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# Company Liability and Competition Law: Exposure of Company to Risk of Undesirable Behaviour of Directors

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## Abstract

In order to protect the objectives of competition policy, companies as undertakings are primarily targeted for the competition law infringements based on the mixed approach of compliance and deterrence theories relying on the view that company directors are incentivised to comply with the rules of competition law by the internal compliance programmes and corporate fines are the consequences of incompliance. This enforcement strategy gives rise to a tension between corporate governance, company law and competition law, as the former two focus on the behaviour of individuals within the corporate structure, while the latter concerns the impact of the company's behaviour in the market. The question that arises in this tension is whether or to what extent competition law actually considers the way in which the company is run internally while it seeks to promote these primary objectives. This article analyses the deterrent effectiveness of primary enforcement strategy employed in the UK competition law regime and argues that competition law does not tend to localise the source of conduct or particular decisions and does not aim to correct the right wrongdoer. Despite that lack of effectiveness of public enforcement strategy to deter further anti-competitive behaviour has led individual sanctions to be introduced by the Enterprise Act 2002 and the Enterprise and Regulatory Reform Act 2013 in the UK, companies are still primarily targeted by corporate fines even though directors have intentionally breached the rules of competition law and this strategy is unlikely to deter directors from engaging with undesirable behaviour which exposes the company to risk of liability and loss.

**Keywords** Company · Directors · Regulatory infringements · Compliance · Deterrence · Public enforcement

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## Introduction

Undesirable behaviour can be defined as a type of conduct by directors to boost the short-term profitability whereas it exposes company to significant corporate risks as it involves regulatory infringements. In order to prevent such behaviour, first remedy for the company would be the control mechanisms to be imposed on them by internal and external actors in order to maintain good corporate governance. There are however a number of hurdles which the company must overcome in order to control directors, and these limitations significantly decrease its ability to prevent directors from becoming involved in undesirable behaviour.

This gives rise to a question as to what would happen if the company is unable to control its directors and they involve in regulatory law breaches such as competition law infringements. Despite that there are number of risks that the company can be exposed as a result of regulatory infringement, the first potential risk that arises would be regulatory risk whose occurrence causes the company to suffer significant monetary loss. On the other hand, directors can also be punished through individual sanctions; however, a concern raises at this point is whether the way the internal decision-making structure works within the company is considered by the legal authorities when the type of punishment and whom it is to be targeted are determined.

For this purpose, the interaction between corporate governance concerning the internal relationships within the company and competition law, which focuses on the behaviour of the company in the market, will be taken into consideration.[1] The common point that unites these different areas of law is the fact that the behaviour of the company in the market is typically determined and conducted by its directors, and competition law seeks to prevent any anti-competitive conduct by companies which would potentially harm the objectives of competition policy. Therefore, the enforcement mechanisms adopted by competition law and against whom they are implemented are crucial issues in terms of the particular relationship between the company and directors. This gives rise to a tension between corporate governance and competition law, as the former concerns the internal structure of the company, while the latter focuses more heavily on the possible effects of the company's behaviour and the extent to which competition in the market could be harmed.

In this tension, the question that arises is whether competition law considers the different internal structures and divisions within the corporate structure when determining the enforcement mechanisms for protecting its objective, and whether it seeks to localise the source of the conduct by taking into account the legally established separation, or the distinct nature corporate entities. It is thus important to determine whether the role of corporate decision makers in anti-competitive behaviour is taken into account by competition law.

Further to this, the article examines the tension between the objectives of UK competition policy and the ability of the company to convince its directors to comply

[1] Thepot (2014, p. 3).

with the rules of competition law. The impact of the operation of UK competition law upon the relationship between the company and directors, and, in particular, whether it protects the company against, or exposes it to, undesirable behaviour on the part of its directors will be examined. For this purpose, UK competition law and its policy objectives will be taken into consideration in this article.

In order to address the main question, the article firstly provides general information about the operation of UK competition law in "The Policy Objectives of UK Competition Law" section. Secondly, while "The Primary Aim of Policy Objectives of UK Competition Law" section discusses what the objectives of UK competition policy are, "The Concept of Undertaking" section defines the concept of an undertaking in competition law. Thirdly, the role of policy objectives on forming the enforcement mechanisms of competition law and the impact of these enforcement strategies on the relationship between the company and directors will be examined in "Public Enforcement and the Company's Exposure to Risk" section. Following this, "Regulatory Compliance and Deterrence Theories" section analyses the theoretical bases that underlie the approach adopted by UK competition law to shape the current competition enforcement strategies, and whether the approach adopted by these theories exposes the company to the risk of liability and loss arising from undesirable behaviour conducted by directors. Lastly, conclusions will be drawn on the ability of the company to avoid being exposed to the risks of undesirable behaviour as a result of UK competition law and policy.

## The Policy Objectives of UK Competition Law

The objectives of competition policy are the foundations of competition law rules and they give guidance as to how these rules are applied and upon whom. In respect of the main purpose of the article, this matter gives rise to a tension between these policy objectives and the relationship of the company and directors, because the question that arises is whether or to what extent competition law actually considers the way in which the company is run internally while it seeks to promote these primary objectives. For this purpose, this section examines the policy objectives of UK competition laws and whether the company's exposure to risk of liability and loss by its directors is considered while these objectives are promoted.

### The Primary Aim of Policy Objectives of UK Competition Law

The policy objectives of competition law play an important role in the enforcement of competition law sanctions and they illustrate whose interest competition law protects.[2] For this purpose, there are two concepts to examine and these are what competition policy is and what its objectives are.

[2] Parret (2010, p. 30).

Motta defined competition policy as 'the set of policies and laws which ensure that competition in the marketplace is not restricted in a way as to reduce economic welfare'.[3] Aaronson described it as 'to secure the optimal allocation of resources in the economy, through the interplay of independent decisions by producers and consumers, in the interest of providing, at minimum cost, the goods and services which consumers value most highly'.[4] On the other hand, Dabbah brought a different perspective by defining it as 'an element of politics, which deals with public authorities' intervention beyond certain market imperfections, such as in the case of market failure'.[5] In this connection, Sir Leon Brittan asserted that, 'a positive competition policy should not be determined in isolation; it must be related to and integrated with economic, industrial, and also social policy'.[6]

Based on these definitions, there are currently two main schools of thought in respect of the objectives of competition policy. The first approach is that of the Chicago school. The primary goal of this approach is to assure that a competitive economy is maintained. For this purpose, competition policy ought to maximize economic efficiency, and protect 'consumer welfare'[7] and prevent 'inefficient allocation of resources'.[8] In doing so, this approach excludes the socio-political concerns. On the other hand, the Brussels school adopted a more balanced attitude to competition. According to this view, considerations in respect of competition, economy, and socio-politics are taken into account. For example, in contrast to the Chicago school, this school of thought more heavily concerns protection of small and medium size firms.[9]

From a broad perspective, there are many purposes that can be identified as competition policy objectives. These include economic and consumer welfare, the defence of smaller firms, the promotion of market integration, economic freedom, fighting inflation, and fairness and equity.[10] All these considerations individually can be controversially seen as a competition policy objective; however, as Willimsky discussed, particular 'objectives and policies ought to be borne in mind when looking at particular legislative enactments'.[11] This is because there are two categories into which these objectives can be classified, ultimate and intermediate.[12] For example, while some consider that promoting consumer welfare is an ultimate objective and effective competition process is an intermediate objective, others consider consumer welfare as a step to promoting effective competition in the market.[13]

[3] Motta (2004, p. 30).
[4] Aaronson (1996, p. 1).
[5] Dabbah (2000, p. 371).
[6] Willimsky (1997, p. 54).
[7] Odudu (2010, p. 599).
[8] Willimsky (1997, p. 55).
[9] Willimsky (1997, p. 55).
[10] Motta (2004, pp. 17–26).
[11] Willimsky (1997, p. 57).
[12] Parret (2010, p. 340).
[13] Parret (2010, p. 340).

