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**HEARING ON OLIGOPOLY MARKETS**

-- Note by Nicolas Petit --

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*This paper by Nicolas Petit (Professor, University of Liege, ULg, Liege Competition and Innovation Institute "LCII") was submitted as background material for Item 5 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.*

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## RE-PRICING THROUGH DISRUPTION IN TACITLY COLLUSIVE OLIGOPOLIES: MAKING SENSE OF ABUSE OF COLLECTIVE DOMINANCE LAW

By Nicolas Petit\*

### Introduction

1. This paper proposes an understanding of abuse of collective dominance or shared monopolization that does not outlaw oligopolistic tacit collusion as such, but that reputes abusive a set of tactics adopted by tacitly collusive oligopolists exposed to disruption. As much as deviation is an internal force likely to undermine tacit collusion, disruption is a powerful external force that can cause a return to the competitive equilibrium. The sources of disruption may be technological (*eg* radical innovation), economic (*eg* entry of a low-cost player) or legal (*eg* tax reform). But disruption may never deliver its pro-competitive promises if oligopolists tinker to restore a collusive equilibrium. This paper suggests that competition agencies (“agencies”) could use the dormant doctrine of abuse of collective dominance to illegalize oligopolists’ conduct that seeks to “*re-price*” through disruption, and elude its pro-competitive effect. This rationalized definition of abuse of collective dominance would both promote legal certainty by clarifying the messy state of the law in this field, and ensure economic efficiency by giving agencies a market-triggered *ex post* remedy in mature oligopolies with lethargic M&A activity.

2. This paper is divided in IV sections. First, it explains the case for more *ex post* enforcement in oligopolistic markets with tacit collusion (I). Second, it describes how disruption can undermine tacit collusion, and what oligopolists can do to overcome the competitive effect of disruption (II). Third, it discusses the pros and cons of this approach, in particular in comparison with alternative scholarly proposals to apply cartel law to tacit collusion (III). Fourth, it skims through EU cases decided at Member State level, to gain a better understanding of the existing antitrust policies on collective dominance (IV).

### 1. The merger control “*blind spot*”: a case for *ex post* enforcement

3. Across the world, antitrust policy predominantly approaches tacit collusion *ex ante*, through the application of merger control regimes. Agencies halt oligopoly mergers that yield risks of coordinated effects. At the margins, antitrust policy also combats tacit collusion *ex post*. Cartel-type provisions are indirectly enforced to illegalize agreements amongst oligopolists that facilitate tacit collusion (for instance, exchange of information agreements).

4. The defect of that enforcement paradigm is so obvious that it should not require much discussion. It leaves unchecked mature oligopolies where mergers do not happen (and/or where oligopolists do not enter into agreements). Worse even, the antitrust laws might be the cause of merger (or agreements) apathy in many mature oligopolies. Take a duopoly – the market structure most likely to harbor tacit collusion in mainstream theory – and make a quick thought experiment – with the hypothetical example of

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the Coca-Cola and Pepsi duopoly. Coca-Cola and Pepsi know that combination (or cooperation) is no option under the antitrust rules, for any agency would prohibit their merger to monopoly.

5. In mature oligopolies where mergers do not or cannot happen – due to tight M&A markets and/or to a legal impossibility in the duopoly case – the trigger that enables agencies to scrutinize tacit collusion is defused. Oligopolists can thus sustain tacit parallel pricing over time without ever facing competition exposure.<sup>1</sup> And many real life markets seem to fall within this category (utilities are a good illustration, with players on those markets being often warned by competition officials that merger are not welcome).

## 2. Re-pricing through disruption in a tacitly collusive oligopoly

### 2.1 *The Pro-competitive impact of disruption*

6. Our proposed theory of liability may be illustrated by a fictional beer duopoly composed of firms A and B. Both hold an equal share of total output, which is sold to 100 well-informed retailers. The average cost of production of a gallon of beer is 5\$. And both charge 10\$ per gallon to their retailers. As a result, A and B make a 5\$ profit margin on each sold gallon.

7. The 10\$ parallel pricing policy is caused by tacit collusion. A and B share a joint understanding that 10\$ is the appropriate supra-competitive pricing point. The market is transparent. Retaliation is possible. And there is no prospect of entry.<sup>2</sup>

8. Moreover, the case is a “*gap case*”: A and B cannot merge because the agency follows a strict prohibition policy in mergers to monopoly. And they do not take part to “*agreements*” that facilitate tacit collusion and that could thus fall within cartel laws.

