States is a party . . . .[122]

The DOJ is focused on not only the subsidiary but the parent corporation as well.[123] Part of the DOJ's plea/cooperation agreements requires the foreign-based corporation to help aid with this process.[124] If the corporation fails to cooperate, the United States can void the plea agreement.[125]

The increase in the DOJ's enforcement of international corporations is because of the introduction of US- and EU-style amnesty and leniency programs.[126] "Previously, a great impediment to use of the US program was the fact that no comparable protection could be obtained under European law—a company's confession to US authorities, in other words, significantly increased exposure in Europe."[127] For example, in 1994, only one percent of the corporate defendants of the DOJ's cases were foreign based, and there were zero prosecutions involving international cartel activity.[128] By comparison, in 1998, roughly fifty percent of the corporate defendants were foreign based, and there were sixteen international cartel prosecutions.[129] The

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[122] Gary R. Spratling, Deputy Assistant Attorney General of Antitrust Division of U.S. Dep't of Justice, Negotiating the Water of International Cartel Prosecutions: Antitrust Division Polices Relating to Plea Agreements in International Cases, Address before the National Institute of White Collar Crime 2 (Mar. 4, 1999) *available at* http://www.justice.gov/atr/public/speeches/2275.pdf.

[123] *See generally id.* at 2–5. The DOJ's investigation may involve collecting foreign-based document. *Id.* Even before entering the plea agreement, the DOJ heavily investigates employees, documents and foreign-based corporate activities. *Id.*

[124] *Id.* at 5.

[125] *Id.* at 8.

[126] HUGHES, *supra* note 120, at 1.

[127] *Id.*

[128] Spratling, *supra* note 122, at 21.

[129] *Id.*

DOJ has extended its grasp over foreign corporations involved in antitrust violations.

On the other hand, the FTC often joins the same position at DOJ, especially on joint investigations.[130] The FTC, however, does not individually pursue international parent companies. The FTC's plan does not reflect the aggressive approach for DOJ's enforcement.[131] Therefore, both government agencies approach foreign corporation violations differently.

b. Enforcement in the United States: Piercing the Corporate Veil

In the United States, antitrust law is unclear about the treatment of "corporate-subsidiary liability."[132] The DOJ has not arrived at a clear standard for determining whether related companies possess the legal capacity to conspire.[133] However, US courts' and the DOJ's "corporate-subsidiary liability" extends antitrust violations to a foreign entity.

The cornerstone rule of US corporate law is that a company is not liable for the acts of its subsidiaries or other affiliated corporations.[134] However, an equally fundamental principle within US corporate law is when the corporate veil is pierced[135] and the corporation is held liable for

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[130] Allissa Wickham, *Antitrust Group, Gov't Want Motorola to Face Price-Fixing Suit*, LAW 360, http://www.law360.com/articles/574989/antitrust-group-gov-t-want-motorola-to-face-price-fixing-suit (last visited Jan. 19 2014) (naming both Motorola and its subsidiaries as defendants in the action. However, the court dismissed Motorola and isolated the suit to its subsidiaries).

[131] Federal Trade Commission Strategic Plan For Fiscal Years 2014 to 2018, *supra* note 99 at 13-14 ("[p]articipation in multilateral competition organizations provides valuable opportunities to promote international cooperation and convergence and for competition officials to share insights on law enforcement and policy initiatives."); Laura Wilkinson, *DOJ is Aggressively Pursuing Cartel Enforcement*, INSIDE COUNSEL (Jan. 9, 2014), http://www.insidecounsel.com/2014/01/09/doj-is-aggressively-pursuing-cartel-enforcement; Jeff Sistrunk, *DOJ, SEC Continue Aggressive FCPA Enforcement: Report*, LAW 360, http://www.law360.com/articles/556879/doj-sec-continue-aggressive-fcpa-enforcement-report (last updated July 11, 2014).

[132] 2 WILBUR L. FULGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 141–42 (5th ed. 1996).

[133] *Id.* at 142.

[134] United States v. Bestfoods, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries."); *see, e.g.*, Buechner v. Farbenfabriken Bayer Aktiengesellschaft, 154 A.2d 684, 686-87 (Del. Ch. 1959); Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.).

[135] "Piercing the corporate veil" is based on an agency or "alter ego" theory. Douglas G. Smith, *Piercing the Corporate Veil in Regulated Industries*, 2008 BYU L. REV. 1165, 1180 (2008). The corporation is treated as a sham and exists for no other purpose than as a vehicle of fraud or injustice. *Id.* Corporations are legally responsible for an action undertaken by their agents, in this their subsidiary, that are performed within the scope of agent's apparent authority. ABA

the subsidiary's conduct.[136] US courts ignore corporate separation when the subsidiary acts as a mere agency or instrumentality for the owning company.[137] The doctrine chiseled away at the bedrock rule for corporate protection. As a result, in recent years, the standards governing the treatment of related entities in antitrust cases have been heavily debated in the United States.[138]

The US Supreme Court attempted to clearly define what businesses can and cannot do.[139] In *Copperweld Corporation v. Independence Tube Corporation*, the Court considered whether there is "corporate-subsidiary liability."[140] *Copperweld* focused on handling the coordinated activity of a parent and its wholly-owned subsidiary.[141] The Court said "[w]e hold that Copperweld and its wholly-owned subsidiary Regal are incapable of conspiring with each other for purposes § 1 of the Sherman Act."[142] The Court held a parent and its wholly-owned company have a "complete unity of interest" that precludes "corporate-subsidiary liability."[143] Some interpret *Copperweld* as shielding the corporation from the subsidiary's liability; however, the Court never determined that the foreign corporation was not liable for its subsidiaries actions, only that the two entities could not conspire. In the end, the question still remains unresolved on who holds the liability for a subsidiary's antitrust violation.

SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 270 (2010). Even if a corporation instructed its agents not to violate antitrust laws, it does not excuse the corporation from responsibility. ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, B-10 (2005).

[136] *Bestfoods*, 524 U.S. at 62.

[137] Chi., Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 501 (1918).

[138] Ethan E. Litwin, *The Shifting Sands of Limited Liability Partnerships*, LAW 360 (June 20, 2010), http://www.law360.com/articles/175684/the-shifting-sands-of-limited-liability-principles.

[139] Lambert, *supra* note 94, at 3.

[140] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 759 (1984); Joshua D. Wright, *MasterCard's Single Entity Strategy*, 12 HARV. NEGOT. L. REV. 225, 229 (2007).

[141] *Copperweld*, 467 U.S. at 771 (creating the "single enterprise for purpose" exception under the Sherman Act).

[142] *Id.* at 777.

[143] *Id.* at 771; *Motorola Mobility LLC v. AU Optronics Corporation* reconsidered treating a corporation and its subsidiaries as separate entities. Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 820 (7th Cir. 2015) ("For example, although for antitrust purposes Motorola contends that it and its subsidiaries are one [. . .] for tax purposes its subsidiaries are distinct entities paying foreign rather than U.S. taxes."). The Court in *Copperweld* refused to address this question.

Additionally, *Copperweld* pointed to another issue courts have not resolved: "[U]nder what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own."[144] As a result, any analysis of "corporate-subsidiary liability" should differentiate between wholly-owned and partially-owned subsidiaries.

Mostly, the United States relies on the murky doctrine of "piercing the corporate veil;"[145] therefore, a parent corporation's liability is dependent on a fact-based analysis of the corporation's control over its subsidiary.[146] However, sometimes US courts find that the corporate veil factors do not undeniably indicate control. For example, the US Supreme Court wrote that:

> [A]ctivities that . . . are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability. The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.[147]

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[144] *Copperweld*, 467 U.S. at 767 (defining the issue as only for corporation which wholly owned its subsidiary).

[145] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1074 n.135 (1991) (underscoring cases where the doctrine was used to pursue antitrust claims); *Comments of the American Bar Association's Section of Antitrust Law and International Law on Draft Guidelines on Administrative Penalties Issued by The South African Competition*, AMERICAN BAR ASS'N 5 (Feb. 13, 2015), http://www.americanbar.org/content/dam/aba/images/antitrust_law/Comments%20-%20SAL%20SIL%20South%20Africa%20Penalty%20Guidelines%20Final%202%2013%2015.pdf.

[146] Courts often look at the traditional piercing factors to "pierce the corporate veil." ALAN R. PALMITER, EXAMPLES & EXPLANATIONS: CORPORATIONS 554 (5th ed. 2006). Courts articulate these tests as the "instrumentality doctrine" or the "alter ego" tests. *Id.* at 554. Courts generally pierce corporations in the following situations: (1) the business is a closely held corporation; (2) the plaintiff is an involuntary (tort) creditor; (3) the defendant is a corporate shareholder; (4) the insiders failed to follow corporate formalities; (5) insiders commingled business assets/affairs with individual assets/affairs; (6) insiders did not adequately capitalize the business; (7) the defendant actively participated in the business; and (8) insiders deceived creditors. *Id.* at 554. However, these factors differ from case-to-case and jurisdiction-to-jurisdiction. *See In re* Holborn Oil Trading Ltd., 774 F. Supp. 840, 844–45 (S.D.N.Y. 1991) (using different factors than those listed above); *see generally* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL (2014); *id*. (summarizing the corporate veil doctrine by federal and state jurisdictions).

[147] United States v. Bestfoods, 524 U.S. 51, 72 (1998) (citations omitted); *see also In re* Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 884 (N.D. Ill. 2010).

However, when the subsidiary's conduct becomes dominated by the influence of the parent corporation, then the corporate veil is pierced.[148] After *Copperweld*, a corporation could hide behind the actions of its subsidiaries because, under the Sherman Act, both entities are treated as unified. The question of liability has a simple answer: corporate separateness generally prevails, and any imputation of liability to another legal entity can be resorted to only as an "extreme remedy."[149] Notably, this case law in the United States does not address antitrust law specifically. In conclusion, US law is murky and offers no cohesive solution.

Even though US courts do not always hold corporations liable for their subsidiaries' price-fixing behavior, US governmental agencies target corporations for a subsidiary's antitrust violations. As stated before, the FTC appears silent on the issue, but the DOJ pursues a foreign corporation, under two circumstances. First, the DOJ will fine a foreign corporation when the fine is large enough to recover the entire amount of the fine. For example, the DOJ recently indicted AU Optronics Corp. and its American subsidiary, AU Optronics Corp. America, for price-fixing.[150] The court imposed the largest-ever fine against a company and its US subsidiary for the antitrust violation.[151] The indictment charged that AU Optronics Corp. participated in the worldwide price-fixing conspiracy and that its subsidiary joined the conspiracy.[152] The fine was US$500 million, tied for the largest fine to date.[153] The DOJ targeted a parent corporation of a subsidiary to recover the largest fine in American antitrust history.

Second, the DOJ targets the foreign corporation of an undercapitalized or bankrupt subsidiary. The DOJ also recently indicted American Airlines' parent corporation for divesting "slots, gates and

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[148] *See* Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979) ("when the corporation has been so dominated by an individual or another corporation (usually a parent corporation), and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego.").

[149] Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 539 (2000) ("Alter ego is an extreme remedy.").

