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FROM FORMALISM TO EFFECTS?

THE COMMISSION'S GUIDANCE ON
ARTICLE 82 EC

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From Formalism to Effects? – The Commission’s Guidance on Article 82 EC

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Introduction

For over a decade now, the debate on Article 82 EC has been replete with passionate, and sometimes over-heated,¹ criticism of the European Commission’s (“the Commission”) “forms based approach” (or *per se* approach) of abuses of dominance. The concern is as follows: to reach findings of unlawful abuses, the Commission would not scrutinize whether the impugned course of conduct generates actual, or probable, anticompetitive effects on the relevant market.² Rather, following a cursory examination of the practice’s formal features (as opposed to an analysis of the market), the Commission would infer that the dominant firm’s conduct has, by its very nature, the ability to cause anticompetitive effects on the market.

Whilst the forms-based approach presents some – underestimated – merits for both firms (legal certainty) and competition authorities (reduction of enforcement costs), its shortcomings are almost certainly more significant. Under a forms-based approach, competition enforcers run the risk of forbidding courses of conduct that have no anticompetitive – or that wield pro-competitive – effects, thereby committing Type-I errors (*i.e.* false convictions). Type I errors do not only waste tax-payers money (because the competition authorities devote their limited resources to the analysis of benign practices) but also send undesirable signals to firms, which may be deterred from adopting efficient (or unproblematic) courses of conduct on the market.³

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¹ See R. O’Donoghue and J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, 2007 at p.185. The authors explain that, as a matter of law, “there are now virtually no practices that could be described as *per se* unlawful under Article 82 EC”.

² *Idem.* See CFI, Case T-203/1, *Michelin v. Commission*, [2003] ECR II-4071 paragraph 239: “For the purposes of establishing an infringement of Article 82 EC, 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”. See also Case T-201/04, *Microsoft Corp. v. Commission*, [ECR] 2007-II, 3601 at paragraph 867: “the fact remains that, in principle, conduct will be regarded as abusive only if it is capable of restricting competition”. See CFI, Case T-340/03, *France Télécom SA. v. Commission*, ECR [2007] II-107 at paragraph 195: “The distinction between the object and effect of the abuse, it should be pointed out 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”. See also ECJ, Case C-62/86, *AKZO Chemie BV v. Commission* [1991] ECR I-3359, paragraphs 70-71 (in the field of predatory Pricing); ECJ, Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Coöperatieve Vereniging “Suiker Unie” UA and other v. Commission* [1975] ECR 1663 and ECJ, Case 85/76, *Hoffmann-La Roche & Co AG v. Commission* [1979] ECR 461 (in the field of exclusive dealing).

³ This is particularly problematic in the field of abuses of dominance, because there is a lot of variance in market definition practices, and the influence of concepts such as collective dominance increases the number of firms exposed to Article 82 EC liability.

Recently, the Commission has sought to stray away from the forms-based approach (or *per se* approach),⁴ and endorse the “*effects-based approach*”, which requires a real “*verification of competitive harm*”.⁵ This paradigmatic shift, which was initiated in three abuse of dominance cases (*i.e.* the *Wanadoo*, *Microsoft I* and *Téléfonica* cases),⁶ culminated with the adoption on 3 December 2008 of the Guidance Communication on the Commission’s enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (the “*Commission Guidance*” or the “*Guidance*”).⁷ Whilst most observers have welcomed the Commission’s endorsement of the effects-based approach, there has so far been limited, if no, attempts to review the content of the Guidance’s effects-based approach. In turn, no commentators have yet sought to assess whether the Guidance’s effects-based approach effectively enshrined a sound analytical framework for the review of anticompetitive effects, devoid of the forms based approach’s flaws.

The primary purpose of the present article is thus to offer preliminary thoughts on this issue, by clarifying the standard of proof which the Commission must discharge under Article 82 EC when it purports to apply the effects-based approach pursuant to the Guidance.⁸ To this end, the present article is divided into three sections. Section I explains that any finding of unlawful exclusionary abuse under the effects-based approach is contingent upon proof that the dominant firm’s conduct leads to actual or potential “*anticompetitive foreclosure*”.⁹ Section II describes the evidentiary method which the Commission must follow to reach a finding of actual or potential “*anticompetitive foreclosure*” under the effects-based approach.¹⁰ Finally, Section III seeks to determine whether the Guidance is likely to modify the future enforcement practice of the Commission or, whether, on the contrary, the Commission will continue to rely on the dissonant, laxer, case-law of the Court of First Instance (the “*CFI*”) to by-pass a burdensome effects-based analysis.

