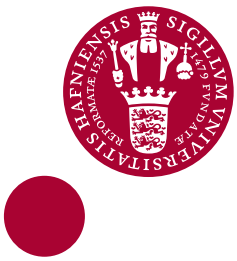

Pursuing regulatory objectives under competition law

Bergqvist, Christian

Published in:
Concurrences

Publication date:
2020

Document version
Publisher's PDF, also known as Version of record

Document license:
Unspecified

Citation for published version (APA):
Bergqvist, C. (2020). Pursuing regulatory objectives under competition law. *Concurrences*, *2*, [Concurrences N° 2-2020].

Concurrences

REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

Pursuing regulatory objectives under competition law

Article | Concurrences N° 2-2020
www.concurrences.com

Christian Bergqvist
cbe@jur.ku.dk
Associate Professor
University of Copenhagen

INSTITUT de droit de la concurrence

+ Article

Christian Bergqvist*
cbe@jur.ku.dk

Associate Professor
University of Copenhagen

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.[1] 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.[2] The blocking of *Siemens/Alstom*[3] (2019) appears to have galvanised this as the Commission stood its ground regardless of mounting political pressure to clear the merger unconditionally.[4] 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.[5]

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).

2 *See*, for example, D. Geradin & I. Girgenson, Industrial Policy and European Merger Control – A reassessment (2011), *TILEC Discussion Paper* No. 2011-053, available at SSRN: https://ssrn.com/abstract=1937586.

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. 1.70–1.72. 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*.

*The paper was initially presented at the Aims and Value in Competition Law Conference (Copenhagen, 2012), but has been updated and redrafted to reflect subsequent development. The author welcomes comments.

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.

I. The fundamentals of competition law and single market regulation

4. While competition law has traditionally been concerned with enhancing economic welfare, and consumer welfare in particular,[6] 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 *See*, e.g., former Commissioner Neelie Kroes, SPEECH/05/512, Delivering Better Markets and Better Choices, European Consumer and Competition Day, London, 15 September 2005.

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.[7] 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

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-Consten*[8] (1966), competition law can be used to prevent the use of national law (in this case on IP rights) to partition the single market.[9] This is normally a role played by single market regulation. In contrast with the traditional perception of a limited interaction between single market

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. Commission*[10] (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 Paper[11] 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 in the UK to a liberalised market, 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 rather than by the undertakings directly affected, but the Court of Justice sided with the Commission. 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.[13] 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 uninfluenced 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*.

11 Towards a Dynamic European Economy, Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(87) 290.

12 Case IV/29.877 – *British Telecommunications*, OJ 1982 L 360/36. Upheld by case C-41/83 – *Italy v. Commission*.

13 A more formal and direct link is identified by S. K Schmidt, Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity, 16 *Journal of Public Policy* 233–271 (1996), p. 243.

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 doctrine[14] 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 Telekom*[15] (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 *Telefónica*[19] (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 Frankfurt*[23] (1998) and *Verbändevereinbarung*[24] (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 question[26] 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

14 *See* Van Bael & Bellis, *Competition Law of the European Community* (Wolters Kluwer, 2010), pp. 527–530.

15 Case T-271/03 – *Deutsche Telekom v. Commission*; *see* para 70–71 and 151. Upheld by case C-280/08 P – *Deutsche Telekom*.

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*, recitals 2–4. This was also the initial position of the Commission, as the case originated as a non-implementation 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/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* (DJOF, 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.

24 The Commission's XXVIII Report on Competition Policy (1998), pp. 156–159.

25 Directive 96/67/EC on access to the groundhandling 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*[27] (2004) and *Football Association Premier League*[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[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.[30] Consequently, in both cases the parties were in principle breaching 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: *United Brands*,[31] *British Leyland*,[32] *Irish Sugar*,[33] *PO/World Cup 1998*,[34] and *Portugal v. Commission*[35], 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*[36] (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,[37] 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,[38] "patent ambush"[39] and "sham litigation."[40] All these situations involve different levels of regulatory shortcomings, either in the legislation, or in enforcement of the legislation by Member States,[41] or both.

13. As isolated examples, there is little to object to the legal arguments in each of the cited cases.[42] 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.[43] 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.[44] 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 *GVG/FS*[45] (2003) and *Swedish Interconnectors*[46] (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[47] the Commission could have taken action on this basis,[48] but it favoured resorting to competition law. Largely the same approach was utilised in *Telekomunikacja Polska*[49] (2011) and *Slovak Telekom*[50] (2014), in the former against stalling of negotiations and in the latter the retaining of technical access information, all hold abusive and contradictive to Article 102,[51] in situations where the obligations followed from adopted sector-specific obligation. In reality, the latter

27 Case T-201/04 – *Microsoft*.

28 Joined cases C-403/08 and 429/08 – *Football Association Premier League*.

29 Case COMP/C-3/37.792 – *Microsoft*, recitals 743–763 referring to Council Directive 91/250/EEC on the legal protection of computer programs.

