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Collective dominance

Collective dominance: An overview of national case law

Anticompetitive practices, Foreword, Collective dominance, High market shares, Barriers to entry, Abuse of dominant position, Price discrimination, Remedies (antitrust), Market power

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.

Nicolas Petit, Norman Neyrinck, e-Competitions, N° 39129, www.concurrences.com

Since the *Airtours* saga [1], the European Union ("EU") law on collective dominance has entered into a period of relative repose. The shift from a structural approach to a more behavioral, game-theoretic approach is now embraced by the EU Commission, which has incorporated the case law of the EU General Court in its Guidelines on the assessment of horizontal mergers [2]. Along these lines, any finding of collective dominance is now conditional on the proof that: (i) it is relatively simple to reach a common understanding on the terms of coordination (the "mutual mindset" condition, or C1); (ii) each member of the oligopoly has the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy (the transparency condition, or C2); (iii) adequate deterrents mechanisms prevent departure from the common policy (the punishment condition, or C3); and (iv) the foreseeable reaction from competitors and customers does not threaten the stability of the common policy (the no-challenge condition, or C4) [3].

With these clarifications, one could have expected an increase in the numbers of collective dominance cases. However, a quick look at the figures reveals that, surprisingly, after a surge in the number of national decisions issued on collective dominance in 2007, the digits dropped in the following years [4].

Fig. 1: Number of EU national case law decisions on collective dominance
http://www.concurrences.com/IMG/Collective_dominance_Fig._1.png

Against this background, the purpose of this foreword is to shed light on the enforcement of the EU law of collective dominance at the national level. To this end, we review a dataset of domestic case law chronicles, extracted from the online journal *e-Competitions.* The cases have been retrieved through a keywords search, based on the terms "*collective dominance*" and "*coordinated effects*". In total, forty-four decisions have been listed as relevant for our purpose [5].

In the following sections, we first discuss the appraisal of the notion of collective dominance in domestic cases (I) [6]. We then turn to the allegations of abuses submitted to domestic competition authorities and national courts (II). Finally, we examine the remedies applied in collective dominance cases (III). A brief conclusion is offered (IV).

I.Collective dominance

1.General statistics

The vast majority of domestic collective dominance cases are merger cases. More than two-third (68%) of the cases of our dataset have been dealt with under the merger control rules, whilst only a fraction of them (32%) have been dealt with under Article 102 of the Treaty on the Functioning of the EU ("TFEU").

From a sectoral standpoint, our dataset reveals that certain industries (medias, telecoms, banks, energy) are more exposed to collective dominance allegations than others. That said, more than a third of the cases (34%) concerns all sorts industries (transports, waste management, baby food and beer distribution, to name a few). This suggests that no sector is *a priori* insulated from collective dominance concerns [7].

Fig. 2: Number of collective dominance cases per industry sector
http://www.concurrences.com/IMG/Collective_dominance_Fig._2.png [8]

2.Implementation of the Airtours conditions

Our survey of the national case law also provides valuable insights as regards the application and the interpretation of the *Airtours* conditions. Overall, most domestic decisions have manifestly integrated the EU case law and followed the shift from a structural approach towards a more behavioral approach [9]. German cases, for instance, repeatedly state that structural market features are as such insufficient to substantiate a finding of collective dominance and that additional dynamic factors (parallelism on pricing, innovation, etc.) must also be present [10]. Likewise, the national competition authorities seem to comply with the principle that the various conditions for collective dominance are cumulative. This has for instance prompted the French Minister of the Economy to dismiss collective dominance allegations from the outset, on the sole observation that one of those conditions was absent [11].

In further line with the *Airtours* approach, the national decisions do not ascribe too much evidentiary weight to very high market shares. Surely, the dataset reveals that the number of collective dominance cases grows with the magnitude of the firms' aggregated market share. However, it also shows that no correlation can be established between very high market shares and actual findings of collective dominance. The national authorities thus seem to view high market shares merely as a signpost of possible collective dominance concerns which calls, in turn, for more intensive investigations.

Fig. 3: Number of cases and percentage of findings of collective dominance according to the aggregated market shares of the firms under inquiry *http://www.concurrences.com/IMG/Collective_Dominance_Fig._3.png* [12]

That said, the treatment of market shares in national cases is not always satisfactory. For instance, several domestic decisions have held that collective dominance concerns should not be ruled out on the sole ground that the market shares of the investigated firms have changed. Those decisions consider that as long as the market share changes occur to the detriment of outsiders, collective dominance remains a plausible theory of harm [13]. Such statements are, however, unconvincing. Changes in market shares to the detriment of outsiders may equally be caused by fierce competition between the insiders [14].

