

EU COMPETITION POLICY REPORT

Political Accountability of the Commission for its Competition Policy

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Executive Summary

Competition policy is an essential component of the internal market and the political economy of the European Union, encompassing a wide array of issues such as the prohibition of anti-competitive behaviour and the review of mergers and State aid. The European Commission is primarily in charge of this policy, much due to the lack of effective legislative, judicial, and administrative constraints. The present Report examines these constraints and proposes the expansion of political accountability before the European Parliament. It does so based on the EU's constitutional framework for institutional relations and the practical application of competition law.

The Report argues that the Parliament already has constitutional guarantees of the Commission's political responsibility, namely regarding the consent and resignation of the Commissioner for competition, and should use these to safeguard the importance of interinstitutional dialogue. The Parliament can also intervene judicially with the same purpose. The Report indicates that the Parliament should become particularly involved in policy questions present in enforcement priorities, Commission guidance, and Temporary Frameworks.

In more detail, the Report starts by showing that the Commission's central role in competition policy is due to its enforcement of open-ended competition rules. It also highlights the power provided to the Commission by the Council to issue block exemptions. This elevates the importance of (unwritten) enforcement priorities and soft law instruments such as guidance and Temporary Frameworks. This is a legitimate dimension of administrative enforcement. However, the Report emphasizes that competition policy is not only technical but contains an important normative dimension. Soft law in particular raises concerns about democratic legitimacy.

Given these concerns, the Report then analyses existing legislative, judicial and administrative constraints that the Commission faces. It notably finds:

- How limited the legislative options to control competition policy are. This results from the special legislative procedure where the Parliament is only consulted and from the overall diminished importance of legislation in the field, which usually grants the Commission substantial leeway in issuing implementing regulations and does not condition soft law.*
- That judicial overview is the main constraint on competition policy but even such control is limited. Litigants must bring admissible cases before the Court of Justice,*

and the Commission has been recognised as having an important margin of discretion protected from judicial review.

The Parliament can strengthen its participation in these forms of control by acting as co-legislator and intervening judicially. Nevertheless, the Commission retains the initiative of any legislation that would curtail its central role, and judicially challenging the Commission should be reserved to the egregious cases.

These findings suggest a stronger focus on political accountability. The Report explores the possible tools over competition policy, highlights their limits, and mentions focus areas to be developed through interinstitutional dialogue.

An important guarantee is the proposition and hearing of the Commissioner for competition. In that context, questions of their suitability and competence are important but the Parliament's questions should concentrate on their approach to policy. In this way, the Parliament's consent is to be understood as given or withheld based on an identifiable competition policy. Subsequently, the Commission's action can be assessed against that consent as well as emerging events and advances in integration.

Political accountability is nonetheless limited by the separation of powers, rule of law, and interinstitutional balance. Thus, political pressure on individual cases being handled by the Commission is highly problematic. However, this is different from scrutinising political choices, which are most evident in enforcement priorities and soft law such as Commission guidance. The Report thus suggests that political accountability should focus on the 'big picture' rather than technical details, with an emphasis on good governance and explanation of policy choices.

The Report concludes on developing interinstitutional dialogue explicitly backed up by the above guarantees. Interinstitutional relations can continue using the existing tools of questions by Members of Parliament, structured dialogue, and annual reports in the assumption that they prove sufficient to secure the political responsibility of the Commission. If not, new tools must be devised. This can be means-tested in the upcoming review of guidance on Article 102 TFEU and, possibly, the hearing of new Commissioner for competition.

1. Introduction

This Report will explore the political accountability of the European Commission ('Commission') for its competition policy before the European Parliament ('Parliament'). It does so within the European Union ('EU') constitutional framework of institutional relations and the practical application of competition law. A recent report on competition policy from the Parliament's Research Service summarised that:

'Competition policy encompasses a wide range of areas: antitrust and cartels, merger examination, State aid, the liberalisation of markets and international cooperation. The [Commission] enforces competition rules through its powers of investigation and sanction. Competition cases can be taken to the General Court with appeals heard by the Court of Justice. Under the Treaties the European Parliament is usually involved in competition matters through the consultation procedure, with notable exceptions being the directives on antitrust damages and on empowering the national competition authorities. In these two cases the Parliament acted as co-legislator together with the Council under the ordinary legislative procedure'.¹

This encapsulates the wide scope of competition rules, the Commission's central role in enforcing them, and the traditional role attributed to the Parliament as participating in the legislative procedure. As will be seen in this Report, this legislative participation – even when the Parliament acts as co-legislator – is not in itself decisive for the tenor of competition policy. In practice, the Commission drives that policy through its implementing regulations, decisions, guidance, and case selection. These are all acts subject to judicial review by the Court of Justice of the EU ('Court'), but this review is limited in relation to the Commission's margin of discretion. This means that the Commission has been able to determine competition policy practically unimpeded. Nevertheless, the absence of significant legislative and judicial constraints calls for political accountability before the Parliament – the object of this Report.

In essence, the Report will argue that the Parliament has the constitutional guarantees for political accountability by consenting to the nomination of the Commissioner for competition and by being able to ask for their resignation. These tools do not only guarantee the competence and integrity of the Commission but also its political responsibility before the Parliament, including for competition policy. Such guarantees are of course not to be deployed lightly but should backup the importance of interinstitutional dialogue. The same can be said of the possibility of the Parliament intervening judicially. The Report will discuss what tools the Parliament can use as part of that dialogue to become involved in competition policy. It will

¹ M. Szczepeński, 'EU competition policy: Key to a fair single Market' (2019) European Parliamentary Research Service, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642209/EPRS_IDA\(2019\)642209_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642209/EPRS_IDA(2019)642209_EN.pdf) (accessed 11 Jan 2024, as all subsequent references). The legislation referred to under the ordinary legislative procedure is Directive 2014/104 of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU OJ L 349/1 5.12.2014 ('Directive on damages') and Directive 2019/1 of the European Parliament and of the Council 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 L 11/3 14.1.2019 ('ECN Plus Directive').

argue that political accountability should focus on the Commission's enforcement priorities and in particular guidance instruments.

The Report will start by characterising the Commission's action and its enforcement of competition rules and why these require political accountability (2.). It will consider the legislative, judicial, and administrative constraints that the Commission is already subject to (3.). The Report will then discuss how political accountability can take place, is limited by separation of powers, and should improve under interinstitutional dialogue (4.).

