Within the modernization movement of EU competition law that took place over the last two decades, the application of Article 102 TFEU (prohibiting the abuse of a dominant position on the internal market) was the last major component of competition law to be reformed. Whatever reasons might have led to it taking place last, its reform has been more controversial than that of any other area. The modernization process has exposed significantly different viewpoints on what Article 102 is about and should be doing. Whereas some have argued for a more explicitly economics-based approach, others have demonstrated a preference for a more traditional, form-based approach.

The modernization process has revealed that it might be impossible to reach consensus on what is the best way to regulate unilateral conduct. At the end of this process, the European Commission adopted a document setting out its priorities in enforcing Article 102 as the product of its reform, as opposed to adopting guidelines taking a stance on substantive legal issues.

This article aims to explain the Commission’s reform of its application of Article 102 and to discuss whether the post-reform decisional practice of the Commission demonstrates the potential impact of the reform. In this context,

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1 Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. (C 326) 47 [hereinafter TFEU].


3 See, e.g., Derek Ridyard, The European Commission’s Article 82 Guidelines: Some Reflections on the Economic Issues, 30 EUR. COMPETITION L. REV. 230, 236 (2009) (arguing that many of the issues of unilateral conduct are “hugely complex, and that the analysis of exclusionary effects includes many puzzles that are incapable of yielding a definitive correct answer”).
the goal is to assess whether the Commission’s aspirations towards adopting a more economics-based approach to Article 102 have been realized in practice. This assessment takes the Commission’s own reform documents and, in particular, the Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings4 (Guidance) as the benchmark against which to assess the Commission’s decisional practice regarding Article 102. In doing so, this article seeks to examine to what extent the Commission has followed its own reform document in practice. This is not, however, meant to suggest that the Guidance represents an entirely modern approach to applying Article 102. Whether the Guidance adopts a modern approach is discussed separately.

The assessment in the article is (and can only be) based on publicly available information about the Commission’s decisional practice. The impact, if any, that the Guidance may have had “behind closed doors” cannot be established or examined if it is not reflected in the actual decisional practice. To the extent that the Guidance is not explicitly used in the decisions, any impact it might have had cannot be unambiguously documented. Similarly, where the Commission decides not to pursue cases after finding that the requirements of the Guidance are not met, this may not be possible to document if the Commission does so without taking a decision.5

Notably, it might not always be possible to pinpoint the impact of the Guidance due to other events taking place over the last decade, such as the creation of the office of the Chief Competition Economist and of the Economic Advisory Group on Competition Policy (EAGCP) in 2003, and more recently the appointment of a new European Commissioner for Competition and of a new Director-General for DG Competition (DG COMP) in 2010.6 Therefore,

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4 2009 O.J. (C 45) 7 [hereinafter Guidance]. Art. 102 of the TFEU, supra note 1, was previously Art. 82 of the Treaty Establishing the European Community, 2002 O.J. (C 325) 1.
5 One example is Velux, where the Commission closed the case which was started ex officio due to the finding that the requirement of foreclosure leading to consumer harm as stipulated in the Guidance was not met. See Case COMP/39.451—Velux, Comm’n Decision (closing investigation). Technically, the case was closed before the Guidance was published in the Official Journal and only a few weeks after the Guidance was unofficially published. However, for a discussion of the case and the rationale for closing the case as being failure to meet the requirements of the Guidance, see Svend Albaek & Adina Claici, The Velux Case—An In-Depth Look at Rebates and More, COMPETITION POL’Y NEWSL. (Eur. Comm’n, Luxembourg), Iss. 2009-2 (2010), at 44, ec.europa.eu/competition/publications/cpn/2009_2_10.pdf. The case does not appear on the Commission’s official antitrust case law database, ec.europa.eu/competition/antitrust/cases/index.html.
6 This article does not cover the period in which the latest European Commissioner for Competition, Margrethe Vestager, has been in office, namely since November 2014. However, at the time this database was created for this research (June 4, 2015), only one decision has been adopted during the term of the new Commissioner, namely the rejection decision in Case AT.40080—Romanian Retail, Comm’n Decision (Jan. 19, 2015), ec.europa.eu/competition/antitrust/cases/dec_docs/40080/40080_675_9.pdf (in Romanian).
this article takes the Guidance and the Commission’s decisional practice at face value in seeking to establish the link between the two to the extent this is possible by using the publicly available decisions.

To establish the impact of the reform on the decisional practice, this article first discusses the reform itself, in particular the Guidance, and to the extent that is relevant, points out potential novelties in and problems with the Guidance’s general approach. Subsequently, the article examines the Commission’s decisional practice. This is divided into three categories of decisions: rejections, commitments, and prohibitions.7 Regarding these decisions, this article assesses all of the rejection decisions available in English, some of the major commitment decisions of the Commission, and all of the prohibition decisions that were taken after the publication of the Guidance, to determine how much the Guidance has been explicitly followed in practice. The vast majority of the Commission’s decisional practice since the adoption of the Guidance has been in the form of commitment decisions, a fact which makes it difficult to assess the impact of the Guidance as such because commitments are not a tool introduced by the Guidance, but by Regulation 1/2003.8 After studying these decisions, this article provides an analysis of the observations derived from these decisions.

The Commission’s practice represents only one side of the coin when it comes to understanding whether the application of Article 102 has been modernized. The other side of the coin, namely the practice of the European Courts, should also be considered before taking a view on the overall state of the reform of Article 102, but that is beyond the scope of this article.9

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7 The Commission’s enforcement powers regarding the EU competition rules are set out in Council Regulation No. 1/2003, 2003 O.J. (L 1) 1 [hereinafter Regulation 1] (explaining the implementation of the rules on competition in Articles 81 and 82 of the Treaty). According to Regulation 1, art. 7, where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of arts. 101 or 102, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end and impose remedies. Id. at 9. According to Regulation 1, art. 9, where the Commission “intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.” Id. at 9. Finally, the Commission can reject a complaint where “on the basis of the information in its possession there are insufficient grounds for acting on a complaint,” but must do so by adopting a decision to that effect. See Commission Regulation No. 773/2004, 2004 O.J. (L 123) 18, 20 (setting forth procedures for rejection of a complaint in proceedings pursuant to Articles 81 and 82 of the Treaty).

8 Regulation 1, supra note 7, at 9.

9 For a perspective taking into account the Courts’ practice, see Jorge Padilla, Whither Article 102 TFEU: A Comment on Akman and Crane, infra this issue, 81 ANTITRUST L.J. 223 (2016).
I. THE EUROPEAN COMMISSION’S REFORM

The Guidance adopted in December 2008 (published on February 24, 2009 in the *Official Journal*) concerns the Commission’s “enforcement priorities” in applying Article 102 to so-called “exclusionary conduct by dominant undertakings.”10 The Commission had been rethinking its approach to Article 102 for about four years before the Guidance.11 Prior to this rethinking, the Commission’s approach was criticized for protecting competitors, not competition, when enforcing Article 102 and for not having a sufficiently economic effects-based approach.12 The approach to abuse of dominance had arguably fallen behind the modernization that took place in the context of both anticompetitive agreements and merger control. The criticism implied that the Commission’s decision making was based on the *form* of conduct without conducting an analysis that would focus on the *effects* of conduct on the market. Although the call for an effects-based approach was widespread, the most comprehensive study arguing for a significant shift to an effects-based approach was the report by the EAGCP commissioned by DG COMP, which preceded DG COMP’s own Discussion Paper in 2005.13

10 Guidance, *supra* note 4, ¶ 2. “Exclusionary” abuses refer to those practices of a dominant undertaking which “seek to harm the competitive position of [its] competitors, or to exclude them from the market,” whereas “exploitative” abuses can be defined as attempts by a dominant undertaking to use the “opportunities provided by its market strength in order to harm customers directly.” THE EC LAW OF COMPETITION ¶¶ 4.144–4.145, at 348 (Jonathan Faull & Ali Nikpay eds., 2d ed. 2007); *see also* D.G. Goyder et al., GOYDER’S EC COMPETITION LAW 315 (5th ed. 2009). The Guidance is limited to abuses committed by a single undertaking holding a dominant position, although Article 102 also applies to abuses by two or more undertakings collectively holding a dominant position. Guidance, *supra* note 4, ¶ 4.


12 EUR. COMM’N, ECON. ADVISORY GROUP ON COMPETITION POL’y (EAGCP), AN ECONOMIC APPROACH TO ARTICLE 82 (July 2005), ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf; Eur. Comm’n, DG Competition, DG Competition Discussion Paper on the
During its rethinking, the Commission’s claim was that it was modernizing its approach to Article 102 by adopting a “consumer welfare” standard. Some have argued that, with the Guidance, the Commission “formally endorsed an effects-based approach to exclusionary conduct by dominant undertakings.” Consequently, the general test that the Commission applies when deciding whether to intervene under Article 102 has been called by the (then) Director-General a “consumer welfare balancing test,” which balances “over- and under-enforcement by protecting consumers from conduct that, on balance, will harm them.”

According to some other commentators, the Commission’s Guidance does not sufficiently embrace an economic approach or a consumer welfare standard. One commentator has argued that the Guidance leaves its stated task “substantially unaccomplished,” whereas some other commentators have suggested that the Commission has moved further in the direction of an economic, effects-based approach. Other commentators have, however, argued


14 Discussion Paper, supra note 13, ¶ 54. There is no clear consensus on the definition of “consumer welfare.” The common understanding of “consumer welfare” in economics is “consumer surplus,” which “is the aggregate measure of the surplus of all consumers.” MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 18 (2004). The surplus of a given consumer is the difference between her valuation of a good and the price she actually pays for it. Id. “Total welfare” is the sum of “consumer welfare” and “producer welfare.” Id. “Producer welfare” understood as “producer surplus” refers to “the sum of all profits made by producers in [an] industry.” Id.


16 Lowe, supra note 15, at 11.


18 Ridyard, supra note 3, at 236.

that the Commission has gone too far by adopting a consumer welfare standard, thus departing from the jurisprudence of the Court of Justice of the European Union, which it cannot do.20

The current author has remarked elsewhere that, although the Commission’s apparent tendency towards embracing “consumer welfare” is not unlawful, the Commission’s reform is far from complete and the Guidance contains statements indicating a rather formalistic approach.21 The Guidance in various places “demonstrates a concern with protecting competitors and an understanding that ‘harm to competitors’ may be tantamount to ‘harm to competition.’”22 Moreover, it was noted that the Guidance does not really set any priorities—despite its explicit aim of doing so—since it more or less describes all types of exclusionary conduct and, as such, its “guidance” value for undertakings in terms of knowing ex ante which of their practices are more likely to attract the Commission’s attention is diminished.23 The rest of this section provides a brief explanation of the general approach adopted in the Guidance document.

From Formalism to Effects?—The Commission’s Communication on Enforcement Priorities in Applying Article 82 EC, 32 WORLD COMPETITION 485, 503 (2009).

20 See, e.g., Bernard Heitzer, (then) President of the Bundeskartellamt, Statement on European Competition Day: Consumer Welfare as a Standard of Competition Policy (Nov. 18/19, 2008), www.bundeskartellamt.de/SharedDocs/Publikation/EN/Reden/L1/Bernhard%20Heitzer%20-%


22 Id. at 629. For instance, “According to the Guidance, the Commission will consider refusal to supply and margin squeeze as an enforcement priority if certain criteria are met. These are that: (i) the refusal relates to a product/service that is objectively necessary to be able to compete effectively on a downstream market; (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market; and (iii) the refusal is likely to lead to consumer harm. Guidance, supra note 4, ¶ 81. When explaining ‘elimination of effective competition on the downstream market,’ the Guidance states that, if the requirements set out under the other criterion of ‘objective necessity of the input’ are met, the Commission considers that a dominant undertaking’s refusal to supply is generally liable to eliminate effective competition in the downstream market. Id. ¶ 85. This understanding of the Commission implies that the criterion relating to the elimination of effective competition is futile and the fact that the input is found to be objectively necessary for the competitors automatically leads to the assumption that effective competition is likely to be eliminated. Hence, the concern with protecting competitors is obvious.” Akman, supra note 21, at 629 n.148.

23 Id. at 610–11; see also Niels, supra note 19, at 7–8 (arguing that there is no real prioritization in the Guidance); Padilla, supra note 9, at 226 (noting that the purpose of the Guidance was to set priorities and its impact should be judged in terms of the selection of cases that the Commission has chosen to pursue).
The Guidance comprises a general approach to exclusionary conduct as well as sections on specific types of abuse, such as exclusive dealing, tying and bundling, predation, refusal to supply, and margin squeeze. According to the Commission, the purpose of the Guidance is “to provide greater clarity and predictability [on] the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission.”24 The Guidance is without prejudice to the possibility for the Commission to reject a complaint when it considers that a case lacks priority on other grounds, such as a lack of Union interest.25

According to the Guidance, “The Commission will focus on those types of conduct that are most harmful to consumers”; it “will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between [firms].”26 However, the Commission also notes that “[t]he emphasis of [its] enforcement activity . . . is on safeguarding the competitive process . . . and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits.”27 “Competition on the merits” is a vague concept that requires definition and interpretation; it is not an economic or legal benchmark that has an objectively defined meaning which the undertakings can use ex ante in deciding whether a certain practice is unlawful. For it to be a guiding principle of enforcement, it must be expressed in more precise terms.28

That said, the Commission also notes that it is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors.29 Then again, how the protection of the “competitive process” is to be distinguished from the protection of competitors is unexplained and it remains unclear what is meant by an “effective competitive process” in terms of providing ex ante predictability and clarity.30 In fact, it has been argued that the Guidance “leaves the Commission significant flexibility to

24 Guidance, supra note 4, ¶ 2.
25 Id. ¶ 3.
26 Id. ¶ 5 (emphasis added).
27 Id. ¶ 6.
29 OECD, Policy Roundtables: Competition on the Merits, supra note 28, at 222.
30 Akman, supra note 21, at 614.
infer consumer harm from the conduct’s negative impact on market structure.”31

It is noteworthy that “exploitative” practices are left out of the scope of the Guidance, although, unlike exclusionary abuses, these are directly to the prejudice of consumers.32 Similarly, it should be noted that “nowhere in the Guidance does the Commission actually require proof of harm to consumers for conduct to be found abusive. What matters is ‘likely’ consumer harm” and there is (unsurprisingly) no discussion of “which types of conduct will cause more ‘likely’ harm,” since the exercise is speculative and fact-dependent.33 In fact, the Commission states that it may “adapt the approach set out in [the Guidance] to the extent that this would appear to be reasonable and appropriate in a given case” when it “take[s] into account the specific facts and circumstances of each case.”34 This reduces the predictability value of the Guidance since the Commission states that it may not necessarily follow the approach expressed therein.

Although preserving a level of flexibility might be desirable for an enforcer, in a document that is voluntarily adopted with the explicit aim of providing “greater clarity and predictability”35 and thus certainty to undertakings in practice, maintaining flexibility clashes with the stated aims. In essence, this flexibility means that undertakings will not be able to determine with sufficient certainty ex ante whether their practices fall within the scope of the Guidance and, if so, what the approach of the Commission will be. This can prevent such undertakings from engaging in certain conduct that might potentially be welfare-enhancing, particularly in areas where there is little established case law and guidance would be most needed.

Within the section in the Guidance which contains the general approach to exclusionary conduct, the Commission covers issues of market power, foreclosure leading to consumer harm (anticompetitive foreclosure), price-based exclusionary conduct, and objective necessity and efficiencies.36 Other than restating the existing law, the section on market power also notes “that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effec-

31 Gutermuth, supra note 19, at 5 (emphasis added); see also Kellerbauer, supra note 19, at 183.
32 Akman, supra note 21, at 610. For an argument that exploitation should be a necessary prerequisite for abuse, see PINAR AKMAN, THE CONCEPT OF ABUSE IN EU COMPETITION LAW 301–07 (2012).
33 Akman, supra note 21, at 610. Interestingly, a separate section on “consumer harm” is only found in the section on the abuse of “refusal to supply and margin squeeze.” Id. at 615 n.53.
34 Id. at 610 (quoting Guidance, supra note 4, ¶ 8).
35 Guidance, supra note 4, ¶ 2.
36 Id. ¶¶ 9–31.
tive competitive constraints and can thus generally be regarded as
dominant.”37 This definition is welcome for recognizing that the relevant in-
crease in prices should be profitable for the firm, but it still presents problems:
identifying the “competitive price level” is almost always impossible38 and
there is “no necessary relationship between price-cost margins and the inten-
sity of competition” on a market.39

The fact that an undertaking is earning large profits may be attributable to
its superior efficiency over its rivals, rather than to its market power.40 Similarly,
the Commission’s statement that the higher the market share and the
longer it has been held the more likely that it constitutes an important prelimi-
nary indication of dominance “and, in certain circumstances, of possible seri-
ous effects of abusive conduct, justifying an intervention by the Commission”
is problematic.41 How market share on its own can indicate possible serious
effects of abuse and how an authority can reach conclusions about abuse with-
out even having identified market power (as opposed to market share) re-
ains unexplained; it clashes with the “modern economic approach” the
Commission claims to adopt and is more in line with a form-based approach.42
At best, it resembles the structure-conduct-performance paradigm from the
1950s, which suggested that market structure could be used to draw inferences
as to how undertakings conduct themselves, which can in turn be used to
evaluate the market’s economic performance.43

The Commission qualifies its statement by noting that, “as a general rule,
[it] will not come to a final conclusion as to whether or not a case should be
pursued without examining all the factors which may be sufficient to con-
strain the behaviour of the undertaking.”44 Although this is welcome for ex-
pressing that serious effects of abusive conduct will not usually be deduced
from mere market shares, it again presents the conflict between providing
clarity and predictability by establishing general guiding principles as well as
seeking to retain flexibility at the same time.

