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Introduction

1.1 COMPETITION LAW AND CORPORATE GOVERNANCE: TWO DISTINCT ORDERS

Antitrust is about markets; corporate [governance] is about firms. Antitrust is about competition; corporate [governance] is about cooperation. Antitrust regulates relations among firms; corporate [governance] governs relations within firms.[1]

Operating in distinct conceptual orders – that of the marketplace and that of the firm – competition law and corporate governance pursue different objectives. Competition law is oriented towards the defence of consumers' interests in the market, while corporate governance rules are designed to protect the interests of shareholders.[2] Competition law and corporate governance also constitute separate areas of academic inquiry across jurisdictions.[3] The aim of this book is to fill a gap in the scholarship, by establishing systematic connections between competition law and corporate governance, regarding both substantive and enforcement issues of contemporary relevance.

1.1.1 *Corporate Governance: the Internal Dimension of the Firm*

In this book, the term 'corporate governance' refers to any relation or mechanism that concerns the *internal dimension* of firms.[4] According to the Organisation for

[1] E. B. Rock, 'Corporate Law Through an Antitrust Lens', *Columbia Law Review*, 92 (1992), 497, 498. The term 'corporate law' has been replaced with 'corporate governance'. In spite of the two different meanings of 'corporate law' and 'corporate governance', I consider that the spirit of the quote is still valid, for the purpose of this introduction.

[2] For a definition of a 'firm', see Section 1.1.3. For the present purpose, the terms 'firm', 'company' and 'corporation' are used interchangeably.

[3] For a literature review, see Section 1.5.

[4] The idea is that the firm is composed of various sociological entities, or groups of participants, characterised by various aspirations and contributions to the firm. Sociological groups may be internal to the boundaries of the firm (e.g. employees, managers and shareholders) or external to the firm (e.g.

Economic Cooperation and Development's (OECD's) definition, corporate governance involves 'a set of relationships between a company's management, its board, its shareholders and other stakeholders'.[5] The definition adopted in the Cadbury Report provides that '(c) corporate governance is the system by which companies are directed and controlled'.[6] Among the different relations contributing to corporate governance, the analysis focuses mostly on that between shareholders and managers in firms where ownership is distinct from the function of control of the business. In those situations, the relationship between the owners, or shareholders, and managers – known as the *agency relation* – is characterised by a tension of interests between both parties. Due to limited information, managers may pursue their own goals, at the expense of the shareholders' interests.[7]

The *internal dimension* also refers to mechanisms and rules of corporate governance. Here, 'corporate governance' refers to mechanisms by which shareholders ensure that managers act in their best interest so as to maximise their return on investment.[8] Other conceptions of corporate governance consider that objectives that are broader than just economic aims, such as social goals, should be pursued by the firm.[9] For the sake of simplicity and conciseness, the theoretical framework for corporate governance retained for present purposes is that focusing on shareholders' interests. This approach is widely adopted in the economic literature on corporate governance, and developed along with the literature on agency costs.[10] However,

consumers, suppliers and distributors). Corporate governance is typically concerned with relations between shareholders and managers, hence the need for other areas of law to deal with other groups (e.g. competition law and consumers): S. Douma and H. Schreuder, *Economic Approaches to Organizations*, 6th edn (Pearson Education, 2017).

5 OECD, Principles of Corporate Governance (2004), p. 11.

6 Financial Reporting Council, Report of the Committee on the Financial Aspects of Corporate Governance (the 'Cadbury Report') (1992), p. 15.

7 For further definition and theoretical explanations of the concept of the agency relationship, see Section 2.4.

8 A. Shleifer and R. W. Vishny, 'A Survey of Corporate Governance', *The Journal of Finance*, 52 (1997), 737, 741.

9 'Corporate Governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The corporate governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society' (Sir Adrian Cadbury in 'Global Corporate Governance Forum' (World Bank, 2000), p. vi).
The stakeholder approach states that managers should take account of a much broader range of interests in making decisions: those of all of the stakeholders in a firm that impact or are affected by the firm's welfare. For discussion of the possible combination of goals, including the conception of an *enlightened* value maximisation objective, see M. C. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function', *Journal of Applied Corporate Finance*, 14 (2010), 8, 10.

