European Competition Journal

ISSN: 1744-1056 (Print) 1757-8396 (Online) Journal homepage: https://www.tandfonline.com/loi/recj20

The judicial reception of competition soft law in the Netherlands and the UK

Zlatina Georgieva

To cite this article: Zlatina Georgieva (2016) The judicial reception of competition soft law in the Netherlands and the UK, European Competition Journal, 12:1, 54-86, DOI: 10.1080/17441056.2016.1221167

To link to this article: https://doi.org/10.1080/17441056.2016.1221167

Published online: 15 Nov 2016.

European Competition Journal, 2016
Vol. 12, No. 1, 54–86, http://dx.doi.org/10.1080/17441056.2016.1221167

Routledge
Taylor & Francis Group

The judicial reception of competition soft law in the Netherlands and the UK

Zlatina Georgieva

PhD Researcher, Tilburg Law and Economics Center (TILEC), Tilburg University, Montesquieu building, Office 519, Warandelaan 2, 5037 AB Tilburg, The Netherlands

(*Received 28 April 2016; accepted 2 August 2016*)

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

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

Introduction – setting the scene, theoretical underpinnings and methodology

Setting the scene

More than a decade after the great bulk of day-to-day enforcement of Articles 101 and 102 TFEU was put in the hands of national authorities and courts, the decentralized and substantively "more economic" EU competition regime seems to have matured enough to lend itself to an empirical analysis. This is evidenced by the increasing amount of studies and country reports that aim at compiling national

The author would like to thank Prof. Pierre Larouche and Prof. Saskia Lavrijssen for their support and comments on the current and previous drafts of this article. Email: z.r.georgieva@uvt.nl

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

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

Other scholars also acknowledge the great weight soft law instruments have acquired in the competition field, with some lamenting this development[4] and others applauding it.[5] The latter normative stances, however, do not answer the question of the legal, and not just practical, status of supranational competition soft law in EU Member States. Going beyond the undisputed fact that supranational competition soft law does not have binding force, this paper ponders into

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

[2]Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 001/1. On the multi-level governance debate, refer to F Cengiz, 'Multi-level Governance in Competition Policy: The European Competition Network' (2010) 35 *European Law Review* 660–77.

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

[4]W Weiss, 'After Lisbon, Can the European Commission Continue to Rely on "Soft Legislation" in Its Enforcement Practice?' (2011) 2 *Journal of European Competition Law and Practice* 441–51.

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

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

[6]On the distinction between legal force and effects, refer to L Senden, *Soft Law in European Community Law (Its Relationship to Legislation*) (Hart Publishing 2004) 264–9.

[7]For the importance of national courts as ultimate instances of normative ordering, see M Dawson, 'Three Waves of New Governance in the European Union' (2011) 36 *European Law Review* 208, 223–5; J Scott and S Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2006) 13 *Columbia Journal of European Law* 565–94; D Panke, 'Social and Taxation Policies – Domaine Reserve Fields? Member States Non-compliance with Sensitive European Secondary Law' (2009) 31 *Journal of European Integration* 489, 491; R Slepcevic, 'The Judicial Enforcement of EU Law Through National Courts: Possibilities and Limits' (2009) 16 *Journal of European Public Policy* 378, 382.

[8]Article 3 and paras 14, 17, 21, 22, 29 of the Preamble to Regulation 1/2003 [2002]. For scholarly accounts on the matter, refer to E Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' in Catherine Barnard (ed), *Cambridge Yearbook of European Legal Studies* (Hart 2013) 139, 143 and H Cosma and R Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14 *European Business Law Review* 25–56.

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

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

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

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

the former been a mere re-statement of the latter.[13] The task at hand here is to establish whether a similar phenomenon is also observable at the national level.

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

Theoretical underpinnings

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

Alternatively, the "refusal (for recognition)" scenario entails that courts exhibit a resistant attitude to soft law that implies a formalistic view on legal sources. Refusal, it is hypothesized, can manifest itself through either explicit rejection (the flip side of explicit recognition) or neglect (the flip side of persuasion), whereby the soft law instrument is ignored even if invoked in an argument

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

[14]ZR Georgieva, 'Soft Law in EU Competition Law and Its Judicial Reception in Member States – A Theoretical Perspective' (2015) 16 *German Law Journal* 223–60. A similar framework is employed by Greene in her study on judicial attitudes to the Merger Guidelines in the US – Greene (n 10) 807.

[15]The idea for the latter scenario is explained (although in different terms) in F Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009), 72. For the Dutch context, a similar intuition is expressed in M Eliantonio, 'Effectieve Rechtsbescherming en Netwerken: een Problematische Verhouding' (2011) 59 *SEW: Tijdschrift voor Europees en Economisch Recht* 116–22.

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),[16] foster the achievement of consistency in enforcement (and the concomitant legal certainty and uniform application). To the contrary, by preventing dialogue, black-letter, doctrinal approaches detract from the said principles.

Finally, the above-proposed model acknowledges that other, more legally legitimate, consistency-enhancing tools are available to the decentralized competition enforcement system. The Treaty-based preliminary rulings procedure, the *amicus curiae* interventions based on Article 15(3) of Regulation 1/2003 and the Article 10-based declaratory decisions are just some of the prominent examples.[17] However, as Boskovits notes, these strict convergence rules generate a re-defined relationship between national courts, on the one hand, and the national and supranational administrative authorities, on the other. This has an impact on administration of justice in Member States.[18] Therefore, the author argues, "It remains to be seen the way in which the Commission intends to make use of the powerful instruments at its disposal as to avoid alienating national judges."[19] Indeed, possible Commission fears for national judicial backlash might be the reason why *amicus* briefs have been issued rather sparingly through the years.[20] So far, declaratory decisions have not been issued[21] and preliminary rulings in competition law have remained steady in numbers in comparison to the period 1958–2004.[22] The possibility cannot be discounted, therefore, that one channel through which convergence could happen is the voluntary judicial acceptance of principles enunciated in supranational competition soft law. As

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

[17]Those should be read together with the obligations imposed by Article 16 and 3 of Regulation 1/2003 [2002].

[18]K Boskovits, 'Modernization and the Role of National Courts: Institutional Choices, Power Relations, and Substantive Implications' in I Lianos and I Kokkoris (eds), *The Reform of EC Competition Law*, vol 41 (Kluwer Law International 2010) 95, 111.

[19]ibid 116.

[20]For the period 2004–2015, there are only 17 *amicus curiae* briefs listed on the website of DG COMP. See http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html accessed on 20 January 2016.

[21]MJ Frese, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014) 163.

[22]For data on the period 1958–2004, refer to B Rodger, 'Article 234 and Competition Law: A Comparative Analysis' (2008) 15 *Maastricht Journal of European and Comparative Law* 149, 156. For data in the period 2004–2015, refer to www.curia.eu.

