

Collective dominance

Collective dominance: An overview of national case law

Unilateral practices, Abuse of dominance, Collective dominance, Investigations/Inquiries, Foreword, All business sectors

Note from the Editors: Although the e-Competitions editors are doing their best efforts to build a comprehensive set of the most important antitrust cases, the completeness of the database can not be guaranteed. The present foreword provides readers with a fair view of the existing trends based on cases reported in e-Competitions. As this article draws a comparison between European Union law and EU member States national case law, therefore excluding analysis from non-EU member States case law, the editors have included in this special issue such foreign case law in order to broaden the scope. Readers are welcome to bring to the editors knowledge of any other relevant cases.

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I am delighted with this invitation to contribute a foreword to this collection relating to the concept [1] of collective dominance. Given the purpose of this collection, I will use this opportunity to set out and reflect upon the current EU law relating to collective dominance and how this compares with domestic regimes. I will pay particularly close attention to the concept of collective dominance in the UK, but also draw cases from other Member States as well as outside the EU into the discussion.

I. Collective Dominance in EU law

(a) Provenance

Article 102 TFEU, which prohibits any “abuse by one or more undertakings of a dominant position,” is so well known it does not warrant being stated in full here. What is of crucial importance for discussion of the issue of collective dominance is the phrase “one or more,” which is to be found in Article 102.

At the outset, the “or more” part of the phrase “one or more” was generally thought to relate to situations where there were multiple undertakings within the same corporate group or, more broadly, constitute different parts of the same economic entity [2]. The problem with adopting that understanding of Article 102 would have been that it would have created inconsistency with the understanding of the term “undertaking” developed under Article 101 TFEU [3]. In *Flat Glass* [4], the General Court confirmed that the phrase “one or more” meant that economically independent undertakings could jointly occupy a dominant position in a market:

There is nothing in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a

dominant position vis-à-vis the other operators on the same market [5].

With this dictum, and the examples provided by the General Court, we saw the start of collective dominance in EU jurisprudence.

As starts go, this was not a particularly good one. The judgment in *Flat Glass* was capable of two different interpretations [6]. The conflicting views revolved around precisely what would count as an “economic link.” One view, the broader of the two, was that economic links could be inferred from the structure of a particular market. The concept of an economic link was thus capable of regulating, in some way, tacit collusion between undertakings. Another view, the narrower of the two, was that inferences from market structure would not suffice and something altogether more tangible, such as an agreement of some kind, would be required. This view was lent weight by the examples given by the General Court in *Flat Glass*, which referred to agreements and licences.

Adoption of the narrower view would have meant that the concept of collective dominance would have actually added very little indeed to the existing law. Agreements between undertakings were already controlled under Article 101. The only use for the concept of collective dominance would be in those situations where agreements between undertakings fell outside of Article 101(1) or met the Article 101(3) criteria.

(b) Development

The Commission’s decisions relating to collective dominance immediately post-*Flat Glass* were concerned solely with situations involving agreements [7]. Despite this, the narrower view of “economic links” would however, eventually be rejected. It was in *Almelo* [8], an Article 267 reference, that the Court of Justice held that “in order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market [9].” This was far from a detailed exposition of what sorts of links were necessary but it seemed to endorse the wider view, portraying the presence of an agreement as only an indication that undertakings were coordinating.

Since those early days, the concept of collective dominance has been forged in judgments, relating not only to Article 102 but also to the European Merger Regulation (‘EUMR’). The provisions of the EUMR, prior to alterations made in 2004 [10], were ambiguous on the question of whether or not it authorised the prohibition of mergers that would have the effect of creating a collective dominant position in a market. Undeterred by this ambiguity, the Commission adopted the view that the Regulation did so apply, almost from the outset [11].

The Commission’s view was accepted, in *France v Commission*, [12] by the Court of Justice. Subsequently, in *Gencor* [13], the General Court confirmed that “a relationship of interdependence existing between parties to a tight oligopoly” which created a likelihood of coordination was sufficient to establish collective dominance.

In *Airtours* [14], the General Court built upon *Gencor*. It stated that collective dominance could be said to exist where each member of the dominant entity would:

[C]onsider it possible, economically rational, and hence preferable, to adopt on a lasting

basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 101.

