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EDITORIAL COMMENTS

Missing in action? Competition law as part of the internal market

On 5 September 2023, Executive Vice-President Vestager took unpaid leave from the Commission for the duration of her campaign for the position of President of the Management Committee of the European Investment Bank (EIB). President von der Leyen temporarily assigned Vestager's portfolio responsibility for competition to Commissioner Reynders and felt the need to recall the obvious fact "that during that period the relevant provisions of the Treaties . . . continue to apply".[1] While at the time of writing these Editorial Comments, we do not know the outcome of Ms Vestager's candidacy and we have no reason to speculate about her motives, the decision of one of the highest-profile members of the Commission to prefer a position at the head of the EIB to her present office is a fitting occasion to reflect on the place of the competition rules in the EU. Do they still need such a prominent voice? Leaving aside State aid law, whose woes would deserve an editorial on its own, and focusing on the rules addressed to undertakings, there is a short and a long answer to this question. The short answer could simply refer to the statement by the Court that "the Commission is responsible for the implementation and orientation of Community competition policy",[2] or to the finding of Advocate General Kokott that the Commission has a "leading role . . . in framing European competition policy".[3] The competition rules have never lent themselves to simple "application". Their contribution to the aims of the EU and to the well-being of its citizens depends on policy choices that have so far been largely shaped by the Commission. These policy choices are in need of constant reassessment, revision, and, sometimes, reorientation. This task deserves nothing less than a first-rate representation in the European polity.

However, this answer ignores a more fundamental concern. There is a gap between widely shared expectations of what the EU competition rules are meant to achieve and their actual performance that no matter who is in charge of the competition portfolio, the Commission will not be able to close on its

1. European Commission, Statement on the temporary withdrawal of Executive Vice-President Vestager from the work of the Commission, 5 Sept. 2023, available at <ec.europa.eu/commission/presscorner/detail/en/statement_23_4352>. Moreover, Ms Vestager's steering and coordination responsibility for "A Europe fit for the digital age" has been assigned to Vice-President Jourová.

2. Case C-234/89, *Delimitis* v. *Henninger Bräu AG*, EU:C:1991:91, para 44.

3. Opinion in Case C-226/11, *Expedia Inc.* v. *Autorité de la concurrence*, EU:C:2012:544, para 38.

own. This gap may not be as flagrant as in the US, where antitrust enforcers of the Biden administration are running up against the wall of a judiciary stuck in beliefs of the Chicago School,[4] but it is still noticeable. The cumbersome enforcement of Article 102 TFEU is certainly the most striking example. The median duration of Article 102 procedures before the Commission that were not closed with a commitment decision has increased from four years in the period between 1990 and 2005 to 7.4 years in the period since 2015.[5] Considering the duration of subsequent litigation before the General Court and the Court of Justice, the situation looks even worse. If even after 23 years (14 of which have so far been spent before the European courts), it has proved to be impossible to close a case that deals with the exclusionary nature of quite ordinary practices,[6] the enforcement of Article 102 TFEU becomes a Sisyphean task. A duty to scrutinize actual or potential competitive effects of the conduct at issue, taking into account every benign economic explanation brought forward by the dominant firm for its conduct, that was first self-imposed by the Commission and then enforced by the Court of Justice, has made the enforcement of Article 102 TFEU by the Commission almost unworkable and in any event much too slow for interventions that help to preserve competition in fast-changing markets. Against this background, it does not come as a surprise that the contribution of Article 102 TFEU to the containment of digital market power, which may well be the biggest contemporary challenge to competition law, has so far been modest.

Case law versus legislation

The Commission has recognized these shortcomings and started a reform of its policy in the area of abuse of dominance by amending its 2008 Guidance on

4. *In the matter of Meta/Zuckerberg/Within*, <www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-metazuckerbergwithin-matter>; *In the matter of Microsoft/Activision Blizzard*, <www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter> (under appeal).