⁴ It was also arguably motivated by the fact that the forms-based approach is inconsistent with the practice of US antitrust agencies, but also with the Commission’s own, parallel, decisional practice under Article 81 EC and in the field of merger control (where the analysis of effects plays a pivotal role).

⁵ See Report by the EAGCP, “An economic approach to Article 82”, July 2005, at p.13. Report available at http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf.

⁶ See <http://ec.europa.eu/competition/antitrust/art82/index.html>

⁷ See Guidance Communication on the Commission’s enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, C(2009) 864 final.

⁸ Meanwhile, this article sheds light on the evidentiary burden that bears on dominant firms to reverse a Commission’s finding of “*anticompetitive foreclosure*”.

⁹ This is also referred to as the “*requisite legal standard*”.

¹⁰ This is often referred to as the “*means of proof*”. See E. Paulis, “The Burden of Proof in Article 82 Cases”, *International Antitrust Law & Policy: Fordham Competition Law 2006*, Barry Hawk, (Ed.).

I. The standard of proof under the effects-based approach (or what the Commission must prove pursuant to the Guidance)

1. The central concept of “*anticompetitive foreclosure*”

Until recently, most Article 82 EC Decisions indistinctly referred to “*foreclosure effects*”, “*foreclosure of competition*” or “*anticompetitive foreclosure*” as the chief competition concerns arising from dominant firms’ conduct. This unfortunate confusion in semantics was further exacerbated by the fact that neither the Commission, nor the Community courts, ever sought to articulate, in a clear, intelligible, manner the content of the concept of foreclosure for the purposes of Article 82 EC.

The adoption of the December 2005 Discussion Paper on Exclusionary Abuses (“the Discussion Paper”) and, recently, of the Commission Guidance ushered in an increased degree of legal clarity as regards the analytical framework of dominant firms’ conduct under Article 82 EC.¹¹ In this context, the Commission’s Guidance unambiguously states that the Commission’s investigations focus on “*anticompetitive foreclosure*” or, put differently, the question whether the dominant firm “*impair[s] effective competition by foreclosing their competitors in an anticompetitive way*”.¹²

In turn, the Commission’s Guidance defines “*anticompetitive foreclosure*” as:

*“a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers”.*¹³

A careful reading of this definition suggests that the concept of anticompetitive foreclosure is composed of two constituent elements, which the Commission must prove to reach a finding of anticompetitive foreclosure under the effects-based approach. First, the Commission must establish *foreclosure*, understood as a situation where “*access of actual or potential competitors to supplies or markets is hampered or eliminated*”.¹⁴ In this context, the Commission’s decisions adopted under the effects-based approach promote a liberal, and disputable, interpretation of foreclosure. As explained by the Commission in its *Telefonica* decision:

¹¹ See Commission’s Guidance at paragraph 2: “*Alongside the Commission’s specific enforcement decisions, it is intended to provide greater clarity and predictability as regards 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 certain behaviour is likely to result in intervention by the Commission under Article 82*”.

¹² See Commission’s Guidance at paragraph 19.

¹³ *Idem*.

¹⁴ See CFI, T-151/01, *Der Grüne Punkt – Duales System Deutschland GmbH v. Commission*, ECR [2001] II-3295. At paragraph 122, the CFI noted that the dominant firm’s abuse consisted in “*obstructing its competitors*” notably by “*prevent[ing] clients from using competing suppliers*”.

*“The establishment of foreclosure effects does not mean that rivals are forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively”.*¹⁵

Whilst there are no doubts that both complete foreclosure – i.e. the exclusion of one or more competitors – and partial foreclosure – i.e. the restriction of the output of rivals on the market –¹⁶ are caught under Article 82 EC, the assertion that a mere competitive “disadvantage” suffices to trigger a finding of abuse is indeed contentious. To the limited exceptions of the CFI *Microsoft* judgment and of price discrimination cases,¹⁷ we are not aware of any previous ruling of the Community courts upholding a finding of unlawful abuse on mere evidence of a competitive “disadvantage”.

Importantly, the Guidance further innovates in stating that in so far as “price-based” conduct is concerned, the Commission will “normally only intervene” if the conduct forecloses rivals that are “as efficient” as the dominant firm.¹⁸ If a rival less efficient than the dominant firm complains to the Commission that it cannot match the latter’s pricing policy, then the Commission will assume that the dominant firm’s conduct constitutes competition on the merits, which is not anticompetitive in nature. On the other hand, if a rival as efficient complains that it cannot match the dominant firm’s pricing policy, then the Commission will be tempted to view the dominant firm’s conduct as anticompetitive. Because, in real world markets, the Commission might on its own motion investigate sectors where a dominant firm faces no actual competitors, and possibly deters entry through pricing strategies, the Commission will apply the “as efficient” standard to hypothetical prospective entrants, to assess whether the dominant firm’s conduct raises concerns.