Similarly, on the role of market shares, the German Federal Court of Justice has stated that the symmetry of market shares is irrelevant, and that competition authorities should rather focus on the symmetry of the product portfolio, costs and technology [15]. Again, while it is true that the symmetry of market shares is not always conclusive of collective dominance, the Court's statement must be nuanced. In industries where there are economies of scale, where products are homogeneous and where technology is mature, share symmetry matters.

Finally – and albeit exceptionnally – a few national cases seem somewhat inconsistent with EU law (and economic theory). For instance, in *Brannigan vs. OFT*, the UK Competition Appeal Tribunal held that it is not always necessary to show that there is price transparency in the relevant market [16]. This is not congruent with EU law, where transparency plays a key role to bring proof of C1, C2 and C3.

The same applies to the *AEM/ASM Brescia* case, where the Italian Competition Authority expressed concerns that the merged entity – which would have been the second largest electricity supplier – could coordinate its activities with the third player [17]. Astonishingly, the Italian Competition Authority considered that the presence of *Enel*, the first largest electricity supplier in Italy, brought no obstacle to the collective dominance of its rivals.

II. Abuse

Amongst the Article 102 TFEU cases gathered in our dataset, only two cases reach a finding of unlawful abuse of collective dominance. In those cases, the impugned practices were exclusionary abuses similar those prohibited in single firm dominance cases [18]. In *Automatia*, the Finnish Competition Authority prohibited a discriminatory pricing scheme established by incumbent Finnish banks with a view to excluding new operators from the ATM market [19]. In *Bulcon vs Sea Malta Company*, the Maltese Competition Commission sanctioned two dominant shipping firms that had sought to block the entry of a new player on a profitable maritime route. The jointly dominant companies had tried to discourage their customers from diverting business towards the new entrant, through threats of tariff increases on other routes [20].

In contrast, our dataset contains no finding of exploitative abuse. This, however, is not entirely surprising. Exploitative abuses, and in particular pricing abuses, are already difficult to prove in single-firm dominance settings. Those difficulties are further compounded in collective dominance cases, where rivals' prices cannot be used as a benchmark. In some circumstances, it may thus be tempting to dismiss allegations of abuse of collective dominance from the outset, short of any evidence of abuse. The French Competition Authority followed this reasoning in *Ethicon*. Departing from the conventional dominance-abuse analytical sequence,the French Competition Authority stated that absent evidence of abusive pricing, no investigation of collective dominance was needed [21].

Finally, our dataset also contains odd, anomalous abuse of collective dominance cases. In *Tele2 vs. Tim, Vodafone, Wind*, for instance, the Italian Competition Authority reached the preliminary finding that the three incumbent mobile telecommunications operators had abused their collective market power by refusing to grant access to their mobile network infrastructures to external competitors [22]. *Vodafone*settled the case with commitments. In contrast, *Tim*and *Wind* were eventually fined for abuse of single dominance. This discrepancy in outcomes stems from the fact that the Italian Competition Authority did not manage to prove the existence of a collective dominant position in its final decision. If anything, this case thus demonstrates that commitments can be negotiated, and imposed, to cure immaterial concerns (in particular when firms are risk-averse). This is all the more true in areas of competition law where concepts are elastic, such as the law on abuse of collective dominance.

III. Remedies

National competition authorities have often proven to be creative when it comes to crafting remedies for collective

dominance concerns in merger cases [23]. If the severance of structural links remains a popular remedy [24], other less conventional remedies have also been applied.

For instance, in *Holcim/Vychodoslovenske*, the Hungarian Competition Office encouraged the creation of a powerful customer, to curb the market power of jointly dominant cement producers. In this case, a conventional divesture seeking to create a new competitor to the cement producers could not be envisioned because none of the production plants was sufficiently competitive on a standalone basis. The Hungarian Competition Office thus required the merging cement producers to (i) sell their shares in a vertically integrated downstream wholesaler; and (ii) to supply the downstream wholesaler with cement for five years. In so doing, the Hungarian Competition Office arguably sought to create countervailing buyer power in the downstream market on the long term [25].