9. Government introduces a new tax on beer of 3\$ per gallon. This can be called a legal disruption. The disruptive effect occurs because A and B are forced into individual re-pricing decisions. And both face four possible re-pricing strategies. A first option is to fully transfer the tax to retailers, and raise the price per gallon to 13\$. In this case, the prospect is to maintain a 5\$ per gallon profit margin. A second option is to fully internalize the tax (ignore it), and keep the price per gallon at 10\$. In this case, the profit margin gallon swells to 2\$ per gallon. A third option is to partially internalize the tax. The price per gallon will be set between 10 and 13\$, and the profit margin will be superior to 2\$ but inferior to 5\$. A last option is to over-internalize the tax, and set the price at 9\$. The profit falls to 1\$, but volumes can be expected to increase because retailers will defect from the competitor.

10. With this background, it should be now apparent that disruption has a huge competitive potential. The new tax introduces a bug in the quiet life of the tacitly collusive beer oligopoly. The beer duopolists must now adjust their prices. And suffice is it that A and B do not follow the same decision for tacit collusion to be structurally undermined. This is because if A and B re-price at distinct levels, the market share of the lowest price duopolist will increase and this will undermine the tacitly collusive equilibrium.

11. From a game theoretic perspective, such disruptions may be reduced to a simple trade-off between compete (absorb) v coordinate (transfer) strategies in a game with two players. But the menu of re-pricing strategies faced by each oligopolist is more copious. In our example, each player faces at least four possible strategies.

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<sup>1</sup> Assuming economists are to be believed that tacit collusion exists.

<sup>2</sup> The industry is mature, the product is homogeneous, technology is stable, there are no capacity constraints, etc.

12. Additionally, disruption has other vexing characteristics that are not well apprehended in a simple game theoretic framework. First, a genuine disruption cannot be anticipated. In our example, the tax may just be introduced as response to unanticipated electoral change. Hence, the re-pricing choice must often be made in poor informational contexts, because oligopolists will not have readily available profitability estimates. Second, disruption demands quick market reaction. In our example, retailers who procure beer weekly will press A and B for a new quote. This leaves little time for trial and error by oligopolists. Third, disruption may also occur in forms which are not necessarily as intelligible as a new tax. Instead of changing the beer tax rate, the Government could just have altered the tax base, change the calculation method or restricted the deductibility of certain expenses. Oligopolists will thus have a hard time deciphering the effect of the disruption on their cost functions.

13. In real life markets, examples of disruptive events in oligopolies abound. Scherer and Ross report, for instance, that foreign import on the US steel market have repeatedly frustrated tacit collusion dynamics in the 1960s, 1980s and 1990s.<sup>3</sup> Similarly, in the 1960s, the introduction of radial technology by Michelin upset the quiet life of the US tyre oligopoly.<sup>4</sup> In the 1980s, the entry of low cost carriers on routes dominated by oligopoly airlines caused fares to plummet. In 2006, Spain increased taxes on cigarettes by 30%. This triggered a price war which decimated the profitability of oligopolists tobacco producers. In 2011, the entry of the company Free on the French mobile market turned the dormant three players' oligopoly into a price battlefield. Closer to us, the change brought by digital technologies and sharing economy business models in local transport or hotel services markets is yet another illustration.

14. When this is properly understood, there is no need to restrict our understanding of disruptive events to cases of market entry. External shocks such as natural disasters, change in tax rates, rise of new technological standards, introduction of new regulatory obligations (*e.g.*, environmental protection, product design, safety regulations, etc.) are all factors which create disruption capable of upsetting tacitly collusive equilibria.

## 2.2 *Re-pricing through disruption*

15. Having exposed the rudiments of our model, let us turn to its implications. By now, it shall be assumed that the beer duopolists will not stay put. They may adopt a range of practices to restore a collusive price equilibrium post disruption. We call this re-pricing through disruption.

16. This can be done through the adoption of subtle price communication conduits. In our fictional example, the simplest strategy is for each duopolist to convey its preferred re-pricing intentions to the other.<sup>5</sup> Let us sift through some of the available possibilities that fall short of a cartel infringement:

- A announces to the press that it will transfer the tax to retailers, and that it expects “*the industry*” to follow this lead;

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<sup>3</sup> See F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, 3rd ed., Houghton Mifflin Company, Boston, 1990.

<sup>4</sup> See D. N. Sull, “The Dynamics of Standing Still: Firestone Tire & Rubber and the Radial Revolution”, “The Dynamics of Standing Still: Firestone Tire & Rubber and the Radial Revolution”, *Business History Review*, Autumn 1999.

