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The question that is the title of this article is very topical as the five-year anniversary of the initiation of the Commission's June 2003 internal policy review of Article 82 EC approaches.

The answer to the question is currently unknown—at least to this author. This short contribution does not predict the future, but presents an educated guess. First, it sets the state of play in the modernization process: what has gone before and how far along are we. Second, it questions the aim of guidelines. In other words, what is the European Commission's Directorate-General for Competition (DG Comp) trying to achieve by issuing guidelines in this area of law? While this may not be all that clear, an answer may be available in DG Comp's *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* in December 2005 ("Discussion Paper").[1] Third, it examines whether some recent case law or policy statements give any indications as to whether guidelines are the way forward. Finally, it looks at implications. Not

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[1] EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (Dec. 2005), *available at* http://www.europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf.

implications of guidelines as DG Comp has yet (if ever) to issue guidelines, but the implications of issuing guidelines as opposed to not issuing guidelines.

I. The Debate and Current State of Play

The modernization of Article 82 currently appears stagnated. Behind the limelight, the debate on the modernization of Article 82 has been ongoing for many years. It reached the public domain at the 8th annual conference of the European University Institute in Fiesole in June 2003. Mario Monti, then-EC Competition Commissioner, announced that the Commission had started an internal review of its policy on abuse of a dominant position.[2] One of the primary reasons for initiating the review was a greater appreciation of microeconomic theory on the part of the policymakers and the need to ensure that the rules under Article 82 are sufficiently responsive to sound economics. Criticism of the application of Article 82, in particular the insufficient economic rigor of the Commission's policy in this area of law, had been growing over the years. Some observers point out that the Commission and the Community Courts—the Court of First Instance (CFI) and European Court of Justice (ECJ)—often place too much emphasis on the legal "form" of the conduct and too little on the economic impact, or the "effects" of the conduct on the market.[3] Many

[2] This was also confirmed in Philip Lowe, Speech at the 13th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute (Oct. 2003), *available at* http://europa.eu.int/comm/competition/speeches/text/sp2003_040_en.pdf.

[3] John Ratliff, *Abuse of Dominant Position and Pricing Practices—A Practitioner's Viewpoint* & Derek Ridyard, *Article 82 EC Price Abuses—Towards a More Economic Approach*, *in* EUROPEAN COMPETITION LAW ANNUAL—WHAT IS AN ABUSE OF A DOMINANT POSITION? 427 & 441 (C.-D. Ehlermann & I. Atanasiu eds., 2006); John Kallaugher & Brian Sher, *Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82*, 5 EUR. COMPETITION L. REV. 263, 268 (2004); Dennis Waelbroeck, *Michelin II: A per se rule against rebates by dominant companies?*, 1(1) J. COMPETITION L. & ECON. 149, 151 (2005). D. GERADIN & N. PETIT, PRICE DISCRIMINATION UNDER EC COMPETITION LAW: THE NEED FOR

commentators believe that the underlying principles of Article 82 could be clearer.[4] One of the overall conclusions from the annual conference in Fiesole was that the concept of abuse does not lend itself easily to per se rules, and that a rule of reason approach is normally preferable. Another conclusion was that legal formalism should be abandoned in favor of the analysis and evaluation of economic effects.[5]

In July 2005, the economic advisory group on competition policy to the Commission (EAGCP) published the report, *An Economic Approach to Article 82 EC*.[6] The report suggests that an economics-based approach to Article 82 must be adopted in order to avoid a confusion of the two objectives "protection of competition" and "protection of competitors".[7] In this context, an economics-based approach is understood to be an approach that "requires a careful examination of how competition works in each

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A CASE-BY-CASE APPROACH 8 (GCLC Working Paper, No. 07/05, 2005); IVO VAN BAEL & JEAN-FRANCOIS BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY 915, 917 (2005).