The Court set out a three-limbed test:

[F]irst, each firm knew how other members were behaving (they could monitor the market to see if they were adopting the policy; secondly, tacit co-ordination was sustainable over time, (i.e., there was not an incentive to depart from the common policy on the market); and thirdly, the foreseeable reactions of competitors (actual and potential) and customers would not jeopardize the results expected from the common policy.

In *Impala*, [15] the General Court affirmed these criteria and further elaborated that the characteristics of the market must provide evidence of those conditions [16].

(c) Alignment

The concept of collective dominance clearly applies across Article 102 and EUMR scenarios. Despite the fact that in the former context the concept is applied retrospectively and in the latter context it is applied prospectively, the same legal principles seemingly apply to both Article 102 and EUMR situations. This can be seen in the consistent cross-fertilisation of the jurisprudence developed in both the Article 102 and EUMR contexts. For example, in *Gencor* the General Court based its ruling upon the interpretation of the concept of collective dominance set out in the judgment in *Flat Glass*, an Article 102 case [17]. Similarly, in *Irish Sugar* [18], an Article 102 case, the General Court relied upon the Court of Justice's ruling in *France v Commission* [19] as a basis for deciding that:

[A]joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers [20].

A third example can be seen in how the Court of Justice in *CEWAL* and the General Court in *TACA*, when defining the concept of collective dominance for the purposes of Article 102, relied on the decision in *France v Commission*, which related to the EUMR.

In the appeal following the *CEWAL* decision, known as *Compagnie Maritime Belge*, the Court of Justice gave extensive consideration to collective dominance [21]. The judgment of the Court of Justice was preceded by a particularly helpful opinion from Advocate General Fennelly [22]. In the judgment of the Court, collective dominance was treated as a unitary concept. It was further affirmed that, what may somewhat ineloquently be called, tangible links are not necessary in order to establish collective dominance in Article 102 cases. The Court of Justice also outlined a two-stage process necessary to prove the existence of a collective dominant position: (i) a collective entity must

be proved to exist; and (ii) it must be shown that the entity holds a dominant position in the market.

When considering how the existence of a collective entity is to be established, the Court relied on the decisions in *Amelo* and *France v Commission*. Those cases established the necessity of proving “economic links or factors which give rise to a connection between the undertakings concerned.” The Court held that such links could, but would not necessarily, be established by an agreement, decision, or concerted practice within the meaning of Article 101 by the undertakings (even if exempted from the prohibition in Article 101(1) by way of Article 101(3)). The Courts did, however, emphasize that:

[T]he existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question [23].

Along with the General Court’s decisions in both *Gencor* and *Airtours*, this view seemed to confirm that undertakings which are able to engage in a parallel manner on a market by tacitly coordinating their behaviour may be found to, as a collective unit, hold a dominant position on a market. Further support for this position is available in the General Court judgments in *Atlantic Container Lines AB (TACA)* [24] and *Laurent Piau* [25].

(d) Abusing a collective dominant position

Whether collective dominance exists within a market is one question. Whether a collectively dominant entity has abused its position in the market is another question altogether [26]. There are multiple ways abuse is possible in this context.

First, however, it must be noted that the law seems to require the Commission, for the purposes of a finding of collective dominance under Article 102, not to merely re-work the basis of a finding for an Article 101 infringement. In *Flat Glass*, [27] the Commission had found the undertaking’s communication of, for example, identical prices to customers and granting of identical discounts constituted an abuse under Article 102. The General Court criticised the Commission for having rehashed the facts of an Article 101 abuse in order to portray an Article 102 abuse. Subsequently, the Commission seeks to elaborate, for the purposes of establishing an Article 102 abuse, what the relevant market is, the undertakings role in that market, and why an Article 102 abuse has specifically occurred. While this is so, the conduct deemed to be abusive of Article 102 in *French-West African Shipowners’ Committee, CEWAL*, and *TACA* essentially reflected the basis upon which the Commission also founded an Article 101 abuse [28].