5. Schweitzer, "Leitlinien zu Art. 102 AEUV – Neue Maßstäbe für die Missbrauchsaufsicht?", Presentation at the annual conference of the "Arbeitskreis Kartellrecht" at the Federal Cartel Office, 28 Sept. 2023, available at <www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2023_Schweitzer.pdf?_blob=publicationFile&v=2>.

6. The *Intel* case originated from a formal complaint filed by AMD with the Commission on 18 Oct. 2000. The Commission adopted a decision on 13 May 2009 (COMP/C-3/37.990 – *Intel*). Most recently, a fine was re-imposed against Intel on 22 Sept. 2023, <ec.europa.eu/commission/presscorner/detail/en/ip_23_4570>, amid ongoing litigation (appeal by the Commission pending before the ECJ in Case C-240/22 P after prior judgments in Case T-286/09, *Intel Corp.* v. *Commission*, EU:T:2014:547; Case C-413/14 P, *Intel Corp.* v. *Commission*, EU:C:2017:632; Case T-286/09 RENV, *Intel Corporation Inc.* v. *Commission*, EU:T:2022:19). For a critical account see Monti, "Rebates after the General Court's 2022 *Intel* judgment", 60 CML Rev. (2023), 107.

enforcement priorities concerning exclusionary abuses,[7] and more significantly, by announcing their replacement by the adoption of Guidelines on the application of Article 102 TFEU based on the judgments delivered by the EU courts on exclusionary abuses.[8] This transition from enforcement priorities, which the Commission can define autonomously within a wide margin of discretion,[9] to an interpretive approach is already familiar from its guidelines concerning Article 101 TFEU. It reflects the insight that the present problems with Article 102 TFEU mainly arise from the substance of the applicable rules which may be in need of clarification, simplification or even modification, and not so much from the way the Commission allocates its resources by setting enforcement priorities. Like any other restatement of the law, this approach is necessarily bound to the case law of the European courts and can at best try to fill in gaps or to gently nudge the courts towards changes. Therefore, any attempt to remedy the defects in the field of Article 102 TFEU within the framework of the existing rules ultimately depends on the Court of Justice as the final arbiter of these rules. However, relying on case law in order to bring clarity in the midst of confusion is generally a precarious concept. Courts can only act upon cases brought before them, which may be far and few between. Their response to new challenges is determined by their prior rulings in a way that normally only allows for piecemeal progress. Most importantly, it is by no means certain whether an existing body of case law, such as the 32 judgments by the Court of Justice and the General Court on exclusionary abuses counted by the Commission in the period since 2008,[10] can be condensed into a synthesis that provides clarity and consistency, all the more so as some of these judgments (such as the *Intel* decision rendered by the ECJ)[11] may be part of the problem and not of the solution.

Looking beyond the realm of the EU legal order, there is of course an alternative way to address such problems. Reforming competition law through legislation is the conventional, democratically perfectly legitimate method of enhancing legal certainty or reacting to new market-related challenges in

7. Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2023, C 116/1.

8. See <ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en>.

9. Case C-119/97 P, *Ufex* v. *Commission*, EU:C:1999:116, para 88; Case C-56/12 P, *EFIM* v. *Commission*, EU:C:2013:575, para 72; Case T-24/90, *Automec Srl* v. *Commission*, EU:T:1992:97, para 77; Case T-458/04, *Au Lys de France SA* v. *Commission*, EU:T:2007:195, para 71.

