Enforcing Corporate Opportunities Rules: Antitrust Risks and Antitrust Failures

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Abstract

This paper identifies potential competitive harm in the enforcement of corporate opportunities rules and explores the extent to which antitrust intervention can address such harm. It suggests that the current antitrust thinking and framework are not well-suited to address the anticompetitive risks. A close analysis of the anticompetitive effects is needed when examining the corporate opportunities rules, particularly with regard to possible detrimental effects on innovation. This paper argues that current antitrust rules are not well suited to address the potential competitive harm. Within the current antitrust law framework only an approach based on modern merger analysis can be used to address at least certain situations of harm. The paper first explains what the corporate opportunities rules are in several EU Member States and in USA corporate laws, and how they can be used strategically in a business context. Then, it highlights possible effects of a strategic use of corporate opportunities rules on competition, in terms of static as well as dynamic efficiency. Having stressed the abovementioned competitive implications, the paper engages in an analysis of the current framework of competition law to show how competition law provisions are, in the majority of cases, ill-suited to address the potential anticompetitive harm of corporate opportunity rules. Finally, it recommends a way forward based on corporate law reform.

Keywords:

Corporate opportunities rules; innovation; disruptive innovation; market foreclosure; TFEU, Sec 1, Sec 2; Sherman Act, Article 101 TFEU; TFEU, Article 102 TEFUE; State action doctrine; merger analysis.

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1. Introduction

In this paper, we explore the anticompetitive effects of corporate opportunities rules and the antitrust remedies currently available.[1] We argue that antitrust laws are not equipped to fully address anticompetitive effects and that reforms of corporate opportunities rules are the only way forward. Corporate opportunities rules have been developing in Anglo-American company laws since the creation of modern large-scale businesses, that is, at the end of the nineteenth century.[2] The rules grant a corporation the right to appropriate business opportunities discovered by its directors.[3] The business opportunities protected by corporate opportunities rules can be of very diverse. In practice, they range from the possibility to acquire production inputs, such as raw materials, to more sophisticated commercial items, such as business-sensitive information, or even full sets of organized information,[4] including the development of a new technology or even information about possible target companies for takeover.[5]

On a very general basis, the international literature has already acknowledged that, in certain situations, the enforcement of corporate opportunities rules may carry anticompetitive harm and may trigger the application of antitrust law,[6] but any actual antitrust analysis is missing.[7] In addition, the corporate opportunities doctrine provides a corporation with an entitlement to the acquisition of certain assets, which may be proprietary.[8] To that extent, in certain cases concerning innovation, these rules may also present analogies with intellectual property (IP) law rules.

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1 We use the terms antitrust and competition law interchangeably. These terms refer here to the rule prohibiting anticompetitive mergers, agreements and unilateral conduct.

2 In US law, see seminal cases such as *Lagarde v Anniston Lime & Stone Co*, 126 Ala 496, 28 So 199 (1900) and *Guth v Loft Inc*, 5 A 2d 503 (Del Ch 1939). The UK developed its corporate opportunity doctrine slightly later; see *Regal (Hastings) v Gulliver* [1942] UKHL 1. Nevertheless, the principle had already been applied in UK partnership law in *Aas v Benham*, [1891] 2 Ch 244. Moreover, the no-profit and no-conflict principles, on which UK corporate opportunities doctrine is based were already applied respectively in *Keech v Sandford* [1726] EWHC Ch J76 and in *Aberdeen Railway Co v Blaikie Brothers* (1853) 15 D (HL) 20.

3 And in certain jurisdictions also by its officers, controlling shareholders or employees.

4 Including as databases or other material protect by copyright.

5 For instance, through the acquisition of a controlling equity stake, by way of private bargaining, see in particular section 2.

6 To a certain extent corporate opportunity rules can be compared to non-compete clauses. They provide the company with rights against agents working within its umbrella and have developed out of the idea of fiduciary duties towards the company. Which has however attracted antitrust scrutiny, see section 4 b) below.

7 Pat Chew, 'Competing Interests in the Corporate Opportunities Doctrine' (1988–1989) 67 N C L R 435.

8 As for instance under UK law. By 'proprietary' we mean that a constructive trust can be declared not only over the business opportunity that has misappropriated, but also on the proceedings from its subsequent sale and on any subsequent reinvestment. Along this line see *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45, that seems to apply also to the taking of corporate opportunities.

This paper is, on the one hand, an attempt to develop a framework for analysing the antitrust risks connected to the enforcement of corporate opportunities rules. On the other hand, the paper highlights the limits of antitrust rules in the context of anticompetitive enforcement of corporate opportunities rules and shows that a corporate law solution may be a better way forward for solving the above-mentioned competitive harm issues. We first provide a description of corporate opportunities rules and of their strategic use in a business setting; second, we highlight possible effects of their enforcement on competition, both from a static and from a dynamic perspective; third, we consider potential ways in which the anticompetitive harm could be addressed by existing competition law using EU and US competition rules as examples. We conclude that current antitrust law is not fully suitable to address competitive harm deriving from the enforcement of corporate opportunities rules and we propose a potential way forward based on corporate law reform.

2. An Overview of Corporate Opportunities Rules

Corporate opportunities rules protect corporations against the expropriation of business opportunities by their directors or by other insiders.[9] Thus, these rules are a manifestation of the directors'[10] duty of loyalty to the corporation.[11] Hence, they are deemed as being one of the core sets of rules that characterize modern corporate law. However, corporate opportunities rules may also create monetary counterincentives to competition by directors with the corporation that employs them.

Corporate opportunities rules were first introduced in the Anglo-American jurisdictions and subsequently imported also into the German legal system.[12] Only since the early 2000 they have become widespread in most civil law jurisdictions and at times they are included in national corporate governance codes.[13] Hence, any potential anticompetitive harm, both in terms of static as well

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[9] And in certain jurisdictions also by its officers, controlling shareholders or employees. For a comparative overview see Marco Claudio Corradi, "Corporate Opportunities Doctrines Tested in the Light of the Theory of the Firm–a European (and US) Comparative Perspective." *European Business Law Review* 27.6 (2016): 755-819.

[10] Or other fiduciaries'.

[11] For the UK law, see Paul Davies and Sarah Worthington (eds), *Gower and Davies' Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012), Ch 16; Clark; Barachini; German Kommentare; French sources; Spanish sources.

[12] In Germany, the *Bundesgerichtshof* introduced these rules through an extensive interpretation of the principle of loyalty of directors to the company (*die Trueupflicht*), and more specifically of their duty to avoid conflicts of interests (*das Gebot der Vermeidung von Interessenkonflikten*). See BGH WM 1977, 361, 362; BGH WM 1983, 498; BGH NJW 1986, 584, 585; BGH WM 1989, 1335, 1339. Corporate opportunities rules were discussed in a very thorough way before being introduced, thanks to an exemplary jurisprudential effort. Awareness of the problem was already revealed in Ernst Mestmäker, *Verwaltung, Konzerngewalt und Recht der Aktionare* (Müller 1958) 166ff. Further references to the first jurisprudential contribution to German corporate opportunities rules are found in Martin Löhnig, *Treuhand* (Mohr Siebeck 2006) 372, in particular n 2.

[13] See for instance the German Corporate Governance Code, Rule 4.3.1

as dynamic efficiency [14] deriving from the enforcement of corporate opportunities rules, might increase in future with any further expansion of these rules. Regardless of their future expansion through case law, their mere presence may strongly affect the allocation of many kinds of rights among economic actors ex ante. As we will argue in the following sections, the rules may consolidate the power of firms and discourage their insiders from attempting to enter the market.

The essence of these rules is the retention of the value and the fruits of business information within the corporation. Therefore, directors (and other insiders) have to disclose information on new business opportunities before any eventual company-authorized appropriation of corporate opportunities can take place.[15] An example of a sophisticated version of this kind of rule is point 4.3.1 of the German Corporate Governance Code, as amended in 2015: 'Members of the Management Board are bound by the interests of the company. When making their decisions they must not pursue any personal interests, are subject to a comprehensive prohibition to compete during their work for the company and must not exploit for themselves business opportunities to which the company is entitled.' If the corporation has not authorized a given appropriation by a director, but the director still appropriates the business opportunity, the corporation can address the situation with the various remedies described in the following paragraphs.

For the analysis of this paper the following three specific aspects are particularly relevant and briefly discussed: (1) the industrial relevance of corporate opportunities rules; (2) the remedies that are available against a non-authorized appropriation of a corporate opportunity by a director or another insider; (3) the question of whether corporate opportunities rules are mandatory or not. Section 4 then builds upon these aspects and highlights their possible anticompetitive harm.

First, in terms of industrial relevance, corporate opportunities rules may cover a very wide set of cases. To provide an idea of the variety of the situations commonly discussed under the 'label' of corporate 'opportunities', consider the following. From an industrial perspective, a corporate opportunity can consist of the possibility to acquire the following assets: a trade secret, such as the Pepsi-Cola secret formula;[16] a cellular telephone service;[17] a mining licence[18] a specific piece of land;[19] technical equipment (at ordinary market price);[20] a business

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14 For details see Section 4 below.

15 For comments see Hans-Uhlrich Wilsing (ed), *Deutscher Corporate Governance Kodex Kommentar* (Verlag CH Beck 2012) para 4.3.3. [Treupflicht] 363, paras 12ff.

16 US: *Guth* v. *Loft* 5 A.2d 503 (Del. 1939)

17 *Broz v. Cellular Information Systems, Inc*. 673 A.2d.

18 *Queensland Mines Ltd.* v *Hudson* (1978) A.J.L.R. 399 and *Peso Silver Mines (NPL)* v. *Cropper* (1976) SCR 673 (Supreme Court of Canada).

