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From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC

Nicolas PETIT*

The purpose of the present article is to offer thoughts on the 'Guidance Communication on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty' and, in particular, to review the requirements which the Commission must meet in Article 82 EC cases when it purports to apply the Communication's economics-oriented, effects-based. In addition, this article seeks to assess whether the Communication's effects-based approach really entails a paradigmatic shift toward increased competition economics, comparable to the (r)evolution that has taken place in other areas of EC antitrust enforcement since the early 2000. It comes to the conclusion that while the Communication marks a welcome economic sophistication of the Commission's Article 82 EC enforcement policy, it nonetheless often fails to go beneath the surface of modern antitrust economics and thus provide only limited guidance to firms and their counsels.

1. INTRODUCTION

For over a decade now, the debate on Article 82 EC has been replete with passionate criticism of the European Commission's ('the Commission') 'forms-based approach' (or *per se* approach) of abuses of dominance.¹ The crux of 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, anti-competitive effects on

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¹ See R. O'Donoghue & J. Padilla, *The Law and Economics of Article 82 EC* (Oxford: Hart Publishing, 2006), 185, who provide a good account of the criticisms levelled against the Commission's forms-based approach. See also, M. Furse, 'On a Darkling Plain: the Confused Alarms of Article 82 EC', *European Competition Law Review* 25, no. 6 (2004): 317–319; M. Furse, 'Abusive Dynamics', *European Competition Law Review* 26, no. 4 (2005): 197–198; B. Sher, 'The Last of the Steam-Powered Trains: Modernising Article 82', *European Competition Law Review* 25, no. 5 (2004): 243–246; T. Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses', *Common Market Law Review* 42 (2005): 129–177; G. Niels & H. Jenkins, 'Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down', *European Competition Law Review* 26, no. 11 (2005): 605–610; D. Ridyard, 'Exclusionary Pricing and Price Discrimination Abuses under Article 82 – an Economic Analysis', *European Competition Law Review* 23, no. 6 (2002): 286–303; D. Waelbroeck, 'Michelin II: A *per se* rule against Rebates by Dominant Companies', *Journal of Competition Law & Economics* 1 (2005): 149–171; J. Kallaughner & B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82', *European Competition Law Review* 25, no. 5 (2004), 263–285; D. Sinclair, 'Abuse of Dominance at a Crossroads – Potential Effect, Object and Appreciability under Article 82 EC', *European Competition Law Review* 25, no. 8 (2004): 491–501; J. Swift QC, 'Selective Price Cuts, Discounts and Rebates – EU Competition Law at a Crossroads – Form or Effects', *Competition Law Journal* 4, no. 3 (2005): 197–209 at 198.

the relevant market.² Rather, following a cursory examination of the practice's formal features (as opposed to an analysis of its market impact), the Commission would infer that the dominant firm's conduct has, by its very nature, the ability to cause anti-competitive effects on the market. As one scholar once put it, the forms-based approach is akin to 'banning the sale of Ferrari cars, because it is highly probable that drivers will not respect the speed limits'.³

While 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 anti-competitive – or that wield pro-competitive – effects, thereby committing Type-I errors (i.e., false convictions).⁴ Type-I errors do not only waste taxpayers money (because the competition authorities devote their scarce 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.⁵

Aware of this, and possibly prompted by the desire to ensure legal consistency across the various areas of competition enforcement (Article 81 EC, merger control and State aid), which now follow an 'economic approach which is based on the effects on the market',⁶ the Commission has recently sought to stray away from its forms-based approach under Article 82 EC (or per se approach),⁷ and endorse an 'effects-based approach', which requires a real 'verification of competitive harm'.⁸ With the unstated ambition of publishing formal Guidelines on Article 82 EC, the Commission first 'tried'

² *Id.* See CFI, Case T-203/1, *Michelin v. Commission*, [2003] ECR II-4071 at para. 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' (a rebates case). See also Case T-201/04, *Microsoft Corp. v. Commission*, [ECR] 2007-II, 3601 at para. 867: 'the fact remains that, in principle, conduct will be regarded as abusive only if it is capable of restricting competition' (a refusal to deal case). See CFI, Case T-340/03, *France Télécom S.A. v. Commission*, ECR [2007] II-107 at para. 195: 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' (a predatory pricing case). See also ECJ, Case C-62/86, *AKZO Chemie BV v. Commission* [1991] ECR 1-3359, paras 70–71 (a predatory pricing case); ECJ, Cases 40–48, 50, 54 to 56, 111, 113 and 114–173, *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 (an exclusive dealing case).

³ See A. Heimler, 'Pricing below Costs and Loyalty Discounts: Are They Restrictive and If So, When?', *Competition Policy International* 1 (2005): 149.

⁴ See A. Christiansen & W. Kerber, 'Competition Policy with Optimally Differentiated Rules instead of "Per se Rules vs. Rule of Reason"', *Journal of Competition Law and Economics* 2 (2006): 215.

⁵ This risk should not be underestimated. Many nondominant firms active on oligopolistic markets must assess their practices through the lenses of Art. 82 EC, simply because they may be found (1) individually dominant pursuant to a narrow market definition analysis; and/or (2) collectively dominant together with their competitors. This risk is further aggravated by the fact that, occasionally, the Commission has seemed to 'assume' dominance on the basis of high market shares. See, on this, F. Dethmers & N. Dodoo, 'The Abuse of Hoffmann-La Roche: The Meaning of Dominance under EC Competition Law', *European Competition Law Review* 27, no. 10 (2008): 537–549.

⁶ See *Commission notice – Guidelines on Vertical Restraints*, OJ C 291, 13 Oct. 2000, 1–44 at para. 7.

⁷ It was also arguably driven by the willingness to converge with the practice of the United States (US) antitrust agencies. See, for a good review of the US-EU divergences, D. De Smet, 'The Diametrically Opposed Principles of US and EU Antitrust Policy', *European Competition Law Review* 29, no. 6 (2008): 356–362.

