Introduction

This book is the fruit of longstanding conversations between the two editors. These conversations prompted them to organise a conference in Lund in 2018 and then to edit this publication. This book collects part of the proceedings of the conference; it equally includes some additional research.

Although the idea of this publication emerged from the interplay between two *legal* fields, company/corporate[1] and competition/antitrust[2] law, such interaction is extremely complex and encompasses vast areas of research that lay well beyond classical legal hermeneutics. Historical, economic, and political variables shape the understanding of the intersection between corporate and competition law: an intersection which academics have just started to explore and which this book aims to foster.

In fact, this edited collection of contributions by leading academics in the field is motivated by the presence of a gap in the academic literature. On the one hand, in major corporate restructurings such as M&A and spin-offs, competition and corporate law practitioners often work shoulder-to-shoulder. On the other hand, they tend to operate within separate spheres of knowledge. Such separation is often clear also within the same law firm, as distinct advisory teams are formed, being well-identifiable by their sectorial competence. It is therefore not surprising that the actual interaction between such advisory teams is often limited to little more than ensuring that relevant information is passed on. There are also other corporate operations which may carry antitrust implications – such as acquisitions of minority equity holdings and certain forms of earnout mergers – where the interplay between corporate law and competition law is not always perceived as relevant from a practical perspective and is scarcely analysed in legal research.

1 The terms corporate and company law are normally used interchangeably, while the first is normally employed in the US and the second in the UK and in the Commonwealth.

2 The terms competition and antitrust law are used interchangeably. Although there might be specific connotation when using one or the other, here they mean the rules governing the interaction between companies by means of corporation, unilateral conduct or their activities in form or mergers and acquisitions.

The organisation of both the professional and research activities dealing with corporate and antitrust law often results in the illusion of a well-defined separation between them.

Such separation between different spheres of legal knowledge contradicts the very dawn of antitrust law. During the late nineteenth century, vast areas of the US economy experienced a time of consolidation with the view of creating larger and better organised businesses – which in turn were able to better control the prices charged on the market. A wave of what we would today call mergers and acquisitions helped corporations in this regard. The attorney Samuel Dodd created the sophisticated structure of financial engineering renowned as the Standard Oil investment trust.[3] In the Standard Oil saga, the investment trust was employed to pool equity of different corporations with different denominations – hence apparently independent corporations – under the same control. At that time, the consolidation in particular sectors such as oil, steel, and railroads diminished competition and consequently increased prices. The Sherman Act was adopted as a reaction to counter the competitive harm of such forms of a corporate reorganisation. It prohibited monopolization and conspiracy in restraint of trade. Regardless, of the historical significance of the Sherman Act and the subsequent Standard Oil case (1911), the dawn of antitrust law was marked by the intensive employment of organisational law – in the form of corporate law and finance – for anticompetitive purposes.

When EU competition law was adopted, it benefited from the achievements of the earlier and longstanding US antitrust tradition. Nonetheless, it followed a well-distinct developmental path. In particular, the first EUMR applied a sophisticated and detailed test based on turnover thresholds and descriptions of specific forms of changes in control. But before the entry into force of the first European Merger Regulation in 1989, the Commission had already tried to use the EU rules on abuse of dominant positions (now Article 102 TFEU) to target mergers.[4] At those earlier times, it was clear that the relationship between corporate law arrangements and EU competition law did not necessarily have to be binary (i.e. control versus no-control) as in the first and second EU merger regulations. In the *Philip Morris* case,[5] the Court of Justice of the European Union had adopted the concept of influence for describing the effects of a company-holding equity in another company, hence leaving space for qualification of such influence in a rather nuanced way (i.e. potentially including also the chance that there could be equity holdings conveying 'some influence' without control).

The EU's legal framework left a gap between proper mergers and anticompetitive agreements as it did not fully account for the wider set of implications brought

[3] By contrast, a couple of decades later, the dominant instrument for achieving concentration had become the holding company, as recognized by the Clayton Antitrust Act of 1914, section 7
[4] See Case 6-72 *Europemballage Corporation and Continental Can v Commission* EU:C:1973:22.
[5] Joined cases 142 and 156/84 *BAT and Reynolds v Commission* EU:C:1987:490.

by the evolution of economics. Neoclassical economists viewed economic actors as market-power-deprived actors engaging in arm's length transactions. In such a theoretical framework, firms could be seen as a black box unworthy of opening. Therefore, the governance dimension could be considered as being of little relevance if not totally irrelevant. But Ronald Coase's insights prompted new ways to explore the organisational role of the firm within a given economic system – highlighting the trade-off between internal coordination and external transaction costs. What Ronald Coase depicted as 'hierarchy' is visible in the organigram of any traditional corporation. Similarly, a trade-off between coordination and transaction costs can also be seen in the wider context of groups of companies and perhaps also in contexts such as common ownership. Hence, such attempts by institutional economics to understand the content of the above-mentioned black box may constitute a way to conceptualise the different topics in this book from an economic perspective.

