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Use and abuse of competition law in pursuit of the single market – has competition law served a quasi-industrial policy agenda?

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Published in:
Aims and Values in Competition Law

Publication date:
2013

Document version
Early version, also known as pre-print

Citation for published version (APA):
Bergqvist, C. (2013). Use and abuse of competition law in pursuit of the single market – has competition law served a quasi-industrial policy agenda? In *Aims and Values in Competition Law* Social Science Research Network (SSRN).

Download date: 19. sep.. 2020

chapter [ ]

Use and abuse of competition law in pursuit of the single market – has competition law served a quasi-industrial policy agenda?

Abstract

The call for an enhanced role for industrial policy has traditionally been relegated to the furthest reaches of the competition law universe and has received limited support. Accordingly it has been assumed that industrial policy has not influenced the Commission's priorities when enforcing competition law. However, as is often the case, the reality is more complex. In pursuit of the single market, competition law has sometimes played a regulatory role with a flavour of industrial policy. Hence, it would be too simplistic to deny that industrial policy considerations are advanced under competition law if a broader definition is applied.

While it is not entirely clear what governs the understanding and application of competition law,[1] industrial policy in the form of government intervention in the market to correct imperfections and facilitate structural changes as part of a larger plan is not normally considered to be part.[2] Further, as there has been no serious call for change from outside the ranks of a limited number of politicians, it may reasonably be argued that there is not and should not be scope for an industrial policy agenda as part of competition law. From an overall perspective this argument appears correct as there is no significant example of the Commission turning a blind eye to serious impediments to competition for industrial policy reasons or giving in to such pressure.[3] On the other hand, to argue that only economic welfare arguments have been made and accepted under competition law would be equally problematic, as there are too many examples of exceptions to this.[4] Over the years a pattern has emerged whereby, in the absence of satisfactory single market regulation, the Commission has occasionally resorted to competition law in order to secure single market objectives. Further, what is satisfactory regulation in the eyes of the Commission should not be confused with actual regulation or the opinions of the Member States and the Council. This is a significant reservation, as there are examples of competition law being used as part of a wider and more political agenda

[1] For the purposes of this paper 'competition law' includes Articles 101, 102 and 106 of the Treaty on the Functioning of the European Union (TFEU) and the applicable Merger Regulations, currently Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[2] There is no authoritative definition of 'industrial policy' available; see Luis Navarro *Industrial policy in the economic literature. Recent theoretical developments and implications for EU policy*, Enterprise paper 12 DG Enterprise 2003 available on the internet. Hence, 'industrial policy' can have many meanings including 'picking the winning strategies', creating 'national champions' through protectionism, and promoting innovation and development by public investments in R&D etc. However, most of definitions include some form of restructuring of sectors and industries in accordance with a 'master plan'.

[3] For possible examples of both see Damien Geradin & Ianis Girgenson *Industrial Policy and European Merger Control - A reassessment*, available on the internet.

[4] See Damien Geradin, Anne Layne-Farrar & Nicolas Petit, *EU competition law and economics*, Oxford 2012, points 1.70 to 1.72.

with some flavour of industrial policy. Consequently if considered in more detail, and if the concept of industrial policy is taken as including any larger restructuring of sectors and industries for the attainment of long term objectives, it could be argued that competition law has occasionally played a regulatory role as part of a quasi-industrial policy agenda. These observations relate mainly to the sectors liberalised from the 1980s on, though they are not limited to these. Thus, there is a need for a more detailed understanding of the interaction between competition law and single market regulation. This understanding should take account of the fact that while industrial policy has not been directly or officially embraced as part of competition law, its fingerprints may nevertheless be discerned. The aim of this contribution is to examine the role of industrial policy in competition law.

1. The fundamentals of competition law and single market regulation

While competition law has traditionally been concerned with enhancing economic welfare, and consumer welfare in particular,[5] regardless of whether it takes the form of directives or regulations, single market regulation is perceived as pursuing a wider agenda with the main aim of creating the single market is the predominant. This could and should involve correcting market failures and their underlying causes as well as any other elements that are undesirable from a Union perspective. Thus, regulation of the single market often concerns the very core of industrial policy. Any such agenda would therefore normally be pursued within the framework of the single market and its associated regulation and would depend on the support of the relevant legislative bodies and, in contrast to competition law, would be subject to few restrictions in the scope.

There is a core of overlap between competition law and single market regulation, whether broad or narrow, as unrestricted competition could be an objective or instrument under both. In addition, being linked to economic theories and paradigms, competition law evolves over time, often in parallel with changes to other regulatory theories, thereby mitigating the differences as neither set of laws is static. On the other hand there are also many objectives of the single market, including opening up and deregulating markets, which fall outside the scope of competition law despite their being a precondition for meaningful competition. A market that is without competition because of the existence of monopoly rights would offer little role for competition law. Competition law is e.g. perceived as being less well suited than sector-specific single market regulation for tailoring specific obligations and remedies.[6] A traditional perception of the interaction between competition law, single market regulation and any implied industrial policy agenda would be that single market regulation paves the way for competition law and mitigates any socially undesirable consequences of unrestricted competition. Further, this process is of an essentially industrial political nature as it is based on a presumption of giving long-term gains in economic welfare. However, competition law come into play when there is competition, ensuring that private restrictions do not replace government restrictions.

[5] See Giorgio Monti *EC Competition Law*, Cambridge 2007, p. 20; and the speech by Commissioner Neelie Kroes - SPEECH/05/512 – *Delivering Better Markets and Better Choices*, European Consumer and Competition Day.

[6] This is the general perception, which could be challenged but which nevertheless has some validity since competition law operates *ex post* and emphasises general principles and is thus less well positioned to provide for prudent, predictable and well tailored remedies in a transitional phase.

1.1. A traditional perception sees limited interaction

Most scholars focus either on competition law or on single market regulation, paying limited attention to any overlap between them. There is some logic to this, as single market regulation is normally addressed to the Member States while competition law is primarily addressed to undertakings. While single market regulation can concern anything that is subject to Union law, competition law must be confined to certain defined objectives, primarily to do with economic welfare. However, to ignore the overlap or to fail to understand how single market regulation must be defined with respect for competition law would be to fundamentally neglect the secondary nature of single market regulation and its subordination to primary law, in this case competition law. As demonstrated as early as in *Grundig Consten*,[7] (1966), competition law can be used to prevent the use of national law (in this case on IP rights) to partition the single market.[8] This is normally a role played by single market regulation. Hence, in contrast to the traditional perception that there is limited interaction between single market regulation and competition law, it is apparent that single market regulation does apply within the area of competition law and potentially could be "corrected" by the latter in the event of a substantive conflict. Thus the traditional view, that there is limited interaction between single market regulation and competition law and that there is no industrial policy agenda associated with competition law, does not tell the whole story.

1.2. In pursuit of a more elaborate interaction and relationship

The interaction between single market regulation and competition law was developed further in *France* v *Commission*,[9] (1982) which is another early example of competition law being used to make up for shortcomings in single market regulation. In this case, pursuant to Article 106(3) TFEU the Commission directed the Member States to disclose their financial transactions with public undertakings in order to prevent unlawful State aid. This requirement may have been reasonable from a Union perspective but it nevertheless found little support in some of the Member States and was unsuccessfully challenged by them before the Court of Justice. However, once it was confirmed that the Commission had powers to adopt Commission directives, by-passing the Council, such directives became an effective instrument for dealing with recalcitrant Member States. In the hands of a self-confident Commission in the 1980s, Commission directives proved very potent in redefining the role of competition law. In the 1980s even more wide ranging initiatives were taken to liberalise a number of sectors, of which the telecommunications sector was the most prominent. While normally associated with the Commission Green Paper[10] of 1987 and its subsequent implementation from 1990 onwards, the foundations were in fact laid in 1982 with

[7] Joined Cases 56 and 58/64 - *Établissements Consten and Grundig* v *Commission*, English special edition, ECR 299.
[8] As explained below, this case predates the development of the Union exhaustion of rights doctrine leaving competition law as the only readily available instrument.
[9] Joined Cases 188 to 190/80 *France, Italy and UK* v *Commission* [1982] ECR 2545.
[10] COM 1987 290 - *Towards a dynamic European economy, Green Paper on the development of the common market for telecommunications services and equipment.*

British Telecommunications.[11] In this case, British Telecom's restriction of access to call-back arrangements, aimed at leveraging its dominant position in the UK to a liberalised market, was held to be in breach of Article 102 TFEU. The Commission's ruling was appealed to the Court of Justice by a group of reluctant Member States rather than by the undertakings directly affected, but the Court of Justice upheld the ruling. While they are not officially related, it is possible to see a link between the outcome of *British Telecom* and *France* v *Commission* and the Green Paper which recommended ending the unrestricted use of exclusive rights. If for no other reason than that it seems unlikely that the Commission would be willing to step into the ring for another round with the Member States following a knockout blow in the first round.[12] It is therefore possible to see an active role for competition law in the deregulation process embarked on in EU from the 1980s, and thus also an underlying industrial policy agenda for competition law. Also, following *France* v *Commission* the Commission had been given a powerful instrument in competition law, which did not require consent of the Member States.

2. A multiple role for competition law in the single market

The prevailing pattern indicates not only that there is a close interaction between the rules and objectives of competition law and single market regulation, but also shows how competition law is at least indirectly influenced by single market considerations. Moreover, this influence indicates how, in its interaction with single market regulation, competition law can give different forms of support for single market regulation. It appears that no fewer than three positions can be identified, whereby competition law:

1. supplements single market regulation and vice versa,
2. is the rock upon which the single market and its regulation is built, and
3. drives the development of the single market and its regulation.