[4] *See* Thomas Eilmansberger, *How to Distinguish Good from Bad Competition under Article 82 EC: in Search of Clearer and More Coherent Standards for Anti-competitive Abuses*, 42 COMMON MKT. L. REV. 129 (2005); and John Vickers, *Abuse of Market Power*, 115 ECON. J. F244 (2005). Brian Sher argues that there is no internal consistency of application, and that there is no longer any coherent policy basis for applying Article 82 (Brian Sher, *The Last of the Steam-Powered Trains: Modernising Article 82*, 25 EUR. COMPETITION L. REV. 243 (2004)); Sven Völcker argues that Article 82 currently lacks a coherent overall approach and remains largely untouched by the increasing focus on economic analysis that has characterized the development of the law and practice under Article 81 (Sven Völcker, *Developments in EC Competition Law in 2003: An Overview*, 41 COMMON MKT. L. REV. 1027, 1048 (2004)).

[5] C.-D. Ehlermann & I. Atanasiu, *Introduction*, *in* EUROPEAN COMPETITION LAW ANNUAL—WHAT IS AN ABUSE OF A DOMINANT POSITION? (C.-D. Ehlermann & I. Atanasiu eds., 2006).

[6] Jordi Gual et al., Report by the EAGCP, An economic approach to Article 82 (Jul. 2005) (on file with European Commission, DG Competition) [hereinafter EAGCP report], *reprinted in* 2(1) COMPETITION POL'Y INT'L 111 (Spring 2006), *available at* http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.

[7] This was also suggested in ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COUNTRY STUDIES, EUROPEAN COMMISSION - PEER REVIEW OF COMPETITION LAW AND POLICY 30 (Oct. 2005), *available at* http://www.oecd.org/dataoecd/7/41/35908641.pdf.

particular market in order to evaluate how specific company strategies affect consumer welfare."[8]

The great intellectual confusion over the proper standard of liability governing allegedly exclusionary conduct in practice and case law under Article 82 led DG Comp to publish the Discussion Paper.[9] In the public consultation following the Discussion Paper, DG Comp received 107 replies.[10]

In June 2006, the Commission hosted a public hearing on the Discussion Paper.[11] Since the public hearing, there have been various conferences, meetings, and gatherings involving discussions on the modernization of Article 82, but no Commission Notice or Guidelines. At the time this article was written (April 2008), little progress had been made.

Having said that, the author acknowledges that reforming Article 82 is not a simple matter and the tools available are limited. Reform of Article 82 is different from the reform of Article 81, because there is no general secondary legislation or practical guidance on the application of Article 82.[12] Moreover, Article 82 does not, unlike Article

[8] EAGCP Report, *supra* note 6, at 2.

[9] DG Competition is also reviewing its policy towards exploitative and discriminatory abuses. The latter is not yet at the stage of public consultation.

[10] *See* European Commission - Competition, Art 82 review: Comments on the public consultation on discussion paper on the application of Article 82 to exclusionary abuses (March 2006), *at* http://ec.europa.eu/comm/competition/antitrust/art82/contributions.html (last visited Apr. 11, 2008).

[11] *See* European Commission - Competition, Art 82 review: Public hearing on Article 82, *at* http://ec.europa.eu/comm/competition/antitrust/art82/hearing.html (last visited Apr. 11, 2008).

[12] One exception is that the Commission has published guidance for specific sectors such as postal services and telecommunications. Some insight into the identification of market power can be gained by analogy from European Commission, Guidelines on Market Analysis and Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services, 2002 O.J. (C 165) 3, ¶70, and European Commission, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic

81, allow the possibility of exemption.[13] The absence of a provision like Article 81(3) means that, even though theoretically possible given Article 83, it is not easy to adopt block exemptions on certain types of conduct, thereby making that type of conduct permissible.

II. The Aim of the Guidelines

Conceptually, there is nothing wrong with guidelines. However, it is crucial to consider what DG Comp would be trying to achieve by issuing guidelines. If the aim is to derogate from older case law by means of soft law such as guidelines, some argue that this it is unacceptable.[14] Similarly, if the aim is to make new law, it would go beyond DG Comp's responsibility for orientating of competition policy.[15] Contrary, it would be acceptable if the aim of guidelines is to summarize and clarify past and current case law, enhancing legal certainty or increasing transparency as to its enforcement. According to former EC Competition Commissioner Monti:

> Its purpose [re-examination of Article 82] is to evaluate existing policy and how we can make it more effective as well as to define the most appropriate means to make it more transparent.[16]

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communications networks and services (Framework Directive), 2002 O.J. (L 108) 33, art. 14(2) where significant market power is equated with dominance under Article 82. Press Release IP/02/1016, European Commission, Commission Issues Market Power Assessment Guidelines for Electronic Communications (Jul. 9, 2002), *available at* http://europa.eu/rapid/pressReleases.