Yet, the political perspective is also present in the analysis of the interaction between corporate and competition law – if, for example, we look at the interaction between corporate and competition law under the lenses of the Varieties of Capitalism literature.[6]

While nowadays the private, for-profit, corporation is the traditional model, it may not be the endpoint of the quest for understanding the organisational reality underlying modern business organisation. For example, public (i.e. listed) companies have only recently become the dominant world model. Before the 1980s and 1990s privatisation era, first inaugurated by Mrs Thatcher in the UK, state-owned or mixed-ownership corporations were dominant in Europe. And, they still are the dominant model in one of the fastest growing economy of the world, the People's Republic of China. Hence, under the same 'corporate' label, a multitude of business organisations, with different scopes and *raisons d'être*, are active around the globe. In this era of constant political and institutional change, we may witness the emersion of previously unknown models, involving not only changes in form but also in function. This may mean that even the 'classic' comparative functional perspective may face limits in analysing and explaining the different realities existing around the world. For example, one may wonder whether a Chinese and a US company carry out the same economic function.

The persisting and emerging cross-border diversity leaves us with a Socratic awareness of standing in front of the unknown. Without any ambition to formulate any theory or to come to systematisation of the relationships between corporate and competition law, we offer a few leitmotifs that can help with the kaleidoscopic reality of the everchanging dynamics inherent to such relationship. We have

6 See e.g., B Hancké, M Rhodes and M Thatcher (eds), *Beyond Varieties of Capitalism: Conflict, Contradictions and Complementarities in the European Economy* (Oxford University Press, 2007); B Hancké (ed), *Debating Varieties of Capitalism* (Oxford University Press, 2009); W Friedman and G Jones, *Business History and Varieties of Capitalism* (Cambridge University Press, 2010).

identified – among the many – four leitmotifs inspired by the current debate on the interaction between corporate and competition law:

- The object and purpose of the corporation
- The boundaries of the corporation
- The governance of the corporation
- Beyond the boundaries of the corporation

The first part of the book explores the object and purpose of corporations and its interaction with competition law. It is in this context, Meagher explores the origins of modern corporations and the emergence of antitrust with a focus on shifting the balance between private and public power. Her chapter shows the complementary roles of corporate and antitrust law in their early interaction and argues that these seem too often forgotten nowadays. These historical and contemporary insights set the scene for an extremely promising area where the interaction between antitrust and corporate law is exponentially increasing: the corporate interest and the corporate *raisons d'être*. The corporation has often been employed as an empty shell for multiple purposes, but traditionally it is business corporations that have been at the core of antitrust interventions. Odudu shows that there is no real reason to subtract no-profit organisations from the application of competition law either. He highlights that the competition law model may apply to a diversified set of scopes while aiming to push economic and social actors to do their best in their respective fields. Nonetheless, shareholder value maximisation conceived as the core of Western corporations throughout the last decades is now heavily under attack, while the debate about the necessity to pursue ESG values in the corporate world is transitioning from the status of wishful thinking to the one of policy-making. Depending on how ESG penetrates the corporate law and governance agenda, this might translate into the inclusion of stakeholders in corporate law-making – including consumers, which represent the category traditionally protected by competition law. Corradi and Nowag claim that the interaction between corporate and competition law within ESG policy-making is only destined to increase here, given the fact that there is an ongoing discussion at multiple levels over the necessity to pursue ESG policies both through private and public policy tools. They also highlight that the most important area of urgent intervention may be innovation, given the crucial nature of dynamic efficiency to solve environmental and social issues.

The second part of the book explores the boundaries of the corporation. The antitrust and competition narrative subsumes economic operators under the term 'firm'. It would be too quick to equate the 'firm' with the 'corporation'; instead, antitrust and competition law understand the firm as organised economic activity. At times, the same term refers to a lower organisational dimension known as 'plant', i.e. a production facility. Yet, if we lift the 'firm' veil, it is indeed true that we often find a corporation behind or a group of companies made up of a parent company and its subsidiaries. From an economics perspective, Hansmann and Kraakman[7] describe the corporation as a legal invention directed to offer to investors the benefit of asset-partitioning through legal personality and limited liability. Such asset-partitioning allows for optimal financial investment diversification to develop. But asset-partitioning can also be employed to shield a group of companies from antitrust liability. Hence, the relationships of the corporation vis-à-vis third parties such as the antitrust enforcer may actually require modulation of such asset-partitioning. In Chapter 4, Koenig describes the intertwining between the principle of a single legal entity and the principle of separation within corporate groups, while highlighting the persistent tension between limited liability and responsibility for competition law infringements. Acknowledging the rationale of the derogations to asset partitioning imposed by competition law, Koenig also warns that an automatic vertical or horizontal liability within the corporate group disregards fundamental principles of corporate and civil law potentially leading to unreasonable results. In the subsequent chapter, Walter and Schunke explore this issue in more detail with a case study. In Germany, it has for some time been possible to restructure antitrust liability away by means of the so-called 'sausage gap'. The chapter explains the implications of the deployment of such a strategy and how EU competition law provided concepts that informed reforms of the German system. In Chapter 6, Hong explores the unique regulation around the chaebol in Korea and how it has evolved over time. Chaebol is a Korean phenomenon of large company groups which are connected primarily by family ties with formal legal links existing only occasionally. This corporate model, while specific to Korea, provides valuable insights for other economies on how to deal with informal ways of control in competition and corporate law.