[150] *AU Optronics Corporation Executive Convicted For Role in LCD Price-Fixing Conspiracy*, DEP'T OF JUSTICE (Dec. 18, 2012), http://www.justice.gov/atr/public/press_releases/2012/290399.pdf.

[151] *Id.*

[152] *Id.*

[153] *Setting of Fines For Cartels in ICN Jurisdictions*, INT'L COMPETITION NETWORK 38, http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf.

ground facilities at key airports" across the country.[154] American Airlines had already filed bankruptcy reorganization and would not have had sufficient resources to follow the settlement proceedings required. Therefore, the DOJ could not fine the subsidiary and had to fine the parent corporation to recover fines. The DOJ indicted a corporation for the antitrust violation because it possessed an undercapitalized subsidiary. The DOJ indicted "corporate-subsidiary liability" based on the composition of the fine and the subsidiary.

2. Canada

Reflecting on the four Scenarios introduced in this Note's Introduction,[155] Canada uses a specific statutory section to enforce antitrust laws. In Canada, the Competition Bureau has free rein to pursue Electrocorp under section 46 of the Competition Act.[156] The Competition Bureau has consistently enforced "corporate-subsidiary liability." Further, Electrocorp is exposed to strict liability offense, under which Electrocorp does not require knowledge of, or intention to participate in, the conspiracy of Microsub.[157] In Scenarios 2, 3 and 4, Canada's Competition Bureau would presumably have a similar response. The capitalization, day-to-day control, and ownership do not factor into the Competition's policy or enforcement decisions.[158] Rather, Microsub's price-fixing violation would represent a strict-liability offense on Electrocorp. The discussion below includes the analysis.

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[154] *Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge*, DEP'T OF JUSTICE (Nov. 12, 2013), http://www.justice.gov/opa/pr/justice-department-requires-us-airways-and-american-airlines-divest-facilities-seven-key.

[155] To recap, the four scenarios as summarized *supra* note 19 were as follows: Scenario 1 is the base scenario where the corporation has a majority ownership in the subsidiary with a well-capitalized subsidiary. The foreign corporation knows about the price-fixing violation and has full control over the day-to-day activities. Scenario 2 involves an undercapitalized subsidiary. Scenario 3 involves a corporation with no day-to-day control over the activities of its subsidiary. Scenario 4 is a corporation, which own less than 50% of the subsidiary.

[156] *See* discussion *infra* Part I.A.2.a.

[157] *See* discussion *infra* Part I.A.2.b.

[158] *See* discussion *infra* Part I.A.2.b.

a. Canada's Antitrust Governmental Agency: The Canadian Competition Bureau

Unlike the United States, Canada relies on one government agency to enforce antitrust law, the Canadian Competition Bureau. The Bureau enforces and administers the Competition Act.[159] The Bureau is involved only in the investigation of complaints,[160] leaving other branches to deal with civil matters and criminal matters.[161] The Bureau decides whether to pursue the matter and files an application with the Competition Tribunal.[162] The Competition Tribunal combines an expertise in economics and business with expertise in law.[163] The Tribunal is a strictly adjudicative body that operates independently of any government department.[164] Parties may appeal a Tribunal decision as if it were a decision of the Federal Court.[165] However, Canada's Attorney General prosecutes breaches of the criminal provisions of the Act in the criminal court.[166] Criminal prosecutions are recommended by the Competition Bureau.[167]

The Competition Bureau uses two sections of the Competition Act against Canadian companies to reach international cartels. Specifically, Section 11(2) requires Canadian targets to produce evidence in the hands of foreign affiliates,[168] and Section 46 creates an offense for a Canadian corporation to implement a foreign-directed conspiracy.[169]

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[159] *2014-2015 Annual Plan: Promoting Compliance for the Benefit of Canadian Consumers*, CAN. COMPETITION BUREAU, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03726.html (last updated May 5, 2014).

[160] *Welcome to the Competition Tribunal*, COMPETITION TRIBUNAL, http://www.ct-tc.gc.ca/Home.asp (last modified Nov. 27, 2014) (outlining the process from the Competition Tribunal's perspective).

[161] Bériault & Borgers, *supra* note 58, at 76.

[162] *Id.*

[163] *Id.*

[164] *Id.* (Unlike the FTC which does both: investigates and acts as the initial judges of the case).

[165] *Canadian Antitrust Laws*, CANADIAN LAW SITE, http://www.canadianlawsite.ca/antitrust.htm (last visited Jan. 9, 2015).

[166] Bériault & Borgers, *supra* note 58, at 76.

[167] *Id.*

[168] Randall Palmer, *Canada Court to Order Apple to Turn Over Records in IPhone Probe*, REUTERS (Dec. 17, 2014), http://www.reuters.com/article/2014/12/17/apple-canada-idUSL1N0U11OC20141217 (requiring Apple Inc.'s Canadian subsidiary to turn over document to the Competition Bureau, including records held by the California-based parent company).

[169] For example, the Bureau used Section 46 "to convict, on guilty pleas, a US firm and Japanese firm which had entered into a conspiracy outside Canada in order to fix the price of thermal fax paper in Canada." BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 24 (2002).