10 E.g. S. A. Ross, 'The Economic Theory of Agency: The Principal's Problem', *American Review*, 63 (1983), 134; M. C. Jensen and W. H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure', *Journal of Financial Economics*, 3 (1976), 305; E. Fama and M. C. Jensen, 'Agency Problems and Residual Claims', *Journal of Law and Economics*, 26 (1983), 327; M. C. Jensen, 'Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers' *The American Economic Review*, 76 (1986), 323.

a broader conception of corporate governance could arguably include the impact of managers' decisions on consumer welfare, thereby sharing concerns with competition law. In some instances, but not systematically, mechanisms of corporate *law* are part of the analysis when relevant.

1.1.2 *Competition Law: the External Dimension of the Firm*

While corporate governance is concerned with the internal dimension of the firm, competition law addresses the *external dimension* or the relations *between* firms. Competition law refers to both the substantive rules and the enforcement processes that are aimed at promoting and protecting competition in free market economies. The terms 'competition law' and 'rules on competition' are used interchangeably to refer to the European Union (EU), the United States of America (USA) and any other jurisdictions when deemed relevant. Among conduct that is regulated by competition law, this book is mostly concerned with anticompetitive agreements with a particular focus on cartel practices, which are prohibited by Article 101 of the Treaty on the Functioning of the European Union) (TFEU) in the EU and section 1 of the Sherman Act in the United States.[11] The restriction to cartel practices enables the examination of an area of competition law in which the harm to economic welfare is unambiguous and that is homogeneously prosecutable across jurisdictions.[12] The harm to economic welfare is more debated in the area of abuse of dominance or monopolisation, which is covered by Article 102 TFEU in the EU and section 2 of the Sherman Act in the United States.[13] Owing to the different enforcement approaches, abuse of dominance practices would require jurisdiction-specific analysis.[14] For the sake of conciseness, abuses of dominance will not be part of the analysis here. This study will also examine aspects of the merger control regime that demonstrate the interplay of competition law and corporate governance.[15]

1.1.3 *Concepts of the Firm*

The boundaries of the firm set the distinction between the two orders in which competition law and corporate governance operate. However, the concept of the

11 Conduct prohibited by Art. 101 TFEU (EU); s. 1 of the Sherman Act 15 USC §1 (USA).

12 Different enforcement approaches are seen in the area of vertical restraints, in which the harm to economic welfare is particularly debated. For the background of debates and contrasted approaches to resale price maintenance, see: S. Umit Kucuk and H. J. P. Timmermans, 'Resale Price Maintenance (RPM): The US and EU perspectives', *Journal of Retailing and Consumer Services*, 19 (2012), 537.

13 Conduct prohibited by Art. 102 TFEU (EU); s. 2 of the Sherman Act 15 USC §2 (USA).

14 For discussion of this divergence, see, e.g., W. E. Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?', *Competition Law International*, 4 (2008), 8; E. M. Fox, 'Monopolization and Abuse of Dominance: Why Europe Is Different', *Antitrust Bulletin*, 59 (2014), 129.

15 Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings [2004] OJ L24/1 ('EU Merger Regulation'); s. 7 of the Clayton Act 15 USC §18 (USA).

firm is not a homogeneous one. Different conceptions and definitions of the firm are used across disciplines. In neoclassical economics, the firm is a production function. In new-institutional economics, the firm refers to the organisation of an economic activity within a hierarchy, rather than through an exchange in the marketplace.[16] The law has also long recognised the existence of firms as entities having rights and responsibilities distinguished from the individuals who compose them. The law recognises the ability of firms to govern themselves through internal processes, while also drawing their external boundaries, marking firm as entities within a larger society composed of different types of actors and institutions.[17] In corporate law, the term 'company', in all its legal variations, generally designates a legal entity that is engaged in a business activity, as distinct from the individuals who compose them.[18] A great variety of corporate forms structure the economy, including corporations, partnerships or individual proprietorship. As a feature of the modern economy, corporate groups linking legally independent entities have considerably complexified and enriched the corporate landscape.[19] Modern firms are also characterised by financial investment that is increasingly disjoined from operational control of the economic activity.[20]

