chapter [ ]

Use and Abuse of Competition Law in Pursuit of the Single Market. Has Competition Law Served as Regulation Subject to a Quasi Industrial Policy Agenda?[1]

The call for an enhanced role for industrial policy considerations has traditionally been relegated to the darkest corner of the competition law universe with limited support. In accordance with this the presumption has been that no such considerations have influenced the Commission´s enforcement priorities. However, the reality tends, as often is the case, to be more complicated. In pursuit of the Single Market, competition law has occasionally served a regulatory role that comes with a flavour of industrial policy. Hence, it would be too simplistic to exclude industrial policy considerations as an objective advanced under competition law if a broader definition is applied.

While it`s not entirely clear what governs the understanding and application of competition law,[2] consideration of industrial policy in the form of governmental intervention in the market with the intention of correcting imperfections and facilitating structural changes as part of a larger plan are normally not considered included.[3] Neither has any serious call for change emerged outside the ranks of a limited number of politicians and it could therefore, with some justification, be argued that there neither has nor should be any room for an industrial policy agenda under competition law. Viewed from an overall perspective the submission appears to be correct as there are no material examples of the Commission turning a blind eye to serious impediments of competition for policy reasons or giving in to such pressure.[4] On the other hand, concluding that only welfare arguments have been accepted and advanced under competition law would be equally problematic, despite the conclusive arguments for emphasising this, as there are too many conflicting examples.[5] Further, over the years a pattern has emerged where the Commission in its enforcement priorities and decisions occasionally resorts to competition law to secure Single Market objectives in the absence of satisfactory Single Market regulation. Satisfactory regulation in the

[1] By associated professor, Christian Bergqvist, ph.d. Falculty of Law/University of Copenhagen. The paper was submitted for the *Conference on Aims and Values in Competition Law*, 20. September 2012 in Copenhagen and will be published in a fortcomming conerence publications in a updated version. Comments etc. be appreactied by mail to cbe@jur.ku.dk.

[2] For the purpose of this paper competition law will include Article 101, 102, 106 TFEU and the applicable Merger Regulations, currently Regulation 139/2004.

[3] There is no definitive definition of industrial policy available c.f. Liuis Navarro *Industrial policy in the economic literature. Recent theoretical developments and implications for EU policy*, Enterprise paper 12 DG Enterprise 2003 available on the internet. Hence, Industrial Policy could hold many meanings including "picking the winner strategies", the forming of "national champions" through protectionism and inducing innovation and development by public investments in R&D etc. Most of the available definitions does, however cover different forms of restructuring of sectors and industries in accordance with a "master plan".

[4] For potential examples of both see Damien Geradin & Ianis Girgenson *Industrial Policy and European Merger Control - A reassessment*. Available on the internet.

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

eyes of the Commission, which should neither be confused with regulation, nor the opinions of the Member States and the Council. A significant reservation, as the pattern entails examples where competition law has functioned as part of a wider and more political agenda, that in other capacities comes with, if not an after-taste at least a flavour of industrial policies. Consequently if pondered upon more meticulously and the concept of industrial policy is specified to entail any larger restructuring of sectors and industries with the purpose of attaining long term objectives, it could be submitted that competition law occasionally has served in a regulatory role as part of a quasi industrial policy agenda. The observations are made predominantly in newly liberalized sector from the 80ies and onward, but not limited to either of these. Consequently, the need for a more elaborate understanding of the interaction between competition law, Single Market regulation and their mutual influence has emerged. Further, this understanding should potentially include that while industrial policy hasn't been embraced, either directly or officially under competition law, its fingerprint might nevertheless be visible. This submission sets out with this double ambition.

1. The Fundamentals of Competition Law and Single Market Regulations

While competition law traditionally revolves around the question of enhanced welfare, consumer welfare in particular,[6] Single Market regulation, regardless of its form whether Directives or Regulations, is perceived to pursue a wider agenda of which the forming of a single integrated market is the predominant. Further, this could and should involve correcting market failures and any underlying structures facilitating these and other, seen from a community perspective, undesirable elements. Hence, Single Market regulation would often revolve around the very hallmark of industrial policy. Any such agenda would therefore normally be pursued within the frame of the Single Market and associated regulations and would subject to adequate support from the relevant legislative bodies, in contrast to competition law, be subject to few restrictions in the scope. There is of course a core of overlap between competition law and Single Market regulation, whether wide or narrow, as unrestricted competition would qualify as either an objective or instrument under both. In addition, competition law would with its link to economic theories and paradigms over time evolve, often parallel with changes in other regulatory theories, thereby mitigating the differences further as neither set of laws are static. On the other hand there are also many Single Market objectives including e.g. the opening and deregulation of markets, that would be perceived outside the scope of competition law, despite being a precondition for a meaningful application hereof. A market deprived of competition due to monopoly rights would after all offer little role for competition law. Further, when it comes to tailoring out very specific obligations and remedies, competition law is perceived to be less well suited compared to sector specific Single Market regulation.[7] A traditional perception of the interaction between competition law, Single Market regulation and any implied industrial policy agenda would be, that Single Market regulation paves the way for competition law and mitigates socially unwanted consequences of unrestricted competition once this emerges. Further, this process would in

[6] C.f. e.g. Monti Giorgio *EC Competition Law*, Cambridge 2007, p. 20 and Speech by Commissioner Neelie Kroes - SPEECH/05/512 – *Delivering Better Markets and Better Choices* European Consumer and Competition Day.

[7] That is the general perception which of course could be challenged but nevertheless would hold some wisdom. If not for other reasons than that competition law is ex post based and emphasises general principles and is thus less well positioned to provide for prudent, predictable and well tailored remedies in a transitional phase.

its very essence be of an industrial political nature as its embarked upon under a presumption of long term (welfare) gains associated with this and a corresponding loss by waiving the option. Once competition has emerged competition law would, however, come into play in full, ensuring that private restrictions don't replace governmental' in contrast to the stipulated objectives.

1.1. A Traditional Perception Would Entail a Limited Interaction

In accordance with the traditional perception most scholars confine themselves to portraying either competition law or Single Market regulation, with limited interest for any potential overlap or interaction. There is a high level of logic in this as Single Market regulation normally would be directed to Member States in contrast to competition law predominately directed to undertakings. Further, while the first could entail anything adoptable under community law the latter must in contrast, be confined to certain predefined objectives primarily of a welfare nature. On the other hand ignoring the overlap or failing to understand how Single Market regulation must be defined with respect for competition law would fundamentally neglect their secondary nature and associated inability to conflict with primarily law, in casu competition law. Further, as demonstrated as early as *Grundig Consten,*[8] (1966) the fourth case to be decided by the Commission, competition law could serve to correct unwanted use of national law (IP rights) portioning the Single Market.[9] A role normally filled by Single Market regulation. Hence, in contrast to the traditional perception of a limited interaction, it's apparent that Single Market regulation is developed and applied within the boundaries of competition law and potentially could be "corrected" in the case of substantial conflicts. Consequently, while not void there are lacunas in the traditional view of a limited interaction and no policy agenda associated with the application of competition law.

1.2. In Pursuit of a more Elaborate Interaction and Relationship

The interaction was developed further in *France vs. Commission,*[10] (1982) another early example of competition law used to correct Single Market deficits. In the specific case the Commission had under Article 106, Section 3, directed Member States to disclose their financial transactions with public undertakings, in order to prevent distorting state aid. A step that while logical from a community perspective nevertheless found little support with (some of) the Member States, and was unsuccessfully challenged by these, before the Court of Justice. However, once confirmed within the powers of the Commission, the adoption of Commission Directives, shortcutting the Council, had emerged as an effective instrument against obstinate Member States. An instrument that as demonstrated later would prove very potent not merely in the hands of a self-confident Commission in the 80ies, but also signal a redefined role for competition law. An even wider step was initiated with the liberalisation wave of the 80ies, of which the telecommunication sector is a prominent representative. While

[8] Joined cases 56 and 58/64 - *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*. ECR. English special edition, p. 299.
[9] The case does as explained below predate the development of the EU exhaustion doctrine leaving competition law the only readily available instrument.
[10] Joined cases 188 to 190/80 - *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*. ECR 1982, p. 2545.

normally associated with the tabling of the Commission Green Book[11] in 1987 and subsequent implementation from 1990 onward, the foundation where in reality laid earlier with *British Telecom*[12] (1982). Here it was held contradictive to Article 102, when British Telecom restricted access to call back arrangement, thereby de facto leveraging its monopoly rights to an (in UK) unreserved market. A move that once again would be challenged, but upheld by the Court of Justice, by a group of reluctant Member States rather than the directly affected undertakings. While not officially related, it's plausible to see a link between the outcome of *British Telecom* and *France vs. Commission* and the tabling of a Green Book recommending ending the unrestricted use of exclusive rights henceforth. If not for any other reason, that it seem less likely that the Commission would be willing to take another round with the Member States following a knockout blow in the first.[13] It's therefore possible to see an active role for competition law in the deregulation process embarked on in EU from the 80ies, and thereby also an underlying agenda of an industrial policy nature governing the first. Further, following *France vs. Commission* the Commission had been allotted a powerful instrument under competition law, as the process didn't require consent from the Member States.