Whilst this principle erects a roadblock against the risk of assisting inefficient entry in the market, it is again unsure that it should be applied strictly. In markets where the dominant firm is inefficient, the entry of less efficient competitors may exercise mounting pressure on the dominant firm to improve its own efficiency. The dominant

¹⁵ See Commission Decision of 4 July 2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – *Wanadoo España v. Telefónica*) at paragraph 586.

¹⁶ And the achievement, by the dominant firm, of an increased market share. In *Telefónica*, the Commission found that even though the dominant incumbent’s practice “stopped short of driving competitors out of the market, it restricted their sustainable presence and growth, limiting their inability to compete on the market”. See MEMO/07/274, *Antitrust: Commission decision against Telefónica – frequently asked questions*, Brussels, 4 July 2007.

¹⁷ See CFI, Case T-201/04, *Microsoft Corp. v. Commission*, [ECR] 2007-II, 3601 at paragraphs 653, 1047 and 1088. This is indeed without prejudice of the case-law in the field of discriminatory pricing under Article 82(c) EC. The necessity to prove the existence of a competitive disadvantage is explicitly provided for at Article 82(c). In addition, the competitive disadvantage is not understood as a disadvantage inflicted to the rivals of the dominant firm but as a disadvantage inflicted to the customers of the dominant firm, in a related downstream, or upstream, market. For references to a “competitive disadvantage” in the context of abusive price discrimination allegations, see: CFI, T-219/99, *British Airways plc v. Commission*, [ECR] 2003-II, 5917 at paragraphs 232 and 240; CFI, T-228/97, *Irish Sugar v. Commission*, [ECR] 1999-II, 2969 at paragraph 183; CFI, T-83/71, *Tetra Pak v. Commission*, [ECR] 1994-II, 755 at paragraph 160; CFI, T-229/94, *Deutsche Bahn v. Commission*, [ECR] 1997-II, 1689 at paragraphs 78 and 93.

¹⁸ See Commission’s Guidance at paragraphs 23-24.

firm indeed runs the risk that, at some point, its inefficient new rivals improve their efficiency, and effectively challenge its market position. This is particularly true of markets where efficiency gains are dynamic rather than static in nature, for instance in markets where experience matters, where there are significant learning effects, where branding and advertisement are critical for the penetration of the relevant product/service, etc. In addition – and irrespective of whether entry is efficient or inefficient – the intrusion of new firms brings an end to a monopolist’s “*quiet life*” and widens consumer choice, a situation which, in and of itself, is generally deemed pro-competitive in the case-law of the Community courts.¹⁹ The Guidance is therefore right to acknowledge that “*in certain circumstances, a less efficient competitor may also exert a competitive constraint which should be taken into account*”.²⁰

Second, the Commission must establish a situation of “*consumer harm*” – or “*adverse impact on consumer welfare*” –²¹ whereby the dominant firm, through foreclosure, enjoys the ability “*to profitably increase prices, to the detriment of consumers*”. Consumer harm is, however, not confined to price increases, but also encompasses:

“*[all] the parameters of competition – such as [...] output, innovation, the variety or quality of goods or services – [which] can be influenced to the advantage of the dominant undertaking and to the detriment of consumers*”.²²

This interpretation, which is fully in line with the approach followed in other fields of competition law (e.g. Article 81(1) EC) is not, in and of itself, open to criticism.²³ However, a critical issue is that the assessment of non-price restrictions of competition is notoriously difficult (because, amongst other things, they cannot be quantified). Therefore, one cannot exclude that, as regards such parameters, the Commission might be tempted to perform an impressionistic, and perfunctory, analysis of consumer harm.²⁴ In the *Microsoft* case, for instance, the Commission and the CFI both found Microsoft’s withholding of interoperability information to be abusive, because, following a terse and abstract analysis, it limited “*technical development*”.²⁵ This risk is further aggravated by the fact that the Guidance does not condition a finding of abuse upon proof that “*consumer harm*” is caused by – or is the result of – the “*foreclosure of competition*”. Put differently, the Commission must not prove that the dominant firm’s ability, and incentives, to increase price, reduce quality, etc. arises from the exclusion of as efficient competitors. Hence, one cannot exclude that the Commission might simply rely on

¹⁹ As John Hicks once put it, “*the best of all monopoly profits is a quiet life*”. See J.R. Hicks, “Annual Survey of Economic Theory: The Theory of Monopoly”, 3 *Econometrica* 1, 8 (1935).