In respect of the objectives of UK competition policy, there have been 'multiple goals and objectives' have changed from time to time in its history.[14] Before the introduction of the Competition Act 1998 (CA98), the public interest and the promotion of full employment were the objectives of competition policy.[15] This view was criticised on the grounds that it left the matter of preserving 'free and fair competition' without consideration while protecting the public interest.[16] As Rodger stated, 'the utilitarian model of public interest assessment [was] central to a system which concentrated on market failure and not necessarily some form of reproachable behaviour'.[17] Therefore, the policy objectives of UK competition law have been changed radically through the CA98. As Walker demonstrated, 'the Act substitutes the old "form" based competition law with an "effects" based regime prohibiting not particular types of restrictions per se, but restrictions which are perceived to have anticompetitive effects'.[18] Adopting a more effect based approach has increased consideration of the economic issues regarding the competition policy.[19]

The objectives of UK competition policy, however, have never been clearly defined[20] because the governments have always referred to 'strong' competition policy without defining what such a policy means precisely, and highlighted the place of competition policy in economic growth without illustrating how the particular relationship between these concepts is considered.[21] This is because a programmatic statement has always been rejected by UK governments.[22] Despite the fact that mission statements were adopted by the OFT [presently Competition Market Authority (CMA)] and the Competition Commission (CC), no statutory objective was given to them.[23] Whereas the CC stated that its goal was to 'help to ensure healthy competition between companies in the UK for the ultimate benefits of consumers and economy', the OFT suggested that its objective was to 'make markets work well for consumers' which 'seems to be a populist version of consumer welfare'.[24] This approach has been formalised by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) through creating the CMA (formerly the OFT) which seeks to encourage the competition for the benefit of consumers.[25] In the process of the ERRA 2013 being formed, 'throughout the government documents and statements, there [was] no discussion of what the objectives of competition law are and how this might affect enforcement policy';[26] however, ERRA13, for the first time, required the CMA to

[14] Graham (2013, p. 5).
[15] Scott (2009, p. 6).
[16] Hutchings Michael (1995, p. 212).
[17] Rodger (2000, p. 310).
[18] Maitland-Walker (1999, p. 51).
[19] Pilsbury and Jenkins (2010, p. 216).
[20] Rodger and MacCulloch (2015, p. 26).
[21] Graham (2012, p. 555).
[22] Graham (2012, p. 555).
[23] Graham (2012, p. 555).
[24] OFT and CC web archives. See also Graham (2013, p. 20).
[25] Graham (2013, p. 20).
[26] Graham (2012, p. 561).

'seek to promote competition, both within and outside the United Kingdom, for the benefits of consumers'.[27] This illustrates that other non-economic objectives are no longer under consideration within the frame of enforcement of competition law.[28]

The influence of the objective of consumer welfare on enforcement strategies can be seen from the past educational materials published by government authorities. The OFT (now the CMA) stated that,

> We prioritised the work we did around five key themes: vulnerable consumers and those challenged by the adverse economic climate; pricing used as a barrier to fair choice; improving trust in online markets; intellectual property and high innovation markets; and public markets.[29]

The CMA also indicated that, 'the likely direct effect of enforcement on consumer welfare in the market or sector where the intervention takes place' needs to be carefully taken under consideration.[30] This is to ensure that the intervention of the CMA is proportionate in terms of promoting consumer welfare.

Accordingly, UK competition law is heavily concerned with the impact of anticompetitive behaviour on consumers, and internal issues would be clearly regarded as irrelevant for the sake of promoting its policy objective. This gives rise to concerns on the extent of accountability on the parts of the company and directors for competition law infringements. In order to analyse this issue, in the next two sections, the primary enforcement mechanism of competition law, which is being targeted by this enforcement strategy, and its impact on risk distribution between the company and directors, will be examined.

## The Concept of Undertaking

The first and primary enforcement strategy adopted by UK competition law is the ability to fine undertakings. In order to achieve the policy objective of maximisation of consumer welfare, the provisions of Chapter I and Chapter II of the CA98 prohibit anticompetitive behaviour conducted by 'undertakings'. Despite the term undertaking being widely used, the CA98 does not provide a definition;[31] thus, the case law is taken as a reference.[32]

In respect of the interpretation of the term, there are two different groups of questions that need to be considered.[33] The first group of questions relies on the factor of 'economic activity' which defines the operation of competition law. In this respect, the term undertaking is defined in *Höfner and Elser v Macrotron*[34] as follows:

[27] Enterprise and Regulatory Reform Act 2013, s 25(3).
[28] Graham (2013, p. 20).
[29] OFT (2012, p. 6).
[30] CMA (2014, para. 5.14).
[31] Galloway (2009, p. III-381).
[32] Storey and Turner (2014, p. 405). See also Wils (2000, p. 100).
[33] Wils (2000, p. 100).
[34] Case C-41/90.

> It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.[35]

The second group of questions is in respect of the 'boundaries of undertaking' which is based on the scope of the term undertaking. This set of questions is complex because there are various forms that differ from single actors to corporate structures. In this regard, a definition of undertaking has been given in two cases. In *Hydrotherm v Compact,*[36] an undertaking was defined as 'designating an economic unit for the purpose of subject matter of the agreement in question, even if in the law that economic unit consists of several persons, natural or legal'.[37] In this case, two companies and the natural person who ran these companies were considered as a single undertaking.[38] In addition, in *Mannesmann v High Authority*,[39] undertaking was defined as 'a single organisation of personal, tangible, and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim'.[40]

Even though the concept of undertaking, on its face, may cover individuals, the term is usually interpreted as the company in competition law. This is because, as argued by Thepot, 'internal relations or mechanisms, including that of corporate governance, are outside of competition law scrutiny'.[41] In a broader sense, competition law considers an undertaking as the firm, and established corporate structures tend to be disregarded. In this sense, competition law challenges long established principles of company law, including the separate and distinct corporate legal personality, and it has a tendency not to consider these issues as relevant. This is suggestive of the fact that it does not place weight on the individuals who run the company's business.

Through prioritising competition policy, which focuses upon consumer welfare, competition law considers the effect on the market of the conduct and focuses far less on the cause of that conduct or identification of the source from particular parts of corporate structure.[42] Competition law does not tend to pay adequate attention to where responsibility should be attributed or where liability should remain, and whether it is more suitable to attribute these to the company as a whole or to particular individuals. Consequently, it highlights the economic entity and the conduct of the company in the market as its concern. For this reason, the internal dimension of

[35] Case C-41/90 [21].
[36] Case 170/83.
[37] Case 170/83 [11].
[38] Case 170/83 [10]–[11].
[39] Case 19/61.
[40] Case 19/61 [371].
[41] Thepot (2014, p. 3).
[42] Thepot (2014, p. 77).

the company is barely concerned with enforcement strategies, as they usually target the company.[43]

This casts serious doubt as to how competition law leaves liability, and whether it imposes sanctions in the right place, due to the fact that competition law focuses on *ex-post* objectives by its willingness to disregard the long-established norms and principles of company law. Moreover, there is a real question as to whether it attributes the liability to the more appropriate individual. In the next section, how the primary enforcement instrument is implemented and its impact on the risk relationship between the company and directors will be examined.