<sup>5</sup> In the *Atlantic Sugar* case, for instance, one firm posted its prices in the lobby of its headquarters, so rivals could see them. See E. M. Iacobucci and R. A. Winter, “Abuse of Joint Dominance in Canadian Competition Policy”, (2010) 60 *University of Toronto Law Journal*, 219, p.228.

- B makes public statements that it is studying with its analysts the effects of a “*full transfer*” of the tax on retailers;
- An alternative is for B to declare that it will wait to see what A decides, and follow its lead.
- A takes a minority shareholding in B, so as to closely monitor B’s pricing strategy as an insider.

17. New technologies also allow for more trivial, though equally effective forms of communication. Think of the following:

- A posts its new price on its Facebook timeline. A is friend with retailer Z. Z shares A’s posts on its Facebook page. B is also friend with Z...

18. Or of the other:

- B tweets @beerretailersassociation that it is ready to discuss compensations given in exchange of a full passing on to retailers.
- @beerretailerassociation retweets this news, and tags @breweryA with the following question: ready to do the same?

19. With this in mind, let us now slightly change an assumption of our model, to explore further the implications of the doctrine under discussion. In our fictional model, let us imagine that the disruption is no longer tax-driven, but that it is caused by the entry of new market players, say 10 micro-breweries.<sup>6</sup> The 10 micro-brewers do not sell a perfectly substitutable beer, so they will not steal more than 10% of the duopolists’ combined market share. This notwithstanding, the incumbent duopolists cannot ignore the disruptive effect caused by the micro-brewers’ entry. If they want to maintain their profitability through disruption – which is a reasonable assumption to make – they must select a new price point. This price will necessarily have to be superior to 10\$, so they can reap similar profits out of 45% of customer demand (assuming that both A and B lose 5% of orders). And again, this re-pricing decision has nothing obvious, for several profit maximizing collusive price points are possible.<sup>7</sup>

20. Similarly, if the beer duopolists attempt to exclude the micro-brewers, this will alter their costs functions. In our example, A and B may purchase all key inputs on the wholesale market or negotiate exclusive supply agreements with water suppliers, in a bid to foreclose the micro-brewers from access to essential inputs. Any exclusionary strategy of this kind will have a cost effect, which will make the re-pricing decision inevitable.<sup>8</sup>

21. Lastly, the beer duopolists can seek to restore the collusive equilibrium with accommodating practices. The point here is to induce the new entrants to join the tacitly collusive equilibrium with threats and incentives. A and B could declare that they will fight without mercy all those micro-brewers who do not stay within their niche, including by resorting to hostile acquisitions. Or A and B can declare that they are ready to offer financial or technological support to the micro-brewers on condition that they do not enter into the market segment served by the duopolists.

<sup>6</sup> For some data on micro-breweries, see <https://www.brewersassociation.org/insights/microbrewery-tap-room/>

<sup>7</sup> Moreover, both A and B might be tempted to take advantage from the disruption as an opportunity to defect, and gain market share over the other.

<sup>8</sup> All the more so if exclusion is carried out by one oligopolist and not the other.

### 2.3 Framework

22. Any disruption alters, directly or indirectly, the costs of oligopolists. And this cost effect consistently requires that oligopolists re-price their products. If oligopolists want to maintain collusive profits through disruption, they need to work together to re-set a collusive price point. In this process, they must avoid entering into a horizontal agreement, facilitating practice or plus factor that would expose them to the strictures of competition rules (joint ventures, exchange of information agreement, etc.). In our opinion, abuse of collective dominance or shared monopolization doctrines have a narrow, yet useful role to play in this space. In particular, the adaptative strategies adopted by oligopolists to re-price collusively through disruption and mitigate its pro-competitive effect could be deemed to constitute unlawful abuses of collective dominance or shared monopolization. The core evidentiary components of this theory of liability would entail proof of (i) some degree of pre-existing collusion; (ii) disruption; (iii) re-pricing strategy; (iv) a likely post-disruption return to collusive equilibria.

23. A chief example of such practices could be the unilateral signaling strategies documented in the economic literature.<sup>9</sup> And if, as some have argued, unilateral communication tactics are pervasive and are often objectively based on other legitimate motives such as customer, investors or shareholders information, this does not rule out the necessity to control them when they purport to ensure competitor information in a subset of tacitly collusive oligopolies subject to disruption.<sup>10</sup> By organizing a sort of antitrust “blackout” in oligopolies subject to disruption, agencies raise the cost of oligopolists’ communication. This may push them towards more hardcore forms of communications, which fall foul of the cartel prohibitions.

