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The European Commission Guidance on Article 82 EC – The Way in which Institutional Realities Limit the Potential for Reform

Ariel Ezrachi*

I. Introduction

This paper explores the rise of the ‘effect based approach’ and its manifestation in the recent European Commission Guidance on its Enforcement Priorities in Applying Article 82 Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (the Guidance).¹

The paper focuses on the way in which institutional limitations affect the scope of the Guidance and the nature of the proposed reform. It highlights how these constraints impact on the European Commission’s ability to change and widen the analytical framework of Article 82 EC. In so doing it raises questions as to the European Commission’s mandate to determine its enforcement priorities and to divert from the traditional case law on Article 82 EC. It further highlights how the Commission’s attempt to widen the analytical framework of Article 82 EC, may trigger inconsistencies, in so much as ‘effect based variants’ are being advanced outside the precedent system.

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¹ DG Competition, Communication from the Commission, Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (Brussels, 3 December 2008), <http://ec.europa.eu/comm/competition/antitrust/art82/guidance.pdf>.

The paper also considers how the European Courts' reactive stance and their reserved response, have affected the reform of Article 82 EC thus far. Subsequently, it draws attention to the emerging gap in analysis between the Commission and European Courts, and its plausible repercussions on the enforcement of Article 82 at national level. All these limitations, it is argued, impact on the viability and effectiveness of the recently published Guidance.

II. The Guidance on Enforcement Priorities in Applying Article 82 EC

The Guidance was published, by the Commission in December 2008; it is the last phase of a lengthy consultation process in which the Commission reviewed its approach to dominance and the abuse of dominance under Article 82 EC. The aim of the review was 'to evaluate policy, to assess how it could be made more effective and to define ways in which we might make it more transparent'.²

In 2005 two significant papers were published by the Commission and launched the public debate on the reform of Article 82. The first was 'An economic approach to Article 82' (the Consultation Paper)³ in which the Economic Advisory Group for Competition Policy (EAGCP) questioned the merits of the traditional formalistic approach to Article 82. The paper advocated an effects-based approach which focused on competitive harm and refrained from treating different categories of behaviour as abusive

² Speech by the Director General of DG Comp, Philip Lowe, at Fordham Corporate Law Institute 30th Annual Congerence on International Antitrust Law and Policy, 23 October 2003, published at 2003 Fordham Corp L Inst (B Hawk, ed 2004) 163.

³ EAGCP Report on An Economic approach to Article 82 EC (July 2005), http://europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.pdf.

per se. The Consultation paper had no binding effect and was used to trigger public discussion and to promote an effect based approach. Such approach was particularly innovative as it departed from the traditionally rather formalistic approach to questions of dominance and abuse.⁴

In December 2005 the Commission published its ‘Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses’ (the Discussion Paper).⁵ This paper was more restrictive in nature than the Consultation Paper for two reasons. Firstly it preserved the analysis of dominance as it existed in the Community case law.⁶ Secondly it was restricted to exclusionary abuses which are likely to have a foreclosure effect on the market⁷ and not exploitative abuses such as excessive pricing. As clearly indicated by the Commission, the Discussion Paper did not create any legitimate interest and could not be relied upon to provide guidance on Commission enforcement policy.⁸

The papers generated a wide ranging debate on the scope and nature of analysis in Article 82 cases.⁹ Commenting on the review of Article 82, Commissioner Neelie Kroes stated

⁴ See EAGCP report (n 3) chapter 1, section 1 for an explanation of the differences between formalistic and effects based approaches. For application of formalistic reasoning in EC law see eg Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, [1993] 5 CMLR 215 paras 66-74 (predatory pricing); Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission* [1983] ECR 3461, [1985] 1 CMLR 282 (loyalty rebates), Cases 6 and 7/73, *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp v Commission* [1974] ECR 223, [1974] 1 CMLR 309 (refusal to supply).

⁵ DG Competition, Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005), <http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf>.

⁶ Discussion Paper (n 5), section 4.

⁷ *ibid*, para 1.

⁸ *ibid*, para 7.

⁹ See eg Niels, ‘The Article 82 Discussion Paper: A Comment on the Economic Principles’, April 2006, available at www.oxera.com/cmsDocuments/Agenda_April%2006/The%20Article%2082%20discussion%20paper.pdf; Padilla, ‘The Law and Economics of Article 82’ (2007) 44(4) CML Rev 1185-1186; Papandropoulos,

that the Commission's intention was not to propose a radical shift in enforcement policy but rather to 'develop and explain theories of harm on the basis of a sound economic assessment'.¹⁰

The culmination of the debate was reached in December 2008 with the publication of the Guidance. It states that its purpose is to set out

the enforcement priorities that will guide the Commission's action in applying Article 82 to exclusionary conduct by dominant undertakings. Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability on the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether a certain behaviour is likely to result in intervention by the Commission under Article 82.¹¹

The Guidance lays down the Commission's modern approach to Article 82 cases and delivers several of the innovative elements which were aired in the preceding papers.¹²

The document retains the concept of market power, which is used to analyse whether a

'Implementing an effects-based approach under Article 82', (2008) Concurrences 1-5. See also the responses to the Discussion Paper on the Commission website:

<http://ec.europa.eu/competition/antitrust/art82/index.html>.