⁸ See Report by the EAGCP, 'An Economic Approach to Article 82', July 2005, at 13. Report available at <http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf>.

the effects-based approach in three abuse of dominance cases (i.e., the *Wanadoo*, *Microsoft I* and *Telefónica* cases).⁹ It subsequently published on 19 December 2005 of a Discussion Paper on Exclusionary Abuses ('the Discussion Paper') and opened a public consultation to gather the views of stakeholders.¹⁰ Faced, however, with reported internal resistances (from the legal service and the Commissioner for competition),¹¹ as well as external interferences (from the Court of justice in Luxembourg), the Commission's purported paradigmatic shift almost derailed.¹² It took the Commission another three years to reach a compromise and adopt on 3 December 2008 a Guidance Communication on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (the 'Communication' or the 'Commission's Guidance').¹³

While many observers have welcomed the Commission's endorsement of the effects-based approach,¹⁴ there has so far been limited, if no, attempts to review the conceptual and analytical framework enshrined in the Communication. Most commentators have indeed concentrated on the various types of abuses described in the Communication or have analysed other topical issues in a piecemeal fashion (e.g., concept of consumer welfare, as efficient competitor standard, objective justifications and efficiency gains, etc.).¹⁵

The purpose of the present article is thus to offer thoughts on this issue by clarifying the overall requirements which the Commission must meet in Article 82 EC cases when it purports to apply the economics-oriented, effects-based, approach pursuant to the Communication.¹⁶ In addition, a related purpose of this article is to assess whether the Communication's effects-based approach really entails a paradigmatic shift toward increased competition economics, comparable to the (r)evolution that has taken place in other areas of EC antitrust enforcement since the early 2000.

⁹ See <<http://ec.europa.eu/competition/antitrust/art82/index.html>>. Commission Decision of 16 Jul. 2003, COMP/38.233 – *Wanadoo Interactive*; Commission Decision of 24 Mar. 2004, COMP/C-3/37.792 *Microsoft*; Commission Decision of 4 Jul. 2007, COMP/38.784 – *Wanadoo España v. Telefónica*.

¹⁰ See DG Competition discussion paper on the application of Art. 82 of the Treaty to exclusionary abuses, Dec. 2005, available at <<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>>; See, for the genesis of the Discussion Paper, H. Cartledge, 'The European Commission's Discussion Paper on Article 82', *Competition Law Journal* 4, no. 4 (2005): 253–262.

¹¹ 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. While the former was adamant to ensure that the Commission's margin of discretion would be left untouched, the latter wanted to go further.

¹² See R. McLeod, 'EC Antitrust Regulators Put Final Touches to Guidance on Taking on Dominant Companies', 10 Nov. 2008, *MLex*, reporting that the Commission 'scaled back' its initial ambitions.

¹³ See Guidance Communication on the Commission's Enforcement Priorities in Applying Art. 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, C(2009) 864 final.

¹⁴ Some observers have, however, warned against the possible drawbacks of the economic approach. See, in particular, V. Mertikopoulou, 'DG Competition's Discussion Paper on the Application of Article 82 EC to Exclusionary Abuses: The Proposed Economic Reform from a Legal Point of View', *European Competition Law Review* 28 (2007): 241–251; See also L. Finell, 'The Article 82 Reform – Increasing the Incentives to Comply?', *World Competition* 32, no. 3 (2009): 283–303.

¹⁵ See, however, the insightful analysis of D. Ridyrd, 'The European Commission's Article 82 Guidelines: Some Reflections on the Economic Issues', *European Competition Law Review* 30, no. 5 (2009): 230–236.

¹⁶ Meanwhile, this article sheds light on the evidentiary burden that bears on dominant firms to reverse a Commission finding of 'anticompetitive foreclosure'.

To this end, the present article is divided into three sections. Section 1 deals with the ‘substantive test’ underpinning Article 82 EC in the new effects-based enforcement era.¹⁷ Put simply, it seeks to answer to the question ‘what must the Commission prove under the effects-based approach?’. It explains that any finding of unlawful exclusionary abuse is contingent upon proof that the dominant firm’s conduct leads to actual or potential ‘anti-competitive foreclosure’.¹⁸ Section 2 clarifies the ‘standard, means and methods of proof’ which the Commission shall observe pursuant to the Communication.¹⁹ In other words, it addresses the question ‘how must the Commission prove anti-competitive foreclosure?’ and describes the evidentiary method which the Commission must follow to reach a finding of abuse under the effects-based approach. Finally, Section 3 speculates on the question whether the future decisional practice of the Commission will be more ‘economic’, in line with the Communication’s spirit. In particular, it seeks to ascertain whether the Communication 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 (CFI) to by-pass a burdensome effects-based analysis.

2. THE SUBSTANTIVE TEST UNDER ARTICLE 82 EC – WHAT THE COMMISSION MUST PROVE PURSUANT TO THE COMMUNICATION

2.1. THE PIVOTAL CONCEPT OF ‘ANTI-COMPETITIVE FORECLOSURE’

Until recently, most Article 82 EC Decisions indistinctly referred to ‘foreclosure effects’, ‘foreclosure of competition’ or ‘anti-competitive 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 applying Article 82 EC.

The adoption of the December 2005 Discussion Paper and, recently, of the Commission’s Guidance marks a welcome increase in the degree of legal clarity as regards the analytical framework of dominant firms’ conduct under Article 82 EC.²⁰ In particular, the Communication unambiguously states that the Commission’s investigations focus on ‘anti-competitive foreclosure’ or, put differently, the question whether the dominant firm ‘impair[s] effective competition by foreclosing their competitors in an anti-competitive way’.²¹

¹⁷ See, on this A.-L. Sibony & E. Barbier De La Serre, ‘Charge de la preuve et théorie du contrôle en droit commercial de la concurrence: pour un changement de perspective’, *R. T.D. eur.* 2 (2007): 205–252.