24. In prior research, we have argued that agencies should go as far as to illegalize the exclusionary tactics of tacitly colluding oligopolists in a context of disruption (predatory pricing, systematic defamation of the entrant, judicial harassment, etc.).<sup>11</sup> Professor HEMPHILL and WU have advanced a similar idea. They propose to declare unlawful oligopolists “parallel exclusion” tactics, though their theory of liability is not limited to a disruption context.<sup>12</sup>

25. With the benefit of hindsight, we believe that those propositions are perhaps too ambitious at this stage for policy implementation. Applying abuse of collective dominance or shared monopolization theories to oligopolists’ exclusionary strategies would move enforcement policy well beyond its current scope. As a result, agency officials might be reluctant to push such theories in the decisional pipe-line and stakeholders might lobby more intensely against such drastic expansions of their liability.

26. Moreover, exclusionary strategies are to some extent embedded in our proposed abusive re-pricing theory of liability, because any foreclosure tactic will have a cost effect that will call for re-pricing initiatives.

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<sup>9</sup> Scherer and Ross, for instance, report unilateral announcements in the steel industry. See F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, op. cit., pp.258-259. Joint negotiations with other firms are not plausible given the antitrust prohibitions.

<sup>10</sup> See J. Markham, “The Nature and Significance of Price Leadership”, (1951) 41(5) *American Economic Review*, 891.

<sup>11</sup> See N. Petit, (2012), “The Oligopoly Problem in EU Competition Law”, *Research Handbook in European Competition Law*, in I. Liannos and D. Geradin eds., Edward Elgar, September 2013. Available at SSRN: <http://ssrn.com/abstract=1999829>

<sup>12</sup> See S. Hemphill and T. Wu, “Parallel Exclusion”, *Yale Law Journal*, Vol. 122, 2013.

### 3. Pros and Cons

27. The consequential debate over the pros and cons of abuse of collective dominance or shared monopolization as an *ex post* enforcement tool against tacit collusion can be approached from several angles.

#### 3.1 Type II V Type I errors?

28. As explained earlier, a merger-only (or merger-mostly) approach of oligopolistic tacit collusion generates a systemic type II error (false negative). The sort of events that triggers the applicability of merger regimes is by definition absent in stable oligopolies, and especially in duopolies.

29. Our proposed approach encounters, to some extent, the same criticism. The trigger of our proposed theory of liability is disruption. Absent disruption, *ex post* remedies cannot be administered, thereby causing too a systemic type II error.

30. At the same time, however, our proposed approach fills part of the enforcement gap created by a merger-only approach of tacit collusion. It is therefore a step in the right direction, considering that tacit collusion may be a “*fat tail*”, low probability-high impact type of market equilibrium.

31. Moreover, a certain degree of type II error is inevitable, to keep antitrust proceedings predictable. Abuse of dominance and shared monopolization proceedings will only start in disrupted oligopolies.<sup>13</sup> This is a specific and well-delineated setting intelligible to all stakeholders. And this is critical because a recurrent objection against abuse of collective dominance or shared monopolization theories of liability has been that agencies conduct unpredictable investigations in oligopolies, which constitute the most widespread market structure in the modern economy. Coupled with this has been the fear that agencies would be entitled to scrutinize the conduct of oligopoly firms who are not market leaders, on liability objections similar to those routinely pursued single firm conduct cases. This, in turn, could chill the competitive efforts of all the number 2, 3, 4 and N players in concentrated markets, and generate a risk of type I errors (false positives).

32. The fear of this bogey man has stalled policy progress in relation to the application of abuse of collective dominance and shared monopolization theories of liability in oligopolies. Explicating that abuse of collective dominance and shared monopolization applies only to certain oligopolies where tacit collusion is observed and has been disrupted by an external shock would overcome the type I error criticism.

33. Additionally, an explicit commitment to import tacit collusion reasoning in the land of abuse of dominance and monopolization regimes could limit the risks of type I errors in single firm conduct cases. A not insignificant number of exclusionary abuse cases involve aggressive price conduct from oligopoly firms.<sup>14</sup> A systematic testing of such cases through tacit collusion lenses could help ensure that agencies do not mistakenly confuse procompetitive deviation in tacitly collusive oligopolies with anticompetitive single firm conduct.

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<sup>13</sup> Moreover, agencies may decide to cast priority eyes on duopolies which escape the merger control regimes.

<sup>14</sup> To talk of European cases only, the major abusive rebates cases of the last decades are often cited as possible illustrations of type I errors.