2. A Pattern of Multirole for Competition Law in the Single Market

The prevailing pattern indicates not merely a close interaction between competition law and Single Market regulation and objects but also how the first, at least indirectly, are made subject to influence by considerations advanced as part of the latter. Further, the influence indicates how competition law in its interaction with Single Market regulation can serve in an unexpected function offering different forms of support. In reality it appears that no less than three positions can be identified, according to which competition law:

1. Offers a supplement to Single Market regulation and vice versa,
2. Is the rock upon which the Single Market and its regulation are built, and
3. Fuels the development of the Single Market and the regulation.

While the line between the positions might be some what foggy, it should in contrast stand out as rather clear that not only do the positions indicate a more elaborate interaction than the traditional perception, but also how competition law in reality has been used to promote the Single Market object and thereby de facto formed against this. As contemplated initially this does, if not directly challenge the presumption of no industry policy agenda under competition law, at least indicate the presence of a broader agenda than the traditional welfare based assumption. Below, the positions will be developed further. As already noted the line between these are less clear and a level of overlap therefore difficult to avoid.

[11] COM 87 290 - *Towards a dynamic European economy, green paper on the development of the common market for telecommunications services and equipment.*
[12] Case IV/29.877 - *British Telecommunications*, OJ 1982L 360, pp. 36-42. Upheld by the Court of Justice in case C-41/83 - *Italian Republic v Commission of the European Communities*, ECR 1985, p. 873.
[13] A more formal and direct link is identified by Susanne K Schmidt, *Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity*, 16 Journal of Public Policy 1997, p. 243.

3. Competition Law as a Supplement for Single Market Regulation

Against the traditional view most undertakings would, subject to the level of Single Market regulation, tend to focus on either competition law or Single Market compliance and limit their interest for the other accordingly. Consequently, it often stands out as, if not surprising, at least unwanted, that undertakings cannot confine themselves to the obligations advanced under sector specific regulation but also must make due to competition law. *Grundig Consten* offers, as already explained, an early example where rights granted under national IP law were considered incompatible with the Single Market and "corrected" under competition law. While the development of what would emerge as the "EC Exhaustion-Doctrine",[14] has filled the vacancy identified in *Grundig Consten,* and as Single Market regulation has filled other potential holes, these wouldn't render the role obsolete. This was demonstrated by *Deutsche Telekom*[15] (2003), where Article 102 was used against a margin squeeze infringement despite Single Market regulation reciting the need to pre-empt this.[16] Further, the involved undertaking (Deutsche Telekom) argued in vain that it fell short of any misconduct on the grounds that the applied wholesale prices had been supervised and approved by the national telecom regulator in accordance with sector specific Single Market regulation. Hence, by abiding by the adopted Single Market regulation immunity for competition law infringements should be levied and any misconduct "discussed" with the involved regulator and Member State. The position argued by Deutsche Telecom might be some what convenient, as the charged wholesale price exceeded the retail price, making the margin squeeze infringement obvious to all, save from apparently Deutsche Telekom. Further, the General Court rightly noted that the regulator had acted on submissions and suggestions from Deutsche Telekom,[17] thereby giving the latter sufficient scope for setting prices independently of the regulator and ultimately squeezing the competitor's margins. On the other hand, the considerations tabled by Deutsche Telekom, where not entirely void as the emerging principles also would be applicable when the disparity between whole- and retail prices, and any potential regulatory defaults, would be less obvious. Consequently a rather high burden is placed upon undertakings operating in tightly regulated sectors compelling these to adhere to two sets of regulations and associated enforcers. Further, approval from one of these doesn't disqualify the other despite overlaps in their fields of interest and considerations.

Neither *Grundig Consten* nor *Deutsche Telekom* are isolated examples of competition law used to correct regulatory deficits. Identical examples have been displayed in *FAG*[18] (1998) and *Verbändevereinbarung*[19] (1998).[20] In the first case against Frankfurt Airport's attempt to reserve certain ground handling services , irreconcilable with

[14] See Van Bael & Bellis, *Competition Law of the European Community*, 2005, pp. 585 – 588 for further.
[15] Case T 271/03 - *Deutsche Telekom AG vs. Commission of the European Communities.* ECR 2006, p. 2207. Se e.g. recital 70-71 and 151. Appealed, and upheld, by the Court of Justice as case C-280/08P - *Deutsche Telekom AG.*
[16] See *Regulation 2887/2000 on unbundled access to the local loop*, recital 11.
[17] See case T 271/03 - *Deutsche Telekom AG vs. Commission of the European Communities,* recital 37 and 122.
[18] Case IV/34.801 - *FAG - Flughafen Frankfurt/Main AG.* O.J. 1998L 72, p. 30. See recital 103-105 for further on the adopted single market regulation and the implied deficits relating to an incorrect national implementation.
[19] European Commission, XXVIII Report on Competition Policy (1998), pp. 156-159.
[20] See also COMP/38.745 - *BdKEP/Deutsche Post AG* for another example of competition law used against national regulation inducing discriminatory abuse thwarting the single market and most likely incompatable with the adopted single marked regulation.

the adopted Single Market regulation,[21] providing for self service or third party sourcing. A right the airport nevertheless attempted to render useless by contractual instruments compelling the Commission to apply Article 102. In the latter case in respect to a horizontal industry agreement governing the tariffs for access to the German electricity grid. An agreement that despite its cartel nature nevertheless could be considered essential as the adopted Directive,[22] specifically referred the matter to commercial negotiations. Presumably concluding that the agreement was less but perfect but better than nothing the Commission decided not to pursue the matter further taking the somewhat unusual step under Article 101 not to adopt any concluding decision. Even recent cases as *Microsoft*[23] (2007) and *Football Association Premier League*[24] (2011) could fit into this pattern. In the first the Commission originally advanced the position that the obligation to deliver the disputed information was regulated by Directive[25] obligating Microsoft to serve these. In the latter the Court of Justice in essence concluded that the IP owner by preventing pubs from concluding agreement with non domestic distributors of TV signals had stepped outside the delicate balance of interest established by the adopted Single Market Regulations.[26] Notable would also be the large trunk of cases involving national and geographical discrimination addressed under competition law of which *UBS*[27] (1978) *British Leyland*[28] (1986), *Irish Sugar*[29] (1999) and *PO/World Cup 1998*[30] (2000), *Portugal vs. Commission*[31] (2001) are prominent examples. Across activities such as the delivery of fruit, cars, air transport, sugar and sport leisure discriminatory practices favouring domestic consumers and undertakings or preventing parallel trade has been considered irreconcilable with the Single Market and condemned under Article 102. Irreconcilable as they, as expressed by the General Court in *Irish Sugar*[32] (1999) ran contrary to the "*essence of a common market*" by creating obstacles for this. However, few welfare arguments can be tabled in support of condemning geographical discrimination outright,[33] making Single Market regulation a more adequate remedy. This is of course subject to the qualification that economic welfare arguments should guide the application of competition law. Recently the doctrine has been applied to alleged misuse of the IP system, involving artificial extension of patents by unmeritorious applications and misrepresentations,[34] "patent ambush"[35] and "sham litigations".[36] All

[21] *Directive 96/67 on access to the ground handling market at Community airports.* OJ 1996L 272, pp. 36-45.
[22] Directive 1996/92 (the first electricity directives) allowed in Article 17 the Member States to regulate the issue of grid access or refer the issue to commercial negotiations. Germany had in its implementation utilized the latter option.
[23] Case T-201/04 - *Microsoft Corp. vs. Commission,* ECR 2007, II, p. 3601.
[24] Case C-403/08 and 429/08 – *Football Association Premier League*, ECR 2011.
[25] Case COMP/C-3/37.792 - *Microsoft,* recital 743-763 refering to directive 91/250.
[26] See recital 104-108, 114-117, 121 and 138-139 for these considerations.
[27] Case C-27/76 – *UBS vs. Commission,* ECR 1978, p. 9, recital 204-234.
[28] Case C-226/84 - *British Leyland plc.vs. Commission,* ECR 1986, p. 3263.
[29] Case T-228/97 – *Irish Sugar vs. the Commission*. ECR 1999, II, p. 2969.
[30] Case IV/36.888 - *PO/World Cup 1998.*
[31] Case C-163/99 - *Portuguese Republic vs Commission.* ECR 2001, p. I-2613.
[32] Case T-228/97 - *Irish Sugar vs.Commission*. ECR 1999, II, p. 2969, recital 185.
[33] For further see e.g. Damien Geradin and Nicolas Petit *Price Discrimination Under EC Competition Law: The Need for a case-by-case Approach* Global Competition Law Centre Working Paper Series No. 07/05, pp. 44-45. Availiable on the Internet
[34] C.f. COMP/37.507 - *Generics/Astra Zeneca.* See also case IV/31.043 – *Tetra Pak II*, O.J. 1992L 72, p. 1, recital 22 and 163-164.
[35] See e.g. MEMO/07/330 - *Antitrust: Commission confirms sending a Statement of Objections to Rambus* for examples of and a definition of "patent ambush".
[36] See e.g. case T-111/96 – *ITT Promedia NV vs. Commission*, ECR 1998, p. II-2937, recital 72-73 and IP12/3445 - *Antitrust: Commission opens proceedings against Motorola.*

situations involving different levels of regulatory deficits, either in the adopted regulation or the national management,[37] perhaps both.