¹⁸ This is sometimes referred to as the ‘requisite legal standard’ in the case law of the Community courts.

¹⁹ On the concept of ‘means of proof’, see E. Paulis, ‘The Burden of Proof in Article 82 Cases’, *International Antitrust Law & Policy: Fordham Competition Law*, ed. Barry Hawk (Juris Publishing, 2006).

²⁰ See Commission’s Guidance at para. 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.’

²¹ See Commission’s Guidance at para. 19.

In turn, the Communication defines 'anti-competitive 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.²²

A careful reading of this definition suggests that the concept of 'anti-competitive foreclosure' is composed of two constituent elements, namely *foreclosure* (2.1.1) and *consumer harm* (2.1.2), which the Commission must prove to reach a finding of abuse under the effects-based approach.

2.1.1. *Foreclosure*

Under the Communication's effects-based approach, the Commission must first establish *foreclosure*, understood as a situation where 'access of actual or potential competitors to supplies or markets is hampered or eliminated'.²³ In this context, the Commission's decisions allegedly adopted to date under the effects-based approach promote a liberal, and disputable, interpretation of foreclosure. As explained by the Commission in its *Telefónica* decision:

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.²⁴

While there are no doubts that both complete foreclosure – that is the exclusion of one or more competitors – and partial foreclosure – that is the restriction of the output of rivals on the market –²⁵ are caught under Article 82 EC, the assertion that a mere competitive 'disadvantage' suffices to trigger a finding of abuse is indeed contentious. First, from a legal standpoint, to the limited exceptions of the CFI *Microsoft* judgment and of price discrimination cases,²⁶ 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'. Second, from an economic perspective, the existence of advantages and disadvantages in the market place is the essence of the competitive process, as epitomized

²² *Id.*

²³ See CFI, T-151/01, *Der Grüne Punkt – Duales System Deutschland GmbH v. Commission*, ECR [2001] II-3295. At para. 122, the CFI noted that the dominant firm's abuse consisted in 'obstructing its competitors' notably by 'prevent[ing] clients from using competing suppliers'.

²⁴ See Commission Decision, *Wanadoo España v. Telefónica*, n. 9 above, at para. 586.

²⁵ 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 Jul. 2007.

²⁶ See CFI, Case T-201/04, *Microsoft Corp. v. Commission*, [ECR] 2007-II, 3601 at paras 653, 1047 and 1088. See also the case law on discriminatory pricing under Art. 82(c) EC. The concept of 'competitive disadvantage' is explicitly referred to under Art. 82(c). In those cases, however, the concept of 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 paras 232 and 240; CFI, T-228/97, *Irish Sugar v. Commission*, [ECR] 1999-II, 2969 at para. 183; CFI, T-83/71, *Tetra Pak v. Commission*, [ECR] 1994-II, 755 at para. 160; CFI, T-229/94, *Deutsche Bahn v. Commission*, [ECR] 1997-II, 1689 at paras 78 and 93.

in M. Porter's business strategy best-seller 'The Competitive Advantage'.²⁷ At best, the existence of a competitive disadvantage should thus only give rise to early suspicions of subsequent risks of foreclosure. Quite unfortunately, the Communication leaves this question in a state of uncertainty. Failing to follow the modern, pervasive, trend toward increased economic quantification in antitrust enforcement, the Communication provides no guidance at all on 'how much' foreclosure is necessary to trigger antitrust intervention.²⁸

More adequately, the Communication states that the Commission is not equally concerned with all situations of foreclosure. In so far as 'price-based' conduct is concerned (e.g., rebates, mixed bundling, below-cost pricing, et cetera),²⁹ the Commission will 'normally only intervene' if foreclosure affects rivals that are 'as efficient' as the dominant firm.³⁰ 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 foreclosure arises from mere competition on the merits, and the dominant firm's conduct cannot be deemed abusive. On the other hand, if a rival as (or more) 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 anti-competitive.³¹

In practice, this test should entail a comparison of the costs of the dominant firms with the costs of the complainants. However, because the Commission might on its own motion investigate markets where a dominant firm faces no actual competitors (they might have been excluded from the market or their entry might have been deterred as a result of the latter's pricing strategy), the Commission will in principle apply the 'as efficient' standard to a hypothetical prospective entrant. To this end, rather than artificially speculating on the costs of a fictitious 'reasonably efficient competitor', the Commission will take the dominant firm's own costs into account (assuming, thus, that it is reasonably efficient). This approach exhibits several advantages. First, it avoids complex inter-firms cost comparisons, which may be rendered difficult because of accounting differences.

Second, it is convenient from a self-assessment perspective because dominant firms do not – and should not indeed – know their rivals costs. In this approach, dominant firms simply have to confront their price with their costs (which they know) with a view to self-assess the legality of their purported practice under Article 82 EC.

²⁷ See M. Porter, *Competitive Advantage* (New York: Free Press, 1985).

²⁸ The lack of guidance on how much foreclosure is necessary to trigger a finding of abuse can be explained by the fact that, by contrast to Art. 81 EC, the anticompetitive effects arising from the dominant firm's conduct need not be 'appreciable' under Art. 82 EC. The case law of the Court of Justice in *Hoffmann-La Roche* takes indeed the structural view that antitrust intervention may be warranted absent appreciable effects because 'as a result of the very presence of the undertaking in question the degree of competition is weakened'. In turn, any course of conduct which 'has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' may run foul of Art. 82 EC. See ECJ, Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, n. 2 above, at para. 91.

²⁹ Unfortunately, however, the Communication remains mute on the principles applicable to the foreclosure of less efficient competitors in non-price cases (e.g., refusals to deal, etc.).

³⁰ See Commission's Guidance at paras 23–24.

³¹ The Commission will consider that by pricing below costs, the dominant firm behaves irrationally and makes a sacrifice, which can only be explained by a strategic, anticompetitive, motive. In such a case, even a competitor as efficient might not be able to match, because adopting a loss making strategy makes simply no commercial sense.

