



Freshfields Bruckhaus Deringer

Collective Dominance

Article 102 TFEU

Collective Dominance in EU
Competition Law
Theory and Practice

Frank Montag, 22 October 2013

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Topics

- Introduction
- Theory of harm for abuse of collective dominance
 - Concept of collective dominance
 - Concept of abuse of collective dominance
- Current enforcement in the EU
- Challenges in enforcement against abuse of collective dominance
- Concluding remarks



Introduction

- Article 102 of the Treaty on the Functioning of the European Union
 - *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*

- Elements:
 - Dominant position
 - Abusive conduct
 - In the internal market
 - Affect trade between MS



Introduction

- Which situations are typically envisaged?
 - No “single firm dominance”
 - Position of economic strength
 - Market share + 50%



Introduction

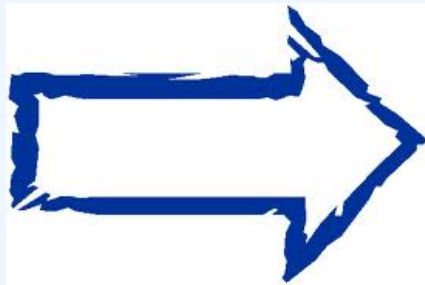
- Which situations are typically envisaged?
 - Behaviour not necessarily caught by Article 101 TFEU

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"



Introduction

- Which situations are typically envisaged?



Abusive behaviour originating from one or more undertaking which collectively hold a position of economic strength on the market.

There does not need to be an agreement between them and the behaviour concerned often falls outside the scope of Article 101 TFEU.

Theory of harm for abuse of collective dominance

- The theory of harm for abuse of collective dominance –
a two step analysis:
 - Concept of collective dominance
 - Concept of abuse of collective dominance



Theory of harm for abuse of collective dominance

1 – Concept of collective dominance

Theory of harm for collective abuse of dominance – Concept of collective dominance

- Test for collective dominance developed by the
Court of Justice of the European Union

- Italian Flat Glass
- CMB
- Airtours
- Laurent Piau
- Sony/BMG



Theory of harm for abuse of collective dominance – Concept of collective dominance

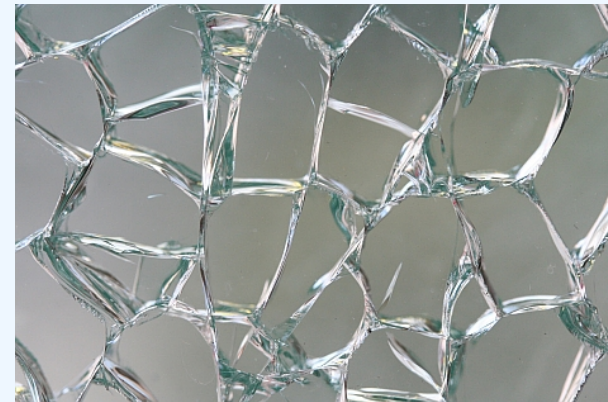
- *Italian Flat Glass 1992*

- two or more independent economic entities
- united by **economic links**
- Examples of such economic links:

Agreements

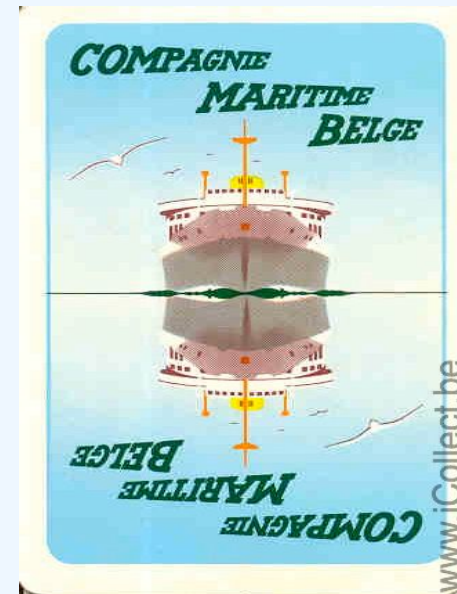
Licences

- affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers



Theory of harm for abuse of collective dominance – Concept of collective dominance