²⁰ See Commission’s Guidance at paragraph 24.

²¹ See Commission’s Guidance at paragraph 19.

²² See Commission’s Guidance at paragraph 11. At paragraph 19, the Commission also mentions “*limiting quality or reducing consumer choice*” as forms of consumer harm.

²³ See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, Official Journal C 101, 27 April 2004, p. 97-118.

²⁴ This is to be contrasted with the Commission Decision in *Telefónica*, where the Commission deals, separately – and in a remarkably extensive manner – with foreclosure and consumer harm.

²⁵ In the form of follow-on innovation. See Commission Decision, at paragraphs 693-701 and CFI, Case T-201/04, *Microsoft Corp. v. Commission*, [ECR] 2007-II, 3601, at paragraph 632.

observations of price increases, quality stagnation, limited innovation which may be caused by other market developments (surge in the price of essential inputs, end of an innovation cycle, etc.) to sustain a finding of abusive consumer harm (and dismiss alternative explanations brought forward by the dominant firm).

2. Actual and/or potential “*anticompetitive foreclosure*”

The Commission’s enforcement duties under Article 82 EC are not merely corrective in nature, but also pursue a preventive purpose. This is why the Commission’s Guidance exhibits an equal concern with “*actual*” and “*potential*” anticompetitive foreclosure.²⁶ In the words of the Commissioner for competition herself:

*“We will not wait until actual [foreclosure] effects have manifested themselves. If we wait until rivals are forced to leave the market then we have two serious problems. First, you cannot resuscitate a corpse. No matter how effective the regulatory intervention, if it only happens after exit has occurred, then the damage to the market may be permanent. Second, such intervention will completely miss many examples of consumer harm that weaken competitors, but do not kill them. Competitors may be wounded, confined to a small corner of the market, but not killed. Leaving these cases to one side is a recipe for serious under-enforcement”.*²⁷

This, in turn, does not imply that the Commission can, and will, enforce Article 82 EC on the basis of unsubstantiated speculations of anticompetitive foreclosure. As will be explained below, absent evidence of actual anticompetitive effects, the Guidance makes it abundantly clear that the Commission must demonstrate a credible, or “*likely*”, risk of foreclosure and consumer harm to enforce Article 82 EC.

II. The means and methods of proof under the effects-based approach (or how the Commission must prove anticompetitive foreclosure pursuant to the Guidance)

1. Preliminary remarks

The means and methods of proof of anticompetitive foreclosure under the effects-based approach have been well summarized in a series of documents issued by the Chief Economist’s team prior to the adoption of the Commission’s Guidance.²⁸ By contrast to the controversial “*forms-based approach*” whereby a practice “*anti-competitive effect*

²⁶ See Commission’s Guidance at paragraph 37.

²⁷ See N. Kroes, “Exclusionary abuses of dominance – the European Commission’s enforcement priorities”, *Fordham University Symposium, New York, 25th September 2008*, SPEECH/08/457, 25 September 2008.

²⁸ See e.g. D. Neven “Competition Economics in Europe – An Introduction by Damien Neven” and P. Papandropoulos “Implementing and Effects-Based Approach under Article 82” available at <http://ec.europa.eu/dgs/competition/economist/publications.html>

[could be] inferred”²⁹ from its intrinsic features, “an effects-based approach requires the verification of competitive harm”,³⁰ through a “detailed assessment”.³¹

A distinction shall be drawn here between two possible enforcement scenarios. First, the Commission may attempt to demonstrate that the dominant firm’s conduct is “likely to lead to anticompetitive foreclosure” in the relevant market.³² Second, the Commission may seek to establish that the dominant firm’s conduct leads/has led to “actual” anticompetitive foreclosure in the relevant market.

Importantly, those scenarios – which are reviewed in turn in the following sections – are not mutually exclusive. Often, the Commission seeks to establish that the dominant firm’s conduct has both had, and will have, anticompetitive foreclosure effects.

2. Bringing evidence that the dominant firm’s conduct is “likely to lead to anticompetitive foreclosure”

Under the first enforcement scenario, the Commission is required to adduce “cogent and convincing evidence”³³ that the dominant firm’s conduct “is likely to lead anticompetitive foreclosure”.³⁴ To this end, the Commission must first devise a prospective theory of anticompetitive harm (for instance, a leverage theory), which will “frame” its assessment of the dominant firm’s conduct.³⁵ As explained the Commission’s Director General, P. Lowe:

²⁹ This forms-based approach was epitomized in the *Michelin II* case. See CFI, 203/01, *supra* at paragraph 56.

