

The union interest: a hidden persuader?

Citation for published version (APA):

Chamon, M., & Bourgeois, J. (2015). The union interest: a hidden persuader? In D. Edward, J. MacLennan, & A. Komninos (Eds.), *Ian S. Forrester Qc LL.D. a Scot without borders Liber Amicorum* (Vol. I, pp. 57-67)

Document status and date:

Published: 01/01/2015

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

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The Union interest: a hidden persuader?

JACQUES BOURGEOIS AND MERIJN CHAMON

I. Introduction

We are grateful for the honour of contributing to this *Liber Amicorum*. Ian Forrester's prose and speech have always been elegant and on occasion, when needed, also barbed. In Court pleadings he once described the position taken by the European Commission as a jellyfish: it has no backbone yet it stings. The following musing over a concept that could deserve the same qualification is offered to Ian Forrester, a barrister/academic and a gentleman.

Legal practitioners working in the fields of trade or competition law will be familiar with what used to be called the Community interest and should now be called the Union interest. While the notion plays a prominent role in the Commission's assessment of complaints on alleged anti-competitive practices under Articles 101 or 102 TFEU and in decisions under the Common Commercial Policy (CCP), its function in these two fields at first sight seems rather different.

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II. The Union interest in the common commercial policy...

While the Union relies on several trade defence instruments in the CCP, we will limit ourselves to looking at the measures taken under the Anti-Dumping Regulation.¹ Article 5 of that Regulation provides that proceedings will be initiated following complaints on behalf of the domestic EU industry, while Articles 7 and 9 of the Regulation provide that even if the Commission indeed concludes there is dumping and injury, duties may only be imposed if this is in the Union interest. Article 21(1) of the Regulation clarifies that various interests (of domestic industry, users and consumers) need to be assessed to verify whether it is in the Union interest to intervene by adopting anti-dumping measures. The first paragraph then further provides that such measures may not be adopted when this is ‘clearly [...] not in the Community interest.’ The wording, unaltered since the introduction of this provision in secondary EU law,² is rather strange, since the logic of the paragraph’s first sentence seems to be that the Union interest needs to be shown, while in its third sentence intervention seems to be the default course of action unless the Union interest militates against it. In any event, regardless of whether the Union interest is implicitly assumed or whether it should be explicitly shown, it is a necessary pre-condition under the Anti-Dumping Regulation in order for the Commission to act. While the Regulation refers to various interests, it only refers to the economic interests of three groups (domestic industry producing the goods in question, domestic users of those goods, and consumers). The Union interest thus only appears to be the EU’s economic interest.

III. Is different from the Union interest in the EU’s competition policy...

This is different for the notion of Union interest in the EU’s competition policy. Article 7(2) of Regulation 1/2003 provides that any natural or legal person who can show a legitimate interest is entitled to lodge a complaint with the Commission for alleged violations of the competition rules laid down in Articles 101 and 102 TFEU. While the Commission is under a clear obligation to seriously examine every complaint with the necessary care,³ this does not amount to a duty to start investigations on every complaint received. The Commission’s discretion here is in large part covered by the

1 Council Regulation (EC) N° 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ 2009 L 343/51.

2 Although the Community interest had figured earlier in the Commission’s decisional practice and in the Regulation itself, this provision was first introduced with the adoption of Regulation 3283/94, see Council Regulation (EC) N° 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community, OJ 1994 L 349/1. Its wording was (and still is) virtually identical to the Commission’s original proposal. See European Commission, COM (94) 414 final, p. 206.

3 Judgment of 18 September 1992, *Automec v. Commission*, T-24/90, EU:T:1992:97, para. 78.

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notion of the Union interest,⁴ commanding the Commission only to pursue those cases if this is warranted by said interest. The Union interest is not referred to in Articles 101 or 102 TFEU and, unlike the EU's anti-dumping policy, neither is it developed in the secondary legislation giving effect to these provisions.⁵ Instead it has been elaborated in the Commission's enforcement practice and sanctioned by the General Court in the *Automec II* judgment⁶ and by the Court of Justice in the *Ufex* case,⁷ and the Commission has hence amply referred to it in its guidelines.⁸ Further, while the Union interest in the anti-dumping regime functions as a necessary precondition to act, the Union interest in competition enforcement is a merely optional ground on which the Commission can rely to justify its decision not to investigate a complaint. Lastly, the Union interest in competition policy seems to be a broader notion than the notion in the EU's trade policy. While the latter, as noted, refers to *various* interests, the appreciation of the Union interest predominantly appears to require the Commission to assess the effects of an anti-dumping measure on all relevant *market* operators.