[13] Joined Cases T-191/98 & T-212/98 to 214/98, Atlantic Container Line AB and others v. European Commission (TACA), 2003 E.C.R. II-3275, ¶1109.

[14] Francis Snyder, *Soft Law and Institutional Practice in the European Community*, *in* THE CONSTRUCTION OF EUROPE, ESSAYS IN HONOUR OF EMIL NOEL 199-201 (Martin ed., 1994).

[15] Case C-234/89, Stergios Delimitis v. Henninger Bräu AG [hereinafter *Henninger Bräu*], 1991 E.C.R. I-935.

[16] Mario Monti, EU Competition Policy after May 2004, Speech at the 13th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute (Oct. 24, 2003), *available at* http://www.eurunion.org/news/speeches/2003/031024mm.htm.

"Transparent" has become a buzzword in competition policy debates. Transparent or transparency are umbrella terms referring to access to documents, knowledge of who makes decisions and how they are made, simplification of the legislative process, consultation, a duty to give reasons, and other elements. The idea behind the concept is to enhance democracy and legitimacy and thus turn the citizens closer to the European Union as well as render trust to the Commission.[17] In the context of Article 82 guidelines, it has been argued that guidelines would provide greater transparency and predictability in the form of legal certainty to European companies and their advisers.[18] However, for guidelines to increase transparency, they would have to specify the changes to the Commission's policy otherwise the point would be defeated.[19]

Connected to transparency is legal certainty—a general principle under Community law. If the aim of issuing Article 82 guidelines is to enhance legal certainty, it would require the guidelines to provide businesses with sufficient information to arrange their affairs in such a way that the risks of unintentional infringement are minimized as are the costs of unnecessary enforcement action or misconceived complaints. If the guidelines provide sufficient information, then they enable firms, to the greatest possible extent, to judge whether their conduct is legal or not at the time they

[17] The legal recognition of transparency began in Declaration 17 at Maastricht to strengthen the democratic nature of the institutions and the public's confidence in the administration. Later, rules were laid down in 1993 in a non-binding Code of Conduct (CC) on public access to Council and Commission documents and more formally in European Commission, Council Decision of 20 December 1993 on public access to Council documents (93/731/EC), 1993 O.J. (L 340) 43.

[18] John Temple Lang, *Legal Certainty and Legitimate Expectations as General Principles of Law*, *in* GENERAL PRINCIPLES OF EUROPEAN COMMUNITY LAW 163 (U. Bernitz & J. Nergelius eds., 2000).

[19] A similar point was made by Giorgio Monti in the preface to his book. *See* G. MONTI, EC COMPETITION LAW (2007).

decide to engage in it.[20] Sufficient information and legal certainty to the framework of Article 82 is important, as it is vital for the undertakings—dominant or not—in the market to know the legal framework within which they can operate.[21] Decisions on innovation and investment involve business risks. Undertakings are less likely to be willing to take these risks if they cannot calculate the risk of future legal sanctions. Enhancing legal certainty could reduce the legal risks, facilitating innovation and investment.[22] For competition policy to be effective it needs support from the business community, which will only happen if businesses understand the Commission's policy.

If the aim of guidelines is to clarify its objectives within Article 82, the question is: Are guidelines necessary to achieve this aim? The answer is "yes" for two reasons. First, the Community Courts rarely articulate their stand as to the objectives and if they do, it is unclear what is meant by the objectives. For example, in *Microsoft Corporation v. the European Commission*, the CFI said that the objectives of Article 82 are to maintain undistorted competition and safeguard the competition that still exists.[23] However, it is not clear that these objectives aim to promote consumer welfare. Thus, ambiguities remain. Given these ambiguities, it is perfectly reasonable for the Commission to establish its own view. If the Community Courts disagree with the

[20] TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EC LAW 165, 166 (1999).

