

Collective Dominance Through Tacit Coordination: The Case for Non-Coordination Between Article 82 and Merger Control “Collective Dominance” Concepts

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I. INTRODUCTION

Intervention in oligopolistic markets or—to be more precise—oligopolistic markets in which firms appear to be coordinating their actions, is a multifaceted topic; aspects of which have sparked some of the most intense debates in competition policy.

The oligopoly problem, as it is often termed, refers to firms acting in a parallel manner in the market in such a way that competition between these firms is dampened with the ultimate effect of the consumer being harmed. Oligopolies may be targeted by EC competition laws through the application of Article 81 (where behavior is explicitly coordinated), Article 82 (where behavior is explicitly or implicitly coordinated) or, prospectively, through the application of merger control rules to concentrations which are likely to enable or further facilitate coordination in a given market. The analytical issues surrounding competition law intervention in oligopolistic markets entail theoretical and practical difficulties; it is notable that the Commission's new guidance on Article 82 has explicitly excluded collective dominance from the ambit of its application.²

This article will briefly outline the application of EC competition law to oligopolistic markets, with particular focus on tacit collusion between firms, the relationship between Article 82 and merger control in this respect, and the judicial pronouncement in *Airtours*³ of the conditions under which tacit coordination exists. The recent European Court of Justice (“ECJ”) *Impala*⁴ judgment will be examined; in particular, as regards the implications for the standard of proof in collective dominance cases and whether a different approach to collective dominance is required for merger control and Article 82 following the decision. In addition, the application of the *Airtours* criteria to collective dominance under Article 82 where exclusionary abuses are concerned will be discussed.

II. LEGAL BASES FOR COMPETITION POLICY INTERVENTION IN OLIGOPOLISTIC

² Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, ¶4 (Sept. 2, 2009).

³ Case T-342/99, *Airtours v Commission*.

⁴ Case C-413/06 P, *Bertelsmann/Sony v Impala*.

MARKETS

A. Article 81

In economic terms, whether there is an explicit agreement between firms to form a cartel or whether the firms are aligning their conduct due to the prevailing market conditions, the effect is the same: competition is malfunctioning and (absent any efficiency benefits) consumers are harmed. The law, however, does not consider that tacit coordination falls, in itself, foul of either Article 81 or Article 82. The emergence or entrenchment of oligopolistic markets is managed through the application of merger control rules, but pure parallelism is not considered a breach of any competition rules.

Where explicit coordination takes place (this including circumstances where parties have come to an agreement even without direct contact), competition policy in the EC is clear in condemning firms. This may be the case where there could also be a parallel cause of action under Article 82 for an abuse of a collective dominant position, although the Commission will still need to go through the procedural hurdles of both Articles 81 and 82 and cannot merely restate the facts of Article 81 to prove an infringement of Article 82.⁵

B. Article 82 and Merger Control

The wording of Article 82 is explicit in its application to abuses by “one or more undertakings.” While this wording sparked interpretational debate for some time in respect of whether it relates to an abuse by undertakings that were joined by structural or contractual links, subsequent case law has clarified that the concept of collective dominance is one that can apply where the relationship between the abusing firms is one of tacit collusion; that is, where the market conditions are such that there is effectively no competition between the firms and they act as one.⁶

In the merger control context, the concept of “collective dominance” (rather than “coordination” which is more commonly used in the Commission's guidelines and decisional practice today) has evolved under the wording of the original Merger Regulation. The regulation required intervention by the Commission only if the merger would create or strengthen a dominant position as a result of which effective competition would be significantly impeded. This resulted in the concept of dominance being central to the assessment of mergers and created considerable overlap and cross-citing between Article 82 cases and merger cases.⁷ For some time now, therefore, the European Courts have amalgamated the concepts of collective dominance in Article 82 and under the European Merger Regulation (“ECMR”). This has encompassed both tacit and explicit coordination between firms.

In *Airtours v Commission*⁸ which involved an appeal against the Commission's prohibition of a merger between two tour operators in the United Kingdom, the Court of First

⁵ *Societa Italiano Vetro SpA v Commission* [1992] ECR II-1403.

⁶ Case C-396/96 P *Compagnie Maritime Belge Transports v Commission*.

⁷ See, for example, Cases C-68/94 and C-30/95 *Kali and Salz*, Case T-102/96 *Gencor/Lonrho*.

⁸ *Supra* note 3.

