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The Slippery Slope of Addressing Collective Dominance Under Article 82 EC

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I. ADDRESSING 'COLLECTIVE DOMINANCE' EX-POST: ARTICLE 82 EC TREATY

Article 82 EC Treaty is the instrument used by European and National Competition Authorities to address the issue of dominance in the market and its abuses by undertakings holding such positions. While this Article was primarily intended to address the issue of “single dominance,” the wording “abuse by one or more undertakings of a dominant position” allowed the interpretation that “collective dominance” (“CD”) may also be addressed by Article 82. This approach may appear very effective from a theoretical point of view, but its application in the real world has proven so complex as to render it inoperative or even perilous.

European case-law has presented a variety of approaches as to the criteria that need to be satisfied for a positive finding of CD, ranging from the mere existence of economic/legal/structural links to the presentation of undertakings on the market as a single entity.

The first judgment in which EC Courts expressly dealt with CD under Art. 82 was *Italian Flat Glass*.² The Commission established the existence of significant economic links between the undertakings in question and held such links to be sufficient evidence of collective dominance. The Court of First Instance (“CFI”) rejected this approach and annulled the Commission’s finding, ruling that CD could not be established solely by the existence of economic links, but additional evidence was needed in order to positively prove that the undertakings concerned were “presented on the market as a single entity.”

This approach, namely that “presentation on the market as a single entity” is an indispensable element of CD seems to be predominant, as it is repeated in many judgments of the EC Courts (indicatively, *Compagnie Maritime Belge*³, *Almelo*⁴, *Centro Servizi Spediporto*⁵) as well

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² Joined cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro vs Commission*.

³ Joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge transports SA (C-395/96P) and Dafra-Lines A/S (C-396/96P) v Commission of the European Communities*, 2000, ECR, I-1365.

⁴ Case C-393/92, *Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij*, 1994, ECR. I-1477, ¶¶ 42-43.

⁵ Case C-96/94, *Centro Servizi Spediporto v Spedizioni Marittima del Porto Srl*, 1995, ECR, I-2883, at ¶ 33.

as the Commission's Discussion Paper on the application of Art. 82.⁶ One can therefore conclude that the presence of economic, legal, or structural links is a necessary condition for the establishment of CD only when they are the means by which "presentation on the market as a single entity" is achieved; or, to put it another way, the mere existence of such links between undertakings is legally inconsequential when it does not result in their presentation on the market as a single entity.

The above findings of the EC Courts seem to provide clear criteria for the substantiation of CD: a) presentation of undertakings on the market as a single entity, b) combined market shares exceeding the presumed dominance threshold (approximately 50 percent⁷), and c) the ability to act irrespective of competitors, trading partners, and consumers. However, in practice this test may prove so vague and intricate to apply that the chances of misuse are extremely high.

II. WHEN COLLECTIVE DOMINANCE BECOMES AN ABUSE OF NCA SINGLE DOMINANCE

The deficiencies of the CD test and the high risk of legal errors associated with its ambiguity was apparent with the decision 452/V/2009⁸ of the Hellenic Competition Commission ("HCC"). The decision⁹, issued on July 22, 2009, concerned the wholesale market of foreign educational books in Greece.

The HCC held that the foreign educational book market was an oligopoly, with essentially only eight active undertakings. The market presented the peculiarity that wholesalers supplied not only retailers, namely book stores, but also their competitor wholesalers with regard to books for which they were exclusive importers. This business practice was effectively imposed by the market and the idiosyncrasy of demand, as demand was concentrated in the first fortnight of September of each academic year, when students were informed by their institutions which books were required.¹⁰ It was therefore understood that wholesalers were not able to sufficiently satisfy country-wide demand, given that once the academic year started students needed to have their books immediately.

