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BERGEN CENTER FOR COMPETITION LAW AND ECONOMICS

Abuse of Collective Dominance: The Need for a New Approach

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Introduction

- Topic: The scope for application of Art 102 TFEU (the prohibition of abuse of dominance) on coordinated behaviour in oligopoly markets
- The application of Art 102 on collective dominance as such is established
- The concept of abuse of collective dominance is however underdeveloped
 - We propose a new approach to the concept of abuse in cases concerning collective dominance
 - An approach less connected to traditional single firm abuses

Outline

- The traditional approach
 - The concept of collective dominance in case law
 - Examples of conduct with coordinated effects
 - Case law on abuse of collective dominance
- A new approach to oligopolies and Art. 102 TFEU
 - Demonstrating that ‘abuse’ is a flexible concept
 - Demonstrating that conduct with coordinated effects which strengthens a collective dominant position may amount to an abuse.

The traditional approach

The concept of collective dominance

- The application of Art. 102 TFEU on collective dominance was first acknowledged by the EU Courts in 1992
 - The General Court's judgment in *Italian Flat Glass* (joined cases T-68, 77 & 78/89).
- Several judgments since then applying either Art 102 or the previous merger regulation to collective dominance
 - The previous merger regulation included a dominance criterion
- These judgments apply two (sometimes three) conditions for finding a collective dominant position:
 - The undertakings must be able to adopt a common policy on the market
 - They must be able to act to a considerable extent independently of their competitors, customers and consumers (the traditional dominance test in Art 102)
 - Some judgments refer to a third condition, which is that there must be some kind of an economic link between the undertakings

The concept of collective dominance

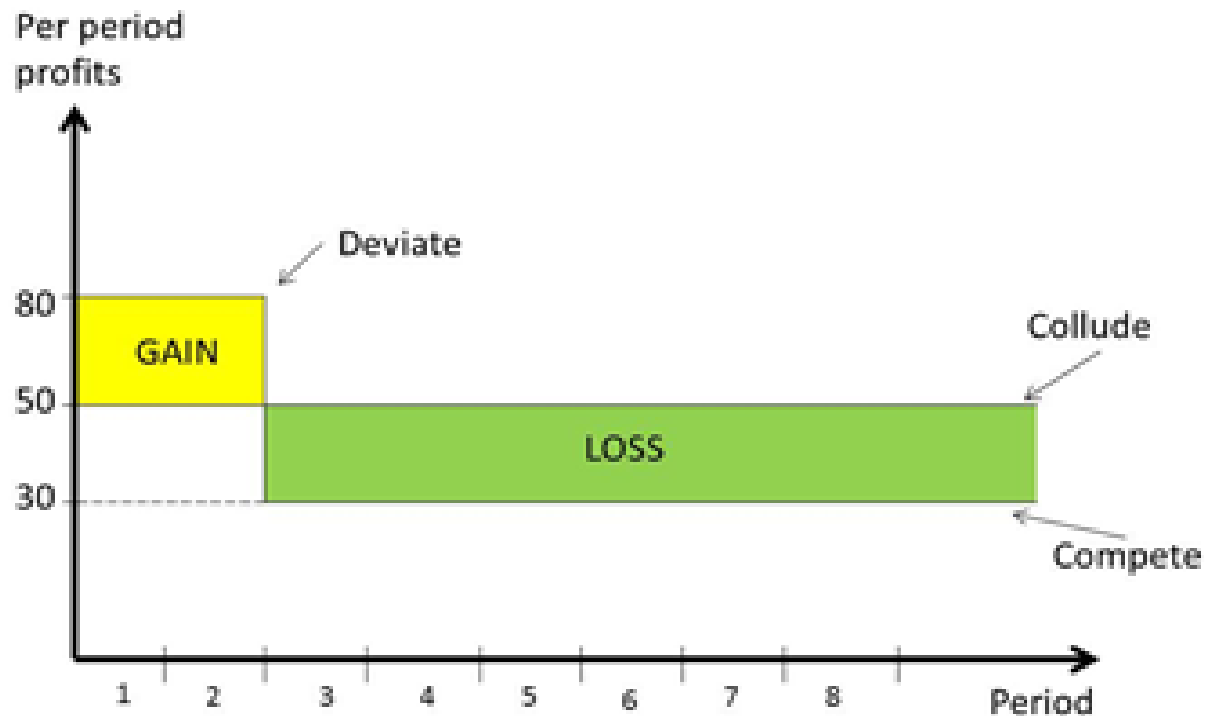
- In its *Airtours* judgment (case T-342/99) the General Court elaborated on the application of the concept of collective dominance to oligopolistic markets (see para 62)
- The Court presented three conditions for finding collective dominance based on an oligopolistic market structure:
 - High degree of transparency
 - Companies must precisely and quickly be able to become aware of other companies' market conduct
 - Tacit coordination must be sustainable over time
 - Threat of retaliation for deviating companies
 - No or little actual and potential competition