19 *Bhullar* v *Bhullar* [2003] EWCA Civ 424

(cinema);[21] stock of the corporation by one of its directors from a third party, at a convenient value[22] or in the case of an initial public offering.[23] A corporate opportunity could also be the offer of a contract to be the developer of a given line of business on the behalf of a third party.[24]

Second, the remedies against misappropriations can range from damages,[25] to an action for unjust enrichment[26] or even, in certain jurisdictions, a disgorgement of profits,[27] eventually assisted by a constructive trust (in its personal or proprietary form).[28]

The essence of all corporate opportunity rules could, therefore, be described as the ability of the company to prevent an insider from appropriating part or all of the profits generated from the business opportunity. In other words, corporate opportunity rules create monetary counterincentives to competition.

In those jurisdictions where the remedy is a constructive trust, the incumbent corporation may acquire not only the profits, but also the entire new corporation

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20 US: *American Metal Forming Corporation v. W Pittman* 52 F3d 504; US: K*nox Glass Bottle Co. v. Underwood* 89 So. 2d 799 (Miss. 1956)

21 *Regal (Hastings) v Gulliver* [1967] 2 AC 134

22 US: *Faraclas* v. *City Vending Co*. 194 A.2d 298 (Md. 1963). But see an opposite view in *Weigel* v. *Shapiro J W* 608 F2d 268. The question has been debated for a long time. On this point see Victor Brudney, 'Insider securities dealing during corporate crisis' (1962) 61 Mich. L Rev 1–38.

23 *In re eBay Inc. Shareholders Litigation* 2004 WL 253521 (Del. Ch. 2004). *Canadian Aero Service Ltd*. v *O'Malley* [1974] SCR 592 (Supreme Court of Canada).

24 *Industrial Development Consultants Ltd v. Cooley* [1972] 1 WLR 443.

25 Damages in for of 'damnum emergens' or 'lucrum cessans' or both. See for instance Italian Civil Code, Article 2391 (5).

26 Marco Claudio Corradi, *Securing Corporate Opportunities in Europe – Comparative Notes on Monetary Remedies and on their Potential Evolution, forthcoming on* Journal of Corporate Law Studies (2018) offers a comparative analysis of this remedy within a sample of European jurisdictions.

27 Disgorgement of profits is the typical Anglo-American remedy that assists corporate opportunities misappropriations. For the UK, see for instance *Bhullar v Bhullar* [2003] EWCA Civ 424. The situation in US law differs from state to state, as corporate law is not federal. Nevertheless, the general remedy available in almost every US state corporate law is disgorgement of profit. See Eric Orlinsky, 'Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability' (1999) 24 *Del J Corp L* 451. The only continental European law that assist misappropriations with a similar remedy is German law, under which the company can exercise its subrogation rights, so-called *Eintrittsrecht.* This right remedy was first applied for violations of the *Wettbewerbsverbot* (*Aktiengesellscahft* (AktG) paragraph 88). And is extended by analogy to corporate opportunities misappropriations. See See Heribert Hirte, Peter Mülbert and Markus Roth, *Grosskommentar zum Aktiengesetz*, vol 1 (paras 76–91) (5th edn, DeGruyter 2015) para 88, s. 8, para 4.d.

28 At least in the UK it is now clear that in this case the constructive trust that applies is proprietary. This point is finally clear in the recent statements of Lord Neuberger in *FHR v Mankarious* [2014] UKSC 45 (para 7 and 33).

as an on-going concern. This acquisition is the essence of a constructive trust. Thus, a constructive trust is a bare trust whose main function is to assist the transfer of the new corporation to the corporation enforcing the corporate opportunities rules.[29]

A third point that is necessary to touch upon before moving on to our competition law and economics analysis is the mandatory nature of corporate opportunity rules. This is necessary in view of our analysis regarding the availability of a State action defence.[30]

If one considers the vast array of jurisdictions of economically developed countries, there are only few that provide expressly and with certainty the possibility of waiving their corporate opportunities rules. They are all US state jurisdictions – among which, pre-eminently, Delaware.[31]

For the other jurisdictions, it is debatable whether it is possible to waive corporate opportunities rules and at present it does not seem possible in the majority of them. For instance, in the UK it is not possible, for there is no exemption from common law duties. However, one might try to argue in favour of the possibility of a waiver, relying on emerging jurisprudence on fiduciaries' loyalty. Nonetheless, there is no case law supporting the possibility of such a waiver.[32]

Regardless of the possibility of a waiver ex ante, one may want to consider the option of an ad hoc authorization for single takings of corporate opportunities. This is possible both in US and in most European jurisdictions.[33] Nevertheless, it is also true that any such an authorization must come from the corporation. This means that none of the incentives of a company to behave strategically are removed by an ad hoc authorization. However, such an option has consequences for the applicability of the State action doctrine to cases of enforcement of corporate opportunities rules.[34]

To a certain extent, corporate opportunity rules can be compared to non-compete clauses.[35] Both provide the company with rights against agents working

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29 For an explanation of the different kinds of trust see Garton, Jonathan, et al. *Moffat's trusts law: text and materials*. Cambridge University Press, 2015.

30 See Section 5 below.

31 See DGCL § 122(17). For further examples see David Rauterberg and Eric Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: an Empirical Analysis of Corporate Opportunity Waivers' *Colum. L. Rev.* 117, no. 5 (2017), footnote 5.

32 See the refined jurisprudential attempts by Matthew Conaglen, Fiduciary Loyalty (Hart, 2011).

33 For the UK, for instance, see Davies & Worthington (n 11). Similar mechanisms are available in most jurisdictions.

34 See Section 5 below.

35 For a functional law and economics analysis of the relationships between corporate opportunities rules and no compete clauses see Marco Claudio Corradi, 'Corporate

under its umbrella and both have developed from the idea of fiduciary duties towards the company. In this sense, both corporate opportunity rules and non-compete clauses or contracts, can be seen as a way of containing hold-up costs. Both provide the company with incentives to invest in their staff/agents so that these individuals provide their principal – the company they work for – with a higher return. However, in contrast to corporate opportunities rules many States are rather restrictive with regard to non-compete arrangements[36] or even prohibit such arrangements, for example as does California. Moreover, collusion between companies to the same end has attracted strong enforcement action by antitrust agencies, as the example of the non-poaching and wage-fixing agreements between Silicon Valley companies shows.[37]

3. The Strategic Use of Corporate Opportunities Rules

As highlighted above, the result of corporate opportunities rules are financial counterincentives to competing with the established company.

In fact, insiders[38] could be the most effective potential competitors for a company. These individuals have acquired a solid knowledge of the market in which they have operated on behalf of their corporation, often for decades. Especially when they are directors or high-ranking officers, they are usually well aware of production processes, of upstream and downstream markets, of the relation between fixed and marginal costs and of the state of the art with reference to innovation.[39]

Not only they are well aware of market variables, but also of the specific business strategy of the firm they work for. Once they leave the corporation the, insiders' competitive advantage may enable them to act much faster as potential competitors than an outsider, pointing straight to the weaknesses of the corporation they have worked for.

Clearly, their contribution to a competitive economic environment in certain cases can be crucial. Therefore, companies may engage in strategic behaviour to

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[36] The most complete comparative resource on no-compete clauses is available at http://ius.hyberink.nl/Non_Compete_Covenants/flipbook_NonCompete_Covenants/mobile/index.html#p=1

[37] District Court of Columbia (2011) United States v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar, 1:10-cv-01629; District Court for the Northern District of California San Jose Division (2014) United States v. eBay, Inc. Case No. 12-CV-05869-EJD-PSG, District Court Columbia (June 3, 2011) United States v. Lucasfilm Ltd. 1:10-cv-02220-RBW. See also, FTC and DoJ Antitrust Guidance for Human Resource Professionals (October 2016) available <https://www.justice.gov/atr/file/903511/download> accessed 5 March 2017.

[38] Whether directors, officers, or controlling shareholders.

[39] And of all the other relevant variables in a business setting. See Dennis Carlton and Jeffrey M. Perloff. *Modern industrial organization*. Pearson Higher Ed, 2015.

hinder or limit potential competition by insiders. They may do so by means of corporate opportunities rules. Beyond corporate opportunity rules, similar results might be achieved through contractual no-competition rules or clauses.

In this section, we set out possible strategic use of corporate opportunity rules by companies. This provides us with the basis to analyse the potential for competitive harm in the next section.[40]

Company law rules usually protect companies from misappropriations by insiders. They do so by granting a company savings in terms of agency costs.[41] However, the choice of having corporate opportunities rules may entail negative externalities from a competition perspective. Indeed, corporate opportunities rules are usually conceived without particular concern for their eventual anticompetitive effects. Instead, they find their basis in the idea of fiduciary duty.[42] By contrast, in this section we take an industrial organization perspective.

Before delving into the strategic use of corporate opportunities rules, we should briefly elaborate on the tests that are applied to identify when a corporation has a right to a given business opportunity. As we will show, these tests are connected to the possibility of a corporation engaging in strategic behaviours.

a) To Which Opportunities Do Corporate Opportunities Rules Apply

Before examining in more detail the use of corporate opportunity rules, it is important to highlight to which business opportunities such rules apply. In the US, the most important jurisdiction, Delaware, employs a so-called line of business test, coupled with a so-called expectancy test and with a financial capability test. To simplify, a corporation may appropriate those business opportunities that are in the same or a potential line of business of the corporation. In terms of industrial organization, this means that opportunities for horizontal competition, as well as opportunities for vertical integration, are included. The so-called interest test may be even wider. In fact, it refers to any kind of opportunity the company is interested in. Depending on the definition of interest (actual or potential), this test may include not only investments in the same product market and vertical integration, but potentially also investment in non-related products markets.

b) The Use of Corporate Opportunities Rules

Having established the broad scope of business opportunities that can be covered by the corporate opportunity rules, we will now turn to the strategic use of these rules.

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40 This analysis cannot be found in Chew (n 7), i.e. the only corporate law article that points at the potential anticompetitive effects of corporate opportunity doctrines.