30 *See* recitals 104–108, 114–117, 121 and 138–139.

31 Case C-27/76 – *United Brands v. Commission*, paras. 204–234.

32 Case C-226/84 – *British Leyland v. Commission*.

33 Case T-228/97 – *Irish Sugar v. Commission*.

34 Case IV/36.888 – *PO/World Cup 1998*.

35 Case C-163/99 – *Portugal v. Commission*.

36 Case T-228/97 – *Irish Sugar v. Commission*, para. 185.

37 For further *see* D. Geradin & N. Petit, Price Discrimination Under EC Competition Law: The Need for a case-by-case Approach, *Global Competition Law Centre Working Paper* No. 07/05, pp. 44–45, available online.

38 Case COMP/A.37.507/F3 – *AstraZeneca*. *See also* case IV/31.043 – *Tetra Pak II*, OJ 1992 L 72/1, recitals 22 and 163–164.

39 For examples of and a definition of a "patent ambush" *see* Commission Press Release MEMO/07/330, Antitrust: Commission confirms sending a Statement of Objections to Rambus, 23 August 2007.

40 *See* Case T-111/96 – *ITT Promedia v. Commission*, para 72–73; and Commission Press Release IP/12/345, Antitrust: Commission opens proceedings against Motorola, 3 April 2012.

41 A more systematic outline of the use of competition law to correct problems in the IP system has been provided by J. Schovsbo, Fire and Water Make Steam: Redefining the Role of Competition Law in TRIPS (2009), available at SSRN: http://ssrn.com/abstract=1339346; and by F. Lévêque, Pharmaceutical Regulation and Intellectual Property: the Third Side of the Triangle, *CERNA Working Paper* 2009-03, available at: https://hal-mines-paristech.archives-ouvertes.fr/hal-00488206/document. Both papers consider the nature of the problems in the IP systems.

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

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

44 Case COMP/C-1/37.451, 37.578, 37.579 – *Deutsche Telekom*, paras. 2–4.

45 Case COMP/37.685 – *GVG/FS*.

46 Case COMP/39.351 – *Swedish Interconnectors*.

47 Primarily Directive 95/19/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.

48 Or alternatively directly on applicable provisions in the TFEU, as noted in case COMP/39.351 – *Swedish Interconnectors*, recital 43.

49 COMP/39.525 – *Telekomunikacja Polska*, recitals 704 and 803–807. Ultimately upheld with case C-295/12P – *Telefónica SA and Telefónica España*.

50 COMP/39.523 – *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*.

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 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). This step was initially opposed by the Member States but ultimately accepted in exchange for them having a level of involvement and influence.[52] Additional substance was given to the role of competition law by the Guidelines on the application of competition rules in the telecommunications sector[53] (1991) and a notice on access agreements[54] (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.[55] *Deutsche Telekom* can be seen in this context, especially if compared with the contemporary *UK Network Sharing Agreement* (2003).[56] 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[57] (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*[58] (2006) in the absence of sufficiently strong regulatory deterrence but not in *HFC Bank Plc/British Gas Trading Ltd*[59] (1997) following assurances from the national sectoral regulator.[60] Principles utilised more specifically in *ELIA/IFM/50HERTZ*[61] (2010) and *RWE/Essent*[62] (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

52 *See* P. Larouche, *Competition Law and Regulation in European Telecommunications* (Hart Publishing, 2000), pp. 39–47.

53 Guidelines on the application of EEC competition rules in the telecommunications sector, OJ 1991 C 233/2.

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 – *O2 UK/T-Mobile UK*, recital 104. *See also* case COMP/M.3695 – *BT/Radianz*, recital 42; and case COMP/M.1439 – *Telia/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.

59 The Commission's XXVII Report on Competition Policy (1997), pp. 130–131.

60 For further examples *see* N. Petit, Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the *Trinko* Case (2004), available at: https://www.semanticscholar.org/paper/Circumscribing-the-scope-of-EC-competition-law-in-A-Petit/eb4dc090b4bcb3a9ec2194cbdbd32ed644b4c4a3.