Third, from an economic standpoint, the 'as efficient' competitor principle erects a roadblock against the risk of assisting inefficient entry in the market. This being said, it is again unsure that it should be applied statically. In markets where the dominant firm is not optimally efficient,³² or where its efficiency stems from exclusive or special rights (for instance, in network industries), any entry, including the entry of less efficient competitors, may well exercise mounting pressure on the dominant firm to improve its own efficiency. As J. Hicks once put it, the entry of new firms brings an end to a monopolist's 'quiet life'.³³ With time passing, the prospect that the one-time less efficient competitor might become as efficient disciplines the dominant firm and in turn is likely to enhance competition in the market. 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, where economies of scope, scale and network effects are important, etc. In addition, from a demand-side perspective, the entry of new firms – irrespective of whether those firms are efficient or not – widens consumer choice, a situation which, albeit less unanimously considered as a necessary economic improvement by scholars,³⁴ has occasionally been deemed pro-competitive in the case law of the Community courts.³⁵

The Communication 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'.³⁶

2.1.2. *Consumer Harm*

The second constituent element of 'anti-competitive foreclosure' consists in establishing a situation of 'consumer harm' – or 'adverse impact on consumer welfare'.³⁷ Quite

³² While standard economic theory generally teaches that monopolies are inefficient, a large number of scholars have lately supported the view that dominant firms were, in general, efficient, at least from a productive efficiency standpoint (because, they are more likely to achieve positive returns to scale) as well as from a dynamic efficiency perspective (because their ability to invest into R&D and incur other large sunk investments would be higher). To the best of our knowledge, however, there is only little empirical support to either proposition in the literature.

³³ John Hicks' original quotation is as follows: 'the best of all monopoly profits is a quiet life'. See J.R. Hicks, 'Annual Survey of Economic Theory: The Theory of Monopoly', *Econometrica* 3, no. 1 (1935): 8.

³⁴ See, for the main proponents of the 'consumer choice' approach, R. Lande & N. Averitt, 'Using the "Consumer Choice" Approach to Antitrust Law', *Antitrust Law Journal* 74 (2007): 175. In mainstream industrial economics, however, scholars are generally doubtful of the economic benefits to be ascribed to increased 'consumer choice'. This is because those benefits are mostly intuitive and cannot be accurately measured through quantitative techniques. For instance, where the new entrant is less efficient than the dominant firm, the net price effect of entry will likely be null. In such a situation, entry certainly increases consumer choice and delivers a number of non-price benefits (in terms of product diversity, alternatives as regards terms and conditions, etc.). However, those benefits are not easily amenable to quantitative measurement.

³⁵ See Case T-201/04, *Microsoft Corp. v. Commission*, where the limitation of consumer choice was a factor relevant in the finding of an abuse, at para. 652: 'The limitation thus placed on consumer choice is all the more damaging to consumers' because, as already observed at paras 407–412 above, they consider that non-Microsoft work group server operating systems are better than Windows work group server operating systems with respect to a series of features to which they attach great importance, such as 'reliability/availability of the ... system' and 'security included with the server operating system (emphasis added)'. See also, Case T-203/1, *Michelin v. Commission*, n. 2 above, at para. 110: 'The rebate system thus limited the dealers' choice of supplier and made access to the market more difficult for competitors, while the position of dependence in which the dealers found themselves, and which was created by the discount system in question, was not therefore based on any countervailing advantage which might be economically justified (emphasis added)'.

³⁶ See Commission's Guidance at para. 24.

³⁷ See Commission's Guidance at para. 19.

remarkably, the Communication's definition thus seems to elevate the existence (or absence) of consumer harm as the key distinctive factor between what constitutes on the one hand competitive, legitimate, foreclosure and, on the other hand, anti-competitive, unlawful, foreclosure. In so doing, the Communication helpfully enshrines the idea that, in essence, EC competition law primarily cares for the exclusion of competitors, because it is a prelude to the exploitation of consumers. Moreover, the emphasis on consumer harm reconciles the Commission's enforcement policy with the spirit and wording of Article 82 EC which, as convincingly demonstrated by the seminal works of Professor R. Joliet in the 1970s, focuses on protecting consumers from dominant firms' exploitative courses of conduct.³⁸

According to the Commission, a situation of consumer harm occurs if the dominant firm 'is likely to be in a position to profitably increase prices, to the detriment of consumers' once rivals are foreclosed.³⁹ Consumer harm is, however, not confined to price increases and may also appear 'in some other form such as limiting quality or reducing consumer choice'.⁴⁰

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.⁴¹ However, a critical issue is that the assessment of non-price competition parameters (product quality, product variety, etc.) is notoriously difficult (because, amongst other things, they cannot be quantified).⁴² Therefore, one cannot exclude that, as regards such parameters, the Commission might be tempted to perform an impressionistic analysis of consumer harm,⁴³ or perfunctorily rely on price as a proxy for the assessment of non-price consumer harm.⁴⁴ 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 rather terse and abstract analysis, it limited 'technical development'.⁴⁵

Moreover, this risk is further aggravated by the fact that the Communication does not condition a finding of abuse upon proof that 'consumer harm' is caused by the 'foreclosure of competition'. Put differently, the Commission must not prove that, as a result of the foreclosure of as efficient rivals, the dominant firm will increase price, reduce

³⁸ See R. Joliet, *Monopolization and Abuse of a Dominant Position – A Comparative Study of the American and European Approaches to the Control of Economic Power*, Collection scientifique de la faculté de droit de l'université de Liège, Faculté de droit, Université de Liège, Martinus Nijhoff, La Haye, 1970.

³⁹ See Commission's Guidance at para. 19.

⁴⁰ *Id.*

⁴¹ See Communication from the Commission – Notice – Guidelines on the application of Art. 81(3) of the Treaty, OJ C 101, 27 Apr. 2004, 97–118.

