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SOFT LAW IN EU COMPETITION LAW AND ITS RECEPTION IN MEMBER STATES' COURTS

An Empirical Study on National Judicial Attitudes to Atypical Legal Instruments in EU Competition Law

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Soft Law in EU Competition Law and its Reception in Member States' Courts

An Empirical Study on National Judicial Attitudes to Atypical Legal Instruments in EU Competition Law

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To my ‘partner in crime’

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INTRODUCTION

1. The Modernization Regulation and the re-defined role of competition soft law

This research focuses on surveying judicial attitudes to soft law instruments issued by the supranational administrator – the European Commission – and is embedded in the domain of EU competition law in the so-called 'post-Modernization period' – the timeframe between the introduction of the 'modernization' Regulation 1/2003 in May 2004[1] and current times.[2] The increased importance of soft law in national and supranational EU competition law enforcement is intimately connected to the process of decentralization, whereby the entry into force of the 'modernization' Regulation 1/2003 on May 1st 2004 abolished the regime of Commission-controlled exemptions to anti-competitive conduct under Article 101(3) TFEU. With the granting of direct effect to the latter article, National Competition Authorities (NCAs) and courts acquired full powers over EU competition law enforcement, concurrent with those of the Commission, with the notable exception that NCAs do not have the power to issue negative (no-infringement) decisions under Article 101(1) TFEU.[3]

At the same time, undertakings – the main subjects of the enforcement regime – lost the opportunity to ask the Commission for official individual exemptions under Article 101(3) TFEU; they were instead required to self-assess their conduct and decide on their own risk whether it could be in breach of competition law. In order to self-assess, firms are now to use the substantial amount of established competition hard law (legislation, Commission decisions and judgments of the supranational courts) and are additionally provided with Commission-issued soft instruments (guidelines, notices, and the like).[4] Therefore, as vessels of the 'more economic approach', the latter instruments are, on the one hand, to serve as self-assessment aids to businesses across the EU. In this sense, the importance of soft law as an interpretative tool for businesses is significant and is supposed to further the principle of legal certainty.

[1] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 001/1 (Regulation 1/2003).
[2] The cutoff-date for the empirical research is December 2015.
[3] See Case C-375/09 *Tele2 Polska* [2011] ECR I-3055 – paras 19 to 30. The task of granting negative (no-infringement) decisions at national level is left to national courts, which further enhances and complicates their role in the decentralized regime.
[4] There are further tools (such as guidance letters) that are available to undertakings under Regulation 1/2003.

The significance of soft law in the decentralized enforcement regime becomes even more apparent when one factors in the challenges to consistency that such an institutional design poses. The challenge to consistency was recognized by the Commission in its White Paper on Modernization,[5] and its reports on the functioning of Regulation 1/2003 in 2009 and 2014, respectively. In order to curb the possibility for divergences in the decisional practices of the different – national and supranational – enforcement actors, the resulting Regulation 1/2003 contains several consistency-securing provisions.[6] On top of this legislative solution, Commission-issued soft law in the field is supposed to further guard against possible inconsistent outcomes.[7] However, the important consistency and legal certainty-enhancing functions[8] of competition soft law are mixed with a soft (non-binding) legal nature, which creates obstacles to the latter instruments' justiciability. This lack of justiciability not only threatens the consistency of substantive outcomes of (public) competition disputes, but also hampers legal certainty for businesses which – although using supranational soft law for self-assessment – will likely be unsuccessful in invoking it in (private disputes) in courts of law. It is therefore important to explore the question of how non-binding competition instruments can contribute to much needed legal certainty and consistency in decentralized competition enforcement across Member States.[9] To answer this question, the current work sets out to perform an empirical study on national judicial attitudes to Commission-issued soft law in the area of competition law. The findings will be analyzed from the perspectives of consistency and certainty in the law, following which conclusions will be drawn and relevant recommendations proposed.

2. Supranational (Commission-issued) competition soft law[10]

Supranational competition soft law: definition

The most comprehensive and accepted scholarly definition of soft law is given by Francis Snyder in his essay of the mid-90's entitled 'The Effectiveness of EC Law'.[11] Snyder deems soft law to

[5] Commission White Paper on modernization of the rules implementing Articles 85 and 86 of the EC Treaty [1999] OJ C 132/01 (White Paper on Modernization).
[6] Articles 3, 11, 16 of Regulation 1/2003.
[7] White Paper on Modernization (n 5), paras. 83 *et seq*.
[8] With regard to soft law's importance, Parret observes that Commission-issued competition soft law constitutes the only group of legal instruments (besides the Block Exemption Regulations) that tackles the substantive enforcement side of the modernized competition regime. See L. Parret, 'Do we (Still) Know what we are Protecting?' (2009) TILEC Discussion Paper 2009-010, 29.
[9] Nevertheless, as submitted by Petit and Rato, such certainty is much needed particularly in instances where the law is unclear or in a state of flux. They thus lament that courts rarely (if at all) rule on the legal effects of soft law instruments. See N. Petit and M. Rato, 'From Hard to Soft Enforcement of EC Competition Law – a Bestiary of "Sunshine" Enforcement Instruments' in Petit/Gheur (eds), *Alternative Enforcement Techniques in EC Competition Law* (Bruylant, 2008).
[10] The terms 'supranational' and 'Commission-issued' soft law are used interchangeably in this dissertation.

encompass 'rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects.'[12] Senden further delineates this definition by adding that soft law, on top of practical effects, may also produce 'legal effects'.[13] The conceptualisation of soft law by Senden, later used by Stefan,[14] is also the definition that this thesis adopts, with the addition that Commission-issued competition soft law are acts of administrative guidance that are not a transitory legal form paving the way to legislation.[15] In that sense, the definition of soft law to be used by this work is as follows:

Acts of administrative guidance, which in principle have no legally binding force, but which nevertheless have practical and legal effects.

While the distinction between practical and legal effects will be addressed further in this section, it is hereby important to classify and clarify the scope of the term Commission-issued competition soft law used by this work.

Supranational competition soft law: classification

The instruments in question fit into the category of 'interpretative' and/or 'decisional' soft instruments according to a classification proposed by Senden.[16] They derive their denominations from the fact that they (1) give the Commission's interpretation of the law and/or (2) express rules by means of which the Commission circumscribes its decisional discretion. The former type of act can be seen as directed to third parties (external orientation), while the latter has an internal orientation (Commission sets limits to own discretion).[17]However, this distinction is not strict and some soft instruments are relevant for both the internal workings of the Commission and are oriented towards external parties. By the same token, because it is difficult to categorize supranational competition

[11] F. Snyder, 'The Effectiveness of EC Law' in T Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (Chichester, West Sussex, New York : J. Wiley, 1995).
[12] Ibid.
[13] L. Senden, *Soft Law in European Community Law: its Relationship to Legislation* (Wolf Legal Publishers ,2003), 139-141. The same distinction is also made by Valentine Korah. See V.Korah*, Intellectual Property Rights and the EC Competition Rules* (1st edn, Hart Publishing, 2006), 21-26.
[14] O. Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International, 2012), Chapter 1.
[15] L.Idot, 'Soft Law and Competition Law' (2007) 2 Concurrences, para. 3.
[16] Senden (n 13), 143-159. Senden argues that most of soft law cannot be seen as either purely interpretative or purely decisional – usually it is a mix of the two. In that regard, see also Korah (n 13), 23-24.
[17] This distinction has also been made by D. Sarmiento, 'European Soft Law and National Authorities: Incorporation, Enforcement and Interference' in J. Ilianopoulos-Strangas (ed), *The Soft Law of European Organisations* (SIPE 2012), 265.

soft law instruments as either only decisional or only interpretative, this study remains wary of the distinction, while employing a different classification that informs the research design.[18]

The French scholars Idot and Vincent,[19] while acknowledging that soft law can have internal or external orientation as established above, categorize the said instruments into substantive and procedural. Furthermore, Idot introduces a third sub-category – instruments that 'address questions of method', giving as an example the Notice on the definition of relevant market.[20] This work adopts Idot/Vincent's classification, referring to instruments addressing questions of method as 'scope' instruments, and adding to this category the Effect on Trade Notice and the *De Minimis* Notice.[21] This is because, since they chart the boundaries of the 'effect on trade' and 'effect on competition' criteria, both the Effect on Trade and the *De Minimis* notice can be said to refer to the scope of application of EU Competition Law rather than to the way in which the Commission is to apply/interpret the substantive core of Articles 101 and 102 TFEU (this role is played by 'substantive' soft law instruments). By the same token, the Relevant Market Notice, insofar as it lays the foundations for an analysis of the substantive competition provisions, can also be seen as a 'scope' instrument. Finally, the procedural soft law category identified by Idot is hereby referred to as 'application' instruments (e.g. the Leniency Notice, the Fining Guidelines, the Notice on Settlements).[22]

In light of the classification of Idot and Vincent, this thesis does not concern itself with instruments of method or procedure (scope or application, respectively), but only with substantive supranational competition soft law. Only substantive instruments are chosen for this study because, as both Idot

[18] A study on the workings of state aid, competition and telecommunications supranational soft law in national legal orders shows that the distinction between 'decisional' and 'interpretative' instruments can make a difference for the way in which national legislatures and judiciaries interact with supranational soft law. See H.Luijendijk and L.Senden, 'De Gelaagde Doorwerking van Europese Administratieve Soft Law in de Nationale Rechtsorde' (2011) NVER Preadvies, available at < https://static1.squarespace.com/static/5574a2fae4b0083487121509/t/557c3f68e4b014e8c75335be/1434206056901/Preadvies2011_NVER_Luijendijk_Senden.pdf >. However, according to the author of this dissertation, the lines between 'decisional' and 'interpretative' soft law are rather blurred in the field of competition law, which is why this study relies on a different classification by L.Idot (n 15) that is also adopted by C. Vincent. See C. Vincent, 'La Force Normative des Communications et Lignes Directrices en Droit Europeén de la Concurrence', in Catherine Thibierge et al (ed), *La Force Normativ*e. *Naissance d'un Concept* (Bruylant, 2009), 691-457.

[19] L.Idot and C.Vincent (n 18). See also N. Petit, 'Rebates and Article 102 TFEU: the European Commission's Duty to Apply the Guidance Paper' (2015) SSRN Paper, available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695732 >, 8. In this paper, Petit distinguishes between substantive, punitive and procedural instruments. For the purposes of this work, the latter two categories are merged into the category 'application instruments'.

[20] Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] OJ C 372/03 (Relevant Market Notice).

[21] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C 291/01 (*De Minimis* Norice) and Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/07 (Effect on Trade Notice).

[22] These concrete examples of procedural soft law are given in W. Sauter, *Coherence in EU Competition Law* (Oxford Studies in European Law, 2016), 24.

and Vincent testify, the justiciability of substantive competition soft law has not yet been tested by supranational courts.[23] Therefore, there is (even) less certainty as to the legal effects of those instruments, which makes it particularly attractive to study their judicial reception at the national level.

The final selection of substantive soft law was thus made by consulting the Commission Compilations of EU Antitrust Legislation[24] and excluding procedural (application) and method (scope) soft law instruments.[25] The derived sample, reflected in bold script in Table 1 below, comprises of the Vertical Guidelines, the Horizontal Agreements Guidelines, the Article 81(3) Guidelines, the Article 82 Guidance Paper and the Technology Transfer Guidelines.[26]

A final observation on the hereby selected soft law instruments concerns the rather uncertain legal status of the Article 82 Guidance Paper. The Guidance Paper is considered as a substantive soft law instrument by this work because, unlike the instrument's title, stating that it constitutes mere 'enforcement priorities', its substance clearly aims at (re-)interpreting the law on abuse of dominant position as several prominent scholars point out.[27] This dichotomy influences the way in which the national judiciary treats the Guidance Paper in its discourse as will be shown in subsequent chapters. A further reflection on the (special) legal status of the Guidance Paper in light of the empirical results will be offered in Chapter 4.

[23] L.Idot (n 18), para. 78. C. Vincent (n 18), 701. Unlike substantive supranational soft law, the justiciability of 'scope' soft law, for instance the *De Minimis* Notice, has been tested by the CJEU in the *Expedia* judgment (Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] ECR-General); the Effect on Trade Notice has been challenged in the *Ziegler* case (Case C-501/11P *Ziegler v Commission* [2013] ECR-General). The same goes for 'application' soft law; for instance, the Fining Guidelines have been the subject of a General Court's judgment in Case T-9/99 *HFB and Others v Commission* [2002] ECR-II 01487.

[24] The Compilations can be consulted on the following web address : <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>. The Handbooks relevant to the scope of this research are the Handbook on General Rules (Vol.1) and the Handbook on General Block Exemption Regulations and Guidelines (Vol.2). The Handbook on Sector-specific Rules (Vol.3) is excluded because sector-specific regulation falls out of the scope of the current research project.

[25] Procedural (application) instruments are all listed in the Commission Handbook on General Rules (Vol.1) and are denoted with the following letter-number combinations therein: D1, D2, D3, D9, D10, D11, D12, D13, D14. Method (scope) instruments are also listed in this document and denoted with the following letter-number combinations: D4, D5, D6.

[26] Commission Notice: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7; Guidelines on vertical restraints [2010] OJ C 130/1; Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C 101/2; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/1.

[27] G.Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1(1) Journal of European Competition Law and Practice, 2. See also L.F. Pace, 'The Italian Way of Tackling the Abuse of a Dominant Position and the Inconsistencies of the Commission's Guidance: not a Notice but a Communication' in L.F.Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar, 2011), 103, N. Petit, 'The AG's Opinion in *Intel v Commission*: Eight Points of Common Sense for Consideration by the CJEU' (2016) SSRN paper, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875422 >, where the author claims the AEC test is a legality and not a priorities test, and P.I. Colomo, 'Three Shifts in EU Competition Policy: towards Standards, Decentralization, Settlements' (2013) 20(3) Maastricht Journal of European and Comparative Law, 363.

SUBSTATNIVE SOFT LAW	PROCEDURAL(APPLICATION) SOFT LAW	(SCOPE) SOFT LAW CONCERNING QUESTIONS OF METHOD
- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11/1, 14.1.2011) **- Guidelines on Vertical Restraints, (OJ C 130/1, 19.5.2010)** **- Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ C 101/2, 27.4.2004)** **- Commission Notice: Guidelines on the application of Article 81(3) of the Treaty (OJ C 101/97, 27.4.2004)** **- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45/7, 24.2.2009)**	- Commission Notice on the best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308/6, 20.10.2011) - Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), (OJ C 101/43, 27.4.2004) - Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101/54, 27.4.2004) - Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003/EC (OJ C 210/2, 1.9.2006) - Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101/65, 27.4.2004) - Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (OJ C 101/78, 27.4.2004) - Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, (OJ C 325/7, 22.12.2005) - Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation 1/2003/EC in cartel cases (OJ C 167/1, 2.7.2008) - Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298/17, 8.12.2006)	- Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997) - Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C 368/13, 22.12.2001) - Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101/81, 27.4.2004)

TABLE 1

The legal versus practical effects of supranational competition soft law

Before proceeding to the research setup of this project, referring back to the definition of soft law employed above, a word on the important distinction between practical and legal effects of soft law is hereby warranted.

If a soft law instrument produces legal effects, the said instrument is able to affect the legal situation of (legal or natural) persons, or, as Stefan puts it 'legal effects consist of the capacity of EU legal instruments to change the rights and obligations of actors.'[28] For instance, in the case of competition law, the CJEU has held that Commission-issued soft law binds the institutions' discretion, which also

[28] O. Stefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance' (2014) 21(2) Maastricht Journal of European and Comparative Law.

means that individuals can invoke supranational soft law vis-à-vis the Commission that will then have to comply with its own text on the basis of the principles of legitimate expectations and equality.[29]

The principle of legitimate expectations working in actions against the Commission should be distinguished from the practical, compliance-inducing expectations that soft law can incite in actors/businesses operating within the EU. The latter phenomenon describes the practical effects of soft law that could include 'policy change in line with the soft law act but may also refer to more subtle impacts on national debates and discourses, changes in ways of conceptualizing policy (policy principles), and in collective understandings and identities.'[30] A good example in that respect is provided by Joanne Scott in her account on the so-called 'large hydro guidelines' – a voluntary harmonization soft instrument in the area of EU environmental law, adopted outside the legislative procedures of the EU, but nevertheless exerting 'a powerful influence on the behavior of Member States'.[31] The pertinent question thus is to what extent – if at all – do these practical repercussions also have a legal dimension?

In that respect, it is important to note that the line between practical and legal effects is drawn by the judiciary – 'the extent to which soft law is justiciable depends on the readiness of the CJEU to give legal weight to the effects such instruments might entail in practice.'[32] The judiciary will endow soft law with legal effects depending on 'whether or not there is a legal obligation to give effect to or comply with the rights and obligations contained in a Community soft law act'.[33] This reasoning is also valid for the national level and national courts, where this research is aimed at.[34] As the dividing line between practical and legal effects of soft law in national legal orders remains largely under-explored, the current work employs a comparative-empirical method to shed more light on the matter in the realm of EU competition law.

[29] Case C-189/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-05425, para. 211.
[30] K. Jacobsson, 'Between Deliberation and Discipline: Soft Governance in EU Employment Policy' in U. Morth (ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar, 2004), 89.
[31] Joanne Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law' (2011) 48(2) Common Market Law Review, 329.
[32] Ibid., 369.
[33] Senden (n 13), 268.
[34] The national legislature can also decide on the legal effects of supranational soft law by means of 'implementation' of these instruments in the national legal order. National administrative authorities can also influence the legal effects of supranational soft law in the national legal order by adopting them as part of their own administrative praxis. See Luijendijk and Senden (n 18), parts D and E. The way that the national legislator and administrative apparatus can influence the legal effects of supranational soft law in the national legal order remains outside the scope of the current work.

3. Scope of research and significance of the project

The duality of soft law

The aim of this work is twofold. Firstly, it sets out to empirically survey national judicial attitudes to supranational competition soft law in order to discover whether, as the Commission itself claims,[35] soft law contributes to the enhancement of legal certainty and consistency in the decentralized competition enforcement system.

Secondly, it makes a normative claim that, for the purposes of the enhancement and furthering of the 'more economic' substantive base of decentralized competition enforcement, courts should be receptive of the contents of supranational competition soft law, adopting a flexible/hybridity attitude to these instruments as delineated in the theoretical section that follows. Within this theoretical framework, it is maintained that national courts, as final instances of normative ordering in Member States, are uniquely positioned to judge on the ability of Commission-issued competition soft instruments to produce legal (as opposed to practical) effects and thus foster the principles of consistency and legal certainty in the 'modernized' enforcement regime.

It is also acknowledged that, due to the non-binding nature of the instruments, judicial interpretation thereof might challenge exactly the same principles that soft law is supposed to further. In particular, Senden and van Dam chart the main avenues through which the use of supranational soft law by the Commission can pose a threat to the (national and supranational) principles of legal certainty, consistency and legality. [36] The principle of legality is challenged by the non-democratic adoption of supranational soft law and the Commission's attempts at using these instruments in order to impose obligations going further than those charted out in hard law. The principles of legal certainty and consistency are undermined by soft law's uncertain workings in national legal orders – the legal vis-à-vis practical effects that those instruments generate are far from clear, which is where this work aims to contribute to the debate by zooming in on courts.

This thesis suggests that the dilemma charted out above can be attenuated and argues that, in order for judicial interpretation of soft law not to clash with the said principles – on the contrary, to further them – judicial engagement with soft law needs to be explicit and meticulously reasoned and to

[35] White Paper on Modernization (n 5). See also Commission Staff Working Paper – Report on the Functioning of Regulation 1/2003, COM (2009)206 final, SEC/2009/0574 final, S.2.3 (Report on the Functioning of Regulation 1/2003).
[36] Luijendijk and Senden (n 18), 11 and Claartje van Dam, 'De Doorwerking van Europese Adminitratieve Soft Law: in Strijd met de Nederlandse Legaliteit' (2013) NALL – Netherlands Administrative Law Library, S. 4.

reflect a common standard of interpretation – the 'comply or explain' principle.[37] This point will be further elaborated on in Chapter 4 of the current work.

Overall, this thesis is conceived as an empirical inquiry into national judicial engagement with Commission-issued competition soft law that, basing itself on the generated results, surveys the ability of the said instruments to enhance legal certainty and consistency within the decentralized system of competition law enforcement. As a second step, the latter point is taken as a normative perspective and justified as such by argumentation on the basis of EU governance literature on judicial flexibility/hybridity. This design warrants the following research questions:

1. *How do national courts deal with the soft, legally non-binding legislative instruments now prevalent in EU Competition Policy? Is soft law:*
   a) *explicitly treated in case law? (Indicator: statement by the court that it is guided by relevant piece of soft law in its reasoning)* ***OR***
   b) *implicitly considered? (Indicator: the judgment comes to a result not inconsistent with the prescriptions of soft law, but neither substantive provisions of the relevant instruments, nor the instruments themselves are mentioned in the judgment proper)* ***OR***
   c) *rejected? (Indicator: explicitly or implicitly, the reasoning of the judgment is inconsistent with the provisions of an invoked soft law instrument)*

2. *How are these choices justified?*

3. To what extent do empirical findings lend support to the Commission's claim that the use of soft law contributes to the enhancement of legal certainty and consistency in the decentralized enforcement framework of EU Competition Law?

4. What conditions should apply to national (and EU) courts for the latter rule of law principles to be furthered (and not hampered) by means of soft law? How should those conditions be applied?

Why national courts and supranational competition soft law?

The thus adopted design is particularly suitable for the study of the phenomenon of soft law in competition law for two inter-related reasons. Firstly, in a post-decentralization EU competition law context, it is both of practical and academic interest to undertake empirical studies of the way in

[37] D. Chalmers and G. Monti, *European Union Law* (2nd ed., CUP 2010), Ch. 9.

which national courts engage with EU norms, not the least because the European Commission has itself called for such an effort.[38] Secondly, current (new) governance literature engages very little with understanding the mechanisms through which soft law might be taken into account by national courts.

To sum up, supranational competition soft law in the hands of national courts can either prove to be an opportunity or a threat to a substantive and consistent alignment with a 'more economic' competition law. Soft law can be an opportunity (if judicially endorsed) for aligning national judicial discourse with the position of the European Commission and, by implication, NCAs, which could eventually stir the supranational judiciary in the same direction.[39] Alternatively, supranational competition soft law can prove to be a complication if judicially rejected or not engaged with at all, since it is an important substantive instrument of enforcement, capable of sufficiently informing all actors what current practice in the field is.[40] In light of the central role the national judiciary assumes with regard to securing the aims of certainty and consistency in competition enforcement, [41] it is necessary for it to not only delineate, but to also as far as possible explain[42] its attitude to Commission-issued competition soft law.

4. Theoretical Setup

Constructivism versus formalism and the multi-level governance debate

As reflected in this work's research questions, judicial engagement with soft law will be examined through the lens of two main theoretical strands on the role of the judiciary in interpreting norms –

[38] Report on the Functioning of Regulation 1/2003(n 34), para. 36.

[39] This is, of course, assuming that bottom-up (and not only top-down) alignments of judicial discourse are possible. Scholars, however, usually discuss the problem of substantive alignment from a top-down perspective, emphasizing the detrimental consequences of misaligned Commission and supranational judicial discourse on national enforcement institutions (courts and NCAs).

[40] In this regard, Gerber and Cassinis stipulate that 'In sum, the new system emphasizes a general expectation of systemic consistency with the decisional practice of the Commission as well as with its competition policy guidelines. The MS authorities play an important role in establishing these guidelines.' See P. Cassinis and D.Gerber, 'The "Modernization" of European Community Competition Law: Achieving Consistency in Enforcement: Part 1' (2006) 27(1) European Competition Law Review, 11. On the other hand, as stipulated by B. de Ghelcke, although in theory Commission-issued competition soft law provides abundant guidance both to the parties to a dispute and to judges, it is difficult to divine whether it really facilitates competition law practice, especially in light of soft law's optional authority – 'while the guidelines will be helpful with regard to the reasoning to be followed, […] the problem of actual application to the case remains'. See See B. van de Walle de Ghelcke, 'Modernization: Will it Increase Litigation in the National Courts and Before National Authorities?' in Geradin (ed), *Modernization and Enlargement: Two Major Challenges for EC Competition Law* (Intersentia, 2004), 137.

[41] Judge Forwood puts an emphasis on the important role of courts for coherence of enforcement. See N. Forwood, 'The Commission's More Economic Approach – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review' in Ehlermann/Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2010).

[42] Joanne Scott obviates the necessity for the (supranational) judiciary to engage with and explain its views on a specific type of soft law (called by her 'post-legislative guidance' that is comprised of, among others, competition soft law). See Joanne Scott (n 31).

(1) the divide between a flexible (pluralist, constructivist) versus a formalist (positivist, realist) role of courts[43] and (2) the multi-level governance embedded gap, hybridity, and transformation thesis proposed by de Burca and Scott.[44] Throughout this work, the author adopts a framework that integrates these two approaches and, insofar as either of these theories is referred to in the chapters to follow, this should be seen as a reflection of both of the above theoretical strands. The way in which these two theories are integrated for the purposes of this project will be hereby explained.

The formalist (or positivist) theory regards as sources of law only those norms that have acquired their legal validity through constitutionally endorsed lawmaking processes; this conception allows drawing a clear boundary between law and non-law, soft law pertaining to the latter category. Thus, should judicial attitude be informed by the formalist tradition, even if pressure is mounting for recognition of soft law, judicial neglect or rejection would follow since formalist interpretation teaches that lack of legal validity prevents soft norms from being interpreted in courts of law.

According to constructivist and pluralist accounts, on the other hand, a court has to exhibit a flexible attitude to sources for legal interpretation.[45] This theoretical construct purports that, 'The law cannot be perceived as a harmonic organized system but rather is characterized by variations,' which allows the classical law/non-law debate of formalists to shift to a debate about 'the extent to which a certain association perceives itself to be obliged to follow certain norms, rather than the norm's formal [legal] status.'[46] Insofar as pluralistic theory originates in comparative studies to further the understanding of foreign laws,[47] it is also a particularly suitable explanatory tool for this – also comparative – study.

The dichotomy between flexible/pluralist and formalist attitudes to legal norms is also reflected in the field of multi-level governance, where it subsists as the 'gap, hybridity and transformation' thesis. This theory is relevant to the current study because the above-discussed decentralization of the EU competition regime introduced a multi-level governance dimension to the interactions of the actors engaged in enforcement. In such a setup, traditional law and non-binding soft law coexist on the

[43] For international law, see, for instance, J. Klabbers, 'The Redundancy of Soft Law' (1996) 65(2) Nordic Journal of International Law, 167; for EU law, see G.M. Borchardt and K.C. Wellens, 'Soft Law in European Community Law' (1989) 14(5) European Law Review, 267.
[44] G. de Burca and J.Scott, 'New Governance, Law and Constitutionalism' in G. de Burca and J. Scott (eds), *Law and New Governance in the EU and the US (Essays in European Law)* (Hart Publishing, 2006).
[45] Jessica van der Sluijs, 'Soft Law – an International Concept in a National Context' (2013) 58 Scandinavian Studies in Law, 285.
[46] Ibid., 299,301.
[47] Ibid., 300.

basis of interactions famously dubbed the 'hybridity', 'transformation' and 'gap' theses by de Burca and Scott.[48] In short, the hybridity thesis presupposes coexistence between law and governance processes and instruments, the gap thesis assumes their mutual exclusion and the transformation scenario hypothesizes that law and governance mutually influence and shape one another.

As Korkea-Aho testifies, this theoretical framework also neatly depicts the ways in which courts engage (or fail to engage) with new governance processes.[49] On the one hand, the gap thesis would reflect a formalist judicial attitude to soft law, whereby courts see themselves as interpreters of hard legal rules only with the aim to either (1) lay out and enforce rights and obligations or (2) provide doctrinal elaborations and clarifications, or (3) settle disputes.[50] On the other hand, both the hybridity and transformation theses would signal a flexible judicial approach and courts willing to accommodate new governance processes in judicial practice.[51]

Judicial reactions to soft law

On the basis of these theoretical accounts, four scenarios for national judicial engagement with Commission-issued competition soft law are envisioned. The first two scenarios can be seen as belonging to an overall 'refusal for recognition' category, while the latter two can be included in a broader 'recognition' category. The options thus envisioned are the following:

(i) *An explicit rejection* scenario, pursuant to the gap thesis, can be envisioned when courts adopt a formalist stance and thus explicitly refuse to engage with the contents of a soft law instrument. The argument that would be given in such a case (if at all) would be that the court does not interpret non-binding provisions (non-law).

(ii) *Neglect,* on the other hand, is detected where the soft law instrument is ignored even if invoked in an argument made by the parties to the dispute. This attitude, though weaker than explicit rejection, reflects the gap thesis/the formalist theory on the role of the judiciary as explained above.

(iii) *An explicit recognition* category would conversely encompass all instances where the court explicitly uses soft law in its reasoning. In this case the court can either explicitly agree or disagree with the content of the soft instrument in question, but engages it

[48] G. de Burca and J.Scott (n 44).
[49] E. Korkea-aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Routledge, 2015), 17-21.
[50] G. Shaffer & M. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review, 748.
[51] A theoretical approach to positively accommodate new governance in courts is developed in J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2006) 13 Columbia Journal of European Law, 565.

openly in the discussion. Pursuant to a hybridity/constructivist thesis, this would likely happen through invocation of soft law together with hard law. It is also possible that judicial interpretation happens through the usage of general principles of law as will be acknowledged in Chapter 1 of this work.

(iv) The possibility for *persuasion* is also factored in the theoretical framework. Persuasion is defined as the case where a court might not be explicitly citing a soft law instrument in its judgment, but the wording used therein closely resembles the one used in the soft law instrument.[52] An important first element to recognition is soft law's internal 'nature', which encompasses, among others, the detail and persuasiveness of its content (wording).[53] This internal nature, it is claimed,[54] influences the way actors in the competition enforcement regime (businesses, NCAs, and courts) perceive soft law.[55] Insofar as the latter is seen as persuasive, it is likely that it is also adhered to in practice (i.e. it is externally legitimized).[56] By acknowledging this judicially (although not explicitly), courts are acting according to a hybridity/constructivist thesis but they are more cautious than courts that engage in explicit recognition.

A graphical representation of this theoretical framework can be found in Table 2 below.

[52] In order to detect this attitude, a sample of keywords specific to certain soft law instruments was created. To consult the sample, please refer to Appendix 1 to this thesis.
[53] A more detailed account on the other elements constituting the 'nature' of soft law can be found in Z.R. Georgieva, "Soft Law in EU Competition Law and its Judicial Reception in Member States – a Theoretical Perspective" (2015) 16 German Law Journal, 223-260.
[54] Ibid.
[55] In the words of F. Schauer: 'the more there is an expectation of reliance on a certain kind of technically optional authority, the more an authority passes from optional to mandatory.' See F. Schauer, *Thinking Like a Lawyer* (HUP, 2009), 82.
[56] The term 'legal legitimacy' is used to talk about the normative aspect of soft law by M. Finnemore and S. Toope. See M. Finnemore and S. Toope, 'Alternatives to Legalization: Richer Views of Law and *Politics*' (2001) 55 (3) International Organization, 743.

DEGREE OF JUDICIAL ATTITUDE / TYPE OF JUDICIAL ATTITUDE	**STRONG**	**MODERATE**
POSITIVE	<u>Outcome: Explicit Recognition</u> (two possibilities: • explicit agreement with soft law and interpretation in line with its substance • explicit disagreement with soft law – the court says soft law applies and is relevant, but it disagrees with the contents of the soft instrument in question)	<u>Outcome: Persuasion (Implicit)</u> (a court might not be explicitly citing a soft law instrument in its judgment, but the wording used therein closely resembles the one used in the soft law instrument)
	RECOGNITION	
NEGATIVE	<u>Outcome: Explicit Rejection</u> (the court says the instrument does not apply/ is not useful, etc.)	<u>Outcome: Neglect (Implicit)</u> (the parties put forward soft law-based arguments, but the ignores them without motivation)
	REFUSAL FOR RECOGNITION	

TABLE 2

Finally, it should be acknowledged that models that draw on the divide and mutual interactions between strict legal rules and soft norms have also been developed to study narrow phenomena such as the US merger guidelines (Greene)[57] or the 'problem of social Europe' – the EU social welfare sector (Hervey).[58] To the extent these models bear explanatory value for this project and the sphere of EU competition law in particular, they will be addressed in the chapters to follow.

[57] H. Greene, 'Guideline Institutionalization: the Role of Merger Guidelines in Antitrust Discourse' (2006) 48(3) William and Mary Law Review, 771.
[58] T. Hervey, 'Adjudicating in the Shadow of the Informal Settlement?: The Court of Justice of the European Union, "New Governance" and "Social Welfare"'(2010) 63(1) Current Legal Problems, 92.

5. The method

Because a significant part of this study aims at delineating and – as far as possible – explaining the similarities and differences between national judicial reactions to supranational soft law across Member States, the method of comparative legal research is hereby employed. The comparison is performed under the assumptions of 'strict comparability'[59] and focuses the attention of the researcher on analysis of both[60] similarities and differences between legal systems with the aim to – firstly – gain better understanding of the object of study[61] and – secondly – offer tentative explanations for descriptive results by linking them as far as possible to their causes.[62] In that respect, it needs to be observed that causation can be suggested but not proven when engaging in legal comparative analysis.[63] As Husa points out, 'To tackle comparability does not automatically include the idea of causal explanations. However, this does not exclude or prevent efforts to somehow give rational and argumentative explanations for similarities and differences appearing in the study.'[64] Such argumentative explanations within the realm of law, thus, form the conceptual limit of the empirical output for this work. [65] Those will be presented in Chapter 4.

It should also be observed that the strict comparability approach chosen by this work is further enabled by the fact that the object of study ((*tertium comparationis)* – supranational competition soft law – is essentially the same for all Member States; thus, the methodological comparative requirement for similarity in bases for comparison (*similia similibus*) is fulfilled.[66] In light of the adopted comparative methodology and in the interest of methodological clarity, the following issues are hereby addressed: 1) how are the selected soft law instruments to be examined, 2) which judgments are to be analyzed and 3) within which jurisdictions?

Before introducing these discussion points, however, a word is needed on the explicit decision for the empirical study to be based on desk research, to the exclusion of structured and semi-structured

[59] Jaakko Husa, 'About the Methodology of Comparative Law – Some Comments Concerning the Wonderland' University of Maastricht Working Paper Series 2007-5.
[60] Ibid. Notwithstanding the scholarly debates among comparatists on whether one should focus on similarities or differences between systems in order to achieve better quality of comparison, this author agrees with Husa who dispenses with the debate by simply stating 'similarity or difference is rather the end-result of the study than a certain method.'
[61] G.Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law (Oxford, 2012), 406.
[62] Ibid., 397-399. It is important to note that, as both Dannemann and Husa observe, causation can be suggested but not proven when engaging the legal comparative method.
[63] Ibid., 398.
[64] Husa, 'Farewell to Functionalism or Methodological Tolerance?' 67 (3) RabelsZ (2003), 433.
[65] Note that, in order to establish a causal link with scientific certainty, one has to go beyond law, or as Reitz testifies, to the 'law and….' disciplines. See J. Reitz, 'How to do Comparative Law' 46 American Journal of Comparative Law (1998), 627.
[66] On the importance of the *tertium* being similar between jurisdictions, see, among others, Orucu (n 18) 442-443, 448.

interviews with judges. One of the reasons why the interviewing method was not adopted lay in the administrative hurdles that such an approach would have entailed.[67] The compliance with those would have significantly slowed down the completion of this project, given that its execution is allotted to a single researcher. Additionally, the oral linguistic competences of the author in the French and German languages did not allow for conducting in-depth interviews with the judiciary in these jurisdictions. Notwithstanding these facts, it is acknowledged that interviews with judges will certainly enrich this study's qualitative observations and do present an avenue for further research.

Examination of the selected soft law sample

As to the first issue – the relevant soft law instruments outlined in Section 2 are retrieved from the 'Antitrust' section of DG Competition's website as described above.[68] Their respective titles (and combinations of words thereof) are used as key search terms in national case law databases for the retrieval of the empirical sample envisaged above.[69] Special attention is to be paid to instruments (or passages thereof) that introduce novel, 'post-modernization' elements to competition law analysis.[70] A table of soft-law specific search terms is devised in this regard and can be consulted in Appendix 1.

Which national judgments?

As to the second issue – the broadest possible selection of national judicial pronouncements in both a public and a private enforcement setting is aimed at. The targeted judgments are follow-on and stand-alone private actions and judicial review cases that have been decided either on the basis of national law only or, alternatively, have a community dimension. The cases eventually detected will be counted only once even if there are several appeals within the same case. However, if more than one soft law instrument is addressed by one judgment, this judgment will be counted twice, thrice, *etcetera*. If new soft law instruments are discussed on appeal, or if they are discussed in a different manner, those references will also be double- and triple- counted.

[67] As asserted in Nowak's book on the way national judges engage with EU law, special endorsements need to be obtained in order to be able to approach judges for interviews in both Germany and the Netherlands. See T. Nowak et al., National Judges as European Union Judges (Eleven Publishing, 2012), Ch.2.2. In that respect, see also U. Jaremba and E. Mak, "Interviewing Judges in the Transnational Context" (2014) 5 Recht en Methode in Onderzoek en Onderwijs 2014-05, S. 3.3.

[68] Refer to Section 2.

[69] For France: Legifrance, Lamyline, Lextenso; for Germany: BeckOnline, Openjur; for the UK: Westlaw UK, Bailii.org; for the Netherlands: Kluwer, Rechtspraak.nl.

[70] These soft law documents are most likely to lead to interpretative confusion in judicial authorities. See Senden (n 13), 284.

Which jurisdictions?

As to the third issue – selection of jurisdictions – this research looks at Germany, France, the Netherlands, and the UK. All of the enumerated Member States have mature EU competition law regimes[71] in comparison with their counterparts that joined the EU during the past two accession waves and that are characterized by a nascent competition culture.[72] Additionally, all but one of the selected countries are founding EU Member States with a long tradition of applying (and developing) EU law. The UK, although not a founding Member State, has also had significant exposure to EU law over the years of its membership and can also introduce valuable variation to the sample due to its common law roots and its complex and not always smooth interactions with the EU legal order.

The selection of jurisdictions can also be justified from the perspective of the comparative method of analysis that this work adopts. In particular, after examining works on system selection for the purpose of comparative analysis,[73] which emphasize the importance of picking systems that are expected to be – in equal measure – similar and different to each other, the choice of jurisdictions mentioned above can be motivated on the basis of one general and several more specific reasons laid out below.

The general justification of the current selection supported by comparative law's epistemology is that three of the four Member States studied in this work – France, Germany and the UK – are considered as 'parent' jurisdictions of the Roman, Germanic and Anglo-American legal families, respectively.[74] A comparatist would thus expect significant variance in the results to be obtained. In this setup, the Netherlands – a civil law jurisdiction blending elements of different legal traditions[75] – is to neatly serve as a control variable for the significance of the assertion that legal tradition matters for judicial engagement with supranational soft law. On the other hand, a factor that could militate against the divergence expectation expressed above is the fact that three of the four selected jurisdictions belong to the civil law tradition, which would rather suggest a convergence in

[71] Concentrating on developed (vis-a-vis developing) systems is an approach of comparative legal research. See Oderkerk, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' (2001) 48 (3) Netherlands International Law Review,301.

[72] For a study in that regard, see K. Cseres, 'The Impact of Regulation 1/2003 in the New Member States' (2010) 6(2) The Competition Law Review, 77.

[73] A.E.Oderkerk (n 63), 293; J. Bell, 'Comparative Administrative Law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, 2006), 1261.

[74] Parent' systems/jurisdictions is a term introduced by the 'founding fathers' of modern comparative law – Zweigert and Kotz. See K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Clarendon Press, 1998). On a more current view with regard to the term 'legal families', see J. Husa, 'Legal Families' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham, 2006)

[75] William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60 La. L. Rev., available at: http://digitalcommons.law.lsu.edu/lalrev/vol60/iss3/2.

empirical outcomes, with the UK being the outlier. These expectations will be juxtaposed with the empirical data in the analytical Chapter 4. The more specific justifications for this work's empirical selection are outlined below.

On the one hand, the idea of using soft law as an instrument of EU competition enforcement is borrowed from the US – a jurisdiction part of the Anglo-American legal family, [76] within which the UK is a 'parent' jurisdiction as noted above.[77] This fact prompts the need to select the UK. On the other hand, the less structured way in which the UK legal system copes with non-legally binding instruments is to be contrasted with the highly elaborate and compartmentalized approach evinced by both Germany and the Netherlands.[78] Germany, being the jurisdiction that provided the conceptual origins of EU Competition Law, is in its turn opposed to the Netherlands, which only recently adopted a competition code aligned with the modern goals of EU competition enforcement.[79] Finally, France enters the picture because its legal system has nourished a soft law category (ministerial directives) very similar to the supranational equivalent of competition guidelines, notices, and the like – a fact that makes the jurisdiction a unique entry with regard to competition soft law.

6. Chapter Outline

Within this theoretical and methodological setup, the research questions of this study are going to be answered in four independently published articles that are going to be presented in Chapters 1 to 4 below. Chapter 1 will draw from accounts on the nature and legal effects of soft law instruments in EU and international law with the ultimate aim to construct a theoretical framework for recognition of EU competition soft law—guidelines, communications, notices, and the like—in the judicial discourse of national courts of the European Union. Chapters 2 and 3, in turn, are comparative-empirical studies, reflecting the ways in which national courts do (or do not) engage with Commission-issued competition soft law in light of the theoretical framework established in Chapter 1. Finally, Chapter 4 aggregates the results of the preceding two chapters and makes a case for the need of flexible judicial engagement with soft law sources that is to further consistency and legal certainty by means of the usage of a single standard of soft law interpretation – 'comply or explain'. In that context, it also reflects on the conditions that should apply to both national and supranational

[76] D. Gerber, 'The US-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective' (1999) 34 New England Law Review, 123.
[77] See n 73 above.
[78] H. E. Broring and G. J. A. Geertjes, 'Bestuursrechtelijke Soft Law in Nederland, Duitsland en Engeland' (2013) 4 Nederlands Tijdschrift voor Bestuursrecht, 74.
[79] The current Dutch Competition Act entered into force in 1998. See Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Mededingingswet) Stb. 1997 242.

courts when they engage with soft law. Possible explanations for the observed empirical results are also sought and delineated.

A BRIEF NOTE ON TERMINOLOGY

In this work, the following terms will be used interchangeably: Commission-issued competition soft law and supranational competition soft law; application soft law and procedural soft law; scope soft law and soft law addressing questions of method. Finally, the common law term *'ratio decidendi'* is used to refer to the 'legal basis for a judicial decision' in a broad sense – not only in the observed common law (UK) cases but also in the cases found in the civil law jurisdictions that form part of this study.

CHAPTER 1

SOFT LAW IN EU COMPETITION LAW AND ITS JUDICIAL RECEPTION IN MEMBER STATES: A THEORETICAL PERSPECTIVE, IN GERMAN LAW JOURNAL (2015) VOL. 16(2)

Chapter 1. Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective

By Zlatina Georgieva[*]

A. Introduction

This work draws from accounts on the nature and legal effects of soft law instruments in EU and international law with the ultimate aim to construct a theoretical framework for recognition of EU competition soft law—guidelines, communications, notices, and the like—in the judicial discourse of national courts of the European Union. "Recognition" is used to encompass instances in which the national judiciary either explicitly interprets—that is, agrees or disagrees with—the content of competition soft instruments, or treats their substance in a roundabout, implicit way—without explicit reference to soft law in the judgment proper. This second option is called "the persuaded judiciary scenario."[1] Importantly, a foundational assumption of the current work is that courts do not transform soft law into hard law when subjecting the former to judicial interpretation/recognition.[2]

This Article also takes issue with the fact that CJEU preliminary rulings on competition soft law disputes originating in Member States have thus far exhibited a rather resistant attitude to soft law. The supranational judiciary has, to a large extent, refused to interpret[3] soft law because of its lack of binding force. The possibility that national courts adopt a similar approach in the currently decentralized competition enforcement system is thus not discounted, but is seen as undesirable for two important reasons.

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[1] Sabine Saurugger & Fabien Terpan, Resistance to EU Soft Law: A Typology of Instruments 24–25 (May 9, 2013) (unpublished manuscript) (on file with the author) (developing a similar typology to account for resistance to, and not recognition of, soft law).

[2] *See infra* Section B.II (elaborating on this view proposed by Oana Stefan); OANA STEFAN, SOFT LAW IN COURT: COMPETITION LAW, STATE AID AND THE COURT OF JUSTICE OF THE EUROPEAN UNION 142 (2012).

[3] The only institution that is bound by competition soft law is the European Commission. *See* Dansk Rorindustri v. Comm'n, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, 2005 E.C.R. I-05425, paras. 209–11 (holding that the European Commission binds its own discretion when issuing latter instruments). Thus, in accordance with formal legal doctrine, unless the Commission is party to a dispute involving soft law, soft instruments cannot be deemed to produce binding effects.

First, this Article argues that judicial recognition of competition soft law at the national level is not only necessary, but also needed in order to determine the currently uncertain legal position of subjects of the de-centralized competition regime (National Competition Authorities—NCAs) and, importantly enough, natural and legal persons affected by anti-competitive practices. Second, judicial recognition is greatly needed in order to legitimate the substantive analytical framework—the so-called "more economic" approach to competition law sealed in soft law instruments—and thus prevent the possibility of divergent judicial interpretations across the different EU Member States.

More specifically, due to the increased importance of soft law in the decentralized EU competition enforcement system, one could argue that the discrepancy between the practical effects that it produces and its concomitant, but largely unrecognized, legal effects creates a quandary with regard to the rights and obligations of the actors in the system.[4] This issue is rooted in the high likelihood that the detailed and sometimes imperative content of EU competition soft law is taken at "face value" by both natural and legal persons who adjust their behavior to soft law,[5] only to realize that conformity does not protect them if faced with an anti-competitive challenge. The national judiciary is highly unlikely to engage with soft law in such a situation because those scenarios involve atypical instruments of law that lack any legally binding force and, allegedly,[6] cannot affect the legal position of third parties.[7]

Indirectly, national judicial resistance to soft law could also create uncertainty for the NCAs. Because the latter are bound by Commission decisions which should incorporate the more economic reasoning of the guidelines, NCAs are most likely also going to adopt a more economic reasoning. Conversely, national courts could stray away from the guidelines because more economic soft law is not necessarily aligned with the case law of the supranational courts, which jurisprudence national courts are obliged to follow. If this scenario comes to fruition, NCA decisions would not be upheld on appeal.

The above-envisioned scenarios pose a serious problem from a rule-of-law perspective and the principle of legal certainty in particular, which postulates that "those subject to the law must know

[4] G.M. Borchardt & K.C. Wellens, *Soft Law in European Community Law*, 14 EUR. L. REV. 267, 270 (1989).
[5] *Id.* at 313.
[6] *See id.* at 321 ("In so far as Community soft law intends to cause legal consequences with regard to the individual these rules of conduct are particularly eligible for an appeal for annulment or a preliminary ruling.").
[7] *See infra* Section C (discussing this point in greater detail); *id.* at 312 ("Soft law does create an expectation that conduct of states, international organizations and the individual will be in conformity with the non-binding rules of conduct. In this regard it is correct to speak of 'commitments' (legal) and 'expectations' (legal).").

what the law is so as to be able to plan their actions accordingly."[8] Taking the principle of legal certainty as a theoretical point of departure, this Article argues that competition soft law should be recognized judicially in national courts. This recognition should be achieved through adoption of a flexible view on law, as opposed to a formalist/positivist view, that rejects all judicial engagement with soft law.

In order to discuss the intricate issue of judicial recognition of soft law, this Article uses terminology developed by Senden[9] that inventories the different legal guises of soft law. Namely, a distinction is made between (1) incidental binding force, and (2) indirect legal effects that a soft law instrument can produce.[10] The former term refers to attribution of formal legally binding force to a soft law instrument by virtue of its internal "particular or specific merits,"[11] while the latter relates to the external dimension of soft law, or the possibility of its validation by the subjects of the law and legal authorities. In this sense:

> [T]he legal effect does not ensue directly from the nature of the act itself, but indirectly from the operation of other legal methods and principles . . . such indirect legal effects can occur as a result of interpretation [in light of primary or secondary EU law] but also as a result of general principles of law.[12]

Because, as Senden establishes, it is quite unlikely for a true soft law act to have incidental binding force (unless it is *ultra vires*), this Article concentrates on the second option for judicial recognition of soft law: Indirect legal effects. Thus, when the "nature" of a soft law act is referenced in Section B.III below, it does not claim the existence of an incidental binding force because this is unattainable for a true soft law act, like competition soft law. The nature of soft law should therefore be seen as a discussion of soft law's internal features that could contribute to it generating indirect legal effects, and not as an incidental binding force.

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[8] *See* TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EC LAW 163 (1999); FREDERICK SCHAUER, THINKING LIKE A LAWYER 43 (2009) ("From the perspective of those who are subject to law's constraints, the gains from marginal improvements in the law are rarely sufficient to outweigh the losses that would come from being unable to rely even on imperfect legal rules and imperfect precedents.").

[9] LINDA SENDEN, SOFT LAW IN EUROPEAN COMMUNITY LAW (ITS RELATIONSHIP TO LEGISLATION) 265 (2004).

[10] *See id.* (noting that those two terms are, in turn, opposed to inherent binding force—the classical stipulation that a hard law act is binding by virtue of the intent of the legislator).

[11] Here, "merits" should be understood as: Drafter's intention (wording, context, and history), possibility of the act to produce novel legal effects not contained in underlying primary or secondary law, legal basis of the act, institutional competence to adopt in conformity with legal basis, and lack or presence of agreement between parties to the act. *See* SENDEN, *supra* note 9, at 292–305.

[12] *Id.* at 267.

With this information in mind, the current Article proceeds by acquainting the reader with competition soft instruments and introduces the main theoretical stances on the nature, discussed in Section B, and legal effects, discussed in Section C, of soft law—the factors that determine judicial engagement with soft instruments. Lastly, taking into account CJEU's case law and literature based off of judicial responses to new governance, Section D of this Article proposes several theoretical possibilities for the national judiciary to recognize competition soft instruments.

B. Soft Law: A Single Concept with Multiple Dimensions

This section will conduct an inquiry into the nature of soft law in the EU Competition domain against the backdrop of theoretical insights on the nature of soft law generated within the fields of international and European law.[13] Such an approach is useful because it has the potential to bring out the specificities of competition soft instruments by juxtaposing them with instruments that exist in two related domains and bear the same name. But before engaging in this task, due attention will be paid to the transformation of law thesis originating in international law that alleges the inability of soft law to exist as a self-standing instrument of law. It is important to examine—and refute—this theory first because if soft law cannot have a legal existence on its own, a discussion of its legal nature is not necessary.

I. Soft Law in EU Competition Law—Setting the Scene

Soft law instruments have been prominent in the field of EU Competition Law since the inception of regulatory activity in the late 1950s. They are issued unilaterally by the European Commission and are devoid of a legally binding force—namely, they do not constitute valid binding law. Article 17.1 TEU authorizes the Commission to produce soft law and stipulates that "[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end . . . it shall exercise coordinating, executive and management functions, as laid down in the Treaties."[14] The

[13] Soft law is also used at member state level in the form of, among others, clarifying circulars issued to administrative authorities by the government. The national setting, however, is not considered in this paper because soft law operates differently in the supra-, national, and international contexts. *See* David Trubek, Patrick Cottrell & Mark Nance, *Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity* 1, 3 (Univ. of Wis. Legal Studies, Working Paper No. 1002, 2005) (presenting a similar compartmentalization approach).

[14] *See* Hakon Cosma & Richard Whish, *Soft Law in the Field of EU Competition Policy*, 14 EUR. BUS. L. REV. 25, 50 (2003) (contending that Art. 17.1 TEU is the legal basis for adoption of competition soft law); Dirk Lehmkuhl, *On Government, Governance and Judicial Review: The Case of European Competition Policy*, 28 INT'L PUB. POL'Y 139, 150 (2008). Note that Art. 17.1 TEU (example: Art. 211 EC) has become even vaguer as to the powers of the Commission after the revision it underwent with the Lisbon Treaty.

wording of this provision leaves the Commission a considerable amount of discretion to develop policy. The notices, guidelines, and communications drafted in the field provide "interpretation and application of the existing body of . . . law."[15] Thus, via soft law, the Commission aims to summarize and clarify its own decisional practice, as well as that of the European Courts, without prejudicing the case law of neither national nor supranational courts. In this sense, soft law in the competition domain has traditionally served as a complement and clarification to already existing law.

However, certain instruments of soft law extend beyond the traditional by introducing novel elements to the established practice.[16] Most of these instruments also contain imperative, compelling language which, combined with the increasing importance of competition soft law as self-standing rather than merely auxiliary instruments,[17] have caused scholars to note that soft law might facilitate "back door" legislation by the Commission.[18]

These concerns were augmented during the competition policy reform of 2004,[19] which decentralized the enforcement regime and made Article 101.3 TFEU, on permissible justifications for otherwise anti-competitive conduct, directly applicable. In effect, both national competition authorities (hereinafter NCAs) and national courts can now conduct full competition analysis. Commission-initiated guidance in the form of competition soft law supposedly diminishes the threat to consistent enforcement resulting from this new multi-level, multi-actor setting. This makes soft law indispensable for national enforcers, especially where formal Commission decisions do not sufficiently inform national decisional practice. The high level of detail in those instruments also increases their perceived reliability and, despite being formally non-binding, they may create expectations in legal persons (businesses) that this Article argues should be addressed[20] by national courts of law, notwithstanding supranational judicial resistance thereof.

[15] *See* SENDEN, *supra* note 9, at 160.
[16] *See, e.g.*, Communication from the Commission—Notice—Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 8 ("[T]he Commission also intends to explain its policy with regard to issues that have not been dealt with in the case law, or that are subject to interpretation.").
[17] *See* SENDEN, *supra* note 9, at 21 (acknowledging that although soft law is not a new phenomenon, its "proposed use as an alternative to legislation is new").
[18] Linda Senden, *Soft Law and its Implications for Institutional Balance in the EC*, 1 UTRECHT L. REV. 79, 93 (2005).
[19] *See* Council Regulation 1/2003, 2002 O.J. (L 4) 1 (changing the EU Competition Law regime both substantively and procedurally on 1 May 2004).
[20] *See* Eleanor Sharpston, *Legitimate Expectations and Economic Reality*, 15 EUR. L. REV. 103, 104 (1990) (expressing this same view).

Thus, competition soft law portrays an intriguing dichotomy. While attempting to provide democratic values such as clarity, certainty, and participation,[21] competition soft law in an increasingly complex policy setup[22] simultaneously erodes those same values because of its non-justiciability.

This curious contradiction can be explained if one looks at its theoretical embedding—the conflict between a flexible and a formalist/positivist view of law. While formalists assert non-binding instruments' lack of justiciability largely due to their non-democratic adoption process,[23] proponents of a more flexible view put forward the phenomenon of "legal legitimacy"[24] that accounts for the legalization of non-legal norms. Authors with a flexible viewpoint acknowledge that for law to be legitimate, it should go beyond, but not disregard, positivist requirements for internal validity of the law—form, forum, and content[25]—and secure "agents in the system understanding why rules are necessary."[26] Importantly, it is submitted that "[p]articipating in constructing law enhances agents' understanding of its necessity . . . adherence to specific legal rationality that all participants understand and accept helps to legitimate the collective construction of the law."[27] In this regard, the flexible view of law marries the formal requirements on the nature and internal validity of the law with a more fluid understanding of its external validity and legitimization by legal subjects. Thus, under a flexible view of law, the internal dimension of a soft instrument is governed by formal requirements whereas, externally, application of a flexible set of norms[28] allows the judiciary to recognize the legal subjects' perception of soft law as legitimate. This enables soft law to produce legal effects without acquiring incidental binding force.

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[21] The term "participation" here refers to the public consultations that the Commission holds before issuing competition soft instruments.

[22] Clarity and certainty here should only be understood as practical clarity and certainty. When it comes to legal certainty, contrary to Commission claims that it is enhanced by soft law, soft law creates greater uncertainty for the subjects of the law whose expectations might be induced by soft law, but are subsequently non-defensible in court since soft law lacks legal status.

[23] *See, e.g.*, Borchardt & Wellens, *supra* note 4 (analyzing from a quite formalist viewpoint); SENDEN, *supra* note 9 (presenting a doctrinal thesis from a similarly formalistic perspective). *But see* STEFAN, *supra* note 2 (adopting a more flexible approach to law).

[24] *See* Martha Finnemore & Stephen Toope, *Alternatives to Legalization: Richer Views of Law and Politics*, 55 INT'L ORG. 743, 749 (2001)

> Under a broader view of law, the legalization of politics encompasses more than just the largely technical and formal criteria of obligation, precision, and delegation. It encompasses features and effects of legitimacy, including the need for congruence between law and underlying social practice. It attends to the purposive construction of law within inherited traditions, the way participating in law's construction contributes to legitimacy and obligation, and to the continuum of legality from informal to more formal norms.

[25] *See* Borchardt & Wellens, *supra* note 4, at 298.

[26] *See* Finnemore & Toope, *supra* note 24, at 749.

[27] *Id.*

[28] *See infra* Sections C & D (delineating the concept of "flexible norms" further).

Focusing these insights on the case of competition soft law, it is likely that, due to its detailed language and other persuasive internal characteristics, subjects of the current competition regime have experienced and perceived competition soft law as legitimate law. In the words of Schauer, "[T]hey have internalized it,"[29] and have consequently created expectations that the enforcement regime should meet. This could potentially occur through active involvement with soft law by the national judiciary, which, by use of general principles of law and other techniques proposed in Section D below, could endow the instruments with two important features: (1) The ability, by producing legal effects, to serve legitimate expectations and thus contribute to legal certainty; and (2) The ability to create uniformity through cross-border judicial and administrative[30] dialogue in the sphere of EU competition law.

On a more general level, the formalist-flexible divide evokes a fundamental question on the meaning of democracy in an international context. A stream of innovative scholarship claims that expert technocratic, rather than representative democracy, is the way forward for polities such as the EU that exhibit non-hierarchical, multi-actor, and multi-level methods of policymaking.[31] Soft law, as a primary product of the latter processes, is therefore capable of functioning as a full-fledged instrument of law.[32] On the other extreme, traditional views on representative democracy as a system that secures checks and balances cannot see soft law as anything but auxiliary, legally non-binding, and informal. While the debate over the existence of a changing model of possibility of supranational democracy is beyond the scope of this paper, it is worth noting that the above-described doctrinal divisions also underlie the prominent dispute regarding whether soft law transforms into hard law when subject to judicial scrutiny.[33]

The matter ultimately boils down to the question of whether a legal system—the EU legal system in this case—can accommodate soft law as a legal, and not merely political, phenomenon. Additionally, under the assumption that the accommodation option exists, the question that arises is how

[29] *See* FREDERICK SCHAUER, PLAYING BY THE RULES 121 (1991) ("[A]n agent has an internal point of view with respect to a rule when that agent treats a rule's existence as relevant to the question of what to do.").
[30] *See Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition Under Article 101(1) of the Treaty on the Functioning of the European Union*, COM (2014) 4136 final [hereinafter *De Minimis Notice*] (providing a recent example of the administration (the European Commission) engaging the judiciary in a dialogue on the substance of soft law). The question now is whether the CJEU could explicitly engage with a Commission soft law instrument in its discourse.
[31] Oliver Gerstenberg & Charles Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289 (Christian Joerges & Renaud Dehousse eds., 2002).
[32] *See* Charles Sabel & William Simon, *Epilogue: Accountability Without Sovereignty*, *in* LAW AND NEW GOVERNANCE IN THE EU AND US 395 (Grainne de Burca & Joanne Scott eds., 2006); *see also* Neil Walker, *EU Constitutionalism and New Governance*, *in* LAW AND NEW GOVERNANCE IN THE EU AND US 15 (Grainne de Burca & Joanne Scott eds., 2006); Grainne De Burca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, *in* LAW AND NEW GOVERNANCE IN THE EU AND US 1 (Grainne de Burca & Joanne Scott eds., 2006); Mark Dawson, *Soft Law and the Rule of Law in the European Union: Revision or Redundancy?*, *in* LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD 221 (Bruno de Witte & Antoine Vauchez eds., 2013).
[33] *See infra* Section B.II.

precisely soft law can be accommodated. Answers to these questions will certainly diverge per policy.[34] This Article focuses on the recently opened multi-level governance (hereinafter MLG) competition domain. The field's current exposure to multi-level processes presents novel opportunities for fitting soft law into legal discourse. To this end, it is hereby maintained that national courts, as ultimate instances of normative ordering within EU Member States,[35] will play an important role in shaping competition MLG processes through the recognition of pertinent soft law instruments.[36]

With these considerations in mind, this Article's end goal is the exploration of theoretical possibilities for judicial recognition of competition soft instruments at the national level. Before proceeding, it is necessary to get acquainted with theoretical debates on the internal nature and external legal dimension of soft instruments.

II. International Law, EU Competition Law, and the Transformation of Law Thesis

According to Borchardt and Wellens, authors of one of the foundational works on the subject, the concept of soft law rose to prominence in public international law in the 1970s when it became obvious that the exhaustive list of international law instruments enumerated in Article 38.1 of the Statute of the International Court of Justice could not accommodate quasi-legal forms such as resolutions.[37]

With regard to the legal dimension of international soft law, the authors emphasize the centrality of states' intention to be bound as a basic tenet of hard legal obligations and contend that, because intention to be bound is lacking with regard to soft law,

> [s]oft law will not be capable of being used as a lever in order to remove [the] necessary, doctrinal distinction between international law and international politics, or to make it redundant. Indeed, this would lead to a juridification of international relations because of its

[34] *See* Trubek, Cottrell & Nance, *supra* note 13, at 3.
[35] Michelle Everson, *The Crisis of Indeterminacy: An Equitable Law of Deliberative European Market Administration?*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET, *supra* note 31, at 231, 234.
[36] *See* Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 566–67 (2006) (emphasizing the importance of courts in MLG settings); *see also* Mark Dawson, *Transforming into What? New Governance in the EU and the Managerial Sensibility in Modern Law*, 2 WIS. L. REV. 389, 411 (2010) (stressing the weight of courts in MLG settings as well).
[37] *See* Borchardt & Wellens, *supra* note 4, at 267.

> possible repudiation of the wills expressed by States and international organizations.[38]

This contention suggests that the authors see international soft law in a legally formalist fashion, as simply an expression of a political commitment. At the other end of the legal-political divide stands hard law with no intermediate (quasi-legal) forms in-between.[39] Jan Klabbers also subscribes to this black-and-white view, stating that an approach mixing law and politics would be quite disastrous because "once political and moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality."[40] In a different work, Klabbers opines, in line with the formalist view on soft law suggested by Borchardt and Wellens, that when international tribunals interpret soft instruments, the latter simply become hard legal obligations.[41]

These views are moderated by the works of scholars who take a more flexible view on law. Abbott, Snidal,[42] and Chinkin,[43] while acknowledging the ability of soft norms to transition into hard ones, opine that soft law has legal merits in and of itself and does not necessarily need to be transformed into hard law when interpreted judicially. Chinkin also considers the desirability of a possible transformation process, stating that,

> Lawyers have a tendency to favor the legal norm and see this claim as desirable but the outcome of any such conclusion must also be considered. If a principle is, or becomes, a legal norm certain legal consequences follow from its performance and its breach. If claims that soft law principles have become hard law are to be accepted, it must be possible both to determine breach and the legal outcome of any claim of breach.[44]

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[38] *Id.* at 270. The importance of intended agreement between parties as a determinant of legal obligation of an instrument materializes in the EU Competition Law domain too as will be argued below. *See infra* Section [insert desired section number here].

[39] *See* Borchardt & Wellens, *supra* note 4, at 271 (discussing soft law as signifying the "inadequate maturity of a particular rule of law" or as a phenomenon with pre-legal or para-legal character, which can thus reach the level of a hard obligation if re-negotiated); *id.* (acknowledging that in a court of law, a soft rule can be transformed into hard law if it forms the *ratio decidendi* of the judges' reasoning).

[40] Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L L. 381, 391 (1998).

[41] Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 177 (1996). *But see* Jan Klabbers, *Institutional Ambivalence by Design: Soft Organizations in International Law*, 70 NORDIC J. INT'L L. 403, 412 (2001) ("A strong argument can be made that to speak of 'political bindingness' versus 'legal bindingness' is not all that meaningful, as there might not exist such a neat separation between law and politics.").

[42] Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 447 (2000).

[43] Cristine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850, 856 (1989).

[44] *Id.* at 859.

Indeed, the establishment of breach can be problematic in international economic law because its subjects are companies and individuals, whose behavior is not subject to sanctions under international law.[45]

The situation is different under EU economic law and competition law in particular. Because the primary provisions establishing the EU competition regime target private action on the market, there is no doubt that the rights and obligations created are aimed towards companies and individuals. In this context, the ability to establish breach—or to resort to any other traditional legal category—is present, and thus the transformation of soft into hard law becomes more plausible. This fact may explain why the transformation thesis has sparked fervent discussion and received both strong acclaim and critique in Europe.[46]

In the specific context of EU competition law, Oana Stefan gives the most in-depth account on the matter.[47] The scholar presents a strong argument against the transformation thesis. Embedded in the discourse of multi-level governance in the EU[48] and taking a more flexible view on law, Stefan claims that EU courts do not allow soft law to become hard. To that end, the judiciary employs refined mechanisms that give legal effect to soft law without endowing it with binding force.[49] More specifically, she claims that through the intermediate use of general principles of law—legitimate expectations, legal certainty, and equality—courts allow soft instruments to produce legal effects in the system without turning them into hard law.[50] The scholar explains the plausibility of this theoretical claim with the conceptual division between incidental binding force and indirect legal effects addressed previously in this Article. She also supports her views with empirical examples.

Stefan's flexible perspective on competition soft law and its interpretation by EU courts gives EU relevance to Chinkin's observations on international economic soft law. Chinkin is hesitant to support the formalist transformation of soft law thesis and stipulates that the very specificity of some international soft law instruments gives them *sui generis* value and makes them more likely to be

[45] *Id.* at 858.
[46] *See* Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques,* 56 MOD. L. REV. 19, 33 (1993) (providing supporting views of the transformation thesis); Albert Graells, *Soft Law and the Private Enforcement of the EU Competition Rules*, *in* INTERNATIONAL CONFERENCE ON THE PRIVATE ENFORCEMENT OF COMPETITION LAW 1 (2010) (supplying additional support for this thesis). *But see* OANA STEFAN, SOFT LAW IN COURT: COMPETITION LAW, STATE AID AND THE COURT OF JUSTICE OF THE EUROPEAN UNION 142 (2012) (stating opposition to the transformation thesis).
[47] *See* STEFAN, *supra* note 2, at 142–54.
[48] *See* David Trubek & Louise Trubek, *The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?*, *in* ANNUAL MEETING OF THE RESEARCH COMMITTEE ON THE SOCIOLOGY OF LAW 1 (2005); Trubek, Cottrell & Nance, *supra* note 13, at 4; David Trubek & Louise Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation* (Univ. of Wis. Legal Studies, Working Paper No. 1047, 2007).
[49] *See* STEFAN, *supra* note 2, at 142–54.
[50] *See* SENDEN, *supra* note 9, at 352–71 (making the same contention).

effective in controlling the respective domains to which they apply, which speaks for their non-transitory character.[51] She also acknowledges that, due to the large variety of soft instruments in the international economic domain, it is undesirable to coin rigid criteria for determining their legal status. Consequently, she advocates an approach whereby each case is evaluated on its own merits. "The effects of entering into a binding or non-binding instrument are not restricted to the international arena and full contextual analysis is needed to resolve claims as to the outcome of becoming party to such an instrument."[52] At the same time, the author does acknowledge that her approach "plays havoc with juristic concepts and creates conceptual uncertainty."[53]

The theoretical model of Stefan is more sophisticated than what Chinkin's work suggests because it actually explains how formal legal categories (for example, general principles of law), can be used to mediate the creation of legal effects for a flexible legal category such as soft law. While this function will be addressed in depth in what follows, it should be emphasized here that the battle between fluidity and rigidity in the law is an imminent trade-off that figures prominently in international and EU economic regulation.[54] In fast-paced, constantly evolving domains, flexibility and effectiveness are needed. A possible means to secure them is through the use of soft, rather than hard, regulatory instruments.[55] At the same time, the actors in the system require assurance of their ability to conduct business transactions in an environment of legal certainty—a demand conducive to the adoption of hard forms of law. The strength of Stefan's thesis in this setting is that it manages to bridge a gap between two polar stances, which is why the latter theory is used as the basis of an attempt to construct a framework for judicial recognition of EU competition soft law at national level in the last section of this Article.

III. The (Legal) Nature of Competition Soft Law vis-à-vis International and EU Law

Several prominent scholars[56] have explored the nature of soft law in the international and EU law domains. These scholarly works begin by delineating the constituent parts of a hard legal obligation

[51] *But see* Finnemore & Toope, *supra* note 24, at 748 ("Increased precision could lead to less obligation, when prospective members of legal regimes are driven away by fears of detailed rules that are inflexible.").
[52] *See* Chinkin, *supra* note 43, at 864.
[53] *Id.* at 865.
[54] See Daniel Crane, *Rules Versus Standards in Antitrust Adjudication* 1 (Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 162, 2006) (discussing the cyclical ebbs and flows of certainty and fluidity); Arthur Vanderbilt, *The Modernization of the Law*, 36 CORNELL L. Q. 433, 433 (1951) (providing a more philosophical account).
[55] This rationale holds explanatory value for the reforms that the EU Competition Policy regime underwent with the introduction of Regulation 1/2003. It also explains the increased importance that the system has attributed to competition guidelines, notices, and the like ever since.
[56] *See* Borchardt & Wellens, *supra* note 4, at 267; Abbott & Snidal, *supra* note 42, at 421; Finnemore & Toope, *supra* note 24, at 743.

and assert that soft law emerges when one or more of the elements constituting a hard obligation are not present.

One of the more detailed works on the subject is that of Borchardt and Wellens, who assert that the differences with regard to the ingredients of a hard legal obligation in the international realm and EU law realms are minimal.[57] For both domains, the authors argue that the publication and place of publication of an instrument have an influence on its legal nature.[58] Additionally, Borchardt and Wellens maintain that the forum (institutional setting at adoption), content (wording), and form (legal form) in which instruments are adopted determine their "distance to the Treaty," which, in turn "will be important when assessing whether it indeed involves Community soft law and to what extent the EEC Treaty affects this."[59]

With that background, Borchardt and Wellens claim that, relating to the notion forum: The more the framework within which actors interact is institutionalized in Treaty Articles, the closer the linkage with the Treaty and the greater the possibility to adopt hard law.[60] Second, when discussing characteristics of content, the authors list—in descending order in terms of ability to generate legal status—several settings, the first being "matters that are directly connected with the EEC Treaty and with respect to which the Community has exclusive competence."[61] This is precisely the situation of EU Competition Law. Judging on the basis of those two factors, it would appear that the EU Competition domain is more likely to be governed by hard rather than soft law.[62] This conclusion remains unaltered by the third factor—form—because it is stated that the form of the instrument can give "a first indication to what extent parties intended a legally binding act,"[63] but definitely not a final one.[64] It thus appears that competition soft law is a theoretical impossibility.[65] Such a conclusion is further warranted by the fact that non-compliance with competition norms usually entails

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[57] *See* Borchardt & Wellens, *supra* note 4, at 280.

[58] Polska Telefonia Cyfrowa v. Prezes Urzędu Komunikacji Elektronicznej, CJEU Case C-410/09, 2011 E.C.R. I-03853 (providing a recent example of the CJEU confirming this view).

[59] *See* Borchardt & Wellens, *supra* note 4, at 301.

[60] *Id.* at 301.

[61] *Id.* at 290.

[62] *See* SENDEN, *supra* note 9, at 282–83

> [R]ecommendations are generally adopted by the Community institutions when the Treaty does not confer the power upon them to adopt binding measures. Where the power is actually provided for, the 'danger' lurks that an institution may in fact want to impose (new) legal rights and obligations by way of soft law acts.

[63] *Id.* at 290.

[64] *See, e.g.*, Jan Klabbers, *Informal Instruments Before the European Court of Justice*, 31 COMMON MKT. L. REV. 997, 1016 (1994) (acknowledging that form is not definitive as to the legal nature of an instrument); SENDEN, *supra* note 9, at 276; Usines à Tubes de la Sarre v. High Authority, CJEU Joined Cases C-1/57 & C-14/57, 1957 E.C.R. I-105 (serving as the original CJEU decision on the matter).