Faced with the difficulty of instantly satisfying demand all over Greece, wholesalers were forced to sacrifice a portion of their profit margins associated with the privilege of exclusive distribution and share this profit with their competitors by cross-supplying books. Wholesalers were also forced into this situation by the editors' practice of requiring guarantees of effective and error-proof distribution in order to grant wholesalers exclusivity. Finally, it was proved that price increases for books that were exclusively distributed and subject to this cross-

⁶ DG Competition Discussion Paper on the application of Art. 82 of the Treaty to exclusionary abuses, 2005, available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

⁷ AKZO Chemie BV v Commission, [1991], ECR I-3359, ¶ 60.

⁸ Decision 452/V/2009 of the HCC, available at: http://www.epant.gr/img/x2/apofaseis/apofaseis576_1_1252500737.pdf.

⁹ For the interest of transparency it should be revealed that the authors acted in this case for one of the alleged "collectively dominant" undertakings.

¹⁰ It should be noted that the average life-cycle of foreign educational books proved to be three years.

supply were actually lower when compared to books for which there was no exclusive agreement and, therefore, for which no cross-supply took place.

The HCC acknowledged that the practice of cross-supply between wholesalers was indeed engaged in by all market players. And it was not proved, not even sustained, that the price of cross-supplied books was above the competitive level, or that production was limited, nor was any other competitive harm proved to exist. Finally, it was not proved that there was a causal link between the practice of cross-supply (or any other practice) and any (unproved) competitive harm.

Despite the above, the HCC found that the two market leaders held a collective dominant position, basing its finding on the fact that each undertaking was not only a competitor but also a supplier of the other; a link that, in the HCC view, constituted a sufficient economic link to establish collective dominance. No other link was established between the undertakings in question, while the fact that cross-supply was a common practice for all market players was completely disregarded. In an attempt to present some sort of special link between the two market leaders, as opposed to the links existing among all players in the market, the HCC vaguely stated that, at times, they presented favorable treatment towards one another—without providing any evidence in support of such an hypothesis and without making any comparison with the terms that the two undertakings offered their other competitors.

Moreover, no evidence was put forward to satisfy the condition of “single entity,” except for a vague reference that the commercial terms of the two undertakings were “similar.” This reference was given without any numeric representation, any sort of comparison with the commercial terms offered by the other wholesalers, or any reference to the respective terms offered by the editors to the wholesalers—namely without any economic or market analysis. Further, the HCC acknowledged that despite the “similarity” in commercial terms, there was no evidence of agreements or concerted practice under Art. 81 EC (and Art. 1.1 of Greek Law 703/77).

Holding the practice of cross-supply to constitute a sufficient link between the undertakings in question and disregarding the fact that the same link existed among all market players, the HCC went on to arithmetically add the two leaders’ market shares, and concluded that collective dominance was established, without providing any explanation as to why it did not add—pursuant to its way of thinking—all other wholesalers’ market shares.

As to the existence of sufficient retaliatory mechanisms for the protection of the common policy—which nowhere in the decision was sufficiently established—the HCC noted that eventual refusal to cross-supply books which the undertakings in question “exclusively” imported could potentially constitute such retaliatory mechanism, although it acknowledged that such retaliation had never been used in practice. This assertion disregarded the fact that such a market choice would be unprofitable and irrational for undertakings (as it would probably result with the editors withdrawing the exclusivity privilege due to poor distribution performance).

Finally, the HCC attempted to substantiate its finding of CD by invoking the CFI judgment *SONY/BMG*, which the HCC interpreted as follows: “the CFI seems to accept that the existence of the three criteria for establishing collective dominance may be inferred by the collective dominance of itself.”¹¹ This extreme case of *obiter dictum* is, in the authors’ view, indicative of the legal and economic deficiencies of the decision in question, which has caused many concerns in the market as to the intentions of the HCC and the way it applies the CD doctrine.