¹⁰ Neelie Kroes, Competition Commissioner, 'Preliminary Thoughts on Policy Review of Article 82' Speech at the Fordham Corporate Law Institute, 23 September 2005.

¹¹ Commission Guidance (n 1), para 2.

¹² See below.

firm holds a dominant position and considers in detail the concept of anticompetitive foreclosure. It identifies considerations that apply to price based exclusionary conduct, explains the Commission's revised approach to the analysis of efficiencies, and provides detail on specific types of conduct: exclusive dealing, tying and bundling, predation and refusal to supply.

In what follows this paper considers the way in which institutional limitations may affect the viability of the Guidance and the Commission's agenda in clarifying and focusing its approach towards exclusionary types of abuse.

III. Can They Do It? – Enforcement Priorities

As indicated above, the Guidance sets out the enforcement priorities which will guide the European Commission's actions in applying Article 82 EC to Abusive Exclusionary Conduct by Dominant Undertakings.¹³ As such it outlines the general framework of analysis which the European Commission employs in determining whether to pursue a case.¹⁴ This form of prioritising is useful in terms of providing undertakings with an insight as to the type of activities on which the Commission will focus. As such it can enhance legal certainty as undertakings can better predict the type of activities which may give rise to concern. Yet, from an institutional perspective, this categorical prioritising raises an interesting question: can the Commission indicate, *ex ante*, which categories of activity it will pursue and which it will not? In other words, does the Commission have the authority to narrow the application of the Treaty of Rome, namely parts of Article 82

¹³ *ibid*, para 2.

¹⁴ *ibid*.

EC? This question is interesting, not least as it may challenge the fundamentals of the Guidance and may lead to its significance being reduced.

It has long been established that the Commission is capable of prioritising its investigation agenda on a case-by-case basis. In *Automec Srl v Commission* the European Court of First Instance (CFI) held that the Commission has been entrusted with an extensive and general supervisory and regulatory task in the field of competition law.¹⁵ It is consistent with its obligations under Community law for it to apply different degrees of priority to the cases submitted to it. The court noted that:

...in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law where those priorities have not been determined by the legislature is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law.¹⁶

¹⁵ Case T-24/90, *Automec Srl v Commission*, [1992] ECR II-2223, [1992] 5 CMLR 431.

¹⁶ *ibid*, para 77.

The CFI noted however, that a decision to close the file on a complaint should only be taken following a careful factual and legal examination of the particulars brought to its notice by the complainant.¹⁷

Similarly, in *AEPI v Commission*¹⁸ the CFI held that the Commission is responsible for defining and implementing Community competition policy and for that purpose has a measure of discretion to prioritise complaints brought before it. The court noted that the Commission can prioritise between cases by referring to the Community interest whilst taking into account the circumstances of the particular case.¹⁹ This decision was upheld on appeal by the European Court of Justice (ECJ).²⁰

The Commission Notice on the handling of complaints echoes the case law in this area and states that the Commission is not required to conduct an investigation in every case and is entitled to accord different weights to the complaints brought before it according to the Community interests.²¹ The Commission is thus authorised to prioritise on a case by case basis following a detailed factual examination of each case. The question is, therefore: has the Commission exceeded the bounds of its discretion in categorically prioritising ex ante?

¹⁷ *ibid*, paras 55-98.

¹⁸ Case T-229/05 *AEPI v Commission* [2007] ECR II-84, ...

¹⁹ *ibid*, paras 38-40; On the evaluation of the Community interest see also: Case T-5/93 *Tremblay and Others v Commission* [1995] ECR II-185, para 62; Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93, paragraph 46; Case T-62/99 *Sodima v Commission* [2001] ECR II-655, paragraph 46.

²⁰ Case C-425/07 P *AEPI v Commission* [2009] ECR 00.

²¹ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/65.

In *Ufex and Others v Commission*²² the ECJ held that the Commission is responsible for defining and implementing the orientation of Community competition policy and acknowledged its discretion to prioritise cases.²³ However, it noted that ‘the discretion which the Commission has for that purpose is not unlimited.’²⁴ The Commission is under an obligation to provide precise and detailed reasons for its decision, to set out the facts justifying it and state the legal considerations on the basis of which it was adopted.²⁵ Furthermore:

‘[W]hen deciding the order of priority for dealing with the complaints brought before it, the Commission may not regard as excluded in principle from its purview certain situations which come under the task entrusted to it by the Treaty.

In this context, the Commission is required to assess *in each case* how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community.’²⁶ [emphasis added]

²² Case C-119/97 P *Ufex and others v Commission* [1999] ECR I-1341.

²³ *ibid.*, para 88.

²⁴ *ibid.*, para 89.

²⁵ *ibid.*, paras 90-91.

²⁶ *ibid.*, paras 92-3.

Accordingly, the Commission cannot as a matter of principle, exclude from its range of operation, situations which come under the tasks entrusted to it by the Treaty.²⁷ It therefore, cannot categorically state that it will not investigate parts of Article 82 EC as indicated in the Guidance.

