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Frederic Depoortere & Giorgio Motta
Skadden, Arps, Slate, Meagher & Flom LLP

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I. INTRODUCTION

What are the policy objectives underlying the collective dominance (“CD”) doctrine under Article 82 of the EC Treaty and what is the legal test governing its application? Even today these questions remain partially unanswered. EC competition law still appears to lack a robust and consistent legal standard for identifying when companies should be held “collectively dominant” and when their conduct constitutes an abuse. In addition, the lack of clear policy objectives has not assisted the debate on these issues. They may even have led to a significant decrease in the European Commission’s interest in CD situations: the recent *Guidance on Enforcement Priorities (“Enforcement Guidance”)*, which presumably sets out the Commission’s enforcement priorities under Article 82, does not cover collective dominance at all.²

Possible policy objectives for CD are outside the scope of this article, which concentrates on providing some observations on the test currently endorsed by the Community Courts³ (“Courts”) to identify abuses of CD. In its *Compagnie Maritime Belge* judgment (“CMB”),⁴ as confirmed by subsequent case law, the ECJ proposes a three-prong test: (i) the existence of a collective position/entity, (ii) such collective position being dominant, and (iii) the abuse by the collectively dominant entity. The first and third prongs are the main focus of this article.⁵

II. THE COLLECTIVE ENTITY

The requirement for a “collective entity” is driven by the text of Article 82 that covers the abuse by “one or more” undertakings of a dominant position. The main challenge is to

¹ Frederic Depoortere is partner and Giorgio Motta is counsel at Skadden, Arps, Slate, Meagher & Flom LLP. The authors would like to thank their colleague Alfonso Giuliani for his assistance in the preparation of this article.

² 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, OJ C 45, 24.2.2009, pp. 7–20. The Enforcement Guidance expressly indicates that it only relates to abuses by an undertaking holding a single dominant position (*see* ¶ 4).

³ The term “Community Courts” is used in this article to identify the Court of First Instance (“CFI”) and the European Court of Justice (“ECJ”).

⁴ Joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities*, 2000, ECR I-1365.

⁵ The establishment of dominance for the collective position has been the least problematic criterion to apply in practice.

identify the circumstances under which several legally (and economically) independent undertakings can be viewed as a “single entity” vis-à-vis their competitors, trading partners, and consumers.

The collective entity test was and still is a brainteaser that has spurred intense legal debate for more than a decade. Since the *Italian Flat Glass* judgment⁶ (the first in which the issue of CD under Article 82 was expressly dealt with), the Courts have reviewed a handful of Commission decisions and preliminary ruling requests.⁷ In most of the judgments, the definition and finding of a collective position was by far the main legal issue.

As also argued elsewhere,⁸ two main conclusions can be inferred from the analysis of these judgments.

First, almost all CD judgments related to cases with a very particular set of circumstances. While this is true for most Article 82 cases, the wide variety in patterns of facts has probably contributed to the difficulties in crafting a workable test for the existence of CD.⁹

Second, the Courts have found CD in situations where the firms allegedly holding a collective position presented themselves or acted together on the market as a single entity. Conversely, in cases where the Courts found that the undertakings did not present themselves or act together as a single entity (see *Italian Flat Glass* and preliminary ruling cases), they concluded that there was no CD. In other words, based on the Courts’ jurisprudence, the presentation on the market criterion is the predominant legal standard for establishing collectivity under Article 82.

⁶ Joined cases T-68/89, T-77/89 and T-78/89, Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities, 1992, ECR II-1403.

⁷ Case C-393/92, Municipality of Almelo and others v NV Energiebedrijf Ijsselmij, 1994, ECR I-1477; joined cases C-140/94, C-141/94, C-142/94, DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chioggia, 1995, ECR I-3257; case C-96/94, Centro Servizi Spediporto v Spedizioni Marittima del Porto Srl, 1995, ECR I-2883; case C-70/95, Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia, 1997, ECR I-3395; joined cases C-215/96, Carlo Bagnasco and others v. Banca Popolare di Novara soc. Coop. arl. (BNP) and C-216/96, Carlo Bagnasco and others v. Cassa di Risparmio di Genova e Imperia SpA (Carige), 1999, ECR I-135; case C-451/03, Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori, 2006, ECR I-2941.