The HCC approach of collective dominance in this case made evident what dangers using the CD test could produce when it was not supported by an economic or structural analysis of the market. An abstract and arbitrary use of the CD criteria is bound to result in serious legal errors, cause uncertainty in the market, and create the paradox of punishing an undertaking for abusive behavior when it is not even aware that it is dominant. The realization and knowledge of dominance is of paramount importance given the increased standards of responsibility that the dominant position entails, which obliges undertakings to adjust their business behavior accordingly. In their judgments on single dominance, the EC courts have acknowledged this need for positive knowledge and have provided such explicit criteria for the single dominance test as arithmetic thresholds.¹² When it comes to collective dominance though, the existing criteria are so vague that they do not allow undertakings to appreciate, let alone positively know, whether they are dominant or not, and act accordingly.

If the current CD test is applied in the way that the HCC has, namely establishing collective dominance without any economic analysis or evidence of links that differentiate or somehow individualize the relationship between certain undertakings, the uncertainty caused will inevitably force every undertaking in the market to start acting as dominant in order to avoid being fined under Art. 82. Unless competition authorities use the CD test responsibly, realizing the level of proof and analysis required for a positive finding of collective dominance under Article 82, they risk punishing undertakings that were never dominant and never intended to abuse their market position.

III. APPROACHING THE CD TEST: HOW CAN ONE ESTABLISH “SINGLE ENTITY PRESENTATION”?

EC case law has repeatedly held that economic or legal links need not be proved in every CD case, on the condition that other factors exist which allow firms to adopt an identical business strategy in the market (“single entity” condition). What the case-law has failed to clarify is what these other factors might be. If no economic or legal links are established between undertakings which present a common policy in the market, then three scenarios are possible:

1. the undertakings engage in unconscious parallelism;

¹¹ See Decision 452/V/2009 of the HCC, Chapter VI, ¶ 16, p. 23, available at: http://www.epant.gr/img/x2/apofaseis/apofaseis576_1_1252500737.pdf.

¹² See ECJ judgment on *AKZO Chemie BV v Commission*, [1991], ECR I-3359, ¶ 60.

2. the undertakings participate in an undetected cartel; or
3. the undertakings are tacitly colluding.

Of all three scenarios, only the last is thought to clearly fall under Art. 82. If competition authorities fail to correctly identify the cause and nature of parallelism, they will either unjustly punish innocent firms that rationally parallelize their behavior (scenario 1) or they will commit an error of law by misapplying Art. 82 instead of Art. 81 (scenario 2).

This uncertainty has further consequences. On the one hand, firms will have incentive to collude given the risk that any parallelism of behavior can be caught and punished. On the other hand, competition authorities will have less incentive to exert effort in gathering evidence of agreements under Art. 81, given the safe haven of Art. 82 which vaguely requires single entity presentation on the market. It is obvious, therefore, that an important difficulty associated with the single entity criterion is the subtle and often indiscernible distinction of tacit collusion from mere parallelism and concealed Art. 81 agreements.

A. Oligopolistic Interdependence: A Sufficient Connecting Factor?

Absent evidence of legal or economic links, undertakings may present similar business behavior due to the oligopolistic structure of the market. EC case-law suggests that such parallelism of behavior should not be punished under Art. 81, even when it results in anticompetitive effects, unless it can be proved that such parallelism exceeds the necessity threshold, making concentration the only plausible explanation for the business practice in question.¹³ Unfortunately, though, when the EC Courts are called to appraise the same behavior under Art. 82 they seem to disregard this fundamental principle of “permitted, rational parallelism.”

The ruling of ECJ in *Compagnie Maritime Belge*—that an assessment of the market structure can be also an element of the single entity test—is the main cause of misinterpretation concerning oligopolistic parallelism. Although the Court in this case ruled that the mere existence of agreements or concerted practices within the meaning of Art. 81 was not sufficient to prove CD (an approach repeated by the CFI in *Flat Glass*), and that stricter links between undertakings must therefore be established, it went on to vaguely add that the requisite connecting factors could be provided by an economic assessment of the particular market structure.¹⁴

This statement gave grounds to the assertion that mere oligopolistic interdependence could constitute a sufficient connecting factor for a finding of CD, an approach not only erroneous but also perilous, as it would mean that undertakings acting in an oligopoly could be found collectively dominant by a simple addition of their market shares. Since, by definition, interdependence exists in an oligopoly, all competition authorities would have to do to establish

¹³ As the ECJ ruled in *Wood Pulp*, “Article 81 does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors” concluding that parallelism in the market is proof of concentration only when it constitutes the “only plausible explanation.” Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ¶ 48.