2. The Commission's action in the field of competition

The so-called 'democratic deficit'² is crucial in understanding the continuous strengthening of the Parliament's constitutional powers throughout the EU's history.³ Concerns over democratic legitimacy have increased with the financial and COVID-19 crises, which further strengthened the executive.⁴ It is thus surprising that the issue of democratic legitimacy has hardly been raised regarding competition law, even though the Commission enjoys possibly the strongest executive role in this field of EU law.⁵ This section will start by highlighting this role which, under the principle of separation of powers, is indeed the natural competence of an administrative authority (a). However, the nature of such enforcement and the effects of its exercise raise call for the Commission's accountability (b).

a) The central role of the Commission provided by enforcing competition rules

In many fields of EU law, the Commission's action is conditioned by the interaction with other institutions during the legislative procedure. Competition law is somewhat different. Even though it is one of several fields of law protecting and implementing the internal market, it does not rely much on harmonising legislation. The Treaties⁶ prohibit undertakings colluding

² See C. Neuhold, 'Democratic Deficit in the European Union' in *Oxford Research Encyclopaedia of Politics* (Oxford University Press 2020), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1141>.

³ For a study showing empirically the importance of the EU parliament from a democratic perspective see M. Sorace, 'The European Union democratic deficit: Substantive representation in the European Parliament at the input stage', <https://doi.org/10.1177/1465116517741562>.

⁴ See P. Kratochvíl and Z. Sychra, 'The end of democracy in the EU? The Eurozone crisis and the EU's democratic deficit' (2019) 41:2 *Journal of European Integration* 169-185, DOI: 10.1080/07036337.2019.1569001 and A. E. Stie, 'Crises and the EU's Response: Increasing the Democratic Deficit?' in M. Riddervold, J. Trondal, and A. Newsome (eds) *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021). On these issues, with regard to the ECB, see e.g. N. de Boer and J. Van 't Klooster, 'The ECB, the courts and the issue of democratic legitimacy after Weiss' (2020), 57:6 *Common Market Law Review* 1689-1724.

⁵ See however O. Stefan, 'Soft Law in EU Competition and State aid: an Imperfect Solution to Grand Regulatory Challenges' in C. M. Colombo, K. Wright, and M. Eliantonio (Eds.) *The Evolving Governance of EU Competition Law in a Time of Disruptions: A Constitutional Perspective* (Hart 2024) and F. Cengiz, (2016) 'Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach' 54 *Journal of Common Market Studies* 826-845. DOI: 10.1111/jcms.12339.

⁶ Referring collectively to the Treaty on EU ('TEU') and the Treaty on the Functioning of the EU ('TFEU').

to restrict competition and abusing their dominant position (Articles 101 and 102 TFEU) and these prohibitions are directly enforced the Commission and national competition authorities ('NCAs') in a European Competition Network ('ECN').⁷ The Commission has a leading role in the ECN by having priority in taking up jurisdiction over a case.⁸ Similarly, the Commission has a monopoly on reviewing concentrations with a Union dimension which must be notified to it under the Merger Regulation.⁹ The Commission further applies the Treaties' prohibition of Member States granting State aid that distorts competition, which must also be notified to it for review (Articles 107 and 108 TFEU). Thus, the Commission drives competition policy by issuing decisions of infringement of these direct prohibitions and within the procedure of merger and State aid review. Nonetheless, as will be discussed, just as (if not more) important are the Commission's implementing regulations and guidelines.

The Commission's central role in all these manners of enforcement stems from the open-ended nature of competition rules. Although the Court has over time defined the elements and conditions of those rules, it has also accepted that applying them is context-dependent: broad legal principles adapted to the facts of each individual case. For example, Article 101(1) TFEU prohibits collusion having its 'object or effect the prevention, restriction or distortion of competition', but Article 101(3) TFEU exempts the restriction when it improves 'production or distribution' or promotes 'technical or economic progress'. Article 102 TFEU is even more sparse in its wording in prohibiting 'abuse'. The Merger Regulation relies on a 'significant impediment of effective competition' ('SIEC') for every notified merger.¹⁰ It is therefore up to the Commission to fill these open-ended notions with meaning when applying them. Similarly, Article 107 TFEU neither defines 'aid' nor do more than specify when it is against the 'common interest', even though these notions are decisive for having notify the aid to Commission and having it approved. This means that, in practice, private actors and Member States look to the Commission to know how competition rules will be applied and adjust their conduct accordingly.

The Commission's implementing regulations have been particularly important in this regard, formulating 'block exemptions' that allow whole categories of restrictions of competition and of State aid to escape the Treaties' prohibitions (Articles 101(3) and 108(3) TFEU). Even though those exemptions are referred to a special legislative procedure (Articles 103(2)(b) and 109 TFEU), as discussed below the Council has opted to empower the Commission to itself issue block exemptions.

Most influential and determinative for competition policy is, however, the combination of the Commission's decisional practice and guidance explaining that practice. Infringement decisions examine not only behaviour but also justifications and, because competition law is context-dependent, are often the only way to go beyond a discussion on principles and confirm

⁷ Available at https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network/documents_en.

⁸ Article 11(6) of Council Regulation 1/2003 on the implementation of the rules on competition laid down in [Articles 101 and 102 TFEU] OJ L 1/1 4.1.2003 ('Regulation 1/2003').

⁹ Council Regulation 139/2004 on the control of concentrations between undertakings OJ L 24/1 29.1.2004 ('Merger Regulation').

¹⁰ Article 2(2) and (3) of the Merger Regulation, notwithstanding the detailed procedural rules.

whether certain conduct is indeed anti-competitive. They also indicate how the competitive processes in those markets will be viewed by the Commission. Hence, when several investigations targeted a string of abuses of dominant position by so-called ‘Big Tech’,¹¹ the Commission effectively elected the digital sector as an ‘enforcement priority’ (a concept discussed in more detail in section 4. below). Such priorities are so important that a significant part of competition policy consists in the Commission’s choice of which practices to investigate and pursue to a final decision (as also discussed below).¹²

The Commission’s experience in deciding – and having their decisions judicially reviewed by the Court, as analysed in section 3.(b) – is translated into guidance instruments which orientates future cases. Such guidance originally started out as explaining the Commission’s individual exemptions and application of block exemptions.¹³ However, their scope has expanded substantially over time into interpreting core Treaty prohibitions,¹⁴ procedural handling of cases, and even creating special procedures such as the ‘leniency’ which provides up to full immunity from fines for cartel members that inform the Commission about their activities.¹⁵ Guidance thus covers practically every aspect of competition law in systematic manner, serving as a summary of the case law and legislation as well as the clearest statements of the Commission’s policy. Their immense importance has been epitomised with the issuance of ‘Temporary Frameworks’ introducing special procedures to deal with crises such as COVID-19 and the war in Ukraine.¹⁶

b) Why control the Commission’s action

It is uncontested that enforcing competition rules in the manners described above is the task of the Commission.¹⁷ To fulfil this task, the Commission is afforded a ‘margin of discretion’ – that is to say, the freedom to choose when and how it applies the rules. Such margin stems from three sources recognised by the Court. First, the Commission has limited resources at its disposal and therefore can decide how to best use them.¹⁸ Second, the Commission must have

¹¹ The latest being the statement of objections in https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207, while there are already the first instance judgments of 10.11.2021 *Google Search* (T-612/17) EU:T:2021:763 and of 14.09.2022 *Google Android* (T/604/18) EU:T:2022:541.