While the line between these positions may not be clear cut, what is clear is that these positions indicate that there is a more elaborate interaction than is traditionally perceived and that competition law has been used to promote single market objectives and has in fact been shaped by this. This challenges the assumption that there is no industry policy agenda in competition law and indicates the existence of a broader agenda than the traditional assumption of economic welfare. These positions will be developed further below. As noted, the lines between these positions are not entirely clear so that it is difficult to avoid some of overlap between them.

3. Competition law as a supplement to single market regulation

In the traditional view, depending on the level of single market regulation most undertakings would tend to focus either on competition law or on compliance with single market regulation and limit their interest in the other accordingly. Consequently, undertakings often find it surprising that they cannot confine

[11] Case IV/29.877 - *British Telecommunications* (OJ 1982 L 360/36). This decision was upheld by the Court of Justice in Case C-41/83 *Italy* v *Commission* [1985] ECR 873.
[12] A more formal and direct link is identified by Susanne K Schmidt, '*Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity*', 16 Journal of Public Policy 1997, p. 243.

themselves to complying with their obligations under sector-specific regulation but must also take competition law into account. *Grundig Consten* is an early example of a situation where IP rights granted under national law were considered incompatible with the single market and were 'corrected' under competition law. While the development of the doctrine of the exhaustion of IP rights[13] has filled the gap identified in *Grundig Consten*, and while single market regulation has filled other gaps, these do not render the role of competition law obsolete. This was demonstrated in *Deutsche Telekom*,[14] (2003) where abuse of a dominant position by imposition of a margin squeeze was found to be in breach of Article 102 TFEU, though single market regulation was intended to prevent it.[15] Furthermore, the undertaking involved (Deutsche Telekom) failed in its argument that its conduct was not a breach of the Treaty on the grounds that it had applied wholesale prices that were supervised and approved by the national telecoms regulator in accordance with sector-specific single market regulation. The argument was that compliance with single market regulation should give immunity from proceedings for breach of competition law and that any misconduct dealt with by the regulator involved and the Member State. Deutsche Telecom's argument was not persuasive as its wholesale price exceeded the retail price, making the margin squeeze infringement obvious to all, apart from Deutsche Telekom apparently. The General Court also noted that the regulator had acted on the suggestions of Deutsche Telekom,[16] effectively allowing Deutsche Telekom to set its prices independently of the regulator and ultimately squeeze competitors' margins. On the other hand, Deutsche Telekom's argument was not entirely invalid as the established principles also would be applicable when the disparity between the wholesale and retail prices, and the regulatory failings, is less obvious. Thus, undertakings which operate in closely regulated sectors are required to adhere to two sets of regulations and regulators and, due to the overlaps in their fields of interest approval by one regulator does not exclude intervention by the other. Not a particularly practical set of obligations in particular if the regulators fail to coordinate their approach.

Grundig Consten and *Deutsche Telekom* are not isolated examples of competition law being used to correct regulatory shortcomings. There are similar examples in *Flughafen Frankfurt*[17] (1998) and *Verbändevereinbarung*[18] (1998). In the first case, Frankfurt Airport's attempt to reserve certain ground handling services was found to be contrary to the single market regulation,[19] which allowed either self-handling or third party sourcing. The airport nevertheless tried to get round the regulation by making contractual arrangements, leading to the Commission taking action pursuant to Article 102 TFEU.[20] *Verbändevereinbarung* concerned a horizontal industry agreement on tariffs for access to the German electricity grid. An agreement that despite being a (hardcore) horizontal price cartel could nevertheless be accepted as

[13] See Van Bael & Bellis, *Competition Law of the European Community*, 2005, pp. 585-588.
[14] Case T-271/03 - *Deutsche Telekom* v *Commission* [2008] ECR II-477; see paras. 70-71 and 151. This decision was appealed to and upheld by the Court of Justice in Case C-280/08P *Deutsche Telekom* [2010] ECR I-9555.
[15] See Regulation (EC) No 2887/2000 on unbundled access to the local loop, recital 11.
[16] See Case-T 271/03 *Deutsche Telekom* v *Commission* [2008] ECR II-477, paras. 37 and 122.
[17] Case IV/34.801 - *FAG - Flughafen Frankfurt/Main.* See paras. 103-105 for further on the single market regulation and the shortcomings related to incorrect national implementation.
[18] The Commission's XXVIII Report on Competition Policy (1998), pp. 156-159.
[19] Directive 96/67/EC on access to the groundhandling market at Community airports (OJ 1996 L 272/36).
[20] See also case COMP/38.745 - *BdKEP/Deutsche Post AG* for another example of competition law being used to prevent national regulation inducing discriminatory abuse to frustrate the single market.

the Directive in question[21] specifically referred access related questions to commercial negotiations rather than regulation. Presumably concluding that the agreement was less than perfect but better than nothing, the Commission decided not to pursue the matter further, taking the somewhat unusual step under Article 101 TFEU of not adopting a decision. Recent cases, such as *Microsoft*[22] (2007) and *Football Association Premier League*,[23] (2011) also fit into this pattern. In the *Microsoft* case the Commission originally argued that the obligation to provide the disputed information was regulated by Directive[24] compelling Microsoft to provide these directly. In *Football Association Premier League* the Court of Justice concluded that, by preventing pubs from entering into agreements with foreign television broadcasters, the owner of IP rights had upset the delicate balance of interests established by single market regulations.[25] Consequently, they were in principle breaching single market regulation rather than competition law. However, it was the latter that was called into service in the case. There have been many cases where national and geographical discrimination has been addressed under competition law, including *United Brands*,[26] *British Leyland*,[27] *Irish Sugar*,[28] *PO/World Cup 1998*,[29] and *Portugal* v *Commission*.[30] Across a wide range of activities, such as the sale of fruit, cars, air transport, sugar and sport/leisure, discriminatory practices that have favoured domestic consumers and undertakings or have prevented parallel trade have been considered incompatible with the single market and in breach of Article 102 TFEU. As expressed by the General Court in *Irish Sugar*,[31] these practices ran contrary to the "…*essence of a common market…*" by creating obstacles to the single market. However, few economic welfare arguments can be made in support of an absolute prohibition of geographical discrimination,[32] so that single market regulation is a better solution. Recently this doctrine has been applied to alleged abuses of the IP system, involving artificial extensions of patents by unmeritorious applications and misrepresentations,[33] 'patent ambush'[34] and 'sham litigation'.[35] All these situations involve different levels of regulatory shortcomings, either in the legislation, or in enforcement of the legislation by Member States,[36] or both.

[21] Article 17 of Directive 1996/92/EC on common rules for the internal market in electricity allowed the Member States to regulate the allocation of grid access or to refer the issue to commercial negotiation. In its implementation of the Directive Germany had chosen the latter option.

[22] Case T-201/04 *Microsoft Corp.* v *Commission* [2007] ECR II-3601.

[23] Joined Cases C-403/08 and 429/08 *Football Association Premier League* [2011] ECR 0000.

[24] Case COMP/C-3/37.792 - *Microsoft,* paras. 743-763 referring to Council Directive 91/250/EEC on the legal protection of computer programs.

[25] See paras. 104-108, 114-117, 121 and 138-139.

[26] Case C-27/76 *United Brands* v *Commission* [1978] ECR 207, paras 204-234.

[27] Case C-226/84 *British Leyland* v *Commission* [1986] ECR 3263.

[28] Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969.

[29] Case IV/36.888 - *PO/World Cup 1998.*

[30] Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613.

[31] Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR 1999 II-2969, para. 185.

[32] For further see Damien Geradin & Nicolas Petit, *Price Discrimination Under EC Competition Law: The Need for a case-by-case Approach,* Global Competition Law Centre Working Paper Series, No 07/05, pp. 44-45, available on the Internet.

[33] Case COMP/A.37.507/F3 - *Astra Zeneca.* See also Commission Decision of 26 July 1988 in Case IV/31.043 *Tetra Pak II* (OJ 1992 L 72/1), paras. 22 and 163-164.

[34] See Commission Press Release MEMO/07/330, '*Antitrust: Commission confirms sending a Statement of Objections to Rambus', for examples of and a definition of a 'patent ambush'*.

[35] See Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paras. 72-73; and Commission Press Release IP/12/345 - *Antitrust: Commission opens proceedings against Motorola*.

[36] A more systematic outline of the use of competition law to correct problems in the IP system has been provided by Jens Schovsbo, *Fire and Water Make Steam: Redefining the Role of Competition Law in TRIPS*, 2009, at http://ssrn.com/abstract=1339346; and by Francois Lévéque, *Pharmaceutical Regulation and Intellectual Property: the*

As isolated examples there is little to object to the legal arguments in each of the cited cases[37] which are generally sound and support the use of competition law to supplement single market regulation. However, if considered in more detail the situation is more complex, particularly as the doctrine also covers ineffective regulation. This was an underlying reality of *Deutsche Telekom*, where the single market regulator failed adequately to remedy the margin squeeze despite the clear provisions of the single market regulation.[38] Hence, the Commission could, and perhaps should, have dealt with the case by bringing proceedings against Germany for its failure to enforce Union legislation, and there are indications that this was the Commission's initial intention.[39] However, it was considered more appropriate to pursue the matter under competition law, thereby confirming the role of competition law as a corrective instrument. The same approach was used in *GVG/FS*[40] (2003) and *Swedish Interconnectors*,[41] (2010) where Article 102 TFEU was applied to distorting behaviour in the railway and electricity sectors respectively. In the first case against refusal to grant access to tracks and traction and in the second case to the periodic reduction of transmission capacity for reasons other than security of supply. As these situations were also governed by single market legislation[42] the Commission could have taken action on this basis,[43] but it favoured resorting to competition law. Thus, competition law's role as a supplement to single market regulation potentially involves it being used to overrule regulatory shortcomings. This is not only a significant expansion of its role but also a potentially troublesome one.