¹⁴ See n. 3, at ¶ 45

CD is add together the market shares of as many undertakings as necessary until the dominance threshold is reached (around 50 percent of the market). Apart from being clearly inadmissible, this approach also poses a practical problem: If oligopolistic interdependence is the only link between undertakings and no other bond exists that somehow individualizes the relation between two (or more) of them, there are no criteria as to which undertakings' market shares must be considered. Therefore competition authorities will be forced to find all oligopolists collectively dominant, a decision that is hardly sustainable.

Further, this approach inevitably leads to a situation where the finding of a single abusive term in an oligopoly renders all market players equally liable under Art. 82 given their assumed collective dominant position. It is evident, though, that such an approach not only contradicts the law but also common sense. Unfortunately, though, it does not totally contradict the Commission's views, as the latter were expressed in the Discussion Paper on Art. 82: "It follows that the structure of the market and the way with which undertakings interact on the market may give rise to a finding of collective dominance."¹⁵

B. Can "Tacit Collusion" Really Exist?

It is commonly asserted that tacit collusion could constitute a sufficient linking factor for a finding of CD, as it normally produces single entity results. Collusion, put simply, is the practice of undertakings to coordinate their behavior in order to achieve monopoly profits—as opposed to competition, where a firm's actions simultaneously depend on and trigger the reactions of its rivals, aiming at short-term profits. Accordingly, collusion may be explicit, i.e. realized by overt agreements between competitors; or it may be tacit, i.e. realized without any communication between market players.

The first problem identified with the notion of tacit collusion is the fact that it is almost impossible to prove the absence of any communication between undertakings in order to reach a sound conclusion as to whether certain behavior must be dealt with by Art. 82 as opposed to Art. 81. In other words, competition authorities cannot positively prove the absence of communication, but can only sustain that no evidence of communication has been found. Lack of such evidence may mean either that communication is absent or that it is so well concealed as to be undetected. Therefore, the margins of error in law, i.e. invoking Art. 82 instead of Art. 81, are incredibly wide. In an extreme example, it is theoretically possible that undertakings found collectively dominant under Art. 82 based on assumptions of tacit collusion can overrule that decision by merely providing evidence of mutual communication.

Given the pragmatic inability of proving the inexistence of communication, competition authorities could provide additional evidence in support of their hypothesis of tacit collusion. Economic theory does not help in this regard, as it has not been able (yet) to provide a positive legal test to identify tacit collusion. So far, economic theory is limited to negative tests,¹⁶ i.e. excluding collusion for theoretical reasons and to mere identification of market features which

¹⁵ *Id.* at ¶46.

¹⁶ Kai-Uwe Kühn, *Closing the Pandora's Box? Joint dominance after the Airtours' Judgment*, p. 17, University of Michigan, John M. Olin Center for Law & Economics, Paper 02-013

may facilitate and/or sustain tacit collusion (e.g. pursuant to game theory, repeated interaction can allow firms to suspend competition and collude, also tacitly). Economists have persuasively argued that collusion is not easily sustainable without any communication whatsoever, mainly due to the complexity caused by the presence of multiple equilibria in repeated game models.¹⁷ To put it simply, faced with multiple equilibria, firms cannot be certain about what game competitors will choose to play making it difficult to adjust their business strategy accordingly. At this point, in order to sustain collusion, firms will probably need to communicate.

