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# **Institutional Aspects of European Commission Guidance in the Area of Antitrust Law**

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From an institutional law perspective, the question arises how to qualify the more than thirty existing communications, notices, and guidelines which the Commission has issued in the area of antitrust law. It is uncontested that they are not legislation adopted by the Commission on the basis of an empowerment granted by the Council of Ministers under Article 83 EC and that is the reason why the Commission itself often refers to them as “non regulatory documents.” But do the documents also produce legal effects?

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## I. Introduction

From an institutional law perspective, the question arises how to qualify the more than thirty existing communications, notices, and guidelines which the European Commission (“Commission”) has issued in the area of antitrust law. It is uncontested that they are not legislation adopted by the Commission on the basis of an empowerment granted by the Council of Ministers under Article 83 EC and that is the reason why the Commission itself often refers to them as “non regulatory documents.”

They may take different forms and can pursue different but—in practice—not easily distinguishable and often combined objectives, which can be summarized as follows: (i) to provide Commission guidance for undertakings on the way it intends to use its powers under substantive and procedural antitrust law; and (ii) to summarize the case law interpreting that law and the Commission’s understanding of it.<sup>1</sup> Practice also shows that in fulfilling the first of these roles, publication of these documents constitutes an important policy tool for the Commission.<sup>2</sup> But do the documents also produce legal effects?

## II. Legal Effects of Commission Documents Giving Guidance on the Way It Intends to Use Its Powers under Antitrust Law

With regard to the legal effects of the first guidance category, which is characterized by the fact that the Commission gives guidance on the way it intends to use a given power in relation to which it enjoys a certain discretion (*cf.* its exclusive power to apply Article 81(3) EC before Council Regulation 1/2003<sup>3</sup> entered into force), the Court of Justice ruling on appeal in *Dansk Rörindustri*<sup>4</sup> dealing with Commission guidelines on its powers to impose fines sheds some light:

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

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This judgment has served as an important precedent for later Court of First Instance rulings, e.g. in *Archer Daniels*:<sup>5</sup>

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“First, the Guidelines are capable of producing legal effects. Those effects stem not from any attribute of the Guidelines as rules of law in themselves, but from their adoption and publication by the Commission.” (What follows is a literal repetition of the Court’s ruling in *Dansk Rörindustri* cited earlier, emphasis added).

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The Court of Justice followed the same approach in its judgment on appeal in *JCB Service*:<sup>6</sup>

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“It should be recalled first of all that, according to the case-law of the Court of Justice, although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment.” (emphasis added)

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Also relevant in this context are the Court of First Instance recent findings in relation to guidelines whereby the Commission imposes limits on the use of powers it was given under a Council and Parliament Directive dealing with emission trading, a phenomenon commonly referred to as “auto limitation” in French or “Selbstbeschränkung” in German.<sup>7</sup> In that case, the CFI not only based its ruling on general principles of law such as equal treatment and legitimate expectations, but also on the principle of legal certainty.

Moreover, from well-established case law in an area of law adjacent to antitrust, i.e. the rules on State aid control and in particular the rules on the compatibility of State aid with the common market, i.e. an area where the Commission enjoys far reaching discretionary powers on an exclusive basis,<sup>8</sup> it can be inferred that the Court will not hesitate to annul Commission guidelines, which formally are only intended to set out the course of its conduct, but in reality create new obligations for Member States and, as a result, for the undertakings affected.<sup>9</sup>

Finally, reference should be made to the Court's case law concerning the Commission guidelines for determining the calculation of the lump sums or penalty payments it proposes to the Court in the context of Article 228 infringement procedures against Member States (cf. Case C-387/97 *Commission v. Greece* and C-304/02 *Commission v. France*).<sup>10</sup> The Court held that these guidelines: "help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty and are designed to achieve proportionality."

Although the Court made it clear that these guidelines did not bind the Court, it considered them "a useful point of reference." Nevertheless, in his recent opinion in Case C-121/07, *Commission v. France*, Advocate General Mazak criticized the approach taken in these guidelines on a specific point for being "tout à fait disproportionnée au regard d'une affaire donnée et qu'elle devrait donc être rejetée." In its judgment, however, the Court of Justice confined itself to repeating that:

MOREOVER, FROM WELL-ESTABLISHED CASE LAW (...) IT CAN BE INFERRED THAT THE COURT WILL NOT HESITATE TO ANNUL COMMISSION GUIDELINES, WHICH FORMALLY ARE ONLY INTENDED TO SET OUT THE COURSE OF ITS CONDUCT, BUT IN REALITY CREATE NEW OBLIGATIONS FOR MEMBER STATES AND, AS A RESULT, FOR THE UNDERTAKINGS AFFECTED.

