Contents

*Introduction* xi
*Table of cases* xv

**PART 1 PARALLELISM IN US COMPETITION LAW**

1. US antitrust policy towards parallelism: the *ex post* enforcement 3
   1. Introduction 3
   2. Sherman Act Section 1 4
   3. Early Section 1 case law on parallelism: *Interstate Circuit, American Tobacco, and Theatre Enterprises* – admitting the inference of agreements from circumstantial evidence 6
   4. Parallelism in the scholars’ debate: Turner, Posner, and the tension between the Harvard and Chicago schools 10
   5. Refining the Section 1 approach to collusion – the ‘parallelism plus’ doctrine as the core of US oligopoly control 16
       5.1 *Monsanto, Matsushita*, and their influence on the lower courts’ approach to parallelism 18
   6. The revival of *Matsushita*: Section 1 conspiracy in the *Twombly* case: new standard of proof and the possible departure from pure ‘parallelism plus’ doctrine 23
   7. The *Twombly* aftermath – the future of Section 1 conspiracy claims 28
   8. The effectiveness and the potential of Section 1 for antitrust control on parallelism 31
   9. Applying Sherman Act Section 2 to parallelism – scholars’ proposals and the case law 34
   10. Federal Trade Commission Act Section 5: the alternative approach to parallelism – *Boise Cascade* and *Ethyl* cases 40
   11. The potential of Section 5 for antitrust control on parallelism 45
   12. Conclusion – trends in the US antitrust policy towards tacit collusion and the potential of behavioural economics 48
Collective dominance and collusion

2. The US merger policy towards collusion
   1. Introduction
   3. Overcoming the structural presumption: the Chicago school’s influence on merger control – General Dynamics case, the 1982 Merger Guidelines, and Hospital Corporation of America case
   4. The 1984 Non-Horizontal Merger Guidelines
   5. The 1992 Horizontal Merger Guidelines and its most paradigmatic application – the Heinz/Beech-Nut case
   6. The 2010 Horizontal Merger Guidelines and the AT&T merger
      6.1 The AT&T merger: adopting a behavioural approach
   7. Conclusion

PART 2 PARALLELISM IN EU COMPETITION LAW

3. First evidence of the ‘oligopoly problem’ in the enforcement of EU antitrust laws
   1. Introduction
   2. The background of the EC Treaty: awareness about the ‘parallelism problem’
   3. The EU Treaty formulation: all rules potentially addressing multilateral conducts – Divergences in interpreting the notion of ‘concerted practices’
   4. The different role of the ‘oligopoly problem’ in US and EU antitrust debate during the 1960s
   5. Antitrust control on parallelism: first possibility – controlling parallelism under article 101. The original case law on concerted practices
   6. The alternative: applying article 102 to more undertakings
   7. Towards a change in article 102 interpretation: abuse as an objective notion and the antitrust significance of corporate groups
   8. The dominant position of more undertakings at the end of the 1980s
   9. The dominant position of more companies in merger control
   10. Conclusions
## Contents

4. The first stage of EU oligopoly control: shaping the category of collective dominance 92  
   1. Introduction 92  
   2. *Flat Glass* – defining collective dominance as the market power of many independent companies 92  
   3. *Nestlé/Perrier* – the antitrust control on oligopolistic mergers 96  
   4. *Almelo* – all European authorities concur on the definition of collective dominance 97  
   5. *Centro Servizi Spediporto; DIP; Sodemare* – the role of legislative and administrative provisions for the establishment of collective dominance 99  
   6. *Kali und Salz* – the Court of Justice concurs on the need for expanding antitrust control to oligopolistic mergers 100  
   7. *Gencor/Lonrho* – the adoption of a game theory approach in merger control 105  
   8. *Irish Sugar* – vertical collective dominance and individual abuses of collective dominance 107  
   9. *Compagnie Maritime Belge* – recognizing the role of oligopoly for the establishment of collective dominance 110  

5. *Airtours* and its aftermath 115  
   1. Introduction 115  
   2. *Airtours*: the Commission decision – overextending the notion of collective dominance 115  
   3. *Airtours*: the CFI judgment – the legal standard for collective dominance 120  
   4. The aftermath of the *Airtours* case: changes in EU merger control 123  
   5. Changes in article 102 enforcement: the 2005 *Discussion Paper* and the 2009 *Guidance on the exclusionary abuses* – collective dominance withdrawn from the list of the Commission’s priorities in enforcing article 102 128  
   6. The post-*Airtours* case law on collective dominance 131  
      6.1 *Sony* – standard of proof for collective dominance and the application of the *Airtours* conditions 134  

PART 3 A SUGGESTED APPROACH TO COLLECTIVE DOMINANCE 141  

6. Coordinated effects in EU merger control 141  
   1. Introduction 141  
   2. Policy framework for merger control: avoiding false positives 142
Collective dominance and collusion

3. Default rule in merger control: arguments for presuming legality of mergers 145

4. Rebutting the presumption of the lawfulness of mergers: standard of proof for prohibitions – preference for a ‘balance of probabilities’ standard 149