41 For this traditional approach see extensively Easterbrook, Frank H., and Daniel R. Fischel. *The economic structure of corporate law*. Harvard University Press, 1996.

42 This is the core argument of Chew (n 7).

To understand how the corporate opportunities doctrine may be employed strategically to create barriers to entry, one has to distinguish between at least two situations.

First, the corporate opportunities doctrine may well be employed appositely to prevent an insider from becoming a direct competitor, on the horizontal plan. This is the most straightforward case. If an insider tries to set up a new company on the basis of business information they obtained during their time in the company, the company will simply ask the court to declare that the new company is held on constructive trust or ask for damages, depending on the remedies available in the jurisdiction.

Second, corporate opportunities rules may serve potentially anticompetitive investment strategies. Companies may revert to (side) strategies that entail operating in upstream or downstream markets. For example, this may happen when a given resource is indispensable for producing a given product at a certain stage of technological development.[43] An example of such strategic behaviour could be the taking of an opportunity to acquire relevant shares of an upstream market in raw materials that are necessary for the productive process downstream. Through the enforcement of corporate opportunities rules an incumbent company may prevent the insider from setting up a company that operates upstream.

Another related case of strategic use of corporate opportunities might be the possibility to secure the fidelity of distributors. As to contracts with distributors, such practice enables the company to recruit agents for retail operations. There may be different strategies that a company may adopt to try to monopolize downstream markets, when this is crucial for the success of the corporation (for instance, in the case of high-end fashion products). First, if an insider succeeds in setting up a new corporation in the same line of business as the company they work for, the original company may invalidate any newly signed contracts with distributors through the enforcement corporate opportunities rules.[44] Second, if a director wants to set up a company in the downstream market, the company again can proceed to vertical integration, claiming the new business through the enforcement of corporate opportunities rules.[45]

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43 This phenomenon is usually known as 'vertical foreclosure' (upstream foreclosure in this case). See in general Patrick Rey and Jean Tyrole, Handbook of Industrial Organization (Elsevier 2015) 2145–2220. On the issues of vertical foreclosure from a competition law perspective see Giacomo Bonanno, John Vickers, 'Vertical separation' (1988) 36 Journal of Industrial Economics 257–265; Dennis Carlton, Michael Waldman, 'The strategic use of tying to preserve and create market power in evolving industries' (2002) 33 Rand Journal of Economics, 194–220; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings para 18ff.

44 In this case the actual line of business of the corporation.

45 Here in form of the potential line of business.

There may also be cases that are not related to horizontal competition or vertical integration, but that would still be the taking of a corporate opportunity. These cases would usually arise under the 'potential line of business clause'. Examples are cases involving new commercial practices, such as the US tobacco case in 1940, where the idea was to launch lower quality cigarettes from lower quality blends of tobacco.[46] Although such commercial ideas may not be innovation in the classical sense, the commercial strategy adopted in this case shares many features of disruptive innovation, to which a significant part of section 4(b) will be devoted.

There are at least two different categories of anticompetitive harm that may arise by way of the enforcement of a company's rights in relation to a corporate opportunity. The first category of anticompetitive harm derives from different types of foreclosure (for example, upstream or downstream foreclosure). The second category pertains to harm to the so-called dynamic competition. These two different cases will be analysed separately in the following sections.

4. Possible Negative Effects on Competition

After having described a company's strategic use of the corporate opportunities rules to prevent competition, we now turn to assessing the potential for competitive harm. We recognize that the enforcement of corporate opportunities and corporate opportunity rules a have an economic justification. The rules' efficiency justification is based on law and finance considerations by majoritarian doctrine. This means that it is appropriate to protect corporate opportunities against misappropriations by insiders because such protection contains agency costs and stimulates investments in equity. In other words, corporate opportunity rules provide for a regime in which the company has an incentive to invest in insiders or the development of its business because any potential returns cannot be expropriated but are secured by those rules.

However, below we highlight possible competitive harm caused by the enforcement of corporate opportunities rules. In broad terms, corporate opportunities rules prevent the establishment of competitors to the already existing company. However, when examining the competitive harm more closely, at least two different categories of anticompetitive harm can be identified. The first category of anticompetitive harm derives from different types of foreclosure, for example, upstream or downstream foreclosure. The second category pertains to harm to the so-called dynamic competition.[47] These two different cases will be analysed separately in the following sub-sections.

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[46] See this case as reported by Hemphill and Tim Wu, 'Parallel Exclusion' (2012–2013) 122 Yale L. J. 1182–1253, at 1201 and 1203. See also general references in Bishop and Walker, 2010, 1185, at1203 ff.

[47] With all the caveats inherent to the use of this term, see Kathuria, Vikas 'A conceptual framework to identify dynamic efficiency' *European Competition Journal* 11.2–3 (2015): 319–339.

a) Static Effects

It seems obvious that a static analysis of the anticompetitive effects alone is not satisfactory from a competition law economics point of view.[48] Nevertheless, static effects can be useful to highlight the main points of the traditional and established approach to competition policy.

When approaching the anticompetitive effects of the enforcement of corporate opportunities rules from a static perspective, it is necessary to start with considerations that are both static and dynamic. These considerations pertain to a company's dimensional growth – in line with the structure-conduct-performance paradigm, as destructured by post-Harvard School studies (in the sense that the causation nexus is not necessarily always linear). Corporate opportunities, which are basically growth and development opportunities, can be the object of a negotiation between a company and its insiders.[49] But transaction costs might mean that such negotiations are inefficient. Moreover, where negotiations cannot be conducted efficiently, the corporate opportunity regime affects a firm's growth. If the rights to exploit a business opportunity are allocated to already the existing company, that company will tend to grow more easily. In the opposite case, that company's market power might be progressively eroded.[50] The growth or erosion depends on the type of market, on the number, dimension and quality of business opportunities to be found in it and, finally, on the specific relevance of business opportunities to a firm's development.

When internalization of corporate opportunities is sporadic and concerns 'minor' business opportunities, such internalization may be not that relevant in quantitative terms for a single firm. Nevertheless, on the macro level, the sum of these internalizations might produce structural modifications. In that sense, transaction costs and the institutional framework (i.e. the implementation of corporate opportunities rules) will direct the allocation of business opportunities and might eventually lead to increased or decreased market power. As a result of the increased concentration or dispersion on the product market, this in turn might affect the structure of the market. Therefore, the corporate opportunity regime is a classic case in which a legal variable affects the market structure. In terms of a traditional static reasoning, only if the enforcement of corporate opportunities rules, coupled with firm's strategic behaviour, causes or facilitates the maintenance or acquisition of market power, may it raise competition concerns.

However, it should be highlighted that the economic and legal definitions of market power often diverge. In fact, whereas the economic definition is centred

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48 Douglas H Ginsburg and Joshua D. Wright. "Dynamic Analysis and the Limits of Antitrust Institutions." Antitrust Law Journal. 2012, Vol. 78 Issue 1, p1–21.

49 See the models proposed by Eric Talley, 'Turning servile opportunities to gold: A strategic analysis of the corporate opportunities doctrine' 108 (1998) *The Yale Law Journal* 108.2 (1998): 277–375 and Whincop, Michael J. 'Painting the corporate cathedral: The protection of entitlements in corporate law' *Oxford Journal of Legal Studies* 19.1 (1999): 19–50.

50 See Section 4.

on the idea of a firm's ability to fix prices above marginal costs,[51] the legal definitions tend to stress other variables, such as, the ability to behave independently in the market.[52] It is, therefore, not surprising that the legal and economic approaches differ. Whereas the economic approach does not necessarily rely on the identification of the product market, the legal one, at least in Europe, tends to follow a way of reasoning centred on a given product market, market shares and barriers to entry.[53] While such an approach is clearly based on economic variables, it does not represent the only or the most advanced technique for the purpose of assessing market power from the perspective of economics.[54]

Nevertheless, despite all these caveat,[55] the abovementioned structural approach is able to provide a concrete illustration of the interactions of market power and corporate opportunities. In fact, this way of reasoning still represents the most accessible way to analyse such interaction within a European competition law and economics framework.

Corporate opportunities rules can be seen as a substantial barrier to entry, thereby foreclosing the market. From an economic perspective, barriers to entry can be employed for different purposes, such as lowering the incumbents' costs, altering the cost structure of rivals and favourably altering demand conditions.[56] In particular, barriers to entry related to the second category appear to be of some interest to our topic. For instance, the cost structure of rivals may be altered by monopolization of inputs, vertical control and IP.[57]

Arguably, corporate opportunities are legal barriers to entry. However, this is not true in general, as they represent exclusively legal barriers to competition from insiders. Therefore, outside competitors remain free to enter the market, at least in principle.

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51 This is why the main proxy employed by economic sciences for assessing market power is still represented by the Lerner index that measures the difference between prices and marginal costs. See Abba Lerner, 'The concept of Monopoly and Measurement of Monopoly Power' (1934) 1 Rev. Econ. Studies 157.

52 Roger Van den Bergh and Peter Camesasca, European Competition Law and Economics: A Comparative Perspective (Paperback 2008) 105 ff. See in particular Case 85/76 *Hoffmann-La Roche* &. Co. AG v Commission [1979] ECR 461 para 38 and more recently. Case C-549/10 P*, Tomra Systems and Others* ECLI:EU:C:2012:221 para 38.

53 Ibid.

54 Ibid, 109 ff.

55 In particular those related to the definition of the product market; see Gregory Werden, 'Assigning Market Shares', (2002) 70 *Antitrust L J* 67.

56 Massimo Motta, *Competition policy: theory and practice*. Cambridge University Press, 2004.

57 See David Harbord and Tom Hoehn, 'Barriers to Entry and Exit in European Competition Policy' (1994) 14 Int Rev L&E, 411–435, at 415 or *Weyerhaeuser Company, v. Ross-Simmons Hardwood Lumber Company, Inc*., 127 S. Ct. 1069 (2007).