Regarding “anti-competitive foreclosure,” it is stated that

37 Id. ¶ 11 (emphasis added).
38 Simon Bishop & Mike Walker, The Economics of EC Competition Law: Concepts,
Application and Measurement 51, 60 (3d ed. 2010); see also Jones & Sufrin, supra note 12,
at 532.
39 William J. Kolasky, What Is Competition? A Comparison of U.S. and European Perspec-
41 Guidance, supra note 4, ¶ 15 (emphasis added).
42 Akman, supra note 21, at 613.
43 On the structure-conduct-performance paradigm and other schools of thought along with
their implications for competition policy, see Giorgio Monti, EC Competition Law 57–63, 86
(2007).
44 Guidance, supra note 4, ¶ 15.
the aim of the Commission’s enforcement activity [concerning] exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.45

“Anti-competitive foreclosure” is described as “a situation where effective access of actual or potential competitors to [the market] is hampered or eliminated [due to] the conduct of the dominant undertaking whereby the dominant undertaking is . . . in a position to profitably increase prices to the detriment of consumers.”46

Although it is welcome that the Commission accepts that the market can be foreclosed without this being “anticompetitive,” and this “represents a move away from ‘protecting competitors, not competition,’ which was the main criticism directed at the Commission’s enforcement of Article 102,”47 the precise relation between foreclosing rivals and adversely impacting consumer welfare is still unclear. The Commission expresses its enforcement aim by stating that the concern is “to ensure that dominant undertakings do not impair effective competition by foreclosing [rivals] in an anti-competitive way, thus having an adverse impact on consumer welfare.”48 This is equivocal: it is unclear whether the adverse impact on consumer welfare is an assumed/expected consequence of foreclosing rivals in an anticompetitive way, in which case “anticompetitive” would not be tantamount to having an adverse impact on consumer welfare.49 This would require a separate definition and assessment of “anticompetitiveness,” which is not provided in the Guidance.

The Commission will normally intervene under Article 102 where, on the basis of cogent and convincing evidence, the “conduct is likely to lead to anti-competitive foreclosure.”50 The Commission intends to assess abuse 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.”51 Although this is welcome, at least in proposing to compare the undertaking’s conduct in question with a relevant counterfactual, the Guidance does not ex-

45 Id. ¶ 19.
46 Id. (internal footnote omitted).
47 Akman, supra note 21, at 613–14.
48 Guidance, supra note 4, ¶ 19 (emphasis added).
49 Akman, supra note 21, at 624.
50 Guidance, supra note 4, ¶ 20.
51 Id. ¶ 21.
press how the outcome of such a comparison is to be interpreted.\textsuperscript{52} It does not explain, “for example, if, in the counterfactual, consumer welfare would be as much (harmed) as in the actual scenario,” whether the Commission will still intervene.\textsuperscript{53}

Moreover, the Guidance adds 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.”\textsuperscript{54}

By accepting that there may be conduct whose anticompetitive effect may be inferred from appearances without any detailed assessment and that there may be conduct which can “only raise obstacles to competition” without this being confirmed by an assessment of effects, the Commission contradicts the principles of its own declared economic, effects-based approach and the references made to consumer welfare as the appropriate enforcement standard.\textsuperscript{55} One cannot claim to adopt an effects-based approach if one does not take into consideration effects: inference of anticompetitive effects from the type of conduct belongs to a form-based approach.

Further, the statement is not coherent within the general framework of the Guidance either. Under the approach of the Guidance, it is not the Commission which investigates whether or not the allegedly abusive conduct creates efficiencies. The dominant undertaking proposes these as a “defense.” Thus, where there is no detailed assessment by the Commission, it is unlikely that there will be any assessment of efficiencies. Consequently, the statement that, without a detailed assessment, the existence or absence of efficiencies could be established is not understandable given the framework of application adopted in the Guidance. Such internal conflict diminishes the potential value of the Guidance for undertakings that might be subject to Article 102.\textsuperscript{56}

The Guidance lists a number of factors that will be relevant to the assessment of anticompetitive foreclosure. These are: (1) the position of the dominant undertaking; (2) the conditions on the relevant market; (3) the position of the dominant undertaking’s competitors; (4) the position of the customers or input suppliers; (5) the extent of the allegedly abusive conduct; (6) possible evidence of actual foreclosure; and (7) direct evidence of any exclusionary

\textsuperscript{52} Akman, supra note 21, at 615.
\textsuperscript{53} Id.
\textsuperscript{54} Guidance, supra note 4, ¶ 22. The same statement can be found in the Discussion Paper, supra note 13, ¶ 60.
\textsuperscript{55} Akman, supra note 21, at 615.
\textsuperscript{56} Id.
strategy. Interestingly, regarding direct evidence of any exclusionary strategy, the Commission notes that “this includes internal documents which contain direct evidence of a strategy to exclude competitors.” According to the Commission, “Such direct evidence may be helpful in interpreting the dominant undertaking’s conduct.”

This reference to so-called intent evidence is not necessarily in line with a more economic approach because what is concerned is the subjective intention of the dominant undertaking and it is at least debatable whether such intention should be part of a modern approach to unilateral conduct.

Under the section on “price-based exclusionary conduct” the Commission sets out its general approach to price-based conduct by explaining that it will “normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.” After stating this general test, the Commission immediately qualifies it by stating that the test is not to be applied in all circumstances. According to the Commission, “a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure.”

This is another example in the Guidance where first a general rule and then its exception is provided, reducing the predictability function of the Guidance since the exceptions will depend on the specifics of each case.

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57 Guidance, supra note 4, ¶ 20.
58 Id.
59 Id.
61 Guidance, supra note 4, ¶ 23. On problems with the Commission’s as efficient competitor test, see Akman, supra note 32, at 274–80. On general criticisms of the as efficient competitor test, see, e.g., O’Donoghue & Padilla, supra note 12, at 232–34.
62 Guidance, supra note 4, ¶ 24.
63 Id.
64 Akman, supra note 21, at 616. For other examples see, e.g., Guidance, supra note 4, ¶¶ 10, 21–22, 25.
sion states that, to prevent anticompetitive foreclosure, intervention is only appropriate where as efficient competitors can be hampered, which implies that only then the conduct would be abusive. Yet, when explaining that intervention may also be justified to protect inefficient competitors, it is noted that this is the case where, in the absence of abuse, that competitor may enhance its efficiency. Thus, what abuse means and how abuse is to be proved when the competitors of the dominant undertaking are not as efficient remains unclear.

Although there is an argument in economics that sometimes it might indeed be necessary to also protect inefficient competitors, without providing the specifics of when this would be the case the Commission’s approach could lead to simply protecting inefficient firms without any redeeming effects on the competition in a given market at any point, as the interpretation of when it is necessary to protect less efficient competitors for the protection of competition will be subjective. Indeed, the Commission’s stance has already been said to have a hint of an “efficiency offense.”

The Commission’s approach can also lead to a situation where a potentially dominant undertaking is not able to assess ex ante whether its practices are lawful since it may (and most likely will) not possess the information required to assess whether its competitors may enhance their efficiency in the absence of its own practices. Such an assessment will depend on having sufficiently detailed information on rivals’ costs, sales, investment plans, access to funding, etc., which will not be available to the dominant undertaking (in the absence of collusion, which may perversely be encouraged by this approach of the Guidance).

Regarding the test to be applied to price-based exclusionary conduct, the Guidance states that “to determine whether even a hypothetical competitor as efficient as the dominant undertaking would [likely be] foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing.” Where it is available, the Commission will use information on the costs of the dominant undertaking itself. Where this is “not available, the Commission may decide to use the cost data of competitors

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65 Guidance, supra note 4, ¶ 23.
66 Id. ¶ 24.
68 Akman, supra note 21, at 616.
69 See Killick & Komninos, supra note 17, at 6.
70 Guidance, supra note 4, ¶ 25 (emphasis added).
71 Id.
or other comparable reliable data."\textsuperscript{72} The current author has argued elsewhere that such an approach of “finding that an undertaking has breached the law by charging prices below \textit{another} undertaking’s costs, is not legitimate.”\textsuperscript{73} This is because it “prevents dominant undertakings from having legal certainty regarding whether or not their pricing is abusive since the benchmark can be the costs of competitors, which will be unknown to them.”\textsuperscript{74}

In \textit{Deutsche Telekom} the inappropriateness of using the cost data of competitors was established by the Court of First Instance (CFI), subsequently known as the General Court (GC).\textsuperscript{75} The CFI held that “the abusive nature of a dominant undertaking’s pricing practices is determined in principle on the basis of its own . . . charges and costs, rather than on the basis of . . . actual or potential competitors[’] [situations].”\textsuperscript{76} The CFI had also stated that “any other approach could be contrary to the general principle of legal certainty” because “[i]f the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure—information which is generally not known to the dominant undertaking—the latter would not be in a position to assess the lawfulness of its own activities.”\textsuperscript{77}

Unfortunately for legal certainty, although the Court of Justice of the European Union (ECJ) in the appeal of \textit{Deutsche Telekom} confirmed the CFI’s approach,\textsuperscript{78} the ECJ seems to have later qualified its position in \textit{TeliaSonera}.\textsuperscript{79} According to the ECJ, “it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue,” particularly “where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons” and so on.\textsuperscript{80} Also according to the ECJ, only where it is not possible, in particular circumstances, to refer to the prices and costs of the dominant undertaking, should those of its competitors on the same market be examined.\textsuperscript{81} Similar to the Guidance, the ECJ finding in \textit{TeliaSonera} potentially breaches the rule of legal certainty and implies a situation in which it will be impossible for dominant undertakings to establish

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} Akman, \textit{supra} note 21, at 617.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} Case T-271/03, Deutsche Telekom AG v. Comm’n, 2008 E.C.R. II-477.

\textsuperscript{76} \textit{Id.} ¶ 188.

\textsuperscript{77} \textit{Id.} ¶ 192.

\textsuperscript{78} Case C-280/08P, Deutsche Telekom AG v. Comm’n, 2010 E.C.R. I-9555, ¶ 225.

\textsuperscript{79} Case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB, 2011 E.C.R. I-527.

\textsuperscript{80} \textit{Id.} ¶ 45.

\textsuperscript{81} \textit{Id.} ¶ 46.
ex ante whether their conduct is within the boundaries of the law or not (in the absence of collusion).  

The final issue discussed under the general approach is that of objective necessity and efficiencies. The Guidance states that a dominant undertaking may prove that its conduct is justified by demonstrating either “that its conduct is objectively necessary or . . . that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers.” According to the Guidance, “[i]n this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.”

There are various problems with the Commission’s approach to the issue. First, the Commission does not explain what the counterfactual is for this assessment. The Guidance does not indicate what the alternative situation with which the comparison will be made for the dominant undertaking’s conduct to be found (in)dispensable and (dis)proportionate. Although the Guidance notes that the assessment will be relative to the “goal allegedly pursued by the dominant undertaking,” this “goal” is most likely to be profit maximization. Deciding whether or not the dominant undertaking’s conduct is indispensable for and proportionate to its goal of maximizing its profits is unlikely to be helpful for a competition authority’s analysis of whether the conduct should be allowed due to the efficiencies it creates.

Another problem is that regarding efficiencies, the Commission states that the proof of efficiencies by the dominant undertaking involves guaranteeing “that no net harm to consumers is likely to arise.” In contrast, when proving abuse, the Commission itself only proves likely anticompetitive foreclosure. Thus, the dominant undertaking may be left with the burden to rebut “a position that the Commission has not actually established in its allegation and/or finding of abuse.” It also begs the question what is the counterfactual against which the “no-net-harm-to-consumers” criterion will be assessed.

Finally, the Commission seems to treat efficiencies in abuse of dominance cases as equivalent to efficiencies in merger control: although in the ex ante analysis of merger control one can legitimately require proof of anticipated

82 Akman, supra note 32, at 278.
84 Id. ¶ 28.
85 Id.
86 Akman, supra note 21, at 620–21.
87 Guidance, supra note 4, ¶ 28.
88 Id. ¶ 30.
89 Akman, supra note 21, at 621.
90 Id.
efficiencies that can be placed alongside proof of anticipated harm, such an approach may be inappropriate when the assessment is ex post as in the cases of abuse. This is because under an ex post assessment, the Commission will not have proven abuse without proving harm to consumers if the objective is “consumer welfare” as it argues. However, if it has proven (likely) harm to consumers, proving that there is no (likely) net harm to consumers would be disproving the existence of abuse and not providing a justification for the conduct.91

The “ultimate assessment of whether the conduct is not objectively necessary and, based on a weighing-up of any apparent anticompetitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm” will be made by the Commission.92 What is unclear, given “it is likely anti-competitive effects the Commission is concerned with, [is] how a weighing-up of likely effects with likely efficiencies can [reliably be] made” as such an assessment “is completely speculative.”93 The Commission also “does not explain what sort of . . . efficiencies can outweigh what sort . . . of anti-competitive effects,” and to what degree.94

The Guidance similarly does not indicate whether dynamic and prospective efficiencies will be taken into account or whether the assessment will be based on a short-term analysis.95 In fact, according to the Commission the “protection of rivalry and the competitive process outweighs possible efficiency gains” “[w]here there is no residual competition and no foreseeable threat of entry.”96 This statement is closer to an ordoliberal approach than a consumer welfare approach and lacks practical guidance value for undertakings since it begs the question of what “protection of rivalry and the competitive process” means “where there is no residual competition.”97 The only part of that statement that can be objectively assessed is whether or not there is any foreseeable threat of entry, and even establishing that might be beyond what a dominant undertaking can do ex ante adopting a certain practice, particularly in fast-moving sectors and markets.

91 Id.; see also Akman, supra note 32, ch. 8, at 316–19 (arguing that lack of an increase in efficiencies should be incorporated in the definition and finding of abuse).
92 Guidance, supra note 4, ¶ 31.
93 Akman, supra note 21, at 623–24.
94 Id. at 624.
95 Id.
96 Guidance, supra note 4, ¶ 30.
97 Akman, supra note 21, at 624.
II. THE EUROPEAN COMMISSION’S DECISIONAL PRACTICE UNDER ARTICLE 102

This Part considers the Commission’s decisional practice under Article 102 since December 2005, which is the date of publication of DG COMP’s Discussion Paper. The main focus of the analysis, however, will be the decisional practice post-Guidance since the Discussion Paper was officially not a Commission document but a document of DG COMP.

As can be seen in Table 1 below, from December 1, 2005 until the end of term of office for Commissioner Joaquin Almunia (who has had the longest period of office during which the Guidance could be utilized) on October 31, 2014, the Commission rendered 40 decisions concerning Article 102.98 Thus, in just under nine years, the Commission has decided an average of 4.5 cases every year. Of the decisions taken, 20 are commitment decisions, 12 are rejections and 8 are prohibitions.99 Thus, half of all the decisions that the Commission has taken on Article 102 have been commitment decisions. From the publication of the Guidance (February 24, 2009) until the time of this writing, the Commission has adopted merely 6 prohibition decisions and 12 rejections under Article 102, in comparison to 16 commitment decisions. Notably, all the rejections since December 2005 are post-Guidance.100 Between the publication of the Discussion Paper and the publication of the Guidance, only four commitment decisions have been taken, despite the fact that commitments have been available since May 1, 2004.

98 Search of official database of Commission antitrust cases decided based on Art. 102 from Dec. 1, 2005 through Oct. 31, 2014, Eur. Comm’n, ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&epolicy_area_id=1 (as of June 4, 2015). Although the database search renders 58 entries, of these ten relate to non-Art. 102 issues (Art. 101), two relate to Art. 106 (in conjunction with Art. 102), four relate to sector inquiry reports, two relate to initiation of proceedings, and one relates to interim measures, leaving 39 decisions. The rejection in EFIM does not appear in the entries as it is incorrectly categorized as an Art. 101 case on the Commission website. Case COMP/C-3/39.391—EFIM, Comm’n Decision (May 20, 2009), ec.europa.eu/competition/antitrust/cases/dec_docs/39391/39391_125_10.pdf. Adding this to the sample, the number goes up to 40 decisions. The rejection of complaint in Case COMP/E-l/39097—Watch Repair, Comm’n Decision (July 29, 2014) is not analyzed in this section as a rejection, but is treated as an initiation of proceedings since the Commissioner’s rejection decision was annulled by the GC in Case T-427/08, Confédération Européenne des Associations d’Horlogers-Réparateurs (CEAHR) v. Comm’n, 2010 E.C.R. II-5865, after which the Commission reopened the proceedings in the case to take into account the GC judgment within the research period. During the period of the research, the Commission closed its investigation for the second time; see Case AT.39097—Watch Repair, Comm’n Decision Rejecting the Complaint (July 29, 2014) ec.europa.eu/competition/antitrust/cases/dec_docs/39097/39097_3128_4.pdf.