Article 102, as is well known, has been invoked as basis for condemning a broad spectrum of conduct [29]. Article 102 prohibits anti-competitive practices, such as predatory pricing and tying. It also prohibits exploitative practices, such as excessive pricing. Where two undertakings are not linked by some form of agreement or tangible link, it must be questioned how useful these concepts of abuse, developed in relation to independently dominant undertakings, will prove to be. I will now briefly consider, first, exploitative behaviour and excessive pricing and, second, collective exclusionary abuses.

Rare are the instances where Article 102 has been invoked to condemn pricing practices [30]. It is no easy feat to demonstrate that prices are excessive. The Commission has also avoided adopting the role of price regulator [31]. It is therefore unlikely, even though theoretically possible, that the Commission will seek to condemn oligopolists for excessive pricing. If the Commission were to do so, there is also the possibility that the Commission would ultimately be condemning a situation which could be said to be “natural” in an oligopolistic market [32].

What of collective exclusionary abuses? In *TACA* [33], the Commission found that members abused their dominant position by (i) agreeing to place restrictions on the availability and content of service contracts [34] and (ii) altering the market structure in order to underpin the TACA’s dominant position. On appeal, the first finding of abuse was affirmed. However, the General Court found that the Commission had failed, on the facts, to demonstrate that the members had induced potential competitors to join the TACA [35]. It is hard to envisage what other abuses may be perpetrated by undertakings partaking in non-collusive parallel behaviour. It would be difficult to explain collective decisions refusing to supply an undertaking, or targeting a new entrant to the market, on the grounds of mutual interdependence. However, it could be argued, for example, that an abuse will have been committed by collectively dominant undertakings which are inefficient or which refuse to innovate or perhaps which all impose exclusive purchasing commitments on their distributors [36].

What of a situation where one undertaking that is one part of an entity that occupies a collectively dominant position on a market commits an abuse? The General Court, in *Irish Sugar plc v Commission* [37], held that it was possible for an individual undertaking to act in a way that abuses its collectively held dominant position:

While the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the 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. Therefore, undertakings occupying a joint dominant position may engage in joint or individual abuse conduct. [38]

This decision arose in a situation where a collective dominant position was occupied on a vertical level by an undertaking and its distributor. The relationship in question in *Irish Sugar* was so close that the undertakings came very near to being considered as a single economic unit [39]. If the Commission had been able to reach that then conclusion the concept of collective dominance would have been entirely extraneous. It ought to be further noted that, in *Irish Sugar*, the undertakings were patently acting to maintain the collective dominant position [40]. Out with such situations, it is less easy to see how anticompetitive conduct carried out by a single undertaking or group of undertakings which form a part of a collectively dominant entity can be deemed abusive—it is not a simple task to determine whether the granting of loyalty rebates, discriminatory pricing, or selective price-cutting is abusive or an indicator of competition existing between oligopolists [41]. That said, the notion of an individual undertaking abusing a collectively dominant position may prove helpful in some situations. It could prove useful, for instance, where an undertaking is targeting a new market entrant in order to protect the collectively dominant position) [42]. It could also prove useful in prohibiting price cuts targeted at a price-cutter that is having a weakening effect on extant

coordination in an oligopolistic market.

Having traced how the concept of collective dominance emerged in EU law, it seems clear that, while Article 102 may be able to be interpreted to include economic links based upon mutual interdependence, the concept of abuse, which was developed in the context of controlling individually dominant firms, seem ill-at-ease in the collective dominance context. The story of collective dominance in EU law therefore seems to be, for the most part, a tale of the Commission and the Court, in absence of any alternative mechanism, using “what they have” to deal with the problems presented by oligopolistic markets, even if “what they have” was not necessarily designed for that purpose.

II. Collective dominance in the UK

As this is a collection dedicated to highlighting the major cases of various jurisdictions relating to collective dominance, a little inward reflection on one’s own domestic law relating to collective dominance seems fitting.

In UK law, the Article 102 prohibition is reflected in the Chapter II prohibition in the Competition Act 1998. That Act, through section 60, instructs that consistency should exist between EU and domestic jurisprudence, while the decisions of the Commission should also be taken into account. The above survey of the EU law relating to collective dominance is thus applicable in the UK sphere. The pervasiveness of EU law relating to collective dominance in the UK is such that domestic jurisprudence adds little of substance but there are, of course, possibilities for divergence. This can be seen in the Competition Appeal Tribunal (CAT) case of *Brannigan v OFT* [43].