Similarly, in *Koninklijke Numico/Mellin*, the Italian Competition Authority applied an intrusive behavioral remedy. According to the Italian Competition Authority, the proposed acquisition of Mellin by Koninklijke Numico would have led to the elimination of a maverick, whose pricing policy had brought a fierce degree of competition in the market for baby food. The Italian Competition Authority thus required Koninklijke Numico to mimic the commercial strategy of Mellin. In practice, Koninklijke Numico committed to significantly reduce its wholesale prices and to sell baby food in retail chains (in spite of pharmacies only) [26].

IV. Conclusion

The sample of decisions commented in *e-Competitions* suggests that most domestic authorities and courts have now espoused the modern standard of collective dominance inherited from the *Airtours* ruling. Only a few jurisdictions are stuck in time, and still follow a structural approach. On remedies, national authorities are sometimes innovative with the adoption of measures that depart from the conventional remedies routinely ordered by the Commission (*i.e.*, divestitures or orders to sever links amongst oligopolists).

In contrast, the notion of *abuse* of collective dominance remains unchartered territory. Many authorities and courts seem to err on the side of caution, and consider the issue through the lenses of the single firm dominance case-law (with the classic exploitation/exclusionary dichotomy). Often, cases are dismissed (or even abandoned) short of uncertainties on the existence of an abuse. After all, many conventional abuses entail aggressive commercial practices (predatory pricing, rebates, bundling, etc.), which are incongruent with the behavioral stability that is typical of collective dominance situations.

This state of affairs is, in our view, unsatisfactory. Merger control cannot prevent all tacitly collusive oligopolies [27]. Given this, *ex post* remedies are necessary to correct restrictions of competition that occur in tacitly collusive oligopolies. Article 102 TFEU could play this role. However, the opacities of the case law on abuse of collective dominance render this instrument wholly ineffective. A clarification of what constitutes an *abuse* of collective dominance is thus urgently needed, to fill the enforcement gap against tacitly collusive oligopolies [28].

Annex: List of the e-Competitions chronicles used for the redaction of this paper

Finland

The Finnish Competition Authority imposes commitments on the pricing of ATM withdrawals by three banks which own the dominant ATM operator (Norde Bank, OP Bank, Sampo Bank), 18 June 2009, Ami Paanajarvi, e-Competitions n° 26689

France

The French Competition Authority fines for the first time two companies for breaching their commitments undertaken under the settlement procedure (Neopost), 30 June 2010, Lila Ferchiche, e-Competitions n° 32657

The Paris Court of Appeal quashes the French Competition Councilâ€™s finding of an abuse of a collective dominant position (Lafarge Ciments - Vicat), 15 April 2010, Emily Austin, e-Competitions n° 32057

The French Competition Authority analyses parallel behaviour as proof of a concerted practice and excessive pricing by a dominant company, in the context of a price-regulated sector (Ethicon, Tyco Healthcare France et Syndicat national des industries technologies medicales), 17 December 2009, Emmanuel Dieny, e-Competitions n° 32053

The French Competition Authority refuses to condemn companies specialized in medical technologies despite their parallel behaviour (Ethicon, Tyco Healthcare France et Syndicat national des industries technologies mÃ©dicales) , 17 December 2009, Nawal Hssinou, e-Competitions n° 34788

The French Council of State confirms the clearance of a merger in the audit and accounting services sector and clarifies the legal test for collective dominance (Deloitte / JMF), 31 July 2009, Romain Maulin, Sergio Sorinas, e-Competitions n° 32052

The French Supreme Court recalls the conditions for the demonstration of collective dominance (Corsican cement cartel), 7 July 2009, Charles Saumon, e-Competitions n° 28366

The French Supreme Court clarifies the standard of proof applicable to collective dominance pursuant to Art. 82 EC and its French equivalent (Lafarge Ciments - Vicat), 7 July 2009, Juliette Goyer, Suzanne Jude, e-Competitions n° 28261

The French Competition Council hands out two key decisions in relation to the concept of abuse of state of economic dependence (Concurrence - National union of the written press distributors SNDP), 20 January 2009, Jerôme Philippe, Lucas Niedolistek, e-Competitions n° 24337

The French Minister of economics clears telecom merger without remedies after investigating possible coordinated effects and elimination of a maverick (Iliad/Liberty Surf), 22 August 2008, Tania Van den Brande, e-Competitions n° 23603