Snyder puts it (in the context of the interaction between the Commission and the supranational courts),

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

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

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

Methodology

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

[23]F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin (ed), *The Construction of Europe* (Springer 1994) 196, 204. In the more specific context of the Article 82 Guidance Paper, similar views are expressed by R Whish, 'National Competition Law Goals and the Commission's Guidance on Article 82 EC: The UK Experience' in LF Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article* (vol 102, Edward Elgar Publishing 2011) 152, 161 and D Sinclair, 'Counterfactuals – A Shift in the Burden/Standard of Proof' (2010) *GCR Antitrust Litigation Conference 2010* 1, 4.

[24]See M Bussani and U Mattei, 'The Common Core Approach to European Private Law' (1996–1997) 3 *Columbia Journal of European Law* 339–56. See also B Fekete, 'Raising Points of Law on the Court's Own Motion? Two Models of European Legal Thinking' (2014) 21 *Maastricht Journal of European and Comparative Law* 652–75. Because the supranational instruments that are object of this study are identical for all Member States, no caveats need to be made with regard to the core comparative concern of picking similar objects of analysis (*tertium comparationis*) across jurisdictions, or in other words, comparing "like with like" (*similia similibus*). On the importance of the *tertium* being

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.[25] 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.[26] 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[27] is to be contrasted with the elaborate and compartmentalized approach evinced by the Netherlands.[28]

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.[29] National sectoral regulation case law is thus only considered if it contains references to supranational competition (Article 101 and 102 TFEU) soft law.

---

similar between jurisdictions, see E Orucu, 'Methodology of Comparative Law' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 442, 448.

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

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

[27]R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' (1986) *Public Law* 239–84.

[28]HE Broring and GJA Geertjes, 'Bestuursrechtelijke Soft Law in Nederland, Duitsland en Engeland' (2013) 4 *Nederlands Tijdschrift voor Bestuursrecht* 74–87.

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

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.[30] 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,[31] the justiciability of substantive soft law has largely[32] not been addressed in the jurisprudence of EU courts[33] – 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).[34]

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

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

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

[33]Idot (n 26) 115 and Vincent (n 5) 701. The situation as described by Idot and Vincent in 2008 and 2009, respectively, has not changed as of the end of 2015, except for the *Post Danmark II* judgment (ibid).

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

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.[35] 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.[36] What is excluded, however, are nationally drafted soft instruments that do not substantively converge with the contents of supranational competition soft law.[37]

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.[38] 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.[39] Where those terms are detected in national judgments, a comparison between the wording used in the relevant guideline and that in the

[35]On the importance of the comparative base (*tertium comparationis*) being similar between jurisdictions, see Orucu (n 25), 442–3, 448.

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

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

[38]The EU case law databases are the following: N-lex; JuriFast; Dec.Nat; Curia. For the UK, the used databases are Bailii and Westlaw UK. For the Netherlands, those are Kluwer and Rechtspraak. The cut-off date for data gathering is 1 October 2015.

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

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.[40] 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.[41]

Judicial recognition of Commission-issued soft instruments in the UK and the Netherlands

Aggregate presentation of empirical observations

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

- National courts can recognize soft law by either explicitly agreeing or disagreeing with its substantive contents. This engagement can happen either on the basis of general principles of law[42] or, alternatively, on the basis of hard law (legislation and case law) which soft instruments usually "supplement".[43]
- National courts can also recognize soft law if they are "persuaded" of its value by endorsing its contents in a roundabout way – not explicitly

and "category management agreement"; (for the Horizontal Guidelines) "age of data" (terms shared by guidelines) "qualitative efficiencies".

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

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

[42]Stefan (n 12) 200.

[43]ibid 141. To illustrate the point specifically for competition law, the Vertical Block Exemption Regulation – VBER (Commission Regulation No 330/2010 [2010] OJ L 102/01) – a hard law instrument – can give teeth to the Vertical Agreements Guidelines (n 34) – a soft law instrument. The same applies to the Horizontal Guidelines (n 34), which are tied to the Block Exemption Regulations on Specialization and R&D Agreements (Commission Regulation No 1218/2010 [2010] OJ L335/43 and Commission Regulation No 1217/2010 [2010] OJ L 335/36). Also, the 81(3) Guidelines (n 34) apply as a general "fall-back provision" to the more specific Horizontal Guidelines and as a "default" when the VBER does not apply. Finally, the Technology Transfer Guidelines (n 34) are supplementary to the Technology Transfer BER (Commission Regulation No 316/2014 [2014] OJ L 93/17) and the 102 Guidance Paper does not seem to be attached to any hard law provision.

mentioning the instrument proper, but reaching a conclusion not inconsistent with its provisions.[44]

- 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.[45] 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).[46] The number of National Competition Authorities' (NCA) decisions in the period 2004–2010,[47] which determines the amount of subsequent public enforcement appeals, shows that the Dutch Competition Authority – ACM (with 76 cases) and the UK Competition and Markets Authority – CMA (with 52 cases)[48] lag behind other top enforcers such as France and Germany. The latter two

[44]Schauer (n 15).

[45]For a listing of the cases detected, refer to Table A1 in the appendix.

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

[47]Rodger (n 1) 271. Aggregate information on Article 102 TFEU public investigations and sanctions between 2005 and 2009, showing a similar distribution of NCA output (France and Germany in the lead, with the UK and the Netherlands lagging behind) is available in B Baarsma and R van der Noll, 'Is Misbruik Machtspositie een Blinde Vlek in het Nederlandse Mededingingstoezicht?' (2013) 3 *Tijdschrift Mededingingsrecht in de Praktijk* 121–4.

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

jurisdictions have issued, respectively, 189 and 128 decisions for the same period.[49] 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,[50] 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)[51] and a total of 34 cases (in 39 judgments) by the Court of Appeal and the Supreme Court taken together.[52] 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.[53] 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".[54]

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,[55] 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),[56] while the highest appellate instance – the Trade and Industry Appeals Tribunal has decided 38 cases (out of which 25 under the DCA).[57] As stated above, these low public enforcement numbers were

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

[50]A search on the ACM website as per 20 January 2016 shows that 29 more cartel and abuse of dominance decisions have been taken in the past 5 years, which is actually a drop in the *per annum* activity of the ACM. A search on the CMA website as per 20 January 2016 shows that 31 more cases have been closed under the Competition Act 1998 since 2011, which would mean that the *per annum* enforcement has significantly increased in the past five years.

[51]Search through the CAT database.

[52]Search on Westlaw UK.

[53]Rodger (n 1) 77, 102–3. However, the author testifies that "anecdotal evidence form practitioners indicates that there has been a considerable increase in competition claims raised at the High Court in recent years". ibid 31. Search done through the CAT database.