¹² See also O. Brook, ‘Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy’ (2020) 16:4 *Journal of Competition Law & Economics* 435–487, <https://doi.org/10.1093/joclec/nhaa014>.

¹³ For example, the Guidelines on the application of [Article 101(3) TFEU] OJ C 101/97 27.4.2004 and the (reviewed and recently updated) Guidelines on vertical restraints C 248/1 30.6.2022.

¹⁴ See Notice on the notion of State aid as referred to in Article 107(1) TFEU OJ C 262/1 19.7.2016 and Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ C 259/1 21.7.2023 (‘Horizontal Cooperation Guidelines’).

¹⁵ Notice on Immunity from fines and reduction of fines in cartel cases OJ C 298/17 8.12.2006.

¹⁶ See Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak OJ C 116/17 8.4.2020, the (latest) Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak OJ C 423/9 7.11.2022, and Amendment to the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia C/2023/1188 21.11.2023.

¹⁷ Joined Cases C-189, 202, 205, 208, and 213/02 P *Dansk Rørindustri* EU:C:2005:408 170.

¹⁸ Judgment of 4.03.1999 *Ufex* (C-119/97 P) EU:C:1999:116 88.

some room to decide due to the complex social and economic assessments involved.¹⁹ Lastly, the open-ended notions of competition rules discussed above provide considerable (and often controversial) leeway to the Commission in applying them – in particular, regarding aspects yet to be clarified by the case law.

Under the principle of separation of powers, the Commission’s margin of discretion is a legitimate dimension of the administrative enforcement of competition rules. In the EU’s constitutional structure, ensuring competition rules are followed by private parties and Member States is also part of Commission’s role as the ‘guardian of the Treaties’.²⁰ The Commission’s discretion has thus been affirmed as an area of limited judicial review, as discussed in 3.(b). Competition policy is indeed a highly technical matter, requiring both legal and economic expertise. A somewhat generalised conception has thus emerged that the Commission is better placed to deal with this field of EU law than other institutions.

Nonetheless, it is questionable whether the Commission should be free to act with no or only minimal accountability. The Commission’s guidance and regulations, and to some extent even its decisions, are not merely administrative or managerial but present normative choices of how undertakings and Member States should develop their economic activity. The Commission’s enforcement priorities also have a normative content which cannot be parcelled into the judicial review of individual acts. This normative dimension of the Commission’s action directly affects not only undertakings and Member States but also a broad range of citizens and market participants – just like legislation.²¹ That kind of action is thus usually referred to as ‘soft law’ and is routinely a concern over the democratic legitimacy of the Commission.²² This concern does not invalidate the use of soft law, particularly under the specific needs of enforcing competition rules, but it beckons a plurality of views over the normative content and effects of the Commission’s action. In fact, the Commission seems to implicitly accept these concerns as it engages in wide publication consultation exercises.²³

The Commission’s normative choices have been on display in a remarkable fashion since its so-called ‘modernisation’ of the enforcement of competition law in the 2000s.²⁴ Of its own motion, the Commission radically changed its policy by adopting a ‘more economic approach’ and prioritising the goal of consumer welfare.²⁵ The guidance that it issued therefore focused on assessing consumer harm throughout the different areas of competition law. As made express for Article 102 TFEU,²⁶ such guidance consists of enforcement priorities as much as

¹⁹ See i.a. judgment of 13.07.2023 *CK Telekom*s (C-376/20 P) EU:C:2023:561 82 and judgment of 12.10.2023 *Est Wind Power* (C-11/22) EU:C:2023:765 30.

²⁰ Article 17 TEU.

²¹ For an approach that suggests using enforcement discretion to address inequality see also A. Ezrachi et al., ‘The effects of competition law on inequality—an incidental by-product or a path for societal change?’ (2023) 11:1 *Journal of Antitrust Enforcement* 51-73.

²² See fn. 5.

²³ It nevertheless goes without saying that such consultation is not the forum for the Parliament’s view.

²⁴ See A. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2019).

²⁵ From the plurality of goals recognised by the case law. See in this regard i.a. Brook (cit. fn. 12) and K. Stylianou and M. Iacovides, ‘The Goals of EU Competition Law: A Comprehensive Empirical Investigation’ (2022) 42:4 *Legal Studies* 620-648.

²⁶ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.

(or despite being presented as) restatements of the case law to ‘guide’ private parties. As part of modernisation, the Commission also refocused its enforcement activity on cartels (supposedly the most harmful practice to consumers due to increases to final prices) with the already-referred leniency procedure and most investigations dedicated to cases originating in leniency.

The Commission’s formulation of competition policy under these principles is still ongoing. Legislation and guidance have massively incentivised damages actions by private parties.²⁷ The Commission has started the process to revise Article 102 TFEU guidance in light of its Big Tech cases and the debate over what kind of remedies these require.²⁸ Recent guidance on Article 101 TFEU still conditions the justification of restrictions based on sustainability benefits to consumer welfare.²⁹ Temporary Frameworks continue being revised or prolonged to deal with delayed effects and emerging crises.³⁰ Geopolitical competition influences State aid and continues to raise the issue of national and European champions.³¹

These are all important normative choices on debatable issues of competition policy, as shown by the views expressed by the Parliament on them.³² The Commission’s action should therefore be subject to some level of accountability so that such views, which are part of the democratic legitimacy of competition policy, are given proper consideration.