10. See <ec.europe.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en>.

11. Case C-413/14 P, *Intel Corp*.

many States.[12] But this alternative path seems exceedingly difficult, if not impossible to pursue in the case of the EU. Articles 101 and 102 TFEU are constitutionally hard-wired and, albeit successfully used as a basis for the Merger Control Regulation, Articles 103 and 352 TFEU present formidable obstacles to legislation in the field of competition law. On the one hand, legislation on the basis of Article 103 TFEU is limited to measures giving "effect to the principles set out in Articles 101 and 102" (Art. 103(1) TFEU) and thus cannot diverge from the substance of these provisions as interpreted by the ECJ.[13] On the other hand, Article 352 TFEU, which is highlighted in the Lisbon Protocol (No. 27) on the internal market and competition as a basis for "a system ensuring that competition is not distorted", only allows for filling in gaps, not changing those parts of the system that already exist in the TFEU. Moreover, proceeding on this basis requires unanimity in the Council, which in the case of the Merger Control Regulation was only achieved after 16 years[14] under the imminent threat of an unforeseeable and economically damaging *ex post* control of mergers under Articles 101 and 102 TFEU.[15] As a result, viable legislative responses to shortcomings of competition law seem to be confined to the basis of Article 114 TFEU, prompting their authors to draft them as internal market legislation and to carefully distinguish them from the sphere of competition law. The Digital Markets Act (DMA) is a prime example. Despite a catalogue of prohibitions that look very familiar to competition lawyers, the overall objective of ensuring "contestable and fair markets in the digital sector" (Art. 1(1) DMA) is characterized as "complementary to, but different from that of protecting undistorted competition" (Recital 11 of the DMA). This distinction is not just a terminological façade that merely disguises competition law as regulatory

12. Cf. e.g. recent reforms in Germany, 11th amendment of the Act against Restraints of Competition, adopted by the Federal Council on 29 Sept. 2023, available at <www.bundesrat.de/DE/plenum/bundesrat-kompakt/23/1036/05.html;jsessionid=EA4EFAB9914D3A61AB9FC805248AD9B0.live532?nn=4352768>, and in the UK, Digital Markets, Competition and Consumers Bill, available at <bills.parliament.uk/bills/3453>.

13. See, with regard to Regulation 19/65, Case 32/65, *Italy* v. *Council and Commission*, EU:C:1966:42. The specific measures enumerated in Art. 103(2) TFEU are not relevant in this context.

14. The original version of the Merger Control Regulation, Regulation (EEC) 4064/89, goes back to a proposal made by the Commission in 1973, O.J. 1973, C 92/1.

15. With regard to Art. 102 TFEU, Case 6/72, *Europemballage Corporation and Continental Can Company Inc.* v. *Commission*, EU:C:1973:22, confirmed by Case C-449/21, *Towercast*, EU:C:2023:207; and with regard to Art. 101 TFEU, Case 142/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc*. v. *Commission*, EU:C:1987:490.

law.[16] It has a substantive dimension that will affect the interpretation of the DMA so that even those concepts that at first glance resemble antitrust doctrines take on a meaning of their own. That provides the conceptual basis for an enforcement system (including fines) which operates alongside the enforcement of competition law and not as a substitute.[17]

A constitutional conundrum

The overall picture that emerges from this bifurcation between primary competition law and secondary regulatory law as elements of the EU market order is unflattering: a building with two separate parts constructed according to incongruous designs. If it is true that primary law dictates the pursuit of consumer welfare (as defined by the aggregate individual benefits gained from the satisfaction of demand in goods and services) as the ultimate goal of the regulation of market conduct, as apparently held by the ECJ in the sphere of competition law,[18] then why is the internal market legislator not bound by this goal under Article 114 TFEU? Or conversely: if it is true that Article 114 TFEU allows internal market legislation to define market-ordering rules irrespective of their welfare effects in accordance with different concepts of access to markets or fairness in the marketplace, then why does this only extend to complementary rules and not to the formation of competition law? It is legitimate to ask these questions because the spheres of Article 114 TFEU and of competition law are not isolated from each other, but intertwined in the internal market. As the Masters of the Treaties put it, "the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted".[19] We are reminded of this by Articles 101(1) and 102 TFEU, which declare practices caught by these prohibitions "incompatible with the internal market". However, the interpretation of the competition rules by the Court of Justice and the EU legislator's reading of the internal market competence in measures such as the DMA reveal diverging visions of the internal market. On the one hand, the Court's vision of the internal market reflected in recent judgments such as *Servizio Elettrico Nazionale* and *Unilever Italia* is a market with rules that in the interest of consumer welfare, only prohibit dominant firms from excluding

16. As argued by Basedow, "Das Rad neu erfinden: Zum Vorschlag für einen Digital Markets Act", 2021 *Zeitschrift für Europäisches Privatrecht*, 217, at 220 et seq. For a new conception of the DMA as secondary competition law see Blaschczok, *Freiheit und Fairness* (Mohr Siebeck, 2023), pp. 365 et seq.