[54]Rodger (n 1), 59.

[55]ibid 99.

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

[57]The figures were generated through Rechtspraak. For a confirmation of the relatively low enforcement figures, see M van Oers, 'De NMa zal Handhaven' in P Kalfbleisch and others

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.[58]

When it comes to the observed soft law references per instrument, some of the cases identified mention more than one relevant instrument, which is why the total number of references to selected soft law [33] exceeds the total number of cases [28]. One-third of those 33 references [11] are directed towards the Vertical Guidelines, while the outstanding 22 are almost evenly split between the 81(3) Guidelines [6], the Horizontal Guidelines [7] and the Guidance Paper [7]; the number of references to the Technology Transfer Guidelines is very low – 1 per jurisdiction [2].[59]

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.[60] 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.[61] This dissonance also prompts the specific denomination of the Guidance Paper[62] – that of "enforcement priorities"

(eds), *Trust en Antitrust: Beschouwingen over 10 jaar Mw en 10 jaar NMa* (Redactiebureau Editor 2008). For information on the builders' cartel, refer to pages 246–7. For the latter, see also E Sakkers, 'Rechtshandhaving van het Kartelverbod: Zoek de Verschillen' in P Kalfbleisch and others (eds), *Trust en Antitrust: Beschouwingen over 10 jaar Mw en 10 jaar NMa* (Redactiebureau Editor 2008) 92–3 and Plomp (n 49) ch 6.

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

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

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

[61]L Gormsen, 'Why the European Commission's Enforcement Priorities on Article 82 EC Should Be Withdrawn?' (2010) 31 *European Competition Law Review* 45–51 and J Killick and A Komninos, 'A Missed Opportunity: Why the Guidance Paper Does Not Increase Predictability or Advance the Debate' (2009) 2 *Concurrences Review* 23–6.

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

informing the Commission's future case selection practice – rather than the originally envisioned "substantive guidelines" reflecting the law in the area.[63] 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)[64] and is thus not that different from substantive guidelines.[65] Others believe that the Guidance Paper is precisely what it claims to be – an enforcement priorities document.[66] 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".[67] 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.

National judicial approaches to supranational competition soft law

Recognition – explicit agreement or disagreement

This section is going 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

[63]The original intent of the Commission to publish guidelines on the enforcement of Article 102 is discussed by Gormsen (n 61), 46 and in LF Pace, 'The Italian Way of Tackling the Abuse of a Dominant Position and the Inconsistences of the Commission's Guidance: Not a Notice but a Communication', in LF Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar Publishing 2011), 104–5.
[64]Monti (n 62) and Sinclair (n 23). Greene (n 10) 779–80 also notes that an implicit role of guidelines in the US antitrust context is "commentary on the law", their explicit (express) role being explanation of the reasoning and analysis underlying agency exercise of prosecutorial discretion.
[65]Gormsen (n 61).
[66]R Whish, 'Intel v Commission: Keep Calm and Carry On!' (2015) 6 *Journal of European Competition Law and Practice* 1, 2.
[67]Monti (n 62) 5.

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,[68] which also seems to have its respective national competition-law-specific counterparts in the two systems under study.[69] 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,[70] where the 81.3 Guidelines and the Vertical Guidelines were at issue before the CAT.[71] 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).[72] 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 (Ofcom) that the exclusivity term in the agreement infringed both the prohibitions on abuse of dominance (Chapter 2) and anti-competitive agreements (Chapter 1)[73] of the UK Competition Act 1998 (hereinafter CA '98).[74] 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]

[68]The principle of consistent interpretation is expressed in Article 4(3) TEU, and is in turn reflected in the contents of Article 3 of Regulation 1/2003 (n 2).
[69]For the Netherlands, Article 1 of the Explanatory Memorandum to the Dutch Competition Act (Kamerstukken II 1995/96, 24707). For the UK, Competition Act 1998, s. 60.
[70]*Independent Media Support Ltd v Office of Communications*, [2008] CAT 13.
[71]The 81(3) Guidelines were also incidentally discussed in this case.
[72]Vertical Block Exemption Regulation (n 34).
[73]The Chapter 1 and 2 prohibitions are the UK national equivalents of the Article 101 and 102 TFEU prohibitions.
[74]Competition Act 1998 (n 25).

Commission".[75] The word "statement" is understood to refer to Commission-issued notices and communications.[76]

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.[77] Although IMS is not a purely domestic case, and therefore the supranational consistency obligation of Regulation 1/2003 applies,[78] 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.[79] This point will be taken up again further in this section and backed up with examples.

Moving to the analytical part of the judgment,[80] IMS alleges an error of assessment in Ofcom's holding that the challenged agreement does not fall under the Chapter 1 prohibition.[81] 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."[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.[83]

[75]Competition Act 1998, s.60 (3).
[76]R Whish and D Bailey, *Competition Law* (6th edn, OUP 2009) 366.
[77]M Furse, *Competition Law of the EC and UK* (6th edn, OUP 2008) 57.
[78]Art.3.of Regulation 1/2003 (n 2).
[79]A similar idea is expressed in Sarmiento (n 5), 272.
[80][2008] CAT 13 (n 70) [100]–[124].
[81]ibid [84].
[82]ibid [115].
[83]ibid [26], which states:

> The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 82.

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.[84] 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.[85]

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.[86] In suggesting how Ofcom should have performed the anti-competitive analysis under Chapter 1/Article 101 TFEU, IMS bases itself on the Vertical Guidelines,[87] and case law – the *Neste* case[88] – 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)".[89] 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 […][90]

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.

---

[84]The decision can be found at <http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_842/c4.pdf> accessed 20 January 2016.

[85]The 81(3) guidelines, unlike the Horizontal, Vertical and Technology Transfer Guidelines, are not directly related to a Block Exemption Regulation. For their connection to the legislative framework of competition law, refer to Frank Wijckmans and Filip Tuytschaever, *Vertical Agreements in EU Competition Law* (OUP 2011).

[86][2008] CAT 13 (n 70) [120]–[124].

[87]ibid [141], [145].

[88]C-214/99 *Neste Markkinointi Oy v Yötuuli Ky and Others* [2000] ECR I-11121.

[89][2008] CAT 13 (n 70) [105].

[90]ibid [109].

Further empirical observations from both jurisdictions under study[91] 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.[92] The Horizontal[93] and Technology Transfer Guidelines[94] also (but less frequently) get endorsed by courts when they support pertinent supranational hard law. The reason for these empirical results has been addressed by several authors[95] 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".[96] 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".[97] 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,[98] where the 81(3) Guidelines were included in an in-text citation, together with several supranational judgments relevant to the matter at hand.[99] The "case-law-read-together-with-soft-law" approach of the court served to emphasize the point that an object restriction should be established

[91]Hof Amsterdam 26 juni 2012, ECLI:NL:GHAMS:2012:BX0258, [2.14]; Conclusie Hoge Raad 02 oktober 2009, ECLI:NL:PHR:2009:BJ9439, [2.36]; Conclusie Hoge Raad 21 december 2012, ECLI:NL:PHR:2012:BX9019, [20].