⁸ B. E. Hawk & G. A. Motta, *Oligopolies and Collective Dominance: A Solution in Search of A Problem*, Treviso Conference on Antitrust Between EC Law and National Law, Eighth Edition, Fordham Law Legal Studies Research Paper No. 1301693, available at SSRN: <http://ssrn.com/abstract=1301693>.

⁹ This is especially true in relation to the liner conference cases (e.g., *Compagnie Maritimes Belges* and *TACA*) where the collective position and the collective rate-setting of the various shipping companies were the direct result of the special legislation in the liner shipping sector. The same argument may hold with respect to the *Irish Sugar* case, often cited as the only case concerning vertical CD. While several facts of this case (supplier holding 51 percent interest in its distributor, close management relationships, tight economic links, etc.) could indeed have supported a single dominance theory, the Commission took an overly cautious approach to the concept of control and, in the absence of robust evidence, saw the use of CD as a safer argument for its conclusions. The preliminary ruling cases (e.g., *Almelo*, *Bagnasco*, *Centro Servizi Spediporto*, *DIP*, etc.) were also characterized by very specific circumstances in that they mostly related to national legislation creating a statutory monopoly or granting exclusive/special rights to a small number of companies.

This conclusion would imply that mere oligopolistic interdependence is not sufficient for a finding of CD. In that sense, CD under Article 82 would be different from a finding of coordinated effects under the EC Merger Regulation, where a merger can be challenged when it will either result in or strengthen oligopolistic interdependence, as defined by the so-called *Airtours* criteria. For a finding of CD, something more seems to be required, although what that something is remains somewhat of a mystery. There needs to be some relationship between the companies, but the nature of that relationship is irrelevant (for example, contractual, structural, or economic).¹⁰

The presentation criterion shows the ambivalent attitude of the Courts towards CD. The links between the collectively dominant undertakings cannot be of such nature that they could warrant the application of Article 81 (see the CFI's criticism in *Italian Flat Glass* of the Commission's "recycling" of the same criteria and facts under both Article 81 and 82), but on the other hand, they need to be more than just oligopolistic interdependence.¹¹ This approach could explain why the CD cases dealt with by the Courts so far have related to relatively atypical market situations, and why CD cases have remained (and will likely remain) somewhat of an anomaly.

III. ABUSE OF COLLECTIVE DOMINANCE

The existence of a dominant position, including a collective dominant position, is not sufficient to find a violation of Article 82. A violation occurs only if the collective entity is found to have engaged in an abusive conduct. The case law and most commentaries on CD traditionally do not focus much on the abuse requirement. The attention typically focuses on the collectivity criterion.

The Commission's 2005 *Discussion Paper on exclusionary abuses*¹² ("*Discussion Paper*") does discuss a few examples of possible abuses by collectively dominant undertakings in some detail, mainly focused on collective boycotts of a competitor (for example, by selective price cuts or a collective refusal to supply). It also adds that collectively dominant undertakings are "less likely to be able to predate."¹³ However, as mentioned above, the final version of this document, the Commission's Article 82 *Enforcement Guidance*, no longer deals with CD at all.

¹⁰ In his opinion in *CMB*, Advocate General Fennelly made this point very clearly. He acknowledged that the essential elements of the collective dominant position are: a) a relationship between the undertakings, and b) a common market strategy. However, he also stated that the case law has consistently shown that the second element is the predominant one. See opinion of the AG Fennelly in Joined cases C-395/96 P and C-396/96 P, *CMB v Commission*, 2000, ECR I-1365, at ¶ 28.

¹¹ While in the 2005 *Discussion Paper on exclusionary abuses* (see fn. 12) the Commission appeared to have endorsed the principle that mere oligopolistic interdependence could be sufficient to give rise to CD, the removal of any discussion on CD in the *Enforcement Guidance* suggests that the Commission may no longer pursue this approach.

¹² DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.

¹³ *Id.*, at ¶ 98.

Still, the issue is of utmost importance. If a company believes that it is at risk of being found part of a CD situation, it will need guidance on what it can and cannot do in order to comply with Article 82.