Thus, the potential anticompetitive harm of corporate opportunities rules will depend mainly on the variables of the relevant market. In fact, the complexity of these variables means that the relevant competition issues cannot be identified in a general manner. Instead, anticompetitive effects of corporate opportunities cases need to be identified through an in-depth, case-by-case, economic analysis.

In an oligopolistic context, the potential anticompetitive harm can be described more precisely. The oligopolistic context is particularly interesting because from an economic point of view corporate opportunities are an example of information asymmetry.[58] First, strategically, corporate opportunities rules can be used to prevent the knowledge about opportunities to enter the oligopolistic market, that is, in on the horizontal level. In this case the enforcement of corporate opportunities rules restricts competition by lessening the number of entrants, and the lesser the number of potential entrants in the same market the higher the competitive harm.

The second situation pertains to restrictions on the vertical level through monopolization of an upstream or downstream market. In this case an acquisition on the upstream or downstream market may well be motivated by efficiency. While vertical integration can increase efficiency[59] and is therefore often unlikely to create competitive harm, the situation is different where the relevant upstream or downstream market is concentrated.[60] Finally, in oligopolistic markets, where every incumbent constantly makes use of corporate opportunities rules to recall corporate opportunities, competitive harm in form of parallel exclusion might occur. Parallel exclusion is where multiple firms block or slow would-be market entrants.[61] As a recent law and economics study about parallel exclusion demonstrates, overbuying a strategic input and contract with distributors are dominant strategies leading to parallel exclusion.[62] Overbuying an input can, for example, take place in relation to 'a natural resource, such as oil or radio spectrum, or an input created by regulation, such as slots at airports for take-offs and landing'.[63] However, it can also involve new commercial practices, such as in the US tobacco case in 1940.[64] In this case the incumbents started buying low-quality blends of tobacco exclusively for the purpose of foreclosing the market to newcomers who would not even be able to launch lower-quality cigarettes from lower-quality blends of tobacco. Corporate opportunities cases can be compared to these scenarios. For example, an insider knowing the market

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58 That is to say, only the insider knows about the business opportunity at a given time (t), and the insider can then decide whether to disclose or not, see Corradi (n9).

59 See already a very early article by Robert Bork, 'Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception' (1954–1955) 22 *U. Chi. L. Rev.*157–201

60 This point is also raised in *Weyerhaeuser Company, v. Ross-Simmons Hardwood Lumber Company, Inc*., 127 S. Ct. 1069 (2007).

61 Scott Hemphill and Tim Wu (n 46)1185.

62 Ibid at 1201 and 1203. See also general references in Bishop and Walker, 2010, 91 ff.

63 Hemphill and Wu (n 46) 120.

64 Hemphill and Wu (n 46) 1203 ff.

might be interested in buying the same blends, either for resale at a higher price to new entrants or to enter the market. It is precisely in such cases, where the business opportunities rules may prevent the potential new entrant from entering the market. In this sense, one might speak of parallel exclusion by means of 'over-enforcement' of corporate opportunity rules.

To summarize, corporate opportunity rules are barriers to entry. They may generate anticompetitive effects depending on the market. These rules may be particularly problematic in oligopolistic markets and cases of over-enforcement of corporate opportunity rules can lead to parallel exclusion. In many cases, the enforcement of the corporate opportunity rules may well serve two alternative, or a joint, anticompetitive strategies: one, stopping competition by insiders; the other, preventing insiders from entering into value-producing transactions with third parties that may in the long term harm the oligopolistic rents of the incumbents.

b) Dynamic Effects

After highlighting static effects of enforcing corporate opportunity rules on competition, we now turn to dynamic effects. When considering the enforcement of corporate opportunities rules and the effects on dynamic competition, the picture is rather complex, if not contradictory. This complex picture is not only the result of the different kinds of business opportunities,[65] but also the different types of dynamic effects.[66] A dynamic analysis can take place along the more traditional lines – innovation in connection with research and development (R&D) or the analysis can focus on disruptive innovation. Below we will examine both separately, adding to traditional considerations also more original ones, based on a disruptive innovation approach. In fact, companies are presented with both kinds of innovation. Finally, we will highlight some empirical studies that examine the effects of non-compete clauses on innovation because such clauses are not unlike corporate opportunities rules.[67]

The traditional dynamic competition analysis focuses largely on the relationships between IP rights and competition.[68] One of the core tenants of IP theory suggests a high degree of temporary protection for fruits of innovation derived from R&D.[69] Starting with these traditional dynamic efficiency considerations, corporate opportunities rules that give the company

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65 See Section 2–3.

66 See Kathuria (n 48)

67 See text to (n 34–37).

68 See the traditional Schumpeter v Arrow debate.

69 On the economics of innovation see in general Cristiano Antonelli and others (eds), *New frontiers in the economics of innovation and new technology* (Edward Elgar, 2006); Gerard Silverberg and Luc Soete (eds), *The economics of growth and technical change* (Edward Elgar 1994); Nathan Rosenberg and others (eds), *Technology and the wealth of nations* (Stanford University Press 1992)

the innovative business opportunities look in line with several ideas grounded in the most established analysis of this type. First, in markets with high fixed costs and low marginal costs IP rights are crucial. In fact, it is well known that R&D competition for certain kinds of patents is extremely fierce and that R&D is cost intensive.[70] Second, in such markets, investment in R&D carries a very high risk, so the expected returns to the winner must be high. Third, there is an inherent tension between competition, that is competition for innovation on the one hand and monopoly power that is granted temporarily on inventions through IP rights on the other hand.

Business opportunities, such as patents, might take forms that can be protected by means of IP rights. However, issues related to business opportunities may occur typically before questions about IP and competition arise, because the issue is to whom a certain IP right should be allocated. Similarly, corporate opportunities rules allow a company to appropriate the fruits of innovations that are not patentable, at least on a temporary basis. Therefore, the rules may be complementary to IP rights in their role of providing incentives to innovation, in particular, where the company has spent resources to support an insider's invention. Moreover, corporate opportunities rules seem less harmful in terms of competition than IP protection. IP rights are enforceable against everyone, while corporate opportunities rules only give rights against the insider. Yet, often corporate opportunities do not require the same high financial expenditures as R&D. By contrast, here it could be said that the protection offered by corporate opportunities to innovation is in line with emerging doctrine on IP. Hovenkamp has described those evolutions, in relation to IP rights, as a shift from monopoly to property rights in the IP and competition analysis.[71] Enforcement of corporate opportunities rules is nothing but an expression of a property right, in the case of a constructive trust and a subsequent transfer order, or in the case of a liability right, in the case of an account of profits or of a request for damages.

One might therefore argue that enforcing corporate opportunities rules is typically not detrimental from a traditional dynamic efficiency perspective.

By contrast, certain cases may be more interesting from a dynamic, though so far less-explored perspective – disruptive innovation. Christensen's research on disruptive innovation has shown that innovation derives not necessarily from high expenditures on R&D.[72] Disruptive innovation usually consists of

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70 Ibid.

71 Herbert Hovenkamp, "Parents, Property, and Competition Policy." *J. Corp. L.* 34 (2008): 1243.

72 See for instance Joseph Bower and Clayton Christensen, 'Disruptive Technologies: Catching the Wave' (1995) 73 (1) Harv Business R 1995, 43–53; Clayton Christensen, *The Innovator's Dilemma* (Harper Business 2000); Clayton Christensen and Michael Raynor, *The Innovator's Solution* (Harvard Business Review Press 2003); Clayton Christensen, Scott Anthony and Erik Roth, *Seeing What's Next* (Harvard Business School Press 2004).

simplifications brought to an existing product, which has been over-refined by incumbent companies because of sustained innovation. However, certain consumers become progressively uninterested in the product because of the over-sophistication. Moreover, the innovative simplifications introduced by the disruptive innovator usually are techniques that are not patentable. Quite often disruptive competition comes at a low cost, so is no need to protect a company's financial R&D expenditure.

What does that mean for corporate opportunities cases? In such cases the innovator is an insider. Therefore, the legal framework should provide incentives to innovate. Such incentives can certainly be generated by more liberal corporate opportunities rules, which allow the insider to take at least some corporate opportunities.[73] In this context it should also be noted that strict corporate opportunity rules will lower insiders' incentives to undertake inventions in their free time. In other words, if an insider knows they cannot appropriate the fruit of their invention there will be no incentive to spend time creating such innovations.

Furthermore, disruptive products tend to offer a set of attributes that is different from the one offered in the mainstream market. While being innovative, disruptive products typically address a niche of the existing market and serve the low-end rather than the high-end market. Christensen provides many examples[74] where low-end innovation conquering a market completely in the medium-long term because incumbent firms were busy refining their old product. From the perspective of corporate opportunities, the question is therefore: what would an incumbent company do, knowing that disruptive innovation by means of low-end innovation, in which it is not presently interested, may become a potential foe? Such a company has, in effect, two options: it could appropriate the chance to develop the opportunity or it could appropriate it and kill it, thereby eliminating potential competition.

The first solution looks the most efficient one, even from the point of view of a corporation. However, there are several potential drawbacks. First, it would be rather difficult to address all the possible innovations that could be developed by insiders. For example, if ten innovative opportunities arise in a given time, the incumbent company carefully analyses them all and decides that only one is potentially disruptive. Therefore, it uses all its resources for the development of that one innovation. What will the company do with those innovative opportunities it has discarded? While benevolence towards insiders would suggest that these business opportunities may be left to the insiders to take, there is also another, more likely, option. Aware of disruptive innovation and of the limits to predicting accurately whether a given opportunity is disruptive or not, it is rational to appropriate and kill those opportunities that the company is not able or willing, to pursue. Practically, the company would enforce the

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73 If not by a corporate opportunities waiver (n 31).

74 Many examples are provided in Christensen, Innovator's Dilemma (n73).

corporate opportunities rule on any kind of innovative opportunity even if it decides not to develop the opportunity and simply let it die. From the point of view of dynamic competition, such behaviour would be extremely harmful.