The purpose of these provisions is to make corporations responsible for the wrong-doings of its subsidiaries or other affiliates when either engages in antirust activity.[170]

When enforcing antitrust violations, the Bureau is motivated by predictability and by creating a hospitable environment for businesses. The Assistant Deputy Minister of the Bureau of Competition Policy, Consumer and Corporate Affairs noted that:

> [t]he new regime could also provide for a reasonable degree of predictability so as to develop a hospitable business environment. If economic efficiency and growth is going to be fostered, it is important that businesses make decisions on the basis of an accurate understanding of the institutional environment in which it operates. This would imply the need to establish clear rules to ensure a consistent interpretation of the relevant law in both jurisdictions.[171]

Similar to US competition law, Canadian legislation attempts to maintain a balance between encouraging businesses to participate in the Canadian market and deterring antitrust violations. Canadian authorities are interested in pursuing non-cooperating foreign parties and extending Canadian antitrust law's jurisdictional grasp.

b. Enforcement in Canada: A Possibly Unconstitutional Section

Canada's Competition Act expressly authorizes the Competition Bureau to investigate a foreign corporation implicated in its Canadian subsidiary's conspiracies. Section 46 of the Act reads:

> It is a criminal offence for a corporation that carries on business in Canada to implement a directive or instruction from a person outside Canada in order to give effect to a conspiracy or agreement, if entered in Canada would contravene section 45 of the Act. The provision expressly applies to all corporations, whether they are incorporated in Canada or elsewhere.[172]

However, "whether any of these criminal provisions apply to conspiracies entered into entirely outside of Canada, other than Section 46's prohibition on implementing foreign conspiracies, has yet to be

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[170] A. N. Campbell et al., *The Long-Arm Grasp of Canadian Cartel Law Enforcement*, MCMILLAN BINCH MENDELSOHN LLP 17, *available at* http://www.mcmillan.ca/Files/ANCampbell_DMLow_TPrendergast_TheLong-ArmGraspCanadianCartel_0206.pdf (revised Apr. 28, 2006).

[171] Goldman, *supra* note 66, at 100.

[172] COMPETITION LAW OF CANADA § 8.10, 8-79 (Calvin S. Goldman ed., 2013) [hereinafter Goldman].

decided."[173] In fact, Section 46 may be vulnerable to a constitutional challenge under the Canadian Charter of Rights and Freedom.[174] The Competition Bureau has successfully invoked Section 46, but every conviction has resulted in a plea agreement.[175] The Bureau's record on plea agreements suggests its effectiveness in imposing liability on foreign cartels under Canadian antitrust law.[176] The Section exposes a foreign directed conspiracy to an absolute liability offense[177] with unlimited fines.[178]

Even though Canada has a dearth of case law surrounding this Section, the Competition Bureau tends to use Section 46.[179] The first conviction under Section 46 involved a guilty plea in an arrangement between Bayer AG of Germany and Sumitomo Chemical Co. Ltd.[180] The Bureau issued a fine on both the subsidiary and the foreign corporation for having implemented a foreign-direct conspiracy.[181] The Director commented, "Corporations operating from outside the country engaging in anti-competitive behavior that affects the Canadian market should not feel that they are beyond the reach of Canadian competition law."[182] Using Section 46, the Competition Bureau has continued to allocate fines

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[173] SECTION OF ANTITRUST LAW, INDIRECT PURCHASER LITIGATION HANDBOOK 277 (ABA Book Publishing, 2007).

[174] *See* Goldman, *supra* note 172, at § 8.10; *see also* Campbell, *supra* note 170, at 25 n.93 (describing current proceedings regarding the constitutional grounds of section 11(2)). The Canadian Charter of Rights and Freedom is the first part of the Constitution Act. *See generally Canadian Charter of Rights and Freedom*, PARLIAMENT OF CANADA, http://www.parl.gc.ca/about/parliament/education/ourcountryourparliament/html_booklet/canadian-charter-rights-and-freedoms-e.html (last visited Mar. 19, 2015).

[175] Goldman, *supra* note 172, § 8.10; Campbell, *supra* note 170, at 19.

[176] Campbell, *supra* note 170, at 17.

[177] *Id.* at 20. Section 46 purports to create an offence of strict liability:

> It does not require knowledge of, or intention to participate in, the conspiracy on the part of the corporation carrying on business in Canada or its directors/officers/employees. This departure from the fundamental requirement of *mens rea* as an essential element of criminal liability would likely be subjected to rigorous judicial scrutiny in a contested criminal trial.

Id.

[178] INT'L COMPETITION NETWORK, *supra* note 153, at 35.

[179] John Clifford & Hayane Dahmne, *Canadian Competition Authority's Reach for Foreign Affiliates in its Cartel Investigations*, ANTITRUST CHRONICLE 2 (Nov. 2009), *available at* https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/CliffordNOV-09_1_.pdf ("Section 45 forms the core of Canadian cartel law . . . "). Canadian courts generally do not pierce the corporate veil to impose liability. *Id.*

[180] *See* Goldman, *supra* note 172, at § 8.10.

[181] *Id.*

[182] *Id.* at §§ 8.10, 8-79–8-80.

and actions against different entities within a corporate structure involved in price-fixing conduct in Canada.[183]

The broad and ambiguous statutory construction of Section 46, however, has partly resulted in the dearth of Canadian corporations.[184] Even though North America has developed an increasing continental market, local Canadian corporations are no longer the preferred means of doing business in Canada.[185] Case law has not developed to support the constitutionality of Section 46, and therefore, Section 46 is not a definite method to enforce price-fixing under the Canadian Competition Act. Even so, the statutory scheme offers a direct cause for "corporate-subsidiary liability."

3. European Union

Returning to the four Scenarios,[186] the European Commission on Competition would pursue a parent corporation for the antitrust violation of its subsidiary under TFEU 102.[187] The Commission's focus, however, appears to be based on the ownership stake a parent corporation maintains in its subsidiary.[188] If in Scenario 1 Electrocorp owns nearly all of Microsub, then Electrocorp would have difficulty rebutting the presumption of liability for Microsub's price-fixing activity. However, the Commission should identify Electrocorp's ownership stake in Microsub to survive a dismissal.