³⁰ See Report by the EAGCP, “An economic approach to Article 82” July 2005, at p.13. Report available at http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf.

³¹ And parts ways with the old forms-based approach where a practice’s “anti-competitive effect may be inferred” from a number of formal features. Paragraph 22 of the Commission’s Guidance indicates, however, that the Commission might, in certain circumstances, nonetheless rely on the forms-based approach, and will not carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm, if “it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies”.

³² Or “liable to”.

³³ See Commission’s Guidance at paragraph 20. To meet this standard (“cogent and convincing”), the Commission’s analysis should withstand the Community courts’ standard of judicial review which, in the field of complex economic assessments, focuses on: “whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it [...]”. See ECJ, Case C-12/03, *Commission v. Tetra Laval BV* ECR [2005] I-987 at paragraph 39.

³⁴ Or, in the wording of the traditional CFI case-law, is “capable of” restricting competition. See CFI, *Michelin v. Commission* at paragraph 239. See also Commission Decision in *Telefónica* at paragraph 544.

³⁵ See L.-H. Röller, “Economic Analysis and Competition Policy Enforcement in Europe” in P. A. G. Van Bergeijk and E. Kloosterhuis (Eds), *Modelling European Mergers: Theory, Competition Policy and Case Studies*, Edward Elgar, Cheltenham, 2005: “Economic theory is necessary to “frame” a case, which in turn is fundamental to arrive at a particular theory of harm. This typically involves information about the structure of the industry, the firms, the structure of demand and the technology, as well as a preliminary understanding of possible strategies. It will always be the first step in an economic analysis in the context of a competition case (including, in principle, a state aid case)”.

“The Commission now uses an ‘effects-based approach’ both in merger control and in antitrust, which focuses on the actual and likely effects on consumer welfare. This means that a framework is needed to establish a theory of consumer harm, and this framework should also come up with hypotheses which can be tested (emphasis added).”³⁶

Subsequently, the Commission must “test” (and, possibly, refine) the relevance of its theory of anticompetitive harm through the examination of various factors. In brief, the Commission shall assess whether the “theory fits the facts of the case”.³⁷ Pursuant to paragraph 20 of the Guidance, the Commission must in particular scrutinize:

- “the position of the dominant undertaking”;
- “the conditions on the relevant market”;
- “the position of the dominant undertaking’s competitors”;
- “the position of the customers or input suppliers”;
- “the extent of the allegedly abusive conduct”;
- “possible evidence of actual foreclosure”; and
- “direct evidence of exclusionary strategy”.

Most, if not all, of these factors are primarily concerned with the first component of “anticompetitive foreclosure”, namely the foreclosure effects arising from the dominant firm’s conduct.³⁸ By contrast, the Commission’s Guidance places a lesser emphasis on the factors that should be taken into account to demonstrate a likely “consumer harm”.³⁹ In a disappointingly brief language, the Guidance simply provides that:

“The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such anticompetitive foreclosure either at the intermediate level or at the level of final consumers, or at both levels”

³⁶ See P. Lowe, “The Design of Competition Policy Institutions for the 21st Century — The Experience of the European Commission and DG Competition”, *Competition Policy Newsletter*, 2008 – Number 3.

³⁷ Put differently, the Commission “checks whether there is a credible “theory of foreclosure” that fits the facts of the case”. See N. Kroes, “Preliminary Thoughts on Policy Review of Article 82”, *Speech at the Fordham Corporate Law Institute*, New York, 23rd September 2005.

³⁸ See Commission’s Guidance at paragraph 20. There is a considerable emphasis on the obstacles that competitors might need to overcome to enter, expand or stay in the market. See, for instance: “Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant undertaking forecloses a significant part of the relevant market”; “the Commission may also consider, in appropriate cases, on the basis of information available, whether there are realistic, effective and timely counterstrategies that competitors would likely deploy”. Later, the Commission refers to the “likely foreclosure effect” only. It ought to be noted here that these factors, which, rather than embodying a modern, sophisticated, and economics grounded reasoning, are clearly reminiscent of the classic, qualitative, and unreliable checklist of factors scrutinized under the forms-based approach.

³⁹ Certainly because, as previously explained, consumer harm covers a whole host of potential parameters, from price to product quality, product variety, innovation, etc., which are uneasy to ascertain from a prospective standpoint.