However, even regarding those opportunities that the company appropriates to develop, problems might arise. In fact, the company may decide to use corporate opportunities rules to slow down innovation. In other words, the company may be slower than an insider in implementing an innovation, because it is still able to earn from a previous technology without aiming to maximize the speed of innovation. Ezrachi and Stucke have shown this in relation to quality.[75] Another example is the already mentioned case of tobacco companies in 1940s. If an insider had taken the opportunity and launched lower-quality cigarettes from loweroquality blends of tobacco it may well have provided a springboard to later engage in competition with the 'normal' tobacco companies.

Finally, as we have explained above,[76] corporate opportunities rules can be compared to non-compete clauses. The effects on innovation of such clauses also provide insights on possible effects of corporate opportunities rules. There is some evidence that non-compete clauses have a negative effect.[77] Moreover, Gilson convincingly argued that the absence non-compete clauses may be an incentive for Silicon Valley inventors. According to Gilson, the unenforceability of employee's non-compete covenants under Californian law[78] fosters intercompany knowledge spillovers, which are renowned as one of the main reasons for Silicon Valley's economic success over Route 128.[79] Legal structure seems to confirm the difference of approach, given the likelihood of enforcement of the same kind of covenant under Massachusetts law.[80]

Form a rational perspective it seems rather surprising that companies would choose to be subject to the strict Californian law that allows former employees to compete freely. One reason why they do so choose may be the sociological features of the Silicon Valley, as Saxenien highlights. First, in Silicon Valley,

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75 Stucke, Maurice E. and Ezrachi, Ariel, When Competition Fails to Optimise Quality: A Look at Search Engines (April 23, 2015). Yale Journal of Law & Technology (2015, Forthcoming); University of Tennessee Legal Studies Research Paper No. 268. Available at SSRN: http://ssrn.com/abstract=2598128 or http://dx.doi.org/10.2139/ssrn.2598128

76 See text to (n 34–37).

77 See for example the negative effects of non-compete and trade secrets see Charles Tait Graves and James A. DiBoise, 'Do strict trade secret and non-competition laws obstruct innovation' 1 (2006) Entrepreneurial Business Law Journal 323–344; On Amir and Orly Lobel, 'Driving Performance: A Growth Theory of Noncompete Law' 16 (2013) Stanford Technology Law Review 833–874.

78 Ronald Gilson, "The legal infrastructure of high technology industrial districts: Silicon Valley, Route 128, and covenants not to compete." *NYUl Rev.* 74 (1999): 575, 607 ff.

79 Gilson (n79) 620 ff.

80 Gilson (n79) 603 ff.

loyalty to network seems to prevail over loyalty to the company.[81] As a consequence, the boundaries between employers and employees are depicted as 'blurring'.[82] Second, despite the existence of a sort of network loyalty, competitive pressure is particularly strong due to the demand of increasing innovation.[83] If Silicon Valley's dynamic efficiency is something that also is related to the strict approach of Californian law to non-compete clauses, then strict corporate opportunity rules should be questioned.

To conclude, we have highlighted that the enforcement of corporate opportunity rules has the potential to harm competition both from static and dynamic perspectives. From a static perspective, the enforcement of corporate opportunity rules is a barrier to entry, which, depending on the market circumstances, can have substantial effects. This is, in particular, the case in oligopolistic markets and in cases of over-enforcement of corporate opportunity rules that can lead to instances of parallel exclusion. In terms of the dynamic competition, on one hand, the corporate opportunities doctrine appears to provide a protection complementary to IP rights. On the other hand, in certain cases involving disruptive innovation, these corporate law rules may be employed in a very harmful way, such that they suppress or slow down innovation. The following sections will discuss how the current law is equipped to deal with these cases.

5. Enforcement of Corporate Opportunities: Competition Law to Address the Competitive Harm?

When examining the enforcement of corporate opportunities rules from a competition law perspective, a distinction has to be drawn between proprietary remedies and non-proprietary remedies.

In several jurisdictions, in particular civil law jurisdictions, the misappropriations of corporate opportunities call for non-proprietary remedies such as damages. These financial remedies are not the subject to competition law because they do not concern the interaction between firms on the market. Yet, as explained above, the incentive structure is changed to ensure that there is no incentive for the insider to develop business opportunities.[84] Hence, competition law is not able to address competitive harm resulting from corporate opportunity rules in jurisdictions with non-proprietary remedies.

Yet, in the following it is shown that the current competition regime is also unable to address the competitive harm sufficiently even in jurisdictions where proprietary remedies are the norm. This section explains, first, that competition law is not generally bared from applying to situations of corporate opportunities. It then shows that the conditions for applying the competition provision relating

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81 Anna Lee Saxenian, *Regional advantage*. Harvard University Press, 1996, 36.

82 Saxenien (n82) 50.

83 Saxenien (n82) 46.

84 See sections 2–4.

to anticompetitive agreements and unilateral practices are not fulfilled. Only in merger control some tools are available to address a small number of cases where the enforcement of corporate opportunity rules creates competitive harm.

a) State Action as a Defence

When examining enforcement of corporate opportunities rules from a competition perspective, it needs to be first established whether or not competition law applies. In particular, corporate law seems to allocate the business opportunities to the company, thus the question whether competition law can apply notwithstanding needs to be answered.

In the context of private anticompetitive conduct,[85] it needs to be remembered that competition law can only apply if no State action defence can be presented[86] by the company. Such a defence is available in the EU context where national laws or regulative measures[87] require an undertaking to act in a certain way; in other words, where a certain anticompetitive behaviour is required by the State. The important element, however, is that the company has no room for autonomous conduct. It is only where there is no room for autonomous conduct on part of the undertaking that the anticompetitive effect stems from the national law and not the undertaking's conduct.[88] The rationale is a catch-22 situation. The company must either act contrary to the law or regulative measure or contrary to competition law. The application of EU competition law to the

85 A different aspect is the obligation on EU Member States not to frustrate competition law, see for example Joined Cases C-94/04 and 202/04 *Cipolla v Fazari* [2006] ECR I–2049.

86 On the State action in the US versus the EU see Fox Eleanor M, 'State Action in Comparative Context: What if Parker vs. Brown Were Italian?' in Barry E Hawk (ed), *International Antitrust Law & Policy: Annual proceedings of the Fordham Corporate Law Institute 2003* (Juris 2004); and in general Wainwright Richard and Bouquet André, 'State Intervention and Action in EC Competition Law' in Barry E Hawk (ed), *International Antitrust Law & Policy: Annual proceedings of the Fordham Corporate Law Institute 2003* (Juris 2004), very critical regarding this defence Castillo de la Torre Fernandno, 'State Action Defence in EC Competition Law' (2005) 28(4) WComp 407.

87 It also applies where the Member State applies 'irresistible pressure', Case T-387/94 *Asia Motor France and others v Commission* [1996] ECR II-961 however, the exact meaning of irresistible pressure does not seem too clear. In this regards see Blomme Eric, 'State Action as a Defence Against 81 and 82 EC: State Action as a Defence Against 81 and 82 EC' (2007) 30(2) WComp 243 246f.

88 Joined Cases C‑359/95P and C‑379/95P *Commission and France v Ladbroke Racing* [1997] ECR I-6265. Often in later cases confirmed Case C-198/01, Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 para 52–55; Case C-207/01, *Altair Chimica* (n 68) para 30, 35–36; Case T-111/96 *ITT Promedia v Commission* [2000] ECR II-2937 para 96; Case T-513/93 *CNSD v Commission* [2000] ECR II-1807 58–59; Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and others v Commission* [2003] ECR II-3275 para 1130; Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969 para 66–71; Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477 para 86–90; Case T-87/05 *EDP v Commission* [2005] ECR II-3745 para 119; Case T-65/99 *Strintzis Lines Shipping v Commission* [2003] ECR II-5433 para 119–120.

enforcement of corporate opportunities does, therefore, depend on whether the company has a choice as to enforcing the rules.[89]

We have previously discussed [90] the mandatory nature of corporate opportunities rules. We have seen that they should generally be considered as mandatory. Nevertheless, we have also seen that most jurisdictions operationalize mechanisms for the authorization of takings. Authorization may come from either the shareholder assembly or a majority of non-conflicted directors. The company or, to be specific, the relevant organs of the company, therefore have the choice whether or not to enforce those rules. Given this freedom of the company to decide whether or not to enforce corporate opportunities rules, the State action defence is not available. Thus, EU competition law can, in general, be applied to such situations.

In the US the concept of State action equally exists. The concept goes back to the 1943 decision of *Parker v Brown*.[91] Under this standard, states as well as municipalities[92] are sovereign and are not subject to the federal antitrust laws as long as the anticompetitive action is clearly expressed state policy with foreseeable anticompetitive effects. In the case of private action, this antitrust immunity extends to private businesses where the State has not merely stimulated the anticompetitive action but has, as a sovereign, compelled the business.[93] Moreover, the defence is available in cases where two conditions are fulfilled.[94] First, there must be a clearly expressed State policy displacing competition. Second, the State must actively supervise those private actors.[95]

The situation is thus similar to that in the EU. The corporate opportunity rules only enable businesses to act in an anticompetitive fashion; there is, however, no direct compulsion by the State to enforce the corporate opportunity rules. Thus, the general State action defence in form of State compulsion is not available. Moreover, even if one could qualify the corporate opportunity as a form of State policy, the States do not actively oversee the enforcement of these rules.[96] Hence, the State action doctrine does not prevent the application of competition law.

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[89] As explained in the following sections.

[90] See Section 1, text to (n 29ff.)

[91] *Parker v. Brown*, 317 U.S. 341 (1943).

