Briefing Paper

Oligopoly Regulation in the European Union; Strengths and Weaknesses of Articles 101 and 102 TFEU

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Oligopoly at its heart is one of the most difficult and controversial areas of European Union competition law to regulate. In this area of competition law two key questions arise frequently; what problems are encountered in the regulation of oligopolies? And how adequately have these been addressed by the European Union's competition law?

To discuss this complex issue we must look at the European Union's competition law, in particular Articles (Art.) 101 and 102 of the Treaty on the Function of the European Union (TFEU) and how these articles aim to regulate antitrust law with regards to oligopolies and what problems are faced by the concept and theories of oligopolies in regulating their behaviour. We will also examine the relevant case law regarding oligopolies to discover both the commission and the European Court of Justice's (ECJ) interpretations of treaty Art.101 and 102 TFEU to determine the true extent of the problems that are encountered in the regulation of oligopolies in the European Union.

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Firstly we must examine the concept of an oligopoly market and how in practice oligopolies work. Monti describes an oligopoly as a way; *'by which firms in a concentrated market might in effect share monopoly power'*[1], Freeman goes on to tell us that; '*[an] Oligopoly is an intermediate market structure, between the two extremes of monopoly and perfect competition'*[2]. Furthermore, Haupt notes that; '*oligopolistic dominance may occur if there are only a few competitors in a specific market making their strategic decisions by considering the prospective conduct of their rivals*[3]*. In such cases, there is a non-co-operative strategic interaction between the members of the oligopoly without any agreement or other form of collusive conduct'*[4]*.* It must be noted however, as Callery comments; *'Oligopolies are not necessarily* unlawful *creatures...It is their abuse which is condemned'*[5]*,* this is a key problem in the regulation of anti-competitive behaviour within an oligopoly market.

Abuses of the dominant market position can occur because as Albaek, Mollgaard and Overgaard observe; *'firms in an oligopoly collectively have an interest in coordinating their actions to reduce total supply and increase the price level so as to increase expected profits'*[6]. Moreover, Frederic observes that; *'In an oligopolistic situation each firm, acting independently, knows that its actions will have an impact on the market, and will, therefore, invite a reaction from its competitors'*.[7]

The argument against oligopolies is that the structural organisation of the market in which the oligopoly is formed are such that the undertakings will not compete with one another on price and will have little incentive to compete in virtually any other way. Furthermore as Whish comments; *'they will be able to earn supra-competitive profits without entering into the type of collusion agreement or concerted practice generally proscribed by competition law'*[8]*.* In a competitive market if an undertaking reduces its price there will generally be little or no effect on its competitors, and therefore the competitors will not have any need to respond.

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[1] G Monti, EC Competition Law (1st edn, Cambridge University Press, 2007) 309

[2] Freeman D, Market Investigations and Oligopolistic Markets, in B. Hawk (ed.) *International Antitrust Law & Policy* (Juris Publishing, 2008) 653

[3] This is known as 'Tacit Collusion'

[4] Haupt H, 'Case Comment – Collective dominance under Article 82 E.C. and E.C. merger control in the light of the Airtours judgement' (2002) 434 European Competition Law Review

[5] Callery C, 'Considering The Oligopoly Problem' (2011) 142 European Competition Law Review

[6] Albaek S, Mollgaard P, Overgaard P B, 'Transparency and coordinating effects in European merger control' (2010) Journal of Competition Law & Economics 841

[7] Frederic J, 'Economic analysis, antitrust law and the oligopoly problem' (2000) 1 (1) European Business Organization Law Review 42

[8] R Whish, Competition Law (6th edn, OUP, 2009) 546

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However, in an oligopoly market the cut in price would be so devastating in that it would take so many customers from the other competitors that it would quickly lead to the other competitors in the market lowering their prices to match the cut. This same effect can also be seen in unilateral price rises in an oligopoly market and, because of this oligopolists as Jones and Sufrin observe that oligopolies *'recognise their independence and realise without needing to agree to do so, that the most efficient course of conduct is for them all to set their prices at a profit maximising level'*[9].