[92][2006] EWHC 1241 (Ch), [254]. For the Netherlands, see Conclusie Hoge Raad 15 april 2011, ECLI:NL:PHR:2011:BQ2213, [2.42]. For the UK, see [2011] EWHC 3165 (Ch), [71].

[93]The Horizontal Guidelines (n 34) are usually interpreted together with the BERs on R&D and specialization agreements. An example of such a judicial engagement is the UK judgment *Sel-Imperial Limited v The British Standards Institution* [2010] EWHC 854 (Ch), [167]. For the Netherlands, see Hof's-Gravenhage 05 mai 2008, ECLI:NL:GHSGR:2008:BD3247, [13]–[14]; see also College van Beroep voor het bedrijfsleven 28 oktober 2005, ECLI:NL:CBB:2005:AU5316.

[94]For the Netherlands, Rechtbank den Haag 3 Juni 2015, ECLI:NL:RBDHA:2015:6346. For the UK, see Unwired Planet (n 59) [31].

[95]Stefan (n 12) 141. The same thesis is also expressed by Sarmiento (n 5) 267–71.

[96]Stefan (n 12) 141.

[97]ibid.

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

[99]ibid [7.2.2].

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.[100]

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.[101] 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.[102] 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.[103] After explaining the main assessment criteria contained in several CJEU/GC refusal to deal judgments,[104] 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.[105] 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.[106]

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*,[107] 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

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

[101]Scholars that argue this point are Gormsen (n 61) and Pinar Akman, *The Concept of Abuse in EU Competition Law* (Hart Publishing 2012).

[102]Hof Amsterdam 12 juni 2012, ECLI:NL:GHAMS:2012:BX0460 and Hoge Raad 24 januari 2014, ECLI:NL:HR:2014:149.

[103]Hof Amsterdam 12 juni 2012, ECLI:NL:GHAMS:2012:BX0460, [2.27].

[104]ibid.

[105]Deutsche Post AG [2001] OJ L 331/40, recital 141. C-52/09 *Konkurrensverket v TeliaSonera AB* [2010] ECR I-00527, Opinion of AG Mazak.

[106]HR 24 januari 2014, ECLI:NL:PHR:2013:1108 (concl. A-G Keus), [3.13].

[107]Rechtbank Rotterdam 26 september 2013, ECLI:NL:RBROT:2013:7337.

market for non-priority (non-urgent) mailing.[108] 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".[109] 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.[110] 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.[111] 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.

Refusal for recognition – explicit rejection

A case illustrative of the explicit rejection hypothesis is the UK Court of Appeal decision in *BAGS*.[112] The soft law that came under fire were the Horizontal Guidelines. The appellant in that case – BAGS – is an organization promoting the interests of bookmakers operating in Licensed Betting Offices (LBOs). In particular, it acquires the media rights of UK racecourses for the purposes of televising horse-racing competitions in LBOs. The complaint of BAGS was against the sale of media rights by a group of 30 UK racecourses (known as the "RUK racecourses")

[108] ibid [9.2].
[109] ibid [9.2.4].
[110] C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR-General.
[111] Akman (n 101).
[112] *Bookmakers' Greyhound Amalgamated Services et al. v Amalgamated Racing Ltd et al* [2008] EWHC 1978 (Ch), [2008] EWHC 2688 (Ch) and – on appeal – [2009] EWCA Civ 750.

to AMRAC – a potential competitor. Importantly, the sale was made in order to sponsor entry into a monopsonistic market (created by BAGS' activities) of AMRAC's business that was to act in direct competition to BAGS. The claim of BAGS relevant for this discussion is the allegation that prior to the sale, there had been horizontal negotiation and subsequent concerted collective action between the RUK racecourses for the sale of their rights to AMRAC. This negotiation, according to BAGS, had an anti-competitive object. In particular, BAGS argued that, since the RUK courses were in competition with each other with regard to the prices and terms of the individual licenses they could have secured with AMRAC, the collective negotiation thereof was restrictive by object.

In response to the latter claim, counsel for the opposing parties (AMRAC/RUK) based his reasoning – solely – on paragraph 24 of the 2001 Horizontal Guidelines. This paragraph provides that when undertakings agree to join forces in order to carry out an activity that they cannot single-handedly pull off, that activity does not imply a coordination of the parties' competitive behaviours on the market and it cannot therefore have the object or effect of restricting competition. On that point, the judge ruled as follows, "I see a good deal of force in that proposition, but I prefer not to decide this case on that basis."[113] No further elaboration on the reasons for this conclusion followed, but it is evident that, in order to decide whether or not there was an infringement by object, the court explicitly preferred to steer away from a party's argument based solely on soft law. This judicial choice is not surprising if one considers an argument made by Borchardt and Wellens more than 20 years ago – namely, that if courts use soft law in the *ratio decidendi* of a judgment, they convert it into hard law.[114] Instead, the judge reached the conclusion that no anti-competitive object could be established by endorsing opposing counsel's (logical) reasoning that "there cannot be an agreement whose object (or for that matter whose effect) is to restrict competition if at the relevant time there is no competition to be restricted".[115] In that sense, the judge held, "arrangements whose object was to enable [an undertaking] to enter the market could not therefore be restrictive of competition that did not and could not exist at the time".[116]

Another instance of judicial rejection, but with regard to the Guidance Paper, is the *Purple Parking v Heathrow Airport* case,[117] decided by the UK High Court.[118]

[113]ibid [2009] EWCA Civ 750 (CA) (n 112) [91].
[114]G Borchardt and K Wellens, 'Soft Law in European Community Law' (1989) 14 *European Law Review* 267, 271.
[115][2009] EWCA Civ 750 (CA) (n 112) [92].
[116]ibid.
[117]*Purple Parking Ltd, Meteor Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch).
[118]Rodger and MacCulloch (n 60) 137 argue that *Purple Parking* is one of the three most significant UK abuse of dominance cases. The other two are *Attheraces Ltd v British Horseracing Board* [2005] EWHC 3015 (Ch) and *Arriva the Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch)).