[21] Case T-51/89, Tetra Pak Rausing SA v. European Commission, 1990 E.C.R. II-309, ¶36; Joined Cases 212/80 to 217/80, Amministrazione delle Finanze dello Stato v. Srl Meridionale Industria Salumi and others, 1981 E.C.R. 2735; Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v. Amministrazione delle finanze dello Stato, 1981 E.C.R. 2417, ¶10; Cases 209/84 to 213/84, Ministère Public v. Asjes and Others (Nouvelles Frontières), 1986 E.C.R. 1425, ¶64.

[22] European Commission, Council Regulation on the Implementation of the Rules on Competition Laid Down in Article 81 and 82 of the Treaty [hereinafter Council Regulation 1/2003], 2003 O.J. (L 1) 1, recital 38.

[23] Case T-201/04, Microsoft v. Commission [hereinafter EC *Microsoft*] (not yet reported) (judgment of Sep. 17, 2007), at ¶561.

Commission's view, they can overturn it in future judgments. While the Discussion Paper makes clear (at least in theory) that the main aim of Article 82 is consumer welfare,[24] it is no authoritative source.

The second reason guidelines are necessary to clarify objectives within Article 82 is that objectives and methodology are interrelated. To achieve the aim of consumer welfare requires an appropriate methodology based on sound economics.[25] The latter requires some explanation and guidelines would be a suitable place to set out the methodology.

Looking at the Discussion Paper, it is clear that the aim was not to publish enforcement guidelines. Instead, it appears that DG Comp is trying to create new law by developing a new framework compared to case law. In its general framework, DG Comp pinpoints the way in which exclusionary conduct may lead to the foreclosure of rivals, and proposes a two-step analysis for assessing whether a particular conduct is exclusionary.[26] The specific conduct in question (1) must be capable of foreclosing the market, but (2) will only be considered abusive where it can be established that the conduct has a market-distorting foreclosure effect. The latter is a new development in contrast to the case law. However, following the Discussion Paper, when asked about the framework, the answer was that it is about better focus and better argumentation:

> There is nothing in the discussion paper that calls into question any of the Commission's past decisions. At the same time, the Commission must always work to improve its decisions and its policies. The review is about a better focus

[24] Discussion Paper, *supra* note 1, at ¶4.

[25] Liza Lovdahl-Gormsen, *Where are we coming from and where are we going to?*, 2(2) COMPETITION L. REV. (2005).

[26] Discussion Paper, *supra* note 1, at §5.

> and a better argumentation in future cases. Furthermore, the fact that if the discussion paper leads to a more refined economic analysis, the Commission would in future argue a case in a different way than in the past, does not mean that the decision taken in a past case was wrong, only that the argumentation would today have been different.[27]

III. Will DG Comp Issue Guidelines?

So far the Commission has not issued a notice or published guidelines under Article 82. The Discussion Paper was welcomed by a majority of the contributors in the public consultation and the move towards consumer welfare, in particular, was applauded. However, some of the contributors criticized the methodology and its inability to convincingly support the objective of consumer welfare.[28] This cast doubt over DG Comp's real intentions. Was consumer welfare simply a rhetorical device to be political correct? The criticism from the written submissions as well as from the contributors at the Commission's public hearing in June 2006 raises doubts about whether guidelines are a possibility.

The Commission is under no obligation to issue guidance. The Commission has not made any promises[29] and it is still unknown whether guidelines will be issued. While the present EC Competition Commissioner, Neelie Kroes, seems keen to reiterate the

[27] European Commission MEMO/05/486, Commission discussion paper on abuse of dominance - frequently asked questions (Dec. 19, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/486&format=HTML&aged=0&language=EN&guiLanguage=en.

[28] To mention a few, *see, e.g.*, G. Monti, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses 3 (Dec. 2005), *at* http://ec.europa.eu/comm/competition/antitrust/art82/065.pdf (last visited Apr. 11, 2008) and E. Fox, Comments on the Discussion Paper of DG Competition on the Application of Article 82 of the Treaty to Exclusionary Acts 2-3 (Mar. 2006), *at* http://ec.europa.eu/comm/competition/antitrust/art82/083.pdf.