### Public Enforcement and the Company's Exposure to Risk

Based on the discussions put forward in the previous sections, UK competition law aims to protect the policy objective of consumer welfare and primarily targets undertakings by imposing fines.[44] These issues have been examined because there is a strong connection 'between the objectives of competition policy and the way in which the policy is enforced and ultimately infringements are sanctioned'.[45]

In order to achieve the objective of competition policy, there are different enforcement strategies adopted by UK competition law. These mechanisms have been put in force through considering three significant dynamics which, it is assumed, potentially deter anticompetitive conduct.[46] These are 'the risk of reputational damage for the company, criminal sanctions for individuals, and financial penalties for the company'.[47]

Based on the first and third factors, in order to prevent competition law infringements for the sake of the protection of consumer welfare, the strategy adopted by the authorities is to target companies by imposing monetary sanctions. In the next two sections, what will be considered is how this mechanism is implemented and its impact on the particular relationship between the company and its directors, in respect of the company's exposure to the risk of regulatory sanctions for regulatory infringements where individuals are involved in anti-competitive behaviour.

### Public Enforcement: The Administrative Enforcement Strategy

The public enforcement strategy is typically implemented by public authorities that are empowered to enforce the rules of competition law. The main purpose of implementing such an enforcement mechanism is to deter anticompetitive behaviour so that the wrongdoer would be aware that the potential punishment is greater than

[43] Thepot (2014, p. 3).

[44] Arguably the behavioural remedy is just as important, and often used, sanction in the competition authority toolkit as the fine.

[45] Parret (2010, p. 365).

[46] OFT (2011a, b, c, para. 6.5).

[47] OFT (2011a, b, c, para. 6.5).

the expected gain.[48] This enforcement mechanism consists of two steps that need to be taken by authorities. These are the detection of infringement, and intervention against the wrongdoer. In a general sense, the state has many forms of sanctions that can be imposed depending on the nature of a particular action. These can include 'pecuniary fines or incarceration'.[49] In respect of UK competition law, the public enforcement strategy usually targets the company through imposing fines that can be up to 10% of its worldwide turnover, which may be considered a large fine.[50]

Based on the companies' 'fear of reputational damage and financial penalties', the CA98 gives significant power to the competition authorities to impose fines.[51] The foundation of this enforcement strategy can be, as Wils suggested, that imposing fine contributes to competition law in three ways: 'through deterrent effects, through moral effects, and by raising the cost of setting up and running cartels'.[52]

A survey undertaken by Frazer on the tendency of companies to comply with the law also supports this attitude that companies must comply with the law if 'there is a likelihood of penalties'.[53] According to the survey, 43.6% of companies agreed strongly and 28.7% agreed with this finding. This outcome may support the view that companies can be incentivised to comply with the rules of law through financial penalties and this may explain the logic behind the tendency to impose a monetary sanction.

The amount of the fine is also an important issue for the purpose of incentivising because the company would probably not enter into wrongdoing if the possible fine exceeds the expected gain, and the desired deterrent aim of the fine is achieved. In consideration of the high level of harm that anticompetitive behaviour causes and the low possibility of detection, the main theoretical basis of UK competition law regime is to set fines as high as possible.

Indeed, although average corporate fines have dramatically increased in UK competition regimes since 1990, the question still remains as to whether this has succeeded in generating greater deterrence.[54] This is because besides the considerations of the enforcement strategy of fining and the amount of the fines, there is another factor that may have been neglected for the purpose of achieving greater deterrence. This dynamic can be defined as targeting the correct wrongdoer. Attention also needs to be given to the matter of who is targeted by imposing a fine, because the desired deterrence may not be achieved unless enforcement is accurately targeted. Concerns about the effectiveness of the deterrent fining strategy may potentially lie on this ground, as Stephan discussed how 'corporate fines (however high they

[48] Hüschelrath (2014, p. 10).

[49] Hüschelrath (2014, pp. 9–10).

[50] Competition Act 1998, s 36. Imprisonment, directors' disqualification, and individual fines are also public enforcement mechanisms but there is a number of issues with them which are far broader issues with which the article cannot deal. These mechanisms are also implemented after imposing regulatory sanctions on companies.

[51] OFT (2010, para. 1.10).

[52] Wils (2006, p. 183).

[53] Frazer (1995, p. 853).

[54] Ginsburg and Wright (2010, pp. 11 and 16).

may be) largely punish the wrong people'.[55] He went on to argue that these fines 'tend to be imposed many years after an infringement was instigated, with little or no direct effect on the individual decision makers responsible'.[56] Accordingly, 'monetary penalties directed at the corporation will often prove inadequate to deter illegal behaviour'.[57]

The best evidence for the lack of deterrent effect with the fine strategy is the current system of EU competition law, which consists of almost entirely corporate fines and this strategy is seen as providing very little enforcement to prevent anti-competitive offences.[58] This was also illustrated by research undertaken by the OFT (currently CMA) on businesses; it was found to be the fourth most effective sanction, following criminal penalties, disqualification of directors, publicity, and private actions.[59] Criminal penalties and disqualification were ranked the most important sanctions in deterring competition law infringements. The potential reason that underlies this finding is that the decisions of the company are typically taken by directors, and considering their potential role in competition law infringements may require the authorities to try a new approach to deterrence.

The problem with solely relying on corporate fines is that sanctions imposed on companies do not always assure the deterrent effect on individuals because, in many cases, the company may not be in a position to control its directors effectively. Consequently, the desired deterrent effect of the sanctions is unlikely to succeed. This is because when the fines are imposed on the company, the ones who bear the burden are the consumers and potentially shareholders, who are almost definitely limited in their ability to affect the company's conduct, rather than the individuals, who are unlikely to be deterred through this strategy as no preventative sanction is taken against them.[60]

This enforcement strategy illustrates that competition law does not tend to localise the source of conduct or particular decisions.[61] It attributes to the larger corporate holding and what it is more interested in is being able to attribute liability in a way that can attract and highlight sanctions. In this sense, competition law is unconcerned with the legally respected and established corporate structures, and the next section will examine the negative consequences that this ignorance may potentially have for the company.

### A Company's Exposure to the Risk of Liability and Loss

As has been seen, public enforcement through administrative fines aims to deter the potential wrongdoing company from breaching competition law for the sake of the

[55] Stephan (2011, p. 535).
[56] Stephan (2011, p. 529).
[57] Coffee (1980, p. 389).
[58] Khan (2012, p. 78).
[59] OFT (2010).
[60] Ginsburg and Wright (2010, p. 22).
[61] Except the individual sanctions.

objective of consumer welfare. The issue is that while competition law targets the company to promote its policy objectives, the matter of how the individuals within the company are incentivised so that they do not tend to engage in anticompetitive behaviour has not been addressed by this public enforcement strategy.