There, the operator and owner of Heathrow Airport (HAL) was held to have abused a dominant position by changing existing arrangements with the intent to exclude competing "meet and greet" operators (Purple Parking, Meteor Parking) from airport terminal forecourts, thus promoting its own and equivalent services. The Guidance Paper[119] was used by HAL's lawyers to support a claim that a foreclosure (abuse) under Article 102 TFEU could only be established by the plaintiffs (Purple, Meteor) if, among others, the latter succeeded in proving elimination of (effective) competition. Purple countered that it was sufficient to show that competition was hindered rather than eliminated. The judge, siding with the plaintiffs, refuted one-by-one the case-law-based arguments in favour of an "elimination" threshold put forward by HAL.[120] Along with those, the invocation of the Guidance Paper was also rejected as irrelevant. The judge dismissed the entire instrument with the following motivation,

> […] as the document itself points in paragraph 3, it is not a statement of the law, and paragraph 81 makes it clear that what is being referred to is an enforcement priority, not a definition of abuse. I do not think that this document assists the debate.[121]

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

Before concluding this sub-section, it needs to be observed that the two instances of judicial rejection described here are very different. In the former case, the Horizontal Guidelines were invoked as the sole supporting instrument for a claim made by a party to the dispute. If, as argued above, the judge had decided the matter relying *solely* on soft law (use of soft law as *ratio decidendi*), that would have amounted to endowing soft law with binding force. This is why, it is argued, rejection ensued.[122] By contrast, in the latter case, the Guidance Paper was used as *support* to case law – an instance in which substantive soft law usually gets judicial recognition as observed in the previous sub-section. However, the

[119]Guidance Paper (n 34) [81] read together with [75].
[120]The case law relied on by HAL was in the realm of essential facilities, which is not applicable to the fact set of the current case.
[121][2011] EWHC 987 (Ch) (n 117) [95].
[122]ibid [101] and [117] support this conclusion. In those paragraphs, the horizontal guidelines are mentioned in support of arguments that are based on case law (soft law read together with hard law). Also, the same paragraph was quoted by the CAT in a case with a similar fact set (*The Racehorse Association and Others v OFT and The British Horseracing Board v OFT* [2005] CAT 29) as part of the legal framework enunciating rules that were not disputed by the parties. In that context, the Tribunal did not have a problem quoting soft law.

response here was rejection due to – in the judge's words – the fact that the soft instrument was not a statement of the law. Therefore, the status of "enforcement priorities" of the Guidance Paper incited the judge to reject the possibility that the instrument produces legal effects through interpretation together with relevant hard law. It is also possible (although no direct indication for that conclusion was found in the judicial text) that the court actually rejected the Guidance Paper because it is a controversial text that is perceived[123] as proposing an alternative reading of existing Article 102 case law.[124]

Refusal for recognition – neglect

In a cartel "hub-and-spoke" collusion scenario that occurred in the UK,[125] the Horizontal Guidelines and their renewed information exchange section in particular,[126] were invoked by the plaintiff Tesco only to be ignored by the judiciary in its reasoning.

In 2011, the CMA issued a Chapter 1 infringement decision to several dairy producers and major UK supermarkets (Tesco and others) with regard to collusive price increases of dairy products for end consumers. Tesco appealed to the CAT against the decision establishing that it had participated in exchange of future retail prices for British-produced cheddar and other territorial cheeses. The CAT, when establishing the relevant legal framework for assessment,[127] discusses the argument put forward by Tesco's lawyer that the information on competitor's pricing its client received through a supplier constituted aggregated (as opposed to individualized) data that could moreover not be trusted as being reliable. While the trustworthiness argument is dismissed, the distinction aggregate-individualized data, argued on the basis of the Horizontal Guidelines[128] together with the national convergence obligation in s. 60(3) CA '98, is acknowledged by the CAT as a relevant consideration in the assessment of anti-competitiveness. The judge, however, rephrases the relevant passages of the Horizontal Guidelines and recites them as if they are coming from the court, "*In our judgment*, the exchange of individualized data is more likely to facilitate coordination because it makes it easier for companies to reach a common understanding regarding future

[123]See Gormsen (n 61) and Akman (n 101).
[124]The Guidance Paper received a subtler, yet similar treatment by the Court of Appeal in *National Grid v GEMA* [2010] EWCA Civ 114, [53], [54], [57]. The relevant discussion there was on the value of counterfactuals and what the Guidance Paper had to say in that regard seemed to not be appreciated.
[125]*Tesco Stores Ltd, Tesco Holdings Ltd, Tesco Plc v Office of Fair Trading* [2012] CAT 31.
[126]In the newest version of the guidelines – that of 2011, the section on information exchange is significantly expanded in comparison to the old version of the same soft law instrument.
[127][2012] CAT 31 *supra* n 130 [44]–[87].
[128]ibid [73], [74], [89].

prices or sales."[129] The court does not give any authority to underpin this statement, so it could be that counsel's invocation of the guidelines accompanied by the s.60(3) consistency obligation provides for explicit judicial recognition of a rule expressed in the soft instrument. One should keep in mind, however, that the above statement is made in the "applicable law" section of the judgment where no actual analysis on the matter(s) at hand is yet present. The CAT also promises that it would take account of the distinction between individualized and aggregate data in the analytical part of the judgment.[130] Although the Tribunal seems to do so,[131] the discussion on the matter is not explicit[132] and the Horizontal Guidelines put forward by defendant's counsel are not mentioned anymore.

At a first glance, the above-described judicial handling of soft law could be signalling recognition on the basis of s.60(3). However, the latter principle was invoked by defendant's counsel, not the CAT. By contrast, judges who endorse supranational soft law on the basis of s.60(3) explicitly emphasize the relevance of that provision. Furthermore, the Tribunal re-stated passages of the Horizontal Guidelines on its own authority – although this might look like recognition, the instrument is not followed up on in the analytical part, which would imply that the court was manoeuvring its way out of a direct, concrete discussion on the basis of the guidelines. This is not unthinkable if one considers the consequences which the court chooses to attach to s.60 of the CA '98 when discussing the provision at the very beginning of the judgment, under the heading "Statutory Framework". For the CAT, s.60 "of course includes ensuring consistency with the jurisprudence of the Court of Justice and General Court of the European Union".[133] The court mentions nothing on having regard to statements or decisions of the Commission, however; this is done by TESCO's counsel, but not taken up by the CAT.

On the basis of these considerations, it could be concluded that this might well be a case of neglect of a supranational soft law instrument – although it was explicitly invoked by counsel, the court chose not to say anything on the matter in the analytical part of the judgment. Why were the Horizontal Guidelines neglected at this instance? It could be because the distinction aggregate-individualized data exchange was only introduced with the 2011 version of the Horizontal Guidelines and supranational case law on the matter before that year was not abundant.[134]

[129]ibid [79].
[130]ibid.
[131]ibid [220]–[280].
[132]ibid [243].
[133]ibid [42].
[134]A search on curia.eu points to one case discussing the matter having been decided pre-2011: Joined cases T-305/94P *Limburgse Vinyl Maatschappij et al.v Commission of the European Communities* 1999] ECR II-00931.