3.1. Competition law as a supplement single market regulation in the liberalisation of markets

It is difficult to date the emergence of the role of competition law as a supplement to single market regulation or to assess its full scope. It could be seen as early as *Grundig Consten*, but it was not fully developed until later. The telecommunications sector is a prime example. Initially competition law was intended to play a secondary role in the liberalisation process, which was to be built around sector-specific single market regulation, probably because it was assumed that there were substantial lacunas in competition law. Nevertheless, almost from the outset the Commission relied heavily on competition law, for example liberalising part of the sector by limiting the use of exclusive and special rights pursuant to Article 106(3) TFEU. This step was initially opposed by the Member States but ultimately accepted in exchange for them having a level of involvement and influence.[44] Additional substance was given to the role of competition law by Commission Guidelines in 1991 and a

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Third Side of the Triangle, Working Paper 2009-03. Both these papers consider the nature of the problems in the IP systems, and both are available on the internet.

[37] Other than the *Verbändevereinbarung* case which should be viewed against the specific legal and political circumstances governing the agreement and the underlying EC Directive.

[38] See Regulation (EC) No 2887/2000 on unbundled access to the local loop, recital 11.

[39] Case COMP/C-1/37.451, 37.578, 37.579 - *Deutsche Telekom*, paras 2-4.

[40] Case COMP/37.685 - *GVG/FS.*

[41] Case COMP/39.351 - *Swedish Interconnectors.*

[42] Primarily Directive 1995/19/EC on the allocation of railway infrastructure capacity and the charging of infrastructure fees; and Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity.

[43] Or alternatively directly on applicable provisions in the TFEU, as noted in para. 43 of the decision.

[44] See Pierre Larouche, *Competition law and regulation in European telecommunications*, Hart Publishing, 2000, pp. 39-47.

Commission Notice in 1998.[45] Not only did these detail the Commission's view of how competition law should be applied to the telecommunications sector, but they also indicated that competition rules could be waived in favour of single market regulation.[46] *Deutsche Telekom* can be seen in this context, especially if compared with the contemporary *UK Network Sharing Agreement*.[47] In *UK Network Sharing Agreement* the Commission left open certain issues relating to a notified concentration as there was effective single market regulation available if such issues should arise. In the Commission's 2008 Guidelines on non-horizontal mergers[48] the same approach was articulated more clearly as a general principle under the Merger Regulation, establishing that further appraisal could be waived subject to the existence of other (non merger) remedies. Accordingly intervention was required in *E.ON/MOL*[49]'(2006) in the absence of sufficiently strong regulatory deterrence but not in *HFC Bank Plc/British Gas Trading Ltd*[50] (1997) following assurances from the national sectoral regulator.[51] Thus as a supplement to single market regulation across sectors and activities, competition law appears to be subordinate to single market regulation when both are considered equally effective.

3.2. The priority of single market regulation has ambiguities and a hint of industrial policy

According to the priority rule identified above, competition law should only serve as a supplement to sectoral regulation when the sectoral regulation is either ineffective or non-existent. This rule makes sense in isolation, if for no other reason than because the single market regulation would presumably deal with most issues, leaving only those where a party suffers either from the absence of regulation or from ineffective regulation. Hence, competition law can be a fall-back position remedying problems not dealt with or inadequately dealt with in single market regulation. Thus, a hypothetical hindrance to competition should not be dealt with under the Merger Regulation if it provides adequate remedies, as such remedies should ensure that the hindrance to competition remains hypothetical. On the other hand elevating this priority rule to a general rule giving priority to single market regulation would be controversial. As demonstrated in *Deutsche Telekom*, and perhaps in *GVG/FS* and *Swedish Interconnectors*, any application of competition law to supplement ineffective regulation would be, if not arbitrary, at least subject to some ambiguity as it is ultimately a matter for the Commission to quantify the level of ineffectiveness and decide what is acceptable. Furthermore, resorting to the settlement of cases, as in *Swedish Interconnectors* and *GVG/FS*, not only circumvents the traditional

[45] *Guidelines on the application of EEC competition rules in the telecommunications sector*, (OJ 1991 C 233/2); and *Notice on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles*, (OJ 1998 C 265/2).

[46] See para. 28 of the *Notice on the application of the competition rules to access agreements in the telecommunications sector*. See also Faull & Nikpay, *The EC Law of Competition*, 2nd Ed., Oxford 2007, pp. 1487 and 1489-1490 for further on identifying ambiguities in Commission practice.

[47] Case COMP/ 38.370 - *O2 UK/T-Mobile UK* ('UK Network Sharing Agreement'), para. 104. See also case COMP/M.3695 *BT/Radianz*, para. 42; and case COMP/M.1439 - *Telia/Telenor*, para. 169, for evaluations of sectoral regulation.

[48] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, para. 46.

[49] Case COMP/M.3696 - *E.ON/MOL*, para. 433.

[50] The Commission's XXVII Report on Competition Policy (1997), pp. 130-131.

[51] See Nicolas Petit, *Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US'*, for further examples; available on the internet.

infringement proceedings under Article 258 TFEU, thus depriving the courts of the opportunity to interpret Union law and the Member States to argue their case, it also gives the Commission a much more direct role in the national implementation of single market regulation. This direct role of the Commission would be particularly problematic if the single market regulation represents a compromise intentionally leaving certain issues unaddressed.[52] Such compromises are not unknown in the liberalisation process where they can create situations in which the Commission may either have to ignore the Member States, or make its enforcement priorities subject to a more political agenda, or even take it to an extreme as in *Verbändevereinbarung*. Also, where the single market regulation adopted differs from the Commission's initial proposal, any application of the priority rule, other than in clear cases, could be thought to be tainted by industrial policy if the Commission's decision appears to be guided by its initial position. It could thus be argued that while competition law does not implement an industrial policy outright, the priority rule and its role as a supplement has a flavour of industrial policy.

4. Competition law: the rock upon which the single market can be built

Following *France* v *Commission*, the Commission was given a powerful competition law instrument, as the objective of the single market could now be pursued by using Commission directives c.f. Article 106(3) TFEU, circumventing the Council and the Member States. Commission directives were successfully used in the telecommunications sector, where competition law formed the core of single market regulation in the early years, but they were not so successful in the energy sector following setbacks at the hands of the Court of Justice and insufficient general support.[53] Nevertheless, competition law emerged as more than a supplement to single market regulation as it could be the very rock upon which the single market was built. Competition law can offer principles and definitions; it can prepare a sector by removing distortions either prior to or in parallel with the application of sector-specific single market regulation; and it can help identify problems and challenges to be remedied by single market regulation. These three aspects of competition law warrant further examination.

4.1. Competition law as a source of principles and definitions

Between 1988 and 1998 the liberalisation of the telecommunications sector was achieved through successive Commission directives adopted pursuant to Article 106 TFEU. These initially limited and eventually abolished the use of special and exclusive rights in the sector. Many of the parallel Council directives, adopted by the Council under the normal single market provisions, either referred directly to terms defined by the Commission directives, such as 'special and exclusive rights', or they drew on general competition law principles, such as the concept of dominance or the

[52] Directive 1996/92/EC (the first electricity directive) is a good example of this with its many options for national derogations, including derogations for grid access under the single buyer system (Article 18) or national regulation of the terms for grid access (Article 17).

[53] See Susanne K Schmidt, *Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity*, 16 Journal of Public Policy 1997, pp. 242-249.

obligation not to mix commercial and regulatory interests.[54] Despite the decision to switch to using traditional single market regulation in the energy sector, the option of using Article 106 was never officially abandoned, giving the Commission some political leverage.[55] Competition law principles and concepts have also played a pivotal role in the energy sector along the same lines as in the telecommunications sector, for example by governing the separation between commercial and regulatory interests or assessing the value of stranded costs as an alternative to derogations, despite there being provisions for derogations in the directive concerned.[56] There are also examples of the use of definitions in energy regulation that are derived directly from competition law, such as the concepts of 'vertical integrated undertaking' and 'control', as defined under the Merger Regulation.[57] Also, across the two sectors the initial single market regulation did not call for the markets to be fully opened but allowed the Member States to reserve certain activities for the incumbent undertaking in order to ensure universal access to services and to pre-empt the use of Article 106(2) TFEU. Hence, despite there being some differences in the role played by competition law in respect of telecommunications and energy, there are many similarities in the origins of the definitions, obligations and key concepts.

From a broader perspective it becomes apparent that the uses of competition law principles, methodology and obligations are not isolated examples, limited to telecommunications and energy. In the course of the 1990s other sectors, including postal services, railways and air transport, underwent parallel transitions from monopoly markets to competitive markets, in which competition law plays a more prominent role than that of a supplement to single market regulation.[58] For example, in the postal sector it is difficult to understand or apply the elaborate system of accounting requirements established by the single market Postal Services Directive unless they are viewed in the light of the concept of cross-subsidisation as defined in competition law.[59] More important has been the use of competition law to control activities and sectors that are outside the scope of single market regulation,[60] and the fact that the exclusion of activities from single market regulation[61] was accepted for the purpose of universal service provision, thus pre-empting an Article 106(2) TFEU defence. Also, the establishment of independent postal authorities to supervise the

[54] See Pierre Larouche, *Competition law and regulation in European telecommunications*, Hart Publishing, 2000, pp. 3-36, for further on the use of competition law principles and concepts in the telecommunications sector up to the turn of the millennium.