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[183] For example:

> Bayer AG was fined C$2.9 million for its part in a rubber chemicals conspiracy and C$400,000 for its role in a nitrile rubber conspiracy. Bayer Corporation, a wholly owned US subsidiary of Bayer AG, was fined C$345,000 for participation in a conspiracy to fix the price of aliphatic polyester polyols made from adipic acid. In all, the fines totalled C$3.645 million.

Michael Kilby, *Canada Levies Fines Against Bayer Group for Role in International Cartels*, COMPETITOR (Nov. 14, 2007), http://www.thecompetitor.ca/2007/11/articles/competition/criminal-matters/canada-levies-fines-against-bayer-group-for-role-in-international-cartels/.

[184] Campbell, *supra* note 170, at 21.

[185] *Id.*

[186] To recap, the four scenarios as summarized *supra* note 19 were: *Scenario 1* is the base scenario where the corporation has a majority ownership in the subsidiary with a well-capitalized subsidiary. The foreign corporation knows about the price-fixing violation and has full control over the day-to-day activities. *Scenario 2* involves an undercapitalized subsidiary. *Scenario 3* involves a corporation with no day-to-day control over the activities of its subsidiary. *Scenario 4* is a corporation, which own less than 50% of the subsidiary.

[187] *See* discussion *infra* Part I.A.3.a.

[188] *See* discussion *infra* Part I.A.3.a.

Finally, in the European Union, Electrocorp's liability would depend on the stake Microsub has in Electrocorp. Therefore, the response in Scenario 2 and Scenario 3 is consistent with the Commission's policy of pursuing wholly-owned or nearly-wholly-owned corporations based on the presumption for parental liability, and Electrocorp is liable for Microsub's actions.[189] In Scenario 4, however, if Electrocorp owns less than half of Microsub, the Commission or European Court of Justice ("ECJ") may hold Electrocorp liable for its subsidiaries' actions.[190] The Commission no longer has the advantage of a presumption against Electrocorp. Below outlines the reasoning.[191]

a. EU Governmental Agency: The European Commission on Competition

In the European Union, the European Commission on Competition (the "Commission") is charged with investigating antitrust law violations. An antitrust case originates when the evidence is sufficient for the Commission to launch an inspection or establish a finding of full exemption from fines.[192] The Commission, headed by the Directorate General for Competition, enforces and regulates antitrust violations in the European Union, and sets competition policy.[193]

After the initial investigative phase, the Commission chooses to pursue the matter and must either follow settlement procedures or conduct an oral hearing by an independent Hearing Officer.[194] The accused can appeal the Commission's decision to the EU General Court, which may cancel, increase, or reduce the fine imposed.[195] An unsuccessful party can appeal the General Court's decision to the ECJ.

The Commission carved out policy based on a corporation's control and ownership of a subsidiary. Holding a parent corporation

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[189] *See* discussion *infra* Part I.A.3.a.

[190] *See* discussion *infra* Part I.A.3.a.

[191] *See* discussion *infra* Part I.A.3.a.

[192] *Procedures in Anticompetitive Agreements (Article 101 TFEU cases)*, EUROPEAN COMM'N, http://ec.europa.eu/competition/antitrust/procedures_101_en.html (last updated Aug. 16, 2013) [hereinafter *Procedures*].

[193] *Directorate-General for Competition*, EUROPEAN COMM'N, http://ec.europa.eu/dgs/competition/index_en.htm (last updated Feb. 4, 2014).

[194] *Procedures*, *supra* note 192. The Hearing Officer is not part of the European Commission on Competition and was created to enhance impartiality and objectivity in competition proceedings before the Commission. *Hearing Officers: Mission*, EUROPEAN COMM'N, http://ec.europa.eu/competition/hearing_officers/index_en.html (last updated Dec. 1, 2014).

[195] *Procedures*, *supra* note 192.

liable for its subsidiaries action is a tricky balance. For example, the Commission has held financial investors liable for antitrust infringements of their subsidiaries as industrial investors.[196] Control is a critical fact, and the Commission attempts to extend parental liability through crafting that term.[197]

There is some inherent tension between the Commission, the ECJ, and the EU member states. The Commission's underlying policy focuses on consumer welfare as the benchmark against which agreements are tested.[198] The Commission relies on member states to ensure that there are effective and well-equipped national competition authorities.[199] The two courts involved in the enforcement of the Commission differed on the actual underlying policy of Article 101. As a result, antitrust law has some tension between the modernized approach favoured by the Commission and the less-evolutionary path of the ECJ.[200]

On the other hand, Article 102 was more focused. Neelie Kroes, a member of the European Union that steered Competition Policy, said that Article 102 (then called Article 82) focused on two aspects:

First, Enforcement Agencies should be cautious about intervening in the functioning of markets *unless* there is clear evidence that they are not functioning well. As you say in the States, "If it ain't broke, don't fix it!" Secondly, Enforcement Agencies don't have

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[196] Christina Renner, *Antitrust Liability for Financial Investors*, GIDE LOYRETTE NOUEL (Apr. 2, 2014), http://www.gide.com/en/news/antitrust-liability-for-financial-investors.

[197] Commission Consolidated Jurisdictional Notice Under Council Regulation No. 139/2004 on the Control of Concentrations Between Undertakings, C 95/01 of 16 Apr. 2008, 2008 O.J. (C 95/1), ¶¶ 16–17. For example, the Commission stated:

> Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective. Article 3(2) further provides that the possibility of exercising *decisive influence* on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved.

Id. at 7 (emphasis added) (defining the means of control). The Commission has not defined "decisive influence" and left the interpretation to the courts. *See also Antitrust Liability for Financial Investors*, *supra* note 196.