17. Witt, "The Digital Markets Act – Regulating the Wild West", 60 CML Rev. (2023), 625, at 649 et seq.

18. Case C-377/20, *Servizio Elettrico Nazionale SpA* v. *Autorità Garante della Concorrenza e del Mercato*, EU:C:2022:379, para 46.

19. Lisbon Protocol (No. 27) on the internal market and competition.

smaller competitors if they are as efficient as the incumbent.[20] On the other hand, the EU legislator's vision of the internal market, as based on Article 114 TFEU and expressed in the DMA, is a market with rules that on behalf of contestability, are meant to facilitate attacks on incumbents ("gatekeepers" in the terminology of the DMA) by smaller firms irrespective of their efficiency and to allow firms to thrive on the market in the presence of a gatekeeper that due to network effects of its platform services, often operates more efficiently than its smaller rivals.[21]

Of course, if the competition rules are (rightly) read as a floor and not as a ceiling for legal interventions in market conduct, there is no immediate conflict between these rules and the use of Article 114 TFEU for the introduction of additional prohibitions, such as the DMA. Except for the agricultural sector where the Treaty (Art. 42 TFEU) explicitly allows for exemptions from the competition rules in secondary internal market law (notably an exemption for sustainability agreements),[22] internal market legislation may not authorize and, to the best of our knowledge, has never authorized anti-competitive conduct that is forbidden under Articles 101 or 102 TFEU. This is also true for the DMA. The mere fact that sector-specific regulation such as the DMA makes stricter demands on dominant firms than the competition rules is not objectionable at all. However, there is a problem of consistency if the stricter rules follow a different understanding of what we expect from the internal market than the general rules on competition. While it is true that inconsistency as such (unless it violates the principle of equal treatment) is generally not a legal issue, but an unavoidable, if slightly irritating side-effect of all democracies whose legal orders are composed of legislative output produced by varying majorities,[23] this is different if the inconsistency derives from a constitutional feature, such as a narrow, monothematic concept of the internal market in one part of the Treaties

20. Case C-377/20, *Servizio Elettrico Nazionale*, para 76; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, para 39. See also Maggiolino, "When an ice cream case provides antitrust experts with food for thought: *Unilever Italia*", 60 CML Rev. (2023), 1433.

21. Schweitzer, "The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal", (2021) *Zeitschrift für Europäisches Privatrecht*, 503, at 511, who rightly points out that the concept of "contestable markets" used in the DMA is different from the economic theory of contestable markets.

22. Art. 210a of Regulation (EU) 2021/2117 amending Regulations (EU) 1308/2013 establishing a common organization of the markets in agricultural products, (EU) 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatized wine products and (EU) 228/2013 laying down specific measures for agriculture in the outermost regions of the Union, O.J. 2021, L 435/262.

23. Lepsius, "Rechtswissenschaft in der Demokratie", (2013) *Der Staat*, 157.

(competition law) in contrast to a broader, multi-faceted concept of the internal market in another part (the internal market competences).