[55] See Susanne K Schmidt, *Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity*, 16 Journal of Public Policy 1997, pp. 265-266.

[56] The term 'stranded costs' refers to various forms of often long-term commitments which predate market liberalisation but which are difficult to honour subsequently. Article 24 of Directive 1996/92/EC (the first electricity directive) provided for derogations to deal with the issue of stranded costs. However, most Member States preferred the route of capitalisation under the State aid rules; see Faull & Nikpay, *The EC Law of Competition*, 2nd edition Oxford 2007, pp. 1383-1384.

[57] Directive 2003/54/EC (the second electricity directive), Article 2(21); and Directive 2009/72/EC (the third electricity directive), recital 13.

[58] This role of competition law is even identifiable outside the newly liberalised sectors. E.g. Article 1(2) of Directive 2003/6/EC on insider dealing and market manipulation refers to the creation of a 'dominant position' as an example of prohibited market manipulation.

[59] See Damien Geradin & David Henry, '*Regulatory and Competition Law Remedies in the Postal Sector'*, in Damien Geradin (ed.): *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation*, Intersentia 2004, pp. 133-134.

[60] See *Commission Decision of 21 December 2000 in relation to the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy* **(**OJ 2001 L 63/59).

[61] Under Article 7 of Directive 97/67/EC (the first postal directive), the sending of letters weighing less than 350 grams could be reserved for the incumbent service provider as a means of securing universal service.

obligations set out in single market postal regulation has been governed by competition law, calling on it in cases where there has been insufficient independence.[62] Hence, the postal sector essentially followed the same path as the telecommunications and energy sectors where competition law and Article 106 played a pivotal role in the liberalisation process. The initial single market regulation did not provide for a fully open market in either the postal sector or the railway sector, which compelled market entrants to enter into service agreements with the incumbent service provider in order to provide cross-border services.[63] These service agreements were entered into against the background of competition law, which governed their terms and the obligation to negotiate in good faith. *Deutsche Post II*[64] (2001) and the already cited *GVG/FS* are examples of this.[65] In *Deutsche Post II* the incumbent operator had effectively refused to accept that remail (mail collected by non-incumbents, exported and then re-imported) qualified as inbound cross-border mail which was liberalised by the single market regulation. A surcharge had been levied, services had been delayed and injunctions had even been obtained against undertakings offering remail services in Germany. In *GVG/FS* the incumbent railway operator had initially ignored and later stalled requests for negotiations for seven years,[66] rendering the rights established by the Directive useless. In both cases the Commission was therefore compelled to use Article 102 TFEU to ensure that agreements were entered into as provided for in the single market regulation. While, due to the monopolistic nature of newly liberalised sectors, Article 102 plays a prominent role, Article 101 has also been applied in parallel manner. In the air transport sector access to listing in a computer reservation system was early identified as being essential for market access, as travel agencies relied heavily on such systems. This issue was therefore governed by a regulation[67] and Article 101 applied to failures to comply with its principles, as demonstrated by *London European - Sabena*[68] (1988) and *British Midland* v *Aer Lingus*[69] (1992). Despite the differences in the legal instruments facilitating the liberalisation processes it could therefore be argued that the prevailing principles are essentially the same across the sectors. All calling on competition law to play an essential and central role.

4.2. Competition law in preparing the way for the single market

A new era of much closer interaction between competition law and the single market has been opened with the remedies used to clear concentrations and to close

[62] See *Commission Decision of 23 October 2001 on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services* (OJ 2002 L 120/19).
[63] Directive 97/67/EC (the first postal directive) differentiated between inbound and outbound mail, reserving inbound mail to the incumbent operator while outbound mail was fully liberalised. Likewise market access under Directive 91/440/EC (the first railway directive) required the formation of an 'international grouping' between the incumbent and the market entrant. Direct market access without the incumbent operator was not allowed.
[64] Case COMP/36.915 - *Deutsche Post – Interception of cross-border mail*.
[65] See also case COMP/38.745 - *BdKEP/Deutsche Post AG* for an example of the application of Article 102 TFEU in a case of failure to conclude certain agreements provided for by single market regulation.
[66] See case COMP/37.685 - *GVG/FS*, paras. 28-32, explaining how the initial request from 1992 had never been answered and the negotiations not handled professionally.
[67] Currently Regulation (EC) No 80/2009 on a Code of Conduct for computerised reservation systems.
[68] Case IV/32.318 - *London European – Sabena* (OJ 1988 L 317/47).
[69] Case IV/33.544 - *British Midland* v *Aer Lingus* (OJ 1992 L 96/34).

investigations. The *VISA I* and *VISA II* decisions[70] (2001) not only ended 25 years of Union concern with international payment cards but also struck a prudent balance between the different interest groups involved and, most importantly, the single market. An exemption under Article 101(3) TFEU was only granted after VISA agreed to reduce charges beyond what was required by the Regulation on cross-border payments in euro,[71] which is applicable only to cross-border transactions in the euro area. This was an important step, not merely because of the implied regulatory lacunas but also because most of the transactions affected would be domestic in nature and thus less obviously of Union interest. Hence, the Commission determined what could constitute an obstacle to the single market without "troubling" the Council. Competition law could help even where there was single market regulation. Regardless of a clear risk of preferential treatment and cross-subsidisation, the single market regulation might lack adequate pre-emptive remedies other than accounting separation and in some cases not even this modest instrument. Thus, there could be lacunas in the enforcement of provisions and principles which could allow infringements and other distortions to elude sanctions. Initially this problem could be addressed under competition law by requiring the parties to extend the terms and conditions applied internally to third parties, as demonstrated in *TNT/GD Net*[72] (1991) and in the *Atlas* and *Phoenix/Global One* (1996) cases.[73] Furthermore, restrictions caused by delayed or insufficient national implementation of single market regulations could be remedied by requiring undertakings to refrain from entering into certain commercial affiliations with the parent group until opening of the market had been achieved, as demonstrated by the *EDF/Louis Dreyfuss*[74] (1999) merger case in the energy sector. More elaborate solutions would become available once single market regulations were adopted. Mergers such as *DHL/Deutsche Post*,[75] (1998) *Deutsche Post/ Securicor*[76] (1999) and *Atlas* and *Phoenix/Global One* were cleared by establishing separate accounts which were subject to external auditing. This was a remedy inspired by already adopted single market regulation, but which went beyond the obligations herein. In the energy merger *VEBA/VIAG*[77] (2000) the remedies included an obligation to break down the prices for certain customers into network-use charges, energy prices, metering/reading etc., not only enhancing transparency and inhibiting cross subsidisation but in essence applying the accounting separation obligations already adopted to invoices.[78] In time even more drastic steps were introduced as demonstrated by *Neste/IVO*[79], *Deutsche Post I*,[80] *Telia/Sonera*[81]

[70] Case COMP/29.373 - *Visa International*, and case COMP/29.373 - *Visa International - Multilateral Interchange Fee*. For practical reasons the Commission split the case into two separate decisions. See Faull & Nikpay, *The EC Law of Competition*, 2nd Ed., Oxford 2007, pp. 1316-1326 for further on the case.
[71] Regulation (EC) No 2560/2001 on cross-border payments in euro.
[72] Case IV/M.102 - *TNT/Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post.* The same approach was used in case COMP/35.141 - *Deutsche Post* in order to close an Article 102 TFEU case.
[73] Case 35.337 - *Atlas* (OJ 1996 L 239/23); and case IV/35.617 - *Phoenix/Global One* (OJ 1996 L 239/57).
[74] Case COMP/M.1557 - *Edf/Louis Dreyfuss* (OJ 1999 C 323/11).
[75] Case IV/M.1168 - *DHL/Deutsche Post* (OJ 1998 C 307/3).
[76] Case IV/M.1347 - *Deutsche Post/Securicor*
[77] Case COMP/M.1673 - *VEBA/VIAG*, para. 244.
[78] According to Article 14(3) of Directive 96/92/EC (the first electricity Directive), separate accounts were to be kept for generation, transmission and distribution and submitted to the national regulator.
[79] Case COMP/M.931 - *Neste/IVO.*
[80] Case COMP/35.141 - *Deutsche Post.* In contrast to the other cases referred to, this case concerned an infringement rather than a merger.
[81] Case COMP/M.2803 - *Telia / Sonera*.

and *E.ON*.[82] In *Neste/IVO*, divestiture to a non-controlling level was held insufficient to prevent the risk of a vertical foreclosure by preferential treatment in the energy sector, unless supplemented by a commitment by the retained board members not to seek election as chairman. In *Deutsche Post I* and *Telia/Sonera*, separation of the activities and infrastructure in separate subsidiaries was introduced for undertakings in the postal and telecommunications sectors, thereby making transactions more transparent. In *E.ON*, an Article 102 TFEU case, not even separation of the infrastructure was considered sufficient to satisfy the Commission making divestiture of electricity infrastructure a requirement. Notable would also be the already cited Regulation on cross-border payments as the updated and expanded version[83] required market actors to submit certain information to the Commission for the purposes of an updated Article 101 TFEU notice. However, as this requirement was not complied with, the Commission published a draft working paper[84] (2009) indicating not only its determination to pursue cases regardless of the missing data, but that it would still be possible to influence the Commission's understanding of the market by submitting the information requested. What makes these cases and the remedies applied notable is the implication of the existence of regulatory defects, not only in single market regulations but also in their enforcement and in the use of competition law to overcome these defects across various sectors including the postal, telecommunications, financial services and energy sectors. Hence, it can be seen that competition law has been used to give leverage to the enforcement of single market regulations.

