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Pursuing regulatory objectives under competition law

ABSTRACT

While the Commission has stood its ground against political pressure to relax enforcement for the purpose of grooming European champions, that does not mean only economic welfare arguments have been accepted under competition law. Rather, 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. This has allowed for the development of an unexpected close interaction between competition law and single market regulation occasionally taking the form of pollution rather than influence.

Bien que la Commission ait tenu bon devant la pression politique et n'ait pas assoupli l'application du droit dans le but de former des champions européens, cela ne veut pas dire que seules les discussions sur le bien-être économique aient été acceptées conformément au droit de la concurrence. Plutôt, au cours du temps, un modèle s'est dessiné selon lequel, en l'absence d'une réglementation du marché intérieur satisfaisante, la Commission a fait occasionnellement recours au droit de la concurrence afin de sécuriser les objectifs du marché intérieur. Cela a permis le développement d'une interaction inattendue entre le droit de la concurrence et la réglementation du marché intérieur, qui a parfois pris la forme d'une pollution plus que d'influence.

1. The idea of grooming industrial development in the EU, through a modernised EU industrial policy, has recently regained prominence, partly as fallout from what some consider a wrongful blocking of the merger in 2019 between key German and French industrial players Siemens and Alstom. It seems that, embedded in this revised policy is that competition law should take guidance from a broader spectrum of considerations partly formulated on a political level.

While the idea of an EU industrial policy has never tainted EU competition law, the matter differs when it comes to pursuing regulatory objectives, formulated on a larger and more political level. Across the years, competition law has often served in a regulatory capacity making it too simplistic to advance the view that competition law is unaffected by political objectives. Further, the current interest in national tax arrangements under EU State aid rules might fit into this pattern providing for an alternative motivation for some of the cases.

2. While it is not entirely clear what governs the objectives and application of competition law, industrial policy in the form of government intervention in the market to facilitate structural changes, picking winners and developing European champions, is normally not considered included. Further, as there has been no serious call for changes to this, 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. There seems to be 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. The blocking of Siemens/Alstom (2019) appears to have galvanised this as the Commission stood its ground regardless of mounting political pressure to clear the merger unconditionally. Purportedly, the transaction was necessary to secure a competitor active on a global scale. The merged entity would create long-term benefits for Europe, and compensating the short-term impediments to competition and consumer welfare in some market segments. 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.

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1 There is no authoritative definition of “industrial policy” available, allowing the concept to have many meanings including “picking the winning strategies, creating “national champions” through measures close to protectionism, and promoting innovation and development by public investments in R&D, etc. Most definitions include some form of restructuring of sectors and industries in accordance with a larger plan. For further see, e.g., OECD Policy Roundtables, Competition Policy, Industrial Policy and National Champions (2009).


3 Case M.8677 – Siemens/Alstom.

4 See, e.g., B. Hall, EU refuses to bend to political winds on Siemens-Alstom merger, Financial Times, 13 December 2018, and L. Thomas, France, Germany step up pressure over Alstom-Siemens deal, Reuters, 21 January 2019. For the Commission’s perspective see Commission Press Release IP/19/811, Mergers: Commission prohibits Siemens’ proposed acquisition of Alstom, 6 February 2019.

5 Further to the examples cited in this paper, see D. Geradin, A. Layne-Farrar & N. Petit, EU Competition Law and Economics (Oxford University Press, 2012), pts. I.70 – I.72. It should also be noted that the European Commission has consented to “update” its 1997 Guidelines on the definition of relevant market, potentially opening for broader market definitions as requested by the merging parties in Siemens/Alstom.
3. 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. While short of a classic form of industrial policy in the context of picking winners, it does come with a regulatory policy flavour. In particular, this concerns what constitutes satisfactory regulation in the eyes of the Commission, which 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, even a larger plan outlined in prepared documents. Consequently, if considered in more detail, and if the concept of industrial policy is replaced by regulatory objectives, it becomes apparent that competition law has played a much more complex role, including being influenced by political objectives. These observations relate mainly to the sectors liberalised from the 1980s on, though they are not limited to this timeframe. Thus, there is a need for a more detailed understanding of the interaction between competition law and single market regulation. An understanding taking account that while industrial policy has neither directly nor officially influenced competition law, other political objectives have. The aim of this contribution is to examine and expand our understanding of when, and how, competition law has served in a regulatory capacity and its complex interaction with single market regulation.

5. 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 being a precondition for meaningful competition. A market void of competition due to extensive monopoly rights would offer little role for competition law. Moreover, competition law is, in contrast to sector-specific single market regulation, normally considered suboptimal for tailoring specific obligations and remedies. A traditional perception of the interaction between competition law, single market regulation and any regulatory objectives would be that single market regulation paves the way for competition law and mitigates any socially undesirable consequences of unrestricted competition. Further, this process overlaps with the regulatory objectives as both focus on long-term welfare objectives. However, following the emerging of competition, competition law comes into play, preventing private restrictions from replacing governmental restrictions, thus negating the formulated objects and initiated liberalisation process.

1. A traditional perception sees limited interaction between competition law and regulation

4. While competition law has traditionally been concerned with enhancing economic welfare, and consumer welfare in particular, single market regulation, regardless of whether it takes the form of directives or regulations, is perceived as pursuing a wider agenda with the single market as the dominant objective. 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, ideally in accordance with a larger plan or policies. Thus, regulation of the single market often concerns the very core of a political agenda and plans, and provided sufficient support from relevant legislative bodies can be secured, in contrast to competition law, subject to few restrictions in scope.