At this point, the tension between corporate governance and competition law in terms of the difference between their purposes arises because, as Rock stated, 'antitrust is about markets; corporate law is about firms. Antitrust is about competition; corporate law is about cooperation. Antitrust regulates relations among firms; corporate law governs relations within firms'.[62] The tension is more about how these subjects operate because corporate governance deals with the 'internal dimension', while competition law concerns the 'external dimension'.[63] From the perspective of competition law, the company is a 'black box' that is referenced to 'the general indifference of competition law provisions and instruments to the internal dimension of [companies]'.[64] Therefore, competition law is enforced in such a way that it disregards how the company operates and different divisions and corporate structures are irrelevant for its purposes.

Public enforcement through corporate fines also illustrates this lack of tendency of competition law to intervene in the particular relationship of the company/directors; however, the issue of whether this approach exposes the company to risk of liability and loss due to breach of competition law rules by its directors has been overlooked because such behaviour usually involves 'a handful of employees' either by engaging personally or permitting others to engage.[65] Thus, they are presumably aware that what they are conducting is illegal and may harm the company in some way.[66] In this sense, competition law misunderstands or oversimplifies the particular relationship between the actors of corporate governance and it is not connected to and concerned about the company's exposure to risk of liability and loss as a result of the illegal conduct of its directors.

In respect to the undesirable behaviour of directors examined in this article, there is no doubt that such anticompetitive behaviour conducted by directors may benefit the company in the short term but such behaviour potentially exposes it to significant risk of liability and loss in the long term. The way in which the breach of rules of competition law is sanctioned illustrates such exposure because, for example, a cartel is usually involved in increasing the short term value but the company is subjected not only to financial but also reputational corporate risks. The fine imposed on the company is not 'paid by the individuals responsible for the infringements but by companies and therefore ultimately shareholders and consumers'.[67] For this reason, 'firm-level liability is generally regarded as inefficient because it imposes significant externalities: the punishment goes beyond those who are responsible,

[62] Rock (1992, p. 498).
[63] Thepot (2014, pp. 14–15).
[64] Thepot (2014, p. 17).
[65] Stephan (2010, pp. 236–239). See also Thepot (2015b, p. 4).
[66] Stephan (2010, p. 239).
[67] Weitbrecht (2008, p. 88).

impacting third parties'.[68] The long term interests of other non-shareholder stakeholders will be also impaired since the value of the company would be decreased as a result of fine imposition. Solely targeting the company through financial penalties illustrates that preventing responsible directors from becoming involved in competition law infringement through disciplining them is left to the company. The next section will examine the theories that underlie this approach in UK competition law.

## Regulatory Compliance and Deterrence Theories

The main logic behind the approach adopted by competition law may be that the company is in such a position that it can sufficiently motivate its individuals to avoid any competition law infringement which may potentially result in fines. The foundation of this approach can be based on the cumulative impact of regulatory compliance and deterrence theories that aim to persuade potential wrongdoers not to involve in any misconduct or to impose punishment if the compliance with the relevant law is not maintained. Thus, despite the fact that their strategies are different as compliance theory employs persuasion as a tool, and deterrence theory uses the threat of punishment, their objectives can be arguably similar.

This section will examine whether these theories are based on effective foundation in terms of persuading or preventing potential wrongdoers from becoming involved in misconduct and their connection with the approach of the UK competition law regime.

### The Regulatory Compliance Theory Approach

The first theory that may underlie the approach of the current competition policy is regulatory compliance theory. In this theory, the company is considered an entity that provides guidance to its members regarding how to behave. In order to avoid any burden as a consequence of potential public enforcement, the company must set up insider norms and regulatory compliance programmes to train its employees so that they do not become involved in any competition law infringement on its behalf.

These methods are called 'compliance strategies' and are typically implemented through the internal compliance programme, which can be defined as 'a tool which will enable companies to detect, deter and prevent any non-compliance with the applicable laws'.[69] The reason for relying on these internal strategies is based on the widely accepted statement that 'corporate culture is an important factor in explaining the engagement of companies in competition law infringements'.[70]

Such programmes have two important functions in increasing social welfare.[71] Firstly, they increase the level of compliance of the company as each member

[68] Schwarcz (2015, p. 554).
[69] Gürkaynak et al. (2015, p. 145).
[70] Thepot (2015a, p. 1).
[71] Oded (2010, pp. 22–23).

within the company would have an awareness in respect of the standard of regulations. Secondly, the cost of investigation to the public agents can be reduced as these programmes monitor the behaviour of employees in case they are involved in any infringement.

Insider programmes and norms typically include an ethics code, training, guidelines, manuals, close monitoring, and the provision of comprehensive working procedures.[72] Through these mechanisms, corporate individuals are guided and trained so that they would be aware of the particular types of conduct they should avoid for the sake of maintaining good corporate governance. These instruments can be very beneficial and helpful in maintaining a certain compliance level with the law as long as the directors behave accordingly.

In this view, compliance theory may underlie the approach adopted by UK competition law, which always encourages companies to incentivise their employees so that the best compliance with the rules of competition law is maintained. This can be seen from the considerable efforts shown by the OFT (currently CMA) through providing some guidance to companies,[73] and organising compliance and awareness workshops across the UK in respect of how they maintain the compliance with competition law.[74] In respect of guidance, it was recognised that a one size fits all approach is not suitable for competition law compliance and a principle-based approach was supported.[75] It was stated that,

> [T]he key point is that businesses should find an effective means of identifying, assessing, mitigating and reviewing their competition law risks in order to create and maintain a culture of compliance with competition law that works for their organisations.[76]

In addition, the CMA has been organising compliance awareness workshops across the UK to motivate businesses to comply with competition law. These seminars were held in London and the West Midlands in January, the East Midlands in February, the North West in March 2016, and further seminars will be held in a rolling programme in 1–2 regions a month.[77] These workshops aim to encourage businesses to become familiar with competition law and increase their awareness of what constitutes illegal anti-competitive behaviours. They are also intended to increase the low levels of competition law training and discussion at a senior level, as they have been found only 16% and 9%, respectively.[78] Through these strategies, companies are not only encouraged to set up their own compliance programme based on the size and nature of their particular corporate risk, but employees are also incentivised to obey the rules of competition law.

[72] Oded (2010, p. 22).
[73] OFT (2010). See also OFT (2011a, b, c).
[74] CMA (2016).
[75] OFT (2010, para. 1.5). See also OFT (2011a, b, c, para 1.2).
[76] OFT (2011a, b, c, para 1.2).
[77] CMA (2016).
[78] CMA (2016).