3. Legislative, judicial, and administrative constraints

According to the principle of separation of powers, the Commission’s administrative enforcement should be subject to legislative empowerment to act and therefore the Parliament’s authority. Judicial review by the Court would reinforce conformity with empowering legislation while the European Ombudsman (‘Ombudsman’) would address aspects not properly covered by judicial review. This section will discuss how these legislative, judicial, and administrative constraints operate relative to competition policy, including how the Parliament’s role in them could be developed. It thereby sets the stage for the political accountability analysed in section 4.. Legislative procedure will be discussed first, finding that legislation is of reduced importance in the field (a). Judicial procedure has thus emerged as the main constraint on the Commission (b). Residual control by administrative procedure will be briefly commented (c).

²⁷ For a summary, see https://competition-policy.ec.europa.eu/antitrust-and-cartels/actions-damages_en.

²⁸ https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1911.

²⁹ Horizontal Cooperation Guidelines 569.

³⁰ See fn. 16.

³¹ For example, the controversy generated by the Commission’s decision in the *Siemens/Alstom* merger, https://ec.europa.eu/commission/presscorner/detail/it/IP_19_881.

³² See the Parliament’s Report on Competition Policy - Annual Report 2022, https://www.europarl.europa.eu/doceo/document/A-9-2023-0183_EN.html.

a) Legislative procedure

The role traditionally assigned to the Parliament for competition policy is connected to its participation in the legislative procedure. In the following subsections, it is analysed how that role has been performed (i.) followed by possible pathways for increased Parliamentary participation (ii.).

i. Parliamentary participation under the special and ordinary procedures

Competition law retains the format of the old ordinary procedure which is, hence, now a special legislative procedure: the Commission has initiative, the Council legislates, and the Parliament is only consulted. Article 103(1) TFEU entrusts to the Council ‘the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102’, while Article 109 does likewise for ‘any appropriate regulations for the application of Articles 107 and 108’. This special procedure has primarily been used to legislate on procedural rules.³³ Nonetheless, as further referred in Articles 103(2)(b) and 109 TFEU, it has also been used to legislate on substantive law and in particular the exemptions granted by Article 101(3) TFEU and those applicable to ‘categories of aid’. As will be discussed next, however, even if the Parliament had as acted as co-legislature in the legislation adopted under the special procedure it would not be able to claim (as the Council cannot) to have decisively influenced competition policy due to the ample leeway given to the Commission.

The procedural rules for applying Articles 101 and 102 TFEU determine that undertakings can be fined up to 10% of their annual turnover,³⁴ a legislative decision which undoubtedly cemented the importance of EU competition law. Nevertheless, how fines are set under this ceiling has been left to Commission guidance.³⁵ The option to close investigations by accepting commitments³⁶ is another procedural cornerstone, which effectively allows the Commission to shape markets under investigation (with the consent of the undertaking involved).³⁷ This option was nonetheless only enunciated in the legislation, eventually requiring the Court to define how commitments operate and what are their limits.³⁸ Finally, as already mentioned, an Article 101(3) TFEU exemption are of great practical importance for compliance. Nevertheless, instead of the ‘detailed rules’ prescribed by the Treaties for legislating on the conditions of such exemption, the Council has empowered the Commission to adopt block exemptions and left the details of such conditions to be addressed by Commission guidance.

³³ Regulation 1/2003 and Council Regulation 2015/1588 on the application of Articles 107 and 108 TFEU to certain categories of horizontal State aid OJ L 248/1 24.9.2015 (‘Regulation 2015/1588’).

³⁴ Article 23(2) of Regulation 1/2003.

³⁵ Other than Regulation 1/2003 referring to gravity and duration in the abstract, see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 OJ C 210/2 1.9.2006.

³⁶ Article 9 of Regulation 1/2003.

³⁷ In practice, the Commission can express concerns about potentially infringing behaviour and its possible remedy, giving undertakings the choice to either follow the Commission’s vision of how the market should work in the form of a commitment or fight the case in uncertain (and lengthy) judicial review of a likely infringement decision.

³⁸ Judgments of 29.06.2010 *Alrosa* (C-441/07 P) EU:C:2010:377 and of 9.12.2020 *Canal +* (C-132/19 P) EU:C:2020:1007.

The procedural rules for State aid allow even greater latitude by delegating to Commission regulation whether aid falls under Article 107(1) TFEU and needs to be notified.³⁹ This is a good example of how a procedural matter, which would (merely) frame the performance of an executive function, effectively turns into a substantive power, since it frees the Commission to set the tests for whether a measure is subject to State aid control. Moreover, the legislation expressly refers this prerogative for ‘De minimis aid’⁴⁰ (for which it has indeed been used in practice the main reason for aid escaping notification), but the Commission has also used it to regulate services of general economic interest (‘SGEI’). Again, this means that the Commission has determined the notification threshold for SGEI without any legislative direction.⁴¹ The Commission has further been empowered by the Council to adopt block exemptions of aid by implementing regulation.⁴² Under State aid procedural rules, all these Commission regulations require consultation of an Advisory Committee composed of representatives of Member States and chaired by the Commission.⁴³

There are two possible exceptions to the special legislative procedure but, so far, they have not significantly changed the Parliament’s input on competition policy.

First, relying on a double legal basis. The Merger Regulation was adopted under both the general competence for competition of Article 103 TFEU and the subsidiary competence of Article 352 TFEU, recognising that instituting merger review at Union level was part of Treaties’ principles on competition but also assuming that (at the time) it went beyond existing rules. This meant little for the Parliament’s participation, since the procedure under Article 352 TFEU also gives it a mere consultative role. Moreover, as already noted, despite its constant application the substantive standard of SIEC is so open-ended that it took the Commission two whole guidance instruments to give it a precise meaning.⁴⁴

The second exception is the possibility afforded by the second paragraph of Article 48(7) TEU to change a special legislative procedure into the ordinary procedure, thereby granting the Parliament the status of co-legislator. As cited from the Parliament’s Research Service report above, this has been used for the Directive on damages and the ECN Plus Directive. However, private enforcement seeking redress from damages favours follow-on actions to infringement decisions, while the ECN Plus empowered NCAs not vis-a-vis the Commission but in relation to their own Member States.⁴⁵ In other words, these Directives were presupposed on the central

³⁹ Article 2 of Regulation 2015/1588.

⁴⁰ The title of Article 2 of Regulation 2015/1588.

⁴¹ Once the Court determined that such aid could escape Article 107(1) TFEU in judgment of 24.07.2003 *Altmark* (C/280/00) EU:C:2003:415.

⁴² Article 1 of Regulation 2015/1588.

⁴³ Without Parliamentary participation, see Articles 7 and 8 of Regulation 2015/1588.