⁴² See P. Hofer & M. Williams, 'Minding Your Ps and Qs: Moving beyond Conventional Theory to Capture the Non-Price Dimensions of Market Competition', *NERA Antitrust Insights*, November/December 2005, at 4–5.

⁴³ However, the Commission Decision in *Telefónica* reviews in an extensive manner both foreclosure and consumer harm.

⁴⁴ This intuition is supported by the Communication's pronouncements on dominance, where it is stated that 'In this document, the expression "increase prices" includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition – such as prices, output, innovation, the variety or quality of goods or services – can be influenced for the profit of the dominant undertaking and to the detriment of consumers.' See Commission's Guidance at para. 11.

⁴⁵ In the form of follow-on innovation. See Commission Decision, at paras 693–701 and CFI, Case T-201/04, *Microsoft Corp. v. Commission*, [ECR.] 2007-II, 3601 at para. 632.

quality, etc.⁴⁶ This lax causation standard thus leaves ample room for the Commission to rely on 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).

In addition, in simply requesting evidence that the dominant firm is in a 'position to profitably' act to the detriment of consumers, the Communication takes a structural view of the consumer harm condition. This interpretation is problematic because a firm that has been proven dominant *ex hypothesi* occupies such a position (it enjoys 'significant market power'). Hence, the Communication's language makes the consumer harm requirement redundant. To be at all meaningful, the concept of consumer harm should trigger an inquiry into whether the dominant firm, is not only capable (it is) to harm consumers, but also has the *incentives* to do so once it has foreclosed its rivals from the market.⁴⁷

2.2. ACTUAL AND/OR POTENTIAL 'ANTI-COMPETITIVE 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 conveys an equal concern with 'actual' and 'potential' anti-competitive foreclosure.⁴⁸ 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.⁴⁹

This, in turn, does not imply that the Commission can and will enforce Article 82 EC on the basis of unsubstantiated speculations of anti-competitive foreclosure. As will be explained below, the Communication conditions a finding of abuse upon the existence of a credible, or 'likely', risk of foreclosure and consumer harm.

⁴⁶ In this respect, the wording of para. 19 of the Guidance is rather unclear. On the one hand, the terms 'thus', 'as a result of' and 'whereby' point towards certain links between 'conduct', 'foreclosure' and 'consumer harm'. On the other hand, it is not entirely clear whether the link is between the foreclosure and consumer harm, between the behavior and consumer harm or both.

⁴⁷ This seems to be the position followed in other areas of EC competition enforcement. See Guidelines on the assessment of nonhorizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265 of 18 Oct. 2008 where both the *ability* and the *incentives* of the merged entity to foreclose are tested by the Commission when reviewing nonhorizontal mergers.

⁴⁸ See Commission's Guidance at para. 37.

⁴⁹ 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 Sep. 2008.

3. THE STANDARD, MEANS AND METHODS OF PROOF UNDER
ARTICLE 82 EC – HOW THE COMMISSION MUST PROVE
ANTI-COMPETITIVE FORECLOSURE PURSUANT TO THE COMMUNICATION

3.1. PRELIMINARY REMARKS

The standard, means and methods of proof of anti-competitive 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.⁵⁰ By contrast to the controversial 'forms-based approach' whereby a practice 'anti-competitive effect [could be] inferred'⁵¹ from its intrinsic features, 'an effects-based approach requires the verification of competitive harm',⁵² through a 'detailed assessment'.⁵³

A distinction shall be drawn here between two possible enforcement scenarios which are reviewed in turn in the following sections. First, the Commission may attempt to demonstrate that the dominant firm's conduct is 'likely to lead to anti-competitive foreclosure' in the relevant market.⁵⁴ Second, the Commission may seek to establish that the dominant firm's conduct is currently leading/has led to 'actual' anti-competitive foreclosure in the relevant market.

Importantly, those scenarios are not mutually exclusive. The Commission may establish that the dominant firm's conduct has both had, and will have, anti-competitive foreclosure effects. In this context, Commission officials have occasionally stated that the existence of 'likely' anti-competitive foreclosure was systematically tested in Article 82 EC enforcement proceedings.⁵⁵ By contrast the existence of 'actual' anti-competitive effects is not necessarily tested (and where it is, may simply be used as corroborating evidence that the dominant firm's conduct is 'likely' to lead to anti-competitive foreclosure). The reason for this hierarchy in enforcement scenarios appears, however, somewhat unclear. Indeed, under a conventional effects-based approach, one would intuitively scrutinize as a matter of priority whether there is concrete, observable, foreclosure in the actual market place and only subsequently assess the likely, potential, risk of anti-competitive foreclosure. This approach is, amongst other, followed in the US.⁵⁶

A plausible explanation for this is that empirical analysis entails burdensome factual investigations. Hence, the Commission might be tempted to review in priority the risk

⁵⁰ See, e.g., D. Neven 'Competition Economics in Europe, The 2007 Handbook of Competition Economics, GCR; P. Papandropoulos 'Implementing and Effects-Based Approach under Article 82' available at <<http://ec.europa.eu/dgs/competition/economist/publications.html>>.

⁵¹ As explained previously, the forms-based approach reached a climax in the *Michelin II* case. See CFI, *Michelin II*, n. 2 above, at para. 56.

⁵² See Report by the EAGCP, 'An Economic Approach to Article 82' July 2005, at 13. Report available at <http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf>.

⁵³ See Commission Guidance at para. 21.

⁵⁴ Or 'liable to'.

⁵⁵ See oral remarks by Iratxe Gurpegi, OCCP Seminar on Dominance and New Technologies, Warsaw, 8 Jul. 2009.

⁵⁶ See, D. De Smet, n. 7 above, 360: 'The US antitrust authorities thus only look at the present situation on the market, they do not try to foresee the short, medium, or long-term effects of certain business behaviour. This is complementary to the requirement of actual concrete impact on the market.'

of 'likely' foreclosure, which is less dependent on factual information; requires less investigative measures; offers more leeway to the Commission in terms of margin of appreciation; and is inevitably subject to a more limited degree of judicial scrutiny.