4.3. Mopping up imperfections and distortions

Besides giving leverage to enforcement, there are also examples of competition law being used to deal with imperfections in underlying markets which hamper the development of the single market. The lack of transmission capacity is a significant obstacle to the internal energy market even when wholesale generation capacity is available. For this reason there has been particular interest in the pricing and principles for the allocation of capacity for international connections as a supplement to freeing up wholesale electricity capacity. In *Dutch Transmission*[85] (1999) the Commission noted that Article 102 TFEU required national transmission charges to be cost-based, and separate charges for cross-border transmission should reflect actual costs which would normally only arise when electrons are moved, which is not necessarily the case when electricity is traded across a border. Further, in *Irish Interconnector*[86] (1999) and *UK/French interconnector*[87] (2001) it was held that the methods for allocating scarce capacity should be transparent and non-discriminatory

[82] Case COMP/39.388 - *German Electricity Wholesale Market*; and COMP/39.389 - *German Electricity Balancing Market.* For a critical analysis of this decision see Malgorzata Sadowska, *Energy liberalization in antitrust straitjacket: A plant too far*, EUI Working Papers RSCAS 2011/34.

[83] Regulation (EC) No 924/2009 on cross-border payments in the Community, recital 11.

[84] SEC 2009 1472 - *Commission Working Document of 30 October 2009 on the 'Applicability of Article 81 of the EC Treaty to multilateral interbank-payments in SEPA Direct Debit.*

[85] See Case IV/E3/37.770 - *Electricity transmission tariffs in the Netherlands*, summarised in the Commission's XXIX Report on Competition Policy (1999), p. 165.

[86] Case IV/E3/37.589 - *Irish Interconnector*, summarised in the Commission's XXIX Report on Competition Policy (1999), pp. 165-166. The case related to gas but its principles can be applied to electricity.

[87] Case COMP/E-3/38.012 - *UK/France interconnector*, summarised in the Commission's XXXI Report on Competition Policy (2001), pp. 208-209.

and that an auction therefore would be preferable. *Swedish Interconnectors*[88] (2010) related to the same issue, as it was claimed that transmission capacity was wrongly withheld in order to reserve cheap electricity for Swedish consumers at the expense of Danish consumers. While there has been no actual case on it, it has even been suggested that Article 102 TFEU might be used where there has been insufficient investment in transmission capacity, if the lack of investment were part of a strategy intended to pre-empt new entrants.[89] While this is a rather novel extension of the concept of abuse, it would not be entirely without precedent; c.f. e.g. *Deutsche Bahn*[90](1997) in which the link between the investments and the vertically integrated operator's own downstream activities in the railway sector were noted but not condemned outright.[91] Another notable energy case is *Marathon*[92] (2001) where the Article 102 TFEU investigation was only suspended when the network owner gave a commitment not merely to accept third party access to a gas pipeline, but also to facilitate this by offering supplementary services. Hence, the network owner was obliged to actively facilitate the emergence of competition and not merely to refrain from impeding it. The Commission's interest was so significant that it decided to pursue the case despite the original complainant having withdrawn their complaint. The remarkable leniency demonstrated in *Verbändevereinbarung*[93] (1998) on a horizontal pricing agreement is probably due to its relation to grid access and the pivotal role played by this in the single energy market. Outside the energy sector, competition law has been used to ease access which is essential for facilitating the single market when bottlenecks and scarcity of resources have been eased across sectors such as railways,[94] telecommunications,[95] harbour infrastructures,[96] air transport (slots),[97] financial services[98] and media.[99] Many of the cases and sectors referred to could warrant comment, however the use of remedies to facilitate the emergence of new media services demonstrated in *EUFA Champions League*[100] (2003) is an excellent example of the novelty displayed in pursuing these cases. Having identified unexploited rights relating to football matches, the Commission moved on to conclude that the then exclusive allocation of rights did not have any

[88] Case 39351 - *Swedish Interconnectors.*

[89] See COM 2006 851 - *the Commission staff working paper on the European gas and electricity sectors*, paras. 157-159.

[90] Case T-229/94 - *Deutsche Bahn* v *Commission* [1997] ECR 1997 II-1689, paras. 87-93.

[91] The strategy formed part of other and clearer infringements, e.g. discrimination, and was therefore neither condemned outright nor dealt with separately. On the other hand the Commission and General Court did find it relevant to refer to the issue.

[92] Case COMP/E-3/36.246 *Marathon*, summarised in the Commission's XXXI Report on Competition Policy (2001), pp. 207-208. See also Case COMP/M.2684 - *EnBW/ EDP/Cajastur/Hidrocantabrico*.

[93] See the Commission's XXVIII Report on Competition Policy (1998), pp. 156-159.

[94] See case 32.490 *Eurotunnel* (OJ 1994 L 354/66); and case IV/34.518 *ACI* (OJ 1994 L 224/28). Both these cases relate to the Eurotunnel between the UK and France.

[95] See e.g. case COMP/M 1439 *Telia/Telenor***,** regarding access to the local loop; and case COMP/M.1760 *Mannesmann /Orange* on access to mobile licenses and spectrums.

[96] See *Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby* (OJ 1994 L 55/52).

[97] See Giorgio Monti, *EC Competition Law*, Cambridge 2007, pp. 476-478.

[98] See case COMP/39.654 *Reuters Instrument Codes* (OJ 2012 C 204/44); and Commission Press Release IP/11/1354: *Antitrust: Commission makes Standard & Poor's commitments to abolish fees for use of US International Securities Identification Numbers binding.*

[99] See e.g. COMP/C.2-37.398 - *Joint selling of the commercial rights of the UEFA Champions League*, COMP/37.214 – *BDF*, COMP/M.2876 – *NEWSCORP/TELEPIU* and IP/03/1748 - *Commission reaches provisional agreement with FA Premier League and BSkyB over football rights.*

[100] Case COMP/C.2-37.398 - *Joint selling of the commercial rights of the UEFA Champions League.*

beneficial effects for the television broadcasting market.[101] In the view of the Commission, it would be possible to exploit the rights by opening up for new services without damaging the interests of the existing users. The conclusion indicates that the Commission preferred to pursue allocative efficiencies directly rather than relying on competition to secure them. The accompanying press release explained that the decision would "*give an impulse for the emerging new media markets*", and that '*barring access to key sport content* [could have] *stifled the development of sport services on the Internet and of the new generation of mobile phones.* [which would not be] *in the interest of broadcasters, clubs, fans and consumers*".[102] The fact that the Court of Justice has traditionally given IP agreements strong protection against intervention under competition law appears either to have been forgotten or ignored, casting some doubt on the legal basis for identifying infringements in the first place.[103]

In parallel with correcting of market imperfections, the Commission has also addressed the usual distortions of competition, though sometimes in a novel manner. While hardly qualifying as a U-turn, it appears that the approach to royalty collection societies has changed due to the single market agenda. Initially the focus was on ensuring that individual members could leave their royalty collection societies, as seen in the 1971 *GEMA* case.[104] The approach later shifted to the end users' perspective and their right to shop around and contract with the collection society offering the most attractive terms, as demonstrated by the *IFPI 'Simulcasting'*[105] (2002) and *Cannes Extension Agreement*[106] (2006) cases. It was argued that while cross-border licences were initially uneconomic due to gaps in enforcement, the emergence of the internet had changed this, thus warranting a new approach by the enforcer.[107] However, that should not overshadow the former silence on the activities of royalty collecting societies and their system of national licensing and reciprocal representation agreements, in essence forming the core of the problem.[108] Further, in the period between *IFPI 'Simulcasting'* and *Cannes Extension Agreement* the Commission's Internal Market and Services Directorate General (DG Markt) issued a *Recommendation on collective cross-border management*[109] (2005) outlining its view of licensing of music for internet-related activities. While initiatives prior to this recommendation had focused on ensuring the availability of online music services,

[101] See paras. 19, 22-24 and 115-116. See also Nicolas Petit, *The Commission's Contribution to the Emergence of 3G Mobile Communications – an Analysis of Some Decisions in the field of Competition Law*, p. 14, available on the internet.

[102] Commission Press Release IP/03/1105: *Commission clears UEFA's new policy regarding the sale of the media rights to the Champions League.*

[103] Some legitimacy can be found in previous cases e.g. case IV/31.734 *Film Purchases by German Television Stations* (OJ 1989 L 284/36), where reservations were expressed about a broad exclusive agreement covering the entire repertoire of MGM. It was considered unlikely that the broadcaster could use the entire repertoire and that the agreement could result in the suppression of rights and be detrimental to the interests of consumers.

[104] Case IV/26.760 *GEMA* (OJ 1971 L 134/15), and the later case IV/29.971 *GEMA*, (OJ 1982 L 94/12). See also Case C-127/73 *Belgische Radio en Televisie* v *SABAM and Fonior* [1974] ECR 313, for the same approach.

[105] Case COMP/C2/38.014 *IFPI 'Simulcasting'*.

[106] Case COMP/C2/38.681 *The Cannes Extension Agreement.* See also case COMP/39.151 *SABAM* and case COMP/C2/39.152 *BUMA* ('Santiago Agreement') (OJ 2005 C 200/11).

[107] See COMP/C2/38.014 *IFPI 'Simulcasting'*, paras. 14-16 and 61- 62.

[108] For a discussion of the application of competition law to royalty collection societies see Lucie Gauibault & Stef van Gompel, *Collective Management in the European Union*, in Daniel Gervais (ed.): *Collective Management of Copyright and Related Rights*, 2nd ed., Kluwer Law International 2010, pp. 135-167.