99 For an explanation of these different types of decisions, see supra text accompanying note 7.

100 With the exception of Case COMP/E-l/39097—Watch Repair, supra note 98, in which the complaint was rejected on May 20, 2009. However, as explained supra note 98, this decision is treated as one of initiation of proceedings for the purposes of this research.
The number of commitments has therefore quadrupled since the Guidance, while the number of prohibitions has trebled. It is, of course, not possible to know whether the significant increase in commitments is due to the Guidance or the undertakings’ becoming more accustomed to the operation of Regulation 1/2003 or due to any changes of officials at the Commissioner level, etc.\textsuperscript{101} A discussion on the use of commitments is provided in Part IV below. It is also noteworthy that of the eight prohibition decisions in total over almost nine years, four were adopted in the last seven months of Commissioner Almunia’s term.\textsuperscript{102} It is striking that the Commission has taken almost six times more decisions post-Guidance in comparison to the period between the Discussion Paper and the Guidance in a similar length of time (roughly four to five years).

\begin{table}[h]
\centering
\caption{Commission Decisions 2005–2009 and 2009–2014 by Type}
\begin{tabular}{|c|c|c|c|}
\hline
\hline
Rejections & 0 & 12 & 12 \\
Commitments & 4 & 16 & 20 \\
Prohibitions & 2 & 6 & 8 \\
Total & 6 & 34 & 40 \\
\hline
\end{tabular}
\end{table}

A. Rejections

This Part discusses all of the Commission’s rejection decisions that are available in English.\textsuperscript{103} Only one of these 7 rejections involved a complaint

\textsuperscript{101} For possible explanations, see Yves Botteman & Agapi Patsa, \textit{Towards a More Sustainable Use of Commitment Decisions in Article 102 TFEU Cases}, 1 J. ANTITRUST ENFORCEMENT 347 (2013).


\textsuperscript{103} Five of the rejections are not available in English. The rejection of the complaint in Rambus is excluded from this section as Rambus is categorized as a “commitment decision” and the complaint was lodged after the Commission made commitments binding. The complaint was also rejected on grounds that the adopted commitments remedy the relevant competition concerns. \textit{See} Case COMP/38.636— Rambus, Comm’n Decision (Dec. 9, 2009) (\textit{Rambus}) (summary at
that was lodged before the publication of the Guidance in the *Official Journal*. Most of these complaints have been rejected on the grounds that “there is no sufficient degree of European Union interest for conducting a further investigation into the alleged infringement(s).” According to established case law, the Commission is not required to conduct an investigation into each complaint that it receives and has discretion in its treatment of complaints. The Commission is free to prioritize and is “entitled to refer to the [Union] interest in order to determine the degree of priority to be applied to the various” complaints brought before it. In establishing “Union interest” the Commission may “balance the significance of the alleged infringement” in view of “the functioning of the [internal] market, the probability of establishing the existence of the infringement[,] and the scope of the investigation required.”

Starting with the oldest, in *EFIM*, the complaint was against four manufacturers of inkjet printers and printer suppliers (Hewlett Packard, Lexmark, Epson, and Canon) and concerned the alleged exclusion of “inkjet cartridge (re)manufacturers . . . from [the] inkjet cartridges’ aftermarkets through patenting strategies, the use of microchips and of recollection programs to shorten the supply of empty cartridges.” In deciding that the complexity of the required investigation and the limited likelihood of establishing proof of an infringement of Article 102 did not justify further investigation, the Commission went through a discussion of market definition by referring to its previous decisional practice. In doing so, the Commission noted that “on the basis of a preliminary examination . . . none of the four [manufacturers was] *prima facie* in a dominant position on the primary market” (i.e., for printers). This is despite the fact that, according to the figures in the complaint,

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2010 O.J. (C 30) 17, ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1203_1.pdf.

104 Case COMP/C-3/39.391—*EFIM*, *supra* note 98.

105 Case COMP/39732—BRV/FIA, Comm’n Decision, ¶ 3 (Aug. 4, 2011) (BRV/FIA), ec.europa.eu/competition/antitrust/cases/dec_docs/39732/39732_250_3.pdf; *see also* Case COMP/39.784—Omnis/Microsoft, Comm’n Decision, ¶ 9 (Dec. 1, 2010) (Omnis/Microsoft), ec.europa.eu/competition/antitrust/cases/dec_docs/39784/39784_326_3.pdf; Case COMP/C-3/39.391—*EFIM*, *supra* note 98, ¶ 7. (Although it has been categorized as a “cartel” decision, it is clearly an abuse of dominance decision.) *EFIM* was upheld by the GC, Case T-296/09, EFIM v. Comm’n, 2011 E.C.R. II-425, and then by the ECJ, Case C-56/12P, EFIM v. Comm’n, ECLI:EU:C:2013:575 (ECJ Nov. 24, 2011).


108 Id. ¶ 86.


110 Id. ¶ 23.
HP had a market share of around 43 percent.\textsuperscript{111} Given the Commission’s past decisional practice in finding dominance at or around 40 percent market share, this approach is welcome and is more in line with an economic approach in comparison to previous practice.\textsuperscript{112}

On a cursory assessment, in \textit{EFIM}, the Commission decided that “all four printer manufacturers are subject to intense competition in the primary market.”\textsuperscript{113} Moreover, the Commission decided that, although “the various markets for cartridges compatible with a certain printer brand may constitute separate relevant aftermarkets, . . . dominance on the aftermarket can be excluded if competition on the printer market results in effective discipline in the secondary market.”\textsuperscript{114} This is to be contrasted with \textit{Hugin} where the Commission had adopted a much more formalistic approach in finding that cash registers and their servicing were separate markets, and that Hugin was dominant on the aftermarket despite a market share of around 12 percent on the primary market.\textsuperscript{115} Importantly, the Commission in its conclusion in \textit{EFIM} held that, “[t]o improve the effectiveness of competition policy[,] it is essential to focus on conduct which is likely to harm competition, and consequently consumers”; this was not deemed to be the case in the complaint at hand.\textsuperscript{116}

In \textit{Omnis/Microsoft}, the Commission rejected a complaint alleging anticompetitive behavior in the market for the provision of Enterprise Resource Planning (ERP) or Enterprise Application Software (EAS) by Microsoft.\textsuperscript{117} The complaint concerned the alleged abuse by Microsoft by engaging in refusal to deal, refusal to supply information, discrimination, illegal tying, and “using interposed companies with a view to foreclose the market for the provision of ERP or EAS software in general and to eliminate competition by [the complainant] in particular.”\textsuperscript{118}

The Commission decided that “further investigation of Microsoft’s alleged anti-competitive behaviour . . . would be disproportionate in light of the limited impact that this conduct had/[was] likely to have on the functioning of the internal market as well as the limited likelihood of establishing proof of an

\textsuperscript{111} Id.
\textsuperscript{112} See, e.g., Case IV/D-2/34.780—Virgin/British Airways, Comm’n Decision, 2000 O.J. (L 30) 1, ¶¶ 88–91; Case IV/26699—Chiquita, Comm’n Decision, 1976 O.J. (L 95) 1, 11–12.
\textsuperscript{113} Case COMP/C-3/39.391—\textit{EFIM}, supra note 98, ¶ 23.
\textsuperscript{114} Id. ¶ 25.
\textsuperscript{116} Case COMP/C-3/39.391—\textit{EFIM}, supra note 98, ¶ 32.
\textsuperscript{117} Case COMP/39.784—\textit{Omnis/Microsoft}, supra note 105.
\textsuperscript{118} Id. ¶ 15. The complainant also alleged that Microsoft “entered into an illegal strategic partnership in contravention of Articles 101 and 106 . . . with the Romanian Government.” Id. ¶ 16.
infringement.” The Commission found “that available market information confirm[ed] Microsoft’s small market share during the [relevant] period” (below 5 percent) and that there was “vigorous competition on the EAS and ERP software markets.” Entry barriers were also deemed to be low. The Commission found the likelihood of establishing an abuse under Article 102 to be “very limited” due to Microsoft’s low market shares on the relevant markets.

In conclusion, the complaint was rejected due to the low likelihood of establishing abuse and lack of sufficient degree of Union interest. There is no reference to the Guidance in the rejection. Given the levels of market share (below 5 percent), one might have expected the Commission to suggest that the likelihood of establishing abuse was non-existent but, even in such a case, the Commission appears to prefer retaining flexibility.

In **BRV/FIA**, regarding Article 102, the complaint alleged an infringement on the part of certain car manufacturers and the Fédération Internationale de l’Automobile (FIA) in the form of banning the rotary valve technology owned by the complainant in Formula One. The Commission rejected the complaint on the grounds that “further investigation . . . would be disproportionate in light of the limited impact that this conduct ha[d] on the functioning of the internal market as well as the complexity of the investigation required and the limited likelihood of establishing proof of an infringement.”

The Commission noted that “[t]he fact that a certain technology developed by one company [did] not form part of a Formula One race car or a race motorcycle had no, or at best a very limited, impact on the functioning of the internal market and on consumers.” More specifically, it was found that there was “insufficient information to determine whether the alleged market for Formula One engines constitute[d] a distinct product market.” Moreover, “[i]rrespective of the question of market definition, there [was] no indication that [the car manufacturers had] collective dominance either in a hypothetical Formula One engines market, or in a potentially wider single seat race car engines market.” No evidence existed to suggest that the car manu-
facturers were collectively dominant in the market for production of cars either.128

Regarding the part of the complaint relating to motorcycle championships, the Commission referred to the Guidance in stating that it “generally [took] the view that a company [was] unlikely to be dominant if its market share on the relevant market [was] below 40 [percent].”129 Thus, it was “unlikely” that Honda was dominant on the allegedly relevant market with a market share of 24 percent.130 The Commission went on to state that the “complaint did not contain any further information suggesting that Honda may be dominant despite its low market share.”131 This implicitly suggests that the Commission does not rule out the possibility of an undertaking being dominant with less than 30 percent market share. This is indeed in line with the Guidance, which states that—perhaps controversially—even where the market share of the undertaking involved is under 40 percent, “competitors [may not be] in a position to constrain effectively the conduct of [the] undertaking, for example, where they face serious capacity limitations.”132 This, again, is an example of the Commission seeking to retain flexibility, which inevitably comes at the cost of some certainty and predictability.

In Ryanair, the Commission rejected a complaint lodged by Ryanair alleging violations of Articles 101 and/or 102 in relation to airport services at Dublin airport.133 Ryanair’s Article 102 complaint revolved around allegedly abusive practice by the Dublin Airport Authority (DAA) through excessive pricing, discrimination, bundling, and manifest failure/refusal to satisfy demand.134 All the alleged abuses related to airport charges and airport schemes incentivizing airlines.

After leaving open the question whether DAA holds a dominant position,135 the Commission went through the evidence provided by Ryanair and each type of alleged abuse as well as a brief explanation of what would be required under the case law to prove the alleged abuse. In light of the limited likelihood of establishing an infringement and considering that the Irish Competition Authority and the Irish courts are well-placed to handle the matter, the Commission rejected the complaint using its discretion to set priorities.136

128 Id.
129 Id. ¶ 50.
130 Id.
131 Id.
132 Guidance, supra note 4, ¶ 14.
134 Id. ¶¶ 81–127.
135 Id. ¶ 80.
136 Id. ¶¶ 125–27.
In *DataCell*, the complaint concerned an alleged abuse (as well as an alleged breach of Article 101) by MasterCard and Visa because they suspended card payments made through DataCell for the benefit of Wikileaks.\footnote{137 Case AT.39921—Refusal to Provide Payment Services, Comm’n Decision (July 23, 2014) (DataCell), ec.europa.eu/competition/antitrust/cases/dec_docs/39921/39921_337_5.pdf.} DataCell, an Icelandic company offering data and software hosting services, agreed in 2010 to host Wikileaks’ website and enable donations to Wikileaks to be made from Wikileaks’ website, in return for remuneration. To accept such payments, DataCell entered into a merchant agreement with Teller, a Danish acquirer company. Soon after, Teller, instructed by MasterCard and Visa, suspended payment services to DataCell, referring to legal and reputational risks posed by WikiLeaks’ activities, which needed to be investigated. DataCell complained to the Commission on the grounds that, inter alia, the conduct in question constituted abusive refusal to supply and discrimination.\footnote{138 Id. ¶¶ 31–32.}

Concerning the alleged refusal to supply, the Commission found it unlikely that upon further investigation it would be established that the card companies’ “refusal to provide payment services to Wikileaks . . . eliminated effective competition [in] the market for card payment facilitation services.”\footnote{139 Id. ¶ 99.} This is fundamental because according to the jurisprudence, an essential criterion for finding that a refusal to supply a customer active in a neighboring market constitutes abuse is that it risks eliminating effective competition in that neighboring market.\footnote{140 Id. ¶ 100.} The conduct in question “did not prevent DataCell from offering such services to other third parties.”\footnote{141 Id. ¶ 101.} The Commission also noted that “competition problems [typically] arise when the dominant undertaking competes [in] the ‘downstream’ market with the buyer whom it refuses to supply.”\footnote{142 Id. ¶ 103.} Although DataCell is not an “actual or potential competitor of the payment card companies,” the Commission accepted that it might indeed be in competition “with acquirers [in] the downstream market for card payment facilitation services.”\footnote{143 Id.} Furthermore, it acknowledged that, theoretically, the card companies “could have an interest in foreclosing the market for card payment facilitation services to protect the interest of their member acquiring banks [in that] market.”\footnote{144 Id. ¶ 104.} Yet, according to the Commission, the fact that the card companies never objected to DataCell providing card payment facilitation to third parties other than WikiLeaks appeared to contradict any argument
that the card companies’ actions sought to foreclose DataCell from the market for card payment facilitation services.\textsuperscript{145}

As for the alleged abuse of discrimination, because the other company by comparison with which DataCell was allegedly discriminated against was not a DataCell competitor, the Commission found that “even if there were . . . discriminatory treatment of DataCell in comparison to [the other company], . . . such treatment would not discriminate between two competitors and would therefore not be such so as to distort competition on the card payment facilitation market.”\textsuperscript{146} It is worth noting that the statutory language of Article 102(c) prohibiting discrimination does not require there to be competitors but rather the application of “dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.”\textsuperscript{147} The Commission’s interpretation of this provision as requiring discrimination between competitors is thus a rather narrow reading of the provision which the Commission does not support with any case law, either.

In \textit{Magyar Suzuki Corporation}, the Commission dismissed a complaint by a Slovakian car dealer that was excluded from Suzuki’s selective distribution system.\textsuperscript{148} The Commission dismissed this allegation by pointing out that the dealer’s request to define Suzuki’s dominance in relation to its position versus the dealer (which purchases most of its cars from Suzuki) was too narrow and unrealistic.\textsuperscript{149} The Commission rejected the proposition that the market could be limited to a specific brand since “Suzuki\textsuperscript{[ ]} vehicles appear to be substitutable to a greater or lesser extent with vehicles from other manufacturers”\textsuperscript{150} and even “the narrowest market definition used by the Commission in merger decisions does not divide the overall market for new cars along brand lines . . . , but rather into . . . segments,” such as mini cars, small cars, luxury cars, etc.\textsuperscript{151} After establishing that Suzuki holds around 3–4 percent of the Slovakian market and around 1 percent of the EU market in terms of total sales of cars,\textsuperscript{152} the Commission found that “given Suzuki’s market position it is unlikely that” even retaining the narrowest definition of the market “would lead to the conclusion that Suzuki would be in a dominant position.”\textsuperscript{153} The Commission therefore refused to further investigate the allegations regarding

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.} \textsuperscript{108}.

\textsuperscript{147} TFEU, \textit{supra} note 1, at 89.


\textsuperscript{149} \textit{Id.} \textsuperscript{20, 27}.

\textsuperscript{150} \textit{Id.} \textsuperscript{20}.

\textsuperscript{151} \textit{Id.} \textsuperscript{21}.

\textsuperscript{152} \textit{Id.} \textsuperscript{32}.

\textsuperscript{153} \textit{Id.} \textsuperscript{33}.
Article 102 due to the “low likelihood of finding that Suzuki was in a dominant position.” It is somewhat bizarre that even at a market share of around 3–4 four percent the Commission did not dismiss the possibility of holding dominance as “impossible” but found it to be “unlikely.”

Finally, in *UEFA Financial Fair Play Rules* the Commission rejected a complaint alleging that UEFA’s Club Licensing and Financial Fair Play Regulation, which “contains a set of licensing criteria that have to be fulfilled by football clubs to compete in UEFA club competitions,” was abusive. In particular, the complaint concerned a “break-even” requirement that, “over a period of three years, [mandated that] the relevant income of clubs . . . at least match their relevant expenses.” According to the complaint, this requirement violated Articles 101 and 102 because “it distort[ed] competition between clubs” by imposing a “limit on the level of debt and investment in players,” by “negatively affect[ing] the salaries and professional mobility of players,” and by “distort[ing] the competition [in] the market for the services of players’ agents.” The Commission rejected the complaint without taking a position on the merits of the complaint (or the complainant’s contentious legitimate interest in filing the complaint) because the complainant had also lodged a private action with the Court of First Instance of Brussels on the same grounds and the Brussels court was well-placed to deal with the issue.

This case clearly represents an example of the Commission using its prioritization powers as well as of it using private enforcement to reduce the burden on the public authority.

**B. COMMITMENTS**

The formal commitments procedure was introduced by Article 9, Regulation 1/2003, which came into effect on May 1, 2004. According to Article 9, “Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.”