Recognition – persuasion

As established in the methodological section above, cases falling under a "persuaded judiciary" scenario were to be found by a specific key term search, which, however, turned out to detect judgments that contained explicit references to soft law only (the specific key terms located judgments that were already in the sample by means of the initial key terms search). In this sense, not even one of the judgments found can be argued to exemplify a pure persuasion instance. However, the Dutch *Nestlé v Mars* case comes close to the ideal persuasion scenario that was envisioned theoretically.[135]

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

In these factual circumstances, when discussing the applicable law, the judge mentions that the case will be decided on the basis of national competition law only, but, in line with Article 3 of Regulation 1/2003, guidance will also be sought in the relevant European legal sources – judgments of the CJEU, "and the assessment guides that the European Commission has issued with regard to Articles 101 and 102 TFEU".[136] In the footnote to this statement, it becomes clear that the court has the Guidance Paper and the Vertical Guidelines in mind when using the formulation "assessment guides" – an approach reminiscent to that of the UK judiciary under s.60(3) of CA'98. This is the only spot in the judgment where the Guidance Paper is mentioned, but central concepts that it makes use of are to be seen throughout the judgment. In particular, there are multiple references to an "as efficient competitor test" that the court tries to perform

[135]Rechtbank Oost-Brabant 07 augustus 2013, ECLI:NL:RBOBR:2013:4356.
[136]ibid [4.1].

according to the methodology suggested by the Commission.[137] In that sense, one can see an (implicit) judicial acknowledgment of a soft instrument's contents without an explicit reference to it in the body of the judgment proper.

Other types of recognition

The above-discussed *Nestlé v Mars* case is significant not only for its implicit engagement with the contents of the Guidance Paper, but also for its judicial treatment of the Vertical Guidelines, which the court explicitly engaged with, no further motivation to this effect given. This is one of the cases where a single judgment employs more than one soft instrument, with a differing interpretative outcome per type of soft law instrument. Therefore, it is discussed in both the previous and current sub-sections.

The claim of Nestlé with regard to the MOP was that it either constituted an abusive rebate under Article 24 DCA, or an unlawful category management agreement between Mars and gas stations under Article 6 DCA. At the beginning of the assessment of the second allegation, the court holds that the appraisal of whether or not the MOP is contrary to Article 6 DCA should happen on the basis of the Vertical Guidelines, "where the European Commission had laid out the principles for assessment of vertical agreements".[138] No further substantiation as to why this should be the case is offered, although the reasoning in the rest of this claim is entirely based on citations to relevant paragraphs of the Vertical Guidelines.[139] This seemingly "stand-alone" engagement with the guidelines that does not seek support in either pertinent case nor hard law could be explained in light of the above-cited initial statement of the court that the case will be decided on the basis of Dutch law, "but guidance will be sought in assessment guides that the European Commission has issued with regard to Articles 101 and 102 TFEU".[140] It seems that this approach, enshrined in national law through Article 1 of the Explanatory Memorandum to the Dutch Competition Act, could aid in grounding national judicial discussion of supranational soft law without further references to pertinent hard law, much like in the UK. Article 1 to the DCA's Explanatory Memorandum reads as follows: "the DCA will strive to follow EU Competition rules to the greatest extent possible".[141] There is consensus in scholarly writings that this is indeed the policy line followed by the ACM – a policy liable to influence courts as demonstrated above.[142] It is

[137]ibid [4.25]–[4.29].
[138]ibid [4.13].
[139]ibid [4.13]–[4.20].
[140]ibid [4.1].
[141]The original text reads: "Dit voorstel van wet strekt ertoe de Wet economische mededinging te vervangen door een mededingingswet, die zoveel mogelijk aansluit bij de mededingingsregels van de Europese Gemeenschap."
[142]Van Oers (n 57) 243; Sakkers (n 57) 87; JE van den Brink and JCA van Dam, 'Nederlandse Bestuursrechters en Unierechterlijke "Beleidsregels"' (2014) Juni *JB Plus* 180. The

hereby argued that the existence – in both jurisdictions – of national consistency obligations working in parallel with the supranational one, allows for national judicial treatment of supranational soft law that very much looks like the engagement with soft law on the basis of general principles of EU law hypothesized in the previous section.[143]

This thesis is supported by further analysis of the Dutch and UK empirical samples. For instance,[144] in the Dutch *Batavus* saga,[145] supranational soft law was invoked several times on the basis of the above-described consistency construction. In this case, Batavus (a bike producer) had terminated a long-lasting contractual relationship with the plaintiff – Blokker – that was, among others, in the business of retail and reparation of bikes. At first instance, it was established that the termination by Batavus happened under pressure from a large rival distributor (Euretco) that was dissatisfied with the low online sale prices for bikes practised by Blokker. The first-instance court decided in Blokker's favour. Batavus appealed. It is important to note that – early on in the appellate judgment – the court makes a general statement on the interaction of EU and national competition law, in which context it mentions its views on the role of Commission-issued soft law in the national domain. The precise formulation used is as follows,

> The court observes that the reading of the DCA is based on EU law (in particular Article 81 TEC), which means that the terms used in the DCA need to be interpreted in light of the jurisprudence of the GC and the CJEU, which is, in turn, to a significant extent supported by the decisional practice of the European Commission and its communications and guidelines.[146]

last author even speaks of a "copy–paste" policy between the EU and Dutch legal orders when it comes to Article 102 TFEU cases (Article 24 Mw). Doctrine stipulates that ACM's compliance with other supranational guidelines is also very high. As to following the Horizontal Guidelines at national level, see C Hamm, 'The Netherlands' in L Davey and M Holmes (eds), *A Practical Guide to National Competition Rules Across Europe* (Kluwer 2004) 609, 616. As to the Guidance Paper, see MV, 'Tussen Vorm en Effect' (2009) 3 *Actualiteiten Mededingingsrecht* 52. The Vertical Guidelines are also complied with by virtue of them being inextricably related to the VBER, which applies in the Netherlands even in purely national situations. To that effect, see the Opinion of AG Keus in the *Batavus* case – HR 16 september 2011, ECLI:NL:PHR:2011:BQ2213 (concl. A-G Keus). In the UK, the existence of a similar alignment with the VBER for purely national situations is suggested in a less categorical manner in Rodger and MacCulloch (n 60) 185.

[143]For a more elaboration on this hypothesis, see Georgieva (n 14).

[144]For a similar Dutch judicial approach with regard to the 81(3) Guidelines, see Hof Arnhem 17 november 2009, ECLI:NL:GHARN:2009:BL7079.