Instance (“CFI”) set out the three conditions that needed to be satisfied in order for coordination to be sustainable: it must be possible for the coordinating firms to monitor each other's conduct; the coordinating firms must have the incentive to sustain the coordination (that is, a credible punishment mechanism must exist); and there must be no external factors (such as entry or buyer power) that would destabilize the coordination. The EC Horizontal merger guidelines⁹ espouse the *Airtours* criteria and so do subsequent Commission decisional practice¹⁰ and European Courts' judgments.¹¹ Recently, the CFI judgment of *Laurent Piau* cited these three *Airtours* criteria as necessary for a finding of collective dominance.¹²

Despite the many judicial statements, however, indicating that tacit coordination can form a sufficient link between the parties in order for them to be considered collectively dominant, there have been no Article 82 cases to date where the firms accused of the abusive conduct were indeed tacitly coordinating. The case law so far relates to firms that did have some contractual or structural links.¹³

III. IS A UNIFIED CONCEPT OF COLLECTIVE DOMINANCE APPROPRIATE?

Responses to the Commission's consultation paper on Article 82 have hinted that the collective dominance tests for Article 82 and ECMR should not necessarily be aligned given the different role of the two provisions in competition policy. The three-step coordination test has been criticized as unsuitable in the context of a historical review of firms' behavior.

This is particularly interesting following the *Impala* CFI and ECJ judgments and the apparent distinctions regarding standards of proof between pre-existing tacit collusion (which is what Article 82 is inevitably concerned with) and tacit collusion arising as a result of the merger (which could only be assessed within merger control). In addition, when considering the types of collective dominance abuse that have been typical of Article 82 so far (i.e. exclusionary abuses), it is not evident how the *Airtours* criteria would be directly applicable in enabling a collective dominance finding in a tacit coordination setting.

A. Different Standards for Pre-existing Collusion?

The CFI and ECJ in *Impala* appear to have lowered the standard of proof for finding an existing collective dominant position in merger control.¹⁴ With reference to the *Airtours* factors, the ECJ noted that “it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.” The CFI had also mentioned in *Impala* that where the Commission is investigating abuse of collective dominance cases it could be relying

⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

¹⁰ For example, *Areva/Urenco/ETC* M.3099; *Linde/BOC* M.4141; *Travelport/Worldspan* M.4523.

¹¹ Case T-464/04 *Impala v Commission*; Case C-413/06 P *Bertelsmann/Sony v Impala*.

¹² Case T-193/02.

¹³ See further Mezzanotte, *Tacit collusion as economic links in article 82 EC revisited*, E.C.L.R. 2009, 30(3), 137-142

¹⁴ Ben Van Rompuy, *Implications for the standard of proof in EC merger proceedings: Bertelsmann and Sony Corporation of America v Impala*, ECLR 2008, 29(10), 608-612.

on “a very mixed series of indicia and terms of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position”¹⁵ to show the collectively dominant position based on tacit coordination. The Courts appear to be saying that it is not necessary to go through all of the *Airtours* factors and this pronouncement by the CFI appears to lower the standard of proof in cases where firms behave in a tacitly coordinated manner.

As far as pre-existing coordination is concerned, the CFI also stated in *Impala* that the *close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such cases*’ (emphasis added).¹⁶

The CFI appears to be indicating that if the Commission can show that firms are pricing in similar ways over a long period of time and above the competitive level, then they are in tacit coordination and therefore the CFI is lowering the thresholds for showing pre-existing tacit coordination.¹⁷ This appears to ignore the evidentiary difficulties in proving the competitive price in a given market and, consequently, the danger of actually finding firms as being in tacit coordination when they are in fact competing hard, as it is possible that firms are aligned at prices close to the competitive price.

The Commission considers, in a single dominance context, that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant.¹⁸ However, the direct incorporation of such an approach into tacit coordination cases, especially where the margin for error is large, could result in undertakings being considered collectively dominant (with all the special responsibility requirements attached to their behavior as a result of this) without that actually being the case.

B. Abuses of Collective Dominance Position—Opening Doors to Price Parallelism as an Abuse?

From an Article 82 viewpoint, even if tacit coordination is found to exist in a market, it is not always easy to grapple with the context of the abuse where more than one firm is engaging in anticompetitive conduct.

Mainstream competition law thinking would shy away from applying Article 82 to pricing behavior of firms that are tacitly coordinating. The apparent asymmetry with merger

¹⁵ CFI, *Impala*, *supra* note 11, at 251. Despite overturning the CFI judgment, the ECJ did not object to this statement in its judgment, stating instead that the CFI judgment was erroneous in “*misconstruing the principles* which should have guided its analysis of the arguments raised before it” (emphasis added). This implies that the ECJ considered the principles laid down by the CFI as correct but that the CFI had misapplied the facts. It is worth noting that the Commission also did not object to this statement by the CFI.