6. 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 EU law, competition law must be confined to certain defined objectives, primarily to do with consumer welfare. However, to ignore the overlap or to fail to understand how single market regulation must be defined within 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 Grundig-Consten6 (1966), competition law can be used to prevent the use of national law (in this case on IP rights) to partition the single market. This is normally a role played by single market regulation. In contrast with the traditional perception of a limited interaction between single market

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7 While a general and simple perception, it does hold some validity as competition law operates ex post and emphasises general principles and is less well positioned to provide for prudent, predictable and well-tailored remedies in a transitional phase.
8 Joined cases 56 and 58/64 – Établissements Consten and Grundig v Commission, English special edition, ECR 299.
9 The case, as explained below, predates the development of the Union exhaustion of rights doctrine leaving competition law as the only readily available instrument.
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 the latter remains untainted by regulatory objective, is manifestly wrong.

2. In pursuit of a more elaborate interaction and relationship between competition law and regulation

7. The interaction between single market regulation and competition law was developed further in France v. Commission10 (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), the Commission directed 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, bypassing 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 Paper11 of 1987 and its subsequent implementation from 1990 onwards, the foundations were in fact laid in 1982 with British Telecommunications.12 In this case, British Telecom’s restriction of access to call-back arrangements, aimed at leveraging its dominant position, was held to be in breach of Article 102. The Commission’s decision was appealed to the Court of Justice by a group of reluctant Member States. 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. It is therefore possible to see an active role for competition law in the market liberalisation and deregulation process embarked on in the EU from the 1980s, and thus also connected to an underlying regulatory 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, an instrument that should come into use several times across the years as demonstrated later.

II. Multiple roles for competition law in the EU single market

8. The prevailing pattern not only indicates 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:

– Supplements single market regulation and vice versa, covering situations where competition law and adopted single market regulation are used to close lacunas in the other set of provisions.

– Stands as a foundation for single market regulation, where concepts and principles from competition law are included in single market regulation.

– Drives the development of the single market and its regulation, covering situations where cases are open, pursued and closed to facilitate, if not directly at a minimum indirectly, the adoption of single market regulation.

9. 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 competition law is influenced by regulatory policy considerations, and confined to economic welfare objectives. As noted, the lines between these positions are not entirely clear providing some overlaps in the outline.

10 Joined cases 188 to 190/80 – France, Italy and UK v. Commission.


III. Competition law as a supplement to single market regulation

10. 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 themselves to complying with their obligations under sector-specific regulation but must also take competition law into account. The early case of Grundig-Consten is an example of a situation where IP rights granted under national law were considered incompatible with the single market and were “corrected” under competition law. Subsequently, the exhaustion of IP rights doctrine14 filled the gap identified in Grundig-Consten, and specific single market provisions, without rendering the identified role of competition law obsolete. This was demonstrated in Deutsche Telekom15 (2003), where abuse of a dominant position by the imposition of a margin squeeze was found to be in breach of Article 102, though single market regulation was intended to prevent it.16 Furthermore, the undertaking involved (Deutsche Telekom) failed in its argument that its conduct was not a breach of Article 102 on the grounds that it had applied wholesale prices that were supervised and approved by the national telecom 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 any possible misconduct “discussed” with the involved regulator and the Member State.17 Deutsche Telekom’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,18 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 would also be applicable in less obvious cases. This was confirmed in Telefónica19 (2007), another telecom margin squeeze case. Here the margin of each wholesale product—and in this, different possible access levels—was tested separately for the purpose of considering any squeeze and ensuring beneficial market entry regardless of technical developments.20 This approach was taken by the Commission for the specific purpose of allowing competitors to enter the retail market with low or few initial infrastructure investments, and later allowing them to “move up” the investment ladder—an approach called “ladder of investment theory” promoted under ex ante (sector) regulation but now translated into ex post competition law.21 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.22

11. Grundig-Consten, Deutsche Telekom and Telefónica are not isolated examples of competition law being used to correct regulatory shortcomings. There are similar examples in Flughafen Frankfurt23 (1998) and Verbändevereinbarung24 (1998). In the first case, Frankfurt Airport’s attempt to reserve certain ground handling services was found to be contrary to governing single market regulation,25 which allowed either self-handling or third-party sourcing. The airport nevertheless tried to get around the regulation by making contractual arrangements, leading to the Commission taking action under Article 102. 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 tacitly be accepted as the directive in question26 specifically allowed the Member States to refer 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 of not adopting a decision regardless of what normally

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16 See Regulation (EC) No. 2887/2000 on unbundled access to the local loop, recital 11.
17 As seen in the underlying Commission decision, case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom, recital 2–4. This was also the initial position of the Commission, as the case originated as a non-instrumentation case against Germany.
18 See case T-271/03 – Deutsche Telekom, para 37 and 122. The doctrine was further developed in case T-398/07 – Kingdom of Spain, in particular para 39–47 and 50.
19 Case COMP/C-38.784 – Wanadoo España v. Telefónica.
20 Ibid., recitals 389–396.
21 For further on the “ladder of investment theory,” see C. Bergqvist, Between Regulation and Deregulation (Dioe, 2016), p. 187.
22 Probably explaining why the Commission in COMP/39.523 – Slovak Telekom, recital 855, felt compelled to provide some cover by referring to “the tests of both authorities are usually based on a different set of data: regulatory authorities, given their forward-looking perspective, often rely on a hypothesis concerning the future development of costs, revenues, number of subscribers etc., while competition authorities look at actual figures of the investigated company.”
23 Case IV/34.801 – FAG – Flughafen Frankfurt/Main. See recitals 103–105 for further on the single market regulation and the shortcomings related to incorrect national implementation.
25 Directive 96/67/EC on access to the ground handling market at Community airports, OJ 1996 L 272/36.
26 Directive 96/92/EC (“First Electricity Directive”). Article 17 allowed the Member States to regulate the allocation of grid access or to refer the issue to commercial negotiation. Germany had opted for the latter option.
should be a clear and manifest infringement. More recent cases, such as Microsoft\textsuperscript{27} (2004) and Football Association Premier League\textsuperscript{28} (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\textsuperscript{29} 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.\textsuperscript{30} Consequently, in both cases the parties were in a balance of interests established by single market regulation rather than competition law. However, it was the latter that was called into service in the cases to remedy this.