3.2. BRINGING EVIDENCE THAT THE DOMINANT FIRM'S CONDUCT IS 'LIKELY TO LEAD TO ANTI-COMPETITIVE FORECLOSURE'

Under the first enforcement scenario, the Commission is required to adduce 'cogent and convincing evidence'⁵⁷ that the dominant firm's conduct 'is likely to lead anti-competitive foreclosure'.⁵⁸ To this end, the Commission must first devise a prospective theory of anti-competitive harm (for instance, a customer foreclosure scenario in a single branding case), which will 'frame' its assessment of the dominant firm's conduct.⁵⁹ As explained by the Commission's Director General, P. Lowe:

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).⁶⁰

In *Microsoft*, for instance, one of the Commission's theories of harm was that in preinstalling Windows media player on its ubiquitous operating system, Microsoft enjoyed a significant distributional advantage over its rivals, which were thus foreclosed of the market. Moreover, the Commission suspected that, by virtue of 'indirect network effects', Microsoft could not only harm competition in the multimedia software market, but also on a number of neighbouring markets of substantial economic importance.⁶¹ Finally, the Commission considered that Microsoft had incentives to foreclose rival media players. Microsoft's competitors might indeed have used their media players as a leverage instrument on other software markets, thereby creating a 'platform threat' against Windows.⁶²

Subsequently, the Commission must 'test' (and, possibly, refine) the relevance of its theory of anti-competitive harm through the examination of various factors.

⁵⁷ See Commission's Guidance at para. 20. The concept of 'cogent and convincing' evidence is derived from the ECJ ruling in *Tetra Laval* in the field of merger control. In line with the principles established in this case, 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 para. 39.

⁵⁸ Or, in the wording of the traditional CFI case law, is 'capable of' restricting competition. See CFI, *Michelin v. Commission*, n. 2 above, at para. 239. See also Commission Decision in *Telefónica* at para. 544.

⁵⁹ See L.-H. Röller, 'Economic Analysis and Competition Policy Enforcement in Europe', in *Modelling European Mergers: Theory, Competition Policy and Case Studies*, ed. P.A.G. Van Bergeijk & E. Kloosterhuis (Cheltenham: Edward Elgar, 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).'

⁶⁰ 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 – no. 3.

⁶¹ See CFI, *Microsoft Corp v. Commission* at paras 987 and 1076 and Commission Decision, *Microsoft* at paras 897–899.

⁶² See Commission Decision, *Microsoft* at para. 972.

In brief, the Commission shall assess whether the ‘theory fits the facts of the case’.⁶³ Pursuant to paragraph 20 of the Communication, 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 of these factors are primarily concerned with the first component of ‘anti-competitive foreclosure’, namely the foreclosure effects arising from the dominant firm’s conduct.⁶⁴ 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’.⁶⁵ In a disappointingly brief language, the Communication 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 levels⁶⁶

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 ‘anti-competitive foreclosure’ arises ‘as a result of the conduct of the dominant undertaking’,⁶⁷ and cannot be ascribed to alternative, equally convincing, explanations (for instance, migration toward new technological standards, rivals’ passivity, increase in the price of essential inputs, deficiencies in capital markets, etc.). Paragraph 21 of the Communication 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.⁶⁸

⁶³ 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, 23 Sep. 2005.

⁶⁴ See Commission’s Guidance at para. 20. The Commission places 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.’ It ought to be noted here that these factors do not embody a modern, sophisticated, and economics grounded reasoning but are clearly reminiscent of the classic, qualitative and unreliable checklist of factors scrutinized under the forms-based approach.

⁶⁵ 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 measure.

⁶⁶ See Commission’s Guidance at para. 19.

⁶⁷ *Id.*

⁶⁸ *Ibid.*, at para. 21.

In close similarity with the legal standards applicable under Article 81 EC,⁶⁹ and the ECMR,⁷⁰ the Communication thus manifestly places the Commission under heavy evidentiary requirements for the purposes of enforcing Article 82 EC. This seems 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.).⁷¹

This notwithstanding, the increased economic sophistication of the legal standards applicable under Article 82 EC shall not be overstated. In particular, the Commission provides little, if any, guidance on the approach that must be followed to establish a solid, accurate, counterfactual. This is all the more surprising in light of the fact that economic theory has devised several well-known methods (e.g., comparison groups and modeling) for the purposes of constructing counterfactuals,⁷² which the Commission itself applies in other fields of EC law.⁷³ In addition, civil law practitioners often grapple with complex causation issues in torts cases and enjoy a significant body of expertise in that field. While we understand that amongst economists, counterfactual analysis still sparks a certain deal of controversy,⁷⁴ the Communication's silence on this issue gives the possibly unfounded impression that the Commission might apply intuitive, rather than scientific, reasoning to this issue. One may thus fear that the Commission will prefer to 'guess' rather than 'construct' counterfactuals.

3.3. BRINGING EVIDENCE OF 'ACTUAL ANTI-COMPETITIVE FORECLOSURE'⁷⁵

Under the second enforcement scenario, the Commission is in principle subject to identical evidentiary requirements. Yet, in line with our above remarks, the duty to adduce 'cogent and convincing evidence' of actual anti-competitive foreclosure should intuitively be less burdensome. This is because, in such a setting, the Commission will often benefit from readily available empirical evidence, which is of great help to formulate an accurate theory of anti-competitive harm and to prove the existence of 'concrete foreclosure effects' (e.g., reduction of rivals' market shares, etc.) and 'consumer harm'

⁶⁹ See Communication from the Commission – Notice – Guidelines on the application of Art. 81(3) of the Treaty, OJ C 101, 27 Apr. 2004, 97–118 at para. 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 and CFI, T-328/03, *O2 (Germany) GmbH & Co. v. Commission*, [2006] ECR II-1231.