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154 Id. ¶ 35.


156 Id. ¶ 2.

157 Id. ¶ 3.

158 Id. ¶¶ 1, 19, 31–36.


160 Regulation 1, *supra* note 7, art. 9(1), at 9. This “decision may be adopted for a specified period.” Id. On the commitments procedure, see Wouter P.J. Wils, *Settlements of EU Antitrust*
Although it is not stipulated in Article 9, according to Recital 13 of Regulation 1/2003 and DG COMP’s Antitrust Manual, legally, a commitment decision is not appropriate when the Commission considers that the nature of the infringement calls for the imposition of a fine. In fact, the usual procedure is for the discussion on commitments to begin before a Statement of Objections (SO) is issued, although “commitments may still be accepted” “in a case where a[n SO] has already been sent to the parties.”

Normally, when commitments are the preferred procedure, a “Preliminary Assessment” is sent to the parties and this document does not require the length and detail of an SO. Most importantly for undertakings, a commitment decision does not make a finding of infringement as it merely establishes that “there are no longer grounds for action by the Commission.” However, there is no finding of lack of infringement, either. Once it is decided that the commitments offered are sufficient to address the competition concerns, the Commission has to give third parties a chance to submit observations by a so-called market test before a decision is adopted under Article 9.

The following Part briefly examines some of the important commitment decisions.

There are only four commitment decisions taken prior to the Guidance but after the publication of the Discussion Paper in December 2005. The number of commitments has therefore quadrupled since the Guidance. In fact, half of all Commission decisions since the adoption of the Discussion Paper have been in the form of commitments. As noted above, the Commission has adopted 20 (16) commitment decisions in the period under examination in a total of 40 (34) decisions.

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163 Id. at 180.

164 Regulation 1, supra note 7, art. 9(1), at 9.

165 Id. art. 27(4), at 19.

166 The numbers in parentheses signify the numbers post-Guidance and the numbers outside the parentheses signify numbers post-Discussion Paper.

167 For the purposes of this article, Deutsche Bahn I, Case COMP/AT.39678—Deutsche Bahn I, Comm’n Decision (Dec. 18, 2013) (summary at 2014 O.J. (C 86) 4), ec.europa.eu/competition/antitrust/cases/dec_docs/39678/39678_2514_15.pdf, and Deutsche Bahn II, Case COMP/AT.39731—Deutsche Bahn II, Comm’n Decision (Dec. 18, 2013) (summary at 2014 O.J. (C 86) 4), ec.europa.eu/competition/antitrust/cases/dec_docs/39731/39731_801_8.pdf, are counted as two separate decisions despite there being a single decision because they are under different case numbers and the Commission’s official database counts them as separate entries. That is due to
Notably, a reference to the Guidance is made in only three of the 16 commitment decisions adopted post-Guidance. It is also interesting that in seven of the adopted commitment decisions in the relevant period, all of which are post-Guidance, the Commission has issued an SO. This suggests that, in almost half of the cases that were concluded with commitments post-Guidance, the Commission has used the commitments procedure in cases where the nature of the infringement could have possibly warranted a fine because an SO “must be used in procedures in which the Commission intends to adopt a decision adverse to the interests of the addressees.” Examples of such decisions include finding an infringement of Article 101 or 102 and ordering its termination and/or imposing behavioral or structural remedies on the parties, ordering interim measures, imposing fines or periodic penalty payments, as well as withdrawing in an individual case the benefit of a block exemption.

the classification of Deutsche Bahn II as concerning the economic activities of freight rail transport and distribution of electricity while Deutsche Bahn I is classified as concerning only freight rail transport.

168 These are Case COMP/39.317—E.On Gas, Comm’n Decision (E.On) (summary at 2010 O.J. (C 278) 9), ec.europa.eu/competition/antitrust/cases/dec_docs/39317/39317_1942_3.pdf; Case COMP/39.530—Microsoft (Tying), Comm’n Decision (Dec. 16, 2009) (Microsoft (Tying)) (summary at 2010 O.J. (C 36) 7), ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_3.pdf; Case COMP/39.402—RWE Gas Foreclosure, Comm’n Decision (RWE) (summary at 2009 O.J. (C 133) 10), ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf. It is noteworthy that whether the proceedings in a case were started before or after the publication of the Guidance does not impact whether there is a reference to the Guidance in the commitments decision since in both Microsoft (Tying) and RWE, case foreclosure proceedings were started before the Guidance was published.


170 Antitrust Manual, supra note 161, at 112.

171 Id. DG COMP’s Antitrust Manual suggests that the Commission only considers the nature of the infringement calling for the imposition of a fine in secret cartel cases: it is stated in the context of commitments not being the appropriate tool that “the Commission does not apply the Article 9 procedure to secret cartels that fall under the Notice on immunity from fines.” Id. at 178; see also Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU, 2011 O.J. (C 308) 6, ¶ 116. This limitation is not understandable since the Commission imposes fines in many cases outside of secret cartels as well. See, e.g., Heike Schweitzer, Decision Making Under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law 3 n.13 (Eur. Univ. Inst., EUI Working Paper LAW No. 2008/22)
Ten (seven) commitment decisions in the period under examination concerned the energy sector. Given that the Commission had conducted a sector inquiry into the energy market, it is not surprising that commitments were used to remedy the problems the Commission had identified. According to the Commission, “The energy sector inquiry . . . allowed [it] to gain an in-depth understanding on the functioning, and in some respects mal-functioning, of the energy sector.” Subsequently, the inquiry “allowed the Commission to draw conclusions [about] where [competition] investigations . . . could be appropriate and effective.” Nonetheless, in two of these decisions, the Commission still sent an SO to the relevant energy companies before commitments were offered.

Amongst these energy-related commitments, the ones in which an SO was not issued have been resolved significantly more quickly than those where an SO was issued (except for CEZ). In most of these energy cases, structural remedies have been adopted and the Commission’s use of commitment decisions has been criticized due to the fact that the “legal standard[ ] required to overcome the statutory preference for behavioural remedies” (Article 7(1), Regulation 1) remains unclear because of this preference for commitments. Commitment decisions have also been argued to be more susceptible to political pressure. Notably, the Commission referred to the Guidance in only two of these commitment decisions.

(suggesting that commitments were not the appropriate enforcement mechanism in some Commission decisions).

The first number relates to the entire period, whereas the second number relates to the post-Guidance period.


Id.

Case COMP/39.315—ENI, supra note 169; Case COMP/39.386—EDF, supra note 169.

Over three years in the cases with SOs and one-to-two years in the cases without SOs (except for CEZ, which took around four years. Case AT.39727—CEZ, Comm’n Decision, 2013 O.J. (C 251) 4.


Similarly, the Commission has been criticized for using commitments in cases that represent novel legal issues. An example is Rambus, where commitments arguably led to a lack of “authoritative clarification of the European . . . position” on the issue of “patent ambush” in technological standard-setting whose importance in high-tech industries will arguably increase in future. In Rambus, the issue was Rambus’s claiming “of potentially abusive royalties for the use of certain patents for ‘Dynamic Random Access Memory’ [(DRAM)] chips subsequent to allegedly intentional deceptive conduct [during the JEDEC] standard-setting process.” The allegedly deceptive conduct consisted of not disclosing “the existence of patents and patent applications . . . later claimed [by Rambus] to be relevant” to the standards adopted by JEDEC.

The Commission took the preliminary view that Rambus’ practice of claiming royalties for the use of its patents from industry standard-compliant DRAM manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would not have been able to charge raised concerns as to the compatibility with Article 102. The Commission also “came to the provisional conclusion that Rambus’ behaviour undermine[d] confidence in the standard-setting process given that an effective standard-setting process [was], in the sector relevant to the present case, a precondition to technical development and the development of the market in general to the benefit of consumers.”

In terms of commitments, Rambus agreed not to charge for the SDRAM and DDR standards that were adopted by JEDEC during the period in which Rambus was a member and engaged in its allegedly intentional deceptive conduct. It also agreed to fix a maximum royalty rate of 1.5 percent for future generations of standards adopted by JEDEC, which was below the 3.5 percent level that Rambus was charging in its existing contracts. Moreover, Rambus

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181 Wagner-von Papp, supra note 178, at 963. “Patent ambush” can be defined as “not disclosing the existence of the patents and patent applications which [a company] later claimed to be relevant to [an] adopted standard.” Case COMP/38.636—Rambus, supra note 103, ¶ 27.

182 Case COMP/38.636—Rambus, supra note 103, ¶ 1. JEDEC is “an industry-wide U.S.-based standard setting organisation,” which “developed a standard for DRAMs.” Id. ¶ 18. “Rambus assert[ed] patents on all JEDEC-compliant SDRAM chips and owns the proprietary RDRAM and XDR DRAM technology,” which means that “the percentage of worldwide commercial DRAM production exposed to Rambus’ patent claims is thus more than 90%. Rambus has been and remains the only company asserting patents on DRAM interface technology.” Id. ¶ 20.

183 Id. ¶ 1.

184 Id. ¶ 3.

185 Id.

186 Id. ¶ 55.

187 Id.
committed to offering this maximum rate to all market participants in the industry.\textsuperscript{188}

Other than Rambus, regarding technology markets, commitments were also used in \textit{IBM}.\textsuperscript{189} The alleged abuse was constructive refusal to supply by IBM, which was possibly dominant in the market for inputs required to provide maintenance services for IBM mainframes.\textsuperscript{190} The alleged abuse was the imposition of unreasonable supply conditions on IBM’s competitors on the maintenance market, which put them at a competitive disadvantage.\textsuperscript{191} IBM committed, for a period of five years, to make critical spare parts and technical information expeditiously available under commercially reasonable and non-discriminatory terms and to allow third parties to enforce the commitments.\textsuperscript{192}

More recently, in \textit{Samsung}, the Commission adopted commitments concerning preliminary (interlocutory) and permanent injunctions sought by Samsung against Apple on the basis of certain of Samsung’s standard essential patents (SEPs) covering Universal Mobile Telecommunications Service (UMTS) technology.\textsuperscript{193} Samsung was under an obligation to license these SEPs on fair, reasonable, and non-discriminatory (FRAND) terms during the standard-setting process, but when Apple sued Samsung for alleged infringement of some of Apple’s non-SEPs, Samsung reacted by seeking injunctions against Apple in several EU Member States on the basis of its UMTS SEPs.\textsuperscript{194} Interestingly, Samsung unilaterally withdrew these injunction actions in December 2012 but the Commission nevertheless proceeded to issue an SO to Samsung, which eventually led to the commitment decision in question.\textsuperscript{195} The Commission defended its pursuit of the case despite the withdrawal of the allegedly abusive actions by stating that “[t]he withdrawal does not . . . prevent Samsung from seeking injunctions based on SEPs in the future.”\textsuperscript{196}

The Commission’s approach raises the concern that the Commission might be using the tool of commitments to change the future conduct of an undertaking by using the ex post legal provision of Article 102 that concerns the

\textsuperscript{188} \textit{Id.}
\textsuperscript{190} \textit{Id.} ¶ 2.
\textsuperscript{191} \textit{Id.} ¶ 31.
\textsuperscript{192} \textit{Id.} ¶ 44.
\textsuperscript{194} \textit{Id.} ¶¶ 53–54.
\textsuperscript{195} \textit{Id.} ¶ 54.
\textsuperscript{196} \textit{Id.}
“abuse” of market power in situations where there is no ongoing potential infringement. Article 9 of Regulation 1/2003 empowers the Commission to make commitments on undertakings binding “[w]here the Commission intends to adopt a decision requiring that an infringement be brought to an end” and the undertakings offer commitments to meet the concerns of the Commission.\textsuperscript{197} The question raised by Samsung is how the Commission can adopt a commitment decision where it appears that the potential infringement no longer exists because the undertaking under investigation has already abandoned the potentially infringing conduct.

This is all the more striking when one compares the wording of Article 7 with that of Article 9 of Regulation 1/2003. Article 7 concerning infringement decisions explicitly stipulates that the Commission can take an infringement decision concerning past conduct “[i]f the Commission has a legitimate interest in doing so.”\textsuperscript{198} This suggests that the drafters of Regulation 1/2003 could not have intended Article 9 to be used in cases of infringements of past conduct since if they did, they would have included the same statement in Article 9 as well. Consequently, this implies that the Commission may have used commitments in Samsung inappropriately since Samsung had already withdrawn the allegedly infringing injunctions and the Commission based its decision on future potential conduct. This approach also contrasts with the Commission’s decisions to reject complaints on the grounds that, inter alia, the behavior complained of was in the past.\textsuperscript{199}

Thus, the use of commitments by the Commission for ex ante regulation, particularly given the specific context of Samsung where no case law exists on the issue of when it might be an abuse to seek injunctions against a potential licensee of an SEP, is problematic. This is aggravated by the fact that access to justice is a fundamental right, and only in exceptional circumstances can legal proceedings constitute abuse.\textsuperscript{200} Yet the Commission does not refer to existing—albeit limited—case law concerning the conditions of vexatious litigation at all in its decision in Samsung.\textsuperscript{201}

\textsuperscript{197} Regulation 1, supra note 7, at 9.

\textsuperscript{198} Id.

\textsuperscript{199} See, e.g., Case AT.39921—DataCell, supra note 137, ¶ 121 (citing the fact that the allegedly abusive conduct ceased as proof of there being no impact on the functioning of the internal market resulting from that conduct).


\textsuperscript{201} The two conditions for such abuse to be found are that: (i) the legal action “cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned”; (ii) the action is part of a plan or is intended to eliminate competition. Id. ¶ 55. It must be noted that the two criteria were promulgated by the European Commission and not challenged in the appeal before the GC, so the GC did not confirm the correctness of the criteria in ITT Promedia. Id. ¶ 57. It is noteworthy that the criteria are similar to those later developed by the ECJ for establishing “abuse of law” in Case C-110/99, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, 2000 E.C.R. I-11569, ¶¶ 52–53. Moreover, in a more recent case, the GC itself has used
In terms of the actual assessment in Samsung, the Commission noted that seeking injunctions cannot, in itself, constitute an abuse of a dominant position in the same way that owning an SEP, in itself, does not confer a dominant position.202 However, on the facts, the Commission found the industry to be “locked-in” and that Samsung’s seeking of injunctions was “capable of excluding Apple, a rival manufacturer of UMTS-compliant mobile devices from the market” and of “inducing Apple to accept disadvantageous licensing terms, compared to those which Apple may have accepted in the absence of the requests for injunctions.”203 The Commission also preliminarily concluded that Samsung’s conduct was not objectively justified, not least because at the time of Samsung’s conduct, Apple was not unwilling to enter into a license agreement for the SEPs in question on FRAND terms.204 Consequently, “Samsung committed not to seek injunctive relief before any court or tribunal in the EEA for infringement of its SEPs” against a potential licensee which agrees to and complies with a certain licensing framework for the determination of FRAND terms and conditions within 60 days of receipt of an invitation to negotiate from Samsung.205 Concerning another technology market, in Microsoft (Tying) the Commission was concerned that tying Microsoft’s web browser, Internet Explorer, to Microsoft’s PC operating system, Windows, was abusive.206 In an SO, the Commission preliminarily decided that tying Internet Explorer to Windows satisfied the criteria for abusive tying under the case law and the Guidance.207 The Commission also preliminarily concluded that, in addition to reinforcing Microsoft’s position in the market for client PC operating systems, tying Internet Explorer to Windows “created artificial incentives for web developers and software designers to optimise their products primarily for Internet Explorer.”208

In the commitment decision a single reference is made to the Guidance, and it concerns the substantive elements of abusive tying.209 As part of the commitments, Microsoft agreed to make available within the European Economic Area (EEA) a mechanism in Windows that enables Original Equipment Manufacturers (OEMs) and users to turn Internet Explorer off and on.210 Microsoft


202 Case AT.39939—Samsung, supra note 193, ¶ 46, 55.

203 Id. ¶ 58, 62.

204 Id. ¶ 65, 68.

205 Id. ¶ 76, 100.

206 Case COMP/39.530—Microsoft (Tying), supra note 168.

207 Id. ¶ 2.

208 Id. ¶ 37.

209 Id. ¶ 33 n.19.

210 Id. ¶ 60.
was also to allow OEMs to “pre-install any web browser(s) of their choice on PCs they ship and set it as the default web browser.”211 In addition, Microsoft “offered to distribute a choice screen software update to users of . . . Windows PCs within the EEA by means of Windows Update.”212

Given the similarity of the facts to the Microsoft (Media Player) case,213 and how long it took to resolve that case, commitments were perhaps the most sensible option to resolve the Microsoft (Tying) case. One might think that the chance to bring the issue to the ECJ might have been missed, though given that Microsoft did not appeal the GC decision in Microsoft (Media Player) and instead offered commitments in Microsoft (Tying), such an appeal to the ECJ was probably unlikely. This reaffirms that the correct approach in this case—at least for the purposes of resolving the dispute—was the adoption of commitments.