⁴⁴ Guidelines on the assessment of horizontal mergers under the [Merger Regulation] OJ C 31/3 5.2.2004 and Guidelines on the assessment of non-horizontal mergers under the [Merger Regulation] OJ C 265/7 18.10.2008. Moreover, the Merger Regulation was revised to exclusively introduce the standard of SEIC without clarifying its meaning - which the Court recently did in *CK Telekoms*.

⁴⁵ This Report will not cover the relationship between Commission and Member States, including possible political accountability.

role of the Commission. Moreover, the burgeoning importance of private enforcement is once more relying on Commission guidance and jurisprudential advances.⁴⁶

ii. Strengthening the Parliament's role

The just described limited role raises the question of how the Parliament can increase its participation in the legislative procedure. Procedural rules and the Merger Regulation have had decades of decisional practice and case law clarification, and the Commission has shown no appetite for legislative change (which remains under its initiative).⁴⁷ Emerging related issues like the DMA or foreign subsidies control have been tackled outside the sphere of competition law,⁴⁸ arguably so as not to disturb existing enforcement. The possibility nevertheless remains that the legislation shows its age, particularly regarding issues currently taken over by enforcement priorities and Temporary Frameworks. It would be expected that, as with the recent Directives, revising this legislation would also follow the ordinary procedure.⁴⁹

The same can be said of the legislation empowering the Commission to adopt block exemptions by implementing regulation. It is true that such regulations and the corresponding guidance codify the Commission's decisional practice, and empowering legislation determines essential aspects like the economic areas to which the block exemption applies. Those aspects could nevertheless be expanded to include many more details (as is quite common in other fields of the internal market), the Commission already applying its technical expertise when proposing the legislation. Again, the involvement of the Parliament under the ordinary procedure would be recommended but is subject to the Commission acquiescence to limiting its implementing power by proposing such empowering legislation.

The main issue with the legislative procedure nevertheless remains the obvious gap of the Commission bypassing the Parliament's participation by using soft law. As already emphasised, not only is soft law crucial for the practical application of competition law – by formulating the rules that private parties and Member States actually follow to ensure compliance – it also raises serious issues of legitimacy precisely because the Parliament is not involved. Changing this state-of-affairs would be challenging since the Commission retains the initiative of any legislation that would interfere with its freedom to issue soft law. Moreover, the Commission can point to an established (and arguably successful) way of doing things. Nonetheless, as discussed in section 4., soft law is the logical object of interinstitutional dialogue with the Parliament.

⁴⁶ See fn. 27.

⁴⁷ Notably, there was only one change to the procedural rules for anti-competitive behaviour since the 1960s, when Regulation 1/2003 decentralised enforcement by allowing NCAs to apply Articles 101 and 102 TFEU, while the Merger Regulation was solely revised to introduce the SIEC standard after case law questioned the Commission's application of the previous substantive standard.

⁴⁸ Regulation 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector OJ L 265/1 12.10.2022 ('DMA') and Regulation 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market OJ L 330/1 23.12.2022.

⁴⁹ This would involve re-adopting the Merger Regulation under the single legal basis of Article 103 TFEU, admitting that, under the evolution of EU law – such as the case law on applying Article 102 TFEU to non-notified merges, see judgment of 16.03.2023 *Towercast* (C-449/21) EU:C:2023:207 –, merger control is now an integral part of competition rules and not an extraordinary move requiring the subsidiary competence of Article 352 TFEU.

b) Judicial Procedure

In the following subsections, the judicial overview of competition policy by the Court is described (i.) as well as possible options for the Parliament to engage in ‘judicial politics’ (ii.).

i. Judicial overview of competition policy

The main form of judicial review of the Commission’s enforcement is the annulment of its acts under Article 263 TFEU. Actions of annulment are primarily instituted by private parties or Member States against decisions addressed to them. Actions for failure to act under Article 265 TFEU can also target the Commission’s inaction in relation to complaints. Formally, the Court controls the legality of any decision by checking whether the Commission acted under its competences, followed procedure – in particular the obligation to state reasons –, and respected applicable rules. In practice, the Court’s influence over competition policy operates by reviewing the Commission’s interpretation of competition rules when applying them (or refusing to do so).⁵⁰ In addition, when NCAs or private parties apply competition rules and go before their national courts, those courts can make a preliminary reference under Article 267 TFEU on the proper interpretation of such rules, thereby providing another avenue for the Court’s influence. The Court’s interpretation prevails over all others, and from that perspective seems like the ultimate arbiter of competition policy.

The Court’s overview is nevertheless first limited by being in the hands of litigants. As already noted, the legality of behaviour is hard to predict in the absence of direct precedent or falling under a block exemption. While this is inevitable due to competition rules being context-dependent,⁵¹ it introduces considerable uncertainty in judicial outcomes. Thus, costs of litigation (or even reluctance to introduce further uncertainty) might lead to avoiding challenges to the Commission’s interpretation, even in unprecedented matters, thereby depriving the Court of the possibility to weigh in. Furthermore, by not adopting the modernisation’s consumer harm and preserving a looser standard of detriment to competition,⁵² the Court also removed a possible substantive limitation on the Commission’s decisions.⁵³

Second, as noted already, the Commission’s margin of discretion is protected from judicial review. Guidance, notably, is considered as a public statement limiting that discretion: the Commission is bound to follow it when handling cases.⁵⁴ This means that the Commission is free to issue guidance on how it will apply competition rules as long as it does not contradict the case law (which is outside its discretion). Guidance nevertheless covers many aspects

⁵⁰ The General Court has jurisdiction over factual issues of decisions, but the appeal to the Court of Justice is limited to points of law.

⁵¹ This Report should therefore not be read as arguing for more ‘black letter’ rules as a general tool for accountability - notwithstanding increasing the Parliament’s participation in legislating the few such rules that have been considered adequate, notably for block exemptions.

⁵² The Court has nonetheless admitted that an open contextual analysis also includes consumers and that the Commission should therefore address undertakings’ arguments in that regard, see judgment of 6.08.2017 *Intel* (C-413/14 P) EU:C:2017:632 140-142.

⁵³ In the US, where that standard is in full force due to the influence of the Chicago School, there is heated debate on whether it has not unduly limited enforcement. See i.a. L. Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 *Yale L. J.* 710, https://scholarship.law.columbia.edu/faculty_scholarship/2808.

⁵⁴ Judgment of 28.06.2005 *Dansk Rørindustri* (C-189, 202, 205-8, 213/02 P) EU:C:2005:408 209-211.

unclarified by the case law and that, for the above reasons, will likely remain so. Guidance thus threads a fine line between setting enforcement priorities and what is effectively prospective (and even retrospective) interpretation of the law.