This of course has to do with the economic ambiguity of anti-dumping measures: while they may be beneficial to the competing domestic industry, downstream industry may instead benefit from lower prices on the upstream market and so may final consumers. All these interests, however, are economic interests. This is different for the Union interest in competition policy where the Commission has *inter alia*⁹ identified the following criteria relevant in its assessment: (i) the possibility for the complainant to bring an action before a national court; (ii) the duration and extent of the alleged anti-competitive behaviour as well as its effect on competition in the EU; (iii) the significance of the alleged infringement for the functioning of the internal market; (iv) the probability of finding an infringement and the scope of the investigation required therefor; (v) the stage of the investigation and whether the alleged infringement has ceased or where the undertakings concerned have made commitments, etc.¹⁰ Some of these criteria are clearly not strictly economic and also relate to the specific bureaucratic interest of the Commission and the general efficiency of enforcement proceedings.

4 For a more extensive discussion of the reasons for rejecting complaints, see Luis Ortiz Blanco (ed.), *EU Competition Procedure*, Oxford, Oxford University Press, 2014, p. 558 et. seq.

5 Regulation 1/2003 does refer once to the Community interest in the 18th recital of its preamble. However, that recital clarifies Article 13 of the Regulation to the effect that the Commission cannot be forced to take up a case, in the event that no national competition authority has indicated its intent to deal with it, if it finds this is not in the Union interest. That the Commission may rely on the notion to reject investigating a complaint in the first place is not actually provided for. See Council Regulation (EC) N° 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 L 1/1.

6 Judgment in, *Automec v. Commission*, footnote 3 above, EU:T:1992:97, *op. cit.*

7 Judgment in *Ufex v. Commission*, C-119/97 P, EU:C:1999:116.

8 See *e.g.*, European Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ 2004 C 101/65.

9 On the grounds for rejecting a complaint generally, see the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011 C 308/6, paras 135-138.

10 *Ibid.*, para. 44.

IV. But both may conceal ‘hidden persuaders’

Even if the two policy fields concerned are rather distinct, it is still remarkable that the notion of Union interest may have such different interpretations, especially given the fact that both fields still fall squarely in the area of economic law, and that both frameworks in which the notion functions are strikingly similar: market operators lodging a complaint at the Commission for competition-distorting practices. Subscribing to Bomhoff’s qualification of the EU legal order as being perfection-seeking,¹¹ the lack of coherence between these two distinct but related areas indeed seems one of those ‘gaps’, ‘blind spots’ or exceptions in an otherwise perfectionist EU legalism.¹² While we would not qualify it as an element in the perfection-seeking dynamics of EU law, we suggest that the two notions of Union interest may still share a similarity, having the function, in the decision-making process, of a hidden persuader.

The term hidden persuader was originally coined by Vance Packard in his discussion of the use of psychological techniques to engineer consumer preferences,¹³ and takes up a slightly different function in our present argument. The working hypothesis proposed here is that the Union interest functions as an obscure criterion, determining the outcome in a procedure resulting from a complaint on either dumping or anti-competitive behaviour. The Union interest may be a hidden persuader in anti-dumping decisions in the sense that its formal assessment may cover only part of what leads to a decision *not* to impose anti-dumping duties or to impose lower ones than would actually be needed to remove the injury.¹⁴ In competition law, the Commission’s reliance on the Union interest may be a hidden persuader in the sense that the Commission may opt to reject a complaint for lack of Union interest, pursuant to Article 7 of Regulation 773/2004,¹⁵ rather than on grounds relating to the intrinsic merits of the complaint.¹⁶ The Commission would have reason to do so because the legal review of such a decision is only marginal compared to the review of a Commission decision finding there is no evidence of anti-competitive behaviour. In addition, it is doubtful that a Commission decision rejecting a complaint for lack of Union interest is a decision within the meaning of Article 16 of Regulation 1/2003 that is binding on national competition authorities (NCAs). Yet under our working hypothesis, the Commission would indeed consider that such a rejection decision pre-empts intervention by NCAs much the same way as

11 Jacco Bomhoff, ‘Perfectionism in European Law’, (2012) 14 *Cambridge Yearbook of European Legal Studies*, p. 83.

12 *Ibid.*, p. 99.