Commitments have also been used in other non-traditional markets, such as in the cases of Reuters and Standard and Poor’s. In Reuters, the issue was the allegedly abusive imposition of certain restrictions on the use of Reuters Instrument Codes (RICs) by Thomson Reuters, which was allegedly “dominant in the worldwide market for consolidated real-time datafeeds.”214 According to the Commission, Thomson Reuters “prohibit[ed] its customers from using RICs to retrieve data from consolidated real-time datafeeds of other providers and prevent[ed] third parties from creating and maintaining mapping tables incorporating RICs that would allow the systems of Thomson Reuters’ customers to interoperate with consolidated real-time datafeeds of other providers.”215

The Commission’s preliminary view was that “these practices create[d] substantial barriers to switching datafeed providers and constituted an abuse

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211 Id.
212 Id. Failure to comply with these commitments on the part of Microsoft led to the adoption of another decision by the Commission, which fined Microsoft over €500 million for this failure to comply. Case COMP/C-3/37.792—Microsoft (Media Player), Comm’n Decision, ¶ 1078 (Apr. 21, 2004) (Microsoft (Media Player) (summary at 2004 O.J. (L 32) 23), ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf.
213 Case COMP/C-3/37.792—Microsoft (Media Player), supra note 212. The case originated in 1998 with a complaint regarding the supply of interoperability information. Id. ¶ 3. The Commission started to examine the media player market in February 2000 and opened proceedings concerning this market in August 2001. Id. ¶¶ 4–5. The Commission published its prohibition decision in March 2004. Id. The appeal to the GC was concluded in September 2007. Case T-201/07, Microsoft Corp. v. Comm’n, 2007 E.C.R. II-3601. Considering the various non-compliance penalties and related appeals, etc., the case was concluded in June 2012. Thus, the issue has taken about 12 years (and three Commissioners for Competition) to resolve.
215 Id. ¶ 3.
of a dominant position under Article 102.” The commitments offered concerned licensing arrangements to be adopted such that customers have the possibility to switch providers. Thomson Reuters also undertook not to discriminate against customers who make a partial switch.

In Standard & Poor’s, the preliminary conclusion established in the SO was that Standard & Poor’s (S&P) had infringed Article 102 by imposing unfairly high fees for the supply of U.S. International Securities Identification Numbers (ISINs). The SO stated that S&P’s licensing fees for U.S. ISINs were unfair because S&P applied a licensing fee vis-à-vis indirect users, which was not in line with the principles developed by the International Organization for Standardization (ISO). Furthermore, the licensing fees that S&P demanded from direct users were unfair because they significantly exceeded the costs incurred for that activity.

S&P committed to eliminate all charges to indirect users relating to the use of [U.S.] ISINs within the EEA. Moreover, for direct users, S&P committed to “distribute [U.S.] ISIN records separately from other added value information,” via File Transfer Protocol (FTP) delivery on a daily basis. In light of S&P’s cost data, the initial price of that service was to be US$15,000 per annum.

In an area like unfair pricing, where there is very little case law and therefore very little certainty in terms of the principles underlying such abuse, using commitments is unlikely to produce greater predictability and legal certainty. However, it is perhaps precisely this lack of case law and princi-

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216 Id.
217 Id. ¶¶ 49–50.
218 Id. ¶ 56.
219 Case COMP 39.592—Standard & Poor’s, Comm’n Decision, 2012 O.J. (C 31) 8, ¶ 1 (“US ISINs are used by banks and other financial institutions in order to identify financial instruments issued in the US in inter-bank communications, asset and portfolio valuation, clearing and settlement, front office operations in particular in relation to bonds, custody issues, internal reporting and reporting to authorities, reference data management, etc.” Id. ¶ 2.).
220 Id. ¶ 5. The ISIN system was developed by ISO as ISO standard 6166 and S&P was designated as the responsible National Numbering Agency (NNA) for the United States, which gave S&P a dominant position. Id. ¶ 3.
221 Id. ¶ 5.
222 Id. ¶ 9.
223 Id. ¶ 10.
224 Id.
amples that made reaching resolution by commitments attractive to S&P as well as to the Commission. This point will be further discussed in Part III.

C. Prohibitions

1. The Intel Case

The proceedings in *Intel* had already been initiated before the Guidance was published. Thus, technically the Guidance did not apply to the case, although the Commission nevertheless took the view that the decision was in line with the orientations set out in the Guidance. *Intel*—a decision which is over 500 pages and which imposes the largest fine ever in EU competition enforcement on a single undertaking (over €1 billion)—concerned microprocessors, which are also known as Central Processing Units (CPUs), namely the devices that interpret and execute instructions given to a computer. Essentially, “The CPU is the computer’s ‘brain.’” Intel and AMD are the main manufacturers of x86 architecture CPUs, which are compatible with Windows and Linux operating systems. Intel has historically been the leading x86 CPU manufacturer in the market, and it started to face competition from AMD around 2001.

The subject matter of the Commission’s decision was various arrangements between Intel and a number of OEMs and between Intel and one European PC retailer. Intel offered rebates to OEMs that were conditional upon the OEM remaining exclusive with Intel and, depending on the specific agreement, rewarded exclusivity by increasing the rebate when the OEM did remain exclu-

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226 The Commission has adopted six prohibition decisions since the adoption of the Guidance. Of these decisions, two were not available at the time of writing, thereby limiting the assessment in this section to the four publicly available prohibition decisions. The following decisions were not available in full at the time of this analysis but are now available: Case AT.39523—*Slovak Telekom, supra* note 102; Case AT.39612—*Perindopril (Servier), supra* note 102. For press releases on these two decisions, see respectively, Press Release, Eur. Comm’n, Antitrust: Commission Fines Slovak Telekom and Its Parent, Deutsche Telekom, for Abusive Conduct in Slovak Broadband Market (Oct. 15, 2014) (IP/14/1140); Press Release, Eur. Comm’n, Antitrust: Commission Fines Servier and Five Generic Companies for Curbing Entry of Cheaper Versions of Cardiovascular Medicine (July 9, 2014) (IP/14/799). Intel is the only prohibition decision in the period covered in this article in which the proceedings were started before the Guidance was published.


228 *Id.* ¶ 1789.

229 *Id.* ¶ 107.

230 *Id.* “CPU performance is a key component in the overall performance of a computer” and “[i]n terms of cost, a CPU . . . represents the most significant proportion of a computer’s cost.” *Id.* ¶ 109.

231 *Id.* ¶¶ 121–125.

232 *Id.* ¶ 149.

233 *Id.* ¶ 165.
sive with Intel. Intel also rewarded the delay or cancellation of the launch of AMD-based computers.\textsuperscript{234} Regarding the arrangements between Intel and the PC retailer, the Commission found that Intel provided this retailer with “considerable amounts of money under continuous funding agreements which were conditional upon [the retailer] selling exclusively Intel-based PCs.”\textsuperscript{235}

Regarding dominance, the Commission stated that, for dominance to exist, the undertaking concerned must have substantial power, although it is not necessary that it has “eliminated all opportunity for competition in the market.”\textsuperscript{236} This is the view accepted in the Guidance as well. In fact, it emanates from such cases as \textit{United Brands} and \textit{Atlantic Container}.\textsuperscript{237}

The Commission found that Intel had in excess of or around 80 percent market share in the overall x86 CPU market and in excess of or around 70 percent in any of the submarkets.\textsuperscript{238} A number of barriers to entry and expansion were also identified by the Commission.\textsuperscript{239} Among these, significant sunk costs and economies of scale were described at length.\textsuperscript{240} The Commission also found Intel to be a must-stock product for OEMs, referring to \textit{Hoffmann-La Roche} and \textit{British Airways}.\textsuperscript{241} The Commission, inter alia, used the profit level of Intel as an indication of its substantial market power.\textsuperscript{242}

In establishing dominance, the Commission also made findings of abuse and stated that Intel’s argument that the discounts offered to Dell and HP “constitute proof of the existence of price reductions due to competitive pressure” could not be accepted because the discounts were conditional on exclusivity or quasi-exclusivity and they “constitute an abuse of a dominant position the aim of which was to foreclose AMD from the market.”\textsuperscript{243} It should be recognized that the Commission’s counter-argument that the discounts were conditional on (quasi)exclusivity does not in itself disprove In-

\begin{itemize}
  \item \textsuperscript{234} E.g., \textit{id.} \S 323, 413, 501–02, 579.
  \item \textsuperscript{235} \textit{id.} \S 581. The retailer also received “indirect marketing contributions for advertising campaigns.” \textit{id.} \S 582.
  \item \textsuperscript{236} \textit{id.} \S 839.
  \item \textsuperscript{238} Case COMP/C-3/37.990—\textit{Intel, supra} note 227, \S 852. The exact market definition is left open. \textit{id.} \S 835.
  \item \textsuperscript{239} \textit{id.} \S 853. Innovation alongside price is one of the main factors that triggers demand in the x86 industry and pace of innovation is rapid \textit{id.} \S 139–140.
  \item \textsuperscript{240} \textit{id.} \S 859–866. According to the Commission decision, manufacturing CPUs is a risky, lengthy, and expensive investment with very high fixed costs (around US$2–3 billion for start-up). \textit{id.} \S 115.
  \item \textsuperscript{242} \textit{id.} \S 880.
  \item \textsuperscript{243} \textit{id.} \S 895.
\end{itemize}
tel’s argument that they were the result of competitive pressure. The Commission also used the “[t]he fact that Intel was able to make the rebates conditional upon (quasi)exclusivity or that OEMs were willing to accept such conditionality” as proof of Intel’s market power.244 Similarly, again with reference to Hoffmann-La Roche, the Commission noted that “[t]he fact that prices may be falling [was] not in itself inconsistent with the existence of a dominant position.”245

The abusive conduct in Intel was categorized as conditional rebates and payments and so-called naked restrictions.246 After going through the established case law on rebates, the Commission reiterated that there was no requirement in the case law to demonstrate actual foreclosure to prove an infringement of Article 102.247 The Commission also noted that a violation of Article 102 may also result from the anticompetitive “object” of the practices pursued by a dominant undertaking.248 Similarly, the Commission remarked that, while the finding of exclusivity attached to the rebates which restricted the buyers’ freedom to choose was sufficient to find an infringement of Article 102 (in the absence of objective justification), “on top of fulfilling the conditions of the case law,” the Commission would additionally demonstrate that the conditional rebates and payments were “capable of causing or likely to cause anticompetitive foreclosure (which is likely to result in consumer harm).”249

After establishing abuse on the basis of the traditional approach found in the existing case law, the Commission also conducted an as-efficient competitor analysis, in line with the orientations of the Guidance.250 To do this, the Commission examined whether Intel itself, in view of its own costs and the effect of the rebate, would be able to enter the market at a more limited scale without incurring losses.251 According to the Commission, the as-efficient competitor analysis is a hypothetical exercise which asks whether a competitor which is as efficient as Intel but without as broad a sales base as Intel would be foreclosed from entering.252 In order to establish whether the rebate system could hinder the expansion or entry of as efficient competitors by preventing them from supplying some of the requirements of individual cus-

244 Id.
245 Id. ¶ 907 (referring to Case 85/76, Hoffmann-La Roche). According to the Commission, falling prices are an intrinsic feature of this industry given its technical characteristics irrespective of the state of competition in the market Id. ¶ 908.
246 Id. ¶¶ 917–919.
247 Id. ¶¶ 919, 923.
248 Id. ¶ 923.
249 Id. ¶ 925.
250 See Guidance, supra note 4, ¶¶ 41–45.
252 Id. ¶ 1004.
tomers, one had to determine the effective price for the buyer over a relevant range of its purchases taking the rebate into account. According to the Commission, the lower the calculated effective price was compared to the average price of the dominant supplier, the stronger would be the foreclosure effect. The decision notes that, “[a]s a general rule, it can be concluded that a rebate scheme is capable of foreclosing equally efficient competitors if the effective price is below a measure of viable cost.” This statement also follows the approach adopted in the Guidance although it is not explicitly stated to do so.

As in the Guidance, the Commission adopts average avoidable cost (AAC) as the benchmark for the test: “[i]f an as efficient competitor is forced to price below AAC, this . . . means that competition is foreclosed because the as efficient competitor incurs losses by making (incremental) sales to customers covered by the dominant firm’s conduct.” This statement begs the question of what is meant by “as-efficient competitor” since the definition of that appears to be independent of the concept of AAC.

According to the Commission, if Intel’s rebate scheme means that, in order to compensate an Intel trading partner for the loss of the Intel rebate, an as-efficient competitor has to offer its products below a viable measure of Intel’s cost, then it means that the rebate was “capable of foreclosing a hypothetical as efficient competitor.” Such foreclosure would “deprive final consumers of the choice between different products which the Intel trading partner would otherwise have chosen to offer were it to make its decision solely on the basis of the relative merit of the products and unit prices offered by Intel and its competitors.”

The Commission emphasizes that “[t]he foreclosing nature of Intel’s conduct does not depend as such on the quality of the competition that it actually encountered but whether it in abstracto had the capacity of excluding an equally efficient competitor by distorting the choices made by the OEMs.” This emphasizes that the as-efficient competitor test is a hypothetical assessment. Later in its decision, the Commission states that “it can be seen that an as efficient competitor would have had to offer its x86 CPUs to the OEMs . . .

253 Id. ¶ 1006.
254 Id. (emphasis added). The “effective price” is “the normal (list) price less the rebate the customer loses by switching [to the competitor], calculated over the relevant range of sales and in the relevant period of time.” Guidance, supra note 4, ¶ 41.
255 See Guidance, supra note 4, ¶¶ 41, 43–44.
256 Case COMP/C-3/37.990—Intel, supra note 227, ¶ 1037. See Guidance, supra note 4, ¶ 44.
257 Case COMP/C-3/37.990—Intel, supra note 227, ¶ 1154.
258 Id.
259 Id. ¶ 1154 n.1473; see also id. ¶ 1685 (as-efficient competitor test being a hypothetical one).
at a price which was below its AAC to match Intel’s conditional offers." \(^{261}\)

Similarly, if an as-efficient competitor “is forced to price below AAC, this clearly means that competition is foreclosed because the as efficient competitor incurs losses by making (incremental) sales to customers covered by the dominant firm’s conduct.” \(^{262}\)

In various places, the Commission refers to unit costs of an entrant when describing the methodology to be used for assessing the rebates. \(^{263}\) Thus, the decision suggests that it is the costs of a hypothetical competitor that constitute the benchmark for the test. In contrast, in other parts of the decision, it is clear that it is Intel’s costs that are being used for the assessment. \(^{264}\) At one point, the Commission appears to equate these two methods by stating that the relevant assessment is whether an as-efficient competitor would be required to sell its products below the “avoidable cost associated with producing these units” which is “equivalent to asking whether Intel is selling the units which a competitor could replace below cost.” \(^{265}\) This seems to suggest that the definition of the “as-efficient competitor” is simply that of a competitor with the identical unit costs as the dominant undertaking, but nowhere in the Guidance or in Intel is this made clear.

Similarly, such a definition might be too restrictive: there may be more factors than just avoidable production costs that contribute to an undertaking’s overall efficiency, particularly in dynamic markets, and defining the as-efficient competitor as one with identical costs to the dominant undertaking does not incentivize competitors to become any more efficient than the incumbent. It thus remains unclear, at least conceptually, whose AAC is the relevant benchmark, i.e., whether it is the dominant undertaking’s or a hypothetical competitor’s AAC. If it is the latter, given that the exercise is hypothetical, it would have to be explained how this hypothetical as-efficient competitor’s costs will be calculated for the purposes of the assessment. \(^{266}\) If it is the dominant undertaking’s own costs that constitute the benchmark, then it would be much better for providing guidance and legal certainty to simply state that the test for abuse is whether the dominant undertaking is essentially engaging in predation. \(^{267}\)

\(^{261}\) Id. ¶ 1574; see also, e.g., id. ¶¶ 1156, 1266 (appearing to be the AAC of the competitor).

\(^{262}\) Id. ¶ 1037.

\(^{263}\) See, e.g., id. ¶¶ 1156, 1157, 1285.

\(^{264}\) See, e.g., id. ¶¶ 1039, 1159, 1471.

\(^{265}\) Id. ¶ 1266.

\(^{266}\) In Intel the Commission bases its analysis on the formula submitted to the Commission by Intel’s economic consultant. Id. ¶ 1007.

\(^{267}\) See Akman, supra note 21, at 616–17, on the test being one of predation. The “contestable share of the market” corresponds to the amount of a customer’s purchase requirements that can realistically be switched to a new competitor in any given period. Case COMP/C-3/37,990—Intel, supra note 227, ¶ 1009. Not all of a customer’s requirements will be contestable at any
For rebate cases like *Intel*, this would imply predation over the contestable share of the market when one takes into account the price after the rebate. Indeed in *Intel*, the author of the formula used in the decision for the test adopts essentially a predation test based on the dominant undertaking’s own costs.268

In establishing the contestable share of the market, which is part of applying the as-efficient competitor test in *Intel*, the decision reiterates that Intel is an unavoidable trading partner with a must-stock product.269 According to the Commission, “Due to Intel’s strong brand and long track record, many final customers would not consider switching away from Intel-based computers, even if an AMD-based alternative were offered.” 270 This reasoning walks a fine line between punishing a firm that has come to the position of must-have because of its attractiveness and superiority and punishing a firm for being a monopolist with an overpriced, low-quality product. Moreover, with this reasoning, the more superior a company’s product is, the easier it will be for the Commission to find a rebate abusive because of the smaller contestable share of the market.

