The Integration of Wide and Narrow Market Investigations in EU Economic Law

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4 The Integration of Wide and Narrow Market Investigations in EU Economic Law*

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4.1 Scope and Aim of the Chapter

In 2020, the European Commission embarked on a major reflection and consultation exercise aimed at adapting EU economic law to the challenges of our times, in particular to the competition issues raised by the deployment of digital technologies.[1] In June 2020, the Commission envisaged adding a new instrument – named then 'New Competition Tool' – to the EU economic regulation toolbox, in order to deal with structural competition problems which could not be addressed adequately by existing instruments.[2] Two main options were put forward for that instrument: a wide version applicable to all sectors of the economy and a narrow version applicable to the digital sector (or platforms) only. The wide version is similar to the market investigations that exist in several jurisdictions across the world. Conceptually, it is located between standard competition law and sector-specific regulation. The narrow version is a tailored instrument for regulation and thus falls more clearly within sector-specific regulation. In December 2020, the Commission opted for the narrow version in its

* This chapter is based in part on an expert study on the interplay between the New Competition Tool and Sector-Specific Regulation in the EU which was prepared in September 2020 for the Directorate-General Competition of the European Commission. The authors wish to thank Peter Alexiadis, Axel Desmedt, Richard Feasey, Giorgio Monti and Marieke Scholz for their very helpful comments and suggestions.

1 Already in 2019, the Commission had commissioned an influential report on the impact of the digital economy on EU competition law: Crémer/de Montjoye/Schweitzer, Competition policy for the digital era, Report to the European Commission, March 2019.

2 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool.

proposal for a Digital Markets Act (DMA), a sector-specific instrument applicable to 'gatekeepers' of 'core platform services', which includes three types of what is termed 'market investigation'.[3]

As market investigations would be part of the broader EU regulation toolbox under either the wide or the narrow option described above, this chapter analyses how to integrate both these options within EU economic law. To do so, the chapter is structured as follows. Following this introduction, Section 4.2 deals with the characteristics of competition law, sectoral regulation and market investigations. Then Section 4.3 sets out the existing relationships between competition law and sectoral regulation at the systemic, substantive and institutional levels. On that basis, Sections 4.4 and 4.5 make recommendations for a smooth integration of market investigations in EU economic law. As market investigation in the wide option is close to competition law, Section 4.4 deals with its interplay with sectoral regulation. Since, under the narrow option, market investigation is a form of sectoral regulation, Section 4.5 deals with its interplay with competition law. Finally, Section 4.6 concludes by summarising our main recommendations.

4.2 Characteristics of the Main Legal Tools of EU Economic Regulation

Next to competition law, EU economic regulation includes a number of more specific regulatory regimes, which are briefly reviewed below, in order to be able to situate a new EU market investigation tool.

4.2.1 Competition Law

4.2.1.1 Systemic and Substantive Issues

The regime of competition law in the European Union is well known;[4] we will briefly survey its main relevant features for the purposes of this

[3] Proposal of the Commission of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842, articles 14–17. For a brief presentation on the rationale of the proposal, see Chirico, Digital Markets Act: A regulatory perspective, (2021) 12 *Journal European Competition Law & Practice*, 493.

[4] See Jones/Sufrin/Dunne, *EU Competition Law*, 7th ed., 2019; Whish/Bailey, *Competition Law*, 9th ed., 2018.

chapter. While discussion remains open on this issue, it is safe to say that the objectives of competition law include consumer welfare and the protection of the competitive process. EU competition law, as it applies to firms, comprises three main components: (i) a prohibition against restrictive agreements and concerted practices, at Article 101 (1) TFEU, coupled with an exemption clause at 101(3) TFEU; (ii) a prohibition against abuses of dominant position, at Article 102 TFEU; (iii) prior review of concentrations (mergers and acquisitions) having an EU dimension, pursuant to Regulation 139/2004 (commonly known as the EU Merger Regulation).[5]

These three components are all couched in fairly general legislative provisions, which are applied in individual cases following a largely common methodology. First, relevant markets are defined, followed by market assessment (in the light of the specifics of each component) and the imposition of appropriate remedies, if necessary. The remedial arsenal of competition law includes fines, damages, nullity of agreements in breach of Article 101 TFEU, prohibition of mergers that run afoul of the Merger Regulation, as well as a wide range of behavioural or even structural obligations to remove or prevent infringements of the law or to restore competition.

4.2.1.2 Institutional Issues

The enforcement of Articles 101 and 102 TFEU is now detailed in Regulation 1/2003.[6] Enforcement powers are shared between the European Commission and the respective National Competition Authority (NCA) of each Member State. Given the increasing importance of the NCAs since the decentralisation of competition law in 2004, EU law includes strengthened institutional requirements for those NCAs – in particular in terms of independence, accountability, expertise, procedural safeguards and remedial powers.[7] In addition, the respective competent court(s) in each Member State are competent

[5] Council Regulation (EU) 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 No. L 25/1.

[6] Council Regulation (EU) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 No. L 1/1, as amended.

[7] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2019 No. L 11/3.

to apply those provisions as original jurisdictions; they are also in charge of judicial review of NCA decisions (with the possibility of reference to the Court of Justice), whereas European courts entertain appeals from Commission decisions. The Merger Regulation is enforced by the European Commission alone, with appeal to European courts.

Member States also have national competition laws along widely convergent lines to EU competition law, which are enforced by the NCA and national courts. Regulation 1/2003 contains a number of rules on the interplay between EU and national competition laws (rules on applicable law and conflict rules). It also provides coordination mechanisms between the categories of authorities involved in EU competition law enforcement, including consultation, coordination, case allocation and the creation of a European Competition Network (ECN) of authorities.[8] There is less need for coordination under the Merger Regulation, given the mutually exclusive scope of EU and national laws. Mechanisms are in place for the transfer of cases from the EU to the national level, and vice versa. Under Regulation 1/2003 as well as under the Merger Regulation, Member States are involved in Commission decision-making through advisory committees (Advisory Committee on Restrictive Practices and Dominant Positions, Advisory Committee on Concentrations).

4.2.2 Sectoral Regulation

4.2.2.1 Systemic and Substantive Issues

Next to competition law, EU economic regulation features a number of more specific regimes, usually dealing with a single economic sector. Dunne defines economic regulation as 'any State-imposed, positive, coercive alteration of – or derogation from – the operation of the free market in a sector, typically undertaken in order to correct market defects of an economic nature'.[9] While more specific in their scope of

[8] For constitutional reasons, coordination mechanisms between the Commission and NCAs are better developed and stronger than between the Commission and national courts.

[9] Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, 2015, at p. 40.

application, these regimes often cover a broader range of concerns than the three components of competition law listed above.

Sector-specific regulation is usually adopted and tailored to correct perceived market failures in part of the economy.[10] Market failures can have different causes, and economic literature on this point is constantly evolving. The main ones are market power, externalities, asymmetry of information and coordination issues.[11] Whereas competition law is mostly concerned with market failures on the supply side (in particular, market power), specific regulation often extends to both supply-side and demand-side failures. In addition, one could argue for an even broader conception of EU economic regulation, which would also include general regimes dealing with demand-side failures, that is, consumer protection rules. As will be seen in Section 4.3.1, there is no theoretical incompatibility in so doing. In terms of methodology, remedies and institutions, these general demand-side regimes tend to resemble sector-specific regulation rather than competition law.

Specific regulation tends to be formulated in more detailed provisions than competition law, and accordingly implementation and enforcement are often more focused on narrow issues. In so doing, authorities typically rely on economic knowledge and analysis in applying provisions that result from the economic assessment made by the legislative authority. Amongst sector-specific regulation, the EU electronic communications regulatory framework[12] stands out through its regime of asymmetric regulation for providers with Significant Market Power (SMP). The SMP regime features a more developed methodology, which leans more clearly on competition law. This regime aims to regulate providers that hold SMP (interpreted as equivalent to dominance) on relevant markets, defined according to competition law methods. However, the alignment with competition law is not complete, as the markets susceptible to ex ante regulation are selected on the basis of

[10] This chapter will not venture into the fundamental issue of the normative benchmark for market failure, which can be either a 'purely economic' concept such as efficiency or welfare or a more political benchmark established by reference to public policy objectives.

[11] Baldwin/Cave/Lodge, *Understanding Regulation: Theory, Strategy and Practice*, 2nd ed., 2012; Viscusi/Harrington/Sappington, *Economics of Regulation and Antitrust*, 5th ed., 2018.

[12] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [hereinafter EECC], OJ 2018 No. L 321/36.

three criteria which single out those markets where a dominant position could not be effectively policed by competition law and, therefore, the stronger force of regulation is required.[13] Note, however, that other than electronic communications regulation, most EU economic regulation regimes are not based on competition law methodology, since they respond to market failures – and may pursue economic policy objectives – that are different from those of competition law. They remain nonetheless mostly grounded in economic analysis.

The remedial arsenal of specific regulatory regimes, in comparison to competition law, tends not to rely on fines, but rather on the imposition of (mostly) behavioural obligations, on wholesale or retail markets. Wholesale obligations range from non-discrimination to price regulation and include all forms of separation/unbundling as well as wholesale access and service provision. Retail obligations include prudential obligations, consumer protection requirements or universal service obligations.

4.2.2.2 Institutional Issues

While, next to NCAs, the Commission can directly enforce EU competition law (which is exceptional in the broader context of EU law), EU economic regulation is usually enforced by Member States. Most regimes require Member States to set up a dedicated National Regulatory Authority (NRA) for implementation and enforcement. Given the importance of applying economic regulation effectively and in a non-discriminatory manner across the internal market, EU law generally sets institutional requirements for those NRAs – in particular in terms of independence, accountability, expertise, procedural safeguards and remedial powers[14] – compliance with which is strictly

[13] EECC, art. 67(1). Those three cumulative criteria are (i) high and non-transitory structural, legal or regulatory barriers to entry are present; (ii) there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry; and (iii) competition law alone is insufficient to adequately address the identified market failure(s). For a very good analysis of the three criteria test, see Never/Preissl, The three-criteria test and SMP: How to get it right, (2008) 1 *International Journal of Management and Network Economics*, 100.

[14] For instance, EECC, Art. 6-9; Directive (EU) 2019/944 on common rules for the internal market for electricity, OJ 2019 No L 158/125, art. 57.

enforced by the Court of Justice.[15] In order to guarantee the consistent application of EU law and some measure of coordination between NRAs, EU sectoral regulation regimes often establish an EU-level forum for NRAs, for instance, in the form of a network or an agency. In general, the Commission plays a very active role in those networks. Moreover, in some cases, NRA decisions are subject to review or even veto at the European level by the Commission or the EU-level forum.[16]

Exceptionally, EU economic regulation can be enforced directly by EU-level agencies or bodies. This is the case, in particular, for the financial supervision of systemic banks, which is undertaken by the Single Supervisory Mechanism at the ECB.[17] In other sectors, the EU agency comprising the network of NRAs may also have direct, but limited, enforcement powers on matters having cross-border dimensions,[18] cross-border externalities or a strong internal market dimension.[19]

4.2.3 Wide and Narrow Versions of Market Investigation

4.2.3.1 Systemic and Substantive Issues

According to its original inception impact assessment,[20] the Commission was envisaging to propose a new market investigation tool – the New

[15] E.g., for the telecommunications regulators: Case C–424/15 *Ormaetxea Garai et al. v Administración del Estado*, EU:C:2016:780. For energy regulators, see C-378/19 Prezident Slovenskej republiky, EU:C:2020:462; C-767/19 *Commission v Belgium*, EU:C:2020:984 and C-718/18, *Commission v Germany*, EU:C:2021:662. For the data protection authorities, see Case C-518/07 *Commission v Germany*, EU:C:2010:125.

[16] This is the case in telecommunications regulation: EECC, arts. 32–34.

[17] Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ 2013 No. L 287/63.

[18] See the powers conferred upon ACER throughout Regulation 2019/943 on the internal market for electricity.

[19] See, in particular, the power of ESMA to supervise and fine credit rating agencies. Article 28 of Regulation 236/2012 which regulates short selling and certain aspects of credit default swaps gives the ESMA the power to intervene through legally binding acts in the financial markets of Member States if there is a 'threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union'. This power has been validated by the Court of Justice in Case C-270/12 *United Kingdom v European Parliament and Council*, EU:C:2014:18.

[20] See fn. 2.