This type of behaviour in an oligopoly market causes serious problems for competition law regulators, as Monti tells us; *'What is particularly worrying from the perspective of competition law enforcement is that the firms need not even communicate with each other to fix prices'*[10]. This is an even larger problem in a market that is highly transparent as this will make it easier for firms to monitor what their competitors are doing.

As discussed earlier this type of behaviour can be described as tacit collusion. The difficulty that faces the EU Commission in regulating tacit collusion in oligopolies is that although the impact of such co-ordination on the market is the same or at least similar in effect to explicit collusion where the consumer is harmed, as mentioned earlier there is no actual agreement between competitors to synchronise their behaviour. It is because of this Jones and Sufrin ask the question; *'How then should the competition rules deal with tacit collusion?'*[11], this is an important question that will now be considered with regards firstly to Art.101 and then with regards to Art.102 and ECJs case law on oligopoly markets.

We will now examine oligopoly markets and their relation to Art.101 and whether this Article can help to regulate oligopolistic markets. As previously discussed undertakings within an oligopolistic market can, without explicit communication coordinate their behaviour. One of the key questions that have arisen in this area of EU competition law that is whether the concept of a concerted practice in Art.101 is broad enough to catch tacit collusion, coordinated effects and conscious parallelism in the same way that it regulates express collusion. The key to answering this question as Jones and Sufrin tell us is; *'whether tacit collusion constitutes practical cooperation between undertakings or independent behaviour outside the scope of Article 101 (1)'*[12].

[9] A Jones, B Sufrin, EU Competition Law: Text, Cases and Materials (4th edn, OUP, 2011) 829
[10] G Monti, EC Competition Law (1st edn, Cambridge University Press, 2007) 309
[11] A Jones, B Sufrin, EU Competition Law: Text, Cases and Materials (4th edn, OUP, 2011) 797
[12] A Jones, B Sufrin, EU Competition Law: Text, Cases and Materials (4th edn, OUP, 2011) 830

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The decisions of the ECJ in relation to this question have attempted to help clear the uncertainty around the issue of Art.101 in relation to oligopolies; the case of *Wood Pulp*[13] it was made clear that tacit collusion is not in itself prohibited by Art.101 (1). The ECJ also stated in *Zuchner v Bayerische Vereinsbank AG*[14] and most notably in the case of *Dyestuffs* where it was said that if there is an agreement or decision by an association of undertakings or a concerted practice then there is potential action under Art.101. The ECJ in this instance stated that; *'Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition… for a producer to co-operate with his competitors in any way whatsoever'* the ECJ went onto say that *'to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action'*[15].

Furthermore in *Peroxygen Products*[16] the ECJ rejected claims that an argument that an agreement between Oligopolists fell outside Art.81(1) as Whish tell us since *'even without the agreement, the structure of the market would have meant that they would have behaved in the same way…the very fact that the firms had entered into an agreement at all indicated that the free play of competition* might have led to different market behaviour*'*[17].

What's more, in the case of *Wood Pulp*[18] the court reiterated its previous statements that parallel conduct could not be used to establish the existence of a concerted practice unless, taking into account the nature of the products, the size, and the number of undertakings and the volume of the market in question as Jones and Sufrin comment; *'Every producer was free to react intelligently to market forces and to alter its course of action, taking into account in so doing the present or foreseeable conduct of his competitors'*[19].

[13] Case C-89, 104, 114, 116-17, and 125-9/85, [1993] ECR I-I 307
[14] Case 172/80 [1981] ECR 2021, [1982] 1 CMLR 313
[15] [1972] ECR 619, [1972] CMLR 557, para 118
[16] OJ [1985] L 35/1, [1985] 1 CMLR 481
[17] R Whish, Competition Law (6th edn, OUP, 2009) 553
[18] OJ [1985] L 85/1, [1985] 3 CMLR 474
[19] A Jones, B Sufrin, EU Competition Law: Text, Cases and Materials (4th edn, OUP, 2011) 832