Despite the fact that the importance of having these compliance programmes established in the corporate structure has been acknowledged by UK competition law authorities,[79] their effectiveness in terms of incentivising employees to comply with the law is an important issue to highlight. In respect of the preventative measure of the compliance approach in UK competition law, it is strange that '[t]here have been no attempts in the literature to estimate empirically the general effects, positive or negative, of antitrust compliance programmes'.[80] There are some empirical studies in the USA on the effectiveness of these programmes in deterring law breaking in some other areas of law; however, no positive outcome has been brought yet.[81] In this connection, Krawiec discussed that 'the data regarding the effectiveness of internal compliance-based organisational liability regimes is both preliminary and disturbing'.[82] She continued to argue that although the empirical studies illustrate that the diversity training programmes increase the awareness and the knowledge of employees, they provide very little information regarding the extent to which these programmes contribute to behavioural change.[83]

Hence, the positive influence of these programmes on employee behaviour is still unclear. This may be because of the fact that they are voluntary, and the incentivising effectiveness depends on whether employees consider the ethics code and what they learned from training programmes before they act. The effectiveness of an ethics code is based on the determination of the individual as to whether they have been involved in any conduct contrary to the ethics code, and whether they tend to report it.[84] In respect of the involvement of executives and controllers in fraudulent financial reporting, Brief, Dukerich, Brown, and Brett also demonstrated that, 'neither personal values, codes of conduct, nor the interaction of the two factors played a significant role'.[85] The findings of the interviews undertaken by Schwartz also support this argument that some individuals do not even remember the provisions of the codes and, consequently, there are very rare occasions on which the codes influence behaviour.[86]

The problematic issue in this sense is that even though the company forms various training programmes and creates a comprehensive ethics codes, it may not ensure that these programmes completely influence the behaviour of directors because how the knowledge gained in training programmes is implemented in practice is left to their discretion. These internal structures may improve the knowledge of employees regarding the different issues that may arise in the company; however, the existing research is limited in terms of observing positive behavioural changes.

[79] The company, which has established strong compliance programme, would be granted up to 10% reduction in fines.

[80] Wils (2013, p. 63).

[81] McKendall et al. (2002, p. 367). See also Krawiec (2003, pp. 510–515).

[82] Krawiec (2005, p. 596).

[83] Krawiec (2003, pp. 514–515).

[84] Kitson (1996, p 1021).

[85] Brief et al. (1996, p. 183).

[86] Schwartz (2001, p. 253).

At this point, the issue of the company's exposure to risk of regulatory punishment arises as its efforts to set up a compliance programme cannot be effective unless directors act on them. This is because, based on the survey undertaken by McKenzie, '[a]nti-trust/competition was most frequently identified as the number one legal risk (18.1% of respondents) and was the most likely to be identified in the top three legal risks (38.6% of respondents)'.[87] These results demonstrate how the potential risk of competition law infringement is likely to incentivise companies to set up strong compliance programmes. In addition, the survey also shows that the legal risks which may be potentially faced by executive directors underlie the reason to implement compliance programmes. The logic behind this issue is that the implementation of compliance programmes in practice is in the hands of directors and they are typically incentivised to do so through the personal liability that they may face. In consideration of the matter that the issue of a compliance programme is a mitigating factor for companies to reduce their punishment, it is unlikely to incentivise directors to implement compliance programmes by the risk of liability and loss upon the company.

Another issue regarding the tension between compliance theory and the company/directors relationship is that if the company failed to control its directors and any infringement arose, it might be punished for noncompliance with the law.[88] The company is typically regarded as a better monitor and investigator of their employees' behaviour than the authorities and, for this reason, corporate sanctions can encourage it to seek ways to improve its monitoring and compliance mechanisms to induce its employees to comply with the law.[89] Krawiec defined such internal compliance programmes as a 'negotiated governance mechanism'[90] and considered this attitude as a 'disturbing fact'.[91] She continued to discuss that,

> Even more disturbing, however, is the fact that the evidence that does exist is decidedly mixed, with many of the most recent and methodologically sound studies finding no significant correlation between the most widely-used internal compliance structures and reduced organizational misconduct.[92]

The logic that may underlie this approach is that 'mild law does not induce widespread law-abiding behaviour if it is imposed by an exogenous authority'.[93] The concept of mild law can be defined as a 'soft law'[94] that relies on compliance through persuasion and the role of the company for this purpose is regarded as greater and more influential than the outside enforcers.

[87] McKenzie (2008, p. 12).
[88] It can be understandable that if the company is punished for non-existence of compliance programme as it would be considered as its ignorance of law.
[89] Arlen and Kraakman (1997, p. 693).
[90] Krawiec (2003, p. 541).
[91] Krawiec (2005, p. 591).
[92] Krawiec (2005, p. 591).
[93] Tyran and Feld (2006, p. 153).
[94] Thepot (2015b, p. 2).

Hence, although there is little existing evidence in the literature on the effectiveness of these internal compliance programmes on individuals, their perceived role as a 'liability determinant' of the company has been commonly relied on.[95] Having an established corporate compliance programme could be a consideration point when a company's liability is determined and the amount of punishment imposed on the company can be reduced if it has established a strong compliance structure. For this reason, this method can be called 'duty-based liability'.[96]

In respect of this issue, two opposite approaches have been adopted by different competition law regimes. For example, whereas the EU competition law authorities do not, and the US authorities almost never, take the compliance programmes into account as a reason to mitigate the punishment for competition law infringements, the UK competition law authorities may reduce the fines up to ten percent if they are satisfied with the company's compliance efforts.[97] It was illustrated in the 2011 policy document that reduction of a penalty imposed for anticompetitive behaviour may be provided if adequate efforts have been made for the purpose of ensuring compliance.[98] An example of such a reduction was seen in the case of the market sharing agreement undertaken between *Arriva plc and FirstGroup plc*.[99] In this case,

> The Director recognised from copies of training manuals and evidence that training had taken place and from documents reporting contacts with competitors that the parties both had genuine compliance systems in place which appeared to be generally followed and adhered to. As a result the penalties would be reduced by 10 per cent.[100]

Such a reduction can be considered as a mitigating factor for the company as it has an opportunity to reduce the amount of the fine by establishing effective compliance programmes;[101] however, the question that arises in this respect is whether the compliance programme can be regarded as strong if a breach or infringement has taken place. In other words, does even one breach result in the failure of the entire corporate compliance structure? This question is based on the fact that even though the company may have established a very strong compliance programme, it is the directors who implement these programmes in practice. This issue has been also noticed by the UK competition law authorities, who noted that,

> [D]irectors play a key role in establishing and maintaining an effective competition law compliance culture within their company. Without the full commitment of individual directors to compliance with competition law, any compliance activities undertaken by the company are unlikely to be effective.[102]

[95] Krawiec (2005, p. 591).
[96] Oded (2010, p. 23).
[97] Thepot (2015b, pp. 2–3). See also OFT (2012, para. 2.15).
[98] OFT (2011a, b, c, para 1.6).
[99] No. CA98/9/2002.
[100] No. CA98/9/2002 [66].
[101] Singleton (2008, p. 102).
[102] OFT (2011a, b, c, para. 1.2).

Based on this consideration, in the UK, reduction can be still awarded for compliance efforts even if directors are involved in competition law breaches.

As an example, the case can be given of the price fixing agreement between *Hasbro UK Ltd, Argos Ltd, and Littlewoods Ltd*.[103] In this case, Hasbro sought to demonstrate the existence of compliance programmes which had been ignored by senior management, and claimed that such ignorance should not be considered as an aggravating element.[104] Normally, although the existence of compliance programmes is regarded as a mitigating reason in many cases, the OFT (now CMA) determined that this factor is 'offset by the fact that it was blatantly ignored at a very senior level within Hasbro and no adjustment is appropriate'.[105] The disciplinary actions taken later on by the company against guilty employees were taken under consideration and, accordingly, Hasbro was granted a 10% fine reduction.[106]

Hence, whether the particular compliance programme established in the company is strong enough to prevent employees from becoming involved in anticompetitive behaviour is not the sole focus of the UK competition law authorities and the efforts made by the company to achieve greater compliance are also to be considered. Fine reductions may encourage companies to make more effort to take greater compliance measures without considering whether directors would follow them because the reduction can be still awarded regardless of whether the directors ignore or comply with the compliance programme.