### 3.2 Abuse V Cartel law?

34. An *ex post* alternative to abuse of collective dominance and shared monopolization law is to approach tacit collusion under cartel law.<sup>15</sup> Professor KAPLOW has made a convincing case in favour of a more economic approach of Section 1 of the Sherman Act.<sup>16</sup> He rightly observes that the current formalistic understanding of the concept of agreement leaves socially harmful price-fixing unchecked. This again causes a type II error.

35. The problem with the cartel law approach is not one of desirability, but of feasibility. In existing antitrust regimes, the cartel provisions invariably require a degree of reciprocal cooperation amenable to a formalized arrangement. Our proposed approach – which is not exclusive of the cartel law approach – is not constrained by such restrictive legal requirements. On the contrary, the abuse of dominance and monopolization provisions of most competition regimes, and in particular those of the US and the EU, are couched in sufficiently broad terms to apply to oligopolistic markets. In reality, the problem with existing abuse of collective dominance and monopolization law is just the polar opposite. In some jurisdictions, the law has received a very wide, and somewhat exotic interpretation. With this, many firms, and not only oligopolistic firms, are placed today in a state of excessive legal uncertainty when it comes to understanding the contours of their liability under abuse of dominance law.

36. Moreover, any interpretation that directly outlaws tacit collusion – be it under cartel law or other *ex post* legal provisions – must overcome the “*problem of proof*”.<sup>17</sup> Proving that tacit collusion actually occurs in a market is allegedly marred with uncertainties, for price parallelism or supra-competitive profits in oligopolies find many explanations alien to tacit collusion (including undistorted competition,<sup>18</sup> product differentiation,<sup>19</sup> Cournot competition,<sup>20</sup> Edgeworth cycles,<sup>21</sup> etc.). The proof that parallel conduct is caused by tacit collusion and not by other market dynamics will arguably necessitate long and costly

<sup>15</sup> See R. Posner, “Oligopoly and the Antitrust Laws: A Suggested Approach”, (1969) 21 *Stanford Law Review*, 1562.

<sup>16</sup> See L. Kaplow, “An Economic Approach to Price Fixing”, *Antitrust Law Journal*, vol. 77(2), 343–449.

<sup>17</sup> For use of this expression and a good explanation, see F. Mezzanote, “*proof of tacit collusion requires the Commission to overcome a difficult problem of identification, notably how to distinguish tacit collusion from other very subtle conducts like unconscious parallelism and undetected overt collusion*”. Mezzanote goes on to advocate against the use of *ex post* unilateral conduct instruments, owing to this problem of proof. See F. Mezzanote, “Tacit Collusion as Economic Links in Article 82 EC Revisited”, (2009) 3 *European Competition Law Review*, 137. See also, F. Mezzanote, “Using Abuse of Collective Dominance in Article 102 TFEU to Fight Tacit Collusion: The Problem of Proof and Inferential Errors”, *World Competition* 33 no 1 (2010): 77-102.

<sup>18</sup> Situations of price uniformity may appear, for instance, in mature markets where technology and costs remain constant when operators price at marginal cost as a result of fierce competition in the market.

<sup>19</sup> Pinkse and Slade show that price increases in the brewery industry had initially been suspected of tacit collusion, and were eventually caused by unilateral effects. See J. Pinkse and M. E. Slade. “Market Power and Joint Dominance in U.K. Brewing”, (2004) 52(1) *Journal of Industrial Economics*, pp. 133-163.

<sup>20</sup> Similarly, in a model of so-called Cournot competition, which leads to price equilibriums situated between marginal cost-pricing and monopoly pricing, oligopolists may achieve supra-competitive profits absent tacit collusion.

<sup>21</sup> See E. Avenel, G. de Muizon and N. Daley, “Collective dominant position: Overcoming the Airtours criteria in the *ex post* control of anti-competitive practices”, *Concurrences*, N° 4-2011, n°39886, pp. 41-50.

economic inquiries and endless experts' discussions. With this background, the affirmation of an *ex post* tacit collusion offense could likely be a difficult sell to resource-constrained agencies.<sup>22</sup>

37. On careful thought, the problem of proof may just be another bogey man. Many empirical economic studies document the existence of tacit collusion,<sup>23</sup> and agencies have often made findings of pre-transaction tacit collusion in the merger context.<sup>24</sup> Moreover, it should not be forgotten that oligopolists may possess internal documents revealing the existence of tacit collusion. In support of its challenge of the *Anheuser-Busch InBev/Grupo Modelo* merger in 2013, the DoJ quoted internal company documents showing the parties' awareness, understanding and intention to pursue a tacitly collusive strategy.<sup>25</sup>

