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The Test for Legality under EU Competition Rules

What Guidance do the Commission's Guidelines provide?

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Peter Behrens*

Abstract

Under the regime of Regulation 1/2003 on the implementation of the rules of competition laid down in Articles 101 and 102 TFEU undertakings are obliged to take care by themselves of their compliance with the competition rules. For practical purposes this is also true when it comes to the rules applicable to the the control of concentrations under Regulation 139/2004. In order to facilitate the task of undertakings, which has become even more difficult according to the "more economic approach" to competition law, the Commission has published a number of guidelines which are setting out the relevant criteria applied by the Commission itself. A closer look reveals, however, that the criteria defined in the various guidelines are far from reflecting a coherent, precise and consistent approach of the Commission. At least four distinct legal tests may be identified, such as a "consumer harm"-test, a "negative market effects"-test, a "market power"-test and a "competitive process"-test. This paper analyses the various guidelines in order to demonstrate how these different approaches are embedded in their wording. The unavoidable conclusion is that undertakings get much less guidance from the guidelines than they would be justified to expect. This is all the more deplorable, because the European cours' jurisdprudence continues to follow an approach which is considerably different from the Commission's.

key words: competition rules, merger control, competition guidelines, effects based approach, consumer harm, market power, market structure, competitive process, competitors' rivalry, consumer choice.

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Undertakings are obliged to take care by themselves of their compliance with EU competition rules. This is true under the regime of Regulation 1/2003[1] on the implementation of Articles 101 and 102 TFEU. But, for practical purposes, it is also true under the merger control regime of Regulation 139/2004[2] as far as undertakings are concerned who are planning a merger with or an acquisition of another undertaking. The main object of the Commission's various competition guidelines [3] is to enable undertakings to properly assess the compatibility of their market strategies with the EU competition rules.[4] The introduction by the Commission of a "more economic approach" to the enforcement of EU competition law has complicated the task of undertakings, because it is less clear than before what exactly the test for legality applied by the Commission may be. Legal and economic literature offers a great variety of positions in this regard. To the practitioner, the debate may sometimes appear purely theoretical, if not sterile. But it is not! It has a very important bearing not only on the general objective of competition policy, but also on the relevant test for judging the legality of undertakings' market conduct. Legal security is, however, crucial for undertakings who are the addressees of the competition rules, especially when it comes to setting up compliance programmes. This paper is devoted to a critical assessment of the EU Commission's own explanations contained in its various competition guidelines as far as they may shed light on the meaning ascribed by the Commission itself to the "more economic approach" and, in particular, on the legality test that may emerge therefrom.

1. Introduction

The main issue of the debate relates to the impact of the "consumer welfare" concept upon the interpretation and application of the EU competition rules which include the prohibition of cartels (Article 101 TFEU), the prohibition of an abuse of a dominant position (Article 102 TFEU) and the prohibition of anti-competitive concentrations (Arti- cle 2(3) of the Merger Regulation 139/2004.[5] In her famous speech given on 15 September 2005,[6] Commissioner *Neelie Kroes* made the following well-known programmatic statement:

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[1] Council Regulation EC No. 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 nd 82 of the Treaty [now Articles 101 and 102 TFEU], OJ 2003/L 1/1.

[2] Council Regulation EC No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004/L 24/1.

[3] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ 2011/C 11/01 (hereinafter: Guidelines on horizontals 2011); Guidelines on Vertical Restraints, OJ 2010/C 130/01 (hereinafter: Guidelines on verticals 2010); Guidelines on the appli cation of Article 81(3) of the Treaty, OJ 2004/C 101/08 (hereinafter: Guidelines on exemptions 2004); Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009/C 45/02 (hereinafter: Guidance regarding Article 102 TFEU); Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004/C 31/03 (hereinafter: Horizontal merger guidelines 2004).

[4] See Guidelines on horizontals 2011, *supra*, note 3, para. 7: "These guidelines will […] assist businesses in assessing the compatibility of an individual co-operation agreement with Article 101." See also Guidelines on Verticals 2010, *supra*, note 3, para. 3: "By issuing these Guidelines, the Commission aims to help companies conduct their own assessment of vertical agreements under EU competition rules."