[92] Recognized in *Town of Hallie v. City of Eau Claire,* 105 S. Ct. 1713 (1985)

[93] *Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)*

[94] *Cal. Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980).*

[95] Recently the Supreme Court established that state agencies controlled by active market participants are *equally* subject to these requirements. The majority also held that this supervision means that State can review the act substantively and can veto it, see *North Carolina State Bd of Dental Examiners v. FTC* 135 S. Ct. 1101 (2015). On the State action doctrine in the US and the latest case see in particular area see Sina Safvati, 'Public-Private Divide in Parker State-Action Immunity' 63 UCLA L. Rev. (2016) 1110 –1141.

[96] And it does also not have the right to review the decision of the company substantively or veto it under the North Carolina State Board of Dental Examiners standard.

b) Existence of Separate Firms

Before the enforcement of corporate opportunity rules can be examined under the standard competition analysis, a second criterion needs to be fulfilled. The rules on anticompetitive agreements, abusive conduct or monopolization, and mergers only apply if two or more separate firms exist. Either two or more companies form an agreement, or merge, or one company abuses its dominant position towards another company. Thus, competition law can only impact the enforcement of corporate opportunity rules where at least two separate companies exist.

In the EU context, this principle is the consequence of the concept of a single economic unit. On the one hand, this concept has the consequence that such arrangements between two units are outside the scope of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) if they form one company.[97] Typical examples of such arrangements are agreements between parent and subsidiary, principal and agent, or contractor and subcontractor. On the other hand, the concept leads to attributing all actions of the different units to one entity. This can be the attribution of abusive behaviour by a unit, cartel arrangement by a unit or, more generally, liability for the infringement.[98]

The concept of single economic entity requires a 'unitary organisation of personal, tangible, and intangible elements, which pursue a specific economic aim on a long-term basis.'[99] In *Viho*, the General Court (GC) indicated that the decisive question is whether the unit enjoys 'real autonomy in determining their course of action in the market [or had to] carry out the instructions issued to them'.[100] In the examination, the economic, organizational and legal links between the two units are investigated and, in particular, whether control can legally and actually be exercised.[101]

In contrast, US antitrust law does not operate with a notion of company or undertaking, instead Sherman Act liability exists for natural and legal persons. Legal persons liable under the Sherman Act include corporations, partnerships, joint ventures, not-for-profit institutions and certain governmental entities.[102] Central to section 1 of the Sherman Act is the issue of whether two separate,

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[97] See e.g. T-111/08 *MasterCard and Others v Commission* ECLI:EU:T:2012:260 para 76

[98] See in particular Okeoghene Odudu and David Bailey, 'The single economic entity doctrine in EU competition law' (2014) 51 Common Market Law Review 1721–1757.

[99] T-112/05 *Akzo Nobel NV v Commission* [2007] ECR II-5049 para 57–58; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II1487 para 54; ase- T-11/89 *Shell* v *Commission* [1992] ECR II-757 para 311, and Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989 para 87

[100] *Case* T-102/92 *Viho v Commission* [1995] ECR II-17 para 47, see also Case 48/69 *ICI v Commission* [1972] ECR 619 para 134; Case 66/86 *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekaempfung Unlauteren Wettbewerbs* [1989] ECR 803 para 35, Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others v Commission* [1992] ECR II-1403 para 357.

[101] See C-521/09 *P ElfAquitaine v Commission* [2011] ECR I-8947 para 54–72.

[102] H. Langer, *Competition Law of the United States*, (2nd ed, Kluwer 2014) 44.

independent entities are involved in the conspiracy. Thus, in *Copperweld v Independence Tube*, it was held that the interaction between a corporation and its subsidiary are not within the scope of section 1. Even though these entities are two separate legal entities, they are a single enterprise for the purpose of the section 1 because they pursue common objectives and are guided by the common corporate consciousness.[103] In the same vein, forming a joint venture is also outside of the scope of section 1 because there is no plurality of actors.[104]

Yet, the criterion of separateness has caused some difficulties, in particular, with regard to the question whether a single enterprise operates on the market or whether this legal entity is actually controlled by a group of competitors. In *American Needle Inc* it was ruled that two separately incorporated teams of the National Football League that assigned their IP rights to the National Football League Properties (NFLP) to be resold were within the scope of section 1.[105] The reason for this decision was that the teams were deemed to be separate legal entities that were also separate from the NFLP and they were independent in their decision-making.

When examining corporate opportunities in light of these principles two situations can be distinguished: (1) cases where the corporate opportunity has not yet been made operational or incorporated, and (2) cases where the corporate opportunity been made operational or incorporated. In both cases the crucial point is whether one or two firms exist.

Where the corporate opportunity has only been discovered by the director but has not been made operational, the opportunity has not yet left the boundaries of the company. Thus, competition law does not apply in this relationship. In contrast, where the opportunity has been appropriated and a new, separate, business has become operational, several aspects need to be investigated. One is whether the director who has appropriated the opportunity remains in charge in the incumbent corporation, which may possibly trigger problems of interlocking directorates. The other and more significant problem pertains to the behaviour of the incumbent corporation towards the new company. In this case, two firms would exist and the rules on anticompetitive agreements, abusive behaviour or monopolization and the mergers can be applied. Where the corporate opportunity has been made operational and the opportunity has left the boundaries of the company, the rules on anticompetitive agreements can be applied. However, these rules are not well suited for such situations as they are not able to address the negative effects on competition fully.

In this context two further situations can be distinguished: (1) an agreement is reached between the parties on how the issue surrounding the opportunity has

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103 *Copperweld Corp. v Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

104 *Texaco Inc .v. Dagher*, 547 U.S. 1, 5–6, 126 S. Ct. 1276, 1279–1280, 164 L. Ed. 2d 1 (2006.)

105 *American Needle Inc v National Football League* 560 US 183 (2010).

to be solved,[106] and (2) court action is taken unilaterally to enforce the corporate opportunity rules against the will of the director.

In the first case, the competition rules relating to agreements can become relevant;, in the second case the rules on unilateral behaviour that is, abuse of dominance and monopolization, come into play.

c) Rules on Anticompetitive Agreements

Where two undertakings within the meaning of EU law or two separate legal entities under the US doctrine exist, and they come to an understanding on how the issue surrounding the business opportunity should be solved, Article 101 TFEU or section 1 of the Sherman Act might be applied.

In the EU, the Court in *Bayer AG v Commission* first used a contractual understanding of agreement for the purpose of Article 101 TFEU, focusing on the concurrence of wills.[107] However, the meaning of agreement in Article 101 is broader, also covering gentlemen's agreements[108] and any other form of conduct where the companies have expressed their intention to behave in a specific way on the market.[109] The Court, therefore, more recently defined an agreement within the meaning of Article 101 TFEU as 'the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive'.[110] A similar result is reached in the US, as section 1 of the Sherman Act is, by its very nature, broad, covering 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade'. While it was for a long time sufficient to show parallel conduct to bring an antitrust claim,[111] since *Bell Atlantic Corp. v Twombly*,[112] the evidential burden to bring antitrust suits has been raised. While parallel conduct might still be used to as circumstantial evidence to infer an agreement, it is now necessary to show why a conspiracy is plausible.

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106 Which can either take place before or after court action was brought taken.

107 Case T-41/96 *Bayer AG v Commission of the European Communities*, ECLI:EU:T:2000:242, para 69.

108 C-41/69 *ACF Chemiefarma v Commission*, ECLI:EU:C:1970:71

109 See e.g. T-9/89 *Hüls AG v Commission of the European Communities*, ECLI:EU:T:1992:31, T-11/89 *Shell International Chemical Company Ltd v Commission of the European Communities*, ECLI:EU:T:1992:33, T-56/02 OP *Bayerische Hypo- und Vereinsbank v Commission*, ECLI:EU:T:2004:301, T-18/03 *CD-Contact Data GmbH v Commission of the European Communities*, ECLI:EU:T:2009:132

110 C-74/04 P *Commission v Volkswagen*, EU:C:2006:460, para 37. It also immaterial whether the company is active in the market (Case C-194/14 P *AC-Treuhand AG v European Commission*, ECLI:EU:C:2015:717) and whether the person was authorized or instructed with regard to the agreement (Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa*, ECLI:EU:C:2013:71).

111 Under *Conley v. Gibson*, 355 U.S. 41 (1957).

112 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

These definitions mean that where unilateral court action is taken to enforce the corporate opportunity rules, no agreement between the parties exists. Otherwise, a company would not need to bring the matter to a court. Yet, in cases where an agreement between the director and the incumbent company is reached on how the dispute surrounding the corporate opportunity is to be solved,[113] an agreement can be established.

However, the anticompetitive nature of the agreement would also need to be established. Leaving aside the difficult issue of whether such an agreement is an object or an effect restriction under EU competition,[114] the focus here should be on the assessment of effects on competition. Taking the EU's model as a guideline, the effect of the agreement can be assessed using a threefold test: first, the product market and the geographical market are determined;[115] second, effects on actual and potential competition are assessed. This is done by comparing the competitive situation with and without the restriction contained in the agreement.[116] When assessing the effects, in particular, the foreclosure effect[117] and the effects on the other parameters of competition, for example, quantity, price, quality and the like,[118] are taken into account. Finally, the relationship between the restriction of competition and the agreement[119] needs to be considered.

When examining agreements on corporate opportunities that relocate the opportunity to the incumbent company, one may need to provide convincing evidence in terms of how the situation would be absent the agreement. In section 4 above, we described a number of effects on competition. In particular, foreclosure effects are interesting, where the company can monopolize a

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113 Whether this arrangement is reached before or after the court proceeding have been started does not matter.

114 We leave a side the difficult question whether such an agreement would need to be considered an object or an effect restriction within the meaning of Article 101(1) TFEU. See Maria Ioannidou and Julian Nowag 'Can two wrongs make it right? Reconsidering minimum resale price maintenance in the light of Allianz Hungaria' (2015) European Competition Journal 1-27 However, it needs to born in mind that this category needs to be interpreted narrowly, see Case C-67/13 P *CB v Commission* ECLI:EU:C:2014:2204 para 58.