38. This notwithstanding, the perception that *ex post* tacit collusion cases will be voracious and uncertain remains a sticky, resilient idea.<sup>26</sup> Hence, agency officials may understandably be over-prudent and conservative when discussing the introduction of an *ex post* tacit collusion offense in antitrust law. Those concerns, however, become moot under our proposed *ex post* theory of liability. This is because our approach centers the antitrust discussion on disruption and re-pricing, and places considerably lesser emphasis on the evidence of tacit collusion. To be clear, some proof of pre-existing tacit collusion remains necessary in our proposed theory of liability. However, given that we do not propose to outlaw tacit collusion in itself, the agency can operate under a "*preponderance of the evidence*" standard of proof, laxer than "*proof beyond reasonable doubt*" when it discusses the existence of tacit collusion. In cartel law, in contrast, the "*proof beyond reasonable doubt*" is.

<sup>22</sup> Resource constrained competition authorities and courts might thus be reluctant to spend time on such cases.

<sup>23</sup> On the Ready-mix concrete market in Denmark, see S. Albæk, H.P. Møllgaard and P.B. Overgaard, "Government-assisted Oligopoly Coordination? A Concrete Case", (1997) *Journal of Industrial Economics*, 0022- 182 1 Volume XLV; On the car industry in the US, see T. Bresnahan, "Competition and Collusion in the American Automobile Industry : The 1955 Price War", (1987) XXXV 4 *Journal of Industrial Economics*, 457; on the audit industry in France, see O. Billard, M. Ivaldi and S. Mitraile, "Evaluation of the Risks of Collective Dominance in the Audit Industry in France" (June 2011), *CEPR Discussion Paper* No. DP8417; On the European 2G mobile telephony market, see R. Bekkers, B. Verspagen and J. Smits, "Intellectual property rights and standardization: the case of GSM", (2002) 26 *Telecommunications Policy*, 171–188; On electricity markets in the US, see R. M. Benjamin, Tacit Collusion in Real-Time U.S. Electricity Auctions, *USAEE Working Paper No. 11-08*, (October 4, 2011); On the London Interbank Offered Rate market, see R. M. Abrantes-Metz & A. D. Metz, "How Far Can Screens Go in Distinguishing Explicit from Tacit Collusion? New Evidence From the Libor Setting", *CPI Antitrust Chronicle*, March 2012 (1).

<sup>24</sup> In the EU, the Commission evidenced pre-existing tacit collusion in a number of merger cases: *Exxon/Mobil* (1999), *Grupo Villar Mir/EnBW/Hidroeléctrica del Cantabrico* (2001), *EnBW/EDP/Cajastur/Hidrocantabrico* (2002), *Bayer/Aventis Crop Science* (2002), *Wallenius Lines AB/Wilhelmsen ASA/Hyundai Merchant Marine* (2002), *Dong/Elsam/Energi E2* (2006), *ABF/GBI Business* (2008), *RWE/Essent* (2009). In *ABF/GBI Business* (2008) it noted: "*a series of structural and behavioural elements are in place supporting the conclusion that the Spanish compressed yeast market already exhibits some degree of tacit coordination allowing ABF, GBI and Lesaffre to influence prices and/or the levels of sales in individual regions through, inter alia, (de facto) exclusive relations with distributors*".

<sup>25</sup> See <http://www.justice.gov/atr/cases/f292100/292100.pdf>

<sup>26</sup> See F. M. Scherer, "The Posnerian Harvest: Separating Wheat from Chaff", (1977) 86 *Yale Law Journal*, p.983: "*Every tacit collusion case [...] would be a "big case", drawing teams of economist to ply the courts with their expert but conflicting opinions. In the end, the decision would turn significantly upon whose experts were more credible. It would not, I fear, be a system highly likely to yield either truth or justice, especially when private respondents pay \$1,000 per day for "credibility" (including extensive preparation) while the government is limited to \$150 or (in exceptional cases) \$250*".

### 3.3 Rationalized V Open-ended abuse of collective dominance?

39. In some jurisdictions, and especially in the EU, the doctrine of abuse of collective dominance has received a wide judicial interpretation. Though some recent courts pronouncements have seemingly limited its scope, the notion of collective dominance is not restricted to oligopolistic markets where tacit collusion conspicuously occurs.<sup>27</sup> It seems to be applicable as soon as an oligopoly is structurally observed regardless of whether price parallelism prevails in the market. And it also seems to apply to un-concentrated markets where atomistic firms share “links”. Moreover, the perennial single-firm conduct principle that the notion of abuse is open-ended has never been judicially refuted in a collective dominance context.