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"(...) while guidelines such as those in the Commission's communications may indeed help to ensure that the Commission acts in a manner that is transparent, foreseeable and consistent with legal certainty, the fact nevertheless remains that such rules cannot bind the Court in the exercise of the power conferred on it by Article 228(2) EC."<sup>11</sup>

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### III. Legal Effects of Commission Documents Summarizing the Case Law on Antitrust Law and the Way It's Understood

What about the legal effects of the second type of the Commission's non-regulatory documents, the so-called interpretative communications?

Interpretative communications are intended to inform Member States and undertakings about their rights and obligations under Community law, in particular in the light of new case-law. Famous examples are the Commission's 1980 Communication on the consequences of the Court's judgment in *Cassis de*

*Dijon*,<sup>12</sup> its 1993 Communication on cross border services,<sup>13</sup> and its 2000 Communication on concessions.<sup>14</sup> In the area of antitrust, mention should be made of a series of successive notices on the cooperation between the Commission and the courts of the EU Member States in applying Articles 81 and 82 EC, which were largely based on the Court's judgment in the *Delimitis* case.<sup>15</sup> Again, in issuing such types of communications, the Commission seems not to

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be entitled to go further than giving, for reasons of transparency and legal certainty, an objective, reasonable, and systematic interpretation and/or clarification of the (case) law.

Occasionally, a Commission position expressed in an interpretative communication inspires the Court when interpreting the law.

This was the case in *Teleaustria*<sup>16</sup> as regards the definition of the concept of "concession" which the Court derived from the Commission communication on the subject. It was an important point of law as it determined the scope of the EC public procurement directives. The same approach was followed by Advocate General Maduro's recent opinion in *ASM Brescia*.<sup>17</sup> In its judgment in the same case, however, the Court did not refer explicitly to the Commission and that, of course, was not necessary as it has the last word on the interpretation of the law. Therefore, if, on closer examination, it appears that through an interpretative communication, the Commission in reality intends to create new law or change existing law, the communication risks annulment by the Court, as was the case in relation to the Commission's 1994 Communication on an internal market for pension funds (cf. C-57/95, *Commission v. France*).<sup>18</sup> Advocate General Kokott in her Opinion in *British Airways v. Commission*<sup>19</sup> made an unequivocal plea for discipline in that respect when dealing with the plaintiff's submission that the Commission envisaged a reform of its practice in relation to Article 82 EC and was planning the publication of a discussion paper for that purpose:

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"In this context, it is immaterial how the Commission intends to define its competition policy with regard to Article 82 EC for the future. Any reorientation in the application of Article 82 EC can be of relevance only for future decisions of the Commission; not for the legal assessment of a decision already taken. Moreover, even if its 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." (emphasis added)

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## IV. Commission Guidance on Its Enforcement Priorities in Applying Article 82 EC to Certain Types of Abusive Conduct: Not a Tertium Genus

One of the Commission's most recent and much awaited documents providing guidance is the communication on its enforcement priorities in applying Article 82 EC to certain types of abusive exclusionary conduct by dominant undertakings.<sup>20</sup> It is not a statement of the law and should therefore not be considered to provide guidance of the second type described above.<sup>21</sup> Nor does it intend to change the law. As indicated by some authors,<sup>22</sup> short of a change in the Treaty itself, changing the law is for the Community courts within the limits of Article 220 EC *et seq.* Moreover, Article 82 EC is not like Article 81 EC where the Commission makes significant changes on its own initiative, either by introducing new or amending existing block exemptions, for which it is properly mandated by the Council of Ministers on the basis of Article 83 EC. Instead, the communication is intended to give greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behavior is likely to result in intervention by the Commission under Article 82 EC.<sup>23</sup> It therefore provides guidance of the first type described above.

AS INDICATED BY SOME AUTHORS, SHORT OF A CHANGE IN THE TREATY ITSELF, CHANGING THE LAW IS FOR THE COMMUNITY COURTS WITHIN THE LIMITS OF ARTICLE 220 EC *ET SEQ.*

Does the guidance, at the same time, clarify how the Commission intends to use its freedom, as conditioned by the Court in its case law (e.g. its judgments in *UFEX* and *A.C. Treuhand*<sup>24</sup>), to decide on the order of priority for dealing with the complaints before it and possibly to reject these complaints for “lack of Community interest” if they do not correspond to the priorities set out in the guidance? This should be possible, since paragraph 8 of the communication states that in applying these “general enforcement principles,” the Commission will take into account the specific facts and circumstances of each case and “may adapt the approach (...) to the extent that this would appear to be reasonable and appropriate in a given case.”<sup>25</sup> At any rate, cases that the Commission for whatever reason does not investigate can be dealt with, if at all, by national competition authorities, which may have their own prioritization criteria; or may be litigated before national courts which in case of doubt may, respectively, must refer the case to the Court of Justice under the terms of Article 234 EC.