The Paris Court of Appeals upholds the French Competition Councilâ€™s decision on cement supply and distribution in Corsica but reduces fines (Corsican cement cartel), 6 May 2008, Charles Saumon, e-Competitions n° 19652

The French Minister of Economy approves a concentration in the sector for organization of fairs and shows subject to phase II undertakings (Unibail Holding/CCIP), 13 November 2007, Didier Theophile, Natasha A. Moskvina, e-Competitions n° 15719

The French Minister of Economy reviews the risk of coordinated effects and grants second-phase clearance to a concentration in the press sector, following the annulment by the Supreme Administrative Court of a previous authorisation decision that failed to find joint control (Lâ€™Est RÃ©publicain / BFCM / Socpresse) , 2 August 2007, Liliana Eskenazi, e-Competitions n° 14241

The French Minister of Economy grants conditional clearance to a merger in the railway laying and maintenance sector (Colas/Spie Rail), 14 May 2007, Aude Guyon, e-Competitions n° 13772

The Paris Court of Appeal rejects the complaint of a French wholesaler-exporter of pharmaceutical products and allows quotas and refusals to sell (Pharma-Lab), 23 January 2007, Jeremy de Douhet, e-Competitions n° 13725

The French Competition Council issues an opinion on the distinction between abusive and legitimate exercise of a trademark (UEEFL), 14 April 2006, Juliette Goyer, Lauriane Lépine, e-Competitions n° 1321

Germany

The German Federal Cartel Office blocks a jointâ€•venture for the creation of an online video on demand platform by the two leading German TV broadcasters (RTL and Pro7Sat1), 17 March 2011, Wolfgang Nothhelfer, e-Competitions n° 36120

The DÃ¼sseldorf Court of Appeals annuls the decision by the German Federal Cartel Office which prohibited a petrol distributor acquiring 59 petrol stations (Total/OMV), 4 August 2010, Tobias Caspary, e-Competitions n° 33236

The German Federal Court of Justice reverses the DÃ¼sseldorf Court of Appealâ€™s decision ruling in favor of a merger in the hearing aids sector and addressing the issue of collective dominance test under German law (Phonak, GN Store), 20 April 2010, Silke Heinz, e-Competitions n° 35661

The German Federal Cartel Office publishes an interim report on its fuel sector inquiry and takes a tough stance on three petrol station mergers, 8 June 2009, Frank Rohling, Bertrand Guerin, e-Competitions n° 27501

The German Federal Cartel Office clears three different mergers involving six of the largest German banks (Deutsche Bank / Deutsche Postbank, Commerzbank / DresdnerBank / (Allianz) and DZ Bank / WGZ Bank), 18 February 2009, Max Klasse, Bertrand Guerin, e-Competitions n° 26222

The German Federal Cartel Office clears a merger subject to structural remedies in the sugar regulated and oligopolistic market (Nordzucker/Danisco), 17 February 2009, Petra Linsmeier, Moritz Lichtenegger, Ines Orth, e-Competitions n° 26685

The German Federal Court of Justice upholds a decision which blocked an energy merger and found that the German market for primary sales of electricity is dominated by a duopoly (E.ON/Stadtwerke Eschwege), 11 November 2008, Frank Rohling, Bertrand Guerin, e-Competitions n° 24290

The German Federal Court of Justice confirms the prohibition of a merger in the electricity market (E.ON/Stadtwerke Eschwege), 11 November 2008, Sebastian Peyer, e-Competitions n° 23819

The German Federal Cartel Office clears a merger in the petrol station market (Shell-HPV), 7 March 2008, Max Klasse, e-Competitions n° 20533

The German Federal Court of Justice acknowledges the right to a declaratory judgement on blocked mergers (Springer/ProSiebenSat.1), 25 September 2007, Max Klasse, e-Competitions n° 14294

A German regional Court upholds the NCAâ€™s decision blocking an energy merger (E.ON/ Stadtwerke Eschwege) , 6 June 2007, Frank Röhling, Bertrand Guerin, e-Competitions n° 13792

The German Federal Cartel Office prohibits further merger of a dominant player in the electricity and gas sector in spite of proposed remedies (RWE/SaarFerngas), 6 June 2007, Frank Rohling, Bertrand Guerin, e-Competitions n° 13789

The German competition authority prohibits the acquisition of the hearing aid business in spite of proposed remedies (GN ReSound / Phonak Holding), 11 April 2007, Maik Wolf, e-Competitions n° 23002