5. The assessment of coordinated effects under a ‘balance of probabilities’ standard 154

6. Quantitative analysis – the Airtours test revisited 156
   6.1 Market prone to collusion 157
   6.2 Internal stability of collusion 165
   6.3 External stability of collusion 168

7. Qualitative analysis: factors strengthening or lowering the suspicion of post-merger coordination 168

8. Merger remedies for coordinated effects 171

9. Conclusion – merger prohibitions on the ground of coordinated effects 175

7. Abuses of collective dominance 177

SECTION I – Taxonomy of collective dominance 177
1. Collective v. single dominance: how the involvement of many companies influences the methodological approach to dominance 177
2. The role of oligopoly in abuses of collective dominance 179
   2.1 Non-oligopolistic collective dominance 179
   2.2 Oligopolistic collective dominance 181
3. A step ahead: including semi-collusion or partial collusion in the notion of collective dominance 186
   3.1 Economic models 189
   3.2 Consequences for antitrust enforcement towards collusion 192
4. Summary – typing collective dominance 194

SECTION II – Dealing with tacit collusion 195
5. Tacit collusion as the anticompetitive but not inevitable outcome of oligopolistic interdependence 195
6. Enforcing article 102 against pure oligopolistic parallelism: means – the Airtours conditions revisited 198
   6.1 Market prone to collusion 199
   6.2 Internal stability of collusion 201
   6.3 External stability of collusion 206
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>Applying the <em>Airtours</em> conditions to non-oligopolistic and impure oligopolistic dominance</td>
<td>207</td>
</tr>
<tr>
<td>8</td>
<td>Method</td>
<td>208</td>
</tr>
<tr>
<td>9</td>
<td>Standard of proof</td>
<td>210</td>
</tr>
<tr>
<td>10</td>
<td>Combining means, method, and standard of proof: does parallelism amount to an abuse of collective dominance?</td>
<td>212</td>
</tr>
<tr>
<td>11</td>
<td>When economic analysis can explain parallelism in terms of collusion</td>
<td>214</td>
</tr>
<tr>
<td>12</td>
<td>Consequences: inference of negligent or intentional abuse of collective dominance and full enforcement of article 102</td>
<td>219</td>
</tr>
<tr>
<td>13</td>
<td>When there is not( enough) evidence of cooperation: exploiting the objective notion of abuse to solve the ‘oligopoly problem’ – enforcing article 102 towards anticompetitive coordination</td>
<td>221</td>
</tr>
<tr>
<td>14</td>
<td>Consequences: no-fault conduct and injunctive relief</td>
<td>225</td>
</tr>
<tr>
<td>14.1</td>
<td>Injunctive measures: cease and desist orders, behavioural remedies, and structural remedies – reluctance towards imposing mandatory and detailed remedies</td>
<td>227</td>
</tr>
<tr>
<td>14.2</td>
<td>Criteria for proper definition of remedies: principle of proportionality and consistency with the idiosyncratic scope of antitrust control</td>
<td>232</td>
</tr>
<tr>
<td>15</td>
<td>The ‘plus value’ of collective dominance in addressing the oligopoly problem</td>
<td>237</td>
</tr>
<tr>
<td>16</td>
<td>Conclusions: parallelism under article 102 – addressing cooperation and anticompetitive coordination</td>
<td>238</td>
</tr>
<tr>
<td>8</td>
<td>Lessons from collective dominance: re-thinking the relationship of articles 101 and 102</td>
<td>240</td>
</tr>
<tr>
<td>1</td>
<td>Introduction</td>
<td>240</td>
</tr>
<tr>
<td>2</td>
<td>Interference between articles 101 and 102: conduct constituting at the same time abuses of collective dominance and unlawful cartels</td>
<td>241</td>
</tr>
<tr>
<td>3</td>
<td>How EU Courts have addressed the interference of articles 101 and 102: from alternative to cumulative application – inconsistencies in the current cumulative approach</td>
<td>242</td>
</tr>
<tr>
<td>4</td>
<td>Comparative analysis of articles 101 and 102 – evident analogies</td>
<td>246</td>
</tr>
<tr>
<td>5</td>
<td>Elements apparently marking the difference: restriction by object and dominance – critics of the traditional interpretation of both notions</td>
<td>250</td>
</tr>
</tbody>
</table>
x

Collective dominance and collusion

6. De-emphasizing the differences: market power and the assessment of effects 264
7. Inferences from the comparative analysis: the thesis about continuity/contiguity of articles 101 and 102 – critics 268
8. Analogies and the evolutive interpretation of ‘dominance’: the substantial coincidence of articles 101 and 102 in dealing with ‘collusive collective dominance’ 271
9. Rationalizing the coincidence of articles 101 and 102: bringing all cartels under article 102 – the supervening redundancy of article 101 275
10. Residual peculiarities of article 102 facing article 101 278
11. Article 102 as a ‘general norm’ 280

Concluding remarks: EU and US approach to the oligopoly problem: an economic-based trend toward convergence 284

Bibliography 291
Index 339