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In this instance the ECJ decided that the system of quarterly price announcements as was present in the wood pulp market was not in itself an infringement of concerted practice. In this case the Commission had failed to appreciate that the wood pulp markets system of advanced announcements on pricing led to a highly transparent market that made it very easy for each competitor to recognise their competitors price moves. However, although this was the case in *Wood Pulp,* in other cases where market transparency is not legitimate Gabrielsen, Hjelmeng, Sorgard believe that; '*in the context of art.101 TFEU, the creation of such artificial transparency may restrict competition. There are no good reasons why such information exchange should not potentially be classified as an abuse'*[20]*.*

Another leading case that referred to the difficulties of highly transparent markets and how information exchanges could lead to anticompetitive behaviour is *UK Agricultural Tractor Registration Exchange*[21]*.* In this case the commission argued that detailed information about past sales could facilitate a means of foreseeing future behaviour[22]. The commission explained that in this case the information exchange was not in itself anti-competitive but the effects of the information exchange may be.

The importance of the decisions in cases like *UK Agricultural Tractor Registration Exchange and Wood Pulp* is hard to underestimate (in the context of oligopoly regulation) as this demonstrates that the emphasis is on the commission to prove the existence of a concerted practice and to deal with any alternative explanations put forward by the parties of parallel behaviour on the market. *Wood Pulp* makes it clear that that the number of undertakings on the market the homogeneity of the product and the transparency of the market would be relevant to the analysis. As Jones and Sufrin elaborate in the *Wood Pulp* case; *'the market structure may therefore, provide a plausible explanation for the behaviour'*[23]*.*

[20] Gabrielsen T S, Hjelmeng E, Sorgard L, 'Rethinking minority share ownership and interlocking directorships – the scope for competition law intervention' (2011) European Law Review 858
[21] [1992] OJ L68/19
[22] Especially in the highly concentrated market this case took place in, with four firms holding 80% of the market
[23] A Jones, B Sufrin, EU Competition Law: Text, Cases and Materials (4th edn, OUP, 2011) 834

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We will now discuss oligopoly with regards to Art.102 to discover if this provision can effectively regulate oligopoly markets and what problems are faced when using this article. Mezzanotte states that; *'Article 82 prohibits the abuse of a dominant position by one or more undertakings in the relevant market'*[24]. Jephcott and Withers comment that; *'The theory is simple: if undertakings present themselves or act together on a particular market unilaterally as a single entity, then their behaviour as such should be collectively assessed for the purposes of Article 82'*[25]. Anticompetitive effects resulting from a tight oligopoly could be labelled as an exploitative abuse of collective dominance and therefore would come under the scope of Art.102. There are several difficulties that this approach would take. Indeed as Monti tells us, this approach; *'should be rejected because it conceals several difficulties'*[26]. There are two obvious difficulties to the approach to regulate oligopoly through the abuse of collective dominance in Art.102. Firstly it is difficult for regulators to characterise oligopoly behaviour as abuse and secondly there is no conclusive way to remedy this abuse if it can be found.

The commission has experimented with the idea of collective dominance under Art.102 and brought a number of cases to the ECJ under this provision. In *Hoffmann-La Roche v Commission*[27] the ECJ rejected the notion that Art.102 could cover the problem of tacit collusion. In this the ECJ stated that a dominant position must also be distinguished from parallel courses of conduct.

[24] Mezzanotte F, 'Tacit collusion as economic links in article 82 EC revisited' (2009) 30 (3) European Competition Law Review 137
[25] Jephcott M, Withers C, 'Where to go now for E.C. oligopoly control?' (2001) European Competition Law Review 295
[26] G Monti, EC Competition Law (1st edn, Cambridge University Press, 2007) 336
[27] Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211

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However following from this the case of *Italian Flat Glass*[28] the commission held that a collective position of dominance held by three Italian flat glass producers had been abused. The undertakings in question were part of a tight oligopoly that enabled abuse of their dominant market position. The conduct had already been condemned under Art.101 however as Whish tells us; *'the decision opened up the possibility that in other situations the conduct of oligopolists, though not within Article 81, might be attacked under Article 82'*[29]. As Whish goes on to contend; the judgement in this case was *'exciting and frustrating in equal measure'*[30]. From this judgement we can see that a doctrine of collective dominance under Art.102 was indeed a possibility, however, the judgement did not advance the understanding of what constitutes collective dominance. *Italian Flat Glass* was a landmark case in the regulation of oligopoly. Subsequent cases have shed more light on this and how Art.102 can be used to regulate oligopoly and have gone some way to answering the questions surrounding this area that we will now discuss.