61 COMP/M.5827 – *ELIA/IFM/50HERTZ*, recitals 34 and 37. *See also* COMP/M.5365 – *IPO/EnBW/Praha/PT*, recital 35.

62 COMP/M.5467 – *RWE/Essent*, recitals 204–206 and 217.

Swedish Interconnectors and *GVG/FS*, 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 *Telefónica*[63] (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 *Verbändevereinbarung*, 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, predating market opening, and more importantly, upon request from the Member States, subject to derogations under the First Electricity Directive[65] (1996). Here, competition law provided a useful instrument as demonstrated in *Skagerrak Cable*[66] (2000) and *UK/France Interconnector*[67] (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.[70] Despite the decision to switch to using

63 Case COMP/38.784 – *Wanadoo 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-17/03 – *VEMW and others* overturned this as detailed by C. Jones (ed.), *EU Energy Law*, Vol. 1 (3rd edition, Claeys & Casteels, 2010), pp. 68–75.

66 Case COMP/E/37.125 – *Statkraft/Elsam - Interconnector capacity. See* XXX Report on Competition Policy (2000), p. 155.

67 *See* Commission Press Release IP/01/341, 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 hoaxing of transmission capacity pre-empting third-party market entry.

69 *See* S. K. Schmidt, Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity, 16 *Journal of Public Policy* 233–271 (1996), pp. 242–249, and C. Bergqvist, *Between Regulation and Deregulation* (DJOF, 2016), pp. 274–278.

70 *See* P. 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.

traditional single market regulation in the energy sector, the option of using Article 106(3) was never officially abandoned, giving the Commission some political leverage.[71] 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.[72] 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.[73] Also, across the two sectors the initial single market regulation did not call for the markets to be fully open 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). 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.

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.[74] 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[75] (1997) unless they are viewed in the light of the concept of cross-subsidisation as defined in competition law.[76] More important has been the use of competition law to control activities and sectors that are outside the scope of single market regulation,[77] and the fact that the exclusion of activities from single market regulation[78] 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.[79] 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.[80] 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*[81] (2001) and the already cited *GVG/FS* are examples of this.[82] 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 reposting services in Germany. In *GVG/FS* the incumbent railway operator had initially ignored and later stalled requests for negotiations for seven years,[83] 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

71 *See* S. K. Schmidt, Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity, 16 *Journal of Public Policy* 233–271 (1996), pp. 265–266.

72 The term "stranded costs" refers to various forms of, e.g., long-term commitments, predating market liberalisation, but difficult to honour subsequently. Directive 96/92/EC ("First Electricity Directive") Article 24 provided for derogations to deal with the issue of stranded costs. However, most Member States opted for capitalisation under the State aid rules; *see* J. Faull & A. Nikpay, *The EC Law of Competition* (2nd edition, Oxford University Press, 2007), pp. 1383–1384.

73 Directive 2003/54/EC ("Second Electricity Directive"), Article 2(21); and Directive 2009/72/EC ("Third Electricity Directive"), recital 13.

74 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.

75 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.

76 *See* D. Geradin & D. Henry, Regulatory and Competition Law Remedies in the Postal Sector, in D Geradin (ed.), *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation* (Intersentia, 2004), pp. 133–134.

77 *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.

78 Under Article 7 of Directive 97/67/EC ("First Postal Services 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.

79 *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.

80 Directive 97/67/EC ("First Postal Services 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 ("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.

81 Case COMP/36.915 – *Deutsche Post – Interception of cross-border mail*.

82 *See also* case COMP/38.745 – *BdKEP/Deutsche Post AG* for an example of the application of Article 102 in a case of failure to conclude certain agreements provided for by single market regulation.

83 *See* case COMP/37.685 – *GVG/FS*, recitals 28–32, explaining how the initial request from 1992 had never been answered and the negotiations not handled professionally.

it allows operators to sell a single ticket, which comprises segments to be performed by different airlines. This issue was therefore governed by regulations,[84] 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*[85] (1988) and *British Midland v. Aer Lingus*[86] (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[87] (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,[88] 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-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 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*[89] (1991) and in *Atlas* and *Phoenix/Global One* (1996)[90] 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 *EDF/Louis Dreyfus*[91] (1999) energy merger.