[198] Jones, *supra* note 82, at 653.

[199] *Report from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions*, at 6, COM (2014) 249 final, *available at* http://ec.europa.eu/competition/publications/annual_report/2013/part1_en.pdf.

[200] Jones, *supra* note 82, at 654.

unlimited resources and need to focus their efforts on what makes a real difference.[201]

Unlike Article 101, Article 102 would not focus on efficiencies because of the lack of consistency of the analytical framework in reviewing these decisions.[202] "The Commission has frequently been successful in imputing, in case of a cartel infringement, the illegal conduct of a subsidiary to its parent,"[203] even if the parent did not participate in or was aware of the alleged cartel.[204] Further, European Courts support the Commission's decisions and policy.

b. Enforcement in the European Union: A Presumption of "Corporate-Subsidiary Liability"

Unlike Canada, the European Union has extensive case law on this issue of "corporate-subsidiary liability." EU law on "corporate-subsidiary liability" was displaced in *Akzo Nobel Chemicals Limited & Akcros Chemicals Limited v. Commission.* The ECJ concluded, "[a]s the Commission has applied for costs and the appellants have been unsuccessful in their submissions, the latter must be ordered to bear the costs; *they must pay these costs jointly and severally* since they brought the appeal jointly."[205] "The remainder of the costs of the proceedings shall be borne jointly and severally by Akzo Nobel Chemicals Ltd and

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[201] Neelie Kroes, Member of the European Commission in Charge of Competition Policy Preliminary Thoughts on Policy, Review of Article 82, SPEECH/05/537, at 2, *available at* http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en. As a result, the Commission prioritized exclusionary abuses, because exclusion is often the basis of later exploitation of customers. *Id.* (Neelie Kroes, the member of the European Commission in charge of Competition Policy, stated that the EC "[would] focus on exclusionary abuses and will not deal with what [the Commission] call[s] exploitative abuses, such as, for instance, excessive pricing, nor with discriminatory abuses.").

[202] *Id.*

[203] Stephen C. Mavroghenis & Matthew Readings, *European Union: Cartel Fines: Liability of Private Equity Funds*, MONDAQ, http://www.mondaq.com/unitedstates/x/306430/Cartels+Monopolies/Cartel+Fines+Liability+Of+Private+Equity+Funds (last updated Apr. 11, 2014); *Antitrust: Commission Welcomes Court of First Instance Judgment in Rubber Chemical Cartel Case*, EUROPEAN COMM'N (Dec. 18, 2008), http://europa.eu/rapid/press-release_MEMO-08-805_en.htm (supporting the Court of First Instance's decision to hold the wholly owned subsidiary liable); Joaquín Almunia, *Antitrust: Commission Fines Slovak Telekom and its Parent, Deutsche Telekom, for Abusive Conduct in Slovak Broadband Market* IP/14/1140, EUROPEAN COMM'N (Oct. 15, 2014), http://europa.eu/rapid/press-release_IP-14-1140_en.htm ("the parent company with decisive influence on its subsidiary . . . has also been held responsible for the abusive conduct.").

[204] Mavroghenis, *supra* note 203.

[205] Case C-97/08 P, Akzo Nobel et al. v. Comm'n, 2009 E.C.R. I-08237 ¶ 195 (Apr. 23) (emphasis added).

Akcros Chemicals Ltd."[206] Therefore, European law is very clear. The foreign parent corporation is jointly and severally liable for the actions of its wholly-owned subsidiary under Article 101.[207] However, the case law did not stop developing there.

AEG Telefunken defined the decision as a presumption. In January 2011, *General Quimica* stated that the *AEG Telefunken* presumption does not lead to the automatic attribution of liability to the parent company holding one hundred percent of the capital of its subsidiary.[208] A presumption remains within the acceptable limits so long as it is proportionate to the legitimate aim pursued.[209] While a wholly-owned subsidiary results in a rebuttable presumption, what about a smaller ownership interest?

In *Koninklijke Grolsch NV v. Commission* (Case T 234/07), the European General Court ("GC") annulled an EU Commission decision regarding a parent company's antitrust liability for its subsidiaries' actions.[210] The GC annulled the decision, explicitly holding that:

> [T]he Commission must include an *adequate statement of reasons* with respect to each of the addressees, in particular those which, according to the decision, must bear the liability for that infringement. Although in the case of a wholly owned subsidiary it is sufficient for parental liability to show that 100 per cent of the capital is held by the parent company, the Commission must say so. Failure to do so deprives the parent company of the possibility to rebut the presumption that it actually exercised decisive influence over the conduct of its subsidiary.[211]

Therefore, the Commission cannot rely on the presumption whenever a subsidiary was owned by a corporation; the Commission must find the ownership interest. However, there is a rebuttable presumption for a wholly-owned subsidiary or even in some cases a "near-100% shareholding."[212] Also, commentators have noted that parent

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[206] *Id.* ¶ 198.

[207] *Id.* ¶ 123.

[208] Lorenzo F. Pace, *The Parent-Subsidiary Relationship in EU Antitrust Law and the AEG Telefunken Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights*, Y.B. ANTITRUST & REG. STUD. 11 (2014).

[209] *Id.* at 12.

[210] Phillip Werner, *European Union: Presumption of Parental Liability Revisited*, MONDAQ, http://www.mondaq.com/unitedstates/x/147440/Antitrust+Competition/Presumption+Of+Parental+Liability+Revisited (last updated. Oct. 3, 2011).

[211] *Id.* (emphasis added).

[212] Thomas Verstraeten et al., *Background Note – The EU Power Cables Case: Antitrust Parental Liability of Private Equity Management Companies*, MONDAQ,

companies attempts to rebut this presumption are "largely unsuccessful."[213] The EU courts, however, fail to offer a concrete solution to small portion of the subsidiary.