13 See Vance Packard, *The Hidden Persuaders*, Harmondsworth, Penguin Books, 1962.

14 We leave aside the question of whether, during pre-lodging contacts with the Complaints office, prospective complainants might be advised not to file a complaint in politically sensitive cases.

15 Commission Regulation (EC) N° 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123/18.

16 Such as those mentioned in the Commission notice, cited *supra* in fn. 9.

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it would by finding there is no sufficient evidence of an infringement of competition rules. While the pre-emption in such a case would not be complete, an NCA would only have the possibility to apply national competition law and then only in so far as its decision does not contradict that of the Commission.¹⁷

V. Identifying the hidden persuader in practice

The embryonic argument presented above should not be interpreted as a contention that the Commission relies on the notion of Union interest to hide a *détournement de pouvoir*. Instead, it is argued that the discretion afforded to the Commission under that notion should be delineated more precisely, something which does not even necessarily imply a restriction of the Commission's discretion.

1. The common commercial policy

It is also precisely this discretion which makes the persuader hidden and hard to reveal in the Commission's decisional practice in the two fields concerned. An important case in the field of the CCP confirming the Commission's far-reaching discretion was *Fediol*.¹⁸ In that 1988 case, the European association of seed crushers and oil processors challenged the Commission's decision not to impose duties against soy imports from Brazil, even after finding Brazil had indeed granted subsidies, since this would not have been in the Community's interests. At that time however, the Anti-Dumping Regulation¹⁹ only provided that the Community interest needed to be taken into account by the Council when fixing definitive duties and by the Commission when fixing provisional duties. *Fediol* relied on these provisions and an *a contrario* reasoning to argue that the Commission could then not invoke the Community interest to simply terminate proceedings.²⁰ The Court however noted that 'although it is true that the Commission is under a duty to establish objectively the facts concerning the existence of subsidization practices and of injury caused thereby to Community undertakings, it has a *very wide* discretion to decide, in terms of the interests of the Community, whether or not to terminate the proceeding.'²¹

As noted above, the current Article 21 of the Anti-dumping Regulation now expounds on the Union interest but in a rather vague manner. While the Commission's bureaucratic interest is not explicitly recognized as coming under that Union interest, it may well

17 See *in fine* Judgment in *Toshiba Corporation e.a.*, C-17/10, EU:C:2012:72, paras 69-92.

18 Judgment in *Fediol v. Commission*, C-188/88, EU:C:1988:400.

19 Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ 1984 L 201/1.

20 Judgment in *Fediol v. Commission*, EU:C:1988:400, *op. cit.*, paras 33-34.

21 *Ibid.*, para. 40 (emphasis added).

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be a legitimate interest to take up in the equation. The same goes for the EU's general interests in its external relations, especially in light of Article 21 TEU and the necessary coherence in its external action: does it not follow from this Treaty provision that the EU's decision in the CCP should take into account the EU's general objectives in its external relations? One could even apply this to the *Fediol* case of 1988, since in 1985 Brazil had just transitioned to a civilian government. Since the EU is now under a duty to advance democracy 'in the wider world' would it not be advisable to refrain from imposing duties on a frail democracy, even if from a purely economic perspective such duties would be justified?