Competition law has its own distinctive conception of the firm. In the EU, the concept of 'undertaking' is used to mark the external boundaries of firms that are the subject of competition law provisions. An undertaking is defined as an 'entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[21] The conception of the firm is thus based on economic concepts and may be indifferent to the legal realities of firms.[22] In the economic literature, the expression 'black box' generally denotes the neoclassical conception that solely the amount of input and the way in which it is allocated – and not operations performed inside the boundaries of the firm – matter for economic efficiency.[23] By extension, this book uses the term 'black box' in reference to the indifference of competition law provisions and instruments to the internal dimension of what it defines as firms.

16 See Chapter 2 for details of economic theories of the firm.
17 E. W. Orts, *Business Persons: A Legal Theory of the Firm* (Oxford University Press, 2013), p. 2.
18 The term 'company' comprises any formal business entity, including a corporation, a partnership, an association or an individual proprietorship.
19 These include parent–subsidiary relationships, conglomerates or pyramid structures. For definitions and a taxonomy of modern business firms, see Orts, *Business Persons*, ch. 5.
20 Separation of ownership and control is not new, but it is furthered by the financialisation of the modern economy. For discussion of the financialisation process, see, e.g., J. Crotty, *Capitalism, Macroeconomics and Reality: Understanding Globalization, Financialization, Competition and Crisis* (Edward Elgar Publishing, 2017); E. Hein, D. Detzer and N. Dodig (eds.), *Financialisation and the Financial and Economic Crises: Country Studies* (Edward Elgar Publishing, 2016).
21 Case C–41/1990 *Klaus Höfner and Fritz Elser* v. *Macroton GmbH* [1991] ECR I–1979.
22 The definition and concept of 'undertaking' or 'person' is discussed in detail in Chapter 3.
23 'Efficiency' is understood here as allocative or static efficiency, which refers to the optimal allocation of resources.

1.2 STATE OF PLAY OF THE INTERACTION OF COMPETITION LAW AND CORPORATE GOVERNANCE

Since its inception, competition law across jurisdictions has shown a variable interest in relations and mechanisms that are internal to the boundaries of the firm. This section takes stock of some of the notable steps in the relationship between competition law and matters of corporate governance. The evolving relationship also shows an interesting transatlantic contrast.

1.2.1 *The Emergence of Competition Law: Closing the 'Black Box'*

In the United States, which is a pioneer in the adoption of modern rules on competition, the history of competition law closely relates to the inability of corporate law to deal effectively with the social consequences of the increasing use of a form of economic organisation – trusts – in the late part of the nineteenth century. The Sherman Act, outlawing contracts, combinations, and conspiracies in restraint of trade, was introduced in 1890 as a response to concerns raised by the emergence of large trusts in the economy.[24] As corporate devices into which individual owners of businesses transferred their stocks, trusts enabled the expansion of businesses and the coordination of production, in spite of the limits set by state laws.[25] Standard Oil was the first trust created in response to the limitations to its corporate power set by state corporate law.[26] However, it was later said to qualify as 'the greatest monopoly and combination in restraint of trade in the world', reflecting a deep public aversion towards trusts.[27] Competition law in the United States (antitrust law) emerged precisely because state corporate laws could not apply to trusts, in view of their interstate dimension.[28] In addition, they were deemed inadequate to deal with the social consequences of the emergence of trusts, the most important being the concentration of economic wealth and power. Following the introduction of the Sherman Act, the United States witnessed the so-called 'great merger movement', in which thousands of business firms consolidated, at least until 1904.[29] Mergers may have been a tool for circumventing prohibitions on combinations that had been set by the newly enacted Act.[30] However, while the Sherman Act prohibited agreements to restrict price or output, it was not meant to 'limit and