In *Treuhand AG v Commission* the CFI provided an illustrative account of the limited leeway available to the Commission in its interpretation of the Treaty provisions.²⁸ The case concerned the interpretation of Article 81 EC but is just as relevant to the subject matter of this paper. The applicant argued that the Commission decision runs counter to the principle of protection of legitimate expectations as it diverts from established decision making of the Commission. While rejecting the claim on the facts of the case, the court noted that the Commission's decision-making practice was based on a correct interpretation of the *full* implications of the prohibition laid down in Article 81 EC. It added that:

Since the interpretation of the undefined legal concept of 'agreements between undertakings' ultimately falls to be determined by the Community judicature, the Commission does not have any leeway enabling it, where relevant, to forgo bringing an action against a consultancy firm which

²⁷ On this point it is interesting to note the decision of the Administrative English Court in Case CO/7886/2006 *Cityhook Limited v Office of Fair Trading* [2009] EWHC 57 (Admin), 2009 WL 6151. The court reviewed a decision by the Office of Fair Trading (OFT) to close an investigation into suspected infringements of competition law. The court accepted that the OFT has a discretion to close an investigation without reaching a final decision and to apply its prioritisation principles in case selection and investigation. (OFT953 - OFT Prioritisation Principles) It rejected the claim that it is not for the OFT 'to identify areas that it will enforce and areas that it will not enforce.' (para 110) The court noted that the guidelines 'cannot replace the wider discretions that the [Competition] Act confers, but they do give the exercise of those discretions a focus that will enable some consistency of approach.' (para 114).

²⁸ Case T-99/04, *AC-Treuhand AG v Commission* [2008] ECR 00.

satisfies the criteria for shared liability. On the contrary, by virtue of its duty under Article 85(1) EC, the Commission is required to ensure the application of the principles laid down in Article 81 EC and to investigate, on its own initiative, all cases of suspected infringement of those principles, as interpreted by the Community judicature. Accordingly, since – notwithstanding the Italian cast glass decision – the Commission’s decision-making practice prior to the contested decision could appear to conflict with the above interpretation of Article 81(1) EC, that practice was not capable of giving rise to legitimate expectations on the part of the undertakings concerned.²⁹

In the context of Article 82 EC this case suggests that the prioritising exercise at the heart of the Guidance cannot establish any legitimate expectation. The Guidance should not and cannot be relied on to assume that the Commission will refrain from applying parts of Article 82 EC. At best it provides an indication as to the focus of the Commission’s enforcement.

To operate within its remit, the Commission will have to explore on *a case by case basis* the *full* implications of the prohibition laid down in Article 82 EC. Failure to do so may be challenged in the courts by rival undertakings and other parties, insofar as the Commission’s decision was solely based on the Guidance.

²⁹ *ibid*, para 163.

The Commission, being aware of this, is likely to refrain from categorical reliance on the Guidance, and will have to reach a decision on each individual complaint, taking into account the factual and legal environment. Paragraph 8 of the Guidance seems to reflect this and states that in applying the general enforcement principles set out in the Guidance ‘the Commission will take into account the specific facts and circumstances of each case’.³⁰ Evidently, the Guidance is carefully crafted to address the need for a case by case examination. There seems, however, to be a gap between the rhetoric of paragraph 2 of the Guidance – setting the enforcement priorities; and that of paragraph 8 – providing a token of conformity with the boundaries of Commission discretion, by establishing a case by case mechanism.

To operate within its discretion, as outlined by the European Courts, the case by case examination will have to be more intense than a mere formalistic review which echoes the principles as set out in the Guidance. It cannot operate as a laundering provision to legitimise the *ex ante* prioritising; such is outside the Commission’s mandate. Subsequently, the intrinsic value of the Guidance as a document which establishes enforcement agenda is hampered. Undertakings should not assume that the priorities as outlined in the document imply lack of intervention as such.

IV. New Effect Based Variants

Leaving aside the questionable weight of the prioritising statement in the Guidance, it is interesting to focus on the innovative elements it carries. The Guidance embodies some of the effect based spirit which dominated the Article 82 EC consultation. The

³⁰ Guidance (n 1), para 8.

introduction of effect based variants in the Commission's analysis is to be welcomed. It reduces the risk of over regulation and of chilling competition, which may result from formalistic analysis. It aims to distinguish between competition on the merits and anticompetitive unilateral action. Yet, the practicality of the effect based analysis is challenging. The move from a formalistic approach to an economic based approach creates uncertainty as to the relevant benchmarks used to establish an abuse and their limiting principles.³¹

Arguably, the Guidance, being a relatively short document, provides a very limited account of these new concepts. New effect based variants are considered but are generally left with no clear indication as to their application and limiting principles. In this respect the Guidance puts forward a suboptimal framework; outlining new principles but refraining from dissecting them in the level of detail required if the concepts are to be relied on in practice.

A few examples may shed light on some of the effect based variants in the Guidance and the uncertainty they carry. Most striking is the Commission's attempt to introduce a new efficiency defence under Article 82. This has been favoured by the Commission for some time and would be structured in the same way as Article 81(3),³² which provides the mechanism for saving agreements between undertakings, which would be anticompetitive, but for the efficiencies provided. This development is, in principle, to be welcomed as it would align Articles 81 and 82 and move closer to developing a

³¹ The notion of 'an equally efficient competitor' is heavily used in the Guidance to underpin the effect based approach. See eg Guidance (n 1) paras 42 ff and 59 ff.