[109] *Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services* (OJ 2005 L 276/54).

the Commission went a step further by emphasising the authors' right to choose between different royalty collecting societies, thereby in essence promoting the development of pan-European and/or specialised royalty collection societies at the expense of the existing national organisations. The principles of the Recommendation were put into effect in *CISAC*[110] (2008) which concerned restrictions by a group of royalty collection societies on the right of IP owners to choose between different collection societies and preventing other collection societies from offering licences to commercial users outside a given territory.[111]

Whether considered as a U-turn, a shift or merely new opportunities warranting a new approach, the publication of a Recommendation on the management of IP rights by one Commission Directorate General (DG Markt), followed by the bringing of competition law proceedings by another Directorate General (DG COMP) to enforce the principles of the Recommendation is somewhat unusual. Furthermore, the Recommendation was followed in 2008 by the establishment of the *Online Commerce Roundtable* to facilitate dialogue with industry stakeholders on the removal of barriers and the opening of internet business opportunities and, in the words of the Commissioner, how competition law could be clarified, updated or better enforced.[112] While the Commissioner's indication of willingness to change competition law is hardly to be taken literally, the opening up of a dialogue on enforcement priorities against serial infringers is somewhat unusual. Another novelty is that the use of competition law for dealing with imperfections and distortions is not limited to private or semi-private undertakings but in some cases has been extended to restrictions originated by government agencies. *Lufthansa/SAS/United Airlines*[113] (2002) ended with a package of commitments under which the German aviation authority agreed to stop exercising a form of indirect price control that was perceived as hampering market access by potential competitors. Also, part of the settlement in *Swedish Interconnectors* entailed restructuring the internal tariff and congestion management system in Sweden, as operated by the official national regulator.[114] Finally, the Commission's decision in *BdKEP/Deutsche Post AG*[115] (2004) was also addressed to Germany for having induced discriminatory distortion by national regulation. Traditionally, regulatory impediments would be handled under the relevant single market provisions, such as Articles 34 and 56 TFEU, or under applicable directives, but it can be seen that the Commission has occasionally relied on competition law. Once again little objection can be made to the individual cases as the arguments and considerations are generally sound. The prevailing pattern is nevertheless one in which competition law is used to remedy market imperfections, even against national regulations that distort competition, in order to improve the

[110] COMP/C2/38.698 - *CISAC.* Part of the case where latter overturned by the General Court.
[111] The members of CISAC were also considered to be engaging in a concerted practice dividing up the Union on the basis of national territories by restricting their internal licences to each member's territory, thereby making them the only source of licences covering collection societies in each territory.
[112] See Commission Press Release IP/08/1338: *Competition: Commissioner Kroes hosts consumer and industry Roundtable on opportunities and barriers to online retailing and the European Single Market.* For a presentation of the work of the Roundtable se Carlo Alberto Toffolon, *The Online Commerce Roundtable – Advocating improved access to online music for EU consumers*, Competition Policy Newsletter, DG COMP 2010-1, pp. 46-50.
[113] Cases COMP/D-2/36.201, 36.076, 36.078 (OJ 2002 C 264/5). See also case COMP/M.3280 - *Air France/KLM*, in which the French and Dutch aviation authorities undertook to remove regulatory restrictions.
[114] See also case COMP/M.1673 - *VEBA/VIAG* where merger remedies were used to address distortions created by the German decision not to regulate access to the grid but to refer these to commercial negotiations.
[115] Case COMP/38.745 - *BdKEP/Deutsche Post AG.*

structures rather than merely safeguard against further impediments caused by imperfections in single market regulation.

4.4. Competition law used to identify problems and challenges

It is one thing to remedy problems or give leverage to enforcement against impediments, but it is another, equally important, thing to identify these in the first place. Over the years competition law has been used for this purpose in many cases. A notable feature of *Swedish Interconnectors*, perhaps driving the Commission's desire for a quick settlement, was the concurrent adoption of sector-specific single market regulation largely addressing the issues involved.[116] Hence, rather than seeing the case merely as an example of competition law being used to supplement single market regulation, it could also be viewed as an example of the use of competition law to identify shortcomings to be remedied by single market regulation. Other examples can be seen by comparing the cases of *REIMS I*[117] (1995), *REIMS II*[118] (1999), successive industrial agreements in the postal sector, and the first Postal Services Directive[119] adopted in between (1997). Not only did the parties in *REIMS II* wisely incorporate elements from the Directive directly into their notified agreement, it is also plausible to see the Directive as having been influenced by *REIMS I.*[120] Further, cases such as *Verbändevereinbarung* (1998) and *VEBA/VIAG* (2000) highlighted the problem of not having provisions on the pricing of grid access in the single market regulation. While initially addressed under competition law, the issue was subsequently incorporated directly into the next generation of single market regulations,[121] illustrating how competition law cases can be used to explore the need for additional regulation.

The use of competition law to identify remediable shortcomings can be seen in the cases referred to above, but it is much clearer in sector inquiries from the late 1990s and subsequently. While the number of cases originating directly from the sector inquiries has fluctuated, they often signal renewed Union interest in regulatory initiatives. The overhaul of telecommunications legislation early in the new millennium was preceded by four inquiries under competition law[122] into issues such as pricing[123] (1998), tariffs for leased lines[124] (1999), roaming[125] (2000) and access to the local loop[126] (2000). This model has also been used for media[127] (2005), energy[128]

[116] Regulation (EC) No 1228/2003 was replaced by Regulation (EC) No 714/2009. Prior to this it had been updated by replacement of the Annex on congestion management in 2006.
[117] Case IV/35.849 *Reims.* (OJ 1996 C 42/7).
[118] Case IV/36.748 *Reims II.*
[119] Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service (the Postal Services Directive).
[120] For further on *REIMS I* and *II* and the link with the Postal Services Directive, see Damien Geradin & David Henry, *Regulatory and Competition Law Remedies in the Postal Sector,* pp. 136-137, in Damien Geradin (ed.): *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation*, Intersentia 2004.
[121] Directive 2003/54/EC (the Second Electricity Directive) did require the Member States to regulate grid access also in respect of pricing.
[122] Pursuant to Article 12 of Regulation (EEC) No 17/62 and Article 17 of Regulation (EC) No 1/2003, the Commission can initiate general inquiries into a particular sector of the economy or into a particular type of agreement across several sectors.
[123] See the Commission's XXVIII Report on Competition Policy (1998), pp. 79-81.
[124] See the Commission's XXIX Report on Competition Policy (1999), pp. 74-76.
[125] See the Commission's XXX Report on Competition Policy (2000), pp. 159-160.
[126] See the Commission's XXX Report on Competition Policy (2000), pp. 155-156.

(2007), financial services[129] (2007) and pharmaceutical services and products[130] (2009) in order to identify impediments to the single market regardless of their origins,[131] regulatory gaps, market distortions or clearly inadequate national implementation. With the tabling of the latest inquiry, on the pharmaceutical industry, there was an announcement of new single market initiatives to correct some of the problems identified in the IP system, including a renewed attempt to introduce a community patent and a specialised patent litigation system.[132] While a direct link is rarely articulated as clearly as with the pharmaceutical sector inquiry, it is nevertheless possible to see not only how the Commission uses sector inquires to identify problems and gain a better understanding of a sector, but also to gauge support for forthcoming initiatives, and sometimes even retabling old proposals.

4.5. Competition law's role as a basis comes packaged in an industrial policy agenda

Despite the legal basis for allowing competition law to serve as the foundation upon which the internal market is built, the role is controversial. For example, the Commission's Recommendation on collective cross-border Management in 2005, and the steps preceding it, were not warmly welcomed by either industry or the European Parliament.[133] The reaction of the European Parliament in particular made it clear that it would be difficult to get traditional single market initiatives adopted, making competition law a more attractive instrument for the Commission as it does not require the involvement of the Council or the European Parliament. The *CISAC* case should also be seen in this context, indicating that the shift from soft to hard law was perhaps influenced by the Commission's failure to ensure voluntary compliance and by a reasonable assessment of the chances of success via the European Parliament. In the light of this, it could said that the telecommunications and energy sectors have been subject to the reverse development, whereby the initial hard law approach has been replaced by a soft law approach, including involvement of the Member States and the Council following a shift in their attitudes to the adoption of single market regulation. The almost perverse stretching of competition law in *Verbändevereinbarung* in order to meet the requirements of the market is perhaps the clearest example of the remarkable leniency that is occasionally demonstrated, but it is definitely not an isolated case.[134] Less controversial would be the application of the principles, concepts and obligations of competition law to single market regulation. Across the various sectors the establishment of independent national regulators to monitor national enforcement of single market regulation has largely been governed

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[127] *Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks*, 21 September 2005.

[128] COM 2006 851 - *Communication from the Commission: Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors*).

[129] COM 2007 556 - *Communication from the Commission - Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance* and COM 2007 33 - *Communication from the Commission - Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on retail banking*.

[130] *Communication from the Commission - Pharmaceutical Sector Inquiry*, 8 July 2009. See also Commission Press Release IP/09/1098 - *Antitrust: shortcomings in pharmaceutical sector require further action.*

[131] Perhaps the establishment of the Online Commerce Roundtable could be viewed as a form of informal sector inquiry into copyright thereby further increasing their numbers.

[132] See Commission Press Release IP/09/1098 - *Antitrust: shortcomings in pharmaceutical sector require further action.*

[133] Lucie Gauibault & Stef van Gompel, *Collective Management in the European Union*, in Daniel Gervais (ed.): *Collective Management of Copyright and Related Rights*, 2nd ed., Kluwer Law International 2010, pp. 155-160.