This amount of fine reduction, however, does not eliminate the primary responsibility of the company for the sanctions imposed on it, because even though it may have made a great effort to set up compliance programmes, it would still be liable to pay at least 90% of the amount of the fine. This is because although the company has strong internal compliance structures, the role of implementing them is left to the directors.

The main problem, thus, lies in the company being regarded as the controller of its directors through compliance programmes. This attitude to the internal compliance structures is unlikely to maintain compliance as they measure the level of the company's liability based on whether any infringement arises, rather than considering whether employees implement the compliance programme in practice.[107] Accordingly, 'if a company has made a reasonable effort to comply with the antitrust law, and an employee nevertheless engages in price-fixing, then it makes no sense to fine the corporation'.[108]

As a result, despite the efforts made by the competition law authorities through publishing guidance, organising compliance workshops, and providing a fine reduction to the company based on the existence of compliance instruments, the

[103] No. CA98/2/2003.

[104] No. CA98/2/2003 [404].

[105] No. CA98/2/2003 [404].

[106] No. CA98/2/2003 [405].

[107] *Hasbro* analysed above can be an example of such situation as it illustrates the difference between the motivation of the company and its senior management employees.

[108] Ginsburg and Wright (2010, p. 18).

company's exposure to the risk of liability and loss due to the anticompetitive behaviour of its directors is still likely to be in place. This is because although these efforts and the fine reduction can be considered as being for the benefit of the company in respect of decreasing the level of punishment, it is still targeted through the administrative enforcement strategy for any incompliance that arises.

### The Deterrence Theory Approach

The second philosophy that may underlie the approach of current UK competition law is deterrence theory. The strategy of this theory is to punish the wrongdoer involved in misconduct or law breaking through monetary and criminal sanctions, so that the desired deterrence is achieved. The modern deterrence theory is largely based on the thoughts of classical philosophers, namely Thomas Hobbes, Cesare Beccaria, and Jeremy Bentham.[109] The common point that unites these early approaches is that, in order to maintain the desired deterrence, the potential benefit from the crime should be less than the punishment.[110] In other words, the cost of the punishment to the wrongdoer should be greater than the potential benefit he/she would gain. According to this, the pain and pleasure, as potential consequences of the misconduct, are the tools that disincentivise or incentivise individuals, and when the pain outweighs the pleasure, the deterrent effect is achieved. Reiss described this as being how 'the presumption in deterrence…is that [the] behaviour is rational to the degree that it responds to incentives and disincentives, particularly to the disincentives of negative sanctions'.[111] Thus, the degree of compliance with the relevant law is based on the level of pain of possible detection. This approach was also supported in the economic models of Becker, Stigler, and Posner in the context of microeconomic theory.[112]

Regarding the concern of enforcement to prevent corporate misconduct, there are four assumptions underlying these early deterrence theories. These are:

> (i) Corporations are fully-informed utility maximisers; (ii) legal statutes unambiguously define misbehavior; (iii) legal punishment provides the primary incentive for corporate compliance; and (iiii) enforcement agencies optimally detect and punish misbehaviour, given available resources.[113]

According to these assumptions, the company is considered as an entity that is aware of how its employees behave and knows how to incentivise them to prevent wrongful behaviour through compliance strategies. The main logic behind this attitude is that 'many corporate crimes…cannot be readily detected by the government', and the company is usually in a better position to discover these crimes and identify

[109] Onwudiwe et al. (2005, p. 234).
[110] Onwudiwe et al. (2005, pp. 234–235).
[111] Reiss (1984, p. 94).
[112] Scholz (1997, p. 254).
[113] Scholz (1997, p. 254).

particular individuals who are engaged with them.[114] According to this approach, if any misbehaviour has arisen within the company, this would illustrate that the company has failed to implement this power to prevent them from breaking the law.

Onwudiwe, Odo, and Onyeozili demonstrated that these early deterrence theories were framed according to the three elements of 'severity, certainty, and celerity'.[115] The places of these elements in deterrence theory are significant because, under the consideration of severity, the effectiveness of the punishment is measured based on whether the pain outweighs the pleasure, while the element of certainty ensures that the misconduct has occurred and the punishment is imposed. In addition, the element of celerity ensures that the investigation is finalised and the required punishment is imposed as quickly as possible.

To achieve the desired deterrence, these three elements are crucial; however, solely focusing on these may result in overlooking another important element, which is targeting the correct wrongdoer. Identifying this person is vital since, if the target is wrongly determined, these three underlying elements are meaningless for the sake of deterrence. This is due to the attitude, which asserts that the harm has arisen because of corporate error. Scholz described how 'the deterrence model reflects a common assumption that rules are imposed on corporations against their wishes, and, therefore, that legal penalties provide the primary motivation to counterbalance the profitability of misconduct'.[116] The underlying assumption of this approach is that targeting companies is always considered less costly and time consuming, and so state agents have more resources and time to address a greater number of violations.

The approach of the deterrence theory has been adopted in a number of areas of law[117] but 'it is particularly suited to cartel regulation as it might be expected that business people, whose main aim is profit maximisation, can be expected to act as 'amoral calculators' in that they will calculate the expected costs and benefits of any behaviour before acting'.[118] Based on administrative sanctions that target companies through imposing fines, it can be suggested that the approach of deterrence theory has influenced UK competition law. This was illustrated in guidance published by the OFT and followed by the CMA, as two purposes of imposing financial penalties were explained:

> (i) to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and (ii) to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anticompetitive activities from engaging in them.[119]

[114] Arlen (1994, p. 835).
[115] Onwudiwe et al. (2005, p. 235).
[116] Scholz (1997, p. 261).
[117] Such as criminal law, consumer law, and environmental law. See Rodger and MacCulloch (2015, p. 218).
[118] Rodger and MacCulloch (2015, p. 218).
[119] OFT (2012, para. 1.4).

Another common consideration that brings deterrence theory and UK competition law regime together is the severity of the punishment. This is because the deterrent effect of administrative fines has always been considered depending on their levels in competition law.[120]

A six-step approach adopted by the CMA also illustrates this common ground. This approach was adopted to calculate the appropriate amount of the fine to impose on a particular company, so that the sanction would be as great a deterrent as possible. These steps consider: (1) the seriousness of the infringement and turnover of the undertaking, (2) the duration of the infringement, (3) mitigating factors, (4) deterrence and proportionality, (5) a maximum penalty of 10% of worldwide turnover, and (6) how leniency and settlement discounts are taken under consideration.[121] The purpose of such determination is to deter the company from infringing competition law through making it aware that the potential punishment is severe and outweighs the gain.

Based on the administrative enforcement strategy and attitudes of competition law authorities in the UK, deterrence theory may potentially underlie its approach, and solely targeting the company to deter potential infringements from happening exposes the company to the risk of liability and loss due to directors' breach of law. In consideration of the last stage of this six-step approach, it can be discussed that the company can still protect itself from being exposed to significant punishment as it can be immune from liability through leniency and settlement discounts. This argument is supportable in the sense of receiving a certain amount of fine reduction; however, this does not change the fact that the company is still primarily targeted and the risk of liability and loss for the competition law infringements remains with it. Therefore, although some remedies are provided to the company, this strategy does not completely eliminate its primary responsibility for the infringement.