[29] *See* MEMO/05/486, *supra* note 27.

importance of the welfare of consumers in her speeches,[30] she seems less keen on revealing anything on the progress of the review—not even in her latest speech, *Competition policy objectives*.[31] Why the silence? Is the Commission internally divided on Article 82? Commissioner Kroes' term comes to an end next year, so one would imagine that she would be under pressure to issue guidelines—unless she is in no hurry because she will be staying for a second term.

The silence is in stark contrasts to the Commission's public relations campaign on the review of Article 81 some years ago. The Commission was not silent during the preparation and in the run up to its publication of *Guidelines on the Application of Article 81(3) of the Treaty*.[32] For example, in a speech given at the end of 2003 on the *Draft Guidelines on the application of Article 81(3) EC*, DG Comp's Director-General Philip Lowe stated that there was:

> …a need for the Commission to explain what is the methodology for applying this exception rule [Article 81(3)]. For instance, it is very important that we [the Commission] explain what are the types of efficiencies that may be created by restrictive agreements and what are the conditions for finding that consumers receive a fair share of these benefits.[33]

[30] *See, e.g.*, Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82, Speech at the 15th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute (Sep. 23, 2005) and Neelie Kroes, European Competition Policy in a Changing World and Globalised Economy: Fundamentals, New Objectives and Challenges Ahead, Speech at the GCLC/College of Europe Conference on "50 years of EC Competition Law" (Jun. 5, 2007).

[31] Neelie Kroes, Competition policy objectives, Address to Economic and Monetary Affairs Committee of the European Parliament, Brussels (Mar. 26, 2008).

[32] European Commission, Notice on Guidelines on the Application of Article 81(3) of the EC Treaty, 2004 O.J. (C 101) 97.

[33] Philip Lowe, Current Issues of EU Competition Law - The New Competition Enforcement Regime, Speech for the North Western Journal of International Law and Business 3-4 (Dec. 31, 2003), *available at* http://ec.europa.eu/comm/competition/speeches/text/sp2003_068_en.pdf.

One explanation for the difference between the review on Article 81 and Article 82 is that at the time of his speech the Commission already had draft guidelines on Article 81(3). It was less uncertain that it was going to publish guidelines. Given the need for Article 81(3) guidelines to *explain* the types of efficiencies and the *conditions* for a fair share to consumers, one can wonder whether it is not necessary to publish Article 82 guidelines to explain these elements.[34] While Director-General Lowe did not hesitate to advertise the guidelines on Article 81(3), he has been remarkable silent on the issuing of Article 82 guidelines. Not one word was mentioned on guidelines in his January 2008 speech, *Pricing and the Dominant Company*: *The Commission's current thinking on Article 82*.[35] One would have thought that the subject of the conference would have indicated such an opportunity. He did however outline the Commission's enforcement priorities—although in a vague way—by concluding:

> We are looking at cases in key sectors of the economy and we are looking at key types of abuse. In all cases, of course, our aim is to focus our enforcement action where it can make a real difference to consumers.[36]

Unlike her colleagues, the Head of the International Relations Unit in DG Comp, Blanca Rodriguez Galindo, has been more elaborate. She explains why the process is so slow:

> We are taking some time to reflect on the various messages we received last year [responses from the pubic consultation]. Presently, [December 2007] we are in the

[34] *See* Discussion Paper, *supra* note 1, at ¶84 (on a fair share) & §5.5 (on efficiencies).

[35] Philip Lowe, The Commission's current thinking on Article 82, Speech at the Conference on "Pricing and the Dominant Company", Brussels (Jan. 31, 2008), *available at* http://ec.europa.eu/comm/competition/speeches/text/2008_01_en.pdf.

[36] *Id.* at 11.

> process of formulating internal conclusions on the basis of the comments received and advancing insights further to internal discussion.[37]

To be fair to the Commission, it is not an easy task.[38] Moreover, the process has received little support from the Community Courts. While it is not the Community Courts' job to develop competition policy, they have the power to change their application of Article 82. The ECJ did not take this opportunity in *British Airways*,[39] regardless of Advocate General Kokott's invitation in her Opinion of February 23, 2006:

> [E]ven if its [the Commission] administrative practice were to change, the Commission would still have to act within the framework prescribed for it by Article 82 EC as interpreted by the Court of Justice.[40]

The ECJ could have changed its current framework to give the Commission some room to develop its policy on Article 82. As it is well-known, the Court did not do that. Although the ECJ's judgment in *British Airways* contains some promising indications, such as the need to establish some form of competitive impact and an appreciation of economic benefits, it did not change its approach to Article 82. This, in conjunction with

[37] Blanca Rodriguez Galindo, Prohibition of the abuse of a dominant position, Speech at the International Symposium on Anti Monopoly Enforcement, Beijing (Dec. 13-14, 2007), at 10, *available at* http://ec.europa.eu/comm/competition/speeches/text/sp2007_18_en.pdf.