Finally, the Commission must carry out a causation analysis (often referred to as “counterfactual”, or “but for” analysis) in order to demonstrate that the anticipated “anticompetitive foreclosure” arises “*as a result of the conduct of the dominant undertaking*”,⁴⁰ and cannot be ascribed to alternative, equally convincing, explanations (for instance, market evolution, rivals’ passivity, etc.). Paragraph 21 of the Guidance document expressly provides:

“This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices”.

In close similarity with the legal standards applicable under Article 81 EC,⁴¹ and the ECMR,⁴² the Guidance thus places the Commission under heavy evidentiary requirements for the purposes of enforcing Article 82 EC. This is particularly true in the context of dynamic markets, where the foreclosure of competitors may be caused by a whole host of market developments, exogenous to the dominant firm (end of an innovation cycle, etc.).⁴³

3. Bringing evidence of “*actual anticompetitive foreclosure*”⁴⁴

Under the second enforcement scenario, the Commission is in principle subject to identical evidentiary requirements. Yet, the duty to adduce “*cogent and convincing evidence*” of actual anticompetitive foreclosure appears, *de facto*, less burdensome. This is because the Commission often benefits from readily available “*empirical evidence*”, which in turn helps formulate an accurate theory of anticompetitive harm and prove the existence of “*concrete foreclosure effects*” (e.g. reduction of rivals’ market shares, etc.) and “*consumer harm*” (e.g. price increases).⁴⁵ For instance, in *Telefónica*, the Commission gathered empirical evidence of consumer harm in the form of supra competitive retail prices on the ADSL market:

⁴⁰ See Commission’s Guidance at paragraph 19.

⁴¹ See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, Official Journal C 101, 27 April 2004, p. 97-118 at paragraph 17: “*The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions*”. See also ECJ, 56/65, *Société Technique Minière*, [1966] ECR 337.

⁴² See, for instance, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 5 February 2004, p. 5-18, at paragraph 9 and, for an example, Commission Decision, *Deloitte & Touche/Andersen*, Case No COMP/M.2810, at paragraphs 44-60.

⁴³ Or where the potential counterfactuals may simply be too numerous to test, in the first place, the theory of anticompetitive harm.

⁴⁴ See Commission’s Guidance at paragraph 52 (in respect of tying abuses).

⁴⁵ See Commission Decision in *Telefónica* at paragraphs 564-608 where the Commission expressly relied on empirical evidence to bring proof of an abuse.

*“[D]ue to weakened retail competition on the broadband market, Spanish consumers pay about 20% more than the EU-15 average for broadband access”.*⁴⁶

Of course, dominant firms may – and indeed often do – submit exculpatory evidence that rivals have expanded over the period under scrutiny, or that new firms have entered. In such circumstances, the Guidance suggests that the Commission must (i) examine – pursuant to a counterfactual analysis – what competitive situation would have *likely* prevailed on the market absent the practice;⁴⁷ and (ii) establish that the dominant firm’s conduct led to a less favourable competitive outcome *“than would have otherwise prevailed”* (for instance, to higher prices).⁴⁸

This being said, a close analysis of the Commission’s decisional practice (and of the CFI’s case-law)⁴⁹ reveals that such dominant firms’ counter-allegations are almost systematically rebutted without being subject to a proper, rigorous, economic analysis.⁵⁰ In the *Wanadoo* case, for instance, the Commission held that:

*“The fact that, during the period while the abuse lasted, some of the surviving competitors increased their market share slightly does not mean that no abuse within the meaning of Article 82 of the Treaty existed or that it had no effects since, in the absence of the behaviour imputed to Wanadoo Interactive, the market shares of those competitors could have grown more significantly”.*⁵¹

⁴⁶ *Idem.* The Commission further established that broadband penetration was really low in Spain, in comparison to other Member states. Finally, it heavily relied on the data provided by an external consultant to demonstrate that Spain’s ADSL retail offers ranked last among the EU-15 countries.

⁴⁷ See Commission’s Guidance at paragraph 21: *“This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual (emphasis added)”.*

⁴⁸ See Commission’s Guidance at paragraph 19.

⁴⁹ See CFI, T-24/93, *Compagnie maritime belge transports and others v. Commission*, ECR [1996] II-1201 at paragraph 149. In the 2004 *Microsoft* Decision, Microsoft relied on data showing that its rivals’ media players in the workplace were growing at a faster pace than its media player. In addition, usage of Microsoft’s media player in the workplace had grown by 259% over the relevant period, whilst usage of Quicktime, a competing format, had grown by 283%. See Commission Decision of 24 March 2004, Case COMP/C-3/37.792 (*“Microsoft”*) at paragraph 913 of Microsoft decision. The Commission dismissed those points on the basis of a rather unconvincing reasoning, whereby *“Even assuming that the two player’s growth continued at the exact same pace, in 2012 QuickTime’s usage would still be less than half of WMP’s usage. Furthermore, more recent data show that QuickTime is no longer growing at a quicker pace than WMP.”*

⁵⁰ Or because the Commission will complement its analysis with a review of the likely anticompetitive effects, in which case the above analysis shall apply.