Crucially, private parties can only question guidance in connection with judicially challenging a decision addressed to them.⁵⁵ As such, even if their challenge is successful and the decision is annulled, the guidance will remain in place.⁵⁶ In this regard, it is remarkable that no Commission guidance has been expressly found illegal by the Court.⁵⁷ However, the Court has found soft law issued by the European Banking Agency to be invalid,⁵⁸ and it can also interpret Commission guidance directly.⁵⁹ Soft law is therefore not immune to judicial review. The Court nonetheless seems to prefer to rely on the expectation that guidance will be revised to incorporate the case law. This remains at the Commission's initiative and may not always go smoothly. For example, even though the Court rebuked Member States having to show an objective of common interest for State aid under Article 107(3)(c) TFEU,⁶⁰ the Commission still requires it in a Temporary Framework⁶¹ and it has formally been replaced by showing 'positive effects for the society at large'.⁶²

Lastly, the Commission's margin of discretion is further extended when choosing which cases to pursue. This effectively determines the importance of competition rules for each economic sector. When reviewing decisions rejecting complaints or failures to act, the Court has accepted that (in addition to the likelihood of an infringement) the Commission can prioritise cases under the Union's interest.⁶³ Therefore, even though formally the Commission cannot ignore an infringement of competition rules and must adequately reason any rejection of complaints, it remains the sole decider of what the Union interest is. This severely limits the judicial review of the Commission's enforcement priorities.⁶⁴

ii. Judicial politics

As the history of the Parliament shows, judicial action is not purely a control of legality – it can serve to advance political claims, particularly those related to democratic legitimacy. The Parliament could also do so for competition policy where, despite its limitations, judicial

⁵⁵ Since, under Article 263 TFEU, as non-privileged applicants, private parties can only challenge 'regulatory' acts (non-legislative general rules) that are of direct concern to them – under the assumption that the Commission still retains discretion when applying competition rules and therefore they are not directly concerned.

⁵⁶ Since the guidance it is not the rule of law which is being applied (see fn. above).

⁵⁷ *Hinkley Point* found that a document issued by the Commission would 'improperly reduce the scope of Article 107(3)(c) TFEU' but did not expressly qualify it as guidance, see judgment of 22.09.2020 *Austria v Commission (Hinkley Point)* EU:C:2020:742 24.

⁵⁸ See judgment of 25.03.2021 *Balgarska Narodna Banka (C-501/18)* EU:C:2021:249, which was further developed by the judgment of 15.07.2021 *FBF (Case C-911/19)* EU:C:2021:599.

⁵⁹ *CK Telekoms* 123.

⁶⁰ See fn. 57.

⁶¹ See e.g. the Temporary Framework for COVID-19 State aid (fn.16), consolidated version available at https://competition-policy.ec.europa.eu/system/files/2021-11/TF_consolidated_version_amended_18_nov_2021_en_2.pdf.

⁶² See Communication from the Commission, 'Guidelines on State aid for climate, environmental protection and energy' (2022) OJ C 80/1 para 22.

⁶³ Judgment of 12.09.2007 *UFEX (T-60/05)* EU:T:2007:269 88.

⁶⁴ On prioritisation see also O. Brook and K. Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' (September 28, 2021), <https://ssrn.com/abstract=3930189>.

overview remains the main constraint. The Parliament is a privileged applicant under Article 263 TFEU (itself a right gained by pursuing such claim judicially) and can therefore challenge Commission acts without showing procedural interest. If it were to do so, it would overstep the limitation of review being in the hands of litigants. The Parliament can also intervene in favour (or against) any such litigants. The Parliament has not made particular use of these possibilities but, like the Commission refusing to pursue complaints, inaction is relevant in and of itself – a tacit approval of the Commission’s policy.

Parliamentary intervention thus only makes sense in connection with the political accountability discussed in section 4., its possibility backing up a rejection of competition policy just as other constitutional guarantees do. As argued there, the Parliament should not simply weigh in individual cases but focus on policy choices. Such choices may be evident in the rejection of complaints and were the Parliament to question them it would seriously – and legitimately – challenge the Commission’s view of Union interest. Even bolder would be to challenge the Commission’s soft law for effectively legislating without the Parliament’s participation. Such challenges would indicate the lack of political support for the Commission acts and, depending on the importance of the act, could be on par with demanding the resignation of the Commissioner for competition.

c) Administrative Procedure

Lastly, and for the sake of completeness, administrative control should be mentioned. This form of control is linked to judicial oversight in the sense of providing accountability other than through legal rights enforceable before courts. These tools are particularly in the hands of the Ombudsman and but also the Court of Auditors. The Parliament may nonetheless also set up a Temporary Committee of Inquiry under Article 226 TFEU to investigate ‘alleged contraventions or maladministration’ as long as they are not (still) subject to legal proceedings. While this tool may be used for serious matters, the work of the Ombudsman and the Court of Auditors can also be used as a basis to ask questions to the Commission in the context of competition policy.⁶⁵

4. Political accountability over competition policy

In the following subsections, the constitutional guarantees of political accountability are examined (a), including to what uses they could be deployed for (b) and how they could be developed through interinstitutional dialogue (c).

⁶⁵ More on political accountability and the ability to raise questions in the next section.

a) Constitutional guarantees of political accountability

Essentially, under the Treaties,⁶⁶ the political responsibility of the Commission before the Parliament is guaranteed by the vote allowing the Commission's mandate and by the possibility to ask the resignation of a standing Commission. These guarantees should be seen as applied by instruments, also with constitutional status, such as procedures under the internal rules of the Parliament⁶⁷ and interinstitutional agreements,⁶⁸ as well as questions by Members of Parliament⁶⁹ and the Commission's annual activity report.⁷⁰ This toolbox has been understood, correctly, as providing the Parliament with a 'soft' influence over the Commission's competition policy. Nevertheless, such instruments would be meaningless in and of themselves without 'hard' guarantees.

At the very inception of the Commission, the Parliament sets up political accountability through the election of the President of the Commission. While the Parliament is not central in this regard, since the election only occurs after proposal by the Council, the 'Spitzenkandidat' system has increased the feedback loop with the Parliament.⁷¹ More importantly, the Parliament gives its accord to the Commissioners proposed by the Council.⁷² The internal organisation of the Commission is the President's responsibility⁷³ and, due to the traditional importance of competition policy for the internal market,⁷⁴ there has always been a Commissioner for competition. The nomination of that Commissioner will thus depend on the consent of the Parliament, even if not individualised but given by vote on the college of Commissioners.⁷⁵ As discussed shortly, this consent should be understood in light of the hearing of the nominated Commissioner before the Parliament.

