Introduction, Structure of the Book and Method

1.1 Introduction

Modern competition law is a tool first employed by countries more than a hundred years ago in order to address issues relating to restrictions of trade conducted by private firms. As a legal instrument used to resolve national problems, competition law continues to be employed by countries. The dominance of market-based economies in the last fifty years, especially following the collapse of the Soviet Union, as well as improvements in transport, communications and technology, and trade liberalisation through the adoption of relevant agreements between states, have, however, progressively dismantled national borders and internationalised trade.

Along with trade liberalisation came practices conducted by firms that have an effect on the territories of more than one country. Attempts to address this paradox – namely, the adoption of national rules to address international issues – have appeared on several occasions over the last eighty years at the international, regional and (lately) bilateral level. The general aim of this book is to observe these attempts and analyse the norms that have been developed: bilateral and tripartite enforcement cooperation agreements, bilateral and plurilateral trade agreements that include competition provisions, and attempts at the adoption of a multilateral competition code.

A number of topics related to the internationalisation of competition law have been addressed in the relevant literature, mostly in the last fifteen years, including, amongst others, the types of practices that may have an effect on multiple countries;\(^1\) the relationship between trade law and competition law; and the debate over the possible inclusion of competition law within the World Trade Organization (WTO) framework.\(^2\)


\(^2\) See e.g., P. Marsden (2003), *A Competition Policy for the WTO* (Cameron May); E.U. Petersmann (1999), 'Legal Economic and Political Objectives of National and
Lately, a number of studies have focused on the examination of trade agreements with competition elements. The influence of policy networks in the process of internationalisation of competition, the development of principles in the process of the internationalisation of competition, and the relationship between preferential trade agreements and the attempts to conclude a multilateral agreement on competition have also been explored. There are also works which have compared different domestic competition regimes. Finally, there are papers discussing the influence of the International Competition Network (ICN) on the internationalisation of competition processes. All these studies will be reviewed in the context of the discussion in subsequent chapters.

On the other hand, there are only few studies available which observe the way in which particular states and/or polities have reacted with regard to the adoption and application of international agreements on competition. For instance, in the case of the European Union (EU), there are...
only a few papers that discuss the position taken by the polity in particular fields of international agreements with competition elements,\(^\text{10}\) while most of the works in this field, in the context of the discussion of international agreements with competition elements, make reference to the position taken by the EU. That said, there is no single work that discusses the EU position in all the levels of international cooperation on competition (i.e. unilateral, bilateral, plurilateral regional, and multilateral). The aim of this book is to observe and evaluate the role of the EU in the development of competition norms at all levels of international cooperation on competition, or put differently, to observe 'The International Dimension of EU Competition Law and Policy'.

In this debate over the development of international competition norms, the examination of the position of the European Union (EU) competition regime is focal, for a number of reasons: first, the regime has been applied for more than fifty years and is considered one of the most mature regimes in the world; secondly and even more importantly, competition law in the EU has been applied on a transnational level, since the EU itself is a regional bloc. As shown later in the book, in the context of this regional bloc, the law is enforced by a centralised regional institution which is the competent body to supervise the regional market and apply the rules in such a way so as to ensure that there is sufficient competition in this market. In this respect, competition law in the EU is applied on a regional level, and such application has an impact on the national markets of its Member States.

Thirdly, the EU has been particularly active in the negotiations of other international agreements which include competition law, and more generally in the process of internationalisation of competition law and policy. As indicated in the book, at least up until ten years ago, negotiations at the international level on competition law had to a certain extent been dominated by industrialised states, and the EU was certainly one of the protagonists in the debate. Furthermore, in the context mainly of its enlargement and its attempts to develop and contextualise its relation

\(^\text{10}\) For instance, Szepesi has reviewed the competition provisions of the EU trade agreements. See S. Szepesi (2004), *Comparing EU Free Trade Agreements: Competition Policy and State Aid*, ECDPM InBrief 6E (ECDPM, Maastricht); and Damro has examined the way that the European Commission has reacted in the process of negotiation on competition at the WTO. See C. Damro (2006), 'The New Trade Politics and EU Competition Policy: Shopping for Convergence and Co-operation' 13(6) *Journal of European Public Policy* 867.
with its neighbouring countries, the EU has also been particularly active in the last twenty years in the conclusion of bilateral trade agreements, and all these agreements include competition provisions. Finally, being the first bloc to have applied a competition regime successfully, the EU both encourages the development of other similar settings and has been a model on which other similar agreements have been based.