This question has so far been kept off the table. In its 2006 green paper on trade defence instruments, the Commission proposed to come to a more transparent (re-)weighing of the industry/users/consumers' interests, further suggesting to take into account other interests (such as the impact on the EU's development policy),²² but the reform process failed. In the currently pending review process,²³ the Commission has re-confirmed that the 'Union interest test ensures that the overall *economic* interests of the EU are considered before measures are imposed'²⁴ while further suggesting to adopt guidelines on the Union interest test.²⁵ While such guidelines would be welcome from a transparency perspective, the basic features of the Union interest test should still be laid down in legislation, in light of Article 290 TFEU, if they are to be considered as essential elements in the EU's trade defence policy.

Apart from these legitimate economic interests, linked to the objectives of the EU, which could be taken up in the Union interest test, the latter's clarification could also be seized to address wider policy interests that are now playing a role of hidden persuaders in the decision-making process. Above, it was noted that despite there being injurious dumping and Union interest, the duties imposed may be lower than the injury margin. Member States which are represented in the Advisory Committee might not share the Commission's view on the Union interest. Rather than meeting these Member States' concerns and reviewing its assessment of the Union interest, the Commission could then simply opt to change the level of the duty as a compromise.

22 See European Commission, Global Europe - Europe's trade defence instruments in a changing global economy, COM (2006) 763 final, p. 7.

23 See the proposal of the European Commission on the modernisation of trade defence instruments, COM (2013) 192 final.

24 European Commission, Impact Assessment accompanying the proposal on the modernisation of trade defence instruments, SWD (2013) 106 final, p. 4 (emphasis added).

25 *Ibid.*, p. 31 *in* *uncto* p. 36.

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The injury margin used being too low to reflect the actual injury margin, is also made possible by the lack of transparency and the difficult methodology used.²⁶ However, the fact that definitive duties are not fixed by the Council any more, now that the CCP has been integrated in the general comitology regime,²⁷ should place a special responsibility on the Commission, guardian of the *common* European interest, to ensure duties are imposed (or not) in line with the *Union* interest.

The Union interest as employed by the Commission in anti-dumping proceedings should be subject to a more profound debate. It should for instance be explored whether the Union interest in some cases might require the Commission not to impose measures, even if this would make sense from a purely economic view. While this could sound like blasphemy to some, it should be repeated that the CCP is not an island, detached from the EU's general objectives and its duties to contribute to a prosperous, stable and democratic world. At the same time, clarification of the Union interest should confirm it is the *common* Union interest and does not serve to hide purely national interests. For this, the elimination of the Council's role in the adoption of anti-dumping measures would serve as a stepping stone.

2. The EU's competition policy

As explained above, the hidden-persuader function of the Union interest in competition law seems different from its function in the CCP. Indeed, while the latter requires clarification and a debate on its broadening, the Union interest in competition law would seem to require clarification and a narrowing of the Commission's discretion afforded pursuant to that notion.

Today the Union interest has become the key concept in the Commission's decisional practice.²⁸ The concept's primordial role is in part due to its flexibility and openness. The criteria composing the Union interest²⁹ therefore do not constitute an exhaustive list and the Courts have further confirmed that the Commission may almost cherry-pick amongst the criteria in the motivation of its decisions rejecting a complaint for lack of Union interest.³⁰ While this large, judicially-sanctioned discretion is very interesting for the Commission, it should be equally clear that it is less so for the

26 See Edwin Vermulst & Paul Waer, 'The Calculation of Injury Margins in EC Anti-Dumping Proceedings', (1991) 25 *Journal of World Trade* 6, pp. 6-7. For a general discussion of the fixing of the amount of the anti-dumping duty, see Ivo Van Bael & Jean-François Bellis, *EU anti-dumping and other trade defence instruments*, Alphen aan den Rijn, Kluwer Law International, 2011, pp. 401-408.

27 This was eventually done through Regulation (EU) N° 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures, OJ 2014 L 18/1. The post-Lisbon rules on comitology are laid down in Regulation (EU) N° 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55/13. For a discussion of the reduced executive function of the Council, see *i.a.* Claude Blumann, 'Un Nouveau Départ Pour la Comitologie : le Règlement n° 182/2011 du 16 février 2011', (2011) 47 *Cahiers de droit européen* 1, pp. 35-36; Paul Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', (2011) 36 *European Law Review* 5, pp. 685-686.