12. Over the years, a large number of cases have emerged involving national and geographical discrimination and addressed under competition law, including: \textit{United Branded}, British Leyland,\textsuperscript{31} Irish Sugar,\textsuperscript{32} POI/World Cup 1998,\textsuperscript{33} and Portugal v. Commission,\textsuperscript{34} to cite a few. 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 101 or 102 on the ground, as expressed by the General Court in Irish Sugar\textsuperscript{35} (1999), that the practice ran contrary to the "essence of a common market" by creating obstacles for this. However, few economic welfare arguments can be made in support of an absolute prohibition of geographical discrimination,\textsuperscript{36} making single market regulation a more natural solution. Subsequently, this doctrine has been applied to alleged abuses of the IP system, involving artificial extensions of patents by unmeritorious applications and misrepresentations,\textsuperscript{37} "patent ambush"\textsuperscript{38} and "sham litigation."\textsuperscript{39} All these situations involve different levels of regulatory shortcomings, either in the legislation, or in enforcement of the legislation by Member States,\textsuperscript{40} or both.

13. As isolated examples, there is little to object to the legal arguments in each of the cited cases.\textsuperscript{41} They 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.\textsuperscript{42} 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.\textsuperscript{43} Eventually, the Commission chose not to avail itself of this opportunity, opting instead to pursue the matter under competition law, thereby confirming the role of competition law as a corrective instrument. The same approach was used in \textit{GVG/FS}\textsuperscript{44} (2003) and \textit{Swedish Interconnectors}\textsuperscript{45} (2010), where Article 102 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\textsuperscript{46} the Commission could have taken action on this basis,\textsuperscript{47} but it favoured resorting to competition law. Largely the same approach was utilised in Telekomunikacja Polska\textsuperscript{48} (2011) and Slovak Telekom\textsuperscript{49} (2014), in the former against stalling of negotiations and in the latter the retaining of technical access information, all hold abusive and contradictory to Article 102, in situations where the obligations followed from adopted sector-specific obligation. In reality, the latter

\textsuperscript{27} Case T-251/04 – Microsoft.
\textsuperscript{28} Joined cases C-403/08 and 429/08 – Football Association Premier League.
\textsuperscript{29} Case COMP/C-337/92 – Microsoft, recitals 745–763 referring to Council Directive 89/250/ECC on the legal protection of computer programs.
\textsuperscript{30} See recitals 104–108, 114–117, 121 and 138–139.
\textsuperscript{31} Case C-257/96 – United Branded v. Commission, paras. 204–234.
\textsuperscript{32} Case C-226/04 – British Leyland v. Commission.
\textsuperscript{33} Case T-228/97 – Irish Sugar v. Commission.
\textsuperscript{34} Case IV/36.888 – POI/World Cup 1998.
\textsuperscript{35} Case C-183/99 – Portugal v. Commission.
\textsuperscript{36} Case T-228/97 – Irish Sugar v. Commission, para. 185.
\textsuperscript{38} Case COMP/C/37.507/03 – AstraZeneca. See also case IV/351.043 – Tetra Pak II, C-1/92/1, T-72/71, recitals 22 and 163–164.
\textsuperscript{39} For examples of and a definition of a "patent ambush" see Commission Press Release MEMO/00/336 Antitrust: Commission confirms sending a Statement of Objections to Rambus, 23 August 2007.
\textsuperscript{40} See Case T-111/06 – ITT Promedia v. Commission, para 72–73; and Commission Press Release IP/12/345, Antitrust: Commission opens proceedings against Motorola, 3 April 2012.
\textsuperscript{41} A more systematic outline of the use of competition law to correct problems in the IP system has been provided by J. Schroba, Fire and Water Make Steam: Redefining the Role of Competition Law in TRIPS (2009), available at SSRN: http://ssrn.com/abstract=1339446; and by F. Lévêque, Pharmaceutical Regulation and Intellectual Property: the Third Side of the Triangle, CERNA Working Paper 2009/03, available at: https://hal-minis-paristech.archives-ouvertes.fr/hal-00408286/document. Both papers consider the nature of the problems in the IP system.
\textsuperscript{42} Other than the \\textit{Verhinderungsverfahren} case, which should be viewed against the specific legal and political circumstances governing the agreement and the underlying EC Directive.
\textsuperscript{43} See Regulation (EC) No. 2887/2000 on unbundled access to the local loop, recital 11.
\textsuperscript{44} Case COMP/C-137.451, 37.578, 37.579 – Deutsche Telekom, paras. 2–4.
\textsuperscript{45} Case COMP/137.685 – GVG/FS.
\textsuperscript{46} Case COMP/139.351 – Swedish Interconnectors.
\textsuperscript{47} Primarily Directive 91/19/EEC 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.
\textsuperscript{48} Or alternatively directly on applicable provisions in the TFEU, as noted in case COMP/139.351 – Swedish Interconnectors, recital 45.
\textsuperscript{50} COMP/139.523 – Slovak Telekom, recitals 370 and 373. Upheld with case T-851/14 – Slovak Telekom, but pending before the Court of Justice as C-152/19P – Deutsche Telekom.
\textsuperscript{51} Jointly with other forms of anti-competitive behaviour.
played negatively, as the Commission for this reason found it irrelevant if the traditional (rigid) requirement for a refusal to supply case were met. It was sufficient that the obligations were metered out in sector regulation, providing for the balancing of conflicting interest and in principle securing a reasonable rate of return on the investments. This allowed competition law to overrule regulatory shortcomings, but also provided for a very expansive role for competition law with the potential to create conflicts and negatively influence otherwise established principles.