[65] *See* Fabien Terpan, *Soft Law in the European Union: The Changing Nature of EU Law* 1 (Sci. Po Grenoble, Working Paper No. 7, 2013) (asserting that a transition to hard law by virtue of internal setup/validation/status is underway in this case).

sanctioning by the European Commission, sanctioning mechanisms being a further criterion determining the existence of hard legal obligation according to Borchard and Wellens.

The analysis does not stop here, however, as Senden, Borchard, and Wellens testify.[66] In order for an obligation to truly be a hard legal obligation, the adopting institution must possess the necessary competence for adoption established in the relevant legal basis of the act in question. This is the requirement on which competition soft law fails. Most guidelines are adopted on the basis of Article 17.1 TFEU—which the CJEU does not accept as a valid legal basis—or fail to mention an explicit legal basis. This warrants the conclusion that "the competence of the Commission will often be confined to the adoption of true, non-binding soft law acts."[67]

This fact has both positive and negative repercussions. On the positive side, the absence of valid legal bases saves competition soft law acts from the possibility of annulment for constituting illegal hard law in the clothing of soft law. The downside is that the absence of legally binding force does not preclude the instruments from producing effects on legal subjects. Namely, businesses that self-assess according to the framework of the new regime adjust their behavior on the substantive basis of soft law provisions. In a recent paper, Stefan observes that the legal situation of businesses may be affected by soft law.[68] More than twenty years before Stefan, Borchardt, and Wellens warned of this problem, maintaining that "[i]n so far as Community soft law intends to cause legal consequences with regard to the individual these rules of conduct are particularly eligible for an appeal for annulment or a preliminary ruling."[69] Nevertheless, as discussed above, competition soft law is unlikely to be subject to an action for annulment. Even if the latter were possible, it would still be an unfortunate result because the positive rule-clarifying role of soft law would be negated. This situation leaves a legal vacuum in the system difficult to bridge, especially at the national level where courts and administrative authorities now have full authority to enforce the Treaty competition law provisions.

Further research into EU economic soft law and its ability to bind or produce legally binding effects revealed a curious phenomenon in the related to competition law area of state aids. In her article on soft law in the EU State Aid regime, Michelle Cini testifies to the fact that provisions of the soft

[66] *See* SENDEN, *supra* note 9, at 76; Borchardt & Wellens, *supra* note 4, at 280.
[67] *See* SENDEN, *supra* note 9, at 306.
[68] Oana Stefan, *European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects*, 75 MOD. L. REV. 879, 886.
[69] *See* Borchardt & Wellens, *supra* note 4, at 305 (noting that the statement should be read with the caveat that if firms voluntarily choose to comply with soft instruments, this fact need not entitle them to a legal remedy).

Community Framework on State Aid to the Motor Vehicle Industry[70] were converted into hard obligations via a negative Commission decision,[71] the latter formalizing "what would have otherwise been an informal rule."[72] Indeed, state aid case law points to the fact that "there is a legal basis for the recognition of binding 'negotiated' acts, which is linked to the specific duty of cooperation [of Article 108.1 TFEU]."[73] An incidental binding force of soft state aid acts can thus occur because state aid soft law is negotiated between the Commission and Member States, and there is a specific duty of cooperation between parties, stipulated in the legal basis of state aid soft law—Article 108.1 TFEU.[74] Such a phenomenon, incidental binding force based on agreement,[75] cannot be generated, however, with regard to competition soft law because the latter are not agreed upon instruments; the Commission issues them unilaterally. Also, there is no reference to general principles of law, such as cooperation, in the legal basis thereof. Still, as argued in the Introduction above, another legal mechanism—that of indirect legal effects—could be the alternative for competition soft law to acquire a legal dimension.

The prospect of soft law producing legal effects via the intermediation of traditional legal categories such as general principles of law is of utmost importance for the safeguarding of the procedural and substantive consistency of the decentralized competition enforcement system. As demonstrated in this section, a strong case can be mounted in support of the independent legal existence and non-transitory nature of soft law, especially in an economic regulatory setting. Also, many of the internal characteristics of EU competition soft law instruments approximate them to hard law. In this sense, there is a mismatch between the outer shell of the instruments framed as non-binding and their quite compelling inner core,[76] which explains why they are likely to produce expectations in the European competition enforcement regime. These expectations need to be addressed judicially. This can be accomplished through judicial recognition of the indirect legal effects of competition soft law. This Article turns to said legal mechanism next.

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[70] *Community Framework on State Aid to the Motor Vehicle Industry*, 1997 O.J. (C 279) 97.
[71] Commission Decision 90/381, 1990 O.J. (L 188) 55.
[72] Michelle Cini, *The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime*, 8 J. EUR. PUB. POL'Y 192, 202 (2001).
[73] SENDEN, *supra* note 9, at 298.
[74] CIRFS v. Comm'n, CJEU Case C-313/90, 1993 E.C.R. I-1125; Spain v. Comm'n, CJEU Case C-135/93, 1995 E.C.R. I-1651; Ijsel Vliet Combinatie v. Minister van Economische Zaken, CJEU Case C-311/94, 1996 E.C.R. I-05023; Ger. v. Comm'n, CJEU Case C-288/96, 2000 E.C.R. I-8237; Comm'n v. Luxembourg, CJEU Case C-69/05, 2006 E.C.R. I-00007; STEFAN, *supra* note 2, at 176, 177; SENDEN, *supra* note 9, at 271, 304, 305.
[75] *See* SENDEN, *supra* note 9, at 295 (coining this term).
[76] If we run competition soft law through the insights of Schauer, it also becomes clear that its compelling and quite detailed content might not be suitable for the context in which it operates. In policy domains that are subject to constant change in circumstances (i.e. electronic communications), it is better to create vaguer rules which are by default more adaptive to change and, in this sense, lend themselves to flexible, prospective decision-making. Insofar as competition regulation is a field experiencing constant change, it needs to be governed by less heavy-weight rules in terms of content (and not only in terms of soft law). *See* SCHAUER, *supra* note 8, at 195.

C. Indirect Legal Effects of Soft Law

The creation of indirect legal effects, or the ability of soft law to produce legal effects via the intermediary use of general principles of EU law, is a thesis purported in several scholarly accounts on soft law.[77] It is also particularly popular with detractors of the "transformation of soft law" thesis because it explains how soft law could still produce legal effects without actually becoming hard law.[78]

Further qualification of the notion "general principles of law" is needed, because their substantive content matters with regard to their ability to induce legal effects of soft law. On the one hand, Takis Tridimas summarizes in his book the basic features of general principles of law by pointing out their pertinence to public law, their primary[79] application to the relationship between the individual and the state, their origin in the laws of Member States, and their pre-existence of written law.[80] On the other hand, general principles of law can also apply to purely private relations.[81] In this light, it is not unthinkable that courts, especially national courts, could engage in interpretation of competition soft law on the basis of general principles of law. The plausibility of this option is further strengthened by scholarly accounts, which argue that, in order to acknowledge the values and views of individuals or self-appointed groups in a fluid supranational setting,[82] courts should resort to ancient legal dogmas such as general principles of law.

Such an act, paradoxically, could also give the competition regulatory system new life because general principles of law are formal tools of law employed when the rigid legal system requires change and flexibility. In this sense, they are the key to bridging the gap between formalism and flexibility, and thus to ensuring a lasting presence of competition soft law in judicial discourse.

Furthermore, an important feature of general principles of law is that they do not carry normative content in and of themselves.[83] This is why courts use them more as rules of interpretation than as self-standing rules. As Tridimas contends, "The importance of general principles cannot be assessed

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[77] *See* STEFAN, *supra* note 2, at 142–54; SENDEN, *supra* note 9, at 267; Borchard & Wellens, *supra* note 4, at 288–89.
[78] *See* STEFAN, *supra* note 2, at 22.
[79] *See* TRIDIMAS, *supra* note 8, at 3 (specifying that general principles of law, because of their diverse application, can also be relied on by Member States and Community institutions).
[80] TRIDIMAS, *supra* note 8, at 3.
[81] Xavier Groussot & Hans Lidgard, *Are There General Principles of Community Law Affecting Private Law?*, *in* GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT 155, 163 (Ulf Bernitz et al. eds., 2008).
[82] Michelle Everson, *The Crisis of Indeterminacy: An Equitable Law of Deliberative European Market Administration?*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET, *supra* note 31, at 231, 252.
[83] BERT VAN ROERMUND, LEGAL THOUGHT AND PHILOSOPHY: WHAT LEGAL SCHOLARSHIP IS ALL ABOUT 273 (2013).

in the abstract but only by reference to results reached in concrete cases. To be of any use, the study of general principles must be a study of outcomes."[84]

Senden argues that the principle of legitimate expectations—as a corollary of the principle of legal certainty—is not suitable for giving legal effect to soft law in the national domain because it does not have a direct connection with the drafter of the rules, the Commission.[85] According to the latter author, these two principles only work in direct claims against the Commission and form the basis of CJEU's case law proclaiming that the institution binds its own discretion when issuing soft law.[86]

Senden recognizes, however, that the principle of legitimate expectations could also be invoked as a principle of national law in competition proceedings between two private parties. Because national authorities are obligated to apply national competition provisions and EU competition law in parallel,[87] the national principle of legitimate expectations should also apply to the supranational soft competition legal framework. One could claim that because of decentralization, the ties between national and EU competition law—itself a domain of exclusive competence for the Union whereby Member States have fully transferred their sovereignty and thusly the traditions common to them[88]—have become stronger. Stronger in fact, even to the effect that general principles of EU law originally devised at the national level, such as legal certainty, should apply directly to Commission-issued competition soft law in purely private competition disputes, without a formal community link requirement.

Alternatively, the principle of community loyalty enunciated in Article 4.3 TEU could serve as a basis for giving legal effect to soft law in the national domain.[89] However, some scholars believe that the latter principle enunciates too general an obligation that would not truly give effect to competition soft law in a national setting.[90] An additional option considered by Oana Stefan is the principle of equality and non-discrimination. Stefan reasons that individuals could potentially rely on competition soft law provisions via the principle of equality because of competition soft law's function "as a tool

[84] *See* TRIDIMAS, *supra* note 8, at 2.
[85] *See* SENDEN, *supra* note 9, at 451.
[86] Rorindustri v. Comm'n, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, 2005 E.C.R. I-05425.
[87] Council Regulation 1/2003, art. 3, 2002 O.J. (L 4) 1 (creating this obligation).
[88] This is how general principles of law that stem from the legal systems of Member States are referred to.
[89] *See* SENDEN, *supra* note 9, at 309.
[90] *See* Stefan, *supra* note 68, at 892 (basing her conclusion on Polska Telefonia Cyfrowa v. Prezes Urzędu Komunikacji Elektronicznej, CJEU Case C-410/09, 2011 E.C.R. I-03853.

to foster formal equality and to ensure that in its discretion to enforce hard law the Commission does not arbitrarily discriminate against individuals."[91]

A further possibility to invoke general principles of law in the competition domain is presented by Usher who sees the notion that competition should not be eliminated[92] as a general principle of EU business law.[93] The importance of freedom of economic activity as a foundational, base concern underlying EU law is further emphasized by the existence of a related right under the Charter of Fundamental Rights of the European Union: The freedom to conduct a business.[94]

The remainder of this section will demonstrate how general principles of EU law and other legal mechanisms—namely, interpretation of soft law in light of the hard legislation to which it pertains—have been used by the CJEU to draw the boundaries of indirect legal effects of soft law. The foundation laid in this section will be used as the basis for the construction of a theoretical framework on the possibilities for judicial treatment of EU competition soft law in EU Member States.[95]

I. Indirect Legal Effects on the EU Commission

EU courts—the CJEU and GC—have already held on several occasions that the Commission binds its own discretion by the adoption of soft law.[96] It is precisely via general principles of law, particularly legitimate expectations and equal treatment, that soft law is deemed to produce a self-binding effect on the latter institution.[97] In this regard, it is also important to acknowledge that a soft instrument can only produce an effect through legitimate expectations if its wording is sufficiently precise,[98] as re-stated by the CJEU in *Dansk Rørindustri*: "It cannot therefore be precluded that, on certain

[91] *See* STEFAN, *supra* note 2, at 209; Herwig Hofmann, *Negotiated and Non-Negotiated Administrative Rulemaking: The Example of EC Competition Policy*, 43 COMMON MKT. L. REV. 153, 165 (2006) (providing another discussion on the principle of equality as a general principle of law that can endow competition administrative guidelines with legal effects).
[92] *See, e.g.*, Commercial Solvents v. Comm'n*,* CJEU Case C-7/73, 1973 E.C.R. I-00223; Europemballage Corp. & Continental Can Co. v. Commission, CJEU Case C-6/72, 1973 E.C.R. I-00215 (asserting that competition in the internal market should not be eliminated).
[93] JOHN USHER, GENERAL PRINCIPLES OF EC LAW 8 (1998).
[94] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, art. 16, 2012 O.J. (C 326) 1.
[95] *See infra* Section D*.*
[96] Case 19/77, Miller Int'l Schallplatten GmbH v. Comm'n, 2 C.M.L.R. 334 (1978); Hercules Chemicals v. Comm'n, CJEU Case T-7/89, 1991 E.C.R. II-1711, paras. 53–54; Rorindustri v. Comm'n, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, 2005 E.C.R. I-05425, paras. 209–11.
[97] *Rorindustri*, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P at para. 211.
[98] Unie v. Comm'n, CJEU Case C-40/73, 1975 E.C.R. I-01663.

conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects."[99]

Intent is an important element to the same effect. In *Delimitis,* AG van Gerven expounded on the legal status of the *de minimis* notice:

> Without wishing to express a view on the exact legal force of such a notice, which constitutes in any event a declaration of intention from which it is possible to deduce the Commission's policy on implementation and confers on the individuals for whom it is intended certain legitimate expectations, the national court may nevertheless find therein guidance as to how the Commission is applying Art. 85.1 [now Art. 101.1 TFEU], which may be of assistance in its assessment.[100]

The above two elements are reminiscent of the criteria for legal nature of an instrument that are used in the international and EU domains.[101] The presence of these elements in the discourse of the EU judiciary demonstrates that judges and advocate generals employ formalist analysis to the phenomenon of soft law.

According to Stefan, and in keeping with the formalist tradition, the self-binding effect on the Commission has two main results: First, soft law could be used as a standard to assess the legality of Commission decisions; and second, soft law cannot be amended by individual Commission decisions notwithstanding the fact that the latter are acts of hard law.[102]

II. Indirect Legal Effects on the Courts

Senden argues that the effects of soft law on the European judiciary are limited to what she calls "voluntary interpretation aid."[103] In particular, she observes that the CJEU takes soft law into account either when it assists in the interpretation of the objective scope of hard law or, alternatively, when

[99] *Rorindustri*, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, at para. 211.
[100] Delimitis v. Henninger Bräu AG, CJEU Case C-234/89, 1991 E.C.R. I-00935, para. 22.
[101] *See supra* Section B.III.
[102] *See* STEFAN, *supra* note 2, at 173–74.
[103] SENDEN, *supra* note 9, at 379–412.

it aids in understanding the subjective intention of the legislature while adopting hard law.[104] Analyzing this same aspect of soft law usage, Howells stipulates that it is precisely in this manner that soft law can influence the scope of rights and obligations that arise from respective hard law.[105] On a different note, Senden submits that EU courts are likely to consider soft instruments when they confirm prior points the judiciary has made with regard to the same subject. In this vein, Senden testifies that "where an interpretative act lacks . . . a basis in case law, there is less likelihood that the court's interpretation will coincide with that of the Commission, as it has not yet committed itself to a certain interpretation."[106]

As to the effect of soft law on the national judiciary, Senden explains that the latter has a duty of "mandatory interpretation" of EU soft law mandated to it by the case law of the CJEU.[107] The authority establishing this relationship is the widely cited CJEU case *Salvatore Grimaldi v. Fonds des maladies professionnelles* (hereinafter *Grimaldi*),[108] where the Court held that a "European schedule" of occupational diseases, a soft instrument annexed to another soft instrument, namely, a Commission recommendation, could not be binding due to lack of proper legal basis, but could certainly produce legal effects. Famously, the Court stated, "The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions."[109] The last point made by the Court is important because this is the principle that it abides by. For instance, in the *Lodato* case,[110] the judiciary dealt with the provisions of several guidelines, but also stated that the discussed terms of the soft instruments coincide with those of hard legislation, thus pointing to the conclusion that the treatment given to soft law was possible due to its textual closeness to the respective hard law provisions.[111]

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[104] Similarly, in the international law context, Hillgenberg submits that non-treaty agreements, although technically non-enforceable, could produce legal consequences when taken into account for the purposes of interpreting a Treaty. *See* Hartmut Hillgenberg, *A Fresh Look at Soft Law,* 10 (3) EUR. J. INT'L L. 499, 513–14 (1999). The same is submitted by KLABBERS, *supra* note 64, at 1012.

[105] Geraint Howells, *Soft Law in EC Consumer Law, in* LAWMAKING IN THE EU, 329 (Craig and Harlow eds., 1998).

[106] SENDEN, *supra* note 9, at 390. The same idea is present in Liza Gormsen, *Why the European Commission's Enforcement Priorities on Art. 82 EC Should Be Withdrawn,* 31 (2) EUR. COMPETITION L. REV. 45, 49 (2010). Stefan also believes that, "In order to justify their position, courts ground soft law in judicial precedent." STEFAN, *supra* note 2, at 181-98.

[107] SENDEN, *supra* note 9, at 402–07. Senden explains that, while earlier case law of the CJEU pointed towards the conclusion that soft law could be considered as nothing more than a voluntary interpretation aid for national courts, after *Grimaldi* and the subsequent *Deutsche Shell* (C–188/91 *Deutsche Shell* [1993] ECR I–5357) case, soft law should be used as a mandatory interpretation aid the national judiciary.

[108] Salvatore Grimaldi v. Fonds Des Maladies Professionnelles, CJEU Case C–322/88, 1989 E.C.R. 04407.

[109] *Id.* at para. 18.

[110] Lodato Gennaro & C. SpA v. Istituto Nazionale Della Previdenza Sociale (INPS) and SCCI, CJEU Case C–415/07, 2009 E.C.R. I-02599.

[111] *Id.* In paragraph 28, the CJEU states completely out of context that a certain comparison term— the subject of the proceedings—that was originally contained in a guideline, is the same as the one adopted in a subsequent Regulation. The

The *Grimaldi* judgment has become a textbook example that sets the tone for the discussion on EU soft law, and the decision's vague language contributes to varied scholarly responses.[112] Paul Craig and Grainne de Búrca, for instance, opine that "[a]ll binding forms of EU law are capable of direct effect, and while other types of non-binding law are not said to have direct effect, they are influential in other ways and may have what has become known as indirect effect."[113] But is this "indirect effect" the indirect effect of unimplemented Directives as expressed in *Marleasing*,[114] or should it be conceptualized differently? Craig and de Búrca do not provide an answer, but Senden qualifies the legal effects that might ensue from soft law in the following manner: "[T]he fact that the community and national courts take account of soft law can also affect the rights and duties of individuals. Yet these effects do not go so far as to make soft law a standard that must be complied with as an end in itself."[115] Klabbers, however, adopts a more radical stance, contending that "[i]f legally non-binding provisions supplementing binding provisions must be taken into account, it follows that . . . those legally non-binding provisions must for all practical purposes be treated as legally binding."[116] Considering the generality of his claim and its possible applicability to several domains of EU regulatory activity, it is unfortunate that the author does not elaborate on how precisely this could happen and with which instruments of EU soft law.

In light of the stance on the compelling legal nature of competition soft law developed above, this Article stands in between the views of Senden and Klabbers, asserting that competition soft instruments should be consistently followed in judicial discourse. They should become a standard that must be complied with as an end in and of itself.[117] They should not, however, be treated as independently legally binding, but should produce indirect legal effects through the use of roundabout legal techniques and mechanisms.

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statement is out of context because earlier in the judgment in paragraph 22 the CJEU explicitly stated that there was no need for it to further discuss said Regulation because it was not adopted at the time of the dispute and was therefore immaterial to it. An explanation for the otherwise redundant paragraph 28, thus, would be the need of the court to somehow ground its soft-law-based arguments in hard law.

[112] For instance, *see* SENDEN, *supra* note 9, at 412; Klabbers, *supra* note 64, at 1014; GRAINNE DE BURCA AND PAUL CRAIG, EU LAW: TEXTS, CASES AND MATERIALS 190 (2011).

[113] GRAINNE DE BURCA AND PAUL CRAIG, EU LAW: TEXTS, CASES AND MATERIALS 190 (2011).

[114] Marleasing SA v. La Comercial Internacional de Alimentacion SA, CJEU Case C–106/89, 1990 ECR I-04135.

[115] SENDEN, *supra* note 9, at 412.

[116] Klabbers, *supra* note 64, at 1014.

[117] SENDEN, *supra* note 9, at 412.

III. Indirect Legal Effects at the National Level

The decisional practice of the Commission summarized in its soft instruments can produce legitimate expectations in natural and legal persons. This is evident in *Austria v. Commission*,[118] where an un-communicated and unpublished national guide to State Aid affected Member States and interested parties on the basis of legitimate expectations. Specifically, according to Stefan, the decisional practice of the Commission described in the guide, not the guide itself, gave rise to these legitimate expectations.[119]

The opposite view was expressed by the CJEU in *Polska Telefonia Cyfrowa* (*PTC*),[120] a competition law case. The question raised in this preliminary ruling was whether a National Regulatory Authority (NRA) of a Member State could be precluded, through its administrative decisions, from referring to guidelines that have not yet been published in the Official Journal of the European Union in the language of the Member State in question. The underlying issue that the CJEU considered was whether these guidelines could give rise to third party rights and obligations because, if they did, they had to be subjected to translation in the native language of the Member State in question. The court held that the guidelines did not have to be published in the official native language for the administrative authorities to refer to them, thus indirectly confirming that soft law cannot give rise to rights and obligations for third parties.

It is intriguing to contemplate the results of this decision in practice: Soft law cannot directly give rise to rights and obligations, but individualized decisions, which are eventually informed by the same soft law, undoubtedly affect the legal position of third parties (legal and natural persons). This is why Stefan rightly claims that the judgment presents a paradox: "[I]t shows how the purpose of ensuring, through soft law instruments, transparency and legal certainty in the enforcement of European law is sometimes defeated by the application of not translated, unpublished guidelines."[121]

The bottom-line of the above discussion is that the court came to opposite conclusions with regard to the ability of soft law to affect the legal obligations of third parties in two similar domains—state aid and competition law. This discrepancy exists because state aid guidelines result from compromise pursuant to Article 108.1 TFEU, which contains a specific cooperation obligation among the

[118] Austria v. Commission, CJEU Case C–99/98, 2001 E.C.R. I-01101.
[119] STEFAN, *supra* note 2, at 181–98.
[120] Polska Telefonia Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej,CJEU Case C–410/09, 2011 E.C.R. I-03853.
[121] STEFAN, *supra* note 2, at 885.

Commission and Member States. This obligation is a specific enunciation of the more general principle of community loyalty of Article 4.3 TEU, which is the principle of law that anchors state aid guidelines in the EU Treaty and generates their incidental binding force.[122] No similar specific obligation exists in EU competition law, in which the Commission unilaterally issues soft law. Some have further argued that the content of Article 4.3 TEU in and of itself is too general to induce legal effects.[123]

An example from international law practice may be enlightening in the case of unilaterally issued competition soft instruments. Hillgenberg asserts that the principle of good faith, paired with legitimate expectations, justifies the legal dimension of a unilateral declaration made under international law.[124] One could argue that within the EU context, it is precisely the principle of community loyalty that comes close to the substantive content of the good faith principle in international law.[125] Thus, it is not unimaginable that Article 4.3 TEU, paired with the principle of legitimate expectations, could offer sufficient grounds for recognition of legal effects to competition soft law.[126,127]

Nevertheless, it is difficult to give legal scope to competition soft law. This is further confirmed by more recent CJEU case law. It was unambiguously held by the Court in *Pfleiderer*[128] that competition soft law was not binding on Member States.[129] The same stance was subsequently taken in the *Expedia* case: "It also follows from the objectives pursued by the *de minimis* notice, as mentioned in paragraph 4 thereof, that it is not intended to be binding on the competition authorities and the courts of the Member States."[130] To that effect, the CJEU discussed arguments relating to the content[131] and place of publication[132] of the notice that were pointing to an impossibility of binding status. It was also claimed that "contrary to the Commission notice on cooperation within the

[122] STEFAN, *supra* note 2, at 189. *See also*, Emilia Korkea-Aho, *What Is New About New Governance?*, 32 RETFÆRD ARGANG 3 (2009).
[123] STEFAN, *supra* note 2, at 190. *See also*, Laurence Gormley, *Some Further Reflections on the Development of General Principles of Law within Art. 10 EC*, *in* GENERAL PRINCIPLES OF EC LAW IN THE PROCESS OF DEVELOPMENT, 303 (Ulf Bernitz et al. eds., 2008).
[124] HILLGENBERG, *supra* note 104, at 506.
[125] For an illustration, see, *infra* Section D.I.1.b, the section on community loyalty.
[126] Raitio testifies that, "In EU law literature, the principle legal certainty has been linked with other general principles." *See* Juha Raitio, *The Principle of Legal Certainty as a General Principle of EU Law*, *in* GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT, 47 (Ulf Bernitz et al. eds., 2008). For the concrete conditions under which the proposed combination could work, *see*, *infra* Section D.
[127] The possibility of pairing legitimate expectations and community loyalty to induce indirect legal effects of competition soft law will be explored in Section D, *infra.*
[128] Pfleiderer AG v. Bundeskartellamt, CJEU Case C-360/09, 2011 E.C.R. I-05161, paras. 21–24.
[129] *Id.* at paras. 21, 23.
[130] Expedia Inc. v. Autorité De La Concurrence and Others, CJEU Case C–226/11, para. 27 (Dec. 13, 2012), https://curia.europa.eu.
[131] *Id*. at para. 24.
[132] *Id*. at para. 30.

network of competition authorities, the *de minimis* notice does not contain any reference to declarations by the competition authorities of the Member States that they acknowledge the principles set out therein and that they will abide by them,"[133] which is a criterion reminiscent of the intended agreement rule as acknowledged in the EU State Aid domain discussed earlier.

The Court's ruling in *Expedia* regarding the legal status of soft law could be deemed disappointing from a flexible law perspective but legally sound from a formalist one. The *de minimis* notice, however, could not be considered absolutely ignored by the CJEU because the judiciary disagreed with the substance of the notice.[134] Because disagreement minimally implies acknowledgment and recognition of the instrument at hand, it is by implication illogical to talk about any disregard thereof. The court was nevertheless cautious not to explicitly refer to the contents of the notice.[135] The generality of its statement is apparent: "It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition."[136] This cryptic formulation relies on implied reasoning picked up by the Commission and translated into its revised *de minimis* notice[137] as meaning that a practice that is shown to have anti-competitive object cannot be saved by the *de minimis* threshold, even if the abusing undertaking is slight enough to fall under that same threshold.

It is intriguing to analyze this rather informal, but still significant, communication between Court and Commission in the *Expedia* case. The communication indicates that a subtle judicial engagement with soft law—although negative—is becoming discernible at the supranational level and allows the judiciary to send signals about its attitude throughout the competition enforcement system. The *Expedia* case can thus be considered an initial indication that supranational courts have begun to recognize the substantive side of competition soft law. This fact may also soon be reflected in national judicial discourse.

Whatever form of action, or lack thereof, *vis-à-vis* competition soft law the CJEU takes in the future, it will be of increased significance for national judicial practice. As AG Kokott acknowledged in her

[133] *Id*. at para. 26.
[134] In order to take account of this substantive judicial disagreement, the Commission issued a new version of the *de minimis* notice in 2014 (O.J. 2014 C 4136) where paragraph 2 of the old *de minimis* notice (O.J. 2001 C 368) was replaced by the holding of the CJEU in para. 37 of its *Expedia* judgment.
[135] *Id.*
[136] *Expedia Inc*., CJEU Case C–226/11 at para. 37.
[137] Commission Staff Working Document SWD(2014) 198, Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 101(1) of the Treaty on the Functioning of the European Union (D*e Minimis* Notice), 2014 O.J. (C(2014) 4136 final).

Expedia opinion: "The Court's reply . . . will to a large extent determine the scope which the national competition authorities and courts will have in the future when applying Article 101 TFEU."[138] In that regard, the AG suggests the introduction of a requirement that national courts give reasons for deviation from soft law, a stricter requirement than the current obligation of mandatory interpretation.[139] Indeed, this may be one of the reasons why the Court largely did not follow the AG in her reasoning. Still, her deeply reflective argumentation was not completely disregarded either:

> The Commission's leading role, firmly anchored in the system of Regulation No 1/2003, in framing European competition policy would be undermined if the authorities and courts of the Member States simply ignored a competition policy notice issued by the Commission. It therefore follows from the duty of sincere cooperation which applies to all the Member States [Art. 10 EC, now Art. 4.3 TEU] that the national authorities and courts must take due account of the Commission's competition policy notices, such as the *de minimis* notice, when exercising their powers under Regulation No 1/2003.[140]

As discussed above, in paragraph 37 of the *Expedia* judgment, the CJEU hesitantly took heed of AG Kokott's strong argument by sending a nebulous, but still extant, signal to national authorities.[141]

This section presented the legal effects of competition soft law *vis-à-vis* the European Commission and the European and national judiciary. It also showed that the CJEU is prepared to acknowledge indirect legal effects of soft instruments in domains such as state aid that are related to the field of competition law.[142] Finally, the supranational judicial practice has been far more resistant to accept the legal effects of competition soft law. While explanations for that result were acknowledged, it is maintained that, in line with a more flexible view on law presented in Section B above, and as argued by AG Kokott, ignoring competition soft instruments judicially—at the national or supranational level—will have serious negative repercussions for the current design of EU competition enforcement. In this sense, recognizing legal effects of competition soft law at the national level—without endowing it with incidental binding force—is a much needed development.

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[138] *Expedia Inc*., CJEU Case C–226/11 at para. 5.
[139] SENDEN, *supra* note 9, at 406-7.
[140] *Expedia Inc*., CJEU Case C–226/11 at para. 38.
[141] *Id.* at para. 37.
[142] With regard to state aid soft law, the previous section, *see*, *infra* Section C.II, showed that incidental binding force has also been accepted by the courts.

The next section will examine the array of plausible national judicial responses to competition soft law. It acknowledges the possibility of formalist judicial rejection of engaging with competition soft law but does not discuss this at length due to this outcome's dissonance with the flexible theoretical underpinnings of the current Article.[143] Thus, the following section will first deal with the possibility of competition soft law in national courts to generate indirect legal effects via the intermediation of general principles of law.[144] Then, the section will propose a second option for judicial recognition of competition soft law, not based on the idea of indirect legal effects.[145] These two approaches constitute judicial "recognition" of soft law.

D. Theoretical Possibilities for Recognition of Soft Law as an Instrument That Produces Legal Effects

The largely dismissive attitude towards competition soft law discernible in supranational judicial practice is unfortunate, as it fails to provide the system of decentralized competition enforcement with certainty regarding the future application of rules. Not only do judgments currently militate against the general principle of legal certainty, which is alarming even from a formalist point of view, they also unsurprisingly prove undesirable in light of the premises of more flexible theories on the role of the judiciary in a new governance context, in which competition soft law exists.

Before engaging with flexible accounts on judicial activity that are open to the idea of judicial recognition of soft law, it needs to be emphasized that the above theoretical presumption that the national judiciary could adopt a formalist stance towards competition soft law and refuse to engage with it, although normatively undesirable, is nevertheless - according to the author - quite plausible to materialize in practice. The extent to which this presumption holds up in practice, however, has to be ascertained through a subsequent empirical study.

Flexible theoretical approaches[146] to judicial activity acknowledge the pivotal importance of courts as catalysts of new power relations in the multi-level EU regulatory space. They maintain that courts are

[143] This is why in the introductory definition of "judicial recognition," the formalist possibility for the courts to "refuse to interpret soft law," is not foreseen.
[144] *See*, *infra* Section D.I.
[145] *See*, *infra* Section D.II.
[146] *See generally*, Alec Stone-Sweet, *The European Court of Justice and the Judicialization of EU Governance*, 5 (2) LIVING REVS. IN EUR. GOVERNANCE 5 (2010). *See also*, Scott & Sturm, *supra* note 36, at 566–67.

a "concrete location where new governance and law must be reconciled"[147] by way of ensuring full and fair participation of actors involved in new governance processes, securing the adequacy of the "epistemic or information base for decision-making within new governance,"[148] and requiring transparency and accountability as essential elements of enforceability.

As previously laid out, by adopting a light-touch, near dismissive and largely formalist approach to competition soft law, supranational judicial discourse has so far failed to send an unambiguous signal on the contents of the information base on which administrative and national judicial decision-making should take place. This attitude—with the hesitant exception of *Expedia*—is liable to trump the crucial judicial role as delineated by Scott and Sturm: "[C]ourts asked to review the adequacy of new governance decisions are not merely assessing the outputs of those bodies; they are signaling the benchmarks for normative activity in these other domains, thus influencing how normative activity will take place in subsequent iterations."[149]

The reasoning of the supranational judiciary could be explained, however, by the judicialization theory of Stone Sweet, whose assumption is that in situations of novelty, judges "behave defensively, . . . they struggle, in decision-making processes, to protect themselves from charges of usurpation."[150] The same attitude seemingly lies at the foundations of the phenomenon of "ignored governance" observed by Scott and Trubek.[151] They claim EU courts ignore governance at times and instead tend to draw "formal lines of authority . . . without even the barest of reference to the social reality of partnership or engagement with its implications for law."[152] Judicial refusal to engage with new governance in its different guises, and competition soft law in particular, is a missed opportunity to direct the recently revamped regulatory domain of competition in a time when new rules need to be contextualized and endowed with new normative existence.[153] Still, as argued above, there are good reasons for the cautious approach of European courts. In addition to their traditional resistance

[147] Scott & Sturm, *supra* note 36, at 566.
[148] *Id.* at 567.
[149] *Id.* at 570. The same observation is also made by Stone-Sweet, *supra* note 132, at 117.
[150] Alec Stone-Sweet, *Constitutional Politics: The Reciprocal Impact of Lawmaking and Constitutional Adjudication*, *in* LAWMAKING IN THE EUROPEAN UNION, 111 (Paul Craig & Carol Harlow eds., 1998).
[151] Joanne Scott and David Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 (1) EUR. L. J. 1, 11 (2002).
[152] *Id.* Scott and Trubek also detect instances at which governance had been (1) thwarted—in the instances where the CJEU had insisted that Directives creating rights and obligations for individuals be transposed as hard legislation only—(2) distorted—an artificial concept is created in order to enable the output of a new governance process to be interpreted in light of general principles of community law—or (3) taken seriously—when interpreting the concept of representativeness as a democratically legitimating feature of the process of lawmaking. It is possible that national courts also exhibit similar attitudes to competition soft law in their first direct interactions with it.
[153] Stone-Sweet discusses the high stakes involved in novel lawmaking in the following way: "At this first stage governments and parliaments enjoy wide policy-making discretion, but face high constitutional uncertainty." This constitutional uncertainty is according to the current author unfortunately not tackled by the CJEU when it comes to the issue of competition soft law. Stone-Sweet, *supra* note 151, at 114.

to novelty, courts also consider other elements curbing their ambit of action, such as the vast discretion of the Commission to set the rules of competition.[154] The current normative confusion in the competition regulatory space is nevertheless highly undesirable, especially in light of the above-mentioned principle of legal certainty and the implications its non-observance could have for the subjects of the law in the recently decentralized system.

National courts, enabled by Regulation 1/2003 to directly apply Articles 101 and 102 TFEU in their entirety, will, to a large extent, decide the fate of the Modernization process.[155] This Article will now hypothesize as to the possible responses to competition soft law that national courts might have. National courts might either be resistant, as Scott and Trubek suggest, or, conversely, explicitly engage with soft law by using legal techniques to give indirect legal effect to non-binding provisions as discussed by Senden and Stefan.[156] Finally, national courts could be persuaded by the substantive content of competition soft law, whereby they would incorporate its reasoning in judicial discourse without explicit reference to the instrument proper.[157]

The following section will proceed by charting out in greater detail the latter two possibilities for judicial recognition of competition soft law at the national level. The formalist resistant judiciary scenario will not be addressed for reasons outlined above.

I. Explicit Treatment of Competition Soft Law in National Judicial Discourse: General Principles of Law

In the instances where courts take soft law "seriously,"[158] they engage in interpretation of technically non-legal instruments by application of general principles of law to them. This happens in two ways, as Tridimas testifies: "Recourse to general principles as a source of law may be made by a court

[154] The large discretion of the Commission to develop competition policy is based on the "exclusive EU competence" status of the policy domain and is further confirmed by the supranational courts in their judgments in the field. The rule by which both the CJEU and General Court abide in the domain of competition law is "judicial deference" to the decisions of the European Commission, because those largely involve matters of complex economic assessment. *See* Nicholas Forwood, *The Commission's More Economic Approach: Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review*, *in* EUROPEAN COMPETITION LAW ANNUAL 2009: EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES, 255, 259 (Claus-Dieter Ehlermann & Mel Marquis eds., 2010).

[155] Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on The Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. L 1, 1.

[156] *See*, *supra* Section C.

[157] Gormsen in the context of the Art. 102 guidelines (and the methodology for conditional rebates laid down therein), expresses the opinion that the CJEU could have taken the relevant provisions into consideration had it thought of them as enunciating a sensible approach. Gormsen, *supra* note 106, at 238.

[158] The expression used by Scott & Trubek is "taking governance seriously"; we allow ourselves the freedom to supplant the term "governance" for "soft law" because the latter is an expression or instrument of the former. *See* Scott & Trubek, *supra* note 151, at 11. [please check that this is the correct pin cite]

either as a result of express reference contained in a legal text or spontaneously by the court itself in order to fill a gap in written law."[159] In other words, in order for general principles to become relevant, the soft guidelines, notices, and the like should contain explicit in-text references to general principles of law; alternatively, it is up to the courts to raise an issue of general principles *ex officio*.

The latter situation is quite unlikely, however, because courts are naturally cautious to engage with atypical instruments, as discussed above.[160] Therefore, for the second scenario to materialize, it is largely up to the parties to the proceedings to raise arguments regarding the applicability of general principles.[161] Literature on the matter discussed above[162] showed that, out of the general principles of law applicable to the competition domain, the principles most likely to be invoked are those of legal certainty and the pertinent legitimate expectations, community loyalty, and equality. The ability of these three principles to endow competition soft law with legal effects—if invoked by parties to the proceedings or *ex officio*—is discussed below.

1. "Spontaneous" Use of General Principles of Law

1.1 Legitimate Expectations and Legal Certainty

The principles of legal certainty and legitimate expectations are so interwoven that sometimes even the CJEU does not distinguish between them.[163] Scholars do agree that the latter is a more specific expression of the former[164] and could thus be a source of substantive rights, while the former is mostly used as a rule of interpretation due to its general character.[165]

It is commonly agreed that the principle of protection of legitimate expectations is inspired by the German principle of *Vertrauensschutz*—a principle that the national courts saw as underlying certain

[159] TRIDIMAS, *supra* note 8, at 9.
[160] *See*, *supra* Section C.II.
[161] Miasik contends that, "Another way of applying general principles in judicial practice is to refer to them in order to inspire the judiciary to interpret [national] law in a manner compatible with a particular principle . . . the more applicants raise issues of general principles of law in their submissions to courts, the more valuable judgments dealing with those principles will be delivered." *See* Dawid Miasik, *Application of General Principles of EC Law by Polish Courts—Is the European Court of Justice Receiving a Positive Feedback?*, *in* GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT, 357, 382, 391 (Ulf Bernitz et al. eds., 2008).
[162] *See*, *supra* Section C.
[163] TRIDIMAS, *supra* note 8, at 163; USHER, *supra* note 93, at 52–71; Raitio, *supra* note 127, at 54.
[164] HOFMANN, *supra* note 92, at 162; USHER, *supra* note 93, at 52. For a more detailed discussion of the difference, *see* TRIDIMAS, *supra* note 8, at 170.
[165] TRIDIMAS, *supra* note 8, at 170.

provisions of the German basic law.[166] The principle entered the EU domain via *Topfer*[167] and has since become quite relevant for the competition domain. As Tridimas reasons, legal certainty acquires particular importance in economic law due to the very nature of economic relations and transactions: "Economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business. Legal certainty may thus be seen as contributing to the production of economically consistent results."[168]

It is precisely on these desiderata that the current EU competition regime fails. In order to secure more legal certainty for the system, one must make sure that the subjects of the law will be able to claim legitimate expectations, which appears to be quite problematic in the competition domain. This is the case because legitimate expectations can rarely[169] be based solely on the content of existing legislation—let alone soft law. Rather, they must be derived from consistent administrative or judicial practice.[170] The current state of EU Competition Law, however, seems to exemplify inconsistency at the levels of both administrative and judicial practice. [171] This state of flux is to a large extent due to the entirely different substantive and procedural rules of competition introduced in Regulation 1/2003 and the varying speeds with which the administrative and judicial organs accept them.[172]

Thankfully, the case law on legitimate expectations does take into account the possibility of changes to the status quo and allows claims under abnormal circumstances to stand.[173] In that regard, legitimate expectations may be invoked against the Commission when there has been a substantial and long-lasting dialogue between the applicant and the institution, including the requirement that "the applicant must have acted on the expectation (or have refrained from taking some action which it would otherwise have taken): [M]ere hopes in the continuance of the status quo are not sufficient to found a legitimate expectation."[174] Thus, it is possible for an individual to claim legitimate

[166] John Usher, *General Principles and National Law—A Continuing Two-Way Process*, *in* GENERAL PRINCIPLES OF EC LAW IN THE PROCESS OF DEVELOPMENT, 393, 402 (Ulf Bernitz et al. eds., 2008).
[167] August Töpfer & Co. GmbH v. Commission of the European Communities, CJEU Case C–112/77, 1978 E.C.R. 01019.
[168] TRIDIMAS, *surpa* note 8, at 163. For a similar argument, see also Raitio, *supra* note 126, at 59.
[169] It is submitted by Raitio that, "The principle of legitimate expectations is primarily applicable to individual decisions, but it may in limited cases apply to the exercise of a more general power and thus to the EU legislation as well." Raitio, *supra* note 126, at 54.
[170] See, among others, Joined Cases Compagnie Industrielle Et Agricole Du Comté De Loheac and Others v. Council and Commission, CJEU Cases 54–60/76, 1997 E.C.R. I–00645; Mulder v. Minister Van Landbouw En Visserij, CJEU Case C–120/86, 1988 E.C.R. 02321; Von Deetzen v. HZA Hamburg-Jonas, CJEU Case C–170/86, 1988 E.C.R. 02355.
[171] This problem is most acute in the abuse of dominance field under Art. 102 as noted by Gormsen, *supra* note 106, and numerous others.
[172] Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on The Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. L 1, 1.
[173] *See* Sharpston, *supra* note 20, at 110–12.
[174] *Id.* at 142.

expectations against the Community with regard to a Community instrument affecting his rights and obligations that he detrimentally relied on, including soft law.

1.2 Community Loyalty: Article 4.3 TEU

Section C above argued that the principle of legitimate expectations, paired with that of community loyalty,[175] could prove successful in inducing legal effect of competition soft instruments. Although legitimate expectations in and of themselves might already be sufficient to this effect, it is necessary to emphasize the strength of community loyalty as a mainly procedural principle, mediating the importance of more substantive principles of EU law, such as legitimate expectations.[176]

The principle enshrined in Article 4.3 TEU acquires its importance at the Member State level, whereby it imposes (1) a positive obligation on Member States to comply with community law, (2) a negative obligation on Member States not to jeopardize the attainment of the objectives of Community law, and (3) an obligation for mutual cooperation between the national and supranational levels. The last sub-category is, in the words of Gormley, "[T]he key to the proper functioning of the relationship between the Commission and national courts in the fields of competition and state aids."[177] In particular, Gormley refers to the relevant notices which secure the proper cooperation between the said institutions[178] and which, in this respective function, silently incorporate the principle of community loyalty.[179]

Both the notices and the principle of community loyalty acquired even greater significance for the EU competition regime after its decentralization with Regulation 1/2003, since, with respect to competition, every national court is now also a Community court. This allows the principle of Article 4.3 TEU to enter the domain of private law because it "imposes on public authorities and courts the

[175] Community loyalty cannot create duties on its own but only together with another rule of community law or principle or objective of community policy which is to be promoted; the latter also needs to be sufficiently and precisely defined. *See* John Temple-Lang, *Art. 10 EC—The Most Important "General Principle" of Community Law*, *in* GENERAL PRINCIPLES OF EC LAW IN THE PROCESS OF DEVELOPMENT, 75, 79, 86, 88 (Ulf Bernitz et al. eds., 2008). There are, however, signals that this situation might be changing in the future. *Id*. at 85.

[176] Temple-Lang states that community loyalty is "the most important of the general principles because it is the legal basis of the obligation on all national courts and authorities to comply with all other general principles." In this regard, it cannot stand on its own and needs to be always used together with another general principle, the latter defining the scope of application of the former. *Id.* at 77.

[177] Gormley, *supra* note 123, at 312.

[178] Commission Notice on the Co-Operation between the Commission and the Courts of the EU Member States in the Application of Arts. 81 and 82 EC of 27 Apr. 2004, 2004 O.J. (C 101/04); Commission Notice on the Enforcement of State Aid Law by National Courts of 9 Apr. 2009, 2009 O.J. (C 85/01).

[179] This is in line with Temple-Lang's argument that community loyalty is an underlying consideration of a vast array of Community actions, although the principle is usually not explicitly mentioned. *See generally*, Temple-Lang, *supra* note 175.

duty to respect and when necessary to protect . . . the Community law rights of individuals and companies, including their rights against other private parties."[180]

According to Temple-Lang, Article 4.3 TEU obliges Member States to promote competition in general, and Community competition law in particular, via their competent authorities and thus to achieve the results provided for by the EU competition framework.[181] To this end, Temple-Lang mentions several duties for promotion of competition, such as offering legal aid to claimants relying on EU competition law, striving for full compensation of victims of a competition law breach and the related adoption of presumption of harm when it is excessively difficult for the claimant to prove it. It is here that the above-proposed link between community loyalty and the general good faith principle becomes most obvious. These duties are procedural in nature, however. It would be equally interesting to know whether the Article 4.3 TEU principle also applies with regard to the achievement of substantive results envisioned in the soft law instruments that constitute the rules of the competition regulatory framework. A significant number of scholars submit that community loyalty alone is too general of a principle to create specific duties.[182] This is also why it was suggested above[183] that community loyalty could be successfully paired with the principle of legitimate expectations, which is more concrete in its application.

Prominent scholars like Klabbers and Everling opine to the contrary—they believe that community loyalty is,[184] or is evolving towards,[185] a self-standing principle of EU law capable of creating specific legal duties. This latter scenario is not unimaginable, especially in light of Temple-Lang's contention that community loyalty is a principle with an often neglected substantive dimension,[186] and especially with regard to private damages actions in national courts.[187] In order to test these theoretical views with respect to competition law further research in the form of an empirical study on national judicial practice is needed.

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[180] Temple-Lang, *supra* note 175, at 90, 97. The author submits that Community law is gradually developing a concept of laws which protect private rights and requiring these rights to be protected, when necessary, under Art. 4.3 TEU; this process, however, when fuelled by judicial output (case law), is slow, incremental and uncoordinated.
[181] *Id.* at 101.
[182] *See generally*, Gormley, *supra* note 123; SENDEN, *supra* note 9; STEFAN, *supra* note 2. The principle could, however, produce a duty at least to motivate deviation from soft law provisions as advocated by AG Kokkot in her *Expedia* opinion. *Expedia Inc*., CJEU Case C–226/11.
[183] *See*, *supra* Section D.I.1.b.
[184] Klabbers, by citing Everling, endorses the view that Art. 10 EC might be just enough to give legal effect to soft law in view of the instruments' "meaning within the context of the integration process at large and the goals of the Treaty in particular." Klabbers, *supra* note 64, at 1016.
[185] *See* Temple-Lang, *supra* note 175, at 85.
[186] *Id.* at 111.
[187] *Id.* at 101.

1.3 Equality

Equality, or the principle of non-discrimination, emerged out of the early EEC Treaty articles which prohibited difference in treatment with regard to nationality, international taxation of goods, pay for men and women, and agricultural markets.[188] It is relevant for all fields of EU activity, with a particular importance for EU economic law,[189] and ensures that authorities apply the law equally to all citizens in the same position (formal equality), and that the content of these laws does not discriminate on arbitrary grounds between groups of peoples (substantive equality).

This principle binds EU institutions and Member States when they act within the scope of EU law and can also, in the context of EU competition law, bind natural and legal persons.[190] These categories of applicants are thus entitled to invoke the principle in competition proceedings at the national level. National courts deciding disputes based on EU competition rules may also be compelled to refer to soft law because those instruments inform the substantive content of the hard competition regulatory framework. Therefore, to ensure formal equality,[191] soft law must be taken into account explicitly, by the use of general principles of law, or implicitly, by mere consideration.[192]

Furthermore, the principle of equality of treatment has been associated with legal certainty in the case law of the CJEU.[193] This Article thus argues that, much like in the case of community loyalty, equality might be paired with legal certainty and the pertaining legitimate expectations in order to give legal effect to otherwise non-binding competition law instruments.

2. General Principles of Law Expressly Incorporated in the Text of Soft Law Instruments

In her dissertation on the treatment of soft law in courts, Stefan argues that it is more likely that the judiciary engages with guidelines if they contain in-text references to general principles of law.[194] In the context of competition law, she maintains that the courts and the Commission engage in a "dialogue" with regard to soft law, mutually accepting each other's creativity in the sphere.[195]

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[188] USHER, *supra* note 93, at 12.
[189] TRIDIMAS, *supra* note 8, at 43, 45. In EU competition law, the principle of equality is seen as underlying the very basic premise of undistorted competition.
[190] *Id.* at 44.
[191] Formal equality is what EU economic integration (including the internal market and competition policies) strives to achieve. *See* DE BURCA &CRAIG, *supra* note 112, at 605.
[192] *See*, *infra* Section D.II.
[193] Raymond Louwage and Marie-Thérèse Louwage, Née Moriame, v. Commission of the European Communities, CJEU Case C–48/73, 1974 E.C.R. 00081.
[194] STEFAN (note 2), 220–21.
[195] *Id.* at 219–25. The case of *Expedia* may serve as a recent example thereof. *See Expedia Inc.*, CJEU C–226/11.

In this line of thinking, relevant passages of case law that refer to general principles of law are "inserted in new soft law being made at Commission level and then back again in new judgments of EU courts, completing a virtuous circle."[196] The CJEU is thus willing to discuss non-binding law when it incorporates and serves general principles of law.

Such a development is hardly surprising if one makes a parallel with the recent CJEU case law in the field of non-implemented Directives – the *Mangold* judgment[197] and others produced in its aftermath.[198] The importance of both the *Mangold* and the subsequent *Kucukdeveci* judgment lies in their assertion that a non-implemented Directive that cannot formally influence the legal situation as between private parties can nevertheless be deemed to do so by the Court if it explicitly mentions and serves the attainment of general principles of higher, constitutional order—namely, the principle of equal treatment in its guise of non-discrimination on the basis of age.[199] Although both the aforementioned cases concern themselves with hard law —a non-implemented Directive—the similarity with soft law lies in the fact that both categories of instruments (soft law and non-implemented Directives) cannot directly produce legal effects at the national level and can thus not be the source of rights and obligations for individuals.[200] But, as demonstrated by these judgments, this situation can be changed in case the instruments in question incorporate general principles of law (of constitutional significance) and are, by virtue of this fact, held to produce legal effects even in horizontal situations between private parties. [201]

[196] STEFAN, *supra* note 2, at 201-25.
[197] Werner Mangold v. Rüdiger Helm, CJEU Case C–144/04, 2005 E.C.R. I-09981.
[198] Seda Kücükdeveci v. Swedex GmbH & Co. KG., CJEU Case C–555/07, 2010 E.C.R. I-00365.
[199] Dagmar Schiek, *The ECJ Decision in* Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation*, 35 (3) INDUS. L. J., 329, 333 (2006).
[200] As a matter of EU Law (Article 288 TFEU), a Directive needs to be first implemented at the national level in order to produce legal effects and to be a source of rights and obligations for parties. Thus, a non-implemented Directive cannot create rights and obligations until implemented. In the period between adoption and implementation, however, Member States' bodies are obliged not to take measures which might work counter to the objectives of the Directive. *See* Inter-Environnement Wallonie ASBL v Région wallonne, CJEU Case C–129/96, 1997 E.C.R. I-7411. For soft law, the only formal obligation that national organs have is to take utmost account of those instruments, following *Grimaldi*.
[201] For an argument that *Mangold* is actually not a case where horizontal direct effect of Directives was further confirmed, *see* Schiek, *supra* note 199, at 337. Schiek argues that, "a Directive . . . having direct effect on a legislative activity that impacts on horizontal relations is not the same as a directive having horizontal effect itself." While the argument is technically correct, the ultimate result of the judgment is nevertheless to create a situation in which the rights and obligations of two private parties (employer and employee) are *de facto* impacted by the non-implemented Directive in question.

II. Implicit Treatment of Competition Soft Law in National Judicial Discourse: The "Persuaded Judiciary" Scenario

The persuaded judiciary theory provides the possibility of engaging with the substantive content of soft law implicitly, without relying on the mechanism of indirect legal effects. This scenario may materialize when courts want to signal that they agree with the substance of a soft law instrument, but do so by alluding to its content rather than explicitly referencing the instrument proper.

This theory builds on the phenomenon of "legal legitimacy" as conceptualized by Finnemore and Toope.[202] The idea of legal legitimacy is that courts might slip in arguments indirectly upholding soft law when the latter instruments are both internally—by virtue of their 'nature'—and externally persuasive—towards subjects of the law and institutions. This happens, for instance, when soft law instruments are sufficiently clear and precise and have been adopted on the basis of broad agreement,[203] involving a majority of relevant stakeholders who exercise pressure on the legal system through perceiving competition soft law as legitimate law and thus aligning their behavior to its provisions.

The phenomenon here highly resembles the account of Frederick Schauer on judicial learning from—as opposed to following—precedent:

> With respect to the former . . . the instant court may learn from a previous case, or be persuaded by some decision in the past, but the decision to do what another court has done on an earlier occasion is not based on the previous case's status as a precedent.[204]

By the same token, the decision of a national court to follow competition soft law is not based on the latter's status as law, but on its persuasive force stemming from what Finnemore and Toope call "legal legitimacy."[205]

Additionally, subjects of the law are themselves on both the input and the receiving ends of soft rules. On the one hand, the perceived legal legitimacy of soft rules fuels the persuasion process by

[202] Finnemore & Toope, *supra* note 24, at 743.
[203] Here we refer to the possibility of multi-party agreement secured at public consultations preceding the adoption of competition soft law.
[204] SCHAUER, *supra* note 8, at 38.
[205] Finnemore & Toope, *supra* note 24, at 749.

which courts will engage with the latter; on the other hand, once courts have signaled their attitude, it is again up to the subjects of the law to pick up on this signal and complete what appears to be an iterative cycle not unlike the one Scott and Sturm as well as Stefan suggest.[206] Consequently, the success of this method of judicial recognition will depend on the actors of the system being able to pick the relevant signals coming from the judiciary and on the judiciary not totally rejecting engagement with soft law in the first place.

This section, in line with a more flexible approach to law, proposed several theoretical possibilities for the judicial acknowledgment of competition soft law at national level, while still acknowledging formalist arguments pointing towards rejection of judicial engagement with the latter instruments. It distinguished between explicit and implicit recognition of soft law, the former being possible through the creation of indirect legal effects by the intermediation of general principles of law, and the latter through the phenomenon of legal legitimacy that competition soft law could potentially evoke.

E. Conclusion

This Article focuses on studying competition soft instruments as instruments of law for the purposes of establishing the theoretical possibility of their recognition in national judicial discourse. The core idea, therefore, asserts that a legal dimension to competition soft law should be judicially acknowledged—in line with a flexible view of law—in order to ensure the functioning of a decentralized competition enforcement system governed by legal certainty and substantive coherence in legal outcomes. In the process of judicial recognition, however, one should keep in mind that soft law does not directly transform into hard law as hypothesized by formalist international legal scholars. To the contrary—and in line with the flexible view—soft law generates legal effects when subject to judicial scrutiny, while remaining soft as an instrument.

In order to further delineate those legal effects, a theoretical framework was devised. On the basis of a study of academic work on judicial attitudes to soft law and the current practice of the supranational European courts, it was hypothesized that national courts could acknowledge the legal effects of competition soft law by either: (a) Employing general principles of law *ex officio* or upon a request of a party to the proceedings, or (b) employing general principles of law because the latter are expressly mentioned—as objectives to be fulfilled—by the soft instrument under review. Within the limits of the same theoretical framework, it was also argued that courts could slip in arguments

[206] Scott & Sturm, *supra* note 36, at 570–75. See also STEFAN, *supra* note 2, at 219–25.

borrowed from soft law in their judicial discourse because they are “persuaded” of the merits of the point that a soft instrument makes. Finally, this study remains wary of the fact that courts could be unreceptive to soft law and, following a formalistic stance, deny engagement with it in their judicial practice.

Post-script to Chapter 1: a Normative Take on National Judicial Recognition of Supranational Soft Law

The following narrative serves as an addition to the theoretical discussion in the preceding chapter and arose out of additional research performed for the purposes of Chapters 2 and 3. It aims to establish the extent to which the suggested possibilities for national judicial recognition of soft law should indeed be used by national courts to further consistency and certainty in the decentralized system of EU competition law enforcement. To this end, the desirability of judicial recognition of supranational competition soft law in national legal orders will be justified, while also acknowledging concerns that this approach might entail. This discussion will be taken up further in Chapter 4, where the assertions hereby made will be (re-)assessed in light of the empirical results generated in Chapters 2 and 3.

The main certainty and consistency-enhancing feature of judicial recognition of soft law, it is argued, lies in its potential to clarify the *yet uncertain* effects of supranational soft law at the national level, while at the same time acknowledging and furthering the substantive value/content of the said instruments. To illustrate, Chapter 1 pinpointed the varied workings of soft law in different contexts – in other words, the legal effects attached to soft law are different depending on the actors involved and the level at which a dispute takes place (national or supranational). Since it is up to (national) courts to attribute legal effects, an alignment of their attitudes to supranational competition soft law towards recognition will also serve to clarify those effects. Alignment in recognition of legal effects should not be absolute, but enough not to cause different consequences for the rights and obligations of individuals depending on circumstances such as – for instance – the type of enforcement setting (public or private). A good example in this respect is the PTC judgment discussed in Chapter 1,[1] where unpublished Commission guidelines in the telecommunications sector were deemed not capable of affecting the rights and obligations of individuals, but a national regulatory decision based on this same instrument could.[2] In this sense, the desirability of approximation of the legal effects of soft law from the viewpoint of consistency and certainty will be advocated below.

[1] Case C–410/09, *Polska Telefonia Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej* [2011] E.C.R. I-03853.
[2] For competition law, this same effect will be achieved through the obligation of NCAs to always comply with Commission decisions following Article 16(2) of Regulation 1/2003. For an elaboration on this argument, see L.F. Pace., "The Italian Way of Tackling the Abuse of Dominant Position and the Inconsistencies of the Commission's Guidance: not a Notice but a Communication" in Pace (ed.), *The Impact of the Commission's Guidance on Article 102*(Edward Elgar, 2011).

The differentiated legal effects of soft law

Before proceeding to the core of the argument in the next section, an inventory of the legal effects of soft law for the national and supranational levels will be hereby made. This account serves as a summary and an extension of the analysis made in that regard in Chapter 1. Although this work concerns itself with the national level, the supranational legal effects of soft law are equally important in the multi-level competition enforcement regime[3] and are therefore also reflected here and previously in Chapter 1. The legal effects of supranational soft law will be discussed per level (supranational and national) and per actor (EU and national legislature, executive and judiciary).

- **Effects at supranational level**

This work considers the legal effects of Commission-issued soft law at the supranational level vis-à-vis the executive (Commission) and the judiciary (CJEU) only since the discussion on the legal effects of soft law for the EU legislature centres around a possible obligation on the legislature to adopt hard law instead.[4] Insofar as the Introductory Chapter established that administrative supranational soft law studied here falls squarely within the decisional discretion of the Commission, the question of whether it should instead be adopted as hard law by means of a legislative procedure does not arise in this author's opinion.[5] Thus, the relevant legal effects of soft law at the supranational level can be summarized as follows:

(i) Binding effect on the Commission: the Commission binds its discretion when issuing soft law instruments with the legal consequence that it cannot depart from them under pain of breaching the principles of equality and the protection of legitimate expectations[6]

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[3] I. Maher, 'Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?'(2007) 31(6) Fordham International Law Journal.
[4] L. Senden, *Soft Law in European Community Law: its Relationship to Legislation* (Wolf Legal Publishers ,2003), Ch.11.
[5] There are scholars who disagree with this view. See, for instance, Wolfgang Weiss, 'After Lisbon, can the European Commission Continue to Rely on "Soft Legislation" in its Enforcement Practice?' (2011) 2(5) Journal of European Competition Law and Practice.
[6] Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rorindustri and others v. Commission* [2005] ECR I-05425.

(ii) Interpretative aid for supranational courts: the CJEU uses soft law as a voluntary interpretative tool;[7] the legal consequence of this usage is the possibility of soft law to co-determine or even broaden[8] policy established by means of the hard law that it helps interpret. This interpretative practice, however, does not happen consistently,[9] which has given ground for criticism of the CJEU voiced by several scholars,[10] especially in light of the fact that a stricter interpretation standard applies to national courts. The extent to which supranational courts should hold themselves obligated to consider/interpret Commission-issued soft law will be discussed in greater detail in Chapter 4.

(iii) Reviewable acts when adding/detracting from legislative obligations: as Scott puts it, 'where guidance is construed by the Court of Justice as introducing a new obligation or as adding to the relevant Treaty or legislative text, the guidance in question will be regarded as susceptible to review.'[11] The legal consequence in such a scenario can be annulment of the soft law act in question on the grounds that the Commission lacks competence to adopt an act deviating (adding to[12] or detracting[13]) from the original legislative obligation. However, it is difficult to imagine such a challenge succeeding in the domain of competition law where the Commission enjoys large discretion and legislative norms are very generally worded. This observation is confirmed by an empirical study performed by Stefan, who shows that supranational competition soft law – the Fining Guidelines[14] – that was challenged on the grounds of non-conformity with a legislative norm – Article 15(2) of Regulation 17/62[15] – has so far withstood annulment challenges in supranational courts.[16] How this reality at the supranational level plays out in national courts will be discussed in Chapter 4 of this work.

[7] L. Senden (n 4), 409.
[8] To the extent this happens, soft law can be subject to an action for annulment. See point (iii) below.
[9] Ibid., 412
[10] Ibid., 414. See also E. Korkea-Aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Routledge, 2015) 178-181.
[11] Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law' (2011) 48(2) Common Market Law Review, 341.
[12] O. Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International, 2012), Ch. 5.02.A.
[13] Scott (n 11), 349.
[14] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003/EC (OJ C 210/2, 1.9.2006).
[15] Council Regulation (EC) No 17/62 of 21 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L 13/204.
[16] O. Stefan (n 12), Chapter 5.02.A.

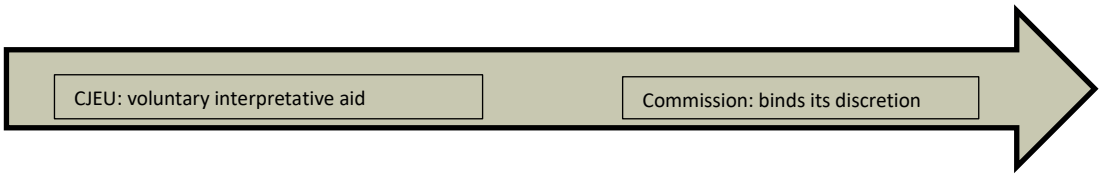

FIGURE 1. SUPRANATIONAL LEVEL: EU INSTITUTIONS

- **Effects at national level**

(i) Mandatory interpretation aid for national courts[17]– as established in Chapter 1, the legal consequences of this obligation for Member States entail that soft law instruments[18] must be taken into account by national courts 'in particular where they are capable of casting light on the interpretation of other provisions of national or Community law .'[19] Additionally, Sarmiento argues that when a reference from national law is made to an EU soft law instrument in cases with community dimension, the duty to observe the soft instrument is even stronger than mandatory interpretation aid , and closer to conform interpretation, as it is reinforced by both national and EU law.[20] Unfortunately, he does not elaborate on the precise mechanisms through which such an obligation functions. Whether such an effect can indeed be detected in Member States remains to be further researched in the empirical chapters of this work; suffice it here to say that the effect Sarmiento describes is reminiscent of the way in which state aid soft law agreed by the Commission and Member States is deemed to be binding on the latter. This effect, described in Chapter 1, is indeed acknowledged on the basis of a specific cooperation obligation derived from EU law, but also reinforced by Member States' agreement.

[17] This particular phrasing was introduced by Senden (n 4).
[18] Although the *Grimaldi* judgment that lays down the national obligation for interpretation of soft law concerned a recommendation, scholars believe that the judgment is applicable to other types of soft law as well. See Senden (n 4), 407-409.
[19] Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 04407, para. 19.
[20] D. Sarmiento, 'European Soft Law and National Authorities: Incorporation, Enforcement and Interference' in Ilianopoulos-Strangas J (ed) *The Soft Law of European Organisations* (The Soft Law of European Organisations, SIPE 2012), 272.

Finally, and as elaborated in the previous sections of the thesis, the possibility that no legal effects are attributed to soft instruments pursuant to a formalist judicial reading of the law is also acknowledged.

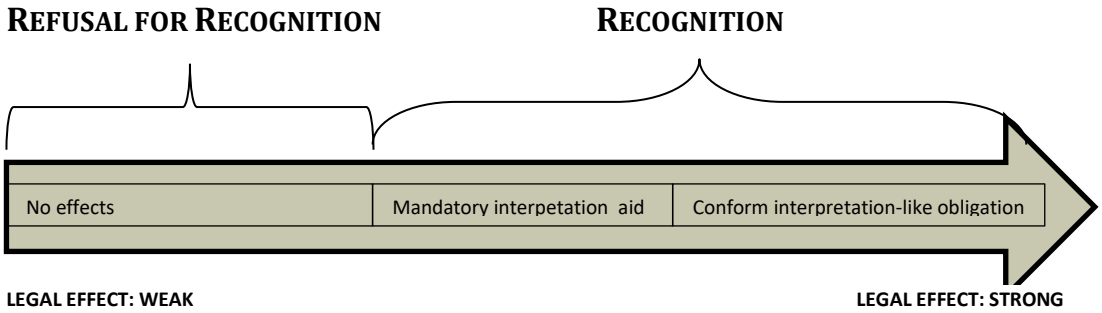

FIGURE 2. NATIONAL LEVEL: COURTS

(ii) The national legislature, according to Luijendijk,[21] can 'treat' supranational soft law in one of the following manners (each of which entails different legal effects): (1) incorporation, (2) reference, (3) explanation and (4) inspiration. Under the first two possibilities, the soft law in question becomes part of the national legal order by either a direct reference from a national legal instrument or by incorporation of specific parts of the soft law act by means of national laws. Under either of these options, national administrative law rules start applying to these instruments, with the legal consequences attached to them by the specific national legal order. Options 3 and 4, on the other hand, entail weaker legal effects, whereby option 3 envisions explaining a national rule in light of a supranational soft law act and option 4 envisions a supranational soft law act being seen as a source of inspiration for a national rule. While the legal effects of supranational law on the national legislature do not as such form the object of this study, they can at times help explain some of the judicial attitudes observed empirically in the chapters to follow. Where this is the case, the issue is explicitly discussed in the relevant chapter.

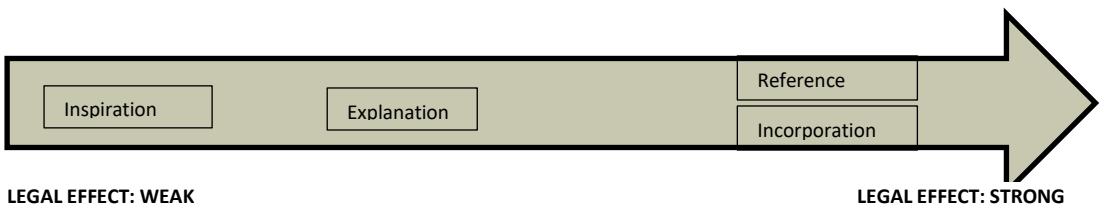

FIGURE 3. **NATIONAL LEVEL: LEGISLATURE**

[21] Ibid., 39.

(iii) National (Competition) Authorities, according to Senden[22] can be deemed to be under an obligation to act in conformity with Commission-issued competition soft law under the abovementioned principle of community loyalty, paired with the competition-specific cooperation obligation of Article 3 of Regulation1/2003.[23] This conclusion, however, is questioned by the *Expedia* case where the CJEU stated exactly the opposite view.[24] Still, it should also be noted that National Competition Authorities operate under the threat of Article 11(6) of Regulation 1/2003, which, by making it possible for the Commission to release national authorities from their jurisdiction to deal with a case, can induce their compliance with Commission-issued soft instruments.[25] Whether this is indeed how national authorities perceive their position vis-à-vis supranational soft law is a matter of further empirical research that falls out of the immediate scope of the current work but remains highly relevant. For the purposes of the current analysis, the focus is on the legal effects of supranational soft law in national courts as illustrated in Figure 2 above.

The possibilities judicial recognition offers

As suggested earlier, judicial recognition of competition soft law would enable courts to (1) clarify the currently uncertain legal effects of the said instruments and (2) further the 'more economic' substantive base of EU competition law. Both these developments will serve the objectives of certainty and consistency desired by the Commission. It is in this line of thinking that suggestions for the possible judicial recognition of soft law at national level were made in Chapter 1 of this work. The desirability of such a solution has been acknowledged by scholars in other, less strongly institutionalized fields of EU activity. For example, Scott[26] and Korkea-Aho plead for (supranational) judicial recognition of guidelines concretizing Framework Directives in EU environmental law. These scholars give cogent reasons for her views that 'the EU courts should review CIS guidance and, by

[22] Senden (n 4), 454-455.
[23] Refer to Figure 2 above.
[24] Case C–226/11, *Expedia Inc. v. Autorité De La Concurrence and Others* [2012] ECR-General. For a discussion of the case, see O. Stefan, Stefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance' (2014) 21 Maastricht Journal of European and Comparative Law 359.
[25] For the use of Article 11(6) as a threat-type mechanism inducing compliance, see I.Maher, 'Functional and Normative Delegation to Non-majoritarian Institutions: the Case of the European Competition Network', 418.
[26] Scott (n 11), Korkea-aho, Adjudicating New Governance: Deliberative Democracy in the European Union (Routledge, 2015), 175-6.

analogy, use the guidance themselves when interpreting the Directive.'[27] In particular, Korkea-Aho builds her argument on the considerations that 1) Member States frequently adhere to soft law guidance and treat it as authoritative and influential, 2) given this important position, judicial scrutiny of such instruments is all the more necessary, 3) judicial review would act as a safety mechanism where guidance 'underperforms'.[28]

It is hereby argued that, given the strong institutional design of EU competition policy (exclusive EU competence, Commission acting as *primus inter pares*) and in particular its emphasis on the principle of consistency in a decentralized enforcement setting (Article 3 of Regulation 1/2003), a case can be mounted for the judicial recognition of competition soft law at the national level that goes beyond 'mandatory interpretation aid'. While this recognition cannot go as far as conform interpretation – unlike state aid guidelines, competition guidelines are unilaterally issued by the Commission – the level of obligation can be based on an intermediate, 'comply or explain' principle that has already been advocated by AG Kokott in her opinion in the *Expedia* case.[29] This proposition is also supported by earlier scholarship on the effects of soft law in the EU competition law domain.[30] In the coming two chapters, it remains to be seen to what extent national courts indeed see themselves under an obligation to engage with the content of supranational competition soft law. The idea of a 'comply or explain' principle to govern national judicial engagement with soft law will be further developed in Chapter 4 in light of the empirical findings

The dangers soft law poses

As recognized in the Introductory chapter of this work, soft law that by design lacks democratic legitimation by means of adoption through a legislative procedure poses a challenge for the (national and supranational) principle of legality and, given its uncertain legal effects, can also work against the principles of consistency and legal certainty.[31]

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[27] Ibid.