EU courts have further extended *Akzo* to other parent-subsidiary relationships. Under the *Akzo* liability framework both private equity investors[214] and 50-50 joint ventures[215] were held liable for the actions of subsidiaries that they owned. The application of the parent liability doctrine seems to continue to expand, and the Commission has offered no clear boundaries to probable liability.

EU competition law imposes liability on "undertakings."[216] A parent and its subsidiaries are considered a unit when the parent exercises "decisive influence" over the conduct of the subsidiary. The separate legal personality does not have to be independently involved in its own market conduct.[217] As a result, the Commission has been heavily influential in crafting these decisions. The Commission, however, has not always been cited for its consistency. Instead, the Commission claims the discretion to impute liability.[218] But because the Commission has *Akzo Nobel* under it, the Commission "invariably targets the operating companies allegedly involved in the cartel and the top group holding company and imposes joint and several liability."[219] The Commission will often bypass "pure intermediaries" when it comes to fines.[220]

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http://www.mondaq.com/x/310434/Antitrust+Competition/Background+Note+The+EU+Power+Cables+Case+Antitrust+Parental+Liability+Of+Private+Equity+Management+Companies (last updated Apr. 30, 2014).

213 Pietro Merlino, *Edison: A Glimpse of Hope for Parent Companies Seeking to Rebut the Parental Liability Presumption?*, J. EUR. COMPETITION L. & PRAC. 1, 2 (May 28, 2014), *available at* http://jeclap.oxfordjournals.org/content/early/2014/05/27/jeclap.lpu051.full.pdf?keytype=ref&ijkey=Tr6LbLAjOUYqQAj.

214 *Commission Holds Goldman Sachs Liable for Former Portfolio Company's Antitrust Infringement*, MCDERMOTT, WILL & EMERY (Apr. 7, 2014), http://www.mwe.com/Commission-Holds-Goldman-Sachs-Liable-for-Former-Portfolio-Companys-Antitrust-Infringement-04-03-2014/.

215 Case C-179/12 P, Dow Chem. Co. v. Comm'n ¶ 3 (26 Sept. 2013).

216 Peter Citron & Hogan Lovells, *50:50 Joint Venture –Possibility of Parental Liability for EU Antitrust Infringement Confirmed*, KLUWER COMP. L. BLOG (Sept. 27, 2013), http://kluwercompetitionlawblog.com/2013/09/27/5050-joint-ventures-possibility-of-parental-liability-for-eu-antitrust-infringements-confirmed/.

217 *Id.*

218 Julian Joshua et al., STEPTOE & JOHNSON LLP, *"You Can't Beat the Percentage" – The Parental Liability Presumption in EU Cartel Enforcement*, EUR. ANTITRUST REV. 3 (2012), *available at* http://www.steptoe.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartels_Joshua-Botteman-Atlee.pdf.

219 *Id.* at 4.

220 *Id.*

III. THE COMPARISON BETWEEN THE UNITED STATES, CANADA, AND THE EUROPEAN UNION

These regions have substantial differences in how they approach a parent corporation liability for the violations of a subsidiary. First, Table 1 will summarize the legal and enforcement responses to "corporate-subsidiary liability." Second, this section will reflect on the comparative analysis and establish a basic framework that legislatures can adopt to create a cohesive, unitary response to the problem of corporation-subsidiary's problem.

TABLE 1: SUMMARY OF ENFORCEMENT AND THE FOUR SCENARIOS[221]

	UNITED STATES	CANADA	EUROPEAN UNION
Government Antitrust Agencies	Department of Justice/ Federal Trade Commission	Canadian Competition Bureau	European Commission on Competition
Relevant Law[222]	Sherman Act, but nothing specific extending liability to foreign corporation	Section 46 of the Competition Act	Treaty on the Function of the European Union: Article 101 and 102
Possibly Unconstitutional?[223]	No	Yes	Yes
Strict Liability	No	Yes	No

[221] To recap, the four scenarios as summarized *supra* note 19 were: *Scenario 1* is the base scenario where the corporation has a majority ownership in the subsidiary with a well-capitalized subsidiary. The foreign corporation knows about the price-fixing violation and has full control over the day-to-day activities. *Scenario 2* involves an undercapitalized subsidiary. *Scenario 3* involves a corporation with no day-to-day control over the activities of its subsidiary. *Scenario 4* is a corporation, which own less than 50% of the subsidiary.

[222] *See supra* Background A–C.

[223] *See* discussion *supra* Part I.B.ii.

Seminal Case Law/ Doctrine[224]	*Copperweld Corp. v. Independence Tube Corp.*/ "Piercing the Corporate Veil"	No case law.	*Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd. v. Commission*
Scenario 1*:* Corporation with Control and Influence over Wholly-owned Subsidiary.	Yes. All factors favoring "piercing the corporate veil."	Yes	Yes, rebuttable presumption of "corporate-subsidiary" liability
Scenario 2: Undercapitalized Subsidiary	Yes. Factor favoring "piercing the corporate veil."	Yes	Yes. Ownership most important factor.
Scenario 3*:* Day-to-day Control over Subsidiary's Activities	Yes. Factor favoring "piercing the corporate veil."	Yes	Yes. Ownership most important factor.
Scenario 4*:* Parent Corporation Owns Less than Fifty Percent of Subsidiary	Uncertain. Factor against "piercing the corporate veil."	Yes	Uncertain. No specific case law.
Litigation in Society (comparative)[225]	High	Low	Average
Fine Maximum	the greater of $100 million, or twice the	No Maximum	10% of the undertaking's world-wide

[224] *See supra* Part I.A.ii, I.B.ii, I.C.ii.