1. Competition law as a supplement for single market regulation

14. 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 lacunae 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). This step was initially opposed by the Member States but ultimately accepted in exchange for them having a level of involvement and influence. Additional substance was given to the role of competition law by the Guidelines on the application of competition rules in the telecommunications sector (1991) and a notice on access agreements (1998). Not only did these detail the Commission’s view of how competition law should be applied to the telecommunications sector, inducing an ex post element to enforcement, but they also indicated that competition rules could be waived in favour of single market regulation. Deutsche Telekom can be seen in this context, especially if compared with the contemporary UK Network Sharing Agreement (2003). 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 Guidelines on non-horizontal mergers (2008) 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 (2006) in the absence of sufficiently strong regulatory deterrence but not in HFC Bank Pte/British Gas Trading Ltd (1997) following assurances from the national sectoral regulator. Principles utilised more specifically in ELIA/IFM/50HERTZ (2010) and RWE/Essent (2009), two electricity mergers. In the first case, effective ex ante regulation on access to balancing power and the distribution network mitigated potential concerns, which led to an unconditional clearance, while in the second it was accepted that the incentive to degrade interconnector capacity would be checked by ex ante regulation despite ability. 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.

2. The priority of single market regulation has ambiguities

15. 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. Competition law can serve as a fallback position remedying problems un- or inadequately addressed in single market regulation. Thus, a hypothetical hindrance to competition should not be dealt with under the Merger Regulation, or Article 101/102, if adequate remedies are available, as these 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

54 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.
55 See Notice on the application of the competition rules to access agreements in the telecommunications sector, recital 28.
56 Case COMP/38.370 – 02 UK/UT-Mobile UK, recital 104. See also case COMP/M.3695 – BT/Radius, recital 42; and case COMP/M.1439 – Tidal/Telenor, recital 169, for evaluations of sectoral regulation.
57 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008 C 265/6, recital 46.
58 Case COMP/M.3696 – E.ON/MOL, para. 433.
61 COMP/M.3827 – ELIA/IFM/50HERTZ, recital 34 and 37. See also COMP/M.5365 – IPO/Elad/Pakefi, recital 35.
62 COMP/M.5467 – RWE/Essent, recitals 204-206 and 217.
Swedish Interconnectors and GYGIFS, not only circumvents the traditional infringement proceedings under Article 258, 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. The “problem” is not even confined to (clear) non-implementation situations as demonstrated by Telefónica63 (2007). Here Article 102 was applied in a manner, and in accordance with principles, detailed in sector regulation, in casu the “ladder of investment theory.” This indicates how the Commission would have preferred that the national regulator had acted, and how competition law can be used to police this, including “correcting” national “mistakes.”

16. This direct role of the Commission is somewhat problematic. First and foremost by negating that directives, in contrast to regulations, must be implemented, and per definition vest the Member States a margin of appreciation. Secondly, as single market regulation might represent a compromise intentionally leaving certain issues unaddressed.64 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. An extreme example of this is Verbundvereinbarung, where Article 101 was bent to an unrecognisable level. 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 regulatory objectives if the Commission’s decision appears to be guided by its initial position. The energy sector is particularly rich with examples of this as demonstrated by the matter of “grandfather rights.” A concept covering long-term reservation arrangements on cross-border transmission capacities, precluding market opening, and more importantly, upon request from the Member States, subject to derogations under the First Electricity Directive65 (1996). Here, competition law provided a useful instrument as demonstrated in Skagerrak Cable66 (2000) and UK/France Interconnector67 (2001). In both cases, the Commission acted against long-term reservations under Article 101, closing the investigation subject to relinquishing of capacity on the cross-border electricity connections.68 It could thus be argued that while competition law is not governed by regulatory objectives, the priority rule and its role as a supplement inescapably come with a flavour of this, when so directly influenced by provisions in adopted single market regulation.

IV Competition law as the foundation for the single market

17. Following France v. Commission, the European Commission was given a powerful competition law instrument, as the objective of the single market could now be pursued by using Commission Directives (cf. Article 106(3)), 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. However, they were not so successful in the energy sector, following setbacks at the hands of the Court of Justice and insufficient general support.69 Nevertheless, competition law emerged as more than a supplement or alternative 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. Three roles warranting further examination.

1. Competition law as a source of principles and definitions

18. Between 1988 and 1998 the liberalisation of the telecommunications sector was achieved through successive directives adopted pursuant to Article 106(3). 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 obligation not to mix commercial and regulatory interests.60 Despite the decision to switch to using