[28] Korkea-Aho mentions one further reason for the necessity of judicial engagement with soft law, which the current author considers more as an enabling factor – namely that the informational base surrounding environmental soft law has expanded in recent years and therefore courts have more information to draw from.

[29] AG's opinion in Case C–226/11, *Expedia Inc. v. Autorité De La Concurrence and Others* [2012] ECR-General, para. 38 *et seq.*

[30] Stefan (n 12), 375.

[31] See See H.Luijendijk and L.Senden, 'De Gelaagde Doorwerking van Europese Administratieve Soft Law in de Nationale Rechtsorde' (2011) NVER Preadvies, available at <https://static1.squarespace.com/static/5574a2fae4b0083487121509/t/557c3f68e4b014e8c75335be/1434206056901/Preadvies2011_NVER_Luijendijk_Senden.pdf > and Claartje van Dam, 'De Doorwerking van Europese Adminitratieve Soft Law: in Strijd met de Nederlandse Legaliteit' (2013) NALL – Netherlands Administrative Law Library.

As will be argued in Chapter 4, the principle of legality cedes way to effectiveness considerations in domains subject to broad delegation of an enforcement mandate such as EU competition law.[32] In such a setting, the haziness of legal effects soft law produces can be addressed precisely through the mechanism of judicial recognition based on a 'comply and explain' principle. Such a judicial attitude could not only clarify disparate legal effects, but – by doing so – could also encourage inter-institutional dialogue (both vertically towards the Commission and CJEU and horizontally between NCAs and courts) as to the substantive merits of soft law instruments.

While the latter point will be deepened in further chapters, it needs to be hereby observed that the preoccupation with the non-democratic character of soft law is not to be understated. This concern can be addressed in several manners which will be discussed in turn. The first solution suggested by scholars would be re-adopting supranational competition soft law as implementing acts under Article 290 TFEU,[33] but insofar as that would negate the inherent features of revisability and flexibility that soft law currently possesses, it would be an unfortunate development and this author would not see it as a solution.

A second discussion is centered on the adoption of supranational soft law as national administrative guidance.[34] This can be done by means of incorporation or reference as shown in Figure 3 above, but then the guarantee that the text will remain unaltered and thus preserve consistency of enforcement across Member States is lost if the method of incorporation is used. Only by means of a reference from national law will it be possible to preserve the consistency objective. Furthermore, even the reference procedure has its downsides, as the legal effects of (then national) competition soft law are going to be determined by national rules of administrative law and the value that is attributed to administrative guidelines in different Member States can vary, thus hindering consistency in enforcement across the EU.

In order to survey the levels of consistency in enforcement across the EU with regard to soft law, the following two chapters contain the empirical part of the study, which aims at charting out the ways in which national judges interact with soft law instruments. Once ascertained empirically, the observations can then be assessed as pertaining to or deviating from the theoretical categories

[32] Jean-Baptiste Poulle, Réflexion sur le droit souple et le gouvernement d'entreprise (L'Harmattan / Entreprises et management / Les Intégrales, 2011), 60-61.
[33] W. Weiss, "After Lisbon, can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?" (2011) 2 *Journal of European Competition Law and Practice* 441-451.
[34] C. van Dam (n 31).

discussed in Chapter 1. To give an example, if it is observed empirically that judicial rejection of soft law happens, this empirical observation is then attributed to the hypothesis of the formalist judiciary. This attribution is purely a matter of logical thinking and legal method; the study therefore remains conscious of the possibility for different interpretations of the data hereby presented.

Corrigendum to Chapter 1

- On page 32, the excerpt 'Nevertheless, as discussed above, competition soft law is unlikely to be subject to an action for annulment. Even if the latter were possible, it would still be an unfortunate result because the positive rule-clarifying role of soft law would be negated'

should be read as follows:

'Nevertheless, for reasons discussed above, competition soft law's justiciability is difficult to establish. It is also unfortunate that, more often than not, the consequence of an admission of justiciability would be annulment, which necessarily negates the positive rule-clarifying role of soft law.'

- On page 39, the sentence 'Soft law cannot directly give rise to rights and obligations, but individualized decisions, which are eventually informed by the same soft law, undoubtedly affect the legal position of third parties (legal and natural persons)'

should be read as follows:

'Soft law cannot directly give rise to rights and obligations, but individualized administrative decisions addressed to legal and natural persons, which are eventually informed by the same soft law, undoubtedly affect the latter's legal position'.

- On page 49, the sentence 'In order to test these theoretical views with respect to competition law further research in the form of an empirical study on national judicial practice is needed' should be read in light of the information provided in the last paragraph of this post-script.

CHAPTER 2

THE JUDICIAL RECEPTION OF COMPETITION SOFT LAW IN THE NETHERLANDS AND THE UK, IN EUROPEAN COMPETITION JOURNAL (2016) VOL. 12(1)

Chapter 2. The Judicial Reception of Competition Soft Law in the Netherlands and the UK

The goal of the current work is to delineate national judicial responses to Commission-issued competition soft law within two EU jurisdictions – the UK and the Netherlands. A comparative methodology is adopted and – in terms of theory – several hypotheses of possible judicial attitudes to soft law are established. In broad terms, it is ventured that courts can either recognize (agreement, disagreement, persuasion) or refuse to recognize (neglect, rejection) supranational soft law in their judicial discourse. While acknowledging that judicial refusal for recognition is a natural judicial response to legally non-binding instruments, the paper argues that competition soft law could and should become recognized by national courts of law because that would contribute positively to the enforcement system's goals of consistency and the concomitant legal certainty and uniform application. The empirical picture that transpires, however, reveals a varied recognition landscape that could well pose challenges for consistent enforcement.

Keywords: soft law, EU competition law, antitrust, guideline, notice, communication, national court, national judiciary, case law, recognition

I. Introduction – Setting the Scene, Theoretical Underpinnings and Methodology

1. Setting the Scene

More than a decade after the great bulk of day-to-day enforcement of Articles 101 and 102 TFEU was put in the hands of national authorities and courts, the decentralized and substantively 'more economic' EU competition regime seems to have matured enough to lend itself to an empirical analysis. This is evidenced by the increasing amount of studies and country reports that aim at compiling national administrative and judicial decisions,[1] thus measuring the output and performance of the now multi-level competition enforcement regime set up by the so-called

[1] For a study: B. Rodger, *Competition law, Comparative Private Enforcement and Collective Redress across the EU* (Alphen aan de Rijn, Wouters Kluwer, 2014). For country reports: A. Maton and others, "Update on the Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation" (2012) 3 *Journal of European Competition Law and Practice* 586, B. Rodger, *Ten Years of UK Competition Law Reform* (Dundee, Dundee University Press, 2010), I. Kokkoris, *Competition Cases from the European Union* (London, Sweet & Maxwell, 2008).

'Modernization' Regulation 1/2003.[2] The current paper also strives to contribute to this burgeoning discussion on national developments by choosing a very particular focus. Namely, the aim is to comparatively inquire into the ways in which and the extent to which national judiciaries engage with Commission-issued competition soft law. The latter term refers to the non-binding guidelines, communications and notices authored by the European Commission, where the institution explains its enforcement practice and the law of EU competition policy. The narrow question of this work is warranted because of the increased importance these instruments acquire in the currently decentralized competition enforcement regime. As Professor Colomo puts it,

> "Nowadays, following the formal dismantlement of the system requiring the ex-ante notification of agreements, it is difficult to see how the practical value of the guidelines is fundamentally different from that of 'hard law' instruments, even though they do not have a comparable legal status from a formal standpoint."[3]

Other scholars also acknowledge the great weight soft law instruments have acquired in the competition field, with some lamenting this development[4] and others applauding it.[5] The latter normative stances, however, do not answer the question of the legal, and not just practical, status of supranational competition soft law in EU Member States. Going beyond the undisputed fact that supranational competition soft law does not have binding force, this paper ponders into the legal effects (as distinct from legal force)[6] that these instruments produce at national level and centers the empirical inquiry on national judiciaries. As ultimate instances of normative ordering within Member States,[7] national courts have the non-trivial task of clarifying the legal effect(s) of

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 001/1. On the multi-level governance debate, refer to F. Cengiz, "Multi-level Governance in Competition Policy: the European Competition Network" (2010) 35 *European Law Review* 660-677.

[3] P. Colomo, "Three Shifts in EU Competition Policy: towards Standards, Decentralization, Settlements" (2013) 20 *Maastricht Journal of European and Comparative Law* 363, 370.

[4] W. Weiss, "After Lisbon, can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?" (2011) 2 *Journal of European Competition Law and Practice* 441-451.

[5] On a positive stance to soft law more generally, refer to D. Sarmiento, "European Soft Law and National Authorities: Incorporation, Enforcement and Interference", in J. Ilianopoulos-Strangas (ed), *The Soft Law of European Organisations* (SIPE, 2012). On competition soft law specifically, refer to C. Vincent, "La Force Normative des Communications et Lignes Directrices en Droit Européen de la Concurrence", in C. Thibierge (ed), *La Force Normative: Naissance d'un Concept* (Paris, Bruylant, 2009), 693-703.

[6] On the distinction between legal force and effects, refer to L. Senden, *Soft Law In European Community Law (Its Relationship To Legislation)* (Hart Publishing, 2004), 264-269.

[7] For the importance of national courts as ultimate instances of normative ordering, see M. Dawson, "Three Waves of New Governance in the European Union" (2011) 36 *European Law Review* 208, 223-225; J. Scott and S. Sturm, "Courts as Catalysts: Re-thinking the Judicial Role in New Governance" (2006) 13 *Columbia Journal of European Law* 565-594; D. Panke, "Social and Taxation Policies - Domaine Reserve Fields? Member States Non-compliance with Sensitive European Secondary Law" (2009) 31 *Journal of European Integration* 489, 491; R. Slepcevic, "The Judicial

supranational competition soft law at the national level, thus contributing to the enhancement of the principles of certainty and consistency so central to Regulation 1/2003.[8] As Stefan notes, "in the absence of judicial recognition, soft law fails to accomplish some of its key objectives, such as fostering legal certainty, transparency, and the consistent application of rules in the EU multi-level governance system."[9]

It also needs to be acknowledged that certain scholarly accounts stipulate that soft law does not have any decisive influence in and of itself because, being a re-statement of case law, it is used by courts as a short-hand for the latter and nothing more.[10] Without discounting judicial 'shorthand' use of soft law for which there is ample evidence,[11] works such as that of Stefan[12] also show that a normative dialogue and cross-fertilization happens between supranational soft instruments and supranational case law – a phenomenon which would not have been possible had the former been a mere re-statement of the latter. [13] The task at hand here is to establish whether a similar phenomenon is also observable at the national level.

This paper will thus proceed as follows – Section 1 will continue by discussing the theoretical and methodological underpinnings of the study. Section 2 will present the sample of detected soft law observations in an aggregate-comparative manner and then engage in a detailed discussion of the cases, putting the individual references in context. Section 3 will outline general trends that stand out from the observed judicial attitudes. Based on patterns spotted, plausible (but non-testable) reasons for the empirical findings will be suggested. Ultimately, conclusions will be drawn as to the effects of the empirical observations on the system's goal of consistency (and the concomitant legal certainty and uniform application). This will be done in the final Section 4.

Enforcement of EU Law through National Courts: Possibilities and Limits" (2009) 16 *Journal of European Public Policy* 378, 382.

[8] Article 3 and paras. 14, 17, 21, 22, 29 of the Preamble to Regulation 1/2003 [2002]. For scholarly accounts on the matter, refer to E. Herlin-Karnell and T. Konstadinides, "The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration", in Catherine Barnard (ed), *Cambridge Yearbook of European Legal Studies* (Oxford and Portland, Oregon, Hart, 2013), 139, 143 and H. Cosma and R. Whish, "Soft Law in the Field of EU Competition Policy" (2003) 14 *European Business Law Review* 25-56.

[9] O. Stefan, "Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance" (2014) 21 *Maastricht Journal of European and Comparative Law* 359, 359.

[10] For a summary of the arguments of this critique, H. Greene, "Guideline Institutionalization: the Role of Merger Guidelines in Antitrust Discourse" (2006) 48 *William and Mary Law Review* 771, 830. The author also states that shorthand usage of soft law actually contributes to soft law's influence rather than detract from it. *Ibid,* 831.

[11] Especially when establishing the legal framework applicable to a case, courts do use soft law as a short hand for case law. For instance, refer to case *Bookmakers' Afternoon Greyhound Services Limited and others v Satellite Information Service Limited and others* [2008] EWHC 1978 (Ch), Part 5: The Law, paras. 289-410.

[12] Stefan, *supra* n 9. See also Oana Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (2012).

[13] Greene *supra* n 10, 831 shows that the ability of soft law (the US Merger Guidelines) to independently influence the path of the law is very much present and exists beyond (on top of) the possibility of substantive overlaps between case law and soft law.

2. Theoretical Underpinnings

The backdrop against which the empirical observations generated are going to be examined is a theoretical framework developed elsewhere[14] that puts forward several hypotheses of possible judicial attitudes to supranational competition soft law. Those attitudes broadly fit into two categories – judicial 'recognition' and judicial 'refusal (for recognition)'. In particular, it is hypothesized that the judiciary can be open to interpretation of soft law – 'recognition' – in which case it explicitly engages (agrees or disagrees) with the content of the said instruments in its reasoning. This attitude implies a flexible judicial approach to legal sources. Another manifestation of the flexible approach is the so-called 'persuaded judiciary' response. [15] It hypothesizes that it is also possible that courts do not explicitly mention soft law in their judgments, but the reasoning therein coincides with the substantive content and logic proposed in the latter instruments.

Alternatively, the 'refusal (for recognition)' scenario entails that courts exhibit a resistant attitude to soft law that implies a formalistic view on legal sources. Refusal, it is hypothesized, can manifest itself through either explicit rejection (the flip side of explicit recognition) or neglect (the flip side of persuasion), whereby the soft law instrument is ignored even if invoked in an argument made by the parties to the dispute. In this setup, and following Stefan quoted above, it is hypothesized that flexible interpretations, by enhancing a dialogue between the national and supranational levels through means of soft law (among others),[16] foster the achievement of consistency in enforcement (and the concomitant legal certainty and uniform application). To the contrary, by preventing dialogue, black-letter, doctrinal approaches detract from the said principles.

Finally, the above-proposed model acknowledges that other, more legally legitimate, consistency-enhancing tools are available to the decentralized competition enforcement system. The Treaty-based preliminary rulings procedure, the *amicus curiae* interventions based on Article 15(3) of

[14] Z.R. Georgieva, "Soft Law in EU Competition Law and its Judicial Reception in Member States – a Theoretical Perspective" (2015) 16 *German Law Journal* 223-260. A similar framework is employed by Greene in her study on judicial attitudes to the Merger Guidelines in the US – Greene, *supra* n 10, 807.

[15] The idea for the latter scenario is explained (although in different terms) in F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009), 72. For the Dutch context, a similar intuition is expressed in M. Eliantonio, "Effectieve Rechtsbescherming en Netwerken: een Problematische Verhouding" (2011) 59 *SEW: Tijdschrift voor Europees en Economisch Recht* 116-122.

[16] This is assuming that bottom-up (and not only top-down) alignments of judicial discourse are possible. In this regard, Gerber and Cassinis stipulate that 'In sum, the new system emphasizes a general expectation of systemic consistency with the decisional practice of the Commission as well as with its competition policy guidelines. The Member State authorities play an important role in establishing these guidelines.' See D. Gerber and P. Cassinis, "The "Modernization" of European Community Competition Law: Achieving Consistency in Enforcement: Part 1" (2006) 27 *European Competition Law Review* 10, 15.

Regulation 1/2003 and the Article 10-based declaratory decisions are just some of the prominent examples.[17] However, as Boskovits notes, these strict convergence rules generate a re-defined relationship between national courts, on the one hand, and the national and supranational administrative authorities, on the other. This has an impact on administration of justice in Member States.[18] Therefore, the author argues, "It remains to be seen the way in which the Commission intends to make use of the powerful instruments at its disposal as to avoid alienating national judges."[19] Indeed, possible Commission fears for national judicial backlash might be the reason why *amicus* briefs have been issued rather sparingly through the years.[20] So far, declaratory decisions have not been issued[21] and preliminary rulings in competition law have remained steady in numbers in comparison to the period 1958-2004.[22] The possibility cannot be discounted, therefore, that one channel through which convergence could happen is the voluntary judicial acceptance of principles enunciated in supranational competition soft law. As Snyder puts it (in the context of the interaction between the Commission and the supranational courts),

> "In seeking to determine the meaning of Commission soft law in practice, we need to view the Commission and the court in interaction: […] as each having an effect on the other, such that the result of each institution's decisional processes are incorporated as an input into the decisional processes of the other."[23]

In this sense, the fact that soft law instruments are recursive and get updated on regular intervals largely based on the dialogue EU Courts-Commission, makes of them a useful tool for the (national) judiciary to consider.

[17] Those should be read together with the obligations imposed by Article 16 and 3 of Regulation 1/2003 [2002].
[18] K. Boskovits, "Modernization and the Role of National Courts: Institutional Choices, Power Relations, and Substantive Implications", in I. Lianos and I. Kokkoris (eds), *The Reform of EC Competition Law*, *vol* 41 (Alphen aan de Rijn, Kluwer Law International, 2010), 95, 111.
[19] *Ibid,* 116.
[20] For the period 2004-2015, there are only 17 *amicus curiae* briefs listed on the website of DG COMP See http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html accessed on 20 January 2016.
[21] M.J. Frese, *Sanctions in EU Competition Law: Principles and Practice* (Oxford, Hart Publishing, 2014), 163.
[22] For data on the period 1958-2004, refer to B. Rodger, "Article 234 and Competition Law: A Comparative Analysis" (2008) 15 *Maastricht Journal of European and Comparative Law* 149, 156. For data in the period 2004-2015, refer to www.curia.eu.
[23] F. Snyder, "Soft Law and Institutional Practice in the European Community", in S. Martin (ed), *The Construction of Europe* (Dordrecht/Boston, Springer 1994), 196, 204. In the more specific context of the Article 82 Guidance Paper, similar views are expressed by R. Whish, "National Competition Law Goals and the Commission's Guidance on Article 82 EC: the UK Experience", in L.F. Pace (ed), *European Competition Law: the Impact of the Commission's Guidance on Article 102* (Cheltenham, Edward Elgar Publishing, 2011), 152, 161 and D. Sinclair, "Counterfactuals – a Shift in the Burden/Standard of Proof" (2010) *GCR Antitrust Litigation Conference 2010* 1, 4.

Determining whether the thus-described supranational horizontal interaction also happens vertically – as between the Commission/EU Courts, on the one hand, and national courts, on the other, is the objective of this work. Possible convergence happening through the European Competition Network is therefore not taken into account although it could have an impact, especially under national public enforcement of EU competition rules. Finally, the possibility that the national judiciary refuses recognition of supranational competition soft law figures prominently in the model, but is a normatively sub-optimal option due to the above-described consistency-enhancing potential of the recognition model.

3. Methodology

The empirical results of the study are presented in a comparative legal framework that enables their critical analysis. Namely, the focus is on bringing out the similarities and differences in national judicial recognition of supranational competition soft law, while searching for a common pattern (core) across Member States.[24,25] The comparative method also allows for a finding of no commonality in judicial approaches towards supranational soft law, which would be a result of equal value for the purposes of this work.

In that setup, the jurisdictions selected for the study are the Netherlands and the UK – belonging to different legal traditions, while at the same time not lacking in commonalities. Firstly, what the jurisdictions have in common is that they both introduced their modern, EU-aligned competition enforcement regimes in the late 1990's.[26] Additionally, Idot testifies that exactly those two EU Member States were among the most prolific in drafting their own national soft law in the early 2000's.[27] Despite the fact that this study touches upon nationally-issued competition soft law only marginally, the latter's increased usage in both the Netherlands and the UK is likely to shape a more open attitude to supranational soft instruments as well. Differences between the jurisdictions could

[24] See M. Bussani and U. Mattei, "The Common Core Approach to European Private Law" (1996-1997) 3 *Columbia Journal of European Law* 339-356. See also B. Fekete, "Raising Points of Law on the Court's own Motion? Two Models of European Legal Thinking" (2014) 21 *Maastricht Journal of European and Comparative Law* 652-675.

[25] Because the supranational instruments that are object of this study are identical for all Member States, no caveats need to be made with regard to the core comparative concern of picking similar objects of analysis (*tertium comparationis)* across jurisdictions, or in other words, comparing 'like with like' (*similia similibus*). On the importance of the *tertium* being similar between jurisdictions, see E. Orucu, "Methodology of Comparative Law", in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham, 2006) 442, 448.

[26] The Dutch Competition Act (Mededingingswet) was adopted on 22 May 1997 http://wetten.overheid.nl/BWBR0008691/2014-08-01 accessed on 26 April 2016 and the UK Competition Act was first published in 1998 http://www.legislation.gov.uk/ukpga/1998/41/contents accessed on 26 April 2016.

[27] L. Idot, "À Propos de L'Internationalisation du Droit: Réflexions sur la Soft Law en Droit de la Concurrence ", in Collectif (ed), *Vers de Nouveaux Équilibres entre Ordres Juridiques : Liber Amicorum Hélène Gaudemet-Tallon* (Paris, Dalloz, 2008), 85, 91.

also be expected – namely, due to the different approaches to administratively-issued guidance under the common and civil law traditions, the particular judicial responses to supranational soft law could differ. Concretely, the less structured way in which the UK legal system copes with legally non-binding instruments[28] is to be contrasted with the highly elaborate and compartmentalized approach evinced by the Netherlands.[29]

The current paper is going to focus on national judicial recognition of supranational competition soft law in both private and public competition disputes. The areas of EU Competition law under study are Articles 101 and 102 TFEU (dealing with anti-competitive agreements and abuse of dominance, respectively). The related domains of EU State Aid and EU Merger control are not subject to decentralized (national) enforcement, so the parameters of the current study naturally exclude them. Sectoral regulation under Article 106 TFEU is also excluded because of its different institutional setup.[30] National sectoral regulation case law is thus only considered if it contains references to supranational competition (Article 101 and 102 TFEU) soft law.

When it comes to selection of soft law for this study, it merits observing that the instruments that could be subsumed under the term 'Commission-issued competition soft law' are of considerable quantity, even if one looks at the enforcement framework of Articles 101 and 102 TFEU only.[31] The current paper therefore chooses to focus on those instruments that lay down the substantive principles that the European Commission deems applicable to the analysis of practices under Articles 101 and 102 TFEU. The reason for this particular choice lies in the fact that, unlike soft law dealing with scope and application of the Treaty competition rules,[32] the justiciability of substantive soft law

[28] R. Baldwin and J. Houghton, "Circular Arguments: the Status and Legitimacy of Administrative Rules" (1986) *Public Law* , 239-284.

[29] H. E. Broring and G. J. A. Geertjes, "Bestuursrechtelijke Soft Law in Nederland, Duitsland en Engeland" (2013) 4 *Nederlands Tijdschrift voor Bestuursrecht* 74-87.

[30] Under Article 106 TFEU, NCAs have no decision-making powers: only the Commission and national courts can apply that provision. This creates different inter-institutional interactions, which also presupposes a different role for supranational regulatory soft law in the national context.

[31] A list of all antitrust soft law can be found on the European Commission's Competition Antitrust Legislation webpage http://ec.europa.eu/competition/antitrust/legislation/legislation.html accessed 20 September 2015. A combined overview of the first two Antitrust Handbooks available on the above webpage (Compilations of EU Antitrust Legislation Volumes 1and 2) gives a total number of 17 soft law instruments, out of which 7 deal with procedural issues, 3 with applicability/scope of the supranational competition provisions and 5 are the selected notices for analysis in this study. The outstanding two are the Leniency Notice and the Fining Notice, which are used at the supranational level only – Member States issue their own guidance on these matters.

[32] The non-justiciability of a 'scope' soft law instrument – the *de minimis* notice – has been confirmed by the Court in its *Expedia* ruling (Case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others* [2012] ECR-General). On the other hand, 'application' soft law – such as the fining guidelines – has been held to be justiciable by the court in Case C-189/02 *Dansk Rørindustri and Others v* Commission [2005] ECR I-05425. On the concept of 'justiciability' and its dependence on the establishment of legal force and/or legal effects, see Stefan, *supra* n 12, 132.

has largely[33] not been addressed in the jurisprudence of EU courts[34]– a fact that entails a further interpretative uncertainty for national courts. An exercise aiming at the delineation of these instruments' national judicial reception and possible legal effects, therefore, is of significant added value. The final selection, thus, comprises the following instruments: the Vertical Guidelines, the Horizontal Guidelines, the Article 81(3) Guidelines (hereinafter, the 81(3) Guidelines), the Technology Transfer Guidelines and the Article 82 Guidance Paper (hereinafter, the Guidance Paper).[35]

Because all the instruments analysed in this work are drafted supranationally, they are essentially the same for all Member States; thus, the methodological comparative requirement for similarity in bases for comparison is fulfilled.[36] However, it should be kept in mind that Member States also issue national-level competition soft law instruments, some of which closely reflect the supranational original. When there is complete overlap in the substantive content of the supranational instrument and its national counterpart, the rule of similarity in bases for comparison is not breached and the national equivalent also forms part of the basis for comparison.[37] What is excluded, however, are nationally-drafted soft instruments that do not substantively converge with the contents of supranational competition soft law.[38]

A final methodological observation relates to the study's data gathering approach. The judicial decisions for empirical analysis were selected through a search on national and EU case law databases.[39,40] Search terms coincide with the relevant (translated in the target language) titles of the soft law instruments under study. For cases falling under the hypothesized 'persuaded judiciary'

[33] Only recently, in October 2015, did the judgment in *Post Danmark II* (Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] NYR) confirm the non-justiciability of the 102 Guidance Paper.

[34] Idot *supra* n 27, 115 and Vincent *supra* 5, 701. The situation as described by Idot and Vincent in 2008 and 2009, respectively, hasn't changed as of the end of 2015, except for the *Post Danmark II* judgment (*Ibid*).

[35] Guidelines on Vertical Restraints [2010] OJ C 130/1; Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1; Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97; Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7; Communication from the Commission - Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C89/03.

[36] On the importance of the comparative base (*tertium comparationis)* being similar between jurisdictions, see Orucu *supra* n 25, 442-443, 448.

[37] Such is the case with the Dutch guidelines on Article 6(3) of the Dutch Competition Act. They are a literal copy of the Commission 81(3) Guidelines – https://zoek.officielebekendmakingen.nl/stcrt-2005-47-p22-SC69176.html accessed on 26 April 2016.

[38] In the UK, despite the proliferation of administrative guidelines in the competition field, none of those identified as relevant for this research (OFT 401, 402, 407, 415, 419, 953) follows closely the texts of supranational soft instruments. This fact is also reflected in an introductory statement usually included in those documents: 'This guideline is not a substitute for the EC Treaty nor for regulations made under it. Neither is it a substitute for European Commission notices and guidelines.

[39] The EU case law databases are the following: N-lex; JuriFast; Dec.Nat; Curia.

[40] For the UK, the used databases are Bailii and Westlaw UK. For the Netherlands, those are Kluwer and Rechtspraak. The cutoff date for data gathering is October 1st 2015.

scenario, a sample of key terms specific to post-Modernization soft law vocabulary is used as search terms.[41] Where those terms are detected in national judgments, a comparison between the wording used in the relevant guideline and that in the respective judgment will help identify whether the reference is indeed a disguised reference to the contents of a Commission-issued competition soft instrument or not.[42] Finally, the hypothesized 'rejection' and 'neglect' scenarios can be detected if courts fail to reason on soft-law based arguments put forward by the parties.[43]

II. Judicial Recognition of Commission-issued Soft Instruments in the UK and the Netherlands

1. Aggregate Presentation of Empirical Observations

This section takes an empirical comparative look at the judicial handling of competition claims involving Commission-issued competition soft law in the UK and the Netherlands. As hypothesized in the Introduction, national judicial recognition of supranational competition soft law can happen through several alternative mechanisms, which are now (re)formulated as extended research hypotheses, namely that:

- National courts can recognize soft law by either explicitly agreeing or disagreeing with its substantive contents. This engagement can happen either on the basis of general principles of law[44] or, alternatively, on the basis of hard law (legislation and case law) which soft instruments usually 'supplement'.[45]

[41] In order to create the sample of post-Modernization, soft- law specific terms, the method of triangulation was used. In particular, the following sources were used to extract the necessary terminology: the text of the soft law instruments forming part of this study, scholarly articles analysing the respective instruments and signalling as to novel approaches and terminology the latter may have adopted, and supranational judgments serving as a check to the results generated by the first two sources. The search within the curia.eu database was done with the terms generated through the cross-checking of the actual notices and scholarly articles. If judgments were found that employed the extracted terms before the Modernization process, the term was discounted because usage pre-Modernization signalled that it was not unique to the Modernization period. The terms thus generated were: (for the Guidance Paper) 'equally efficient competitor (analysis)', 'LRAIC', 'AAC', and 'anti-competitive foreclosure'; (for the 81(3) Guidelines) 'consumer pass on' [in that word order]; (for the Vertical Guidelines) 'online sales', 'offline sales', 'upfront access payment', and 'category management agreement'; (for the Horizontal Guidelines) 'age of data' (terms shared by guidelines) 'qualitative efficiencies'.

[42] The reference detected in the national judgment could also reflect the wording of a CJEU/CFI judgment that was, in its turn, summed up in supranational soft law. Where this is the case, it will be explicitly acknowledged and reflected on.

[43] If courts avoid reasoning on the basis of soft law without voicing explicit rejection, the theoretical model presupposes neglect – implicit rejection.

[44] Stefan *supra* n 12, 200.

[45] *Ibid,* 141. To illustrate the point specifically for competition law, the Vertical Block Exemption Regulation-VBER (Commission Regulation No 330/2010 [2010] OJ L 102/01) – a hard law instrument – can give teeth to the Vertical Agreements Guidelines (*supra* n 35) – a soft law instrument. The same applies to the Horizontal Guidelines (*supra* n 35), which are tied to the Block Exemption Regulations on Specialization and R&D Agreements (Commission Regulation No 1218/2010 [2010] OJ L335/43 and Commission Regulation No 1217/2010 [2010] OJ L 335/36). Also, the 81(3) Guidelines (*supra* n 35) apply as a general 'fall-back provision' to the more specific Horizontal Guidelines

- National courts can also recognize soft law if they are 'persuaded' of its value by endorsing its contents in a roundabout way – not explicitly mentioning the instrument proper, but reaching a conclusion not inconsistent with its provisions.[46]
- National courts can refuse to interpret soft law or simply ignore the instruments in question, both those attitudes signalling 'refusal (for recognition)'.

Within this theoretical framework, the empirical findings of the current study will be addressed. A few remarks on the size of the sample, and the number and type of references found are hereby in order.

The number of Dutch and UK public and private enforcement competition cases that have engaged supranational soft law in the past eleven years is not staggering – 14 cases were identified per jurisdiction, amounting to a total of 28 cases.[47] However, these low figures are not surprising when one compares them to the competent national organs' overall enforcement numbers on Article 101 and 102 matters during the period under examination (2004-2015).[48] The number of NCA decisions in the period 2004-2010,[49] which determines the amount of subsequent public enforcement appeals, shows that the Dutch Competition Authority – ACM (with 76 cases) and the UK Competition and Markets Authority – CMA (with 52 cases) [50] lag behind other top enforcers such as France and Germany. The latter two jurisdictions have issued, respectively, 189 and 128 decisions for the same

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and as a 'default' when the VBER doesn't apply. Finally, the Technology Transfer Guidelines (*supra* n 35) are supplementary to the Technology Transfer BER (Commission Regulation No 316/2014 [2014] OJ L 93/17) and the 102 Guidance Paper does not seem to be attached to any hard law provision.

[46] Schauer, *supra* n 15.

[47] For a listing of the cases detected, refer to Table 1 in the Annex.

[48] In the UK, the relevant judicial bodies (courts and tribunals) are: the Competition Appeals Tribunal (CAT), the Court of Appeal of England and Wales (appellate instance to the CAT by virtue of the Civil Procedural Rules 2004, s 30(8)), the Chancery Division of the High Court of England and Wales, and the Supreme Court of the United Kingdom (cassation instance). For the Netherlands, the specialist courts are: the Rotterdam District Court (it has a specialist division for competition appeals under Article 93 of the Dutch Competition Act) and the Trade and Industry Appeals Tribunal (an appellate court of last instance on economic matters pursuant to Title III Chapter I Article 18 of the DCA). Private enforcement claims must be brought before civil courts.

[49] Rodger *supra* n 1, 271. Aggregate information on Article 102 TFEU public investigations and sanctions between 2005 and 2009, showing a similar distribution of NCA output (France and Germany in the lead, with the UK and the Netherlands lagging behind) is available in B. Baarsma and R. van der Noll, "Is Misbruik Machtspositie een Blinde Vlek in het Nederlandse Mededingingstoezicht?" (2013) 3 *Tijdschrift Mededingingsrecht in de Praktijk* 121-124.

[50] Out of these 52 decisions, 22 are infringement decisions according to figures presented by R. Whish, "The Role of the OFT in UK Competition Law", in B. Rodger (ed), *Ten Years of UK Competition Law Reform* (Dundee, Dundee University Press, 2010) 1, 14. Out of these 22 infringements, 16 are cartel infringement decisions according to A. Riley, "Outgrowing the European Administrative Model? Ten Years of British Anti-Cartel Enforcement", in B. Rodger *Ibid.,* 257, 261. In this sense, although the latter author argues that cartel infringement decisions over the period 1998-2008 are relatively few, they actually constitute more than ¾ of all infringement decisions based on the figures provided by Whish.

period.[51] Adding to the above numbers the output of the ACM and CMA in the period 2010-2015, the overall figures are summed up to 105 decisions for the Dutch authority and 83 for its UK counterpart, [52,53] both of which are comparatively low numbers. Therefore, it is no surprise that public judicial enforcement figures for the UK show that only 56 cases (in 91 judgments) have been rendered in the relevant period by the Competition Appeals Tribunal (CAT)[54] and a total of 34 cases (in 39 judgments) by the Court of Appeal and the Supreme Court taken together.[55] Private enforcement numbers according to Rodger are not high either – in the period 2004-2012 he identifies 85 judgments (both stand-alone and follow-on), out of which more than half (44) are follow-on actions at the CAT. [56,57] Lower stand-alone claims numbers are explained by the author through the so-called 'hidden story' of settlements, which, according to Rodger, means that the observable stand-alone litigation practice forms only 'the tip of the iceberg.'[58]

In comparison to UK judicial output, the Netherlands appears to have a better track record, especially when it comes to private enforcement, which more than compensates the lower public enforcement figures. According to Rodger,[59] in the period 2004-2012, the total number of follow-on and stand-alone private competition actions has been 217, with a steady average of circa 20 cases per year. When it comes to public enforcement, the Rotterdam District Court has issued a total of 41 judgments in competition matters (21 of which on the basis of the Dutch Competition Act – hereinafter DCA),[60] while the highest appellate instance – the Trade and Industry Appeals Tribunal has decided 38 cases (out of which 25 under the DCA).[61] As stated above, these low public enforcement numbers were expected on the basis of the relatively small amount of ACM sanctioning decisions (excluding those in a building sector cartel that unfolded in the spring of 2004). Indeed, it

[51] The amount of files processed by the authorities is, of course, much higher. For example, Plomp testifies that more than 6000 files (cases) have been processed by the Dutch Competition Authority (ACM) between 1998 and 2009. M.J. Plomp, *Praktijkboek Mededingingsrecht* (Uitgeverij Den Hollander, 2009), Chapter 6.

[52] A search on the ACM website as per 20 January 2016 shows that 29 more cartel and abuse of dominance decisions have been taken in the past 5 years, which is actually a drop in the *per annum* activity of the ACM.

[53] A search on the CMA website as per 20 January 2016 shows that 31 more cases have been closed under the Competition Act 1998 since 2011, which would mean that the *per annum* enforcement has significantly increased in the past five years.

[54] Search through the CAT database.

[55] Search on Westlaw UK.

[56] Rodger *supra* n 1, 77, 102-103. However, the author testifies that 'anecdotal evidence form practitioners indicates that there has been a considerable increase in competition claims raised at the High Court in recent years.' *Ibid,* 31.

[57] Search done through the CAT database.

[58] Rodger *supra* n 1, 59.

[59] *Ibid*, 99.

[60] The figures are confirmed by searches both on Kluwer and Rechtspraak.

[61] The figures were generated through Rechtspraak. For a confirmation of the relatively low enforcement figures, see M. van Oers, "De NMa zal Handhaven", in P. Kalfbleisch and others (eds), *Trust en Antitrust: Beschouwingen over 10 jaar Mw en 10 jaar NMa* (Rotterdam, Redactiebureau Editor, 2008). For information on the builders' cartel, refer to pages 246-7. For the latter, see also E. Sakkers, "Rechtshandhaving van het Kartelverbod: Zoek de Verschillen", in P. Kalfbleisch *Ibid, 92-3* and Plomp *supra* n 51, Chapter 6.

needs to be observed that a great amount of the resources of the Dutch enforcer in the period after 2004 were dedicated to work on one single but significant infringement – a huge cartel in the building sector.[62]

When it comes to the observed soft law references per instrument, some of the cases identified mention more than one relevant instrument, which is why the total number of references to selected soft law [33] exceeds the total number of cases [28]. One-third of those thirty-three references [11] are directed towards the Vertical Guidelines, while the outstanding twenty-two are almost evenly split between the 81(3) Guidelines [6], the Horizontal Guidelines [7] and the Guidance Paper [7]; the number of references to the Technology Transfer Guidelines is very low – 1 per jurisdiction [2].[63]

If one looks at references per country, a gap can only be noticed in the number of judicial references to the Guidance Paper. While Dutch courts refer to the instrument five times in five separate judgments, UK courts engage with the Guidance Paper just twice in two separate judgments. However, both numbers are quite small to enable a meaningful conclusion as to whether there is a quantitative cross-jurisdictional disparity in treatment of Article 102 TFEU cases mentioning the Guidance Paper.[64] The latter low numbers could be owing to the fact that the substance of the Guidance Paper significantly deviates from supranational case law on abuse of dominant position.[65] This dissonance also prompts the specific denomination of the Guidance Paper[66] – that of 'enforcement priorities' informing the Commission's future case selection practice – rather than the originally envisioned 'substantive guidelines' reflecting the law in the area.[67] In that sense, the function of the Guidance Paper cannot be equated with that of other substantive soft law. Still, some authors opine that the Guidance Paper actually contains principles that aim at changing the law (the

[62] A perusal of the annual summaries of ACM's activity, published in the journal *Mededingingsrecht in de Praktijk* shows that since 2005 there has been a relatively high number of sanctioning decisions taken in relation to the builder's cartel. See Issues 1 of the years 2006 through 2009.

[63] This could be due to the fact that, as Justice Birss argues in the UK Unwired Planet judgment (*Unwired Planet International Limited v Huawei Technologies Co. Limited,* [2015] EWHC 2097 (Pat), [48]), the inter-relationship between competition law and IP forms quite a specific field of knowledge/law, especially when it comes to the intersection of FRAND obligations and competition law.

[64] For explanations for the low amount of Article 102 TFEU judgments/decisions, refer to B. Rodger and A. MacCulloch, *Competition law and Policy in the EU and the UK* (Oxon/New York, Routledge, 2015), 75, 130, 135-6 and Rodger *supra* n 1, 139. See also Whish *supra* n 50, 170.

[65] L. Gormsen, "Why the European Commission's Enforcement Priorities on Article 82 EC should be Withdrawn?" (2010) 31 *European Competition Law Review* 45-51 and J. Killick and A. Komninos, "A Missed Opportunity: Why the Guidance Paper does not Increase Predictability or Advance the Debate" (2009) 2 *Concurrences Review* 23-26.

[66] G. Monti, "Article 82 EC: What Future for the Effects-Based Approach?" (2010) 1 *Journal of European Competition Law and Practice* 2, 5 (at footnote 28).

[67] The original intent of the Commission to publish guidelines on the enforcement of Article 102 is discussed by Gormsen *supra* n 65, 46 and in L.F. Pace, "The Italian way of Tackling the Abuse of a Dominant Position and the Inconsistences of the Commission's Guidance: Not a Notice but a Communication", in L.F. Pace (ed) *supra* n 23*, 104-105.*

concept of abuse)[68] and is thus not that different from substantive guidelines.[69] Others believe that the Guidance Paper is precisely what it claims to be – an enforcement priorities document.[70] In that sense, national judicial refusal for recognition of this instrument may well be higher due to the Guidance Paper's indeterminate status and function. However, it may also happen that "given the paucity of private enforcement and the pressures NCAs will be under to follow the Commission's enforcement stance, the Commission's practice will mean that in time the new enforcement standards will become concepts of abuse."[71] This work will aim at providing an answer as to which of the described attitudes prevails in national courts.

In order to perform a reliable comparison between the two chosen jurisdictions that also reflects the hypotheses enumerated in the beginning of this section, the detected attitudes to competition soft law of the Dutch and UK judiciaries are going to be comparatively analyzed under the headings 'Recognition' (with sub-parts 'Explicit agreement/disagreement' and 'Persuasion'), and 'Refusal for Recognition' (with sub-parts 'Explicit rejection' and 'Neglect'). A final heading 'Other Types of Recognition' will encompass results that could not be subsumed under the above-listed headings. For purposes of textual coherence, cases most illustrative of each trend will be discussed in detail, while the rest of the empirical material will be touched upon more briefly.

2. National Judicial Approaches to Supranational Competition Soft Law

a) Recognition - explicit agreement or disagreement

This section is going discuss cases where the Dutch and UK judiciary seem to explicitly engage with soft law instruments. The majority of explicit agreement/disagreement instances happened on the basis of soft law, read together with hard law. Explicit soft law-based reasoning through the intermediation of general principles of law was not detected. However, in both jurisdictions there appears to be an implicit working of the supranational principle of consistent interpretation reflected in EU competition law by Article 3 of Regulation 1/2003,[72] which also seems to have its respective national competition-law specific counterparts in the two systems under study.[73] Instances in which

[68] Monti, *supra* n 66 and Sinclair *supra* n 23 Greene *supra* n 10, 779-780 also notes that an implicit role of guidelines in the US antitrust context is 'commentary on the law', their explicit (express) role being explanation of the reasoning and analysis underlying agency exercise of prosecutorial discretion.

[69] Gormsen *supra* n 65.

[70] R. Whish, "Intel v Commission: Keep Calm and Carry on!" (2015) 6 *Journal of European Competition Law and Practice* 1, 2.

[71] Monti *supra* n 66, 5.

[72] The principle of consistent interpretation is expressed in Article 4(3) TEU, and is in turn reflected in the contents of Article 3 of Regulation 1/2003 *supra* n 2.

[73] For the Netherlands, Article 1 of the Explanatory Memorandum to the Dutch Competition Act (Kamerstukken II 1995/96, 24707). For the UK, Competition Act 1998, s. 60.

courts explicitly disagreed with the contents of guidelines were not detected as such, but a case of implicit disagreement that was not previously hypothesized did arise at the level of the Rotterdam District Court.

A prime example of explicit agreement with soft law is the UK *IMS v OFT* case,[74] where the 81.3 Guidelines and the Vertical Guidelines were at issue before the Competition Appeals Tribunal (CAT).[75] This case dealt with an exclusive purchasing contract between the British broadcaster Channel 4 and BBC Broadcast (BBCB). Under the contract's terms, BBCB undertook to supply Channel 4 with broadcasting access services in the form of, among others, subtitling and sign language. At the time of signing, the exclusive agreement fell under the protective ambit of the Vertical Block Exemption Regulation (VBER).[76] However, subsequent developments increased BBCB's market share, to the effect that, for a significant part of its duration, the contract fell out of the VBER's safe harbors, making the agreement vulnerable to a challenge under competition law. Under these circumstances, IMS, a competitor of BBCB, complained to the regulator (Ofcom) that the exclusivity term in the agreement infringed both the prohibitions on abuse of dominance (Chapter 2) and anti-competitive agreements (Chapter 1)[77] of the UK Competition Act 1998 (hereinafter CA '98).[78] IMS's complaint was reviewed by Ofcom, which decided there were no grounds for action on either of the allegations made. Unsatisfied with the decision, IMS appealed to the CAT. Only certain fragments of the Chapter 1 claim are material to this study.

The judgment begins by setting out a framework of the applicable law, including both the primary domestic and EU competition provisions, and soft law relevant to the assessment of the dispute – the 81(3) and the Vertical Guidelines. Importantly, what is also mentioned is section 60(3) of the CA '98 according to which, in its deliberations under national competition law, the Tribunal must "have regard to any relevant decision or statement of the [European] Commission."[79] The word 'statement' is understood to refer to Commission-issued notices and communications.[80]

The main function of s.60 as a whole is to make UK enforcers apply EU law to purely domestic situations – this is also why it is called by authors the 'absolute obligation to apply EU law'

[74] *Independent Media Support Ltd v Office of Communications*, [2008] CAT 13.
[75] The 81(3) Guidelines were also incidentally discussed in this case. This court's reasoning in that regard is going to be addressed in Section II.B.5 below.
[76] Vertical Block Exemption Regulation *supra* n 35.
[77] The Chapter 1 and 2 prohibitions are the UK national equivalents of the Article 101 and 102 TFEU prohibitions.
[78] Competition Act 1998 *supra* n 26.
[79] Competition Act 1998, s.60 (3).
[80] R. Whish and D. Bailey, *Competition Law* (OUP, Sixth Edition, 2009), 366.

provision.[81] Although IMS is not a purely domestic case, and therefore the supranational consistency obligation of Regulation 1/2003 applies,[82] the national equivalent – the s.60(3) obligation – is nevertheless mentioned by the CAT. This 'repetition', also observed in other judgments, allows this author to stipulate that the role of s.60, and more specifically of s.60(3), extends beyond approximation of purely national cases with EU law. Namely, in cases where cross-border effect is established, s.60(3), by being more specific than Article 3 of Regulation 1/2003 in its reference to particular supranational (soft) instruments, has a second function of grounding national reasoning based on supranational soft law without the need for further judicial elaboration.[83] This point will be taken up again further in this section and backed up with examples.

Moving to the analytical part of the judgment, [84] IMS alleges an error of assessment in Ofcom's holding that the challenged agreement does not fall under the Chapter 1 prohibition.[85] One of the particular objections mounted by IMS is that, in its assessment of the market structure for the purposes of establishing a possible breach under Chapter 1, Ofcom had simply recycled its earlier analysis of the competitive situation for the purposes of assessing dominance under Chapter 2. The CAT accepts IMS's concerns on the basis that: "There is an important difference between the degree of market power required for the purposes of Articles 81 and 82."[86] To support this observation, the court cites a relevant passage of the 81(3) Guidelines, "The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 82."[87] The CAT then proceeds with its own assessment of the market structure, which in the end leads it to the conclusion that no competitive concerns exist.

In this instance, the court was not prompted to use soft law either by the parties' arguments or by Ofcom's decision under appeal.[88] Therefore, it could be concluded that this is an instance of an explicit (own initiative) engagement and agreement with the content of a supranational competition soft instrument – namely, the 81.3 Guidelines. This (spontaneous) recognition without further elaboration on the mechanics of judicial reliance on soft law could be explained by a) the

[81] M. Furse, *Competition Law of the EC and UK* (OUP, Sixth Edition, 2008), 57.
[82] Art.3.of Regulation 1/2003 *supra* n 2.
[83] A similar idea is expressed in Sarmiento *supra* n 5, 272.
[84] [2008] CAT 13 *supra* n74, [100]-[124].
[85] *Ibid,* [84].
[86] *Ibid,* [115].
[87] *Ibid,* [26], which states: 'The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 82.'
[88] The decision can be found at http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_842/c4.pdf accessed on 20 January 2016.

intermediating force of s.60(3) of the 'CA 98 as stipulated above and b) by the pertinence of the said guidelines to the legislative supranational Block Exemption Regulations.[89]

A similar explanation could be given to account for the CAT's judicial engagement with the Vertical Guidelines as an answer to the last claim made by the plaintiff.[90] In suggesting how Ofcom should have performed the anti-competitive analysis under Chapter 1/Article 101 TFEU, IMS bases itself on the Vertical Guidelines,[91] and case law – the *Neste* case[92] — to argue that "the Channel 4 Contract not only fell within Article 81(1), but was incapable of satisfying the criteria set out in Article 81(3)."[93] In particular, the plaintiff puts forward the formalistic argument that the duration of the non-compete obligation in the contract in question, given the market power of its parties, is in itself sufficient to engage the Chapter 1 prohibition. In response, the court turns the argument of the plaintiff on its head, asserting incorrect reading of both the case law and the pertinent Vertical Guidelines, which do not suggest formalistic, but flexible interpretation of all the circumstances surrounding a given contract,

> "It is apparent from paragraph 62 of the Vertical Restraints Guidelines that there is no presumption that a vertical agreement which falls outside the Vertical Agreements Block Exemption will fall within the prohibition in Article 81(1): the agreement will need to be assessed on the particular circumstances of the case […]"[94]

This judicial engagement instance shows that so long as the Vertical Guidelines are in line with hard law – in this case – case law, the judiciary has no problem invoking them and agreeing with (recognizing) their content.

Further empirical observations from both jurisdictions under study[95] confirm that the above assertion is valid for the Vertical Guidelines, also when they are interpreted together with relevant Commission decisions and secondary EU law – namely, the VBER.[96,97] The Horizontal[98] and

[89] The 81(3) guidelines, unlike the Horizontal, Vertical and Technology Transfer Guidelines, are not directly related to a Block Exemption Regulation. For their connection to the legislative framework of competition law, refer to Frank Wijckmans and Filip Tuytschaever, *Vertical Agreements in EU Competition Law* (Oxford, OUP, 2011).
[90] [2008] CAT 13 *supra* n 74, [120]-[124].
[91] *Ibid,* [141], [145].
[92] C-214/99 *Neste Markkinointi Oy v Yötuuli Ky and Others* [2000] ECR I-11121.
[93] [2008] CAT 13 *supra* n 74, [105].
[94] *Ibid,* [109].
[95] Hof Amsterdam 26 juni 2012, ECLI:NL:GHAMS:2012:BX0258, [2.14]; Conclusie Hoge Raad 02 oktober 2009, ECLI:NL:PHR:2009:BJ9439, [2.36]; Conclusie Hoge Raad 21 december 2012, ECLI:NL:PHR:2012:BX9019, [20].
[96] [2006] EWHC 1241 (Ch), [254].

Technology Transfer Guidelines[99] also (but less frequently) get endorsed by courts when they support pertinent supranational hard law. The reason for these empirical results has been addressed by several authors[100] writing about soft law reception in supranational courts. As Stefan testifies, the EU competition domain is defined by a hybridity of (legal and non-legal) instruments the Commission issues, whereby "soft law adds further precision to the general rules provided for in the Treaty, regulations and directives, thus specifying and concretizing the law."[101] By means of empirical examples, Stefan shows that this hybridity is also acknowledged by EU Courts, which, after checking whether the provisions of soft law remain within the boundaries set by hard law, interpret and engage both types of instruments together, "the principles of normative interpretation cut along the hierarchy of legal norms, showing the integration between soft and hard law in a hybrid regulatory system."[102] As it seems, the same principle holds in national courts.

When it comes to the 81(3) Guidelines, one way for them to get endorsed judicially in UK courts is through the intermediation of s.60(3) 'CA 98 as exemplified above. An example from the Netherlands shows that recognition of those guidelines also happens through interpretation together with hard law as attested by the *Modint* judgment*,*[103] where the 81(3) Guidelines were included in an in-text citation, together with several supranational judgments relevant to the matter at hand.[104] The 'case-law-read-together-with-soft-law' approach of the court served to emphasize the point that an object restriction should be established through a careful analysis of, *inter alia*, the economic context in which the agreement takes place. Similar judicial treatment of those guidelines can also be detected in UK courts.[105]

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[97] For the Netherlands, see Conclusie Hoge Raad 15 april 2011, ECLI:NL:PHR:2011:BQ2213, [2.42]. For the UK, see [2011] EWHC 3165 (Ch), [71].

[98] The Horizontal Guidelines *supra* n 35 are usually interpreted together with the BERs on R&D and specialization agreements. An example of such a judicial engagement is the UK judgment *Sel-Imperial Limited v The British Standards Institution* [2010] EWHC 854 (Ch), [167]. For the Netherlands, see Hof 's-Gravenhage 05 mai 2008, ECLI:NL:GHSGR:2008:BD3247, [13]-[14]; See also College van Beroep voor het bedrijfsleven 28 oktober 2005, ECLI:NL:CBB:2005:AU5316.

[99] For the Netherlands, Rechtbank den Haag 3 Juni 2015, ECLI:NL:RBDHA:2015:6346. For the UK, see Unwired Planet *supra* n…, [31].

[100] Stefan *supra* n 12, 141. The same thesis is also expressed by Sarmiento *supra* n 5, 267-271.

[101] Stefan *Ibid.*

[102] *Ibid.*

[103] College van Beroep voor het bedrijfsleven 28 oktober 2005, ECLI:NL:CBB:2005:AU5316.

[104] *Ibid,* [7.2.2].

[105] For an engagement with the 81(3) Guidelines together with pertinent case law in the UK, see *The Racehorse Association and Others v OFT and The British Horseracing Board v OFT* [2005] CAT 29 [2005] CAT 29, [153]; *Bookmakers' Greyhound Amalgamated Services et al. v Amalgamated Racing Ltd et al* [2008] EWHC 1978, [310], [327]-[341], [438]; *Cityhook Ltd v OFT* [2007] CAT 18, [268] – [295].

With regard to the Guidance Paper, the fact that it deviates from current supranational case law to a significant extent does not contribute to a positive national judicial engagement with its contents.[106] Still, in instances where the said instrument can be interpreted in harmony with existing supranational precedent, courts do not shy away from doing so. Such was the situation in the Dutch *NVM v HPC* case.[107] The judgment dealt with, *inter alia,* a refusal to supply claim under Article 24 Mw (the Dutch counterpart of Article 102 TFEU). The plaintiff at first instance (HPC's curator) complained that the dominant undertaking (NVM) delayed sharing interoperability information with its downstream competitor HPC, which, as a direct consequence thereof, was forced to exit the market. In its judgment, the Regional Court of Amsterdam employs the Guidance Paper in order to establish the applicable EU framework for analysis of refusal to deal cases.[108] After explaining the main assessment criteria contained in several CJEU/GC refusal to deal judgments,[109] the court refers to the Guidance Paper in order to explain the meaning of the term 'constructive refusal', also of importance for the assessment. The term had been used before in the Commission decisional practice and case law. [110,111] Therefore, here we can again speak of reference to the content of soft law on the basis of/together with existing hard law. The same type of engagement with the Guidance Paper can also be found in the *NVM v HPC* Opinion of AG Keus at the Supreme Court.[112]

Another – and very different – type of judicial treatment of the Guidance Paper is exhibited by a judgment of the Rotterdam District Court. In *Sandd BV*,[113] the plaintiffs (Sandd) allege several anti-competitive activities performed by TNT (now PostNL) in the period before the full liberalization of the Dutch postal services market (pre-2009). The relevant allegations relate to predatory pricing on the market for non-priority (non-urgent) mailing.[114] The question that has to be determined is whether the Dutch ACM was correct to rely on LRAIC (Long-Run Average Incremental Cost) as the correct cost benchmark in order to conclude there could be no suspicion of predatory pricing practiced by the defendant. The plaintiffs' complaint is that the LRAIC benchmark cannot be the correct measure because it assumes that there exists an equally efficient competitor on the market, which was not the case. The judge dismisses this argument by stating that the 'as efficient competitor' benchmark is the correct one because otherwise, "a less efficient competitor could force

[106] Scholars that argue this point are Gormsen *supra* n 65 and Pinar Akman, *The Concept of Abuse in EU Competition Law* (Oxford and Portland, Oregon, Hart Publishing, 2012).
[107] Hof Amsterdam 12 juni 2012, ECLI:NL:GHAMS:2012:BX0460 and Hoge Raad 24 januari 2014, ECLI:NL:HR:2014:149.
[108] Hof Amsterdam 12 juni 2012, ECLI:NL:GHAMS:2012:BX0460, [2.27].
[109] *Ibid.*
[110] Deutsche Post AG [2001] OJ L 331/40, recital 141.
[111] C-52/09 *Konkurrensverket v TeliaSonera AB* [2010] ECR I-00527, Opinion of AG Mazak.
[112] HR 24 januari 2014, ECLI:NL:PHR:2013:1108 (concl. A-G Keus), [3.13].
[113] Rechtbank Rotterdam 26 september 2013, ECLI:NL:RBROT:2013:7337.
[114] *Ibid,* [9.2].

a dominant undertaking to increase its prices, precisely because the former is less efficient, which, in the end, is to the detriment of consumers."[115] A citation to the *Post Danmark I* case follows where it was stated that the goal of Article 102 TFEU is not to allow less efficient competitors than the dominant one to stay on the market.[116] Therefore, basing itself on (the supremacy of) supranational case law, the court indirectly dismisses/disagrees with the content of paragraph 24 of the Guidance Paper, which states that "the Commission recognizes that in certain circumstances 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."

In this sense, one can speak of a non-verbalized, but extant disagreement with a part of the Guidance Paper that is not supported in case law. The above citation to the Guidance Paper is in fact much disputed in literature and, besides not being in line with case law, is argued to be adding unnecessary confusion to the already complicated concept of anti-competitive foreclosure.[117] In the second part of the following sub-section, the Guidance Paper will again be touched upon, but this time with regard to a judicial attitude of explicit rejection.

b) Refusal for recognition – explicit rejection

A case illustrative of the explicit rejection hypothesis is the UK Court of Appeal decision in *BAGS*. [118] The soft law that came under fire were the Horizontal Guidelines. The appellant in that case – BAGS – is an organization promoting the interests of bookmakers operating in Licensed Betting Offices (LBOs). In particular, it acquires the media rights of UK racecourses for the purposes of televising horseracing competitions in LBOs. The complaint of BAGS was against the sale of media rights by a group of 30 UK racecourses (known as the 'RUK racecourses') to AMRAC – a potential competitor. Importantly, the sale was made in order to sponsor entry into a monopsonistic market (created by BAGS' activities) of AMRAC's business that was to act in direct competition to BAGS. The claim of BAGS relevant for this discussion is the allegation that prior to the sale, there had been horizontal negotiation and subsequent concerted collective action between the RUK racecourses for the sale of their rights to AMRAC. This negotiation, according to BAGS, had an anti-competitive object. In particular, BAGS argued that, since the RUK courses were in competition with each other with regard to the prices and terms of the individual licenses they could have secured with AMRAC, the collective negotiation thereof was restrictive by object.

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[115] *Ibid,* [9.2.4].
[116] C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR-General.
[117] Akman, *supra* n 106.
[118] *Bookmakers' Greyhound Amalgamated Services et al. v Amalgamated Racing Ltd et al* [2008] EWHC 1978 (Ch), [2008] EWHC 2688 (Ch) and –on appeal – [2009] EWCA Civ 750.

In response to the latter claim, counsel for the opposing parties (AMRAC/RUK) based his reasoning – solely – on paragraph 24 of the 2001 Horizontal Guidelines. This paragraph provides that when undertakings agree to join forces in order to carry out an activity that they cannot single-handedly pull off, that activity does not imply a coordination of the parties' competitive behaviors on the market and it cannot therefore have the object or effect of restricting competition. On that point, the judge ruled as follows, "I see a good deal of force in that proposition, but I prefer not to decide this case on that basis."[119] No further elaboration on the reasons for this conclusion followed, but it is evident that, in order to decide whether or not there was an infringement by object, the court explicitly preferred to steer away from a party's argument based solely on soft law. This judicial choice is not surprising if one considers an argument made by Borchardt and Wellens more than twenty years ago – namely, that if courts use soft law in the *ratio decidendi* of a judgment, they convert it into hard law.[120] Instead, the judge reached the conclusion that no anti-competitive object could be established by endorsing opposing counsel's (logical) reasoning that "there cannot be an agreement whose object (or for that matter whose effect) is to restrict competition if at the relevant time there is no competition to be restricted."[121] In that sense, the judge held, "arrangements whose object was to enable [an undertaking] to enter the market could not therefore be restrictive of competition that did not and could not exist at the time."[122]

Another instance of judicial rejection, but with regard to the Guidance Paper, is the *Purple Parking v Heathrow Airport* case,[123] decided by the UK High Court. [124] There, the operator and owner of Heathrow Airport (HAL) was held to have abused a dominant position by changing existing arrangements with the intent to exclude competing 'meet and greet' operators (Purple Parking, Meteor Parking) from airport terminal forecourts, thus promoting its own and equivalent services. The Guidance Paper[125] was used by HAL's lawyers to support a claim that a foreclosure (abuse) under Article 102 TFEU could only be established by the plaintiffs (Purple, Meteor) if, among others, the latter succeeded in proving elimination of (effective) competition. Purple countered that it was sufficient to show that competition was hindered rather than eliminated. The judge, siding with the plaintiffs, refuted one-by-one the case-law based arguments in favour of an 'elimination' threshold

[119] *Ibid,* [2009] EWCA Civ 750 (CA) *supra* n 118, [91].
[120] G. Borchardt and K. Wellens, "Soft Law in European Community Law" (1989) 14 *European Law Review* 267, 271.
[121] [2009] EWCA Civ 750 (CA) *supra* n 118, [92].
[122] *Ibid.*
[123] *Purple Parking Ltd, Meteor Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch).
[124] Rodger and MacCulloch *supra* n 64, 137 argue that *Purple Parking* is one of the three most significant UK abuse of dominance cases. The other two are *Attheraces Ltd v British Horseracing Board* [2005] EWHC 3015 (Ch) and *Arriva the Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch)).
[125] Guidance Paper *supra* n 35, [81] read together with [75].

put forward by HAL.[126] Along with those, the invocation of the Guidance Paper was also rejected as irrelevant. The judge dismissed the entire instrument with the following motivation,

> "[…] as the document itself points in paragraph 3, it is not a statement of the law, and paragraph 81 makes it clear that what is being referred to is an enforcement priority, not a definition of abuse. I do not think that this document assists the debate."[127]

This reasoning shows that the judge does not consider the Guidance Paper as a source for interpretation of the law, but as a mere instrument citing enforcement priorities that have no relevance for legal interpretation. If that reasoning is followed, even in passages where the Guidance Paper does reflect existing (case) law, it will be disregarded in judicial reasoning because it is not an instrument relevant to legal interpretation.

Before concluding this sub-Section, it needs to be observed that the two instances of judicial rejection described here are very different. In the former case, the Horizontal Guidelines were invoked as the sole supporting instrument for a claim made by a party to the dispute. If, as argued above, the judge had decided the matter relying *solely* on soft law (use of soft law as *ratio decidendi*), that would have amounted to endowing soft law with binding force. This is why, it is argued, rejection ensued.[128] By contrast, in the latter case, the Guidance Paper was used as *support* to case law – an instance in which substantive soft law usually gets judicial recognition as observed in the previous sub-section. However, the response here was rejection due to – in the judge's words – the fact that the soft instrument was not a statement of the law. Therefore, the status of 'enforcement priorities' of the Guidance Paper incited the judge to reject the possibility that the instrument produces legal effects through interpretation together with relevant hard law. It is also possible (although no direct indication for that conclusion was found in the judicial text) that the court actually rejected the Guidance Paper because it is a controversial text that is perceived[129] as proposing an alternative reading of existing Article 102 case law.[130]

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[126] The case law relied on by HAL was in the realm of essential facilities, which is not applicable to the fact set of the current case.

[127] [2011] EWHC 987 (Ch) *supra* n 123, [95].

[128] *Ibid,* [101] and [117] support this conclusion. In those paragraphs, the horizontal guidelines are mentioned in support of arguments that are based on case law (soft law read together with hard law). Also, the same paragraph was quoted by the CAT in a case with a similar fact set (*The Racehorse Association and Others v OFT and The British Horseracing Board v OFT* [2005] CAT 29) as part of the legal framework enunciating rules that were not disputed by the parties. In that context, the Tribunal did not have a problem quoting soft law.

[129] See Gromsen *supra* n 65 and Akman *supra* n 106.

[130] The Guidance Paper received a subtler, yet similar treatment by the Court of Appeal in *National Grid v GEMA* [2010] EWCA Civ 114, [53], [54], [57]. The relevant discussion there was on the value of counterfactuals and what the Guidance Paper had to say in that regard seemed to not be appreciated.

c) Refusal for recognition – neglect

In a cartel 'hub-and-spoke' collusion scenario that occurred in the UK,[131] the Horizontal Guidelines and their renewed information exchange section in particular,[132] were invoked by the plaintiff Tesco only to be ignored by the judiciary in its reasoning.

In 2011, the CMA issued a Chapter 1 infringement decision to several dairy producers and major UK supermarkets (Tesco and others) with regard to collusive price increases of dairy products for end consumers. Tesco appealed to the CAT against the decision establishing that it had participated in exchange of future retail prices for British-produced cheddar and other territorial cheeses. The CAT, when establishing the relevant legal framework for assessment,[133] discusses the argument put forward by Tesco's lawyer that the information on competitor's pricing its client received through a supplier constituted aggregated (as opposed to individualized) data that could moreover not be trusted as being reliable. While the trustworthiness argument is dismissed, the distinction aggregate-individualized data, argued on the basis of the Horizontal Guidelines[134] together with the national convergence obligation in s. 60(3) CA '98, is acknowledged by the CAT as a relevant consideration in the assessment of anti-competitiveness. The judge, however, rephrases the relevant passages of the Horizontal Guidelines and re-cites them as if they are coming from the court, "*In our judgment*, the exchange of individualized data is more likely to facilitate coordination because it makes it easier for companies to reach a common understanding regarding future prices or sales."[135] The court does not give any authority to underpin this statement, so it could be that counsel's invocation of the guidelines accompanied by the s.60(3) consistency obligation provides for explicit judicial recognition of a rule expressed in the soft instrument. One should keep in mind, however, that the above statement is made in the 'applicable law' section of the judgment where no actual analysis on the matter(s) at hand is yet present. The CAT also promises that it would take account of the distinction between individualized and aggregate data in the analytical part of the judgment.[136] Although the Tribunal seems to do so, [137] the discussion on the matter is not explicit[138] and the Horizontal Guidelines put forward by defendant's counsel are not mentioned anymore.

[131] *Tesco Stores Ltd, Tesco Holdings Ltd, Tesco Plc v Office of Fair Trading* [2012] CAT 31.
[132] In the newest version of the guidelines – that of 2011, the section on information exchange is significantly expanded in comparison to the old version of the same soft law instrument.
[133] [2012] CAT 31 *supra* n 130, [44]-[87].
[134] *Ibid,* [73], [74], [89].
[135] *Ibid,* [79].
[136] *Ibid*.
[137] *Ibid,* [220]-[280].
[138] *Ibid,* [243].

At a first glance, the above-described judicial handling of soft law could be signaling recognition on the basis of s.60(3). However, the latter principle was invoked by defendant's counsel, not the CAT. By contrast, judges who endorse supranational soft law on the basis of s.60(3) explicitly emphasize the relevance of that provision. Furthermore, the Tribunal re-stated passages of the Horizontal Guidelines on its own authority – although this might look like recognition, the instrument is not followed-up on in the analytical part, which would imply that the court was manoeuvring its way out of a direct, concrete discussion on the basis of the guidelines. This is not unthinkable if one considers the consequences which the court chooses to attach to s.60 of the CA '98 when discussing the provision at the very beginning of the judgment, under the heading 'Statutory Framework'. For the CAT, s.60 "of course includes ensuring consistency with the jurisprudence of the Court of Justice and General Court of the European Union." [139] The court mentions nothing on having regard to statements or decisions of the Commission, however; this is done by TESCO's counsel, but not taken up by the CAT.

On the basis of these considerations, it could be concluded that this might well be a case of neglect of a supranational soft law instrument – although it was explicitly invoked by counsel, the court chose not to say anything on the matter in the analytical part of the judgment. Why were the Horizontal Guidelines neglected at this instance? It could be because the distinction aggregate-individualized data exchange was only introduced with the 2011 version of the Horizontal Guidelines and supranational case law on the matter before that year was not abundant.[140]

d) Recognition – persuasion

As established in the methodological section above, cases falling under a 'persuaded judiciary' scenario were to be found by a specific key term search, which, however, turned out to detect judgments that contained explicit references to soft law only (the specific key terms located judgments that were already in the sample by means of the initial key terms search). In this sense, not even one of the judgments found can be argued to exemplify a pure persuasion instance. However, the Dutch *Nestlé v Mars* case comes close to the ideal persuasion scenario that was envisioned theoretically.[141]

[139] *Ibid,* [42].
[140] A search on curia.eu points to one case discussing the matter having been decided pre-2011: Joined cases T-305/94P *Limburgse Vinyl Maatschappij et al.v Commission of the European Communities* 1999] ECR II-00931.
[141] Rechtbank Oost-Brabant 07 augustus 2013, ECLI:NL:RBOBR:2013:4356.

The claim relevant for this discussion, mounted by Nestlé before the District Court of East Brabant, is a complaint against an anti-competitive rebate scheme (the MOP 2011) operated by Mars on the premises of Dutch gas stations. The scheme (for chocolate products distribution) consists in granting discounts and bonuses to gas stations that arrange their shelf space according to the conditions set by Mars. The fulfillment of those conditions results in allocation of considerable gas-station space to Mars products. On top of this, gas stations have to install specific additional displays for Mars products only. Nestlé submits that this behavior of Mars can be seen as an abuse of dominant position (Article 24 Mw) or, in the alternative, that Mars's contracts with Dutch gas stations constitute anti-competitive agreements in the sense of Article 6 Mw. In the framework of Article 24 Mw, Nestlé submits that the arrangements of Mars have a considerable market foreclosure effect – the discounts are percentage-based (a percentage of the yearly tank station's turnover on Mars products), whereby a leveraging effect is created between Mars must-stock products and additional purchases subject to a possible discount. Nestlé also submits that, because of the leveraging effects that Mars profits from, an equally efficient competitor cannot rival its discounts without suffering significant (structural) losses.

In these factual circumstances, when discussing the applicable law, the judge mentions that the case will be decided on the basis of national competition law only, but, in line with Article 3 of Regulation 1/2003, guidance will also be sought in the relevant European legal sources – judgments of the CJEU, "and the assessment guides that the European Commission has issued with regard to Articles 101 and 102 TFEU."[142] In the footnote to this statement, it becomes clear that the court has the Guidance Paper and the Vertical Guidelines in mind when using the formulation 'assessment guides'—an approach reminiscent to that of the UK judiciary under s.60(3) of CA'98. This is the only spot in the judgment where the Guidance Paper is mentioned, but central concepts that it makes use of are to be seen throughout the judgment. In particular, there are multiple references to an 'as efficient competitor test' that the court tries to perform according to the methodology suggested by the Commission.[143] In that sense, one can see an (implicit) judicial acknowledgment of a soft instrument's contents without an explicit reference to it in the body of the judgment proper.

e) Other types of recognition

The above-discussed *Nestlé v Mars* case is significant not only for its implicit engagement with the contents of the Guidance Paper, but also for its judicial treatment of the Vertical Guidelines, which

[142] *Ibid,* [4.1].
[143] *Ibid,* [4.25] to [4.29].

the court explicitly engaged with, no further motivation to this effect given. This is one of the cases where a single judgment employs more than one soft instrument, with a differing interpretative outcome per type of soft law instrument. Therefore, it is discussed in both the previous and current sub-sections.