Yet, it may not be because of the rebates that the product of the dominant undertaking is attractive, but because of its superiority. The approach adopted in *Intel* does not include any filters that could distinguish between these two as it stands. Furthermore, the Commission appears to use evidence such as internal documents (e.g., a Dell spreadsheet) that belong to Intel’s customers in establishing the contestable share.271 Indeed, in its appeal to the General Court, Intel argued that the Commission’s as-efficient competitor analysis is “based on information that it could not know at the time it was granting discounts to its customers,” and therefore a fine should not have been imposed on Intel.272

The Commission also notes that the relevant period in which to examine what proportion of an OEM’s supplies is contestable is at most one year, and contracts and rebates in the relevant market rarely exceed one year.273 In the decision, the shortness of the time period is treated only as a factor that makes

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269 Id. ¶ 1010.

270 Id.

271 See, e.g., id. ¶¶ 1202–1212, 1231, 1340.


switching by OEMs less likely.\textsuperscript{274} However, the shortness of the period also begs the question whether the foreclosure effect of any rebate should be short-lived and whether a competitor should be able to offer a competing product that is at least as good as the dominant company’s if contracts are renewed so frequently, not least of all because of the rapid rate of innovation on the concerned market. This possibility is not discussed in \textit{Intel}.

In a section on “harm to competition and consumers,” the Commission explains that a variety of Intel’s conditional rebates were “capable of inducing loyalty and thereby limiting consumer choice and foreclosing the access of competitors to the market.”\textsuperscript{275} Additionally, the exclusivity agreement with the major retailer “deprived competitors of the ability to use certain distribution channels in the consumer segment, had an influence on the OEMs’ choice of their x86 supplier . . . and limited the choice of consumers who wanted to purchase their product from [this retailer].”\textsuperscript{276} Further, “Intel’s exclusionary practices had a direct and immediate negative impact on those customers who would have had a wider price and quality choice if they had also been offered the product of their [favorite] OEM and/or retailer with x86 CPUs from Intel’s competitors.”\textsuperscript{277}

According to the decision, Intel’s practices with respect to the OEMs prevented important and genuinely different AMD-based products from ever being brought to the market in significant quantities.\textsuperscript{278} The Commission noted that “the fact that a ‘rebate’ can be leveraged by the dominant company from its non-contestable share into the contestable share may allow that company to foreclose as efficient, or even more efficient, rivals even if its overall average price is higher than that of its rivals.”\textsuperscript{279} The Commission found this to be “to the detriment of consumers and competition both in the short and in the long term, in terms of price, choice and innovation.”\textsuperscript{280} It is not entirely clear whether this actually happened in \textit{Intel} or whether this is a hypothetical statement.

Similarly, the statement that Intel’s rebates and payments induced the loyalty of key OEMs and of a major retailer, the effects of which were complementary in that they significantly diminished competitors’ ability to compete on the merits and “Intel’s anticompetitive conduct thereby resulted in a signif-

\textsuperscript{274} \textit{Id.} \textsuperscript{¶} 1013. This in turn implies that the shortness of the period is a factor that confirms foreclosure.
\textsuperscript{275} \textit{Id.} \textsuperscript{¶} 1598.
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textit{Id.} \textsuperscript{¶} 1603.
\textsuperscript{278} \textit{Id.}
\textsuperscript{279} \textit{Id.} \textsuperscript{¶} 1612.
\textsuperscript{280} \textit{Id.}
icant reduction of consumer choice and in lower incentives to innovate” 281 is not entirely internally consistent: the former part of the statement concerns the competitors’ potential ability to compete, whereas the latter finding concerns actual effects of Intel’s conduct in the market. Further, a genuine choice-based argument is difficult to sustain if the competitors are supplying essentially the same product as the dominant undertaking. In such cases, the theory of harm should really be one based on price effects. However, if the competitors are supplying genuinely differentiated products, the strength of customer loyalty to any given particular brand becomes relevant and exclusion should be considered to be less likely. 282

In addition, when the entrant has already become active in the market, it will have incurred the sunk costs of entry and will have strong incentives to remain in the market, which is a limitation of theories based on the potential exclusionary effects of loyalty rebates. 283 In Intel, the Commission’s response to such potential issues is presumably that, according to the case law, “abuse is an objective concept” and the performance of the competitors is not relevant for the application of Article 102. 284 The view that the performance of competitors is irrelevant implicitly suggests that Article 102 is an ex ante prohibition, rather than ex post, which is not necessarily a position that the provision of Article 102 itself supports. 285

In conclusion, Intel was found to have engaged in a “long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels in the market.” 286 Taken together, Intel’s practices “were capable of having or likely to have had an even greater negative impact overall [in] the market, which harmed consumers by depriving them of choices of computers based on AMD x86 CPUs.” 287 Logically, given the speculative nature of the first part of this finding (“were capable of having or likely to have had”), the latter part of it regarding consumer harm should have also been speculative in nature (“likely harmed”) as opposed to expressing actual harm (“harmed”). 288

281 Id. ¶ 1616.
282 For exclusion being less likely with differentiated products, see O’DONOGHUE & PADILLA, supra note 12, at 468.
283 See id.
284 See Case COMP/C-3/37.990—Intel, supra note 227, ¶ 1685. The Commission briefly discussed and dismissed Intel’s argument that AMD performed better than ever in its corporate history during the period covered by the decision. Id. ¶¶ 1732–1736.
285 If it were to be an ex ante prohibition, the text of Article 102 would have at least prohibited the acquiring of a dominant position, which would have been similar to the prohibition of monopolization under Sherman Act Section 2, and not simply its abuse.
286 Case COMP/C-3/37.990—Intel, supra note 227, ¶ 1747.
287 Id.
288 See id.
Overall, as noted throughout this sub-Part, the decision presents actual and hypothetical findings together and that reduces its precedential value for future cases. There is also no explicit discussion of a counterfactual in finding abuse in *Intel*, unlike the approach set out in the Guidance, which requires the comparison of the situation with the dominant undertaking’s conduct with an appropriate counterfactual. Intel represents a mixture of the form-based approach with a more modern economic approach, which one commentator has likened to a boxing match with a boxer who wants to explore a different style of fighting but, when attacked, resumes the posture and response in which he was trained. Similarly, the use of the approach set out in the Guidance is somewhat superfluous in *Intel* given that abuse is first and foremost established on the basis of the principles found in the case law predating the Guidance. Regardless of the merits of the outcome in *Intel* on the basis of the actual facts, as a decision, *Intel* does not represent an example that will provide adequate clarity and legal certainty to other undertakings facing similar allegations in the future.

2. The Telekomunikacja Polska Case

In *Telekomunikacja Polska (TP)*, the Commission found that the Polish telecoms incumbent, Telekomunikacja Polska (TP) abused its dominant position by refusing to supply its wholesale broadband products. TP is the first prohibition decision that is truly post-Guidance because the decision to initiate proceedings was taken after the publication of the Guidance. The Commission issued a 243-page decision in which it found that TP “consciously planned and engaged in practices aimed at hindering” alternative operators (AOs) from efficiently accessing the incumbent’s network and using its wholesale broadband products. The Commission consequently fined TP around €136 million.

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289 For the approach of the Guidance, see *supra* text accompanying note 46.
290 For the analogy with a fight, see Kent Bernard, *The Intel Cases—Legal Convergence or Leaps of Faith?*, CPI ANTITRUST J., Feb. 2010, at 1, 7.
291 During the preparation of this article, Intel’s appeal to the GC failed on all grounds. Case T-286/09, Intel Corp v. Comm’n, ECLI:EU:T:2014:547 (GC June 12, 2014). Strikingly, the GC held that fidelity/exclusivity rebates are abusive if there is no justification for granting them and the Commission does not have to analyze the circumstances of the case to establish a potential foreclosure effect. *Id.* ¶ 80. Moreover, the GC found that the as efficient competitor test is neither necessary nor sufficient for establishing the abusive nature of fidelity/exclusivity rebates. *See id.* ¶¶ 143–145, 150–151. Intel has appealed the judgment, which is currently under consideration by the ECJ. Case C-413/14 P, Intel Corp. v. Comm’n.
293 *Id.*
294 *Id.* ¶ 912.
As the only undertaking having a local access network in the entire Polish territory, TP was the only provider of fully unbundled and shared access to the local loop in Poland. Since October 1, 2003, TP had been obliged to grant access to its local access network at local loop unbundling (LLU) and wholesale broadband access (BSA) levels in the Polish wholesale broadband market. TP’s abusive pattern of conduct consisted of: (1) “proposing unreasonable conditions at the beginning of access negotiations with AOs;” (2) “delaying negotiations with AOs;” (3) “limiting access to its network;” (4) limiting access to subscriber lines;” and (5) “refusing to provide reliable and complete General Information.” Overall, the abuse was one of “refusal to supply.”

Regarding the conditions for establishing refusal to supply, the Commission adopted the approach in the Guidance. In explaining the legal position on refusal to supply, the Commission remarked that “in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.” Although this statement is based on previous case law, particularly emanating from the GC, the proposition that there are unilateral practices that are in themselves abusive is without a sound legal or economic base and does not sit well with a modern, effects-based approach.

There is no guidance from the Commission or European courts as to which unilateral practices are abusive in themselves under Article 102, as opposed to unilateral practices that are not in themselves abusive but are nevertheless abusive when adopted by a dominant undertaking. Given that any potentially abusive conduct also can potentially be objectively justified, it is not legally

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295 Id. ¶ 54.
296 Id.
297 Id. ¶ 5.
298 Id. ¶¶ 695–706, 803.
299 Id. ¶ 703. According to the Guidance, refusal to supply will be an enforcement priority if: (i) “the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;” (ii) “the refusal is likely to lead to the elimination of effective competition on the downstream market;” and (iii) “the refusal is likely to lead to consumer harm.” Guidance, supra note 4, ¶ 81.
300 Case COMP/39.525—Telekomunikacja Polska, supra note 292, ¶ 698.
correct to speak of practices that are necessarily abusive in themselves. Similarly, given that there are no clear and hard rules based on economics regarding when unilateral conduct is anticompetitive, it is also not economically sound to accept that there are practices that are abusive in themselves. It is similarly not correct at a principle level to accept that some practices are abusive in themselves because abusive practices under Article 102 are essentially unilateral practices, sometimes commonly found in business practice. A presumption that certain practices are abusive in themselves belongs to a formalistic legal approach, akin to a strict liability rule for a tort, not to a legal approach that is meant to be based on competitive effects.

According to the decision, the “evidence” gathered by the Commission during its investigation indicated that TP “consciously planned and engaged in practices aimed at hindering AOs from efficiently accessing the incumbent’s network and using its wholesale broadband products.” The Commission held that “[t]he existence of such a market strategy [was] confirmed by contemporaneous documents of TP seized during the inspection at the incumbent’s premises.” Apparently, these documents “prove” that “TP focused its efforts on creating impediments to the development of competition on relevant markets.” The current author has argued elsewhere that it is inappropriate to use such documents expressing the subjective intention of an undertaking to establish abuse. These documents could be nothing more than hard sales talk, and it is not appropriate to take them as the proof of abuse in an effects-based approach.

The Commission not only uses TP’s own internal documents, but also statements of AOs to establish the strategy adopted by TP. It is naïve to trust such statements from competitors of a dominant undertaking under investigation because it would be in their interest to get a fine levied on their competitor. In fact, TP did raise an argument that the Commission was raising many objections against TP that were mainly based on the declaration of competing entities, the credibility of which raised justified doubts. The Commission’s response was that the findings in the case were based on “a large number of documents gathered in the Commission’s file” which encompassed “contemporaneous documents of TP collected during the inspection of TP’s premises, replies of TP and of all major market players to the Commission’s requests for information,” as well as a number of submissions of the relevant regulators.

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302 Case COMP/39.525—Telekomunikacja Polska, supra note 292, ¶ 148 (emphasis added).
303 Id. ¶ 149.
304 Id.
305 See Akman, supra note 60, at 336.
306 See, e.g., Case COMP/39.525—Telekomunikacja Polska, supra note 292, ¶ 166.
307 Id. ¶ 794.
308 Id. ¶ 798.
The Commission appears to argue that TP’s exclusionary strategy was confirmed by “ample evidence on obstacles actually created by TP” and this evidence was in line with the “strategy contained in the internal documents of TP” and could be “seen as an illustration of the implementation phase of TP’s strategy.”\(^\text{309}\) At face value, the Commission appears to be using internal documents only to supplement other facts. Interestingly, the Commission referred to the Guidance in justifying the use of internal documents.\(^\text{310}\) Accordingly, “Amongst the evidence the Commission may decide to use . . . are inter alia the documents confirming the actual foreclosure or even direct evidence of exclusionary strategy.”\(^\text{311}\) Thus, this is an example of the principles in the Guidance being applied in an actual case, albeit in ways that are questionable in an economic, effects-based approach.

The bulk of the evidence that the Commission used (and which was supported by the documentary evidence) related to issues such as: (1) negotiations of contracts for a wholesale broadband product (e.g., TP’s practice of presenting unreasonable conditions in its draft contracts); (2) TP’s dilatory techniques in negotiations, etc.; (3) limited access to TP’s network due to a high level of rejections of AO’s orders on formal and technical grounds; and (4) lengthy implementation of AO’s orders (when arguably better access conditions were possible), which the Commission interpreted as TP creating obstacles to AOs at the stage of accessing the network.\(^\text{312}\) A lot of these problematic practices give the impression of conduct by an inefficient monopolist.\(^\text{313}\)

Another set of issues related to TP’s creating problems for AOs in offering their services to subscribers.\(^\text{314}\) Much of this evidence is based on the competitors’ complaints and documentary evidence.\(^\text{315}\) Some of it—in fact, internal documents of TP—again presented the picture of an inefficient monopolist unable to handle the orders it received.\(^\text{316}\) According to the Commission, “contemporaneous evidence of TP collected during inspections” showed that “TP did not introduce on time measures necessary for AOs to effectively access the subscriber lines” and it “could have offered better conditions to AOs.”\(^\text{317}\) Again, there is mainly a demonstration of inefficiency in this conduct. A final

\(^{309}\) Id. ¶ 159.

\(^{310}\) Id. ¶ 160. Reference is made to Guidance, supra note 4, ¶ 20, 6th tiret, last sentence, but it should be ¶ 20, 7th tiret, last sentence, on the basis of the argument.

\(^{311}\) Case COMP/39.525—Telekomunikacja Polska, supra note 292, ¶ 160.

\(^{312}\) See id. ¶ 5.

\(^{313}\) See, e.g., id. ¶¶ 327–329.

\(^{314}\) Id. ¶¶ 444–445.

\(^{315}\) See, e.g., id. ¶¶ 459–465, 476.

\(^{316}\) See id. ¶ 476.

\(^{317}\) Id. ¶ 510.
set of objections was based on TP’s not providing reliable and accurate “General Information” to AOs that was “necessary for AOs to make a sound decision regarding access to TP’s wholesale broadband products at specific locations.”

In the section on abuse, the Commission referred to the Guidance, albeit not heavily. The Commission found that “TP’s delaying tactics at the different stages of the negotiation process constitute[d] an element of the refusal to supply the wholesale input.” It noted that better access conditions were possible; “TP’s subsidiary, PTK, benefited from more [favorable] conditions in accessing the incumbent’s network.” However, the decision also stated that even PTK’s BSA orders were occasionally rejected—just not as much as orders of other AOs. Similarly, “AOs could not count on TP’s prompt reparation of faulty BSA lines, which had an impact on AOs’ customers’ satisfaction.”

The “non-existence of efficient solutions on TP’s part” was confirmed by an internal document. The decision did not explain whether this was an issue for PTK, too, or whether this was only towards AOs. If it is the former, this again would point to inefficiency on the part of the dominant undertaking. Regarding the refusal to provide reliable and complete General Information, it was noted that “the fact that TP made available to its own retail clients more detailed data than it provided to AOs is a clear indication” that improvements could have been made regarding the quality of the General Information provided to the AOs.

In the decision, the Commission established that TP’s conduct was likely to restrict competition in the retail market and that TP’s conduct was likely to have a detrimental effect on consumers, although the latter was not required by the case law. The Commission argued that “the foreclosure effect [was] likely since DSL competitors in the retail market could not avoid having recourse to the BSA and LLU wholesale inputs provided by TP by turning to an alternative . . . wholesale input.”

