

Contents

<i>Introduction</i>	xi
<i>Table of cases</i>	xv
PART 1 PARALLELISM IN US COMPETITION LAW	
1. US antitrust policy towards parallelism: the <i>ex post</i> enforcement	3
1. Introduction	3
2. Sherman Act Section 1	4
3. Early Section 1 case law on parallelism: <i>Interstate Circuit</i> , <i>American Tobacco</i> , and <i>Theatre Enterprises</i> – 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 <i>Monsanto</i> , <i>Matsushita</i> , and their influence on the lower courts' approach to parallelism	18
6. The revival of <i>Matsushita</i> : Section 1 conspiracy in the <i>Twombly</i> case: new standard of proof and the possible departure from pure 'parallelism plus' doctrine	23
7. The <i>Twombly</i> 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 – <i>Boise Cascade</i> and <i>Ethyl</i> 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

2. The US merger policy towards collusion	51
1. Introduction	51
2. The first stage: the influence of Structuralism – <i>Philadelphia National Bank, Von's Grocery</i> , and the 1968 Merger Guidelines	53
3. Overcoming the structural presumption: the Chicago school's influence on merger control – <i>General Dynamics</i> case, the 1982 Merger Guidelines, and <i>Hospital</i> <i>Corporation of America</i> case	55
4. The 1984 Non-Horizontal Merger Guidelines	60
5. The 1992 Horizontal Merger Guidelines and its most paradigmatic application – the <i>Heinz/Beech-Nut</i> case	62
6. The 2010 Horizontal Merger Guidelines and the <i>AT&T</i> merger	66
6.1 The <i>AT&T</i> merger: adopting a behavioural approach	69
7. Conclusion	70

PART 2 PARALLELISM IN EU COMPETITION LAW

3. First evidence of the 'oligopoly problem' in the enforcement of EU antitrust laws	75
1. Introduction	75
2. The background of the EC Treaty: awareness about the 'parallelism problem'	76
3. The EU Treaty formulation: all rules potentially addressing multilateral conducts – Divergences in interpreting the notion of 'concerted practices'	77
4. The different role of the 'oligopoly problem' in US and EU antitrust debate during the 1960s	80
5. Antitrust control on parallelism: first possibility – controlling parallelism under article 101. The original case law on concerted practices	81
6. The alternative: applying article 102 to more undertakings	83
7. Towards a change in article 102 interpretation: abuse as an objective notion and the antitrust significance of corporate groups	85
8. The dominant position of more undertakings at the end of the 1980s	87
9. The dominant position of more companies in merger control	89
10. Conclusions	91

4.	The first stage of EU oligopoly control: shaping the category of collective dominance	92
1.	Introduction	92
2.	<i>Flat Glass</i> – defining collective dominance as the market power of many independent companies	92
3.	<i>Nestlé/Perrier</i> – the antitrust control on oligopolistic mergers	96
4.	<i>Almelo</i> – all European authorities concur on the definition of collective dominance	97
5.	<i>Centro Servizi Spediporto; DIP; Sodemare</i> – the role of legislative and administrative provisions for the establishment of collective dominance	99
6.	<i>Kali und Salz</i> – the Court of Justice concurs on the need for expanding antitrust control to oligopolistic mergers	100
7.	<i>Gencor/Lonrho</i> – the adoption of a game theory approach in merger control	105
8.	<i>Irish Sugar</i> – vertical collective dominance and individual abuses of collective dominance	107
9.	<i>Compagnie Maritime Belge</i> – recognizing the role of oligopoly for the establishment of collective dominance	110
5.	<i>Airtours</i> and its aftermath	115
1.	Introduction	115
2.	<i>Airtours</i> : the Commission decision – overextending the notion of collective dominance	115
3.	<i>Airtours</i> : the CFI judgment – the legal standard for collective dominance	120
4.	The aftermath of the <i>Airtours</i> case: changes in EU merger control	123
5.	Changes in article 102 enforcement: the 2005 <i>Discussion Paper</i> and the 2009 <i>Guidance on the exclusionary abuses</i> – collective dominance withdrawn from the list of the Commission’s priorities in enforcing article 102	128
6.	The post- <i>Airtours</i> case law on collective dominance	131
6.1	<i>Sony</i> – standard of proof for collective dominance and the application of the <i>Airtours</i> conditions	134
PART 3 A SUGGESTED APPROACH TO COLLECTIVE DOMINANCE		
6.	Coordinated effects in EU merger control	141
1.	Introduction	141
2.	Policy framework for merger control: avoiding false positives	142

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 <i>Airtours</i> 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 <i>Airtours</i> conditions revisited	198
6.1	Market prone to collusion	199
6.2	Internal stability of collusion	201
6.3	External stability of collusion	206

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

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
<i>Bibliography</i>	291
<i>Index</i>	339