The claim of Nestlé with regard to the MOP was that it either constituted an abusive rebate under Article 24 Mw, or an unlawful category management agreement between Mars and gas stations under Article 6 Mw. At the beginning of the assessment of the second allegation, the court holds that the appraisal of whether or not the MOP is contrary to Article 6 Mw should happen on the basis of the Vertical Guidelines, "where the European Commission had laid out the principles for assessment of vertical agreements."[144] No further substantiation as to why this should be the case is offered, although the reasoning in the rest of this claim is entirely based on citations to relevant paragraphs of the Vertical Guidelines.[145] This seemingly 'stand-alone' engagement with the guidelines that does not seek support in either pertinent case nor hard law could be explained in light of the above-cited initial statement of the court that the case will be decided on the basis of Dutch law, "but guidance will be sought in assessment guides that the European Commission has issued with regard to Articles 101 and 102 TFEU."[146] It seems that this approach, enshrined in national law through Article 1 of the Explanatory Memorandum to the Dutch Competition Act, could aid in grounding national judicial discussion of supranational soft law without further references to pertinent hard law, much like in the UK. Article 1 to the DCA's Explanatory Memorandum reads as follows "the DCA will strive to follow EU Competition rules to the greatest extent possible."[147] There is consensus in scholarly writings that this is indeed the policy line followed by the ACM – a policy liable to influence courts as demonstrated above.[148] It is hereby argued that the existence – in both jurisdictions – of national consistency obligations working in parallel with the supranational one, allows for national judicial

[144] *Ibid,* [4.13].
[145] *Ibid,* [4.13]-[4.20].
[146] *Ibid,* [4.1].
[147] The original text reads: 'Dit voorstel van wet strekt ertoe de Wet economische mededinging te vervangen door een mededingingswet, die zoveel mogelijk aansluit bij de mededingingsregels van de Europese Gemeenschap.'
[148] Van Oers *supra* n 61, 243; Sakkers *supra* n 61, 87; J. E. van den Brink and J. C. A. van Dam, "Nederlandse Bestuursrechters en Unierechterlijke "Beleidsregels"" (2014) Juni *JB Plus* 180. The last author even speaks of a 'copy-paste' policy between the EU and Dutch legal orders when it comes to Article 102 TFEU cases (Article 24 Mw). Doctrine stipulates that ACM's compliance with other supranational guidelines is also very high. As to following the Horizontal Guidelines at national level, see C. Hamm, "The Netherlands", in L. Davey and M. Holmes (eds), *A Practical Guide to National Competition Rules Across Europe* (Kluwer, 2004), 609, 616. As to the Guidance Paper, see MV, "Tussen Vorm en Effect" (2009) 3 *Actualiteiten Mededingingsrecht* 52. The Vertical Guidelines are also complied with by virtue of them being inextricably related to the VBER, which applies in the Netherlands even in purely national situations. To that effect, see the Opinion of AG Keus in the *Batavus* case –HR 16 september 2011, ECLI:NL:PHR:2011:BQ2213 (concl. A-G Keus). In the UK, the existence of a similar alignment with the VBER for purely national situations is suggested in a less categorical manner in Rodger and MacCulloch *supra* n 64, 185.

treatment of supranational soft law that very much looks like the engagement with soft law on the basis of general principles of EU law hypothesized in the previous section.[149]

This thesis is supported by further analysis of the Dutch and UK empirical samples. For instance,[150] in the Dutch *Batavus* saga,[151] supranational soft law was invoked several times on the basis of the above-described consistency construction. In this case, Batavus (a bike producer) had terminated a long-lasting contractual relationship with the plaintiff – Blokker – that was, among others, in the business of retail and reparation of bikes. At first instance, it was established that the termination by Batavus happened under pressure from a large rival distributor (Euretco) that was dissatisfied with the low online sale prices for bikes practiced by Blokker. The first-instance court decided in Blokker's favour. Batavus appealed. It is important to note that – early on in the appellate judgment – the court makes a general statement on the interaction of EU and national competition law, in which context it mentions its views on the role of Commission-issued soft law in the national domain. The precise formulation used is as follows,

> "The court observes that the reading of the DCA is based on EU law (in particular Article 81 TEC), which means that the terms used in the DCA need to be interpreted in light of the jurisprudence of the GC and the CJEU, which is, in turn, to a significant extent supported by the decisional practice of the European Commission and its communications and guidelines."[152]

In this context, the judge engages in a discussion of the contents of the Vertical Guidelines and the Commission's *De Minimis* Notice,[153] references to which are not further explained nor justified. This attitude, again, makes sense in light of the above-quoted general statement that reflects the national and European consistency obligations.[154]

[149] For a more elaboration on this hypothesis, see Georgieva *supra* n 14.
[150] For a similar Dutch judicial approach with regard to the 81(3) Guidelines, see Hof Arnhem 17 november 2009, ECLI:NL:GHARN:2009:BL7079.
[151] See, in particular, Hof Leeuwarden 06 oktober 2009, ECLI:NL:GHLEE:2009:BJ9567. The *Blokker* saga is seen as one of the more important Dutch vertical distribution cases by scholarship. Refer to T. Ottervanger, "'The Netherlands'", in I. Kokkoris (ed), *Competition Cases from the European Union* (London, Sweet & Maxwell, 2008).
[152] *Ibid,* [15].
[153] *Ibid,* [25], [27].
[154] A similar judicial attitude, but with regard to the 81(3) Guidelines, can be seen in Hof Arnhem 17 november 2009, ECLI:NL:GHARN:2009:BL7079.

With respect to the UK, another exemplary case is *Cityhook*,[155] where, on grounds of administrative priority, the CMA closed an investigation into a complaint by Cityhook, a small firm specialized in the laying of submarine cables. The complaint was, among others, of a collective boycott of Cityhook's business by bigger competitors. The case closure decision was challenged by Cityhook, who maintained the CMA had taken an appealable final decision. On appeal, the CAT held that the decision was not appealable, but what is more important for this discussion is part of the argumentation used in that regard. In alleging the case closure decision to be a final decision on the substance (and therefore appealable), Cityhook argues that the references to 'hard-core' infringements in the final case closure letter should be read to mean 'by object' restrictions, which would imply that the OFT had made a final decision on substance.[156] In order to ascertain the meaning of the term 'hard-core' and its relation to the notion 'object restriction', the CAT refers to the 81(3) Guidelines because – at the time – there was no case law it could base itself on in that regard. The court simply states, "we were not cited any jurisprudence of the Community Courts which uses the term 'hard-core'".[157] In this situation of sole reliance on soft law, the CAT bases itself on s.60(3) of the CA'98, stating that

> "It appears from the European Commission's guidance that so-called 'hard-core' restrictions are generally considered by it to have as their object the restriction of competition. However, it would also appear that the category of restrictions by object may extend beyond the narrow set of so-called 'hard-core' restrictions, although normally the former encompasses the latter. It therefore appears that the term 'hard-core' is used to refer to the most serious object-based infringements of Article 81(1) EC and, by virtue of Section 60(3) of the 1998 Act, the Chapter 1 prohibition."[158]

This quotation serves to further support the hypothesis that the national consistency principle is used as a hook that anchors supranational competition soft law discussion in national judicial reasoning. Support for this claim can also be found through a simple search on UK databases,[159]

[155] *Cityhook Ltd v OFT* [2007] CAT 18.
[156] *Ibid*, [249].
[157] This is indeed because the first mentioning of the term 'hard core' by the supranational courts happened post-2007 (search performed on curia.eu). Thus, in this paragraph, the case uses soft law with no endorsement in supranational case law (at the time) to make a point/build an argument.
[158] [2007] CAT 18 *supra* n 155, [255].
[159] The databases used are Westlaw UK and Bailii. Out of a total of 23 UK competition judgments mentioning S.60 between its introduction in 1998 and today (the search was performed with search terms 'Section 60 of the 1998 Act'), 12 deal extensively with supranational soft law instruments. Six of them relate to the Commission Fining Guidelines ([2011] CAT 3; [2011] CAT 7; [2011] CAT 9; [2011] CAT 11; [2014] EWHC 1613 (Ch); [2002] ECC 13) and the other six deal with instruments that form the basis of this study ([2011] CAT 10; [2011] CAT 40; [2008] EWHC 1978 (Ch); [2008] CAT 13; [2007] CAT 18; [2012] CAT 31).The rest of the judgments that mention both S.60 and soft law use S.60 either to

where, out of 10 judgments mentioning s.60(3) of the CA '98, 9 actually deal with supranational soft law in one way or another.

III. Trends Detected in Empirical Observations

The main trends that could be detected from the above empirical observations chart out several lines for possible subsequent inquiry and show that – rather than being different due to the different type of legal system they represent (civil versus common law) – the Netherlands and the UK mostly converge in their treatment of supranational soft law.

It is evident that courts in both jurisdictions do not shy away from engaging positively (no explicit disagreement was detected) with soft law content when this content can be traced back to relevant supranational hard law. In that regard, it merits observing that the greatest amount of recognition references belongs to the Vertical Guidelines, with less for the 81(3) Guidelines and the Horizontal Guidelines. The situation is reverse for the Guidance Paper, which often gets implicitly or explicitly rejected (refusal for recognition). However, when in line with hard law, it could also be subject to implicit or explicit endorsement as evidenced by Dutch judicial practice. This latter phenomenon was not observed in the UK. The second most judicially rejected instrument are the Horizontal Guidelines. In both jurisdictions, they get almost as many recognition references as refusals for recognition. This fact is surprising. While it is true that the new, 2011 version of the Horizontal Guidelines does broaden certain discussions that were very condensed in the older edition,[160] scholarly accounts do not point to anything at odds with established law.[161] In that light, it should be mentioned that the current version of the Vertical Guidelines also expanded on certain concepts that were marginally discussed in the old document, but this fact does not affect their positive judicial reception.[162] In this sense, reasons for the observed negative treatment instances with regard to the Horizontal Guidelines should be sought elsewhere.

A possible explanation for the different judicial attitude towards the Horizontal and Vertical Guidelines could be given by a theory with its origins in sociology – the so-called 'institutionalization'

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ground a claim in EU hard law (4 cases: [2015] EWHC 3585 (Admin); [2005] CAT 30; [2011] CAT 13; [2011] CAT 6) or to motivate a deviation from it (another 4 cases: [2001] EWCA Civ 2021; [2014] EWCA Civ 400; [2011] CAT 14; [2005] SLT 1041).

[160] Horizontal Guidelines *supra.* For instance, the Information Exchange Section in the new guidelines is an example of significant expansion and elaboration.

[161] P. Camesasca and A. Schmidt, "New EC Horizontal Guidelines: Providing Useful Guidance in the Highly Diverse and Complex Field of Competitor Cooperation and Information Exchanges" (2011) 2 *Journal of European Competition Law and Practice* 227, 229.

[162] As Colomo testifies, all post-Modernization guidelines have expanded their scope in light of the 'more-economic' approach that ensued post-2004. See Colomo *supra* n 3, 370.

theory. According to Greene, [163] who uses 'institutionalization' to explain judicial attitudes to the US Merger Guidelines, the latter become institutionalized "when they gain sufficient stature that they become valued in legal arguments by the courts and others, beyond the persuasive power of the ideas they embody."[164] 'Stature' seems to build up the more an instrument is used in administrative and judicial practice (decisions and judgments),[165] the latter two influencing each other to the point where "each successive version of the guidelines moves the law towards it."[166] In that sense, "the antitrust guidelines had acquired a power to influence the law because they were the antitrust guidelines, and not just because they were good ideas or the pronouncements of expert federal agencies."[167] While there is no evidence that the Vertical Guidelines have reached this stage in the institutionalization process, their more frequent judicial usage in comparison with other soft law is a fact that has been empirically ascertained for the national level.[168] This increased judicial usage in comparison with the Horizontal Guidelines might well be due to the fact that – after decentralization – the Commission had committed itself to dealing with all the serious cartel cases, which therefore do not reach the national level. Thus, more vertical cases are decided at the national level on average, which gives the Vertical Guidelines the opportunity to get institutionalized and probably also acquire a stronger independent influence over time.

Going back to the trends detected in the empirical Section 2, the most curious phenomenon that was found to exist in both jurisdictions was the ability of judges to engage with supranational competition soft law on the basis of national statutory-based consistency principles, reflecting their supranational counterpart – Article 3 of Regulation 1/2003. As seen above, s.60 of the CA '98 and Article 1 of the Explanatory Memorandum to the DCA have had the effect – among others[169] – of enabling supranational soft law to get recognized in national judicial discourse, thus producing legal effects at the national level. This judicial endorsement mechanism seems to work like the above-hypothesized recognition on the basis of general principles of law.[170]

[163] Greene *supra* n 10.
[164] *Ibid*, 810.
[165] *Ibid*, 811.
[166] *Ibid*, 812.
[167] *Ibid.*
[168] On top of the observations for the Netherlands and the UK made above, in France, more than 80% of the judgments that mention substantive supranational competition soft law deal with the Vertical Guidelines (35 out of 43 judgments).
[169] In the Netherlands, for instance, this principle has also led to a narrow adherence to supranational soft law by the ACM. For instance, the 81(3) Guidelines have literally been transposed into the national legal system. See Plomp *supra* n 51, Ch.6. See also the website of the Dutch Government http://wetten.overheid.nl/BWBR0033029/geldigheidsdatum_01-09-2014 accessed September 2015.
[170] For an elaboration on the mechanics of judicial recognition though the use of general principles of law, see Georgieva *supra* n 14.

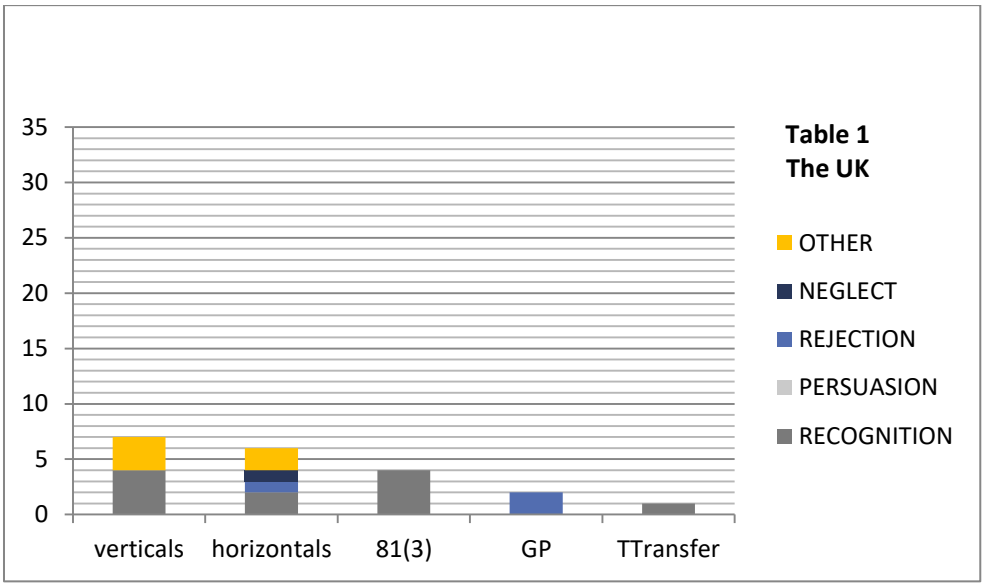
Finally, it was observed that courts will refuse to recognize a rule enunciated in a soft instrument and put forward by the parties if – by such an act – that rule could be seen as forming the *ratio decidendi* of the judicial decision. Soft law – if it is to remain soft – should not be a source to inform a *ratio.*

IV. Conclusions – the 'Common Core' of Dutch and UK Judicial Recognition of Supranational Competition Soft Law

From the above empirical observations, several conclusions can be made. Firstly, it is evident from both the findings in the UK and the Netherlands that courts are a lot more likely to recognize soft law when it is used together with pertinent hard law. Proof was also found for the supposition of likely judicial rejection if soft law is invoked on a stand-alone basis, especially if the soft law passage under discussion is not supported by hard law or if it can serve as the *ratio* of the judicial decision. Lack of supporting hard law can also provoke judicial neglect. Finally, while not much empirical support was found for the 'persuaded judiciary' hypothesis, a most curious finding was made with regard to the role of the UK and Dutch national consistency obligations, which, working together with their supranational counterpart (Article 3 of Regulation 1/2003), can be used by national courts to ground supranational competition soft law in national judicial reasoning.

Overall, this work's aim was to delineate the attitudes of the Dutch and UK national judiciaries towards Commission-issued competition soft law. To do that, it was initially ventured that, with regard to supranational competition soft law, courts could take several courses of action – 'recognition' (comprising agreement, disagreement, or persuasion), and explicit or implicit 'refusal for recognition', the latter denominated 'neglect'. In the empirical part, most of these hypotheses were actually corroborated. Some new observations were also added to the overall picture. Generally, it transpired that soft law is indeed being invoked in an array of different manners, whereby not every instrument is treated in the same way across the jurisdictions under study or sometimes even within the same jurisdiction. While the Vertical, the Technology Transfer and the 81(3) Guidelines generally get positive recognition, the results are more varied with regard to the Guidance Paper and the Horizontal Guidelines. The current treatment of the latter two instruments, thus, is not optimal from the perspective of the principle of enforcement consistency and the concomitant legal certainty and uniform application.

GRAPHICAL REPRESENTATION OF EMPIRICAL FINDINGS



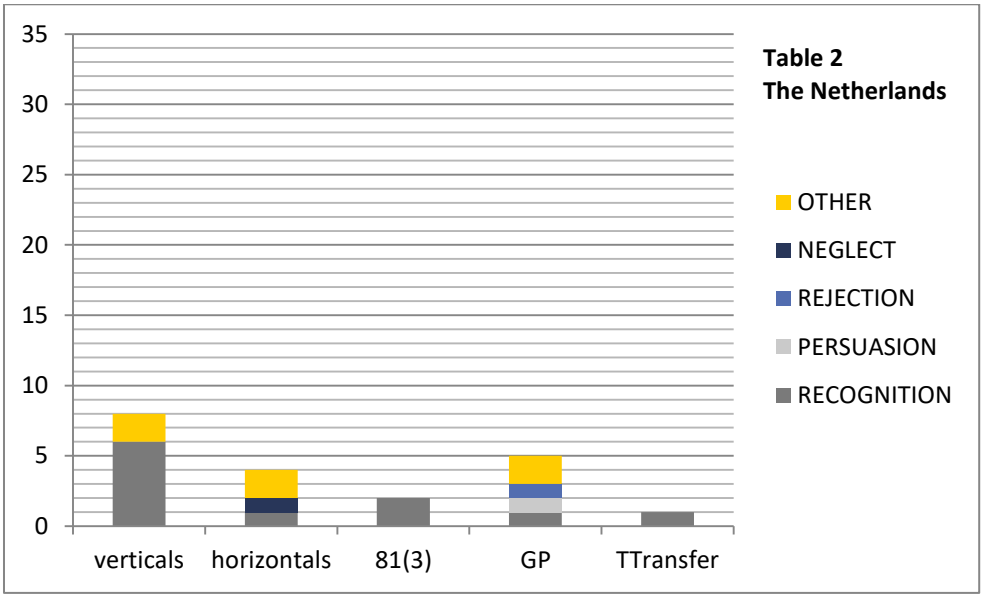


TABLE OF CASES

UK	The Netherlands
1. *The Racehorse Association and Others v OFT and The British Horseracing Board v OFT* [2005] CAT 29	1. *Batavus v Anonymous Defendant* ECLI:NL:RBLEE:2006:AY9814 (at Rb Leeuwarden); ECLI:NL:GHLEE:2009:BJ9567 (at Hof Leeuwaarden); ECLI:NL:HR:2011:BQ2213 (at Hoge Raad, with opinion of AG Keus: ECLI:NL:PHR:2011:BQ2213)
2. *Independent Media Support Ltd v Office of Communications* [2008] CAT 13	2. *NVM v HPC* ECLI:NL:GHAMS:2012:BX0460 (at Hof Amsterdam); ECLI:NL:HR:2014:149 (at Hoge Raad, with opinion of AG Keus: ECLI:NL:PHR:2013:1108)
3. *Bookmakers' Greyhound Amalgamated Services et al. v Amalgamated Racing Ltd et al* [2008] EWHC 1978 (Ch), [2008] EWHC 2688 (Ch) and [2009] EWCA Civ 750	3. *Chipsol Holding BV v ACM* ECLI:NL:RBROT:2013:9069
4. *Sel Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch)	4. *De Nieuwe Heuvel BV v Koninklijke Vereniging 'Het Friesch Paarden-Stamboek'* ECLI:NL:GHARN:2009:BL7079
5. *Cityhook Ltd v OFT* [2007] CAT 18	5. *Vereniging Modint v ACM* ECLI:NL:CBB:2005:AU5316 and *Vereniging Nederlandse Textiel Conventie v NMa* ECLI:NL:RBROT:2004:AR4213
6. *Tesco Stores Ltd, Tesco Holdings Ltd, Tesco Plc v Office of Fair Trading* [2012] CAT 31	6. *Anonymous Plaintiff v Stichting Raad voor de Boomkwekerij en Stichting Erkenningen Tuinbouw* ECLI:NL:GHSGR:2008:BD3247
7. *National Grid Plc v Gas and Electricity Markets Authority* [2010] EWCA Civ 114	7. *Sandd BV v ACM* ECLI:NL:RBROT:2013:7337
8. National Grid Electricity Transmission Plc v ABB Ltd and Others [2012] EWHC 869 (Ch)	8. *CRV Holding BV v ACM* ECLI:NL:CBB:2010:BN994
9. Purple Parking Ltd, Meteor Parking Ltd v Heathrow Airport Ltd [2011] EWHC 987 (Ch)	9. *Service Stations Benschop Woerden BV/Service Stations Benschop BV v BP Europa SE* I:NL:GHAMS:2012:BX0258 (at Hof Amsterdam); ECLI:NL:HR:2013:2123 (at Hoge Raad, with opinion of AG Keus: ECLI:NL:PHR:2013:875)

10. *Calor Gas Ltd v Express Fuels (Scotland)* [2008] CSOH 13	10. *Prisma Vastgoed BV/Prisma Food Retail BV v Slager* ECLI:NL:HR:2009:BJ9439 (with opinion of AG Keus: ECLI:NL:PHR:2009:BJ9439)
11. *Ineos Vinyls et al v Huntsman Petrochemicals (UK) Ltd* [2006] EWHC 1241 (Ch)	11. *Nestlé Nederland BV v Mars Nederland BV* ECLI:NL:RBOBR:2013:4356
12. *Crest Nicholson and ISG Pearce Ltd v OFT* [2011] CAT 10	12. *Brink's Nederland BV v ACM* ECLI:NL:RBROT:2015:5805
13. *Enterprise Inns Plc v Palmerson Associates Ltd, Paul Rigby, James Younger* [2011] EWHC 3165 Ch	13. *Commissariaat voor de Media v SplinQ* B.V.: ECLI:NL:HR:2012:BX9019 (with opinion of AG Huydecoper here: ECLI:NL:PHR:2012:BX9019)
14. Unwired Planet International Limited v Huawei Technologies Co. Limited [2015] EWHC 2097 (Pat)	14. *Jet Set Hydrotechniek BV v Hoffland BV* ECLI:Nl:RBDHA:2015:6346

CHAPTER 3

COMPETITION SOFT LAW IN FRENCH AND GERMAN COURTS: A CHALLENGE FOR ONLINE SALES BANS ONLY?, FORTHCOMING IN MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW (2017)

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Chapter 3. Competition Soft Law in French and German Courts: A Challenge for Online Sales Bans Only?

By Zlatina Georgieva*

Ten years after the decentralization of EU competition law enforcement, this paper aims to ascertain through empirical means whether Commission-issued competition guidelines and notices (soft law) actually help to enhance enforcement consistency at the national level. This is what the European Commission itself maintained in White Paper on Modernization in 1999. The main premise of the White Paper is that if soft law is to help enhance consistency (a goal central to the current regime), it needs to be treated consistently by national judiciaries within and across EU jurisdictions – a difficult task, however, given its lack of binding force. Therefore, to ascertain the extent to which and how national courts in two select jurisdictions – France and Germany – engage or refuse to engage with supranational soft law, a theoretical framework of 'judicial recognition' of soft law is superimposed on a sample of 84 national judgments. While not discouraging, the results show some significant discrepancies that require further attention.

Keywords: Soft Law; EU Competition Law; Legal Effect; Courts; France; Germany

§1. Introduction

More than 15 years ago, in its White Paper on Modernization,[1] the European Commission set out its plans for the decentralization and 'modernization' of EU competition law, while emphasizing the importance of preserving the consistency of enforcement in the newly designed multi-stakeholder system. The consistency goal was subsequently sealed into legislation – Regulation 1/2003 and Articles 3, 11 and 16 thereof.[2] Those provisions penetrate into national (judicial) autonomy by,

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[1] Commission White Paper on modernization of the rules implementing Articles 85 and 86 of the EC Treaty, [1999] OJ C 132/01 (the White Paper on Modernization).

[2] Council Regulation No. 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2002] OJ L 1/1. On the consistency-enhancing function of the Regulation, see L.T. Feteira, *The Interplay between European and National Competition Law after Regulation 1/2003: 'United (Should) We Stand?'* (Kluwer Law International, 2015), p. 47–70.

among other things, requiring national courts not to render judgments that are contrary to existing or even envisioned Commission decisions (Article 16(1) of Regulation 1/2003). Therefore, save for the ability of national courts to challenge the Commission's choices under Article 234 TFEU, consistent decentralized enforcement is achieved through a focus on the Commission's output as an enforcer that functions as a 'first among equals'.

More specifically, in its White Paper the Commission explained that, in addition to its Block Exemption Regulations, enforcement decisions, and the case law of the supranational courts, the decentralized enforcement system would benefit from added legal certainty and consistency by means of notices and guidelines issued 'to explain (…) policy and provide guidance for the application of the Community competition rules by national authorities'.[3] Given their non-binding nature, the latter instruments were deemed particularly suitable for usage as interpretative aids to hard law, thereby making 'a valuable contribution to the consistent application of Community law'.[4] This enhanced consistency-securing function of guidelines also increased their relative importance as enforcement instruments.[5]

Ten years down the road of modernization, however, the first indications appear that challenge the originally envisioned, consistency-enhancing role that Commission-issued guidelines were supposed to play in the decentralized competition enforcement system.[6] Discrepancies are observable in recent judgments of French and German courts, which have adopted opposing stances on a specific rule introduced by the Commission in its 2010 Vertical Restraint Guidelines.[7]

The rule in question spells out the Commission's policy on the issue of online platform sales bans. It seems as if this rule has not resonated with the majority of (French and German) courts that have adjudicated on the matter. However, at the same time, there are also several German courts that have endorsed the Commission's approach. While this article acknowledges that the observed divergences can partly be explained with regard to the peculiarities of national (judicial) decision-

[3] White Paper on modernization, para. 86.
[4] Ibid.
[5] V. Korah, *Intellectual Property Rights and the EC Competition Rules* (Hart Publishing, 2006), p. 24; P.I. Colomo, 'Three Shifts in EU Competition Policy: towards Standards, Decentralization, Settlements', 20 *Maastricht Journal of European and Comparative Law* (2013), p. 370.
[6] Similar contradictions also arise in interpretations of the rules on dual pricing and Most Favoured Nation (MFN) clauses. For dual pricing, see L. Vogel, 'The Recent Application of European Competition Law to Distribution Agreements: a Return to Formalism?', 6 *Journal of European Competition Law and Practice* (2015), p. 457-459; for retail MFNs, see Y. de Vries et al., 'Verticale Prijsbinding geen Prioriteit? Elders Wel', 2 *Actualiteiten Mededingingsrecht* (2010), p. 15-19.
[7] Commission, Guidelines on Vertical Restraints, [2010] OJ C 130/1.

making, it claims that they are also related to the uncertain legal effects of the soft law instruments in national courts.

In that context, this article asks whether – as claimed in the White Paper – Commission-issued competition guidelines (soft law) actually contribute to the achievement of consistency in national judicial practice.[8] The main premise is that if soft law is to help enhance consistency, it needs to be treated similarly by national judiciaries within and across EU jurisdictions. An obstacle in that respect is the lack of binding force of the instruments. However, supranational courts have (sparingly) acknowledged the ability of soft law to produce legal effects and,[9] by such means, to anchor itself in judicial reasoning.[10] The question, therefore, is whether and how national courts acknowledge the legal effects of soft law, which directly affects the latter's ability to contribute to the achievement of consistent judicial outcomes.[11]

This question will be approached in two stages. Firstly, the article will examine the case study of online sales bans to show that consistent national judicial outcomes cannot be secured if the relevant soft law rules are novel and/or unclear. Consistency is also undermined, as the *Pierre Fabre* case[12] exemplifies, when supranational courts miss an opportunity to elaborate on the legal effects of soft law. Secondly, the work undertakes a broader empirical examination into how other Commission-issued competition soft instruments, similar to the Vertical Restraint Guidelines,[13] fare in national judicial practice with regard to their consistency-enhancing function.

The question posed by this article will be tackled through a comparative study that focuses on France and Germany, as these are jurisdictions likely to offer fruitful ground for analysis due to their

[8] Only national court judgments form the basis for this study because the final instance on rule interpretation is the judicial instance.

[9] On the distinction between legal force and effects, refer to L. Senden, *Soft Law in European Community Law (Its Relationship to Legislation)* (Hart Publishing, 2004).

[10] O. Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Wolters Kluwer, 2012).

[11] O. Stefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance', 21 *MJECL* (2014), p. 359.

[12] Case 439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence,* ECLI:EU:C:2011:649.

[13] The instruments selected comprise all of the so-called 'substantive' Commission-issued competition soft law, namely: Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, [2011] OJ C 11/1; Communication from the Commission, Notice - Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97; Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45/7; Communication from the Commission, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, [2014] OJ C 89/03. For further elaboration on the term 'substantive soft law', see L. Idot, 'Soft Law and Competition Law', *Concurrences* (2007), http://www.concurrences.com/revue/numeros/No-2-2007/Articles-423/A-propos-de-l-internationalisation.

differing treatment of online sales bans. These two jurisdictions are also interesting to compare because they have the longest competition enforcement traditions in the EU and are thus equally experienced, but also equally diverse in their attitudes towards certain competition issues, as will be demonstrated in the following sections.

The article is divided in four parts: in Section 2, the case of differential judicial treatment of online sales bans is explored in more detail. Section 3 tackles the broader question of national judicial attitudes to Commission-issued competition soft law by presenting further empirical data. Section 4 then provides an analysis of the empirical results, while Section 5 contains the concluding observations.

§2. The peculiar case of online sales bans in France and Germany

Currently, e-commerce and its regulation are hotly debated topics on the Commission's (competition) agenda.[14] However, this was not the case 10 years ago[15] when only a limited number of legal sources, in particular the Vertical Restraint Guidelines, provided guidance on the competitive assessment of online sales.

In this context, several examples pertaining to the operation of the Vertical Restraint Guidelines in situations concerning uncertainty in the law will be put forward. What transpires is that, under such conditions, while (national) competition enforcement bodies are explicit about their reliance on soft law rules, courts hesitate even to involve those instruments in their discourse. As will be explained in Section 3 below, this attitude is likely to have its roots in the judicial apprehension over soft law rules being perceived as forming the *ratio decideni* of a judgment, which would essentially convert them into hard law.[16] Nonetheless, by simply excluding relevant soft law from their deliberations, courts hinder the ability of these instruments to foster certainty and consistency in the law.

[14] DG COMP, 'Sector Inquiry into E-commerce', http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.
[15] According to Hederström and Peeperkorn, the debate on the treatment of online sales under competition law dates back to 1999, but became more concrete with the adoption of the new VBER in 2010. See J. Hederström and L. Peeperkorn, 'Vertical Restraints in On-line Sales: Comments on Some Recent Developments', 7 *Journal of European Competition Law and Practice* (2016), p. 11.
[16] J. Klabbers, 'The Redundancy of Soft Law', 65 *Nordic Journal of International Law* (1996), p. 167-182.

To illustrate, in 2008, the French Competition Authority (*Autorité de la concurrence*, FCA) issued a decision[17] containing the novel finding that a manufacturer of high-end cosmetic products (Pierre Fabre) had infringed Article 101 TFEU and the equivalent national provision[18] by imposing, in its selective distribution agreements, a total ban on the online sale of cosmetics and personal care products to end-users. The infringement was held to constitute a 'by object' restriction because it denied a marketing channel that would otherwise have been available to Pierre Fabre's distributors. The FCA's reasoning relied heavily on paragraphs 51, 53 and 54 of the old Vertical Restraint Guidelines, read together with the Vertical Block Exemption Regulation (VBER)[19] and Article 4(c) thereof. Most significantly, the FCA broadened the ambit of Article 4(c) to include online sales bans by relying on paragraph 53 of the 2001 Vertical Restraint Guidelines, which stated that 'in a selective distribution system the dealer should be free to advertise and sell with the help of the internet'.[20] Pierre Fabre objected to this interpretation on the basis that Commission guidelines were of no legal value in the dispute.[21] The FCA replied that – although not binding on national judicial and administrative bodies – those soft law instruments were a useful 'analytical guide' for the interpretation of hard legal provisions to which they pertained, thus guaranteeing – to a certain extent – the uniform application of EU law by National Competition Authorities.[22] However, on appeal,[23] the Paris Court of Appeal was not entirely convinced, noting that it was uncertain of the law in the area and that neither the Commission guidelines nor the subsequent amicus brief that it received from the Commission were legally binding.[24] Given these circumstances, a request for a preliminary ruling on the legality of online sales bans was submitted to the Court of Justice of the European Union (CJEU).

The CJEU clarified the law in the matter at hand (agreeing with the FCA that online sales bans constituted 'by object' restrictions), but at no point did it discuss the relevance of the Vertical Restraint Guidelines, which were clearly used as an important guidance tool by the FCA. The only

[17] FCA, Decision No. 08-D-25 of 29 October 2008, www.autoritedelaconcurrence.fr/user/avisdec.php?numero=08D25.
[18] (FR) Article L.420-1 of the French Commercial Code (*Code du Commerce*).
[19] Commission Regulation No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] OJ L 336/21 (the old VBER).
[20] Guidelines on Vertical Restraints [2000] OJ C 291/1, para. 53.
[21] FCA, Decision No. 08-D-25 of 29 October 2008, www.autoritedelaconcurrence.fr/user/avisdec.php?numero=08D25, para. 62.
[22] In ibid., para. 65, the FCA presented the Vertical Restraint Guidelines as pertinent to the VBER and the 81(3) Guidelines as being pertinent to Article 101(3) TFEU; a similar view seems to also have been held by the Paris Court of Appeal in its final judgment on the *Pierre Fabre* case, where the judge relied exclusively on the provisions of the 81(3) Guidelines to decide (in the negative) on whether the defendant could benefit from an individual exemption.
[23] Cour d'Appel de Paris (C.A. Paris), 29 October 2009, RG No. 2008/23812.
[24] For a further discussion of the issue of 'non-bindingness', see D. Ferré, 'Le Point de Vue d'un Avocat', 3 *Concurrences* (2010), p. 35-40.

brisk reference to the soft law instrument in the CJEU's judgment came in the statement of facts, whereby the CJEU noted that the Paris Court of Appeal's position on soft law was 'that neither the Commission's guidelines nor its observations were binding on the national courts'.[25]

While undoubtedly correct, this statement says nothing about the CJEU's views on the matter; in this sense, the CJEU missed an opportunity to clarify the legal effects of the Vertical Restraint Guidelines for national courts.

It is therefore not surprising that, in a later case very similar to *Pierre Fabre*,[26] the Paris Court of Appeal reduced a fine initially imposed on the plaintiff by the FCA because of uncertainty in the law relating to online selling. The French court disagreed with the FCA's argument that pursuant to the provisions of its Vertical Restraint Guidelines, the plaintiff should have been aware of the 'by object' nature of their conduct. The law, as it stood in the guidelines, was thus seen as being uncertain.

With the *Pierre Fabre* developments in mind, and from the perspective of consistency in the judicial treatment of soft law across the EU, it is of particular interest to this paper to track national cases where courts were challenged – similarly to the CJEU – to rule on the related issue of banning sales via online third-party platforms such as Amazon and Ebay. Importantly, and similarly to the situation in the *Pierre Fabre* case, there is no supranational case law or legislation spelling out the rules applicable to the latter situation and the only guidance on the matter can be found in paragraph 54 of the Vertical Restraint Guidelines. Paragraph 54, which was introduced in 2010, spells out the following rule (hereinafter, the 'paragraph 54 rule'):

> 'a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.'

[25] Case 439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence,* ECLI:EU:C:2011:649, para. 30.
[26] C.A. Paris, 13 March 2014, RG No. 2013/00714.

The rather unclear second sentence of this passage permits a supplier to prevent its distributors from placing the contract goods/services on online platforms such as marketplaces or price comparison sites.[27] As will be demonstrated below, despite the similar circumstances, reactions of national judicial bodies to the paragraph 54 rule did not quite resemble that of the CJEU in *Pierre Fabre* – in particular, and unlike the CJEU, national judges did not steer away from a direct discussion of the paragraph 54 rule. On the contrary, they clashed in their interpretations.

It is hereby maintained that the lack of an authoritative CJEU judgment on the legal effects of the Vertical Restraint Guidelines, combined with paragraph 54's uncertain meaning and the type of instrument it is contained in (that is, soft law), contributed to the divergent judicial reactions to the issue in both France and Germany. This observation will be backed by evidence in the following sections.

A. Online sales bans and the German judiciary

The paragraph 54 rule was criticized by several German courts in the context of private enforcement claims [28] and also seems to have been rejected by the German Federal Cartel Office (*Bundeskartellamt*, BKartA) in its 2013 Background Paper on Vertical Restraints in the Internet Economy.[29] In this document, the German Federal Cartel Office suggested that the CJEU's *Pierre Fabre* judgment clashed with the aforementioned rule and, by implication, superseded it.

In this sense, both judicial instances in the *Casio* case[30] maintained that the defendant – a manufacturer of digital cameras – had included a 'by object' restriction in its distribution contracts by prohibiting its distributors from selling on so-called 'internet auction platforms' and 'internet marketplaces' (for example, Ebay and Amazon Marketplace). The courts arrived at that conclusion by arguing that the sales prohibition considerably hindered the distributors' access to certain customer groups (marketplace and platform users). This reasoning echoes Article 4(b) of the VBER, which provides that an agreement is restrictive 'by object' if it restricts the territory into which, or the

[27] L. Peeperkorn and J. Hederström, 7 *JECLAP* (2016), p. 19, explain this formulation in the following way: 'The rationale of paragraph 54 is that a condition not to sell or advertise on a platform that carries the platform's logo can be considered similar to an obligation not to carry other names or logos in a brick-and-mortar shop or not to locate the shop in a particular street or shopping mall'.

[28] LG Frankfurt Am Main, BeckRS 2015, 02191; LG Frankfurt am Main, GRURRS 2014, 13727; LG Kiel, BeckRS 2013, 19630 (first instance); and OLG Schleswig, BeckRS 2014, 17798 (appeal).

[29] Bundeskartellamt Working Group on Competition Law, 'Background Paper: Vertical Restraints in the Internet Economy', http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/Vertical%20Restraints%20in%20the%20Internet%20Economy.pdf?__blob=publicationFile&v=2, p. 23.

[30] LG Kiel, BeckRS 2013, 19630 and, on appeal, OLG Schleswig, BeckRS 2014, 17798.

customers to whom a buyer could sell the contract goods. The court further elaborated on this argument by relying on passages of the Vertical Restraint Guidelines that clarify the content of Article 4(b) of the VBER.[31]

Importantly, with regard to paragraph 54 of the guidelines that precludes an interpretation of total online *platform* sales bans as 'by object' restrictions, the lower court reasoned by inferring the Commission's intent. The judge maintained that with this paragraph, the Commission did not support a total online *platform* sales ban because such a ban would surely be anti-competitive 'by object'.[32] On appeal, this reasoning was upheld and it was further argued that had the Commission wished to allow a total ban on online platform sales, it would have formulated this in simple terms in paragraph 54 (which, accordingly, it did not).[33] Both courts were therefore of the opinion that by adopting paragraph 54, the Commission simply wanted to establish the rule that the manufacturer could introduce certain justifiable quality requirements (such as those in brick-and-mortar shops) to its distribution system.

A similar reasoning was exhibited by the Frankfurt District Court in its *Coty* and *Deuter* cases.[34] Both cases dealt with bans on online platform sales within the selective distribution systems of the perfume manufacturer Coty Germany and the rucksack manufacturer Deuter, respectively. The court decided both cases by viewing the bans in question as absolute restrictions completely excluding certain customer groups from the reach of distributors. The restrictions were thus found to be 'by object' restrictions. In contrast to the *Casio* case, however, the paragraph 54 rule was not subjected to re-interpretation, but was dismissed on the grounds that the paragraph's content was not compatible with hard law provisions (namely, Article 101 TFEU and Article 4 of the VBER) and CJEU case law – the *Pierre Fabre* judgment.[35] Additionally, in both cases the court held that paragraph 54 was superseded by the *Pierre Fabre* judgment.[36]

[31] Paragraphs 50 and 52 of the new Vertical Restraint Guidelines (Guidelines on Vertical Restraints [2010] OJ C 130/1), both containing indicative lists of hardcore clauses in distribution contracts, are offered as proof that online platform sales bans should be seen as 'hardcore' as well. However, there is nothing in those paragraphs that suggests such an interpretation. It seems the court is reading in to soft law to defend its position.
[32] LG Kiel, BeckRS 2013, 19630.
[33] OLG Schleswig, BeckRS 2014, 17798, §75.
[34] LG Frankfurt am Main, BeckRS 2015, 02191; and LG Frankfurt am Main, GRURRS 2014, 13727.
[35] Case 439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence,* ECLI:EU:C:2011:649.
[36] The argument that paragraph 54 of the 2010 Guidelines is superseded by the *Pierre Fabre* judgment cannot be sustained due to chronological reasons. The guidelines at stake in the *Pierre Fabre* case were the previous version of the Commissions' Guidelines on Vertical Restraints from 2000. By contrast, the German courts discussed the 2010 Vertical Restraint Guidelines. In the older version, paragraph 54 did not exist, so the *Pierre Fabre* case cannot be seen as an authority on the matter of how web platforms should be treated.

It is important to note, however, that this constitutes a very broad reading of the *Pierre Fabre* case, which essentially dealt with the fact that a manufacturer cannot – without legitimate reasons – restrict sales of its products only to physical stores; it must allow online placement too. This is a different issue from the discussion on whether or not to use online platforms, which are but one – amongst many – methods of placing products on the internet.

A variation of this argument is used by courts that disagree with the 'by object' characterization of online platform bans.[37] The reasoning goes that one cannot see an object restriction excluding a particular customer group[38] in a situation, such as sales via platforms, when such a group cannot be clearly demarcated. As the Higher Regional Court of Munich reasoned in its *Sports Articles* decision: '[s]ince internet platforms are destined for all internet users, the customers of those platforms can also be reached through other means'.[39]

Yet, a different interpretation was given by the Higher Regional Court of Frankfurt on appeal to the aforementioned *Deuter* case.[40] The reasoning of the lower instance court was modified and the ban on sales via online platforms was re-framed as a restriction that could be legitimized where it was applied in a non-discriminatory fashion. In particular, the appellate court stated that a brand manufacturer has a legitimate interest that its branded products are perceived as high quality products accompanied with high quality sales advice. Consequently, the manufacturer is, in principle, free to decide under which conditions its products are sold, provided that these conditions are necessary to meet the quality standards. In that sense, the appellate court endorsed the Commission's reasoning contained in the guidelines.

The Higher Regional Court of Berlin, in its *Scout* satchels case, also took a view similar to the Higher Regional Court of Frankfurt in *Deuter*.[41] In *Scout*, the dispute centered around distribution agreements for the sale of luxury schoolbags, whereby the manufacturer had imposed a prohibition on Ebay sales. Although, at a first glance, the ultimate decision of the court to prohibit the Ebay selling restriction as a hardcore restriction seems to go against the provision of paragraph 54 of the guidelines, the case must be read on its facts. The court only prohibited the 'Ebay clause' because the manufacturer itself had sold some of its (allegedly) high-quality produce to discount retailers. In this

[37] OLG München, BeckRS 2009, 20091.
[38] Article 4(b) of the VBER.
[39] OLG München, BeckRS 2009, 20091, §II.1. bbb).
[40] OLG Frankfurt am Main, BeckRS 2016, 00021.
[41] KG, BeckRS 2013, 16518.

sense, the Ebay clause was seen as discriminatory to other distributors and thus prohibited. The decision did not take issue with the Vertical Restraint Guidelines themselves.

Overall, the position of the German judiciary on online platform sales bans seems to depend on whether the court sees these practices as either:

> (1) restricting market access to a particular customer group, in which case they will be deemed as 'by object' restrictions; or
>
> (2) restricting a particular method of distribution, whereby they are unlikely to be seen as anti-competitive.[42]

For that determination, the judicial interpretation of the paragraph 54 rule (together with the VBER) is key and it is unfortunate that the judgments discussed above disagree not only on the meaning, but also on the relevance and applicability of the provision. As discussed above, this fact can certainly be attributed not only to the peculiarities of national (judicial) decision-making, but also to the unclear phrasing of the paragraph 54 rule, combined with the uncertain legal effects of the Vertical Restraint Guidelines and the lack of supranational judicial guidance/precedent on the latter.

B. Online sales bans and the French judiciary

The French outcry on online platform sales bans is more recent than the German one; hence, fewer cases exist and – for the most part – relevant cases are still pending. The most recent case had its roots in a conflict between the companies Concurrence and Samsung and was subject not only to litigation in the French courts (that was ultimately referred to the CJEU), but also to a public investigation by the FCA. Unfortunately, due to a request for interim measures by the complainant Concurrence,[43] the FCA has not yet pronounced itself on the substance of the dispute – namely the legality of the manufacturer's (Samsung) ban on its former distributor's (Concurrence) online marketplace sales. While the factual setup of the case embodies the classical scenario 'supplier prohibits authorized distributor from selling via certain online channels', there are certain important

[42] Case 26/76 *Metro v. Commission*, EU:C:1977:167.
[43] The interim measures claim was denied by the FCA in its Decision 14-D-07 due to lack of evidence of an immediate danger to the claimant's interests. This decision was then appealed and confirmed on appeal. See C.A. Paris, 03December 2015, RG No. 14/18125.

details which must be taken into consideration. In particular, Samsung allowed sales by means of online marketplaces to other distributors taking part in its distribution network. In that sense, Concurrence also alleged discriminatory treatment, which makes the facts similar to those of the German *Scout* case discussed above. Thus, the future decision of the FCA might also have to be read on its facts and, in that sense, will not lead the interpretation of paragraph 54 of the Vertical Restraint Guidelines.

An important judgment that could prove to be leading on the interpretation of the paragraph 54 rule though is the Paris Court of Appeal's recent pronouncement in the *Caudalie* case.[44] In this judgment, the court prohibited manufacturers using selective distribution networks from completely banning marketplace retailers from offering their products. In other words, the scope of the *Pierre Fabre* rule is broadened to encompass bans on specific types of online sales.

In that case, the cosmetics company Caudalie applied for an injunction before the Paris Commercial Court against a marketplace platform operated by the company eNOVA, which was selling Caudalie brand products online without being an approved distributor. Even authorized Caudalie distributors were only to sell online via their own websites, as opposed to offering the products on an online marketplace. This selective distribution system was defended by eNOVA on the basis that it had been approved by the FCA on a prior occasion (in 2007) and therefore was perfectly legal. Nevertheless, Caudalie was granted an order for interim measures,[45] which stated that eNOVA should cease all marketing of the products in question. Consequently, eNOVA filed an appeal against this order, citing among other things recent decisions of the French and German Competition Authorities favoring completely unrestricted sales via online marketplaces.[46] The lower court's injunction was then overturned by the Paris Court of Appeal, which instead ruled that a blanket prohibition of selling online via a marketplace platform may well constitute an impermissible restriction of competition.

[44] C.A. Paris, 2 February 2016, RG No. 2014/060579.
[45] Note that the scope of review of interim measures is limited.
[46] Those are the recent cases of the BKartA in Asics (BKartA BeckRS 2016, 09244) and Adidas (Bundeskartellamt, 'Case Summary – Adidas abandons ban on sales via online marketplace', http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2), and the FCA Adidas case closure decision (Autorité de la concurrence, 'Press Release: The Autorité de la concurrence has closed an investigation against Adidas', http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2671). Another (not yet final) decision on the matter in France is FCA Decision No. 14-D-07 of 28 July 2014, http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=14D07.

Although, in ruling so, the court did not expressly mention the paragraph 54 rule, the sources on which it based the final judgment – decisions of the French and German Competition Authorities – are decisions that directly affect the interpretation of this provision. In particular, they all contradict the position of the Commission expressed in the said rule. In this sense, a rule initially proposed in supranational soft law has been picked up, re-interpreted in the decisions of national administrative authorities, and – in this latter form – informed a French judicial decision. This development can be seen as the reverse image of what the Commission initially hoped to achieve with its guidelines, namely that

> They (guidelines) might not be binding on national authorities, but they would make a valuable contribution to the consistent application of Community law, because in its decisions in individual cases the Commission would confirm the approach they set out. Provided those individual decisions were upheld by the Court of Justice, then, notices and guidelines would come to form part of the rules that must be applied by national authorities.[47]

On the contrary, in the *Caudalie* case, national authorities not bound by Commission soft law resisted the original idea behind paragraph 54 and were then followed by a French appellate court, which disregarded the views of some of its German colleagues.[48] In the absence of a Commission decision or a CJEU precedent on the matter, there is certainly no obligation on the French judiciary to follow the approach taken by German courts, but the fact remains that the observed development can hardly be seen as certainty and consistency-enhancing. From this perspective, now that the issue of online platform sales bans has reached the CJEU by means of two preliminary references,[49] the CJEU's answer on the legality of these practices will be extremely important. Should the court adhere to the majority position that online platform sales bans are restrictive 'by object' contrary to what the Commission believes, this would hint at an ability of national enforcers to formally set EU competition policy in a bottom-up fashion, thus interfering with the top-down (formal and informal)[50] processes of EU competition policy-setting by the Commission.

[47] White Paper on modernization, p. 31.
[48] OLG Frankfurt am Main*,* BeckRS 2016, 00021.
[49] Case C-618/15 *Concurrence,* NYR and Case C-230/16 *Coty Germany,* NYR. For the significance of this case, see the blog post of P.I. Colomo, 'Case C-230/16, Coty: a straightforward issue with major implications', *Chillin' Competition Blog* (2017), https://chillingcompetition.com/2017/02/16/case-c-23016-coty-a-straightforward-issue-with-major-implications/.
[50] Formally speaking, the Commission has the policy-making initiative pursuant to Article 16 of Regulation 1/2003; 'informal processes' are meant as those taking place within the European Competition Network.

Having examined the dynamics underlying national judicial treatment of the paragraph 54 rule and the implications for enforcement consistency, this article will now turn to the broader question of how other Commission-issued competition soft law instruments are seen by national courts and whether their legal effects are recognized or not.

§3. Judicial reception of Commission-issued soft instruments in France and Germany

In order to analyze a broader empirical sample of judicial attitudes to supranational soft law, this paper adopts a classification developed in the previous works of this author[51] that draws from and builds on theoretical accounts proposed by several legal scholars[52] and political scientists.[53] The generated categories of judicial attitudes are as follows: (1) national judicial recognition of supranational soft law (comprising explicit agreement or disagreement with the instruments' contents, or, alternatively, implicit persuasion[54] of their value); and (2) national judicial refusal for recognition of supranational soft law (comprising explicit rejection to engage with the instruments' contents, or, alternatively, implicit neglect thereof). The recognition category presupposes attribution of legal effects to soft law, while refusal for recognition suggests the opposite outcome.

Before fitting the generated empirical data within this framework, it is necessary to define the parameters of the empirical sample.

A. Aggregate presentation of empirical observations

The total empirical sample, including the cases discussed in Section 2 above, amounts to 84 judgments (44 for France and 40 for Germany) that mention Commission-issued competition soft law

[51] Z.R. Georgieva, 'Soft Law in EU Competition Law and its Judicial Reception in Member States: a Theoretical Perspective', 16 *German Law Journal* (2015), p. 223-258 and Z.R. Georgieva, 'The Judicial Reception of Competition Soft Law in the Netherlands and the UK', 12 *European Competition Journal* (2016), p. 54-86.
[52] O. Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union*, and L. Senden, *Soft Law in European Community Law (Its Relationship to Legislation).*
[53] H. Greene, 'Guideline Institutionalization: the Role of Merger Guidelines in Antitrust Discourse', 48 *William and Mary Law Review* (2006), p. 807. T. Hervey, 'Adjudicating in the Shadow of the Informal Settlement?': The Court of Justice of the European Union, "New Governance" and Social Welfare', 63 *Current Legal Problems* (2010), p. 92-152.
[54] The persuasion scenario hypothesizes that courts do not explicitly mention soft law in their judgments, but the reasoning therein coincides with the substantive content and logic proposed in the latter instruments.

since the entry into force of Regulation 1/2003.[55] The observations – comprising of both public and private enforcement judgments – were selected by means of a key-term search[56] through national[57] and EU[58] case law databases. Finally, the sample aims to encompass all relevant judgments – both purely national and with an EU dimension – that were issued by French and German courts in the above-delineated period.

The final number of competition judgments dealing with supranational soft law forms a relatively small percentage of the totality of competition judgments delivered in the researched jurisdictions during the relevant reference period. Empirical studies point to consistently high levels of overall competition litigation activity in Germany – circa 200 cases per year in the period of 2000-2010.[59] This figure seems realistic when juxtaposed with data on private enforcement cases, which, after excluding judgments that do not have competition matters as their core, constituted 608 judgments within the period of 2004-2009.[60] With regard to public enforcement, in the period of May 2004 to May 2016, records of the German Federal Cartel Office show a total of about 200 administrative decisions taken, which formed the basis for subsequent judicial activity.

For France, the public enforcement figures available seem to be more reliable than the private enforcement figures. The latter figure is a mere 58 judgments in the period 2004-2012 by a report drafted by Chagny and Fourgoux.[61] However, the authors admitted that there was a lack of easily accessible information on French private competition judgments. The given number is thus likely to be underreported. As to public enforcement, Idot testified to the existence of 219 FCA decisions and 94 envisaged decisions for the period of 2004-2013,[62] which reflected (in rough terms) the numbers available on the public database of the FCA – namely, 464 decisions in the period between mid-2004 and late-2015.

[55] The cutoff date for the data gathering was 30 November 2015.
[56] For a detailed description of the methodology, refer to Z.R. Georgieva, 12 *ECJ* (2016) p. 54-86.
[57] For Germany: BeckOnline, Openjur and Juris. For France: Legifrance, Lamyline and Lextenso.
[58] The EU case law databases are the following: N-lex, JuriFast, Dec.Nat and Curia.
[59] B. Rodger, *Ten Years of UK Competition Law Reform* (Edinburgh University Press, 2010), p. 77, footnote 155; see also W.H. Roth, 'Private Enforcement of European Competition Law – Recommendations Flowing from the German Experience', in J. Basedow (ed.), *Private Enforcement of EC Competition Law* (Kluwer, 2007), p. 62.
[60] S. Peyer, 'Germany: Comparative Private Enforcement and Consumer Redress in the EU', *AHRC Project* (2014), http://www.clcpecreu.co.uk/pdf/final/Germany%20report.pdf. See also S. Peyer, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence', 8 *Journal of European Competition Law and Economics* (2012), p. 331-359.
[61] M. Chagny and J.L. Fourgoux, 'French Report: Competition Law, Private Enforcement and Collective Redress in France', *AHRC Project* (2014), http://www.clcpecreu.co.uk/pdf/final/France%20report.pdf.
[62] L. Idot, 'How has Regulation 1 Affected the Role and Work of NCAs?', 1 *Concurrences* (2014), p. 4.

Finally, the empirical data-gathering exercise showed that cases mentioning the Vertical Restraint Guidelines form a significant part of the total findings per country: 77% for France and 62% for Germany. This can be explained by the general trend identified by de Vries and others[63] that nowadays 'vertical' cases before the Commission are very scarce, while they are on the rise in Member States. Additionally, the fact that both the French and German competition authorities have a historical proclivity for enforcing the competition rules against vertical agreements sheds light on the observed statistics.[64] For Germany, according to Rodger, vertical agreements are also often the subject matter of stand-alone civil litigation.[65] Also, as seen above, the advent of e-commerce and the novel issues it poses for selective distribution in particular, gives further enforcement impetus to the authorities in question as testified by their sector inquiries[66] and position papers[67] on the matter. As to other types of possibly anti-competitive agreements, experts in both jurisdictions testify to the fact that because cartels and horizontal cooperation agreements are, in general, more difficult to prove, those cases are rarer than the ones concerning vertical relationships.[68]

In light of the significantly higher number of judgments related to the Vertical Restraint Guidelines, not all of them are going to be discussed in detail, thus giving way to a discussion of judgments dealing with other supranational competition soft instruments. The selection in that regard comprises of substantively significant Commission-issued soft instruments similar to the Vertical Restraint Guidelines, namely[69] the Horizontal Agreements Guidelines,[70] the Article 81(3) Guidelines,[71] the Article 82 Guidance Paper[72] and the Technology Transfer Guidelines.[73] It is also worth mentioning

[63] Y. de Vries et al., 1 *AM* (2014), p. 16.
[64] See A. Collinson et al., 'Vertical Restrictions in the EU: a Renewed Focus?', *Lexology* (2015), http://www.lexology.com/library/detail.aspx?g=d18994da-ef05-46bf-ac0e-7e81bfde2c99; for an account on Germany, see W.H. Roth, in J. Basedow (ed.), *Private Enforcement of EC Competition Law*, p. 65-66; for a brief account on France, see L. Idot, 'Private Enforcement of Competition Law – Recommendations Flowing from the French Experience', in J. Basedow (ed.), *Private Enforcement of EC Competition Law* (Kluwer, 2007), p. 94.
[65] B. Rodger, *Competition law, Comparative Private Enforcement and Collective Redress across the EU* (Wolters Kluwer, 2014), p. 294.
[66] For France, see Autorité de la concurrence, 'Sector Inquiry No. 12-A-20 of 18 September 2012', http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=12a20.
[67] For Germany, see Working Group on Competition Law, 'Vertical Restraints in the Internet Economy', *Bundeskartellamt Background Paper* (2013), http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/Vertical%20Restraints%20in%20the%20Internet%20Economy.pdf?__blob=publicationFile&v=2.
[68] W.H. Roth, in J. Basedow (ed.), *Private Enforcement of EC Competition Law*, p. 66-68; L. Idot, in J. Basedow (ed.), *Private Enforcement of EC Competition Law*, p. 94.
[69] L. Idot, 2 *Concurrences* (2007).
[70] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/1.
[71] Commission Notice: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97.
[72] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.
[73] Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C 101/2.

that the instances where judicial recognition of soft law was observed significantly outnumbered the rest of the envisioned judicial attitudes. This is, at least at first glance, a positive development from a consistency perspective.

B. National judicial approaches to supranational competition soft law

1. Recognition - explicit agreement or disagreement

Judicial recognition of supranational soft law happens when courts explicitly acknowledge the relevance of soft law instruments to a dispute, be it because of a soft law invocation by the parties or on the courts' own initiative. In that respect, the conclusion that surfaces from an in-depth examination of the empirical sample is that supranational soft law is judicially recognized when used together with relevant hard law (case law or legislation) that it complements and/or clarifies. A soft law instrument can also be judicially invoked and recognized on its own (stand-alone invocation) when the court sees it as a 'shorthand reference' to well-known principles and rules established in hard law. To illustrate those two instances of judicial recognition, a few examples will now be discussed.

In the German *HRS* case, an appeal to a 2013 German Federal Cartel Office decision,[74] the Higher Regional Court of Düsseldorf invoked the Article 81(3) Guidelines in order to assess the plaintiff's efficiencies claim.[75] The case concerned the so-called retail 'most favoured nation agreements' (MFNs) – vertical arrangements by means of which sellers through an internet retail platform agree not to sell at a lower price elsewhere, including through other retail platforms.[76] This practice was sanctioned by the German Federal Cartel Office as 'a significant restraint of competition', which was subsequently appealed because the alleged infringer (HRS) believed the market definition and therefore its market share estimation to be incorrect, which led to an inaccurate disapplication of the VBER.

[74] BkartA, BeckRS 2014, 04343.
[75] OLG Düsseldorf, BeckRS 2015, 03467.
[76] A. Fletcher and M. Hviid, 'Retail Price MFNs: are they RPM "at its Worst"', *CCP Working Paper* No. 14-5 (2014), http://competitionpolicy.ac.uk/documents/8158338/8199490/CCP+Working+Paper+14-5.pdf/0ec21eee-12ca-4bc8-b3ea-d5076ab264af.

The court dismissed HRS's arguments and proceeded to examine a possible individual exemption under Article 101(3) TFEU. In the context of the balancing test to be performed under the said provision,[77] the judge used the Article 81(3) Guidelines and paragraph 51 thereof to assess whether the first of the four cumulative conditions under Article 101(3) was fulfilled. In this context, the relevant information contained in the soft law instrument, which listed the conditions for substantiation of efficiency claims, was invoked on the court's own initiative and on a stand-alone basis. It is important to observe, however, that the information contained in paragraph 51 of the guidelines is well established in hard law (more specifically, in prior Commission decisions).[78] Therefore, in this case, the 81(3) Guidelines and paragraph 51 thereof were used as a 'shorthand reference' to rules already established in hard law.[79] The same phenomenon with regard to the 81(3) Guidelines is also detectable in the decisions of the French courts.[80]

A French 'shorthand' use of the 81(3) Guidelines is exemplified by the *Crédit Lyonnais* judgment – an appeal to an FCA decision which held that an agreement between major French banks to reform the national interbank check-processing system amounted to a cartel-like, 'by object' violation of competition law. The Paris Court of Appeal criticized the authority for being too eager to place the agreement in the 'object' box. In that context, an extensive discussion of the difference between the 'object' and 'effect' categories in EU competition law followed, an illustration of which was given (among others) by means of a stand-alone reference to paragraph 20 of the 81(3) Guidelines that essentially summarized relevant case law on the matter.

The Horizontal Guidelines[81] received similar treatment by the German judiciary in the *Press Wholesaler Association (PWA)* case – a cartel-like arrangement that was eventually legitimized under Article 106(2) TFEU. [82] The case concerned the practices of the PWA, which was in the business of

[77] According to Petit, this test, modelled on older CJEU judgments and (re-)introduced in the Article 101(3) Guidelines by the Commission, is not workable as a self-assessment tool because of the inability of firms to quantify the benefits of their agreements. See N. Petit, 'The Guidelines on the Application of Article 81(3) EC: A Critical Review', *IEJE Working Paper* No. 4 (2009), http://ssrn.com/abstract=1428558, p. 4.

[78] Commission Decision of 8 May 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty Cases: IV/36.957/F3 Glaxo Wellcome (notification), IV/36.997/F3 Aseprofar and Fedifar (complaint), IV/37.121/F3 Spain Pharma (complaint), IV/37.138/F3 BAI (complaint), IV/37.380/F3 EAEPC (complaint), [2001] OJ L 302/1.

[79] Other such case is BGH, BeckRS 2009, 09090.

[80] Cour d'Appel de Paris (C.A. Paris), 29 October 2009, RG No. 2008/23812.

[81] Other such cases are: LG Hannover, BeckRS 2012, 00337; LG Mannheim, BeckRS 2015, 10955; OVG Berlin-Brandenburg, BeckRS 2006, 20174.

[82] The lower court judgments (LG Köln, BeckRS 2012, 05107 and OLG Düsseldorf, BeckRS 2014, 04324), which denounced the practice as anti-competitive, spurred a legislative change to the German Competition Act and the practice was eventually cleared by the Federal Supreme court as a 'service of general economic interest'. See M. Schoner, 'Federal

negotiating uniform contract conditions with publishers (suppliers) on behalf of its members (press wholesalers). An independent publisher negatively affected by this practice complained to the Cologne District court, which consequently denounced the practice as anti-competitive. One of PWA's defending arguments in that regard was that its members were not competing undertakings and thus competition could not be restricted. To counter this reasoning, among other things, the court cited the content of a footnote to the 2001 Horizontal Guidelines that defined the concept 'potential competitor' under EU law. This stand-alone citation was only possible because the concept had already been discussed in a preceding Commission decision and in other hard law instruments.[83] The citation to the guidelines was thus used as a shorthand reference to those sources.

In turn, on appeal, the Vertical Restraint Guidelines were cited by the Dusseldorf Court of Appeal. However, they were not used as a shorthand reference to hard law, but rather in a supporting function to legislation – namely, the VBER.[84] In particular, PWA argued that its press distribution model was to be seen as 'exclusive distribution' under the VBER and thus exempted under the latter's provisions. However, a precondition for exemption of exclusive distribution under the VBER[85] is the non-preclusion of passive sales into delineated exclusive territories. Thus, the court had to determine what constituted 'passive sales' and consulted the provisions of the Vertical Restraint Guidelines, which further complemented and clarified the VBER on that point. This judicial engagement instance is therefore one that reflects the interpretation of soft law together with pertinent hard law.[86] Both of the described types of recognition testify to soft law's ability to produce legal effects under the circumstances delineated above.

2. Refusal for recognition – neglect

The theoretical model that this article utilizes sees judicial neglect as an instance whereby an argument based on soft law is made by a party to the dispute, but is ignored by the court. Such cases are significantly fewer than the ones constituting explicit recognition; still, their occurrence is

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Supreme Court Confirms Joint Negotiations of Press Wholesalers', *Lexology* (2015), http://www.lexology.com/library/detail.aspx?g=811ec849-dae2-4144-a53d-361cf978889b.

[83] Commission, Horizontal Guidelines, [2001] OJ C 3/02, footnote 9.

[84] Commission Regulation No. 330/2010/EU of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L 102/1 (the VBER).

[85] Article 4(b)(i) of the VBER.

[86] Other such instances are detected in the German cases denoted under the following numbers in Table 1 below: 1, 11, 12, 15, 16, 17, 18, 20 and 30 through 40; such instances are also detected in the following French cases: 1, 2, 3, 4, 5, 9, 10, 12, 41, 16, 18, 19, 20, 27, 30, 32, 34, 35, 36, 37, 39, 40 and 42.

certainly not conducive to consistency in enforcement at national level. To illustrate, an example of judicial neglect by a French court will be given.

In the *Crédit Lyonnais* case discussed above, the 2001 Horizontal Guidelines were neglected by the judge when the plaintiff banks invoked paragraph 24 of the said instrument to argue that their check-processing agreement fell outside the remit of competition law altogether. In particular, this part of the Horizontal Guidelines provides that when undertakings agree to join forces in order to carry out an activity that they cannot single-handedly achieve (as was the case with the check-issuing agreements), that activity does not imply a coordination of the parties' competitive behaviours on the market and thus falls outside the remit of competition law. The court was silent on this issue; it chose not to engage with it and ruled that the practice was not anti-competitive because of the applicability of a particular national regulatory framework to the hybrid (public and private) banking sector.[87]

In this sense, one can argue that the Horizontal Guidelines and paragraph 24 thereof were subject to judicial neglect.[88] This will not come as a surprise if one considers that this same passage was also subjected to a similar judicial attitude (that is, rejection) by Justice Morgan of the English Court of Appeal.[89] Such instances could be explained by a judicial hesitation to engage with soft law passages that could, in principle, be perceived as the relevant rule that solves the case (the so-called *ratio decidendi*). Since the *ratio* must be exclusively informed by hard law rules,[90] judges would not risk interpreting soft law in cases where such interpretation could be seen as forming the *ratio* of a decision.

As a second and final point on judicial neglect, it is worth mentioning that, after a thorough examination of the empirical data, it transpires that neglect can also be the result of situations where courts simply do not need to involve soft law in the discussion, even if it is invoked by the parties to a dispute. In such cases, judicial economy considerations are a good reason for non-engagement with certain arguments. Such situations do not exhibit a particular judicial attitude to soft law and therefore have no bearing on the research question posed by this work. To illustrate, a party to the

[87] The court applied the French Monetary and Financial Code (*Code monétaire et financier*) to decide the case.
[88] Other similar French cases are: C.A. Paris, 11 September 2013, RG No. 11/13785; and C.A. Aix-en-Provence, 15 November 2012, JurisData No. 2012/029544.
[89] *Bookmakers' Greyhound Amalgamated Services et al. v. Amalgamated Racing*, [2009] EWCA Civ. 750, para. 91. The judge subjected para. 24 to an outright rejection by stating the following, 'I see a good deal of force in that proposition, but I prefer not to decide this case on that basis'.
[90] G.M. Borchardt and K.C. Wellens, 'Soft Law in European Community Law', 14 *European Law Review* (1989), p. 271.

proceedings invokes Commission-issued guidelines, but the court decides the dispute on the basis of national competition law only.[91] Other cases were detected where the competition matter, although pled by the parties, was not decided due to lack of sufficient evidence[92] or because of insufficiently elaborate argumentation.[93] Another relevant illustrative example concerns situations where national appellate courts have to judge on the legality of an administrative decision and, in this sense, can disregard party arguments (including such based on soft law) that do not contribute to the purpose of judicial review.[94]

3. Refusal for recognition – explicit rejection

With regard to the hypothesized explicit judicial rejection of soft law, no further cases beside those already identified in Section 2 above were found in French judicial practice. The cases detected in German courts, however, further confirm the skeptical attitude of some judges towards the rules on online selling in vertical distribution agreements enunciated in the Vertical Restraint Guidelines.

To illustrate, in 2013 the Cologne District Court had to rule on the anti-competitiveness of a refusal of membership to an applicant to the German Wholesaler's Association 'Haustechnik'.[95] The applicant alleged discriminatory treatment that – unless objectively justified – was anti-competitive. The plaintiff also claimed that one of the reasons for its rejection – the fact that it handled its business predominantly over the internet – is protected by the European Commission in its Guidelines on Vertical Restraints. However, the judge did not even come to rule on the substance of this point, but rather denied the applicability of the Vertical Restraint Guidelines by explicitly stating they were not controlling in relations between private parties.[96] Although the soft law instrument could have been interpreted together with the pertinent VBER, which both the French and German courts have done on other occasions, the German judiciary refused to interpret the guidelines in this case altogether. This could be due to the fact that the paragraph of the Vertical Restraint Guidelines relevant to the

[91] Cases C.A. Paris, 23September 2010, RG No. 2010/00163; C.A. Douai, 6 June 2013, RG No. 12/06333; Tribunal de Commerce (TC) de Marseille, 3 October 2012, RG No. 2011F04004. Technically speaking, Vogel and Vincent observed that even in purely national disputes, supranational soft law is seen as a useful 'guide d'analyse'. See, C. Vincent, 'La Force Normative des Communications et Lignes Directrices en Droit Européen de la Concurrence', in C. Thibierge (ed.), *La Force Normative* (LGDJ, 2009), p. 698; see also, L. Vogel, *Droit de la Concurrence* (Bruylant, 2015), Chapter 2, Section 1, para. 742.
[92] C.A. Colmar, 30 March 2010, RG No. 08/02269; LG Köln, BeckRS 2013, 05905.
[93] C.A. Paris, 3 July 2008, No. 06/20432.
[94] Cases C.A. Paris, 10 October 2013, RG No. 2012/07909; C.A. Paris, 5November 2008, RG No. 2007/17386.
[95] LG Köln, BeckRS 2012, 19707.
[96] LG Köln, BeckRS 2012, 19707, Entscheidungsgründe, para. 6.

dispute (paragraph 52 regarding online distribution) was only inserted in the latest version of the guidelines, dating to 2010, and, similarly to paragraph 54 discussed above, was not yet 'tested in battle' before the CJEU. In that sense, the national judiciary was careful not to tread new ground and set in stone rules that have not yet surfaced as 'hard principles' at EU level.[97]

The reason why some German courts were less cautious when endorsing paragraph 54 of the Vertical Restraint Guidelines might lie in the fact that that passage had already been subject to several decisions of the German Federal Cartel Office, which – by interpreting soft instruments – signaled how the authority saw the particular issue.[98] This, in turn, charts a possible line of reasoning that could be endorsed or rejected by courts as observed above.

4. Recognition – persuasion

Instances of judicial persuasion are generally hard to determine because in such cases courts never explicitly engage with the content of guidelines, but still reach a conclusion compatible with their content. This study only detected two such instances, both in French courts.[99] On both occasions, the Vertical Restraint Guidelines were invoked by a party to the proceedings together with the pertinent VBER. In the grounds for the decision, on both occasions, the judges preferred merely to quote the provisions of the VBER as informing their conclusions, although in doing so they were very likely also agreeing with the content of the Vertical Restraint Guidelines previously invoked by the parties.