Competition Tool – to address certain structural competition problems (i) due to problematic market features; (ii) which have adverse consequences on competition and may ultimately result in inefficient market outcomes in terms of higher prices, lower quality, less choice and innovation and (iii) that standard competition law tools cannot tackle or cannot address in the most effective manner.

The inception impact assessment grouped those structural competition problems into two categories depending on whether harm is about to affect or has already affected the market. First, *structural risks for competition* occur where certain market features – such as network and scale effects, lack of multi-homing and lock-in effects – and the conduct of the firms operating in the markets concerned create a threat for competition. This applies to (i) tipping markets, where risks for competition can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position, which could have been prevented by early intervention or (ii) unilateral strategies by non-dominant firms to monopolise a market through anti-competitive means. Second, a *structural lack of competition* happens when a market is not working well and not delivering competitive outcomes due to its structure. These include (i) markets displaying systemic failures – going beyond the conduct of a particular firm with market power – due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation or (ii) oligopolistic market structures with an increased risk for tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions.

Remedies may consist in imposing on firms certain obligations which may be structural, non-structural or hybrid. Since the market features or failures giving rise to structural competition problems are not imputable to any particular firm, there is no finding of infringement, nor are fines imposed on firms. Beyond those remedies, the market investigation tool could also lead to recommendations to legislative bodies (which could bring market investigations close to existing sector enquiries under competition law, as these sector enquiries are often followed by legislative proposals from the Commission);[21]

[21] Report from the Commission of 10 May 2017, E-Commerce Sector Inquiry, COM(2017) 229 which, among others, led to Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on consumers'

recommendations to sectoral regulators; non-binding recommendations to firms, for instance, in form of code of conducts; or voluntary commitments made by firms.

To tackle those structural competition problems and the related market features, the inception impact assessment of the Commission envisaged four different options depending on (i) the *scope* of the market investigation: a wide scope applicable horizontally to all sectors of the economy (as it is the case for standard competition rules) or a narrow scope limited to certain sectors, in particular the digital or digitally enabled markets or (ii) the *threshold* for intervention: a low threshold applicable to all cases of structural competition problems (and potentially to all firms in those markets) or a high threshold limited to dominant firms as it is the case under Article 102 TFEU (but without having to prove abuse).

On the basis of the results of the public consultation[22] and its own internal thinking, the Commission decided in the end to propose an instrument – the Digital Markets Acts (DMA) – with a narrow scope, limited to digital gatekeepers. The DMA rests on three main concepts, namely, a list of 'core platform services' (its material scope of application), 'gatekeepers' (the firms that are subject to the DMA) and a list of obligations imposed on gatekeepers of core platform services. The DMA features three types of market investigation that relate to these concepts:[23] (i) The first type of market investigation allows the Commission to *designate as gatekeeper* a provider of core platform services, on the basis of a series of quantitative and qualitative indicators set out in the DMA.[24] (ii) The second type of market investigation

nationality, place of residence or place of establishment within the internal market, OJ 2018 No. L 60I/1.

[22] See https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_stakeholder_consultation.pdf

[23] DMA Proposal (fn. 3). For a description of the propsosal, see de Streel/Larouche, The European Digital Markets Act proposal: How to improve a regulatory revolution, (2021) 2 *Review Concurrences*, 46.

[24] Ibid., arts. 3(6) and 15. The DMA Proposal (art. 2.2) lists eight core platform services to which the obligations of the DMA may apply: (i) online B2C intermediation services which include marketplaces such as Amazon Marketplace and app stores such as Apple App Store or Google Play store; (ii) online search engines such as Google search or Microsoft Bing; (iii) online social networks such as Facebook; (iv) video-sharing platform services such as YouTube; (v) a number independent interpersonal communication services such as WhatsApp, Skype or Gmail; (vi) cloud computing services such as Amazon webservice or Microsoft Azure; (vii) operating systems such as Google Android, Apple iOS, Microsoft Windows and (viii) advertising services including ad

allows the Commission to impose behavioural and, if necessary, structural *remedies* when a designated gatekeeper systematically refuses to comply with the obligations and prohibitions imposed by the DMA.[25] (iii) The third type of market investigation allows the Commission to *extend the scope of application* (i.e., add new core platform services to the list) *and add to the list of obligations* contained in the DMA. Regarding the scope, the Commission could propose to the EU legislative bodies a revision of the DMA to include new digital services and business models in the regulation.[26] As for the obligations, the Commission could, with a delegated act (and thus without going back to the EU legislature), enlarge the list of obligations incumbent upon the designated gatekeepers.[27]

Thus, in practice, the narrow version of the market investigations proposed by the Commission in the DMA are merely flexibility clauses, aiming to adapt the DMA to the evolution of digital technologies and markets as well as update it in the light of the enforcement experience of the Commission. Using the 'market investigation' label for such a flexibility clause in sectoral regulation can be a bit of a misnomer,[28] because such a narrow tool has little in common with the market investigations existing in other jurisdictions.

4.2.3.2 Institutional Issues

At the institutional level, the DMA Proposal entails a centralised EU-level enforcement model. Indeed, the Commission will be in charge of the enforcement of the new sector-specific regulation applicable to digital gatekeepers, including the three types of narrow market investigation mentioned above. For the first time in the history of EU integration, fully-fledged sectoral regulatory powers would be entrusted to the European Commission.

networks, ad exchanges and any ad intermediation services such as Google AdSense.

[25] Ibid., art. 16.

[26] Ibid., art.17(a). As the extension of the DMA scope should be done with a legislative review (and not with a delegated act), this type of market investigation mechanism does not add much to the right of legislative initiative already granted to the Commission by the article 17 TEU.

[27] Ibid., arts. 10 and 17(b).

[28] As suggested by Camus, 'mal nommer les choses, c'est ajouter au malheur du monde'.

Conversely, the role of the Member States and their national authorities is more limited than in the other fields of EU economic law. For the first type of market investigation (gatekeeper designation) and the second type of market investigation (imposition of sanctions in case of systematic non-compliance), the DMA Proposal provides for the establishment of the Digital Markets Advisory Committee (DMAC), a comitology-type committee which could issue non-binding opinions on Commission draft decisions.[29] For the third type of market investigation related to addition of new obligations, the standard dual control mechanism for delegated acts will apply: before the adoption of the act, representatives of the Member States will be consulted by the Commission, and after the Commission adopts the delegated act, the Council may oppose that act.[30]

4.3 Existing Interplay between Competition Law and Sector-Specific Regulation

A market investigation tool will therefore be introduced into a well-populated landscape of legal regimes of economic governance in the EU. Accordingly, its relationship with the existing legal regimes must be carefully considered. For instance, in its response to the public consultation, the network of national telecommunication regulators BEREC pointed to the risks that 'a conflict between Electronic Communications Services regulation and the New Competition Tool could result in inconsistent application of ex-ante regulation, forum shopping by market actors and potential regulatory uncertainty on whom, how and under which circumstances a market actor is subject to regulation. This legal uncertainty could have serious implications for investment in a dynamic and competitive sector'.[31]

In order to structure the analysis of the relationship between a new market investigation tool and existing EU economic regulation, we will distinguish between three aspects thereof: (i) the *systemic* relationship between market investigation as an instrument and other existing

[29] DMA Proposal (fn. 3), art. 32 and art. 15(1) for the first type of market investigation and art. 16(2) for the second type of market investigation.
[30] Ibid., art. 37(4) and (6).
[31] BEREC Response of 7 September 2020 to the Public Consultations on the Digital Services Act Package and the New Competition Tool, BoR(20) 138, at p. 37.

regimes of economic governance – including consumer protection law – that is, boundary and hierarchy issues between these regimes; (ii) the *substantive* relationship, as concerns the respective substance and methodology of these regimes and (iii) the *institutional* relationship, as between the institutions who are in charge of implementing, interpreting and enforcing these regimes. In this section, we provide a survey of the state of the law and of existing options regarding the three aspects of the relationship between various regimes of economic regulation, by way of background to our analysis of how market investigation would fit into that landscape, which will be developed in the next sections.

4.3.1 Systemic Relationship: Complementarity between Economic Regulation Regimes

In the wake of the substantial expansion of sector-specific regulation at the EU level from the mid-1980s onward, as a result of harmonisation and liberalisation efforts to achieve the single market, the systemic relationship between these regulatory clusters came to the fore, and in particular the relationship between competition law and sectoral regulation. Practitioners and academics alike sometimes conceive of competition law and sector-specific regulation as substitutes or alternatives: each of them would have its domain, exclusive of the other.[32] Under this view, the main challenge would then be to properly classify concrete issues and disputes as pertaining to one or the other. Quite conceivably, this view is influenced by US law, where regulation has been seen as a substitute to antitrust law, and where leading case law tends to consider antitrust and regulation as exclusive of one another.[33]

[32] This was a prominent feature in the discussions around the future of sectoral regulation, and it is linked with the sometimes excessive use of the ex ante vs. ex post distinction, especially by economists. See, for instance, Bourreau/Dogan, Regulation and innovation in the telecommunications industry, (2001) 25 *Telecommunications Policy*, 167; or Newbery, Regulation and competition policy: Longer-term boundaries, (2004) 12 *Utilities Policy*, 93. On the legal side, see Breyer, *Regulation and Its Reform*, 1982, p. 156–161.

[33] Shelanski, The case for rebalancing antitrust and regulation, (2011) 109 *Michigan Law Review*, 638, chronicles and criticises the two leading US cases on point, *Verizon Communications v Trinko* 540 US 398 (2004) and Credit *Suisse v Billing* 551 US 264 (2007). See also OECD, Regulated conduct defence in

Yet both a theoretical analysis of EU law and the weight of practice and case law point to the opposite direction: in the EU, competition law and sectoral regulation should be seen as complements which pursue similar objectives but with different means, each of the two focusing on its particular strength.[34] To the extent it is at all useful to try to delineate their respective domains, these domains overlap. Hence, cases will arise where both are applicable, and coordination mechanisms will be necessary. The theoretical analysis is based on the architecture of EU law. Ultimately, all instruments of EU law are meant to pursue the overall objectives listed at Article 3 TEU (and Protocol 27), including, for the legal instruments concerned by the present chapter, the establishment of an internal market where competition is not distorted. These objectives inform the main provisions of primary EU law, such as Articles 101 or 102 TFEU (which establish the competition rules) or Articles 34, 45, 49, 56, 63 TFEU (which establish the four freedoms of movement within the EU internal market) as well as the corresponding legal bases used to enact secondary law (regulations, directives), including Articles 103, 114 or 352 TFEU which have been used for competition law and internal market law. Secondary law based on these legal bases is meant to contribute to the realisation of those overarching objectives. In other words, the architecture of EU law connects all these regimes and subsumes them under common objectives. It is accordingly not only possible but even preferable to conceive of them as components of a coherent whole, that is, an EU body of economic regulation.

Hence, over the years, it has become customary to refer to competition law as a general, across-the-board component of that body of economic regulation, next to which a number of specific regulatory

antitrust cases (2011) DAF/COMP(2011)3. Note that a nuanced reading of Trinko reveals that, in order to conclude that the application of antitrust law is excluded, the US Supreme Court is careful to point out that the prior regulatory process 'fulfilled the antitrust function'.

[34] See also Dunne (fn. 9); and Hellwig, Competition policy and sector-specific regulation in network industries, in: Vives (ed.), *Competition Policy: Fifty Years on from the Treaty of Rome*, 2009, p. 203–235. This is also the view of some US authors like Carlton/Picker, Antitrust and Regulation, (2007) NBER Working Paper 12902 noting that: 'Antitrust and regulation can also be viewed as complements in which regulation and antitrust assign control of competition to courts and regulatory agencies based on their relative strengths. Antitrust also can act as a constraint on what regulators can do.'

regimes are concerned with specific sectors or issues.[35] General competition law and specific regulation then go hand in hand as complements (and not substitutes or alternatives). Specific regulation contributes to achieving the overall objectives of EU economic regulation by dealing with questions that either lie outside the purview of general competition law because competition law was not conceived to deal with them or are recurrent systemic issues for which competition law is not the most effective instrument. Overlaps between competition law and specific regulation are therefore unavoidable.

The practice of the last decades bears witness to these overlaps and to the complementarity between economic regulation regimes. Electronic communications regulation offers many instances. The 1998 Access Notice already detailed the interplay between competition law and sector-specific regulation in the emerging competition practice of the 1990s.[36] In the 2000s, a string of high-profile refusal to deal and margin squeeze cases further highlighted the relationship between competition law and sector-specific regulation.[37] Examples come from other sectors as well. In the postal sector, the liberalisation of cross-border mail services came through the application of the Postal Services Directive and competition law.[38] In the energy sector, enforcement of Article 102 TFEU against the major network operators gave a decisive impetus to the unbundling of networks (transmission and distribution) from production, as provided in the sectoral directives.[39]

[35] Larouche, *Competition Law and Regulation in European Telecommunications*, 2000.