The third part of the book explores the governance level, thereby entering into the very essence of organisational law and dealing with corporate constituencies and their conflicts of interest. In this part of the book, Woodcock proposes a new model of a corporation which represents a wider set of constituencies, which he calls 'counterparties'. He supports the idea of creating a balance of power in firm governance, whereby counterparties have the right to elect board members, therefore eliminating the internal forces that induce firms to exercise monopoly power. Moving the focus to directors' duties, Corradi and Nowag explain that corporate law and governance may occasionally restrict competition which can create problems which may be extremely difficult to solve by reverting to competition law. This seems to be the case with corporate opportunity rules, which may prevent directors from competing with the companies for which they serve as directors. While such a rule is an expression of a company's directors' duty of loyalty, in certain cases it may stifle dynamic competition.

7 Henry Hansmann and Reinier Kraakman, *The Essential Role of Organizational Law*, (2000) 110 Yale LJ 387. See also Henry Hansmann, Reinier Kraakman, and Richard Squire, *Law and the Rise of the Firm*, (2006) 119 Harv Law Rev 1333.

The fourth and final part of the book addresses the interaction between corporate and competition law beyond the boundaries of the corporation. This area is the most debated one in law and finance literature; it addresses some of the most contentious issues in competition law today. Within this area, two connected subthemes can be identified: questions of interlocking directors, that is to say, directors that are on the board of different companies, and questions of common ownership. Chapters 10 and 11, by Nili and Thépot, respectively, deal with interlocking directorships in the US and in Europe, respectively. They both highlight the potential connection between interlocking directorships and common ownership and the necessity to approach such potential restrictions of competition jointly. While Nili shows that it may be possible to target interlocking directorships under US competition law, he cautions against such an approach. Thépot shows that this area may represent a challenge in the present state of EU competition law. What remains to be explained is whether interlocking directorships may represent a tool through which common owners attempt restrictions on competition or if interlocking directorships may represent an independent explanation for restrictions of competition in markets where there is a significant presence of parallel holdings. Ghezzi and Picciau provide us with a more optimistic perspective on interlocking directorships, presenting the very peculiar case of the Italian ban on interlocking directorships in the banking sector. Their empirical analysis provides evidence of the disappearance of such a practice in the Italian banking sector. The ban and disappearance of interlocks were accompanied by an increase in competition in product markets. Ghezzi and Picciau show us that effective solutions to antitrust harm may come from banking law and thus legislation external to competition law.

This part of the book also features the debate about common ownership. In Chapter 12, Schmalz provides an overview of the debate on common ownership and evaluates the different policy proposals that have been advanced so far by US lawyers. He highlights the necessity of acting urgently for addressing the anticompetitive effects deriving from parallel holdings, without waiting for more economic research; he points to the damages that the present inaction causes to consumers. Rock and Rubinfeld in contrast, doubt that the overall increase in prices in the US is connected to common ownership, pointing instead at alternative explanations, such as the exponentially increased product market concentration – which has created 'superstar' firms with exorbitant market power. In Chapter 14, Corradi focuses on EU competition policies for common ownership suggesting that, regardless of the econometric findings on the issue of parallel holdings, sound policy-making should inspire the application of the counterfactual and should take into consideration wider implications such as the geopolitical ones. Finally, Tzanaki addresses the relationships between common ownership and present competition policies by reframing them into the wider picture of the intersection between corporate law and antitrust law. The final chapter by Lianos and McLean zooms in a specific area: digital value chains and the importance of Google, Apple, Facebook, Amazon, and

Microsoft. The chapter explores the ownership structures in digital value chains and how these might explain competitive strategies and broader economic models of behaviour, considering the conglomerate analogy frequently invoked. Moreover, they highlight distributional effects resulting from the ownership structure – in particular, when such effects are observed in the context of the broader concerns around these digital giants.