³² *ibid*, paras 37-46.

consistent theoretical basis for the operation of the competition law system as a whole. However, its treatment in the Guidance provides little evidence of its limiting principles or suggestions as to how it would be put into practice. Given that there is no case law on this area from the European Courts and, as yet, no Commission decisions have been based on efficiency considerations, there is a real need for further clarification of the nature of the defence.

Similarly the Guidance explains how the Commission will deal with conditional rebates.³³ There the Commission stipulates that the loyalty inducing nature of the rebate can be assessed by reference to the ‘non contestable’ and ‘contestable’ portions of demand. These variables are affected, among other things, by the capacity constraints of existing competitors and the entry prospects of potential competitors. Whilst this way of dealing with rebates may provide a useful way of analysing the issue, its practical application is challenging. It is no straightforward matter for a dominant firm to accurately assess these variables and to obtain information from its existing and potential competitors. This problem is exacerbated in cases of borderline dominance. Similar difficulties arise in relation to the Commission proposal to examine conditional rebates by estimating the price a competitor would have to offer a customer in order to compensate the customer for the loss of the conditional rebate if they switched part of their demand away from the dominant firm.³⁴ Such a benchmark can *theoretically* help to identify anticompetitive rebate structures. However, in practice lack of access to such

³³ *ibid*, paras 37-46.

³⁴ *ibid*, para 40.

information and the difficulty of calculating the relevant measurement makes the benchmark a sub optimal tool for guiding the conduct of dominant undertakings.³⁵

More generally, undertakings may find it difficult to establish whether their competitor is ‘as efficient’ and subsequently whether their activity may amount to ‘anticompetitive foreclosure’. The concept of ‘as efficient’ has been used (arguably, to some extent inconsistently) by the Commission throughout the Guidance to set the benchmark for intervention.³⁶ Evidently, confusion surrounding such a pervasive concept in the Guidance is damaging to the principle of legal certainty.

One must stress that by its nature developing a new approach, especially one which shifts the emphasis from formalistic reasoning to the effect based approach, involves a level of uncertainty. Thus, part of the uncertainty is inherent to the process and naturally emerges from it. Furthermore this uncertainty is not likely to triggered in ‘hard core’ cases where abusive conduct is evident, as these do not call for elaborate application of the effect based approach.³⁷

Nevertheless, in practice, the majority of cases raise doubt as to the legality of an undertaking’s actions or the possibility of a challenge by other undertakings or competition authorities. Ambiguities as to the nature and limitations of some of the concepts in the Guidance and their practical applicability is detrimental for businesses

³⁵ See comment on the relevant range in John Temple Lang ‘A question of priorities – The European Commission New Guidance on Article 82 is Flawed’ Competition Law Insight 10 February 2009, p 3.

³⁶ *ibid* p 3 on the unsatisfactory nature of this benchmark.

³⁷ See eg Case COMP/E-1/38.113 *Prokent/Tomra* (2008) OJ C 219/12 where the dominant company imposed de facto exclusivity clauses on its customers.

and may chill competition. Such uncertainty has a cost, as the most restrictive approach dictates the commercial unilateral behaviour of the dominant undertaking. Arguably, it may have been possible to limit the extent of uncertainty by developing a more detailed framework to surround some of the new concepts. This argument is all the stronger as concerns about the chilling of competition are one of the key issues which the Guidance was intended to resolve.

As will be discussed below, institutional limitations may have limited the Commission's ability to fully develop some of the concepts in the Guidance. Disagreement on the scope and nature of some of the concepts may have also contributed to this. Either way, it seems that the Guidance lacks some of the ingredients which could transform it into a true guiding tool.

In his work on the US Merger Guidelines, William Blumenthal identified a number of elements which contributed to their success.³⁸ He noted that the main strength of the 1982 US Merger Guidelines, and the revisions which followed, was in the detail of the document and the fact that it left the basic analytical framework intact by adhering to pre-existing law. In addition he pointed to the balance between simplicity and flexibility and the practicality of the merger guidelines, as some of the other variants which contributed to their success.

³⁸ William Blumenthal 'Clear Agency Guidelines: Lessons from 1982' (2000-2001) 68 Antitrust LJ 5; William Blumenthal 'Ambiguity and discretion in the new guidelines: some implications for practitioners' (1992-1993) 61 Antitrust LJ 469.

While the Commission's Article 82 Guidance retains the overall framework of analysis of dominance and abuse, and as such adheres to the traditional case law, it seems to fail to deliver the requisite level of detail. The new concepts are relatively abstract and as such not fully specified. This, it is argued, creates avoidable ambiguity which undermines the practicality of the Guidance and its contribution to creating a transparent analytical framework for analysis under Article 82 EC.