In *Brannigan*, the claimant, a newspaper proprietor, complained to the OFT that two rival publishers—Newsquest and Johnston Press—had been engaging in exclusionary practices, which ultimately had the effect of forcing him out business. The OFT initially refused the complaint. Then, upon reassessment, the OFT reached the conclusion that there was not sufficient evidence of either dominance (individual or collective) or abuse. Mr Brannigan appealed to the CAT on various grounds, including that the OFT had erred in concluding that the evidence before it did not prove sufficient for a finding that there had been a collectively dominant position held in the market between Newsquest and Johnston Press.

The OFT had applied the *Airtours* criteria during their assessment of Mr Brannigan’s complaint. On the basis of those criteria, they made three main findings. First, they found that, although there was transparency in the market in the sense that newspapers would have known the advertisers in the various newspapers, there was not sufficient evidence to establish that newspapers would have generally know the price of that advertising. Second, they found that a co-ordinate market could only possibly be established in a small part of the market. Third, larger publishers and powerful advertisers appeared to have the ability to constrain tacit collusion. There was also no evidence to support the existence of tacit collusion and the dynamic nature of the market made it appear that the two undertaking complained of—Newsquest and Johnston Press—were actually competition. The existence of collective dominance in the market was thus considered highly unlikely.

The claimant had various complaints about the assessment undertaken by the OFT. First, he argued that the OFT’s suggestion that the market was “dynamic” did not align with the increasing

concentration of local newspapers and other indicators that, he alleged, suggested the market may not be competitive (those factors included the practice of “clustering” whereby publishers focus their efforts on a particular geographic area, a “live and let live” approach whereby publishers tacitly share the overall market and create dampened competitive conditions in those areas where they are present, and the difficulties faced by a new entrant to the market). Second, the claimant argued that the OFT had applied the *Airtours* criteria wrongly or too narrowly. This claim was rooted in two bases: (i) that there is transparency in advertising prices because sales teams ensure they acquire that information, which is often freely given by customers; and (ii) that the OFT were incorrect to assume that retaliation from the other local publishers would be likely, as there was no evidence for this position.

The argument relating to collective dominance advanced by the claimant was made, simply, because his other lines of argument faced obvious difficulty (such as the difficulty of, given the market share of the undertakings complained of, establishing individual dominance). The CAT ultimately rejected the argument relating to collective dominance. It could not be found that the market prices were transparent. However, the CAT did make some interesting comments relating to the requirement of transparency. It suggested that it is: “not convinced that it is necessary, in every case of collective dominance, to show that there is price transparency in the market being considered. [44]” As to the likelihood of retaliation by other local publishers, the Competition Commission’s Reports on mergers involving Newsquest and Johnston did not appear to support Mr Brannigan’s complaint that they might support, tacitly or otherwise, the elimination of new independent entrants on the basis of showing an example to others, although the Commission did refer the existence of a “live and let live” mentality.

Brannigan is a good example of a case of collective dominance at the national level for two reasons. First, it shows the prevalence on the EU jurisprudence at national level on this issue. Second, it shows how national courts may adopt slightly differing positions to the EU approach. The judgment in *Brannigan* appears to differ from EU law on its interpretation of the necessity of transparency in a market; whereas the CAT is “not convinced... it is necessary... in every case,” EU law seems to assign it a key role in proving that the *Airtours* criteria have been met.

There are some further features, notably two, which are significant in relation to how issues of collective dominance are handled in the UK. First, the market investigation provisions of the Enterprise Act 2002 provide an alternative mechanism whereby oligopolistic markets may be investigated. Second, the domestic system of merger control requires the Competition and Markets Authority to, in appropriate situations, determine whether a merger may be expected to result in a “substantial lessening of competition.” I will now briefly consider each in turn.

(a) Market investigations under the Enterprise Act 2002

Market investigations (previously conducted by the Office of Fair Trading and now by the Competition and Markets Authority) are important to the handling of the problem of collective dominance in the UK. There is no space here to set out the market investigation provisions of the Enterprise Act 2002 in any detail [45], and the competition authorities have guidance available [46]. It suffices to say that collective dominance is plainly a complicated problem and the possibility of market investigations, an inherently broad exercise, operating as “safety net [47]” in situations where Articles 101 and 102, and thus the corresponding domestic provisions, may seem to be blunt

instruments can be useful.