[145]See, in particular, Hof Leeuwarden 06 oktober 2009, ECLI:NL:GHLEE:2009:BJ9567. The *Blokker* saga is seen as one of the more important Dutch vertical distribution cases by scholarship. Refer to T Ottervanger, '"The Netherlands"' in I Kokkoris (ed), *Competition Cases from the European Union* (Sweet & Maxwell 2008).

[146]ibid [15].

In this context, the judge engages in a discussion of the contents of the Vertical Guidelines and the Commission's *De Minimis* Notice,[147] references to which are not further explained nor justified. This attitude, again, makes sense in light of the above-quoted general statement that reflects the national and European consistency obligations.[148]

With respect to the UK, another exemplary case is *Cityhook*,[149] where, on grounds of administrative priority, the CMA closed an investigation into a complaint by Cityhook, a small firm specialized in the laying of submarine cables. The complaint was, among others, of a collective boycott of Cityhook's business by bigger competitors. The case closure decision was challenged by Cityhook, who maintained the CMA had taken an appealable final decision. On appeal, the CAT held that the decision was not appealable, but what is more important for this discussion is part of the argumentation used in that regard. In alleging the case closure decision to be a final decision on the substance (and therefore appealable), Cityhook argues that the references to "hard-core" infringements in the final case closure letter should be read to mean "by object" restrictions, which would imply that the OFT had made a final decision on substance.[150] In order to ascertain the meaning of the term "hard-core" and its relation to the notion "object restriction", the CAT refers to the 81(3) Guidelines because – at the time – there was no case law it could base itself on in that regard. The court simply states, "we were not cited any jurisprudence of the Community Courts which uses the term 'hard-core'".[151] In this situation of sole reliance on soft law, the CAT bases itself on s.60(3) of the CA'98, stating that

> It appears from the European Commission's guidance that so-called "hard-core" restrictions are generally considered by it to have as their object the restriction of competition. However, it would also appear that the category of restrictions by object may extend beyond the narrow set of so-called "hard-core" restrictions, although normally the former encompasses the latter. It therefore appears that the term "hard-core" is used to refer to the most serious object-based infringements of Article 81(1) EC and, by virtue of Section 60(3) of the 1998 Act, the Chapter 1 prohibition.[152]

This quotation serves to further support the hypothesis that the national consistency principle is used as a hook that anchors supranational competition soft law

[147] ibid [25], [27].
[148] A similar judicial attitude, but with regard to the 81(3) Guidelines, can be seen in Hof Arnhem 17 november 2009, ECLI:NL:GHARN:2009:BL7079.
[149] *Cityhook Ltd v OFT* [2007] CAT 18.
[150] ibid [249].
[151] This is indeed because the first mentioning of the term "hard core" by the supranational courts happened post-2007 (search performed on curia.eu). Thus, in this paragraph, the case uses soft law with no endorsement in supranational case law (at the time) to make a point/build an argument.
[152] [2007] CAT 18 (n 149) [255].

discussion in national judicial reasoning. Support for this claim can also be found through a simple search on UK databases,[153] where, out of 10 judgments mentioning s.60(3) of the CA '98, 9 actually deal with supranational soft law in one way or another.

Trends detected in empirical observations

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

It is evident that courts in both jurisdictions do not shy away from engaging positively (no explicit disagreement was detected) with soft law content when this content can be traced back to relevant supranational hard law. In that regard, it merits observing that the greatest amount of recognition references belongs to the Vertical Guidelines, with less for the 81(3) Guidelines and the Horizontal Guidelines. The situation is reverse for the Guidance Paper, which often gets implicitly or explicitly rejected (refusal for recognition). However, when in line with hard law, it could also be subject to implicit or explicit endorsement as evidenced by Dutch judicial practice. This latter phenomenon was not observed in the UK. The second most judicially rejected instrument are the Horizontal Guidelines. In both jurisdictions, they get almost as many recognition references as refusals for recognition. This fact is surprising. While it is true that the new, 2011 version of the Horizontal Guidelines does broaden certain discussions that were very condensed in the older edition,[154] scholarly accounts do not point to anything at odds with established law.[155] In that light, it should be mentioned that the current version of the Vertical Guidelines also expanded on certain

[153]The databases used are Westlaw UK and Bailii. Out of a total of 23 UK competition judgments mentioning S.60 between its introduction in 1998 and today (the search was performed with search terms 'Section 60 of the 1998 Act'), 12 deal extensively with supranational soft law instruments. Six of them relate to the Commission Fining Guidelines ([2011] CAT 3; [2011] CAT 7; [2011] CAT 9; [2011] CAT 11; [2014] EWHC 1613 (Ch); [2002] ECC 13) and the other six deal with instruments that form the basis of this study ([2011] CAT 10; [2011] CAT 40; [2008] EWHC 1978 (Ch); [2008] CAT 13; [2007] CAT 18; [2012] CAT 31).The rest of the judgments that mention both S.60 and soft law use S.60 either to ground a claim in EU hard law (4 cases: [2015] EWHC 3585 (Admin); [2005] CAT 30; [2011] CAT 13; [2011] CAT 6) or to motivate a deviation from it (another 4 cases: [2001] EWCA Civ 2021; [2014] EWCA Civ 400; [2011] CAT 14; [2005] SLT 1041).

[154]Horizontal Guidelines (n 34). For instance, the Information Exchange Section in the new guidelines is an example of significant expansion and elaboration.

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

concepts that were marginally discussed in the old document, but this fact does not affect their positive judicial reception.[156] In this sense, reasons for the observed negative treatment instances with regard to the Horizontal Guidelines should be sought elsewhere.

A possible explanation for the different judicial attitude towards the Horizontal and Vertical Guidelines could be given by a theory with its origins in sociology – the so-called "institutionalization" theory. According to Greene,[157] who uses "institutionalization" to explain judicial attitudes to the US Merger Guidelines, the latter become institutionalized "when they gain sufficient stature that they become valued in legal arguments by the courts and others, beyond the persuasive power of the ideas they embody".[158] "Stature" seems to build up the more an instrument is used in administrative and judicial practice (decisions and judgments),[159] the latter two influencing each other to the point where "each successive version of the guidelines moves the law towards it".[160] In that sense, "the antitrust guidelines had acquired a power to influence the law because they were the antitrust guidelines, and not just because they were good ideas or the pronouncements of expert federal agencies".[161] While there is no evidence that the Vertical Guidelines have reached this stage in the institutionalization process, their more frequent judicial usage in comparison with other soft law is a fact that has been empirically ascertained for the national level.[162] This increased judicial usage in comparison with the Horizontal Guidelines might well be due to the fact that – after decentralization – the Commission had committed itself to dealing with all the serious cartel cases, which therefore do not reach the national level. Thus, more vertical cases are decided at the national level on average, which gives the Vertical Guidelines the opportunity to get institutionalized and probably also acquire a stronger independent influence over time.