[38] This is no criticism, as it is probably the most difficult question in competition law to determine what conduct is "competition on the merits" (and therefore legal) and what conduct is "anticompetitive" (and therefore illegal), as the two kinds of conduct often look identical in practice. *See* F.M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORK ECONOMY 19 (Brookings Institution, 1944) (quoting Arthur Hadley: "to control the abuses without destroying the industries is a matter of the utmost difficulty.").

[39] Case C-95/04 P, British Airways v. Commission [hereinafter *British Airways*] (not yet reported) (judgment of Mar. 15, 2007).

[40] Opinion of Advocate-General Kokott (Feb. 23, 2006), *British Airways*, *id.* at ¶28.

the CFI's judgments in *Michelin II*[41], *Wanadoo*[42], and *Microsoft*[43] confirm that reform of Article 82 is not going to happen immediately.[44] Despite this, Rodriguez Galindo did say:

> Obviously, the formulation of policy guidance on a legally and economically complicated topic like unilateral conduct is an important step.[45]

This is not a promise but an acknowledgement of its importance. It is no more than a policy statement and no substitute for guidelines. Guidelines will be difficult to produce, but this is exactly what drives the imperative for them. Unfortunately, she questioned the appropriateness of guidelines:

> We therefore need to reflect carefully on issues like the right balance between a more 'case by case analysis' and the formulation of general rules, the relationship between policy guidance and case law, and even the appropriateness of issuing policy guidance. In this matter 'getting it right' has priority over speed. We therefore need to call on those who are waiting for next steps for somewhat more patience until we have finished our internal work.[46]

Again, finishing internal work reveals nothing about whether or not guidelines can be expected. It remains to be seen what will happen, and only time can tell.

IV. Implications

Since it is still unknown whether guidelines will be issued, this paper can only discuss the different implications of issuing guidelines as opposed to not issuing

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[41] Case T-203/01, Manufacture Française des Pneumatiques Michelin v. Commission [hereinafter *Michelin II*], 2003 E.C.R. II-4071.

[42] Case T-340/03, Wanadoo Interactive SA v. Commission (not yet reported) (judgment of Jan. 30, 2007).

[43] EC *Microsoft*, *supra* note 23, at ¶664.

[44] This is true so long as the Community Courts are unwilling to move away from their focus on the structure of competition and without an assessment of effects, *see* Liza Lovdahl-Gormsen, *The Conflict between Economic freedom and Consumer Welfare in the Modernisation of Article 82 EC*, 3(2) EUR. COMPETITION J. 329, 342 (2007).

[45] B. Rodriguez Galindo, *supra* note 37, at 10.

[46] *Id.*

guidelines, noting that, if issued, the broader implications really then depend on what the guidelines say.

If guidelines are issued, they will not legally bind the Community Courts.[47] However, the case law of the ECJ has made it clear that where the Commission has adopted rules specifying the criteria which an institution intends to apply when using its discretionary powers, such rules may produce legal effects.[48] Thus, the Commission cannot depart from the rules which it has imposed on itself. In *Libéros*,[49] the ECJ held that internal measures adopted by the administration may not be regarded as rules of law which the administration is always bound to observe. However, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. This was reiterated by the ECJ in *Dansk Rørindustri*,[50] which further held that the Commission cannot depart from such rules without being in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. This was also Advocate General Tizzano's understanding in his Opinion in *Dansk Rørindustri*.[51] This strongly indicates that if the Commission issued Article 82 guidelines, then they would

[47] According to Article 249 EC, only regulations, directives, and decisions are legally binding measures in the Community.

[48] Case 148/73, Louwage v. Commission, 1974 E.C.R. 81, ¶12.