V. The Emergence of New Jurisprudence

As indicated above the new Guidance does more than merely summarise the existing case law on Article 82, but also seeks to influence its interpretation and widen its analytical envelope. Achieving this aim, however, may be hampered by the institutional division in Europe. Under European law the Commission is not only limited in its ability to prioritise, *ex ante*, (section III above), but may also be limited in its ability to widen the analytical framework of Article 82 EC (section IV above).

The European institutional framework subrogates the Commission's creative leeway to the Community judicature. Accordingly, in the Discussion Paper, the Commission clarified that its interpretation of Article 82 is without prejudice to the interpretation that may be given by the Court of Justice or the Court of First Instance.³⁹ Similarly, the Guidance clarifies that 'it is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the European Court of Justice and the Court of First Instance'.⁴⁰ The practical impact of this was highlighted, in *British*

³⁹ Discussion Paper (n 5), para 6.

⁴⁰ Guidance (n 1), para 3.

Airways v Commission, Advocate General Kokott noted that even if the Commission's administrative practice was to change, it 'would still have to act within the framework prescribed for it by Article 82 as interpreted by the Court of Justice.'⁴¹

This principle hampers the ability of the Commission to advance a meaningful and prompt reform of Article 82. It signifies that the introduction of an 'effect based agenda' will have to be managed within the existing boundaries of Article 82, as set by the European Courts. Breach of this analytical boundary may be challenged in court.

The institutional structure thus allows the Commission to engage in the evolution of case law but not in its revolution. Some might point out that the European Courts interpretation of Art 82 has been guided to a large extent by the approach promoted by the Commission itself during the formative years of European competition law. This was largely formalistic in nature. Subsequently, the Commission's creative leeway is now restricted by its own past formalistic practice which was approved and endorsed by the European courts. Having been embedded in the European case law, this structured analysis cannot easily be changed.

For now the fact remains that the Commission's new thinking is subrogated to the Court's interpretation of Article 82. Arguably, this limitation led the Commission to a creative approach in positioning the new Guidance of Article 82. It is not by chance that the document was not entitled 'Guidelines', but rather '*Guidance* on the Commission's Enforcement Priorities in Applying Article 82 Treaty to Abusive Exclusionary Conduct

⁴¹ Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, para 28.

by Dominant Undertaking'. The title echoes the hybrid nature of the document and the potential tension between some of the new concepts and the case law of the European Courts. In this respect the Guidance is a weaker document that one would have hoped for. Whilst the prudence of the Commission may be useful in avoiding direct conflict with the courts, equally it may undermine the relative certainty which other guidelines have provided.

An endorsement by the European Courts of the effect based approach will not only help crystallise the concepts but will also transform them from soft law into binding law. By embracing the effect based concepts in the Guidance the European Courts can 'import' these variants into the precedent system. Unfortunately, so far, there is little evidence that the CFI and ECJ are willing to widen the analytical framework of Article 82 EC and endorse a new jurisprudence.

Noticeably, the courts' reactive position means that they operate *ex post* and have limited opportunities to advance new jurisprudence. To import the effect based approach into the case law one requires a suitable case to be appealed to the courts and be used as a vehicle to advance reform. The slow turnover of cases hinders the courts' ability to react in a timely fashion to the introduction of new concepts. This *reactive* status of the court stands in contrast to the Commission's *proactive* stance, which enables it to introduce and develop novel concepts independently of an investigation.

For these reasons it is too early to reach firm conclusions as to the European Courts' reaction to the effects based approach. Nevertheless, with these caveats in mind, a brief look at recent judgments of the European Courts, reveals little support for effect based analysis.

The recent decision of the CFI in *British Airways v Commission* dealt with the issue of rebates. The CFI's reasoning contained no hint of the effects based approach,⁴² but was based solely on earlier case law and ignored a real economic assessment of possible objective justification. The CFI's comment in paragraph 293 of its judgment is significant for its strict adherence to previous cases:

'In the first place, for the purposes of establishing an infringement of Article 82, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.'⁴³

A similar formalistic approach to the question of abuse was evident in the CFI judgement in *Microsoft Corp v Commission*.⁴⁴ Here the Court took a formalistic approach to the

⁴² *British Airways* (n 41).

⁴³ *ibid*, para 293. See also comments by the CFI in Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission* (Michelin II) [2003] ECR II-4071, [2004] 4 CMLR 18 para 239: 'For the purposes of establishing an infringement of Article 82, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect'.

⁴⁴ Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-3601.

question of abuse focussing narrowly on the facts of the case and adopted the court's traditional consideration of exceptional circumstances when analysing a refusal to licence intellectual property rights.⁴⁵ The CFI refrained from commenting directly on the Commission's view stated in its decision⁴⁶ and the Discussion Paper, according to which a refusal to licence should not impair the customer's ability to benefit from innovation brought about by the dominant undertaking's competitors.⁴⁷

In *France Télécom SA v Commission*,⁴⁸ a predation case, the CFI held that there was no need to demonstrate the actual effects of the alleged predatory behaviour or to prove the effects of eliminating competition. Accordingly, it held that

'for the purposes of applying that article, showing an anti-competitive object and an anti-competitive effect may, in some cases, be one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect.'⁴⁹ ...

'Furthermore, it should be added that, where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not

⁴⁵ At least in terms of form.