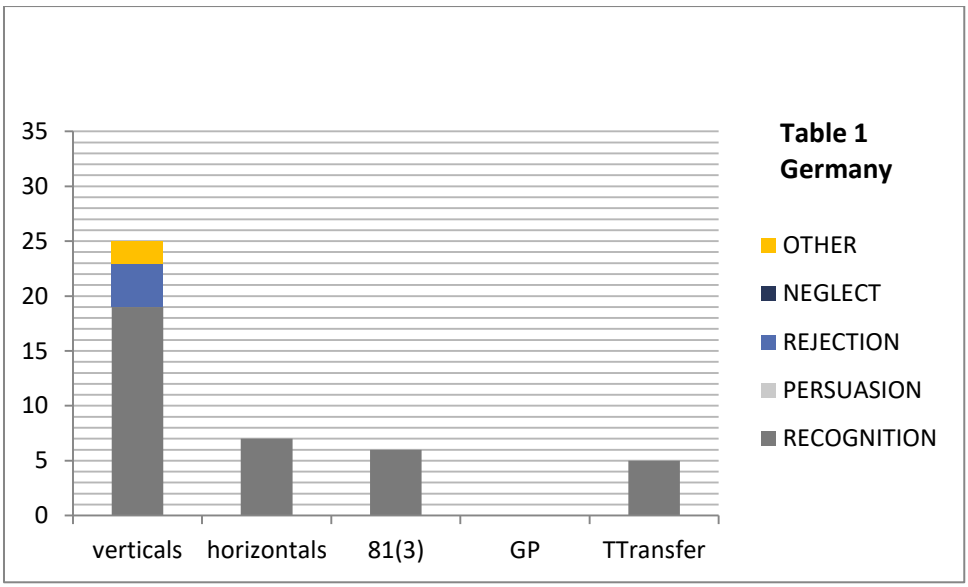
§4. Discussion of results and their implications for enforcement consistency

In this Section, the above account on national judicial attitudes to supranational competition soft law will be summarized, analyzed and represented graphically.[100]

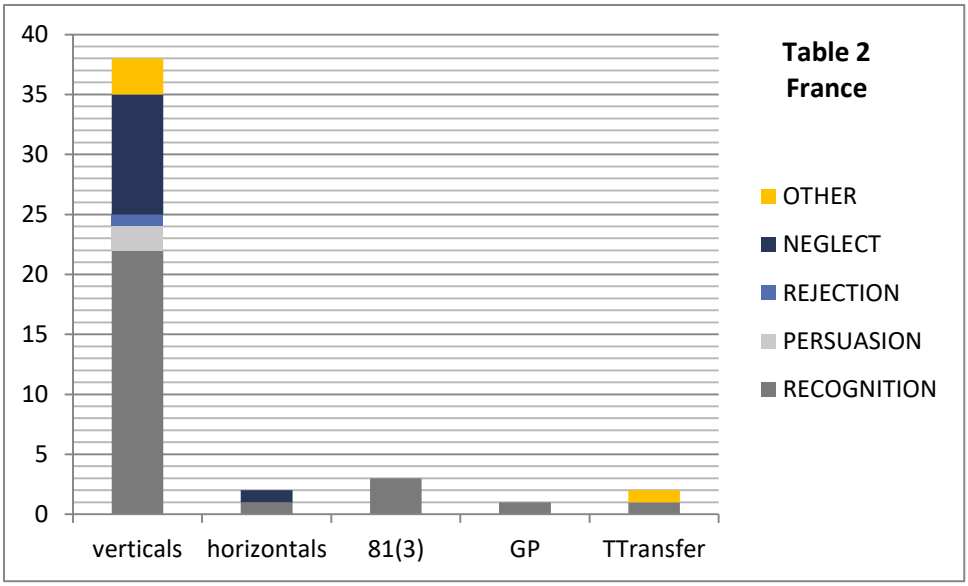
A first observation that stands out is that unlike the Horizontal and 81(3) Guidelines, which are the subjects of relatively homogenous treatment (recognition) across jurisdictions, the Vertical Restraint

[97] OLG Düsseldorf Kartellsenat, BeckRS 2004, 18469.
[98] On the proclivity of the BKartA to engage with the content of supranational soft law, see A. Kallmayer, 'Die Bindungswirkungen von Kommissionsmitteilungen im EU-Wettbewerbsrecht – Mehr Rechtssicherheit durch Soft Law', in C. Calliess (ed.), *Herausforderungen an Staat und Verfassung: Völkerrecht – Europarecht – Menschenrechte* (Nomos, 2015), p. 662-682. On the same point for France, see C. Vincent, in C. Thibierge (ed.), *La Force Normative*, p. 691-457.
[99] C.A. Paris, 27 March 2014, RG No. 10/19766; C.A. Aix-en-Provence, 15 November 2012, No. 11/11057.
[100] See Tables 1 and 2 below.

Guidelines have engendered more varied judicial attitudes. Nevertheless, more than half of the observations dealing with the Vertical Restraint Guidelines in both jurisdictions exhibit a 'recognition' attitude by the courts. In fact, scholarly accounts on the Vertical Restraint Guidelines point out that, unlike other soft instruments (namely, the Guidance Paper[101]), those guidelines (together with the Horizontal Guidelines) enunciate precise and clear rules that help businesses to correctly self-assess.[102] Therefore, it is only logical that the judiciary treats such unambiguous rules relatively consistently. Additionally, the majority of cases dealing with the Vertical Restraint Guidelines in which neglect or rejection by national courts can be observed are either cases exhibiting judicial economy concerns (as explained in Section 3) or cases dealing with rules newly introduced by the 2010 version of the Vertical Restraint Guidelines (discussed above).[103]



[101] Although the Guidance Paper is formally entitled 'enforcement priorities', prominent scholars express doubts as to whether the instrument is not actually intended as a guideline. See G. Monti, 'Article 82 EC: What Future for the Effects-Based Approach?', 1 *JECLAP* (2010), p. 5.
[102] J. Peyre, 'Rebates: Clearer but not Safer', 2 *Concurrences* (2009).
[103] Vertical Restraint Guidelines, para. 52-54.



This observation thus confirms the intuition that courts are hesitant to interpret rules contained in soft law that have not yet been 'tested in battle' before the CJEU.[104] Besides precedent established by the CJEU, what makes courts more willing to engage with soft law content and thus endow it with legal effect, is the existence of a legislative instrument that forms the basis for the existence of the soft law instrument. This is the case for the VBER that forms the backbone of the Vertical Restraint Guidelines and the Technology Transfer Block Exemption Regulation[105] that plays the same role for the Technology Transfer Guidelines. By the same token, the Block Exemption Regulations (BERs) on (1) specialization and (2) research and development agreements are further elaborated on in the Horizontal Guidelines. The existence of these Block Exemption Regulations likely preconditions the largely positive national judicial attitude (recognition) to both the Technology Transfer and the Horizontal Guidelines. Although the latter guidelines were subject to judicial recognition only in Germany, the neglect observed in France in that regard is – as explained in Section 3 above – an aberration.

Finally, with regard to the 102 Guidance Paper, no relevant judgments were detected in Germany and only one – a judicial recognition instance – was found in France. This might well be due to the fact that German law on abuse of dominance is stricter than its supranational counterpart, which would imply that it is easier for claimants to establish abuse under national law where the Guidance

[104] In that regard, soft law can be seen as the Commission's litmus test of new ideas that the CJEU could decide to endorse or reject.
[105] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, [2014] OJ L 93/17.

Paper is of limited or no relevance.[106] This fact would undoubtedly make claims under German law more attractive. Another, more general, explanation for the lack of judicial engagement with the Guidance Paper might lie in the fact that the principles enunciated in it are not entirely consistent with the CJEU's case law.[107] France, although it was initially very positive about the upcoming Guidance Paper[108] and impatiently expected it[109] does not yet have a significant track record of judicial pronouncements in that regard either. This could indeed be owing to the fact that the national judiciary is more likely to get its cues from CJEU case law, which is essentially contradicted by the Guidance Paper.[110]

The same reasoning also holds true for Germany, with the added fact that – at the time of adoption of the Guidance Paper – there was already strong political resistance to its adoption.[111] As to the French position, Prieto testifies that '[u]nlike the BKartA, the Conseil de la Concurrence was convinced that the Discussion Paper was a workable framework to improve the enforcement of Article 82 EC and the concept of consumer welfare in particular'.[112] The empirical data hereby generated, however, does not confirm this statement. A final explanation to account for the very limited number of references to the Guidance Paper could be a scarce statistical basis – relative to Article 101 TFEU cases, dominance claims are in short supply both at EU and national levels according to both Peyer[113] and Rodger.[114]

§5. Concluding remarks

The empirical sample presented in this paper shows that national courts are hesitant to engage with competition guidelines and do not endow them with legal effects when those instruments spell out

[106] W.H. Roth, in J. Basedow (ed.), *Private Enforcement of EC Competition Law*, p. 62.
[107] See L.L. Gormsen, 'Why the European Commission's Enforcement Priorities on Article 82 EC Should Be Withdrawn?', 31 *ECLR* (2010).
[108] B. Lassere, 'The New French Competition Law Enforcement Regime', *Competition Law International* (2009), http://www.autoritedelaconcurrence.fr/doc/competition_law_international_october_2009.pdf.
[109] C. Prieto, 'Anticipated Enforcement in France of the Commission's Guidance on Article 82', in L.F. Pace (ed.), *The Impact of the Commission's Guidance on Article 102* (Edward Elgar, 2011), p. 125.
[110] R. Whish, 'National Competition Law Goals and the Commission's Guidance on Article 82 EC: the UK Experience', in L.F. Pace (ed.), *The Impact of the Commission's Guidance on Article 102.*
[111] On the roots of German resistance to the Guidance Paper, see E.J. Mesmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008', in L.F. Pace (ed.), *The Impact of the Commission's Guidance on Article 102*; see also C. Prieto, in L.F. Pace (ed.), *The Impact of the Commission's Guidance on Article 102,* p. 134, 139.
[112] Ibid., p. 140.
[113] For an account on Germany, see S. Peyer, *AHRC Project* (2014), p. 22.
[114] For an account on France, see B. Rodger, *Competition law, Comparative Private Enforcement and Collective Redress across the* EU, p. 133.

vague and/or novel rules that have not been previously endorsed by supranational hard law (case law or legislation). The outcome is the same when a certain soft-law enunciated rule can serve as the *ratio decidendi* of a judgment. In those instances, soft law does not produce legal effects and its consistency-enhancing function is undermined.

On the contrary, when the content of Commission guidelines does reflect and/or clarify rules previously established in supranational hard law, judges readily endow soft law with legal effects through interpreting it together with the said hard law; its consistency-enhancing function is thus secured.

The online sales bans case study introduces a variation to the above conclusions, showing that when soft law fails to secure consistent outcomes at national level, the classical road of the preliminary ruling procedure is always open. However, empirical studies show that not many national cases make it to that stage.[115] Thus, unless the intensity of preliminary references in that regard increases significantly, national courts do need a common approach to tackling the issue of the legal effects of soft law in the ambit of competition law. This common approach can still be spearheaded by the CJEU, which should not eschew opportunities to delineate the legal effects of Commission-issued competition soft law.

[115] B. Rodger, 'Article 234 and Competition Law: A Comparative Analysis', 15 *MJECL* (2008).

TABLE OF CASES

France	Germany
1. *SA Brasseries Kronenbourg v Societe JBEG,* TGI Strasbourg, 04 fev. 2005; -- C.A. Colmar, 01 avr. 2008, RG No. 05/02931; --- C.cass, 24 nov. 2009, RG No. 08/16259.	1. OLG Frankfurt, Urteil v 21.12.2010, (11 U 37/09), BeckRS 2011, 05114.
2. *SA Brasseries Kronenbourg v SARL Victor Hugo,* TGI Strasbourg, 03 fev. 2005, RG No. 03/01568; -- C.A. Colmar, 11 sept. 07, RG No. 05/01681.	2. OLG Düsseldorf Kartellsenat, Urteil v 24.03.2004 (VI-U (Kart) 43/02), BeckRS 2004, 18469.
3. *EURL Le Westbury v Brasseries Kronenbourg,* C.A. Colmar, 30 mar. 2010, RG No. 08/02269.	3. OLG Braunschweig, Urteil v 05.12.2012 (2 U 69/11), BeckRS 2014, 09750.
4. *Pacific Création v PMC Distribution,* Trib.com Paris, 15 fev. 2007, No. 2006/073063; -- C.A. Paris, 18 avr. 2008, RG No. 07/04360.	4. LG Köln, Urteil v 09.02.2012 (88 O (Kart) 33/10), BeckRS 2012, 19707.
5. *Societe Chelmarne Voyages v SA Nouvelles Frontieres Distribution*, C.A. Paris, 04 dec. 2008, Joint judgments RG No. 05/23983 and 05/23982; -- C.cass, 14 fev. 2012, Joint judgments No. 09/11.690 and 09/11.691.	5. KG, Urteil v 19.9.2013 (2 U 8/09), BeckRS 2013, 16518.
6. *SAS Philips France and SA Sony France v Conseil de la Concurrence*, C.A. Paris, 29 avr. 2009, RG No. 2008/11907 ; -- C.cass, 7 jan. 2011, No. 09/14316 and 09/14667.	6. LG München I, Urteil v 24.06.2008 (33 O 22144/07), BeckRS 2009, 07108); -- OLG München, Urteil v 2.7.2009 (U (K) 4842/08), BeckRS 2009, 20091.
7. *Pierre Fabre Dermo Cosmetique SAS v Autorité de la Concurrence*, C.A. Paris, 29 oct. 2009, RG No. 2008/23812; -- C.A. Paris, 31 jan. 2013, RG No. 2008/23812 (after preliminary ruling in case EU:C:2011:649).	7. LG Frankfurt, Urteil v 31.07.2014 (2-03 O 128/13), BeckRS 2015, 02191.
8. *SAS Kontiki v Autorité de la Concurrence*, C.A. Paris, 16 mai 2013, RG No. 2012/01227; -- C. cass., 7 oct. 2014, No. 13-19.476.	8. LG Kiel, Urteil v 08.11.2013 (14 O 44/13 Kart), BeckRS 2013, 19630; -- OLG Schleswig, Urteil v 5.6.2014 (16 U (Kart) 154/13), BeckRS 2014, 17798.

9. *SAS Diapar v Société v Carrefour Proximite France*, C.A. Paris, 3 avr. 2013, RG No. 10/24013; -- C.cass, 16 sept. 2014, No. 13/18710.	9. LG Frankfurt am Main, Urteil v 18.6.2014 (2-03 O 158/13), GRURRS 2014, 13727; -- OLG Frankfurt am Main, Urteil v 22.12.2015 (11 U 84/14 (Kart)).
10. *Lionel Johane M v Societe Biotherm Distribution&Cie*, C.A. Pau, 1 oct. 2007, No. 04/00192.	10. LG Köln, Urteil v 15.02.2013 (90 O 57/12), BeckRS 2013, 05905.
11. *La Société SNCF v Autorité de la Concurrence*, C.A. Paris, 06 nov. 2014, RG No. 2013/01128.	11. Landgerichts München I v 21.03.2006 (33 O 24781/04), ZUM 2006, 671.
12. *Société Royer Sport SAS/Societe Converse Inc v Société Auchan France SA and others,* C.A. Rennes, 15 avr. 2014, RG No. 12/05938.	12. LG Nürnberg-Fürth, Beschluss v 16.04.2010 (4 HKO 2611/09), BeckRS 2010, 29293.
13. *Bang and Olufsen France SAS v La Autorité de la Concurrence*, C.A. Paris, 13 mar. 2014, RG No. 2013/00714.	13. OLG Düsseldorf, Beschluss v 13.11.2013 (VI - Kart 5/09 (V)), BeckRS 2015, 03537.
14. *SA Au Forum du Batiment v SA Vachette*, C.A. Paris, 3 jul. 2008, No. 06/20432.	14. OLG Düsseldorf, Beschluss v 21.12.2011 (VI-Kart 5/11 (V)), BeckRS 2013, 13541.
15. *Société COSIMO SAM v SAS Carrefour France,* C.A. Paris, 27 mar. 2014, RG No.10/19766.	15. OLG Karlsruhe, Urteil v 27.08.2014 (6 U 115/11 (Kart.)), BeckRS 2014, 20482.
16. *CNPA v Societe Honda Motor South SA and others*, C.A. Paris, 4 mai 2004, Court of Appeal Paris, published in 'Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes' No.9 from 8 nov. 2004.	16. LG Stuttgart, Urteil v 02.07.2012, BeckRS 2015, 17997 -- BGH, Urteil v 06.10.2015 (KZR 87/13), BeckRS 2015, 17973.
17. *Société Locatelli Eurocontainers SPA v SARL L'Atelier Industriel* C.A.Paris, 11 sept. 2013, RG No. 11/13785.	17. LG München I, Urteil v 27.05.2015 (37 O 11673/14), BeckRS 2015, 09562.
18. *SARL La Gadgetomaine v SA SOHO/SA Groupe Grand Sud,* C.A. Paris, 17 sept. 2009, No. 05/20661.	18. BGH, Urteil v 08.04.2014 (KZR 53/12), BeckRS 2014, 12999.
19. *SARL MKAT v SAS Groupe Salmon Arc en Ciel*, C.A. Paris, 31 mai 2006, No. 04/22966.	19. KG, Urteil v 26.03.2007 (23 U 7/06), BeckRS 2009, 88471.
20. *La Societe Cooperative de Commercants-Détaillants à Conseil d'Administration EPSE Joue Club and others v Autorité de la Concurrence*, C.A. Paris, 28 jan. 2009, No. 2008/00255.	20. LG Essen, Urteil v 27.08.2015 (43 O 30/15), BeckRS 2015, 20237.

21. *La SA Societe Beaute Prestige International v La SARL PMC Distribution,* Trib.com Paris, 3 juin 2008, RG No. 07/045745.	21. LG Hannover, Urteil v 25.08.2015 (18 O 91/15), BeckRS 2015, 19145.
22. *La Société NPPF SAS v Autorité de la Concurrence,* C.A.Paris, 10 oct. 2013, RG No. 2012/07909.	22. LG Düsseldorf, Urteile v 24.04.2012 (4b O 274/10 & 4b O 273/10), BeckRS 2012, 09376 and BeckRS 2012, 09682.
23. *La société Crédit Lyonnais SA and others v Autorité de la Concurrence*, C.A. Paris, 23 fev. 2012, RG No. 2010/20555.	23. LG Köln, Urteil v 14.02.2012 (88 O (Kart) 17/11), BeckRS 2012, 05107. -- OLG Düsseldorf, Urteil v 26.2.2014 (VI-U (Kart) 7/12), BeckRS 2014, 04324.
24. *La Société Digicel Antilles Francaises Guyane and others v La Societe Outremer Telecom SAS and Autorité de la Concurrence,* C.A. de Paris, 23 sept. 2010, RG No 2010/00163.	24. LG Düsseldorf, Urteil v 11.12.2012 (4a O 54/12 U), BeckRS 2013, 14798.
25. *La Société Grands Moulins de Paris SA v Autorité de la Concurrence,* C.A.Paris, 20 nov. 2014, RG No. 2012/06826.	25. LG Hannover, Urteil v 15.06.2011 (21 O 25/11),BeckRS 2012, 00337.
26. *La Société CIPHA SA v La Société SOGEMA SA and Autorité de la Concurrence,* C.A.Paris, 5 nov. 2008, No. 2007/17386.	26. LG Mannheim, Beschluss v 21.11.2014 (7 O 23/14), BeckRS 2015, 10955.
27. *La Société Reckitt Benckiser PLC v La Société Arrow Generiques SAS and Autorité de la Concurrence*, C.A.Paris, 26 mars 2015, RG No. 2014/03330.	27. OVG Berlin-Brandenburg, Urteil v 20.10.2005 (12 B 3/05), BeckRS 2006, 20174.
28. *SAS Puma France v France Telecom E Commerce and others,* TGI Strasbourg, 8 jan. 2008, No. 07/00359.	28. OLG Düsseldorf, Beschluss v 09.01.2015 (VI Kart 1/14 (V)), BeckRS 2015, 03467.
29. SARL Jeumont Lavage v SA Hypromat France, C.A.Douai, 6 juin 2013, RG No 12/06333.	29. BGH, Urteil v 10.12.2008 (KZR 54/08), BeckRS 2009, 09090.
30. SARL Les Conquerants v SAS Prodim and others, C.A.Rennes, 23 oct. 2007, No. 06/06364.	30. LG Dusseldorf, Urteile v 11.09.2008 (4b O 107/07; 4b O 78/07; 4a O 81/07), BeckRS 2014, 13080; BeckRS 2009, 10890; NJOZ 2009, 930.
31. *SARL Le Clemenceau v Brasserie Mauro Antibes*, C.A. Aix-en-Provence, 15 nov. 2012, No. 11/11057.	31. LG Düsseldorf, Urteil v 30. 11. 2006 (4b O 346/05), NJOZ 2007, 2100.
32. *SA Beaute Prestige International v Autorité de la Concurrence*, C.A. Paris, 26 jan. 2012, RG No. 2010/23945.	32. LG Frankfurt, Urteil vom 06.01.2006 (3-11 O 42/05), Juris.

33. *Société Coty France SAS v Société Cite Achat SA*, Trib.com Marseille, 3 oct. 2012, RG No. 2011F04004.	33. OLG Düsseldorf, Beschluss vom 17.09.2008 (VI-Kart 11/07 (V)), Juris.
34. *Société Cosimo v Société Cdiscount*, Trib.com Bordeaux, 25 jan. 2011, RG No. 2010F00607.	34. OLG Frankfurt, Urteil vom 17.04.2007 (11 U 5/06 (Kart)), Juris.
35. *Société Cosimo SAM v Société Distribution Casino France SAS,* Trib.com Marseille, 6 mai 2011, RG No. 2010F02131.	35. LG Düsseldorf, Urteil vom 30.11.2006 (4b O 508/05), Juris.
36. *SA Boucheron Holding and others v SARL PMC Distribution and others*, TGI Paris, 10 dec. 2008, RG No. 07/10592; --C.A.Paris, 17 dec. 2010, No. 2009/01517.	36. LG Düsseldorf, Urteil vom 30.11.2006 (4b O 546/05), Juris.
37. *Société Flora Partner v Société Eco Flor and others,* C.Cass, 14 mars 2006, RG No. 03/14640.	37. LG Hamburg, Urteil vom 07.06.2012 (315 O 77/11), Juris.
38. *S.A. Thales Air Defence v G.I.E. Euromissile and Others*, C.A.Paris, 10 nov. 2004, No. 2006 E.C.C. 6.	38. OLG Frankfurt, Urteil vom 29.07.2014 (11 U 6/14 (Kart)), Juris.
39. *SARL Lovi v SA Hypromat France,* C.A.Colmar, 04 mai 2010*,* No.08/03430.	39. OLG Frankfurt, Urteil vom 16.09.2014 (11 U 46/13 (Kart)), Juris.
40. *SARL Light v SA Hypromat France*, C.A.Colmar, 04 mai 2010, No. 08/04825.	40. OLG Karlsruhe, Urteil vom 27.08.2014 (6 U 116/11 (Kart)), Juris.
41. *Société Converse Inc. V SA Auchan France,* C.A.Douai, 14 jan. 2015, RG No. 10/08776.	
42. *Société Genentech Inc* v *Société Hoechst GMBH* and *Société Sanofi-Aventis Deutschland GMBH,* C.A.Paris, 23 sept. 2014, RG No. 12/21810 ; RG No. 13/09296 ; RG No. 13/17187.	
43. *SAS eNova Sante v SAS Caudalie,* C.A.Paris, 2 fev. 2016, RG No 2014/060579.	
44. *La Société Concurrence v Autorité de la Concurrence,* C.A.Paris, 03 dec. 2015, RG No. 2014/18125.	

CHAPTER 4

EU COMPETITION SOFT LAW, NATIONAL COURTS AND MULTI-LEVEL ENFORCEMENT: CERTAINTY AND CONSISTENCY SECURED, FORTHCOMING IN GLOBAL ANTITRUST REVIEW (2017)

ISSUE 10

Chapter 4. EU Competition Soft Law, National Courts and Multi-Level Enforcement: Certainty and Consistency Secured?

Introduction

In the not so distant 2009, Maher pointed out that decentralized EU competition enforcement contains conflicting mandates, whereby, on the one hand, 'there is an emphasis on procedural and substantive consistency within and across jurisdictions',[1] while at the same time the regime generates 'soft law solutions that, although functional and often effective, have an uncertain legal status.'[2] She also acknowledged that the observed dichotomy underpins the tension between 'discretion and generality, functionality and normativity that is a characteristic of law in general'.[3] This duality is also at the core of the phenomenon of competition *soft law* that forms the main research interest of this contribution. Therefore, the question this paper explores is whether consistency and the certainty requirement that the Commission pairs it with[4] are furthered or hindered by soft law instruments now proliferating in the competition domain.

Answers to this quandary are to be obtained on the basis of empirical observations derived from a previously generated sample of 112 national judgments[5] that engage with Commission-issued competition soft law.[6] The judgments identified have arisen in both public and private enforcement settings. National courts are the objects of this study as they are focal points of ultimate decision-making in the decentralized competition enforcement regime – it is at the judicial stage that competition law is given its final shape and where the ultimate decision as to the (legal) status of supranational soft law in the national legal setting is made. In particular, the focus of this paper is on the extent to which legal effects are attached to supranational soft law by national courts. To the extent that legal effects are recognized, national courts could be seen as deviating from the role of

[1] I. Maher, 'Functional and Normative Delegation to Non-majoritarian Institutions: the Case of the European Competition Network' (2009) 7 Comparative European Politics, 425.
[2] Ibid.
[3] Ibid.
[4] Paragraph 22 of Regulation 1/2003, talks about certainty and uniformity (not consistency). Insofar as uniformity is defined as 'deterministic in terms of outcomes' by Sauter, it can be argued that the Commission attributes the same meaning to the term 'consistency' in para. 86 of the White Paper on Modernization. In this sense, the terms uniformity and consistency as employed by the Commission are synonyms. See W. Sauter, *Coherence in EU Competition Law* (OUP, 2016).
[5] Zlatina Georgieva, 'The Judicial Reception of Competition Soft Law in the Netherlands and the UK', (2016) 12(1) European Competition Journal, 54 and Zlatina Georgieva, 'Competition Soft Law in French And German Courts: A Challenge for Online Sales Bans Only?', (2017) 24(2) Maastricht Journal of European and Comparative Law (forthcoming).
[6] The judgments are derived from the following influential EU jurisdictions: France, Germany, the UK and the Netherlands.

the 'formalist judiciary' and gearing towards a more flexible engagement with (legal) sources. The ultimate question, thus, is whether – if detected – such attitude by national judges undermines certainty and consistency or – on the contrary – enhances them.

This research setup is particularly suited to shed light on the assertion made by the Commission in its White Paper on Modernization more than 10 years ago – namely, that soft law instruments in the field of EU competition law are to further consistency and certainty in the new enforcement setup. [7] After having established its conclusions on this point, and having ventured to explain some of the observed outcomes, the current work takes the discussion a step further and also asks whether and, and if so which, conditions should apply to national (and EU) courts in order for them to (better) serve the said principles.

For the execution of this setup, as a first step, the tensions within the concept of soft law at the supranational and national levels will be outlined. In Section II, the empirical sample of relevant national case law is presented and possible reasons for the observed empirical results are given. Section III, in turn, tackles the implications for certainty and consistency of the presented sample, and takes a normative stance as to the level to which the observance of certainty and consistency in a decentralized system would impose duties on national and supranational enforcers with regard to their engagement with Commission-issued soft law. Section IV concludes.

I. Commission-issued Competition Soft law, Multi-level Governance, and the Role of the Judiciary

1. The tensions within supranational competition soft law

The instruments hereby referred to as supranational (or Commission-issued) competition soft law fit into the category of administrative guidance that (1) serves as interpretative aid to rules already enunciated in hard law and/or (2) expresses rules by means of which the Commission circumscribes its decisional discretion. [8] In the context of decentralization of EU competition law, soft law

[7] Commission White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, [1999] OJ C 132/01.

[8] Senden categorizes these administrative instruments as 'interpretative' and/or 'decisional'. See L. Senden, *Soft Law in European Community Law: its Relationship to Legislation* (Wolf Legal Publishers, 2003), 143-159. Senden believes that most

instruments were intended by the Commission not just to restrict its discretion, but to also influence decision-making by national administrative authorities and national courts, which makes the study of soft instruments' possible legal effects at the national level all the more relevant.

In this context, it is important to note that the Commission does not always stay within the limits prescribed by hard law when issuing its administrative soft law. In particular, the institution has made use of soft law to introduce a 'more economic' reading of EU competition law post decentralization.[9] This is readily visible in the content of, for instance, the Article 101(3) Guidelines, which were introduced in the aftermath of decentralization and which contain several novel additions to the existing status quo at the time.[10] This practice is even more obvious in the Article 102 Guidance Paper (the Guidance Paper), which deviated from established hard law so much so that it was presented as a document enunciating prospective 'enforcement priorities', instead of containing the usual guidelines delineating the Commission's view on the law and binding its discretion. It can thus be argued that the Guidance Paper, although undoubtedly interpretative content-wise,[11] is not to produce the legal effects attributed to other administrative soft instruments issued in the field due to its form – namely, one cannot speak of a self-binding effect on the issuing institution since administrative authorities are generally not to be bound by their enforcement priorities.[12] As argued by Pace, the only way in which the Guidance Paper can become binding on the Commission and indirectly bind national-level enforcers, is if the Commission follows it in its enforcement decisions, which will in turn have to be observed at the national level by virtue of Article 16 of Regulation 1/2003.[13] However, as will be shown in Section II.2, the Commission has so far met resistance in gearing the enforcement of Article 102 in the direction envisioned by the Guidance Paper. A reason for this fact can be the Guidance Paper's status of prospective enforcement priorities – essentially a 'weaker' instrument on the scale of bindingness of administrative guidelines issued by the Commission in the realm of competition law.

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competition soft law cannot be seen as either purely interpretative or purely decisional – usually it is a mix of the two. See also Valentine Korah, *Intellectual Property Rights and the EC Competition Rules* (Hart Publishing, 2006), 23-24.

[9] Frédérique Berrod, 'L'utilisation de la Soft Law comme Méthode de Conception du Droit Europeén de la Concurrence', (2015) 588 Revue de l'Union Europeéne, 288.

[10] Paul Lugard & Leigh Hancher, 'Honey, I Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty' (2004) 25 European Competition Law Review.

[11] Giorgio Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 Journal of European Competition Law and Practice, 2. See also Lorenzo Federico Pace, 'The Italian Way of Tackling the Abuse of Dominant Position and the Inconsistencies of the Commission's Guidance: not a Notice but a Communication' in Pace (ed.) *The Impact Of The Commission's Guidance On Article 102* (Edward Elgar 2011).

[12] Case T-24/90, Automec v Commission [1992] ECR-II 02223.

[13] Pace (n 11).

The bottom-line is that adding novel elements to interpretation of already existing law poses a problem from a rule of law perspective, undermining the same principle of certainty that soft law is supposed to further. This dichotomy is also reflected in the refusal of the CJEU to engage with such instruments. As Senden testifies in her survey of the usage of soft law in various EU law domains, 'when a soft law act presents a subjective interpretation of Community law […] the Court is not willing to take it into account.'[14] Yet again, recent scholarly and practitioner's accounts on national judicial reactions to supranational *competition* soft law paint a different picture than the one detected in CJEU judgments by Senden. For instance, Schroeder observes that 'guidelines are needed for predictability and judges tend to accept such guidelines even where these have no legal value other than binding the authority that issued them.'[15] How can this discrepancy be accounted for? The answer could lie in the different institutional setup of EU policies.[16] Certain EU domains are organized on the basis of concrete legislative mandates, with delegation of powers strictly delineated in appropriate legislative instruments. While EU action in such domains derives its strength from the principle of legality, in other fields – where mandates are broad and discretion is significant – EU action gets its strength from considerations of effectiveness[17] and fairness that are reflected by procedural rule of law guarantees.[18] This reasoning will be explained below.

The first account described above, espousing the CJEU attitude to soft law, is based on the idea that soft law can be engaged with by courts when issued on the basis of legislative delegation under a concrete mandate in accordance with the principle of legality (the 'legislative model').[19] However, in the context of EU competition law, where hard law rules are deliberately open-ended and leave the Commission (and other enforcers) broad discretion in the field, determining what lies within or without the law – unless it is an obvious deviation as the Guidance Paper – is a challenge. In this line of thinking, Larouche argues that competition enforcement is validated not by the workings of the 'legislative model', but is rather anchored in the so-called 'adjudicative model'.[20] According to this model, the Commission, issuing its decisions under a broad legislative mandate, is also subject to 1) the observance of procedural guarantees, 2) the obligation to set out reasons and 3) the possibility of

[14] Senden (n 8), at 477.
[15] Dirk Schroeder, 'Normative and Institutional Limitations to a More Economic Approach' in Drexl et al. (eds.), *Competition Policy And The Economic Approach: Foundations And Limitations* (Edward Elgar 2011), s. 283.
[16] Jean-Baptiste Poulle, Réflexion sur le Droit Souple et le Gouvernement d'Entreprise (L'Harmattan / Entreprises et management / Les Intégrales, 2011), 59.
[17] Ibid., 61.
[18] Maher (n 1), 420.
[19] On the legality principle, see C. van Dam, 'De Doorwerking van Europese Adminitratieve Soft Law: in Strijd met de Nederlandse Legaliteit' (2013) NALL – Netherlands Administrative Law Library, S.1.
[20] Larouche, *Competition Law and Regulation in European Telecommunications* (Hart Publishing, 2000), 119.

judicial review. In this sense, it could be argued that insofar as soft law concerning the Commission policy discretion and the way it views the law is indirectly subject to control on the basis of the procedural rule of law guarantees enumerated above, it does not pose a threat to rule of law values. However, how does this assertion play out under an enforcement model where the Commission is not the sole enforcer of EU Competition Law anymore, and where national courts and authorities are supposed to cater for consistent EU-wide application under a loose hard legal framework set at the supranational level? In the sections that follow, this question will be explored further and the implications its answer has for the principles of certainty and consistency will be outlined. Suffice it here to say that decentralization complicated the enforcement landscape, whereby the legal effects of supranational competition soft law for national actors are now subject to the vicissitudes of multi-level governance interactions. Therefore, in order to survey the legal effects of supranational soft law in national courts, it is only appropriate to apply a theory embedded in multi-level governance literature.

2. A multi-level governance perspective

Following Maher's definition, 'governance can be understood as the diffusion and fragmentation of governmental arrangements, which in this context is exemplified by the multi-level governance structures of the EU.'[21] In such a setup, traditional law and non-binding soft law coexist on the basis of interactions famously dubbed the 'hybridity', 'transformation' and 'gap' theses by de Burca and Scott.[22] The idea behind this theory can be summed up as follows: the hybridity thesis presupposes coexistence between law and governance processes and instruments, the gap thesis assumes their mutual exclusion, and the transformation scenario hypothesizes that law and governance mutually influence and shape one another, with no clear boundaries between the two being acknowledged.

As Korkea-Aho testifies, this theoretical framework also neatly depicts the ways in which courts engage –or fail to engage – with new governance processes, the issuing of soft law being such a process.[23] On the one hand, the gap thesis would reflect a formalist judicial attitude to soft law, whereby courts see themselves as interpreters of hard legal rules only, the aim being to either (1) lay out and enforce rights and obligations or (2) provide doctrinal elaborations and clarifications, or (3)

[21] I. Maher, "Regulation and Modes of Governance in EC Competition Law: what's New in Enforcement?" (2007) 31(6) Fordham International Law Journal, 1713.
[22] G. de Burca and J.Scott, 'New Governance, Law and Constitutionalism' in G. de Burca and J. Scott (eds.), *Law and New Governance in the EU and the US (Essays in European Law)* (Hart Publishing, 2006).
[23] E. Korkea-aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Routledge, 2015), 17-21.

settle disputes.[24] On the other hand, both the hybridity and transformation theses would signal a flexible judicial approach and courts willing to accommodate new governance processes in judicial practice.[25] On the basis of these insights, the current paper envisions four possible reactions of national courts to supranational competition soft law.

A rejection scenario that depicts a formalist judiciary pursuant to the gap thesis can be envisioned when courts explicitly refuse to engage with the contents of a soft law instrument. The argument that would be given in such a case (if at all) would be that the court does not interpret non-binding provisions (non-law).

A recognition category, depicting a more flexibly-oriented judiciary, would conversely encompass all instances where the court explicitly engages soft law in its reasoning – this engagement can constitute either agreement or disagreement with the contents of a soft law instrument. Pursuant to a hybridity thesis, this would likely happen through invocation of soft law together with hard law. It is also possible that judicial interpretation happens through the usage of general principles of law as argued in a previous work of this author.[26]

The possibilities for indirect judicial recognition (persuasion) and indirect rejection (neglect) are also hypothesized. Persuasion is defined as the case where a court might not be explicitly citing a soft law instrument in its judgment, but the wording used therein closely resembles the one used in the soft law instrument. Neglect, on the other hand, is detected where the soft law instrument is ignored even if invoked in an argument made by the parties to the dispute.

In light of these theoretical insights, the paper now proceeds to examine the empirical sample of national judgments that engage with supranational competition soft law. The section will first offer a general discussion of the empirical results and then proceed to examine them in light of the gap, hybridity and transformation framework presented above. Since, for practical reasons, the full sample of judgments cannot be presented in detail, only select cases illustrative of particular important empirical observations will be discussed. The complete sample will, in turn, be presented in the form of graphs in Annex I.

[24] G. Shaffer & M. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review, 748.
[25] A theoretical approach to positively accommodate new governance in courts is developed in J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2006) 13 Columbia Journal of European Law, 565.
[26] Zlatina Georgieva, 'The Judicial Reception of Competition Soft Law in the Netherlands and the UK' (n 5).

II. National Judicial Treatment of Supranational Competition Soft Law

1. General Findings of the Empirical Inquiry: Results and Possible Explanations

The empirical dataset gathered consists of 112 national public and private enforcement competition cases of the judiciaries of several leading EU jurisdictions - France, Germany, the UK and the Netherlands.[27] The sample was derived through opting for an exhaustive examination of national judicial engagement with a selection of the numerous soft law instruments issued by the Commission in the field.[28] The search for judgments was performed on the basis of key terms, consisting of the title of each respective instrument translated into the target language, and several variations thereof.[29] Additionally, for exhaustiveness purposes, the search was performed through cross-checking on several national (public and private) case law databases.[30]

The empirical data presented in Table 1 below suggests that the overwhelming majority of judicial recognition of soft law happens with regard to the so-called Guidelines on Vertical Restraints, which are also the most cited supranational competition soft instrument in the courts of the jurisdictions under observation. Slightly more than 60 per cent of all judicial soft law references are references to the said guidelines. France has a particularly strong contribution to this high total as 77 per cent of the judgments that mention substantive supranational competition soft law in that country deal with the Vertical Guidelines. By contrast, the so-called Guidance Paper receives the lowest amount of references – a mere seven per cent – and is also often either rejected or neglected by the national

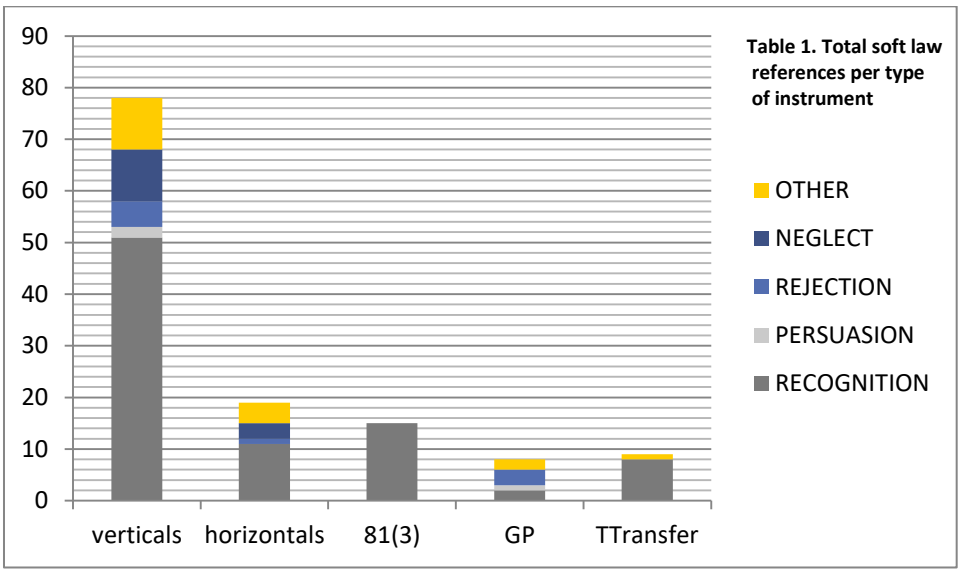
[27] France, Germany and the UK were chosen for comparative empirical analysis because they are 'parent' jurisdictions within the terminology of modern comparative law introduced by the seminal work of Zweigert and Kotz; *see* Konrad Zweigert and Hein Kötz*, An Introduction to Comparative Law* (translator Tony Weir ed., Clarendon Press, 1998). The Netherlands, on the other hand, besides being a founding EU Member State like France and Germany, is also often seen as a good case study because it 'usually tries to synthesize the best elements from its larger neighbors'. For this latter idea, see Maartje de Visser, *Network-based Governance in EC Law* (Hart Publishing, 2009), 7.

[28] Only those guidelines that contain the substantive principles for assessment of anti-competitive practices under Articles 101 and 102 TFEU are taken into account.28 These are: the Vertical (Agreements) Guidelines, the Horizontal (Agreements) Guidelines, the Technology Transfer Guidelines, the (Article 102) Guidance Paper and the Article 101.3 Guidelines. All soft law in the field can be consulted through the website of the European Commission. European Commission Antitrust Legislation, available at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html/>.

[29] The variations included partial searches with just a few of the words in the title (instead of the entire title) used as search terms.

[30] For France: Legifrance, Lamyline, Lextenso; for Germany: BeckOnline, Openjur; for the UK: Westlaw UK, Bailii.org; for the Netherlands: Kluwer, Rechtspraak.nl.

judiciaries.[31] Other two soft instruments under observation in this study – the Guidelines on Horizontal Cooperation Agreements and the Article 101(3) Guidelines – are engaged with sparingly (they comprise 15 and 11 per cent of the total cases, respectively). As to the judicial attitudes towards the latter two instruments, it is interesting to observe that, while the Horizontal Guidelines have received their fair share of judicial rejection and neglect, the 101(3) Guidelines seem to be subject to judicial recognition only. The same is true for the Technology Transfer Guidelines – although they were mentioned in merely nine cases, possibly due to their very specific subject matter,[32] they were endorsed judicially on nearly all of these instances. These matters will be addressed further in the Section II.2 below.



Overall, Table 1 reveals that – especially with regard to the Vertical Guidelines, the Technology Transfer Guidelines and the 101(3) Guidelines – there is significant convergence as to the total instances of judicial recognition, which is a positive outcome from the perspective of consistency and certainty. However, it is also notable that the same soft law instruments are not at all times treated

[31] While it is true that the Guidance Paper constitutes mere enforcement priorities for future case selection on the side of the Commission and can in no way bind even the Commission's discretion, this might not be the main reason why courts hesitate to engage with its provisions. A more likely explanation would be the obvious contradiction between the contents of the Guidance Paper and current case law in the dominance arena. In that respect, scholars submit that the Guidance Paper is an attempt by the Commission at changing the law as it stands under Article 102, which is of course going to be resisted by courts. In that respect, see Ortiz Blanco and Lamadrid de Pablo, 'Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases' in J. Derenne and M.Merola (eds.), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant, 6th Annual GCLC Conference), 305-312.

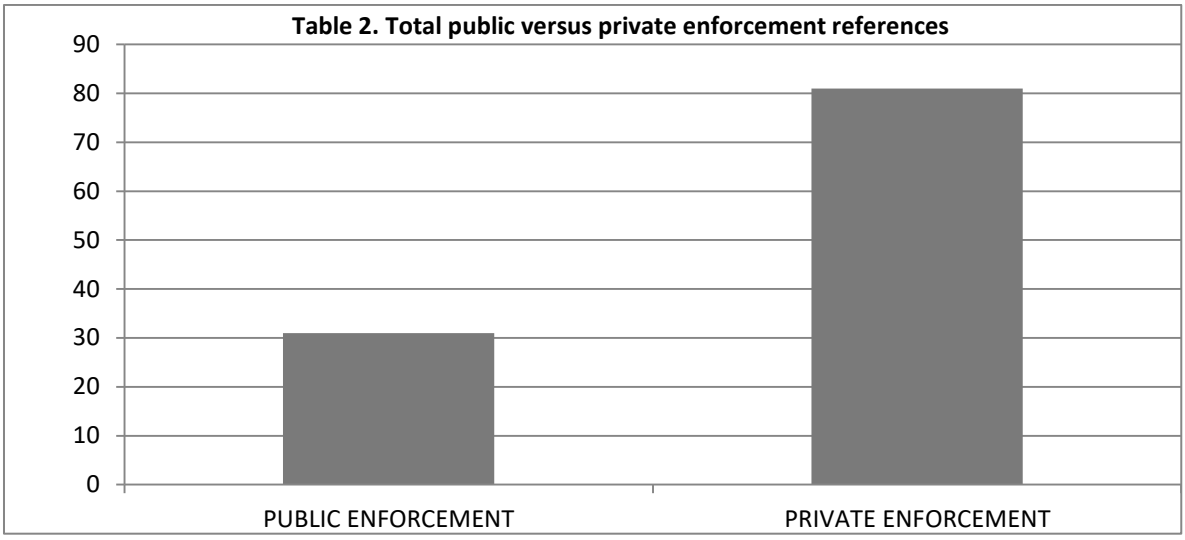
[32] Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International, 2012). Section 3.04 in particular shows that more topically specific soft instruments tend to be cited less in supranational courts.

similarly. While it is true that complete convergence is untenable, [33] contradictory treatment of the same soft law instrument – for instance rejection and recognition– that could in the end lead to contradictory decisions on the same subject matter is hereby seen as problematic from the perspective of certainty and consistency. This understanding is also the benchmark by which to assess whether the empirical sample contributes to, or detracts from, the principles of consistency and certainty. In that regard, it must be observed that a specific instrument in the empirical sample – the Guidance Paper – stands out as posing serious challenges. Specific provisions of the Vertical Guidelines, dealing with bans on online sales via platforms, are also contributing to clashing judicial interpretations between France and Germany and within Germany itself. While these points will be elaborated on in the following section, at the outset a couple of general remarks are in order with regard to the empirical results.

An initial intuition for the sample of judgments was that, in comparison with privately initiated disputes, competition judicial review cases would contain a lot more references to supranational soft law because there is evidence that National Competition Authorities do rely on these instruments in their enforcement practice. [34] It was initially reasoned, therefore, that is was highly likely that references to supranational soft law also figured prominently in judicial review cases. While such instances were indeed detected, they were significantly fewer than the cases in which civil courts engaged with the contents of Commission-issued competition soft law. As Table 2 suggests, references to the selected competition soft law instruments for this study are significantly more numerous in a private enforcement context. This finding is likely to simply reflect the higher total number of private enforcement decisions (vis-à-vis public enforcement ones) in the jurisdictions under observation.[35] In contrast to the 2004 *status quo* when the Ashurst study found competition private enforcement in the EU to be in a state of 'total underdevelopment',[36] private actions have

[33] The same approach is adopted by Larouche. See P. Larouche, 'Contrasting legal solutions and the comparability of EU and US experiences', in F. Leveque & H. Shelanski (eds.), *Antitrust and Regulation in the EU and US: Legal and Economic Perspectives* (Cheltenham: Edward Elgar, 2009).
[34] M. de Visser (n 27), 260 at fn. 232; see also Axel Kallmayer, 'Die Bindungswirkungen von Kommissionsmitteilungen im EU-Wettbewerbsrecht – Mehr Rechtssicherheit durch Soft Law', in Christian Calliess (ed.), *Herausforderungen An Staat Und Verfassung: Völkerrecht – Europarecht – Menschenrechte* (2015), 662-682; Catherine Vincent, 'La Force Normative des Communications et Lignes Directrices en Droit Europeén de la Concurrence', in Catherine Thibierge et al (ed.), *La Force Normative* (2009), 691-457.
[35] Tallying up the numbers provided by relevant empirical studies, one comes up with a figure of more than 1500 private enforcement decisions for the 4 jurisdictions in question. The relevant public enforcement figure is less than 500.
[36] Denis Waelbroeck et al., 'Study On yhe Conditions of Claims for Damages in Case of Infringement of EC Competition Rules', available at <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf>.

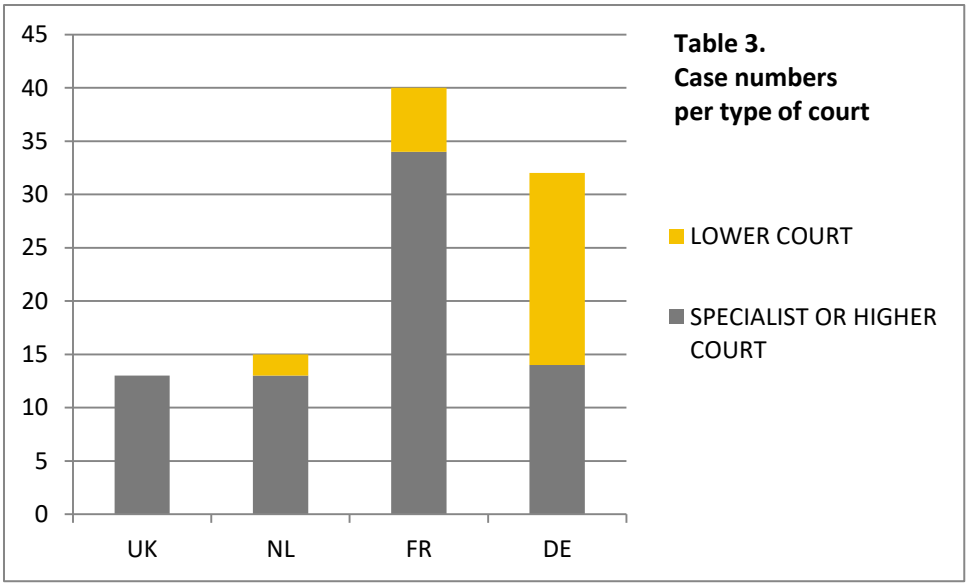
indeed been stimulated by national and supranational initiatives and have been on the rise in the past years as observed in a recent OECD report.[37]



Another observation that merits discussion is the fact that a trend can be detected whereby the soft law instruments subject to this study are almost exclusively invoked in either specialist or higher courts. This finding is aligned with previous literature, [38] which indicates that the higher the instance of the court dealing with a particular competition dispute, the higher its willingness and ability to engage with arguments invoking supranational soft law. The data in Table 3 suggests the same observation applies with regard to specialist courts.

[37] Submission of the United Kingdom, 'Relationship between Public and Private Antitrust Enforcement', available at <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)8&docLanguage=En>.

[38] Tobias Nowak et al., *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherland*s (Eleven International Publishing, 2011).



The fact that Germany significantly deviates from the rest of the jurisdictions under observation is relatively easy to explain – in a private enforcement setting (to which all the German cases marked in yellow belong), claims are always initially lodged at the level of District Courts, no matter what the value of the claim is.[39]

Finally, the empirical findings do not support the initial expectation of the author that judiciaries in civil – on the one hand – and common law jurisdictions – on the other hand – will significantly deviate in their engagement with supranational competition soft law (refer to Annex I). Instead, as explained below, the patterns in data suggest that what matters is the specific soft law instrument that courts have before them and whether or not it generally reflects principles already established in hard law.

2. Gap, Hybridity and Transformation in National Judicial Discourse

a) Hybridity

When the gap, hybridity and transformation framework is superimposed on the aggregated results presented above, several conclusions can be drawn. Firstly, national courts seem to recognize competition soft law by acknowledging its role as an aid for interpretation of hard law. This co-existence in judicial discourse is demonstrated by observations where the Vertical Guidelines were

[39] GWB, § 87(1).

cited together with the Vertical Block Exemption Regulation.[40] It is also evident in the eight cases in which the Technology Transfer Guidelines were endorsed in the context of the provisions of the Technology Transfer Block Exemption Regulation, [41] or when the Horizontal Guidelines are interpreted together with the Block Exemption Regulations on Specialization[42] and R&D agreements.[43] What is important to emphasize in these scenarios is that – so long as soft law stays within the limits previously charted out by case law and Commission Regulations – its judicial recognition is guaranteed. When this is the case, soft law can even be cited on a 'stand-alone' basis (without reference to pertinent hard law) because it is seen by the court as a shorthand summary of principles already well established in hard law. This often happens with the 101(3) Guidelines[44] in their elaboration on, for example, the cumulative criteria for meeting the Article 101(3) test.[45] These types of treatment of soft law confirm the so-called 'hybridity' hypothesis put forward above and empirically ascertained for the supranational EU competition domain by Stefan.[46] It is thus maintained that the hybridity acknowledged by national courts points to their recognition of the Commission's broad mandate to steer EU competition policy as expressed in its soft law, while also not losing sight of the hard legal framework that comprises the backbone of the enforcement regime.

Another way for the achievement of hybridity in national judicial discourse is through general principles of law that can play the role of a hard law 'anchor' for Commission-issued competition soft law. This observation was empirically ascertained only for one particular general principle of EU law– community loyalty as expressed in Article 4(3) TEU, working together with the consistency principle

[40] Commission Regulation No 330/2010 on the on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/01.
[41] Commission Regulation No 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] OJ L 93/17.
[42] Commission Regulation No 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements [2010] OJ L 335/43.
[43] Commission Regulation No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L 335/36.
[44] Some scholars had (erroneously according to the results of this study) hypothesized that the unworkability of the Article 101(3) guidelines will lead to stagnation in case law development at national level; see Bernard van de Walle de Ghelcke, 'Modernization: will it Increase Litigation in the National Courts and before National Authorities' in Damien Geradin (ed.), Modernization and Enlargement: Two Major Challenges for EC Competition Law (Intersentia, 2004), 146-7; see also Nicolas Petit, 'The Guidelines on the Application of Article 81(3) EC: A Critical Review' IEJE Working Paper No. 4/2009, available at <http://ssrn.com/abstract=1428558>.
[45] For the indispensability criterion, see C.A. Paris, 13 mar. 2014, RG no. 2013/00714. For all the 4 conditions assessed through the use of the 101(3) guidelines, see C.A. Paris, 31 jan. 2013 , RG no. 2008/23812; OLG Düsseldorf, Beschluss v 13.11.2013 (VI - Kart 5/09 (V)), BeckRS 2015, 03537; OLG Düsseldorf, Beschluss v 09.01.2015 (VI Kart 1/14 (V), BeckRS 2015, 03467. These guidelines are also used for clarification of distinctions set in stone, such as the existence of a difference in market power needed for establishment of breach of Article 101 and 102 TFEU, respectively. In that regard, see Independent Media Support Ltd v Office of Communications [2008] CAT 13.
[46] Stefan (n 32), Chapter 5, 137-156.

enunciated in Article 3 of Regulation 1/2003 and the latter's mirror-images at the national level.[47] That the Article 3 consistency principle is related to the principle of community loyalty is suggested by the European Commission itself in the Notice on Cooperation between the Commission and National Courts.[48] This interaction allows the principle of community loyalty, which cannot create obligations on its own,[49] to enable the more concrete Article 3 obligation (taken together with parallel national obligations) to endow national courts with the ability to engage with the contents of supranational soft law. A clarification is hereby in order – in cases which do not have community dimension, Article 3 of Regulation 1/2003 does not apply, but supranational soft law can nevertheless be interpreted by national courts by virtue of the above-quoted national-level (self-imposed) consistency obligations that mirror the substance of the latter provision.[50] For cases with a community dimension, national-level consistency principles also play a role in anchoring Commission-issued competition soft law[51] although – strictly speaking – they should not apply.[52] This phenomenon can be explained by the fact that some national consistency obligations – such as s.60 of the UK Competition Act – are even more specific than Article 3 of Regulation 1/2003 and thus play a facilitative role in grounding supranational soft law in national judicial discourse even in cases where they should not apply.[53]

The above-described judicial attitudes show that national judiciaries are creative in their approaches to supranational competition soft law and grant legal effects to soft instruments on the basis of legal constructions reflecting hybridity as defined by Scott and de Burca. So long as the supranational competition judgments, the decisional practice of the Commission, and the guidance given in soft law

[47] Competition Act 1998, SI 1998, c. 41, s.60 (3), available at <http://www.legislation.gov.uk/ukpga/1998/41/contents>; Memorie van toelichting tot de Mededingingswet van 9 mei 1996, Kamerstuk 24707 nr.3, available at <https://zoek.officielebekendmakingen.nl/kst-24707-3.html>. Pursuant to the consistency obligation of Article 1 of the Dutch Explanatory Memorandum, certain provisions of supranational hard law instruments (of the VBER for instance) have been implemented in the national legal system through Articles 12 and 13 of the Dutch Competition Act (Mededingingswet). For an explanation, see para. 2.40 of the Batavus decision of the Dutch Hoge Raad (ECLI:NL:HR:2011:BQ2213); GWB Novelle at <http://www.gesetze-im-internet.de/gwb/index.html>. No similar provision was found in Book 4 of the French Commercial Code.

[48] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C 101/04.

[49] M. de Visser (n 27), 313.

[50] This phenomenon can be observed with regard to the usage of the Horizontal Guidelines in Germany. See, for instance, LG Hannover, Urteil vom 15.06.2011 - 21 O 25/11, BeckRS 2012, 00337.

[51] For the Netherlands, see Rechtbank Leeuwarden 04 october 2006, rolnr. 68134 / HA ZA 05-64 (first instance), Gerechtshof Leeuwarden 06 october 2009, rolnr. 107.001.584/01 (on appeal) and Hoge Raad 16 september 2011, rolnr. 10/00372 (cassation).

[52] For the UK, see Independent Media Support Ltd v Office of Communications [2008] CAT 13.

[53] Although no specific national-level consistency/convergence obligation exists in France, Vogel testifies to the fact that supranational competition soft law is used as an analytical guide (guide d'analyse) even in purely national cases; see Louis Vogel, *Droit de la Concurrence* (Bruylant, 2015), Ch.2, S.1, para. 742.

are not contradicting each other, national courts allow soft law to produce legal effects as interpreted together with hard law or in light of general principles of law. The achievement of consistency and certainty in that respect is shaped by the multi-level interactions of all the relevant national and supranational actors. In this broader sense, the regime can achieve consistency and certainty with respect to its soft law practice by aligning the way in which national and supranational actors engage with soft law and attribute legal effects to it. In the alternative, as will be seen in the following section, engagement with these instruments remains fortuitous and can be compared with the practice of 'cherry-picking' observed by Elaine Mak in her study on the engagement of higher national courts with foreign sources of law.[54] However, unlike foreign legal sources, supranational competition soft law is embedded within a highly institutionalized EU law domain, where the strong call for consistency in the aftermath of decentralization suggests a more systematic approach. All this is not to suggest that soft law has to be complied with at all times, but that a dialogue between enforcement actors about its contents – what is seen as a viable or an unviable rule – has to be encouraged and made explicit. As will be argued in Section III, such a course of action will not only enhance certainty and consistency, but also boost the regime's effectiveness.[55] This suggestion and the concrete proposals for action that flow from its execution will be further delineated in Section III below.

b) Gap in the Shadow of the Preliminary Ruling Procedure

Currently, dialogue about the contents of soft law instruments that are not supported by supranational precedent or prior Commission decisions happens only occasionally and by means of the slow-paced preliminary reference procedure. While preliminary rulings are undoubtedly one way to enhance consistency and certainty by means of vertical 'signaling' between national and supranational enforcers,[56] it will also be shown that more often than not national courts decide not to refer. They often choose to distance themselves from soft law that does not have backing by hard law. In this case, national courts, not having jurisdiction to judge on the legality of EU law and aware that a certain soft law instrument or a rule expressed within it goes beyond or against established hard law, adopt a non-motivated stance of rejection or neglect as defined in section I.2 above.

[54] E. Mak, *Judicial Decision-Making in a Globalized World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford: Hart Publishing, 2013).
[55] For the relationship between these concepts, see Sauter (n 4).
[56] Francis Snyder, 'Soft Law and Institutional Practice in the European Community' in S. Martin (ed.), *The Construction of Europe* (1994), 204. Snyder expresses the idea of 'signalling' happening horizontally (with regard to the interactions between the Commission and supranational courts); the current author suggests it is also happening vertically (as between the national and supranational courts).

Although such an attitude is understandable from the perspective of *legality,* it creates a 'gap' as described by Scott and de Burca – a gap which undermines the overall *effectiveness* of the decentralized enforcement regime by hampering dialogue as to the legal value and effects of the said instruments. Dialogue can be furthered either by more intensive use of the preliminary ruling procedure, which is slow and in that sense ineffective, or by the introduction of a legal obligation on national courts and authorities to 'comply or explain' their (dis)engagement with supranational competition soft law. While the concrete dimensions of the 'comply or explain' obligation will be delineated in Section 3, it is hereby important to observe that such an approach will enable a more streamlined (judicial) engagement with soft law, whereby its legal effects will be better cognizable. This proposal is all the more relevant in light of the fact that the 'harder' tools for inter-institutional communication envisioned by the Commission in Regulation 1/2003 (*amicus curiae* interventions, Article 10 declaratory decisions) seem to be used sparingly or not at all in practice.

Going back to the preliminary ruling procedure, it is readily observable that it constitutes a means of 'vertical' communication between the national and supranational levels about the value of Commission-issued soft law, which can secure consistency and certainty over time. To illustrate, after a prolonged uncertainty about the interpretation of the soft law policy of the Commission on online distribution via platforms,[57] the Higher Regional Court of Frankfurt sent a preliminary question to the CJEU, asking for a clarification on whether banning distributors from selling on third-party platforms could be seen as a hardcore restriction.[58] Although the question referred is not posed as a query on the validity of the soft law instrument in question – the Vertical Guidelines[59] – should the interpretation of the CJEU differ from the Commission's position in this instrument, the Vertical Guidelines will be implicitly rejected and could be revised in the light of the CJEU pronouncement. This outcome is likely in light of previous vertical interactions with regard to soft law – namely, the 2001 version of *de minimis* notice[60] was changed in 2014[61] to reflect the CJEU's stance in the *Expedia*

[57] Paragraph 54 of the Vertical Guidelines.
[58] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* (information not yet available).
[59] The 'indirect bindingness' phenomenon observed by Pace with regard to the Guidance Paper has been asserted with regard to all Commission-issued competition soft law in other scholarly accounts. For instance, Kirchner maintains that 'The European Commission has in the past been very active in promoting the "more economic approach" and supporting this approach by a number of guidelines. It has become evident that the Commission is pursuing three goals simultaneously: (1) reducing frictions with the US antitrust authorities, (2) to better defend its decisions in merger cases against repeal by the European Courts, and (3) to indirectly bind the courts by guidelines.' See Christian Kirchner, 'Goals of Antitrust and Competition Law Revisited' in D. Schmidtchen et al. (eds.), *Jahrbruch fur Neue Politische Okonomie* (2007), 7-26.
[60] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de* minimis) [2001] O.J. C 368/07.
[61] Commission Staff Working Document 'Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice' [2014] O.J. C 4136 final.

case[62] that 'object' agreements cannot be seen as *de minimis.* In this case, it was also the French Competition Authority that sent a clear signal that it was not inclined to apply the said soft law instrument.[63] A similar distrust of supranational soft law at the national level can be detected with regard to the Guidance Paper. As will be seen below, even before the 2015 ruling of the CJEU in the *Post Danmark II case,*[64] which confirmed that the instrument constituted nothing more than mere enforcement priorities, national courts were skeptical towards the Guidance Paper. This skeptical preliminarily attitude is also possibly due to the vocal criticism the instrument received after the publication of its initial version.[65] Another likely reason for such a response may be the interactions of national judges within the Association of European Competition Law Judges (AECLJ) – a governance-type forum for informational exchanges between EU judiciaries.[66] Indeed, in its recent judgment in *Post Danmark II*, the CJEU confirmed the Guidance Paper was of no relevance to the current state of the law (unlike other Commission guidelines and notices) as it 'merely sets out the Commission's approach as to the choice of cases that it intends to pursue as a matter of priority.'[67] Although scholars express doubts about this reading[68] and put and emphasis on the interpretative tone of the Guidance Paper discussed in Section I.1 above,[69] it is likely that national courts have now absorbed the stance of the CJEU and will not treat this instrument as anything but future-oriented enforcement priorities of the European Commission of no further legal significance either for the issuing institution or other enforcement actors. The expected future judicial responses to the Guidance Paper (if any) are, therefore, rejection or neglect. However, the pressing need for substantive guidance and consistency in the area of Article 102 TFEU remains. It is therefore expected that a new (multi-level) cycle of interaction between the main stakeholders – the European Competition Network[70] and supranational courts, with a subsequent spill-over to national courts – is needed in order to solve the current informational deadlock in the area of abuse of dominance.

[62] Case C-226/11 *Expedia Inc. v. Autorité De La Concurrence and Others* [2011] Court Reports-General.
[63] Décision No. 09-D-06 du 5 février 2009 relative à des pratiques mises en œuvre par la SNCF et Expedia Inc. dans le secteur de la vente de voyages en ligne, available at < http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=09-D-06>.
[64] Case C-23/14, *Post Danmark A/S v Konkurrencerådet* [2015] NYR.
[65] European Commission, DG Competition. Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Public Consultation), available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.
[66] For more information on the AECLJ, see Maartje de Visser and Monica Claes, 'Courts United? On European Judicial Networks', in Bruno de Witte & Antoine Vauchez (eds.), *Lawyering Europe: European Law As a Transnational Social Field* (2013).
[67] Ibid., para. 52.
[68] N. Petit, 'Rebates and Article 102 TFEU: The European Commission's Duty to Apply the Guidance Paper' SSRN Paper available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695732>
[69] See L.F. Pace and G. Monti (n 11).
[70] For more information on the ECN, see de Visser (n 27), 32-34, 207-8.

These cases show that a vertical feedback loop about the 'value' of supranational soft law does exist. With its competition judgments, the CJEU shows its position on Commission-issued competition soft law and thus sends a signal to the national level, which – in turn – absorbs/transforms the signal and sends it back to the supranational level. This iterative game is good news for the principles of consistency and legal certainty. However, its downside lies in the fact that a significant amount of time lapses before a definitive and legally binding answer by the CJEU surfaces. In the meantime, in the 'shadow' of the preliminary ruling procedure, uncertainties and contradictions arise at the national level.

For instance, although the Vertical Guidelines are usually judicially recognized through hybridity-based interpretation together with hard law, certain provisions concerning the Commission's treatment of distribution via the internet, added in 2011, have been subject to rejection – or a mix of rejection and recognition – in national courts. Additionally, in most of these cases, it is not clear if the court takes issue just with a specific rule expressed within the guidelines, or with the legal relevance of the instrument as whole. This distinction is significant as the former attitude can be seen as recognition of soft law, allowing for an agreement or disagreement with a rule enunciated therein, while the latter would constitute rejection of the legal relevance of the instrument as a whole. The latter situation, making it impossible for soft law to be taken into account judicially, negates the possibility for inter-institutional dialogue to emerge, thus hindering its consistency- and certainty-enhancing potential. The former attitude – by creating a dialogue about the scope of the rules – is good news for certainty and consistency.

An example of an unequivocal rejection attitude is a case heard by the Cologne District Court where the judge held that the Vertical Guidelines were not applicable in relations between private parties[71] while other civil courts – both within and outside Germany – had recognized this same instrument by interpreting it together with the Vertical Block Exemption Regulation. This situation – in supporting two alternative and incompatible outcomes with regard to the Vertical Guidelines – creates an issue from consistency- and certainty-enhancing perspective.

[71] LG Koln, BeckRS 2012, 19707, Entscheidungsgründe, para. 6.

Such conflicting outcomes are also exhibited by national judicial references to the Guidance Paper, which – as discussed in Section I above – is perceived as an instrument with an unclear purpose[72] and a substance contradicting currently established case law.[73] In the few judgments in which the instrument was subject to recognition (or persuasion), parts of the Guidance Paper reflecting existing case law were in question. For example, the 'As-Efficient-Competitor Test' described in the soft instrument[74] has been endorsed by the CJEU as a valid tool for assessment of foreclosure in predatory pricing cases[75] and was applied in such a way by a Dutch[76] and a French court,[77] both examining possible predation.

However, and similarly to the Vertical Guidelines discussed above, the Guidance Paper has more often than not been rejected in its entirety and dismissed as irrelevant. An illustrative example in that respect can be found in a judgment by the UK High Court, where Justice Mann stated "[…] as the document itself points in paragraph 3, it is not a statement of the law, and paragraph 81 makes it clear that what is being referred to is an enforcement priority, not a definition of abuse. I do not think that this document assists the debate."[78] As discussed above, this judicial attitude sends a vertical signal of the unwillingness of national courts to be indirectly bound by rules through which the Commission essentially strives to change the law on abuse of dominance.[79] Indeed, this roundabout binding effect can happen, as Pace argues,[80] through Article 16 of Regulation 1/2003, which obliges national authorities and courts to strive not to deviate from the decisional practice of the European Commission. In other words, '[…] it is the decisions that the Commission adopts pursuant to Article 102 TFEU and which put flesh on the bones of the Guidance that will bind the national authorities and courts as to the way in which Article 102 TFEU is to be interpreted.'[81] Insofar as the Commission is expected to follow its own Guidance Paper in upcoming decisions – a proposition currently questioned by the

[72] The discussion centers on the question of whether the Guidance Paper actually constitutes enforcement priorities or – to the contrary – is an attempt at a change of the law of Article 102 TFEU. For the former opinion, see Richard Whish, 'Intel v Commission: Keep Calm and Carry on!' (2015) 6 Journal of European Competition Law and Practice, 2. For the latter view, refer to G. Monti (n 11), 5 at fn. 28.
[73] Liza Gormsen, 'Why the European Commission's Enforcement Priorities on Article 82 EC Should Be Withdrawn?' (2010) 31 European Competition Law Review.
[74] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, paras.23-27.
[75] Case C-62/86 *AKZO Chemie v Commission* [1991] ECR I-3359.
[76] Rb Oost Brabant 7 augustus 2013, rolnr. 232816 / HA ZA 11-1168.
[77] C.A. Paris, 06 novembre 2014, RG no. 2013/01128.
[78] [2011] EWHC 987 (Ch) supra n 123, 95.
[79] Monti (n 11), 5.
[80] Pace (n 11), 116.
[81] Ibid.

Intel decision pending at the CJEU[82] – the provisions of the latter could indeed become indirectly binding. It seems, therefore, that national and supranational courts are already signaling their discord with such a (potential) option. Thus, it can be concluded that the type of judicial attitude to the Guidance Paper is directly related to whether or not a controversial or non-controversial part of this instrument is being discussed; in the former case, the outcome is rejection and in the latter – recognition. This type of contradictory treatment, as maintained above, is precisely what needs to be avoided in order for consistency and certainty in enforcement to be furthered.

c) Transformation

Transformation as defined by Scott and de Burca was not empirically observed. Insofar as 'this approach suggests that the basic premises and normative presuppositions of law, legal form and legal function need to be rethought',[83] such a radical hypothesis is not supported by the data generated. In particular, if this theory could be observed in practice, soft and hard law would not have been treated as distinct (legal) forms in national courts of law. The results, on the contrary, clearly show that soft law is only recognized and endowed with legal effects when it can be fit within the system of hard law, including general principles of law. Another fact that detaches the interaction between competition soft and hard law from the possibility that they are seen as interchangeable pursuant to the transformation thesis is the empirically observed unwillingness of national courts to use soft law instruments as the *ratio decidendi* for their judgments, since the *ratio* can only be informed by a hard legal rule.[84]

The conclusion that transformation does not occur in the competition domain is also aligned with the results of studies on the use of soft law in other fields of EU activity. The results of Tamara Hervey's[85] study on the EU social welfare sector and, in particular, the relationship between adjudication and new governance-based informal arrangements, point to a similar conclusion as the one found here – namely, that 'mutual transformation' between formal and atypical sources of law (or legal interactions) does not occur in practice.

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[82] The *Intel* decision of the General Court (Case T-286/09 *Intel v Commission* [2014] Court Reports – General) dismissed as superfluous an entire section of the Commission decision under appeal. Non-coincidentally, this section dealt with the applicability of the 'as-efficient-competitor' test to rebates – a topic initially explored by the 102 Guidance Paper.
[83] Scott/de Burca (n 22), 17.
[84] *Independent Media Support Ltd v Office of Communications* [2008] CAT 13.
[85] T. Hervey, 'Adjudicating in the Shadow of the Informal Settlement?: The Court of Justice of the European Union, "New Governance" and "Social Welfare"'(2010) 63(1) Current Legal Problems.

In light of the observed transformation, gap and hybridity interactions, the following section will chart out their implications for certainty and consistency, and the related principle of effectiveness. Suggestions for improvement of the current status quo will also be made.

III. Certainty, Consistency and their Relationship to Effectiveness: Current Status and Ways Forward

Since this section will further explore the issue of whether the observed judicial approaches advance or hinder the principles of certainty and consistency and how the end result influences their interaction with effectiveness, it is necessary to define these three concepts at the outset.

1. Consistency, certainty, effectiveness

The three principles of interest to the discussion are multi-dimensional and have more than one interpretation as pointed out in scholarship;[86] therefore, their interactions can be both harmonious and strenuous. The latter relationship is illustrated by the assertion of Maher described in the Introductory Section, who testifies that while effectiveness is served by means of soft law, consistency is undermined. This is so because, under the 'legislative model' described in Section I.1 above, consistency as tied with the principle of legal certainty in the Commission's discourse,[87] imposes on the legislator the strict process requirement that law is readily ascertainable and immutable to the benefit of the subjects of the law who need to 'know what the law is so as to be able to plan their actions accordingly'.[88] Departing from this view of certainty, the revisable and non-binding nature of instruments such as soft law is a difficult fit.