⁷⁰ See, for instance, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 Feb. 2004, 5–18, at para. 9 and, for an example, Commission Decision, *Deloitte & Touche/Andersen*, Case No. COMP/M.2810, at paras 44–60.

⁷¹ Or where the potential counterfactuals may simply be too numerous to test, in the first place, the theory of anticompetitive harm.

⁷² See R.W. Fogel, *Railroads and American Economic Growth: Essays in Econometric History* (Baltimore: Johns Hopkins Press, 1964). See, for a practical review of counterfactual analysis techniques, S. Lاراia, 'Parallel Universes: Assessing the Counterfactual in Article 81 EC Cases', *Competition Law Journal* 6, no. 7 (2007): 150–157.

⁷³ See, for instance, <http://ec.europa.eu/europeaid/evaluation/methodology/methods/mth_cft_en.htm>.

⁷⁴ See, on this R.P. McAfee, 'American Economic Growth and the Voyage of Columbus', *American Economic Review* 73, no. 4 (1983): 735. I am grateful to I. Liannos for bringing this article to my attention.

⁷⁵ See Commission's Guidance at para. 52 (in respect of tying abuses).

(e.g., price increases). For instance, in *Telefónica*, the Commission allegedly gathered empirical evidence of both a ‘containment of competition’ on the retail broadband market,⁷⁶ and of ‘consumer harm’ in the form of above competitive retail prices on the ADSL market.⁷⁷

Of course, under this enforcement scenario, 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 Commission suggests that the Commission must (1) examine – pursuant to a counterfactual analysis – what competitive situation would have *likely* prevailed on the market absent the practice;⁷⁸ and (2) establish that the dominant firm’s conduct led to a less favourable competitive outcome ‘than would have otherwise prevailed’ (for instance, more firms would have entered, expansion of existing firms would have been wider and faster, etc.).⁷⁹

While this test makes certainly a lot of sense from an economic standpoint, a close analysis of the Commission’s decisional practice (and of the CFI’s case law)⁸⁰ reveals that such dominant firms’ counterallegations are often rebutted without being subject to a proper, rigorous, economic analysis.⁸¹ 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.⁸²

⁷⁶ See Commission Decision in *Telefónica* at paras 564–591 where the Commission allegedly relied on empirical evidence of foreclosure effects to bring proof of an abuse.

⁷⁷ See Commission Decision in *Telefónica* at para. 602: ‘broadband prices in Spain are the highest in the EU-15 after Austria and the average monthly subscription in Spain is more than 7.6 €/month/user higher than in the rest of the EU (20% higher than the EU-15 average)’. The Commission further established that broadband penetration was low in Spain, as compared to other Member States. In addition, the Commission relied on the data provided by an external study to demonstrate that Spain’s ADSL retail offers ranked last among the EU-15 countries.

⁷⁸ See Commission’s Guidance at para. 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).’

⁷⁹ See Commission’s Guidance at para. 19.

⁸⁰ See CFI, T-24/93, *Compagnie maritime belge transports and others v. Commission*, ECR [1996] II-1201 at para. 149. In the 2004 *Microsoft* Decision, Microsoft relied on data showing that its rivals’ media players were growing at a faster pace than its media player. In addition, usage of Microsoft’s media player had grown by 259% over the relevant period, while usage of Quicktime, a competing format, had grown by 283%. See Commission Decision ‘Microsoft’ at para. 913. The Commission dismissed those points on the basis of a disputable 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.’

⁸¹ For instance, faced with such counterarguments, the Commission may find the conduct had at any rate, likely anticompetitive effects.

⁸² See Commission Decision of 16 Jul. 2003 relating to a proceeding under Art. 82 of the EC Treaty (COMP/38.233–*Wanadoo Interactive*) at para. 385. See also para. 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.⁸³

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. While the Commission's Guidance 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 follows this interpretation.

4. WILL THE FUTURE DECISIONAL PRACTICE OF THE COMMISSION BE MORE ECONOMIC, IN LINE WITH THE COMMUNICATION?

The effects-based approach encapsulated in the Communication is undeniably demanding and resource-intensive from an institutional standpoint. The question thus arises whether the Commission will apply it in future Article 82 EC proceedings.⁸⁴

4.1. AN *EX ANTE* SPECULATION ON THE COMMISSION'S FUTURE ENFORCEMENT POLICY

In our opinion, a number of reasons point toward a risk that the Commission might, in upcoming Article 82 EC cases, disregard the Communication's economic approach and rely on the old-fashioned forms-based analysis. 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 they enter into force. In this context, it cannot be excluded that the Commission will revert to the forms-based approach should the approach advocated in the Communication prove overly burdensome in terms of administrative resources. The fact that the Commission pretends to have successfully tested the effects-based approach in cases such as *Wanadoo*, *Microsoft I and Telefónica* is in this regard 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.

⁸³ See Commission Decision in *Telefónica* at para. 557.

⁸⁴ 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 para. 22, the Guidance states that the Commission 'will treat most cases under the effects-based approach'.

Second, the Commission has cautiously stressed that a full-fledged effects-based approach might not be warranted in all Article 82 EC cases. In this regard, the Communication contains a number of ‘opt-out clauses’, which may allow the Commission to disapply the effects-based approach. For instance, paragraph 2 of the Communication declares that ‘is not intended to constitute a statement of the law’.⁸⁵ Also, paragraph 22 states 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 Communication’s ambitious push in favour of the effects-based approach goes 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).⁸⁶

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, 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’.⁸⁷

In line with the case law, the Commission may thus stray away from the effects-based approach where it is can establish that the impugned conduct has an anti-competitive object, in particular, because the dominant firm intended to foreclose rivals. The Commissioner for competition alluded to this possibility in a speech delivered in September 2009. She stated that the ‘Likely effects can sometimes be deduced from internal documents showing an exclusionary strategy by the dominant company.’⁸⁸ Paragraph 20 of the Communication further underlines that ‘direct evidence of exclusionary conduct’, and in particular ‘internal documents which contain direct evidence of a strategy to exclude competitors’ are a relevant factor in the assessment of anti-competitive foreclosure.⁸⁹

⁸⁵ See Commission’s Guidance at para. 3.