63 Case COMP/38.784 – Rádioso España v Telefónica.
64 Directive 96/92/EC ("First Electricity Directive") is a good example of this with its many options for national derogations, including derogations for mandatory grid access (Articles 17 and 18) or old long-term reservation agreements (Article 24).
65 Directive 96/92/EC ("First Electricity Directive") Article 24 provided for derogations for old rights and initially it was understood that this was granted automatically. However, case C-179/03 – VEMW and Others overturned this as detailed by C. Jones (ed.), EU Energy Law, Vol. 1 (3rd edition, Clancy & Castex, 2010), pp. 66–75.
67 See Commission Press Release IP/01/141, UK-French electricity interconnector opens up, increasing scope for competition, 12 March 2001. See also MEMO/01/76, Role of interconnectors in the electricity market. A competition perspective, outlining additional cases, 12 March 2001.
68 See also Case AT.39.727 – CEZ (2013), where Article 102 was used against hoarding of transmission capacity pre-empting third-party market entry.
70 See P. Lessche, Competition Law and Regulation in European Telecommunications (Hart Publishing, 2009), 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.
19. 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. Necessarily, in these markets competition law plays a more prominent role than that of a supplement to single market regulation. For example, in the postal sector it is difficult to understand or apply the elaborate system of accounting requirements established by the single market First Postal Services Directive (1997) unless they are viewed in the light of the concept of cross-subsidisation as defined in competition law. More important has been the use of competition law to control activities and sectors that are outside the scope of single market regulation, and the fact that the exclusion of activities from single market regulation was accepted for the purpose of universal service provision, thus pre-empting an Article 106(2) defence. Also, the establishment of independent postal authorities to supervise the obligations set out in single market postal regulation has been governed by competition law, allowing the Commission to intervene directly against insufficient independence. 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. 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 IP (2001) and the already cited GVGF/S are examples of this. 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 remailing services in Germany. In GVGF/S the incumbent railway operator had initially ignored and later stalled requests for negotiations for seven years, rendering the rights established by the Directive useless. In both cases the Commission was therefore compelled to use Article 102 to ensure that agreements were entered into as provided for in the single market regulation.

20. Due to the monopolistic nature of newly liberalised sectors, Article 102 plays a prominent role. However, Article 101 has also been applied in parallel manner. In the air transport sector access to listing in a computer reservation system and different forms of joint selling of tickets (called interlining) were early identified as essential for market access, the former as travel agencies relied heavily on such systems and the latter as...
it allows operators to sell a single ticket, which comprises segments to be performed by different airlines. This issue was therefore governed by regulations, adopted under Article 101(3), and a mix of Articles 101 and 102 applied to failures to comply with their principles, as demonstrated by London European – Sabena (1988) and British Midland v. Aer Lingus (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 these sectors, all calling on competition law to play an essential and much more prominent role that normally understood.

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

21. 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 investigations. The Visa I and Visa II decisions (2001 and 2002) not only paused twenty-five 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) was only granted after Visa agreed to reduce charges beyond what was required by the Regulation on cross-border payments in euro, 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. Through competition law the Commission removed 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-empive 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 that might 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 (1991) and in Atlas and Phoenix/Global One (1996) within the postal and telecom sector respectively. 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 EDI/Louis Dreyfus (1999) energy merger.

22. More elaborate solutions would become available once single market regulations were adopted. Mergers such as DHL/Deutsche Post (1998), Deutsche Post/Securico (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 VEBALIVAG (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. Over time even more drastic steps were introduced as demonstrated by Neste/IVO (1998), Deutsche Post P (2001), Telia/Sonera (1999) and E.ON (2008). 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 case, not even separation of the infrastructure was considered sufficient to satisfy the Commission, making divestiture of electricity infrastructure a requirement. Further, the abuse had involved manipulation of the market price through

86 Case IV/M.102 – TNI/Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post. The same approach was used in case COMP/M.141 – Deutsche Post in order to close an Article 102 case.
88 Case COMP/M.1557 – EDI/Louis Dreyfus.
89 Case IV/M.1168 – DHL/Deutsche Post.
90 Case IV/M.1347 – Deutsche Post/Securico.
91 Case COMP/M.1673 – VEBALIVAG, rectal 244.
92 According to Directive 96/92/EC (“First Electricity Directive”) Article 14(3), separate accounts were to be maintained for generation, transmission and distribution.
93 Case COMP/M.931 – Neste/IVO.
94 Case COMP/M.55.141 – Deutsche Post. In contrast to the other cases referred to, this case concerned an infringement of Article 102 rather than a merger.
95 Case COMP/M.2803 – Telia/Sonera.
98 Case COMP/M.1557 – EDI/Louis Dreyfus.
99 Case IV/M.1168 – DHL/Deutsche Post.

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withholding of production (electricity) capacity, an issue subsequently addressed in the REMIT Regulation, mandating ex ante actions and review from the national energy regulators. Notable would also be the already cited Regulation on cross-border payments as the updated and expanded version required market actors to submit certain information to the Commission for the purposes of an updated Article 101 notice. However, as this requirement was not complied with, the Commission published a draft working paper (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. Against this it can be demonstrated how competition law has been (ab)used to give leverage to the enforcement of adopted single market regulations.

3. Mopping up imperfections and distortions

23. 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 a 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 (1999) the Commission noted that Article 102 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 (1999) and UK/French interconnector (2001) it was held that the methods for allocating scarce capacity should be transparent and non-discriminatory and that an auction therefore would be preferable.”