In its attempt to review the position taken by the EU in the various levels of international cooperation on competition, and the development of international competition norms, the discussion carried out in the context of the book encompasses two main concepts: international agreements with competition elements, and the position taken by the EU in the formation of these agreements. As to the former, the book identifies and discusses four main types of agreements, which are further discussed in separate chapters of the book: bilateral and tripartite enforcement cooperation agreements; bilateral trade agreements with competition provisions; plurilateral regional trade agreements; and the negotiations over a possible multilateral agreement on competition. As to the latter, the EU will be the focus of the examination concerning these agreements. With the aim to understand the international dimension of the EU competition regime, the book attempts, first, to review the relevant agreements signed by the EU and, secondly, to observe the environment under which these agreements are negotiated and (where possible) applied in practice.

1.2 Structure of the book and method

Based on these considerations, the book is structured as follows.

Chapter 2 attempts to highlight some of the aspects of national competition laws and policies which may have an effect on the way that competition law and policy operates at the international level. In particular, the chapter includes the historical development of competition law and policy and makes reference to the various economic theories that may have an effect on the particular application of competition law. The chapter also discusses the relationship between competition policies and other national policies that may have an effect on its application, and endeavours to observe the way that competition law and sectoral regulations interact in a given territory of a nation. Finally, the chapter provides a discussion on economic globalisation and the way that this particular phenomenon has had an effect on the operation of competition law. In doing so, the chapter includes particular business practices that may have an effect on the territory of more than one state. In sum, the aim of this chapter is to draw
attention to the main factors that have led to the existence of international cooperation between states on competition law and policy, which, in its turn, has led to the negotiation and adoption of international agreements on competition that are discussed in subsequent chapters of the book.

Chapter 3 analyses bilateral and tripartite enforcement cooperation agreements in the field of competition law and policy. Mainly based on the relevant agreements signed between the EU and the United States, the chapter looks at the legal nature and the provisions of the two generations of these agreements, and also attempts to illustrate the debate relating to their usefulness. In the context of this discussion, the chapter analyses the way in which the EU has used this particular legal instrument.

Chapter 4 also looks at bilateral agreements. In contrast to Chapter 3, it examines bilateral trade agreements that include competition law provisions. The analysis is focused on relevant agreements concluded between the EU and a number of countries; this analysis has a dual aim: first, to discuss the way in which competition law co-exists with other commercial policies included in the text of these agreements; and secondly, to evaluate EU policy regarding the use of this particular instrument.

Chapter 5 discusses plurilateral regional trade agreements which include competition provisions. Once more, the starting point of the analysis is the EU Treaty itself, which has been the most successful example of a plurilateral regional trade agreement. The chapter briefly introduces the main features of the EU competition regime and compares it with the competition regimes developed in other similar agreements in various parts of the world. In this context, the chapter also evaluates the role played by the EU in the development of competition regimes in other regional blocs.

Chapter 6 discusses the attempts to adopt a multilateral agreement on competition law and policy, and in particular, it discusses the EU as an actor in the context of these attempts. The discussion includes negotiations over a possible competition agreement in the General Agreement on Tariffs and Trade (GATT), and lately WTO, context, and examines also the alternative forms of multilateral cooperation, particularly the operation of the ICN.

Finally, Chapter 7 provides the overall findings of this study with regard to the development of international norms on competition and the role of the EU in the formation and, where relevant, application of these norms. The major finding with regard to the particular question that this book attempts to address is that depending on the particular category of agreements under examination, the role of the EU in the formation of such agreements varies.
The analysis carried out in the context of the book is doctrinal, in the sense that it is focused on the discussion of legal provisions, by analysing the texts of international agreements and court decisions, where relevant. The discussion is also informed by various theories borrowed from political science and economics. As McCrudden notes:

much traditional doctrinal legal analysis now relaxes its view of the autonomy of law, drawing on economic and socio-legal insights increasingly easily.\(^{11}\)

Competition law is one of the areas of law where this interaction of law and economics is clearly visible; hence the book takes into account economic theories in the context of the discussion of the particularities concerning the application of competition law on a national level. In addition, the process of creation of international rules encompasses various features and theories borrowed from the field of political and social science, and in this regard, the book also employs theories, such as policy networks, epistemic communities and isomorphism, to analyse the process of negotiation and final formation of international agreements, either dedicated to, or which include, competition law.