[5] *Supra*, note 2.

> *Consumer welfare* is now well established as the standard the Commission applies when *assessing mergers and infringements of the Treaty rules on cartels and monopolies*. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy.

This policy statement required further clarification as to what the "standard" of "consumer welfare" meant. Was it meant as a new definition of the "goal" or "objective" of the EU competition policy? Or was it rather meant as guide for the specification of such rules in terms of per-se rules or rules of reason? Or was it meant as a test for the determination of the legality of undertakings' market conduct and transactions?[7]

Difficulties begin already when it comes to the definition of "consumer welfare". The term is widely used without any indication what it means.[8] It is not an economic term with an established meaning, but rather a term of art introduced by *Robert Bork* in his well-known book "The Antitrust Paradox".[9] It may be associated with "consumers' surplus" (as opposed to "total surplus") as well as with "total welfare" (or "social welfare") – two very different economic concepts. In legal literature "consumer welfare" tends to be used as synonymous with "consumers' surplus" where "consumers" means "end-consumers".[10] The Commission quite clearly prefers a broader understanding of the term "consumer" so as to include all customers at any level of the distribution chain irrespective of whether they purchase products or services for consumption, for resale, or as inputs for their own products. So, even producers are considered to be consumers since they rely always on inputs purchased from others. According to para. 84 of the Guidelines on exemptions 2004,[11] this broader understanding of the Commission applies at least in the context of Article 101 TFEU:

> The concept of "*consumers*" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers.

According to para. 19 (note 2) of the Guidance on Article 102 TFEU,[12] the same applies also in the context of the prohibition of the abuse of a dominant position:

> The concept of "consumers" encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers.
> Where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream.

And Article 2(1)(b) of the EC Merger Control Regulation 139/2004 as interpreted by the Commission in para. 79 (note 105) of its Horizon-merger guidelines 2004[13] follows precisely the same line:

> Pursuant to Article 2(1)(b), the concept of "consumers" encompasses intermediate and ultimate consumers, i.e. users of the products covered by the merger. In other words, consumers within the meaning of this provision include the customers, potential and/or actual, of the parties to the merger.

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[6] See http://ec.europa.eu/competition/speeches (emphasis added).

[7] The distinction of goals, guides and tests follows Werden, G.J., "Consumer welfare and competition policy", in J. Drexl, W. Kerber, R. Podzun (eds.), *Competition Policy and the Economic approach*, 2011, pp. 11-43.

[8] See for a detailed analysis of different possible meanings Werden, *ibid*., pp. 13-15.

[9] Bork, R., *The Antitrust Paradox: A Policy at War with Itself*, 1978.

[10] Werden, *supra*, note 7, p. 14.

[11] *Supra*, note 3.

[12] *Supra*, note 3.

[13] *Supra*, note 3.

If we keep furthermore in mind that the use of the "consumer welfare" concept in the context of competition law cannot be limited to the assessment of potentially restrictive market behaviour on the supply of markets, but that it must be extended to the assessment of market behaviour on the demand side of markets as well, "consumer welfare" properly understood must also include – literally speaking – "supplier welfare". The Commission's "more economic approach" therefore refers to a standard of assessment which is in fact based on "total surplus" if not on "total welfare" or "social welfare" (i.e. the welfare of all). These latter two concepts differ from the first in that they go beyond the limits of a partial analysis of a specific "relevant" market and include welfare effects that cannot be captured in terms of "consumer surplus" and/or "producer surplus" (which add up to "total surplus").

The next problem arises with regard to the notion of an "effects-based approach". Instead of relying on a so-called "formalistic" interpretation of the competition rules, their application should, according to the "new economic approach", rather be based on the economic effects of the specific business strategy under consideration. But "effects" on what? If "consumer welfare" is what matters, it should be proper to assume that the "effects" should relate to "consumer welfare". The latter is then taken as a proxy for competition (rather than the other way round as one would be intuitively inclined to think).