24 Sherman Act 15 USC§§1–7.
25 For an account of different legal models of trusts, see H. Hovenkamp, *Enterprise and American Law, 1836–1937* (Harvard University Press, 1991), p. 249.
26 B. Y. Orbach, 'The Antitrust Curse of Bigness', *Southern California Law Review*, 85 (2012), 605, 610–11.
27 W. H. Taft in Orbach, 'The Antitrust Curse of Bigness', 609; W. Letwin, 'Congress and the Sherman Antitrust Law: 1887–1890', *University of Chicago Law Review*, 23 (1956), 222.
28 Although the Sugar Trust was defeated on the basis of state corporate law: *People* v. *N River Sugar Ref Co* 121 NY 582, 622–3 (1890), 614.
29 Hovenkamp, *Enterprise and American Law*, p. 242.
30 The first targets of the Sherman Act were 'loose' combinations (or cartels); thus, mergers were a way to form 'tight' combinations and avoid prosecution ibid.

restrict the rights of corporations [. . .] in the acquisition, control, or disposition of property'.[31] Therefore a legal response was needed to address the potential negative economic consequences stemming from these consolidations.[32] For a while, state corporate laws were used as an antitrust device to solve the issue of trust combinations. However, after various developments, federal antitrust law appeared much more adequate to address concentrations of multistate companies.[33] As such, US antitrust law developed in response to the failure of corporate law to address issues of common concern to both disciplines.

In contrast to the United States, where the emergence of antitrust closely relates to corporate matters, the history of EU competition policy is linked to the goal of economic integration.[34] The development of EU competition policy occurred in a period when the European Community was working on its integration and on the realisation of the common market. At that time, in spite of the adoption of the EU treaties, the national governments of the member states still held considerable economic powers, and no single economic area existed. In such conditions the role of EU competition policy was deemed 'more extensive, more complex and even more necessary' to achieve economic integration.[35] As a result, competition law provisions were predominantly applied by the European Commission and the European Court of Justice as instruments to eliminate private restraints on trade between member states.[36] In addition, the introduction of competition rules in the European Community marked a cultural shift: in the first half of the twentieth century, cartels were commonly accepted and no member states had rules on competition.[37] EU competition law was shaped by member states who were traditionally characterised by state monopolies and had long focused on industrial policy alongside free market competition.[38] Therefore, unlike that of the United States, EU competition law has remained separate from concerns of corporate law, the latter having also largely remained a national matter.

Until a few decades ago, US antitrust law remained somehow concerned with intracorporate matters. According to the intra-conspiracy doctrine that emerged in

31 *US* v. *EC Knight Co* 156 US 1 (1895).
32 See Hovenkamp, *Enterprise and American Law*, p. 244: 'Two legal models in dealing with the Trust Problem'. This also discusses legal solutions found at state or corporate level.
33 Ibid., p. 267.
34 P. Akman and H. Kassim, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy', *Journal of Common Market Studies*, 48 (2010), 111, 114.
35 Ibid.
36 S. M. Ramirez Pérez and S. van de Scheur, 'The Evolution of the Law on Articles 85 and 86 EEC [Arts 101 and 102 TFEU], Ordoliberalism and Its Keynesian Challenge' in K. K. Patel and H. Schweitzer (eds.), *The Historical Foundations of EU Competition Law* (Oxford University Press, 2013).
37 Rules on competition such as rules that prohibit cartels and prevent abuse of dominant position: L. F. Pace and K. Seidel, 'The Drafting and the Role of Regulation 17, a Hard-Fought Compromise' in Patel and Schweitzer, *Historical Foundations*, p. 54.
38 M. Motta, *Competition Policy, Theory and Practice* (Cambridge University Press, 2004), 13–19.