Three main research tools have been employed for the analysis of the theme of this book. These include a review of the relevant literature, which is carried out in the context of the discussion in the chapters which follow. Another analytical tool employed is that of interviews with academics, competition officials and practitioners, which supplement the primary literature. These discussions have been very informative, as they give a broad idea of what experts believe about the issues addressed in this book.\(^{12}\) This information is further expanded by practical working experience with institutions which are involved in the application of competition norms.\(^{13}\) Such experience has been of major importance in the context of research undertaken for this book, as it has provided insights regarding the way in which the political and legal issues relating to cooperation at the international level are addressed in practice.

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\(^{11}\) C. McCrudden (2006), ‘Legal Research and the Social Sciences’ 122 Law Quarterly Review 632, particularly at 635 and 644.

\(^{12}\) In particular, twenty-two interviews were conducted, of which eleven were with EU officials, four with UK academics, two with EU practitioners, two with US practitioners, one with an UNCTAD official, one with a Brazilian official, and one with business representatives.

\(^{13}\) Such experience includes a six-month internship with the International Affairs Unit of the European Commission’s Directorate-General of Competition, and three years’ work for the Greek Competition Commission, as the official in charge of international issues. The opinions expressed in the book are those of the author.
The National and International Dimensions of Competition Law and Policy

2.1 Origins of competition law

The first known restrictive trade agreement to be examined under common law by the English courts was *Dyer's Case* in 1414\(^1\) where the court denied the collection of a bond for John Dyer's breach of his agreement not to 'use his art of dyer’s craft within the town … for half a year'.\(^2\)

Since then, and throughout the following decades, a number of cases were decided by the English courts, and this gradual development of competition-related jurisprudence created an environment in which judicial principles were transformed into statutes. It was England once again which went even further and adopted statutory rules related to restrictive business practices. The Statute of Monopolies\(^3\) was adopted in 1624, following the 1602 decision in the *Darcy v. Allein* case,\(^4\) in which the King’s Bench unanimously held as void the sole right that Queen Elizabeth I granted to her groom Darcy to import playing cards into England.\(^5\)

The main question the courts had to address was whether to declare as void any restrictive trade agreement for reasons relating to fairness of trade, or whether a distinction should be made between naked and ancillary (otherwise general and particular) restrictions to trade, where the former would be declared void de facto but the latter should be analysed in order to evaluate their positive and negative effects on the market and then a decision made as to their voidness. With the *Mitchel v. Reynolds*

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1. (1414) 2 Hen. 5, 5 Pl. 26.
3. 21 Jac. 1, c.3.
4. (1602) 11 Co. Rep. 84b.
decision in 1711, the court upheld such ancillary restraints since these restraints were limited in time and restricted to a geographical place.

Two further developments strengthened the domination of liberalism in England at that time and the consequent development of competition law. The first was the diffusion of the ideas of Adam Smith, who invented the concept of the market economy. The second was the emergence and development of industrialisation. As Gerber puts it, industrialisation ‘changed the unit of competition, replacing the individual artisan or group of artisans with salaried labourers and the organised unit of machine-based production’. It also changed the competition process itself, replacing quality and dependability as keys of commercial success with the rationalisation of production: the main aim was to maximise production while minimising cost. A consequence of this phenomenon was that the size of a firm became increasingly important, in the sense that factories demanded increasingly larger organisations.

These changes in the structure of society demanded a relevant response from the law and, thus, a number of statutes were enacted in continental Europe to regulate combinations by large companies which were restrictive to trade. In France, where the social revolution of 1789 was built upon the notion of freedom and its protection, the law of 14–17 June 1791, declared as unconstitutional, hostile to liberty and void agreements of members of the same trade that fixed the price of an industry or its labour. Two main features of French society at the time led to the adoption of such a statute. The first was the belief that the political system should change in order to constrain the king and the government from wielding power according to their discretion. Those who inspired the revolution further believed that law would be the only way to control such power. In the same intellectual context, albeit later, the Austrian Penal Code of 1852, provided that

