Introduction

1.1 COMPARISON 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’. The definition adopted in the Cadbury Report provides that ‘(c) corporate governance is the system by which companies are directed and controlled’. 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.

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. 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. 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.

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).
Introduction

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. 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. 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. Owing to the different enforcement approaches, abuse of dominance practices would require jurisdiction-specific analysis. 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.

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

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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), 557.
13 Conduct prohibited by Art. 102 TFEU (EU); s. 2 of the Sherman Act 15 USC §2 (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. 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.

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. 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. Modern firms are also characterised by financial investment that is increasingly disjoined from operational control of the economic activity.

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’.

Efficiency’ is understood here as allocative or static efficiency, which refers to the optimal allocation of resources.

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16 See Chapter 2 for details of economic theories of the firm.
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.
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

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’. Therefore a legal response was needed to address the potential negative economic consequences stemming from these consolidations. 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. 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. 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. 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. 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. 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. 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

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.
35 Ibid.
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.
the 1940s, companies belonging to the same corporate group could conspire within the meaning of section 1 of the Sherman Act. 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. 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’. 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. 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. 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.

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. In Europe, only rarely do enforcement instruments, such as sanctions, address the internal structure of firms, or target the business participants that compose them. 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

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40 332 US 218, 228 (1947).
41 121 F 2d 376 (7th Cir 1941).
44 ‘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).
45 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


\(^{52}\) 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.

Introduction

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


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).


57 Provimi Ltd v. Aventis Animal Nutrition SA [2003] EWCH 96, Cooper Tyre & Rubber Co & Others [2006] EWCH 2609 (Comm); KME Yorkshire Ltd and others and Toshiba Carrier UK Ltd and others [2011] EWCH 2665 (Ch); Nokia Corp v. AU Optronics Corp [2012] EWCH 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–233/11P and C–232/11P 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, 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. 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. 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. 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

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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.
61 See nn. 19 and 20.