As isolated examples little can be held against each of the cited cases as the legal arguments[38] generally are sound, proving a base for competition law as a supplement. However, if contemplated more meticulously the situation is less straight forward, in particular when recalled that the doctrine also covers ineffective regulation. An underlying reality of *Deutsche Telekom*, perhaps lost in translation or conveniently left out, where the neglectfulness of the designated Single Market regulator to adequately remedy the margin squeeze despite clear references in the adopted Single Market regulation.[39] Hence, the Commission could, and perhaps should, rightly have pursued the case as a non implementation case against Germany, and there are indications that this was the Commissions initial position.[40] However, eventually it was considered either more beneficial or correct, to pursue the matter under competition law, thereby confirming the role as a corrective instrument. The same approach was demonstrated in *GVG/FS*[41] (2003) and *Swedish Interconnectors*[42] (2010), where Article 102 was used against distorting behaviour in the rail- and electricity sector respectfully. In the first to the non granting of access to tracks and traction and in the latter to the periodic reduction of transmission capacity for other reasons than securing of supply. As the questions also where regulated in the adopted Single Market legislations,[43] most likely not providing for the engaged practices, the Commission could alternately have advanced the cases on this.[44] An option eventually waived in favour of a competition law settlement. Hence, the role as a supplement does potentially involve overruling ineffective regulation or regulatory neglects and in this process metering out the level hereof. Not only a rather significant expansion of the interaction but also a potential troublesome role.

3.1. The Role as a Supplement was Utilized Widely in the Liberalisation Process

It's difficult to date the emergence of the role for competition law as a supplement or assess its full scope. As already indicated, it was displayed as early as *Grundig Consten*, from 1966 but not developed fully before later. The telecommunication sector however offers, as already indicated, a primer. Initially competition law was intended to take a secondary role in the liberalisation process and the core of the regulation was to be built around sector specific Single Market regulation. Most likely against a presumption of substantial lacunas in competition law. Nevertheless, the Commission did almost from the outset embark on a road relying heavily on competition law e.g. by adopting the obligation to limit the use of exclusive and special rights, hence liberalize part of the sector, under Article 106, section 3. A step initially opposed by the

[37] A more systematic outline of the use of competition law to correct "problems" in the IP system has been provide by Jens Schovsbo, *Fire and Water Make Steam: Redefining the Role of Competition Law in TRIPS*, 2009 and by Francois Lévéque, *Pharmaceutical Regulation and Interlectual Property: the Third Side of the Triangle*, Working Paper 2009-03, pondering the nature of the problems in the IP systems. Both are available on the Internet.
[38] Save from *Verbändevereinbarung* that, however, should be viewed against the specific legal and political circumstances governing the agreement and the underlying EC Directive.
[39] See *Regulation 2887/2000 on unbundled access to the local loop*, recital 11.
[40] C.f. case COMP/C-1/37451 - *Price squeeze local loop Germany*, recital 2-4.
[41] COMP/37.685 - *Georg/Ferrovie.*
[42] Case 39.351 - *Swedish Interconnectors.*
[43] Primarily *Directive 1995/19 on the allocation of railway infrastructure capacity and the charging of infrastructure fees* and *Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity*.
[44] Alternative directly on applicable provisions in TFEU as noted in recital 43 of the decision.

Member States but ultimately accepted in exchange for a level of involvement and influence.[45] Additional substance to the role was added with the tabling of two subsequent Notices (1991 and 1998).[46] Not only detailing how competition law, in the eyes of the Commission, should be applied to the telecommunication sector but also that it could be waived subject to available and applicable Single Market regulation.[47] *Deutsche Telekom* can be viewed in context of this especially if compared with the temporal *UK Network Sharing Agreement*[48] (2003). In the latter the Commission left certain issues open in relation to a notified concentration as (effective) Single Market regulation was available should they emerge. The same approach was articulated more clearly in the guidelines on non-horizontal mergers[49] (2008) as a general principle under the Merger Regulation establishing how further appraisal could be waived subject to other (non merger) remedies. Accordingly intervention was required in *E.ON/MOL*[50] (2006) "*…. in the absence of sufficiently strong "regulatory" deterrence*" but not in *HFC Bank Plc/British Gas Trading Ltd*[51] (1997) following ensures from the national sector regulator.[52] Hence, the role as a supplement, across sectors and activities, appears subject to a priority rule according to which Single Market regulation should be preferred over competition law, if considered equally effective.

3.2. The Priority Rule Comes with Ambiguities and a Industrial Policy Flavour

According to the identified priority rule competition law should only serve as a supplement for sector regulation when the latter could be considered either ineffective or non-existing. In isolation the rules make some sense. If not for other reasons than that Single Market regulation presumable would remedy most legitimate conflicts leaving behind only those victims to either non or ineffective regulation. Hence, competition law could serve as a fall back position remedying problems unanswered or inadequately remedied in Single Market regulation. In correspondence herewith, hypothetical impediment of competition shouldn't warrant consideration under the Merger Regulation, if adequate remedies are available, as they should ensure that they would remain hypothetical. On the other hand elevating it to a general rule thereby demonstrating a preference for Single Market regulation is not uncontroversial. Any application against ineffective regulation, as demonstrated in *Deutsche Telekom* and perhaps *GVG/FS* and *Swedish Interconnectors* would, if not arbitrary, at least be subject to some ambiguities as it ultimately falls to the Commission to quantify the level of ineffectiveness and decide what to accept. Further, resorting to settlements as displayed in *Swedish Interconnectors* and *GVG/FS* not only circumvents the traditional in-

[45] See Pierre Larouche, *Competition law and regulation in European telecommunications*, Hart Publishing, 2000, pp. 39-47 for further.
[46] *Guidelines on the application of EEC competition rules in the telecommunications sector*, OJ 1991C 233, pp. 2-26 and *Notice on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles*, OJ 1998C 265, pp. 2-28.
[47] See recital 28 of the latter notice. See also Faull & Nikpay, *The EC Law of Competition*, Second Edition, Oxford 2007, pp. 1487 and 1489-1490 for further on the issue including the identifying of some ambiguity in Commission practices.
[48] Case 38.370 - *Network sharing UK (BT Cellnet + BT 3G + ONE2ONE Personal Communications)*, Recital 104. See also COMP/M.3695 - *BT/Radianz*, Recital 42 and COMP/M.1439 - *Telia/Telenor*, recital 169 for evaluations of sector regulation.
[49] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, recital 46.
[50] COMP/M.3696 - *E.ON/MOL*, recital 433.
[51] European Commission, XXVII Report on Competition Policy (1997), pp. 130-131.
[52] See Nicolas Petit *Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US*, available on the internet, for further examples and considerations.

fringement proceedings under Article 258 TFEU, depriving the courts of the ability to interpret EU law and the Member States to argue their case, but also gives the Commission a much more direct role in the national implementation of adopted Single Market regulation. The latter would in particular be troublesome when the adopted Single Market regulation represents a compromise rather than a coherent regulation intentionally leaving issues unaddressed.[53] A phenomenon that would be no stranger to a liberalisation process, potentially creating situations where the Commission latter could be compelled to either ignore the Member States, make its enforcement priorities subject to a more political agenda or perhaps even twist it to the extreme as demonstrated by *Verbändevereinbarung.* Further, in situation where the adopted Single Market regulation differs from the initial proposal of the Commission, any exercise of the priority rule, save from the obvious examples, could easy be tainted with the fingerprint of industrial policy if and when the Commission e.g. structures commitments with inspiration from their initial position. It could therefore be submitted that while not outright industrial policy the priority rule and any role as a supplement comes with a flavour hereof.

4. Competition Law: The rock Upon Which the Single Market can be Built

Following *France vs. Commission* the Commission had been allocated a powerful instrument under competition law as the objective of the Single Market could be pursued on the basis of commission Directives c.f. Article 106, Section 3 circumventing the Council and the Member States. This was utilized successfully in the telecommunication sector, where competition law would form the core of the adopted Single Market regulation in the early years and unsuccessfully in the energy sector following setbacks at the hand of the Court of Justice and insufficient general support.[54] Nevertheless, competition law had emerged as more than a supplement as it could be the very rock upon which the Single Market was built. An option that comes in variations as competition law either can offer principles and definitions, prime the sector by levelling distortions prior or parallel to the application of sector specific Single Market regulation or identify problems and challenges to be remedied under the latter. Hence, three sub positions can be identified warranting further exploration.

4.1. Competition Law as a Source of Principles and Definitions

Between 1988 and 1998 the liberalisation of the telecommunication sector came about by successive Commission Directives adopted pursuant to Article 106. Initially limiting and evidentially abolishing the use of special and exclusive rights in the sector. Further, many of the parallel Council Directives, adopted by the Council under the normal Single Market provisions, would either refer directly to terms defined by the Commission Directives, e.g. *special and exclusive rights*, or draw on general competition law principles e.g. the concept of *dominance* or the obligation not to mix commercial and regulatory interests.[55] Despite the decision to switch to (traditional)

[53] Directive 1996/92 (the first electricity directives) is a good example hereof with its many options for national derogations, including derogation for grid access under the single buyer system (Article 18) or national regulation of the term for grid access (Article 17).