22. More elaborate solutions would become available once single market regulations were adopted. Mergers such as *DHL/Deutsche Post*[92] (1998), *Deutsche Post/Securicor*[93] (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*[94] (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.[95] Over time even more drastic steps were introduced as demonstrated by *Neste/IVO*[96] (1998), *Deutsche Post I*[97] (2001), *Telia/Sonera*[98] (1999) and *E.ON*[99] (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

84 At that time Commission Regulation (EEC) No. 2672/88 and Commission Regulation (EEC) No. 84/91.

85 Case IV/32.318 – *London European – Sabena*, OJ 1988 L 317/47.

86 Case IV/33.544 – *British Midland v.Aer Lingus*, OJ 1992 L 96/34.

87 Case COMP/29.373 – *Visa International*, and case COMP/29. – *Visa International – Multilateral Interchange Fee*. For practical reasons the Commission split the case into two separate decisions (with the same number).. Further, the decision only signalled a pause as the Commission would return to the issue of interchange fees as detailed by J. Faull & A. Nikpay, *The EC Law of Competition* (3rd edition, Oxford University Press, 2014), pp. 1523–1532.

88 Regulation (EC) No. 2560/2001 on cross-border payments in euro.

89 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 case.

90 Case IV/35.337 – *Atlas*, OJ 1996 L 239/23 and case IV/35.617 – *Phoenix/Global One*, OJ 1996 L 239/57.

91 Case COMP/M.1557 – *EDF/Louis Dreyfus.*

92 Case IV/M.1168 – *DHL/Deutsche Post*.

93 Case IV/M.1347 – *Deutsche Post/Securicor.*

94 Case COMP/M.1673 – *VEBA/VIAG*, recital 244.

95 According to Directive 96/92/EC ("First Electricity Directive") Article 14(3), separate accounts were to be maintained for generation, transmission and distribution.

96 Case COMP/M.931 – *Neste/IVO.*

97 Case COMP/35.141 – *Deutsche Post*. In contrast to the other cases referred to, this case concerned an infringement of Article 102 rather than a merger.

98 Case COMP/M.2803 – *Telia/Sonera*.

99 Case COMP/39.388 – *German Electricity Wholesale Market*; and COMP/39.389 – *German Electricity Balancing Market*. For a critical analysis *see* M. Sadowska, Energy Liberalization in Antitrust Straitjacket: A Plant Too Far, *EUI Working Papers RSCAS* 2011/34.

withholding of production (electricity) capacity, an issue subsequently addressed in the REMIT Regulation[100] (2011), 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[101] 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[102] (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*[103] (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*[104] (1999) and *UK/French interconnector*[105] (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. *Swedish Interconnectors*[106] (2010) and *DK/DE Interconnector*[107] (2018) cases related to the same issue, as it was claimed that transmission capacity was wrongly withheld in order to reserve cheap electricity for Swedish/German consumers at the expense of Danish consumers. However, the actions were undertaken as a consequence of domestic congestion issues, and in principles addressed *ex ante* in the Cross-Border Transmission Regulation[108] (2009) mandating the use of market-based instruments against congestion. Rather than pursuing a normal non-implementation case, competition law served to secure correct national implementation, arguably because it was faster but hard to reconcile with the Commission's tacitly developed priority rule. Further, in 2004 the Commission had even announced that it henceforth would move to formal decisions[109] in the energy sector, with less clemency for infringements.[110]

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.[111] 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*[112] (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.[113] Further, in *Baltic Rail*[114] (2017), the elimination of track for the purpose of securing a pre-emptive foreclosure was held abusive giving further support for the position.[115] Other notable energy cases are *Marathon*[116] (2001), *BEH Electricity*[117] (2015) and *Gazprom*[118] (2018). In the first, the Article 102 investigation was suspended after the network owner committed

100 Regulation (EU) No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency.

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

102 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, SEC(2009) 1472.

103 *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.

104 Case IV/E-3/37.589 – *Irish Interconnector*, summarised in the Commission's XXIX Report on Competition Policy (1999), pp. 165–166.

105 Case COMP/E-3/38.015 – *UK/France interconnector*, summarised in the Commission's XXXI Report on Competition Policy (2001), pp. 208–209.

106 Case COMP/39.351 – *Swedish Interconnectors*.

107 Case AT.40461 – *DK/DE Interconnector*.

108 Council Regulation (EC) No. 714/2009 on conditions for access to the network for cross-border exchanges in electricity. *Swedish Interconnectors* was advanced under the former transmission regulation (No. 1228/2003) as the new regulation had not entered into force. However, following a new Annex in 2006, no differences existed between the two on congestion management.

109 *See*, e.g., XXXIII Report on Competition Policy (2003), recital 97.

110 Commission Press Release IP/04/1310, Commission confirms that territorial restriction clauses in the gas sector restrict competition, 26 October 2004.

111 *See* Commission Staff Working Paper on the European Gas and Electricity Sectors, COM(2006) 851, recitals 157–159.