Effectiveness, on the other hand, accords with a more purposive, functional conception of law as a means to an end[89] and can therefore further and even encourage the use of soft law as a tool of

[86] On the inter-relation between coherence/consistency, on the one hand, and legitimacy and effectiveness, on the other, see Sauter (n 4). On effectiveness, see F.Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques'(1993) 56 Modern Law Review. On certainty, see J. van Meerbeeck, 'The Principle of Legal Certainty in the Case-Law of the European Court of Justice: from Certainty to Trust' (2016) 41(2) European Law Review and F. Preetz, 'Does the Notion of Legal Certainty Prohibit an Effects-Based Approach to Rebates? (2017) 38(3) European Competition Law Review.
[87] Refer to (n 4).
[88] Takis Tridimas*, The General Principles of EC Law* (1999), 163.
[89] Sauter (n 4), 17. See also Jean-Baptiste Poulle (n 16), 58.

regulation, leading to desired outcomes. This functional, purposive view, as discussed in Section I.1, would also require that a rulemaking process under a broad legislative mandate such as competition law is surrounded by certain procedural rule of law guarantees so that its legitimacy is secured.[90] Such a guarantee of procedural nature[91] that can be applied in the vertical interactions between enforcement actors in a decentralized setting is the 'comply or explain' principle.[92] As will be explained below, the 'comply or explain' principle makes transparent the actions of participants in regimes operating under conditions of broad legislative mandates, soft norms and multiple stakeholders, which in the end contributes to both effectiveness and certainty and – by enhancing dialogue between enforcement actors – to consistency.

In that sense, it is important to note that effectiveness and certainty are seen as mutually reinforcing. As Preetz testifies, 'Ensuring the effective enforcement of competition law is an inherent second dimension of the principle of clarity and definiteness of the law.'[93] For the latter statement to hold true, however, one needs to adopt a flexible understanding of the principle of certainty as well. Such an understanding is proposed by the 'fiduciary (trust) logic',[94] whereby certainty is no longer secured by a monolithic state nor does it only cater for the protection of the individual. Instead, 'Once it is acknowledged that the law does not have the innate ability to determine its application fully in advance, the recipients of the standard will continue to obey as long as they have confidence in the fact that the authorities respect their expectations based on this standard. Trust plays—and should continue to play—a decisive role in any legal system.'[95] Such an understanding of legal certainty, aligned with the outcome-oriented principle of effectiveness – and the related concern for fairness – offers an avenue through which national courts can explore the legal effects of supranational soft law in a more uniform fashion by means of the 'comply or explain' principle.

This functional perspective is also in line with the interpretation of the empirical results described above – namely that national judiciaries can undermine certainty and effectiveness only if their interpretations of the same soft law instrument are contradictory. In that sense, whether courts engage – agree or disagree with – a certain soft instrument by means of interpretation together with legislation, case law, general principles of law or by means of persuasion, is immaterial so long as the

[90] Larouche (n 20).
[91] The procedural nature of the 'comply or explain' principle is ascertained in the 2013 Annual Report of the French Conseil d'État, 'Le Droit Souple', 73.
[92] Jean-Baptiste Poulle (n 16), 62 *et seq*.
[93] F. Preetz (n 86).
[94] J. van Meerbeeck (n 86), 275.
[95] Ibid., 286.

attitude exhibited consistently reflects a flexible judicial stance to soft law across EU Member States. So long as this happens, the fiduciary logic of certainty – the trust of legal subjects that a certain set of rules will be discussed as relevant to their situation – will be fulfilled; the effectiveness and consistency associated with the use of and dialogue about the contents of soft law will also be secured. Alternatively, if a formalist judicial stance of rejection or neglect is consistently applied to soft law by the EU judiciary, while the fiduciary logic of certainty will not be undermined, effectiveness and consistency associated with the use of soft law will necessarily be lost. As Snyder aptly puts it, soft law rules

> 'play a vital role today in Commission efforts to ensure the effectiveness of Community law. They identify what is settled and what is in dispute, circumscribe the arena for debate, and define the agenda for negotiation and, if necessary, litigation. In other words, they aim to provide guidelines for negotiating the effectiveness of Community law.'[96]

It is precisely these types of interactions that are confirmed by the above empirical findings that espouse judicial recognition; rejection – by contrast – does not further dialogue but stifles it. In light of Snyder's insight, fears that supranational competition soft law can be used as a substitute to legislation or that soft law constitutes hard law in disguise seem to be unfounded. As seen above, national courts never follow soft law blindly and are keenly aware of the circumstances under which the instruments in question can be allowed to produce legal effects. In fact, the very means of judicial engagement with soft law some national courts employ, reflects their concern for furthering effectiveness – for instance, the principle of community loyalty used to anchor soft law in national judicial discourse is an enabler of the principle of effectiveness as confirmed by CJEU case law.[97]

In order for effectiveness and consistency to be better furthered in the decentralized competition enforcement regime, it will be argued here that – in alignment with a functional understanding of certainty – national and supranational enforcement actors need to adopt a common stance as to their treatment of supranational competition soft law. This stance should not constitute outright rejection or neglect since both attitudes thwart effectiveness and consistency as argued above, but it should not be 'blind recognition' either (that latter scenario does not materialize in practice anyway

[96] Snyder (n 86), 33.
[97] G. Monti and D. Chalmers, *EU Law: Cases and Materials* (CUP, 2010), 1015.

as shown in the discussion of the empirical results). In this sense, a rationale that strikes a middle ground, promotes dialogue between enforcers, and also fits squarely within the debate on effective enforcement is presented by the 'comply or explain principle' as introduced below.

2. The 'Comply or Explain' Principle – a Way Forward

The 'comply or explain' principle has gained prominence through its use in the corporate governance world in the UK, where it caters to effectiveness of enforcement by furthering new, hybrid – soft and hard – methods of regulation prompted by the dynamic regulatory environment.[98] This approach relies on transparency in order to incentivize the subjects of regulation – in this case listed companies – to take into account, for instance, non-binding corporate governance codes.[99] The idea is that each economic actor could either choose to (1) conform to or (2) deviate by means of explicitly stating reasons when presented with a certain non-binding regulatory instrument (soft law). The 'comply or explain' principle, with certain cross-jurisdictional variations, constitutes part of national administrative law in other EU jurisdictions as well.[100] At the EU level, according to van Dam, although there is no case law to that effect, the European Commission does consider that its soft law needs to be taken into account by national administrative authorities and that deviation from it should be motivated.[101] In the competition realm specifically, although case law – the *Expedia* case[102] – has been clear on the fact that Commission soft law is not to be seen as binding on national authorities (nor courts), the Opinion of AG Kokott does point towards a 'comply or explain' direction for national-level enforcers. That suggestion is going to be explored as a possible avenue for alignment of national and supranational treatment of supranational competition soft law.

In particular, paragraph 39 of the Advocate General's Opinion states:

> 'Therefore, even though no binding requirements concerning the competition-law assessment of agreements between undertakings arise for national competition authorities and courts from the Commission's *de minimis* notice, those authorities and

[98] Poulle (n 16), 44-45.
[99] That transparency is used a tool to secure objectives of consistency and effectiveness in fluid regulatory environments is also stipulated by Maher (n 1), 428.
[100] For France, see 2013 Annual Report of the Conseil d'Etat (n 91), 44; for the Netherlands, see H.E. Broring and G. J. A. Geertjes, 'Bestuursrechtelijke Soft Law in Nederland, Duitsland en Engeland' (2013) 4 Nederlands Tijdschrift voor Bestuursrecht, 5.
[101] See C. van Dam (n 19), S.2.2.2.2.
[102] Case C-226/11 *Expedia Inc. v. Autorité De La Concurrence and Others* [2011] Court Reports-General.

courts must nevertheless consider the Commission's assessment, as set out in the notice, of what constitutes an appreciable restriction of competition and must give reasons which can be judicially reviewed for any divergences.'[103]

This reasoning, in essence, charts the dimensions of the 'comply or explain' principle discussed above. What is of additional importance, and potentially makes the 'comply or explain' interpretation of AG Kokott even stricter, is the argument that the reasons given for a deviation from supranational competition soft law should be *judicially reviewable*. The Advocate General suggests two possible avenues in this respect[104] – national competition authorities should either issue their own soft law which will bind them by means of national law or should motivate their reasoning with regard to supranational soft law in each individual decision that is then subject to review. Insofar as only the latter option retains the flexibility of the 'comply or explain' logic, it will be the preferred solution from the perspective of effectiveness and the fiduciary view of legal certainty that this paper is preoccupied with. By contrast, the former idea – issuing national soft law that reflects the contents of its supranational counterpart – can hamper the principle of effectiveness (although it does enhance formal legal certainty).[105] As Senden argues, '[…] depending on the national follow-up given to soft law acts, rights and obligations ensuing therefrom may vary from one Member State to another. This is problematic […] from the viewpoint of effectiveness, in particular uniform application […].'[106]

a) Duties on national courts

Insofar as this paper argued that national competition authorities should be subject to the 'comply or explain' principle when engaging with supranational competition soft law, the same duty should also apply to national courts. This conclusion can be drawn from the parallel duties of uniform application of EU competition law that national courts and authorities have under Article 16 of Regulation 1/2003.

As seen in the empirical results, national courts do already – in great part – comply with (recognize by means of explicit agreement or disagreement) supranational soft law instruments. In this way,

[103] Case C-226/11 *Expedia Inc. v. Autorité De La Concurrence and Others* [2011] Court Reports-General, Opinion of AG Kokott, para. 39.
[104] Those two avenues can be found in footnote40 of AG Kokott's Opinion in the Expedia case (n 103).
[105] In her work, van Dam (n 19) proposes precisely the adoption of national-level guidelines to solve the problem of the legitimacy of the supranational ones.
[106] Senden (n 8), 26.

they further inter-institutional dialogue on the direction of EU competition law and help the effectiveness- (and consistency-) enhancing function of soft law as described by Snyder. What national courts never do, however, is motivate their deviation when they opt for explicit rejection of the said instruments – as argued above, this attitude hampers dialogue and it is precisely here that the 'comply or explain' principle can nudge outright judicial rejection and convert it into motivated disagreement. In this way, the 'rejection' category will give way to 'recognition by means of disagreement', the latter being a significantly better option from the perspectives of effectiveness and consistency. The 'comply or explain' logic – by its emphasis on transparent motivation – can also work towards making explicit the currently implicit 'persuasion' and 'neglect' attitudes that national courts seem to exhibit. In this line of argumentation, it is important to emphasize that national courts – much as administrative authorities – operate under an obligation to motivate the legal grounds on which they take their decisions and the reasoning used in that regard.[107] In that sense, there is an alignment between the requirement of transparency embedded within the 'comply or explain' principle and the obligation for justification of national judicial decisions stemming from national law. This further enhances the potential of the 'comply and explain' logic as a tool for inter-institutional communication.

b) Duties on supranational courts

In order for inter-institutional dialogue to be furthered in the interest of effectiveness, consistency and certainty, supranational courts should also be subject to the same duty of interpretation as their national counterparts – namely, 'comply or explain'. In other words, if different standards as to engagement with competition soft law are applied by national and supranational courts, effectiveness but also certainty and consistency in enforcement are undermined. Especially in light of the above-identified important vertical feedback loop by means of the preliminary reference procedure, and given the scarcity of interactions between the Commission and national courts under Regulation 1/2003, a common standard for judicial engagement with Commission-issued competition soft law is warranted. Otherwise, by using laxer standards of interpretation for soft law, the CJEU risks undermining the effectiveness and consistency-securing function of the preliminary reference route.

[107] I. Opdebeek, S. de Somer et al., 'Duty to Give Reasons in the European Legal Area: a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law', 2 (DOI:10.4467/24497800RAP.16.001.5094).

The use of a uniform standard for engagement with supranational competition soft law is also prompted by the principle of community loyalty that works hand-in-hand with effectiveness as established above. Although Article 4(3) TEU is drafted as imposing a top-down obligation of sincere cooperation on Member States only, case law over the years has confirmed that the same obligation applies bottom-up with equal force as argued by Mortelmans.[108] In this sense, the institutions of the EU – and the CJEU in particular – can and should be held to the same standard as national courts when it comes to engagement with Commission-issued competition soft law. Another argument in the same vein can be made on the basis of the principles of subsidiarity and proportionality as suggested by Senden. Given that soft law reflects the impetus of the Union for better regulation made closer to the citizen, 'one can argue that the Court should take account of, for instance, a decision of the legislature to use soft law rather than hard law for reasons of subsidiarity and proportionality.'[109] Although the legislature is not involved in the drafting of supranational competition soft law, an argument on the basis of subsidiarity and proportionality can also be made in light of the Commission's role as the enacting institution in the context of decentralization of competition enforcement. In particular, the point can be made that the increased importance of soft law in the field is largely due to decentralization, which was – among others – motivated by an appeal to the latter two principles.[110] In taking due notice of competition soft law, thus, the CJEU can be seen as answering to the demands of subsidiarity and proportionality in the decentralized EU competition enforcement model.

c) Duties on the European Commission

Lastly, the European Commission – as the drafter of supranational competition soft law – is the primary agent responsible for securing the effectiveness, and the certainty- and consistency-enhancing functions of the said instruments. As already established in Section 1 above, since the Commission is situated at the apex of EU Competition Policy under an enforcement, and not under a legislative mandate, the output it produces – its decisional practice – is subject to procedural rule of law guarantees. Its soft law output, insofar as it reflects the latter decisional practice, should also not be subject to classical legality tests. In order to further the above principles of effectiveness, certainty and consistency, instead, supranational competition soft law should be engaged with in a spirit of

[108] K. Mortelmans, 'The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions'(1998) 5 Maastricht Journal of European and Comparative Law, 67.
[109] Senden (n 8), 414.
[110] C.D. Ehlermann, 'The Modernization of EC Antitrust Policy. A Legal and Cultural Revolution' EUI Working Paper No. 2000/17, available at <https://www.peacepalacelibrary.nl/ebooks/files/00_17.pdf>.

dialogue and cooperation, whereby the 'comply or explain' principle serves as a vehicle for motivated deviation.

For this model to function, soft law rules that are proposed by the Commission need to be constantly and consistently endorsed by the drafting institution in its decisional practice and on appeal in courts of law. Because this latter condition was not fulfilled with regard to the Guidance Paper – the Commission was not assertive enough of its guidance before the GC in the *Intel* case– the Guidance Paper is now largely dismissed as an instrument that can inform the debate on a 'more economic' reading of Article 102 TFEU. This trend of credibility loss can also transfer to other soft law instruments – a point of interest in that regard is the currently pending preliminary reference case *Coty Germany* that deals with the interpretation of paragraph 54 of the Commission's Vertical Guidelines – another Commission-introduced innovation.[111] The danger in this line of cases lies in the fact that – should the Commission fail to convince the CJEU of its approach – the latter will likely go in a different direction, thus creating an alignment between itself and national courts and undermining the Commission's policy initiative in the competition domain. In light of the enforcement mandate of the Commission given to it under the Treaties, this is certainly not a desirable development.

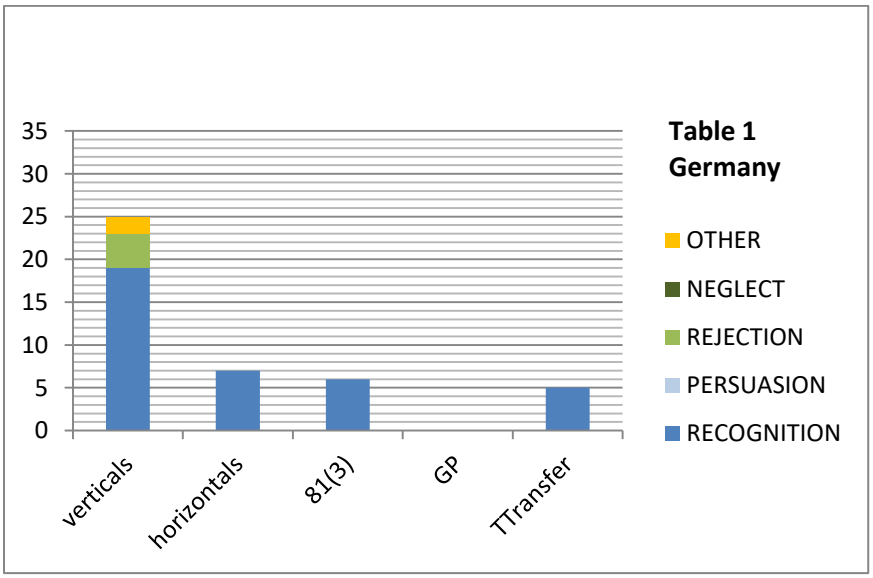
IV. Concluding Remarks

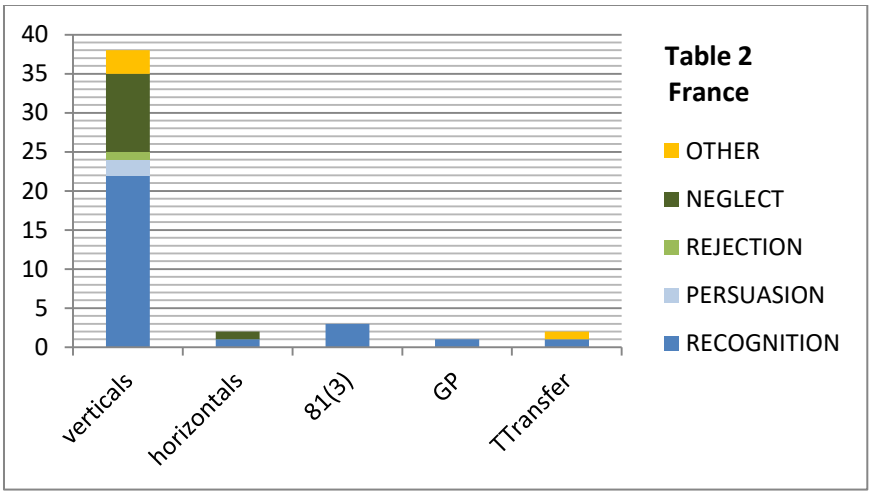
By way of conclusion, it is argued that this study showed that there is a range of techniques that the judiciaries of the jurisdictions under observation use in order to engage with Commission-issued competition soft law. National courts are not agnostic to hybrid interpretation of soft law together with hard law, by which means judicial recognition is achieved. However, when faced with soft law not strictly following established hard law principles, national judges tend to shy away from creative interpretations, this attitude resulting in judicial rejection of the said instruments that reflects the gap thesis proposed by Scott and de Burca. These different judicial attitudes are clearly contradictory and thus incompatible; what is more, their cohabitation in the same enforcement system (the EU) is certainly not compatible with the principles of effectiveness, enforcement consistency and legal certainty that were taken as the normative points of departure for this study. In order to further those goals, therefore, a more structured and internally consistent judicial approach towards Commission-issued competition soft law is warranted.

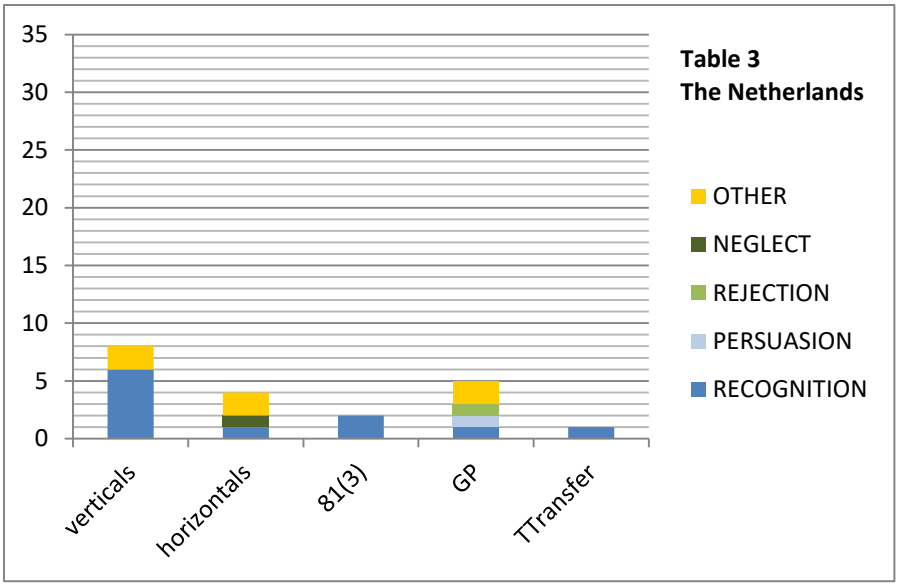
[111] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* (information not yet available).

In that respect, it was argued that the 'comply or explain' principle as articulated in paragraph 39 of AG Kokott's Opinion in the *Expedia* case can be used as an anchor for the achievement of better alignment in national and supranational (judicial) attitudes to Commission-issued competition soft law. Whether national and supranational enforcement agents are prepared to embrace such an obligation in the name of more effective and certain (in its fiduciary sense) enforcement is yet to be established by further studies.

ANNEX 1. JUDICIAL ATTITUDES TO SOFT LAW PER JURISDICTION



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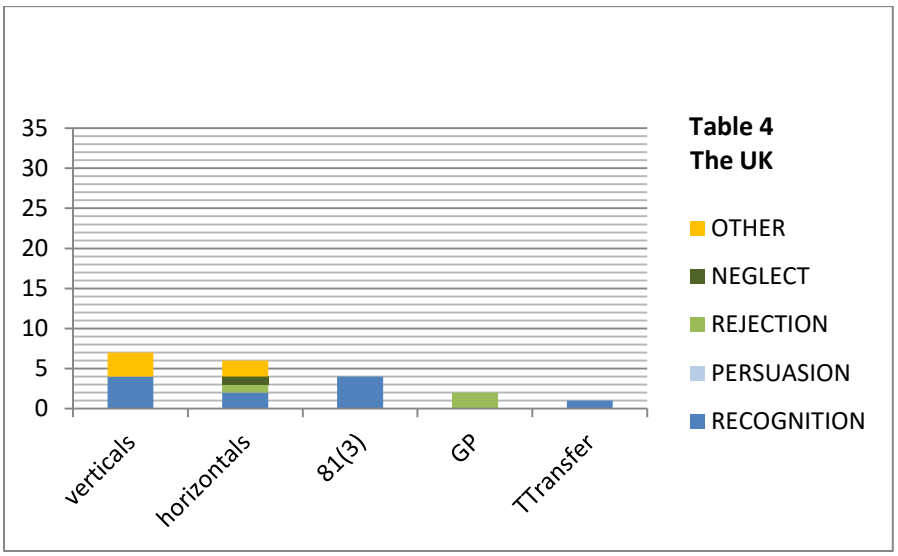
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CONCLUDING REMARKS

1. Scope of the project

This thesis set out to examine the ways in which, and the reasoning on the basis of which, national courts engage with Commission-issued soft law in the field of EU competition law, in the aftermath of its decentralization. This descriptive question was prompted by the important consistency- and certainty-enhancing role that soft law, while legally non-binding, is meant to play in the current institutional design of competition enforcement. In particular, the objective was to ascertain the extent to which certainty and consistency in a decentralized enforcement system could indeed be secured by means of non-binding instruments. The intuition was that the discrepancy between the practical effects that soft law produces and its concomitant but underexplored legal effects, could prove to be detrimental for the main institutional actors (from a legal certainty perspective) and for the revamped system as a whole (from a consistency perspective). In this setup, national courts became the research focus since they, as final decision-making instances within their respective jurisdictions, are uniquely positioned to shape the legal fate of supranational competition soft law and thus promote the objectives of certainty and consistency.

To the extent that the expected discrepancy materialized in the empirical findings, it was ventured that – from a normative point of view – consistency and certainty could be restored by means of judicial engagement with soft law instruments on the basis of a single standard – the 'comply or explain' principle. The normative point of departure for this work, therefore, is the view that legal effects of competition soft law should be ultimately acknowledged in national courts of law and that this should happen in an aligned fashion – namely, by the usage of the same standard of interpretation. This idea was developed with several caveats in mind: 1) by attaching legal effects to competition soft law instruments national courts do not convert them into hard law; 2) competition soft law is a regulatory tool that is necessary for the effective functioning of a decentralized, dynamically evolving and technical field such as competition law; 3) competition soft law is not meant to serve as a substitute to legislation nor is it meant to be 'hard law in disguise'. In this sense, supranational competition soft law is seen as an important dialogue-enhancing tool in a multi-level enforcement setting that – in order to achieve its intended aims – needs to be judicially interpreted (engaged with) in a consistent manner. The research scope introduced above was approached by the means of a comparative methodology and the utilization of a theoretical approach embedded in new governance literature.

2. Setup and Research Results

Setup

The project was set up as a comparative study, whereby national judicial responses to supranational competition soft law were studied through the lens of several scenarios prompted by the 'gap, hybridity and transformation' theory of Scott and de Burca as juxtaposed with the idea of the divide between a flexible (pluralist, constructivist) versus a formalist (positivist, realist) role of courts. In particular, four scenarios for possible judicial reactions to supranational soft law emerged: a recognition scenario, a persuasion scenario, a rejection scenario and a neglect scenario. The first two scenarios can be seen as belonging to an overall 'recognition' category, while the latter two can be included in a broader 'refusal of recognition' category. While recognition would presuppose either explicit or implicit judicial engagement with the content of competition soft law instruments, refusal of recognition would signify that courts avoid to recognize such instruments in their decisions either by explicitly stating this or by ignoring the proposed applicability of soft law by a party to a dispute. From the normative angle of this work (to be described below), the recognition category (recognition and persuasion scenarios) furthers consistency and certainty by allowing a judicial dialogue about the value/legal effects of soft law in the decentralized competition enforcement system, while the refusal of recognition category (rejection and neglect scenarios) severs this dialogue and is therefore sub-optimal from the perspectives of consistency and certainty.

Research Results

In the empirical-comparative Chapters 2 and 3 it transpired that – indeed – national courts were not oblivious to the existence of a legal dimension to soft law instruments and, under the appropriate conditions, were willing to grant legal effects.

Several avenues through which judicial recognition of soft law happens were identified. Firstly, the so-called 'hybrid' interpretation of soft law together with hard law to which it pertains constitutes the most frequent type of judicial recognition of soft law. A variation of this type of recognition is the so-called 'stand-alone' use of soft law, whereby courts do not shy away from citing directly and exclusively to a certain soft instrument when it summarizes rules already well established in previous hard law. In that sense, it was maintained that the observed hybridity acknowledged by national courts points to their recognition of the Commission's broad mandate to steer EU competition policy

as expressed in its soft law, while also not losing sight of the hard legal framework that comprises the backbone of the enforcement regime.

Secondly, although it was initially expected that general principles of EU law listed under Chapter 1 would play a significant role in the judicial recognition of soft law, this was only the case to a limited extent. In particular, only the principle of community loyalty (Article 4.3 TEU) as embodied in specific consistency obligation of Article 3 of Regulation 1/2003,[1] could anchor judicial discourse on supranational competition soft law. In that regard it was also noted that, in jurisdictions such as the UK and the Netherlands where a specific national-level obligation for convergence with EU competition law existed, the latter was used by courts to anchor discussion of supranational soft law instruments. A similar development was not observed with regard to the other principles discussed in Chapter 1 – namely, legal certainty and equality. Legal certainty, as initially discussed in Chapter 1, is indeed – as argued by Senden – a principle that can be invoked solely vis-à-vis the drafter of the relevant rules in question and can therefore not be used with regard to supranational competition soft law in a purely national dispute (with no connection to the European Commission). However, when a certain supranational competition soft law instrument is incorporated into a national legal system (such as the Article 101(3) Guidelines for the Netherlands), the national principle of legitimate expectations will apply to it.[2] Instances of the latter type were noted with regard to the Article 101(3) Guidelines in the Netherlands. Similarly to the supranational principle of legal certainty, the principle of equality was also not invoked by national courts as a principle of EU law anchoring the legal effects of supranational competition soft law.

With regard to judicial neglect and rejection to interpret soft law instruments, it transpires that these attitudes manifest themselves in judicial discourse when (1) a soft law instrument can potentially serve as the *ratio decidendi* of a dispute or (2) soft law deviates from, or adds to, rules and principles already enshrined in hard law. These scenarios were observed with regard to (1) the Horizontal Guidelines and (2) the Guidance Paper and paragraph 54 of the 2011 Vertical Guidelines, respectively. The refusal to interpret in the first case relates to the strict distinction that the judiciary

[1] On the principle of community loyalty, see K. Mortelmans, 'The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions' (1998) 5 Maastricht Journal of European and Comparative Law. See also J. Temple Lang, 'Article 10 EC – the Most Important 'General Principle' of Community Law' in Bernitz et al (eds.) *General Principles of EC Law in the Process of Development* (Kluwer, 2008).

[2] In that case, the principle of legitimate expectations will apply toward the National Competition Authority and not the Commission. For a more detailed account on this phenomenon, see D. Sarmiento, 'European Soft Law and National Authorities: Incorporation, Enforcement and Interference' in Strangas/Flauss (eds.) *Das Soft Law der Europäischen Organisationen* (Baden-Baden: Nomos, 2012).

makes between binding and non-binding rules, with only the former having the ability to inform the *ratio* of a judgment. In the second case, rejection can be explained by the fact that national courts are either (1) not sure how to engage with new rules not yet 'tested in battle' in competition proceedings or before the CJEU, such as paragraph 54 of the Vertical Guidelines or (2) unwilling to give legal effect to rules that seem to deviate from established hard law, such as the Guidance Paper. In cases pertaining to the latter two scenarios, as observed in Chapter 4, the danger of mutually inconsistent interpretations of the same soft law provision is the highest. In that sense, and as demonstrated by the online sales bans case study (paragraph 54 of the Vertical Guidelines) in Chapter 3, when soft law fails to secure consistent outcomes at national level, the classical road of the preliminary ruling procedure is always open. However, empirical studies show that not many national cases make it to that stage.[3] Thus, unless the number of preliminary references in that regard increases significantly, national courts do need a common approach to tackling the issue of the legal effects of soft law in competition law. This issue was further elaborated on in the normative part of this work.

3. Normative insights and conclusions

In Chapter 4, the idea was introduced that in the domain of EU competition law, where the so-called 'adjudicative model' – as opposed to the 'legislative model' – prevails, the concerns of certainty and consistency have to be addressed in the context of the principles of effectiveness and fairness. In this sense, the fiduciary view of legal certainty was introduced, whereby certainty is achieved when subjects of the law can reasonably rely on the fact that authorities will respect their expectations that a certain set of rules will be applied to their situation. This view accords with the purposive, functional conception of law as means to an end embedded in the effectiveness principle. Seen from this angle, consistency is also not to be viewed as a complete alignment of outcomes, but as an alignment of judicial attitudes towards supranational competition soft law. In that sense, while it is admitted that complete convergence in outcomes is untenable, contradictory treatment of the same soft law instrument – for instance rejection and recognition– is seen as problematic from the perspective of certainty and consistency. Therefore, a common standard for judicial engagement with competition soft law that is particularly well-aligned with the effectiveness demands of fast-paced and highly technical regulatory domains such as competition, was proposed – namely, the 'comply or explain' principle. It was further argued that this principle will impose certain duties not

[3] B. Rodger, 'Article 234 and Competition Law: A Comparative Analysis' (2008) 15 Maastricht Journal of European and Comparative Law.

only on national courts, but on all enforcement actors in the decentralized competition regime. These duties were examined in turn and will be presented in a summary form here.

With regard to the national level, and national courts in particular, it was argued that the 'comply or explain' principle as introduced by AG Kokott in paragraph 39 of her Opinion in the *Expedia* case would impose a strong duty of national judicial engagement with soft law.[4] The 'comply or explain' standard, by requiring explicit motivation of a court's reasons for (dis)engaging with supranational competition soft law, can nudge outright judicial rejection and convert it into motivated disagreement. In this way, the 'rejection' category will give way to 'recognition by means of disagreement', the latter being a significantly better option from the perspectives of effectiveness and consistency as defined above. When it comes to national authorities, it was maintained that they should be under the same obligation to engage with soft law as national courts on the basis of Article 16 of Regulation 1/2003.

With regard to the supranational level, and the CJEU in particular, it was maintained that considerations of effectiveness, community loyalty and even subsidiarity and proportionality, would require that supranational courts adopt the same standard of interpretation of soft law as their national counterparts. Otherwise, Commission-issued soft law for the CJEU would have a status similar to that of foreign law to national highest courts[5] – they can use it opportunistically when it helps them to support an argument they want to make and completely neglect it in other scenarios. As argued in Chapter 4, such an attitude is not acceptable in the highly institutionalized EU competition law field, where the demands of consistency and certainty militate against arbitrariness. When it comes to duties that have to apply to the Commission when it issues soft law, it was argued that if supranational soft law is to contribute to the fostering of consistency and legal certainty in the decentralized enforcement system, the Commission needs to firmly stand behind its output. The very essence of soft law that makes it suitable for consistently furthering the debate in EU competition policy is its ability to cogently navigate through the existing hard law while at the same time filling in the missing substantive base that the Commission encapsulates therein pursuant to its discretion in the field. By not being able to be judicially recognized, sometimes due to the Commission's weak support of its own output – as in the case of the Guidance Paper – Commission soft law loses its

[4] Case C-226/11 *Expedia Inc. v. Autorité De La Concurrence and Others* [2011] Court Reports-General, Opinion of AG Kokott, para. 39.

[5] E. Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford: Hart Publishing, 2013).

consistency-enhancing power. It is this very conundrum that the European Commission needs to have in mind when envisioning its next guideline, notice and/or communication in the competition field.

4. Summary

This work set out to descriptively examine the ways in which and the reasoning on the basis of which national courts engage with the contents of Commission-issued soft law in the field of competition law. In that respect, a theoretical framework for national judicial engagement with soft law was proposed in Chapter 1. In Chapter 2, a normative claim was made that a flexible national judicial attitude to Commission soft law that comes down to judicial recognition of the said instruments would be one avenue through which consistency and legal certainty in the decentralized competition enforcement system could be achieved. For judicial recognition to happen, however, there must be instances in which national courts are prepared to attribute legal effects to Commission-issued competition soft law. Therefore, Chapter 3 set out to survey empirically how courts attribute legal effects to competition soft law in France in Germany, while its counterpart – Chapter 2 – did the same for the UK and the Netherlands. Having explored the legal effects that soft law produces in the jurisdictions under observation and having surveyed the implications the observed outcomes have for enforcement consistency and certainty, this work acknowledged the need for a common and consistent judicial approach to supranational competition soft law. Chapter 4, basing itself on the empirical findings and further theoretical literature, explored the latter suggestion in greater depth and concluded that, in order for consistency and certainty to be furthered, not only national courts, but all actors engaged in competition enforcement should consider adopting the 'comply or explain' approach when engaging with the contents of supranational competition soft law. This suggestion opens up further avenues for empirical research that will be briefly sketched below.

5. Further avenues for research

While studying national judicial attitudes to supranational competition soft law certainly opens up one possible avenue of inquiry into the legal effects (value) of those instruments at the national level, surveying how the rest of the competition enforcement actors engage with those instruments is also of paramount importance and can offer a more complete image of the enforcement landscape. In particular, what merits further surveying is the way in which National Competition Authorities handle

supranational soft instruments, the aim being to identify discrepancies or convergence between the administrative and judicial approaches to soft law at the national level.

In the same vein, the 'soft' output of National Competition Authorities acting as a network with the aim to enhance cooperation and coordination also merits attention. Although this issue has already been subject to intense scholarly debate, more and more instruments with questionable legal dimension are produced by the said network. In particular, one could point to the Report on the Monitoring Exercise Carried out in the Online Hotel Booking Sector by EU Competition Authorities in 2016[6] that was issued in the aftermath of serious inconsistencies in the treatment of 'Most-Favored-Nation' clauses across jurisdictions. What can the persuasive value of such an instrument be and does it have the potential to produce legal effects in courts of law are issues that certainly merit further attention.

[6] European Competition Network, 'Report on the Monitoring Exercise Carried out in the Online Hotel Booking Sector by EU Competition Authorities in 2016, available at <http://ec.europa.eu/competition/ecn/index_en.html>.

LITERATURE REVIEW

Abbott K & Snidal D, Hard and Soft Law in International Governance, 54 Int'l Org. 421, 447 (2000)

Akman P, *The Concept of Abuse in EU Competition Law* (Hart Publishing 2012)

Akman P, 'The European Commission's Guidance on Article 102 TFEU: from Inferno to Paradiso?'73(4) Modern Law Review (2010)

Baarsma B and Noll Rvd, 'Is Misbruik Machtspositie een Blinde Vlek in het Nederlandse Mededingingstoezicht?' (2013) 3 Tijdschrift Mededingingsrecht in de Praktijk 121

Bakker RE and Stoink FAM, "Epilogue" 1 Maastricht Journal of European and Comparative Law (1994)

Baldwin R and Houghton J, 'Circular Arguments: the Status and Legitimacy of Administrative Rules' (1986) Public Law

Berrod F, "L'utilisation de la soft law comme méthode de conception du droit europeén de la concurrence" (2015) 588 Revue de l'Union Europeéne

Blanco LO and de Pablo AL, "Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases" in J. Derenne and M.Merola (eds.), The Role of the Court of Justice of the European Union in Competition Law Cases (Bruylant, 6th Annual GCLC Conference)

Bok AJ, "Policy Rules in German Law" 1 Maastricht Journal of European and Comparative Law (1994)

Borchardt G and Wellens K, 'Soft Law in European Community Law' (1989) 14 European Law Review 267

Boskovits K, 'Modernization and the Role of National Courts: Institutional Choices, Power Relations, and Substantive Implications' in Lianos I and Kokkoris I (eds), *The Reform of EC Competition Law*, vol 41 (The Reform of EC Competition Law, Kluwer Law International 2010)

Bourgeoius and Bocken, 'Guidelines on the Application of Article 81(3) of the EC Treaty or How to Restrict a Restriction?' 32(2) Legal Issues of Economic Integration (2005)

Brink JEvd and Dam JCAv, 'Nederlandse Bestuursrechters en Unierechterlijke "Beleidsregels"' (2014) Juni JB Plus

Bröring HE, "Administrative Rules in British Law" 1 Maastricht Journal of European and Comparative Law (1994)

Broring HE and Geertjes GJA, 'Bestuursrechtelijke Soft Law in Nederland, Duitsland en Engeland' (2013) 4 Nederlands Tijdschrift voor Bestuursrecht 74

Bussani M and Mattei U, 'The Common Core Approach to European Private Law' (1996-1997) 3 Columbia Journal of European Law 339

Camesasca P and Schmidt A, 'New EC Horizontal Guidelines: Providing Useful Guidance in the Highly Diverse and Complex Field of Competitor Cooperation and Information Exchanges' (2011) 2 Journal of European Competition Law and Practice 227

Cassinis and Gerber, 'The "Modernization" of European Community Competition Law: Achieving Consistency in Enforcement: Part 1' 27(1) European Competition Law Review (2006)

Cengiz F, 'Multi-level Governance in Competition Policy: the European Competition Network' (2010) 35 European Law Review 660

Chinkin C, The Challenge of Soft Law: Development and Change in International Law, 38 Int'l & Comp. L. Q. 850, 856 (1989)

Cini M, The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime, 8 J. Eur. Pub. Pol'y (2001)

Claes/de Visser, "Courts United? On European Judicial Networks" in de Witte/Vauchez (eds.), Lawyering Europe: European Law as a Transnational Social Field (2013, Oxford/Hart)

Colomo PI, 'Three Shifts in EU Competition Policy: towards Standards, Decentralization, Settlements' (2013) 20 Maastricht Journal of European and Comparative Law 363

Cosma H and Whish R, 'Soft Law in the Field of EU Competition Policy' (2003) 14 European Business Law Review 25

Cseres K, ' The Impact of Regulation 1/2003 in the New Member States' 6(2) The Competition Law Review (2010)

Crane D, Rules Versus Standards in Antitrust Adjudication 1 (Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 162, 2006)

Dawson M, 'Three Waves of New Governance in the European Union' (2011) 36 European Law Review 208

Dawson M, Soft Law and the Rule of Law in the European Union: Revision or Redundancy?, in Lawyering Europe: European Law as a Transnational Social Field 221 (Bruno de Witte & Antoine Vauchez eds., 2013)

De Burca G & Scott J, Introduction: New Governance, Law and Constitutionalism, in Law and New Governance in the EU and US 1 (Grainne de Burca & Joanne Scott eds., 2006)
Eliantonio M, 'Effectieve Rechtsbescherming en Netwerken: een Problematische Verhouding' (2011) 59 SEW: Tijdschrift voor Europees en Economisch Recht 116

De Vries, Y et al., 'Verticale Prijsbinding geen Prioriteit? Elders Wel' ('Vertical Price Fixing not a Priority? Elsewhere it is one'), 2 Actualiteiten Mededingingsrecht (2010)

Everson M, The Crisis of Indeterminacy: An Equitable Law of Deliberative European Market Administration?, in Good Governance in Europe's Integrated Market

Fekete B, 'Raising Points of Law on the Court's own Motion? Two Models of European Legal Thinking' (2014) 21 Maastricht Journal of European and Comparative Law 652
Finnemore M and Toope S, Alternatives to Legalization: Richer Views of Law and Politics, 55 (3) International Organization 743, 749 (2001)

Ferré D, 'Le Point de Vue d'un Avocat' 3 Concurrences (2010)

Feteira LT, The Interplay between European and National Competition Law after Regulation 1/2003: "United (Should) We Stand?" (64th International Competition Law Series Volume, Kluwer Law International, 2015)

Fletcher A and Hviid M, 'Retail Price MFNs: are they RPM "at its Worst"', CCP Working Paper 14-5 (2014)

Forwood N, 'The Commission's More Economic Approach – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review' in Ehlermann/Marquis (eds.), European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases (Hart Publishing, 2010)

Frese MJ, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014)

Furse M, *Competition Law of the EC and UK* (Sixth Edition edn, OUP 2008)

Gerber D and Cassinis P, 'The "Modernization" of European Community Competition Law: Achieving Consistency in Enforcement: Part 1' (2006) 27 European Competition Law Review 10

Gerber D, "Two Forms of Modernization in European Competition Law" (2007) 31(5) Fordham International Law Journal

Gerstenberg O & Sabel C, Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?, in Good Governance in Europe's Integrated Market 289 (Christian Joerges & Renaud Dehousse eds., 2002)

Gormley L, Some Further Reflections on the Development of General Principles of Law within Art. 10 EC, in General Principles Of EC Law In The Process Of Development, 303 (Ulf Bernitz et al. eds., 2008)

Gormsen L, 'Are Anti-Competitive Effects Necessary for an Analysis under Article 102 TFEU?' 36(2) World Competition (2013)

Gormsen L, 'Why the European Commission's Enforcement Priorities on Article 82 EC should be Withdrawn?' (2010) 31 European Competition Law Review 45

Graells A, Soft Law and the Private Enforcement of the EU Competition Rules, in International Conference on the Private Enforcement of Competition Law 1 (2010)

Greene H, 'Guideline Institutionalization: the Role of Merger Guidelines in Antitrust Discourse' (2006) 48 William and Mary Law Review 771

Groussot X & Lidgard H, Are There General Principles of Community Law Affecting Private Law?, in General Principles Of EC Law In A Process Of Development (Ulf Bernitz et al. eds., 2008)

Hancher and Lugard, 'Honey, I shrunk the Article! A critical assessment of the Commission's Notice on Article 81(3) of the EC Treaty'25(7) European Competition Law Review (2004)

Hamm C, 'The Netherlands' in Davey L and Holmes M (eds), *A Practical Guide to National Competition Rules Across Europe* (A Practical Guide to National Competition Rules Across Europe Kluwer 2004)

Herlin-Karnell E and Konstadinides T, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' in Barnard C (ed) *Cambridge Yearbook of European Legal Studies* (Cambridge Yearbook of European Legal Studies, Hart 2013)

Hillgenberg H, A Fresh Look at Soft Law, 10 (3) Eur. J. Int'l L. 499, 513–14 (1999)

Hofmann H, Negotiated and Non-Negotiated Administrative Rulemaking: The Example of EC Competition Policy, 43 Common Mkt. L. Rev. 153, 165 (2006)

Howells G, Soft Law in EC Consumer Law, in Lawmaking In The EU (Craig and Harlow eds., 1998)

Idot L, 'À Propos de L'Internationalisation du Droit: Réflexions sur la Soft Law en Droit de la Concurrence ' in Collectif (ed) *Vers de Nouveaux Équilibres entre Ordres Juridiques : Liber Amicorum Hélène Gaudemet-Tallon* (Vers de Nouveaux Équilibres entre Ordres Juridiques : Liber Amicorum Hélène Gaudemet-Tallon, Dalloz 2008)

Idot L, 'How has Regulation 1 Affected the Role and Work of NCAs?', 1 Concurrences (2014)

Idot L, 'Private Enforcement of Competition Law – Recommendations Flowing from the French Experience', in Basedow (ed.), Private Enforcement of EC Competition Law (Kluwer, 2007)

Kallmayer A, 'Die Bindungswirkungen von Kommissionsmitteilungen im EU-Wettbewerbsrecht – Mehr Rechtssicherheit durch Soft Law'), in C.Calliess (ed.), Herausforderungen an Staat und Verfassung: Völkerrecht – Europarecht – Menschenrechte (Nomos, 2015)

Kerkmeester H, "Economic evidence in competition law: the experience from a National Administrative Court" in M. Kovac et al. (eds.), Economic evidence in competition law (Intersentia, 2016)

Killick J and Komninos A, 'A Missed Opportunity: Why the Guidance Paper does not Increase Predictability or Advance the Debate' (2009) 2 Concurrences Review 23

Kirchner C, 'Goals of Antitrust and Competition Law Revisited' in D. Schmidtchen, M. Albert & S. Voigt (eds.), The More Economic Approach to European Competition Law (Tübingen: Mohr Siebeck)

Kjolbye L, 'The new Commission guidelines on the application of Article 81(3): an economic approach to Article 81' 25(9) European Competition Law Review (2004)

Klabbers J, Informal Instruments Before the European Court of Justice, 31 Common Mkt. L. Rev. 997, 1016 (1994)

Klabbers J, Institutional Ambivalence by Design: Soft Organizations in International Law, 70 Nordic J. Int'l L. 403, 412 (2001)

Klabbers J, The Undesirability of Soft Law, 67 Nordic J. Int'l L. 381, 391 (1998)

Klabbers J, The Redundancy of Soft Law, 65 Nordic J. Int'l L. 167, 177 (1996)

Kokkoris I, *Competition Cases from the European Union* (Sweet & Maxwell 2008)

Korah V, Intellectual Property Rights and the EC Competition Rules (1st edition, Hart Publishing, 2006)

Korkea-Aho E, Adjudicating New Governance: Deliberative Democracy in the European Union (Routledge, 2015)

Korkea-Aho E, What Is New About New Governance?, 32 Retfærd Argang 3 (2009)

Lavrijssen S et al, 'European and National Standards of Review: Differentiation or Convergence' in Essens et al (eds.), National Courts and the Standard of Review in Competition Law and Economic Regulation (Europa Law Publishing, 2009)

Lehmkuhl D, On Government, Governance and Judicial Review: The Case of European Competition Policy, 28 Int'l Pub. Pol'y (2008)

Lianos/Geradin, Handbook on European Competition Law: Substantive Aspects (Edward Elgar, 2013)

Lugard P and Hancher L, "Honey, I shrunk the article! A critical assessment of the Commission's Notice on Article 81(3) of the EC Treaty" (2004) 25(7) European Competition Law Review

Maher I, "Regulation and Modes of Governance in EC Competition Law: what's New in Enforcement?" (2007) 31(6) Fordham International Law Journal

Maton A and others, 'Update on the Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation' (2012) 3 Journal of European Competition Law and Practice 586

Miasik D, Application of General Principles of EC Law by Polish Courts—Is the European Court of Justice Receiving a Positive Feedback?, in General Principles of EC Law in a Process of Development, 357, 382, 391 (Ulf Bernitz et al. eds., 2008)

Montag F and Janssens T, 'Article 81(3) in the Context of Modernization – A Lawyer's View' in Geradin (ed.), Modernization and Enlargement: Two Major Challenges for EC Competition Law (Intersentia, 2004).

Monti G, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 Journal of European Competition Law and Practice 2

MV, 'Tussen Vorm en Effect' (2009) 3 Actualiteiten Mededingingsrecht 52

Nowak T, National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands (Eleven International Publishing, 2011)

Oderkerk E., 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' 48 (3) NedILR 301.

Oers Mv, 'De NMa zal Handhaven' in Kalfbleisch P and others (eds), *Trust en Antitrust: Beschouwingen over 10 jaar Mw en 10 jaar NMa* (Trust en Antitrust: Beschouwingen over 10 jaar Mw en 10 jaar NMa, Redactiebureau Editor 2008)

Orucu E, 'Methodology of Comparative Law' in Smits J (ed) *Elgar Encyclopedia of Comparative Law* (Elgar Encyclopedia of Comparative Law, Cheltenham 2006)

Ottervanger T, ''The Netherlands'' in Kokkoris I (ed) *Competition Cases from the European Union* (Competition Cases from the European Union, Sweet & Maxwell 2008)

Pace LF, The Impact of the Commission's Guidance on Article 102 (Edward Elgar, 2011)

Pace L.F., 'The Italian Way of Tackling the Abuse of Dominant Position and the Inconsistencies of the Commission's Guidance: not a Notice but a Communication' in Pace (ed.), The Impact of the Commission's Guidance on Article 102(Edward Elgar, 2011)

Panke D, 'Social and Taxation Policies - Domaine Reserve Fields? Member States Non-compliance with Sensitive European Secondary Law' (2009) 31 Journal of European Integration 489

Peeperkorn L and Hederström J, 7(1) Journal of European Competition Law and Practice (2016)

Petit N and Rato M, 'From Hard to Soft Enforcement of EC Competition Law – a Bestiary of "Sunshine" Enforcement Instruments' in Alternative Enforcement Techniques in EC Competition Law (2008)

Petit N, 'The Guidelines on the Application of Article 81(3) EC: A Critical Review', IEJE Working Paper No 4/2009, available at <http://ssrn.com/abstract=1428558> .

Petit and Rabeux, 'Judicial Review in French Competition Law and Economic Regulation' in Essens et al (eds.), National Courts and the Standard of Review in Competition Law and Economic Regulation (Europa Law Publishing, 2009)

Peyre J, 'Rebates: Clearer but not Safer', 2 Concurrences (2009)

Peyer S, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence' 8(2) Journal of European Competition Law and Economics (2012)

Plomp MJ, *Praktijkboek Mededingingsrecht* (Uitgeverij Den Hollander 2009)

Raitio J, The Principle of Legal Certainty as a General Principle of EU Law, in General Principles Of EC Law In A Process Of Development, 47 (Ulf Bernitz et al. eds., 2008)

Rodger B, 'Article 234 and Competition Law: A Comparative Analysis' (2008) 15 Maastricht Journal of European and Comparative Law 149

Rodger B, *Competition law, Comparative Private Enforcement and Collective Redress across the EU* (International Competition Law Series, Wouters Kluwer 2014)

Rodger B, *Ten Years of UK Competition Law Reform* (Dundee University Press 2010)

Rodger B and MacCulloch A, *Competition law and Policy in the EU and the UK* (Routledge 2015)

Sarmiento D, 'European Soft Law and National Authorities: Incorporation, Enforcement and Interference' in Ilianopoulos-Strangas J (ed) *The Soft Law of European Organisations* (The Soft Law of European Organisations, SIPE 2012)

Sabel C & Simon W, Epilogue: Accountability Without Sovereignty, in Law and New Governance in the EU and US 395 (Grainne de Burca & Joanne Scott eds., 2006)

SauruggerS & Terpan F, Resistance to EU Soft Law: A Typology of Instruments 24–25 (May 9, 2013) (unpublished manuscript)

Sauter W, *Coherence in EU Competition Law* (OUP, 2016)

Schauer F, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009)

Schauer F, *Playing by the Rules* 121 (1991)

Schiek D, The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation, 35 (3) Indus. L. J (2006)

Schroeder D, "Normative and Institutional Limitations to a More Economic Approach" in J. Drexl et al (eds.) Competition Policy and the Economic Approach: Foundations and Limitations (Edward Elgar, 2011)

Scott J and Sturm S, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2006) 13 Columbia Journal of European Law 565

Scott J and Trubek D, "Mind the Gap: Law and New Approaches to Governance in the European Union" 8(1) European Law Journal (2002)

Scott J, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law' 48(2) Common Market Law Review (2011)

Seitz C, 'One Step in the Right Direction – the New Horizontal Guidelines and the Restated Block Exemption Regulations' 2(5) Journal of European Competition Law and Practice (2011)

Senden L, Soft Law and its Implications for Institutional Balance in the EC, 1 Utrecht L. Rev. 79, 93 (2005)

Senden L, *Soft Law In European Community Law (Its Relationship To Legislation)* (Hart Publishing 2004)

Shaffer and Pollack 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review

Sharpston E, Legitimate Expectations and Economic Reality, 15 Eur. L. Rev. (1990)
Sinclair D, 'Counterfactuals – a Shift in the Burden/Standard of Proof' (2010) GCR Antitrust Litigation Conference 2010

Slepcevic R, 'The Judicial Enforcement of EU Law through National Courts: Possibilities and Limits' (2009) 16 Journal of European Public Policy 378

Snyder F, 'Soft Law and Institutional Practice in the European Community' in Martin S (ed) *The Construction of Europe* (The Construction of Europe, Springer 1994)

Snyder F, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, 56 Mod. L. Rev. 19, 33 (1993)

Stefan O, European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects Mod. L. Rev.

Stefan O, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (2012)

Stefan O, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance' (2014) 21 Maastricht Journal of European and Comparative Law 359

Stone-Sweet A, Constitutional Politics: The Reciprocal Impact of Lawmaking and Constitutional Adjudication, in Lawmaking In The European Union (Paul Craig & Carol Harlow eds., 1998)
Stone-Sweet A, The European Court of Justice and the Judicialization of EU Governance, 5 (2) Living Revs. in Eur. Governance 5 (2010)

Temple-Lang J, Art. 10 EC—The Most Important "General Principle" of Community Law, in General Principles of EC Law In the Process of Development (Ulf Bernitz et al. eds., 2008)

Terhechte J, 'Administrative Discretion and Judicial Review in Gemany' in in Essens et al (eds.), National Courts and the Standard of Review in Competition Law and Economic Regulation (Europa Law Publishing, 2009)

Terpan F, Soft Law in the European Union: The Changing Nature of EU Law 1 (Sci. Po Grenoble, Working Paper No. 7, 2013)

Tousis A, 'New De Minimis Communication: 'De Minimis' and 'by Object' Restrictions of Competition Law' 5 (10) Journal of European Competition Law and Practice (2014)

Tridimas, T., The General Principles of EC Law 163 (1999)

Trubek D, Cottrell P & Nance M, Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity 1, 3 (Univ. of Wis. Legal Studies, Working Paper No. 1002, 2005)

Trubek D & Trubek L, The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?, in Annual Meeting of the Research Committee on the Sociology of Law 1 (2005)

Trubek L and Trubek D, "New Governance and Legal Regulation: Complementarity, Rivalry or Transformation" (2007) Columbia Journal of European Law

Usher J, *General Principles of EC Law* (1998)

Usher J, General Principles and National Law—A Continuing Two-Way Process, in General Principles of EC Law In the Process of Development

Vanderbilt A, The Modernization of the Law, 36 Cornell L. Q. 433, 433 (1951) (providing a more philosophical account)

van der Heul, S et al., 'Beperking van Onlinedistributie van Merkproducenten, waar Liggen de Grenzen?', 7 Tijdschrift Mededingingsrecht in de Praktijk (MP) (2014)

van der Sluijs J, 'Soft Law – an International Concept in a National Context' 58 Scandinavian Studies in Law (2013), 285

van de Walle de Ghelcke,B. 'Modernization: Will it Increase Litigation in the National Courts and Before National Authorities?' in Geradin (ed.), 'Modernization and Enlargement: Two Major Challenges for EC Competition Law' (Intersentia, 2004), 137

van Roermund B, *Legal Thought And Philosophy: What Legal Scholarship is All About* (2013)

Vincent C, 'La Force Normative des Communications et Lignes Directrices en Droit Européen de la Concurrence' in Thibierge C (ed) *La Force Normative: Naissance d'un Concept* (La Force Normative: Naissance d'un Concept, Bruylant 2009)

Vogel L, *Droit de la Concurrence* (Bruylant, 2015)

Vogel L, 'The Recent Application of European Competition Law to Distribution Agreements: a Return to Formalism?', 6(6) Journal of European Competition Law and Practice (2015)

Walker N, EU Constitutionalism and New Governance, in Law and New Governance in the EU and US 15 (Grainne de Burca & Joanne Scott eds., 2006)

Weiss W, 'After Lisbon, can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?' (2011) 2 Journal of European Competition Law and Practice 441

Whish R, 'The Role of the OFT in UK Competition Law' in Rodger B (ed) *Ten Years of UK Competition Law Reform* (Ten Years of UK Competition Law Reform, Dundee University Press 2010)

Whish R, 'National Competition Law Goals and the Commission's Guidance on Article 82 EC: the UK Experience' in Pace LF (ed) *European Competition Law: the Impact of the Commission's Guidance on*

Article 102 (European Competition Law: the Impact of the Commission's Guidance on Article 102, Edward Elgar Publishing 2011)

Whish R, 'Intel v Commission: Keep Calm and Carry on!' (2015) 6 Journal of European Competition Law and Practice 1

Whish R and Bailey D, *Competition Law* (Sixth Edition edn, OUP 2009)

Whish/Bailey, 'Regulation 330/2010: the Commission's New Block Exemption for Vertical Agreements' (47) Common Market Law Review (2010), 1757

Wijckmans F and Tuytschaever F, *Vertical Agreements in EU Competition Law* (OUP 2011)

Zweigert and Kotz, *An Introduction to Comparative Law* (OUP, 1998, third edn.)

APPENDICES

APPENDIX 1. TERMS SPECIFIC TO CERTAIN COMMISSION-ISSUED COMPETITION SOFT LAW INSTRUMENTS

In order to create the sample of post-Modernization, soft- law specific terms, the method of triangulation was used. In particular, the following sources were employed: the text of the soft law instruments forming part of this study,[7] scholarly articles analyzing the respective instruments and signaling as to novel approaches and terminology the latter may have adopted,[8] and supranational judgments of the GC and the CJEU serving as a check to the results generated by the first two sources. The search within the supranational judgments database www.curia.eu was done with the terms generated through the cross-checking of the first two types of sources (the actual notices and scholarly articles). If any judgments were found that employed the extracted terms before the Modernization process (before 2003), the term was discounted since its usage pre-Modernization signaled that it was not unique to the Modernization period, and, by implication, also not unique to the soft law instruments forming the object of this study (since the latter were only adopted post-Modernization).

[7] The selection includes: Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45; Communication from the Commission - Notice - Guidelines on the application of Article [101(3)] of the Treaty [2004] OJ C101 p.97 (Guidelines on Article 101.3); Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to vertical agreements [2010] OJ C130 p.1; Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11 p.1; Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice) O.J. 2014 C 291.

[8] For scholarly views, analysis and pinpointing of terms unique to the related notices on horizontal agreements and vertical agreements, see Gunnar Niels et al., *Economics for Competition Lawyers* (OUP, 2011), Chapters 5 and 6 and Whish/Bailey, 'Regulation 330/2010: the Commission's New Block Exemption for Vertical Agreements' (47) Common Market Law Review (2010), 1757. For a discussion on horizontal agreements only, see Claudia Seitz, 'One Step in the Right Direction – the New Horizontal Guidelines and the Restated Block Exemption Regulations' 2(5) Journal of European Competition Law and Practice (2011). For the Guidelines on Article 101.3, see Frank Montag and Thomas Janssens, 'Article 81(3) in the Context of Modernization – A Lawyer's View' in Geradin (ed.), *Modernization and Enlargement: Two Major Challenges for EC Competition Law* (Intersentia, 2004); Lars Kjolbye, 'The new Commission guidelines on the application of Article 81(3): an economic approach to Article 81' 25(9) European Competition Law Review (2004). Hancher and Lugard, 'Honey, I shrunk the Article! A critical assessment of the Commission's Notice on Article 81(3) of the EC Treaty'25(7) European Competition Law Review (2004); Bourgeoius and Bocken, 'Guidelines on the Application of Article 81(3) of the EC Treaty or How to Restrict a Restriction?' 32(2) Legal Issues of Economic Integration (2005); Nicolas Petit, 'The Guidelines on the Application of Article 81(3) EC: A Critical Review', IEJE Working Paper No 4/2009, available at <http://ssrn.com/abstract=1428558> . For the *de minimis* notice, see Andreas Tousis, 'New De Minimis Communication: 'De Minimis' and 'by Object' Restrictions of Competition Law' 5 (10) Journal of European Competition Law and Practice (2014) and Lianos/Geradin, *Handbook on European Competition Law: Substantive Aspects'* (Edward Elgar, 2013)For the 102 Guidance Paper, see Liza Gormsen, 'Are Anti-Competitive Effects Necessary for an Analysis under Article 102 TFEU?' 36(2) World Competition (2013), 232. See also Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Bloomsbury Publishing, 2012); Akman, 'The European Commission's Guidance on Article 102 TFEU: from Inferno to Paradiso?'73(4) Modern Law Review (2010), 605-630; Gormsen (n 56).

The terms thus generated are the following:

Terms (s) unique to 102 Guidance Paper: **'equally efficient competitor (analysis)'; LRAIC; AAC; anti-competitive foreclosure**

Term (s) unique to *de minimis* notice: the percentage categories of **'10%'** – the safe harbor for horizontal agreements and **'15%'**— for vertical ones[9]

Term (s) unique to the 101.3 guidelines: **'consumer pass on' (in that word order)**

Term(s) unique to the guidelines on horizontal agreements: 'age of data'

Term (s) shared by the 101.3 guidelines and the guidelines on horizontal agreements: **'qualitative efficiencies'**

Terms unique to the vertical agreements guidelines: 'online sales'; 'offline sales'; 'upfront access payment'; 'category management agreement'

[9] Since the specific terms used by the *de minimis* notice largely coincide with those used by the Block Exemption Regulations for vertical and horizontal agreements (which are not part of the object of analysis of this study), the choice was made to rely on the 'safe harbor' percentages used by the *de minimis* notice, since those are unique. See, to that effect, the contribution of Frank Montag and Thomas Janssens, 'Article 81(3) in the Context of Modernization – A Lawyer's View' in Geradin (ed.), *Modernization and Enlargement: Two Major Challenges for EC Competition Law* (Intersentia, 2004).

APPENDIX 2. LIST OF CASES PER JURISDICTION

The UK

1. The Racehorse Association and Others v OFT and The British Horseracing Board v OFT [2005] CAT 29

Plaintiff: the Racecourse Association (RCA), the British Horseracing Board (BHB) and entities owning 29 racecourses in Great Britain

Defendant: the OFT

Facts and Arguments: The OFT found that RCA's (and others) collective selling of non-LBO media rights that were then exploited by ATR (Attherace's subsidiary) was against the Chapter 1 prohibition of the UK Competition Act. The collective selling agreement was also held not to fulfill the conditions for exemption under the same provision.

The court's reasoning and use of soft law:

RECOGNITION

This judgment refers to both the Horizontal and the Article 101.3 Guidelines of the European Commission. The references to the Horizontal Guidelines happen exclusively in the submissions of the parties, and the facts stated therein are not in dispute, 'The RCA appellants extract from all this three statements of principle which they say are directly applicable to the present appeal, being principles we do not understand to be in dispute'. Therefore, the Horizontal Guidelines are not reasoned on by the court.

The reference to the Article 101.3 Guidelines, in turn, constitutes a classical reference to soft law in the context of relevant supranational case law – the court outlines the dimensions of the concept 'appreciable effect on competition' on the basis of the *Société Technique Minière* case[1] of the CJEU that is also reflected in the text of the Article 101.3 Guidelines.

[1] Judgment of 30 June 1966, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) C-56/65, EU:C:1966:38.

2. Independent Media Support Ltd v Office of Communications [2008] CAT 13

Plaintiff: Independent Media Support (IMS), competitor of Red Bee (BBCB) on the market for the provision of media access services

Defendant: Ofcom

Facts and Arguments: IMS complained to Ofcom (the UK communications regulator) against contracts entered into by Red Bee for the exclusive supply of access services to the BBC and Channel 4 respectively. In particular, IMS alleged that Red Bee had abused its dominant position by winning the Channel 4 contract on the basis of a below-cost bid. IMS further argued that the term of exclusivity in the Channel 4 contract infringed the Chapter I and Chapter II prohibitions and Articles 101 and 102 TFEU. On these allegations with regard to the Channel 4 contract, the Ofcom adopted a non-infringement decision, which triggered this appeal to the CAT. Before the CAT, IMS argues that Ofcom had incorrectly adopted a non-infringement decision.

The court's reasoning and use of soft law:

RECOGNITION

The court engages with the content of the Vertical Guidelines when they are invoked by the parties to the dispute. IMS uses the said soft law instrument to build its argument that there is an obligation on companies that are not dominant, but fall outside the safe harbors of the VBER, to justify non-compete obligations in their contracts that are longer than a year. Ofcom counters by stating that no presumption of anti-competitiveness exists once a contract exceeds the VBER safe harbors, and that, therefore, it built its challenged decision by relying on supranational case law (emphasis added), and the relevant paragraphs of the Vertical Guidelines. The court, in its assessment of these arguments, relies openly on the provisions of the Vertical Guidelines, basing its reasoning (in an equal proportion) on the guidelines and supranational case law (*Delimitis* and *Société Technique Miniere*).[2] This seems to be an instance of explicit engagement with soft law interpreted together with case law. With regard to a different claim adduced by the plaintiff, the court also refers to the Article 101.3 Guidelines, which seems to be an own-initiative, stand-alone reference. IMS maintains

[2] Ibid. and Judgment of 28 February 1991, Stergios Delimitis v Henninger Bräu AG C-234/89, EU:C:1991:91.

that the Ofcom 'recycled' its earlier dominance analysis of one and the same contract for the purposes of analyzing that contract (at a later stage) under Article 101. In setting the scene for his response, and on his own initiative, it seems, the judge cites paragraph 26 of the Article 101.3 Guidelines that distinguishes between the amount of market power that is relevant for an assessment under Article 101 and 102 TFEU, respectively. The judge then continues,

> 'An agreement can properly be regarded as appreciably restricting competition under Article 81(1) if it satisfies a much lower threshold than that set for determining whether an undertaking holds a dominant position under Article 82. It must therefore be determined whether the reasoning in the Channel 4 Decision, taken as a whole, indicates that Ofcom has erred in its analysis of the foreclosure effect of the Channel 4 Contract for the purposes of Article 81(1).'

Here the judge referred to the guidelines in a preliminary, 'setting the tone' fashion; they are used as a prelude to the hard-law argumentation that follows with regard to IMS's the challenge to the reasoning of Ofcom. In that sense, it can be maintained that here soft law was again used 'in the shadow' of hard law.

3. Bookmakers' Greyhound Amalgamated Services et al. v Amalgamated Racing Ltd et al [2008] EWHC 1978 (Ch) and [2008] EWHC 2688 (Ch) and [2009] EWCA Civ 750

Plaintiff: BAGS (Bookmakers Greyhound Amalgamated Services) - BAGS was formed as a betting industry body which would pay greyhound tracks to put on meetings on afternoons when horseracing might be cancelled due to bad weather
Defendant: AMRAC, RUK and others (racecourses consortia with diverse functions)
Facts and Arguments: BAGS allege anti-competitive object of an agreement for collective exclusive licensing of media rights (from RUK racecourses to AMRAC) on a closed basis. In the alternative, they also allege anti-competitive effects thereof. BAGS allege that not the act of exclusive licensing itself, but the *agreed on collective action* of selling of rights as agreed between the RUK racecourses prior to the licensing to AMRAC has an anti-competitive object.

- **[2008] EWHC 1978 (Ch). High Court of Justice Chancery Division**

The court's reasoning and use of soft law:

RECOGNITION

The first reference to soft law is to the Article 101.3 Guidelines,[3] which are used for the purposes of substantiation and explanation of supranational case law dealing with the distinction between the concepts 'agreements' and 'concerted practices'. Similarly, the Horizontal Guidelines, read together with the Article 101.3 Guidelines, are used later on in the judgment to clarify the dimensions of the concept 'competition'; [4] the lengthy and in-depth discussion that follows is based on a joint reading of supranational case law and soft law – namely, the Article 101.3 Guidelines.[5] Finally, in paragraph 438 of the judgment, the judge uses paragraphs 21 and 22 of the Article 101.3 Guidelines to express his view on what constitutes a 'by object' restriction,'[…] the approach which I should adopt is the approach summarized in paragraphs 21 and 22 of the Article 81(3) Guidelines'. This latter use of the guidelines as a shorthand reference to well-established (hard law) principles that they summarize is also seen as a type of judicial recognition of soft law.

- **[2009] EWCA Civ 750 (Appeal to the Civil Division of the Court of Appeal)**

The court's reasoning and use of soft law:

REJECTION

The old Horizontal Guidelines were invoked by the racecourse's lawyer, whose argument essentially consisted in showing that when undertakings agree to join forces in order to carry out an activity they cannot single-handedly pull off, then they cannot be seen as competitors

[3] Page 41.
[4] Para. 310.
[5] In para. 321 and onwards, the 81.3 guidelines are again cited as a summary of supranational case law on the matter of what constitutes 'competition restriction by object'. In paras. 327 -341, a discussion with regard to what constitutes 'restriction by object' alternates by citing supranational case law and the 81(3) guidelines.

with regard to that activity and their agreement cannot therefore have the object nor the effect of restricting competition. This argument was solely based on paragraph 24 of the old Horizontal Guidelines. While, at first glance, the judge seems to acknowledge the reasoning contained therein, he eventually bluntly

RECOGNITION

Later on in the judgment, when discussing the recurring point of whether or not the joint agreement in question restricts competition or not, the court discusses the contents of the Horizontal and the Article 101.3 Guidelines together with relevant supranational judicial and Commission decisions.[6] This judicial stance, contrary to the one described above, expresses recognition.

4. Sel Imperial Ltd v The British Standards Institution [2010] EWHC 854 (Ch)

Plaintiff: Sel Imperial Ltd. (importer and distributor of – largely non-original – parts for motor vehicle repairs)

Defendant: BSI (British Standards Institution) – engages in the publication of private, national and international standards covering a wide range of industries and goods; it also engages in certification for compliance with its 'Kitemark' schemes

Facts and Arguments: The PAS 125 (vehicle body repair specification) and section 4.5 d) thereof in particular, specifies that in case a spare vehicle part is not certified, in order for it to fall under the PAS 125, it has to be deemed to be 'non-safety related'. The interpretation of the latter term is left to the BSI. Sel Imperial mount a case on the basis of Article 101 TFEU saying that that BIS and the undertakings it consulted when coming up with the PAS 125 form an association of undertakings and the power given to BIS to interpret the scope of the term 'non-safety related' in Art. 4.5 d) of the PAS 125 is a decision by an association of undertakings that can fall under the scope of Article 101.1 TFEU.

[6] Para. 117.

The court's reasoning and use of soft law:

RECOGNITION

According to the court, the association of undertakings argument cannot be sustained, but there is merit to the idea that an understanding was reached whereby the consulted undertakings 'gave up their individual freedom to adopt their own interpretation or to choose which certification body they would use to interpret PAS 125 and instead collectively decided to adopt the interpretation applied by BSI through its Kitemark service […] If that interpretation was restrictive, then this collective agreement could have the effect of restricting competition in the supply of replica parts.'[7]

In order to emphasize the logic of the above reasoning, and as a counterpoint to supranational case law evoked by the defendants (Adalat),[8] the judge quoted paragraph 167 of the old Horizontal Guidelines, which, discussing standardization agreements, purports that 'Agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition.' In this case, the Horizontal Guidelines are used on their own, which could be explained by the fact that they pertain to the Block Exemption Regulations on (1) Specialization and (2) Research and Development Agreements[9] and should therefore be read as their extension even if this is not explicitly stated by the judge.

5. Cityhook Ltd v OFT [2007] CAT 18 and 2009 EWHC 57 admin (High Court of Justice Queen's Bench Division Administrative Court)

Plaintiff: Cityhook (a company in the business of laying submarine cables)

Defendant: OFT

[7] Para. 32.