the 1940s, companies belonging to the same corporate group could conspire within the meaning of section 1 of the Sherman Act.[39] In *United States* v. *Yellow Cab* the Supreme Court stated that being under common corporate ownership and control did not preclude the existence of a conspiracy.[40] In *United States* v. *General Motors* a parent company and its subsidiaries were considered separate entities for the purpose of antitrust analysis, even though they may have constituted a 'single corporate enterprise'.[41] In 1984, the *Copperweld* case reversed the intracorporate conspiracy doctrine, in finding that different firms forming a single economic entity were not capable of conspiring with each other and that any combination of them could not constitute an antitrust violation.[42] Through a clear adoption of the single entity doctrine, the Supreme Court thereby confirmed that antitrust law was not meant to interfere with intracorporate decisions.[43] A century after its introduction in response to corporate issues, the scope of section 1 of the Sherman Act was then rooted outside the boundaries of the corporation. In the EU, the single entity doctrine was later adopted, also marking the scope of EU competition law provisions outside the boundaries of what is defined as an undertaking.[44]

1.2.2 *Current Developments: a Renewed Interest in the Internal Dimension of the Firm?*

To date, very few competition rules are concerned with the internal dimension of firms. The only statutory provision that directly concerns corporate governance can be found in the United States, in the provision on interlocking directorates in the Clayton Act.[45] In Europe, only rarely do enforcement instruments, such as sanctions, address the internal structure of firms, or target the business participants that compose them.[46] Nonetheless, issues of corporate structure and corporate governance are very topical for competition law. The issue of corporate links among competitors has been the object of vivid debates in the United States and in the

39 D. V. Williamson, 'Organization, Control, and the Single Entity Defense in Antitrust', *Journal of Competition Law and Economics*, 5 (2009), 723, 731–2.
40 332 US 218, 228 (1947).
41 121 F 2d 376 (7th Cir 1941).
42 *Copperweld Corp* v. *Independence Tube Corp* 467 US 752 (1984).
43 A. I. Gavil, W. E. Kovacic and J. B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, 2nd edn (Thomson West, 2008), p. 239, although other provisions, such as s 2 of the Sherman Act, can still apply to single-firm conduct.
44 The single entity doctrine was clearly adopted in Case C–73/95P *Viho Europe BV* v. *Commission of the European Communities* [1996] ECR I–5457.
45 'No person shall, at the same time, serve as a director or officer in any two corporations [. . .] that are – (A) engaged in whole or in part in commerce; and (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust Law' (s. 8 of the Clayton Act, 15 USC §19).
46 In most jurisdictions, undertakings are the primary subjects of competition rules. EU competition law does not sanction individuals. Many EU member states have individual sanctions, ranging from fines to jail sentences. The latter type of sanction is rarely used in practice (see Section 7.3.2.1).

EU. In some sectors, portfolio diversification strategies by institutional investors can result in concentration of financial ownership. Recent empirical studies suggest that such links between competitors can produce anticompetitive effects, and have triggered concerns that these may be left unchallenged.[47] In the EU, minority shareholdings not conferring control were at the heart of the project on merger control reform.[48] Although the reform has not been pursued, the issue keeps its contemporary relevance.[49] Common shareholdings links were recently discussed by the Commission in the *Dow/DuPont* merger case.[50] Commissioner Vestager also expressed the Commission's intention to examine the scope of issues raised by common institutional investors.[51]

The everlasting cartel problem also calls for greater inquiry into internal incentives and processes. The past decade has seen a significant growth in criminalisation of cartels across the world, providing jail or monetary penalties for individuals who engage their companies in collusive behaviour.[52] Recent initiatives show an increased interest by competition authorities in interactions occurring within the boundaries of the firm: guidance resources issued by the European Commission and the Competition and Markets Authority (CMA) – including 'Compliance: Why does it Matter?',[53] 'Company Directors and Competition Law' and 'How your