When it comes to the relevance of "effects on consumer welfare" in the context of competition law, it is crucially important to distinguish between the use of this concept as a goal or objective of competition policy or as a test for the determination of the anti-competitiveness of a specific market conduct.[14] There can be no doubt that Commissioner *Neelie Kroes* in her statement quoted above referred to "consumer welfare" as a test. The "more economic approach", said she, implies the use of the concept "as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies". What exactly does this mean? The following short analysis of the wording of relevant statements in the Commission's competition guidelines is designed to find a response to this question by clarifying how the "more economic approach" to competition law and, more precisely, the "consumer welfare"-test is reflected in these guidelines irrespective of whether they relate to Articles 101 and 102 TFEU or – for that matter – to the control of concentrations.

2. Critical Analysis of the Guidelines

A superficial first reading of the guidelines provides at best a mixed impression. A closer look reveals that the Commission is far from presenting a coherent, precise and consistent approach. Arguably the Commission offers at least four distinct approaches to what may be regarded as a "consumer welfare"-test according to which the anti-competitive nature and the illegality of a specific market conduct or transaction may be determined: (A) the "consumer harm"-test, (B) the "negative market effects"-test, (C) the "market power"-test, and (D) the "competitive process"-test. These tests shall be briefly characterized by reference to the Commission's own statements in the various guidelines.

A. The "Consumer Harm"-Test

The "consumer harm"-test appears most clearly in the Horizontal merger guidelines 2004[15] where the "consumer welfare" concept is introduced in the guise of an "efficiency defence":

[14] See Werden, *supra*, note 2, pp. 15-17.

[15] *Supra*, note 3.

> Corporate reorganisations in the form of mergers may be in line with the requirements of dynamic competition and are capable of increasing the competitiveness of industry, thereby improving the conditions of growth and raising the standard of living in the Community. It is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential *harm to consumers* that it might otherwise have. […][16]

> For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. […][17] The relevant benchmark in assessing efficiency claims is that *consumers will not be worse off* as a result of the merger. […][18]

Here the "consumer welfare" standard is said to be used when assessing the legality of a merger. The legality is explicitly made dependent upon the absence of negative effects on consumers' wellbeing. A merger will be prohibited, if it causes harm to consumers. This then is the test. The Commission does not pretend, however, to have a direct measure of "consumer welfare"; it will rather rely on indicia such as effects on prices or innovation. Improvements in these respects (i.e. lower prices due, for example, to cost savings or better chances for innovation) are said to prove the absence of "consumer harm".[19]

The notion of "consumer harm" also appears in the Guidance regarding Article 102 TFEU[20] where the Commission states:

> In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most *harmful to consumers.*[21]

However, this statement in favour of the "consumer harm"-test is immediately followed by the following "softener":

> Consumers *benefit from competition* through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from *effective competition* between undertakings.[22]

The impression that the finding of an illegal exclusionary practice depends on the proof of "consumer harm" (even if measured in terms of negative effects on prices, quality and product variety) is therefore compromised by the fact that "consumer benefits" (i.e. efficiency and productivity) are said follow from "effective competition". Consequently, "consumer harm" must follow from the opposite of "effective competition", i.e. the restriction of competition. Competition is the controlling variable then. Hence the intention of the Commission to protect "effective competition" rather than "consumer welfare" as a result thereof.

The Commission's statement in its Guidelines on verticals 2010[23] that

> [t]he objective of Article 101 is to ensure that undertakings do not use agreements – in this context, vertical agreements – to restrict competition on the market *to the detriment of consumers*,[24]

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[16] Horizontal merger guidelines 2004, *supra,* note 3, para. 76 (emphasis added).

[17] *Ibid*., para. 78 (emphasis added).

[18] *Ibid*., para. 79 (emphasis added).

[19] See *ibid*., paras. 80-81.

[20] *Supra*, note 3.

[21] Guidance regarding Article 102 TFEU, *supra*, note 3, para. 5 (emphasis added).

[22] *Ibid*. (emphasis added).

[23] *Supra*, note 3.