⁴⁶ *Microsoft* Case COMP/C-3/37.792, European Commission. The Commission argued that 'it follows from paragraph 49 of *IMS Health*, ...that a 'new product' is a product which does not limit itself essentially to duplicating the products already offered on the market by the owner of the copyright. It is sufficient, therefore, that the product concerned contains substantial elements that result from the licensee's own efforts'. On appeal, the CFI did not comment directly on this statement (para 631, CFI judgment).

⁴⁷ *ibid*, para 240.

⁴⁸ Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107.

⁴⁹ *ibid*, para 195.

sufficient to prevent that being an abuse of a dominant position within the meaning of Article 82.’⁵⁰

A less formalistic approach may be found in the recent opinion of Advocate General Dámaso Ruiz-Jarabo Colomer in the *Glaxo Smith Kline* case.⁵¹ The Advocate General argued in his opinion that a formalistic approach to the question of abuse may fail to recognise activities which are of benefit to consumers. Accordingly, certain conduct cannot be deemed abusive even when the circumstances of the case make the undertaking’s intention clear.⁵² The AG noted that a formalistic approach to the question of abuse may fail to recognise activities which are of benefit to consumers. Subsequently the real effect of the activities can only be recognised while comparing positive and negative consequences of the activity.⁵³ The opinion clearly moves away from a formalistic ‘per-se’ analysis into an effect based one, in which the positive effects of the conduct are examined. As such it provides valuable support for the effect based approach. Unfortunately the choice of AG in this case, and the effect based analysis in his opinion, could not counter the courts formalistic approach. The ECJ did not incorporate the AG comments on the analysis of effect and reverted to formalistic reasoning – focusing on the abuse and opening the door to objective justification.⁵⁴ In doing so, the court did not comment on either the effects approach or the suggested framework laid out by the Advocate General.

⁵⁰ *ibid*, para 196, citing Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission* [1996] ECR II-1201, para 149; and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 191.

⁵¹ Case C-468/06 – 478/06 *Sot. Lélos kai Sia E.E v Glaxosmithkline AEVE Farmakeftikon Proïonton* (hereafter GSK), AG Opinion dated 1 April 2008.

⁵² *ibid*, AG opinion, para 123.

⁵³ *ibid*, AG opinion, para 73/5.

⁵⁴ *ibid*, ECJ judgment, para 68-70 and 78-122

Again, it is important to acknowledge that only a short period of time has elapsed since the beginning of the discussion on the effect based approach. As mentioned above, not every case provides the European Courts with a relevant opportunity to advance an effect based approach. Further, even if the courts were willing to back the effect based approach, they may nevertheless hesitate to adopt novel approaches without more indication of their practical impact and limiting principles. However it seems that in the *Glaxo Smith Kline* proceedings the ECJ missed an opportunity to engage with the debate on the effects approach. This is particularly disappointing since the Advocate General laid, in his opinion, the foundations of an effect based analysis. Consequently, the signal sent by the court seems to favour formal reasoning, as the court actively chose to move away from an effect based analysis. This makes it harder to reconcile the effect based variants in the Guidance with the analysis of the ECJ.

VI. Amplified Uncertainty at the National Level

At present, the *new* effect based variants in the Guidance remain outside the precedent system and are the preserve of the Commission's analysis. They therefore form part of the body of 'soft law' which the Commission develops in its recommendations and guidelines. These communications serve a significant purpose in the area of competition law, clarifying and explaining the Commission's enforcement practice. However, it is argued that in the area of Article 82 EC the lack of formal backing from the European courts, identified in the previous section, amplifies the uncertainty which stems from the Commission's attempt to widen the analytical framework of Article 82 EC.

In Europe, the Commission, national courts and competition agencies share parallel competence in applying Article 81 and 82 EC.⁵⁵ The Guidance on Article 82 EC may thus be used by a large group of users and applied by a multitude of institutions at national and European levels. In this respect the Guidance's 'uncertainty multiplier' differs from previous Commission Guidelines on merger control where the Commission has sole jurisdiction to take decisions.⁵⁶

Unless and until the European Courts provide a clear and positive signal regarding an effect based approach, a gap is likely to emerge between the Commission's proposed analysis and the European Courts' case law. This raises questions as to the status of the Commission Guidance. Can the effect based variants exist within the case law and can they coexist with the Community judicature? Or, alternatively, do they depart from it? The way one answers these questions directly affects the viability of the Guidance and boundaries of Article 82.

Inconsistency may arise at two distinct levels. First, inconsistency at European level between the Commission and the courts may arise. The formalistic analysis requires a much higher degree of intervention to the effects-based approach and this will lead to legal and commercial uncertainty. As highlighted above the courts are likely to have the opportunity to accept or reject aspects of the Guidance through the medium of appeals.

⁵⁵ Article 5, Regulation 1/2003; see also Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C 101/54.

⁵⁶ Article 21. ECMR. The impact of any possible ambiguity in merger guidelines is easily contained and resolved through development of case law by the European Commission and the courts on appeal. It also differs from other guidelines which are addressed to a 'large group of users' but are more in line with the community judicature. See for example the guidance on Article 81(3) which reflects the case law as developed over the years by the Commission and Community courts.