24. While void of actual examples it has even been suggested that Article 102 might be used against insufficient investment in transmission capacity if motivated by a strategy of pre-empt new entrants. While this is a rather novel extension of the concept of abuse, it would not be entirely without precedent—e.g., Deutsche Bahn (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. Further, in Baltic Rail (2017), the elimination of track for the purpose of securing a pre-emptive foreclosure was held abusive giving further support for the position. Other notable energy cases are Marathon (2001), BEH Electricity (2015) and Gazprom (2018). In the first, the Article 102 investigation was suspended after the network owner committed...
to accept third-party access to a gas pipeline, including supplementary services. In the remaining two, suspension was available subject to commitments lifting the reselling restriction on electricity and gas respectively, and in BEH Electricity supplemented with establishing an electricity pool. Hence, companies were obliged to actively facilitate the emergence of competition and not merely to refrain from impeding it. The remarkable leniency demonstrated in Verbändevereinbarung¹¹⁹ (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 market entry by newcomers by providing better management of bottlenecks and scarcity of resources across sectors such as railways,¹²⁰ telecommunications,¹²¹ harbour infrastructures,¹²² air transport (slots),¹²³ financial services¹²⁴ and media.¹²⁵ 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 League¹²⁶ (2003) is an excellent example of the novelty displayed in pursuing these cases. Having identified unexploited rights relating to football, the Commission moved on to conclude that the then exclusive allocation of rights did not have any beneficial effects for the television broadcasting market.¹²⁷ 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 impetus 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.”¹²⁸

²⁵. In parallel with the correction 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 GEMA case (1971).¹³⁰ 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 IFPI “Simulcasting”¹³¹ (2002) and Cannes Extension Agreement¹³² (2006). Here 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.¹³³ 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.¹³⁴ 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 management¹³⁵ (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, 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

¹²¹ See, e.g., case COMP/M.1439 – Telefónica, regarding access to the local loop; and case COMP/M.1766 – Mannci (Orange) on access to mobile licences and spectrum.
¹²⁶ See cases COMP/2.37.398 – Joint selling of the commercial rights of the UEFA Champions League.
¹²⁸ Commission Press Release IP/03/1105, Commission clarifies UEFA’s new policy regarding the sale of the media rights to the Champions League, 24 July 2003.

¹²⁹ Some legitimate can be found in previous cases, e.g., case IV/31.734 – Film Purchases by German Television Stations, OJ 1981 L 224/36, 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.
¹³¹ Case COMP/C/38.014 – IFPI “Simulcasting.”
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 structures rather than merely safeguard against further impediments caused by imperfections in single market regulation.

4. Competition law used to identify problems and challenges

27. It is one thing to remedy problems or give leverage to enforcement against impediments, but it is another, equally important, 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.\(^{144}\) 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 \( \text{REIMS I} \)\(^{145}\) (1995), \( \text{REIMS II} \)\(^{144}\) (1999), successive industrial agreements in the postal sector, and the first Postal Services Directive\(^{146}\) (1997) adopted in between. Not only did the parties in \( \text{REIMS II} \) wisely incorporate elements from the Directive directly into their notified agreement, it is also plausible to see the Directive as having been influenced by \( \text{REIMS I} \).\(^{146}\) Further, cases such as \( \text{Verbändereinigung} \) (1998) and \( \text{VEBA/VL} \) (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,\(^{147}\) illustrating how competition law cases can be used to explore the need for additional regulation.

28. 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\textsuperscript{148}—tariffs for leased lines\textsuperscript{149} (1999), roaming\textsuperscript{151} (2000) and access to the local loop\textsuperscript{152} (2000). This model has also been used for media\textsuperscript{153} (2005), energy\textsuperscript{154} (2007), financial services\textsuperscript{155} (2007), pharmaceutical services and products\textsuperscript{156} (2009) and e-commerce\textsuperscript{157} (2016)\textsuperscript{158} in order to identify impediments to the single market regardless of their origins: regulatory gaps, market distortions or (clearly) inadequate national implementation. Both the inquiries on pharmaceutical and e-commerce were followed by single market initiatives—the former the (re)launch of proposal for an EU-patent system\textsuperscript{159} and the latter the Geo-blocking Regulation\textsuperscript{(2018)}\textsuperscript{160} 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 re-tabling old proposals.

5. Competition law as the basis comes packaged in a regulatory agenda

29. 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 Recommendation on collective cross-border management (2005) and the steps preceding it were not warmly welcomed by neither industry nor the European Parliament.\textsuperscript{161} 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 (competition) law was perhaps influenced by the Commission's failure to ensure voluntary compliance and by a reasonable assessment of the chances of success at the European Parliament. In the light of this, it could be submitted 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 \textit{Verbändevereinbarung} in order to meet the requirements of the market is perhaps the clearest example of the remarkable leniency that is occasionally demonstrated, but not an isolated case.\textsuperscript{162}

30. 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 by competition law. This development has mostly gone smoothly and without intervention from the Commission. However, Article 106 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 its control and subject to the Commission's opinions and priorities. Once again it can be argued that while clearly short of regulation, allowing competition law to serve as a basis for the single market comes with a flavour of this as the changes in the priorities and regulatory approach will inevitably appear to subject to some level of arbitrariness rather than the consistent pursuit of economic welfare gains.

\textsuperscript{148} Pursuant to Article 12 of Regulation 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.

\textsuperscript{149} \textit{See the Commission’s XXVIII Report on Competition Policy (1998), pp. 79–81.}

\textsuperscript{150} \textit{See the Commission’s XXIX Report on Competition Policy (1999), pp. 74–76.}

\textsuperscript{151} \textit{See the Commission’s XXX Report on Competition Policy (2000), pp. 159–160.}

\textsuperscript{152} Ibid., pp. 155–156.