From a pragmatic point of view as well, it seems that collusion in the real world cannot be sustainable over time without any communication. Apart from the fact that it is hard to imagine how the terms of collusion would be introduced to the market in the first place, it is almost impossible to sustain collusion without any communication when the economic conditions of the market change, e.g. due to the entry of a new player, alterations in demand, economic crises, etc. In such cases, which are rather probable, the common policy, or any unspoken agreement must be readjusted.¹⁸ Readjusting requires an extensive and complex organization, which is impossible to achieve without any contact between the tacitly-colluding undertakings.¹⁹ Therefore, the collusion will either turn overt, or it will collapse since it can no longer be profitable.

In the alternative, if only one of the tacitly-colluding firms takes the initiative to alter its behavior in order to protect the group's market position, such action can be easily misinterpreted by the other colluding firms as a deviation from the tacitly-agreed common policy, in which case collusion becomes unsustainable.²⁰ In order to be sustained, the deviating firm's reasoning must be somehow communicated to the other members of the group, making the collusion overt.

It is obvious from the above that the notion of tacit collusion poses many problems, especially problems of proof. Not only is it difficult to positively establish absence of communication as opposed to concealed communication, but it is also difficult to distinguish tacit collusion from the neighboring notion of unconscious parallelism. With regard to the latter, in order to positively establish tacit collusion it would be necessary to somehow determine the allowed degree of parallelism in an oligopoly and subsequently prove that the behavior in question exceeded that threshold. It is clear, though, that determining a safe haven of permitted parallelism is extremely difficult, if not impossible.

¹⁷ Kai-Uwe Kühn, *Fighting Collusion by Regulating Communication between Firms*, 16 ECONOMIC POLICY 32, 167-204 (April 2001).

¹⁸ Barry E. Hawk & Giorgio Motta, *Oligopolies and Collective Dominance: A Solution in search of a problem*, Eighth Edition of the Treviso Conference on Antitrust Between EC Law and National Law', p. 72, forthcoming.

¹⁹ Felix E. Mezzanotte, *Can the Commission use Article 82 EC to Combat Tacit Collusion?*, CCP Working Paper 09-5, ESRC Centre for Competition Policy and Norwich Law School, University of East Anglia, pp. 31-33.

²⁰ R. O' DONOGHUE & J. A. PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 82 EC*, 161-2, (2006).

III. WHAT DOES EC CASE-LAW HAVE TO SAY?

Although Community Courts have often stressed the inadequacy of agreements or concerted practices under Art. 81 for a finding of CD, their uncertainty as to what alternative criteria may be used is indicated by the fact that, in most cases, the undertakings identified as collectively dominant under Art. 82 were also linked by consensual arrangements (either by agreements or by common participation in the industry’s associations). Relevant case-law that confirms this assumption are judgments in *Compagnie Maritime Belge* (undertakings were members of a shipping conference), *TACA*²¹ (undertakings were members of a liner conference, the agreements of which contained, among others, common pricing provisions), *Italian Flat Glass* (undertakings were found to have formed a cartel), *Almelo* (undertakings were members of a trading association with legally binding agreements containing, among others, exclusive purchasing obligations), *Wouters*²² (undertakings were contractually linked through their membership in an association, although these links were not regarded by the ECJ as sufficiently close to establish CD), and *Laurent Piau*²³ (undertakings were members of an association with legally binding rules as to the members’ transactions).

This approach of the EC case-law to support the CD criteria with evidence of legal bonds, often illicit in themselves, may constitute a tacit acknowledgement of the inadequacy of the CD test, at least in its present form. The same deficiency is also manifested by the *Impala* judgment,²⁴ only this time to the negative. In this case, the CFI ruled that the criteria which were necessary to substantiate a CD finding may be considered proved by the very existence of CD (*obiter dictum*). This clear manifestation of the Court’s insecurity about what really needs to be proved in order to establish CD is made further evident by what the Court contradictorily stated in the same judgment: “the determination of the existence of a collective dominance position must be supported by a series of elements of established facts, past or present, which show that there is a significant impediment of competition on the market.”²⁵ In other words, the the Court simultaneously held that the CD criteria must be supported with past or present evidence and that they may be considered proved by the mere existence of CD.