112 Case T-229/94 – *Deutsche Bahn v. Commission*, para 87–93.

113 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.

114 Case AT.39813 – *Baltic Rail*, recitals 177–178. On appeal as T-814/17 – *Lietuvos geležinkeliai*.

115 *See also* case AT.39.727– *CEZ* (2013), where Article 102 was used against hoaxing of transmission capacity pre-empting third-party market entry.

116 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*.

117 Case AT.39767 – *BEH Electricity*.

118 Case AT.39816 – *Upstream gas supplies in Central and Eastern Europe. See also* Commission Press Release IP/07/1074, Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts, involving a variation of the destination clauses, 11 July 2007.

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 *Verbändevereinbarung*[119] (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 services[124] 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 League*[126] (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 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 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*."[128] 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.[129] Equally unusual is the use of competition law to pursue allocative efficiencies directly and not as normally indirectly and through competition.

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 Agreement*[132] (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 management[135] (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

119 *See* the Commission's XXVIII Report on Competition Policy (1998), pp. 156–159.

120 *See* case IV/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.

121 *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 licences and spectrums.

122 *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.

123 *See* R. Whish & D. Bailey, *Competition Law* (9th edition, Oxford University Press, 2018), pp. 1006–1007.

124 *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, 15 November 2011.

125 *See*, e.g., cases COMP/C.2-37.398 – *Joint selling of the commercial rights of the UEFA Champions League*, COMP/37.214 – *DFB*, COMP/M.2876 – *NEWSCORP/TELEPIU*, and Commission Press Release IP/03/1748, Commission reaches provisional agreement with FA Premier League and BSkyB over football rights, 16 December 2003.

126 Case COMP/C.2-37.398 – *Joint selling of the commercial rights of the UEFA Champions League.*

127 *See* recitals 19, 22–24 and 115–116. *See also* N. 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 online.

128 Commission Press Release IP/03/1105, Commission clears UEFA's new policy regarding the sale of the media rights to the Champions League, 24 July 2003.

129 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.

130 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*, for the same approach.

131 Case COMP/C2/38.014 – *IFPI "Simulcasting."*

132 Case COMP/C2/38.681 – *The Cannes Extension Agreement*. *See also* case COMP/C2/39.151 – *SABAM* and case COMP/C2/39.152 – *BUMA* ("Santiago Agreement").

133 *See* COMP/C2/38.014 – *IFPI "Simulcasting,"* recitals 14–16 and 61–62.

134 For a discussion of the application of competition law to royalty collection societies *see* L. Guibault & S. van Gompel, Collective Management in the European Union, in D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (2nd edition, Kluwer Law International, 2010), pp. 135–167.

135 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.

in *CISAC*[136] (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.[137]

26. 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.[138] 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*[139] (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.[140] Finally, the Commission's decision in *BdKEP/Deutsche Post AG*[141] (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 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.[142] 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*[143] (1995), *REIMS II*[144] (1999), successive industrial agreements in the postal sector, and the first Postal Services Directive[145] (1997) adopted in between. 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*.[146] 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,[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

136 COMP/C2/38.698 – *CISAC*. Part of the case was later overturned by the General Court.

137 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.

138 *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, 17 September 2008. For a presentation of the work of the Roundtable *see* C. A. Toffolon, The Online Commerce Roundtable – Advocating improved access to online music for EU consumers, *Competition Policy Newsletter*, DG COMP No. 1-2010, pp. 46–50.

139 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.

140 *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.

141 Case COMP/38.745 – *BdKEP/Deutsche Post AG*.

142 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.

143 Case IV/35.849 – *REIMS I*, OJ 1996 C 42/7.

144 Case IV/36.748 – *REIMS II*. OJ 1999 L 275/17.

145 Directive 97/67/EC ("First Postal Services Directive").

146 For further on *REIMS I* and *II* and the link with the: First Postal Services Directive, *see* D. Geradin & D. Henry, Regulatory and Competition Law Remedies in the Postal Sector, in D Geradin (ed.), *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation* (Intersentia, 2004), pp. 136–137.

147 Directive 2003/54/EC ("Second Electricity Directive") did require the Member States to regulate grid access also in respect of pricing.

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[148] into issues such as pricing[149] (1998), tariffs for leased lines[150] (1999), roaming[151] (2000) and access to the local loop[152] (2000). This model has also been used for media[153] (2005), energy[154] (2007), financial services[155] (2007), pharmaceutical services and products[156] (2009) and e-commerce[157] (2016) [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 (2009)[159] and the latter the Geo-blocking Regulation (2018).[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.[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 *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.[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 be subject to some level of arbitrariness rather than the consistent pursuit of economic welfare gains.