[36] Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ 1998 No. C 265/2.

[37] Case C-280/08P *Deutsche Telekom v Commission*, EU:C:2010:603; Case C-52/9 *Konkurrensverket v TeliaSonera*, EU:C:2011:83; Case C-295/12P *Telefonica v Commission*, EU:C:2014:2062. The relationship between competition law and regulation set by those cases is analysed in de Streel, The antitrust activism of the Commission in the telecommunications sector, in: Lowe/Marquis (eds.), *European Competition Law Annual 2012: Competition, Regulation and Public Policies*, 2014, at p. 189. More recently, Case C-165/19P, *Slovak Telekom v. Commission,* EU:C:2021:239.

[38] Directive (EC) 97/67 of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1997 No. L 15/14, as amended; Geradin, Enhancing Competition in the Postal Sector: Can We Do Away with Sector-Specific Regulation? (2006) TILEC Working Paper.

[39] Now: Directive 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity OJ [2019]

In the financial sector, as well, the realisation of the internal market in insurance, for example, was a result of the interaction between competition law and sectoral directives.[40] Conversely, EU law has a long tradition of relying on complementary regulation when competition law has been ineffective in solving structural competition problems. This has happened in the telecommunications sector with the regulation of international roaming charges[41] or in the financial sector with the regulation of credit card interchange fees.[42] In all of these examples, the existence of an overlap between competition law and sectoral regulation was acknowledged and accepted. That overlap is the very foundation for the complementary interplay between these regimes that led to successful outcomes from the point of view of the overarching EU objectives.

For the purposes of this chapter, this EU body of economic regulation can be deemed to include demand-side regulation as well, dealing with consumer protection or data protection (in particular, the GDPR).[43] Indeed, consumer protection is primarily dealt with through secondary legislation based on Article 114 and 169 TFEU, thereby linking with the general objectives of Article 3 TEU as they relate to the functioning of the economy. Furthermore, a number of the sector-specific regulatory regimes, such as those in network industries, the financial sector, the audio-visual sector and e-commerce, span both supply- and demand-side regulation.

Figure 4.1 gives a rapid overview of some of the many regimes of economic regulation in the EU, as they were discussed above, using

L 158/125. See Hancher/Larouche, The coming of age of EU regulation of network industries and services of general economic interest, in: Craig/de Búrca (eds.), *The Evolution of EU Law*, 2nd ed., 2011, p. 743–782.

40 As best exemplified in the role played by the sectoral block exemption, lately Regulation 267/2010, OJ [2010] L 83/1 (now expired), in charting a balance between the liberalisation of the sector and the need for insurance firms to cooperate on certain aspects of their operations.

41 Regulation (EU) 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks, OJ 2012 No. L 172/10, as amended by Regulation 2015/2120 and Regulation 2017/920.

42 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ 2015 No. L 123/1.

43 On the interplay between competition law and consumer protection, see Cseres, Competition and Consumer Policies: Starting Points for Better Convergence (2009), ACLE Working Paper 2009-06.

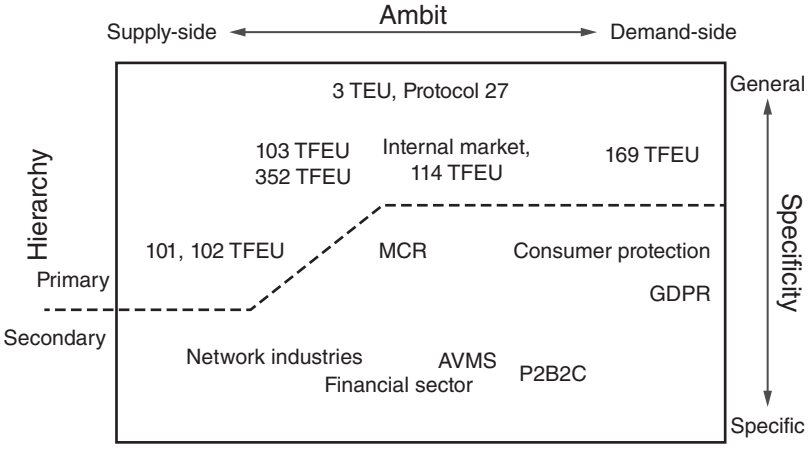

Figure 4.1 The EU body of economic regulation

mainstream abbreviations for some specific regimes, such as AVMS (Audiovisual Media Services),[44] GDPR (General Data Protection Regulation)[45] or P2B (for Regulation 2019/1150).[46] On the horizontal axis, these regimes are ordered according to whether they are predominantly concerned with supply-side regulation (towards the left) or with demand-side regulation (towards the right). On the vertical axis, these regimes are ordered according to how specific they are, from the whole economy on top to the narrowest sectors at the bottom. The regimes based on primary EU law (TEU and TFEU) are included above the dotted line, with the legal bases and the statements of policy aims coming at the very top, given their high level of generality. In this chart, the broader version of the new instrument, as envisaged earlier, would come close to the MCR, whereas the narrower version, as

[44] Directive (EU) 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 No. L 95/1, as amended by Directive 2018/1808.

[45] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation), OJ 2016 No. L 199/1.

[46] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ 2019 No. L 186/55.

proposed in the DMA, would be closer to network industries and AVMS regulation.

4.3.2 *Substantive Relationship: Reliance on Common Economic Methodologies*

If the various regimes of EU economic regulation are complements within a larger body of law, with some overlap between them, their respective substantive rules should be compatible, if not aligned. Indeed, the starting point is that all of these regimes share a common theoretical basis and methodology. With respect to theory, EU economic regulation typically follows a public interest approach: public authorities stand at some distance from markets and society, they observe the operation of markets and act in the public interest in order to remedy or correct market failures. Compared to the United States, public choice theory plays a less important role in Europe. Government failure is of more limited concern: it is assumed that the EU multi-level institutional setting is less vulnerable to capture and other government failures.[47] EU economic regulation is content with traditional safeguards such as judicial review, reporting obligations or periodical assessments and reviews.

This theoretical basis is reflected in the methodology used to develop and review regulation, which is derived from the principles of proportionality and subsidiarity.[48] That methodology is set out in the Better Regulation Guidelines, especially in the chapter on Impact Assessment.[49] In the case of EU economic regulation, the methodology incorporates the use of economic analysis in the development of regulation and, to the extent necessary, in its implementation and enforcement as well. In other words, economic regulation relies on recognised economic knowledge from fields such as industrial organisation, institutional economics, political economy, game theory or behavioural economics, to name but the main ones.

[47] On the different positive and normative explanations of regulation, including public interest and public choice theories, see Baldwin/Cave/Lodge (fn. 11) Chapter 4; Viscusi/Harrington/Sappington (fn. 11) Chapter 2.
[48] TUE, Art. 5 and Protocol No. 2.
[49] European Commission Staff Working Document of 7 July 2017, Better Regulation Guidelines SWD(2017)350, Chapter III.

In principle, the substance of a new EU market investigation tool, as a general regime of economic regulation, should fit within the theoretical basis and methodology set out above. No significant difficulties should arise. Nonetheless, it is worth mentioning a few substantive lessons arising from the experience with other economic regulation regimes, which could be useful in the elaboration of a market investigation tool.

Firstly, there is limited value in methodological convergence going beyond the general commitment to rely on recognised economic knowledge, as set out just above. As mentioned in Section 4.2.2, in the course of developing the current regulatory framework for electronic communications in the early 2000s, EU institutions decided to rely on competition law methodology for a core element of the framework, the SMP regime. It was hoped that this would ensure coherence between electronic communications and competition law and boost the ease-of-use and legitimacy of sector-specific regulation. Market definition and market analysis (in order to ascertain if a player held SMP) were built into the regulatory process, ostensibly to reproduce competition law analysis.[50] A good argument can be made that both market definition and SMP analysis never were done quite along the same lines as under competition law.[51]

In any event, starting at the latest with the second Recommendation on relevant markets in 2007,[52] the exercise became mostly one of market selection, with the famous 'three-criteria test' becoming the main focus of discussion. The market selection made in the Commission Recommendation was so influential that the 'competition law' analysis carried out by NRAs to define markets and then identify SMP operators on those markets receded in the background. The experience of electronic communications regulation with the introduction of competition law methodology is therefore at best

[50] de Streel, The integration of competition law principles in the new European regulatory framework for electronic communications, (2003) 26 *World Competition*, 489.

[51] Larouche, A closer look at some assumptions underlying EC regulation of electronic communications, (2002) 3 *Journal of Network Industries*, 129; de Streel, A program for review of the European economic regulation for electronic communications, (2008) 32 *Telecommunications Policy*, 722.

[52] Recommendation 2007/879 of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, OJ 2007 No. L 344/65.

inconclusive.[53] On a more general note, Hellwig explains how the use of market definition (within the meaning of competition law) in sectoral regulation would unduly prevent regulation from taking a more systemic view of the market failures and theories of harm.[54]

Secondly, the commitment to rely on recognised economic knowledge does however have some concrete implications for regulatory design. Here as well, electronic communications regulation provides a good illustration. The current regulatory framework rests on the principle of technological neutrality, which implies that the law must be framed so as to be sustainable in the face of technological change and evolution and that it must avoid picking technological winners inadvertently.[55] As a consequence, most of the central concepts of electronic communications law have been formulated in economic or functional terms, eschewing technological categories.[56] This choice has stood the test of time. In comparison, regulatory frameworks that enshrine technological categories or models – such as the successive electricity directives – have proven more difficult to manage over time, with each round of legislative review leading to more regulation and increased complexity.

Thirdly, since the early 2000s, with the reform of competition law and the electronic communications regulatory framework, the Commission relied mostly on soft-law instruments as the preferred vehicle to achieve coordination, whether substantive or procedural. These soft-law instruments include recommendations (within the meaning of Article 288 TFEU) as well as less official types such as communications, notices and guidelines. The Commission chose soft-law instruments because of their informality and flexibility, given that they were meant for fellow regulatory or competition law authorities.

[53] If the reliance on competition law methodologies proved inconclusive at the substantive level, such reliance serves an institutional purpose, namely, to justify the Commission veto over NRAs draft decisions regarding market definition and SMP designation.
[54] Hellwig (fn. 34).
[55] EECC, art. 4(c). On the principle of technological neutrality, see Hancher/Larouche (fn. 39); van der Haar, The principle of technological neutrality: Connecting EC network and content regulation (2008), unpublished PhD dissertation.
[56] Although the European Electronic Communications Code reintroduces some technology-based concepts with the notion of 'very high capacity network' at EECC, art. 2(2).

In practice, these soft-law instruments were largely followed, but their formal legal force was questioned and tested by litigants in a number of court cases. Unfortunately, European courts weakened the approach of the Commission by emphasising the lack of binding effect of soft-law instruments upon courts and other authorities than the Commission itself.[57]

Historically, amongst these soft-law instruments, only recommendations have been given any effect at all, even if limited, in that courts are bound 'to take them into account in order to decide disputes submitted to them, in particular where they cast light on the interpretation on national measures adopted in order to implement them or where they are designed to supplement binding Community provisions'.[58] It took years for the Court to finally accept, in 2016, that soft law – in this case a recommendation – could bind further and impose some actual constraints on NRAs and reviewing courts, in situations where legislation expressly requires the NRA to 'take utmost account' of such soft law. For the NRA, 'taking utmost account' implies following the recommendation, unless it finds that this is not appropriate, in which case the NRA must give reasons for its position.[59] Upon review, a national

[57] This can be observed in particular with respect to competition law, where the CJEU insisted upon the non-binding nature of the De minimis notice (now at OJ 2014 No. C 291/1) (Case C-226/11 *Expedia* EU:C:2012:795, at para. 4); the Notices on cooperation within the ECN, OJ 2004 No. C101/43 and on leniency, OJ 2006 No. C 298/17 (Case C-360/09 *Pfleiderer*, EU:C:2011:389, at para. 21); the Guidance paper on Article 102 TFEU, OJ 2009, No. C45/7 (CJEU, 6 October 2015, Case C-23/14 *Post Danmark I*, EU:C:2015:651, at para. 52); the instruments produced by the ECN, especially the Model Leniency Programme (Case C-428/14, *DHL Express (Italy)*, EU:C:2016:27, at paras. 41–44). The General Court also denied any binding nature to Commission comments issued under Art. 7(3) of Directive 2002/21 [now Art. 33(3) EECC]: Case T-109/96 *Vodafone España*, EU:T:2007:384, at para. 93 and Case T-295/06 *Base and Mobistar v Commission*, EU:T:2008:48.