However, to eradicate this uncertainty fully would probably require the CFI and ECJ to move beyond the facts of the instant case and discuss the principles at stake. Whilst the courts have not shied away from doing this in some areas,⁵⁷ they so far seem unwilling to do this in the realm of Article 82. Until the courts adopt a position, ‘external uncertainty’ at the European level will exist as to whether novel variants in the Guidance exist within, or outside, the case law and as to the limiting principles that govern them.

A second level of uncertainty may arise at national court level. In general terms national courts are bound by the doctrines of direct and indirect effect which require them to accord supremacy to EC law over their own national laws.⁵⁸ To the extent that the ECJ and CFI do not endorse the effect based variants in the Guidance, these, being soft law, function outside the precedent system. As such they have no binding effect on national courts.⁵⁹ In its ‘Notice on the co-operation between the Commission and the courts of the EU Member States’ the Commission stated:

The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments. When applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying

⁵⁷ See eg court activism in the free movement of goods context: case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 ‘Cassis de Dijon’.

⁵⁸ See eg Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 43/75 *Defrenne v Sabena* [1976] ECR 455, Case 2/74 *Reyners v Belgium* [1974] ECR 631, Case 148/78 *Publico Ministero v Ratti* [1979] ECR 1629 and Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53; Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

⁵⁹ Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [1989] ECR 803, para 27; and Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935, para 50.

Article 81(3) EC to certain categories of agreements, decisions or concerted practices. Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission. Finally, and without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in Commission regulations and decisions which present elements of analogy with the case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC and in the annual report on competition policy.⁶⁰

This position is also reflected in national legislation, for example in the provisions of the UK Competition Act 1998 (the Act). Section 60(2) of the Act stipulates that the national court should avoid inconsistencies with decisions of the European Courts. Section 60(3) establishes that the national court ‘must have regard to any relevant decision or statement of the Commission’.⁶¹

⁶⁰ Commission Notice, *Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC* (2004) OJ C 101/54, para 8.

⁶¹ Note more generally Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1 art 16; *Inntrepreneur Pub Company (CPC) and others v Crehan, House of Lords* (English Court), [2006] UKHL 38.

Indeed, in the area of competition law Commission's communications have increasingly been referred to in case law and metamorphosed into law.⁶² The role of guidelines in the development of competition law is thus much more significant than that which their informal non-binding nature may suggest.⁶³ Accordingly, despite its focus on enforcement priorities and its lack of binding effect the Guidance is likely to play a paramount role in national courts.⁶⁴ Here, possible inconsistency may emerge as different courts across Europe apply the effect based variants' from the Guidance in an inconsistent manner. Some courts may favour the approach and rely on effect based variants. The UK courts, for example, are likely to favour an effects based approach as this is increasingly the norm in UK cases.⁶⁵ Other national courts, however, may favour the traditional formalistic approach. This may be the case when courts have less experience or resources to devote to the analysis of competition cases. Alternatively, it may be the case when the national courts consider the effect based variants in the Guidance to depart from the European jurisprudence. The consequence of the above might be the creation of an unlevel playing field, as different national courts, with different approaches and expertise, pick and choose different elements from the Guidance.

⁶² Oana Andreea Stefan 'European Competition Soft Law in European Courts: A matter of Hard Principles?' *European Law Journal* 14(6) [November 2008] 758, 753-772; The article documents the boost in reference to soft law instruments in competition law, post year 2000.

⁶³ *Ibid*

⁶⁴ See for example the ECJ judgement in C-322/88 *Grimaldi* [1989] ECR I-4407 para 18

⁶⁵ See eg case law of the UK including *At the Races Limited v The British Horse Racing Limits and others* England and Wales Court of Appeal (Civil Division), [2007] EWCA Civ 38, *Albion Water Ltd v Director General of Water Services* [2006] CAT 7; see also the approach taken by the UK in their market sector investigations available at http://www.offt.gov.uk/advice_and_resources/resource_base/references/.

In addition, further ambiguity may emerge from the heterogeneous nature of the European private litigation scene. Different courts across Europe exhibit diverse levels of experience and expertise in the area of competition law.⁶⁶ These differences add to the different maturity of competition law regimes in the various Members States.⁶⁷

To some extent one may identify a mismatch between the capacity of some of the national courts in Europe to hear competition law cases, and the complexity which accompanies an effect based approach to Article 82 EC. It is generally accepted that the many of the national courts across Europe have limited capacity when it comes to the analysis and deliberation of complex economic concepts and the assessment of ‘consumer harm’. Given this, a rule based approach, formalistic in nature, is both easier to apply and to predict. By contrast, an effect based approach, requires courts to grapple with complex economic concepts and large quantities of empirical evidence in order to establish the ‘true’ impact of an undertaking’s conduct. Given the option, some courts may refrain from adopting an ‘effect based approach’ because of capacity constraints. Others, with greater experience and resources, may incorporate some of the variants into their national jurisprudence.

A further consequence of varying capacity across national courts is that quality of analysis may suffer. Again, as courts differ in their economic and competition law proficiency, so might their ‘effect oriented’ analysis of Article 82. Whilst some may

⁶⁶ For links to national courts websites see the DG Competition website: <http://ec.europa.eu/competition/eojade/antitrust/nationalcourts/>.