[134] See Copenhagen Economics, *Use and Abuse of Market Power in the Nordic Power Market*, project 3, 2002 summary report, pp. 3 and 10-11 for further on this.

by competition law. This development has mostly gone smoothly and without intervention from the Commission. However, Article 106 TFEU and the Commission are always there in the background should any Member States fail to ensure the required level of independence as defined by the Commission. However, regulatory gaps and lacunas may not be accidental and may be the result of a compromise required to ensure the adoption of a proposal. Also, when the Council accepts methodologies etc. drawn from competition law, it also accepts that their definition may be outside their control and subject to the Commission's opinions and priorities. Once again it can be argued that while it does not constitute an outright industrial policy, when competition law serves as a basis for the single market it does have the flavour of industrial policy as the changes in the priorities and regulatory approach will inevitably appear to be subject to some level of arbitrariness rather than the consistent pursuit of economic welfare gains.

5. Competition law as a driver of the development of the single market

In addition to its role of adding leverage to the enforcement of single market regulation or inspiration for its structure, competition law has also driven the development of or changes to the single market, as indicated above. However, this is not limited to the removal of minor regulatory obstacles to the single market as demonstrated in *Lufthansa/SAS/United Airlines* or *BdKEP/Deutsche Post*, but has had a much broader role. For example, freeing up wholesale generation capacity has been an integral part of many energy mergers, thereby fostering competition from the bottom up. Further, the liberalisation of the telecommunications sector came about by the adoption of directives because Article 106 TFEU allows competition law to serve directly as regulation. Consequently, the role of competition law as a driver for the development of the single market and its regulation appears to take two forms, both creating a market where no market existed, and developing regulations applicable to the market.

5.1. Developing a market from the ground up

Transforming a market sector from a monopoly market to a competitive market is a process in which the first step entails the removal of legal restrictions and where the next has to be taken by the market players. While the telecoms sector largely brought about its own conversion following the lifting of legal barriers, fostering competition in other sectors has been more of a challenge from a Union perspective, even when there has been a sufficient level of political acceptance and adequate single market regulation. However, competition law has been a handy instrument in the process as its remedies can achieve more than merely preventing further impediments. One consistent remedy that has been used to clear airline mergers and alliances involving incumbent airlines has been the surrender of take-off and landing rights (slots) at airports,[135] in order to ease market access for new entrants and foster competition. Similarly, broadcasting spectrum rights and generation capacity have been relinquished through commitments to foster competition at the wholesale level in the mobile communications and electricity sectors. This was initially mainly in order to clear concentrations, but more recently increasingly to close on-going investigations.

[135] See also Giorgio Monti *EC Competition Law*, Cambridge 2007, pp. 476-478.

Further, in the telecoms sector concentrations such as *Telia/Telenor*[136] (1999) and *Telia/Sonera*[137] (2002) were cleared subject to the divestiture of a cable television network, which was the most viable alternative to the established infrastructure around the turn of millennium and thus a suitable instrument for inducing competition.

The remodelling of a market can take various forms. It can take the simple form of reducing the duration or scope of an exclusive supply or use agreement, freeing up wholesale capacity or relinquishing control over a facility that restricts capacity. It need not even require rights to be relinquished but could be limited to abstaining from certain activities or affiliations which are considered problematic. The *EDF/Louis Dreyfuss*[138] (1999) merger in the energy sector is an example of the latter as the acquirer (EDF) of a specialised electricity trading company undertook not to transfer the acquired know-how to France before the single market regulation had been fully implemented, here, reducing some of the competitive advantages.[139] From many perspectives the energy sector offers a prime example of competition law being used to facilitate a market restructuring, as the Commission showed such a strong preference for settlement and contractual amendment between 1991 and 2012 that only one decision was adopted establishing that there had been an infringement,[140] despite the sector inquiry (2007) uncovering serious impediments and potential infringements. The recent *E.ON* case[141] (2008) is a good example of this. While the case was brought on the grounds of possible market manipulation by the strategic withholding of production capacity and other aggravating infringements, it was eventually concluded with a traditional settlement. In other words, because of the divestment of generation and network capacity, there was no formal infringement decision on the issue of market manipulation. Consequently, competition law remedies have been actively used to break up market concentrations and settle cases in the liberalisation of the European energy market and other newly liberalised sectors and industries.

5.2. Developing the regulation to be applied in the single market

The use of competition law, and Article 106 TFEU, as an instrument in the development of single market regulation has already been referred to. However, the process is much wider and includes the 'aggressive' use of remedies in order to secure regulatory objectives, including the expansion of single market regulation. The Commission's approach in the *Atlas* and *Phoenix/Global One* cases[142] (1996) is an example of this, as the establishment of a telecoms joint venture between the

[136] COMP/M.1439 - *Telia/Telenor*
[137] COMP/M.2803 - *Telia / Sonera*
[138] Case COMP/M.1557 - *Edf/Louis Dreyfuss.*
[139] See also case COMP/M.2947 - *Verbund/Emergie Allianz* in which commitments were given including accelerated implementation of the structural separations stipulated by Directive 2003/54/EC (the Second Electricity Directive).
[140] The infringement was identified in Commission Decision of 8 July 2009 in Case COMP/39.401 *E.ON/GDF* involving market-sharing agreements dating back to 1975 which were incompatible with Article 101 TFEU. For a discussion of this case and cases in which commitments were accepted by the Commission, see Michael D. Diathesopoulos, *From Energy Sector Inquiry to Recent Antitrust Decisions in European Energy Markets: Competition Law as a Means to Implement Sector Regulation* (14 July 2010); available on the internet.
[141] Cases COMP/39.388 - *German electricity wholesale market* and COMP/39.389 - *German Electricity Balancing Market.* For a critical analysis of the decision see Malgorzata Sadowska *Energy liberalization in antitrust straitjacket: A plant too far*, EUI Working Papers RSCAS 2011/34.
[142] Case 35.337 *Atlas* (OJ 1996 L 239/23); and case IV/35.617 *Phoenix/Global One*, (OJ 1996 L 239/57).

incumbent operators in Germany and France was considered problematic unless national laws were amended to limit the use of reserved rights. Hence, by using its power to grant exemptions under Article 101(3) TFEU, the Commission has forced national liberalisation beyond what was required by single market regulation. Also, as the Commission launched the idea of full liberalisation of the telecoms sector at the same time, the remedies would indirectly induce two significant members of the Council to take a more favourable view of such move. While it might not be fair to see a direct link between the cases and the Council's acceptance of full liberalisation, eluding the perception is difficult. Hence, it could be argued that the Commission has occasionally used its power to scrutinise concentrations and infringements to put pressure on the Council to adopt proposed single market regulation.[143]

The use of competition law remedies to develop single market regulation is notable for reasons other than those described above. The Commission has traditionally maintained that a concentration can only be assessed in the context of the distortions it creates.[144] Pre-merger impediments outside the control of the parties are therefore in principle not held against them.[145] This should also be the position under Article 102 TFEU as dominance is not in itself prohibited. Nevertheless, the Commission has willingly also remedied also pre-existing dominant positions and there are no indications that such considerations have limited the measures taken by the Commission. Following the General Court's ruling in *EDP*,[146] (2005) which rejected the claim that the Commission had attempted to secure remedies aimed at liberalising the energy sector beyond what was required by single market regulation, it must be concluded that the Commission enjoys a wide margin of discretion when it considers remedies under the Merger Regulation. This is also the case when the Commission considers remedies in conjunction with parallel single market regulation which can result in commitments from undertakings which go beyond what is required under the regulation. The proactive use of competition law to advance the development of single market regulation is not limited to concentrations and merger remedies. The core of competition law, and the definition of infringements, has even been used in support of the single market agenda. In 1994 the Commission put forward a proposal for a directive[147] on cross-border credit transfers, and in the following year a Notice on the application of competition law to cross-border credit transfers.[148] The Directive[149] was adopted in 1997 but later replaced by two regulations.[150] As a supplement to the regulations the Commission has published a draft working document[151] on the application of Article 101 TFEU to multilateral interbank-payments. While it is natural to see a link where the Notice addresses issues on which

[143] For further see e.g. Susanne K Schmidt, *Commission activism: subsuming telecommunications and electricity under European Competition law*, Journal of Public Policy, 1998, pp. 169-184; and Susanne K Schmidt, *Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity*, 16 Journal of Public Policy, 1997, p. 245.
[144] See Case IV/M.1347 *Deustche Post/Securior*, para. 44.
[145] See David Went, *The Acceptability of Remedies Under the EC Merger Regulation: Structural Versus Behavioural*, *ECLR* 2006, pp 458-459.
[146] Case T-87/05 *EDP* v *Commission* [2005] ECR II-03745, paras 86-96.
[147] COM 94 436 - *Commission Proposal for a Directive on cross-border transfers*.
[148] *Notice on the application of the EC competition rules to cross-border credit transfers* (OJ 1995 C 251/3).
[149] Directive 97/5/EC on cross-border credit transfers.
[150] Regulation (EC) No 2560/2001 on cross-border payments in euro; and Regulation (EC) No 924/2009 on cross-border payments in the Community.
[151] *Commission Working Document on the 'Applicability of Article 81 of the EC Treaty to multilateral interbank-payments in SEPA Direct Debit'*.

the Directive and the Regulations are silent, it is also plausible to see a more advanced interaction, as some of the obligations eventually incorporated in the single market regulation could have been advanced by competition law. In the same way the obligations pursuant to Articles 101 and 102 have been hammered out to supplement single market regulation in respect of postal services[152] and telecommunications.[153] However competition law can be more than a supplement, as illustrated by the Commission's approach to local loop unbundling[154] in the telecom sector. This approach was first introduced as a Union instrument using commitments in the case of the *Telia/Telenor*[155] (1999) merger, and it was later made a general obligation under Article 102 TFEU by the publication in 2000 of a Communication from the Commission[156] and eventually secured by the adoption of a Regulation,[157] same year. Hence, a significant regulatory objective could have been secured by competition law if the Council had refused or delayed the adoption of the Regulation. It could therefore be argued that the Commission sometimes indirectly presents the Member States with two options: either they can be actively involved in framing single market regulation, or the Commission can take action under competition law against what, in most cases, will be state owned and well connected undertakings.