In the case of *Almelo*[31] it was said that for 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. *Compagnie Maritime Belge Transports v Commission*[32] supported this where important and vital light was shed on the situation regarding collective dominance in Art.102. The ECJ in this instance stated that there had been an infringement under Art.102 and that collective dominance implies that a dominant position may be held by two or more economic entities legally independent of each other provided that from an economic point of view as the judgement tells us at paragraph 36; *'they present themselves or act together on a particular market as a collective entity'.*

The ECJ went on to state in this case that to establish collective dominance, it is necessary to examine the economic links or factors that give rise to a connection between the undertakings concerned. Paragraph 49 of this states; *'the 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'.*

[28] OJ [1989] L 33/34, [1990] 4 CMLR 535
[29] R Whish, Competition Law (6th edn, OUP, 2009) 559
[30] R Whish, Competition Law (6th edn, OUP, 2009) 560
[31] Case C-393/92 Almelo v NV Energiebedrijf Ijsselmij [1994] ECR I-1477
[32] Case C-396/96 P [2000] ECR I-1365, [2000] 4 CMLR1076

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This case is important in the regulation of oligopoly as Whish observes: *'It would appear that the ECJ considers that the test of collective dominance is the same under Article 82 and the ECMR; and the court specifically states that there is no legal requirement on an agreement or other links in law for there to be a finding of collective dominance'*[33].

The decision in the *Airtours v Commission*[34] echoes this reasoning in that it agrees that the essence of collective dominance is parallel behaviour within an oligopoly. In this case a definition for the finding of collective dominance was defined as; each member of the dominant oligopoly must have the ability to know how the other members are behaving to monitor whether or not they are adopting the common policy; the situation of tacit co-ordination must be sustainable over time; to prove the existence of a collective dominant position to the requisite legal standard. As we have seen the case law is still not fully developed to help Art.102 deal with oligopoly as Callery comments; *'It remains perfectly axiomatic that the "oligopoly problem" is one of the chief concerns of EU competition policy'*[35].

Because of this it is clear that within EU competition law, oligopoly is one of the hardest areas to regulate. Monti tell us; *'Economists are divided over the level of regulation required in oligopoly markets because while high degrees of concentration might make markets less competitive, it is also possible to find lively competition in an oligopoly market'*[36]. Indeed Goyder and Albors-Llorens have also commented that oligopoly is one of the biggest obstacles to the construction of an effective system of EU competition law[37] with the difficulty the area brings to regulation.

The fact that oligopoly doesn't entirely fit into the full scope of Art.101 or 102 (as these are mainly focused on cartels and the regulation of monopolies respectively) makes the regulation of an oligopoly market a very difficult brief.

[33] R Whish, Competition Law (6th edn, OUP, 2009) 564
[34] Case T-342/99 [2002] ECR II-2585, [2002] 5 CMLR 317
[35] Callery C, 'Considering The Oligopoly Problem' (2012) 32 (3) European Competition Law Review 142
[36] G Monti, EC Competition Law (1st edn, Cambridge University Press, 2007) 309
[37] A Albors-Llorens, J Goyder, EC Competition Law (4th edn, OUP, 2009) 375

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Furthermore, at this time the case law on oligopolies has still not reached an adequate point which would lend enough support to Art.101 and 102 to prevent the abuse of competition. What's more, this situation could be made worse in future cases. As Callery comments; *'There can be no doubt that future cases will present unforeseen sets of facts'*[38] and this in turn will mean that there is yet more complication added to the field.

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[38] Callery C, 'Considering The Oligopoly Problem' (2012) 32 (3) European Competition Law Review 152

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