¹⁶ The ECJ again did not object to this statement.

¹⁷ *Supra* note 14.

¹⁸ *Supra* note 2, ¶ 11.

control (which intervenes to prevent parallelism) is justified since it is considered appropriate for competition authorities to avert structural changes to the market which will restrict (or further restrict) effective competition going forward. Imposing quasi-criminal sanctions on firms which are merely rationally reacting to market conditions (without of course explicitly coordinating) appears offensive to a sense of natural justice.¹⁹

Although the theoretical possibility of abuse of collective dominance via excessive pricing has been commented on, it does not seem likely that the Commission would pursue such cases given that very few excessive pricing cases actually exist even for single dominance cases.²⁰ This sits uncomfortably, however, with the CFI comments in *Impala* as to the probative value of parallel pricing that is beyond the “competitive level.” To the extent that the Commission will be in a position to pronounce parallel pricing as evidence of tacit coordination, it could also use this evidence as grounds for an excessive-pricing finding since the firms are likely to be pricing well above the competitive level for the price parallelism to be used to show collective dominance.

Despite the extensive body of law unifying the collective dominance concepts in Article 82 and merger control (which was also cited by the ECJ in *Impala*), it is possible that these particular CFI comments could be more strictly applied in a merger control context so that there could be less convergence between the Article 82 collective dominance concept and the coordination concept in merger control. Given the difficulties in the prospective assessment of mergers, it could be appropriate to have different standards of proof in merger control which is of a predictive nature and therefore inherently includes a possibility of error.

Even in cases of pre-existing coordination in merger control, however, it is not clear that this will necessarily lead to coordination post merger. For example, the merger could lead to less symmetry and in itself upset coordination so further analysis would need to be conducted to actually show that the merger does worsen pre-existing coordination. The additional level of analysis, however, could be lacking from an Article 82 review since, as discussed above, a finding that firms are tacitly coordinating could potentially in itself be regarded as an abuse, therefore causing price parallelism to be caught by Article 82. It could be, therefore, that there are valid reasons for a separation in approach between Article 82 concepts of collective dominance and the *Airtours* criteria.

C. Exclusionary Abuses and the *Airtours* Criteria

¹⁹ Note that there can be other mechanisms to deal with oligopolistic markets. For example, in the United Kingdom the Enterprise Act 2002 enables the OFT, following a preliminary investigation, to make a market reference to the Competition Commission where competition is not properly functioning in that market. The Competition Commission has the power to impose remedies in order to address the competition concerns it identifies following its extensive investigation.

²⁰ RICHARD WHISH, *COMPETITION LAW*, 6th Ed, 566, (2008), although the Commission's 2005 Discussion Paper does discuss excessive pricing as a possibility (DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, ¶ 74).

It is sometimes argued that it is exclusionary abuses that will attract the most attention from the Commission's perspective in collective dominance cases, and the existing collective dominance decisional practice and case law support this proposition. A (tacitly) coordinated attempt to exclude a competitor from the market, especially where that competitor could have upset the sustainability of the oligopoly, could be regarded as abusive. The circumstances under which this would occur in a tacitly coordinated market are less well defined, however, as existing collective dominance anticompetitive abuses are within the context of firms being found collectively dominant through the existence of structural or contractual links between them (rather than through tacit coordination).

In such a case, the *Airtours* criteria could seem inappropriate as a test for finding tacit coordination between firms, given that entry of a competitor, for example, evidently did "upset" the coordination if the collectively dominant firms were coordinating to somehow exclude the new entrant from the market. The Commission's horizontal merger guidelines (expanding on the *Airtours* criteria) state that "[f]or coordination to be successful, the actions of non-coordinating firms and potential competitors [...] *should not be able* to jeopardise the outcome expected from coordination" (emphasis added).²¹ Leaving aside the evidentiary difficulties the Commission would be facing in order to show an abuse in this context (such as, for example, showing that conduct is predatory rather than merely a response to competition) it appears that the *Airtours* criteria may be unworkable in these circumstances.

IV. CONCLUSION

While there is yet no Commission decisional practice on abuse of collective dominance by firms that are tacitly coordinating, difficult theoretical and practical issues arise out of applying symmetrical tests to identify tacit coordination in collective dominance under Article 82 and merger control. The sustainability of a common set of tacit collusion criteria in the Article 82 and merger control contexts remains to be tested should the Commission bring an Article 82 case against entities that are found to be collectively dominant under tacit coordination.

²¹ *Supra* note 9, ¶ 56.