115 Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-93 para 16; Case T-168/01, Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969. See also in this regard the *Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law* [1997] OJ C372/5.

116 Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969 para 162; Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 249–250; Case C-7/95P *John Deere v Commission* [1998] ECR I‑3111 para 76; Case T‑328/03 *O2 (Germany) v Commission* [2006] ECR II-1231 para 66ff, but see also Opinion AG Römer Case 56 & 58/64 *Consten and Grundig v Commission* [1966] ECR 299 342.

117 See Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-93 para 13 ff.

118 In this regard Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063 para 109; Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969 para 167. For an approach on how to measure the effect on competition see Odudu Okeoghene, *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP 2006) 103ff.

119 Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-93 para 24–25.

strategic market upstream or downstream. Yet, the major challenge in this regard is that the potential effects will be seen in the long term rather than immediately. Therefore, reasoning in terms of counterfactual would be extremely difficult.

However, possibly the main difficulty arises from the enforcement side. The parties to the agreement usually do not have an incentive to challenge such an agreement since they have just both agreed to it. So, one would have to rely on outsiders to challenge such agreements. Competition authorities seem not (yet?) to be concerned about corporate opportunities and, in reality, they would only rarely hear about such agreements.[120] Typically, those agreements are confidential so only if a case was subsequently brought to court or someone broke the confidentially clause would such agreements come to light. In this regard, the monitoring problem can be compared to pay-for-delay settlements.[121] Only after the sector enquiry[122] and enactment of reporting requirements, the European Commission seemed to have sufficient knowledge to take enforcement action.[123] Thus, the main enforcement pressure would need to come from third-party private claimants. However, similar to the competition authorities, it would be hard for those claimants to acquire intelligence about the conclusion of such agreements.

To conclude, a very small number of cases might be caught under the rules relating to anticompetitive agreements. The majority of cases would not be caught and even the where cases might come under the prohibition on anticompetitive agreements, numerous difficulties exist.

d) Rules on Abuse of Dominance or Monopolization

We return now to the assessment of cases where court action is taken unilaterally to enforce the corporate opportunity rules against the will of the director who appropriated the opportunity. Similarly to the assessment of anticompetitive agreements, only those cases where the corporate opportunity has already been made operational or incorporated can come under the EU prohibitions of abusive behaviour or, in the US context, monopolization.

[120] Typically those agreements are very confidential so only case if it would subsequently be is when it is brought in front of a court to be declared void under 101 (1) and (3)…never happened that I know.

[121] On pay-for-delay settlements see e.g. Stanislas de Margerie, "*Pay*-for-*Delay*' *Settlements*: *In Search of the Right Standard*' (*2013*) *36 World Competition* 85-97; Farasat A.S. Bokhari; 'What Is the Price of Pay-To-Delay Deals?' (2013) 9 *Journal of Competition Law & Economics* 739–753; Sven Gallasch 'Activating Actavis in Europe – the proposal of a 'structured effects-based' analysis for pay-for-delay settlements' (2016) 36 Legal Studies 683–705.

[122] See Commission Communication of 8 July 2009 on the Executive Summary of the Pharmaceutical Sector Inquiry Report, press release IP/09/1098, available at: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/ (accessed 14 July 2017).

[123] See in particular Case T-472/13 *Lundbeck v Commission* EU:T:2016:449.

The main filter that prevents the application of these competition rules addressing unilateral behaviour is the requirement of market power. Certainly, the corporate opportunity rules bestow a form of power upon the incumbent company, that is, the power to prevent the newly established company from continuing its activity as an independent entity. However, this power is different from market power. Any market power of the company depends mainly on the actual and potential competitors of that company.[124] And in the majority of the cases involving corporate opportunities the company involved will not be dominant. Only in the small number of cases where the company is dominant can the questions of abuse by means of enforcing corporate opportunity rules become relevant.

Yet, in those cases, the question of whether such behaviour can be considered to be abusive is challenging. In the EU context, it needs to be remembered that the list of abuses in Article 102 TFEU is not exhaustive.[125] To determine whether a certain behaviour is abusive, the anticompetitive effect of the behaviour, as well as redeeming pro-competitive effects in form of a justification, need to be established. As the European Commission in its Guidance paper explains, it will focus on cases where the behaviour leads to an anticompetitive foreclosure.[126] In its assessment the Commission will take into account the position of the dominant firm vis-à-vis its competitors, the conditions on the market, the position of the customers or input suppliers, as well as the extent of the abusive conduct, and evidence of an exclusionary strategy or actual foreclosure.[127]

In the US, section 2 of the Sherman Act prohibits monopolization and any attempt to monopolize, although it does not define the term 'monopolize'. Under US antitrust rules it is not necessary to first establish market shares, because it is sufficient that the claimant shows that the market power has been used in an anticompetitive way.[128] Yet, the examination of section 2 follows a pattern similar to Article 102 TFEU. It needs to be established that substantial market power in the relevant market exists and that it has been used to an anticompetitive or exclusionary end.[129]

Thus, the issue of whether another area of law, such as corporate law, allows the behaviour is irrelevant for the assessment under competition law. This

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124 In the EU the ECJ has established early on that such market power exists, where the company can operate independently from competition, see Case 27/76 *United Brands v Commission* EU:C:178:22 para 67.

125 This is clear from the wording, but see also Case 6/72 *Continental Can* v. Commission [1973] ECR 215 para 26, Joined Cases C-395/96 P *and C-396/9 P*, *Compagnie Maritime Belge* and Others v Commission [2000] ECR I-1365 para 112.

126 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7 para 20.

127 Ibid.

128 Langer (n 102) 49.

129 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 595/596, 105 S.Ct. 2847, 2854, 86 L.Ed. 2d 467 (1985).

corresponds to the idea of the State action defence[130] and the special responsibility doctrine.[131] Although the law allows the enforcement of corporate opportunity rules, it is a choice that the company makes. Where it makes a decision to enforce the corporate opportunity rules autonomously, it can encounter antitrust liability. Moreover, given the market power of the undertaking, the behaviour might be more harmful to competition as compared to a scenario without market power.

Article 102 TFEU and section 2 of the Sherman Act are, therefore, able to address the anticompetitive effects that the rules on corporate opportunities can create where market power already exists. Any assessment will consider the anticompetitive effects described above,[132] with a particular focus on the exclusionary effects. While the enforcement of corporate opportunity rules has not yet been considered under the abuse prohibition, it might share some similarities with a refusal to supply. The company with the rights to the corporate opportunity has power over the input – that is to say, the opportunity – of another company that was set up by the directors. As with all refusals to deal cases, it would need to be considered carefully how incentives to invest and innovate are affected.[133]

This shows that the abuse prohibition is – in general – able to address the competitive harm where the opportunity has already been made operational or has been incorporated. Yet, such an assessment will only be carried out where the market power has reached a sufficiently high level.

e) Rules on Mergers

The most common interaction between corporate opportunities and competition law is presumably merger regulation. This interaction would occur in two sets of cases: first, in cases where the corporate opportunity has been made operational or incorporated, and second, where the corporate opportunity consists of buying another company.

In the EU context, both cases would be covered by the EU's Merger Regulation (EUMR) if the measure is a concentration within the meaning of Article 3 EUMR and the thresholds of are met. A concentration occurs where a change of control

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130 See e.g. Joined Cases C‑359/95P and C‑379/95P *Commission and France v Ladbroke Racing* [1997] ECR I-6265, Case C-198/01, Case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 para 52-55; Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969 para 66–71; Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477 para 86–90; Case T-87/05 *EDP v Commission* [2005] ECR II-3745 para 119.

131 See Case 322/81 *Michelin v Commission (Michelin I)* [1983] ECR 3461 para 10; Case T-83/91 *Tetra Pak v Commission* (Tetra Pak II) [1993] ECR II-755 para 114; Case T-111/96 ITT *Promedia v Commission* [1998] ECR II-2937 para 39; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969 para 112; Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071 para 97.

132 See above section 4.

133 See Guidance on the Commission's enforcement priorities (n 126) para 75.

on a lasting basis results from a merger between at least two (previously) independent undertakings or where control over such an independent undertaking is gained.[134]

As explained above,[135] where the corporate opportunity has been made operational or has been incorporated an independent entity exists. The case of two independent companies is even clearer where the opportunity is the acquisition of another company. The concept of concentration is a broad concept that covers any acquisition of *de jure* or *de facto* control.[136] Therefore, it is immaterial how the incumbent company gains control over the corporate opportunity. This gaining of control includes also a constructive trust and a consequent transfer order, even though this is not a contractual transfer of control.

The main reason why such a transaction would not be subject to the EUMR is the jurisdictional threshold in Article 1. It is a numerical threshold based on the turnover. EU Member States also have turnover thresholds in their domestic competition laws, albeit typically lower ones.

Yet, the real problem relating to the thresholds is not the case where the opportunity lies in the acquisition of another company. The problem occurs where the opportunity is in the early stage of development, in particular where a corporate opportunity has just recently been made operational or incorporated. In those cases, the newly established business is likely to have an extremely low turnover, which means that the turnover thresholds are not met. A similar problem with thresholds has been observed in the context of the acquisition of start-ups. Thus, the German government has suggested applying merger control to low turnover situations that have high transactional value.[137] In the US, section 7 of the Clayton Act, which is the main rule for mergers, establishes a requirement for per-notification to the Federal Trade Commission and the Department of Justice. The relevant thresholds are established in the Hart-Scott-Rodino Act[138] and adjusted on a yearly basis to reflect inflation.

Both in the EU and the US, merger control is mainly triggered by means of certain thresholds for turnover or the value of the transaction. Hence, many cases of corporate opportunity rules – in particular, those of newly incorporated or newly made operational business opportunities – would not be subject to the merger regime. For those transactions that meet the threshold the normal

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134 See also Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) [2008] OJ C 95/1.