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6 (1711) 1 P. Wms. 181. See Gellhorn and Kovacic (1994), supra n. 2 at 5.
7 On the development of the ‘restraint of trade’ doctrine, see S.B.T. (1966), ‘Petrol Solus Agreements: British Common Law of Restraint of Trade in a New Context’ 52(4) Virginia Law Review 690, at 697–702, where the author notes that by the beginning of the twentieth century agreements were only rarely declared void by the courts on the basis of the doctrine.
8 See 2.2.1 infra.
10 Ibid.
11 F. Walker (1905), ‘The Law concerning Monopolistic Combinations in Continental Europe’ 20(1) Political Science Quarterly 13, at 27. It has to be noted that industrial combinations were not per se prohibited. Only combinations injurious to the welfare of the community were prohibited. See ibid. at 39.
'agreements … to raise the price of a commodity … to the disadvantage of the public' should be punished as misdemeanours. A subsequent law of 7 April 1870 abolished the penalties but still declared such agreements to be void.12

Thus, the idea of excessive restriction of trade by dominant private firms and/or legal monopolists13 was disseminated in some of the important trading countries of continental Europe throughout the eighteenth and nineteenth centuries. That said, there was no international consensus on whether business firms could restrict trade with their practices, or put differently, ‘privatise public interest’.14 In contrast with the examples given above, during this same period, German civil law clearly validated agreements between firms to raise prices.15 On the other hand, the Depression which emerged in 1873 (the ‘Panic of 1873’) following the crash of the Vienna stock market, and which spread throughout Europe and the United States, altered once more the conception of the competitive process. Managed competition came to alter perceptions about liberalism in general and consequently ideas of free competition. Under huge pressure concerning prices and profits, firms had to cooperate by forming cartels in order to survive. As Gerber informs us, with the exception of Austria,16 ‘by the 1890s, cartels were considered “natural” parts of the economic landscape in many parts of the Continent’.17

2.1.1 Canada and the United States: first modern competition statutes to be enacted

In contrast to continental Europe, where towards the end of the nineteenth century the idea of competition was losing favour, Canada enacted in 188918 what is considered as the first competition-related

12 Ibid. at 22 and 38.
15 Walker (1905), supra n. 11 at 38.
16 Where in the 1890s there was a lively debate as to how the problem of cartels should be addressed, and relevant draft legislation was issued. See Gerber (2000), supra n. 9 at 54–60.
17 Ibid. at 26.
18 For an overview of the particular circumstances of the time that led to the enactment of the law, see M. Bliss (1991), 'The Yoke of the Trusts: A Comparison of Canada's Competitive Environment in 1889 and 1989' in R.S. Khemani and W.T. Stanbury (eds.), Historical Perspectives on Canadian Competition Policy (Halifax NS: The Institute for Research on...
legislation of modern times: the Act for the Prevention and Suppression of Combinations formed in restraint of Trade.\textsuperscript{19} More importantly, a year later, the most famous legal statute on competition law, the Sherman Act,\textsuperscript{20} was enacted in the United States. The Act took its name from Senator Sherman who at the time expressed the opinion that the statute ‘does not announce a new principle of law, but applies old and well recognised principles of common law’.\textsuperscript{21} The adoption of the Sherman Act was a reaction to the prevailing domination of trusts. With the conclusion of the American Civil War, a number of changes occurred in the US market: rapid growth of the economy; an explosion of urban communities; the improvement of transportation and communications linked smaller communities; and new technologies enabled manufacturers to meet the increasing demands by exploiting economies of scale.\textsuperscript{22} Nonetheless, in subsequent years declining economic growth and continuous entry by new competitors created major problems for big firms. Fixed costs were too high and, as it was very difficult for established firms to cease operation in order to avoid over-production, these firms were seeking ways to limit competition in the markets in which they operated. The solution was to cooperate with rivals in order to fix output, prices and market shares, initially in the form of pools, and when this proved insufficient, in the form of trusts.\textsuperscript{23}

The trust phenomenon first appeared in railroads, the first business to experience the modern type of ‘big business’.\textsuperscript{24} Railroads were capital intensive. Capital requirements of railroad construction precluded competitive services to scarcely settled territories.\textsuperscript{25} Given the absence of competition, railroads were able to discriminate on rates imposed and services provided to clients, and to destroy competitors through predation. Furthermore, a consequence of big business was the creation of trusts, which could become dominant in several markets. A typical example was the trust of the Standard Oil Company, which in the 1880s was controlling a number of markets, including fuel oil, sugar, lead and whiskey.\textsuperscript{26}