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

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

Single Market regulation in the energy sector, the option of using Article 106 was never officially surrendered giving the Commission some leverage in the political process.[56] Further, competition law principles and concepts have played a pivoting role in the energy sector along the same lines as with telecom. E.g. by governing the separation between commercial and regulatory interests or indicating capitalization of "stranded cost" as an alternative to derogations, despite provisions for the latter in the adopted directive.[57] There are even examples in the energy regulation of definitions sourced directly from competition law, e.g. the concept of *vertically integrated* and *control* as defined under the Merger Regulation.[58] Further, across the two sectors the initial Single Market Regulation didn't call for full market opening but allowed the Member States to retain certain activities for the incumbent in order to secure universal services and pre-empt the use of Article 106, section 2. Hence, despite some differences the role played by competition law in respect to telecommunication and energy holds many similarities in respect to the sourcing of definitions, obligations and key concepts.

Viewed from a broader perspective it becomes apparent that the utilization of competition law principles, methodology and obligations aren´t isolated examples limited to telecommunication and energy. In the course of the 90ies other activities including postal, railroad and air transport underwent a parallel transition from monopoly to market calling on competition law in more advanced roles than merely a supplement.[59] In the postal sector its e.g. difficult to either understand or apply the elaborate system of accounting requirements established by the adopted Single Market Postal Directive unless viewed in the light of the concept of cross subsidising as defined under competition law.[60] More important has been the use of competition law against attempts to retain activities and segments beyond the area allowed by the adopted Single Market regulation,[61] and that reserving these[62] was in the first place only accepted for the purpose of universal services and thus pre-empt Article 106, section 2 defence in forthcoming cases. Further, it could also be noted how the establishment of independent post authorities, to supervise the obligations hammered out under the adopted Single Market postal regulation has been governed by competition law calling upon this in cases of insufficient levels of independence.[63] Hence, the postal sector did in

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

[57] The concept of "stranded cost" refers to different forms of often long term commitments predating market opening but difficult to honour subsequently. Article 24 of Directive 1996/92 (the first electricity directive) provided for derogations in order to handle i.a. stranded cost. Most member states did, however, prefer capitalization under the state aid rules c.f. Faull & Nikpay, *The EC Law of Competition*, 2nd edition Oxford 2007, pp. 1383-1384.

[58] C.f. Directive 2003/54 (the second electricity directive), Article 2, Section 21 and Directive 2009/72 (the third electricity directive), recital 13.

[59] It might even be identifiable outside newly liberalised sector. *Directive 2003/6/EC on insider dealing and market manipulation* does e.g. in article 1, section 2 refer to the creation of a "dominant position" as an example of prohibited market manipulation.

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

[61] See e.g. *Commission Decision of 21 December 2000 concerning proceedings pursuant to Article 86 of the EC Treaty in relation to the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy*, O.J. 2001L 63, p. 59.

[62] C.f. Directive 97/67 (the first postal directive), article 7 letters below 350 gram could be reserved for the incumbent as an instrument of securing USO.

[63] See e.g. *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*. O.J. 2002L 120, p. 19.

essence follow the same path as telecommunication and energy where competition law and Article 106 played a pivot role for the liberalisation process. It could also be noted how the initial Single Market Regulation didn´t provide for a fully open market in both the postal and rail sector, compelling newcomers to conclude service agreements with the incumbent in order to provide cross border services.[64] Service agreement concluded against a background of competition law, governing their terms and the obligation to negotiate in good faith. *Deutsche Post II*[65] (2001) and the already cited *GVG/FS* (2003) are examples hereof.[66] In the first the incumbent had in essence refused to accept that remail, that is mail collected by non incumbents, exported and later returned, could qualify as inbound cross border mail and hence liberalised by the adopted Single Market regulation. A surcharge had therefore been levied, services delayed and even injunctions obtained against undertakings offering remail services in Germany. In the latter case the incumbent rail operator had initially ignored and later stalled the request for negotiations for 7 years,[67] rendering the rights established by the Directive useless. In both cases the Commission was therefore compelled to use Article 102 in order to ensure the conclusions of agreements anticipated under the Single Market regulation. While Article 102 due to the monopolistic nature of newly liberalised sector, would serve in a prominent role Article 101 has also been applied. In the air transport sector access to be listed in a *Computer Reservations System* (CRS) was early identified as essential for market access as travel agencies increasingly relied on these. The issued was therefore regulated by Regulation[68] and Article 101 applied against failure to comply with its principles as demonstrated by *London European - Sabena*[69] (1988) and *British Midland v. Aer Lingus*[70] (1992). Despite the differences in the legal instrument facilitating the liberalisation processes it could therefore be submitted that the prevailing principles in essence are the same across sectors. Competition law has played an essential and central role.

4.2. Competition Law Priming the way for the Single Market

A new and much more powerful chapter on the interaction between competition law and the Single Market has been opened under the remedy instruments used to clear concentrations and close investigations. *VISA I* (2001) and *VISA II*[71] (2002) not only ended what would amount to 25 years of community interest into international payment cards but also stroke a prudent balance between the different interest groups involved and, most importantly, the Single Market. Exemption under Article 101, section 3 was only granted after VISA conceded to reduce charges beyond what was re-

[64] Directive 97/67 (the first postal directive) did e.g. differentiate between inbound and outbound mail reserving the first to the incumbent operator while the latter was subject to full liberalisation. Likewise did market access under Directive 91/440 (the first railroad directive) requiring the forming of an "international grouping" between the incumbent and the newcomer. Direct market access without the incumbent was not allowed.
[65] Case COMP/36.915 *Deutsche Post – Interception of cross-border mail.*
[66] See also case COMP/38.745 - *BdKEP/Deutsche Post AG* for an examples of Article 102 used against failure to conclude certain agreements provided by the adopted single market regulation.
[67] C.f. recital 28- 32 explaining how the initial request from 1992 had never been answered and latter not handled professionally.
[68] Currently *Regulation 80/2009 on a Code of Conduct for computerised reservation systems.*
[69] IV/32.318 - *London European – Sabena*, O.J. 1988L 317, p. 47.
[70] IV/33.544 - *British Midland v. Aer Lingus*, O.J. 1992L 96, p. 34.
[71] Case COMP/29.373 - *Visa International*. For practical reasons the Commission decided to split the case into two separate decisions. See Faull & Nikpay, *The EC Law of Competition*, Second Edition, Oxford 2007, pp. 1316-1326 for further on the case.

quired by the adopted Regulation on cross-border payment in euro,[72] applicable, as indicated by the name only to cross border transactions between EURO countries. An essential move, not merely because of the implied regulatory lacunas but also as most of the affected transaction would be domestic in nature and thus less obvious of community interest. Hence, by commitments the Commission fixed what could be an obstacle to the Single Market without "troubling" the Council. Even where Single Market regulation was available competition law could offer assistance. Regardless of the eminent risk of preferential treatment and cross subsidising the adopted Single Market Regulation might lack adequate pre-emptive remedies beyond accounting separations and in some cases not even this modest instrument. Hence, the actual enforcement of adopted provisions and principles might be subject to lacunas allowing infringements and other distortions elude detection. Initially this could be addressed by committing the involved parties under competition law to extend the terms and conditions applied internally to third party as demonstrated with *TNT/GD Net*[73] (1991) and *Atlas/Phoenix*[74] (1996). Further, restrictions created by delayed or insufficient national implementation of adopted Single Market regulations could be remedied by committing undertakings to refrain from certain commercial affiliations with the parent group until opening of the market had been achieved as demonstrated by the energy merger *Edf/Louise Dreyfuss*[75] (1999). Later, when Single Market regulation was adopted more elaborate solutions would come to hand. Postal mergers such as *DHL/Deutsche Post*[76] (1998) and *Deutsche Post/Securicor*[77] (1999) and the already cited *Atlas/Phoenix* (1996) was i.e. cleared by the establishing of separate accounts subject to external auditing. A remedy inspired by the already adopted regulation but which went beyond any obligations therein. Further, in the energy merger *VEBA/VIAG*[78](2000) the remedy package incorporated an obligation to segment the prices for certain customers into network-use charge, energy prices, metering/reading etc. thereby not only enhancing transparency and inhibiting cross subsidizing in generally but in essence transferring the already adopted accounting separation obligations onto the invoices.[79] As time went on even more drastic steps would be introduced as demonstrated by *Neste/IVO*[80] (1998), *Deutsche Post I*[81] (2001), *TELIA/SONERA*[82] (2002) and *EON*[83] (2008). In the first, divesture 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 of not seeking electing as chairman of the retained board members. In the two next cases structural separations, isolating the activities and infrastructure in separate subsidiaries, were introduced for post and telecommunication respectfully thereby making transactions more transpar-