It is tempting to blame the architects of the Treaties for this flaw in the edifice of the internal market and to daydream of a simpler design that avoids a distinction between competition law and other internal market law. Indeed, it has been argued that for the sake of a more democratic Union, substantive EU law including competition law should be downgraded to secondary law, leaving it at the disposal of the EU legislator.[24] However, as explained in an earlier editorial comment,[25] there are good reasons not to seize on this idea, even though at first view, competition law as part of the primary rules of a legal order appears as an oddity. In any event, it would be premature to suggest that only a Treaty change can bring about constitutional consistency regarding the internal market. The inconsistency that has been pointed out here (admittedly in a stylized manner) was not forced on us by the Masters of the Treaties, but it is the result of an uncoordinated interpretation of competition law (by the ECJ), on the one hand, and of the internal market competence (by the Council and the Parliament), on the other hand. It is therefore submitted that this issue can be resolved by remedying this deficit, in particular by reconnecting the interpretation of the competition rules to a constitutional concept of the internal market that is richer than recent case law on Article 102 TFEU suggests.

EU competition law as part of internal market law

In the early case law of the ECJ, the constitutional link between competition law and the establishment of the common market was prominent; most famously in the prohibition of restrictions of parallel imports the Court derived from ex-Article 85 EEC Treaty in *Consten and Grundig* on the grounds that "an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections [objectives] of the Community".[26] Interestingly, this rule has survived to this day despite its dubiousness from the perspective of consumer welfare, which was once taken up in a dissent by the General Court that was then overruled by the Court of

24. Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie* (C.H. Beck, 2016).

25. "Editorial comments: A way to win back support for the European project?", 54 CML Rev. (2017), 1.

26. Joined Cases 56 & 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH* v. *Commission*, EU:C:1966:41, at p. 340. "Objections" is an obvious mistake in the English translation of the original judgment, which refers to "objectives" ("objectifs", "Zielen").

Justice.[27] Its rationale – the interpretation of competition law as complementing the fundamental freedoms and other fundamental tenets of the Treaties such as Article 18 TFEU – can also be traced in cases dealing with Article 102 TFEU.[28] However, just like the negative integration accomplished by the fundamental freedoms, this line of cases, while still relevant, does not exhaust the concept of the internal market as it has evolved since the early days of the Community. Today, the internal market can be described as a regulatory sphere formed by EU legislation that merely needs potential trade barriers as a trigger for a competence invoked for legislative choices across a wide range of policies. This presents a significant challenge to (EU and national) courts and authorities entrusted with the interpretation and application of competition law. Recalling Pierre Pescatore's comparison of European integration with the freely moving elements and wires of a "mobile" by Alexander Calder,[29] courts and authorities have to find a proper place for competition law as part of the variable and constantly changing geometry of the internal market. In this regard, three observations may be in place.

First, locating competition law as part of internal market law puts into perspective the legal significance of welfare economics. There is little evidence to suggest that the internal market as a whole is constitutionally focused on maximizing consumer welfare. The "well-being of its peoples" (Art. 3(1) TEU) as one of the Union's overarching aims that is served by the establishment of the internal market is certainly not the same, as can be seen from the list of economic and non-economic objectives in Article 3(3) TFEU that contribute to this aim. Against this background, it would be far-fetched to read into Article 114 TFEU (or into any other basis of competence in internal market law) an unwritten requirement that all legislative measures enacted on this basis must increase or at least not harm consumer welfare, and must therefore be interpreted in accordance with this criterion. An argument can be made that the same reasoning should apply to Articles 101 and 102 TFEU in order to avoid an inconsistency between these primary internal market rules and the secondary rules enacted on the basis of the internal market competence. In particular, the qualification of exclusionary practices as abusive under Article 102 TFEU should not depend on the demonstration of consumer harm. It is therefore submitted that the recent reference by the Court

27. Case T-168/01, *GlaxoSmithKline Services Unlimited* v. *Commission*, EU:T:2006:265, para 119; rejected by Case C-501/06 P, *GlaxoSmithKline Services Unlimited* v. *Commission*, EU:C:2009:610, para 63.

28. Case C-18/93, *Corsica Ferries Italia Srl* v. *Corpo dei piloti del porto di Genova*, EU:C:1994:195; Commission Decision of 20 July 1999 (Case IV/36.888 – 1998 Football World Cup).