- *Compagnie Maritime Belge 2000*
 - **Collective entity** vis-à-vis competitors, trading partners and consumers
 - Existence of an agreement or of other links in law is not indispensable
 - **Other connecting factors**
 - Depending on economic assessment
 - Particularly on an assessment of the structure of the market



Theory of harm for abuse of collective dominance – Concept of collective dominance

- *Airtours 2002*



- 3 conditions for collective dominance:

- 1) Market transparency (common understanding of the position)
- 2) Mechanism of retaliation
- 3) Lack of competitive pressure from outsiders to the oligopoly



Theory of harm for abuse of collective dominance – Concept of collective dominance

- *Laurent Piau 2005*
 - 3 conditions of *Airtours* are applicable to situations arising under 102 TFEU



Theory of harm for abuse of collective dominance – Concept of collective dominance

- *Sony/BMG 2008*

- Confirms the *Airtours* conditions

- Refines the test of market transparency

(taking into account the monitoring mechanism which facilitates the information on competitors market behaviour)

- Refines the test for retaliation

(mere existence of a credible deterrent mechanisms is sufficient to establish the condition of retaliation)



Theory of harm for abuse of collective dominance – Concept of collective dominance

- Commission Discussion Paper 2005

- Reiterates the case law
- Special focus on
 - Collective entity
 - Application of the *Airtours* conditions



- Commission Guidance Paper 2008

- Does not mention the principle of collective dominance
- This shows that it is not an enforcement priority of the Commission

Theory of harm for abuse of collective dominance

2 – Abuse of collective dominance

Theory of harm for abuse of collective dominance – Concept of abuse of collective dominance

- *Irish Sugar 1999*

- Vertical collective dominance

supplier – distributor

- **Joint or individual** abusive conduct

(abuse does not necessarily have to be the action of all the undertakings)

- It is enough for that abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market.



Theory of harm for abuse of collective dominance – Concept of abuse of collective dominance

- Examples of abusive conduct
 - (a) unfair purchase or selling prices
 - (b) limiting production, markets or technical development
 - (c) discriminatory pricing
 - (d) tying and bundling



Current enforcement in the EU

- By the Commission



Current enforcement in the EU

- By national competition authorities
 - France 2001
 - Collective dominance in the markets for water and purification
 - Abusive conduct relating to tendering procedures
 - Greece 2009
 - Collective dominance on the market of foreign educational books
 - Abusive conduct relating to unfair commercial terms
 - Spain 2010
 - Collective dominance on the retail mobile telephone market
 - Abusive conduct relating to discriminatory tariffs

Challenges in enforcement against collective dominance

- In all past Commission decisions, the undertakings were connected by legal or structural links
- The biggest challenge is thus to act against abusive behaviour emanating from a purely oligopolistic market structure in which there is a purely tacit collusion between the market players



Challenges in enforcement against collective dominance

– Tackling tacit collusion in oligopolistic markets

- Tacit collusion in oligopolistic markets

	RED	Black
RED	1 / 1	1 / 3 _⊕
Black	1 / 3 _⊕	2 / 2

Challenges in enforcement against collective dominance

– Tackling tacit collusion in oligopolistic markets

- Problem of tacit collusion in oligopolistic markets
 - Welfare loss for society
 - Mutes competition
 - Higher prices
 - Problem of identification
 - Prove the absence of vigorous competition
 - Distinguish tacit collusion from unconscious parallel behaviour
 - Finding an abuse

Challenges in enforcement against collective dominance

– Tackling tacit collusion in oligopolistic markets

- Case study: parallel exclusionary behaviour

- Visa & MasterCard



Challenges in enforcement against collective dominance

– Tackling tacit collusion in oligopolistic markets

- Case study: parallel exclusionary behaviour
 - Potential harms to competition
 - allows the excluders to sustain higher prices
 - reinforces parallel pricing
 - blocks product innovation
- it hinders the entry of higher-quality substitutes and lower-price substitutes.

Concluding remarks

- Lack of current enforcement in the EU
- Some anti-competitive behaviour remains untouched
- Existence of an enforcement gap



Thank you for your attention

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