In respect of the risk distribution between the company and directors, the issue with this approach, as it was in compliance theory, is that whereas the company is targeted to maintain the desired deterrence, the role of employees, particularly directors, in the potential infringement is overly disregarded. Individual accountability is not considered as a matter of maintaining the desired deterrence and, consequently, the deterrence theory is unlikely to be tailored to be able to recognise the distinctive incentives for the company and directors.

### The Mixed Approach

Although the deterrence and compliance theories are both established for the purpose of maintaining compliance with the law, they are distinctively different approaches to achieve this aim. Whereas compliance is encouraged by the punishment of misconduct through imposing sanctions on the company under the deterrence theory, the company is sought to be persuaded to obey the rules of law under

[120] Rodger and MacCulloch (2015, pp. 221–222).
[121] OFT (2012, para 2.1).

the compliance theory. While 'repair' is the main objective in compliance theory, 'retribution' is that of deterrence theory.[122] From this point of view, competition law might have adopted both theories to form the foundations of its enforcement strategies.

With the natures of these theories under consideration, it can be seen that they are in conflict as 'following one approach means abandoning the other'; however, it has been seen in the literature that their approaches may not be mutually exclusive[123] because the enforcement strategies should be flexible based on the fact that there is more than one way to incentivise every entity to comply with the law. Braithwaite and Ayres discussed that 'to reject punitive regulation is naive; to be totally committed to it is to lead a charge of the light brigade. The trick of successful regulation is to establish a synergy between punishment and persuasion'.[124] A number of 'imperfections' have been identified in deterrence and compliance theories, so it is suggested that these two strategies should be mixed in order to combat these imperfections.[125] Thus, what should be balanced is providing an incentive by persuading the potential wrongdoer *ex ante* and imposing sanctions to punish him/her *ex post*.

In respect of the application of the mixed approach in the context of corporate governance, the foundation of the reconciliation of the compliance and deterrence philosophies is established by Scholz based on the game theory.[126] Under this approach, the company is perceived to be in a position to determine whether to comply with the rules of law and, based on the level of its compliance, either the cooperative or deterrence enforcement method is employed by the enforcement authorities.[127] For example, the certain lower limit of compliance is determined by the state and if the level of the company's compliance goes below this limit, the deterrence strategy would be imposed on the company through punishment. If the degree of compliance by the company remains above this limit, the cooperative response will be made by the authorities.[128]

The second strategy in this approach was introduced by Braithwaite and Ayres, and is known as 'responsive regulation'.[129] The main objective of this strategy is to see the company as being law-abiding in nature and, from this point of view, the theory can be perceived as closer to the compliance strategy due to being persuasive more than punitive. The enforcement strategies are classified into the levels of an 'enforcement pyramid' based on the degree of punishment.[130] The pyramid illustrates when either strategy of punishment or persuasion is appropriate to employ. The bottom of the pyramid consists of the persuasion and guidance which are the least strict methods. In between, there are harsher methods such as warnings and

[122] Hawkins (1983, p. 36).
[123] Oded (2010, p. 3).
[124] Braithwaite and Ayres (1992, p. 25). See also Braithwaite (1985, p. 182).
[125] Oded (2010, p. 1).
[126] See generally Scholz (1984a, b).
[127] Oded (2010, p. 23).
[128] Scholz (1984a, b, p. 393).
[129] Braithwaite and Ayres (1992).
[130] Braithwaite (1985, p. 142). See also Braithwaite (1985) and Braithwaite and Ayres (1992, 35).

civil sanctions. On the top level, the strictest methods such as criminal sanctions are employed.[131] The aim of creating this type of pyramid is to guide the agents to start with compliance strategy.[132] If the company has not started to comply with the law by improving its behaviour, the authorities can employ harsher sanctions.

These different approaches are examples of the mixed method that combines compliance and deterrence theories. The logic behind this approach is that persuasion to comply with the law is employed *ex ante* and, should the persuasion strategy be found inadequate in terms of incentivising the wrongdoer, punishment should be *ex post*. In this sense, it can be discussed that the mixed approach may be identical with the administrative fine strategy adopted by UK competition law regime. This is because it is based on the belief that 'expressly including competition compliance in the business's code of conduct and making it clear that activity that risks causing an infringement of competition law attracts disciplinary sanctions'.[133] This can also be seen from the three key pillars of compliance identified by the OFT to encourage competition compliance and improve deterrence. These are:

> (i) [K]nowledge and awareness of competition law: providing guidance and information on compliance measures and risks, (ii) sanctions and enforcement: ensuring the penalties regime is designed to achieve optimal deterrence, and (iii) voluntary compliance measures: facilitating a culture of compliance within firms through efficient and effective provision of the first two pillars.[134]

Rodger also suggested that, before the enactment of the CA98, 'the OFT had adopted a three-pronged strategy, or an "enhanced carrot and stick" approach, incorporating a deterrent strategy; an educative strategy; and a third, legitimising" strategy involving OFT officials touring the country to explain the nature and rationale of the new legislation'.[135] This enforcement strategy has also been promoted by the CMA (formerly the OFT) to encourage companies to set up their own compliance programme to educate their employees, and it seeks to deter any infringement through administrative fining. Support for this approach was also given by the CMA's former chief executive, Alex Chisholm, who said that, 'the more we can promote awareness of competition and consumer law and a culture of compliance amongst firms, the more we will be able to demonstrate that those firms who do not comply merit the serious punishments that we are empowered to impose'.[136]

Consequently, targeting companies is primarily in place in the mixed approach and this has influenced UK competition law in respect of the enforcement strategy of administrative fining. However, this gives rise to the issue that the 'root causes'[137] of competition law infringements may be heavily disregarded. The UK competition

[131] Braithwaite and Ayres (1992, p. 35).
[132] Braithwaite (2002, pp. 29–43).
[133] International Chamber of Commerce (2011, p. 31).
[134] OFT (2011a, b, c, para 1.10 and 4.18).
[135] Rodger (2009, p. 65).
[136] Chisholm (2014).
[137] Krawiec (2005, p. 615).

law authorities have always sought to motivate companies and employees to comply with competition law through education, guidance, compliance seminars, leniency, and settlement discounts; however, enforcement strategies primarily target companies through administrative fines, and what is overlooked is the role of the individual in any wrongdoing.[138]

### The Mixed Approach and the Company's Exposure to the Risk of Liability and Loss

The approach adopted by UK competition law based on the mixed approach relies on the view that corporate culture embeds compliance. The company's ability to prevent its directors from being involved in anti-competitive behaviour depends on how it incentivises them to comply with the law through internal compliance programmes. The company is considered an entity, above its directors, and 'monitoring, investigating, [and] reporting their misconducts' are its responsibilities.[139] If misconduct arises, it is likely to be due to the company's failure to set up effective compliance programmes and it is considered to be ignorant of competition law. In such a case, targeting the company through an administrative enforcement strategy, which is the classic economic approach and currently being employed by the competition authorities in the UK, should not be surprising.[140]