47 For an overview of the issue, see: OECD, 'Common Ownership by Institutional Investors and Its Impact on Competition', DAF/COMP/WD (2017)10; CPI Antitrust Chronicle, 'Index Funds – A New Antitrust Frontier?' (2017) 3. For more particular legal and economic analysis, see, e.g., J. Azar, M. Schmalz and I. Tecu, 'Anti-Competitive Effects of Common Ownership', *Journal of Finance*, 73 (4), (2018), 1513; E. Elhauge, 'Essay: Horizontal Shareholding', *Harvard Law Review*, 129 (2016), 1267; J. Baker 'Overlapping Financial Investor Ownership, Market Power, and Antitrust Enforcement: My Qualified Agreement with Professor Elhauge', *Harvard Law Review Forum*, 129 (2016), 212; J. He and J. Huang, 'Product Market Competition in a World of Cross-Ownership: Evidence from Institutional Blockholdings', *The Review of Financial Studies*, 30(8) (2017), 2674–718; E. Posner, F. Scott Morton and E. G. Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors', *Antitrust Law Journal*, 81(3) (2017), 669–728; D. O'Brien and K. Waehrer, 'The Competitive Effects of Common Ownership: We Know Less than We Think', *Antitrust Law Journal*, 81(3) (2017), 729–76; M. S. Patel, 'Common Ownership, Institutional Investors, and Antitrust', *Antitrust Law Journal* (2018).

48 European Commission, 'Towards More Effective EU Merger Control', White Paper COM (2014) 49.

49 M. Vestager, 'Refining the EU Merger Control System', speech, *Studienvereinigung Kartellrecht*, Brussels, 10 March 2016, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en

50 *Dow/DuPont* (Case COMP/M.7932), Commission Decision 2017/C1946 [2017] paras. 2349–52, Annex 5, p. 5.

51 M. Vestager, 'Competition in Changing Times', FIW Symposium, Innsbruck, 16 February 2018, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en; Commission, Management Plan 2017 of DG Competition, Ref Ares(2016)7130280. 16.

52 A. Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws', *Journal of Antitrust Enforcement*, 2 (2014), 333, 335 (map of jurisdictions that criminalise cartels). For a discussion of individual sanctions in EU member states, see Section 7.3.2.1.

53 DG Competition, 'Compliance with Competition Rules: What's in It for Business?' (2011).

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Business can achieve Compliance'[54] – illustrate that corporate culture and internal compliance with competition law norms have become an important subject for competition authorities.

In addition, competition authorities, courts and practitioners face novel challenges relating to the complex corporate structures of undertakings, in which financial investments are increasingly disjoined from the economic operations of businesses.[55] In the EU, this is a very significant and highly contentious issue in cases of liability attribution for breaches of competition law by wholly owned subsidiaries.[56] National cases also suggest the critical importance of the concept of undertaking, and its internal structure, with regard to private actions in cross-border competition cases. In *Provimi*, the court noted that a wholly owned subsidiary could be held liable for the breach of its parent, thereby establishing the jurisdiction of a member state in which a subsidiary (or 'anchor defendant') is domiciled.[57] Finally, the allocation of fines among different entities forming a single undertaking was a particularly difficult question in the *Siemens* case.[58]

54 OFT1341, 'How your Business can Achieve Compliance with Competition Law' (2011); and OFT1340, 'Company Directors and Competition Law' (2011). See, more generally, CMA, 'Businesses and Individuals: Competition Law Guidance', available at: www.gov.uk/government/collections/competition-and-consumer-law-compliance-guidance-for-businesses#company-directors

55 For a description of the growing complexity of the corporate landscape, see: Orts, *Business Persons*, ch. 5; Separation of ownership and control is not new, but it is furthered by financialisation of the modern economy. For discussion of the financialisation process, see, e.g., Crotty, *Capitalism, Macroeconomics and Reality*; E. Hein, D. Detzer and N. Dodig (eds.), *Financialisation and the Financial and Economic Crises: Country Studies* (Edward Elgar Publishing, 2016).