29. As related by Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (OUP, 2018), p. 3.

to the "well-being of both intermediary and final consumers . . . as the ultimate objective warranting the intervention of competition law"[30] should not be read as a requirement of consumer harm, but merely as a reminder that by prohibiting exclusionary abuses, Article 102 TFEU seeks to prevent a deterioration of market structures that is ultimately to the detriment of consumers. This was already held by the Court 50 years ago in its first judgment on ex-Article 86 EEC.[31]

Second, looking at competition law in the broader context of internal market law helps us understand the significance of open markets. By applying Articles 101 and 102 TFEU as a complement to the fundamental freedoms, the Court has used competition law as a means to grant firms access to markets in other Member States, irrespective of the question whether a restriction of market access harms consumer welfare. As such an intervention is oblivious to its economic effects and knowingly accepts false positives, the hostility towards national boundaries displayed in these cases is easily discarded as an idiosyncratic feature of EU competition law from an economic perspective. However, if seen from the angle of internal market law, granting and preserving access to markets as an opportunity even for smaller and less efficient firms is an essential and perfectly legitimate concern of internal market rules. This notion of openness does not only have a cross-border, but also a product-related dimension, as can be seen in the case of the DMA with its objective of ensuring the contestability of platform markets. It is therefore suggested that this perspective should also inform the concept of exclusionary abuses under Article 102 TFEU and that the recent rise of the "as-efficient-competitor" (AEC) test in the case law of the Court of Justice since *Intel* should be reconsidered. The premise of the AEC test that legitimate "competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers"[32] may make economic sense, but it does not adequately reflect the broader concern of internal market law for open markets, which may however be seen as part of the "special responsibility" of the dominant firm that has also been upheld by the Court.[33]

Last but not least, the affinity between competition law and (other) internal market law is instructive for the depth or granularity that is required for the assessment of actual or potential market effects of conduct that potentially

30. Case C-377/20, *Servizio Elettrico Nazionale*, para 46. For a different view see Komninos, "A steady course towards the effects-based approach: Case C-377/20 *Servizio Elettrico Nazionale*", 14 JECLAP (2023), 290 ("for the first time an express acknowledgement that consumer welfare is the ultimate objective of Article 102 TFEU").

31. Case 6/72, *Europemballage Corporation*, para 26.

32. Case C-413/14 P, *Intel Corp.*, para 134.

33. Ibid., para 135.

violates Articles 101 or 102 TFEU. Irrespective of whether market ordering rules are made by authorities, judges or legislators, it is always advisable to consider their market effects, either *ex ante* (in the case of legislation) or *ex post* (in the case of the application of a broad standard to a given case). All rule-makers have to gauge the precision of their rules in the range between a "one size fits all" rule and a myriad of fine-tuned rules that fit each and every case. This decision does not only depend on the risks of getting it wrong and producing adverse effects (false positives or false negatives) in individual cases, but also on the cost of administering these rules. Such a balancing exercise is part and parcel of all modern legislative procedures, including EU internal market legislation which requires an impact assessment under the Better Regulation Guidelines that considers both aspects. However, in the sphere of judge-made competition law, it seems that administrative costs are not sufficiently factored in and the quest for precision sometimes goes unchecked. As a consequence, we end up with excessively burdensome requirements that hamper the enforcement of competition law. While no one would expect the EU courts to go through the checklists of the Better Regulation Guidelines before rendering their judgments in order to avoid this consequence, it could be helpful if judges considered that their role in distilling rules from the broad standards of Articles 101 and 102 TFEU is similar to that of a legislator, and that taking into account the administrative burden of an individual assessment of market effects is not inappropriate.

Which way forward for the Commission?

