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«Soft-law» in providing of fair competition

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«М`яке право» у забезпеченні чесної конкуренції

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***Анотація**. Мета цієї статті – окреслити позиції національних судів стосовно положень м'якого права про конкуренцію, сформованих Комісією ЄС, на прикладі двох юрисдикцій ЄС – Великобританії та Нідерландів. У статті застосовується порівняльний підхід, стосовно теорії встановлено кілька підходів щодо можливого ставлення судів до м'якого права. В широкому розумінні, суди можуть визнати (згоду, незгоду, переконання) або відмовитись у визнанні (нехтуванні, відхиленні) наднаціонального м'якого права у своєму судовому процесі. Визнаючи, що відмова судом у визнанні є природною судовою відповіддю на юридично необов'язкові інструменти, у статті стверджується, що м'яке право щодо конкуренції може і повинно бути визнане національними судами, оскільки це позитивно сприятиме досягненню цілей системи правозастосування та послідовності що може забезпечити юридичну визначеність та рівномірне застосування. Однак емпірична картина демонструє наявність різноманітних позицій та підходів з досліджуваного питання, які можуть стати викликом для послідовного правозастосування. Режим зебезпечення дотримання добросовісної конкуренції в ЄС зазнав певних змін як за змістом, так і за процедурою, відповідно до Регламенту 1/2003 – Регламент «Модернізації», який набув чинності 1 травня 2004 року. Зазначений Регламент суттєво децентралізував процедуру розгляду справ та вніс суттєві зміни щодо самого змісту забезпечення конкуренції, що у свою чергу, створило певні виклики для нової системи, особливо з огляду на загальний принцип правової визначеності. Зважаючи на можливе (і досить ймовірне) неналежне та непослідовне*

забезпечення конкуренції, Європейська Комісія запевняла, що визначеність буде належним чином забезпечена вже існуючою і добре розробленою прецедентною практикою (з питань конкуренції) Європейського суду, рішеннями Комісії ЄС, і, нарешті, не менш важливе значення – нормами м'якого права, що формуються у різного роду актах Комісії ЄС Власне зазначені правові акти та їх значення для судових дискурсів у державах-членах ЄС є об'єктом дослідження у даній статті.

Ключові слова: м'яке право, конкурентне право ЄС, антимонопольне законодавство, настанова, повідомлення, національний суд, національна судова система, прецедентне право, визнання

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***Annotation**. The goal of the current article 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. The EU competition enforcement regime underwent quite some changes in both its substantive and procedural workings when Regulation 1/2003 – the 'Modernization' Regulation – entered into force on May 1st 2004. The procedural decentralization and the change in the logic of substantive enforcement the Regulation introduced created challenges for the new system, especially in light of the general principle of legal certainty. Mindful of possible (and plausible) enforcement inconsistencies, the European Commission maintained that certainty is going to be well served by the already existing and well-developed competition case law of the CJEU, the Commission's own decisional practice, and, last but not least, its soft law guidance in the forms of guidelines, notices, communications, etc. It is these latter instruments and their value for steering judicial discourse in EU Member States that the current paper is interested in.*

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

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Formulation of the issue

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 established by the so-called "Modernization" Regulation 1/2003.[2] The current article 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.

Analysis of recent research and publications

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 centres 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 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 shorthand 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. The task at hand here is to establish whether a similar phenomenon is also observable at the national level.

Part of the general issue that has not been solved before

The backdrop against which the empirical observations generated are going to be examined is a theoretical framework developed elsewhere [13] 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. [14] 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 set-up, 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), [15] 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 Regulation 1/2003 and the Article 10-based declaratory decisions are just some of the prominent examples. [16] 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. [17] 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."[18] Indeed, possible Commission fears for national judicial backlash might be the reason why amicus briefs have been issued rather sparingly through the years. [19] So far, declaratory decisions have not been issued [20] and preliminary rulings in competition law have remained steady in numbers in comparison to the period 1958–2004. [21] 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. [22]

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.

Formulating the objectives of the article

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.

Outline of the main research material

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.