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318 Id. ¶ 511.
319 See, e.g., id. ¶ 703.
320 Id. ¶ 747.
321 Id. ¶ 759.
322 Id. ¶ 765.
323 Id. ¶ 778.
324 Id.
325 Id. ¶ 787. Similarly, more information was provided to PTK than to other AOs. Id. ¶ 788.
326 Id. ¶¶ 814–863.
327 Id. ¶ 815.
For the Commission, it was crucially important for AOs to “obtain a minimum ‘critical network size’ in order to fully benefit from network effects and economies of scale and be able to make investments.”\(^\text{328}\) By preventing its competitors from entering and/or expanding in the retail market, TP prevented its downstream competitors from reaching a critical customer size that would have allowed them to climb “the investment ladder, have the possibility to differentiate themselves from TP . . . and to compete on costs.”\(^\text{329}\) At one point, the Commission simply took the statement of one competitor regarding the breakdown of negotiations with TP as evidence that TP’s argument to the contrary was “plainly unconvincing.”\(^\text{330}\)

Regarding the likely negative effect on consumers, the Commission found that the immediate harm was likely to be significant because if competition had not been restricted by the refusal to supply, in all likelihood consumers’ choice would have increased and retail prices would have been driven down.\(^\text{331}\) This is clearly speculation, and it is remarkable that the Commission suggests that the “immediate harm” to consumers was likely to be “significant” on the basis of speculation. Similarly, the Commission argued that the “competitiveness of the market was likely to be restricted” in comparison to a situation without the refusal and “[t]his inevitably leads to likely harm to consumers.”\(^\text{332}\) Although this is possibly the counterfactual assessment that the Commission promoted in the Guidance, this type of analysis cannot be deemed to constitute a genuine consumer welfare approach. One cannot speak of “inevitably likely harm” under an economic approach based on effects.\(^\text{333}\)

According to the Commission, “Without such constraints on competing AOs, it [was] likely that the market would have delivered greater benefits to consumers as a whole.”\(^\text{334}\) In quantifying the likely effects on consumers, the Commission explains that “TP’s refusal to supply wholesale DSL services to new entrants allowed it to maintain high retail prices and avoid investments in the upgrading and expansion of the network, which resulted in harm to consumers reflected in lower broadband penetration, higher broadband prices and lower average broadband speeds.”\(^\text{335}\)

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\(^{328}\) Id. ¶ 818.

\(^{329}\) Id.

\(^{330}\) Id. ¶ 819(a).

\(^{331}\) Id. ¶ 829.

\(^{332}\) Id. ¶ 830 (emphasis added).

\(^{333}\) For the counterfactual assessment, see supra text accompanying note 43.

\(^{334}\) Case COMP/39.525—Telekomunikacja Polska, supra note 292, ¶ 830 (emphasis added).

\(^{335}\) Id. ¶ 838.
This is the part of the decision where the Commission demonstrated the potential harm to consumers resulting from TP’s conduct on the basis of broadband penetration levels, price levels and connection speeds in Poland in comparison to other countries.\textsuperscript{336} It is in this part that one can observe a consumer welfare approach. Having said that, in establishing that TP’s conduct was a rational and profitable strategy for TP, the Commission remarked that it was \textit{likely} that “the profits extracted from the high level of retail prices that TP [was] able to impose surpassed by far the predicted [lost] profits related to the forsaken wholesale sales.”\textsuperscript{337} Thus, it was not \textit{actually} calculated whether this practice, which is abusive, was profitable for TP. By implication, one could argue that it was not necessarily established whether TP had the \textit{incentive} to restrict competition, over and above possibly having had the ability to do so.\textsuperscript{338}

\textit{TP} is a long decision, most of which contains mainly narrative on the views of competitors, with some figures relating to broadband penetration, etc. It is difficult to identify any (empirical) economic analysis in the decision. Overall, the decision presents the picture of an inefficient monopolist. There is no explicit discussion of the as-efficient competitor test in the decision, which one might consider unfortunate given that this is one of the very few post-Guidance prohibition decisions and the main test in the Guidance is the as-efficient competitor test.\textsuperscript{339}

3. \textit{The Romanian Power Exchange/OPCOM Case}

In this decision, the Commission found the operator of the only power exchange in Romania, OPCOM, to have abused its dominance in “the market for services facilitating short-term electricity trading in Romania.”\textsuperscript{340} The abuse took the form of “discrimination against companies on the basis of their nationality/place of establishment,” which in turn restricted competition in the wholesale electricity market in Romania.\textsuperscript{341} The discrimination consisted of OPCOM requiring all participants in certain markets of the power exchange to have Romanian VAT registration and subsequently to establish business premises in Romania, even though those foreign traders would already have

\textsuperscript{336} See id. ¶¶ 838–863.

\textsuperscript{337} Id. ¶ 867.


\textsuperscript{339} On the Guidance presenting “missed opportunities” regarding the telecommunications sector, see Alexandre Verheyden & Yvan Desmedt, Article 82 Guidelines—Missed Opportunities in the Telecoms Sector, GLOBAL COMPETITION POL’Y, Feb. 2009.

\textsuperscript{340} Case AT.39984—Romanian Power Exchange/OPCOM, supra note 102, ¶ 1.

\textsuperscript{341} Id.
VAT registration in their home country. OPCOM required such registration despite Romanian law not imposing such an obligation. There is no reference to the Guidance in the decision. After defining the relevant market as services facilitating short-term electricity trading, the Commission found the market share of OPCOM to have been consistently above 99 percent since 2008 as it was the only company holding a license for operating a power exchange in Romania since 2001.

Regarding abuse, the Commission reiterated that in specific circumstances, an undertaking in a dominant position “may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.” The Commission held that “OPCOM’s VAT requirement discriminates against EU traders who are already established and registered for VAT in another EU Member State because—contrary to domestic traders who only need one VAT registration—EU traders are required to obtain a second VAT registration for Romania.” The Commission then referred to existing case law establishing that “discrimination on grounds of nationality” by a dominant undertaking can be abusive. The Commission held that “EU traders are precluded from trading [in] spot markets of the power exchange unless they register for VAT in Romania.” Furthermore, it held, since they are “dependent on access to the power exchange” to conduct business in the competitive wholesale electricity market in Romania, they are also thereby effectively prevented from participating in the wholesale electricity market in Romania unless they register for VAT in Romania.

The Commission explained that on the basis of the case law, to establish abuse it does not have to demonstrate the actual effects of the behavior in question but need only show that the behavior “tends to distort competition [in] the relevant market” or that it is “capable of having that effect.” It then held that raising barriers to trade between Member States and thus to the internal market by discriminating against trading partners on the basis of nationality restricts competition within the internal market. The VAT requirement was found to create artificial barriers to market entry for electricity traders,
which in turn reduced liquidity in the wholesale electricity market.\textsuperscript{352} According to the decision, four energy companies were prevented from entering the Romanian market due to the registration requirement.\textsuperscript{353} The Commission also noted that liquidity and more generally the functioning of electricity markets benefit from a large number of participants at the wholesale level and, “[i]n the long-term, distorted electricity prices, resulting from unequal, discriminatory access of participants to the power exchange,” lead to inefficient investment, which in turn leads to higher prices for consumers.\textsuperscript{354}

After an assessment of the objective justification and efficiency arguments provided by OPCOM, the Commission dismissed them as not having been established\textsuperscript{355} and found OPCOM’s conduct abusive, subject to a fine of around €1 million.\textsuperscript{356}

The OPCOM decision is another example of the Commission intervening in a regulated utilities market using its competition tools. It presents an addition to limited—and rather dated—case law that finds discrimination on the grounds of nationality an abuse of dominance. What is striking is that such discrimination is treated as an issue of competition law rather than, for example, an issue of discrimination per se or an issue of free movement of capital, etc., since it is difficult to see why such discrimination would be objectionable only when the undertaking engaging in it is dominant. In fact, historical research shows that although discrimination on nationality grounds was initially considered to be included as a standalone prohibition among the competition rules by the drafters of the Treaty, it was soon taken out of this set of rules and put in a separate preliminary provision (then Article 7 EEC, now Article 18 TFEU) explicitly prohibiting discrimination on nationality grounds. That suggests that such discrimination is not covered by the competition rules but by other provisions in the Treaty.\textsuperscript{357} However, it is welcome that the Commission at least makes an effort to argue that such discrimination would eventually lead to higher prices for consumers since it limits the number of competitors in the relevant market. What is unfortunately missing from the Commission’s assessment is any empirical evidence demonstrating that a higher number of competitors in the relevant electricity market does indeed lead to lower prices.

\textsuperscript{352} Id. ¶ 174.
\textsuperscript{353} Id. ¶ 175.
\textsuperscript{354} Id. ¶ 178.
\textsuperscript{355} Id. ¶ 229.
\textsuperscript{356} Id. ¶ 319.
\textsuperscript{357} For an assessment of the travaux préparatoires, see Pinar Akman, Searching for the Long-Lost Soul of Article 82EC, 29 Oxford J. Legal Stud. 267, 283–87 (2009).
4. The Motorola Case

This decision concerns patents that Motorola declared essential to the GSM/GPRS standard and committed to license on FRAND terms. The dispute arose out of Motorola’s seeking to, inter alia, enjoin Apple from selling any Apple products in Germany that implement the asserted patents. The Commission explicitly noted that this decision meets the Commission’s enforcement priorities as set out in the Guidance, but there is no other reference in the decision to any substantive element of the Guidance.

The Commission defined the input market as the market for licensing Motorola’s technology as specified in the GPRS standard and the output market as the one in which GPRS standard-compliant products are sold. The relevant technology market encompassed Motorola’s GPRS SEP and “other technologies to which customers could switch in response to a small but permanent increase in relative prices of Motorola’s technology.” The Commission also found that there are no substitutes to Motorola’s technology for manufacturers of mobile devices in the EEA. Following on from this market definition, the Commission naturally found that Motorola held 100 percent share of the market for the technology to which Motorola’s GPRS SEP pertains. However, the Commission explicitly noted that the “mere holding or exercise of its rights” under the GPRS SEP does not “confer dominance,” which “must be assessed on the basis of all relevant factors.” According to the Commission, there were two such relevant factors: “first, the indispensability of the GPRS standard” for manufacturers of standard-compliant products, and “second, the industry lock-in to that standard.” The Commission held that “[d]ue to the widespread adoption of the GPRS standard, it is indispensable for manufacturers of mobile devices to comply with that standard.”

358 Case AT.39985—Motorola, supra note 102, ¶ 54.
359 Id. ¶¶ 115–116.
360 See id. ¶ 1 n.4.
361 Id. ¶ 184.
362 Id. ¶ 191. The reason for defining a separate relevant technology market (as opposed to a relevant input/output market) is because the Horizontal Guidelines require the Commission to do so “[w]hen intellectual property rights are marketed separately from the products to which they relate.” Eur. Comm’n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11) 1, ¶ 116.
363 Case AT.39985—Motorola, supra note 102, ¶ 193.
364 Id. ¶ 225.
365 Id. ¶ 226.
366 Id.
367 Id. ¶ 227.
Moreover, “Due to the wide adoption of GPRS in the EEA and the need of operators and device manufacturers to base their services and products on the same air interface technology,” in order to enable the devices’ communication with the network, “industry players are locked-in to the GPRS technology.”368 The emergence of an alternative technology was also found to be unlikely in the short to medium term.369 After a discussion of whether Apple’s buyer power would prevent Motorola from occupying a dominant position as alleged by Motorola, the Commission decided that this was not the case and that Motorola was indeed dominant in the relevant market.370

Although it is welcome that the Commission did not find that holding an SEP in itself leads to a dominant position, the relevant factors proposed by the Commission are likely to be satisfied in every case where an SEP is concerned since an SEP is by definition indispensable for the standard that it relates to and, similarly, the existence of a standard in itself might create a lock-in effect due to the inherent nature of standards. What the Commission in essence appears to be doing is establishing whether the standard itself has any actual or potential competition from a technical/technological point of view. A difficulty with this approach could be that the Commission might not be the best-placed party to establish the future development of an innovative, technology-driven sector and that it might in practice always lead to the conclusion that an SEP holder is dominant by virtue of the SEP.

Regarding abuse, the Commission reiterated earlier case law in stating that a dominant undertaking “may be deprived of the right to adopt a course of conduct or to take measures which are not in themselves abuses and which would be unobjectionable if adopted or taken by non-dominant undertakings.”371 The Commission also noted that in the majority of cases, abuses of a dominant position consist of behavior that is lawful under branches of law other than competition law.372 Furthermore, although an SEP holder does not abuse a dominant position merely by seeking and enforcing injunctions, exercising an exclusive right may, “in exceptional circumstances and absent any objective justification, involve abusive conduct.”373 According to the Commission, on the basis of existing case law, the list of these “exceptional circumstances is not exhaustive.”374 The Commission noted that “Motorola has a special responsibility to ensure that its conduct in relation to the . . . GPRS

368 Id. ¶ 231.
369 Id. ¶ 232.
370 Id. ¶¶ 269–270.
371 Id. ¶ 274.
372 Id. ¶ 275.
373 Id. ¶ 278.
374 Id.
SEP does not impair genuine undistorted competition in the internal market.”\footnote{Id. ¶ 279.} 

The Commission further explained that the “exceptional circumstances” that rendered Motorola’s behavior abusive were the GPRS standard-setting context and the commitment by Motorola to license the SEP on FRAND terms.\footnote{Id. ¶ 280.} After acknowledging that, “[a]s a general principle, a patent owner has the right both to refuse to license a patent and [also] to obtain remuneration” for licensing the patent, the Commission noted that the situation is different in the standard setting-context, where the owner voluntarily commits to license its SEP on FRAND terms and “the benefits of the standard-setting process in terms of increased compatibility, interoperability and competition, lower production and lower sales costs may be endangered” when a dominant undertaking seeks an injunction on the basis of an SEP.\footnote{Id. ¶¶ 282–284.} The decision further held that despite the prolonged litigation between Apple and Motorola, Apple was not an unwilling licensee.\footnote{Id. ¶ 307.} 

The Commission reiterated that the prohibition in Article 102 was aimed at behavior that “tends to restrict competition or is capable of having that effect, regardless of its success.”\footnote{Id. ¶ 308.} Moreover, the fact that an act, such as an injunction, by a judicial body was a precondition for anticompetitive effects to arise from the conduct could not affect the conduct’s abusive nature.\footnote{Id. ¶ 309.} Thus, Motorola was required neither to start nor maintain the proceedings seeking the injunction, nor to enforce the injunction once it was granted: while exercising that discretion, Motorola had to ensure that its elected course of conduct was consistent with its obligations under Article 102.\footnote{Id. ¶ 310.} Motorola’s choice to continue with the injunction proceedings and to enforce it against Apple was capable of having the anticompetitive effect of temporarily banning the online sale of Apple’s GPRS-compatible devices, of including licensing terms disadvantageous to Apple in the settlement agreement, and of having a negative impact on standard setting.\footnote{Id. ¶ 311.} 

Notably, only the last one of these identified effects directly concerns harm to competition in the overall market as opposed to effects on a competitor/customer (which may or may not indirectly have effects on the overall market and the state of competition therein). It is also striking that the Commission
found Motorola to have been in a position of not having to start or maintain the proceedings or enforce the injunction once granted; the presumption should be that Motorola was exercising its right to access the system of justice, not least because the injunction it sought was indeed granted by a German court, which suggests that Motorola had legitimate legal grounds to start or maintain the proceedings or enforce the injunction. Without making a finding that the court erroneously granted an injunction to Motorola as a result of, for example, deceptive conduct on the part of Motorola, the Commission’s position of requiring Motorola to justify its access to justice is not acceptable. This is aggravated by the fact that the Commission does not use the case law on vexatious litigation in reaching the decision that it did in *Motorola*, as will be discussed below.

The Commission identified the anticompetitive effect of temporarily eliminating Apple’s products from the German market as one that may limit consumer choice and partially eliminate downstream competition. One might have expected the Commission to examine how much competition there was in the downstream device market so as to establish whether it could be eliminated before reaching such a conclusion, but the Commission did not conduct such an examination. It is also interesting to note that the temporary ban on Apple products’ sales in Germany lasted only for a few hours and concerned only online sales for one night. The Commission’s response to these facts was that Article 102 prohibits abusive behavior regardless of its success and it is irrelevant that the desired result, namely the exclusion of Apple’s products, was “achieved only for a short period of time.”

The Commission also related the temporary ban to the other anticompetitive effect that it identified, namely that of Apple “accepting disadvantageous licensing terms requested by Motorola as a condition for not enforcing the injunction.” According to the Commission, the ban on Apple’s products lasted only a short while because Apple was led to accept the disadvantageous license terms; had Apple not accepted such terms, “the injunction and the ban would have remained in force.” The Commission found that “to avoid having its products removed from the market, Apple agreed to . . . disadvantageous licensing terms which it would likely not have agreed to” absent the injunction. The anticompetitive effects of such disadvantageous terms are identified to be a potential limitation on “Apple’s ability to influence the level of royalties it will have [to] pay to Motorola” and the possibility that it “may

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383 *Id.* ¶ 312.
384 *Id.* ¶ 317.
385 *Id.* ¶ 319.
386 *Id.* ¶ 320.
387 *Id.*
388 *Id.* ¶ 327.
lead other potential licensees of the SEPs covered by the [agreement] to pay for invalid IP." The gist of these arguments appears to be that by reserving the right to terminate the license of a licensee who sues for a declaration that the patent is invalid, Motorola not only can “influence the royalty rate to its advantage,” but consumers may also lose out as a result of licensees paying royalties for invalid IP, which will keep the prices of the devices incorporating such IP higher than they should be.

In *Motorola*, the Commission also considered whether there was any objective justification for the otherwise abusive conduct. All of Motorola’s arguments in this regard were dismissed. Motorola raised several issues such as the protection of its commercial interests; the contention that it acted in line with German case law; the relevant standard-setting policy not prescribing the waiver of the right to seek injunctions; the termination clause being in line with the Technology Transfer Block Exemption Regulation, and finally, the licensing agreement giving rise to efficiencies to the benefit of consumers. None of these reasons could objectively justify Motorola’s conduct according to the assessment of the Commission.