40. As a result, abuse of collective dominance is an open-ended concept. In enforcement terms, it is a tool that gives vast remedial flexibility to agencies, should they want to intervene oligopoly markets. With this in mind, why would they ever embrace our proposed approach, if only to restrict their margin of discretion?

41. In our view, there is a compelling argument in support of a rationalization of the abuse of collective dominance concept. In current shape, the open-ended abuse of collective dominance understanding is ill of the “*sports-league*” disease. Clever complainants – almost invariably sports clubs, sports players or their agents – keep demanding to agencies to illegalize restrictive sports leagues’ regulations, on the ground that the league members would occupy a joint dominant position through their organizational link.<sup>28</sup> Agencies have no other choice but to devote time and resources to review, and then dismiss, those ludicrous complaints. And sometimes, agencies are even dragged in appeals proceedings.<sup>29</sup>

42. Under a rationalized notion of abuse of collective dominance limited to tacitly collusive oligopolies, those cases would collapse like a house of cards. Agencies would in turn free resources for cases worthy of investigation.<sup>30</sup>

43. Moreover, the conjecture that the open-ended abuse of collective dominance theory is a Swiss-knife that antitrust agencies want to keep in their toolbox is preposterous. The best proof of this is that the European Commission has expressed a clear disinterest for the enforcement of the abuse of collective dominance theory in the Guidance Paper on enforcement priorities under Article 102 TFEU.<sup>31</sup>

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<sup>27</sup> Even though the General Court (“GC”) of the EU has made declaration in this sense. *See* GC, T-193/02, *Laurent Piau v. Commission*, 26 January 2005, ECR [2005] II-209, §111; *See also* GC, T-296/09, *EFIM v. Commission*, 24 November 2011, ECR II-0000, §§73 and 75. Some authors challenge the relevance of *Piau* as a precedent to the principle that collective dominance applies to tacit collusion. *See* F. Mezzanote, “Tacit Collusion as Economic Links in Article 82 EC Revisited, (2009) 3 *European Competition Law Review*, 137.

<sup>28</sup> *See*, for instance, the EU Commission cases in COMP/39471 (*ATP*); COMP/39732 (*Formula 1 association*); AT.40105 (*UEFA*). A notable exception is COMP AT/39921 (*DataCell*), related to payment services.

<sup>29</sup> *See*, for instance, Case T 273/09, *Associazione Giulemanidallajuve v European Commission*, Order of the General Court, 19 March 2012.

<sup>30</sup> And they would also make a more intelligible use of the case-law, which should help firm in their compliance efforts.

<sup>31</sup> Even if the Guidance Paper confirmed the theoretical applicability of the concept of collective dominance, it focuses on situations of “*single dominant position*” as a matter of enforcement priority. *See* Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 3 December 2008, COM(2008), 26 p., §4: “*Article 82 applies to undertakings which hold a dominant position on one or more relevant markets. Such a position may be*

#### 4. Overview of enforcement in EU member states

44. In 2011, we published a review of collective dominance and coordinated effects cases in the EU member States over the period 2007 to 2011.<sup>32</sup> This exercise was conducted with the database *e-competitions*. It led to the identification of 39 decisions worthy of interest. For this paper, we have decided to renew the exercise since 2011.<sup>33</sup>

45. In this new research, we have identified only 9 relevant decisions or judgments.<sup>34</sup> This is not much. It may denote a disinterest for collective dominance at the Member State level.

46. In so far as merger control is concerned, most of the cases concern Germany. Two cases discuss the use of structural market share presumptions in collective dominance cases.<sup>35</sup> In *Fresenius Kabi/Fenwal*, the German agency has seemed willing to advance a “*more economic*”, less structural approach of oligopoly mergers.<sup>36</sup> In contrast, the German Federal Court vindicated a more orthodox stance in the *Total/OMV* case, reaffirming a tough stance on mergers in concentrated industries.<sup>37</sup>

47. In abuse of dominance cases, three agency decisions found an infringement,<sup>38</sup> but only two of them deserve commentary.<sup>39</sup> In the Spanish *Telefonica, Vodafone and Orange* case, the agency imposed large fines to three telecommunications firms for abusive pricing in termination markets.<sup>40</sup> The case,

*held by one undertaking (single dominance) or by two or more undertakings (collective dominance). This document only relates to abuses committed by an undertaking holding a single dominant position”.*

<sup>32</sup> See N. Petit and N. Neyrinck (2011), “Collective dominance: An overview of national case law”, *e-Competitions*, No. 39129, October 2011. Available at: <http://orbi.ulg.ac.be/handle/2268/106843>

<sup>33</sup> The same caveats apply to this research. They are discussed at footnote 5 of our 2011 paper.