\textsuperscript{153} \textit{Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks, 21 September 2005.}


\textsuperscript{156} \textit{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, 8 July 2009.}

\textsuperscript{157} \textit{Preliminary Report on the E-commerce Sector Inquiry, SWD(2016) 312 final.}

\textsuperscript{158} \textit{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.}

\textsuperscript{159} \textit{See Commission Press Release IP/09/1098, Antitrust: shortcomings in pharmaceutical sector require further action, 8 July 2009.}

\textsuperscript{160} \textit{Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market.}


\textsuperscript{162} See C. Bergqvist, \textit{Between Regulation and Deregulation} (DJOF, 2016), pp. 339–340 for further on this.
V. Competition law as a driver of the development of the single market

31. 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. However, this was not limited to the removal of minor regulatory obstacles to the single market as demonstrated in Lufthansa/SAS/United Airlines or BilK/Deutsche Post. It had a much broader role. For example, competition law allowed a freeing up of wholesale generation and transmission capacity in many energy mergers, fostering competition from the bottom up. A very prominent role, as the adopted single market regulation initially provided immunity to old long-term reservation agreements, when it came to access to the grid, as explained earlier. Further, the liberalisation of the telecommunications sector came about by the adoption of directives because Article 106(3) allows competition law to serve directly as regulation negating the need for involving the Council and the Member States. 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 this market as it comes about.

1. Developing a market from the ground up

32. Transforming a sector from a monopoly to a competitive market is a process. The first step entails the removal of legal restrictions. The second step has to be taken by the market players. While the telecom 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. Here, competition law has proven a handy instrument in the process, as its remedies can achieve more than merely preventing further impediments. One consistent merger remedy used to clear transactions involving incumbent airlines has been the surrender of take-off and landing rights (slots) at airports, 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 mobile communication and electricity. This was initially mainly in order to clear concentrations, but more recently increasingly to close ongoing investigations under Articles 101 and 102. Further, in the telecom sector concentrations such as Telia/Telenor\(^\text{164}\) (1999) and Telia/Sonera\(^\text{165}\) (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 the millennium and thus a suitable instrument for inducing competition.

33. The remodelling of a market using competition law 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 does not even require rights to be relinquished but could be limited to abstaining from certain activities or affiliations which are considered problematic. The\(^\text{166}\) EDF/Louis Dreyfus\(^\text{167}\) (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. 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 2020 that only three decisions were adopted establishing infringements of Articles 101 and 102,\(^\text{168}\) despite the sector inquiry (2007) uncovering serious impediments and potential infringements. The E.ON case\(^\text{169}\) (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 of competition law, 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. Equally interesting would be BEH Electricity\(^\text{32}\) (2015) and Gazprom\(^\text{33}\) (2018) as the parties, as part of the settlement, here accepted to establish an electricity pool and a gas-swapping program, respectively, for the purpose of grooming the emerging of wholesale markets. Consequently, competition law remedies have been...

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164 COMP/M.1439 – Telenor.
165 COMP/M.2803 – Telenor.
166 Case COMP/M.1557 – EDF/Louis Dreyfus.

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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.

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

34. The use of competition law, including Article 106, 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 to Atlas and Phoenix/Global One\(^170\) (1996) is a primer on this, as the establishment of a telecom joint venture between the incumbent operators in Germany and France was considered problematic unless national laws were amended to limit the use of reserved rights—rights otherwise permissible under Article 106 and in principle authorised by the Commission.\(^171\) By using its power to grant exemptions under Article 101(3), the Commission has forced national liberalisation beyond what was required by single market regulation. At the same time, the Commission launched the idea of full liberalisation of the telecom sector allowing the remedies to 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. Against this, it could be argued that the Commission occasionally uses its power to scrutinise concentrations and infringements to put pressure on the Council to adopt proposed single market regulation,\(^172\) moving its development forward.

35. 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.\(^173\) Pre-merger impediments outside the control of the parties are therefore in principle not held against them.\(^174\) This should also be the position under Article 102 as dominance is not in itself prohibited. Nevertheless, the Commission has willingly remedied pre-existing dominant positions and there are no indications that such considerations have guided the Commission. Following the General Court’s ruling in EDP\(^175\) (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 that goes 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 been used in support of the single market agenda. In 1994 the Commission put forward a proposal for a Directive\(^176\) on cross-border credit transfers, and in the following year a notice on the matter under competition law.\(^177\) The Directive\(^178\) was adopted in 1997 but later replaced by two regulations.\(^179\) As a supplement to the regulations the Commission even circulated (2009) a working document\(^180\) outlining the application of Article 101 to multilateral interbank payments. While it is natural to see a link where the notice addresses issues on which 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\(^181\) and telecommunications.\(^182\) However, competition law can be more than a supplement, as illustrated by the Commission’s approach to local loop unbundling\(^183\) in the telecom sector. This approach was first introduced as a Union instrument using commitments in the case of the Telia/Telenor\(^184\) (1999) merger, and it was later made a general obligation under Article 102 by the publication in 2000 of a communication from the Commission\(^185\).

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171 As detailed earlier the liberalisation of the telecom sector came about through a series of successive directives adopted under Article 106(3) thereby in principle authorising the retaining of certain activities in France and Germany. For further on the use of Article 106 to liberalise the telecom sector see P Larouche, Competition Law and Regulation in European Telecommunications (Hart Publishing, 2008), pp. 39–47.


173 See Case IV/M.1347 – Deutsche Post/Securicor, recital 44.


175 Case T-7/05 – EDP v. Commission, para 86–96.

176 Commission Proposal for a Directive on cross-border credit transfers, COM(94) 436.

177 Notice on the application of the EC competition rules to cross-border credit transfers, OJ 1995 C 251/3.

178 Directive 97/5/EC on cross-border credit transfers.


181 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 392/2.


183 “Local loop” refers to the physical circuit between the customer’s premises and the telecommunications operator’s local switch or equivalent facility.

184 Case COMP/M.1439 – Telia/Telenor.

185 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, COM(2000) 237.
and eventually secured by the adoption of a regulation.\textsuperscript{186} in the 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 politically well-connected) undertakings.