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 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 set-up, 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 1990s. [23] 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 2000s. 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 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 is to be contrasted with the elaborate and compartmentalized approach evinced by the Netherlands.

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 set-up. 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. 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, the justiciability of substantive soft law has largely [24] not been addressed in the jurisprudence of EU courts – 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).

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. 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. What is excluded, however, are nationally drafted soft instruments that do not substantively converge with the contents of supranational competition soft law.

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. 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" scenario, a sample of key terms specific to post-Modernization soft law vocabulary is used as search terms. 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. 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.

The empirical comparative look at the judicial handling of competition claims involving Commission-issued competition soft law in the UK and the Netherlands is necessary to discuss. 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 or, alternatively, on the basis of hard law (legislation and case law) which soft instruments usually "supplement".

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. National courts can refuse to interpret soft law (rejection) or simply ignore the instruments in question (neglect), 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 11 years is not staggering – 14 cases were identified per jurisdiction, amounting to a total of 28 cases. 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). The number of National Competition Authorities' (NCA) decisions in the period 2004–2010, which determines the amount of subse-

quent public enforcement appeals, shows that the Dutch Competition Authority – ACM (with 76 cases) and the UK Competition and Markets Authority – CMA (with 52 cases) lag behind other top enforcers such as France and Germany. The latter two jurisdictions have issued, respectively, 189 and 128 decisions for the same period. 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, 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) and a total of 34 cases (in 39 judgments) by the Court of Appeal and the Supreme Court taken together. 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. 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".

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, 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), while the highest appellate instance – the Trade and Industry Appeals Tribunal has decided 38 cases (out of which 25 under the DCA). 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 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.

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 exceeds the total number of cases. One-third of those 33 references are directed towards the Vertical Guidelines, while the outstanding 22 are almost evenly split between the 81(3) Guidelines, the Horizontal Guidelines and the Guidance Paper; the number of references to the Technology Transfer Guidelines is very low – 1 per jurisdiction.

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. 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. This dissonance also prompts the specific denomination of the Guidance Paper – 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. 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 concept of abuse) and is thus not that different from substantive guidelines. Others believe that the Guidance Paper is precisely what it claims to be – an enforcement priorities document. 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". 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 analysed 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.

So, now its necessary to 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, which also seems to have its respective national competition-law-specific counterparts in the two systems under study. Instances in which 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, where the 81.3 Guidelines and the Vertical Guidelines were at issue before the CAT. 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). 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 harbours, making the agreement vulnerable to a challenge under competition law. Under these circumstances, IMS, a competitor of BBCB, complained to the regulator that the exclusivity term in the agreement infringed both the prohibitions on abuse of dominance and anti-competitive agree-

ments of the UK Competition Act 1998 (hereinafter CA '98). 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". The word "statement" is understood to refer to Commission-issued notices and communications.

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" provision. Although IMS is not a purely domestic case, and therefore the supranational consistency obligation of Regulation 1/2003 applies, 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. This point will be taken up again further in this section and backed up with examples.

Moving to the analytical part of the judgment, IMS alleges an error of assessment in Ofcom's holding that the challenged agreement does not fall under the Chapter 1 prohibition. 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." 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.

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. 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 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.

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. In suggesting how Ofcom should have performed the anti-competitive analysis under Chapter 1/Article 101 TFEU, IMS bases itself on the Vertical Guidelines, and case law – the Neste case – 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)". 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 […] 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 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. The Horizontal and Technology Transfer Guidelines 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 authors95 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". 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". 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, where the 81(3) Guidelines were included in an in-text citation, together with several supranational judgments relevant to the matter at hand. 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.

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. 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. The judgment dealt with, inter alia, a refusal to supply claim under Article 24 DCA (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. After explaining the main assessment criteria 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 had been used before in the Commission decisional practice and case law. 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.

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, 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. 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 practised 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 a dominant undertaking to increase its prices, precisely because the former is less efficient, which, in the end, is to the detriment of consumers". 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. 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. Paragraph 24 of 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. 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.

Conclusions

The "common core" of Dutch and UK judicial recognition of supranational com-

petition 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 national 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" and the former – "rejection". 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.

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