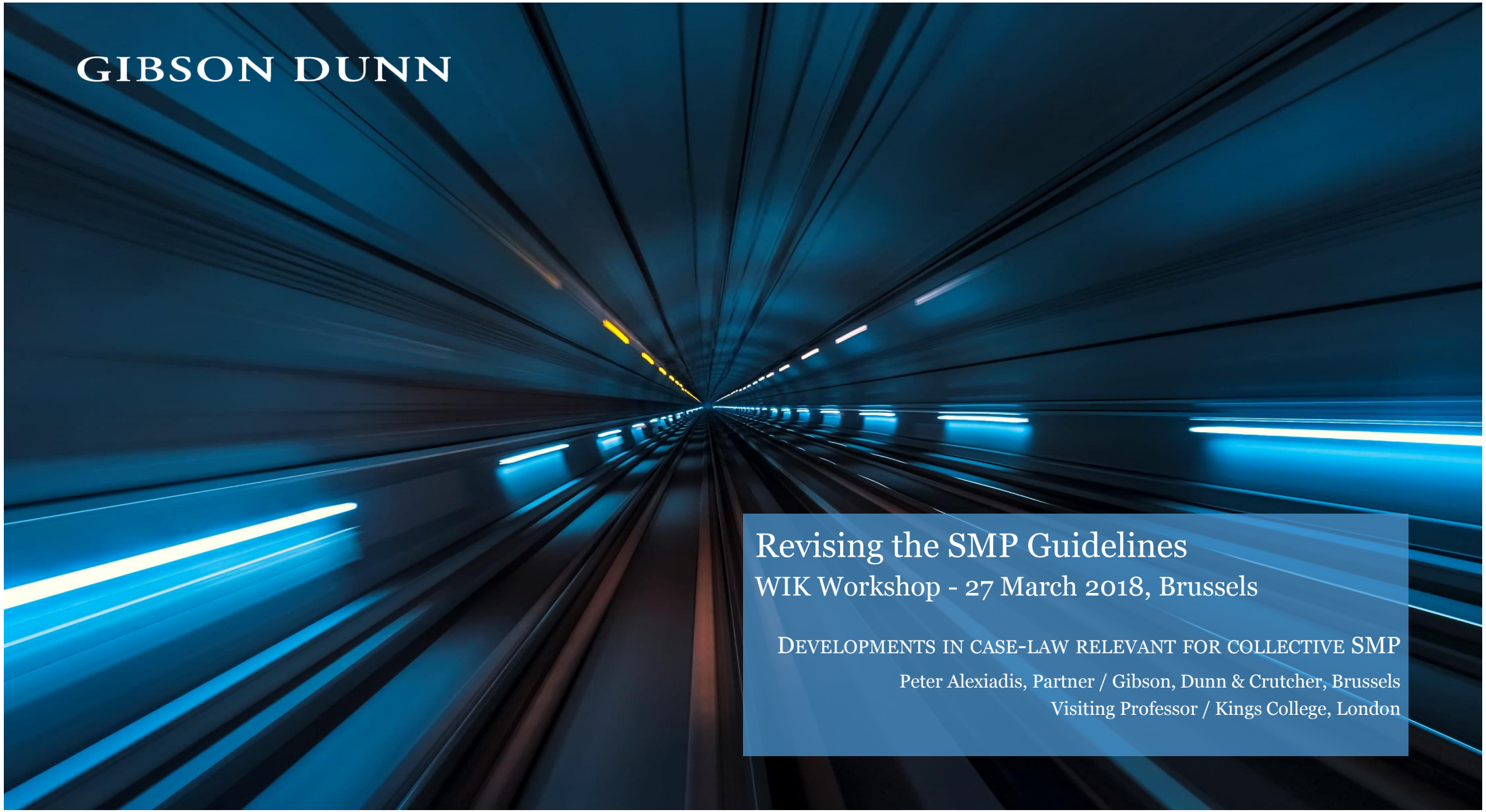

Revising the SMP Guidelines

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DEVELOPMENTS IN CASE-LAW RELEVANT FOR COLLECTIVE SMP

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0. Introduction

- ***SMP Guidelines***: Imposition of *ex post* standards in an *ex ante* context
- Different features of each institutional setting for the application of the concept of 'collective SMP'
- Philosophy behind intervention in an *ex ante* context

1. Article 102 Precedents
1.1 Pre-SMP Guidelines

- ***Italian Flat Glass*** (1992): Ambiguity of CFI legal test, suggesting that some form of agreement is a precondition to intervention: "…[T]*wo or more independent economic entities from being […] united by economic links […] through agreements or licences affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers.*" (para. 358)

- ***Almelo*** (1994): Suggestion by the CJEU that non-collusive conduct is caught under Article 102 when "*the undertakings in the group [are] linked in such a way that they adopt the same conduct on the market.*" (para. 42)

1.1 Pre-SMP Guidelines

Compagnie Maritime Belge (2000)

- No distinction between the treatment of the concept of collective dominance under Article 102 and the EUMR (para. 41).
- Clarification that oligopolies might result in collective dominance insofar as "*from an economic point of view [the parties] present themselves or act together on a particular market as a collective entity*" (para. 36), while the existence of a collective dominant position may flow from "*the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it; 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*." (para. 45)

1.2 Post-SMP Guidelines Precedents

- ***Laurent Piau*** (2005)

➢ Applied the ***Airtours*** criteria from 2002 to FIFA's National Football Associations and clubs forming them, all of whom were linked to one another by the FIFA Players' Agents Regulations.

➢ The relevant market was structured in such a way that FIFA's top-to-bottom orders to other buyers dictated how they could interact on the market with sellers (*i.e.*, agents).