(b) Merger investigations under the Enterprise Act 2002

Under the Enterprise Act 2002, “relevant merger situations” will be assessed by reference to whether they will result in a “substantial lessening of competition. [48]” Roughly the same standard applied prior to the Act, under the guise of a public interest test. The idea of collective dominance is, therefore, not particularly new in the UK merger context and the UK competition authorities have been concerned with tacit collusion for many years [49]. As Whish and Bailey put it, “UK merger law... has not had to suffer the growing pains of the concept of collective dominance. [50]”

A recent example of a merger situation that was investigated is the (now abandoned) merger proposal between Pure Gym Limited and The Gym Limited [51]. Pure Gym and The Gym are the leading budget gyms in the UK, they operate over 100 gyms between them. Furthermore, the budget gym market is quickly expanding and Pure Gym and The Gym have expansion plans. The merger was investigated on the basis of concerns that it would lead to high memberships fees, a reduction in quality, and diminished choice for customers.

The predecessor authorities to the Competition and Markets Authority, the Office of Fair Trading and the Competition Commission, produced clear guidance as to how they would approach collective dominance in the context of merger investigations. The gist of the guidance was that the economic considerations are the same as when the issue arises in the context of a market investigation [52], except for the fact a prospective analysis must be carried out in the context of mergers.

The general nature of the substantial lessening of competition test seems an apt way to tackle the complex issue of collective dominance. It, in essence, asks a very “straightforward question” [53]: will competition in the market after the merger be substantially less because of it? Where the possibility of tacit collusion would increase due to a prospective merger then there is likely to be a good case for suggesting that competition in the market will be “substantially less.” Cases relating to coordinated effects under the Enterprise Act have, however, been rare [54].

III. Comparative lessons on collective dominance

Looking beyond the UK, different Member States naturally have differently configured mechanisms for handling collective dominance issues, some of which are explored in this collection. There are some general trends that it is useful to highlight [55].

First of all, what is obvious from the domestic jurisprudence and from this collection is the high level of synchronization between domestic and EU jurisprudence on the issue of collective dominance across all of the Member States. As such, changes in the EU law have been reflected in national jurisprudence and the current law seems to be applied with an almost extraordinary level of consistency. However, as was seen in the *Brannigan* case, national courts, tribunals, and authorities are capable of deviating from the apparent norms of EU law. *Brannigan* does not stand alone as an example of this possibility [56]. That being said, these departures from EU jurisprudence are certainly exceptional, as opposed to being a regular occurrence.

In terms of contexts where collective dominance issues are most likely to arise in the domestic sphere, most cases relate to mergers. However, no one sector seems to generate more collective dominance than any other. Sectors such as telecoms, banking, and energy may appear a little more frequently in the national case law than others, but there is little to suggest these sectors are particularly vulnerable to collective dominance problems.

These trends were observed by Nicholas Petit and Normal Neyrinck in their 2011 review of national authorities on collective dominance [57]. Since that review, there have been some further developments at the national level, which will now be considered.

Shortly after the 2011, the German Federal Court of Justice [58] overturned a decision of the Higher Regional Court of Düsseldorf, a judgment which itself had overturned a decision of the Bundeskartellamt prohibiting Total Deutschland GmbH from acquiring 59 petrol stations from OMV Deutschland GmbH. The Higher Regional Court's judgment held that the Bundeskartellamt was wrong to conclude that several petrol companies, including Total and OMV, occupied a collectively dominant position on a certain regional market. The Federal Court did not follow this view, specifically noting that the existence of price fluctuations within a market did not preclude a finding of collective dominance. The Federal Court therefore returned the case back to the Düsseldorf court.