[8] Judgment of 26 October 2000, Bayer AG v Commission of the European Communities T-41/96, EU:T:2000:242 and

[9] Commission Regulation 1217/2010/EU of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, (OJ L 335/36, 18.12..2010) & Commission Regulation 1218/2010/EU of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements (OJ L 335/43, 18.12.2010).

Facts and Arguments: This is an appeal to an OFT decision to close an investigation on administrative priority grounds. The main question the CAT has to establish is whether OFT's decision to close its investigation on the grounds of administrative priority is an appealable non-infringement decision (the latter point is supported by the plaintiffs Cityhook). In case that a non-infringement decision is found to exist, the CAT would have jurisdiction to hear Cityhook's appeal to this decision.

- **CAT Judgment**

The court's reasoning and use of soft law:

RECOGNITION

The Article 101.3 Guidelines are used as the main source to shed light on an issue plead by the plaintiff, namely, whether the term 'hard core' is synonymous with the term 'by object' restriction. Reasoning on the basis of the said guidelines, the court states that no relevant supranational case law to enlighten the discussion was pleaded.[10] In essence, there is no hard law to anchor the discussion based on soft law. In this situation, the use of S.60.3 of the UK Competition Act merits attention, because it catalyzes the interpretation of the soft law instrument by reference to a principle emanating from the national legal order.[11]

Another mentioning of the Article 101.3 Guidelines [12] serves the purpose of summarizing the established supranational judicial view that an agreement should be assessed in its context, taking account of all relevant factors, when determining whether or not it constitutes a restriction 'by object'. Therefore, this mention exemplifies the category 'interpretation together with supranational hard law'.[13]

- **Judgment of the High Court of Justice Queen's Bench Division Administrative Court**

[10] This is likely because the first mentioning as intended in the guidelines of the term 'hard core' by the supranational courts happened post-2007 (search performed via curia.eu).In this sense, in this paragraph, this case uses soft law with no endorsement in supranational case law (at the time) to make a point/build an argument. The relevant hard law bases for this argument are ONLY Article 60(3) of the CA'98 and, to some extent, the VBER cited in fn.1
[11] Para. 255.
[12] Para. 268.
[13] See fn. 27 of the guidelines.

The court's reasoning and use of soft law:

RECOGNITION

In the decision at the Administrative Division of the High Court that followed,[14] the Article 101.3 Guidelines were also mentioned several times. The first interaction of the judge with the guidelines constitutes a judicial summary of the arguments of the OFT team,[15] who were reading soft law together with supranational case law to conclude there was no clear line of law on collective refusals to purchase and their definition as either object or effect restrictions.

The second mention of the guidelines[16] is with regard to the idea of 'consumer welfare' as the benchmark for competition enforcement that they propagate. The guidelines' stance on consumer welfare is only used for illustrative purposes – it is given as an example of how an administrative authority (the European Commission) can set its enforcement priorities on the basis of its discretion to do so. By analogy, the argument of the judge goes, it is not unreasonable for the OFT to also self-determine its priorities.

The last point making use of the content of the 101.3 guidelines[17] goes back to the first one and deals with the issue of whether the OFT committed an error of law when doubting that collective boycotts by purchasers were restrictions 'by object'. In order to discover whether the error is one of law, the judge needed to ascertain whether there is established law on the matter of collective boycotts by purchasers being competition restrictions by object. He concludes there is none, but on the basis of doctrine and the provisions of the 101.3 guidelines on the matter, he believes the OFT had reasonable basis to doubt about the status of the law and thus to decide as it did (close the file without deciding on the merits of the dispute in question). In this situation, soft law –together with doctrine – is used as a foundation for the main argument by the judiciary, namely that there could be no conclusion

[14] The CAT had no jurisdiction on the merits because the OFT decision was held to be un-appealable; thus, Cityhook could have recourse to an administrative court which would examine the legality of the OFT decision.
[15] Para. 57.
[16] Para.105.
[17] Paras. 124-133.

as to the existence of error of law on the side of the OFT. The soft law argument was not used to prove or disprove a point of competition law as such, but to assess the extent to which the authority could entertain a doubt as to the state of the law on the matter of collective boycotts by purchasers.

6. Tesco Stores Ltd, Tesco Holdings Ltd, Tesco Plc v Office of Fair Trading [2012] CAT 31

Plaintiff: Tesco

Defendant: OFT

Facts and Arguments: This is a 'hub and spoke' collusion case, where the OFT claims that Tesco (among other retailers and suppliers of milk products in the UK) had infringed the Chapter 1 prohibition. Tesco mounts and appeal to the OFT infringement decision, which is overturned in a not insignificant part by the CAT in this judicial decision.

The court's reasoning and use of soft law:

NEGLECT

The Horizontal Guidelines and – in particular – the newly introduced in 2011 discussion on information exchange are evoked by Tesco in its submissions. The applicants make an argument on the basis of the guidelines, submitting that the CAT should take account of the guidelines by virtue of S. 60(3) of the UK Competition Act. The only way one could describe the subsequent handling of this soft law instrument by the court is 'clumsy'. Instead of discussing the specific (and largely unexplored) point that the guidelines make with regard to particularized (individualized) information exchange – the point that Tesco de facto makes – the judge goes on to comment on the more general (and set in stone) issue that information exchange can provoke competition concerns because it facilitates cooperation between competitors. It seems that the court is maneuvering its way out of a direct, concrete discussion on the basis of the guidelines, as to the difference between exchanges of aggregate versus individualized data. Such a conclusion can be supported also on the basis of a reading of the judgment as a whole – in paragraph 79 of the judgment, the court promises to take into account the distinction between aggregate and individualized data exchanges

'below' [18] in the judgment. Unfortunately, no such discussion is clearly distinguishable 'below'.[19] Furthermore, the unease of the CAT to engage with an argument based purely on guidelines can be inferred from its treatment of the issue of consistent interpretation coming from S. 60(3) of the UK Competition Act. The court avoids mentioning Section 60(3), which explicitly warrants judicial observance of relevant decisions and statements by the EU Commission. The references made to S.60 of the UK Competition Act are either to S. 60(2) or the provision in general.[20]

7. National Grid Plc v Gas and Electricity Markets Authority [2010] EWCA Civ 114

Plaintiff: National Grid (historically, the business has a monopoly on gas transportation in the UK and on the supply of gas meters and ancillary services)

Defendant: the GEMA

Facts and Arguments: In a decision published in February 2008 the Gas and Electricity Markets Authority (GEMA) found that National Grid had abused its dominant position in the market in Great Britain for the provision of domestic-sized gas meters, contrary to section 18 of the UK Competition Act and article 102 TFEU. The Authority imposed a penalty and ordered National Grid to put an end to the infringement. On an appeal under section 46 of the UK Competition Act, the Competition Appeal Tribunal (CAT) substantially upheld the finding of abuse of a dominant position but reduced the penalty. National Grid now brings a further appeal, under section 49 of the UK Competition Act, against the Tribunal's decision. It contends that the Tribunal erred in law in upholding the finding of abuse and/or that the penalty set by the Tribunal was manifestly excessive and wrong in principle.[21]

The court's reasoning and use of soft law:

REJECTION

[18] Unlike in other parts of the judgment, no indication is given as to which paragraph 'further down' refers to.
[19] Some vague references to the issue can be found in paras. 243&308, neither of which is particularly helpful with regard to our research question.
[20] The court gives the impression it is battling against having to consider Commission decisions and statements as provided by s. 60(3). This impression is given because, when discussing S.60 in general, the court feels obliged to emphasize the contents of its s. 60(2) obligation, namely: ' That [compliance] of course includes ensuring consistency with the jurisprudence of the Court of Justice and General Court of the European Union.' (para.42). In contrast, nothing is mentioned with regard to S.60(3) which forms no lesser part of s.60.
[21] This case description can be found in paragraph 1 of the judicial decision in question.

The Guidance Paper was invoked by the lawyer of National Grid in paragraphs 53-54 and 57 of the judgment to support an argument that more 'bright line rules' (benchmarks) had to be applied in the finding of abuse. He quoted several CJEU cases to that effect and (in their context) the Guidance Paper's stance on counterfactuals. The court, however, acknowledging the merit of the appeal of the applicants to more steady rules, said that no special rule existed with regard to counterfactuals, while the Commission in its guidance merely stated that its approach to assessing anti-competitive foreclosure is to 'usually make a comparison with an appropriate counterfactual.'[22] Indeed, the Guidance Paper is quite vague on the topic of counterfactuals. An interpretation of this judicial position can point to a conclusion that, although the court does not discuss the legal value of the Guidance Paper, the main idea is that, so long as there is no support in law (case law or hard law) of a certain approach to counterfactuals, the Guidance Paper is not going to be acknowledged as offering such guidance. In this case, it is rejected as a possible source of interpretation, possibly due to both its vagueness and indeterminate legal status.

8. National Grid Electricity Transmission Plc v ABB Ltd and Others [2012] EWHC 869 (Ch)

Plaintiff: NGET (National Grid Electricity Transmission) – an overcharged user of gas-insulated switchgear (GIS)

Defendant: ABB Ltd. and others – participants in the Switchgear cartel unraveled by the European Commission; ABB and most of the other defendants in this follow-on damages claim had applied for leniency, but only ABB had been granted leniency by the EU Commission.

Facts and Arguments: The main discussion centers around the dichotomy between leniency and the right of victims of cartels to damages actions; the question is what (if any) confidential documents in the possession of the European Commission should be revealed for the purposes of the follow-on damages action instituted by NGET. The main discussion centers on the *Pfleiderer* case of the CJEU.[23]

[22] Para. 54.
[23] Judgment of 14 June 2011, Pfleiderer AG v BkartA C-360/09, EU:C:2011:389.

The court's reasoning and use of soft law:

OTHER

This is not a case dealing with a particular soft law instrument picked on the basis of this study's methodology. It is an overall discussion of the value of soft law and, in particular, references are made to the Leniency Notice of the European Commission. A relevant paragraph for discussion is 22, where it is once again stated that Commission notices and guidelines are not binding on Member States. There is also an interesting discussion as to whether the Leniency Notice could create legitimate expectations in the leniency applicants, which the court believes is not possible.[24]

9. Purple Parking Ltd, Meteor Parking Ltd v Heathrow Airport Ltd [2011] EWHC 987 (Ch)

Plaintiff: Purple Parking Ltd. and others
Defendant: Heathrow Airport Ltd.
Facts and Arguments: HAL is operator and owner of Heathrow Airport and considers itself as an 'on airport' operator for the purposes of services that it offers (among others, those are 'meet and greet' and 'valet parking'). By contrast, the plaintiffs, Purple Parking and Meteor, are seen as 'off airport' operators engaged in the provision of the same services. The denomination 'off airport' stems from the fact that the car parks the latter two companies operate are considered by HAL as being situated off the airport premises. All operators originally had equal access to the forecourts right next to the Heathrow Terminals for the purposes of picking up and/or dropping off customers. In 2010, HAL sought to change the existing arrangements with regard to access to the forecourts. The new terms were, according to the other two operators, disadvantageous to them. The case mounted against HAL was therefore for anti-competitive conduct on the market for 'meet and greet' services, which is unlawful because it is wrongfully discriminatory and is intended to damage competition.

The court's reasoning and use of soft law:

[24] Paras 31-35.

REJECTION

The Guidance Paper was used by HAL's lawyers to support a claim that a foreclosure under Article 102 can only be established by the plaintiffs if, among others, the latter succeeds in proving elimination of (effective) competition. Purple counters that it is sufficient to show that competition is hindered rather than eliminated. The judge, siding with the plaintiffs on that point, refutes one-by-one the arguments in favor of an 'elimination' threshold put forward by HAL (HAL's arguments were based, among others, on several essential facilities cases). Along with the refutation of case-law based arguments, the judge also dismisses the invocation of the 102 Guidance Paper by HAL. To aid their 'elimination' line of reasoning, HAL had relied on the Guidance Paper, in particular paragraphs 75 and 81 thereof. Paragraph 75 states that an undertaking (whether dominant or not) should have the right to choose its trading partners, while paragraph 81 maintains that in refusal to supply cases, the Commission will consider a case as an enforcement priority if (inter alia) the refusal to supply would be likely to lead to elimination of effective competition. Those paragraphs of the Guidance Paper were cited, but to no avail. The judge dismissed the entire document with the following brisk statement: 'as the document itself points in paragraph 3, it is not a statement of the law, and paragraph 81 makes it clear that what is being referred to is an enforcement priority, not a definition of abuse. I do not think that this document assists the debate.'

Here, the court could have been gentler in its dismissal of the Guidance Paper, because, on a closer reading, the document does not support the interpretation which the lawyers of HAL gave it. More specifically, the formulation 'likelihood of elimination' used by the soft instrument is closer to 'hindrance' – argued by Purple – than to HAL's absolute elimination argument. It is unfortunate that the judiciary did not go into this discussion, especially in light of the fact that it could have read the Guidance Paper in light of relevant case law that argued a standard 'likelihood of elimination'. Maybe the court did not think this instrument needed interpretation because it is a controversial text anyway, which could cause further confusion if engaged with by the judiciary.

10. Calor Gas Ltd v Express Fuels (Scotland) [2008] CSOH 13

Plaintiff: Calor Gas, the market leaders in the distribution and supply of LPG and cylinder LPG (the dispute is about the cylinder LPG market)

Defendant: Express fuels is a family venture (distributors) managed by David Jamieson and his family

Facts and Arguments: The case concerns a vertical (single branding) agreement for the supply of LPG cylinders, signed between the plaintiff and the defendant. The duration of the agreement is 5 years and, on top of not being able to sell competitor's LPG cylinders, the defendant is also precluded from handling Calor Gas cylinders after the eventual expiration/termination of the agreement. Both clauses are eventually held to have the effect of restriction of competition by the judge. In essence, the defendants successfully invoked Article 101(1) TFEU as a shield against a breach of contract claim by the plaintiffs.

The court's reasoning and use of soft law:

RECOGNITION

The judge discussed the Vertical Guidelines in relation to the duration of the contractual agreement (he was prompted by the independent economic expert on the case – Mr. Marshall – as to the relevance of the said soft law instrument). The guidelines were engaged with on a stand-alone basis – their pertinence to the VBER grounds them firmly in hard law, which likely makes judges willing to discuss this soft law instrument even without explicitly mentioning the VBER.

11. Ineos Vinyls et al v Huntsman Petrochemicals (UK) Ltd [2006] EWHC 1241 (Ch)

Plaintiff: Ineos Vinyls

Defendant: Huntsman Petrochemicals

Facts and Arguments: This is a dispute on the validity of contract terms, which discusses competition issues raised by the plaintiff only as a secondary concern. The main allegations

with regard to competition law are (a) abuse of dominant position and (b) anti-competitive effects of the agreement/contract that the plaintiff and defendant had entered into.

The court's reasoning and use of soft law:

RECOGNITION

The discussion of the old Vertical Guidelines happens in the context of the claim that the contractual agreement infringes Article 101 TFEU/ Chapter 1 of the UK Competition Act. The judge decides that the claim under competition law falls, as it is co-dependent on the contractual issues discussed earlier in the judgment. Therefore, the judge concludes there is no need for him to discuss the competition issue, but he nevertheless makes a hypothetical analysis of the case under claim (b) restriction by effect, saying the following,

'I would have accepted Mr Brealey's submission that the relevant product market is confined to the UK merchant market in ethylene. I would have accepted that that market does not include EDC but does include ethylene which is available for export (exclusive of exports for a captive use). In these two respects I would have accepted the conclusions of Dr. Cento Veljanovski, the claimants' expert, and would have had regard to the Commission Decision in Case COMP/M.2389 Shell/Dea (of 20 December 2001) and to paragraph 98 of the [Vertical] Guidelines. I would also have accepted Mr Brealey's submission that the relevant geographical market is the UK rather than Europe. In this respect too I would have accepted Dr Veljanovski's conclusion.'[25]

In this hypothetical scenario, the Vertical Guidelines are interpreted (recognized judicially) together with pertinent hard law.

12. Crest Nicholson and ISG Pearce Ltd v OFT [2011] CAT 10

Plaintiff: Crest Nicholson. ISG Pearce Ltd
Defendant: OFT

[25] Para. 254.

Facts and Arguments: The issue that has to be determined by the court is whether ISG Pearce (as an intermediate parent company) was to be held liable for cartel damages incurred by the actions of the subsidiary because of its special (agency) relationship with its subsidiary. Apparently, other intermediate parents of the joint infringers were not fined by the OFT because they did not have special (agency) arrangements with their subsidiaries. Therefore, the question is whether the agency arrangement indeed justified a different treatment of ISG Pearce in comparison with other intermediate parent companies. The question is thus not whether there was an agency agreement or not (it was clear that there was one because the OFT had already established the ability of ISG Pierce to exercise decisive influence over its subsidiary Pierce, so the guidelines are not needed) but whether its existence could justify different treatment of ISG Pierce and its fining in that regard. The court concluded that – yes – the agency agreement did correctly enable the OFT to hold ISG Pierce liable, especially because the latter was the company that processed the turnover of Pierce (Pierce had no turnover of its own) and could thus be fined on the basis of that turnover. If Pierce had not turnover, then it could not be fined on the basis thereof.

The court's reasoning and use of soft law:

OTHER

The Vertical Guidelines were invoked by the defendant, but the court stated that they had no bearing to the dispute in question.

13. Enterprise Inns Plc v Palmerson Associates Ltd, Paul Rigby, James Younger [2011] EWHC 3165 Ch

Plaintiff: Enterprise Inns Plc

Defendant: Palmerson Associates Ltd and others

Facts and Arguments: This is a 'beer tie' case between the owner of an inn (plaintiff) and the tenant (first defendant). The case is largely decided under contract law and only marginally touches upon the competition dimension of 'beer tie' contracts. The competition dimension of 'beer tie' contracts is rather used as an aid to the interpretation of the contractual provisions.

The court's reasoning and use of soft law:

RECOGNITION

The relevant paragraph of the judgment, where the oldest Vertical Guidelines (of 1984) were mentioned, is paragraph 71. The instrument was mentioned as pertaining to the then-applicable VBER and was cited as one of the many 'items' constituting the regulatory background of 'beer tie' cases. In other words, together with supranational case law, other pertinent hard and soft law, the 1984 Vertical Guidelines were mentioned by the court as relevant elements of the regulatory background (competition law) within which 'beer tie' contracts exist. No further engagement with or interpretation of the guidelines followed.

14. Unwired Planet International Limited v Huawei Technologies Co. Limited [2015] EWHC 2097 (Pat)

Plaintiff: Unwired Planet International Ltd. (holds a patent portfolio related to telecommunications)
Defendant: Huawei and Samsung
Facts and Arguments: This is a patent infringement case, whereby Unwired Planet maintains that the products sold by the defendants infringe its standard-essential patents (SEPs). The defendants' position is rather that none of the patents are valid or infringed. This includes (where relevant) a denial that any given SEP is in fact essential to the relevant standard. The defendants have all stated expressly that they are willing licensees. They are prepared to take a license under any Unwired Planet patent which has been found to be valid and infringed. The defendants also make allegations about competition law and FRAND within the setting of both Articles 101 and 102 TFEU. It is in this latter context that the discussion of relevant soft law happens.

The court's reasoning and use of soft law:

RECOGNITION

The guidelines discussed by the court are both the Horizontal and the Technology Transfer Guidelines. Both are explicitly engaged with (recognized by) the court.

The FRAND competition claim under Article 101 TFEU consisted in Samsung alleging (to no avail) that when a transfer of patents from Ericsson to Unwired Planet happened, this transfer did not transfer what Samsung calls Ericsson's FRAND obligation to Unwired Planet. The question the judge asked himself was whether that was something which could have as its object or effect a distortion or restriction of competition given that FRAND. The judge concluded it was not. In that sense, he was convinced by Ericsson's argument, which used provisions of the Horizontal Guidelines (paragraph 285) and a Commission decision (Google/Motorolla Mobility)[26] to argue that two parties exchanging patents would be preliminarily bound by the FRAND commitment in any case and that would therefore constrain incentives to raise the royalty level.

Another discussion to which only the provisions of the Technology Transfer Guidelines were relevant was an alleged horizontal price fixing arrangement between Ericsson and Unwired Planet. In order to decide on that matter, the judge explicitly engaged with the content of the said guidelines.

These instances of explicit recognition of the soft instruments in question are likely due to the latter's pertinence to legislation – namely, the Technology Transfer Block Exemption Regulation (TTBER) and the BERs on Cooperation Agreements and R&D Agreements already cited above.

[26] Case No. COMP/M.6381.

The Netherlands

1. Batavus v Anonymous. ECLI:NL:RBLEE:2006:AY9814 (Rechtbank Leeuwarden) and ECLI:NL:GHLEE:2009:BJ9567 (Hof Leeuwaarden) and ECLI:NL:HR:2011:BQ2213 (Hoge Raad)

Party to the dispute 1: Batavus

Party to the dispute 2: Anonymous Distributor of Batavus Bikes

Facts and Arguments: This is a case where, in the context of selective distribution, Batavus (a producer of bikes) had terminated a long-lasting contractual relationship with an (anonymous) distributor operating in the business of retail and reparation of bikes. At first instance, it is established that the termination by Batavus happened under pressure from another (important) distributor, who was unhappy with the low bike sales prices that the eventually excluded (anonymous) distributor was offering online. The first-instance court decided in favor of the (anonymous) distributor and did not make any mention of soft law relevant for this study.

- **Appellate Judgment**

The court's reasoning and use of soft law:

RECOGNITION

Before mentioning the Vertical Guidelines, the court makes a general statement on the interaction of EU and national competition law, in which context it expresses its views on the role of Commission-issued soft law in the national domain. In paragraph 15 of the judgment, the court observes that the reading of the Dutch Competition Act (DCA) is based on EU law (in particular Article 101 TFEU), which means that the terms used in the DCA need to be explained in light of the jurisprudence of the GC and the CJEU, which is, in turn, to a significant extent explained and supported by the decisional practice of the European Commission and her communications and guidelines. In this context, the Vertical Guidelines are mentioned, which proves the point that soft law is used as an aid/clarification tool for binding legal texts.

- **Cassation at the Hoge Raad**

The court's reasoning and use of soft law:

RECOGNITION

Paragraph 2.40 of the Hoge Raad judgment makes the important remark that, pursuant to paragraph 12 of the DCA, the Commission Block Exemption Regulations (thus also the VBER) apply in the same way in 'only national' cases as they apply to cases with a community dimension. It is thus not surprising that in the opinion of AG Keus (paragraph 2.42 thereof), the Vertical Guidelines are cited as a tool for the interpretation of the VBER. The other mentioning of the said guidelines is a quote to the reasoning of the lower instance court.

2. NVM v HPC. ECLI:NL:GHAMS:2012:BX0460 (Hof Amsterdam) and ECLI:NL:HR:2014:149 (Hoge Raad)

Party to the dispute 1: NVM

Party to the dispute 2: HPC

Facts and Arguments: There were two matters of competition law that had to be assessed in this case – an anti-competitive exclusive supply agreement under Article 6 DCA (national equivalent of Article 101 TFEU) and refusal to supply under Article 24 Mw (national equivalent of Article 102 TFEU). Soft law relevant for this study – namely the Article 102 Guidance Paper – was invoked in the refusal to supply discussion. Refusal to supply was alleged because a dominant undertaking (NVM) delayed sharing interoperability information with a downstream competitor – HPC. By the time the information became available, HPC was already driven out of the market.

- **Appellate Judgment**

The court's reasoning and use of soft law:

RECOGNITION

The court employs the Guidance Paper only at one spot (paragraph 2.27) in order to establish the applicable EU framework for analysis of refusal to deal cases. After explaining the main assessment criteria[27] contained in several CJEU/GC refusal to deal judgments, the court refers to the Guidance Paper in order to explain the meaning of the term 'constructive refusal', also of importance for the assessment. The term has been used before in the Commission decisional practice[28] and case law.[29] Therefore, here we can again speak of reference/interpretation on the basis of existing hard law.

- **Cassation at the Hoge Raad**

The court's reasoning and use of soft law:

RECOGNITION

The Hoge Raad does not mention the Guidance Paper, only the opinion of the Advocate General does. In paragraph 3.13 of his opinion, AG Keus discusses paragraph 83[30] of the Guidance Paper because it was invoked by one of the parties – HPC.[31] The point made on the basis of the Guidance Paper, that an input should be considered indispensable when its refusal prevents access to a certain distribution channel/service, was dismissed by the AG as a mistaken reading of both the Guidance Paper, as well as of the case law on which that paragraph was based.[32] The point made by the AG (on the basis of the case law and the Guidance Paper as part of it) is that for an input to be considered indispensable, contrary to what the respondent submits, it would be necessary to (at the least) establish that it is not viable to create a second alternative to the channel/service, access to which is sought. This is certainly an example of reading soft law in light of hard law (case law).

[27] Namely, that one can only speak of abuse in refusal to deal cases when the refusal leads to (1) complete elimination of competition on the downstream market and (2) the refused input is essential for remaining active on the market, in the sense that there exists no real or potential alternative to the refused input.
[28] Commission Decision of 25 July 2001 relating to a proceeding under Article [102 TFEU] COMP/C-1/36.915 – Deutsche Post AG – Interception of cross-border mail (OJ 2001 L 331, p. 40), recital 141.
[29] Judgment of 2 September 2010, Konkurrensverket v TeliaSonera AB C-52/09, ECLI:EU:C:2010:483.
[30] This paragraph deals with the condition of indispensability of the refused input in refusal to supply cases.
[31] It does not become clear whether the Guidance Paper was relied on explicitly or implicitly by HPC. The AG simply says (in para. 3.13) 'this argument is clearly inspired by the 102 GP'.
[32] Judgment of 26 November 1998, Bronner C-7/97, EU:C:1998:569.

3. Chipsol Holding BV v ACM. ECLI:NL:RBROT:2013:9069 (Rechtbank Rotterdam)

Plaintiff: Chipsol

Defendant: Autortiteit Consument en Markt (hereinafter ACM)

Facts and Arguments: This was a complaint to the ACM by the company Chipsol (a 'business areas' development and investment society) against an alleged abuse of a dominant position by Schiphol airport. The alleged abuse consisted in actions undertaken by Schiphol that were aimed at preventing Chipsol from executing its building plans on the property around the airport. In particular, through concluding contracts with certain governmental bodies for the development of the airport zone, Schiphol had excluded Chipsol as the biggest potential competitor on the market for development of the business terrain. Ultimately, the request for enforcement of Art.24 Mw (national equivalent of Article 102 TFEU) was denied by the ACM. Chispol mounted an appeal against the conclusions of the ACM, which is heard by the Rechtbank Rotterrdam and is the subject of the current case.

The court's reasoning and use of soft law:

OTHER

The only mentioning of the Guidance Paper in paragraphs 11 and 12 of the judgment is a direct citation to the reasoning of the ACM in its original decision. In that regard, it is stated that the ACM examined the alleged abusive conduct on the basis of Article 24 Mw, the Guidance Paper of the European Commission and the *Promedia* case of the General Court.[33] The text of the Guidance Paper is then used to give a general summary of the assessment criteria for finding anti-competitive foreclosure, after which the court proceeds with a discussion of the General Court case mentioned above, which gives guidance on the specific subject matter of the complaint – namely – the extent to which vexatious litigation can be seen to constitute an abuse of dominant position. In the following paragraph, the court gives its assessment of ACM's conclusions on the subject matter of the case, referring exclusively to the *Promedia* case – the precedent controlling the specific subject matter. In this sense,

[33] Judgment of 17 July 1998, ITT Promedia NV v Commission of the European Communities T-111/96, EU:T:1998:183.

the 102 GP (together with Article 24 Mw) is used in an auxiliary fashion. It is also not invoked by the court in its own reasoning, but mentioned as an instrument used by the administrative authority in its decisional practice. Therefore, no conclusions on the attitude of the judiciary toward soft law can be derived from this judgment.

4. De Nieuwe Heuvel BV v Koninklijke Vereniging 'Het Friesch Paarden-Stamboek'. ECLI:NL:GHARN:2009:BL7079 (Hof Arnhem)

Plaintiff: De Nieuwe Heuvel

Defendant: Koninklijke Vereniging 'Het Friesch Paarden-Stamboek'

Facts and Arguments: The dispute is between the Royal Association 'Het Friesch Paarden-Stamboek', a body entrusted with the management of the Frisian horse breed book under public law, and De Nieuwe Heuvel, who are horse owners and breeders. The dispute arose because De Nieuwe Heuvel exceeded the annual allowed insemination limit for four Frisian breeds, contrary to a decision by the Royal Association. De Nieuwe Heuvel were fined accordingly; the fine was confirmed by the Rechtbank Arnhem (lower instance court) and the Nieuwe Heuvel appealed , which resulted in the current judicial pronouncement. The appellants argue that they do not have to pay the above mentioned fines because the decision to establish insemination limits is anti-competitive in the first place and is therefore null and void by virtue of Art. 101.2 TFEU.

The court's reasoning and use of soft law:

RECOGNITION

The first reference to the Article 101.3 Guidelines is in paragraph 4.18 of the judgment, where the court discusses the guidelines in light of the case law of the CJEU (the discussion is about whether to consider the legitimate end of an agreement that has an anti-competitive effect already within the framework of Article 101.1 or to assess it in the framework of Article 101.3). The second and last reference to the said guidelines is in paragraph 4.20 of the judgment where the court says that, in order to assess an agreement under Article 101.3, the Article 101.3 Guidelines of the Commission should be applied 'flexibly and reasonably' (this is an expression used by the guidelines themselves – in paragraph 6 thereof). The court then

proceeds with its assessment under Article 101.3 solely and exclusively relying on the text of the 101.3 Guidelines of the Commission. This is very likely possible because the Commission guidelines are implemented in the Dutch (national) legal system through a direct reference (see Chapter 2 for further elaboration on the matter).[34] These guidelines, therefore, have the status of a national administrative rule (beleidsregel) in the Netherlands.

5. Vereniging Modint v ACM. ECLI:NL:CBB:2005:AU5316 (CBb) and Vereniging Nederlandse Textiel Conventie v Nma. ECLI:NL:RBROT:2004:AR4213 (Rechtbank Rotterdam)

Party to the dispute 1: Modint

Party to the dispute 2: Nederlandse Mededingingsautoriteit (now ACM)

Facts and Arguments: At the last instance, the Association representing Dutch clothing suppliers challenges the conclusions of both the ACM and the Rechtbank Rotterdam that certain contractual arrangements (a *del credere* commission and a revenue enhancing premium) between the Association and its customers (retailers), are by object restrictions that represent an indirect method of price-setting. The last instance court (CBb) pronounces itself in favor of the Association, maintaining that the said restrictions operate differently from price-setting agreements, should not be qualified as such, and should consequently be examined in their context in order to determine whether they might have an anti-competitive object or effect.

- **Judgment of Rechtbank Rotterdam**

The court's reasoning and use of soft law:

NEGLECT

The Horizontal Guidelines are invoked by the plaintiff (the Association representing Dutch clothing suppliers), but the argument that was built on them and on an EU Commission's decision,[35] was not taken up by the court in its reasoning. The plaintiffs submitted that the interpretation given by the ACM to the practices in question was too strict and in stride with

[34] https://zoek.officielebekendmakingen.nl/stcrt-2005-47-p22-SC69176.html

[35] 2001/782/EC: Commission Decision of 9 August 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/29.373 — Visa International).

the 'more economic' approach visible in the Commission's decisional practice and soft law. This argument was subsidiary to a claim that a balancing of pro- and anti- competitive (economically defined) effects of a practice should take place within Article 101. The court did reply (in the negative) to the claim that a balancing of effects should take place within Article 101, but chose to say nothing about the 'more economic' approach pioneered by the Commission in its soft law.

- **Judgment of CBb**

The court's reasoning and use of soft law:

RECOGNITION

The Article 101.3 Guidelines are mentioned in paragraph 7.2.2 of the CBb judgment together with supranational case law. The point that the court makes with the invocation of both the guidelines and supranational case law is that whether an agreement might have the object or effect of restricting competition should be determined in a counterfactual setting, where certain familiar conditions have to be taken into account (e.g. the market realities in which the agreement takes place, effect on inter- and intra- brand competition, etc).

6. Anonymous Plaintiff v Stichting Raad voor de Boomkwekerij en Stichting Erkenningen Tuinbouw. ECLI:NL:GHSGR:2008:BD3247 (Hof 's-Gravenhage)

Plaintiff: The former Director and a majority shareholder in Agrofino Products N.V. (producer of soil/compost)
Defendant: SRB (a foundation that developed a brand for potting soil called 'QualiTree T') and SET (foundation that develops and maintains qualification systems for Dutch horticulture)
Facts and Arguments: The claim with regard to competition law is that the QualiTree T brand has the object of restriction of competition because it can only be affixed to types of potting soil that comply with requirements set by SRB and SET, and therefore excludes businesses that do not meet the latter's requirements.

The court's reasoning and use of soft law:

RECOGNITION

The old Horizontal Guidelines are discussed in paragraphs 13 and 14 of the judgment. The guidelines are used to provide a background to and a more detailed account of the assessment of open standard-setting agreements (such as the one in question on appeal). The guidelines are interpreted together with a decision of the European Commission (and its confirmation on appeal by the General Court).

7. Sandd BV v ACM. ECLI:NL:RBROT:2013:7337 (Rechtbank Rotterdam)

Plaintiff: Sandd BV

Defendant: ACM

Facts and Arguments: The plaintiffs allege several anti-competitive activities performed by TNT (now PostNL) in the period before the full liberalization of the postal services market in 2009. The allegations relate to the market for non-priority (non-urgent) mailing. The concrete allegations are: predatory pricing, bundling, market partitioning through exclusive contracts, cross-subsidization, price discrimination.

The court's reasoning and use of soft law:

REJECTION

The discussion of the Guidance Paper happens in the context of predatory pricing.[36] The question that has to be determined is whether the ACM was correct to rely on LRAIC as the correct cost benchmark in order to conclude there could be no suspicion of predatory pricing practiced by the defendant. In summarizing the steps that the ACM undertook in its analysis, the court turns to paragraph 26 of the Guidance Paper (among others), which was used by the ACM in its decision. This passage of the Guidance Paper explains the difference between the cost benchmarks proposed by the European Commission to detect anti-competitive

[36] Para 9.2.

foreclosure – namely, AAC and LRAIC. Until that point in time, the guidelines are discussed by the court because they were used by the ACM in its decision, which constitutes an 'indirect reference' that shows no specific judicial attitude to soft law. The next step of the court is to reply to the plaintiffs' complaint that the LRAIC benchmark cannot be the correct measure because it assumes that there exists an equally efficient competitor on the market, which is not the case. The judge dismisses this argument by stating that the 'as efficient competitor' benchmark is the correct one because otherwise 'a less efficient competitor could force a dominant undertaking to increase its prices, precisely because the former is less efficient, which, in the end, is to the detriment of consumers.' [37]A citation to the Post Danmark I case follows where it was stated that the goal of Article 102 is not to allow less efficient competitors than the dominant one to stay on the market. On the basis of this reasoning, the court also indirectly dismisses the content of paragraph 24 of the Guidance Paper, which states the following: *'However, the Commission recognizes that in certain circumstances 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. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.'* In this sense, one can speak of a non-verbalized, but extant rejection of a part of the 102 Guidance Paper that is not supported in case law. The paragraph 24 of the Guidance Paper is in fact much disputed in the literature and, besides not being in line with case law, is argued to be adding unnecessary confusion to the already complicated concept of anti-competitive foreclosure.

8. CRV Holding BV v ACM. ECLI:NL:CBB:2010:BN994 (CBb)

Party to the dispute 1: CRV Holding B.V.

Party to the dispute 2: ACM

Facts and Arguments: This is an appeal against a judgment of the Rechtbank Rotterdam, which confirmed a prior ACM decision against CRV. CRV holding disagrees with the verdict of the Rechtbank that its 'customer trust' policy is a forbidden anti-competitive rebate scheme and that its so-called 'tester discount' constitutes an abuse of dominant position as well.

[37] Para. 9.2.4.

The court's reasoning and use of soft law:

NEGLECT

The Guidance Paper is invoked by the appellant CRV to strengthen its argumentation attacking the 2008 ACM decision on the basis that insufficient attention was paid to the context in which the alleged anti-competitive practices were taking place. Referring to supranational case law *inter alia,* the appellant puts an emphasis on the Guidance Paper as clear proof of the fact the European Commission chooses for a strictly effects-based, economic approach precisely in order to prevent that behavior that lacks anti-competitive effect might be sanctioned under Article 102 TFEU. According to the appellant, 'The Commission is imposing on itself a very high, economics-based onus of proof […] the [ACM] endorses this approach and considers itself bound to it as well.' This submission by the appellant is, however, rejected by the submission of the ACM, which (in paragraph 5.3.1 of the judgment) makes it clear that 'These priorities [the Guidance Paper] are not meant as rules of law and are without prejudice to the case law of the GC and the CJEU. Neither national competition authorities nor the national judiciary is obliged to follow those priorities.'

In the context of this dispute between the appellant and the ACM, the court says nothing on the applicability of the Guidance Paper or its (legal) value. This could be considered to be an instance of judicial neglect.

9. Service Stations Benschop Woerden BV/Service Stations Benschop BV v BP Europa SE. ECLI:NL:GHAMS:2012:BX0258 (Hof Amsterdam) and ECLI:NL:HR:2013:2123 (Hoge Raad)

Party to the dispute 1: Benschop BV

Party to the dispute 2: BP Europa SE

Facts and Arguments: This is a contractual dispute over an allegedly anti-competitive exclusive supply clause. BP is accused of having infringed article 6 Mw (national equivalent of Article 101 TFEU) by including an exclusive supply obligation in the contracts with its

suppliers. Although the case makes it all the way to the Hoge Raad, the judgment relevant to this study is the lower court judgment of the Gerechtshof Amsterdam.

The court's reasoning and use of soft law:

RECOGNITION

The court explicitly engaged with the content of the Vertical Guidelines in its discourse in order to analyze the anti-competitive effects of the exclusive supply clause. When discussing the issue of appreciability, the court cites paragraph 133 of the Vertical Guidelines on the matter of duration of exclusive supply obligations. This citation is accompanied by an immediate discussion of relevant CJEU case law on the same matter (see paragraph 2.14). This case is a clear example of a situation in which soft law, used together with hard law (the case law of the CJEU in this situation), can serve to clarify and further substantiate judicial argumentation.

10. Prisma Vastgoed BV/Prisma Food Retail BV v Slager.ECLI:NL:HR:2009:BJ9439 (Hoge Raad)

Party to the dispute 1: Prisma Vastgoed BV
Party to the dispute 2: Slager C.S.
Facts and Arguments: Prisma appeals to the Hoge Raad to dismiss the judgment of Hof Amsterdam, which declares void a contract for the joint exploitation of commercial premises (a shop). The basis of the voidness is Article 6.2 Mw (the national equivalent of Article 101.2 TFEU), in particular because the contract contains non-compete clauses and obliges Slager to offer the shop for sale first to Prisma. Slager pleas for dismissal of the appeal.

The court's reasoning and use of soft law:

RECOGNITION

This judgment concerns itself with the topic of whether a contract, which is declared to be invalid under Article 101.2 TFEU (and its equivalent Art. 6.2 Mw) can nevertheless be subject

to the principle of 'conversion' (Art. 3:42 BW).[38] In essence, this provision allows the courts to re-write an invalid juridical act into a valid one. The topic of soft law (the Vertical Guidelines) plays only a marginal role in the opinion of AG Keus, where he refers to the guidelines in a footnote while discussing the issue of whether the combination of non-compete clauses, Prisma's option rights, and the obligation on Slager to offer the shop for sale first to Prisma, can be seen as a restriction of competition 'by object'. In his assessment, the AG reasons on the three above-mentioned contractual provisions separately, asserting that, in the case of non-compete clauses, those need not be seen as 'object' restrictions from the get-go, especially when it comes to franchise contracts. The AG supports his statement with a quote to paragraph 199 of the old Vertical Guidelines. The footnote in which he quotes the guidelines roughly translates as, 'See, for example, paragraphs 199 of the Vertical Guidelines, which state that "In addition to the provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution and/or non-compete and/or exclusive distribution or weaker forms thereof."'

The use of the word 'for example' signals that the judge is using this source as one among many that could serve as a proof of his point, which makes of this reference one that takes place in the context of already existing case law. The Hoge Raad in its judgment does not comment on this part of the reasoning of the AG, because it considers that further research has to be done in order to answer the question of the existence of an 'object' infringement.

11. Nestlé Nederland BV v Mars Nederland BV. ECLI:NL:RBOBR:2013:4356

Plaintiff: Nestlé BV

Defendant: Mars BV

Facts and Arguments: Mars is operating a chocolate products distribution system for (non-company owned, non-company operated) Dutch gas stations, abbreviated 'the MOP 2011',

[38] Text of Article 3:42 BW: "When the necessary implications of an invalid juridical act are in conformity with those of another - valid - juridical act and this in such a degree that it is presumable that this other juridical act would have been chosen instead of the invalid one if the acting party or parties would have been aware of the invalidity of the latter act, then this invalid juridical act shall be converted by operation of law into that other valid juridical act with all its normal legal effects, unless such a conversion would be unreasonable towards an interested person who has not participated as a party in the involved juridical act." Translation taken from here: <http://www.dutchcivillaw.com/legislation/dcctitle33022.htm>.

which Nestlé finds to be anti-competitive. The program consists in granting discounts and bonuses to gas stations that arrange their shelf space according to the conditions set by Mars; the fulfillment of those conditions results in allocation of considerable gas-station space to Mars products. On top of this, gas stations have to install specific additional displays for Mars products only. Nestlé submits that these agreements can be seen as an abuse of dominant position (Article 24 Mw/Article 102 TFEU) or, in the alternative, as an anti-competitive agreement in the sense of Article 6 Mw (the national equivalent of Article 101 TFEU). In the framework of Article 24 Mw, Nestlé submits that the arrangements of Mars have a considerable market foreclosure effect – the discounts are percentage-based (a percentage of the yearly tank station's turnover on Mars products), whereby a leveraging effect is created between Mars must-stock products and additional purchases subject to a possible discount. Nestlé also submit that, because of the leveraging effects that Mars profits from, an equally efficient competitor cannot rival its discounts without suffering significant (structural) losses.

The court's reasoning and use of soft law:

RECOGNITION/PERSUASION

The first reference to soft law (both the Guidance Paper and the Vertical Guidelines) is made early on in the judgment – namely, in the discussion on the applicable law. The court states that the case will be decided on the basis of the national competition provisions only, but this does not mean that guidance would not be sought in the relevant European legal sources – relevant judgments of the CJEU and the 'assessment guides that the European Commission has issued with regard to Articles 101 and 102 TFEU.'[39] In the footnote to this statement, it becomes clear that the court has the Guidance Paper and the Vertical Guidelines in mind when using the term 'assessment guidelines'. In this sense, it would seem, the Guidance Paper and the Vertical Guidelines are (at the least) seen as a source of information and assessment for the national judiciary.[40]

This is confirmed by the second reference to soft law (the Vertical Guidelines), where the court states that the assessment on whether or not the MOP is contrary to Article 6 Mw

[39] Para. 4.1.

[40] This also suggests that both the Vertical Guidelines and the Guidance Paper are seen as instruments of equal legal value by the national judiciary (or at least by this court).

should happen on the basis of the Vertical Guidelines of the European Commission without qualifying this statement any further. The following paragraphs of the judgment (from 4.14 to 4.20) are entirely based on citations of relevant paragraphs of the Vertical Guidelines.

The 102 Guidance Paper is not directly referred to in the judgment proper (only in footnote 1 as stated above), but the court mentions the equally efficient competitor analysis that precisely the Guidance Paper introduces in the context of exclusionary abuses (paragraphs 4.25 to 4.29). Maybe here we can talk about (an attempt) at implicit following of the Guidance Paper.

12. Brink's Nederland BV v ACM.ECLI:NL:RBROT:2015:5805 (Rechtbank Rotterdam)

Plaintiff: Brink's Nederland

Defendant: ACM

Facts and Arguments: Brink's is a US company, offering security-related services to banks, among which secure cash transportation. It complained to the ACM of suspected breaches of the Mw by three Dutch Banks (ABN AMRO, ING and Rabobank). The complainant alleged two main infringements – (1) an agreement between the said undertakings to perform cash handling activities together (qualified as a production agreement by the ACM) and suspected to be in stride with Art.6 Mw and Art.101 TFEU, and (2) collective buying of cash transportation services, alleged to be abusive in the sense of Art. 24 Mw and Art. 102 TFEU. The ACM decided not to mount a case on either allegation, and Brink's appealed this decision.

The court's reasoning and use of soft law:

RECOGNITION

This case mentions two soft law instruments of relevance to the current study – the Horizontal and the Vertical Guidelines of the European Commission. While the Horizontal Guidelines only enter the judicial discourse in the form of (secondary) references/ quotes to the reasoning of the ACM in its decision not to proceed with the case, the Vertical Guidelines are invoked by the plaintiff Brink's and engaged with by the court.

In particular, Brink's alleges that the ACM was wrong not to include the Vertical Guidelines in its analysis – a statement on which the court disagreed, but not on the basis of the explanation that no such obligation on the ACM exists. Instead, the court rejected the claimant's argument on its substance, by explaining that the joint production agreement had no vertical dimension and therefore needed not be examined by recourse to the Vertical Guidelines. It seems, thus, that had there been a vertical dimension to the case, the said guidelines would have been engaged with (probably on a stand-alone basis).

13. Commissariaat voor de Media v SplinQ BV. ECLI:NL:HR:2012:BX9019 (Hoge Raad)

Plaintiff: Commissariaat voor de Media (an administrative body)
Defendant: SplinQ (an online platform and comparison site for books)
Facts and Arguments: The main issue at hand is that SplinQ operates a system for building customer loyalty by offering certain discounts on the purchases of books to customers that fulfill certain purchase thresholds. The Commissariaat believes that these discounts – because they lower the prices of some books below the minimum required by law – are contrary to the law. However, another issue that comes to the fore is whether the book law itself, in setting minimum prices, is not in stride with competition law. The argument of with regard to soft law is made exactly in this latter context.

The court's reasoning and use of soft law:

RECOGNITION

The Vertical Guidelines are cited in a footnote and are used by the AG in his opinion in order to support the argument that not all vertical price arrangements are in stride with competition.[41] He says that there are important sources that point in this direction, very likely referring to the case law that is reflected in the Vertical Guidelines (they are the only cited source in the footnote to this sentence). In this sense, here we can see the guidelines being used as a summary reference to existing case law in the area of vertical restraints. No

[41] Para. 20.

more is said on the topic, unfortunately. The AG then continues his reasoning on the concrete question of book price-setting policies existing in the EU and what they could mean for his understanding of and reasoning on the concrete case.

14. Jet Set Hydrotechniek BV v Hoffland BV. ECLI:NL:RBDHA:2015:6346 (Rechtbank den Haag)

Plaintiff: Jet Set Hydrotechniek BV and others
Defendant: Hoffland BV and others
Facts and Arguments: One of the plaintiffs has a patent on a 'System and method for cutting steal plate', which has been granted to it in the Netherlands in 2007. JetSet exploits this patent for a steal cutting machine under the name 'RAGWORM'. It seems, however, that a technology with the same name is also exploited by another (unauthorized) business operating in the Netherlands – Hoffland BV. After JetSet finds out about Hoffland's activities, they agree to settle their dispute. In the meantime, JetSet starts proceedings for patent infringement against other undertakings, during which its patent is proclaimed to be invalid. In light of the patent invalidity, Hoffland alleges that, because one cannot infringe an invalid patent, it follows that its settlement agreement should also be (temporarily) set aside since its (inevitable) anti-competitive effects infringe article 6 Mw.

The court's reasoning and use of soft law:

RECOGNITION

The court states that the reasoning of Hoffland is wrong in light of the EU Technology Transfer Regulation and the pertinent Commission Guidelines, which provide that settlements in technology disputes are exempt from the competition prohibition. In this case, in its reasoning on the matter, the court relies on soft law read together with hard law.

Germany

1. Exploitation of Dominance. OLG Frankfurt, Urteil v 21.12.2010, (11 U 37/09), BeckRS 2011, 05114

Plaintiff: not named

Defendant: not named

Facts and Arguments: The appellant alleges abuse of dominance, whereby he was charged excessive prices for the purchase of a certain medicinal product from the respective producer. The appellant alleges that that producer has a dominant position on the relevant market, which allowed it to charge supra-competitive prices to the prejudice of its customers. The appellant also alleges the first instance court improperly assessed the relevant market and thus erroneously held the producer to not be dominant. One of the main issues in the case, thus, is the definition of the relevant market.

The court's reasoning and use of soft law:

RECOGNITION

In the context of its reasoning on the proper relevant market definition, the court invokes paragraph 27 of the 2010 Vertical Guidelines together with the Vertical Block Exemption Regulation (paragraph 27 refers to Article 2(4) of the Vertical Block Exemption Regulation – hereinafter VBER). In its relevant part, the said paragraph states:

'A company is treated as a potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative prices it is likely that this first company, within a short period of time normally not longer than one year, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the other company is active. That assessment must be based on realistic grounds; the mere theoretical possibility of entering a market is not sufficient. A distributor that provides specifications to a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods.'

2. Self-Service Gas Station. OLG Düsseldorf Kartellsenat, Urteil v 24.03.2004 (VI-U (Kart) 43/02), BeckRS 2004, 18469

Plaintiff: not named

Defendant: not named

Facts and Arguments: The respondent alleges no nullity of a service station agreement on account of a long-term exclusivity clause inasmuch as Article 101(1) TFEU (Article 14 German Competition Act - GWB) are not applicable to the service station agreement as an agency contract and the appellant has not demonstrated the existence of a substantial market partitioning effect in accordance with the cumulative effects theory.

The court's reasoning and use of soft law:

REJECTION

The court held the Vertical Guidelines (in their reasoning on agency) invoked by the appellant to be inapplicable to the situation at hand, which – in any case – played out before the time of writing of those guidelines. The Vertical Guidelines were also held to be of limited value because they can be a legal aid but do not have the status of law.

3. Repurchase Obligations. OLG Braunschweig, Urteil v 05.12.2012 (2 U 69/11), BeckRS 2014, 09750

Plaintiff: Zentralvereinigung des Kraftfahrzeuggewerbes zur Aufrechterhaltung lauteren Wettbewerbs e.V. (ZLW)

Defendant: V. Leasing GmbH

Facts and Arguments: This case concerns agreements in the automotive industry that the appellant alleges are caught by competition law, but the court disagrees on that point. To establish his competition challenge, the appellant – among others – refers to the Vertical Guidelines together with the VBER. However, since the court does not decide the dispute on the basis of competition law, the guidelines are not further engaged with.

The court's reasoning and use of soft law: Since the case was not decided on competition law grounds, the court did not engage in reasoning on either EU or German competition law.

OTHER

4. Specialist Wholesalers Home Automation. LG Köln, Urteil v 09.02.2012 (88 O (Kart) 33/10), BeckRS 2012, 19707

Plaintiff: not named

Defendant: Deutsche Großhandelsverband Haustechnik (DG Haustechnik) – Association of wholesalers of housing appliances

Facts and Arguments: The case is about exclusion of an applicant for membership in the DG Haustechnik. The reason is that mail order distributors such as the plaintiff do not necessarily have all the required expertize and showrooms to satisfy the demands of the members of the DG Haustechnik (wholesalers). This fact is such because mail order delivery companies usually deliver distantly and do not invest in physical spaces or specific expertize for the products they deliver.

The court's reasoning and use of soft law:

REJECTION

The plaintiff alleged discriminatory treatment that – unless objectively justified – is anti-competitive. He also claimed that one of the reasons for its rejection – it handling its business predominantly over the internet – is protected by the European Commission in its Guidelines on Vertical Restraints. However, the judge did not rule on this point and denied the Vertical Guidelines' applicability by maintaining they were not controlling in relations between private parties.

5. Scout Shoolbags. KG, Urteil v 19.9.2013 (2 U 8/09), BeckRS 2013, 16518

Plaintiff: Scout bags

Defendant: Berlin-based stationer

Facts and Arguments: School bag manufacturer Sternjakob had prohibited any sales via eBay "or similar auction platforms" in its selection criteria for admitted distribution partners. This prohibition was challenged by a Berlin-based stationer, who was part of Sternjacob's distribution network and who sold the Scout products in his retail shop and online. The ruling hinges on the interpretation of paragraph 54 of the Commission's Vertical Guidelines, which creates an explicit rule on the issue at hand, namely that 'a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.'

The court's reasoning and use of soft law:

RECOGNITION

The court actually accepts the line of reasoning in paragraph 54 of the Vertical Guidelines with regard to the possibility of banning sales on online platforms, saying that 'attempts to introduce such restrictions as "hard-core" in the meaning of the VBER have remained unsuccessful.' The court maintains that the restriction in question is of a qualitative nature and – for it to be licit – it needs to be examined in light of the non-discrimination principle. The appeal court took an approach in favor of branded articles. The judge shared the disputed view that a purchaser of a product may be prohibited from reselling this product via an internet platform such as eBay within the framework of a selective distribution system. The court drew this conclusion from recognized principles of European competition case law which state that selective distribution systems are not anticompetitive if the selection of resellers is based on objective quality criteria which refer to the professional competence of the reseller, its staff or its material resources and equipment, and which are applied in a uniform way without discrimination.

6. Sports articles. LG München I, Urteil v 24.06.2008 (33 O 22144/07), BeckRS 2009, 07108) and OLG München, Urteil v 2.7.2009 (U (K) 4842/08), BeckRS 2009, 20091

Party to the dispute 1: not named

Party to the dispute 2: Amer Sports

Facts and Arguments: The distributor of an international consortium producing sports articles complains against the manufacturer for having prohibited it from selling via online platforms.

The court's reasoning and use of soft law:

RECOGNITION

Following the line taken by the lower court, the Munich Appellate Court reasons that doctrine/case law and the (old) Vertical Guidelines point to the conclusion that (non-discriminatory) qualitative requirements should not be seen as restrictive of competition in the sense of Article 4b. of the VBER. According to the court, online sales should be seen as qualitative requirements (they do not completely eliminate access to the product online in the *Pierre Fabre* sense) and not as outright bans on a certain type of selling. Seen in that way, qualitative restrictions such as online sales bans can be justified if not discriminatory, in the same way that such restrictions in physical stores can be justified.

7. Coty v Akzente. LG Frankfurt, Urteil v 31.07.2014 (2-03 O 128/13). On appeal, the case was sent to the CJEU for a preliminary ruling

Party to the dispute 1: Akzente (distributor)

Party to the dispute 2: Coty (cosmetics manufacturer)

Facts and Arguments: The case concerns a restriction imposed by the manufacturer on its offline distributor Akzente to sell products via third party platforms on the Internet. The ruling hinges on the interpretation of paragraph 54 of the Commission's Vertical Guidelines (for the content of the said paragraph, refer to case 5 above).

The court's reasoning and use of soft law:

REJECTION

The court maintains that the understanding expressed in paragraph 54 of the Vertical Guidelines is not compatible with the wording of Article 101 TFEU nor with Article 4 of Regulation 330/2010. Following paragraph 54 would in essence mean that the manufacturer could prohibit a substantial proportion of internet sales on platforms without differentiating between them on the basis of their respective quality. The court believes the Guidelines were issued in 2010. After the *Pierre Fabre* judgment of CJEU, paragraph 54 of the Guidelines should be considered as outdated. Finally, the Guidelines only bind the Commission and not the judge.

8. Digital Cameras. LG Kiel, Urteil v 08.11.2013 (14 O 44/13 Kart), BeckRS 2013, 19630 and OLG Schleswig, Urteil v 5.6.2014 (16 U (Kart) 154/13), BeckRS 2014, 17798

Party to the dispute 1: A distributor of the defendant Casio

Party to the dispute 2: Casio

Facts and Arguments: The case concerns a manufacturer of digital cameras who prohibits its distributors from selling on – among others – online platforms. The distribution contracts expressly list eBay and Amazon Marketplace as inadmissible marketplaces. The ruling hinges on the interpretation of paragraph 54 of the Commission's Vertical Guidelines (for the content of the said paragraph, refer to case 5 above).

The court's reasoning and use of soft law:

RECOGNITION

The court sees the restriction on sales on online platforms as a hardcore restriction, basing itself on paragraph 50 of the Vertical Guidelines, which in turn elaborates on the content of Article 4 b) of the VBER. The court, therefore, maintains that paragraph 54 of the Vertical Guidelines cannot be interpreted as supporting a total sales ban on online platforms (as this is an object restriction). The court re-interprets the meaning of paragraph 54 by saying that,

in this paragraph, the Commission rather meant that the producer could introduce certain justifiable quality requirements (such as those in brick and mortar shops) to its distribution system, but not ban sales on online platforms in their totality. On appeal, essentially the same argument is repeated by the OLG Schleswig.

9. Sales Bans by Deuter. LG Frankfurt am Main, Urteil v 18.6.2014 (2-03 O 158/13), GRURRS 2014, 13727 and OLG Frankfurt am Main, Urteil v 22.12.2015 (11 U 84/14 (Kart))[1]

Party to the dispute 1: Owner of the website for sports goods 123.de

Party to the dispute 2: Deuter

Facts and Arguments: Deuter started operating a selective distribution system in the year 2013. In its terms and conditions with distributors, those were *inter alia* prohibited from either selling products via online marketplaces or cooperating with price comparison websites without the prior written consent of Deuter. The ruling hinges on the interpretation of paragraph 54 of the Commission's Vertical Guidelines (for the content of the said paragraph, refer to case 5 above).

- **First Instance Judgment**

The court's reasoning and use of soft law:

REJECTION

The Regional Court found that the contractual clauses that Deuter and its distributors agreed on violated Art. 101(1)TFEU and its equivalent in German law (Section 1 of the GWB). The court further stated that the clauses constituted hardcore restrictions and could therefore not be justified by efficiencies. With regard to the Vertical Guidelines, in paragraph 48 of the Regional court's judgment, the judge calls paragraph 54 thereof 'outdated' and superseded

[1] Facts and arguments are taken from the following Lexology report: http://www.lexology.com/library/detail.aspx?g=85fbd713-efa5-4c82-b003-4f2c7542fa3d&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2015-12-28&utm_term=.

by the case law of the CJEU (namely, *Pierre Fabre*). Additionally, the paragraph is seen as not complying with the hard legal framework.

- Appellate Judgment

The court's reasoning and use of soft law:

RECOGNITION

On the point of the ability of manufacturers to prohibit sales via online marketplaces or price-comparison websites, the appellate court overturned the Regional Court. The appellate court's ruling found a manufacturer-imposed ban of sales on third party platforms in line with German/European competition law (as suggested by paragraph 54 of the Vertical Guidelines). More specifically, the court found a manufacturer of brand products had a legitimate interest to market its produce as high quality and – in this respect – impose conditions on its sale with this aim in mind. A ban on online marketplace or price-comparison websites was thus justified if it was necessary for the maintenance of brand image.

10. Specialized distribution agreement. LG Köln, Urteil v 15.02.2013 (90 O 57/12), BeckRS 2013, 05905

Plaintiff: not named

Defendant: not named

Facts and Arguments: This case is a follow-on damages claim. In a vertical distribution network, the manufacturer inserts contractual clauses that discourage distributors from selling online. In particular, the distributors were not getting remunerated for online sales at the same level as when they were making sales offline (dual pricing). In that regard, paragraph 52 d) of the 2010 Vertical Guidelines clearly states that a hard-core restriction exists if there is 'an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a variable fee where the sum increases with the realized offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts.' The latter

scenario is precisely what happened in this case, but the defendant believes that it had no way of knowing that it is doing something anti-competitive at the time it was implementing the practices in question, because the 2010 Vertical Guidelines were not yet published and their older equivalent did not mention such a prohibition. Therefore, the claimant argues, its agreement should be exempted under the VBER it fell under its protective ambit at the time of writing.

The court's reasoning and use of soft law:

OTHER

The argument on the basis of soft law made by the claimant was not taken up further by the court because it was not relevant to the claim for damages that was in dispute. It was, however, discussed that should it have been needed to examine the exemption claim, to which the Vertical Guidelines were relevant, it would not succeed under either VBER or Article 101.3 TFEU because no positive effects of the behavior of the undertaking could be seen in the first place.

11. TV Digital. Landgerichts München I v 21.03.2006 (33 O 24781/04), ZUM 2006, 671

Plaintiff: A member of the Bauer Media Group
Defendant: The operator of the pay-TV channel Premiere
Facts and Arguments: The defendant had stopped with its business of TV-program magazine production, had sold its subscribers' base to a third party and had committed to this third party to sell this party's magazine – ' TV Digital' – on an exclusive basis for a period of 5 years. In this context, the defendant, who also operates a service for paid-TV subscriptions, had offered attractive packages to its customers, comprising free access to 'TV Digital' if customers opted for going for a Premium paid-TV offer. If they opted for a lower paid-TV package, they were given two free copies of the magazine 'TV Digital' and the possibility to become subscribers for the magazine (not for free though).
The plaintiff makes the case that these offers make it impossible for it to operate on the market for TV program magazines and it already visibly suffers losses. The defendant disagrees with this reasoning, showing that about 40% of all its magazine subscribers were

actually not paid TV subscribers. Out of their own pay-TV subscribers, on the other hand, only 25% had Premium packages offering the magazine subscription for free.
The court agreed that such an arrangement (for exclusive distribution for 5 years) fell within the protective ambit of the VBER.

The court's reasoning and use of soft law:

RECOGNITION

The first reference to the Vertical Guidelines is made by the defendants, who allege that their contract for distribution of 'TV Digital' should be seen as an agency agreement that falls out of the ambit of Article 101(1) TFEU pursuant to the old Vertical Guidelines. In order to examine this argument, the court uses paragraphs 13 to 16 of the old Vertical Guidelines, which – as the guidelines themselves state – should be read in conjunction with Council Directive 86/653/EEC. Therefore, this instance of judicial engagement with the guidelines represents interpretation of soft law together with pertinent hard law.

12. Selective distribution in cosmetic products. LG Nürnberg-Fürth, Beschluss v 16.04.2010 (4 HKO 2611/09), BeckRS 2010, 29293

Plaintiff: P.P. GmbH
Defendant: B.B.P. GmbH
Facts and Arguments: The case deals with the issues of selective distribution in the perfumery sector. In particular, the plaintiff (distributor) complains for not having been supplied a particular brand by the producer with which it has a distribution contract. The supplier alleges that, for the delivery of the particular brand of products, the shops of the distributor need to comply with certain – both quantitative and qualitative criteria – which is currently not the case. The plaintiff refers to a requirement for supply based on the GWB and sues saying that its economic dependency on the supplier does not allow it to get the refused products from elsewhere.

The court's reasoning and use of soft law:

RECOGNITION

The court uses the VBER and the Vertical Guidelines in order to deny the claim of the plaintiff that the defendant's behavior is objectionable under competition law, because it actually falls under the protective ambit of the VBER as explained in paragraphs 185-6 of the (old) Vertical Guidelines.

13. OLG Düsseldorf, Beschluss v 13.11.2013 (VI - Kart 5/09 (V)), BeckRS 2015, 03537

Plaintiff: Plaintiff is called 'Z' by the court
Defendant: Bundeskartellamt (hereinafter BKartA)
Facts and Arguments: This case is an appeal to a BKartA decision that went against an anti-competitive rebate/discount system instituted by German producer of medicines Merck. The system of discounts (although non-discriminatory on the surface) privileged essentially only one big distributor– the former exclusive distributor for Merck in Germany (VWR) – to the prejudice of smaller distributors. The discounts were therefore found to be discriminatory by the BkartA.

The court's reasoning and use of soft law:

RECOGNITION

On appeal, the Article 81(3) Guidelines and paragraph 51 thereof become relevant at the point where it has to be determined whether the practices of Merck can be justified on efficiency grounds. The guidelines are used as shorthand for describing the details under which the first condition of Article 101(3) TFEU applies. Additionally, the Vertical Guidelines are used by the court on multiple occasions with regard to their provisions on market definition for the purposes of the applicability of the VBER (paragraphs 87 to 95).

14. Laborchemikalien 2. OLG Düsseldorf, Beschluss v 21.12.2011 (VI-Kart 5/11 (V)), BeckRS 2013, 13541

Plaintiff: Defendant is called 'M' by the court

Defendant: BKartA

Facts and Arguments: This case was an appeal to a decision of the BKartA (B3-64/05) which held that the exclusive distribution of Merck products (German producer of medicines) through one sole distributor is anti-competitive under German and EU competition law and is also discriminatory under German law (Art. 20 GWB).

The court's reasoning and use of soft law:

RECOGNITION

The mentioning of the Article 101(3) Guidelines happens when the defendant claims efficiencies, which the court dismisses. In particular, the specific paragraphs of the guidelines cited are 51 and 54, which summarize the rules for analysis under Article 101(3) that are already well known from established case law. The Vertical Guidelines are also mentioned (together with the VBER) in the section of the judgment where the defendant claims that its agreement should be exempted both under the old and the new VBER rules.

15. Supplementary Pension. OLG Karlsruhe, Urteil v 27.08.2014 (6 U 115/11 (Kart.)), BeckRS 2014, 20482

Plaintiff: not named

Defendant: not named

Facts and Arguments: The pension institution of the Federation and the Länder (VBL), a public institution, concludes with public sector employers (so-called stakeholders) participation agreements in the form of group insurance policies. On this basis, workers of the parties to the agreement get supplementary social benefits (supplementary retirement, earning capacity and survivors contributions) in accordance with the applicable statutes (VBLS). The provisions of § 23 para. 2 VBLS oblige a withdrawing party to pay a certain proportionate amount from the institution's assets; however, the 'equivalency provision'

in the statute-supplementing resolution of the board of directors of the VBL of 21.11.2012 disadvantages the separated institutions inadequately. With this provision, the board of directors of the VBL on behalf of VBL abused its dominant position.

The court's reasoning and use of soft law:

RECOGNITION

The Vertical Guidelines and paragraph 27 thereof are used by the court at the market definition stage, when discussing supply-side substitutability and the extent to which new entry was possible in the relevant market. It seems that paragraph 27 of the Vertical Guidelines is cited on its own, but this is because it contains a well-known piece of information supported by hard law (for a quote to the paragraph, see case number 1 above).

15' (listed as case 40 below and under Chapter 3). Supplementary Pension (VBL Modified reimbursement model II, related to case 15). OLG Karlsruhe, Urteil vom 27. 08. 2014 – 6 U 116/11 (Kart) – Juris

This judgment is given against the same defendant as the one in the previous case – VBL. The plaintiff (which is different from the clinic mentioned in the above judgment 6 U 115/11 Kart) is not explicitly named. In this case, the same paragraph of the Vertical Guidelines (paragraph 27) is mentioned in the same context as the previous case. For details, please refer to the case 6 U 115/11 Kart above.

The court's reasoning and use of soft law:

RECOGNITION

The Vertical Guidelines and paragraph 27 thereof are used by the court at the market definition stage, when discussing supply-side substitutability and the extent to which new entry was possible in the relevant market. It seems that paragraph 27 of the Vertical Guidelines is cited on its own, but this is because it contains a well-known piece of information supported by hard law (for a quote to the paragraph, see case number 1 above)

16. PIWIS Diagnostic. LG Stuttgart, Urteil v 02.07.2012 (41 O 163/07 KfH), BeckRS 2015, 17997 and BGH, Urteil v 06.10.2015 (KZR 87/13), BeckRS 2015, 17973

Party to the dispute 1: A number of German tuning companies

Party to the dispute 2: Prosche

Facts and Arguments: This is a refusal to supply case – a refusal by Porsche to deliver spare parts and/or new vehicles to tuning companies.

The court's reasoning and use of soft law:

RECOGNITION

In the lower court judgment, the Vertical Guidelines are mentioned once together with the VBER, in a statement by the court that they are not directly applicable to the automotive sector. The court nevertheless finds it useful to quote the quite general paragraph 3 thereof. In the appellate judgment, the only soft law discussed are the 'Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles' (2010/C 138/05). These, however, are not an object of study of this work.

17. AdBlock Plus. LG München I, Urteil v 27.05.2015 (37 O 11673/14), BeckRS 2015, 09562

Plaintiff: not explicitly named

Defendant: not explicitly named

Facts and Arguments: This is a case in which the plaintiff (an owner of several websites in Germany – ran.de; sixx.de; songtexte.com) complains against the so-called 'whitelisting' agreements used by AdBlock plus (whose distributors are defendants to the case). Those are claimed to be anti-competitive under Article 101.1 because they allow website owners and AdBlock Plus to agree on excluding certain type of 'non-acceptable' advertising on websites, thus stifling commercial activity on the advertising market.

The court's reasoning and use of soft law:

RECOGNITION

The court rejects the claim of the plaintiff that in the framework of the VBER and the pertinent Vertical Guidelines, the AdBlock business of the defendant can be sanctioned. The court, reading the Vertical Guidelines and the VBER together, says that their provisions are not applicable to the narrow question of blocking ads online. The specific paragraphs of the Vertical Guidelines that were reviewed are 56 and 64. Thus, although no actual conclusions were based on the interpretation of the Vertical Guidelines together with the VBER, the judicial citation to these sources shows that if the court did consider them relevant, it would have used the guidelines.

18. VBL. BGH, Urteil v 08.04.2014 (KZR 53/12), BeckRS 2014, 12999

Plaintiff: not named
Defendant: VBL (Versorungsanstalt des Bundes und der Länder)
Facts and Arguments: The judgment is an appeal from a lower court decision that declared EU competition law not applicable to a contract for compulsory group insurance with a single exclusive supplier, because that supplier/insurer does not fall within the definition of 'undertaking' under EU competition law. Although the appellate court disagreed on the point that the insurer was not an undertaking, it still decided that competition law was not applicable to the dispute at hand.

The court's reasoning and use of soft law:

RECOGNITION

In order to reach the conclusion that no anti-competitive agreement existed, the court looked at the provisions of the VBER together with the Vertical Guidelines and paragraph 132 thereof in particular. The latter, in its relevant part, is formulated as follows 'The capacity for single branding obligations of one specific supplier to result in anticompetitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors that either are not yet present on the market at the time the

obligations are concluded, or that are not in a position to compete for the full supply of the customers […]The market position of the supplier is thus of main importance to assess possible anti-competitive effects of single branding obligations.' With this (and other case law- and doctrine-based) relevant information in mind, the court concluded that foreclosure was not able to materialize in the case of the contracts at hand that could be terminated at a very short notice.

19. Tanking Stations. KG, Urteil v 26.03.2007 (23 U 7/06), BeckRS 2009, 88471

Plaintiff: Confederation of gas-station operators
Defendant: not explicitly named (one of the largest oil companies in Germany)
Facts and Arguments: The case concerns agency agreements in the oil sector in Germany, the claim of the plaintiff material to this study being that the contracts in question are not true agency contracts as maintained by the lower-instance court.

The court's reasoning and use of soft law:

RECOGNITION

The agency-relevant part of the 2001, older version of the Vertical Guidelines (paragraphs 12-20) is engaged with explicitly by the court. This engagement represents use of soft law as shorthand to case law, also proven by the reasoning of the court in the section of the judgment where a preliminary ruling to the CJEU is contemplated. Where the preliminary ruling is contemplated, the court indeed justifies its refusal for reference on the basis – among others – that the guidelines are sufficiently clear in their provisions and they also do not add anything new to already established principles sealed in hard law.

20. Oil Company. LG Essen, Urteil v 27.08.2015 (43 O 30/15), BeckRS 2015, 20237

Plaintiff: not named
Defendant: not named

Facts and Arguments: The case happens in the context of a terminated 'petrol station agreement', whereby one party managed the tank station and the other supplied the fuel, etc. In the course of the original 'petrol station agreement', an additional supplementary agreement for cashless payment transactions was signed by the parties. This agreement forms the object of the current dispute.

The court's reasoning and use of soft law:

RECOGNITION

The question for which the invocation of the Vertical Guidelines is necessary is the allegation of the defendant that the agreement claimed to be anti-competitive by the opposing party (supplementary agreement for cashless payment transactions) is actually an agency agreement, for which the plaintiff does not bear the risk. The court, citing the 2010 Vertical Guidelines (paragraph 16) together with case C-217/05 of the CJEU, says that its national-law based deliberations prior to deciding the agency issue had led it to conclude that the agency question is not material to the dispute. Thus, although no actual conclusions were based on the interpretation of the Vertical Guidelines together with supranational case law, the judicial citation to these sources shows that if the court considered it necessary to judge on the agency question, it would have used the guidelines.

21. Pharmacy. LG Hannover, Urteil v 25.08.2015 (18 O 91/15), BeckRS 2015, 19145

Plaintiff: not named
Defendant: not named
Facts and Arguments: The contract at issue is between pharmacies and a supplier of a medicinal-cosmetic product for weight loss. In its contracts with pharmacies, the supplier/producer of the medicinal products includes minimum-price clauses, which essentially amount to Resale Price Maintenance (RPM – an object restriction under EU competition law).

