Collective Dominance under EC competition law - The legal perspective*

- The relevant provisions: Article 82 of the EC Treaty (ex post analysis), Article 2 of the Merger Regulation (ex ante analysis)
- The terminology used: joint, collective, oligopolistic dominance: Is there a difference?
- Compare with US law and other jurisdictions

*The views contained in this presentation are those of the author and do not necessarily reflect those of the European Commission
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The origins: an evolving concept

- “Report on the behavior of the Oil Companies during the period from 1973 to 1974, COM (75) 675
- “European Sugar Industry” Decision 73/109 (collective dominant position of two Dutch Sugar producers: commercial links, uniform conduct single entity in the eyes of customers)
- The uncertainties created by the “Hoffman-La Roche” Case: Does Article 82 apply to oligopolies?
The case-law of the ECJ/CFI

- 1992: The Flat Glass judgment: first attempt by the CFI to define collective dominance: the reference to the existence of “economic links”.
- 1994 - 1997: The ECJ gives a slight different definition: undertakings must be sufficiently linked to each other to adopt the same conduct” (see “Almelo”, “Centro Servizi”, “DIP” “Rendo” and “Sodemare” Cases)
The case-law of the ECJ/CFI

• The “Kali und Salz” Case (C-68/94 and C-30/95) The Commission’s criteria for assessing collective dominance are upheld. However, annulment for lack of a prospective, dynamic interpretation of market conditions.

• 1999: The “Gencor” judgment: Absence of “structural links”. The reinterpretation of the Flat Glass judgement.

• Conscious parallel behavior and tacit collusion: is this the end of “Hoffmann-La Roche”? 

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The “CMB” Case

• An Article 82 case: an important judgment
• The ECJ spelt out a number of conditions to be fulfilled for collective dominance
  – a) absence of effective competition
  – b) uniform conduct / common policy
• ECJ upheld indirectly Gencor
The Airtours judgment

• Has the law changed?

• Is there a difference between Article 82 and the MCR?
The Commission Guidelines on SMP

• SMP equals dominance, including collective dominance

• Council and Parliament set out conditions for Oligopolistic Dominance (Annex I of the FWD). Not an exhaustive, mechanical bullet-point list.

• NRAs should look into whether
  – the characteristic of the market makes it conducive to tacit collusion
  – whether such form of coordination is sustainable