⁸⁶ See CFI, T-271/03, *Deutsche Telekom v. Commission*, not yet reported, at para. 237.

⁸⁷ See CFI, T-340/03, *France Télécom SA. v. Commission*, ECR [2007] II-107 at paras 195–196. Confirmed in ECJ, Case C-202/07 P, *France Télécom SA. v. Commission*, 2 Apr. 2009, not yet reported.

⁸⁸ See N. Kroes, at n. 49 above.

⁸⁹ See Commission’s Guidance at para. 20.

However, the evidentiary value of anti-competitive intent in Article 82 EC cases is disputed. As Judge Posner explained in the US *Olympia* case,⁹⁰ it is indeed the essence of the competitive process that all firms, including dominant ones, seek to prevail over their competitors on – and force them off – the market. As a result, documentary evidence of anti-competitive intent (emails, internal memorandas, etc.) often proves inconclusive. Allowing competition authorities to rely primarily on anti-competitive intent for the purpose of proving unlawful behaviour might lead to overestimate the value of ‘cheap’ evidence, and in turn may trigger a plethora of unfounded convictions (type I errors). This is not to say, however, that the Commission shall discard, from the outset, evidence of anti-competitive intent. In line with our previous remarks, reliance on intent is compatible with an economic approach to Article 82 EC. The dominant firm’s intent indeed provides a good flavour of its strategic incentives, and is thus of great help to competition authorities when devising theories of harm.⁹¹

In full compliance with the Community judicature’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.⁹²

4.2. A REALITY CHECK ON THE COMMISSION’S FUTURE ENFORCEMENT POLICY

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 makes 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),⁹³ 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.⁹⁴ The *Dansk Rørintustri and others v. Commission* judgment encapsulates this principle:

The Court has already held, in a judgment concerning internal measures adopted by the administration, that although those measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the

⁹⁰ See, on this and more generally, A. Bassavo, ‘The Role of Intent under Article 82 EC: From “Flushing the Turkeys” to “Spotting Lionesses in Regent’s Park”’, *European Competition Law Review* 26, no. 11 (2005): 616–623.

⁹¹ See oral remarks of A.–L. Sibony, *How Much More Economic Is the New Approach?*, IEJE Conference, 11 May 2009, Brussels. Slides available at <www.ieje.net>.

⁹² Commission officials have publicly declared that the Commission would apply, in future Art. 82 EC cases, the effects-based approach contained in the Communication. See oral remarks of C. Esteva-Mosso, Roundtable, IEJE Conference, 11 May 2009, Brussels.

⁹³ See Commission’s Guidance at para. 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.’

⁹⁴ See B. Smulders, ‘Institutional Aspects of European Commission Guidance in the Area of Antitrust Law’, *Competition Policy International* 5, no. 1 (Spring, 2009): 25–34 (this is true unless ‘the Commission is able to properly reason a deviation in a specific case, that is to say without violating in particular the principles of equal treatment and legal certainty’, 32).

administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. Such measures therefore constitute a general act and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of the measures.

That case-law applies a *fortiori* to rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders.

In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects (emphasis added).⁹⁵

Of course, one may question whether this duty applies to Communication's pronouncements that are incompatible with 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 leaves the latter free to review the impugned practice on the basis of a forms-based approach. On this particular issue, our opinion is that the Communication's effects-based approach is not inconsistent, let alone incompatible, with the case law. This is because 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. Consequently, the forms-based approach should be considered as an optional, bottom-line, enforcement standard. It thus follows that if the Commission does not avail itself of the – easy – forms-based option, and states in a soft law instrument that it will apply the more demanding effects-based approach in Article 82 EC cases, it thus willingly forfeits part of its discretion, and should hence abide by its pronouncements. Other things being equal, this principle is firmly anchored in EC law. In the field of fines, for instance, the case law only defines very few methodological standards. To fill this gap, the Commission adopted in 1998 and 2006 a set of Guidelines which establish principles and standards for setting fines in antitrust proceedings. In so doing, according to the Court, the Commission 'has bound itself to use' a method for setting fines in competition cases.⁹⁶

Moreover, there are is another important institutional limitation to the Commission's freedom to depart from the Communication'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, on pain of triggering an undesirable snow-ball effect on national competition authorities (NCAs) and courts. Rather, to induce NCAs and courts to improve their decisional output under Article 82 EC, the Commission is clearly incentivized to

⁹⁵ See Case C-189/02 P, *Dansk Rørindustri and others v. Commission* [2005] ECR I-5425, at paras 209–211.

⁹⁶ *Id.*, at para. 213.

implement – in a clear and comprehensible manner – its Communication's effects-based approach.

5. CONCLUSION

The adoption of the Communication marks a welcome economic sophistication of the Commission's Article 82 EC enforcement policy. The effects-based approach promoted in the Communication 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, on close examination a number of concepts of the Communication, which exhibit a clear economic texture, do not seem to be taken seriously. To focus on the most salient only, we believe that the analysis of consumer harm is particularly unsatisfactory. While, from the outset, the Commission's Guidance claims that consumer welfare is a pivotal objective in Article 82 EC enforcement,⁹⁷ the Guidance's provisions on the factors and methods relevant to the assessment of consumer harm remain extremely murky and sometimes redundant. The same is true of causation issues. While the Communication requires the proof of a causal link between foreclosure and the dominant firm's conduct, it fails to clearly impose a similar causation requirement in respect of consumer harm and foreclosure. Overall, our assessment of the Communication's effects-based approach is thus mixed.

⁹⁷ See, in particular, Commission Guidance at paras 5 and 19.

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