[58] Case C-322/88 *Salvatore Grimaldi*, EU:C:1989:646, at para. 18, reconfirmed in the context of economic regulation in Case C–55/06, *Arcor v Bundesrepublik Deutschland*, EU:C:2008:244, at para. 94; and Case C-28/15 *KPN v ACM*, EU:C:2016:692, at para. 41.

[59] Case C-28/15 *KPN v ACM*, at para. 38. This ruling is confirmed in Case C-277/16 *Polkomtel v UKE*, EU:C:2017:989, at para. 37 and further clarified C-689/19P *VodafoneZiggo v Commission*, EU:C:2021:142. The CJEU gives more effect to 'utmost account' than the Gen Ct had previously done in Case T-109/96 *Vodafone España*, (fn. 57), at para. 93.

court may depart from a recommendation only for reasons having to do with factual circumstances.[60]

4.3.3 Institutional Relationship: The Importance of Cooperation

4.3.3.1 Overall Picture

When it comes to institutions, the relationship between regulatory regimes is multi-dimensional.[61] Typically, within each regime there is a *horizontal* relationship between the regulatory authorities of each Member State – in charge of implementing EU secondary law, as a default rule – as well as a *vertical* relationship between the Member State authorities and the European-level authority, usually the Commission. In addition, as between regimes, the respective authorities find themselves in a *transversal* relationship.

The overall picture is quite complex. At the apex of the pyramid, the European Commission plays a role in every EU economic regulation regime. In EU competition law, it holds direct implementation powers, shared with NCAs. Where national authorities are (also) in charge of implementation, the Commission is empowered – depending on the regime – to enact implementing or delegated legislation, to issue non-binding coordination documents (recommendations, guidelines, etc.) or to review, veto or take over the work of national authorities. In addition, the Commission is always a member or observer in the EU-level institutions regrouping national authorities.

At the bottom of the pyramid, each Member State created a national competition authority (NCA) as well as a number of national regulatory authorities (NRAs), in order to handle the implementation and enforcement tasks arising from EU economic regulation. Within each Member State, one or more courts are responsible for the judicial

[60] Case C-28/15 *KPN v ACM*, at paras. 42–43, expanding upon existing case law, as mentioned at para. 41.

[61] See Larouche, Coordination of European and member state regulatory policy: Horizontal, vertical and transversal aspects, (2004) 5 *Journal of Network Industries*, 277; Petit, The proliferation of national regulatory authorities alongside competition authorities: A source of jurisdictional confusion, in: Geradin/Munoz/Petit (eds.), *Regulatory Authorities in the EC: A New Paradigm for European Governance*, 2005, at p. 180; Monti, Attention Intermediaries: Regulatory Options and their Institutional Implications (2020) TILEC Discussion Paper 2020-18.

review of NRA and NCA decisions (or a similar mechanism of judicial control), and courts also hold original jurisdiction for the application of competition law.

In the middle of the pyramid, between the European Commission and the national authorities and courts, one finds for each regime that the NCAs or NRAs, as the case may be, are regrouped in an EU-level forum wherein they can – depending on the regime – exchange information, coordinate or allocate enforcement activity, develop best practice or issue recommendations or other soft-law instruments or in some cases even issue decisions. These European fora take various legal forms, and their size and powers vary.[62] They include the European Competition Network (ECN),[63] the Body of European Regulators for Electronic Communications (BEREC),[64] the Agency for the Cooperation of Energy Regulators (ACER)[65] or the European Supervisory Authorities (ESAs) in the financial sector.[66]

4.3.3.2 Horizontal and Vertical Coordination

In each EU economic regulation regime, EU law typically provides for means of horizontal and vertical coordination between the relevant authorities concerned with that regime.[67] It is beyond the scope of this chapter to describe them in detail. One prominent example is

[62] See de Visser, *Network-Based Governance in EC Law*, 2009.
[63] Directive 2019/1 (fn. 7).
[64] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of the European Regulators for Electronic Communications, OJ 2018 No. L 321/1.
[65] Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing an European Agency for the Cooperation of Energy Regulators, OJ 2019 No. L 158/22.
[66] Regulation (EU) 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), OJ 2010 No. L 331/12, as amended; Regulation (EU) 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), OJ 2010 No. L 331/48, as amended; Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ 2010 No. L 331/84, as amended.
[67] On the need and types of institutional cooperation in shared regulatory spaces, see Freeman/Rossi, Agency coordination in shared regulatory space, (2012) 125 *Harvard Law Review*, 1131.

found at Regulation 1/2003, as regards Articles 101 and 102 TFEU. This Regulation sets out a mechanism for cooperation between the Commission and the NCAs: they notify each other when proceedings are initiated and before they are closed, with a view to coordinating their action. Such coordination takes place within the European Competition Network (ECN).[68] Ultimately, the Commission retains the power of taking cases away from an NCA under certain circumstances, but that power has not been used formally so far.[69] Another model is found in electronic communications, under the SMP regime:[70] there, NRAs communicate their draft SMP measures to one another and to the Commission, for consultation. Coordination takes place within BEREC, which can also comment on NRA draft measures. Ultimately, the Commission retains the power to object to a draft measure and even veto it if it concerns market definition or SMP assessment. A small but not insignificant number of veto decisions have been issued over the years, while several comment decisions by the Commission have led to changes in NRA final decisions.[71]

The mechanisms described above are too detailed and probably too prescriptive to be applied to transversal relationships between two different economic regulatory regimes, if only because such regimes are contained in separate legal instruments. Indeed, no comparable mechanisms exist between two different regimes in EU economic law at the moment. Nonetheless, two features of these mechanisms could be useful in the design of what would be a more limited transversal coordination regime involving a new EU market investigation tool.

Firstly, the duty to consult is designed to be as effective as possible. For competition law, consultation takes place early in the process on the basis of a notice of intent to open an investigation, in order to avoid

[68] Regulation 1/2003, art. 11, save for consultations on draft Commission decisions, which take place through the Advisory Committee on Restrictive Practices and Dominant Positions: Regulation 1/2003, art. 14(1).
[69] Regulation 1/2003, art. 11(6) and Case C-857/19 *Slovak Telekom v Protimonopolný úrad Slovenskej republiky*, EU:C:2021:139. Note that some cases have been moved informally to the Commission.
[70] EECC, arts. 32–33.
[71] See https://ec.europa.eu/digital-single-market/en/consultation-procedures-telecom.

wasteful duplication of enforcement efforts.[72] Subsequently, a more extensive round of consultation takes place towards the end of the proceedings, when the authority has reached the point in its work where it can table a draft decision or measure. The Commission and other authorities have all the information in hand to be able to give meaningful comments to the authority that tabled the draft, and that authority has time to take these comments into account.

Secondly, one of the most interesting features of the SMP regime under the electronic communications framework is the obligation to 'take utmost account', which figures throughout Articles 32 and 33 EECC.[73] NRAs must take utmost account of the objectives of the EECC.[74] They must equally take utmost account of (i) comments received from other NRAs, BEREC or the Commission regarding a draft measure[75] and (ii) a Commission notification that it entertains serious doubts regarding a draft measure.[76] In return, the Commission is also bound to take utmost account of BEREC's opinion before issuing a veto or a recommendation to an NRA.[77] Similarly, NRAs must also take utmost account of Commission recommendations aiming to harmonise EECC implementation[78]. As mentioned above, the Court of Justice of the EU elaborated on the meaning of 'taking utmost account'.[79] It held that, in order to take utmost account of a Commission recommendation, an NRA is expected as a rule to follow the recommendation. The NRA can depart from the recommendation only if it finds the recommendation inappropriate in the circumstances of a given situation, and then the NRA must give reasons for its conclusion. In other words, 'taking utmost account' would correspond to a strong 'comply or explain' obligation. Even though the Court of

[72] Such a round of early consultation would be pointless under the EECC, since the NRAs are well aware of their respective enforcement agenda (being coordinated via the Commission Recommendation on relevant markets) and the risk of overlap is minimal.

[73] The notion of 'taking utmost account' figures in many other places in the EECC, and indeed throughout EU law. However, it is in the context of articles 32 and 33 EECC that it has received the most attention in practice and in academic work.

[74] EECC, art. 32(1) [75] EECC, arts 32(8) and 33(1). [76] EECC, art. 33(4a).

[77] EECC, arts. 32(6) and 33(5). [78] EECC, art. 38(2).

[79] Here in the context of EECC, art. 38(2): Case C-28/15 *KPN v ACM* (fn. 58), at paras. 37–38.

Justice formulated its reasoning in general terms, it remains to be seen whether 'taking utmost account' will be interpreted similarly in other contexts.

4.3.3.3 Transversal Coordination

As mentioned above, as regards transversal relationships between authorities across regimes, EU law is much less developed. At a minimum, all authorities at the EU and national level, in their capacity as actors in the implementation and enforcement of EU law, are under a duty of loyalty (sincere cooperation) towards one another.[80] Such duty translates in an obligation to consult other authorities – usually between an NRA and the NCA – as explicitly stated in some EU regimes.[81] But effective coordination often requires more than consultations.

At the European level, some transversal coordination effort takes place internally, given that the Commission plays a role in every EU economic regulation regime. Such coordination is a matter for the internal rules and procedures of the Commission. In principle, internal coordination within a single institution – the European Commission – should happen without too much friction. The joint work of Directorates-General for Competition and for Communications Networks, Content and Technology in 2003–2006, the early years of the SMP regime, provides a successful example of intra-Commission coordination. Coordination between the EU-level regulatory fora is uneven: whereas in network industries the respective fora are perhaps too diverse to be able to coordinate effectively, the three financial-sector European Supervisory Authorities appear to be in closer contact, given their greater symmetry and their common design.

If anything, the most interesting developments regarding transversal coordination occurred at Member State level. A number of innovative formulae have been deployed. By way of example, Italy and the United Kingdom have created NRAs spanning multiple regimes in the converging ICT sector (electronic communications and audio-visual media services), in order to regulate more effectively. Given commonalities and also out of efficiency concerns, Germany has bundled all network-industry NRAs into one (Bundesnetzagentur or BNetzA), as well as all financial-sector NRAs into one (Bundesanstalt

[80] TEU, art. 4. [81] For instance, EECC, art. 11.

für Finanzdienstleistungsaufsicht or BaFin).[82] In order to avoid frictions and forum shopping between competition law and sectoral regulation, the United Kingdom has given concurrent competition law powers to a number of NRAs in the network industries. Finally, Spain and the Netherlands have gone the furthest, merging the NCA with the NRAs in the network industries and the consumer protection authority into a wide authority (Comisión Nacional de los Mercados y la Competencia or CNMC, Autoriteit voor Consumenten en Markten or ACM). While these different formulas are attractive and worth studying,[83] none of them appears feasible in the context of the relationship between the authorities in charge of implementing an EU market investigation tool and other authorities tasked with the application of economic regulation.

4.3.4 *Conflict Rule: Arbitrating Conflicting Obligations*

In the end, despite the emphasis on cooperation and coordination, or perhaps because of it, a conflict rule is also needed. Such a rule was at the heart of *Deutsche Telekom*,[84] a case where the Commission found that DT had breached Article 102 TFEU by engaging into a margin squeeze between its wholesale access prices and its retail tariffs, leaving competing retailers with limited and sometimes even negative margins. One of DT's main points in defence was that both its wholesale and retail prices had been approved by the German sectoral regulatory authority.[85] Following the Commission and the General Court, the Court of Justice held that Article 102 TFEU remained applicable even if the German regulatory authority had already dealt with the case, unless DT would have been positively compelled by the authority to act as it did (which it was not).[86] The underlying message was clear: a

[82] In the same vein, the United Kingdom has created a UK Regulators Network (UKRN) bringing together regulators in the network industries and the financial sector, yet without the competition authority: https://www.ukrn.org.uk/.
[83] See Alexiadis/Pereira Neto, Competing Architectures for Regulatory and Competition Law Governance, (2019) EUI-FSR Energy Research Report.
[84] Case C-280/08P *Deutsche Telekom v Commission* (fn. 37).
[85] RegTP, as it then was. The corresponding regulatory powers are now vested in the BNetzA.
[86] Case COMP/37.451 Deutsche Telekom AG, OJ 2003 No. L263/9, at para. 54; Case T-271/03 *Deutsche Telekom v Commission*, EU:T:2008:101, at paras. 85–88; Case C-280/08P, at paras. 80–90.

firm remains subject to competition law for its course of conduct, even if such conduct would not fall foul of sectoral regulation. Competition law therefore prevails.[87] In the subsequent *Spain v Commission* case, a similar margin squeeze issue arose, with Spain arguing for the primacy of the decision taken by its sectoral authority. The General Court framed the issue more explicitly in terms of a conflict rule when it wrote the following:[88]

> In any event, even if the sectoral regulation referred to by the Kingdom of Spain derives from European Union secondary legislation, it must be stated that, in view of the principles governing the hierarchical relationship of legal rules, such secondary legislation could not, in the absence of any enabling provision in the Treaty, derogate from a provision of the Treaty, in this case Article [102 TFEU].