[72] *Regulation 2560/2001 on cross-border payment in euro*.
[73] Case *IV/M.102 - TNT/CANADA POST, DBP POSTDIENST, LA POSTE, PTT POST & SWEDEN POST.* The same approach was used in case COMP/35.141 - *Deutsche Post* in order to close an article 102 case.
[74] Case 35.337 - *Atlas*, OJ. 1996L 239, p. 23 and case IV/35.617 - *Phoenix/Global One*, OJ 1996L 239, p. 57.
[75] COMP/M.21557 - *Edf/Louise Dreyfuss.*
[76] IV/M.1168 - *DHL/DEUTSCHE POST*
[77] IV/M.1347 - *DEUTSCHE POST/SECURICOR*
[78] Case COMP/M.1673 - *VEBA/VIAG*. See recital 244.
[79] According to Directive 96/92 (the first electricity Directive), Article 14, section 3 separate accounts where to be provided for production, transmission and distribution and submitted to the national regulator.
[80] Case COMP/M.931 - *Neste/IVO.*
[81] Case COMP/35.141 - *Deutsche Post.* The case is in contrast to the other cited cases an infringement and not a merger.
[82] COMP/M.2803 - *TELIA / SONERA*
[83] Case COMP/39.388 - *German electricity wholesale market* and COMP/39.389 - *German Electricity Balancing Market.* For a critical analysis of the case se Malgorzata Sadowska *Energy liberalization in antitrust straitjacket: A plant too far*, EUI Working Papers RSCAS 2011/34.

ent. In the final case not even isolation of the infrastructure was considered sufficient in order to appease the Commission and close the Article 102 case. Hence, divesture of the electricity infrastructure was incorporated into the adopted remedy package. Notable would also be the already cited Regulation on cross-border payments as the updated and expanded version[84] (2009) required the market actors to submit certain information to the Commission for the purpose of an updated Article 101 Notice. However, as the requirement was not honoured the Commission decided to issue the paper as a draft working paper[85] (2009) indicating not only its determination to pursue cases regardless of the missing data but most likely also that it would still be possible to influence the Commission´s view and understanding of the issue by e.g. submitting the requested information. What makes the cited cases and the adopted remedies notable is the implied presumption of inefficiencies. Not only in the Single Market Regulation but also in the enforcement and the use of competition law to overcome this across sectors as post, telecommunication, financial services and energy. Hence, it can be demonstrated how competition law has been used to give leverage to the enforcement of the already adopted Single Market Regulation.

4.3. Mopping Up Imperfections and Fixing Distortions

Besides giving leverage to the enforcement there are also examples of competition law being used to mop up imperfections in the underlying market hampering the development of the single market. Insufficient transmission capacities and bottlenecks are e.g. significant obstacles for the internal energy market even to the extents generations capacity are available at wholesale level. Particular interest has therefore been allocated to prices and principles for allocation of capacity on the international connections as a supplement to the freeing up of wholesale electricity capacity. In *Dutch Transmission case*[86] (1999) the Commission noted that Article 102 required national transmission charges to be cost based and separate charges for cross border trade only levied against actual costs. A cost that normally only would be endured when electrons were moved, which wouldn´t necessarily be the case when electricity was traded across a border. Further, in *Irish Interconnector*[87] (1999) and *UK/French interconnector*[88] (2001) it was held that the allocation methods of scarce capacity should be transparent and non-discriminatory and an auction method therefore would be preferable. In essence *Swedish Interconnectors*,[89] (2010) related to this, as it was claimed that transmission capacity was wrongly withhold in order to reserve cheap electricity for Swedish consumers at the expense of Danish'. Further, whilst never pursued, it has even been contemplated to use Article 102 against insufficient investments in transmission capacity, if part of a foreclosure strategy intending to pre-empt new entrants.[90] While a rather novel extension of the concept of abuse, it would not be entirely without precedence c.f. *Deutsche Bahn*[91] (1997). A case where the link between

[84] *Regulation 924/2009 on cross-border payments in the Community*, recital 11.
[85] *Commission Working Document on the 'Applicability of Article 81 of the EC Treaty to multilateral interbank-payments in SEPA Direct Debit.*
[86] Case IV/E3/37.770 - *Electricity transmission tariffs in the Netherlands.* See XXIX Report on Competition Policy (1999), p. 165 for resume.
[87] Case IV/E3/37.589 - *Irish Interconnector* and XXIX Report on Competition Policy (1999), pp. 165-166. The case related to gas but its principles could be transferred to electricity.
[88] COMP/E-3/38.012 - *UK/France interconnector* and XXXI Report on Competition Policy (2001), pp. 208-209.
[89] Case 39351 – *Swedish Interconnectors.*
[90] C.f. SEC 2006 1724 - *DG Competition report on energy sector inquiry*, recital 157-159.
[91] Case T-229/94 - *Deutsche Bahn AG vs. Commission*, ECR 1997, p. II-1689, recital 87-93.

the investments and the vertically integrated operators own downstream activities and interest in the rail sector where noted, but not condemned outright.[92] Another notable energy case is *Marathon*[93] (2001) where the Article 102 investigation only was suspended following commitments from the network owner not merely to accept third party access to a gaspipeline but also to facilitate this by offering supplementary services. Hence, the network owner was obligated to actively facilitate the emergence of competition and not merely referring from further impediments. Further, the Commissions interest was so significant that it where decided to pursue the settlement across the interest of the original plaintiff, having retracted their complaint. The remarkable leniency demonstrated in the *Verbändevereinbarung*[94] (1998) against a horizontal price agreement most likely follows from its relation to the issue of grid access and the pivot role played by this in the Single Energy Market. Outside the energy sector access to bottlenecks and scared resources, essential for facilitating the Single Market, has been eased under competition law across sector such as railroad,[95] telecommunication,[96] harbour infrastructures,[97] air transport (slots),[98] financial services[99] and media.[100] Many of the cited cases and sectors could warrant comments. The use of remedies to facilitate the emerging of new media services as demonstrated by *EUFA/Champions Leagues*[101] (2003) does however offer an excellent example of the novelty displayed when pursuing these cases. Following identifying of unexplored rights relating to football matches the Commission moved onto concluding that the current exclusive allocation didn't have any beneficial effects for the TV broadcasting market.[102] Hence, in the view of the Commission it would be possible to better utilize the rights by opening up for new services without damaging the interests of the current users. The conclusion is plausible but does indicate that the Commission has preferred to pursue allocative efficiencies directly rather than relying on competition in securing this. In the accompanying press state it's explained how the decision will "*…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. This was not in the interest of broadcasters, clubs, fans and consumers.*[103] Further, it appears to either have been

[92] The strategy formed part of other and more clear infringements e.g. discrimination and was therefore neither condemned outright nor isolated. On the other hand did the Commission and General Court find it relevant to recite the issue.

[93] COMP/E-3/36.245 - *Marathon* and XXXI Report on Competition Policy (2001), pp. 207-208. See also case COMP/M.2684 – *EnBW/ EDP/CAJASTUR / HIDROCANTABRICO*.

[94] See XXVIII Report on Competition Policy (1998), pp. 156-159.

[95] See e.g. case 32.490 - *Eurotunnel*, O.J. 1994L 354, p. 66 and case IV/34.518 - *ACI*, O.J. 1994L 224, p. 28. Both relating to the Eurotunnel between UK and France.

[96] See e.g. case COMP/M 1439 - *Telia/Telenor***,** regarding access to the local loop and COMP/M.1760 - *MANNESMANN /ORANGE* on access to mobile licenses and spectrums.

[97] See e.g. *94/119/EC: Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby*. O.J. 1994L 55, p. 52.

[98] For further see e.g. Giorgio Monti *EC Competition Law*, Cambridge 2007, pp. 476-478.

[99] See e.g. Case COMP/39.654 - *Reuters Instrument Codes* and IP/11/1354 - *Antitrust: Commission makes Standard & Poor's commitments to abolish fees for use of US International Securities Identification Numbers binding*.

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

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

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

[103] IP/03/1105 - *Commission clears UEFA's new policy regarding the sale of the media rights to the Champions League,*

forgotten or ignored that the Court of Justice traditionally has allotted IP agreements a strong protection against intervention under competition law, casting some doubt onto the legal ground for identifying infringements in the first place.[104]

Parallel to the correcting of market imperfections the Commission has also addressed the usual distortions of competition, however, sometimes in a novel manner. While hardly qualifying as a U-turn it does appear that the approach to collective collecting societies has changed subject to a Single Market agenda. Initially focus was laid to ensure the ability of the individual members to leave their respective collecting societies as demonstrated by *GEMA*[105] (1971). An approach later shifted to an end users' perspective and their right to shop around contracting with the collecting society offering the most attractive terms as demonstrated by *IFPI Simulcasting*[106] (2002) and *Cannes agreement*,[107] (2006). Arguing along the lines that while cross border licenses initially were uneconomic due to gaps in the enforcement the emerging of the internet had changed this thus warranting a new approach by the enforcer, some legitimacy was offered to the shift.[108] That should, however, not overshadow earlier silence on the activities of collective collecting societies and their system of national licenses and reciprocal representation agreements, in essence forming the core of the problems.[109] Further, in the interim period between *IFPI Simulcasting* and *Cannes agreement*, the internal market branch of the Commissions (DG Markt) issued a *Recommendation on collective cross-border management*[110] (2005) outlining the Services view on licensing of music for internet-related activities. While initiatives prior to the recommendation had focused on ensuring the availability of online music services, the Commission went a step further by emphasizing the authors' right to choose between different collecting societies, thereby in essence promoting a development of pan-European and/or specialized collecting societies at the cost of the current national organization. The principles of the recommendation was put to effect in *CISAC*[111] (2008) against a group of collecting societies´ restrictions of IP owners' access to choose between different collecting societies and their fellow collecting societies from offering licenses to commercial users outside a given territory.[112]

U-turn, shift or merely new opportunities warranting a new approach. The submitting of a recommendation on the management of IP rights by one branch of the Commis-

[104] Some legitimize can be found in previous cases e.g. case IV/31.734 - *Film Purchased by German Television Stations*. OJ 1989L 284/36 where reservations where expressed against a broad exclusive agreement covering the entire repertoire of MGM. Considered unlikely that the broadcaster could utilize the entire repertoire the agreement could result in the suppression of rights determinant to the interest of the consumer.