In June 2012, the Austrian Council of Minister adopted proposals to reform the Cartel Act and the Competition Act (the proposals were subsequently enacted as law) [59]. Within the proposals were new provisions related to collective dominance. The effect of the provisions were that two or more undertakings would be considered to occupy a dominant position if there is no significant competition amongst undertaking and undertakings did not have external competition. The provisions also included a rebuttable presumption that a collective dominant position exists on a market where: (i) two or three undertakings have a market share of 50% or more; and (ii) where up to five undertakings have a collective market share of 66.6% or more.

In October 2012, the Federal Antimonopoly Service of Russia suggested new pricing guidelines [60]. Abuse of dominance issues form a large part of the Service's workload and these guidelines would be highly relevant to potential collective dominance situations. Russia has maintained a "structural" approach to collective dominance, in contrast to the "behavioural" approach adopted in *Airtours*. Therefore, collective dominance issues may arise in Russia where the combined market share of undertakings goes beyond a certain threshold. Given this approach and the content of the guidelines, the Russian approach to collective dominance is likely to remain much more "heavy handed" than national authorities within the EU.

In November 2012, the Bosnia and Herzegovina Competition Authority (Konkurencijsko vijeće BiH) held there to be an abuse of a collective dominant position in the fast money transfers market [61]. The abuse occurred through the undertakings including exclusivity clauses in their cooperation agreements with banks and postal services, which the Konkurencijsko vijeće BiH found to have foreclosed the market for existing competitions and new entrants. The effect of this foreclosure was that choice for consumer was limited. The decision of the KV reflects the 2010 decision of the Serbian Competition Authority, where an undertaking's agents were found to be abusing their dominant position by use of exclusivity clauses in their cooperation agreements with the banks [62]. The Court of Bosnia and Herzegovina has since considered the Konkurencijsko vijeće BiH's decision [63]. The appellant claimed, amongst other complaints, that the decision in relation to the

existence of collective dominance position was incorrect, as there were no structural, contractual or other links between the four companies except for the agency agreements with another undertaking. The Court rejected the appellant's argument and upheld the Konkurencijsko vijeće BiH's decision, finding that the relevant undertakings were in fact implementing common commercial policy.

In January 2013, the Kazakhstan administrative court fined two regional cement producers for tacit collusion [64]. A division of the antimonopoly agency investigated a regional cement market where two companies occupied a dominant position (with an above 50% market share). The Agency found that the undertakings had acted in parallel to increase the wholesale price of cements in a similar, but not identical, timeframe. The Agency, upon finding a breach of national law (which was to be found in Article 11 of the Law on Competition), referred the case to the first instance court, who concurred with the Agency's conclusion and imposed fines. An appellate court (Appeals panel of judges in civil and administrative matters of the East Kazakhstan Oblast Court) further agreed with the Agency and first instance court, while imposing further fines.

IV. Conclusion

The developments post-October 2011, seem to evince the points noted by Nicholas Petit and Normal Neyrinck in their review. There remains a large amount of harmonisation within EU member states and no specific sectors seem more prone to collective dominance issues than others. However, many recent noteworthy cases and developments have occurred outside of the EU, and they show the amount of divergence in approach that is possible in these areas. The Russian structural approach, for instance, now stands in stark contrast with the behavioural approach that is the standard across the EU post-*Airtours*.

Given the pervasive overlap between EU jurisprudence and national jurisprudence on the issue of collective dominance along with the possibility of deviation from EU law norms, an education is available through considering the places where similarities and variations exist between jurisdictions. Lessons may also be learnt by examining the law and practices of non-EU states. This collection, with its detailed analyses of cases relating to collective dominance in a wide range of jurisdictions, is capable of being the source of much learning for competition lawyers everywhere.

[1] Some would prefer the use of the word "concepts" here, but I shall stay in line with the Court for now: Case T-102/96 *Gencor v Commission* [1999] ECR II-753 [276]-[277].

[2] Case 85/76, *Hoffmann La-Roche v Commission* [1979] ECR 461 [39].

[3] On the interpretation of Article 101, see: Alison Jones and Brenda Sufrin, *EU Competition Law* (2014, OUP, 5th edn) 127 *et seq.*

[4] Cases T-68, 77-78/89, *Societa Italiana Vetro SpA v Commission* [1992] ECR II-1403 [357]-[358].

[5] *Ibid* [358].

[6] Alison Jones and Brenda Sufrin, *EU Competition Law* (2014, OUP, 5th edn) 718.