56 See, e.g., C. Koenig, 'An Economic Analysis of the Single Economic Entity Doctrine in the EU Competition Law', *Journal of Competition Law and Economics*, 13 (2017), 281; B. Wardhaugh, 'Punishing Parents for the Sins of their Child: Extending an EU Competition Liability in Groups and to Subcontractors', *Journal of Antitrust Enforcement*, 5 (2017), 22; S. Thomas, 'Guilty of a Fault that One has not Committed: The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law', *Journal of European Competition Law & Practice*, 3 (2012), 11; J. Joshua, Y. Botteman and L. Atlee, '"You Can't Beat the Percentage" – The Parental Liability Presumption in EU Cartel Enforcement', *European Antitrust Review*, (2012), 3; S. Burden and J. Townsend, 'Whose Fault Is It Anyway? Undertakings and the Imputation of Liability', *Competition Law Journal*, 3 (2013), 294; B. Leupold, 'Effective Enforcement of EU Competition Law Gone Too Far? Recent Case Law on the Presumption of Parental Liability', *European Competition Law Review*, 34 (2013), 570; J. Temple Lang, 'How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-Owned Subsidiary Be Resolved?', *Fordham International Law Journal*, 37(5) (2014), 1481.

57 *Provimi Ltd* v. *Aventis Animal Nutrition SA* [2003] EWHC 96; *Cooper Tyre & Rubber Co & Others* [2009] EWHC 2609 (Comm); *KME Yorkshire Ltd and others and Toshiba Carrier UK Ltd and others* [2011] EWHC 2665 (Ch); *Nokia Corp* v. *AU Optronics Corp* [2012] EWHC 731. For further discussion, see Section 4.4.

58 In the *Siemens* case, the Commission, General Court and Court of Justice had different views with respect to the allocation of fines among companies pertaining to the same undertaking. Reversing the approach of the General Court, which noted the exclusivity of the Commission in determining the internal allocation of the fine, the Court of Justice affirmed its general indifference to the internal allocation of fines between the parent company and the infringing subsidiary, thereby leaving national courts to define such allocation: Joined Cases C–232/11P and C–233/11P *Commission* v. *Siemens AG Österreich* [2014] EU:C:2014:256.

1.3 THE SIGNIFICANCE OF OPENING THE 'BLACK BOX'

This book is the first to establish the meaningful and significant interaction between competition law and corporate governance, regarding both substantive and enforcement issues. Part I of this book will concern the *substantive* dimension;[59] and Part II the *enforcement* aspect of such interaction, with a focus on collusive behaviour.

Part I – Moving Boundaries: Substantive Issues

Competition law and corporate governance meaningfully interact when the boundaries between the firm and the market are not of clear-cut application. The substantive reach of competition law and corporate governance operates within moving boundaries. The concept of undertaking that is used in competition law to define its boundaries is based on economic concepts, applying to a wide range of evolving legal realities.[60] As such, some of the most contemporary issues for competition law are the growing complexity of corporate structures, and the increasing disconnection between financial investment and operation of the economic activity.[61] For example, the acquisition of shares in a competing undertaking renders the boundary between those unclear: two undertakings are simultaneously competitors with and shareholders of the same company.[62] Likewise, a relationship between a parent company and its subsidiary or between a company and its commercial agent constitute neither a clear market nor a clear intrafirm relation. Capturing the anticompetitive effects of such relations may require adjustment of the substantive reach of competition law vis-à-vis corporate governance. This is because relations at the border between the firm and the market may give rise to anticompetitive effects that are not adequately captured by the market/firm paradigm that underlies the theories of harm.

Examining issues of contemporary relevance, this book appraises the distinctive conception of the firm in competition law, by which it defines the boundaries of its substantive reach. Competition law submits *undertakings* (in the EU) or *persons* (in the United States) to rules relating to their conduct on the market. In EU competition law and US antitrust law, the single entity doctrine supports the idea that relationships among entities that form part of a single entity should be immune from prohibitions on anticompetitive agreements. The doctrine is thereby used to distinguish one undertaking from another, and to determine whether entities will be subject to competition law either separately or jointly. In the EU, the single entity doctrine is also critically used to attribute liability in the cases of undertakings composed of economically affiliated but legally independent companies. Showing

59 Although Part I also discusses the question of liability attribution within complex undertakings, and as such also engages with the enforcement dimension of the interaction.
60 Case C–41/1990 *Klaus Höfner and Fritz Elser* v. *Macroton GmbH* [1991] ECR I–1979.
61 See nn. 19 and 20.
62 Rock, 'Corporate Law Through an Antitrust Lens', 498.