[105] Common referral to case IV/26.760 – *GEMA*, OJ 1971L 134, p. 15, case IV/26.760 – *GEMA*, OJ 1971L 134, p. 15 and the somewhat latter case IV/29.971-GEMA, OJ. 1982L 94, p. 12. Se also case C-127/73 - *Belgische Radio en Televisie v SV SABAM and NV Fonior*. ECR 1974, p. 313 for the same approach.

[106] Case COMP/M.C2/38.014 - *IFPI Simulcasting.*

[107] Case COMP/38.681 - *Cannes Agreement.* See also COMP/39.151 - *SABAM* and COMP/39.152 - *BUMA* ("Santiago Agreement").

[108] See e.g. COMP/M.C2/38.014 - *IFPI Simulcasting*, recital 14-16 and 61- 62.

[109] For a presentation of the application of competition law to collective collecting societies see e.g. Lucie Gauibault & Stef van Gompel, *Collective Management in the European Union*, published in Daniel Gervais (ed) *Collective Management of Copyright and Related Rights*, 2nd edition Kluwer Law International 2010, pp. 135-167.

[110] *Commission Recommendation of 18th May 2005 on collective cross-border management of copyright and related rights for legitimate online music services*, OJ 2005 L 276, p. 54.

[111] Case COMP/38.698 - *CISAC Agreement.* Currently pending before the General Court.

[112] Further, the members of CICAS were also considered engaged in a concerted practice segmenting the territories on a national basis by limiting their internal licenses to each member's territory, thereby translating them into the only source of licenses covering repertoire of more than one collecting societies in each territory.

sion, followed by the opening of cases under competition law by another branch in order to enforce the principles of the recommendation are somewhat unusual or at least novel. Further, the Recommendation was followed in 2008 by the establishing of the Online Commerce Roundtable in order to facilitate a dialog with industry stakeholders on the removal of barriers and opening of business opportunities on the internet and how, competition law, in the word of the Commissioner could be clarified, updated or better enforced.[113] [114] While hardly to be taken literally when the Commissioner indicates willingness to change competition law, opening a dialog relating to the enforcements priorities with potential serial infringer is somewhat unusual. Another novelty is that the use of competition law to mop up isn't limited to private, or semiprivate distortions as normally perceived but has in some cases been extended to restrictions originating at governmental agencies. *Lufthansa/SAS/United Airlines*[115] (2002) was e.g. closed against a commitment package under which the German aviation authority would stop exercising a form of indirect price control that was perceived to hamper access by potential competitors. Further, part of the settlement in *Swedish Interconnectors* entailed a restructuring of the internal tariff and congestion management system in Sweden as operated by the designated national regulator.[116] Finally the Commission´s decision in *BdKEP/Deutsche Post AG*[117] (2004) was also directed against Germany for having induced discriminatory abuse by national regulation. Traditionally, regulatory impediments would be handled under the relevant Single Market provision, e.g. Article 34 and 56 TFEU or any applicable Directives but as demonstrated the Commission has occasionally relied on competition law. Once again little can be held up against the individual cases as the arguments and considerations are generally sound. The prevailing pattern is nevertheless one of competition law used to remedy market imperfections, even distorting national regulation, in order to improve the structures rather than merely safeguard against further impediments referring imperfections to Single Market regulation.

4.4. Competition Law Used to Identify Problems and Challenges

One thing is to remedy problems or give leverage to the enforcement against impediments, another, but equally important issue, is identifying these in the first place. Over the course of the years competition law has been used in this capacity in a reoccurring pattern. A notable feature of *Swedish Interconnectors*,[118] perhaps driving the Commission´s preference for a fast settlement, was the concurrent adoption of sector specific Single Market regulation largely addressing the involved issues.[119] Hence, rather than seeing the case merely as an example of competition law used as supplement, the case could also be viewed as an recent example of the use of competition law used to identify shortfalls to be remedied by Single Market regulation. Other ex-

[113] See IP/08/1338 - *Competition: Commissioner Kroes hosts consumer and industry Roundtable on opportunities and barriers to online retailing and the European Single Market.*

[114] A presentation of the work of the roundtable can be found in Carlo Alberto Toffolon, *The Online Commerce Roundtable – Advocating improved access to online music for EU consumers,* Competition Policy Newsletter, DG COMP 2010-1, pp. 46-50.

[115] Case COMP/D-2/36.201, 36.076, 36.078 - *PO / Lufthansa + SAS + United*. See also COMP/M.3280 – *Air France/KLM*, where the French and Dutch aviation regulators undertook to remove regulatory restrictions.

[116] See also case COMP/M.1673 - *VEBA/VIAG* where merger remedies are used to address distortions created by the German decision not to regulate the issue of access to the grid but refer these to commercial negotiations.

[117] COMP/38.745 - *BdKEP/Deutsche Post AG.*

[118] Case 39351 - *Swedish Interconnectors.*

[119] Regulation 1228/2003 was replaced in 2009 by Regulation 714/2009. Prior to this it had undergone an update by replacement of the Annex on congestion management in 2006.

amples can be identified by comparing *REIMS I*[120] (1995), *REIMS II*[121] (1999), successive industrial agreements in the postal sector, and the first postal directive[122] (1997) adopted in between. Not only did the participants to the latter case (wisely) incorporate elements from the Directive directly into the notified agreement it's also plausible to see a link whereby the Directive in the first place was formed on the background of the experience gained by appraising the first case.[123] Further, cases as *Verbändevereinbarung* (1998) and *VEBA/VIAG (*2000) would have stressed the short- and pitfalls of not having price provisions on the grid access in the adopted Single Market Regulation. While initially addressed under competition law the issue would eventually be incorporated directly into the next generation of applicable Single Market Regulations[124] thereby indicating how competition law cases can be used to explore the need for additional regulation.

The use of competition law to identify remediable shortfalls can be identified in material cases as demonstrated above, but is much more dominant in the sector inquiries launched from the latter 90ies and onward. While the number of cases originating directly from the sector inquires has fluctuated, they would often signal a renewed community interest in regulatory initiative. The overhaul of the telecommunication legislation in the new millennium was e.g. spearheaded by four inquires under competition law[125] into issues such as prices[126] (1998), tariffs for lease lines[127] (1999), roamings[128] (2000) and access to the local loop[129] (2000). Further, the model has been utilised for media[130] (2005), energy[131] (2007), financial sector[132] (2007) and pharmaceutical services and products[133] (2009) in order to identify impediments to the Single Market regardless of their origins[134] regulatory gaps, market distortions or plainly insufficient national implementations. Accompanying the tabling of the latest inquiry, the pharmaceutical inquiry, the announcement of new Single Market initiatives correcting some of the identified faults in the IP system was made, including a renewed attempt to introduce a community patent and a specialized patent litigation system.[135] While a direct link rarely is articulated as clearly as following the pharmaceutical sector inquiry, it's nevertheless plausible to see not only how the Commission uses sector inquires to identify problems and gain a better understanding of a sector but also

[120] Case No IV/35.849 - *Reims.* OJ 1996C 42, p. 7.
[121] Case IV/36.748 - *Reims II.*
[122] *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.*
[123] For further on *REIMS I* and *II* and the link with the postal directive see Damien Geradin & David Henry, *Regulatory and Competition Law Remedies in the Postal Sector*,pp.136-137, published in Damien Geradin (ed) *Remedies in Network Industries: EC Competition Law vs. Sector-specific Regulation.* Intersentia 2004.
[124] Directive 2003/54 (the second electricity directive) did e.g. obligated the Member States to regulate the issue of grid access also in respect to the prices.
[125] C.f. Article 12 of Regulation 17/62 and Article 17 of Regulation 1/2003 the Commission can initiate general inquiries into a particular sector of the economy or into a particular type of agreements across.
[126] See XXVIII Report on Competition Policy (1998), at 79-81.
[127] See XXIX Report on Competition Policy (1999), at 74-76.
[128] See XXX Report on Competition Policy (2000), at 159-160.
[129] See XXX Report on Competition Policy (2000), at 155-156.
[130] *Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks*.
[131] SEC 2006 1724 - *DG Competition report on energy sector inquiry.*
[132] COM 2007 556 - *Sector Inquiry into business insurance* and COM 2007 33 - *Sector Inquiry on retail banking*.
[133] *Pharmaceutical Sector Inquiry*, 8 July 2009. See also IP/09/1098 - *Antitrust: shortcomings in pharmaceutical sector require further action.*
[134] Perhaps the establishing of the Online Commerce Roundtable could be viewed as a form of informal sector inquiry into copyrights, indicating that existing of further than listed.
[135] See IP/09/1098 - *Antitrust: shortcomings in pharmaceutical sector require further action.*

to probe for support for forthcoming initiatives. In some cases even the retabling of old.