A. Is the Abuse Under Collective Dominance the Same as Under Single-firm Dominance?

As mentioned above, in the Discussion Paper, the Commission acknowledged that collectively dominant undertakings are less likely to be able to predate “because it may be difficult for the dominant companies to distinguish predation against an outside competitor from price competition between the collective dominant companies and because they usually lack a (legal) mechanism to share the financial burden of the predatory action.” The same can probably be said about loyalty or fidelity discounts: How can foreclosure of an outside competitor be distinguished from legitimate and pro-competitive price competition between the members of the collectivity?

In *CMB*, collective boycott of a competitor by selectively undercutting the competitor’s prices was possible only because the members of the collectivity found a way to share the losses. Without such an agreement, which in itself may violate Article 81, it would be difficult for members of the collectivity to share the burden of predation or aggressive discounting practices. The same difficulty of distinguishing between pro-competitive behavior and collective abuses must exist also for tying and bundling practices.

The Discussion Paper also identifies single branding as a potential CD abuse, but only to the extent that several members of the collectivity engage in single branding, leading to a cumulative foreclosure effect. However, single-branding arrangements may also cut out the other members of the collectivity, and competition to enter into exclusivity arrangements with customers (especially long-term agreements) is likely not conducive to prolonging the life of the collectivity.

It is clear from the above that cases of abuse may be rarer in the context of CD. In addition, it may prove to be very difficult to show that the allegedly abusive practice is a result of the CD (as opposed to mere unilateral competitive behavior of the collectivity’s members). In other words, the concept of abuse under a CD theory shows a number of differences compared to abuse under single-firm dominance.

The question therefore remains whether the abuse of CD should be subject to the same legal principles applied to the abuse of single-firm dominance? And if not, which justifications could support the application of a different legal treatment? The CFI apparently sees no need for a distinction. In the most recent judgment in the *CMB* saga, in assessing the nature of the abuses committed in the original *CMB* case, the CFI stated that there was nothing novel in the abusive practices in question (competitor foreclosure), and that the only novel question related to the doctrine of CD.¹⁴ Query to what extent this position is tenable in the long term.

B. Attributing the Abuse

¹⁴ Case T-276/04, *Compagnie Maritime belge SA v Commission*, 2008, ECR II-1277, at ¶¶ 114-17.

The second issue is whether or not all members of the collectivity need to engage in a certain practice for that practice to be qualified as an abuse. In other words, when can the abuse of CD be attributed to an individual member of the collectivity?

The response to the question is necessarily linked to the definition of CD itself. Taking into account that presentation as single entity appears to be the predominant criterion for collectivity, one could envisage two attribution standards: (1) an “All Together” abuse standard and (2) a “Just One” abuse standard. Below is a brief overview of possible issues under each approach.

1. All Together Abuse Standard

Under the All Together approach an abuse of CD can be established only if all members of the collectivity enter into the same type of abuse, simultaneously or within relatively short time intervals. Under this scenario, customers and competitors that are outside the collectivity would experience the effects of a substantially uniform action pattern by the members of the collective entity.

While it is not always entirely clear which approach the Commission and the Courts have adopted on this issue, most cases seem to deal with All Together abuses, with the notable exception of *Irish Sugar*. The All Together approach is also reflected in most of the examples of CD abuses provided by the Commission in its Discussion Paper (collective boycott, cumulative effect of single branding arrangements, refusal to supply). In addition, the All Together standard should be most consistent with the presentation criterion, which defines the existence of a collective dominant position: The members of the collectivity present themselves as a single entity also (or particularly) in their abusive behavior.

On the other hand, the All Together standard presents some interpretative issues.

First and foremost, how similar or contemporaneous does the collective behavior need to be? It is obvious that this question is open to many interpretations. All CD cases where the All Together standard was applied essentially involved contemporaneous and/or uniform action by the members of the collective entity.

Second, one can question how frequently companies will engage in the same or similar behavior. Companies, even when they are members of some type of collectivity, tend to have differentiated rather than uniform commercial strategies, unless those strategies are governed by Article 81-type illegal agreements. In how many cases will the Commission find similar or identical behavior by the members of a collectivity, without finding an illegal agreement? In other words, does the All Together standard for finding a CD abuse further limit the cases for a finding of CD?