The rule arising from *Deutsche Telekom* and *Spain v Commission* therefore flows from the primacy of competition law (specifically Article 102 TFEU) – as primary EU law – over sectoral regulation, which is secondary EU law. This rule is useful whenever Articles 101 or 102 TFEU is involved. What about other situations where no hierarchical element is present, such as between two regimes of secondary law? Of course, the regimes in question could contain their own conflict rules, as is the case for instance with the EECC for electronic communications and audio-visual media services regulation.[89] In the absence of such explicit rules, case law on this point is not well established. Available principles of legislative interpretation could apply, but they do not carry the same strength as a hierarchical rule.

[87] The reverse situation, where a firm would comply with competition law but not with sectoral regulation, has not yet been explored in the case law. In the 1998 Access Notice, the Commission states that in such a case, compliance with competition law does not prevent liability under sectoral regulation. In practice, such cases are unlikely to arise: since the 2004 reform (Regulation 1/2003), the Commission has ceased to issue non-infringement decisions under Articles 101 or 102 TFEU, and national competition authorities do not have the power to issue such decisions. Unless a firm would somehow have obtained a court judgment on the issue, it will accordingly not be in a position where it can invoke an actual decision to support a claim that it complies with competition law in the course of regulatory proceedings.

[88] Case T-398/07, *Commission v Spain*, EU:T:2012:173, at para. 55. In the same paragraph, the General Court explicitly dismissed Spain's argument that Trinko was a relevant authority on this point.

[89] EECC, art. 1(3).

In some situations, a general/specific articulation could be used. In such cases, the Court of Justice tries to apply both regimes in a complementary manner as far as possible. For instance, in the electronic communications sector, the Court of Justice clarified that the sector-specific consumer protection rules of the EECC are complementary – and not substitute – to the general consumer protection rules. Therefore, those general consumer protection rules apply fully to the electronic communications sector and should be enforced by the consumer protection authority.[90] Otherwise, the more specific regime should apply first, but at the same time it should not apply so as to contradict the more general regime, unless the more specific regime explicitly deviates from the more general one.

Another possibility would be a principal/accessory relation: for composite services, instead of applying two different regimes, only the regulation pertaining to the principal component would apply, leaving aside the regulation applicable to the accessory component. For instance, in *UPC Nederland*, a case concerning the delivery of audio-visual media content over electronic communications networks, the Court of Justice applied the legal regime of the principal component (electronic communications network) to the entire service and left aside the regime that only applied to an ancillary element of the service (audio-visual media service).[91] A similar approach was followed by the Court of Justice in the collaborative economy cases to decide whether the sharing platform should be qualified as a provider of an information society service or as a provider of the intermediated service (such as transport for Uber or hosting for Airbnb).[92] The Court sought

[90] Joined Cases C–54/17 and C–55/17, *Autorità Garante della Concorrenza e del Mercato (AGCM) v Wind Tre and Vodafone Italia*, EU:C:2018:710, at para. 60, noting that: 'The term "conflict" refers to the relationship between the provisions in question which goes beyond a mere disparity or simple difference, showing a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other without the need to bring them to an end.'

[91] Case C-518/11, *UPC Nederland v Hilversum*, EU:C:2013:709.

[92] Case C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain*, EU:C:2017:981, at para. 40; Case C-320/16, *Uber France*, EU:C:2018:221, at para. 22, deciding that: 'The intermediation service (provided by Uber) had to be regarded as forming an integral part of an overall service the main component of which was a transport service and, accordingly, had to be classified, not as an "information society service" . . . but as a "service in the field of transport."' Case C-390/18, Airbnb Ireland, EU:C:2019:1112, at para. 69; Case C-62/19

to identify the main component of the service provided by the collaborative economy platform and then applied the legal regime relating to that main component to the whole service provided by the platform.

4.4 Recommended Interplay between a Wide Market Investigation and Sector-Specific Regulation

As explained above, the Commission had envisaged two versions, wide and narrow, of a market investigation at the EU level. The wide version applies to all sectors of the economy, including the regulated ones. This is the version generally applicable in jurisdictions having a market investigation tool. For instance, in the United Kingdom, the CMA may launch a market investigation in any sector of the economy, including regulated sectors, as no sector is legally excluded from Part 4 of the UK Enterprise Act. The sectoral regulators may themselves make market investigation references for which the investigation is to be conducted by the CMA. They will do so when it would be more appropriate to deal with a competition problem through a market investigation than under sectoral regulation.[93] In this regard, Whish indicates that 4 of the 20 market investigation references so far came from sectoral regulators.[94] Next to the market investigations done in regulated sectors at the request of the regulators, other investigations have been done in regulated sectors at the CMA's own initiative.[95] Similarly, in South Africa, all the provisions of the Competition Act,

Star Taxi App v Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General, and Consiliul General al Municipiului Bucureşti, EU:C:2020:980.

[93] Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act, OFT 511, March 2006, at para. 2.3 in fine (fn. 37).

[94] See Whish, Chapter 5. Those were (i) the Office of Rail and Road made a reference of Rolling Stock Leasing in April 2007 and the Competition Commission reported in April 2009; (ii) OFCOM made a reference of Movies on Pay TV in August 2010 and the Competition Commission reported in August 2012; (iii) OFGEM referred Energy in June 2014 and the CMA reported in June 2016; (iv) the Financial Conduct Authority referred Investment Consultants in September 2017 and the CMA reported in December 2018. Moreover, in one other case in 2005, OFCOM accepted undertakings from BT in lieu of a market investigation reference

[95] This was the case of the market investigations in retail banking or in investment consultants.

including the market inquiries, apply to regulated sectors.[96] In practice, some market inquiries have been completed in regulated sectors such as the Banking Inquiry in 2008 and the Mobile Data Services in 2019.[97] This is also the case in Mexico where market examinations have been launched in regulated sectors such as transport or credit card payment systems.[98]

An advantage of a wide version of market investigation over a narrow one is that it alleviates uncertainty and costly litigation on the precise scope of the market investigation. The risks and costs of a narrow sectoral version could be illustrated by the constant frustration, in the long-standing process of ICT convergence, with the attempts to neatly delineate the respective ambits of sector-specific regulatory regimes through definitions. Intense negotiations have produced a complex definitional scheme involving 'electronic communications' networks and services, to be distinguished from 'Information Society services' and from 'audio-visual media services' (themselves divided in both linear and non-linear subcategories).[99] The resulting pigeonholing exercise is profoundly at odds with the technological and economic reality of the ICT sector.[100] A wide version avoids these pitfalls, but it requires a smooth interplay with sector regulation when market investigations are conducted in a regulated sector.

4.4.1 *Systemic Relationship: Closing Regulatory Gaps*

As explained above, the EU approach to economic regulation sees the various regimes – general and sector-specific – as complements rather than substitutes. Hence, a new wide market investigation could easily be integrated in European economic law and applicable to sectors

[96] South African Competition Act No. 89 of 1998 as amended, art. 3(1A). On the South African regime, see Bonakele/das Nair/Roberts, Chapter 6.
[97] http://www.compcom.co.za/banking-enquiry/, http://www.compcom.co.za/newsletter/data-market-inquiry/.
[98] https://www.cofece.mx/wp-content/uploads/2018/11/COFECE-047-2018-English-.pdf.
[99] Those respective definitions are now included in EECC, art. 2; Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ 2015 No. L 241/1, art.1; AVMSD, art. 1(1).
[100] See, for instance, Case C-518/11, *UPC Nederland v Hilversum*.

which might be subject to specific regulation.[101] The presence of overlaps is a logical consequence thereof; to borrow from computer science, it is not a bug, it is a feature.

4.4.1.1 Market Investigation to Close Substantive Regulatory Gaps

The application of a new market investigation tool in a regulated sector – electronic communications, energy, transport, financial services, etc. – may be justified and useful to remedy a structural competition problem that either does not trigger regulatory intervention or for which available regulatory remedies would offer no effective solution. In this case, the market investigation could close a 'regulatory gap'. By way of illustration of such a 'gap', one could think of the tight oligopoly structure that appears to be prevailing in electronic communications markets, as evidenced in a number of merger control assessments.[102] At the beginning of the last review of the regulatory framework for electronic communications, BEREC pointed to the insufficiency of the (then) Directives to intervene in case of tight oligopolies and suggested legislative changes to broaden the possibilities of intervention.[103] However, the EU institutions did not adopt all the

[101] This is also recommended by Crawford/Rey/Schnitzer, Chapter 7.

[102] Such tight oligopoly is a result of concentration on mobile communications markets (given the limited number of spectrum licenses), coupled with the relative transparency of the market and extensive infrastructure sharing. See, for instance, Case T-399/16, *CK Telecoms UK Investments v Commission*, EU:T:2020:217, where the oligopolistic state of the UK mobile communications market is discussed at length, against the backdrop of Merger Regulation case law making comparable findings in other national markets. As for fixed communications markets, in most Member States they are at best duopolies.

[103] BEREC Opinion of 15 December 2015 on the Review of the EU Electronic Communications Regulatory Framework, BoR(15) 206, at p. 14, noting that: 'NRAs should be able to address duopoly scenarios – e.g. where NRAs are unable to find a single SMP operator in the relevant market but where two players are nonetheless not effectively competing. This is especially relevant, for example in the market for internet access, where the duopoly situations (with only two infrastructure-based competitors) is more likely to develop. As described in BEREC's report on oligopolies, duopolistic/oligopolistic communications markets face a high risk of evolving in a non-competitive manner and are less likely to support efficient and sustainable competition ('two are not enough').' BEREC's report on oligopoly analysis and regulation has identified several possible options for adapting the Framework regarding the regulatory treatment of oligopolies, including potential market indicators of non-competitive oligopolies. BEREC Report of 15 December 2015 on oligopoly analysis and regulation, BoR(15) 195.

changes proposed by BEREC and, doing so, may have left a regulatory gap which could be usefully closed by a marker investigation tool.[104]

A gap could also arise because a structural competition problem occurs so infrequently that establishing a regulatory regime for such a problem is deemed too costly for the benefits it would bring. These include the cost of carrying out the intervention (inquiry, proceedings, decision), the cost of maintaining, enforcing and reviewing regulation and of course the compliance costs and disincentives visited on market actors. A wide market investigation tool which can be used only when needed could be less costly to use than a fully-fledged sector-specific regulatory regime. Finally, a gap could also arise as a matter of regulatory dynamics: the structural competition problem in question could be a new occurrence that has not yet been acknowledged and identified by sector-specific regulation. Conceivably, experience could have been gained under the market investigation in dealing with such a problem in other sectors, in which case the market investigation could offer a comparative advantage over sector-specific regulation.

4.4.1.2 Market Investigation to Close Institutional Regulatory Gaps

It has also been suggested that the market investigation could be useful to intervene in situations where a structural competition problem could be addressed by sector-specific regulation but has not been remedied because of failure on the part of the NRA in charge of such regulation. For instance, the NRA may apply sector regulation in an incorrect manner and make mistakes,[105] the NRA may be captured[106] or the

[104] All the more since the General Court in Case T-399/16 *CK Telecoms* (fn. 102), severely restricted the applicability of the Merger Regulation to mergers involving such markets.

[105] This has been used to justify the Commission decision in Deutsche Telekom (fn. 37). See Geradin, Limiting the scope of article 82 of the EC treaty: What can the EU learn from the US Supreme Court's judgement in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?, (2004) 41 *Common Market Law Review*, 1519; contra Larouche, Contrasting legal solutions and comparability of the EU and US experiences, in: Levêque/Shelanski (eds.), *Antitrust and Regulation in the EU and US: Legal and Economic Perspectives*, 2009, p. 76–100. As discussed above, this is not how the Court of Justice explained the case: Case C-208/08P, *Deutsche Telekom* (fn. 37). On the use of competition law actions to correct intervention of NRAs, see also de Streel (fn. 37).