4.5. The Role of a Rock Comes Packaged in a Industrial Policy Agenda

Despite the legal foundation for allowing competition law to serve as the rock upon which the internal market is raised, the role holds many controversies. The *Recommendation on Collective Cross-Border Management* (2005), and the steps predating this, did. e.g. not receive a warm welcome by either industry or the European Parliament.[136] The reaction of the latter in particular would have made it apparent that traditional Single Market initiatives wouldn't be easy to pass making competition law a more attractive instrument as it didn't require the involvement of the Council or the European Parliament. *CISAC* (2008) should also be viewed with this in mind, indicating that the shift from soft to hard law was perhaps influenced by the Commission´s failure to ensure a voluntary alignment and fair assessment of the chance with e.g. the European Parliament. In light of this it could also be considered whether or not telecommunication and energy have been subjected to the opposite development, whereby the initial hard law approach has been substituted by a soft law approach including the Member States and the Council following a shift in their attitude to the adoption of the Single Market Regulation. The perverted twisting of competition law in *Verbändevereinbarung* in order to meet market requirements, is perhaps the most prominent and easily identifiable example of the remarkable leniency occasionally demonstrated but definitely not in isolation.[137] Less controversial perhaps would be the sourcing of principles, concepts and obligations from competition law. Across sectors the establishing of independent national regulators monitoring the national enforcement of the adopted Single Market Regulation, has e.g. largely been governed by competition law. A development that in most cases went smoothly and without intervention from the Commission. Article 106 and the Commission would, however, always be luring in the background should the Member States fail in securing the required level of independence as defined by the Commission. Further, it should not be forgotten that regulatory gaps and lacunas might not be accidental but rather represent a compromise required to ensure the adoption of the tabled proposal. Further, when the Council accepts sourcing methodology etc. from competition law they also accept that the definition of these would eventually be out of their control and instead subject to the Commission's view and prioritorization. Once again it can be submitted that whilst not outright industrial policy, competition law serving as a rock for the Single Market comes with a flavour thereof as the shift(s) in the priorities and regulatory approach unavoidably would stand out as subject to a level of arbitrism rather than a consistent pursue of welfare gains.

5. Competition Law as Fuel for the Development of the Single Market

In addition to the role of leverage for the enforcers or inspiration for the structuring of the Single Market Regulation, competition law has also fuelled the Single Market´s development and amendment as already indicated. This is, however, not limited to the

[136] C.f. Lucie Gauibault & Stef van Gompel, *Collective Management in the European Union*, published in Daniel Gervais (ed) *Collective Management of Copyright and Related Rights*, 2nd edition Kluwer Law International 2010, pp. 155-160.
[137] C.f. e.g. Copenhagen Economics, *Use and Abuse of Market Power in the Nordic Power Market*, project 3, 2002 summary report, pp. 3 and 10-11.

removal of minor regulatory obstacles to the Single Market as demonstrated in *Lufthansa/SAS/United Airlines* or *BdKEP/Deutsche Post AG* but has taken a much broader role. Freeing up generation capacity at wholesale level has e.g. formed an integrated part of many energy mergers thereby fostering competition from the bottom. Further, the liberalisation of the telecommunication sector did as explained come about by the adoption of Directives under Article 106 allowing competition law to directly serve as regulation. Consequently, the role of fuel for the development of the Single Market and the applicable regulation appears to come in two variations as competition law has been used to create a market where no market existed and to develop the, often parallel, regulation applicable to this.

5.1. Developing the Market From the Ground Up

Moving a sector from a monopoly to competition is a process where the first step would entail the removal of legal restrictions but where the next would have to be made by the market players. While the telecom sector largely brought the conversion of itself following the lifting of the legal barriers, fostering competition in other industries and sectors has been more challenging from a community perspective. Even when sufficient political acceptance where available and adequate Single Market regulation therefore adopted. Competition law has however formed a handy instrument in the process as remedies can achieve more than merely preventing further impediment. A stable remedy utilized to clear airline mergers and alliances involving incumbents, has e.g. been the relinquishing of takeoff and landing rights (slots) in airports,[138] in order to ease market access for newcomers and groom competition. Spectrum rights and generation capacity have been relinquished along the same lines through commitments in order to foster competition in mobile communication and electricity at a wholesale level. This was initially predominately done to clear concentrations, however, more recently increasingly to close on-going investigations. Further, in the telecom sector concentrations such as *Telia/Telenor*[139] (1999) and *TELIA/SONERA*[140] (2002) were cleared subject to i.e. the divesture of the cable TV network, the most viable alternative to the established infrastructure around the turn of millennium and thus an able instrument to induce competition.

The modelling of the market comes in variations and could take the simple form of reducing the length or the scope of an exclusive supply or utilization Agreement freeing up capacity at the wholesale level or relinquishing control over a bottleneck facility. Further, it doesn't even require the relinquishment of rights but could be limited to abstaining from certain activities or affiliations which are considered problematic. The already cited energy merger *Edf/Louise Dreyfuss*[141] (1999) is an example of the latter as the acquiror (EDF) of a specialised electricity trading company, undertook not to transfer the acquired know-how to France before full implementation of the adopted Single Market Regulation had taken place, levelling some of the competitive advantages.[142] In many perspectives does the energy sector offers a prime example of competition law used to facilitate a market restructuring as the Commission has

[138] See in addition Giorgio Monti *EC Competition Law*, Cambridge 2007, pp. 476-478..
[139] COMP/M.1439 - *Telia/Telenor*
[140] COMP/M.2803 - *TELIA / SONERA*
[141] COMP/M.21557 - *Edf/Louise Dreyfuss.*
[142] See also COMP/M.2947 - *Verbund/Emergie Allianz* closed against commitments including an accelerated implementation of the structural separations obligations stipulated by Directive 2003/54 (the Second Electricity Directive).

demonstrated such a strong preference for settlement and contractual amendment between 1991 and 2012 that only one infringement decision was adopted,[143] despite the uncovering of serious impediments and potential infringements by the Sector Inquiry (2007). The recent *EON*[144] (2008) would serve as a good example hereof. While opened on the grounds of possible market manipulation by strategic withholding of production capacity and other aggravate infringements it would eventually be closed with a traditional settlement. That is to say no formal infringement decision against divesture of generation capacity and network. Hence, competition law and the possibility of clearing concentrations and settling cases with the help of remedies has been used most actively in defrosting the European energy market and other newly liberalised sectors and industries.

5.2. Developing the Regulation to be Applied in the Single Market

The use of competition law, hence Article 106, to instrument the development of the Single Market Regulation has already been cited. The process is, however, much larger and includes an "aggressive" use of remedies in order to secure regulatory objectives including expanding the Single Market Regulation. The Commission´s approach in *Atlas/Phoenix*[145] (1996) is an example hereof as the establishing of a telecom joint venture between the incumbents in Germany and France was considered problematic unless national laws where amended in order to limit the use of reserved rights. Hence, by using its power to grant exemptions under Article 101, section 3 the Commission forced a national liberalisation beyond what was required in the adopted EU Single Market Regulation. Further, as the Commission at the same time had launched the idea of full liberalisation of the telecom sector the remedies would indirectly induce two central members of the Council to take a more favourable view on such move. While it might not be fair to identify a direct link between the case and the Council´s acceptance of full liberalisation this would nevertheless be the prevailing picture if pondered more meticulous. Hence, it could be argued that the Commission occasionally has used its power to scrutinize concentrations and infringements to put pressure on the Council to adopt tabled Single Market regulation.[146]

The use of remedies to develop the Single Market Regulation is notable for other reasons than the prevailing pattern. The Commission has traditionally maintained the position that a concentration can only be assessed in the context of he distortions it creates in its own rights.[147] Premerger impediments outside the control of the parties should therefore on principle not be held against them.[148] Further, this should also be

[143] The infringement was identified in case COMP/39.401 - *E.ON/GDF* involving market sharing agreements dating back to 1975 and hence incompatible with Article 101. For a presentation of the case and the those closed by commitments see Diathesopoulos, Michael D., *From Energy Sector Inquiry to Recent Antitrust Decisions in European Energy Markets: Competition Law as a Means to Implement Sector Regulation* (July 14, 2010). Available on the Internet.

[144] Case COMP/39.388 - *German electricity wholesale market* and COMP/39.389 - *German Electricity Balancing Market.* For a critical analysis of the case see Malgorzata Sadowska *Energy liberalization in antitrust straitjacket: A plant too far*, EUI Working Papers RSCAS 2011/34.

[145] Case 35.337 - *Atlas*, OJ. 1996L 239, p. 23 and case IV/35.617 - *Phoenix/Global One*, OJ 1996L 239, p. 57.

[146] For further see e.g. Susanne K Schmidt, *Commission activism: subsuming telecommunications and electricity under European Competition law* Journal of Public Policy 1998, pp. 169-184 and Susanne K Schmidt, *Sterile Debates and Dubious Generalisations: European Integration Theory Tested by Telecommunications and Electricity,* 16 Journal of Public Policy 1997, p. 245.

[147] See e.g case IV/M.1347 – *Deustche Post/Securior*, recital 44.