[49] Case C-171/00, P Libéros v. Commission, 2002 E.C.R. I-451, ¶35.

[50] Case C-189/02, Dansk Rørindustri A/S and Others v. Commission [hereinafter *Dansk Rørindustri*], 2005 E.C.R. I-5425, ¶¶ 211-13.

[51] Opinion of Advocate-General Tizzano (Jul. 8, 2004), *Dansk Rørindustri*, *id.* at ¶59.

bind the Commission,[52] although the Commission does not regard itself as being bound by its previous decisions.[53]

The Member States' national courts and competition authorities cannot take decisions running counter to Commission decisions.[54] If national authorities and courts are to achieve a similar outcome with Community practice in future cases, they will need to know what the Commission is trying to achieve. In general, when national courts and competition authorities are called on to apply Community competition law, they can seek guidance in the case law of the Community Courts or in Commission regulations, decisions, and notices applying the competition rules.[55] However, the Commission has not sought to publish general secondary legislation or practical guidance under Article 82, apart from in some specific sectors,[56] so this opportunity is not available. Moreover, the rules emerging from the body of case law under Article 82 are not clear. If DG Comp decides to issue guidelines, national courts and competition authorities would be able to seek guidance. Without guidelines, these authorities may be more likely to ask the Commission for its opinion on economic, factual, and legal matters.[57] Lack of guidance may increase the number of requests as more national courts may ask the Commission for its opinion on questions concerning the application of EC competition law. The Member

[52] *Dansk Rørindustri*, *supra* note 49, at ¶211.

[53] Case T-210/01, General Electric v. Commission, 2005 E.C.R. II-5575, ¶118.

[54] Council Regulation 1/2003, *supra* note 22, at recital 22 & art. 16.

[55] European 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 O.J. (C 101) 54, recital 27.

[56] Such as postal services and telecommunications (*see supra* note 12).

[57] *Henninger Bräu*, *supra* note 15, at ¶53; Joined Cases C-319/93, C-40/94 & C-224/94, Hendrik Evert Dijkstra v. Friesland (Frico Domo) Coöperatie BA and Cornelis van Roessel and others v. De coöperatieve vereniging Zuivelcoöperatie Campina Melkunie VA and Willem de Bie and others v. De Coöperatieve Zuivelcoöperatie Campina Melkunie BA, 1995 E.C.R. I-4471, ¶34.

States' courts may also ask the Commission to "transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules."[58] The workload will increase if the national courts are given insufficient information about how to assess exclusionary conduct by dominant undertakings. Besides asking the Commission for its opinion on economic, factual, and legal matters, national courts may refer questions to the ECJ under the Article 234 procedure if the criteria for admissibility are fulfilled.[59]

V. Conclusion

It is to be expected that there are different views on the economic approach to Article 82 within the Commission as well as between the Member States. This in itself makes it difficult to write guidelines. This is made even more difficult if the Commission wants to adopt a new approach to Article 82 that deviates from existing case law, in particular recent case law. While it cannot issue guidelines contradicting case law, it can issue a statement of prosecutorial discretion. It would seem that DG Comp would do well to get pen to paper in the hope that the five-year anniversary this June be a celebration rather than a reminder of the lack of progress. There are too many cases under Article 82 where it is unclear whether the Commission is trying to promote consumer welfare. The more the Commission expresses its thoughts in writing, the more familiar the concepts

[58] Council Regulation 1/2003, *supra* note 22, at art. 15.

[59] These are set out in amongst other cases. *See* Cases 28/62 to 30/62, Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v. Nederlandse Belastingadministratie, 1963 E.C.R. 31; Cases C-415/93, Union Royal Belge des Societes de Football Association v. Bosman, 1995 E.C.R. I-4921; and Case C-379/98, PreussenElektra AG v. Schleswag AG, 2001 E.C.R. I-2099.

will become over time. And, as a result, the underlying objectives are more likely to be realized.[60]

[60] EUROPEAN COMMISSION, REPORT ON THE ACTION PLAN FOR CONSUMER POLICY 1999-2001 AND ON THE GENERAL FRAMEWORK FOR COMMUNITY ACTIVITIES IN FAVOUR OF CONSUMERS 1999-2003, COM(2001) 486, at 17-19.