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.

149 *See* the Commission's XXVIII Report on Competition Policy (1998), pp. 79–81.

150 *See* the Commission's XXIX Report on Competition Policy (1999), pp. 74–76.

151 *See* the Commission's XXX Report on Competition Policy (2000), pp. 159–160.

152 Ibid., pp. 155–156.

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

154 Communication from the Commission – Inquiry pursuant to Article 17 of Regulation (EC) No. 1/2003 into the European gas and electricity sectors, COM(2006) 851.

155 Communication from the Commission – Sector Inquiry under Article 17 of Regulation No. 1/2003 on business insurance, COM(2007) 556, and Communication from the Commission – Sector Inquiry under Article 17 of Regulation No. 1/2003 on retail banking, COM(2007) 33.

156 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.

157 Preliminary Report on the E-commerce Sector Inquiry, SWD(2016) 312 final.

158 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.

159 *See* Commission Press Release IP/09/1098, Antitrust: shortcomings in pharmaceutical sector require further action, 8 July 2009.

160 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.

161 L. Guibault & S. van Gompel, Collective Management in the European Union, in D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (2nd edition, Kluwer Law International, 2010), pp. 155–160.

162 *See* C. Bergqvist, *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 *BdKEP/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,[163] 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*[164] (1999) and *Telia/Sonera*[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 *EDF/Louis Dreyfus*[166] (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.[167] 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,[168] despite the sector inquiry (2007) uncovering serious impediments and potential infringements. The *E.ON* case[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* (2015) and *Gazprom* (2018) as the parties, as part of the settlement, here accepted to establishing 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

163 *See* R. Whish & D. Bailey, *Competition Law* (9th edition, Oxford University Press, 2018), p. 1007 for examples.

164 COMP/M.1439 – *Telia/Telenor.*

165 COMP/M.2803 – *Telia/Sonera.*

166 Case COMP/M.1557 – *EDF/Louis Dreyfus.*

167 *See also* case COMP/M.2947 – *Verbund/Energie Allianz*, in which commitments were given, including accelerated implementation of the structural separations stipulated by Directive 2003/54/EC ("Second Electricity Directive").

168 Infringements were identified in case COMP/39.401 – *E.ON/GDF* (2009), case AT.39952 – *Power Exchanges* (2014) and case AT 39984 – *Romanian Power Exchange/OPCOM*, in the first and second in the form of market-sharing agreements, and in the last in the form of a discriminatory practice involving requirement of Romanian VAT number as a trading condition. In case COMP/38.700 – *Greek Lignite and Electricity Markets* Article 106 was used against a Greek attempt to negate the liberalisation process.

169 Cases COMP/39.388 – *German Electricity Wholesale Market* and COMP/39.389 – *German Electricity Balancing Market*. For a critical analysis *see* M. Sadowska, Energy Liberalization in Antitrust Straitjacket: A Plant Too Far, *EUI Working Papers RSCAS* 2011/34.

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]

170 Case 35.337 – *Atlas*, OJ 1996 L 239/23; and case IV/35.617 – *Phoenix/Global One*, OJ 1996 L 239/57.

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, 2000), pp. 39–47.

172 For further *see*, e.g., S. K Schmidt, Commission activism: subsuming telecommunications and electricity under European Competition law, 5 *Journal of Public Policy* 169–184 (1998); and S. K Schmidt, Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity, 16 *Journal of Public Policy* 233–271 (1996), p. 245

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

174 *See* D. Went, The Acceptability of Remedies Under the EC Merger Regulation: Structural Versus Behavioural, *ECLR* 2006, pp. 458–459.

175 Case T-87/05 – *EDP v. Commission*, para 86–96.

176 Commission Proposal for a Directive on cross-border 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.

179 Regulation (EC) No. 2560/2001 on cross-border payments in euro; and Regulation (EC) No. 924/2009 on cross-border payments in the Community.

180 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, SEC(2009) 1472.

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 39/02.

182 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.

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,[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 *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.[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,[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[189] (2009), which was adopted to address the impediments identified by the sector inquiry, 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. Further, while the Third Electricity Directive did not mandate structural unbundling, it did prevent negating already adopted and further specifically allowed for voluntarily unbundling.[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 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 IP rights that might not qualify as IP rights in the eyes of the enforcer.[191] 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 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 *CISAC* (2008) case might also require reconsideration. In between the Recommendation and *CISAC* the Service Directive[192] (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.[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.[194] The current interest into geoblocking and platforms might also form part of this pattern. Following the e-commerce inquiry[195] (2016), detailing how cross-border sales were restricted by blocking or directing customers based upon their nationality *Guess*[196] (2018), *Paramount*[197] (2019) and *NBCUniversal*[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[199] (2018) this

186 Regulation (EC) No. 2887/2000 on unbundled access to the local loop.

187 *See* recitals 41–44 of the decision.