[225] J. Mark Ramseyer & Eric B. Rasmusen, *Comparative Litigation Rates*, JOHN M. OLIN CTR. FOR L., ECON. & BUS. 1, 5 (Nov. 7, 2010), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf.

	gross pecuniary gain[226] or loss (of the victim)		total turnover.
Largest Fine Issued[227]	$500 million USD	$12.5 million CAD	€479,669,850

A. CRAFTING NEW LEGISLATION

"Courts and enforcers should craft liability and procedural rules that minimize the sum of antitrust error and decision costs."[228] Individual jurisdictions, however, approach antitrust law differently when a "corporate-subsidiary liability" issue arises. The lack of cohesiveness is attributed to social and political pressures within the region. Therefore, a uniform antitrust law would effectively achieve three policy goals: (1) accountability, (2) predictability, and (3) growth.

Opponents to a uniform statute may argue that it creates an inflexible, unrealistic framework for these regions. Regardless, the lack of a shared foreign policy would result in future divergence. With the lack of uniformity in the current system, antitrust standards would drift back to competing interests. Therefore, eliminating the focus on the primary objective, protecting consumers. Instead, regions will attempt encourage business investment by developing less strict standards. Creating a bright-line standard for certain cases, however, reduces disparity for certain treatment.

All three antitrust agencies have overlapping policy goals with distinct focuses. The DOJ extends liability to the entities within the corporation. The policy may infringe on encouraging a free market, however, it ensure a "fair profit" scheme. Additionally, leniency programs encourage disclosure. The Canadian Competition Bureau, on the other hand, encourages predictability in antitrust laws, so that corporation can easily assess risk and carefully enter markets. Finally, the Commission requires a free-market approach allowing global growth,

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[226] "A loss [or gain] of money or of something having monetary value" BLACK'S LAW DICTIONARY 17c (10th ed. 2014); *Setting of Fines For Cartels in ICN Jurisdictions*, *supra* note 153, at 38.

[227] *Id.* at 35, 38.

[228] Lambert, *supra* note 94, at 3.

but control is an important policy for extending "corporate-subsidiary liability" in the European Union. A uniform antitrust law should meet all three policy goals.

Canada's statutory scheme and governmental agency offers the best starting framework for antitrust law. Antitrust law should begin with a specific statute with provisions[229] directed at "corporate-subsidiary liability." Regions should not adopt Section 46 of the Competition Act because the statute faces the danger of constitutional challenges in Canada alone. The section would not stand exposure to the litigious environment of the United States, and the unlimited liability under section 46 makes Canada's economy appears unattractive to foreign corporations looking to invest in the country. Each country should have single government agency that enforces antitrust law to prevent a dichotomy of policy implementation.[230] A specific antitrust statute and single enforcement agency creates consistency, and predictability to encourage economic growth.

To extend fines and actions to a subsidiary's corporation, a statutory scheme must create a presumption of liability for a corporation when a subsidiary is wholly-owned or mostly wholly-owned.[231] The presumption should be impossible to dispel. Antitrust enforcers must hold corporations liable for their subsidiaries' action, even corporations who unknowingly acquire a subsidiary, which is partaking in this misconduct.

Additionally, courts must support the statutory scheme, and the "corporate-subsidiary liability" statute must develop supportive case law. In less-than-wholly-owned corporations, US "piercing the corporate veil" factors[232] offer the best case-by-case interpretation. The "piercing the corporate veil" factors offer the best guidelines on how to determine a parent corporation's control over a subsidiary. The legislature must codify the "piercing the corporate veil" factors but allow the courts to interpret control on a case-by-case interpretation. Additionally, the antitrust agency must pursue corporations with undercapitalized or bankrupt subsidiary, which participate in price-fixing violations.

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[229] Both the United States and the European Union rest heavily on case law to interpret a parent corporation's liability for its subsidiaries actions.

[230] For example, in the US, the DOJ and FTC both enforce laws divergently. *See* discussion *supra* Part I.A.i. Similarly, in the EU, has some tension between the Commission and ECJ's construction of Article 101. *See* discussion *supra* Part II.A.i.

[231] This should be a statutory scheme; not one created through case law.

[232] *See* Palmiter, *supra* note 146.

However, if a corporation is not wholly owned and the "piercing the corporate veil" factors do not establish control, the parent corporation should be shielded from liability for the subsidiary's violations.

In sum, the region's antitrust scheme should include:

- A single antitrust government agency, which establishes competition policy.
- An antitrust statute, which imposes "corporate-subsidiary liability" without strict liability.
- The statute should create a presumption of liability for a foreign corporation with a wholly owned or mostly wholly owned subsidiary.
- The presumption should be difficult to dispel.
- Lack of knowledge does not release the corporation from "corporate-subsidiary liability."
- The statute should codify the "piercing the corporate veil" factors, which courts can use to "pierce the corporate veil."

IV. CONCLUSION

A corporation's ability to use its subsidiary as a shield creates a dangerous precedent. Without "corporate-subsidiary liability," a corporation could restructure to distance itself from the antitrust violations of its subsidiary. To prevent this, and to foster further growth, the United States, Canada, and the European Union should develop a uniform system to avoid corporations using structure or ineffective enforcement to avoid liability. Antitrust enforcement must hold corporations accountable for violations but also create laws that are predictable, that protect consumers, and that encourage economic growth. The United States, Canada, and the European Union have developed antitrust law with strengths and flaws. Assessing the positive and negatives of each antitrust regime offers an excellent framework for a single, coherent network of price-fixing laws to control "corporate-subsidiary liability."