⁵¹ See Commission Decision of 16 July 2003 relating to a proceeding under Article 82 of the EC Treaty (COMP/38.233 – *Wanadoo Interactive*) at paragraph 385. See also paragraph 380 where the Commission observed *“a gradual emergence of different offerings”* in the relevant market, but found this to be compatible with the existence of an abuse of dominance, because this simply *“reflect[ed] in most cases a strategy of mere passive presence on the market, the aim for the service providers concerned being to respond to spontaneous demand and upgrade their existing customers”.*

Likewise, in *Telefónica*, the Commission relied on a debatable structural presumption to consider that:

“[T]he competitiveness of the market was likely to be restricted relative to the situation that would have prevailed in the absence of the margin squeeze. This inevitably leads to likely harm to consumers. All else being equal, consumers will ultimately be worse off in a market in which the structure of competition is distorted, restricted or impaired. Absent the distortions resulting from Telefónica’s margin squeeze in this case, the retail market for broadband services would have been likely to have witnessed more vigorous competition between ISPs”.⁵²

Those two cases demonstrate the Commission’s previous tendency to enforce Article 82 EC absent “bullet-proof” evidence that the dominant firm’s conduct led to actual foreclosure, but merely on the basis that the conduct had *likely* led to actual foreclosure. Whilst the Guidance document seems to suggest that a stronger causation analysis is now necessary – the dominant firm’s conduct has *effectively* led to actual foreclosure – it remains to be seen whether, in the context of its enforcement activities, the Commission undertakes to implement it.

III. What “likely effects” will the Guidance have on the Commission (and national enforcers)?

The effects-based approach encapsulated in the Guidance is undeniably demanding and resource-intensive from an institutional standpoint. The question thus arises whether the Commission will apply it in most (if not all) Article 82 EC proceedings.⁵³

In our opinion, a number of reasons point towards a risk that the Commission might decide, in future Article 82 EC cases, to stray away from the Guidance and resort to the old-fashioned forms-based analysis.⁵⁴ First, unlike most goods or services which are subject to consumer testing prior to being traded on the market place, legal texts cannot generally undergo empirical testing before the day of their entry into force. In this context, it cannot be excluded that the Commission will occasionally revert to the forms-based approach should the approach advocated in the Guidance prove overly burdensome

⁵² See Commission Decision in *Telefónica* at paragraph 557.

⁵³ Of course, one could immediately discard this issue as moot. Why indeed, would the Commission go through the lengthy process of adopting a novel instrument, if to immediately disregard it? Furthermore, at paragraph 22, the Guidance states that the Commission “*will treat most cases under the effects-based approach*”.

⁵⁴ One of them being that in the process leading to the adoption of the Guidance document, a number of observers reported conflicts between the Commission’s legal service and DG COMP. Whilst the former was adamant to ensure that the Commission’s margin of discretion would be left untouched, the latter wanted to go further. It may therefore well be that DG COMP, which is the operational enforcer of Article 82 EC, does not feel fully confident with the final version of the Guidance, which it may therefore be reluctant to apply.

in terms of administrative resources. This is supported by the fact that the Guidance declares from the outset that it “*is not intended to constitute a statement of the law*”.⁵⁵ By contrast, the fact that the Commission had arguably successfully tested the effects-based approach in cases such as *Wanadoo*, *Microsoft I* and *Telefónica* is in our opinion inconclusive. Most of these decisions have indeed been interpreted, and criticized, for being at best a half-way between the effects-based and the forms-based assessment.

Second, a full-fledged effects based approach might not be warranted in all Article 82 EC cases. This is especially true of cases where a dominant firm has blatantly sought to foreclose competition. For instance, in cases where a dominant firm has engaged into deceptive practices with the sole intent of excluding rivals, an effects-based approach appears unnecessarily burdensome. This is arguably why the Guidance paper observes at paragraph 22 that:

“[t]here may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product (emphasis added)”.