[24] Guidelines on verticals, *supra*, note 3, para. 7 (emphasis added).

therefore cannot be meant as using "consumer harm" as a test for legality but merely as a definition of the goal ("the objective") of competition. Again, competition is conceived as causing consumer welfare and restraints of competition as causing consumer harm. It follows that the guidelines of the Commission are far from establishing "consumer welfare" as the standard for assessing mergers and infringements of the Treaty rules on cartels and monopolies.

B. *The "Negative Market Effects"-Test*

A different approach of the Commission transpires from its Guidelines on exemptions 2004[25] where we find the following statement regarding restrictions of competition by effect caught by Article 101(1) TFEU:

> Agreements between undertakings are caught by the prohibition rule of Article 81(1) when they are likely to have an appreciable *adverse impact on the parameters of competition on the market*, such as price, output, product quality, product variety and innovation. Agreements can have this effect by appreciably *reducing rivalry between the parties to the agreement or between them and third parties.*[26]

And the Commission continues by stating that

> [r]estrictions of competition by object are those that by their very nature have the potential of *restricting competition*. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any *actual effects on the market.*[27]

Here the legality test for restrictions of competition is clearly based on negative market effects and such effects will be measured according to their impact on relevant parameters of competition (price, output, product quality, product variety and innovation). The link to "consumer welfare" is established in the following way:

> Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a *reduction in consumer welfare*, because consumers have to pay higher prices for the goods and services in question.[28]

It may be concluded therefore that the Commission assumes an interrelationship, if not a causal link, between:

- the reduction of the pressure of competition provided by the *rivalry* among competitors,
- the negative effects on *prices, output, product quality, product variety and innovation*, and
- the reduction of *consumer welfare* due to misallocation of resources.

There can be, of course, no doubt about the correctness of this assumption *in abstracto*. Whether this interrelationship can be measured *in concreto* in every single case is a different question. Also, whether the proof of anti-competitive behaviour is possible by simply measuring, for example, price effects is very doubtful. We would be measuring the measurable and not necessarily the relevant variable (such as product quality, variety or innovation). All this depends on the type of economics on which the analysis is based. Even though the Commission has never expressly explained the theoretical foundations of its position, it is quite obvious that the "more economic approach" is based on the neoclassical welfare economic orthodoxy with its implicit axiomatic assumptions such as the rationality principle and the *homo oeconomicus* model. Only within the framework of this model,

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[25] *Supra*, note 3.

[26] Guidelines on exemptions 2004, *supra*, note 3, para. 16 (emphasis added).

[27] *Id*., para. 21 (emphasis added).

[28] *Ibid.* (emphasis added).

however, is it possible to derive in a conclusive way positive or negative consumer welfare effects from specific business strategies. Only within the limits of neoclassical theory may positive or negative efficiencies of a specific business strategy measured on the level of the individual undertaking(s) involved be directly translated into efficiencies or inefficiencies at the level of the economy at large (i.e. the whole society). Whether, however neoclassical welfare economics is an adequate (i.e. sufficiently sophisticated) approach in the context of the application of competition rules to real life cases, is more than questionable. Institutional economics have emphasized the impact that transaction costs may have on business decisions as well as the limitations of rationality which are due to incomplete information and uncertainty about future developments (in particular about competitors' or customers' reactions in the market place). As a matter of prudence "consumer welfare" (efficiency) should therefore not be considered as directly measurable but rather as the not fully predictable result of a process of rivalry among competitors (i.e. of competition in the sense of a continuous process of interaction between all market actors using their limited information and coordinating their individual decisions by trial and error in the market place). Competition rules are meant to institutionalize and protect the proper functioning of this process. Hence the overriding relevance of "residual competition" in the context of the efficiency defence according to Article 101(3) TFEU. Anyway, the Commission's statement quoted above leaves the question open whether the legality test should be the reduction of (competition) among market actors, the impact on the parameters of competition (such as prices, output etc.) or the impact on "consumer welfare". So far, the guidelines are not taking a clear position.