[106] There are few actual cases where regulatory capture was at stake, even though by all accounts capture is not unheard of in the EU. A more striking case of legislative capture occurred in the case of the removal of regulation of Next

NRA may fail to successfully defend its decision on appeal for reasons that are independent of its control.[107] In the jurisdictions that already have a market investigation tool, it has sometimes been used to correct the inaction of the regulators.

However, the EU context is different from these national jurisdictions. We would resist any suggestion that the market investigation tool is the appropriate means to correct the (in)action of an incompetent or captured NRA. There are other legal means to do that, in particular the specific coordination mechanisms set up by the sectoral regulation in question[108] or, in last resort, an infringement procedure against the Member State of the NRA in question under Article 258 TFEU. It would be detrimental to the integrity of both the market investigation tool and other economic regulation regimes if market investigation was seen as an additional means of recourse in regulatory proceedings. The existence of a regulatory gap should not depend on the quality of NRA enforcement activities but rather on the inability of the regulatory regime to deal with a structural competition problem in the abstract. In other words, the gap should be substantive and not institutional. Therefore, as will be suggested in Section 4.4.3, if the market investigation concludes that the obligations necessary to remedy the structural competition problem could in fact be imposed under existing regulation (hence, there is no substantive regulatory gap), then it would be better to solve such problem with existing sector regulation. To do so, the Commission, having done the market investigation, could make recommendations to the authorities, often national, in charge of sectoral regulation.

4.4.2 *Substantive Relationship: Using Economic Methodologies*

To fit into the broader landscape of EU economic law, market investigation should rest on solid economic analysis, as do the other

Generation Network in Germany: Case C-424/07 *Commission v Germany*, EU:C:2009:749.

[107] See the example of termination rates in the Netherlands, leading up to Case C-28/15 *KPN v ACM* (fn. 58) where the Dutch NRA duly applied EU law only to see its decision vacated on appeal. The reasons given by the Dutch court of appeal were severely criticised by the CJEU in its judgment at para. 42, with reference to the opinion of the Advocate-General for more detail.

[108] For instance, EECC, arts. 32–34.

regulatory regimes. In the light of the experience with electronic communications regulation, however, we would like to emphasise that, even as regards the relationship with traditional competition law, there is no significant advantage to be gained by placing the economic inquiry to be carried out under the market investigation within the strait-jacket of competition law analysis (i.e., relevant market definition, followed by an assessment of whether the relevant market as defined – or the firms that populate it – meets certain criteria).

In particular, relevant market definition can introduce an element of rigidity that might impair the effectiveness of market investigation: it results in a snapshot view of markets, and the EU practice tends to define narrow markets. Competitive phenomena that might occur outside of or beyond the relevant market(s) have proven difficult to introduce into the analysis at the market assessment stage.[109] This is all the more critical when market investigation deals with structural competition problems in dynamic markets, where part of the competitive game involves reshaping markets through disruptive innovation, for instance.[110] Even if breaking with the standard formula of competition law analysis might perhaps wrongly create the impression that market investigation does not belong within competition law, the very rationale for market investigation is to bridge gaps in the coverage of competition law, some of which arise as a consequence of rigidities induced by relevant market definition.[111]

What is truly important for the market investigation tool to fit within the broader landscape of EU economic law is a clear

[109] By way of example, see how the relevant market definition exercise prevents the Commission from perceiving what is truly at stake in Facebook/WhatsApp, namely, the acquisition of one of the most likely springboards for disruptive innovation by the very powerful platform: Decision of the Commission of 3 October 2014, Case M.7217 Facebook/WhatsApp. See LEAR, Ex-post Assessment of Merger Control Decisions in Digital Markets (2019) Study for the Competition and Markets Authority; Fletcher, Chapter 8, cautioning against the reliance on rigid market definition in the digital sectors.

[110] In the specific context of the DMA Proposal, Larouche/de Streel, The European Digital Markets Act: A revolution grounded on traditions, (2021) 12 *Journal of European Competition Law & Practice*, at p. 548–552.

[111] In that respect, one could argue that the market investigation tool would merely follow the trend already underway in merger control, where the horizontal guidelines in both the United States and the EU put forward analytical methods that reduce the need for market definition to carry out a conclusive assessment in cases of monopolistic competition (markets with significant product differentiation amongst competitors).

commitment to the theoretical and methodological foundations of such law. In other words, market investigation should be solidly anchored in economics. Instead of insisting on the analytical structure of competition law, it is preferrable to invest time and resources to ensure that the rationale for a market investigation is well developed and that the provisions of the market investigation legislation properly render or translate the underlying economics. In all likelihood, this means that the market investigation tool should be formulated in more precise terms than current competition law (which relies on general notions such as 'agreement', 'restriction of competition', 'abuse' and 'dominant position'). A more precise formulation would also reduce the need to use concepts such as market definition in order to put boundaries on the discretion of the authority. We would also suggest that the market investigation tool contains devices designed to foster sound economic analysis, such as a requirement that a cogent theory of harm be formulated, tying all the economic features into a coherent analysis.[112] This implies that the tool should be based on structural problems and not on the finding of a dominant position. Furthermore, the experience with sectoral regulation shows the significance of technological neutrality and, with it, the use of economic or functional concepts.[113] Technological neutrality is especially important if the market investigation applies across the board to all economic sectors as suggested above.

Finally, the experience with sectoral regulation also indicates that the substantive development of market investigation and its coordination with other regulatory regimes should not rely too much on soft-law instruments. If the EU market investigation is enforced by the Commission alone, these soft-law instruments will bind the Commission, as recognised by case law. Nevertheless, some soft-law instruments could be used to set out the relationship between market investigation and other economic regulation regimes, and hence between the respective authorities. In certain cases, case law indicates that a 'comply or explain' effect can be achieved, but only with the use of recommendations or with the addition of an obligation to 'take utmost account' of the instrument. In our view, informed by the experience of the last 20 years, it is preferable to try to lay down the

[112] This is also the direction suggested by Motta/Peitz, Chapter 2.
[113] This is also recommended by Crawford/Rey/Schnitzer, Chapter 7.

fundamentals of the market investigation substance and of its relationship with other regimes in the legislation itself, even if it requires a greater expense of time and resources during the legislative process. Soft-law instruments can be used later to build and elaborate on these existing fundamentals, without running any risk for the validity and legal force of these fundamentals.

4.4.3 Institutional Relationship: Involving the National Regulatory Authorities

4.4.3.1 Vertical Cooperation between the Commission and the National Competition Authorities

Considering the number of regimes making up EU economic regulation at the institutional level, a new EU market investigation tool should not be set up as yet another stand-alone regime, an institutional island whose authorities need to coordinate and cooperate with those in charge of every other regime. Since market investigation is closely linked with EU competition law, its institutional structure would be best embedded within that of competition law. After all, market investigation is likely to be applied by the Commission or the NCAs or both. It would stand to reason that the mechanisms of Regulation 1/2003 would then be used to achieve coordination and cooperation with the authorities applying competition law.[114]

In concrete terms, this would mean that a round of consultation within the ECN would be undertaken every time the Commission (or an NCA) proposes to launch a market investigation.[115] This would allow for a discussion, within the ECN, of whether the use of the market investigation tool – as opposed to standard competition tools (Articles 101 or 102 TFEU) – is appropriate and of which authority is best placed to investigate. Similarly, at the end of the investigation, the proposed measure could be circulated for consultation within the ECN[116] or the Advisory Committee,[117] depending on whether an NCA or the Commission led the investigation. Relying on the tried-and-true mechanisms of Regulation 1/2003 for institutional coordination between the new market investigation tool and the rest of competition law would be an effective and efficient choice.

[114] This is in line with the analysis put forward by Schweitzer, Chapter 3.
[115] In line with Regulation 1/2003, art. 11(2) and (3). [116] Ibid., art. 11(4).
[117] Ibid., art. 14(1).

4.4.3.2 Transversal Cooperation between the Commission and the National Regulatory Authorities

As the authorities in charge of sector-specific regulation are often national, transversal cooperation between the Commission and the NRAs is needed at every stage of the application of a market investigation in a regulated sector.[118] Indeed, in the jurisdictions having a market investigation tool, cooperation between the NCA and the NRA is often foreseen for all the tasks of the authorities, including the enforcement of the market investigation.[119] This is the case, for instance, in Greece[120] or in South Africa.[121]

At the initiation stage, a market investigation could be *launched* ex officio or upon a reference. There are pros and cons as to whether NRAs should be able to lodge a reference for market investigation with the competent authority. On the pro side, NRAs are ideally placed to identify regulatory gaps in the sectors that they scrutinize. On the con side, as we set out above, the integrity of both the market investigation tool and sector-specific regulation would be prejudiced if a market investigation is used as an additional battlefield for sector-specific regulation. Accordingly, the market investigation legislation should clearly define the circumstances under which an NRA can make a reference: there must be a substantive regulatory gap, that is, a situation where the NRA either has no competence to intervene or no adequate remedy at its disposal, in the abstract, even if it discharged its functions in the best possible fashion.

During the enquiry and the *information gathering* process about a possible structural competition problem in a regulated sector, the Commission should consult the relevant NRA(s). The Commission

[118] The possible market investigation stages are described in Schweitzer, Chapter 3.
[119] Generally, on the relationships between NCA and NRA, see OECD, Relationship between Regulators and Competition Authorities (1999) DAFFE/CLP(99)8; OECD, Relationships between Competition Authorities and Sectoral Regulators (2005) DAF/COMP/GF(2005)2 and International Competition Network, Working Group on Antitrust Enforcement in Regulated Sectors (2004) Report to the Third Annual Conference in Seoul; International Competition Network; Working Group on Antitrust Enforcement in Regulated Sectors (2005) Report to the Fourth Annual Conference in Bonn.
[120] Greek Law 3959 of 2011 on the Protection of Free Competition, art. 24.
[121] South African Competition Act No. 89 of 1998 as amended, art. 82. On that basis, the Competition Commission of South Africa (CCSA) has concluded several Memoranda of Understanding with sector regulators: http://www.compcom.co.za/mou/.

should also be able to receive confidential information from those NRAs, provided it ensures the same level of confidentiality as the NRA which gathered the information.[122] Such exchange of information should be foreseen in the law and possibly organised through cooperation agreements between the Commission and the NRAs.[123] The same principles may apply to the sharing of information in the other direction, that is, information gathered in the course of a market investigation being shared with an NRA.

The *identification of the structural competition problem* should be done in close cooperation with the relevant NRAs and/or the EU-level forum regrouping those NRAs. In that regard, the Commission should be required to consult the relevant NRA(s) and the EU-level forum before issuing a decision on the structural competition problem.[124] Conversely, the relevant EU-level forum, if any, should be able to issue a non-binding opinion on the Commission draft decision, thereby extending its advisory power to market investigations.[125] In the light of the discussion above, the Commission should be under a requirement to 'take utmost account' of the NRA or EU-level forum opinion in order to add credibility to the consultation process. With such a requirement, the Commission is bound either to follow the opinion or to provide explanations as to why it is not appropriate to follow that opinion.

However, there is no need to go any further than cooperation and consultation. In particular, we do not see why, as some have suggested, the market investigation should be implemented by the NRAs

[122] A similar provision to exchange information between NCA and NRA is included in the EECC, art. 11. Such sharing of information should comply with the fundamental principles of procedural fairness guaranteed by Article 41 of the Charter of Fundamental Rights of the EU. To do so, Schweitzer, Chapter 3, explains that two conditions must be met: '(i) the transfer of information must be provided for by law; and (ii) the information transferred must not have been obtained under an investigatory regime [here the sectoral regulatory regime] that provides for a lower degree of procedural protection than the one that is applicable in the context in which the information shall be used after the transfer [here the NCT regime]'.

[123] Cooperation agreements between NCA and NRA often contain provisions on information sharing between agencies.

[124] Such cooperation is also foreseen between the NCA and the regulatory authority in Mexico: Mexican Federal Economic Competition Law of 2014, art. 94(III).