<sup>34</sup> The 6 other results that we retrieved do not concern cases but advocacy and legislative proposals.

<sup>35</sup> See W. Nothhelfer, “The German Federal Cartel Office blocks a joint-venture for the creation of an online video on demand platform by the two leading German TV broadcasters (RTL and Pro7Sat1)”, 17 March 2011, *Bulletin e-Competitions* March 2011, Art. N° 36120; see P. Elliott, “The German Competition Authority prohibits merger between cable network operators (*Tele Columbus/Kabel Deutschland*)”, 22 February 2013, *Bulletin e-Competitions* February 2013, Art. N° 57216.

<sup>36</sup> See P. Werner, “The German Competition Authority clears merger in the healthcare industry despite presumed market dominance and a presumed oligopoly, and applies a rather detailed economic analysis, in relation to the SIEC and the old dominance test (*Fresenius Kabi/Fenwal*)”, 11 December 2012, *Bulletin e-Competitions* December 2012, Art. N° 57351.

<sup>37</sup> See P. Elliott, “The German Federal Court of Justice rules on appeal against decision prohibiting petrol station deal (*Total/OMV*)”, 6 December 2011, *Bulletin e-Competitions* December 2011, Art. N° 58350

<sup>38</sup> There was one additional abuse of dominance case, but this was a failed action for damages before the Italian courts. See P. Croene, “The Italian Supreme Court confirms a rejection of damages claim for alleged abuse of collective dominance (*Delta Impianti*)”, 5 March 2014, *Bulletin e-Competitions* March 2014, Art. N° 67173

<sup>39</sup> We do not discuss here a Lithuanian case that we found in the database, for the facts and the description given do not clearly explain the collective dominance analysis followed in the case. See Giedrė Adomavičiūtė, “The Lithuanian Competition Council fines two retailers for imposing unfair conditions on their food and drinks suppliers (*Norfos mazmena/Rivona*)”, 24 January 2014, *Bulletin e-Competitions* January 2014, Art. N° 71867.

<sup>40</sup> See P. Pérez Fernández, “The Spanish Competition Authority imposes fines of nearly € 120 M on telecom operators for having abused of their dominant position in the wholesale telephone sort messaging market

however, did not concern a genuine tacit collusion setting. The agency found that each telecommunication operator individually occupied a dominant position on its own termination market. In its reasoning, it aggregated those legal findings and eventually talked of a situation of collective dominance, but this is merely formal.

Besides, in a French case in the aggregates sector, the agency found that four firms that had unlawfully engaged into price fixing, had also abused of a collective dominant position by jointly refusing to supply rockfills to competitors.<sup>41</sup> We read the decision in full. In this case, the abuse of collective dominance allegations seemed largely ancillary to the price-fixing and bid rigging concerns. And the collective dominance finding was not reasoned in tacit collusion terms, but instead by recourse to proof of “*structural links*” amongst the four players (*ie* the participation to an industry-wide trade grouping).

The sole possible conclusion of this modest review is perhaps that no case clearly concerns tacitly collusive oligopolies. Beyond this, however, the sample of the results found in the *e-competitions* database is unfortunately too poor and unclear to shed any light on issues worth of policy discussion.

## 5. Conclusion

This paper has sketched the contours of a rationalized, market-triggered, case-law proof and predictable abuse of collective dominance theory of liability. It is not the grand legal revolution that some may have ambioned. But as limited as it may be, we believe that our proposed approach would incrementally improve the current *ex ante* merger-only (or merger-mostly) paradigm that prevail in many antitrust jurisdictions. It would fill part of the gap caused by the exclusive recourse to merger instruments. And it would complement existing *ex post* tools that illegalize oligopolists agreements that facilitate tacit collusion, such as unilateral price-signalling.<sup>42</sup>

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(*Telefonica, Vodafone and Orange*)”, 19 December 2012, *Bulletin e-Competitions* December 2012, Art. N° 50523

<sup>41</sup> See French Competition Authority, “The French Competition Authority fines several civil engineering companies for having distorted competition in the civil engineering sector in Saint-Pierre-et-Miquelon (*GIE Exploitation des carrières*)”, 26 January 2012, *Bulletin e-Competitions* January 2012, Art. N° 58714.

<sup>42</sup> At a later stage, the approach may be enlarged to tackle exclusionary tactics of tacitly colluding oligopolists exposed to disruption. For more on this see N. Petit, *supra*.