Once the Commission's mandate has started, there are a number of levers which provide further accountability. In particular, the Parliament can censure the Commission (as a whole) in the case of serious failings.⁷⁶ The Parliament may also set up a Temporary Committee of Inquiry, as already mentioned, in connection to a proposed motion of censure.⁷⁷ While the Commission has never been formally censured, the events and effects around the votes on the censure of the Santer Commission show the political power of the tool.

⁶⁶ For the sake of convenience, the corresponding Treaty provisions in this section will be indicated in footnote.

⁶⁷ Article 232 TFEU.

⁶⁸ Article 295 TEU.

⁶⁹ Article 230 TEU.

⁷⁰ Article 233 TFEU.

⁷¹ Taking the composition of the Parliament into account.

⁷² Upon suggestions by Member States, see Article 17(7) TEU.

⁷³ Article 17(6)(b) TEU.

⁷⁴ See Article 17(7) TEU and Protocol 27.

⁷⁵ Article 17(7) TEU.

⁷⁶ Article 17(8) TEU and Article 234 TFEU.

⁷⁷ Also occurring regarding the Santer Commission. This is an instrument of political control, since it is precluded when 'the alleged facts are being examined before a court and while the case is still subject to legal proceedings' (Article 226 TFEU).

Moreover, the Framework Agreement on relations between the Parliament and the Commission (the 'Framework Agreement')⁷⁸ states, in the section on Political Responsibility, that '[e]ach Member of the Commission shall take political responsibility for action in the field of which he/she is in charge'.⁷⁹ As detailed in the Framework Agreement, this allows the Parliament to ask the President of the Commission to withdraw confidence in a Commissioner.⁸⁰ The President will either ask that member to resign or explain their refusal to do so to the Parliament.⁸¹ This allows ultimate accountability for competition policy.

b) Tools for political accountability: possible uses and limits

The Parliament being provided with the above constitutional guarantees begs the question of what exactly are they for. This subsection will discuss possible uses (i.) and their limits (ii.) as well as focus areas for political accountability (iii.).

i. Possible uses

The Treaty states that Commissioners should be chosen 'on the ground of their general competence and European commitment from persons whose independence is beyond doubt',⁸² and the hearing of proposed Commissioners before the Parliament have thus been focused on their independence and competence. Commissioners should further avoid any action incompatible with their duties,⁸³ the scrutiny of which has been illustrated by the Santer Commission. Nevertheless, it should be remembered that the Court may compulsorily resign a Commissioner who 'no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct'.⁸⁴ Since the Court remains in charge of legal compliance, accountability before the Parliament is political, not legal.

Moreover, political accountability should not mainly be about independence, competence, or integrity. These are presupposed in any Commissioner (and, expectedly, in proposed Commissioners also). Political accountability should instead focus on the Commission's policy approach to competition. This is the necessary reading of the Commission's role to 'ensure the application of the Treaties' and 'oversee the application of Union law under the control of the [Court]' together with the guarantee that '[t]he Commission, as a body, shall be responsible to the European Parliament'.⁸⁵

Political accountability should therefore start at the outset and continue throughout the tenure of a Commissioner:

- In the hearing before the Parliament, once the questions of suitability and competence have been adequately dealt with, the approach to policy questions should be discussed

⁷⁸ Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L 304/4.

⁷⁹ Para 4.

⁸⁰ Para 5.

⁸¹ *Idem*. The resignation at the request of the President would take place in accordance with Article 17(6) TEU.

⁸² Article 17(3) second para.

⁸³ Article 245 TFEU.

⁸⁴ On application by the simple majority of the Council or the Commission itself, Article 247 TFEU.

⁸⁵ Article 17(1) and (8) TEU.

to the degree possible. In this way, the Parliament's consent is to be understood as given or withheld based on an identifiable competition policy.

- Afterwards, the Commission's action should be assessed against that consent as well as emerging events and advances in integration. This 'updating' of consent should be the function of interinstitutional dialogue discussed in the next section.

The political accountability ensured during the proposition of the Commissioner is therefore prolonged for the whole of their mandate.

ii. Limits

The principles of separation of powers, rule of law, and interinstitutional balance guarantee not only the political accountability of the Commission but also its executive function thereby setting limits. Namely, the rule of law⁸⁶

'requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers (5); effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected'.⁸⁷

In terms of interinstitutional balance,⁸⁸ the Court has highlighted that institutions must exercise their prerogatives with due regard for the powers of the other institutions:

'Those prerogatives are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different [Union] institutions, assigning to each institution its own role in the institutional structure of the [Union] and the accomplishment of the tasks entrusted to the [Union]'.⁸⁹

These principles guarantee the Commission's independence, in particular with respect to handling individual cases, and also enshrine the margin of discretion that the Court has recognised to the Commission. Indeed, the independence of Commissioners in relation to Member States is clearly expressed in the Treaties.⁹⁰

While designed for empowerment of NCAs in relation to Member States, the ECN Plus Directive⁹¹ also covers questions of independence. It declares that independence needs to be ensured so 'that such authorities perform their duties and exercise their powers impartially and

⁸⁶ See in this regard L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 *Hague J Rule Law* 107–138.

⁸⁷ Recital 3 and see also Article 2 Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget (references omitted).

⁸⁸ See J.P. Jacqué 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 383–391.

⁸⁹ Judgment of 22.05.1990 *Parliament v Council (Chernobyl)* (C-70/88) EU:C:1990:217 21.

⁹⁰ Article 245 TFEU.

⁹¹ See fn. 1.

in the interests of the effective and uniform application of those provisions, subject to proportionate accountability requirements'.⁹² For these purposes, the independence of NCAs includes:

1. Being able to 'perform their duties and to exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence'⁹³
2. '[N]either seek nor take any instructions from government or any other public or private entity when carrying out their duties and exercising their powers [...] without prejudice to the right [...], where applicable, to issue general policy rules that are not related to sector inquiries or specific enforcement proceedings'.⁹⁴
3. '[H]ave the power to set their priorities for carrying out the tasks [and] have the power to reject [...] complaints on the grounds that they do not consider such complaints to be an enforcement priority'.⁹⁵

These limitations seem sensible also in the context of the Commission's independence. For the purposes of this Report, two consequences should be highlighted. First, political pressure in individual cases already being handled by the Commission (or NCAs) is highly problematic. Second, contrary to individual cases, the ECN Plus Directive does not exclude 'political and other external influence' regarding enforcement priorities. In other words, political accountability takes place in relation to enforcement priorities.

iii. Focus areas

As just highlighted, scrutinising individual cases raises serious concerns about the rule of law and separation of powers. Political accountability is about policy choices, notably where they have general application and embody normative elements. This is markedly the case with soft law and enforcement priorities. Policy choices may nonetheless also be evident from the normative content of decisions,⁹⁶ enforcement patterns, and statements by the Commissioner painting an enforcement priority not explicitly set out in an instrument.