[7] See *French-West African Shipowners' Committees* [1992] OJ L134/1; CEWAL [1993] OJ L34/20;

Trans-Atlantic Conference Agreement (TACA) [1999] OJ L95/1; *Irish Sugar* [1997] OJ L258/1.

[8] Case C-392/92, *Amelo v NV Energiebedrijf IJsselmij* [1994] ECR I-1477.

[9] *Ibid* [42]-[43].

[10] Reg. 4064/89 [1989] OJ L395/1, as amended by Reg. 1310/97 [1997] OJ L180/1. Since replaced by Reg. 139/2004 [2004] OJ L24/1.

[11] Case IV/M190, *Nestle/Perrier* [1992] OJ L356.

[12] Cases C-68/94 and C-30/95, *France v Commission, Societe Commerciale des Potasses et de l'Azote v Commission* [1998] ECR I-1375 [178] (Commission decision, Case IV/M308 [1994] OJ L186/30).

[13] Case T-102/96 *Gencor v Commission* [1999] ECR II-753.

[14] Case T-342/99, *Airtours v Commission* [2002] ECR II-2585. See also: Case T-464/04, *Independent Music Publishers and Labels Association (Impala) v Commission* [2006] ECR II-2289.

[15] Case T-464/04, *Independent Music Publishers and Labels Association (Impala) v Commission* [2006] ECR II-2289

[16] In an appeal from this case - *Bertelsmann and Sony Corp v Commission* Case C-413/06 P, [2008] ECR I-4951 - the Court of Justice expressed the conditions in slightly different terms. The substantive criteria was, however, in line with the views expressed by the General Court.

[17] Case T-102/96 *Gencor v Commission* [1999] ECR II-753 [273].

[18] In *Irish Sugar* [1997] OJ L258/1, the Commission fined Irish Sugar €8,800,000 for a number of breaches of Article 102, which were affirmed in Case T-228/97, *Irish Sugar plc v Commission* [1999] ECR II-2969.

[19] Cases C068/94 and C-30/95, [1998] ECR I-1375.

[20] Case T-228/97, *Irish Sugar plc v Commission* [1999] ECR II-2969 [46].

[21] Cases C-395 and 396/96 P, *Compagnie Maritime Belge Transports SA v. Commission* [2000] ECR I-1365 [35]-[45].

[22] Cases C-395 and 396/96 P, *Compagnie Maritime Belge Transports SA v. Commission* [2000] ECR I-1365, Opinion of AG Fennelly.

[23] *Ibid* [45].

[24] Cases T-191 and 214-216/98, *Atlantic Container Line AB v Commission* [2003] ECR II-3275 [602].

[25] Case T 193/02, *Laurent Piau v Commission* [2005] ECR II-209.

[26] See: Pablo Muñiz Fernandez, “Increasing Power and Increasing Uncertainty: Collective Dominance and Pricing Abuses” [2000] 5 ELR 645; Giorgio Monti, “The Scope of Collective Dominance Under Article 82” (2001) 38 CMLR 131.

[27] Cases T-68, 77, and 78/89, *Societa Italiana Vetro SpA v Commission* (‘Flat Glass’) [1992] ECR II-1403.

[28] Although the Commission clearly avoided the impression that this was in fact the case.

[29] Alison Jones and Brenda Sufrin, *EU Competition Law* (2014, OUP, 5th edn), Ch. 7.

[30] *Ibid*, Ch. 7.

[31] For example, see: *Attheraces Ltd v British Horseracing Board Ltd* [2007] EWCA Civ 38.

[32] Richard Whish and Brenda Sufrin, “Oligopolistic Markets and EC Competition Law” [1992] YEL 59, 74-75. In condemning excessive prices on a monopolist, however, Article 102 in the same sense also condemns natural or rational behaviour by a monopolist.

[33] [1999] OJ L95/1, on appeal, Case T-191/98, *Atlantic Container Line AB v Commission* [2003] ECR II-3275.

[34] Contracts by which a shipper undertakes to provide a minimum quantity of cargo to be transported by the conference (conference service contracts) or by individual carrier (individual serve contracts) over a fixed period of time and the carrier or the conference commits to a certain rate or rate schedule as well as a defined service level.