The concept of collective dominance

- *Airtours* was a merger case, not an art. 102 case
- In its *Piau* judgment the General Court confirmed that the same test applies to art. 102 (para 111).

Abuse of collective dominance

- The most typical effect of a collective dominant position in an oligopoly is collusion

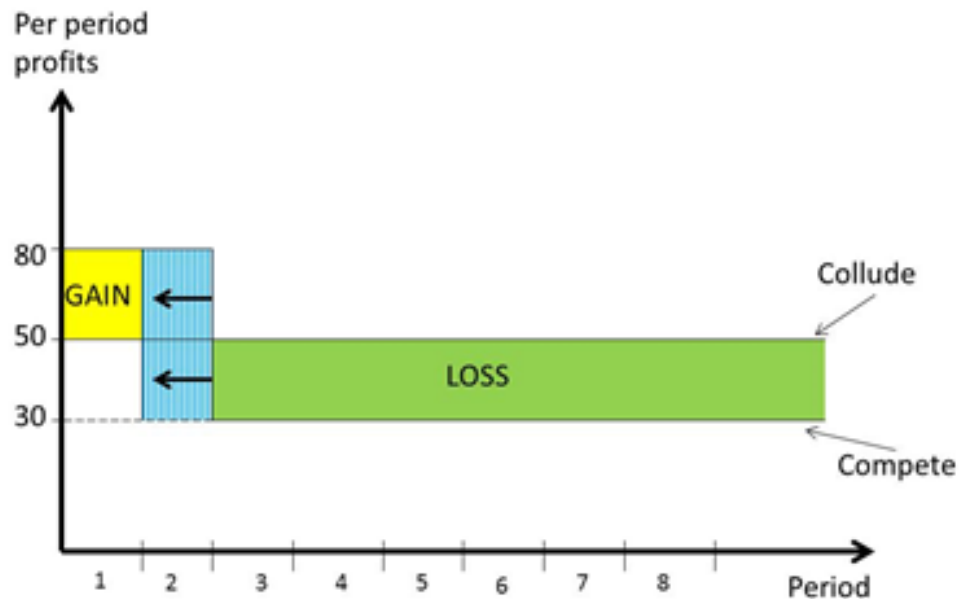


Abuse of collective dominance

- Interfering with the tacit collusion as such is problematic
 - Would have to interfere with or sanction the price level
 - When is a price excessive?
 - What is the suitable remedy?
 - Art. 102 designed to prohibit conduct
 - The coordinated effects in a oligopoly is a consequence of the market structure
- We should hence discuss if other forms of behaviour liable to restrict competition in an oligopoly may amount to an abuse of a collective dominant position

Conduct with Coordinated Effects

- Meet-Competition Clause
 - Reducing the profit gained from deviation and may facilitate collusion



- Unilateral introduction of MCC falls outside art 101.