In the light of this, the 2008 *E.ON* case warrants a re-examination. While the case was initiated because there was a presumption of price manipulation by withholding strategic capacity, the case was concluded by the undertaking in question agreeing to divest itself of 20 % of its generation capacity and its transmission network. The purpose of divesting the transmission network was to improve the structure of the German wholesale electricity market by preventing preferential treatment. In the course of its investigations the Commission also identified a strategy to deter new investors in generation capacity. However, this allegation was never developed or explained beyond a few lines and it was probably only a secondary concern.[158] While the commitment to divest generation capacity could be considered a natural and effective measure for addressing the ability to exercise market power, the network commitment was somewhat more far-reaching, not to mention the view that strategic investment could be an infringement. The case not only involved distortions identified on somewhat vague grounds, it was also concluded by the making of commitments that addressed more fundamental problems in the market. This does not invalidate either the analysis or the rationale of the Commission. Insufficient investment is unquestionably a serious impediment to the single market, while ownership unbundling is an equally serious benefit. So far, however, the Council has declined to promote further ownership unbundling despite the strong arguments made by the Commission. Thus the third energy package (2009), which was adopted to

[152] *Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services* (OJ 1998 C 39/20).
[153] *Guidelines on the application of EEC competition rules in the telecommunications sector* (OJ 1991 C 233/2): and *Notice on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles* (OJ 1998 C 265/2).
[154] 'Local loop' refers to the physical circuit between the customer's premises and the telecommunications operator's local switch or equivalent facility.
[155] Case COMP/M.1439 - *Telia/Telenor*.
[156] COM 2000 237 - *Communication from the Commission - Unbundled access to the local loop: Enabling the competitive provision of a full range of electronic communication services including broadband multimedia and high-speed internet*.
[157] Regulation (EC) No 2887/2000 on unbundled access to the local loop.
[158] See paras. 41-44 of the decision.

address the impediments identified by the sector inquiry and which is currently being implemented, only provides for optional ownership unbundling. The *E.ON* case thus demonstrates how significant regulatory objectives can be achieved by means of competition law in situations where the Council has declined to advance an issue, perhaps placing it in the same category as the *Atlas* and *Phoenix/Global One* cases.

The approach to IP rights also fits the prevailing pattern. For example, the examination of IP rights under competition law, and particularly refusals to grant licences, has mainly involved rights such as copyright and thus only IP rights that might not qualify as IP rights in the eyes of the enforcer.[159] Without either rebutting or questioning this observation, a more adequate argument would be that competition law has primarily been applied to IP rights that are not subject to Union harmonisation. This would offer a new perspective on the Commission's current interest in the pharmaceutical sector, the implied infringements identified in the sector inquiry and the current attempts to establish a community patent. In the light of this, the Recommendation on collective cross-border management (2005) and the *CISAC* (2008) case might also require reconsideration. In between the Recommendation and *CISAC* the Service Directive[160] (2006) was finally adopted following prolonged negotiations. A notable feature of the Directive is the inclusion of IP rights, despite calls for their exclusion by the European Parliament, and the subsequent application of the Directive against national authorisations of royalty collecting societies.[161] Steps that has caused considerably turbulence in the sector. If this leads to renewed interest in Union action, the long-term beneficiaries of the current uncertainty about the legal framework governing royalty collecting societies could be the Commission and the internal market project. A proposal for Union harmonisation was tabled in 2012, and fortune may favour the bold.[162]

5.3. Using competition law to drive development has the flavour of industrial policy

Introducing regulation via the backdoor of competition law has some less attractive side effects. While the adoption of a formal decision pursuant to Articles 101 or 102 TFEU requires substantial analysis to be made, and the adoption of single market regulations by the Council and European Parliament demands equally persuasive arguments, the requiring of commitments to conclude cases under competition law is less stringent. In contrast to a formal decision or the promotion of new regulation, the Commission can conclude an investigation by accepting commitments on the basis of a preliminary assessment, thus in effect reducing the need to identify significant barriers to competition and the single market; the existence of a low level of competition and allegations of impediments will be sufficient and should be easy to find in a newly liberalised sector. Consequently, there are few if any legal barriers to the Commission initiating a case with the aim of obtaining a commitment from the parties. Also, even though the wording of Article 9 of the Enforcement Regulation[163]

[159] See Richard Whish, *Competition Law*, 6th ed., 2009, p. 788.
[160] Directive 2006/123/EC on services in the internal market.
[161] See Thomas Riis, *Collecting societies, competition, and the Service Directive*, Journal of Intellectual Property Law & Practice, 2011, Vol. 6, No 7, pp. 482-493.
[162] See MEMO/12/545 - *Proposed Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions.*
[163] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

restricts the Commission to accepting commitments that meet the concerns expressed, it is obvious that any commitment process will be subject to some negotiation between the enforcer and the potential infringer. This is a process that could in itself increase the perception that competition law has been reduced to a form of quasi-regulation. The use of competition law to facilitate the implementation of the single market goes back some way and has not only involved remedies used to clear concentrations but also to deal with infringements under Articles 101 and 102 TFEU. In this process the Commission has been active in giving guidance on the application of competition law by issuing a large number of notices and comments. While legal clarity is always desirable, this may nevertheless cement the perception that competition law plays an unusual role. Thus, using competition law to drive the single market comes with a strong flavour of industrial policy.

6. Concluding Remarks

While industrial policy has not been directly embraced under competition law, there are nevertheless clear indications that competition law has been used as part of a wider agenda. While arguments based on economic welfare may be the main considerations advanced under competition law, over the years a pattern has emerged whereby the Commission sometimes resorts to competition law to secure single market objectives. The Commission has done so not only in absence of single market regulation, but also in situations where it considers that single market regulation is either insufficient or imperfect. Hence, competition law has functioned as part of a wider and more political agenda under the single market, giving it at least a flavour of industrial policy. This not only creates a need for a more complex understanding of the interaction between competition law and single market regulation, it should perhaps also influence perceptions of the call for an industrial policy agenda under competition law. Rather than being an unwelcome move promoted by the Member States, it should rightly be seen as a logical step from the traditional special interest groups which are deprived of their ability to lobby the Council and the European Parliament when the Commission short circuits these. This does not make the bid more welcome or attractive, but it nevertheless puts it into the right perspective, making a call for an industrial policy an indirect consequence of the use of competition law in a quasi-regulatory role.

Reference list

- Copenhagen Economics, *Use and Abuse of Market Power in the Nordic Power Market*, project 3, 2002 summary report.
- Diathesopoulos, M.D., *From Energy Sector Inquiry to Recent Antitrust Decisions in European Energy Markets: Competition Law as a Means to Implement Sector Regulation* (July 14, 2010), available on the Internet.
- Faull & Nikpay, *The EC Law of Competition*, 2nd Ed., Oxford 2007.
- Geradin, D., & Girgenson, I., *Industrial Policy and European Merger Control - A reassessment*, available on the Internet.
- Geradin, D., Layne-Farrar, A. & Petit, N., *EU competition law and economics*, Oxford 2012.
- Geradin, D. (ed.), *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation.* Intersentia 2004.

- Geradin, D. & Petit, N., *Price Discrimination Under EC Competition Law: The Need for a case-by-case Approach, Global Competition Law Centre Working Paper Series* No 07/05, available on the Internet.
- Geradin, D. (ed.), *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation*, Intersentia 2004.
- Gervais, D. (ed.), *Collective Management of Copyright and Related Rights*, 2nd Ed., Kluwer Law International 2010.
- Larouche, P., *Competition law and regulation in European telecommunications*, Hart Publishing, 2000.
- Lévéque, F., *Pharmaceutical Regulation and Intellectual Property: the Third Side of the Triangle*, Working Paper 2009-03, available on the Internet.
- Monti, G., *EC Competition Law*, Cambridge 2007.
- Navarro, L., *Industrial policy in the economic literature. Recent theoretical developments and implications for EU policy, Enterprise Paper* 12 DG Enterprise 2003, available on the Internet.
- Petit, N., *Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US*, available on the Internet
- Petit, N., *The Commission's Contribution to the Emergence of 3G Mobile Communications – an Analysis of Some Decisions in the field of Competition Law*, available on the Internet.
- Riis, T., *Collecting societies, competition, and the Service Directive*, Journal of Intellectual Property Law & Practice, 2011, Vol. 6, No 7, pp. 482-493.
- Sadowska, M., *Energy liberalization in antitrust straitjacket: A plant too far*, EUI Working Papers RSCAS 2011/34.
- Schmidt, S.K., *Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity*, 16 Journal of Public Policy, 1997, pp. 233-271.
- Schmidt, S.K., *Commission activism: subsuming telecommunications and electricity under European Competition law*, Journal of Public Policy, 1998, pp. 169-184
- Schovsbo, J. *Fire and Water Make Steam: Redefining the Role of Competition Law in TRIPS*, 2009.
- Toffolon, C.A., *The Online Commerce Roundtable – Advocating improved access to online music for EU consumers*, Competition Policy Newsletter, DG COMP 2010-1, pp. 46-50.
- Van Bael & Bellis, *Competition Law of the European Community*, 2005.
- Went, D., *The Acceptability of Remedies Under the EC Merger Regulation: Structural Versus Behavioural*, ECLR 2006, pp 454 475.
- Whish, R., *Competition Law*, 6th Ed., 2009.