c. *The "Market Power"-Test*

Several guidelines indicate still another twist in the Commission's approach to the relevant legality test. Quite a number of statements made by the Commission refer to the concepts of "market power", "market structure" and even "competition" which are clearly quite distinct from the concept of "consumer welfare". To begin with, the Guidelines on horizontals 2011[29] state in paras. 3-5:

> [H]orizontal cooperation agreements may lead to competition problems. This is, for example, the case if the parties agree to fix prices or output or to share markets, or if the co-operation enables the parties to maintain, gain or increase *market power* and *thereby* is likely to give rise *to negative market effects* with respect to prices, output, product quality, product variety or in- novation.
>
> The Commission, while recognising the benefits that can be generated by horizontal cooperation agreements, has to ensure that effective competition is maintained. Article 101 provides the legal framework for a balanced assessment taking into account both adverse *effects on competition* and pro-competitive effects.
>
> Economic criteria such as the *market power* of the parties and other factors relating to the *market structure* form a key element of the assessment of the market impact likely to be caused by a horizontal cooperation agreement and, therefore, for the assessment under Article 101.

Similarly, the Guidelines on exemptions 2004[30] state in para. 25:

> Negative *effects on competition* within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of *market power* and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.

Here the Commission clearly identifies market power as potentially anti-competitive and as a factor that may negatively impact competition parameters (such as prices, output etc.). This is

[29] *Supra*, note 3 (emphasis added).
[30] *Supra*, note 3 (emphasis added).

highly important, because the Commission relates negative welfare effects (inefficiencies) no longer directly to the business strategy under consideration but to the negative impact that this strategy may have on the market structure. This implies the recognition of the fact that a sufficiently open market structure is a prerequisite for effective competition as an inter-active process and – indirectly – of the consumer welfare enhancing effects of competition. This interpretation is supported by the following statement of the Commission in para. 8 of its Horizontal merger guidelines 2004:[31]

> *Effective competition brings benefits to consumers*, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the *market power* of firms. By "increased market power" is meant the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition.

Here the Commission attributes beneficial effects on consumer welfare to "effective competition" and not to the specific market conduct under consideration as such. Accordingly, the relevant legality test applied to such conduct must relate to the verification of a restriction of competition in terms of its impact on the market structure (market power). This is very different from directly measuring the consumer welfare effects as – according to a widespread view – the "more economic approach" wants to have it.

A. *The "Competitive Process"-Test*

It is only a small step from the "market power"-test to the fourth legality test that may be identified in the Commissions competition guidelines. Para. 13 of the Guidelines on exemptions 2004[32] provides:

> The objective of Article 81 is to protect *competition on the market* as a *means* of enhancing *consumer welfare* and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

Here the Commission makes it crystal clear that it is competition that produces consumer welfare. Competition rules therefore protect competition rather than consumer welfare as its product. Hence the prohibition of anti-competitive conduct rather than the prohibition of inefficient conduct. This approach also transpires, e.g., from para. 6 of the Guidance regarding Article 102 TFEU 2009:[33]

> The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the *competitive process* in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that *what really matters is protecting an effective competitive process* and not simply protecting competitors.

There we are: If the prohibitions of restraints of competition are meant to safeguard the competitive process, the legality test applied to a specific conduct or transaction under consideration must necessarily be based on the question whether or not the effectiveness of this interactive process is diminished rather than whether or not the specific conduct or transaction under consideration reduces consumer welfare. In other words: it may safely be presumed that a specific conduct or transaction which reduces the effectiveness of the competitive process *thereby* reduces consumer welfare. It is from this perspective that the market structure becomes relevant: The process of "rivalry" to which the Commission has alluded elsewhere presupposes a market structure which is sufficiently "open" and not

[31] *Supra*, note 3 (emphasis added).
[32] *Supra*, note 3 (emphasis added).
[33] *Supra*, note 3 (emphasis added).

artificially closed. A competitive market structure provides at the same time opportunities for choice on the opposite side of the market.