Greece

The Hellenic Competition Commission rejects complaint and reports that allege refusal to supply constitutes abuse of dominance (Ioannis Georganas / Odeon, Prooptiki, Village Roadshow, United International Pictures), 25 August 2010, Georgios Tsouloufas, e-Competitions n° 32447

The Hungarian Competition Office clears a concentration in the cement sector subject to remedies (Holcim / VÃ½chodoslovenskÃ©) , 15 December 2010, Zsuzsanna Németh, e-Competitions n° 35152

The Hungarian Competition Office authorizes poultry processing merger subject to structural remedies (Bacs-Tak - Kiskunhalasi), 9 October 2007, Tünde Gönczöl, e-Competitions n° 14981

The Hungarian Competition Office unconditionally approves a merger between two fixed line telecommunications incumbents (HTTC/Matel), 20 April 2007, Attila Komives, e-Competitions n° 13736

Ireland

The High Court of Ireland holds that Dublin local authorities abused their dominant position in the household waste collection market in an attempt to remove rival private operators (Nurandale, Panda Waste services), 21 December 2009, Pat O'Brien, e-Competitions n° 39181 .

The Irish Competition Authority clears a merger in the market for radio broadcasting subject to a remedy involving the exit from a contract with an advertising sales agency, board withdrawal and divestment of partial ownership (SRH/Highland Radio), 12 August 2005, Silja Baller, e-Competitions n° 20888

Italy

The Italian Competition Authority starts a second phase investigation into a banking merger for allegedly anti-competitive coordinate effects (Intesa San Paolo/Banca Monte Parma), 19 January 2011, Michele Giannino, e-Competitions n° 34258

An Italian administrative Court upholds an NCAâ€™s decision finding that mobile phone operators do not hold a collective dominant position in the market for access to mobile phone network (Eutelia), 22 October 2008, Luca Crocco, e-Competitions n° 25888

The Italian Competition Authority gives the go-ahead to the creation of a new multiutility operator with structural remedies (AEM/ASM Brescia), 13 December 2007, Michele Giannino, e-Competitions n° 15894

The Italian Antitrust Authority accepts for the first time commitments but also imposes fines in the same case (Vodafone/Tim/Wind), 3 August 2007, Francesca Morra, Lucio d'Amario, e-Competitions n° 14318

The Italian Competition Authority accepts commitments from the main mobile phone operators following investigations on alleged abuse of joint dominant position (Vodafone, TIM, Wind), 3 August 2007, Luciano Vasques, e-Competitions n° 14176

The Italian Competition Authority clears in phase II the merger between the two main baby milk producers subject to remedies, including wholesale prices reduction (Koninklijke Numico / Mellin), 15 June 2005, Denis Fosselard, Vito Auricchio, Benedetto Brancoli Busdraghi, e-Competitions n° 21364

Luxembourg

The Luxembourg Competition Authorities releases a termination decision removing suspicions of competition law infringements consisting in cross-subsidizing and abuse of collective dominance by a press group concerning a free daily newspaper (Groupe de Presse Nicolas/Lâ€™Essentiel) , 2 July 2009, William Simpson, Philippe-Emmanuel Partsch, e-Competitions n° 30188

Malta

The Maltese Competition Commission condemns collective dominance in sea cargo carriage market (Bulcon/Sea Malta Company), 10 October 2005, Phyllis Aquilina, e-Competitions n° 14827

Poland

The Polish Competition Authority rules on collective dominance in the mobile telephony sector (Polska Telefonia Cyfrowa, Centertel, Polkomtel), 15 February 2006, Maciej Fornalczyk, e-Competitions n° 14053

Spain

The Spanish National Competition Commission expresses concerns about the merger between two German air transport companies and opened an in-depth investigation in Spain (Air Berlin/Condor), 25 March 2008, Henar Gonzalez Durantez, e-Competitions n° 21782 .