188 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 redefinition of the notions of dominance and abuse or a case that could not have been finalised. For further *see* C. Bergqvist, *Between Regulation and Deregulation* (DJOF, 2016), p. 315.

189 Directive 2009/72/EC ("Third Electricity Directive").

190 Ibid., Article 9(11)

191 *See* R. Whish & D. Bailey, *Competition Law* (9th edition, Oxford University Press, 2018), p. 817 for examples.

192 Directive 2006/123/EC on services in the internal market.

193 *See* T. Riis, Collecting Societies, Competition, and the Service Directive, 6 Journal of Intellectual Property Law & Practice 482–493 (2011).

194 Directive 2014/26/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.

195 Preliminary Report on the E-commerce Sector Inquiry, SWD(2016) 312 final.

196 Case AT.40428 – *Guess.*

197 Case AT.40023 – *Cross-border access to pay-TV (Paramount)*.

198 Case AT.40433 – *Film merchandise.*

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.

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 Regulation[200] (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 Shopping*[201] (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 Enforcement Regulation[203] 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 involved remedies used not only to clear concentrations but also to deal with infringements under Articles 101 and 102. 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. Using competition law in this way to drive the single market clearly comes with a flavour of regulation and regulatory objectives.

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.

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. ■

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.

201 Case COMP/39740 – *Google Search (Shopping)*. On appeal as case T-612/17 – *Google and Alphabet*, OJ 2017 C 369/51.

202 For further on the Platform Regulation and Article 102 *see* C. Bergqvist, Discrimination and Self-favoring in the Digital Economy (February 4, 2020), available at SSRN: https://ssrn.com/abstract=3531688.

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).

Concurrences

Concurrences est une revue trimestrielle couvrant l'ensemble des questions de droits de l'Union européenne et interne de la concurrence. Les analyses de fond sont effectuées sous forme d'articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L'actualité jurisprudentielle et législative est couverte par onze chroniques thématiques.

Editoriaux

Jacques Attali, Elie Cohen, Claus-Dieter Ehlermann, Jean Pisani Ferry, Ian Forrester, Eleanor Fox, Douglas H. Ginsburg, Laurence Idot, Frédéric Jenny, Arnaud Montebourg, Mario Monti, Gilbert Parleani, Jacques Steenbergen, Margrethe Vestager, Bo Vesterdorf, Denis Waelbroeck, Marc van der Woude...

Interviews

Sir Christopher Bellamy, Lord David Currie, Thierry Dahan, Jean-Louis Debré, Isabelle de Silva, François Fillon, John Fingleton, Renata B. Hesse, François Hollande, William Kovacic, Neelie Kroes, Christine Lagarde, Johannes Laitenberger, Emmanuel Macron, Robert Mahnke, Ségolène Royal, Nicolas Sarkozy, Marie-Laure Sauty de Chalon, Tommaso Valletti, Christine Varney...

Dossiers

Jacques Barrot, Jean-François Bellis, David Bosco, Murielle Chagny, John Connor, Damien Géradin, Assimakis Komninos, Christophe Lemaire, Ioannis Lianos, Pierre Moscovici, Jorge Padilla, Emil Paulis, Robert Saint-Esteben, Jacques Steenbergen, Florian Wagner-von Papp, Richard Whish...

Articles

Guy Canivet, Emmanuelle Claudel, Emmanuel Combe, Thierry Dahan, Luc Gyselen, Daniel Fasquelle, Barry Hawk, Nathalie Homobono, Laurence Idot, Frédéric Jenny, Bruno Lasserre, Luc Peeperkorn, Anne Perrot, Nicolas Petit, Catherine Prieto, Patrick Rey, Joseph Vogel, Wouter Wils...

Pratiques

Tableaux jurisprudentiels : Actualité des enquêtes de concurrence, Contentieux indemnitaire des pratiques anticoncurrencielles, Bilan de la pratique des engagements, Droit pénal et concurrence, Legal privilege, Cartel Profiles in the EU...

International

Belgium, Brésil, Canada, China, Germany, Hong-Kong, India, Japan, Luxembourg, Switzerland, Sweden, USA...