Conduct with Coordinated Effects

- Most Favoured-Customer Clause
 - Promising each customer the same offer as given to other customers
 - Increases the cost of deviating, especially if offered retroactively
 - On the other hand it may also make it costly to retaliate through aggressive competition
- Minority Shareholding
 - Acquiring a minority shareholding in a competing firm reduces short term gain from deviating, as part of the losses inflicted on other firms is internalized
 - May also increase transparency

Comparing single firm abuse and abuse of collective dominance

- Traditional single firm abuses are exclusionary conduct
- Conduct with coordinated effects in an oligopoly are not exclusionary
- Instead of excluding rivalry from outsiders, the conduct “excludes” rivalry among the collective dominant firms

Case law on Abuse of Collective Dominance

- Only a few cases, and these cases did not concern typical oligopolies
- No discussion of the concept of abuse of a collective dominant position in these judgments
- General statements by the courts indicating that the abuse criterion is the same for collective dominance as it is for single firm dominance
 - See case C-393/92, *Almelo* and Case T-228/97, *Irish Sugar*.

Summary (so far)

- Companies in an oligopoly may be found to be in a collective dominant position
- The concept of abuse mainly covers exclusionary abuses?
- Possibly anti-competitive conduct in an oligopoly is not exclusionary
- Mismatch between the traditional concept of abuse and possible harmful conduct in oligopolies
- The Courts state that the concept of abuse is identical for single firm dominance and collective dominance
 - Does that imply that the types of conduct which may restrict competition in an oligopoly market falls outside the scope of art 102?

A New Approach to Abuse of Collective Dominance and oligopolies

Weaknesses in the traditional approach

- The traditional approach, applying the same abuse-concept and tests on collective dominance as single firm dominance, is not effective
- It has lead to a discussion of applying unfair prices as a possible abuse of collective dominance
 - Which is not a suitable approach
- It doesn't take into account the difference in effects
 - The dominant position itself rests on different structural factors (coordinated and not unilateral effects)
 - And potential anti competitive effects may occur in very different ways
- **A new approach is needed – Does the legal framework allow a new approach?**

The definition of abuse

- Case 6/72, Continental Can: «The strengthening of the position of an undertaking may be an abuse», para 27
- Case 85/76, *Hoffmann-La Roche*, para 91
- *“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to **influence the structure of a market** where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, **has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.**”*
- The definitions provide a flexible legal basis focusing on the effects of the conduct

The definition of abuse applied to conduct with coordinated effects in an oligopoly

- The definitions provide a flexible legal basis to adjust the concept of abuse to the possible anti-competitive effects which may arise in oligopolies
- By restricting or eliminating ‘internal’ competitive pressure a collective dominant position may be **strengthened**
 - Similar to how eliminating external competitive pressure may strengthen a single firm dominant position
- The types of conduct which may reduce incentives to deviate from collusion, may have a **negative effect on competition**
- The definition of an abuse does not prevent adjusting the concept to catch conduct restricting competition in oligopolies

Is case law an obstacle to adjusting the concept of abuse for collective dominance?

- Are the statements by the courts about the abuse criterion for collective dominance being the same as for single firm dominance and obstacle?
- No
 - Case law on the application of art 102 in conjunction with art 106 shows that the concept of abuse may be adjusted to fit with the relevant context (or to fit the relevant theories of harm)
 - These are cases where a public company or a company granted special or exclusive rights are dominant
 - In these cases the courts have developed different tests for finding abuse, for cases regarding e.g. extending the dominant position to other markets and unavoidable demand limitation.
 - The main point here being that the case law demonstrates that art 102 has an inherent flexibility which may lead to ‘new’ forms of behaviour being classified as abusive

Summary

- The concept of abuse of a collective dominant position may cover practices different from those constituting an abuse of single firm dominance
- The competitive concern in oligopolies are different than in single firm dominance
- Practices such as MFC, MCC and acquiring minority shareholding are practices falls outside the scope of art 101
 - Arguably a need for them to be covered by art. 102.

The next step

- Developing suitable legal tests for assessing when these practices should amount to an abuse and when they should not.