## V. Legal Effects of Internal Guidelines and Documents of the Commission Services

So far, only the possible legal effects of non-regulatory documents, which the Commission not only adopts but also publishes, have been considered. What about internal guidelines? According to settled case law, an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. However, it should also be noted that internal guidelines have effects only within the administration itself and do not give rise to rights or obligations on the part of third parties. They do not, therefore, constitute acts adversely affecting any person, against which, as such, an action for annulment can be brought under Article 230 EC. See e.g. Case C-443/97, *Spain v. Commission*<sup>26</sup> concerning internal guidelines relating to the management of structural funds indicating the general lines along which the Commission envisaged to adopt individual decisions; the legality of which could be challenged before the Court by the Member State concerned.

Such an act of the Commission reflected only the Commission's intention to follow a particular line of conduct in the exercise of the powers granted to it by a Council regulation on the coordination of structural funds. It could not therefore, according to the Court, be regarded as intended to produce legal effects. Neither the circumstances, in which the internal guidelines were adopted (i.e. consultation with a group of representatives of Member States) nor the fact that, after adoption, they were communicated to Member States, Parliament, and the

HOWEVER, IT SHOULD ALSO BE NOTED THAT INTERNAL GUIDELINES HAVE EFFECTS ONLY WITHIN THE ADMINISTRATION ITSELF AND DO NOT GIVE RISE TO RIGHTS OR OBLIGATIONS ON THE PART OF THIRD PARTIES.

Court of Auditors—all of which could be explained as a way of complying with the principle of partnership underlying the financial management of Structural Funds—altered the Court's conclusion that these were purely internal guidelines producing no external legal effects. It is, in particular, this element which may be of relevance to the way internal Commission guidelines on antitrust matters could be adopted. Indeed, the European

Competition Network ("ECN") is also very much based on the principle of partnership among competition regulators and, following the Court's reasoning, one could argue that consulting the ECN before adoption of Commission guidelines would not change their "internal" character.

More and more documents are issued by Commission services which are discussion papers that do not reflect the position of the Commission but merely seek to obtain views of interested parties. An example is the 2005 *Staff Discussion Paper* on the application of Article 82 EC.<sup>27</sup> In *Pfizer v. Council*,<sup>28</sup> a case where the question arose whether through such a document the Commission had committed itself to applying the precautionary principle in a certain way, the CFI



made it clear that, whatever its title, the document did not produce any legal effect. However, this ruling contrasts to some extent with the Court's finding in *VW-Audi Forhandlerforeningen*,<sup>29</sup> where it did attach some importance to a Commission staff brochure clarifying the scope of the Block Exemption for motor vehicle distribution agreements.

## VI. Conclusions

The case law of the Court of Justice shows that whatever the nature, object, or purpose of the non-regulatory document adopted by the Commission in the area of antitrust, such as a notice on procedural issues, guidelines on the way it intends to apply certain powers, or an interpretative communication, the Commission needs to be very diligent and should be respectful of the division of powers between institutions as foreseen in the Treaty. Clearly, the Commission cannot create or change the law, whatever economists may think of its merits in terms of a given consumer welfare or harm theory. Therefore, if the Commission wishes to clarify the state of the law, it should remain faithful to the Treaty and the case law and accept that the Court has the final word about its interpretation.<sup>30</sup> However, where the Treaty confers to the Commission as a discretionary power it has some room to develop a policy on how to use that power. Nevertheless, if the Commission decides to lay down that policy in guidelines and to publish them, it should realize that general principles of law do not allow the Commission to deviate from these guidelines as they entail a self-imposed limitation on its freedom of action. However, the words “where appropriate,” used by the Court in *Dansk Rörindustri* quoted above, seem to indicate that this might be different provided the Commission is able to properly reason a deviation in a specific case, that is to say without violating in particular the principles of equal treatment and legal certainty.