The Commission should therefore be asked about such priorities and be expected to set them out and explain them. As already mentioned, the Commission's action in the digital sector is to all effects one such priority. Yet, the Commission has hesitated to articulate sector priorities explicitly⁹⁷ and the Parliament might question whether a coherent prioritisation is indeed taking place and which pre-established criteria is being followed for such prioritisation.

⁹² Article 4(1) of the ECN Plus Directive.

⁹³ Article 4(2)(a) of the ECN Plus Directive.

⁹⁴ Article 4(2)(b) of the ECN Plus Directive.

⁹⁵ Article 4(5) of the ECN Plus Directive.

⁹⁶ Occasionally, there may be individual decisions with important the policy implication. In such situations, however, these policy implications may be discussed in general terms in the decision and are in any event usually discussed in the wake of the decision.

⁹⁷ One explanation might be that consumer welfare is supposed to be of general application and should provide guidance. However, it provides very little guidance as to which consumers should actually be prioritised, see our EU Competition Policy Report 'Greedflation, Competition Law, and the Cost-of-Living Crisis' <https://www.socialistsanddemocrats.eu/sites/default/files/2023-06/greedflation-competition-law-and-the-cost-of-living-crisis-report-final.pdf>.

In this regard, lessons can be learned by examining the United States ('US') experience of political accountability of the authorities applying their 'antitrust' law. Authors have suggested that, instead of focusing on 'the minutiae of competition law and policy or conducted hearings on high profile mergers',⁹⁸ it makes sense to concentrate on broad policy decisions. Applying that experience, the Parliament could also use the following questions as a rough guide to performing its function of ensuring the accountability of the Commission:

- *'Is the [Parliament] addressing fundamental issues or minor matters at the fringe?*
- *Is the [Parliament] addressing matters of national importance or local concern of a small group of members?*
- *Has the [Parliament] proposed or explored actual improvements or is it primarily airing issues for which no action is likely to ensue?*
- *How is the [Parliament] ensuring that power is delegated subject to democratic controls and that the other institutional actors are acting in accordance with democratic norms?*
- *If major changes have occurred elsewhere in the system, had [Parliament] actually approved or merely not paid attention?*
- *What non-mandatory hearings occur, how were they selected, and why do they matter?'.⁹⁹*

In this sense, guidance and enforcement priorities again appear at the forefront of the political accountability, with the focus on questions of good governance and explanation of policy choices.

c) Developing the toolbox through interinstitutional dialogue

The principle of institutional balance is closely connected to interinstitutional cooperation.¹⁰⁰ It also guarantees that EU institutions will have the proper means to secure their prerogatives, which can even include the creation of legal remedies.¹⁰¹ It is under this principle that interinstitutional dialogue on competition policy must be understood, since institutional balance is not limited to legislative and judicial issues. The Commission's political responsibility before the Parliament is unquestionably a prerogative of the latter. This means that interinstitutional dialogue must be fit to ensure accountability for political choices by the Commission – if existing tools are not, new ones must be created.

This is particularly an issue with the consent given by the Parliament to a proposed Commissioner based on their statements on competition policy. There must be a remedy for

⁹⁸ S. Weber Waller, 'Antitrust and Democracy', <https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1658&context=facpubs> 5 832.

⁹⁹ Ibid 833-834. For the debate in the Americas see also H. First and S. Weber Waller, 'Antitrust's Democracy Deficit', 81 *Fordham L. Rev.* 2543 (2013) and I. Peralta Fierro, "Technocrats and their Monopoly on Free Competition" (2022) 10:2 *Latin American Legal Studies* 416-469, DOI: 10.15691/0719-9112Vol10n2a8.

¹⁰⁰ Article 13(2) TEU.

¹⁰¹ *Chernobyl* 25-27.

failing to abide by those statements. As also seen, the Parliament can subsequently ask for the resignation of the Commissioner, but this is obviously not appropriate to every deviation. It necessarily asks for other tools to investigate, discuss, and allow the Commission to correct any failings regarding the Parliament's consent. Moreover, much of competition policy is reacting to unforeseen events (as demonstrated by COVID-19) and the particularities of cases. This limits the definition of competition policy when the proposed Commissioner is heard by the Parliament. Again, it calls for tools with the purpose of ensuring the continuity of the Parliament's consent.

The primary tool for political accountability is questions by Members of Parliament. These provide the timeliest *ex ante* control of Commission initiatives and policy decisions. The expertise of the competition working group at the Parliament is crucial in this regard. Nevertheless, more *ad hoc* working or action groups dedicated to specific issues that overlap with competition matters might also be thought of.¹⁰² Another important tool is the structured dialogue between the Parliament and the Commission around the annual report on competition and the resolution of the Parliament.¹⁰³ These provide an opportunity for political dialogue and, while the process is typically *ex post*, it should be used to suggest adjustments and future directions for the Commission's policy.

As emphasised throughout this Report, policy dialog should focus on matters such as guidance, enforcement priorities, and Temporary Frameworks. These instruments are in their effects and working close to legislation and deserve an added legitimacy which only the Parliament can provide. This could concretely apply to the upcoming review of the guidance on Article 102 TFEU (foreseen for 2024/25).¹⁰⁴ This will likely set the Commission's policy in the area for the next decade, taking into consideration the results of the enforcement priority of Big Tech, the concurrent application of the DMA, and the increased concentration in these and numerous other markets. It would certainly be a topic in the hearing of a Commissioner proposed before the guidance is finalised. In any event, the experience of the Commission in applying the existing guidance (including judicial review) and the intended direction of any changes can be discussed in detail by interinstitutional dialogue.

¹⁰² For example, on inflation and the cost-of-living, as indicated in our EU Competition Policy Report (cit. fn. 97).

¹⁰³ See fn. 32.

¹⁰⁴ See fn. 29.