28 Lorenzo Federico Pace, *European Antitrust Law*, Cheltenham, Edward Elgar, 2007, p. 234.

29 See *supra* at fn. 10.

30 See *i.a.* Case C-450/98 P Judgment in *IECC v. Commission*, C-450/98 P, EU:C:2001:276, paras 58-59.

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individual complainant. Certainly, the latter would be better off if the Commission were required to exercise its far-reaching material discretion in a more structured fashion. Exactly this argument was made in the *Ufex* case on appeal by the appellants who argued that in *Automec II*, the Court of First Instance had ruled that '[t]he Commission should in particular balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles 85 and 86 are complied with.'³¹ They inferred from this that those criteria should all be looked at by the Commission before taking a decision on the Union interest and that the criteria could 'only be supplemented according to the circumstances by other particulars of the case.'³² Otherwise, the appellants argued, the Union interest would 'become a vague concept defined on a case-by-case basis by the Commission itself.'³³

The Court however noted that accepting such an argument 'would rigidify the case-law.'³⁴ And as a result the notion of Union interest remains a very malleable concept in the hands of the Commission. While the Court cannot be faulted with its rejection of the appellant's argument in *Ufex*, since it would otherwise indeed have codified the criteria to be taken into account to determine the Union interest, there nonetheless remains scope for requiring the Commission to follow a more structured approach in its assessment.

Incidentally, this could also be to the benefit of the Commission, since its large discretion has already backfired on occasion. In the *Watch repairers* case, the Commission had found that there was insufficient Union interest to continue its investigations into the alleged anti-competitive practices. The Commission had invoked four reasons to this end: (i) the market concerned was of limited size, (ii) the Commission could not establish the existence of an agreement or concerted practice, (iii) no dominant position in the market could be found (and hence the question of abuse did not pose itself) and (iv) there would be little likelihood to establish an infringement of competition rules.³⁵ However, these considerations were to a great extent linked, and depended on the Commission's definition and assessment of the relevant market (and its size). Since the Court found that the Commission had erred on the latter point, the Commission's rejection based on lack of Union interest collapsed like a house of cards.³⁶ In addition, the *Watch repairers* case also set at least one further limit to the discretion of the Commission when assessing the Union interest: whereas it is accepted that the

31 Judgment in *Automec v. Commission*, footnote 3 above, EU:T:1992:97, *op. cit.*, para. 86.

32 Judgment in *Ufex v. Commission*, EU:C:1999:116, *op. cit.*, para 76.

33 *Ibid.*

34 *Ibid.*, para. 81.

35 See Judgment of 15 December 2010, *CEAHR v. Commission*, T-427/08, EU:T:2010:517, para. 163.

36 Ultimately, the annulment of the Commission's decision by the General Court did not really help the complainants. While the Commission reopened the case, it again concluded in 2014 that there was only a limited likelihood of finding an infringement, thus closing the case. See http://ec.europa.eu/competition/antitrust/cases/dec_docs/39097/39097_3089_3.pdf.

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Commission may refer to the possibility to bring proceedings at the national level, if the complainant's rights may be safeguarded at national level, the Court clarified that this possibility does not suffice if the practices complained of exist in several (*in casu* five) Member States, since that would make the Commission the appropriate authority.³⁷ Does the Union interest then not also impose a special responsibility on the Commission?

The decentralization of the enforcement of competition rules following Regulation 1/2003 also warrants a renewed look at the concept of the Union interest. In those cases where the Commission rejects a complaint for lack of Union interest, the complainant should indeed have the possibility to turn to the national competition authority, in accordance with the decentralization which Regulation 1/2003 puts in place. The latter's presence in the European Competition Network, together with the Commission, should allow a more efficient and effective handling of the complaint.

If the Commission follows a structured approach in its assessment, the complainant will be able to properly assess whether it could be fruitful to file a complaint at the NCA. Legal certainty and the efficiency of competition law enforcement would gain from such a structured approach. Conversely, it is more difficult for a complainant to appreciate the reasons behind a rejection if the Commission continues to apply the current concept of Union interest. In addition it may undermine the Commission's legitimacy if parties might believe that the Commission relies on the malleable concept of Union interest all too freely and that it in reality may have had other reasons for rejecting a complaint.