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The Commission's responsibility and the inherent necessity of prudence in issuing guidelines were very eloquently described by late Advocate General Geelhoed in his opinion in *VW-Audi Forhandlerforeningen*:<sup>31</sup>

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“The importance of the Commission's communications for policy-making and the administration of justice in the Member States has increased since responsibility for supervising the compliance with Community competition rules was transferred to the national competition authorities and the national courts under 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. Legal certainty and unity of law in the application of and compliance with those rules, and the effectiveness thereof, are ensured if the Commission provides clear guidance on the application of the components of those rules.” (emphasis added)

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In that respect, reference should also be made to Article 16 of Council Regulation (EC) nr 1/2003 which codifies the main finding of the Court in *Masterfoods*.<sup>32</sup> The ultimate rationale of this rule is to ensure that the Luxembourg Courts can effectively guarantee the uniform application of antitrust law by fully reviewing, on the basis of Article 230 EC, the legality of Commission decisions. This implies that the decisions of neither national courts nor national competition authorities can run counter to these Commission decisions. It also implies that clear and carefully formulated Commission guidance on the way it intends to use its decision making powers, though not binding national courts or national competition authorities, is also of some use to them. ▼

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- 1 The Commission regularly produces and updates such documents. The most recent survey can be found at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.
- 2 See C. BELLAMY AND G. CHILD, *EUROPEAN COMMUNITY LAW OF COMPETITION*, 6<sup>th</sup> Ed. 37 *et. seq.* (2008).
- 3 Council Regulation (EC) No 1/2003 (O.J. 2003, nr L 1).
- 4 Case C-189/02P, *Dansk Rørindustri and others / Commission*, [2005] ECR I-5425.
- 5 Case T-59/02, *Archer Daniels Midland / Commission*, [2006] ECR II-3627.
- 6 Case C-167/04P, *JCB Service/Commission*, [2006] ECR I-8935.
- 7 Case T-374/04, *Germany v. Commission*, [2007] ECR II- 4431.
- 8 See Article 87(3) EC.
- 9 Case C 310/85, *Deufil*, [1987] ECR 901.
- 10 Case C-387/97, *Commission v. Greece*, [2000] ECR I-5047 and Case C-304/02, *Commission v. France*, [2005] ECR I-6263.
- 11 Opinion delivered on June 5, 2008 and judgment of December 9, 2008, Case C-121/07, *Commission v. France*, not yet reported.
- 12 O.J. 1980, nr. C 256.
- 13 O.J. 1993, nr. C 334.
- 14 O.J. 2004, nr. C 121.

- 15 Case C-234/89, *Delimitis v. Henniger Bräu*, [1991] ECR I-935.
- 16 Case C-324/98, *Teleaustria and Telefonadress*, [2000] ECR I-10745.
- 17 Opinion delivered on April 24, 2008 in Case C-347/06, not yet reported.
- 18 Case C-57/95, *Commission v. France*, [1997] ECR I-1627. See also T-258/06, *Germany v. Commission* (pending).
- 19 Case C-95/04P, *British Airways v. Commission*, [2007] ECR I-2331.
- 20 O.J. 2009, nr C 45.
- 21 See ¶ 3 of the communication.
- 22 See R. WISH, *COMPETITION LAW*, 6<sup>TH</sup> ED. 210-211 (2008).
- 23 See ¶ 2 of the communication.
- 24 Case C-119/97P, *UFEX and others v. Commission*, [1999] ECR I-1341 and judgment of July 8, 2008 in Case T-99/04, *AC Treuhand v. Commission*, not yet reported.
- 25 See for a detailed analysis of that question, Friedrich Wenzel Bulst, *Mehr Licht—Zur Anwendung des Art. 82 EG auf Behinderungsmisbräuche*, forthcoming in RABELZ, Vol. 4 (2009).
- 26 Case C-443/97, *Spain v. Commission*, [2000] E.C.R. I-2415.
- 27 Available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.
- 28 Case T-13/99, *Pfizer Animal Health v. Council*, [2002] ECR II-3305.
- 29 Case C-125/05, *VW-Audi Forhandlerforeningen*, [2006] ECR I-7637.
- 30 Compare also Case T-170/06, *Alrosa v. Commission*, [2007] ECR II-2601, dealing with the limits of the Commission's powers under Article 9 of Regulation 1/2003 in relation to so-called commitments—appeal pending, C-441/07.
- 31 See *supra* note 29.
- 32 Case C-344/98, *Masterfood and HB*, [2000] ECR I-11369. See for an identical approach as regards the relationship between national judges and Commission decisions under the Customs Code, the ECJ's recent judgment of November 20, 2008 in Case C-375/07 *Heuschen & Schrouff Oriental Foods Trading*, not yet reported. See also the opinion of Advocate General Mengozzi delivered on 5 March 2009 in Case C-429/07, *Inspecteur van de Belastingdienst v. X BV*, not yet reported, dealing with the scope of Article 15 (3) of Regulation (EC) 1/2003 conferring the right to the Commission to submit, on its own initiative, written observations to national courts "where the coherent application of articles 81 or 82 of the Treaty so requires".