As human beings, we are living in very exciting and challenging times. Changes are occurring worldwide at an accelerated pace, which makes predictions on the evolution of the future business, financial, and overall social environment hardly reliable. Humanistic aspirations to better our world still collide with the most destructive instincts of human beings, as the war in Ukraine remind us. But the attempts to foster change, and hopefully a change for the best, are still living in the heart and actions of many. For sure, both corporations and the State have been and still are vessels and forces contributing in a substantial way to shape the world in which we live. We hope that this excursus on the intersection between corporate and antitrust law lights a candle – no matter how small – to the complex, tangled, and often unfathomable dynamics that animate the intersection between the corporate and the antitrust world. We want to express our heartfelt thanks to all our contributors for rowing together with us on unchartered waters!

PART I

The Object and Purpose of Corporations

1

Corporate Law, Antitrust, and the History of Democratic Control of the Balance of Power

Michelle Meagher

Grown to tremendous proportions, there may be said to have evolved a "corporate system"—as there was once a feudal system—which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution.[1]

Adolf A. Berle and Gardiner C. Means, The Modern Corporation & Private Property (1932)

1.1 INTRODUCTION

Since their creation, corporations have proven to be vehicles for incredible aggregate wealth creation. Indeed, this was part of the intended design: the resource-strapped state sought a catalyst for public investment and so constituted the legal entity of the company, attaching to this artificial construct the rights and privileges that would allow it to successfully corral private capital.[2] From the creation of the Bank of England to the empire-building of the East India Company, the company form was harnessed as a tool for the expansion of public life.

It was, however, recognised at the outset that in creating a unique set of legal features that would make the company so attractive for private investment – in particular the later ability to own property, via the company, with limited liability – the state was not only creating its own co-investor in public wealth but there was also the possibility that the company would pose a threat to the state itself through its ability

Michelle Meagher is Senior Policy Fellow at the UCL Centre for Law, Economics and Society, and co-founder of the Inclusive Competition Forum and the Balanced Economy Project. This work builds on a previous article by the author, Michelle Meagher, 'Powerless Antitrust' (2019) 2(1) Competition Policy International Antitrust Chronicle. The author would like to thank the editors for their helpful substantive input. All errors remain the author's own.

[1] Adolf A Berle and Gardiner C Means, *The Modern Corporation & Private Property* (Macmillan Company 1932) 3.

[2] WG Roy, *Socializing Capital* (Princeton University Press 1997) 41, 48.

to channel and multiply the accumulation of private power.[3] The public's salvation, therefore, came with an inherent threat of its undoing.

As such, since its inception, the corporation has been involved in a delicate dance with the state both to route its productive capacity towards socially desirable ends and to control the corporation's power.[4] Today, as technological development and the mobilisation of international financial capital allow the power of the corporation to transcend that of the democratic state in both scale and scope, the tools of the past that were used with varying degrees of vigour to constrain the corporation are increasingly relevant. Corporate law and antitrust were once used to maintain the balance between the power of the corporation and the power of the state. Today, this vital role has been all but forgotten.

We have many regulatory tools that are used to proscribe the bounds of operation of the company, corporate law, and antitrust being two of them. Both disciplines are currently engaged in an active debate as to their core purpose in the modern context. Within antitrust, this has involved revisiting the 'consumer welfare standard' as the accepted litmus test of permitted competitive conduct; within corporate law, it manifests as a collective reflection on the shareholder primacy principle of corporate governance and the stakeholder capitalist model proposed as its alternative. Each debate would benefit from a more nuanced understanding of the origins of antitrust in corporate law (and vice versa) and the historical attempts to constrain the corporation as an entity with the built-in capability of challenging the state's governmental power.

What we see from looking at the history of corporate law and antitrust is that each discipline historically played a complementary role in maintaining the *balance of power* between private, economic concentrations and the demos. The now-separate conversations about corporate responsibility in the corporate governance sphere and about corporate power within competition policy circles have always, in fact, been fundamentally connected and targeted at the same set of risks.

This chapter will start in Section 1.2 by exploring the concept of the *balance of power*, which will then form the framework for our historical exploration of corporate and antitrust law. We will then consider two manifestations of private power that the state must regulate: its own public grants of monopoly power, considered in Section 1.3, and what we will designate as 'constructed monopolies', discussed in Section 1.4. Constructed monopolies differ from publicly granted monopolies in that they are generated within the market, and it is in reaction to the development of such monopoly market positions that modern antitrust law comes into being. It is tempting to consider such monopolies to be 'self-generating' and as such the

[3] JW Hurst, *The Legitimacy of the Business Corporation* (University of Virginia 1970) 43.

[4] For a useful 'potted history' of the corporation, particularly in America, see N Lamoreaux and W Novak, 'Introduction' in Lamoreaux and Novak (eds), *Corporations and American Democracy* (Harvard University Press 2017) 1–33.