36. The \textit{E.ON} case (2008) 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.\textsuperscript{187} 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,\textsuperscript{188} 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 Electricity Directive\textsuperscript{189} (2009), which was adopted to address the impediments identified by the sector inquiry, only provides for optional ownership unbundling. The \textit{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 \textit{Atlas} and \textit{Phoenix/Global One} cases. Further, while the Third Electricity Directive did not mandate structural unbundling, it did prevent negating already adopted and further specifically allowed for voluntarily unbundling.\textsuperscript{190} While the first prevented Member States from undoing commitments (already) secured under competition law, the latter cemented the instrument as Member States could not prohibit it nationally.

37. The approach to \textit{IP} rights also fits the prevailing pattern. For example, the examination of \textit{IP} rights under competition law, and particularly refusals to grant licences, has mainly involved rights such as copyright and thus \textit{IP} rights that might not qualify as \textit{IP} rights in the eyes of the enforcer.\textsuperscript{191} Without either rebutting or questioning this observation, a more adequate argument would be that competition law has primarily been applied to \textit{IP} rights that are not subject to Union harmonisation. This would offer a new perspective on the Commission’s interest in the pharmaceutical sector, the implied infringements identified in the sector inquiry and the parallel attempts to establish a community patent. In the light of this, the Recommendation on collective cross-border management (2005) and the \textit{CISAC} (2008) case might also require reconsideration. In between the Recommendation and \textit{CISAC} the Service Directive\textsuperscript{192} (2006) was finally adopted following prolonged negotiations. A notable feature of the Directive is the inclusion of \textit{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.\textsuperscript{193} Steps that have caused considerably turbulence in the sector but perhaps smoothed the subsequent adoption (2014) of the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.\textsuperscript{194} The current interest into geoblocking and platforms might also form part of this pattern. Following the e-commerce inquiry\textsuperscript{195} (2016), detailing how cross-border sales were restricted by blocking or directing customers based upon their nationality \textit{Guess}\textsuperscript{196} (2018), \textit{Paramount}\textsuperscript{197} (2019) and \textit{NBCUniversal}\textsuperscript{198} (2020) were delivered, three cases not only condemning different forms of geoblocking, but also signalling a renewed interest for vertical restrictions under Article 101, otherwise not considered a priority since the late 1990s. Further, while the matter now is governed by the Geoblocking Regulation\textsuperscript{199} (2018) this

\begin{footnotesize}
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  \item[186] Regulation (EC) No. 2887/2000 on unbundled access to the local loop.
  \item[187] See recitals 41–44 of the decision.
  \item[188] \textit{E.ON} was either single dominant, with a market share below 30\%, or a member of a loose trio of joint dominant undertakings while the abuse involved retaining of electricity when the market price exceeded marginal costs (MC). Normally, excessive pricing is benchmarked against average total costs (ATC), indicating either a redetermination of the notions of dominance and abuse or a case that could not have been finalised. For further see C. Bergqvist, \textit{Benson Regulation and Deregulation} (DRIE, 2016), p. 315.
  \item[191] \textit{Directive 2006/12/EC on services in the internal market.}
  \item[193] Directive 2014/24/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
  \item[196] Case AT-40428 – \textit{Guess}.
  \item[197] Case AT-40023 – Cross-border access to pay-TV (\textit{Paramount}).
  \item[198] Case AT-40433 – Film merchandise.
  \item[199] Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market.
\end{itemize}
\end{footnotesize}
does not apply to IP rights, making it plausible that more cases will follow if accepted that the Commission enforcement priorities are partly guided by single market considerations. In respect to platforms the Platform Regulation200 (2019) sets out targeted mandatory rules, e.g., in respect to ranking, and self-favouring in the digital economy. However, neither can be isolated from Google Shopping201 (2017) identifying an obligation under Article 102 to secure ranking neutrality and refrain from self-favouring. Further, void of this decision political support for adopting the Platform Regulation might have been lacking, and should Google Shopping be overturned on appeal, enforcement of this will be complicated.202

3. Promoting regulation comes with a political flavour

38. Introducing regulation via the backdoor of competition law also has some less attractive side effects. While the adoption of a formal decision pursuant to Article 101 or 102 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 negating the need to identify substantial and persistent impediment to competition and the single market. It is sufficient to identify low level of competition and allegations of impediments, which 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 European Parliament demands equally persuasive arguments, the role is somewhat persistent and it might even be possible that it includes the current interest for national tax arrangements under the EU State aid while the legal merits for some of the rendered decisions are debatable,203 they have secured renewed debate of the relevance for EU regulation on the matter of national company tax codes and principles. A matter currently, unregulated on community level.

40. The more advanced interaction between competition law and single market regulation not only creates a need for a more complex understanding of the matter, it should perhaps also influence any calls for a modified 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 corporate special interest groups which are deprived of their ability to lobby the Council and the European Parliament when the Commission short-circuits these more traditional routes. This does not make the bid more welcome or attractive, but it puts it into the right perspective, making a call for a more active political involvement an indirect consequence of the use of competition law in a quasi-regulatory role.

VI. Concluding remarks

39. While an industrial policy has not been directly embraced under competition law, there are nonetheless 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 European 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 regulation. Further, while changing across the years in intensity, the role is somewhat persistent and it might even be possible that it includes the current interest for national tax arrangements under the EU State aid. While the legal merits for some of the rendered decisions are debatable,204 they have secured renewed debate of the relevance for EU regulation on the matter of national company tax codes and principles. A matter currently, unregulated on community level.

200 Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services. See recitals 4–8 for outline of its object.


203 Council Regulation 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.

204 For further see, e.g., L. Lovdahl Gormsen & C. Mifsud-Bonnici, Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax, 8 Journal of European Competition Law & Practice 423–436 (2017).
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