Going back to the trends detected in the empirical second section, the most curious phenomenon that was found to exist in both jurisdictions was the ability of judges to engage with supranational competition soft law on the basis of national statutory-based consistency principles, reflecting their supranational counterpart – Article 3 of Regulation 1/2003. As seen above, s.60 of the CA '98 and Article 1 of the Explanatory Memorandum to the DCA have had the

[156]As Colomo testifies, all post-Modernization guidelines have expanded their scope in light of the "more-economic" approach that ensued post-2004. See Colomo (n 3) 370.
[157]Greene (n 10).
[158]ibid 810.
[159]ibid 811.
[160]ibid 812.
[161]ibid.
[162]On top of the observations for the Netherlands and the UK made above, in France, more than 80% of the judgments that mention substantive supranational competition soft law deal with the Vertical Guidelines (35 out of 43 judgments).

effect – among others[163] – of enabling supranational soft law to get recognized in national judicial discourse, thus producing legal effects at the national level. This judicial endorsement mechanism seems to work like the above-hypothesized recognition on the basis of general principles of law.[164]

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

Type of judicial attitude / Type of instrument	Recognition			Refusal for Recognition	
	Agreement	Persuasion	Disagreement/ Other	Neglect	Rejection
Vertical Guidelines	*10 instances (4 UK; 6 NL)*	-	*1 instance (UK)*	-	-
Horizontal Guidelines	*4 instances (2 UK; 2 NL)*	-	-	*2 instances (1 UK; 1 NL)*	*1 instance (UK)*
Guidance Paper	*1 instance (NL)*	*1 instance (NL)*	*1 instance (NL)*	*1 instance (NL)*	*3 instances (2 UK; 1 NL)*
101(3) Guidelines	*6 instances (4 UK; 2 NL)*	-	-	-	-
Technology Transfer Guidelines	*2 instances (1 UK; 1 NL)*	-	-	-	-

Conclusions – the "common core" of Dutch and UK judicial recognition of supranational competition soft law

From the above empirical observations, several conclusions can be made. Firstly, it is evident from both the findings in the UK and the Netherlands that 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.

[163] In the Netherlands, for instance, this principle has also led to a narrow adherence to supranational soft law by the ACM. For instance, the 81(3) Guidelines have literally been transposed into the national legal system. See Plomp (n 49) ch 6. See also the website of the Dutch Government <http://wetten.overheid.nl/BWBR0033029/geldigheidsdatum_01-09-2014> accessed September 2015.

[164] For an elaboration on the mechanics of judicial recognition through the use of general principles of law, see Georgieva (n 14).

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.

Disclosure statement

No potential conflict of interest was reported by the author.

Appendix

Table A1. Table of cases

UK	The Netherlands
1. *The Racehorse Association and Others v OFT and The British Horseracing Board v OFT* [2005] CAT 29	1. *Batavus v Anonymous Defendant* ECLI:NL:RBLEE:2006:AY9814 (at Rb Leeuwarden); ECLI:NL:GHLEE:2009:BJ9567 (at Hof Leeuwaarden); ECLI:NL:HR:2011:BQ2213 (at Hoge Raad, with opinion of AG Keus: ECLI:NL:PHR:2011:BQ2213)
2. *Independent Media Support Ltd v Office of Communications* [2008] CAT 13	2. *NVM v HPC* ECLI:NL:GHAMS:2012:BX0460 (at Hof Amsterdam); ECLI:NL:HR:2014:149 (at Hoge Raad, with opinion of AG Keus: ECLI:NL:PHR:2013:1108)
3. *Bookmakers' Greyhound Amalgamated Services et al. v Amalgamated Racing Ltd et al* [2008] EWHC 1978 (Ch), [2008] EWHC 2688 (Ch) and [2009] EWCA Civ 750	3. *Chipsol Holding BV v ACM* ECLI:NL:RBROT:2013:9069

(*Continued*)

Table A1. Continued.

UK	The Netherlands
4. *Sel Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch)	4. *De Nieuwe Heuvel BV v Koninklijke Vereniging* "*Het Friesch Paarden-Stamboek*" ECLI:NL:GHARN:2009:BL7079
5. *Cityhook Ltd v OFT* [2007] CAT 18	5. *Vereniging Modint v ACM* ECLI:NL:CBB:2005:AU5316 and *Vereniging Nederlandse Textiel Conventie v Nma* ECLI:NL:RBROT:2004:AR4213
6. *Tesco Stores Ltd, Tesco Holdings Ltd, Tesco Plc v Office of Fair Trading* [2012] CAT 31	6. *Anonymous Plaintiff v Stichting Raad voor de Boomkwekerij en Stichting Erkenningen Tuinbouw* ECLI:NL:GHSGR:2008:BD3247
7. *National Grid Plc v Gas and Electricity Markets Authority* [2010] EWCA Civ 114	7. *Sandd BV v ACM* ECLI:NL: RBROT:2013:7337
8. *National Grid Electricity Transmission Plc v ABB Ltd and Others* [2012] EWHC 869 (Ch)	8. *CRV Holding BV v ACM* ECLI:NL:CBB:2010:BN994
9. *Purple Parking Ltd, Meteor Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch)	9. *Service Stations Benschop Woerden BV/ Service Stations Benschop BV v BP Europa SE* I:NL:GHAMS:2012:BX0258 (at Hof Amsterdam); ECLI:NL:HR:2013:2123 (at Hoge Raad, with opinion of AG Keus: ECLI:NL:PHR:2013:875)
10. *Calor Gas Ltd v Express Fuels (Scotland)* [2008] CSOH 13	10. *Prisma Vastgoed BV/Prisma Food Retail BV v Slager* ECLI:NL:HR:2009:BJ9439 (with opinion of AG Keus: ECLI:NL:PHR:2009: BJ9439)
11. *Ineos Vinyls et al v Huntsman Petrochemicals (UK) Ltd* [2006] EWHC 1241 (Ch)	11. *Nestlé Nederland BV v Mars Nederland BV* ECLI:NL:RBOBR:2013:4356
12. *Crest Nicholson and ISG Pearce Ltd v OFT* [2011] CAT 10	12. *Brink's Nederland BV v ACM* ECLI:NL:RBROT:2015:5805
13. *Enterprise Inns Plc v Palmerson Associates Ltd, Paul Rigby, James Younger* [2011] EWHC 3165 Ch	13. *Commissariaat voor de Media v SplinQ* B.V.: ECLI:NL:HR:2012:BX9019 (with opinion of AG Huydecoper here: ECLI: NL:PHR:2012:BX9019)
14. *Unwired Planet International Limited v Huawei Technologies Co. Limited* [2015] EWHC 2097 (Pat)	14. *Jet Set Hydrotechniek BV v Hoffland BV* ECLI:Nl:RBDHA:2015:6346