



**University of
Leicester**

Department of Law

LW2011/LW2012 Competition Law and
Policy

Question 2

“Is there effective means of dealing with
oligopolistic industries that are
insufficiently competitive? ”

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2627 words in the document

Introduction

This essay discusses if there is effective means of dealing with oligopolistic industries that are insufficiently competitive. The essay consists of a description on the economic theories that have influence on the competition law, a description of relevant legislation on the topic, a discussion of Art. 101 and 102 TFEU in relation to prohibit certain behaviour by oligopolistic industries, a description of other means to deal with oligopolistic industries and a conclusion.

Theory

An oligopoly is a market structure dominated by a small group of sellers, and has become important in relation to competition law because of the economic development in the 20th century. The oligopoly has a risk for market failure¹, where parallel conduct increases prices – but because of the few sellers on the market it might not be necessary to communicate to reach a point with no normal competition. The question is how to move the oligopolistic industries in direction of competition instead of parallel conduct, and to answer this question it is necessary to understand the economic theory behind the oligopoly:

“The Harvard School” argued that the best remedy against oligopoly was changing the market share using the “Structure-Conduct-Performance Paradigm”² to explain that a great market power was equal to lower efficiency, since it was the idea that undertakings with smaller market power would be more competitive. By using structural remedies, as merger control, it was argued the lower efficiency. The problem is, however, that it is very difficult to say what market power an undertaking must have to be able to be innovative and compete on the market.

¹ See the theory of “monopolistic competition” Chamberlin, Hastings Edward – “*Theory of Monopolistic Competition*” and Robinson, Joan - “*The Economics of Imperfect Competition*”

² Website 1

“The Chicago School” was, in contrast to “The Harvard School”, of the opinion that undertakings with big market power, not necessarily, were equal to lower efficiency³. A market with undertakings with a big market power could be more effective than a market with undertakings with smaller market power⁴.

“The New Industrial Economy” came up with another way of understanding the behaviour of the undertakings in an oligopoly based on game theory in the “prisoner’s dilemma”. The idea is that two persons are charged for a crime, and if one of them confess, that person will be free and the other person placed in prison for 10 years. The persons are not able to communicate. If both persons confess they will be placed in prison for 5 years each. If none of them confess they will both be free. If one undertaking charges a high price in an oligopoly; the other undertakings should charge a low price – since this would lead to a higher sale. If both undertakings charge a low price; profit will be low. If both undertakings charge a high price; a higher profit is made than charging the low price. The best solution for an undertaking will then be to charge a low price, when one undertaking do not know what the other undertaking will do, since it has the best outcome. The oligopoly does not work like this in reality, since the undertakings are monitoring the market and changing their prices when “something happens”. This means that an undertaking could raise the price when the other undertakings do so, or se the price lower – the first choice might be the most profitable⁵. The theory shows some of the complexity connected to the burden of proof when the commission has to prove the outcome and purpose of actions on the market.

³ Website 2 - Distribution of daily consumer goods: Competition, Oligopoly and Tacit Collusion - Spanish Competition Law Tribunal p. 46

⁴ See Stigler, Joseph George – “A Theory of Oligopoly” The Journal of Political Economy, Volume 72, Issue 1 (Feb., 1964), p. 59

⁵ Graham, Cosmo, p. 372 with reference to Competition Commission, *Merger Investigation Guidelines* (2003) at para. 3.35

Legislation

The relevant legislation on this topic are Art. 101 and 102 in the Treaty on the Functioning of the European Union (TFEU) and the EC Merger Control Regulation (ECMCR).