[125] For instance, the current advisory powers of BEREC are listed in Regulation 2018/1971, art. 4(1), esp. 4(1)(b).

themselves when applied in a regulated sector.[126] As market investigation forms part of the EU competition law regime, NRAs might not be suited to carry out a market investigation.[127] Moreover, in the context of a new tool, enforcement should be in the hands of the same authority irrespective of the sector where it is applied. It took almost 40 years of experience under EU competition law before the law was thought to be sufficiently well developed for Regulation 1/2003 to introduce fully decentralised application by national competition authorities without fear of fragmentation. If any national authority should get the power to apply market investigation, it should be the NCA, and then only in the medium to long term, provided it has sufficient resources for these tasks.

At the remedial stage, if a structural competition problem has been identified in a regulated sector, then the Commission should *design the remedies* in close cooperation with the relevant NRAs. This is all the more justified since, in designing the remedies, the Commission would be well advised to take into account the different objectives the NRAs might be pursuing. Inspiration may be taken from the UK system where the CMA should take into account the various objectives of sectoral regulation when designing the remedies in a market investigation.[128] As explained by Whish and Bailey 'those remedies may go beyond preventing adverse effects on competition: for example there is a legal obligation to ensure the maintenance of a universal postal service'.[129]

The *implementation of the remedies* depends on the competence of the NRAs. On the one hand, if the NRAs have the competence – under their national law transposing EU law or directly under EU law – to remedy the structural competition problem, then there is no regulatory gap. In such a case, the Commission could issue a recommendation to the NRAs to implement the designated remedies under their respective sectoral framework, with a requirement to take utmost account of the Commission recommendation. This case is perhaps unlikely but not

[126] This has been suggested by BEREC in its Response to the Public Consultation on the DSA and the NCT, at p. 37.
[127] Except maybe in Member States where the relevant NRA is merged with the NCA in a super-authority (e.g., the Netherlands or Spain for network industries); but there the super-authority in its quality as NCA would be in a position to undertake the investigation.
[128] UK Enterprise Act 2002, section 168. [129] Whish/Bailey (fn. 4).

impossible: it is conceivable that, at the end of a long market investigation, the additional information and knowledge gained through the investigation leads to a different conclusion than what was expected earlier. What seemed like a regulatory gap, on the basis of the information available at the outset of the investigation, could turn out to be actually solvable with the existing array of regulatory remedies. This approach would be similar to the Mexican system where the NCA could notify the NRA regarding the finding of barriers to competition and free market access for it to determine, within the scope of its jurisdiction and according to the procedures in prevailing legislation, what actions should be taken to achieve competition conditions.[130] On the other hand, if the NRAs do not have the competence to remedy the structural competition problem (hence, there is truly a regulatory gap), then the Commission should be able to impose appropriate remedies, thereby ensuring that the market investigation usefully complements sector regulation.

Finally, the *monitoring and the control of compliance* with the remedies imposed after the market investigation could be delegated by the Commission to the NRA. In this case, the NRA should regularly report to the Commission, which would remain in charge of sanctioning any failure to comply with the imposed remedies.[131]

4.4.4 *Conflict Rule: Protecting the Internal Market*

Given the extensive cooperation and coordination mechanisms suggested above, there should be few cases where conflict between the application of the market investigation tool and the specific regulation occurs.[132] We have explained in Section 4.3.4 that standard competition law (Articles 101 and 102 TFEU) prevails over sectoral regulation mainly because of the hierarchy of law: competition law is primary EU law and therefore enjoys primacy over sectoral regulation, which is secondary law. A new EU market investigation tool would itself not be primary law. Since it would potentially have a broader scope than standard competition law, it may even not be considered as an

[130] Mexican Federal Economic Competition Law of 2014, art. 95.
[131] This setting was relied in the Decision of the Commission of 2 April 2003, Case M.2876 NewsCorp/Telepiu, at para. 259.
[132] Coordination between the market investigation tool and current competition law is discussed in Schweitzer, Chapter 3.

implementation of primary EU competition law like Regulation 1/2003 or, to some extent, the Merger Control Regulation.[133] Thus, an argument based on the hierarchy of law is more difficult to make.

As a starting point, we would be against an absolute hierarchical rule based on 'fields' or 'competences', without any regard for the concrete implementation and enforcement by the respective authorities. To wit, such a rule would state that there is a market investigation 'field' where sector-specific regulation cannot thread, irrespective of what has been done under the market investigation, or vice-versa. Indeed, absolute market investigation tool primacy over sectoral regulation would lead to difficulties when the two legal regimes have different objectives, for example, to remedy different market failures, which is often the case.

Conversely, sector-specific regulation should not prevail over the market investigation tool as an absolute rule. Some favour such a solution because sectoral regulation could be considered as a *lex specialis* in relation to the more general market investigation tool, applicable across the board to the whole economy.[134] Even if this argument could apply in a horizontal relationship (between two national regimes or two EU regimes), it is less convincing in a transversal situation pitting EU law enforced at the EU level (the market investigation tool) against another EU legal regime, often a Directive, applied at the national level (sectoral regulation). In such a situation, a primacy rule in favour of sectoral regulation risks undermining the internal market by fragmenting the effect of the market investigation tool.

We would accordingly propose a much narrower rule, based not on abstract notions of 'fields' but on the concrete actions of the respective authorities. As a starting point, both the market investigation tool and sector-specific regulation should apply concurrently, unless their concurrent application puts a firm in a situation where it cannot comply

[133] The legal basis of the market investigation may also play a role in this assessment. If the market investigation is based not only on Art. 103 TFEU, but also on another legal basis such as Art. 114 TFEU (as suggested in the Inception Impact Assessment) or Art. 352 TFEU (as it is the case for the Merger Regulation), then the direct link with EU primary law (Art. 101 and 102 TFEU) will be loosened.

[134] See BEREC Response to the Public Consultation on the DSA and NCT, at p. 36.

with both regimes at the same time. Such cases should be exceptional. There would thus be no conflict if, under one regime, a firm is put under a regulatory obligation, whereas under the other regime, regulatory analysis led the firm to be exempted from any obligation.[135] In such a situation, the firm can comply with both regimes. To the extent that the two regimes are complementary, there should not be any significant proportionality issue, since the respective interventions of each authority are presumably necessary and proportionate to the aims of the respective regimes. In any event, if – as is assumed – the application of the market investigation in a regulated sector is premised on the existence of a regulatory gap, there can be no divergence since sector-specific regulation cannot be applied. Under such a narrow conflict rule, the emphasis would be on institutional mechanisms for the Commission and the NRA to cooperate and coordinate their actions, along the lines described above, so as to avoid a situation where the firm is put in an impossible bind.

In spite of the above, should a firm find itself in a position where it cannot comply with one regime without breaching the other, then we would suggest the following conflict rule. Our starting point is that, in principle, the market investigation tool will be used to impose obligations across the EU. Sector-specific regulation, on the other hand, is usually applied at Member State level, with a specific set of obligations for each Member State.[136] In a case where the scope of the two conflicting regulatory obligations is different, then the regulatory obligation applicable across the EU (usually coming from the market investigation tool) should prevail, out of concern for the internal market.

4.5 Recommended Interplay between a Narrow Market Investigation and Competition Law

As explained in Section 4.2, the Commission decided to propose a narrow version of market investigations which, in practice, are merely

[135] With the possible exception of a situation where the exemption from any obligation is essential for the overall effectiveness of the regulatory instrument in question.

[136] Our reasoning would not necessarily hold if the starting assumptions (market investigation tool applied uniformly across the EU, sectoral regulation applied to the specific set of circumstances of a Member State) are not met.

flexibility clauses for the Digital Markets Act. As the narrow version places market investigations within sector regulation, we deal now with the interplay between DMA market investigations and (EU or national) competition law.

4.5.1 Systemic Relationship: Closing Competition Law Gaps

At a general level, the proposed DMA is a new EU sector-specific regulation applicable to the providers of a pre-defined list of eight 'core platform services'. The DMA aims to cover competition law 'gaps' and intervenes when competition law cannot act or can only act in an ineffective manner in achieving market contestability and B2B fairness in the digital economy.[137] Hence, as for any other EU sector-specific regulation, the DMA will complement – and not substitute for – competition law. In fact, the list of obligations and prohibitions in the DMA Proposal is very much inspired by past or ongoing EU or national competition cases which, it is claimed, did not prove effective in solving the competition problems beyond the scope of the instant cases.[138] Once the DMA is adopted, the Commission will intervene on the basis of the DMA against the courses of conduct targeted by such sectoral regulation and would no longer have recourse to competition law for that purpose. That should facilitate and speed up Commission intervention.

4.5.2 Substantive Relationship: Using Economic Methodologies

The DMA Proposal foresees three different types of market investigation: the first to designate digital gatekeepers on the basis on quantitative and qualitative economic indicators, the second to sanction gatekeepers that systematically violate the obligations and prohibitions to which they are subject by virtue of the DMA and the third to expand the scope or the obligations of the DMA. As recommended above for the wide market investigation, we think that the design and the implementation of the narrow version of market investigation should also be

[137] DMA Proposal (fn. 3), rec. 9 and 10.
[138] Impact Assessment Report of the Commission Services of 15 December 2020 on the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD(2020) 363, at para. 155.

based on sound economic analysis without being put in the straitjacket of competition law methodologies.

In particular, regarding the gatekeeper designation, the DMA Proposal foresees three generic criteria which apply cumulatively, namely: (i) a large size and impact on the EU internal market, (ii) the control of an important gateway for business users to reach end-users and (iii) whether the control in question is entrenched and durable.[139] Those generic criteria are 'operationalised' with an open list of quantitative and qualitative indicators such as the financial size, the number of customers and their lock-in, the entry barriers or the scale and scope effects.[140] We welcome those criteria and indicators because, on the one hand, they reflect the economic theories on gatekeepers and bottlenecks[141] and, on the other hand, they do not rely on competition law market definition tools, whose methodologies are difficult to apply in the digital economy.[142]

Regarding the addition of new obligations or prohibitions, the DMA Proposal sets out two normative standards to guide the market investigation:[143] (i) ensuring contestability of digital markets, which means that markets should remain open to new entrants and innovators offering digital services that may substitute or complement the services already offered by the gatekeepers;[144] or (ii) ensuring fairness in the B2B relationship between the gatekeepers and their business users, which is defined as a balance between the rights and obligations of each party and the absence of a disproportionate advantage in favour of the gatekeepers.[145] Those standards are much more open than the criteria of the first type of market investigation on gatekeeper designation, hence they increase the discretion of the Commission. To ensure consistency with the other tools of EU economic law, it is crucial that those standards are applied and interpreted on the basis of sound

[139] DMA Proposal (fn. 3), art. 3(1). [140] Ibid., art. 3(6).
[141] Caffara and Scott Morton define gatekeeper as 'an intermediary who essentially controls access to critical constituencies on either side of a platform that cannot be reached otherwise, and as a result can engage in conduct and impose rules that counterparties cannot avoid'. Caffara/Scott Morton, The European Commission Digital Markets Act: A translation (2021) Vox.eu. On the related concept of bottleneck, see Armstrong, Competition in two-sided markets, (2006) 37 *Rand Journal of Economics*, 668.
[142] See fn.106 and 107. [143] DMA Proposal (fn. 3), art. 10.
[144] This is sometimes referred as fairness in some Executive Vice-President Vestager speeches.
[145] DMA Proposal (fn. 3), art. 10(2) and also art. 7(6) and rec. 57.

economic analysis. This will probably be easier for the contestability standard, which relates to economic efficiency (i.e., the size of the pie) and is intrinsically linked to entry barriers (and hence also part of competition law analysis), than for the vague fairness standard, which includes distributional considerations (i.e., the distribution of the pie) that are always more controversial.

4.5.3 Institutional Relationship: Involving the National Competition Authorities

4.5.3.1 Use by the Commission of Concurrent Powers

Once the DMA is adopted, the Commission will have concurrent regulatory and competition powers. To intervene against conduct of the digital gatekeepers which will (already) be regulated by the DMA, the Commission should rely on its DMA power and no longer on its competition law powers. The interesting question, however, is which route the Commission will follow when intervening against courses of conduct that are not (yet) covered by the DMA. Given the concurrency of powers, the Commission should choose between competition law or a market investigation of the third type under the DMA. Under the former, the Commission would open an abuse of dominance case and should build a theory of harm to the requisite legal standard imposed by the EU Courts. Under the latter, the Commission would launch a market investigation and then adopt a delegated act to add the course of conduct under consideration to the list of the DMA obligations. In order to do so, the Commission should prove that such conduct weakens market contestability or creates an imbalance between the rights and the obligations of the gatekeeper and its business users. This standard seems to be lower than the legal standard under competition law, all the more since judicial review of delegated acts adopted in the wake of DMA market investigations is likely to be less intensive than in individual competition law decisions. This difference in legal standards is not surprising, as the DMA aims to facilitate and speed up intervention compared to competition law, for a subset of firms designated as gatekeepers of core platform services.