135 See section 5 b).

136 Commission Jurisdictional Notice para 16.

137 See 2016 Annual Economic Report, available at https://www.bmwi.de/BMWi/Redaktion/PDF/J-L/jahreswirtschaftsbericht-2016-englisch-kurzfassung,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf accessed 30 March 2016.

138 15 U.S.C.§18A

merger control rules apply. In practice, these cases will mainly be where the corporate opportunity consists of the acquisition of another company.

Once such a transaction falls within the scope of the relevant merger regulation, the US and the EU regulations provide ample room to address anticompetitive concerns. In the EU, according to Article 2 EUMR, a transaction would be prohibited if it would significantly impede effective competition and, in particular, if a dominant position is created or strengthened. The assessment would, both in horizontal and vertical cases, examine the potential for unilateral and coordinated effects and it would focus on the possibilities for exclusion, such as input and customer foreclosure.[139] In the US, the Horizontal Merger Guidelines are the main yardstick for mergers.[140] The focus is similar to the EUMR; the examination concentrates on adverse competitive effects, both unilateral and coordinated.

The analysis performed by merger regimes uses sophisticated tools to address innovation or dynamic concerns. The EU Commission, in the EUMR, specifically highlights 'the importance of innovation as a competitive force'.[141] Similarly in the US, the horizontal merger guidelines have a section that explains the approach of the authority when assessing whether a merger diminishes innovation competition.[142] *Intel/McAfee* is a good example of such an assessment.[143] In this case, the Commission undertook an extensive assessment of the nature of the market, the relevant type of innovation and how the merger would affect innovation in the market. The Commission found that the input data from hardware manufacturers was essential for software producers to innovate and improve their software incrementally. Intel's commitment finally addressed this concern by providing full interoperability on a royalty-free basis, including access to merger specific innovations that would be generated by the newly merged *Intel/McAfee* entity.

6. Outlook: Focus on Dynamic Efficiency and Competition in Corporate Law

We have established that the rules on corporate opportunities can have serious effects on competition. On one hand, a static analysis shows potential for exclusion on a horizontal level and for foreclosure on a vertical level. On the other hand, a dynamic analysis highlights the potential for new scenarios that

139 See in particular Commission Notice, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5 para 30ff.

140 For the updated (2010) Horizontal Merger Guidelines are available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010. Moreover, the 1984 Non-Horizontal Merger Guidelines are still in place, see https://www.justice.gov/atr/non-horizontal-merger-guidelines

141 Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2004] OJ C 31/5 para 38.

142 US Horizontal Merger Guidelines, section 6.4.

143 Case No COMP/M.5984 C(2011) 529 final.

are, at least in theory, very harmful to dynamic efficiency and also rather unusual from an industrial organization perspective.

However, neither the current corporate rules nor the competition regime can presently address these concerns sufficiently. Corporate law rules, in this context of corporate opportunity rules, are usually concerned with a reduction of agency costs. This focus calls for a strict enforcement of corporate opportunities rules, to defend investors' incentives to purchase and maintain an equity stake in the corporation. It might not be surprising to hear that the corporate law does not address these concerns; indeed, even competition law is not able to provide sufficient tools to address the relevant competition concerns.

In this brief overview of the competition regime we showed that the competitive implications of enforcing corporate opportunities rules can be addressed only in a small number of cases. Competition law can only apply in jurisdictions with proprietary remedies and comes into play where the corporate opportunity has already been made operational or incorporated or where the opportunity consists of acquiring another company. However, the majority of cases are not caught under competition law, in particular, in jurisdictions where the remedies are non-proprietary, that is to say, where damages have to be paid. In countries with these remedies competition law does not apply. Yet, the whole incentive structure is changed is changed to the detriment of competition. The availability of effective damages actions means that there is no incentive for the insider to develop business opportunities because the damages, particularly where they encompass all losses resulting from the breach,[144] mean that the insider would not be able to run the new company properly or make any profits.

However, even in cases where competition law could potentially apply, problems persist. The cartel prohibition will not apply in the majority of cases as there is no agreement. But even where an agreement is present, serious enforcement problems, such as questions of visibility of such agreements, exist. Similarly, the abuse/monopolization rules only apply in the small number of cases where the incumbent company has a sufficient degree of market power. Only then, the analysis is able to address and examine the competitive effects of the enforcement of corporate opportunity rules.

More generally, the issue of corporate opportunities is intrinsically linked to innovation and the assessment of dynamic effects under the cartel and abuse/monopolization rules are not well developed compared to merger regulations. Additionally, cartel and abuse/monopolization rules are rather blunt in their *ex post* application. The *ex ante* approach of the merger regulations seems better equipped to deal with the dynamic side of the competition law issues and is, moreover, closer to the situation at hand. In cases of corporate opportunities, it is the future that is to be regulated rather than the past; whether that is seen from a competition perspective as the blocking of future business opportunities of a (future) competitor, or from a corporate law perspective as a future business opportunity for the incumbent company.

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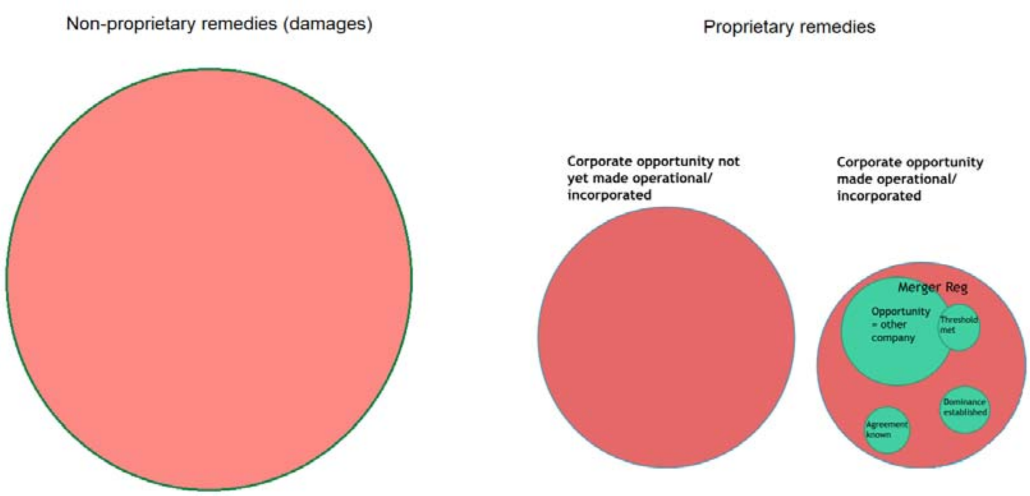
[144] See above sections 2 and 3.

Although the merger regulations seem better suited to deal with the competition issues involved in the enforcement of corporate opportunity rules, the toolkit is also unable to address all the issues. This is so mainly because the current form of thresholds are not suitable to the situation of corporate opportunities because the situations can be compared to take overs of start-ups.

To address the competition concerns, an evolution of the thresholds in the merger regulations would be one option. However, even such a bold move would not fully remedy the situation. Such a competition approach would not address: a) cases of corporate opportunities where no proprietary remedies exists, and b) cases where proprietary remedies are available but where the opportunity has not been made operational or incorporated. Similarly, the approach would not be able address the counterincentives against efficient takings of an opportunity. In other words, insiders who could become significant competitors may decide not to take the opportunity because of the corporate opportunities doctrine. Taken together, this result can be visualized as set out in Figure 1 below.

Figure 1: Options for Competition Law to Address Anticompetitive Effects of Corporate Opportunity Rules



Red areas are situations that cannot be addressed by competition law
Green areas show where competition law can address anticompetitive effects

Thus, only a corporate law approach can help to address the competition problems stemming from the corporate opportunity rules. This approach should subject the issue of corporate opportunities to a competitive assessment. How such a rule in corporate law should be designed in practice should depend on an empirical question, that is to say, on whether the current corporate opportunity rules are in the majority of cases beneficial or harmful from a competition perspective. Our overview of the potential competitive harms assumes that it is only in a smaller number of cases that the current rules create competitive harm. Based on this assumption, the standard rules would not have to be changed, but the director taking the opportunity should be allowed to argue a competition defence. The director, once faced with a claim to a corporate opportunity by the incumbent company, could argue that from the perspective of competition it would be better if the opportunity were not allocated to the company but remained with the director.[145]

7. Conclusion

In this paper we have shown the anticompetitive effects of corporate opportunities rules. First, we explained the basic principles of corporate opportunity rules that grant a corporation the right to appropriate business opportunities discovered by its directors. We then explored possible anticompetitive effects, both from a static perspective as well as from a dynamic perspective. This provided us with a basis to examine whether the current EU and US antitrust framework is able to sufficiently address anticompetitive effects that can arise from the enforcement corporate opportunity rules. We showed that the current framework of competition law is ill-suited to address possible anticompetitive implications of the enforcement of corporate opportunity rules. It will not be able to address the majority of cases where corporate opportunity rules can have anticompetitive effects. We, thus, proposed a corporate law solution that introduces some elements of a competition analysis into the corporate law framework. What became clear in the course of this paper is that much more empirical research on the pro- and anticompetitive effects of corporate opportunity rules needs to be done. The research is especially needed because the current framework can have a chilling effect that is difficult to measure. This effect stems from directors being dissuaded from any attempt to use business opportunities when they consider the implications of the corporate opportunity rules. However, the questions raised in this context are broader than the rules that are related to the interaction between the director and the company, namely corporate opportunity rules. The basic problem exists in a number of other areas, such as general non-compete clauses and agreements with employees that prevent them from working for or acting as a competitor to the incumbent company. The analytical framework presented in this paper may be a starting point for a wider analysis on these areas of the law.

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145 If the empirical results suggest that the corporate opportunity rules are in the majority of cases anticompetitive the roles would be changed. The standard would be that the opportunity would remain with the director and the company would need to show why it would be more beneficial if it were to receive the opportunity.