⁶⁷ Note that with respect to national competition agencies these difficulties are dealt with through the European Network of Competition Agency. The above comments solely apply to national courts.

argue that Article 234 references could be used to allow the ECJ to provide some measure of quality control, in reality this is only a partial cure because of the time required to resolve an Article 234 reference. This dissonance may lead to divergent interpretations of new concepts.

One area, which illustrates the capacity of national courts to foster an economic based approach, is excessive pricing. This area of law is complex requiring the courts to establish first the competitive price and then to assess the fairness of the excessive price. Illustrative in this respect are comments made by the English Court of Appeal in *At the Races Limited v The British Horse Racing Limits and others*.⁶⁸ The case in question concerned claims that the British Horseracing Board Limited had abused its dominant position, among other things, by excessively and unfairly pricing pre-race data which was in its sole possession. In the judgment the Court noted that the claim of excessive pricing presented the court with a range of factual and legal challenges, of a kind which even specialist lawyers and economists regard as very difficult. The judge stated that difficulties in assessing the excessiveness and unfairness of the price, suggest that these problems may be solved ‘more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers’.⁶⁹

Arguably, these comments, do not apply solely in the context of excessive pricing, but reveal the difficulty that courts across Europe may have when prompted to engage in greater economic oriented analysis of Article 82 cases. Capacity concerns may result in

⁶⁸ *At the Races Limited v The British Horse Racing Limits and others* England and Wales Court of Appeal (Civil Division), [2007] EWCA Civ 38.

⁶⁹ *ibid*, paras 3-7.

low tolerance to novel effect based analysis, especially when such an approach has not filtered through the precedent system.

In the midterm, uneven application of effect variants and uneven proficiency in competition law and economics, are likely to contribute to the creation of an unlevel playing field. These differences at the national level may give rise to legal uncertainty and trigger forum shopping, as claimants seek to bring their claims in a forum which they perceive as better suited for their purposes.⁷⁰

The possible inconsistent application at the national level draws attention to the interface between the Guidance and the proposed changes to private enforcement in Europe.⁷¹ Interesting in this respect is the proposal in the White Paper in Section 2.3 where the Commission states that:

The Commission sees no reason why a final decision on Article 81 or 82 taken by an NCA in the European Competition Network (ECN), and a final judgment by a review court upholding the NCA decision or itself finding an infringement, should not be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases.

⁷⁰ Such decision may be based on cost, risk, disclosure provisions and other procedural and substantive provisions. It may also be affected by the type of abuse, the position of the dominant firm and the injured party, transfer of wealth between jurisdictions and the risk of populist decisions.

⁷¹ Commission (EC), 'Damages Actions for Breach of the EC Antitrust Rules' (White Paper) COM (2008) 165, 2 April 2008.

The interface between two developing areas, the private enforcement of competition law and new concepts in relation to Article 82, may result in friction. In Article 82 cases, the White Paper's proposal, may lead to interesting circumstances where courts with different approaches toward the application of Article 82 have to apply, in follow-on claims, decisions which are based on analysis which they have specifically rejected as applicable in their own country. This difficulty is not unique to Article 82, yet the introduction of the 'effect based variants' makes the potential tension more noticeable.

These uncertainties as to the scope of Article 82 and its possible application in national courts may also impact on out of court settlements. Settlements represent a significant part of private enforcement which, due to their nature, are not often in the public eye. However, the willingness to settle is derived, at least in part, from the cost and certainty as to the outcome of proceedings. In other words, the alternative cost, namely the price and risk of court litigation, impact on the economic and legal integrity of these settlements. Shortcomings in one or more of the variables mentioned in this paper would increase this alternative cost, allowing manipulations and opportunism, rather than calculated risks based on a consistent and principled system of law, to set the tone of out-of-court settlements.

VII. Conclusion

The paper draws attention to the institutional landscape which surrounds the Guidance and the effect based variants. While it does not question the merit of an effect based

approach and the benefits such approach may carry, it notes how legal and practical challenges limit the proposed reform.

Focusing on the Commission - the paper highlights its limited mandate to engage in ex-ante categorical prioritisation to and the dis-application of parts of Article 82 EC. It also emphasises that the Commission is limited in its ability to develop new effect based variants to the extent that these divert from the European Courts' case law. In doing so it identifies a gap between the Commission's rhetoric and the credence which the Guidance carries. It also draws attention to the Courts' formalistic approach and reactive stance which undermine efforts to reform.

With respect to the substantive provisions in the Guidance, the paper stresses that the current lack of endorsement from the European courts of the effect based variants, may trigger inconsistency between the Courts and Commission's jurisprudence. This, it is argued, may amplify the uncertainty as to the boundaries of Article 82 EC. Such uncertainty is further augmented at the national level as national courts across Europe may engage in selective application of effect based approach, with varying levels of competence.

Together, the multitude of users and the institutional limitations impact on the viability and effectiveness of the recently published Guidance. They dictate a prudent approach in the formulation, application and dissemination of an effect based approach.