[35] Case T-191/98, *Atlantic Container Line AB v Commission* [2003] ECR II-3275.

[36] Such conduct would be likely to be caught by Article 101(1) in any event.

[37] Case T-228/97, [1999] ECR II-2969.

[38] *Ibid* [66].

[39] *Ibid* [28].

[40] Giorgio Monti, “The Scope of Collective Dominance Under Article 82” (2001) 38 CMLR 131.

[41] See *TACA* [1999] OJ L95/6.

[42] Giorgio Monti, “The Scope of Collective Dominance Under Article 82” (2001) 38 CMLR 131, 146-149.

[43] [2007] CAT 23.

[44] *Brannigan v OFT* [2007] CAT 23 [106].

[45] For an overview, see: Richard Whish and David Bailey, *Competition Law* (2012, OUP, 7th edn),

Ch. 11.

[46] OFT/CC, *Market Investigation References* (Ref: OFT511) (2002) The Guidance has since been adopted by the CMA and is available at the CMA website: .

[47] Richard Whish and David Bailey, *Competition Law* (2012, OUP, 7th edn), 583.

[48] For further information and discussion, see: *Ibid*, 932-940.

[49] For example, see: *Interbrew SA/Bass plc* Cm 5014 (2001) and *Lloyds TSB Group plc/Abbey National plc* Cm 5208 (2001).

[50] Richard Whish and David Bailey, *Competition Law* (2012, OUP, 7th edn), 584.

[51] The notice of investigation is available here: .

[52] OFT/CC, *Merger Assessment Guidelines* (CC2 (Revised)/OFT1254) (2010). The Guidance has since been adopted by the CMA and is available at the CMA website: .

[53] *Ibid*.

[54] *Ibid*, 936-937.

[55] For a detailed review of those general trends, See [Nicolas Petit, Norman Neyrinck, Collective dominance: An overview of national case law, 13 October 2011, e-Competitions Bulletin Collective dominance, Art. N° 39129](#)

[56] See, example, the Italian Antitrust Authority's approach in the *AEM/ASM Brescia* Case (2007).

[57] See [Nicolas Petit, Norman Neyrinck, Collective dominance: An overview of national case law, 13 October 2011, e-Competitions Bulletin Collective dominance, Art. N° 39129](#)

[58] See [Porter Elliott, The German Federal Court of Justice rules on appeal against decision prohibiting petrol station deal \(Total / OMV\), 6 December 2011, e-Competitions Bulletin December 2011, Art. N° 58350](#)

[59] See [Florian Neumayr, The Austrian Council of Ministers adopts proposal to reform the Austrian Cartel Act and the Competition Act, 12 June 2012, e-Competitions Bulletin June 2012, Art. N° 47951](#)

[60] See [Vitaly Pruzhansky, Jan Peter van der Veer, The Federal Antimonopoly Service of Russia proposes new pricing guidelines, 26 October 2012, e-Competitions Bulletin October 2012, Art. N° 50362](#)

[61] See [Alexandr Svetlicinii, The Competition Authority of Bosnia and Herzegovina finds an abuse of a collective dominant position on the market of fast money transfer services \(Western Union\), 6 November 2012, e-Competitions Bulletin November 2012, Art. N° 50536](#)

[62] See [Dusan Popovic, The Serbian Competition Authority finds abuse of a dominant position on](#)

[the market of fast money transfer services \(Western Union\), 12 January 2010, e-Competitions Bulletin January 2010, Art. N° 30439](#)

[63] See [Alexandr Svetlicinii, The Court of Bosnia and Herzegovina upholds the infringement decision of the Competition Authority of Bosnia and Herzegovina concerning abuse of dominant position on the market for fast money transfer services \(Raiffeisen Bank\), 12 March 2014, e-Competitions Bulletin March 2014, Art. N° 68487](#)

[64] See [Aldash Aitzhanov, Anara Batyrbayeva, The Specialized Administrative Court of Kazakhstan fines two major regional cement producers for a tacit collusion \(Semei Cement Plant, Bukhtarma cement company\), 9 January 2013, e-Competitions Bulletin January 2013, Art. N° 53112](#)

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