3. Conclusion

Distinguishing four tests of legality on the basis of the competition guidelines may appear to some extent artificial. These tests admittedly overlap to some extent. The notion of *competition as a process* to which the Guidelines on exemptions 2004[34] as well as the Guidance regarding Article 102 TFEU 2009[35] are alluding matches nicely with the characterization of *competition as rivalry* which is also mentioned in the Guidelines on exemptions 2004.[36] And the "*market power*"-test if interpreted as a dynamic concept would also be compatible with the notions of *competitive process* and *rivalry*. But the connotations of these various tests are by no means fully identical and their enforcement implications are dramatically different if we contrast the "*consumer harm*"-test at one end of the spectrum and the "*competitive process*"-test at the other end. In any case, there is a wide gap between the straightforward programmatic announcement of Commissioner *Neelie Kroes* regarding the relevance of the "consumer welfare" as a standard of assessment[37] and the various statements in the competition guidelines that reflect a number of different positions of the Commission regarding the relevant legality test.

From the vantage point of undertakings, the lack of consistency and guidance may be deplored. It should be kept in mind, however, that the Commission's interpretation of the competition rules must stay within the limits of the jurisprudence of the Court of Justice of the European Union. In its *AC Treuhand* ruling, the CFI has expressly stated that "the Commission is required to ensure the application of the principles laid down in Article 85(1) EC […] as interpreted by the Community judicature".[38] This is recognized by the Commission itself by stating that the guidelines are "without prejudice to the interpretation the Court of Justice of the European Union may give"[39] to the competition rules. The ECJ has in fact limited the variety of possible legality tests by ruling that the "consumer harm"-test is not an element of the prohibition contained in Article 101 TFEU.[40] And other rulings by the ECJ have emphasized the continuing relevance of the market structure as an indicator of effective competition.[41] This supports those statements in the Commission's guidelines which highlight the rivalry among competitors, the market structure and the competitive process as relevant standards of assessment. Paraphrasing *Richard Posner,*[42] it

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[34] *Supra*, at note 32.

[35] *Supra*, at note 33.

[36] See *supra*, at note 26.

[37] See *supra*, note 6.

[38] CFI Case T-99/04, *AC Treuhand/Commission*, ECR 2008, II-1501, para. 163.

[39] Guidelines on horizontals, *supra*, note 3, para. 17.

[40] ECJ joined cses C-501/06 P, C-513/06 P. C-515/06 and C-519/06 P, *GlaxoSchmithKline/Commission*, ECR 2009, I-9291, 9374, para 63.

[41] See ECJ Case C-95/04 P, *British Airways/Commission*, ECR 2007, I-2331, 2411, para. 106; CFI Case T-340/03, *France Télécom/Commission*, ECR 2007, II-117, 193, para. 266; CFI Case T-201/04, M*icrosoft/Commission*, ECR 2007, II-3601, 3824, para. 664; ECJ Case C-8/08, *T-Mobile Netherlands/Commission*, ECR 2009, I-4529, para. 38; see also the recent judgment of the ECJ of 19 April, 2012, in Case C-549/10 P, *Tomra Systems ASA et al./Commission*, analysing a rebate scheme in light of Article 102 AEUV: Here the Court (as well as the Commission itself!) relied on the exclusionary effect of the scheme (i.e. its negative impact on the market structure) rather than on the equally efficient competitor-test which forms an essential part of the „more economic approach" as outlined in the Commission's Guidance regarding Article102 TFEU.

[42] Posner, R., *Antitrust Law*, 2nd ed., 2001, at p. 29.

can be said therefore that "consumer welfare" is the ultimate objective of EU competition policy, but competition a mediate goal and standard of assessment that will often be close enough to the ultimate objective to allow competition authorities, courts and, last but not least, undertakings to look no further. In the end, competition based on *competitors' rivalry* in terms of competition on the merits and on *consumers' choice*[43] is probably the best available proxy for consumer welfare.

[43] See in this regard the preliminary ruling of the ECJ of 17 February 2011, Case C- 52/09, *TeliaSoneraSverige*, para. 28: "In order to determine whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict *the buyer's freedom to choose his sources of supply*, to bar com- petitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition." (emphasis added).