[148] See David Went, *The Acceptability of Remedies Under the EC Merger Regulation: Structural Versus Behavioural*, ECLR 2006, pp 458-459 for further.

the position under article 102 as dominance in itself isn't prohibited. Regardless, the Commission has as demonstrated most willingly remedied also pre-existing dominant positions and there are thus no indications that the considerations have either concerned or limited the Commission. Following the General Courts ruling in *EDP*[149] (2005), which rebuts that the Commission had attempted to secure remedies aimed at liberalizing 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 a remedy package submitted under the Merger Regulation. This is even the case when considering a packages in conjunction with parallel Single Market regulation which can result in commitments, which defacto go beyond what is required under this. Further, the proactive use of competition law to advance the development of the Single Market Regulation is not limited to concentrations and merger remedies. The core of competition law and the definition of infringements, have even been drafted to serve as a tool for the Single Market agenda. In 1994 the Commission did e.g. table a proposal for a Directive[150] on cross border credit transfers, followed the subsequent year by a Notice on the application of competition law to the same issue. [151] The Directive[152] was adopted in 1997 but later replaced by Regulation (2001 and 2010).[153] As a supplement to the latter the Commission has tabled a draft working document[154] on the application of Article 101 to multilateral interbank-payments. While it's natural to see a link where the Notice addresses issues on which the Directive and the Regulations are silent, it's also plausible to see a more advanced interaction as some of the obligations eventually incorporated into the adopted Single Market Regulation could have been advanced by competition law. In the same manner the obligations from Article 101 and 102 have been hammered out as regards to postal activities[155] (1998) and telecommunication[156] (1991 and 1998) in order to offer a supplement as detailed earlier. However competition law can be more than a supplement as illustrated by the Commission´s approach to local loop unbundling.[157] First introduced as a community instrument by commitments in the *Telia/Telenor*[158] (1999) merger it would later be made into a general obligation under Article 102 by the submission (2000) of a Communication from the Commission[159] but eventually secured by the adoption of Regulation[160] (2000). Hence, a significant regulatory objective could have been secured by competition law had the Council declined or delayed advancing the Regulation. It could therefore be submitted that the Commission

[149] Case T-87/05 - *EDP vs Commission*, ECR 2005, p. II-03745, recital 86-96.
[150] COM 94.436 - *Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on cross-border transfers*
[151] *Notice on the application of the EC competition rules to cross-border credit transfers*, O.J. 1995C 251, p. 3-10.
[152] *Directive 97/5 on cross-border credit transfers.*
[153] *Regulation 2560/2001 on cross-border payments in euro* and *Regulation 924/2009 on cross-border payments in the Community*.
[154] *Commission Working Document on the 'Applicability of Article 81 of the EC Treaty to multilateral interbank-payments in SEPA Direct Debit'*
[155] *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*, O.J. 1998C 39, pp. 2-18.
[156] *Guidelines on the application of EEC competition rules in the telecommunications sector*, OJ 1991C 233, pp. 2-26 and *Notice on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles*, OJ 1998C 265, pp. 2-28.
[157] Local loop refers to the physical circuit between the customer's premises and the telecommunications operator's local switch or equivalent facility.
[158] COMP/M.1439 - *Telia/Telenor*.
[159] COM 2000 237 - *Communication from the Commission - Unbundled access to the local loop: Enabling the competitive provision of a full range of electronic communication services including broadband multimedia and high-speed internet.*
[160] *Regulation 2887/2000 on unbundled access to the local loop.*

occasionally presents - at least indirectly - the Member States with two options. Either their active involvement in framing the Single Market Regulation by Single Market regulation or community actions under competition law against, what in most cases would be state owned, and well connected, undertakings.

In this light *EON* (2008) might warrant a revisit. While opened against a presumption of price manipulation by strategic capacity withholding the case would be closed by committing the undertaking to divesture 20% generation capacity and the transmission network. The latter with the purpose of improving the structuring of the German wholesale electricity market by preventing preferential treatment. Further, in the course of the investigations the Commission also identified a strategy involving strategic deterrence of new investors in generation capacity. An allegation that, however, never are developed nor explained further beyond a few lines and consequently most likely of a secondary nature.[161] While the commitment to divesture generation capacity could be considered a natural and able instrument in addressing the ability to exercise market power, the network commitment was somewhat more far reaching not to mentioned considering defining strategic investments as an infringement. Hence it would be obvious that not only did the case involve distortions that might have been identified on somewhat lose grounds but also that it would be closed for commitments addressing more fundamental problems in the market. This disqualifies neither the analysis nor the rationel exhibited by the Commission. Insufficient investments are unquestionably a serious impediment to the Single Market while ownership unbundling would represent an equally serious gain. So far however, the Council has declined to further promote ownership unbundling despite strong arguments put forward by the Commission. Thus the third energy package (2009) currently under implementation and adopted to address the impediments identified by the Sector Inquiry only provides for optional ownership unbundling. *EON* therefore also demonstrates how significant regulatory objectives can be secured by means of competition law in situations where the Council has declined to advance the issue further perhaps placing it in the same category as *Atlas/Phoenix*.

The approach to IP rights would also fit into the prevailing pattern. It has e.g. been noted that the scrutinising of IP rights under competition law, particularly in respect to refusal to license, predominantly has involved second rate IP rights, in casu copyrights and thus in essence only IP rights that might not qualify as IP rights in the eyes of the enforcer.[162] Without either rebutting or questioning the observation, a more adequate or elaborate submission would be that competition law has primarily been applied to IP rights that aren´t subject to Community harmonisation. This would offer a new perspective on the Commission´s current interest for the pharmaceutical sector, the implied infringements identified in the sector inquiry and the current bid for a community patent. In light of this the already cited *Recommendation on Collective Cross-Border Management* (2005) and *CISAC* (2008) might also require a revisit. In the period between these two the *Service Directive*[163] (2006) finally came about following prolonged negotiations. A notable feature hereof is the inclusion of IP rights, despite calls for its exemption by e.g. the European Parliament, and the subsequent application of the Directive against national authorisations of collective collecting so-

[161] See recital 41-44 of the decision.
[162] See e.g. Richard Whish, *Competition Law*, 6th edition 2009, p. 788 for further.
[163] *Directive 2006/123 on services in the internal market.*

cieties.[164] It cannot be excluded that the long term benificiary of the current uncertainty regarding the legal framework governing collective collecting societies would be the Commission and the internal market project, should it lead to renewed interest in community action. A proposal for community harmonisation was tabled in 2012 and luck might favour the bold.[165]

5.3. Fuelling the Development Smells like Industrial Policy

Introducing regulation through the backdoor by competition law and remedies has some unattractive side effects. While the adoption of a formal decision pursuant to Article 101 or 102 requires a substantial analysis, the tabling of the Single Market Regulation before the Council and European Parliament demands equally prudent arguments, whereas the use of commitments comes somewhat easier. In contrast to a formal decision or the promotion of new regulation the Commission can close an investigation by commitments on the basis of a preliminary assessment thereby in reality limiting the need to identify significant barriers for competition and the Single Market. A low level of competition and the notion of impediments would be sufficient. This requirement should be easy to meet in a newly liberalised sector. Consequently, there are few if any legal barriers for the Commission to open a case with the purpose of obtaining a commitment from the parties. Further, regardless of the factual wording of Article 9 of the Enforcement Regulation[166] confining the Commission to submitted commitment provided they terminate the expressed concerns it's obvious that any commitment process would be subject to a level of negotiations between the enforcer and the potential infringer. A process that in itself would enhance the perception that competition law has been reduced to a form of quasi regulation. The use of competition law to facilitate the Single Market project goes back and has involved not merely the remedies used to clear concentrations but also infringements after Article 101 and 102. Further, the Commission has in the process been most active in outlining how competition law would be applied by issuing a large number of notices and comments. While legal clearance always should be appreciated this would nevertheless cement the perception of an unusual role for competition law. Using competition law to fuel the Single Market therefore comes with a strong smell of industrial policy.

6. Concluding Remarks

While industrial policy hasn't been directly embraced under competition law, there is nevertheless clear indication of competition law serving as part of a wider agenda. While welfare based arguments might be the dominant considerations advanced under competition law, over the years, a pattern has also emerged where the Commission occasionally resorts to competition law to secure Single Market objectives. Not only in absence of Single Market regulation, but also in situations where Single Market regulation is either inefficient or framed in a manner that the Commission deems imperfect. Hence, it can be demonstrated how competition law has functioned as part of a wider and more political agenda under the Single Market, giving it if not an after-

[164] See Thomas Riis, *Collecting societies, competition, and the Service Directive*, Journal of Interlectual Property Law & Practice 2011, vol 6, no 7, pp. 482-493 for further.
[165] See MEMO/12/545 - *Proposed Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions.*
[166] *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*

taste at least a flavour of industrial policies. Further, this does not only create a need for a more elaborate, or complex, understanding of the interaction between competition law, Single Market regulation and their mutual influence, but should perhaps also recast our perception of the call for a industrial policy agenda under competition law. Rather than an unwelcome move promoted by the member states, it should rightly be identified as a logical step from the traditional special interests groups deprived from their ability to lobby before the Council and the European Parliament when the Commission "decides" to shortcuts these. This doesn't make the bid more welcome or attractive, but nevertheless, it puts it into the right perspective making a call for an industry policy agenda an indirect consequence of the use of competition law in a quasi-regulatory role.

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