Third, what is the effect of the All Together standard on an individual company’s commercial strategy? Will a member of a collectivity more easily engage in aggressive foreclosure behavior against a selected (non-member) competitor given that its behavior will not be caught under Article 82 unless and until the other members engage in the same or similar behavior? Or conversely, will a company refrain from entering into potentially pro-competitive

behavior (for example, aggressive discounting) because it may be sanctioned if other CD members engage in the same type of behavior?¹⁵

In other words, the All Together approach, while arguably being most consistent with the overall theory of CD adopted by the Courts and the Commission (including the presentation as a single entity condition), also further shows the limits of the overall theory itself, and it offers a possible explanation why CD has been applied only in a handful of cases in the past.¹⁶

2. Just One Abuse Standard

Under this approach the anticompetitive behavior by a single member of the collective entity can be sufficient to trigger the abuse requirement, regardless of whether the other members mimic the conduct in question. This was the test endorsed by the CFI in *Irish Sugar*:

[t]he abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as *one of the manifestations* of such a joint dominant position being held [...]¹⁷ (emphasis added)

The manifestation criterion was confirmed in the *TACA* judgment,¹⁸ and it was later endorsed by the Commission in its Discussion Paper (probably to preserve the authority of the dicta in *Irish Sugar*).

The potential problems of the Just One approach are obvious.

First, the *Irish Sugar* principle of an individual action being objectionable as one of the manifestations of CD blurs the line between the existence of dominance and the abuse. Even if an individual action is one of the manifestations of CD, that still does not mean the action is abusive.

Second, the Just One approach has potentially serious stifling effects in that a company could refrain from taking individual actions simply because: (i) it may be considered as a member of a collectively dominant group of companies (based on criteria which are all but clear), and (ii) an individual action, entirely decided upon independently, could be seen as a manifestation of a CD and therefore be found abusive. The chilling effects on companies' commercial freedom to act are obvious.

¹⁵ In this respect, the All Together standard may also have the pro-competitive effect of favoring autonomous commercial behavior in oligopolistic settings (i.e. one may have the incentive to distinguish/distance itself from the other members of the CD to ensure it does not inadvertently fall into an All Together abuse conspiracy theory).

¹⁶ A possible extension of the All Together standard is the sequential/serial attribution standard. The sequential approach may cover situations in which the members of the collective entity achieve essentially the same exploitative/exclusionary effect, (i) while not all adopting the same type of behavior (e.g., applying different contract terms such as duration, purchase requirements, territorial scope, etc.), , and/or (ii) adopting their strategies at longer time intervals. On the one hand, this approach has the advantage of capturing business reality more appropriately; on the other hand, it may make it more difficult to establish the presentation test with respect to the collectivity requirement. In other words, it may be harder to argue that different actions implemented at different times could be the expression of a collective anticompetitive plan.

¹⁷ Case T-228/97, *Irish Sugar plc v Commission*, 1999, ECR II-2969, at ¶ 66.

¹⁸ Joined cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line AB and Others v Commission of the European Communities*, 2003, ECR II-3275, at ¶ 633.

Third, the Just One approach could lead to some form of indirect liability for the non-abusing members of the collectivity, resulting from the independent actions of the abusing member(s) of that collectivity.

In other words, while the All Together criterion shows the limits of the CD theory in its entirety and would undoubtedly further limit the cases in which a CD theory can be applied, the Just One alternative is fraught with so many negatives that it cannot be the right approach from a policy perspective. In that sense, the *Irish Sugar* principle cited above should be interpreted as being limited to the very specific facts of that case (for example, the fact that it concerned a vertical link and, arguably, even a situation of control between the so-called members of the collectivity).

IV. CONCLUSIONS

The definition of the concept of CD and, above all, of the concept of abuse under CD show the strong limits of the theory overall. Those limits may be the explanation of why the Commission decided to eliminate the discussion started in its Discussion Paper and no longer retain CD as an enforcement priority in the Enforcement Guidance. While it is difficult to predict how the Commission will pursue CD in the future, it is likely that under the current legal standards the number of CD cases will remain a rarity in the EC enforcement practice.