If the constitutional link between competition law and the internal market is (re-)established, there is reason to believe that the enforcement of Article 102 TFEU will become manageable again.[34] However, this is within the control of the EU courts. For the Commission, the adoption of guidelines is therefore a delicate task. Even if only minor changes in the existing case law were enough, the Commission would walk a tightrope by ostensibly explaining the case law while implicitly pushing for a change. Of course, there is room for innovation in interpretive guidelines, as can be seen in the guidelines regarding Article 101 TFEU, but mainly to fill in gaps where case law is sparse, and not in an area that is already relatively densely populated with judgments as in the field of exclusionary abuses. Individual cases (such as the current, and perhaps last round in the *Intel* saga) are probably a more convenient way to advocate for change. During the time that elapses before the guidelines are adopted,[35] this

34. While Art. 102 TFEU is the focus of these Editorial Comments, the idea of competition law as part of the internal market applies to competition law as a whole.

35. The adoption of the Guidelines is planned for 2025.

may after all lead to further clarification and perhaps even modifications that would benefit the guidelines. But this is mere speculation.

Against this background, the legislative path may be more attractive if real change is desired. While there seems to be little chance that Article 103 TFEU or Article 352 TFEU can be successfully relied on as a basis for a regulation that diverts from the interpretation of Article 102 TFEU by the EU courts, it is worth taking a second look at Article 114 TFEU. At first glance, in view of the distinction between the internal market competence as a shared competence under Article 4(2)(a) TFEU and the competition competence as an exclusive competence under Article 3(1)(b) TFEU, there seems to be a clear separation between these two fields that does not allow internal market legislation to pursue the goal of protecting competition.[36] Moreover, as far as gaps in the protection of competition are concerned, the Lisbon Protocol on the internal market and competition merely mentions Article 352 TFEU, thus confirming the legal basis of the Merger Control Regulation that the drafters of this Protocol obviously had in mind. Yet, the same Protocol stipulates that the "system ensuring that competition is not distorted" is part of the internal market. In this comment, we have already made the argument that this link informs substantive competition law. But this link can also be said to affect the level of competence. If the protection of competition is an element of the internal market and not divorced from it, it is a natural conclusion that internal market legislation on the basis of Article 114 TFEU may have the goal of protecting competition,[37] provided that the internal market legislation does not grant any exemptions from Articles 101 and 102 TFEU, which is only permitted within the scope of Article 42 TFEU. This interpretation of Article 114 TFEU is not necessarily in conflict with Article 103 TFEU. This provision merely confers limited powers on the Council to act on a proposal by the Commission, whereas the Parliament is reduced to a consultative role, and thus can be distinguished from Article 114 TFEU which due to the applicability of the ordinary legislative procedure, awards a higher degree of democratic legitimacy. As a result, it could be feasible and deserving of further discussion to read Article 114 TFEU as a legal basis for stricter rules for the purpose of protection of competition, while Article 103 TFEU has the more limited purpose of concretizing and putting into effect the basic prohibitions in Articles 101 and 102 TFEU. If this is true, Article 114 TFEU provides a

36. However, the Court held that despite being "essential in order to maintain competition undistorted on the internal market", rules on intellectual property fall under Art. 4(2)(a) TFEU and not under Art. 3(1)(b) TFEU, Joined Cases C-274/11 & 295/1, *Spain and Italy* v. *Commission*, EU:C:2013:240, paras. 20–25.

37. The use of Art. 114 TFEU for the protection of competition has also been advocated by Franck, Monti and de Streel, *Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law*, TILEC Discussion Paper DP 2021-016.

suitable basis for legislation within the scope of Article 102 TFEU that unlike the DMA, may openly pursue the strengthening of the protection of competition. Not least, Article 114 TFU derives its appeal from an increasing tendency of Member States (such as Germany)[38] to go it alone in the field of competition law. If Member States start to take steps to amplify national competition laws, then the legal basis of Article 114 TFEU becomes stronger because it allows the Commission to claim that it is better to harmonize than to let Member States go their own way.

Whichever option the Commission chooses, a fair amount of courage and patience will be needed in order to get Article 102 TFEU back on track. So let us return to the question from which our digression started. Do the competition rules still need a strong voice in the Commission? We think: now more than ever.

38. See *supra*, note 12.