The Spanish Tribunal for the Defence of Competition clears without condition in phase II a merger in the beer sector (Mahou-San Miguel/Cervezas Alhambra), 7 March 2007, Salomé Santos, e-Competitions n° 13678

The Spanish National Competition Authority opens a merger phase II investigation in the brewing sector (Mahou/San Miguel), 8 January 2007, Margarita Fernandez, e-Competitions n° 13157

United Kingdom

The UK Competition Appeal Tribunal finds that it is not for the Tribunal to assess the reasonableness of the Office of Fair Tradingâ€™s exercise of its discretion to decide whether or not to open an investigation (Brannigan) , 26 July 2007, Liza Lovdahl Gormsen, e-Competitions n° 14874

The UK Competition Appeal Tribunal upholds the OFT decision rejecting a complaint against alleged abusive practices by local publishers (Brannigan/Newsquest - Johnston), 26 July 2007, Pierre-Hugues Vallée, e-Competitions n° 15165

The UK Competition Appeal Tribunal rejects rival newspaper publishers complaint of alleged abusive anti-competitive practices (Brannigan), 26 July 2007, Sanna Laila Shahzada, e-Competitions n° 14806

The UK CC clears a three to two merger in the insurance sector holding that the transaction would not give rise to a substantial lessening of competition (Hampden/CBS), 1 December 2006, Peter Crowther, e-Competitions n° 37347

Notes

[1] CFI, June 6th, 2002, *Airtours v. Commission*, Case T-342/99*, [2002] ECR II-2585*.

[2] See European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings,*OJ*, 5 February 2004, C 31/5, para. 39.

[3] For a discussion of the Airtours standards and of those various conditions, see Nicolas Petit, *Oligopoles, collusion tacite et droit communautaire de la concurrence*, Bruxelles, Bruylant-LGDJ, 2007.

[4] This may be due to the fact that with the *Airtours*standard, bringing evidence of collective dominance has become more demanding than under the checklist approach that prevailed previously.

[5] Five caveats should be made here. First, our assessment is not based on raw material (*i.e*. original judgments and decisions), but on case law commentaries drafted by legal specialists. It is thus necessarily contingent on the subjective analysis of third parties. Second, those case law commentaries use the English language to review cases delivered in other languages, so linguistic errors cannot be excluded. Third, while there are numerous cases included in the *e-Competitions* database, it cannot be excluded that a number of national collective dominance cases are missing. Fourth, the search tool present on the e-*Competitions* website has intrinsic limitations, and may have left out a number of relevant decisions from our dataset (in particular those relating to "*tacit collusion*", given that this expression is not registered as a searchable keyword in the *e-Competitions*database). Finally, this foreword takes only account of decisions issued by competition authorities and courts of the EU, and thus does not review decisions of non-EU authorities. A complete list of the chronicles relied upon in this foreword is provided in Annex.

[6] We highlight decisions that are of special interests for comments and provide statistics where available.

[7] Interestingly, if collective dominance cases mostly result from merger screening, ex officio investigations or rivals' complaint, it may also result from leniency applications. In the *GPL* case, the French Competition Authority decided to handle an alleged cartel under Article 102 TFEU. See Christophe Lemaire, *Clémence : L'Autorité de la concurrence décide de clore une affaire dans laquelle elle avait reçu deux demandes de clémence après avoir relevé des anomalies sur les pièces fournies par le demandeur de clémence, et met en cause le respect de son obligation de coopération (GPL), Concurrences*, N 1-2011, pp. 200-201 (case not part of our dataset).

[8] Doubles resulting from appeals have been excluded from the dataset.

[9] For an example of dold-fashioned decision that still opts for the piling up of "*plus*" factors to support its finding of collective dominance, see Zsuzsanna N□th , *The Hungarian Competition Office clears a concentration in the cement sector subject to remedies (Holcim / Východoslovenské)* , 15 December 2010, e-Competitions.

[10] See Maik Wolf, *The German competition authority prohibits the acquisition of the hearing aid business in spite of proposed remedies (GN ReSound / Phonak Holding)*, 11 April 2007, e-Competitions n 23002 ; Tobias Caspary, *The Düsseldorf Court of Appeals annuls the decision by the German Federal Cartel Office which prohibited a petrol distributor acquiring 59 petrol stations (Total/OMV)*, 4 August 2010, e-Competitions n 33236 .

[11] See Romain Maulin, Sergio Sorinas, *The French Council of State confirms the clearance of a merger in the audit and accounting services sector and clarifies the legal test for collective dominance (Deloitte / JMF)*, 31 July 2009, e-Competitions n 32052 .