Certain aspects of *Motorola* are striking. First, Motorola was successful in obtaining an injunction from the German court, meaning that the court must have agreed that Motorola was properly exercising its rights. Second, it was the German court’s decision that found Apple’s licensing offer to be inadequate without the inclusion of the right to terminate on the part of Motorola if Apple challenges the validity of the relevant patent. In fact, according to one German court decision on the issue, the licensor can terminate a license with a licensee if the licensee challenges the validity of a patent anyway under German law. This same issue is also the crux of the Commission’s argument for why the licensing terms were disadvantageous to Apple. Third, the Commission disregarded the case law on vexatious litigation and created a new legal test that applies to the facts in this case. Instead of drawing on the case law on vexatious litigation, it drew an analogy between the case law

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389 Id. ¶ 336.
390 Id. ¶ 357.
391 Id. ¶ 377.
392 Id. ¶¶ 421–425.
393 See id. ¶ 496.
394 Id. ¶¶ 424–425. The Regulation that Motorola refers to is Commission Regulation (EC) No. 772/2004, 2004 O.J. (L 123) 11 (concerning the application of Article 81(3) of the Treaty to categories of technology transfer agreements).
395 See Case AT.39985—*Motorola*, supra note 102, ¶ 130.
396 See id. ¶ 142.
397 See id. ¶ 345.
398 See id. ¶ 320.
concerning the refusal to license IP and the case at hand,\textsuperscript{399} which is arguably inappropriate since the case law on vexatious litigation would appear to be more directly relevant for \textit{Motorola}. Motorola was already under a legal obligation to license and this case cannot really be considered one of refusal to license. It is more directly a case of preventing an undertaking from having recourse to the courts because it is an abuse of its dominant position to do so and therefore, the correct case law to consider would have been that concerning vexatious litigation, as argued by Motorola.\textsuperscript{400}

One cannot help but think that the Commission might have considered the conditions of that case law to be unmet on the facts. The Commission would have had to demonstrate first that seeking an injunction cannot be reasonably considered as an attempt to establish Motorola’s rights and therefore served only to hassle Apple, and second that the legal proceedings were conceived as part of a plan to eliminate competition.\textsuperscript{401} Satisfying the first criterion would have been a challenge in the face of the injunction granted by the German court. Satisfying the second criterion would have required demonstrating a plan to eliminate competition, which is not explicitly discussed in \textit{Motorola}. Instead, the Commission based its legal reasoning on “exceptional circumstances” which are far less specific and far more open to interpretation than the conditions for vexatious litigation. This is also unfortunate for legal certainty because “exceptional circumstances” in the presence of a not-unwilling-licensee as the test for when the request for an injunction by an SEP holder might be abusive does not provide guidance to SEP holders or potential licensees. The fact that the Commission used the lack of EU-level case law and diverging national case law on the matter as the “legitimate interest” under Article 7 Regulation 1/2003 for justifying an infringement decision despite the infringement being in the past (similar to \textit{Samsung} above) aggravates this position.\textsuperscript{402} It is also noteworthy that Motorola has not been fined due to the fact that there is no EU decisional practice concerning the issue at hand and that

\textsuperscript{399} See id. ¶ 531.
\textsuperscript{400} See id. ¶¶ 527–529.
\textsuperscript{401} See id. ¶ 527.
\textsuperscript{402} The abusive conduct was ended on May 29, 2012, namely about 3.5 months after the complaint to the Commission and around a year before an SO was sent to Motorola. See Case AT.39985—\textit{Motorola}, supra note 102, ¶¶ 20, 23, 443. The Commission also notes that the likely anticompetitive effects of Motorola’s conduct persist because the licensing agreement with Apple is still in force and that there is a multitude of disputes over FRAND-encumbered SEPs between industry players as two other factors justifying the taking of an infringement decision despite the abusive conduct being in the past. \textit{Id.} ¶¶ 554, 556.
national courts have reached diverging conclusions on the issue.\textsuperscript{403} Perhaps as a result of the absence of a fine, Motorola has not appealed this decision.\textsuperscript{404}

III. COMMENTS AND CONCLUSIONS

The Commission’s decisional practice regarding Article 102 demonstrates that the Commission has become more active post-Guidance in comparison to the period between the Discussion Paper and the Guidance. It has adopted almost six times as many decisions in the former as in the latter. As noted above, half of these decisions have been commitment decisions. The use of commitments reveals a conflict of interest between what may be seen as the “public interest” and the interests of the enforcer (Commission) as well as the potentially abusive undertaking. The conflict is particularly apparent in cases where there is a lack of case law and principles. In such cases, commitments become attractive not only to the undertaking (because of the uncertainty regarding what might happen if proceedings led to the adoption of an infringement decision) but also to the public enforcer (because of the uncertainty regarding what might happen if its decision were appealed).

Oddly enough, this conflict creates a vicious circle in that the less clarity and guidance there is in one particular area, the more likely that commitments will be attractive to all sides involved, leading to an even greater lack of guidance and clarity in that area. Although this might be desirable from the point of view of resolving a particular case for both the enforcer and the undertaking involved, it is not desirable for the legal system and is not in the “public interest” in the long term. The lack of resolution at a principle level of issues that require clarification can chill innovation and investment by undertakings that may be subject to the relevant competition rules and unable to establish ex ante whether their envisaged conduct is lawful, as well as lead to potentially wasteful enforcement costs including those that relate to settlements.

It has been noted that commitments can lead the Commission to shape its own competition policy outside the control of the EU courts.\textsuperscript{405} Indeed, none of the “public” benefits arising from infringement decisions such as deterrence, public censure, disgorgement of illicit gains or facilitation of follow-on damages claims are benefits for undertakings subject to infringement decisions, implying a systematic bias for commitments on their part.\textsuperscript{406} As Wils has remarked, optimally, commitment decisions should be used instead of in-

\textsuperscript{403} Id. ¶¶ 560–561.

\textsuperscript{404} After the cut-off date for this article, the ECJ has ruled on a similar matter in the context of a request for preliminary ruling under Article 267 TFEU in Case C-170/13, Huawei Technologies Co. Ltd. v. ZTE Corp., ECLI:EU:C:2015:477 (ECJ July 16, 2015).

\textsuperscript{405} Schweitzer, supra note 171, at 11.

\textsuperscript{406} WOUTER PJ WILS, EFFICIENCY AND JUSTICE IN EUROPEAN ANTITRUST ENFORCEMENT 31 (2008).
fringement decisions only in cases where the benefit in terms of the cost of longer proceedings outweighs the benefit of the other contributions that infringement decisions can make, in terms of clarification of the law, deterrence, etc.\textsuperscript{407} It would be more in line with the “public interest” in the long term if controversial and/or legally unclear issues were resolved with generally applicable principles rather than with firm-specific commitment agreements that carry no guidance for similar cases in the future.\textsuperscript{408} This has, in fact, been one of the criticisms directed at the use of commitments in the area of Article 102.\textsuperscript{409}

Commitment decisions “lack the adversarial element that is needed to establish legal rules” and standards that apply directly to third parties.\textsuperscript{410} One would expect commitments to be used in areas where there is established case law, so that the main advantage of commitments (reduced length and cost of enforcement) presents a real benefit. As demonstrated in Part II.B, the Commission does not seem to limit its use of commitments to such cases and instead has been using commitments in many cases that involved potentially novel abuses. The argument that commitments have been preferred in some of these cases due to the dynamic nature of the industries involved, making speedy resolution necessary, is not entirely convincing. With a few exceptions, post-Guidance commitment decisions have taken on average around two years to reach.\textsuperscript{411}

Overall, the heavy use of commitments which do not require any in-depth legal or economic assessment on the part of the Commission is not conducive to the development of a systematic, more economic approach and raises doubts about the Commission’s intentions toward such an approach. It also makes it very difficult to assess whether the Commission’s own modernization has been successful or even followed in practice by the Commission itself.

Regarding the prohibitions, one issue that stands out is that it remains unclear how the as-efficient competitor test is meant to be applied in practice.

\textsuperscript{407} Id. at 30.

\textsuperscript{408} In this vein, see the discussion in Wagner-von Papp, supra note 178, at 961–66.

\textsuperscript{409} See, e.g., id. at 962–63; Botteman & Patsa, supra note 101, at 363–64; see also Wagner-van Papp, supra note 178, at 950–51 (identifying the alignment of interest between the enforcer and the undertaking from a different point of view).

\textsuperscript{410} Cook, supra note 159, at 227.

\textsuperscript{411} The two main exceptions are those commitment decisions regarding the energy sector inquiry, such as E.On and Swedish Interconnectors, in which resolution was reached in four months and nine months, respectively. Case COMP/39.317—E.On, supra note 168; Case COMP/39.351—Swedish Interconnectors, Comm’n Decision, 2010 O.J. (C 142) 28. When these two decisions are taken out of the sample, post-Guidance commitment decisions have taken on average almost two and a half years to reach (around 28 months). With these decisions left in the sample, the average is just under two years (around 23 months).
Whose costs are the relevant benchmark for the assessment is somewhat ambiguous, particularly after *Intel*. If the relevant cost is that of the dominant undertaking (as it should be), then it would be much better for the Commission to expressly state this to be so in cases and as a principle without mixing in language that suggests the costs of a hypothetical competitor to be relevant. This would imply that the general test of abuse under Article 102 for exclusionary abuses is essentially that of predation. If the relevant cost benchmark for the as-efficient competitor test is genuinely that of a hypothetical as-efficient competitor, then the Commission must provide guidance regarding how these costs will be calculated, which would enable potentially dominant undertakings to assess for themselves the legality of their practices ex ante.

The possibility of the relevant cost benchmark being the costs of an undertaking other than the one under investigation is a genuine possibility given the acceptance of such an approach by the Court of Justice in *TeliaSonera* and the express provision indicating this possibility in the Guidance.412 Currently, confusion might indeed exist between the “as-efficient-competitor standard” as a guiding principle and the “test” applied in practice, which is ultimately a test of predation, and which would be better if explicitly acknowledged as such.

The so-called as-efficient competitor standard was proposed by Judge Richard Posner as the principle for judging practices that were allegedly exclusionary in the following terms: in every case in which an exclusionary practice is alleged, the plaintiff must prove that “first, the defendant has monopoly power and second that the challenged practice is likely in the circumstances to exclude from the defendant’s market an equally or more efficient competitor.”413 Further, “the defendant can rebut by proving that although it is a monopolist and the challenged practice exclusionary, the practice is, on balance, efficient.”414 Thus, the as-efficient competitor standard as originally conceived first involves establishing monopoly power415 and, second, it still provides the possibility of rebuttal by proof that the practice is on balance efficient.

It is striking that the standard proposed by Posner also does not make any reference to any cost levels. Posner uses below cost pricing only as an example of a practice that might exclude an equally or more efficient firm: “Practices that will exclude only less efficient firms, such as the monopolist’s dropping his price nearer to (but not below) his cost, are not actionable, be-

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413 RICHARD A. POSNER, ANTITRUST LAW 194–95 (2d ed. 2001).
414 Id. at 195.
415 Posner describes monopoly power as “a degree of control over price and output that far exceeds the minimal market power possessed by most sellers of nonfungible goods and services. Such power is ordinarily inferred from possession of a dominant share . . . in a market sufficiently broadly defined to include all close substitutes of the defendant’s product.” Id. at 195–96.
cause we want to encourage efficiency.” According to Posner, the law should step in only when monopoly power is used to “discourage equally or more efficient firms and thus perpetuate a monopoly not supported by superior efficiency.”

Thus, the Commission appears to pick and choose parts of the as-efficient-competitor standard and mix it with elements of the test for predation which leads to uncertainties and potential analytical and practical problems because they are not necessarily meant to fulfil the same function. In fact, the standard as originally conceived is not even that of the as-efficient-competitor but that of the “equally or more efficient competitor,” which the Commission does not seem to have taken on board in full.

One major problem with equating the as-efficient competitor standard with the predation test is that its applicability becomes limited to pricing abuses (as in the Guidance) although in theory, it should be possible to use it as a standard in all types of abuse cases (provided that it is complemented by specific tests). Similarly, when the as-efficient competitor standard is used as the test for establishing abuse in a case, because it is hypothetical in nature, one encounters the problem of whose costs are relevant. This essentially turns it into a test of predation in practice which, in turn, leads to lack of clarity resulting from the disjunction between the standard in theory (which is based on a hypothetical competitor) and the test in practice (which must be based on actual cost levels).

Therefore, in future cases, it would be better from a predictability and certainty point of view for the Commission to either acknowledge that the test for price-based exclusionary conduct is essentially that of predation or to explain how the hypothetical as-efficient competitor standard is to be applied in practice.

In the area of prohibitions, the post-Guidance prohibitions make it difficult to assess the Guidance’s success not least because there is hardly any reference to the Guidance therein. Moreover, the available decisions either concern novel practices, technology markets with unique characteristics, or regulated markets with unique characteristics. For example, TP is an instance of regulatory failure and therefore does not really present an accurate picture of the implementation and/or impact of the Guidance in practice. The decision is more about fixing the problems created by failed regulation. Therefore, even from the perspective of establishing the Commission’s enforcement priorities

416 Id. at 196.
417 Id.
418 The Guidance discusses the as-efficient competitor test only in the context of price-based exclusionary conduct as a general test. Guidance, supra note 4, ¶¶ 23–27.
it is perhaps an unfortunate example because of the special regulatory circumstances of the case. It is impossible to know whether the Commission acted on this case due to the regulatory failure or whether it would have pursued the case even if there were no such regulatory issues. The same can be said of OPCOM, where the market was regulated, as well, and the Commission’s intervention on the grounds of nationality-based discrimination appears to be more concerned with the erection of barriers to trade between Member States than competition per se.

Concerning the substance of the decisions irrespective of their unusual contexts, the argument adopted in TP, OPCOM, and Motorola that some practices are abusive in themselves is not a move in the right direction regarding the approach to Article 102. It is not in line with a modern approach based on sound economics and does not provide any ex ante certainty to potentially dominant undertakings regarding their conduct: it more closely resembles a traditional form-based approach.

Rejections are perhaps the most interesting types of decisions for demonstrating whether or not the Commission’s approach has changed since the adoption of the Guidance. As noted above, in the period since the publication of the Discussion Paper, all of the rejections have been post-Guidance. Unfortunately, some of these are not available in English, preventing their use for the purposes of this article. However, on the basis of some of the rejections like EFIM, where under the traditional case law following Hilti and Hugin one might have thought that the Commission could see scope for intervention, the Commission has demonstrated a modern approach by not pursuing the case further. Therefore, the rejections might indeed be the outcome of a more modern approach to Article 102, but further research covering all of the rejections is required to examine this thoroughly.

Overall, the Guidance and, to a degree, the Commission’s decisional practice under Article 102 since the Guidance, evidence a conflict between flexibility and predictability. It has been argued that one challenge facing the Commission during the reform process was the fact that the Commission is an inherently conservative body, and that the authors of the guidelines [sic] needed to deal with a number of diverse internal interest groups. The tendency to add caveats and exceptions in this situation, and to keep enforcement options open, makes it inevitable that the end product will contain some contradictions and clashes of philosophy, and that it will err on the side of over-enforcement.419

It has also been argued that “potentially dominant companies will continue to face significant uncertainty when self-assessing the risk that a specific com-

419 Ridyard, supra note 3, at 235.
commercial conduct could be seen as exclusionary abuse.”  This is because the Guidance often requires complex analyses, “reliance on information that companies often will not be able to establish with a high degree of certainty,” and “grants the Commission significant flexibility not only regarding the type of evidence it will look at, but also regarding the weight to be attributed to the various factors that are part of the assessment.” Indeed, there are “very few bright line rules.”

For undertakings that are potentially subject to the prohibition of Article 102, this means that the value of the Guidance cannot be too significant, particularly when it comes to those areas of the law where the case law is not well established. Where the case law is well established, the need for guidance could not have been very high in the first place. Thus, one is left wondering how necessary the Guidance was, given the way it was drafted in the first place. Similarly, the flexibility retained in the Guidance with principles being complemented by numerous exceptions might also reduce the usefulness of the Guidance for competition authorities around the world who might look up to the Commission for “guidance.”

The heavy use of commitments exacerbates the situation since they do not contribute at all to increasing legal or business certainty which the Guidance might have failed to provide adequately. Out of a total of 16 commitment decisions post-Guidance, there are only three in which the Commission has made any reference at all to the Guidance. Such heavy use of commitments coupled with a lack of references to the Guidance demonstrate an apparent lack of enthusiasm for the Guidance within the Commission and this further raises questions about the state of the Guidance as an official document.

It also means that, in practice, observing the increasing use of commitments in the area of abuse of dominance, potentially dominant undertakings will seek to find principles and rules in these commitment decisions as opposed to the Guidance. This, however, will only create a situation akin to that existing before the adoption of the Guidance since, if the case law relating to Article 102 lacked any clear lines, the commitment decisions will lack predictability and certainty to an even greater extent as they are all specific to individual cases and do not require any detailed general substantive legal or economic

\(^{420}\) Gutermuth, supra note 19, at 12.  
\(^{421}\) Id. at 12–13.  
\(^{422}\) Id. at 13; see also Gravengaard & Kjaersgaard, supra note 19, at 286.  
\(^{423}\) See Padilla, supra note 9, at 229 for the argument that it is not a secret that the Commission’s legal service does not like the Guidance, and the legal service is focused on winning cases. Consequently, the legal service is not willing to surrender its powerful litigation tool (i.e., the formalistic traditional case law) as long as the EU courts endorse the formalistic approach.
assessment. The reform of Article 102 might thus be a mission not yet accomplished.