Droit & économie

Emmanuel Combe, Philippe Choné, Laurent Flochel, Frédéric Jenny, Gildas de Muizon, Jorge Padilla, Penelope Papandropoulos, Anne Perrot, Nicolas Petit, Etienne Pfister, Francesco Rosati, David Sevy, David Spector...

Chroniques

Ententes

Ludovic Bernardeau, Anne-Sophie Choné Grimaldi, Michel Debroux, Etienne Thomas

Pratiques unilatérales

Laurent Binet, Frédéric Marty, Anne Wachsmann

Pratiques commerciales déloyales

Frédéric Buy, Valérie Durand, Jean-Louis Fourgoux, Rodolphe Mesa, Marie-Claude Mitchell

Distribution

Nicolas Ereseo, Dominique Ferré, Didier Ferrier, Anne-Cécile Martin

Concentrations

Jean-François Bellis, Olivier Billard, Jean-Mathieu Cot, Ianis Girgenson, Sergio Sorinas, David Tayar

Aides d'État

Jacques Derenne, Bruno Stromsky, Raphaël Vuitton

Procédures

Pascal Cardonnel, Alexandre Lacresse, Christophe Lemaire

Régulations

Orion Berg, Hubert Delzangles, Emmanuel Guillaume

Mise en concurrence

Bertrand du Marais, Arnaud Sée

Actions publiques

Jean-Philippe Kovar, Francesco Martucci, Stéphane Rodrigues

Droits européens et étrangers

Walid Chaiehloudj, Sophie-Anne Descoubes, Marianne Faessel, Pierre Kobel, Silvia Pietrini, Jean-Christophe Roda, François Souty, Stéphanie Yon-Courtin

Livres

Sous la direction de Stéphane Rodrigues

Revues

Christelle Adjémian, Mathilde Brabant, Emmanuel Frot, Alain Ronzano, Bastien Thomas

Tarifs 2020

Abonnement Concurrences +

Devis sur demande
Quote upon request

Revue et Bulletin : Versions imprimée (Revue) et électroniques (Revue et Bulletin) (avec accès multipostes pendant 1 an aux archives)
Review and Bulletin: Print (Review) and electronic versions (Review and Bulletin)
(unlimited users access for 1 year to archives)

Conférences : Accès aux documents et supports (Concurrences et universités partenaires)
Conferences: Access to all documents and recording (Concurrences and partner universities)

Livres : Accès à tous les e-Books
Books: Access to all e-Books

Abonnements Basic

e-Bulletin e-Competitions | e-Bulletin e-Competitions

	HT Without tax	TTC Tax included
☐ Version électronique (accès monoposte au dernier N° en ligne pendant 1 an, pas d'accès aux archives) *Electronic version (single user access to the latest online issue for 1 year, no access to archives)*	805,00 €	822,00 €

Revue Concurrences | Review Concurrences

☐ Version électronique (accès monoposte au dernier N° en ligne pendant 1 an, pas d'accès aux archives) *Electronic version (single user access to the latest online issue for 1 year, no access to archives)*	595,00 €	607,50 €
☐ Version imprimée (4 N° pendant un an, pas d'accès aux archives) *Print version (4 issues for 1 year, no access to archives)*	635,00 €	648 €

Pour s'assurer de la validité des prix pratiqués, veuillez consulter le site www.concurrences.com ou demandez un devis personnalisé à webmaster@concurrences.com.

To ensure the validity of the prices charged, please visit www.concurrences.com or request a personalised quote from webmaster@concurrences.com.

Renseignements | Subscriber details

Prénom - Nom | *First name - Name* . . . . . .

Courriel | *e-mail* . . . . . .

Institution | *Institution* . . . . . .

Rue | *Street* . . . . . .

Ville | *City* . . . . . .

Code postal | *Zip Code* . . . . . Pays | *Country* . . . . . .

N° TVA intracommunautaire | *VAT number (EU)* . . . . . .

Formulaire à retourner à | Send your order to:

Institut de droit de la concurrence
19 avenue Jean Aicard - 75011 Paris - France | webmaster@concurrences.com

Conditions générales (extrait) | *Subscription information*
Les commandes sont fermes. L'envoi de la Revue et/ou du Bulletin ont lieu dès réception du paiement complet. Consultez les conditions d'utilisation du site sur www.concurrences.com ("Notice légale").

Orders are firm and payments are not refundable. Reception of the Review and on-line access to the Review and/or the Bulletin require full prepayment. For "Terms of use", see www.concurrences.com.

Frais d'expédition Revue hors France 30 € | *30 € extra charge for shipping Review outside France*