[12] Graph realized from the cases where market share data was available. Where the alleged dominant undertakings are active on multiple markets, we select the market where the market shares are the highest. Doubles resulting from appeals are excluded from the dataset. Where no final ruling is available, decisions to open Phase II are assimilated to findings of collective dominance. Where no final decision is available, cases rebutted by national Supreme Courts are assimilated to rulings of absence of collective dominance.

[13] See Maik Wolf, *op. cit.* ; Maciej Fornalczyk, *The Polish Competition Authority rules on collective dominance in the mobile telephony sector (Polska Telefonia Cyfrowa, Centertel, Polkomtel)*, 15 February 2006, e-Competitions n 14053 .

[14] It is only if the changes in market shares result from the implementation of a common policy that allegations of collective dominance are valid.

[15] See Silke Heinz, *The German Federal Court of Justice reverses the Düsseldorf Court of Appeal's decision ruling in favor of a merger in the hearing aids sector and addressing the issue of collective dominance test under German law (Phonak, GN Store)*, 20 April 2010, e-Competitions n 35661 .

[16] See Liza Lovdahl Gormsen, *The UK Competition Appeal Tribunal finds that it is not for the Tribunal to assess the reasonableness of the Office of Fair Trading's exercise of its discretion to decide whether or not to open an investigation (Brannigan)*, 26 July 2007, e-Competitions n 14874 ; Pierre-Hugues Valle , *The UK Competition Appeal Tribunal upholds the OFT decision rejecting a complaint against alleged abusive practices by local publishers (Brannigan/Newsquest - Johnston)*, 26 July 2007, e-Competitions n 15165 .

[17] See Michele Giannino, *The Italian Competition Authority gives the go-ahead to the creation of a new multiutility operator with structural remedies (AEM/ASM Brescia)*, 13 December 2007, e-Competitions n 15894 .

[18] For a description of possible specific abuses in collective dominance settings, see Nicolas Petit, *Oligopoles, collusion tacite et droit communautaire de la concurrence*, *op. cit*.

[19] See Ami Paanajarvi, *The Finnish Competition Authority imposes commitments on the pricing of ATM withdrawals by three banks which own the dominant ATM operator (Norde Bank, OP Bank, Sampo Bank)*, 18June 2009, e-Competitions n 26689 .

[20] See Phyllis Aquilina, *The Maltese Competition Commission condemns collective dominance in sea cargo carriage market (Bulcon/Sea Malta Company)*, 10 October 2005, e-Competitions n 14827 . Following the entry, of the new players, customers started receiving threatening calls and correspondence directed to frighten them away from the new competitor.

[21] See Nawal Hssinou, *The French Competition Authority refuses to condemn companies specialized in medical technologies despite their parallel behaviour (Ethicon, Tyco Healthcare France et Syndicat national des industries technologies médicales)* , 17 December 2009, e-Competitions n 34788 .

[22] See Francesca Morra, Lucio d'Amario, *The Italian Antitrust Authority accepts for the first time commitments but also imposes fines in the same case (Vodafone/Tim/Wind)*, 3 August 2007, e-Competitions n 14318 .

[23] On remedies, see Nicolas Petit, Remedies for Coordinated Effects under the EU Merger Regulation, *Competition Law International*, September 2010, N 6/2, pp. 29-37.

[24] See Silja Baller, *The Irish Competition Authority clears a merger in the market for radio broadcasting subject to a remedy involving the exit from a contract with an advertising sales agency, board withdrawal and divestment of partial*

ownership (SRH/Highland Radio), 12 August 2005, e-Competitions n 20888 ; Tnde Gnczl , *The Hungarian Competition Office authorizes poultry processing merger subject to structural remedies (Bacs-Tak - Kiskunhalasi)*, 9 October 2007, e-Competitions n 14981 .

[25] See Zsuzsanna N□th , *op. cit.*

[26] See Denis Fosselard, Vito Auricchio, Benedetto Brancoli Busdraghi, *The Italian Competition Authority clears in phase II the merger between the two main baby milk producers subject to remedies, including wholesale prices reduction (Koninklijke Numico / Mellin)*, 15 June 2005, e-Competitions n 21364 . The commentary does not tell how efficient these commitments were nor how the competition authority monitored their enforcement.

[27] See Nicolas Petit and David Henry, Why the EUMR should not enjoy a Monopoly over Tacit Collusion, *OCCP Anniversary Publication*, 2010.

[28] On this, see Nicolas Petit, *Oligopoles, collusion tacite et droit communautaire de la concurrence*, *op. cit*.

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