²¹ 1999/243/EC Commission Decision of 16 September 1998 relating to a proceeding pursuant to Article 85 and 86 the EC Treaty (Case No. IV/35.134 – Trans-Atlantic Conference Agreement), OJ L 095, 1999, pp. 1-112.

²² Case C-309/99, J.C.J Wouters, J.W. Salvelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002, ECR, I-1577.

²³ Case T-193/02, Laurent Piau v. Commission of the European Communities, 2005, ECR, II-209.

²⁴ Independent Music Publishers and Labels Association (Impala) v Commission [2006] ECR II-2289, [2006] 5 CMLR 19, ¶. 251: “It follows that in the context of the assessment of the existence of a collective dominant position although the three conditions defined by the CFI in *Airtours v Commission* (...) are indeed also necessary (...) they may be established indirectly on the basis of a very mixed series of indicia and terms of evidence relating to the signs, manifestations and phenomena inherent in the presence of a Collective Dominance Position.”

²⁵ *Id.*, at ¶ 250.

IV) THE INAPPROPRIATENESS OF ADDRESSING COLLECTIVE DOMINANCE EX-POST UNDER ARTICLE 82 EC

The above makes it clear that addressing collective dominance under Art. 82 may not only be difficult but also risky. The main concern is that European case-law has failed to provide a reliable legal and economic standard for CD considerations, leaving undertakings uncertain as to how they should develop their business practice to avoid an Article 82 punishment.

The unfortunate admixture of the ECMR²⁶ and Article 82 criteria in assessing CD has contributed to the issue’s complexity. While the ECMR aims at addressing CD *ex-ante* in order to prevent significant impediments to competition, Article 82 aims at addressing it *ex post*. This is not a mere temporal difference between the two instruments, but a fundamental difference of the actual pursued aim: While the ECMR aims at preventing significant impediments to competition of any nature²⁷ by assessing in advance the consequences of a future merger, Article 82 addresses already effectuated abuses of dominance. Further, it is evident that the burden of proof in an *ex-post* analysis of CD under Art. 82 is significantly more onerous for competition authorities than the one in an *ex-ante* analysis under the ECMR, where only predictions can be made.

While the Horizontal Merger Guidelines provide clear guidance as to the economic assessment of CD and possible coordinated effects of a merger,²⁸ there is no such detailed guidance on the more complex issue of appraising CD under Article 82. The Commission expressly excluded the issue of CD from its recently published Guidance on its Enforcement Priorities in applying Art. 82,²⁹ which may be interpreted as a tacit acknowledgment that addressing CD under Article 82 is not within the Commission’s priorities, and that the ECMR must be used instead. Besides, both the *Airtours* and the *Impala* judgments made it clear that *ex-ante* and *ex-post* rules regarding CD should be clearly separated.

The approach of having separate criteria for the assessment of CD depending on the relevant legal context (i.e. ECMR as opposed to Art. 82, *ex-ante* as opposed to *ex-post* analysis) contributes towards legal certainty—an imperative need today, especially in view of such unsuccessful decisions like the HCC example described above. Until clear guidance is provided, abstaining from applying Article 82 to tackle collective dominance *ex-post* seems the safer option.

²⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the [control of concentrations between undertakings \(the EC Merger Regulation\)](#) Official Journal L 24, 29.01.2004

²⁷ Contrary to the old ECMR, (Council Regulation 4064/89) which directly targeted dominance (“dominance test”) the new ECMR uses the “significant impediment to competition test.”

²⁸ ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’, OJ C 31, 5.2.2004, p. 5–18, paras. 39-57, *available at*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF>.

²⁹ Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Chapter II, ¶ 4, page 4, *available at*: <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>.