Art. 101 TFEU

The interpretation by the ECJ of the meaning of “concerted practise” in Art. 101 TFEU makes it possible⁶, under certain circumstances, to use the Art. as a regulation of the undertakings characterized as “oligopolistic industries” to secure competition in order to complete the internal market and secure consumer welfare. The circumstances required establishing a “concerted practice” prohibited by Art. 101 TFEU, was the question in the “Dyestuff-judgements”⁷, where the ECJ ruled that: *“Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market”*⁸. The parallel behaviour was not enough to establish a “concerted practice”, since it was necessary to make an analysis of the market a whole⁹ to decide if the parallel behaviour *“was designed to replace the risks of competition and the hazards of competitors’ spontaneous reactions by cooperation constituting a concerted practice”*¹⁰. The meaning of this is that, even though there is no proof of an agreement, if the behaviour on the market is not normal, it could be concerted practice – which was found in the “Dyestuff-cases”. It was not very clear what was required of the assessment of the market as a whole to establish a “concerted practice”, but in *Ahlström, Osakeyhtiö and*

⁶ ICI v Commission and *SA française des matières colorantes v. Commission*

⁷ Ibid

⁸ Ibid. para. 66 and para. 53

⁹ Ibid. para. 68 and 55

¹⁰ Ibid. para. and para. 106

*others v Commission*¹¹, known as “*Wood Pulp II*” the ECJ held that parallel behaviour on its own was not enough to be a “concerted practice”, even when there was evidence of contracts and exchange of information¹², since other factors on the market could explain the simultaneous price raises. Since oligopolistic industries does not have to communicate, at least in theory¹³, to prevent competition in the interest of all undertakings involved, it is very difficult, in the light of the “Dyestuff-cases” and “*Wood Pulp II*”, for the commission to prove that the parallel behaviour is “*designed to replace the risks of competition and the hazards of competitors’ spontaneous reactions*”¹⁴. The fact of the existence of markets where “*competition is limited and that, so long as undertakings make their decisions independently, that is not an offence under Article 101 TFEU*”¹⁵, leaves the commission with a very hard case, since the structure of the markets with oligopolistic industries can be explained with “concerted practice”, as in the “Dyestuff-cases”, but also with legal actions in order to meet the needs to succeed on the market. This means that Art. 101 TFEU is not effective dealing with oligopolistic industries that are insufficiently competitive.

Art. 102 TFEU

An alternative to the prohibition in Art. 101 TFEU is to establish abuse of a dominant position by “one or more undertakings” under Art. 102 TFEU. The first problem with Art. 102 TFEU in relation to oligopolistic industries is that most undertakings will not have a market share above 40%, and it is unlikely that the undertaking would be found in a dominant position with a smaller market share¹⁶. The commission tried to change the narrow interpretation¹⁷ of “*one or more undertakings*”, which was done by the Court

¹¹ Ahlström, *Osakeyhtiö and others v Commission*, paras. 66-72

¹² Graham, Cosmo, p. 375

¹³ Ibid.

¹⁴ ICI v Commission para. 119 and *SA française des matières colorantes v. Commission* para. 106

¹⁵ Graham, Cosmo, p 375

¹⁶ Ibid., p. 123 with reference to the OFT (n, 26), para. 2.12 – the only exception is in Case C-95/04P *British Airways v Commission* [2007] ECR U-2331 with a market share one year on 39,7%

¹⁷ *Hoffmann-La Roche v Commission*, para. 39

of First Instance (CFI), known as the General Court (GC) after the Treaty of Lisbon, in the case known as “*Italian Flat Glass*”¹⁸. The Court of First Instance held that two independent entities could hold a dominant position, and states that: “*this could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers.*”¹⁹. This was thought to mean, even though it is an example, that there has to be a legal connection between the undertakings in order to establish a collective dominant position. In *Almeno v Energiebedrijf IJsselmij NV* the ECJ held that: “*in order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market*”²⁰. In *Gencor v. Commission* it is made clear that a link can be established in an oligopoly through interdependence between two undertakings, where they “*align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices*”²¹, and it gives a description of the needed link, mentioned in the *Almeno*-case, clarifying that it did not necessarily have to be of a legal character. In reality, however, it seems like a legal-link is the only connection strong enough to establish a collective dominant position²². What the impact of the description of the link will be in relation to Art. 102 TFEU is a difficult to answer, but it is a fact that it is very difficult for the commission to prove, as showed above, through economic analysis that the conduct on the market is because of coordinated effects as abuse of collective dominant position and not the principles of market economy. This means that Art. 102 TFEU is not effective dealing with oligopolistic industries that are insufficiently competitive.