Third, the Guidance’s ambitious push in favour of the effects-based approach goes far beyond the lax evidentiary requirements imposed under the case-law of the Community courts. In this regard, the CFI *Deutsche Telekom* judgment handed down in 2007 is a case in point. Drawing implicit inspiration in the forms-based approach epitomized in *Michelin*, the CFI held that:

“[A] margin squeeze will in principle hinder the growth of competition in the downstream markets (emphasis added)”.⁵⁶

Similarly, in its *Wanadoo* judgment, the CFI dismissed the need for an effects-based approach under Article 82 EC:

“[S]howing an anticompetitive object and an anticompetitive effect may be, 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”;
“Furthermore, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 82 EC”.⁵⁷

⁵⁵ See Commission’s Guidance at paragraph 3.

⁵⁶ See CFI, T-271/03, *Deutsche Telekom v. Commission*, not yet reported, at paragraph 237.

In full compliance with the Community judiciary’s pronouncements, the Commission might thus be tempted to resort to the forms-based approach in the course of its future enforcement activities under Article 82 EC.

This being said, we believe that the Commission is no longer entirely free to apply forms-based analytical frameworks in Article 82 EC proceedings. First, the case-law of the Community courts make it abundantly clear that the provisions of soft law instruments may give rise to a legal duty, on the part of the Commission (and, conversely, to rights benefiting individuals),⁵⁸ to abide by its pronouncements in subsequent enforcement initiatives, under pain of being found in breach of general principles of EC law and, in particular, of the principle of legitimate expectations.⁵⁹ Of course, one may question whether this duty applies to Commission’s pronouncements that depart from the substantive principles established in the case-law of the EC courts. For example, it is open to debate whether a dominant firm subject to Article 82 EC proceedings can request the Commission to assess its conduct through the lenses of the effects-based framework, when the case-law of the CFI allows the latter to review the impugned practice on the basis of a forms-based approach. On this particular issue, our opinion is that the CFI’s case-law on the forms-based approach is optional in nature. Indeed, any finding of abuse under a detailed effects-based analysis would, *a fortiori*, imply a similar finding of abuse under a summary forms-based approach. It thus follows that if the Commission does not avail itself of the – easy – forms-based option, and rather expresses in a soft law instrument that it will perform an effects-based approach in most Article 82 EC cases, it thus deliberately renounces to part of its discretion, and should hence be under a duty to abide by its pronouncements.

Moreover, there are good reasons to believe that the Commission faces strong disincentives to depart from the Guidance’s effects-based approach. With the advent of Regulation 1/2003, the Commission’s decisional practice is now perceived as a major point of reference at the national level, where the bulk of Article 82 EC cases lies. The Commission might thus be reluctant to promote forms-based analytical methods in its own decisions, anticipating an undesirable “snow-ball” effect on national competition authorities (“NCAs”) and courts’ decisions. Rather, to induce NCAs and courts to improve their decisional output under Article 82 EC, the Commission is clearly incentivized to implement – in a clear and comprehensible manner – its Guidance’s effects-based approach.

⁵⁷ See CFI, T-340/03, *France Télécom SA. v. Commission*, ECR [2007] II-107 at paragraphs 195-196. Confirmed in ECJ, Case C-202/07 P, *France Télécom SA. v. Commission*, 2 April 2009, not yet reported.

⁵⁸ Regardless of the general declaration that the Guidance “does not constitute a statement of the law”. See Commission’s Guidance at paragraph 3.

⁵⁹ See Commission’s Guidance at paragraph 3, where the Commission arguably seeks to avoid creating legitimate expectations: “*This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance of the European Communities. In addition, the general framework set out in this document applies without prejudice to the possibility for the Commission to reject a complaint when it considers that a case lacks priority on grounds of lack of Community interest*”.

Conclusion

The adoption of the Guidance marks a welcome improvement in Article 82 EC enforcement. The effects-based approach promoted in the Guidance places the Commission under mounting evidentiary thresholds. Should it be applied in future Article 82 EC cases, one can expect a likely upgrade in DG COMP's decisional output.

This notwithstanding, several provisions of the Guidance are problematic. To focus on the most salient only, we believe that the analysis of consumer harm is particularly unsatisfactory. Whilst, from the outset, the Guidance claims that consumer welfare is a pivotal objective in Article 82 EC enforcement,⁶⁰ the Guidance's provisions on the factors and methods relevant to the assessment of consumer harm remain extremely unclear. In the same vein, whilst the Guidance requires the proof of a causal link between foreclosure and the dominant firm's conduct, it illogically fails to impose a similar causation requirement in respect of consumer harm and foreclosure. Overall, our assessment of the Guidance's effects-based approach is mixed.

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⁶⁰ See, in particular, Commission Guidance at paragraphs 5 and 19.

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