Again transparency is an issue here as well. The Commission's Annual reports on Competition Policy are not as voluminous as they used to be, and in the past the Commission only reported on the number of complaints received and the number of complaints rejected, without specifying whether it did so by relying on the (then) Community interest.³⁸ Furthermore, we have reached out to several NCAs querying whether market operators had lodged complaints with them following a rejection decision by the Commission for want of Union interest. Here the rules on confidentiality in those Member States proved to be very disparate and overall lacking in transparency. In all, the impression is that the potential of the concept of Union interest as a mechanism to come to an effective and transparent division of labour within the European Competition Network (ECN) is not being realized.

Taking the example of cooperation within the ECN: if the Commission rejects a complaint for lack of Union interest, because the conduct complained of is largely restricted to a single Member State or because there is insufficient significance for the functioning of the internal market, should the Commission not link this by default to the criterion whereby an NCA is better placed to conduct investigations? The NCA in turn could benefit from the first assessment of the Commission but could evidently not invoke the lack of Union interest to reject a complaint itself. While the Commission

³⁷ *Judgment in CEHR v. Commission*, fn.35 above, EU:T:2010:517, *op. cit.*, para. 176.

³⁸ See for instance European Commission, Report on Competition Policy, Volume 2, 2004, p. 7.

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has rightly noted that a rejection of a complaint at national level does not mean that the complaint will have sufficient Union interest,³⁹ this should then surely work both ways. The fact that a complaint was rejected for want of Union interest could never as such be invoked by an NCA. This was also recently recognized by the Belgian Competition Authority in the *Spira* case, but it still qualified the Commission's opinion as an 'important argument'.⁴⁰ It should be clear that whether this is the case depends on the quality of the Commission's reasoning and how it relies on the Union interest in its assessments.

Precisely this issue was also contested in the *Spira* case before the General Court,⁴¹ but the latter followed its traditional approach to scrutinizing the Commission's assessment of the Union interest. The fact that the practices complained of had an EU- (and even world-)wide scope, was not found to be sufficient by the Court to prove Union interest. While the Court is evidently right on this point, an approach such as the one taken in the *Watch repairers* case might have resulted in special scrutiny by the Court: because the Commission would be the best-placed competition authority, it must be very sure that there is no Union interest, since recourse to the NCAs would not be a genuine alternative.

The Union interest as used by the Commission in its enforcement of Competition rules should be subject to a more profound debate. It should for instance be explored whether the Union interest in some cases requires the Commission to act, like in the CCP, instead of allowing the Commission not to (further) act (on complaints). The Union interest's potential in clarifying the division of tasks with the ECN, to the benefit of market operators and the efficiency of enforcement in general, also merits further consideration.

VI. Concluding remarks

In the Common Commercial Policy and in Competition Policy, the notion of Union interest plays an important role. While one might think that the Union interest in both fields would be one and the same, we found that their content and function is radically different even if there may be a sting to both.

However, in the ever self-perfecting EU legal order, greater coherence between these notions is possible and worthy of pursuing. A more profound debate on the Union interest would allow it to reflect the *genuine* Union interest, expelling such hidden persuaders as may exist now that are alien to it. Depending on the case, the Union interest might then require the Commission to act or refrain from acting. In both the

39 See Commission européenne, Affaire COMP/38863/B2 – Décision de rejet de plainte, 03/11/2007.

40 Decision, nr.BMA-2015-P/K-08 of 25 March 2015, para. 103 (http://economie.fgov.be/nl/binaries/BMA-2015-PK-08_PUB%20_tcm325-265454.pdf).

41 Judgment of 11 July 2013 *Spira v. Commission*, joined cases T-108/07 and T-354/08, EU:T:2013:367, para. 190.

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fields of the CCP and the EU's Competition Policy, elements of the Union interest's current function in the other field could be introduced.

Greater transparency in the Commission's reliance on the Union interest would then also be in the interest of market operators, allowing them to better understand the Commission's reasoning and to make a more considered assessment of their case before filing a complaint at the Commission.

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