The court's reasoning and use of soft law:

RECOGNITION

In its reasoning on the nature of the restriction, and the possible situations in which an RPM might be warranted, the court invokes paragraph 225 of the 2010 Vertical Guidelines, which provides that RPM could be acceptable only when indispensable to a contract promoting competition. However, the contract in question is not such a contract. In this case, to decide on the issue at hand, the relevant passage of the guidelines was used as a stand-alone reference (shorthand) for established case law.

22. Mobilstation Patent. LG Düsseldorf, Urteile v 24.04.2012 (4b O 274/10 & 4b O 273/10), BeckRS 2012, 09376 and BeckRS 2012, 09682 (the same legal issue is decided in several cases with different parties to them – see case 24 in that regard)

Plaintiff: not explicitly named (patent owner)
Defendant: not explicitly named (member of ETSI)
Facts and Arguments: The relevant part of the judgment discusses the issue of whether a FRAND- engaged SEP-owner infringes competition law (Article 102 TFEU) when it applies for injunctive relief against an infringer of its patent.

The court's reasoning and use of soft law:

RECOGNITION

The Horizontal Guidelines (which the court considers to be an important source of interpretation in the context of standardization) and paragraphs 285 and 287 thereof in particular are invoked by the defendant to support an argument that a FRAND commitment granted to it by the SEP-holder affects the latter's ability to raise an injunction claim against it. However, *the court states the Horizontal Guidelines do not support such a reading of FRAND* and that such a commitment does not affect the ability of the license holder to claim injunctive relief against the defendant. This instance seems to be explicit reasoning on the basis of the guidelines.

23. Press Distribution Assiociation. LG Köln, Urteil v 14.02.2012 (88 O (Kart) 17/11), BeckRS 2012, 05107 and OLG Düsseldorf, Urteil v 26.2.2014 (VI-U (Kart) 7/12), BeckRS 2014, 04324

Party to the dispute 1: Bauer Media Group (one of the largest German publishing houses)
Party to the dispute 2: the National Association of Newspaper Wholesalers (comprising 55 independent wholesalers)
Facts and Arguments: The norm for press distribution in Germany is that there is one big wholesaler servicing a territory exclusively (with all the publications of all publishing houses). For these purposes the agreements between the publishing houses and wholesalers were made through the National Association, whereby the conditions negotiated by the association with one publisher are then taken over by all the rest of the publishers. The effect of this practice is that the conditions and prices agreed with all publishers are the same. The dispute started when the Bauer Media Group no longer agreed to such arrangements and wanted to negotiate its individual terms of supply with wholesalers. The wholesalers did not agree. The applicant requests that the wholesalers association is precluded from imposing uniform conditions on all publishers, is fined (also imprisonment is suggested for some key officials) and is forced to adopt individualized conditions in its contracts with publishers. The defendants want the action against them to be dismissed.

- First Instance Judgment

The court's reasoning and use of soft law:

RECOGNITION

Bauer allege that the arrangements between the individual members of the National Association completely prevent competition on the market as all the members are (potential) competitors who instead agree to work under a singular entity. Here, the old Horizontal Guidelines (paragraph 9, in particular with reference to footnote 9) were cited by the court to clarify the concept of 'potential 'competitors. This use of the guidelines constitutes shorthand reference to a principle established in a Commission decision, namely that 'A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other

necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices.'

- Appellate Judgment

The court's reasoning and use of soft law:

RECOGNITION

The Vertical Guidelines and paragraph 51 thereof are cited together with the VBER [(Art.4 b) (i)] to show that – contrary to what Bauer Media Group alleges – the vertical agreements in question (between the publishers and the wholesalers) could qualify for exemption under the VBER because they only restrict active sales under an exclusive distribution framework. According to the VBER [(Art.4 b) i)], if passive sales are still available in such a scenario, the exclusive agreement can fall under the permissive scope of the Regulation. In that regard, paragraph 51 of the Vertical Guidelines is used to illustrate the difference between active and passive sales.

The Article 101(3) Guidelines and paragraphs 50 and 51 thereof are also invoked by the court on its own initiative to test whether the claimed efficiencies by the National Association of Newspaper Wholesalers could justify the existence of their restrictive (horizontal) agreement. Here it seems the guidelines are used as shorthand for discussion of well-known principles established in case law/Commission decisions. In particular, the principles in question are that the efficiencies claimed should be objective in nature and that there should be a causal link between the efficiencies claimed and the restrictive agreement that is to be exempted.

24. LG Düsseldorf, Urteil v 11.12.2012 (4a O 54/12 U), BeckRS 2013, 14798 (refer to case 22, which is with the same fact set but different parties)

Plaintiff: The legal successor of IP Com GmbH & Co

Defendant: Nokia

Facts and Arguments: The relevant part of the judgment discusses the issue of whether a FRAND- engaged SEP-owner infringes competition law (Article 102 TFEU) when it applies for injunctive relief against an infringer of its patent.

The court's reasoning and use of soft law:

RECOGNITION

The Horizontal Guidelines (which the court considers to be an important source of interpretation in the context of standardization) and paragraphs 285 and 287 thereof in particular are invoked by the defendant to support an argument that a FRAND commitment granted to it by the SEP-holder affects the latter's ability to raise an injunction claim against it. However, *the court states the Horizontal Guidelines do not support such a reading of FRAND* and that such a commitment does not affect the ability of the license holder to claim injunctive relief against the defendant. This instance seems to be explicit reasoning on the basis of the guidelines.

25. Purchase Agreement. LG Hannover, Urteil v 15.06.2011 (21 O 25/11)

Plaintiff: not explicitly named (a pharmaceutical company)
Defendant: Sprechstundenbedarfsbeschaffung GbR (influenza vaccinations supplier)
Facts and Arguments: This is a challenge for anti-competitiveness of a purchasing agreement concluded between statutory health care insurance funds in the region of Lower Saxony in order to buy influenza vaccinations from the above-mentioned supplier. The agreement was challenged by a pharmaceuticals company, which claimed that the market share of the (collective) buyers– the health insurance funds – was too high and their agreement could thus create a significant problem for competition.

The court's reasoning and use of soft law:

RECOGNITION

In order to determine the market power of the collective buyers, the court uses the old (2001) Horizontal Guidelines and paragraphs 130-131 thereof. The judge states that it is a long established practice under both EU and German law that for the antitrust assessment of buying collectives the determination of market power (in market share terms) is key. It is then estimated that the market share of the buyer collective is no more than 15% on both the purchasing and selling markets. In addition, the existence of counterveiling buyer power exerted by pharmaceutical companies (paragraph 131 of the guidelines) allows the court to further its argument that there is no restriction of competition in the case at hand. In this case, the Horizontal Guidelines are endorsed in a stand-alone fashion, because they embody well-established principles of both national and EU law.

26. Coded Data. LG Mannheim, Beschluss v 21.11.2014

Plaintiff: not explicitly named (the owner of the European patent 'Subtitling transmission system')
Defendant: not explicitly named
Facts and Arguments: The plaintiff believes its patent had been infringed by the defendant. The latter, however, retorts that the plaintiff had acted against EU and German competition law by not offering its patent on FRAND terms in the first place. Had this been the case, the defendant claims, it would have entered into negotiations (the final decision of this case was suspended until the pronouncement of the CJEU in the *Huawei* case).[2]

The court's reasoning and use of soft law:

RECOGNITION

The Horizontal Guidelines are used by the court in order to reason on the scope of a FRAND obligation as described in paragraphs 278-292 of the guidelines. This is a stand-alone invocation of the guidelines in their summary of a term that is shaped (to a great extent) by (supranational) case law.

[2] Judgment of 16 July 2015, Huawei Technologies C-170/13, EU:C:2015:477.

27. OVG Berlin-Brandenburg, Urteil v 20.10.2005 (12 B 3/05), BeckRS 2006, 20174

Plaintiff: not explicitly mentioned (independent food retailers)

Defendant: not explicitly mentioned

Facts and Arguments: In this case, food retailers object to being subjected to deposit and return obligations for disposable drink packages pursuant to the provisions of a government 'Packaging Ordinance'. The plaintiffs claim that the obligations are an infringement on their freedom to exercise their profession and are also against EU law. In particular, the so-called 'Kostenclearing' system is contrary to EU and German competition law (essentially a system that allows the big industry players to set the rules for waste management to the exclusion and detriment of the smaller ones).

The court's reasoning and use of soft law:

RECOGNITION

In the court's reasoning on whether the implemented waste management system is actually contrary to competition law, the old Horizontal Guidelines are invoked. The particular passages discussed are paragraphs 192-197 – the discussion there centers on the applicability of Article 101(3) to environmental agreements. The guidelines are explicitly reasoned upon (recognized) by the court because, the judge argues, these passages reflect the way Article 101(3) should be interpreted under EU law, but also under German law after decentralization, which imposes a far reaching 'synchronization obligation' on national law in that regard.

28. HRS. OLG Düsseldorf, Beschluss v 09.01.2015 (VI Kart 1/14 (V)

Plaintiff: HRS

Defendant: BkartA

Facts and Arguments: This is an appeal against an administrative decision sanctioning the hotel booking portal HRS for its continuous use of the so-called 'wide' MFN (Most Favored Nation) clauses in its contracts with hotels. The wide MFN clauses provide that hotels must

always provide HRS with the most favorable conditions for their rooms (lowest prices, greatest availability, most advantageous cancellation policies, etc.). This rule thus excludes hotels from offering better conditions on their own websites or on other platforms. The MFN clauses in the contracts of HRS and its customers (hotels) were held to be anti-competitive by both the BkartA and the OLG Düsseldorf.

The court's reasoning and use of soft law:

RECOGNITION

In paragraph 123 of the judgment, an abstract of the Article 101(3) Guidelines is cited (paragraph 51) as a shorthand for well-established case law on the conditions that should be fulfilled for the first paragraph of Article 81(3) – improvement of technical and economic progress – to apply.

29. Employer v former employee. BGH, Urteil v 10.12.2008 (KZR 54/08), BeckRS 2009, 09090

Plaintiff: not explicitly mentioned (employer)
Defendant: not explicitly mentioned (former employee)
Facts and Arguments: The case concerns a contract for the delivery of goods, which includes a 2-year non-compete clause. The latter has to be tested for ancilliarity for a final decision on the contract's anti-competitiveness to be made.

The court's reasoning and use of soft law:

RECOGNITION

The Article 101(3) Guidelines are mentioned with regard to ancillary restraints, together with relevant judgments (Pronuptia, Remia).[3] The judgment states that those supranational cases are 'summarized' in the Article 101(3) Guidelines, which would mean that this judicial

[3] Judgment of 28 January 1986, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, EU:C:1986:41; Judgment of 11 July 1985, Remia BV and others v Commission of the European Communities, EU:C:1985:327; Judgment of

engagement with soft law is a shorthand use of the guidelines as summary of relevant case law on a topic (in this case – ancilliarity).

30. LG Dusseldorf, Urteile v 11.09.2008 (4b O 107/07; 4b O 78/07; 4a O 81/07), BeckRS 2014, 13080; BeckRS 2009, 10890; NJOZ 2009, 930 (the same legal issue is decided in several cases with different parties to them)

Plaintiff: owner of MPEG-2 standard

Defendant: not explicitly mentioned

Facts and Arguments: This is a patent infringement case in which several German companies (disk manufacturers) were found to have infringed certain patents in the MPEG-2 patent portfolio of the plaintiff. The defendants raise an antitrust challenge to the licensing practices of the plaintiff, claiming that they have long strived to obtain a license, but the plaintiff only offered a worldwide license which was not suited to the needs of the defendants. A license only for the German territory was required by the defendant instead. The defendants claim that the plaintiff's denial to offer them a standard license constitutes anti-competitive behavior forcing the defendants to secure a worldwide license instead.

The court's reasoning and use of soft law:

RECOGNITION

The court assesses the claim of the defendant in light of the provisions of the old Technology Transfer Guidelines (paragraphs 210-221), ruling that the plaintiff's licensing practices are not to be seen as anti-competitive. To the contrary, the court says, bundling of licenses (technology pools) can actually be pro-competitive and save costs and time for the parties that would otherwise have to secure multiple individual licenses. This reasoning is largely based on the guidelines, which are invoked in a stand-alone fashion. Although the court does not mention the pertinent Technology Transfer Regulation explicitly, this legislative instrument forms the basis on which the guidelines stand and this judicial engagement instance is therefore seen as recognition together with hard law.

31. MPEG-2. LG Düsseldorf, Urteil v 30. 11. 2006 (4b O 346/05, NJOZ 2007, 2100)

Plaintiff: owner of MPEG-2 standard

Defendant: not explicitly mentioned

Facts and Arguments: The factual base within which the Technology Transfer Guidelines are invoked is identical to that of case 30 above.

The court's reasoning and use of soft law:

RECOGNITION

Exactly the same passages of the old Technology Transfer Guidelines (paragraphs 210-221) are used (recognized) in exactly the same way by the court as in the previously described patent infringement case (number 30). There is also an additional claim made by the defendant – namely that it doubts the independence of the experts involved in the development of the MPEG-2 standard. In responding to this claim, the court cites paragraphs 232 and 233 of the Technology Transfer Guidelines (without further invocation of the pertinent Regulation), which citation is hereby seen as another explicit recognition instance.

32. Licensing agreement cases. LG Frankfurt 3/11 O 42/05 and, on appeal 34. OLG Frankfurt 11 U 5/06 (Kart)

Plaintiff: not explicitly mentioned

Defendant: not explicitly mentioned

Facts and Arguments: This case concerns a licensing agreement between Warner and the plaintiff (name not mentioned) for the rights for the production and distribution of items based on movie X (name not mentioned) in the territories of Germany, Austria and Switzerland. The plaintiff subsequently concluded a sub-licensing agreement for joint production and distribution with the defendants, who – four months after the conclusion of the aforementioned agreement – stopped paying the fees negotiated under it. The plaintiff therefore brought the action with number 3/11 O 42/05 before the District Court of Frankfurt. The defendants argued that they owed nothing to the plaintiffs because the sub-licensing agreement concluded with them was void due to the voidness of the original

licensing agreement with Warner that contained hard-core anti-competitive clauses according to the defendants.

- First instance case

The district court agreed with the argument put forward by the defendants – namely that, because the licensing agreement between Warner and the plaintiffs contained anti-competitive provisions (hard-core restrictions in the framework of the VBER 2790/1999), which rendered it void, no claim could be made under the sub-licensing agreement with the defendants either. In this context, the 101.3 guidelines were mentioned in a one-liner when the court discussed the possibility for an individual exemption of the licensing agreement. The statement in that regard reads as follows: 'The conditions of an individual exemption pursuant to Art. 101.3 TFEU in conjunction with Regulation 1/2003, and as formulated in the guidelines on Article 101.3, were not discussed by the plaintiff'.' This mentioning of the guidelines as part and parcel of the hard legislative framework established by Regulation 1/2003 and Article 101.3 TFEU again shows that courts are comfortable in using soft law as support/clarification for pertinent hard law.

The court's reasoning and use of soft law:

RECOGNITION

- Appellate Judgment

On appeal, the lower court's judgment was reversed and the district court criticized for failing to acknowledge that this case could not be decided purely on the basis of competition law, as at its core there lays an intellectual property issue. In this context, the appellate court went into a discussion of the relevant legal framework (case law, legislation) that explained the ability of intellectual property rights considerations to affect the analysis under competition law. As part of this framework, and to confirm its analysis based on case law, the court also cited the Technology Transfer BER, together with the pertinent technology transfer guidelines. This is another classical instance of judicial citation of hard law together with soft law – in this case, in an *obiter* fashion.

The court's reasoning and use of soft law:

RECOGNITION

33. Business Liability Insurance Pool. LG Düsseldorf Kart 11/07 (V)

Plaintiff: not explicitly mentioned

Defendant: BKartA

Facts and Arguments: In this case, the Düsseldorf Court of Appeal suspended a BkartA decision that prohibited several insurance groups from continuing to operate an insurance pool that covered for the liability risks of auditors and accountants (collective coverage under standardized terms). The BkartA considered the collective coverage agreements as a restriction of competition under Article 101 TFEU and its national equivalent – S. 1 GWB. In its decision, the Düsseldorf Court of Appeal questioned the BkartA's narrow relevant market definition that claimed there existed a separate market for the insurance of auditors and accountants. The court, instead, opted for a broader relevant market definition – that of consulting professions more generally. Under the new relevant market definition, the practices in question fell under the protective ambit of the IBER (Insurance Block Exemption Regulation) and were therefore exempted from anti-trust scrutiny. In this case, the horizontal guidelines were only briefly mentioned in the statement of facts section, together with other relevant policy and legal instruments ((i.e. the Insurance Block Exemption Regulation – IBER) and scholarly contributions. The court did not reason on the contents of the guidelines in the 'assessment' part of the judgment.[4]

The court's reasoning and use of soft law:

RECOGNITION

[4] See para. 18 and 19 of judgment.

Plaintiff: not explicitly mentioned

Defendant: not explicitly mentioned

Facts and Arguments: The claimants were the proprietors of patents on the encoding of video signals in accordance with the MPEG-2 standard (they had formed a so-called 'patent pool'). The defendant, a large (worldwide scale) manufacturer of DVD disks, was accused of patent infringement because it produced MPEG-2 compatible DVDs without having obtained the relevant licenses. In its defense, among other arguments, the defendant maintained that the licensing conditions offered by the plaintiffs were discriminatory and therefore incompatible with antitrust law. Looking into this claim, the court laid out the relevant national and European legal framework, ultimately coming to the conclusion that the defendant had not proven anticompetitive conduct. In its summary of the relevant legal framework, on top of relevant case law (IMS,[5] Renault[6]), the court also cited passages of the technology transfer guidelines on patent pools (para. 214, paras. 213,221). These citations again show that courts do not have issues in reading soft law together with hard law.
The technology transfer guidelines were also used in a similar fashion when the court reasoned on another defendant's claim – namely that it had been the victim of a 'patent ambush'. The defendant argued that the plaintiffs had influenced the MPEG-2 standard during the standard-setting process with the aim to make their patent part of it and, additionally, that many patents included in the standard were either not essential to it or invalid altogether. The court rejected the defendants' allegations on the basis of both German and EU law, and in particular paras. 232 and 233 of the technology transfer guidelines.

The court's reasoning and use of soft law:

RECOGNITION

[5] Judgment of 29 April 2004, IMS Health GmbH & Co. OHG NDC Health GmbH & Co. KG, ECLI:EU:C:2004:257.
[6] Judgment of 5 October 1988, Consorzio italiano della componentistica di ricambio per autoveicoli en Maxicar tegen Régie nationale des usines Renault, ECLI:EU:C:1988:472.

36. Videosignal Encoding II. LG Düsseldorf No. 4b O 546/05

Plaintiff: not explicitly mentioned

Defendant: not explicitly mentioned

Facts and Arguments: This judgment is given against the same defendant as the one in the previous case – worldwide producer of DVDs. The plaintiff is another member of the patent pool that holds the rights over the MPEG-2 standard. In this case, the claims pursuant to which usage of the technology transfer guidelines was warranted are formulated in an identical manner to those of the previous case. The reasoning of the court on the relevant guidelines is also identical. For details, please refer to the case above.

The court's reasoning and use of soft law:

RECOGNITION

37. Franchise agreement in IT sector. LG Hamburg 315 O 77/11

Plaintiff: not explicitly mentioned

Defendant: not explicitly mentioned

Facts and Arguments: The plaintiff is a franchisor operating in the IT sector. The defendants are franchisees of the plaintiff. The defendants failed to pay certain amounts due contractually and the franchisor sued them for recovery of those amounts. In their defense, the defendants invoked competition law as a shield and argued that the franchise contract was anti-competitive and thus void because it contained hardcore restrictions listed under the VBER. The invocations of the vertical guidelines subsequently made by the court in its argumentation are all to clarify specific provisions of the VBER (the meaning of active sales and the prohibition on the restriction of passive sales, in particular internet sales). This type of engagement with soft law is another example of the court using soft law as an aid to hard law.

The court's reasoning and use of soft law:

RECOGNITION

38. Distribution contracts in the automobile industry. OLG Frankfurt. 11 U 6/14

Plaintiff: not explicitly mentioned

Defendant: not explicitly mentioned

Facts and Arguments: In this case, a former appointed dealer and repairer of the manufacturer of a specific vehicle brand (not named) was not allowed back into the manufacturers' authorized dealers' network in the aftermath of the manufacturer's business re-organization. The former dealer therefore launched a challenge accusing the vehicle manufacturer, among others, of a breach of competition rules (both Articles 1 and 19 GWB). For the purposes of the challenge under the dominance rules (Art. 19 GWB), the definition of the relevant market is of crucial importance and it was at this stage where the Vertical Guidelines and their paragraph 89 became relevant. The plaintiff was arguing for a narrow market definition, while the court decided for a broader one in accordance with national case law (the MAN decision of the BGH).[7] In its reasoning on the relevant market definition, the court cited as authorities EU case law together with para. 89 of the Vertical Guidelines; the ultimate conclusion with regard to the Vertical Guidelines, however, was that they were not applicable, since the relevant market definition under Article 19 GWB (abuse of dominance) was to be determined under national law.

While this reasoning is sound, it needs to be kept in mind that commentaries on the MAN decision acknowledge its opposition to the line held by the EU Commission in the context of the motor vehicles BER and the pertinent supplementary guidelines[8] – namely that on the aftermarkets for spare parts, the market is to be defined per brand serviced by distributors and not in a general sense as the market for repair services.

The other time when the Vertical Guidelines are mentioned is when the claim of the plaintiff that Article 1 GWB applies to the case at hand. The court rejects this contention as there is no contract (agreement in the wording of Article 101 and its national equivalent) to speak of.

[7] KZR 6/09 v 30.03.2011.

[8] These supplementary guidelines explicitly state that they are to be read together with the main guidelines in the area – the Vertical Guidelines.

Therefore, the court maintains, the VBER and its guidelines (among others) are not applicable (cannot form the legal basis) to the claim at hand.

The court's reasoning and use of soft law:

RECOGNITION (CASE DECIDED ON THE BASIS OF NATIONAL LAW)

39. District agency agreement. OLG Frankfurt 11 U 46/13 (Kart)

Plaintiff: not explicitly mentioned
Defendant: not explicitly mentioned
Facts and Arguments: This case concerns an (agency) agreement in the aftermath of which (after termination), the defendant has to repay significant amounts of money to the plaintiff. Here again competition law is used as a shield by the defendant who argues that the presence of a price fixing clause in the agreement would invalidate it in its entirety. Although the defendant is not successful in this claim, what is important for the purposes of this research is the usage of soft law in the judgment – namely, the mentioning of the vertical guidelines by the court. The latter instrument (paragraphs 15 and 16 thereof) is used to support the determination that the agreement in question is not a true 'agency' agreement and could therefore be subject to an examination under competition law. In making this determination, the guidelines are not used together with hard law, but their pertinence to the VBER and other hard law (i.e. Directive 86/653/EEC, see case TV Digital above) is likely implicitly considered by the court.

The court's reasoning and use of soft law:

RECOGNITION

40. OLG Karlsruhe. Supplementary Pension (VBL Modified reimbursement model II). OLG Karlsruhe, Urteil vom 27. 08. 2014 – 6 U 116/11 (Kart) – Juris

For a discussion of this case, please refer to the case denoted as 15' above.

France

1&2. Brasseries Kronenbourg v JBEG and Brasseries Kronenbourg v Café Le Victor Hugo

Plaintiff: Brasseries Kronenbourg

Defendant: Café Victor Hugo and (in a different case) Société JBEG

Facts and Arguments: Concerns an exclusive supply agreement for beer. Brasseries Kronenbourg (beer supplier) demands setting aside the exclusivity agreement because of non-performance on the side of the distributor/retailer (Café Victor Hugo& Société JBEG in the second case). The defendants in both cases ask that the agreement is set aside because it is contrary to EU Competition law (typical use of EU competition law as a shield)[9]. The cases will be hereby discussed in parallel, going sequentially through the different appellate levels.

- **First Instance Judgment**

Brasseries Kronenbourg v SARL Le CafeVictor Hugo. TGI Strasbourg, 03 fev. 2005, RG No. 03/01568

The court's reasoning and use of soft law:

RECOGNITION

Vertical restraint guidelines used as an interpretation aid to the VBER (para. 22) + (para.33) invocation of the said guidelines in the context of them clarifying the VBER 'The defendant does not set out the consequences of the situation which it describes for trade within the common market. For that purpose the defendant could have taken into account Commission Notice 2000/C 291/101, *Guidelines on Vertical Restraints*, which describes the Commission's policy for applying the Community competition rules case by case and gives the criteria for assessing vertical restraints by reference to Art.81(1) and (3).

[9] TGI Strasbourg, 3 févr.2005*, Kronenbourg c/ Café le Victor Hugo Sarl*, n° 03/01568, version translated into English obtained from Westlaw UK, available at <http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=11&crumb-action=replace&docguid=I79F68EF0E42711DA8FC2A0F0355337E9>.

No document was found for the first instance proceedings between SA Brasseries Kronenbourg and Société JBEG.

- **Appellate Judgment**

SA Brasseries Kronenbourg v Société JBEG. C.A. Colmar, 01 avr. 2008, RG No. 05/02931
SA Brasseries Kronenbourg v SARL Victor Hugo. C.A. Colmar, 11 sept. 07, RG No. 05/01681

The court's reasoning and use of soft law:

RECOGNITION

It is very similar for both cases –the old vertical guidelines (from 2000) were used in the context of a discussion on transitional provisions applicable to the agreement in question (para. 70 of the old verticals) that were established in the new then Regulation 2790/1999 and further clarified in the pertinent guidelines. This is an obvious interpretation of soft law in light of hard law (legislation).

- **Cassation at the Cour de Cassation**

SA Brasseries Kronenbourg v Société JBEG. C.cass, 24 nov. 2009, RG No. 08/16259

The court's reasoning and use of soft law:

RECOGNITION

The court is referring to the judgment of the second instance court and the latter's reference to para. 70 of the vertical guidelines in the context of transitional provisions applicable to the agreement in question. This is not an independent reference made by the cassation court, rather a repetition of what the lower instance said (it is in the section 'AUX MOTIFS QUE', and not in the one starting with 'ALORS')

3. EURL Le Westbury v Brasseries Kronenbourg. C.A. Colmar, 30 mars 2010, RG No 08/02269

Plaintiff: Brasseries Kronenbourg

Defendant: EURL La Westbury

Facts and arguments: This is a (beer) exclusive supply agreement case. EURL La Westbury breaches the contract and invokes competition law as a shield, arguing that the contract is in any case anti-competitive. Kronenbourg argues the opposite – the contract is valid and Westbury needs to compensate it for breach.

The court's reasoning and use of soft law:

NEGLECT

Kronenbourg invoke the Vertical Guidelines in their defence, but the court does not decide the competition part of the dispute for lack of sufficient evidence.

4. Pacific Création v PMC Distribution. Trib.com Paris, 15 fev. 2007, No. 2006/073063 and C.A. Paris, 18 avr. 2008, RG No. 07/04360

Plaintiff: SAS Pacific (producer of perfumery)

Defendant: SARL PMC Distribution

Facts and Arguments: The case concerns online retail by a non-authorized retailer (SARL PMC) of products which are otherwise subject to exclusive distribution established by the manufacturer SAS Pacific

- **First Instane Judgment**

The court's reasoning and use of soft law:

RECOGNITION

The Vertical Guidelines are discussed in the context of determining whether the distribution system that SAS Pacific operates is legal or not (the court believes the system is legal). The guidelines are mentioned only once by the court when it argues that the VBER says nothing on online sales, but pararaph 51 of the guidelines provides that 'an outright ban on Internet or catalogue selling is only possible if there is an objective justification. In any case, the supplier cannot reserve to itself sales and/or advertising over the Internet.'

- **Appellate Judgment**

The court's reasoning and use of soft law:

RECOGNITION

The lawfulness of the distribution network operated by the respondent was questioned by the appellant, one of the particular arguments to that effect being the excessively restrictive conditions that the respondent maintained for the online sale of its products. In its assessment of the claim, the appellate court repeats the reasoning of the lower instance: 'As appropriately noted by the first court, Regulation 2790/1999, referred to above, contains no provision specific to sale on the internet. However, the Commission guidelines of October 13, 2000 relating to vertical restrictions specify, at point 51, that 'the prohibition of sales on [the] Internet is only admissible if it is objectively justified […]'. This is the same type of usage of soft law together with hard law as in the first instance judgment.

5. Societe Chelmarne Voyages v SA Nouvelles Frontieres Distribution. C.A. Paris, 04 dec. 2008, Joint judgments RG No. 05/23983 and 05/23982 and C.cass, 14 fev. 2012, Joint judgments No. 09/11.690 and 09/11.691

Plaintiff: Phebus (part of Chelmarne)
Defendant: Nouvelles Frontieres
Facts and Arguments: Nouvelles Frontiers (NF) had appointed Phebus (part of Chelmarne) as its exclusive distributor of touristic services in a certain area in France (Seine-et-Marne). The part of the case material for this study is the complaint of Phebus against Nouvelles Frontieres, which, according to Phebus, acted against the exclusivity clause in opening a

website where NF can sell the products exclusively assigned to Phebus for that territory (Seine-et-Marne).

- **Appellate Judgment**

The court's reasoning and use of soft law:

PERSUASION

There is no court reasoning on soft law (the case is decided on the basis of national law), but the Vertical Guidelines and paragraph 51 thereof are invoked by Nouvelles Frontiers to argue that it opening a website constitutes a passive form of sales which cannot be seen to breach the exclusivity in its contract with Phebus. The court does not reason on the basis of the guidelines but on national law to grant the claim to the defendant. However, one can possibly see persuasion in that attitude because what the court says right after the invocation of the guidelines by the defendant is the following: 'Considérant que le site Internet de NOUVELLES FRONTIERES ayant les caractères d'un site "passif" non orienté spécifiquement pour atteindre la clientèle de la ville de Meaux à ce titre, il ne porte pas atteinte à l'exclusivité territoriale de CARPE VOYAGES'. The terminology used by the court – 'passive sale' – is directly borrowed from the Vertical Guidelines and the pertinent VBER.

- **Cassation at the Cour de Cassation**

The court's reasoning and use of soft law:

RECOGNITION

The Vertical Guidelines are mentioned as part of the submissions of NF but not reasoned upon by the court; however, the court does confirm the verdict of the lower instance on that matter, thus confirming the reasoning of the guidelines and the pertinent Article 4 of the VBER.

6. SAS Philips France and SA Sony France v Conseil de la Concurrence. C.A. Paris, 29 avr. 2009, RG No. 2008/11907, and C.cass, 7 jan. 2011, No. 09/14316 and 09/14667

Plaintiff: Philips FR and Sony FR

Defendant: French Competition Authority (FCA)

Facts and Arguments: This is an appeal from a decision of the FCA that maintains that, through a recommended retail price clause in the agreements with their distributors, Philips and Sony had equalzied retail prices of cassettes and other types of electronics on the French market, which constitutes a hard core restriction of competition under Article 101 TFEU. However, the main issue on appeal (and then on cassation) is different. The issue is whether the use of a particular type of evidence through which the FCA incriminated the undertakings Philips and Sony was not contrary to human rights (the evidence in question was a recording that was made without the knowledge of the undertakings Philips and Sony). The court of appeal held that there was no issue with this evidence and it was admissible, but the Cassation court reversed the ruling and remitted it back to the CoP for a further decision with a differently composed college of judges.

The court's reasoning and use of soft law:

RECOGNITION

The court uses the Vertical Guidelines (together with the VBER) to make the following point: 'Sur la gravite des faits reproches : Considérant que les ententes verticales sur les prix, constitutives de «restrictions caractérisées» au sens du règlement européen n° 2790 du 27 décembre 1999 éclairé par les lignes directrices de la Commission, même si elles ne sont pas regardées avec autant de sévérité que les ententes horizontales, figurent parmi les pratiques anticoncurrentielles les plus graves'. This is a clear usage of soft law together with hard law. On cassation, there is no reasoning on soft law by the court proper, but a citation to the above quote of the Paris Court of Appeal.

7. Pierre Fabre Dermo Cosmetique SAS v Autorité de la Concurrence. C.A. Paris, 29 oct. 2009, RG No. 2008/23812 and C.A. Paris, 31 jan. 2013, RG No. 2008/23812 (after preliminary ruling in case EU:C:2011:649)

Plaintiff: Pierre Fabre

Defendant: Autorité de la Concurrence

Facts and Arguments: This is an appeal from a decision of the FCA sanctioning the practice of Pierre Fabre by which it prohibited its distributors (within a selective distribution system) from selling products of Pierre Fabre through online channels.

- **First Instance Judgment**

The court's reasoning and use of soft law:

RECOGNITION

It seems that the court discusses the Article 101.3 Guidelines because they are used by the FCA in its decision and also by Pierre Fabre in counterclaims. A judicial invocation of the Article 101.3 Guidelines happens only in the context of the provisions of the Vertical Guidelines and paragraph 51 thereof, which is interpreted in light of paragraph 18.2 of the 101.3 Guidelines. This seems to be an interpretation of two soft law instruments together, with the VBER being the hard law backing of the Vertical Guidelines. The court seems to be generally hesitant to rely on soft law instruments in its reasoning and it actually ascertains this as one of the reasons for sending a preliminary ruling request on the matter at hand. At the CJEU level, the relevant judgment mentions the Article 101.3 Guidelines only once (as part of the submissions of the referring court), but the Commission *amicus* brief does discuss them more in detail, together with the Vertical Guidelines.

- **Judgment after preliminary ruling**

The court's reasoning and use of soft law:

RECOGNITION

The Article 101.3 Guidelines are invoked by the plaintiff together with the GlaxoSmithKlein case[10] to argue that the administrative body has committed an error in assessment in categorizing its agreement as a restriction by object without examining its effects; the court says that there is no error in assessment and the authority has discharged is burden of proof in that regard. The same guidelines are also used by the court to assess the 4 conditions under Article 101.3 that Pierre Fabre claims it has met. The guideline has no supportive hard law here, but it is most likely used as a shorthand thereof.

8. *SAS Kontiki v Autorité de la Concurrence*. C.A. Paris, 16 mai 2013, RG No. 2012/01227 and C. cass., 7 oct. 2014, No. 13-19.476.

Plaintiff: Kontiki

*Defendant:*FCA

Facts and Arguments: The FCA had adopted an infringement decision against Société Kontiki on grounds that – in the context of exclusive distribution – it had fixed retail prices for certain items (the mouse Diddl) in its produce that its distributors had to observe.

The court's reasoning and use of soft law:

OTHER

The Vertical Guidelines were not reasoned on by the court; they were mentioned as part of the framework on hard-core restrictions established in the VBER that the FCA had engaged with in its decision (paragraph 113 of the administrative decision). The court mentions that the FCA engaged with the guidelines in their role as 'guide d'analyse'. No mention of soft law was made on cassation.

9. *SAS Diapar v Société v Carrefour Proximite France.* C.A. Paris, 3 avr. 2013, RG No. 10/24013 and C.cass, 16 sept. 2014, No. 13/18710

Plaintiff: DIAPAR

Defendant: PRODIM and SCF (suppliers of products in the food industry)

[10] Judgment of 6 October 2009, GlaxoSmithKline Services and Others v Commission and Others C-501/06P, EU:C:2009:610.

Facts and Arguments: There are two contracts against which DIAPAR is appealing after an arbitral tribunal held it liable to pay for breach of contract. One is a franchise contract with restrictive terms concluded with SCF and the other one is a contract for exclusive supply with PRODIM. Those two contracts were mutually exclusive and, by handling both suppliers, DIAPAR got into trouble with both of them. In arbitration, it lost. Now it seeks to establish the contracts contain clauses that are restrictive of competition, which makes them illegal under Article 101 TFEU.

- **Appellate Judgment**

The court's reasoning and use of soft law:

RECOGNITION

The old Vertical Guidelines and paragraph 200 thereof are used in their role as 'guide d'analyse' by the court to show that – in the context of franchise agreements – a clause that completely prohibits supplies from another business can only be saved if it is ancillary to the main agreement (it is indispensable to its existence). In this situation, this was not the case, which made the court decide in favor of the plaintiff in that point. On cassation, the court does not engage in judicial interpretation of the guidelines.

10. Lionel Johane M v Societe Biotherm Distribution&Cie. C.A. Pau, 1 oct. 2007, No. 04/00192

Plaintiff: Lionel Johane (owner of pharmacy Lafayette)
Defendant: Biotherm Cosmetics
Facts and Arguments: This is a dispute about the refusal of Biotherm cosmetics (producer of high-end cosmetic products) to accept the Lafayette pharmacy within its selective distribution network.

The court's reasoning and use of soft law:

RECOGNITION

The old Vertical Guidelines, in particular paragraphs 185 and 186 thereof, are invoked by the plaintiff to assert that – according to them – a discriminatory selective distribution system should be prohibited by Article 101 TFEU. In the argumentative part, the court says that this interpretation of the guidelines is flawed as shown previously in a decision of the FCA (03-D-60, paragraphs 35-6), confirmed by the Paris Court of Appeal. The correct reasoning, according to the court, is that an objective (non-discriminatory) selective distribution system handled by undertakings with market shares below 30% will not fall under the scope of Article 101 TFEU. Even if it contains restrictive elements (provided they are not hard-core), the agreement will still be exempted. Thus, the allegation of the plaintiff that there is an infringement of Article 101 TFEU cannot be sustained even if the selective distribution system is discriminatory.

11. La Société SNCF v Autorité de la Concurrence. C.A. Paris, 06 nov. 2014, RG No. 2013/01128

Plaintiff:SNCF

Defendant: FCA

Facts and Arguments: This is an appeal to a decision of the FCA that sanctioned several instances of abuse of dominant position by SNCF and five affiliated companies (in which the latter had ownership).

The court's reasoning and use of soft law:

RECOGNITION

In its reasoning, the Paris Court of Appeal used a particular section of the Guidance Paper (paragraph 26 and footnote 2 thereof) because the latter summarized the practice of the CJEU in establishing cost measures allowing for a conclusion of existence of price-based exclusion (predation). This quotation is used together with cases where the AEC test for predation was first established (AKZO).[11]

[11] Judgment of 3 July 1991, Akzo Chemie v Commission C-62/86, EU:C:1991:286.

12. Société Royer Sport SAS/Societe Converse Inc v Société Auchan France SA and others. C.A. Rennes, 15 avr. 2014, RG No. 12/05938

Plaintiff: *Converse et al*

Defendant: *Auchan FR*

Facts and Arguments: The band 'Converse' in France is subject to exclusive distribution, which Auchan France (a non-authorized retailer) breached by selling shoes of the brand for low prices. This is how the trademark owners got alerted of the infringement and sued for IP rights infringement (this is the basis of the claim). In a counterclaim based on competition law, the defendant invokes the Vertical Guidelines.

The court's reasoning and use of soft law:

RECOGNITION

The court does not engage with the content of soft law in the argumentation, but the defendant puts forward a counter-claim partially based on the Vertical Guidelines that, in the end, it manages to win. In essence, it is claimed by Auchan that the exclusive distribution system of Converse in France has serious market-partitioning effects because the distribution contract not only prohibits active sales into the exclusive territory of the French distributor, but it also prevents passive sales. The argument of serious market partitioning is based on CJEU's case law, cited together with the old Vertical Guidelines: 'les produits de marque Converse sont commercialisés dans l'Espace Economique Européen, par le biais d'un système de distribution exclusive, qui présente par nature un risque de cloisonnement des marchés, ainsi que l'a notamment souligné la Cour de Justice de l'Union Européenne dans l'arrêt Van Doren (Affaire C244/00) mais également la Commission européenne dans les Lignes Directrices sur les restrictions verticales (201/C130/01), et qu'au surplus le contrat de licence versé aux débats n'autorise même pas de ventes passives par la société Royer Sport en dehors de son territoire exclusif (la France).'

13. Bang and Olufsen France SAS v La Autorité de la Concurrence. C.A. Paris, 13 mar. 2014, RG No. 2013/00714.

Plaintiff: Societe Bang&Olufsen

Defendant: FCA

Facts and Arguments: Bang and Olufsen prevent (ban) their authorized distributors from selling products online (this situation is identical to the one that triggered the Pierre Fabre judgment)

Forms of order sought: annulment of the NCA decision

The court's reasoning and use of soft law:

RECOGNITION

The Article 101(3) Guidelines are invoked by the court in its reasoning on the indispensability criterion within the Article 101(3) TFEU test; the reference to SL is without further footing in hard law, but the cited paragraphs of the guidelines (38-9,73,75,78-9) are enunciating principles that are well established in case law. I believe this is shorthand use of the guidelines.

The court's reasoning and use of soft law:

NEGLECT

The Vertical Guidelines are also invoked by the defendant (the FCA), who argue that Bang&Olufsen should not have the fine imposed on them reduced because they must have known that their contractual provisions were contrary to Article 101 TFEU. This is so, the FCA argues, especially because of the existence of the Vertical Guidelines which explicitly say so since the year 2000. The court, despite this allegation, does not say anything on the guidelines and reduces the fine on the basis of general uncertainty in this area of the law.

14. SA Au Forum du Batiment v SA Vachette. C.A. Paris, 3 jul. 2008, No. 06/20432

Plaintiff: SAFB

Defendant: Vachette

Facts and Arguments: SAFB is an applicant for admission into a selective distribution network who is refused access by the patron of the network (Vachette). The applicant then sues arguing (1) discriminatory treatment and (2) non-objectivity of the quantitative selective distribution criteria instituted by Vachette. The plaintiff loses.

The court's reasoning and use of soft law:

NEGLECT

There is no court reasoning on the basis of the Vertical Guidelines, but paragraph 185 thereof is invoked by the defendant to show the court that its distribution network operates perfectly legally according to the rules enunciated in that paragraph of the guidelines. On that point, the court maintains that the plaintiff does not adequately argue its allegation of non-objectivity of the agreements of the defendant. On this ground, the appellate court agrees with the lower court that the selective distribution network is not restrictive of competition. The guidelines are not reasoned upon.

15. *Société COSIMO SAM v SAS Carrefour France.* C.A. Paris, 27 mar. 2014, RG No.10/19766

Plaintiff : Cosimo SAM

Defendant: Carrefour FR

Facts and Arguments: Cosimo SAM claims to be the patron of a selective distribution network of Eastpack backpacks in France and Switzerland. Carrefour seems to also be selling those bags in its supermarkets in France without being part of the selective distribution network that Cosimo SAM operates – as a patron – within France. Cosimo sues Carrefour because of selling outside the established by Cosimo selective distribution network. Carrefour, in turn, alleges that the contracts of Cosimo that establish its selective distribution

network are anti-competitive and Carrefour therefore is not acting illegally by selling Eastpack bags even if it is not a member of the network.

The court's reasoning and use of soft law:

PERSUASION

The first mention of the Vertical Guidelines is by the defendant in its submissions. Carrefour alleges that the plaintiff has not proven in any way that its distribution system complies with the framework for legality of selective distribution established in the case law of the CJEU and the respective guidelines of the EU Commission. The court, in its argumentation, literally repeats the submission of Carrefour described above but does not – on its own – mention the guidelines any further. It continues its reasoning on the legality of the selective distribution system on the basis of the articles of the VBER, but without mentioning the guidelines. However, they are most likely implicitly considered.

16. *CNPA v Societe Honda Motor South SA and others*. C.A. Paris, 4 mai 2004, Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes' No.9, 8 nov. 2004

Plaintiff: CNPA (National Council of Automotive Professionals)

Defendant: FCA

Facts and Arguments: This is an application of the CNPA for annulment of parts of the decision of the FCA, where the FCA claims to see no anti-competitive dimension to some of the contracts concluded between certain car manufacturers and their distributors. The claims made by the CNPA are of clauses that – although not per sé restrictive by object – can hinder the competitive process because of the multiplicity of similar contracts on the market of car wholesale.

The court's reasoning and use of soft law:

RECOGNITION

In judging the argument of the plaintiff on the anti-competitiveness of the said clauses, the court invokes the VBER (its article 2 exempting agreements below the 30% threshold) and the pertinent guidelines that explain in more detail the conditions under which the Article 2 exemption applies.

17. Société Locatelli Eurocontainers SPA v SARL L'Atelier Industriel C.A.Paris. 11 sept. 2013, RG No. 11/13785

Plaintiff: Locatelli

Defendant: L'atelier industriel

Facts and Arguments: The plaintiff had terminated abruptly the negotiation phase of a distribution contract and, when the other party sues, one of the claims it makes is that this rupture was because the envisioned distribution contract was anti-competitive in containing a provision for a tacitly renewable, 3-year non-compete clause.

The court's reasoning and use of soft law:

NEGLECT

The Vertical Guidelines are not engaged with by the court, which seems to believe the rupture is contrary to good faith and there are other reasons behind it than the anti-competitive concerns of Locatelli; the anti-competitive element is only briefly argued by the plaintiff. In particular, Locatelli argues that the VBER and the pertinent guidelines stipulate that the type of non-compete clause envisioned by the parties was anti-competitive. The court does not take up this argument.

18. SARL La Gadgetomaine v SA SOHO/SA Groupe Grand Sud. C.A. Paris, 17 sept. 2009, No. 05/20661

Plaintiff: Gadgetomanie

Defendant: SOHO

Facts and Arguments: The competition issue at hand is about a non-compete clause in a franchise agreement between the plaintiff and the defendant. The plaintiff alleges the non-compete clause is anti-competitive. This is held not to be the case by the court. The reasoning in that regard is, among others, based on the Vertical Guidelines.

The court's reasoning and use of soft law:

RECOGNITION

The first use of the guidelines is by the defendant, who alleges that a non-compete clause in a franchise agreement that extends for a reasonable time beyond the duration of that agreement is admissible under competition law. For this allegation, both case law of the CJEU and the old Vertical Guidelines are put forward. In the argumentative part of the judgment, the court engages with the Vertical Guidelines on the question of the permissible duration of a non-compete clause in the context of a franchise agreement. The reasoning is solely based on the guidelines, with no further case law support, but it needs to be kept in mind that the reference the court makes is to paragraph 200 of the old guidelines, which, in turn, references relevant case law in footnote 1 attached to it.[12]

19. SARL MKAT v SAS Groupe Salmon Arc en Ciel. C.A. Paris. 31 mai 2006, No. 04/22966

Plaintiff: SARL MKAT

Defendant: SAS GROUPE SALMON

Facts and Arguments: MKAT, as the final receiver of goods that were subject to a non-resale clause in the context of the (primary) contract for sale of goods (baby clothing and products) between Groupe Salmon and another undertaking – Interchange, is now made to account for its acquisition of the goods by the Salmon group. MKAT maintains that the non-resale clause in the original contract between Salmon and Interchange is anticompetitive and therefore its acquisition of the goods in question as a second level in the chain of distribution is not in any way wrongful.

[12] See pp. 40 of the old Vertical Guidelines.

The court's reasoning and use of soft law:

RECOGNITION

The court uses the VBER and the old Vertical Guidelines to assess the anti-competitiveness of the non-resale clause, which, the court observes, cannot be saved by the VBER by virtue of its Article 4, further clarified by paragraph 46 of the guidelines, which specifies that these types of restrictions are likely to harm competition by object (hardcore restrictions).

20. La Societe Cooperative de Commercants-Détaillants à Conseil d'Administration EPSE Joue Club and others v Autorité de la Concurrence. C.A. Paris, 28 jan. 2009, No. 2008/00255

Plaintiff: multiple toy producers (Lego, Hasbro and others)

Defendant: FCA

Facts and Arguments: This is an appeal to an FCA decision condemning practices of alignment of prices for toys sold in the Christmas periods of the years 2001-2004. The alignment was namely between toy producers and their distributors (vertical alignment), which was still judged to be a hard core restriction even if it was not as pernicious as horizontal cartels according to the court.

The court's reasoning and use of soft law:

RECOGNITION

*Th*e court uses the old Vertical Guidelines, cited together with the old VBER in the section discussing the gravity of the infringement. Namely – on the basis of both instruments – the court makes the point that, although vertical price fixing is not as pernicious as horizontal cartelization, it is still considered as an object (hard core) restriction by the VBER and the pertinent guidelines.

21. La SA Beaute Prestige International v SARL PMC Distribution. Trib.com Paris, 3 juin 2008, RG No. 07/045745

Plaintiff: SA Beaute Prestige International is a perfume producer, marketer and distributor; it also holds licenses for the distribution of several well-known perfume brands (which it does not itself produce)

Defendant: SARL PMC Distribution, an online seller of discounted perfumery

Facts and Arguments: The plaintiff mounts a claim against SARL PMC because, by selling online, the latter is undermining SA Beauté Prestige's selective distribution network for the licensed perfumes. A claim for unfair competition is also filed against the defendant. In response, the defendant alleges that the selective distribution network of Beauté Prestige is invalid because it is illegal under competition law due to the plaintiff's resale price maintenance practices – a fact that the French Competition Authority has also ascertained.

The court's reasoning and use of soft law:

RECOGNITION

The court uses the provisions of the Vertical Guidelines (read together with the VBER) to assess whether or not the selective distribution network of SA Beauté Prestige is anti-competitive. The court reasons that paragraph 51 of the Vertical Guidelines, which tackles the issue of online sales, does not point in the direction of illegality of the plaintiff's practices.

22. La Société NPPF SAS v Autorité de la Concurrence. C.A. Paris, 10 oct. 2013, RG No. 2012/07909

Plaintiff: Royal Canin, Nestle Purina Petcare France and others

Defendant: FCA

Facts and Arguments: The decision that the authority took against the plaintiffs alleges several infringements of competition contained in the clauses of vertical contracts between suppliers of pet food (the plaintiffs) and their distributors. In particular, the following problematic arrangements have been ground for concern: division of customer areas,

discounts granted on condition of exclusive supply, restrictions of passive sales in exclusive territories of other distributors, fixing of prices for distributors.

The court's reasoning and use of soft law:

NEGLECT

The Vertical Guidelines are referred to by the plaintiffs in the section on the determination of the appropriateness of the fines imposed by the FCA. The plaintiffs argue (among others) that the fines must be reduced because the authority bases its theory of harm only on reduction of intra-brand competition, while – according to paragraph 102 of the new Vertical Guidelines – inter-brand competition reduction is the usual cause of competitive concerns. The court does not engage with the guidelines in its reasoning, it reviews the whole decision of the FCA for possible flaws in reasoning with regard to sanctions. In that sense, the court holds that the theory of harm put forward by the FCA is completely reasonable and affirms the administrative decision.

23. La société Crédit Lyonnais SA and others v Autorité de la Concurrence. C.A. Paris, 23 fev. 2012, RG No. 2010/20555

Plaintiff: Major French banks

Defendant: FCA

Facts and Arguments: The decision of the Autorité is against French banks' agreements to fix rates for mutual reimbursement with regard to the handling of checks issued by all of the defendants

The court's reasoning and use of soft law:

NEGLECT

The old Horizontal Guidelines (in their paragraph which cites that agreements that cannot be handled without cooperation are not anti-competitive – paragraph 24) are invoked by the plaintiff when they try to argue that their agreement falls outside of the remit of competition law. The guidelines are not taken up by the court.

The court's reasoning and use of soft law:

RECOGNITION

The Article 101(3) Guidelines (paragraphs 20-23 thereof) are used by the court without further reference to case law, but those paragraphs refer extensively to supranational case law within the footnotes of the guidelines. This must be shorthand usage of the Article 101.3 Guidelines.

24. La Société Digicel Antilles Francaises Guyane and others v La Societe Outremer Telecom SAS and Autorité de la Concurrence. C.A. de Paris, 23 sept. 2010, RG No 2010/00163

Plaintiff: Orange Caraibe/ France Telecom

Defendant: FCA

Facts and Arguments: The FCA had sanctioned Orange Caraibe for, among others, exclusivity clauses that it imposes in its distribution contracts with independent distributors (in light of its dominant position), including linking with an exclusivity clause the only repairer of terminals in the Caribbean.

The court's reasoning and use of soft law:

NEGLECT

The plaintiff, citing paragraph 116 of the old Vertical Guidelines, maintains that exclusivity in a network such as the one it operates is objectively justified due to it working against the so-called 'free rider' problem described in the said guidelines. While the court does not mention the guidelines in its response, it shows that the arrangements of Orange Caraibe cannot be seen as objectively justified given the market structure and the way that the contracts are constructed (with exclusivity clauses with indefinite durations past the duration of the contracts proper). However, the court performs the analysis under French law only, because it proclaims EU law is not applicable to the situation in question.

25. La Société Grands Moulins de Paris SA v Autorité de la Concurrence. C.A.Paris, 20 nov. 2014, RG No. 2012/06826

Plaintiff: Flour producers (French and German)

Defendant: FCA

Facts and Arguments: This is part of an investigation into flour cartels in Germany and France

The court's reasoning and use of soft law:

RECOGNITION

The Horizontal Guidelines are mentioned as part of the reasoning of the FCA, but are not quoted as secondary quotes to the FCA decision only. The court also mentions the guidelines as a relevant assessment instrument (see passage in red of the FR decision) on its own initiative.

26. La Société CIPHA SA v La Société SOGEMA SA and Autorité de la Concurrence. C.A.Paris, 5 nov. 2008, No. 2007/17386

Plaintiff: CIPHA

Defendant: FCA (on request of SOGEMA)

Facts and Arguments: SOGEMA – a company in the business of fuel storage at ports – complains to the FCA to have been a victim of abuse of dominant position by the company CIPHA operating the port of Havre. SOGEMA also complains of discrimination in terms of the prices it had been charged for using the services of the port (in comparison to other prices offered to other users).

The court's reasoning and use of soft law:

NEGLECT

CIPHA, in arguing for a broader market definition, complains that – in determining the relevant market for the purposes of establishing a dominant position – the FCA had

incorrectly applied provisions of the Vertical Guidelines on the consideration of in-house production for the purposes of calculating market share (paragraph 98). The court responds that even without relying on the guidelines, the dominant position had been established properly by the FCA.

27. La Société Reckitt Benckiser PLC v La Société Arrow Generiques SAS and Autorité de la Concurrence. C.A.Paris, 26 mars 2015, RG No. 2014/03330

Plaintiff: Reckitt Benckiser

Defendant: FCA

Facts and Arguments: This case concerns an exclusive distribution agreement for marketing of medicines of the UK company Reckitt B. into the French market. The exclusive distributor for France appointed in that regard is Schering-Plough. The complaint to the FCA that subsequently triggered this appeal before the Paris Court of Appeal is actually against Schering – Plow. The latter company is accused of abuse of dominance by precluding the entry of a generic medicine, equivalent to the one it is exclusively distributing on behalf Reckitt B. in France. The FCA confirms the abuse and Schering-Plow/ Reckitt B. appeal.

The court's reasoning and use of soft law:

RECOGNITION

The plaintiff contends that the FCA erred in maintaining that there was a concurrence of wills (agreement) between Schering-Plow and Reckitt B. to delay the production of generic medicines competing with its own within the French market. In order to clarify the issue, the court refers to national, EU jurisprudence and the Vertical Guidelines, making the point that "proof of a vertical agreement requires the demonstration of the agreement of wills of the parties to the accord". Using that premise as a starting point for its reasoning, the court concludes that the FCA had managed to prove that an agreement actually existed.

28. SAS Puma France v France Telecom E Commerce and others. TGI Strasbourg, 8 jan. 2008, No. 07/00359

Plaintiff: Puma SAS France

Defendant: France Telecom E Commerce/ Brandalley and others

Facts and Arguments: Puma mounts an action against France Telecom for having sold its products with great discounts without being part of its selective distribution system which – it alleges – is perfectly legal under competition law.

The court's reasoning and use of soft law:

RECOGNITION

In their defense, the defendants put forward paragraph 186 of the old Vertical Guidelines saying that where the nature of the product does not require selective distribution, such a system does not usually bring the required efficiency to counterbalance the ensuing reduction in intra- brand competition and, therefore, the selective distribution of Puma can be considered illicit. The court says that this is not the correct reading of the Vertical Guidelines in that this paragraph only refers to situations where the market power of the patron of the selective distribution network is significant enough to trigger the non-application of the VBER safe harbor. This is not the case of Puma, however, which only has a 4% market share on the market in question. This is an explicit engagement with the Vertical Guidelines.

29. SARL Jeumont Lavage v SA Hypromat France. C.A.Douai, 6 juin 2013, RG No 12/06333

Plaintiff: SARL Jeumont Lavage

Defendant: SA Hypromat FR

Facts and Arguments: This entire decision is not about competition law, but about the validity of a court execution order that was not complied with immediately after the termination of a franchise contract.

The court's reasoning and use of soft law:

NEGLECT

The claimant uses competition law as a shield – citing the VBER and the Vertical Guidelines together to argue nullity of the franchise agreement. However, this argument is not taken up by the court which decides the case on the basis of French civil law.

30. SARL Les Conquerants v SAS Prodim and others. C.A.Rennes, 23 oct. 2007, No. 06/06364

Plaintiff: SARL Les conquerants

Defendant: SAS Prodim

Facts and Arguments: This is a case about a franchise agreement that an entrepreneurial couple signed with SAS Prodim and others. The franchise agreement was for the opening of a supermarket under the brand of SAS Prodim and contained a non-compete clause for the duration of the contract and for one year past its expiration. The couple, however, breached the contract by establishing another shop, competing with the one they already had under the Prodim contract. They were therefore sued for breaching the non-compete clause.

The court's reasoning and use of soft law:

RECOGNITION

The court openly cites the Vertical Guidelines which say that a non-compete clause in franchise agreements is not problematic. In establishing this point, the court cites the Vertical Guidelines on their own. Later on in the judgment, when discussing the inability of the plaintiffs to compete for one year after the expiry of the contract (Article 27 of the signed agreement), the court cites the guidelines again – this time together with the VBER – in order to establish that such a provision is also in accordance with the law.

31. *SARL Le Clemenceau v Brasserie Mauro Antibes*. C.A. Aix-en-Provence, 15 nov. 2012, No. 11/11057

Plaintiff: SARL Le Clemenceau

Defendant: SA La Sa Brasserie Mauro Antibes

Facts and Arguments: This is contract of exclusive supply for drinks between SARL Le Clemenceau and the brewery Mauro Antibes. The contract runs for 7 years and is for 100% of the needs of the buyer SARL Le Clemenceau.

The court's reasoning and use of soft law:

PERSUASION

The exclusive duration of the contract is claimed to be anti-competitive by the plaintiff (which invokes the VBER and the guidelines in that regard). The court agrees with the argument of the plaintiff, but only on the basis of the VBER, not citing the guidelines.

32. SA Beaute Prestige International v Autorité de la Concurrence. C.A. Paris, 26 jan. 2012, RG No. 2010/23945

Plaintiff: multiple undertakings operating luxury perfume and cosmetics brands

Defendant: FCA

Facts and Arguments: These case is part of multiple appellate proceedings (CoP-Cassation-CoP) with regard to an administrative decision of the FCA sanctioning several undertakings exercising rights over well-known perfume trademarks. The original FCA sanctioning decision was against these undertakings' vertical collusion with their distributors for equalizing prices to end-consumers.

The court's reasoning and use of soft law:

RECOGNITION

The reasoning on the Vertical Guidelines in this case is a typical invocation together with hard law (the VBER) and happens in the context of the sanctioned undertakings trying to argue for lower penalties. The Vertical Guidelines are invoked by the court to argue that, according to the VBER (and the pertinent Vertical Guidelines), price fixing is a hard core restriction that cannot therefore allow for any reduction in the sanctions already imposed. The court also establishes – on the basis of the old and new Vertical Guidelines [13] – that in the context of maximum or recommended prices, the reduction of intra-brand competition can eventually lead to price transparency and therefore also to a reduction in inter-brand competition (the latter being more problematic).

33. Société Coty France SAS v Société Cite Achat SA. Trib.com Marseille, 3 oct. 2012, RG No. 2011F04004

Plaintiff: Société Coty FR

Defendant: Société Cite Achat SA

Facts and Arguments: This is a case of an unauthorized distribution (by Cite Achat) of a luxury product (perfume Calvin Klein) otherwise subject to licit selective distribution system operated by Coty. Coty sues – among others – on the basis of the new VBER and the pertinent guidelines. However, the court does not decide the case on the basis of competition law, but rather on the basis of national unfair trading practices law, so nothing is said on the VBER or the guidelines in the judgment proper. The result is that the non-authorized distributor is precluded from the online sale of perfumes belonging to the licit selective distribution system of Coty.

The court's reasoning and use of soft law:

PERSUASION

See facts and arguments above.

[13] The old and new verticals remain unchanged on that point – para.112 in the old verticals

34. *Société Cosimo v Société Cdiscount.* Trib.com Bordeaux, 25 jan. 2011, RG No. 2010F00607

Plaintiff: Cosimo

*Defendant:*CDiscount

Facts and Arguments: Cosimo – operating an exclusive distribution system for Eastpack bags in France and Switzerland – sues CDiscount for selling those products without being part of the network. CDIscount alleges that the system supported by Cosimo is anti-competitive and it therefore does nothing wrong when selling Eastpack bags.

The court's reasoning and use of soft law:

RECOGNITION

The Vertical Guidelines are engaged with by the court twice – the first time they are engaged with (in our view by mistake) as if they were part of the text of the VBER. In deciding whether the distribution system of Cosimo is legal, the court invokes Regulation 330/2010 and paragraph 175 thereof. However, such paragraph only exists in the pertinent guidelines. In any case, this is a signal for either interpretation together with hard law or 'stand-alone' interpretation of the Vertical Guidelines. After this engagement with the guidelines, the court cites them once more towards the end of the judgment, together with the French equivalent of Article 101 TFEU – Article L 420-1. The court says that – having in mind the Vertical Guidelines – the distribution system operated by Cosimo complies with none of the criteria cited within those guidelines. This is explicit stand-alone use of the Vertical Guidelines when they repeat what established case law says (the Metro I conditions).

35. Société Cosimo SAM v Société Distribution Casino France SAS. Trib.com Marseille, 6 mai 2011, RG No. 2010F02131

Plaintiff: Cosimo SAM

Defendant: Société Distribution Casino France SAS

Facts and Arguments: The facts of this case are roughly the same as of case 34, it is just a different illegal distributor Cosimo goes against. An important difference, however, is that

this case is decided on the sole basis of national law. In that sense, the VBER and the pertinent guidelines are both only seen as 'guide d'analyse'.

The court's reasoning and use of soft law:

RECOGNITION

See facts and arguments above.

36. *SA Boucheron Holding and others v SARL PMC Distribution and others*. TGI Paris, 10 dec. 2008, RG No. 07/10592 and C.A.Paris, 17 dec. 2010, No. 2009/01517

Plaintiff: SA Boucheron Holding

Defendant: SARL PMD Distribution

Facts and Arguments: This case concerns a sale of luxury perfumerie by an unauthorized retailer (PCM). The owner of the brand – Boucheron – starts court proceedings for counterfeiting. PCM, in turn, alleges anti-competitiveness of the distribution network operated by Boucheron.

The court's reasoning and use of soft law:

RECOGNITION

The reasoning of PCM is that the distribution contracts of the plaintiff contain a clause restricting online sales only to physical outlets that have a designated site for that purpose. The court, in that sense, says that the VBER says nothing on online sales, but the pertinent guidelines do, '*Le Règlement CE 2790/99 ne contient aucune disposition spécifique à la vente par internet, cependant les lignes directrices de la commission du 13 octobre 2000 relatives aux restrictions verticales précisent au point 51 que "l'interdiction de vente sur internet n'est admissible que si elle est objectivement justifiée..." et que le fournisseur ne peut se réserver la vente sur internet.'* This is an instance of interpretation of the guidelines together with the VBER.

In light of paragraph 51 of the guidelines quoted above, the court concludes that no general prohibition of online sales has happened and therefore the selective distribution network is perfectly licit, contrary to the submissions of the defendant.

37. Société Flora Partner v Société Eco Flor and others. C.Cass, 14 mars 2006, RG No. 03/14640

Plaintiff: Société Flora Partner

Defendant: Société Eco Flor

Facts and Arguments: Flora Partner had a franchise agreement with Eco Flor. In the course of its business, it also made a website to sell the contract products. However, this website was seen as infringing the franchise contract that was subsequently rescinded by Eco Flor. Although it was acknowledged by the lower court that website-selling most often constitutes passive sales (no competitive concerns), it nevertheless decided in favor of Eco Flor on that point.

The court's reasoning and use of soft law:

RECOGNITION

The Vertical Guidelines were interpreted together with the VBER and this interpretation was the reason for cassation of the part of the appealed judgment that held that passive sales could infringe a franchise contract. Basically, the Cassation court held that, in judging so, the lower court had infringed EU law and the VBER in particular, and also French law (Arts. 1134 and 1184 of the Civil Code).

38. S.A. Thales Air Defence v G.I.E. Euromissile and Others. C.A.Paris, 10 nov. 2004, No. 2006 E.C.C. 6

Plaintiff: Thales

Defendant: Euromissile

Facts and Arguments: This is an application for annulment of an arbitral award because it contradicts public policy (in this case –Article 101 TFEU, which is a provision of a public policy nature). It is argued by Thales that the contract that was subject to the arbitral award was supposed to be declared null and void due to it breaching EU competition rules on horizontal licensing. The court said it would not rule on the topic because this argument was not brought before the arbitral tribunal in the first place, but it made some observations as to how it would have gone about an analysis of anti-competitiveness had it been necessary to examine the issue.

The court's reasoning and use of soft law:

RECOGNITION

This is all the court says: 'Before being able to determine […] that the aim of the restrictions complained of is to adversely affect competition, it is necessary to examine the factors on which the agreement of the parties was based and the specific circumstances of its operation, the prohibited restrictions in the block exemption regulations *or mentioned in the guidelines and notices giving, by way of example, an indication of what constitutes restrictions by object* [author's italics].'[14]

In other words, the French judiciary accepts soft-law based arguments so long as they serve to supplement and/or clarify a pertinent hard law norm. The latter norm can be an EU legislative instrument as suggested in the above quote, or can be contained in a judgment of the CJEU or CFI. French courts seem to also be comfortable interpreting soft law in the latter situation. This is demonstrated by the recent (and final) pronouncement of the Supreme Court in the Total Reunion[15] case where all five arguments of the appellants relating in one way or another to the problems of legal certainty that competition soft law provoked, were

[14] Cour d' Appel de Paris, 10 nov. 2004, *S.A. Thales Air Defence v G.I.E. Euromissile and Others* , version translated into English obtained from Westlaw UK , available at <http://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad8289e0000014d436de7e8a89e15e0&docguid=ICEFD4320E42811DA8FC2A0F0355337E9&hitguid=ICEFD4320E42811DA8FC2A0F0355337E9&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=3&resolvein=true>. The judgment tackles no particular guidelines; it only offers a general statement on their usage.

[15] This case has gone back and forth between the Paris Court of Appeals and the Supreme Court in the period 2008-2015. See, to that effect, the records of the FCA, available at: <http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=08D30>. We are hereby discussing only the last (and final in the saga) judgment of the Supreme Court. Cour de Cassation, 20 jan. 2015, *Total Reunion v FCA,* n° 63 FS-P+B.

dismissed with the reasoning that the content of guidelines[16] added nothing new to already established CJEU case law and could thus pose no dangers of the kind suggested. No instances were found in which the court approached soft law creatively by – for example – interpreting it in light of general principles of law.

39&40. *SARL Lovi v SA Hypromat France.* C.A.Colmar, 04 mai 2010, No.08/03430 and *SARL Light v SA Hypromat France*. C.A.Colmar, 04 mai 2010, No. 08/04825 (the same legal issue is decided in two cases with different parties to them)

Plaintiff: SARL Lovi/Light

Defendant: SA HYPROMAT FR

Facts and Arguments: A franchisee had infringed a franchise contract by installing a piece of equipment in its car wash that was not supposed to be there because it was not part of the technology to be used under the franchise contract. Despite oppositions by the franchisor to the introduction of this equipment, it was nevertheless put in place. Hypromat therefore sues Light/Lovi, but Light/Lovi retort that the franchise contracts are anti-competitive.

The court's reasoning and use of soft law:

RECOGNITION

In its reasoning on the anti-competitiveness claim put forward by SARL Lovi/Light, the court makes it clear that the claimants have not managed to prove that inter-state trade is affected and therefore the VBER invoked by them is not applicable. In this context, and to show the claim of the plaintiffs wouldn't have worked even if there was an EU dimension to the case, the court also states that the Vertical Guidelines (paragraph 44 thereof) provide that engaging in activities beyond the franchise agreement (as the claimants do) is prejudicial to the essence of the agreement itself.

This type of interpretation, although hypothetical, can be seen either as one based on reasoning together with hard law, or as a stand-alone invocation of the Vertical Guidelines.

[16] The guidelines in question in this judgment were the Guidelines on the Effect on Trade Concept [2004] OJ C 101/07.

41. Société Converse Inc. V SA Auchan France. C.A.Douai, 14 jan. 2015, RG No. 10/08776

Plaintiff: Converse and Royer Sport

Defendant: Auchan FR

Facts and Arguments: The band 'Converse' in France is subject to exclusive distribution, which Auchan France (a non-authorized retailer) breached by selling shoes of the brand for low prices. This is how the trademark owners got alerted of the infringement and sued for IP rights infringement (this is the basis of the claim). In a counterclaim based on competition law, the defendant invokes the Vertical Guidelines.

The court's reasoning and use of soft law:

RECOGNITION

As in judgment 12, the defendant relies on the same passage of the old Vertical Guidelines (paragraph 50), together with the same relevant case law – *van Doren* – to put forward an argument that (in 2007) Converse had exclusive distribution contacts that prohibited its distributors from making passive sales into other territories – a fact that should be seen as an anti-competitive restriction. This point (granted to the defendant) was engaged with in the argumentative part of the judgment, where – in order to clarify the meaning of passive sales – the court cites paragraph 50 of the old Vertical Guidelines. The court does not elaborate further on its engagement with the Vertical Guidelines, but – insofar as prohibition of passive sales in exclusive distribution is an issue mentioned in hard law – the VBER – we can talk about engagement with soft law on the basis of hard law (legislation).

42. *Société Genentech Inc* v *Société Hoechst GMBH* and *Société Sanofi-Aventis Deutschland GMBH.* C.A.Paris, 23 sept. 2014, RG No. 12/21810 and RG No. 13/09296 and RG No. 13/17187 (the same legal issue is decided in several cases with different parties to them – see case 24 in that regard)

Plaintiff: Société Genentech Inc.

Defendant: Société Hoechst GMBH and Société Sanofi-Aventis Deutschland GmbH

Facts and Arguments: This is a patent infringement case.

The court's reasoning and use of soft law:

OTHER

In this case, the national court is asked to send a question to the European Commission on the interpretation of paragraphs 81 and 156 of the Technology Transfer Guidelines. The request as such includes no reasoning on the said instrument.

43. *SAS Caudalie v SAS eNova Sante.* C.A.Paris. 2 fev. 2016, RG No 2014/060579

Plaintiff: SAS Caudalie

Defendant: SAS eNova Sante

Facts and Arguments: An online platform (non-approved distributor) sells Caudalie cosmetic products on its website. Caudalie's contracts with its approved distributors stipulate that 'only a selected distributor in possession of a physical vending space and complying with all selectivity criteria will be in the position to sell *Caudalie* products online'. Caudalie therefore applied for injunction against SAS eNova, which was granted. SAS eNova, however, appealed and the Paris Court of Appeal ruled in its favor, stating that, absent objective justification, the contractual arrangements of *Caudalie* are indeed anti-competitive. The case has been criticized by commentators, not the least because it apparently contradicts the provisions of paragraph 54 of the Vertical Guidelines.[17]

The court's reasoning and use of soft law:

NEGLECT

There is no direct engagement with the text of the Vertical Guidelines as such, but the result of this judgment is the exact opposite of what paragraph 54 of the soft law instrument in question prescribes. In this sense, we have implicit rejection of the guidelines (neglect).

[17] For a (not unfounded) criticism of this judgment, refer to the following Lexology report http://www.lexology.com/library/detail.aspx?g=3a9c294c-65af-4d90-b60c-8dec347ee927.

44. La Société Concurrence v Autorité de la Concurrence. C.A.Paris, 03 dec. 2015, RG No. 2014/18125

Plaintiff: Concurrence

Defendant: FCA

Facts and Arguments: At question in this dispute is the legality of the manufacturer's (Samsung) ban on its former distributor's (Concurrence) online marketplace sales. The case is currently being handled by the FCA, but no final pronouncement is available yet due to a request for interim measures by the complainant Concurrence.

The court's reasoning and use of soft law:

OTHER

No reasoning on soft law is yet available.