¹⁸ T-68, 77 and 78/89 *Società Italiana Vetro (Italian Flat Glass) v Commission*

¹⁹ *Ibid.*, para. 358

²⁰ Para. 42

²¹ Para. 276

²² Graham, Cosmo, p. 382

Other means to deal with oligopolistic industries

The EC Merger Control Regulation (ECMCR) has been used in order to deal with oligopolistic industries, where a collective dominant position was found to be within the scope of the MCR²³. This subject was further clarified by the Gencor-case, mentioned above, which made it clear that “*the concept of collective dominance was the same under Article 102 TFEU and the MCR*”²⁴, which was the case because of the way the CFI referred to the case of “*Italian Flat Glass*”²⁵. The idea was that if a merger would create coordinated effects on the market, it should be blocked. This was the case with the agricultural company “*Kali und Salz*”, in which the ECJ blocked a merger with Mitteldeutsch, after an interpretation of the ECMCR based on the “*purpose and general structure*”²⁶. What was necessary to establish a collective dominant position was not clarified before the ECJ created, through case law²⁷, an “*economic assessment of the connecting factors and the structure of the market in question*”²⁸, to decide whether collective dominance existed in the oligopoly. In *Airtours v Commission*, where the merger was blocked, the ECJ laid down three conditions in this assessment to establish collective dominance²⁹: 1) the undertakings had to be able to monitor the behaviour on the market, 2) the situation had to be stable over time and 3) parties outside the oligopoly “*would not jeopardise the results expected from the common policy*”³⁰. In *Bertelsmann and Sony v Impala and Commission* the conditions in the assessment was clarified. In this case the CFI did not make an analysis of the market transparency³¹, which is condition number 1, and this led to critique from the ECJ³². It is very difficult

²³ Graham, Cosmo, p. 376 with reference to *Nestlé/Perrier*

²⁴ *Ibid.*, p. 377

²⁵ *Gencor v Commission*, para. 273

²⁶ Cases C-68/94 and 30/95 *France v Commission*, para. 168

²⁷ Graham, Cosmo, p. 379 with reference to *Gencor v Commission* and *Compagnie Maritime Belge Transports (CMBT)*

²⁸ *Ibid.*, p. 379

²⁹ *Ibid.*, Cosmo p. 379

³⁰ *Ibid.*, p. 379 with reference to *Airtours v Commission*, para. 62

³¹ para. 123

³² *Bertelsmann and Sony v Impala and Commission*, paras. 113 and 133

for the commission to establish all three conditions in the assessment mentioned above. The ECMCR has not proven itself effective in dealing with oligopolistic industries with insufficient competition.

Conclusion

This essay shows the problems the European Union is facing in relation to oligopolistic industries that are insufficient competition. There is no effective means of dealing with insufficient competition in oligopolies. Art. 101 TFEU was not effective, since it is hard for the commission to prove, by making an analysis of the market as a whole, that parallel behaviour was concerted practise. Art. 102 TFEU was not effective either, since the involved undertaking will not have 40% market share, why collective dominance has to be established. It has proved to be very difficult for the commission to prove the collective dominance, through the economic analysis required, is because of coordinated effects as abuse of collective dominant position and not the principles of market economy. So far the only abuse of collective dominant position established, outside the ECMCR, has been in cases with a legal link – and even though this is not required as mentioned above, there is no example of a non-legal link³³. Structural remedies, such as merger control, do not solve the problems in relation to already established oligopolies with insufficient competition, and the ECJ has proved to be quite reluctant to block mergers on the grounds of collective dominant position. In the future it might be clarified what the 3 conditions, in relation to establish a collective dominant position, means in depth. The conclusion is that the European Union does not have effective means dealing with oligopolistic industries that are insufficient competitive.

³³ Graham, Cosmo, p. 382

Tables of Authorities

Legislation

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The Treaty of Lisbon

Regulations

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