However, given such difference in the applicable legal standard, it is reasonable to expect that the Commission will choose between its competition and DMA powers not only according to the type of gatekeeper conduct at play but also as a function of the ease of

intervention. As the DMA standard is lower than the competition standard, we may reasonably expect the Commission to favour market investigation under the DMA over competition law enforcement when intervening against designated gatekeepers. Again, this is not a problem as such, since the regulated platforms have significant market power in their role as gatekeepers and cannot hence claim that they could not have been subjected to any intervention absent the DMA. Nonetheless, according to us, two important safeguards are necessary to ensure that the Commission does not abuse its extensive concurrent powers and to maintain legal predictability.

To prevent the risk of abuse of power and regulatory creep, the standard of intervention to propose a delegated act expanding the DMA list of obligations should be based on sound economic interpretation of market contestability and B2B fairness, as explained above. To ensure legal predictability, the Commission should explain in advance the criteria it will use to choose between its regulatory and competition powers.[146] To do that, the Commission may, for instance, rely on the criteria it uses to select markets for ex ante regulation in telecommunications. Such selection is based on three criteria, and the third one, in particular, indicates that[147]

> This third criterion aims to assess the adequacy of competition law to tackle identified persistent market failure(s), in particular given that *ex ante* regulatory obligations may effectively prevent competition law infringements. Competition law based interventions are likely to be insufficient where frequent and/or timely intervention is indispensable to redress persistent market failure(s). In such circumstances, *ex ante* regulation should be considered an appropriate complement to competition law.

The Commission could also rely on the criteria proposed by Motta and Peitz to determine when a (broad) market investigation may be a better

[146] In the United Kingdom, where most of the regulators have concurrent power, they have concluded MoU with the competition authority which clarify how concurrent powers will be exercised. See, for instance, Memorandum of understanding of 8 February 2016 between the CMA and Ofcom on concurrent competition powers. Also Crocioni, Ofcom's Record as a Competition Authority: An Assessment of Decisions in Telecoms, EUI Working Paper RSCAS 2019/93.

[147] EECC, art. 67(1) clarified by Commission Recommendation 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, OJ 2020 No. L 439/23, recital 17. See fn. 13.

route than an Article 102 TFEU enforcement action. This may be the case when a competition law assessment may be long, complex and uncertain or when it would not solve a generalised problem but just deal with one specific conduct or firm.[148] On those bases, possible criteria to favour a DMA market investigation over competition law enforcement could comprise the recurrence or the prevalence of conduct by different types of gatekeepers or the need to intervene quickly or with remedies that require extensive monitoring.[149] Adopting such criteria would be useful to ensure legal predictability but cannot undercut the responsibility of the Commission to apply EU competition law. Indeed, competition law – which is primary law – cannot legally be sacrificed on the altar of the DMA – which is secondary law. More fundamentally, given that the initial list of obligations and prohibitions found in the DMA appears largely based on experience in competition law enforcement, it would seem appropriate to continue to use competition law as a first line of intervention, in order to build up experience and 'test-drive' theories of harm in actual cases before courses of conduct are enshrined in the DMA list of prohibitions and obligations.

4.5.3.2 Transversal Cooperation between the Commission and the National Competition Authorities

As the DMA will apply next to competition law, it is important that the authorities in charge of both legal instruments coordinate amongst themselves. The DMA will be enforced by the Commission while competition law is enforced by the Commission and the NCAs. On the one hand, coordination within the Commission (as DMA enforcer and the leading EU competition authority) is inherent to the Commission decision-making process, as decisions are prepared by the relevant Directorates-General in a collaborative manner, with inter-DG steering groups, and adopted by all Commissioners under the principle of collegiality.[150] On the other hand, the coordination

[148] Motta/Peitz, Chapter 2.
[149] Those criteria may also be inspired by the reasons mentioned by the Commission services for the insufficiency of competition law in dealing with some structural competition problems in the digital economy: Impact Assessment Report on the DMA Proposal (fn. 138), at paras. 119–124.
[150] Commission Decision 2010/138 of 24 February 2010 amending its Rules of Procedure, arts. 1 and 23.

between the Commission as DMA enforcer and the NCAs may be more complex as there is no obvious existing forum where such coordination should take place. Indeed, the ECN and the coordination mechanisms of Regulation 1/2003 may not be appropriate because the DMA is not conceived of as a competition law tool.

However, such coordination is essential, as parallel intervention by the Commission under the DMA and by an NCA under national competition law is not improbable. Indeed, while the DMA Proposal prohibits Member States from imposing further obligations on designated gatekeepers for the purpose of ensuring contestable and fair markets, it does not prevent Member States from imposing obligations on the basis of EU or national competition rules.[151] In other words, national competition law can be used to impose obligations on designated gatekeepers, provided that this is compatible with Regulation 1/2003.[152] For instance, obligations could be imposed in parallel under the DMA and under the newly adopted §19a of the German Competition Act[153] which targets similar platforms. Such parallel imposition, at best, undermines the internal market and, at worst, leads to incompatibility.

In order to avoid such pitfalls, the DMA Proposal provides for two coordination mechanisms between the Commission and national authorities. Firstly, the DMA establishes a Digital Markets Advisory Committee (DMAC), a comitology committee which could issue non-binding opinions on Commission draft decisions under the first and the second types of market investigation[154] Secondly, the DMA requires prior consultation with Member State experts for the third type of market investigation.[155] However, such coordination mechanisms are

[151] DMA Proposal (fn. 3), art. 1.6.
[152] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 No. L 1/1, as amended, art. 3(2) provides that: 'Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.'
[153] See Section 19a of German Competition Law on Abusive Conduct of Undertakings of Paramount Significance for Competition across Markets.
[154] DMA Proposal (fn. 3), art. 32 and art. 15(1) for the first type of market investigation and art. 16(2) for the second type of market investigation.
[155] Ibid., art. 37(4).

not enough. First, the national experts composing a comitology committee or consulted before the adoption of a delegated acts are not necessarily coming from independent authorities, let alone the NCAs. Second, the Commission is relatively free as to what to make of the national experts' opinions and is not subject to a 'comply or explain' principle. It would probably be better to establish a new permanent forum where the Commission and the NCAs (possibly with other independent national authorities) could meet to discuss the enforcement of the DMA. Such a forum would allow the national authorities to bring their expertise and legitimacy in support of DMA market investigations. It would also reduce the risk of divergent or incompatible decisions by the Commission under the DMA and by an NCA under competition law.

4.5.4 Conflict Rule: Protecting the Internal Market

If the establishment of a discussion forum between the Commission and the NCAs may reduce the risk of divergent or incompatible decisions, it may not alleviate it completely. Therefore, as for the wide market investigation, a conflict rule needs to be in place. As before, we adopt a narrow conception of conflict, which should be based on the concrete existence of two incompatible decisions and not on an abstract notion of incompatible 'fields'. As before also, we think that the starting point for the conflict rule should be the preservation of the single market (which is the objective of the DMA) while respecting the hierarchy of law: this means that EU competition law would prevail over the DMA, but not national competition law when it goes further than EU law. Therefore, in case of an incompatibility between an obligation imposed by the Commission under the DMA, which applies across the EU, and a remedy imposed by an NCA under national competition law, which applies to one Member State only, the DMA obligation should prevail.

4.6 Conclusion

This chapter shows that, at the *systemic level*, the different components of EU economic law (competition law and sectoral regulatory regimes) often overlap. They stand in a complementary relationship to each other. They all are meant to pursue the overall objectives of the

Treaties but with different means, each of them focusing on its particular strengths. At the *substantive level*, competition law and sectoral regulation share a common theoretical basis and typically follow a public interest approach. They also share a common methodology, based on economic analysis and the application of the principles of subsidiarity and proportionality. At the *institutional level*, both competition law and sectoral regulatory regimes are implemented and enforced by a complex set of EU and national institutions: the European Commission, National Competition Authorities (NCAs), National Regulatory Authorities (NRAs) and EU-level networks, with national and European courts playing a role as well. Coordination mechanisms are in place to cover horizontal (between national authorities), vertical (between the European and national levels) and transversal (across legal regimes) relationships. The success of the overall system depends mostly on a smooth coordination between the different institutions.

Therefore, a new market investigation tool could easily be integrated in the existing body of EU economic law. Two versions of market investigation have been mooted: a wide version applicable horizontally to all the sectors of the economy, including the regulated ones, and a narrow version applicable to specific sectors of the economy. While the wide version corresponds to the market investigation existing in other jurisdictions, the narrow one is akin to a flexibility clause for sector-specific regulation.

A wide market investigation could be integrated within EU economic law. At the *systemic level*, such a tool would apply horizontally to the whole economy, including regulated sectors, as it could usefully close eventual regulatory gaps. Such gaps could arise because a structural competition problem occurs so infrequently that the establishment of a fully-fledged regulatory regime has been deemed too costly for the benefits it would bring or because, as a matter of regulatory dynamics, the problem in question is a new occurrence that has not yet been acknowledged and identified by sector-specific regulation.

At the *substantive level*, such a wide market investigation tool should rest on the same theoretical basis and methodology as existing EU economic law. However, the tool should not be strait-jacketed within specific competition law methodology (including relevant market definition and assessment of the relevant market in the light of the provision at stake), as long as solid economics underpin its

implementation, including a theory of harm in individual cases. This does not necessarily imply an increase in the discretion of the authority in charge of the market investigation but rather reliance on an economic methodology which is better adapted to the structural competition problems that the market investigation is aimed to address. Also, the tool should be formulated in technology-neutral terms, that is, using economic or functional concepts. Finally, the fundamental elements of the market investigation tool should be set out in legislation, and the role of soft-law – if any – should be limited to developing or elaborating on these fundamentals.

At the *institutional level*, wide market investigation enforcement should be embedded within the institutional framework for coordination under Regulation 1/2003 to ensure proper coordination with competition authorities. Furthermore, if and when a market investigation is applied in regulated sectors, the Commission (or any institution in charge of the market investigation) and the relevant NRAs should cooperate closely at every stage of the investigation: (i) at the *initiation* stage, NRAs should be able to make a reference when they cannot deal with a structural competition problem in their sector because of the existence of a regulatory gap; (ii) at the *information gathering* stage, the Commission and NRAs should be able to exchange confidential information provided confidentiality is respected at both ends of the exchange; (iii) at the *structural competition problem identification and remedy design* stages, the NRAs (and relevant EU-level networks) should be able to issue an opinion on draft Commission decisions, and the Commission should be bound to take the utmost account of such opinion; (iv) at the *remedy implementation* phase, the Commission should be able to impose remedies when the NRAs cannot act; however, if the NRAs are able to act (hence the market investigation shows that there is no regulatory gap in the end), then the Commission should make recommendations for action, of which the NRAs should take utmost account; (v) finally, at the *remedy monitoring* stage, the Commission may delegate to the NRAs the compliance monitoring as well as the evaluation of the remedy.

Given these coordination mechanisms, the potential for conflict between the market investigation tool and sectoral regulation is minimised. In any event, market investigation and sectoral regulation should apply concurrently, except in the rare case where a firm would be put in a position where it could not comply with one without

breaching the other. In such case, the remedy under the market investigation – which has EU scope – should prevail over the sectoral remedy – which has a national scope – in order to protect the integrity of the internal market.

However, the Commission has decided to propose, in the Digital Markets Act, a narrow version of the market investigation. The integration of such a narrow version in EU economic law is somewhat easier than the integration of the wide version, as it comes closer to the more traditional relationship between sectoral regulation and competition law. At the *systemic level*, the DMA complements competition law where practice has shown that competition law is ineffective in solving competitive problems. At the *substantive level*, the standards, the criteria and the indicators used to implement the three types of DMA market investigation are not strait-jacketed within competition methodologies, but they should be applied and interpreted with sound economic analysis. At the *institutional level*, the Commission will acquire concurrent regulatory and competition powers and it should explain in guidelines the criteria it will use to choose between those different powers when addressing the conduct of the digital gatekeepers. Moreover, given the possible parallel application of the DMA by the Commission and national competition law by the NCAs, it is key that the cooperation between the Commission and the NCAs is ensured. Finally, a *conflict rule* needs to be established when the parallel application of the DMA and competition law leads to incompatible obligations.