In respect of the risk distribution between the company and its directors, the issue with this approach is that the company, regardless of whether it has made a great effort to establish strong compliance programmes, would still be punished for any infringement by its employees on its behalf.[141] In a nutshell, the company is subjected to the risk of liability and the cost of such preventative measurement. This was discussed by Gray, who stated that,

> Companies are not protected from legal responsibility for the acts of their employees by the existence of quality-control and preventative compliance systems designed to ensure that all employees act in such a way that legislation and regulations are never infringed. No matter how seemingly watertight and superior those controls are, if someone within the company subverts them and takes the company outside the law, the company cannot escape ultimate responsibility by pleading that it tried its best and its preventative systems ought to have worked. The simple fact is they did not and the task of the law here is to punish effective non-compliance no matter from where it was generated within the company.[142]

This approach is likely to disregard the distinctive incentives to the company and its directors to obey the rules of competition law because even though the company seeks to keep directors away from anticompetitive behaviour through compliance

[138] Individuals are additionally punished through individual sanctions.
[139] Ginsburg and Wright (2010, p. 16).
[140] Ginsburg and Wright (2010, p. 16).
[141] Such effort provides only 10% fine reduction to the company.
[142] Gray (1996, pp. 299–300).

strategies, it cannot escape the responsibility for the infringement that may have arisen from ignorance of the rules of law by its directors. Such a situation is likely to expose the company to risk of liability and loss due to punishment imposed on it for infringement.

This is not to suggest that the company should be completely immune from any sort of responsibility arising from an infringement by its directors, because it has some power[143] to incentivise them to act according to ethics and restrictions through insider tools. For this reason, it can still be held responsible for any infringement that arises because infringement may be considered the company's failure to set up a strong compliance programme. However, the extent to which directors implement what the company teaches and reminds them is a crucial question which should be considered to discipline them regarding their involvement in competition law infringements. This is based on the matter that, as Whelan suggested that, the capability of the company to discipline its directors is not 'without serious drawbacks'.[144] This is because setting up a strong compliance programme to educate and train directors does not guarantee that the desired disciplinary effect and compliance with the relevant law would be achieved. For this reason, it can be suggested that the effort put forward by the company to educate its directors and how they implement what they learn from compliance programme in practice needs to be investigated to find the root cause of the particular anticompetitive behaviour. This is because punishing the company for the infringement without investigating the source of wrongdoing is likely to neglect the fact that the company and its directors are distinctively incentivised to obey the rules of law. In this scenario, directors' ignorance of the law and the compliance programme set up by the company would be left without punishment.

There are two reasons underlying this view. The first reason is the existing understanding in respect of the relationship between the company and its directors. The company is regarded as an entity that has strong tools to monitor the activities of individuals to check whether they have fulfilled their duties. This is because the company is perceived as being in the 'best position' to identify and discipline particular individuals.[145] Full protection and freedom are provided to the company and if any wrongdoing emanates from its affairs, it would be responsible. The company's compliance with the relevant law is the main focal point because it is assumed that if the company desires to comply with the law, it would seek and find a way to encourage its directors to comply with it. Its liability is determined based on its perceived ability to monitor its directors, based on the assumption that 'the true fault lay with the company'.[146]

The second reason is that the authorities are reluctant to find the particular wrongdoer among other individuals within the company because there are a number of individuals but only one principal, which is the company. Each company

[143] Calkins (1997, p. 147).
[144] Whelan (2007, p. 27).
[145] Clarkson (1996, p. 563).
[146] Clarkson (1996, p. 563).

has their own complicated structure and it is very difficult for outside authorities to investigate and determine which individual within the company is the actual wrongdoer.[147] This difficulty is very much linked to the issues of potential costs and length of the process. This is because identifying the actual responsible individual among the numbers of individuals within the company is costlier and may take a considerable time as it requires comprehensive investigation. The authorities have to appoint qualified agents to investigate the managerial relationships between individuals and documents so that they can find the right wrongdoing individual.

In short, competition law heavily adopts the mixed approach of compliance and deterrence theories, which leaves the responsibility of establishing certain compliance programmes to the company to encourage directors to comply with the relevant law, and punishes it for any incompliance that arises. However, it may not be appropriate to employ enforcement strategies that solely and primarily target the company, because this attitude disregards the potential role of directors in law infringement. Any failure to take preventative measures by the company to educate and train its directors should be its own failure, and should be punished, but the existence and scope of its compliance programme to encourage its directors to comply with the law and the role of individuals in infringement also need to be seriously considered before the punishment is determined. Consequently, the mixed approach does not tend to recognise the distinctive incentives for the company and its directors, and it is likely to cause the company to be exposed to the risk of liability and loss as a result of regulatory punishment caused by directors' infringement of law.

## Conclusion

The purpose of the article was to analyse the impact on the company of the regulatory infringements and sanctions that can arise where directors involve the company in anticompetitive behaviour. For this purpose, the objectives of UK competition policy, the administrative enforcement strategy of competition law, the theories underlying this enforcement mechanism, the company's exposure to the risk of liability and loss were examined.

The regulatory enforcement strategies of competition law are implemented to protect its policy objectives. In order to promote the objective of consumer welfare, companies, as undertakings, are primarily targeted for infringements through administrative fining and this gives rise to a tension between what competition law seeks to achieve and the safeguarding of the company against directors' undesirable behaviour. Competition law is not connected to or concerned about the company's exposure to the risk of liability and loss caused by directors' undesirable behaviour, and it rather misunderstands or oversimplifies the particular relationship between the actors of company law. It also disregards the matter that stakeholders, and the consumers whose welfare it seeks to protect, eventually suffer loss and their long-term interests will be impaired as a result of administrative fining.

[147] Clarkson (1996, p. 563).

The foundation that underlies this enforcement strategy is based on compliance and deterrence theories, since while compliance theory considers the company to be an internal controller of its employees through establishing a compliance programme within the corporate structure, the deterrence theory primarily targets the company for infringement, which is considered a consequence of the company's failure to establish a strong compliance programme to persuade its employees to obey the rules of law. UK competition law has adopted a mixed approach of these theories and even if the company establishes the strongest programme and the director decides not to follow it, the company's risk of liability and loss will still not be removed.[148] This approach disregards the role of directors and their accountability for the law infringement in question. There are also individual sanctions introduced in the UK Competition Law; however, these sanctions are with a number of some other issues with which the article cannot deal.

The CMA is always eager to crack down on cartels by initiating new campaigns such as 'be safe, not sorry'[149] and 'do the right thing'[150] in order to encourage whistle blowers to come forward to report any cartel they were involved or witnessed. The effort that the CMA put forwarded should be greatly appreciated; however, as this strategy shows, the approach adopted by the CMA is to prevent future cartels *ex post* as the cartel should have already taken place in order for this strategy to be implemented. However, for achieving the purpose of maintaining cartel free market and considering that the cartels are mainly involved by directors, there should be strong *ex ante* deterrent mechanisms that dissuade directors from breaching the rules of competition law. Implementing this strategy firmly may also deter future cartels from happening; however, this can be only achieved as long as the correct wrongdoers are targeted. When a cartel is revealed, companies are still primarily punished whereas the role of directors in the cartel is considered later on.

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[148] The UK provides 10% fine reduction for functioning strong compliance programme, but such allowance does not diminish the company's liability significantly as it is still held liable for the infringement.

[149] See CMA (2017).

[150] See CMA (2018).

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