1.2 Post-SMP Guidelines Precedents

- ***EFIM Case*** (GC, 2011 – upheld by CJEU, 2013)

- Unsuccessful attempt to establish the first criterion (market transparency) under the ***Airtours*** standard in relation to an alleged situation of collective dominance in printer aftermarket (*i.e.*, for toners).
- Relevance of 'maverick' should be accorded due weight. (GC para. 75)
- No proof that market concentration in printer market could prevent competitive constraints being exercised in an aftermarket. (GC para. 77)
- Inability to demonstrate how the conscious parallelism for the manufacture of printer cartridges could potentially restrict competition on the printer market and override competitive constraints in aftermarkets. (GC para. 78)
- The case explicitly covers the situation of tacit coordination with no reference being made to the notions of *"sufficiently strong links", "correlative factors"* or *"economic links"* used in previous cases.

2. EUMR
2.1 Case-law

- ***Airtours*** (2002)

In the context of a 5-to-4 merger, the CJEU held that three cumulative conditions are necessary for coordinated effects to arise from an oligopoly situation, namely (para. 62):

i. the operators must be able to **monitor** the behaviour of each other to ensure each adheres to the terms of coordination;
ii. a **credible deterrent mechanism** must be in place to "punish" deviating behaviour from the oligopolistic parallel conduct; and
iii. there must be no effective **external constraint**, such as those from consumers or potential competitors, that could jeopardise the common conduct on the market. (para. 210)

2.1 Case-law

- All three abstract criteria are difficult to prove in a communications sector context, absent the ability to take into account the particularities of the sector.

- The legal standard established is silent on the issue of the functional level of the market where monitoring, deterrence and competitive constraints should occur.

- The existing SMP Guidelines hardly took into account the implications of the Judgment.

2.1 Case-law

- ***Impala*** (GC, 2006)

➢ Commission approval of 5-to-4 merger in recording industry because of lack of evidence of pre- or post-merger collective dominance overturned by General Court for its lack of a prospective and detailed appraisal of collective dominance. The General Court confirmed that, while the *Airtours* standard continues to be necessary for a theoretical analysis of the concept of collective dominance, the standard might also:

"*in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position. Thus, in particular, close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might in the* ***absence of an alternative reasonable explanation****, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances*." (paras. 251-252)

2.1 Case-law

- In emphasising the holistic approach in assessing ***Airtours***, the General Court pointed out that the Commission carries out a prospective analysis on the probable development of the market, which "entails complex economic assessments in respect of which the Commission has a wide discretion" (para. 250).

- The language of ***Impala*** is more compatible with the language of the EU Regulatory Framework (*i.e.*, market structure "conducive to coordinated effects". Thus, the standard of proof is arguably modified by reference to the existence of structural market criteria.)

2.1 Case-law

- ***Impala*** (CEJU, 2008)

- While the General Court's Judgment was overturned by the Court of Justice in terms of the application on the principles it applied, those principles do not seem to have been overturned at an analytical level. For example, the Court emphasized that even a more flexible application of the *Airtours* criteria still requires the adoption of a cautious approach and the identification of plausible coordination strategies that may be available in the circumstances (para. 129).
- The Court of Justice drew on these principles to assess whether the firms, given their symmetrical market positions, could anticipate one another's behaviour and were encouraged to align their conduct to maximise their joint profits. Tacit coordination would be "more likely" if the firms could "easily arrive" at a common perception as to how the coordination should work and the parameters that may serve to support the focal point of non-collusive coordination.

2.1 Case-law

- The Court did conclude, however, that where the alleged collective dominance emanates from a non-collusive oligopoly, *the onus is on the Commission* under an *ex ante* analysis to prove that the parties will create a SIEC situation on the market via a common policy likely to be adopted by those undertakings. This can include:
  i. an analysis of the interdependence between the parties in the tight oligopoly; and
  ii. whether, based on appropriate characteristics such as market concentration, transparency and product homogeneity, those parties in the tight oligopoly would be able to anticipate one another's behaviour, which would strongly encourage them to align their market conduct to maximize their joint profits (paras. 125-126). Tacit coordination of this nature is *more likely* if competitors can easily comprehend how the coordination should work and the parameters that lend themselves to being focal points for non-collusive coordination.

2.1 Case-law

- As regards deterrence (2nd criterion in *Airtours*), much will depend upon monitoring mechanisms being identified which can be used to observe evolving coordinated conduct, presupposing that some form of credible deterrent mechanism can be put into effect if deviations are detected (paras. 123, 125-126). This would be most effective if the oligopolists in question could comprehend how such coordination should work and on which specific parameters the parallel conduct depends (paras. 120-123).

- The Court again emphasized that the third *Airtours* criterion should be taken into account, namely, whether or not current and potential competitors outside the oligopoly could undermine the non-collusive coordination.

2.1 Case-law

- The Court emphasized that the *Airtours* criteria should not be applied mechanically because the criteria are interrelated and cannot be assessed in the abstract. Rather, they must be assessed by reference to the overall economic mechanism of an alleged tacit coordination (especially the market transparency criterion in relation to the *modus operandi* of any alleged tacit coordination), which can be monitored to determine whether or not each oligopolist adheres to the commonly adopted policy (para. 126).

- The General Court was held to have committed an error in law by having accorded too much weight to aligned rebates policies as a means of monitoring commonly adopted policy without having adequately assessed departures from this rebates policy. Instead, the General Court relied on the unsupported assertions of an industry professional. The Court held that the burden of proof rests on the party alleging the existence of coordinated effects to explain how the rebates policies constituted a *modus operandi* to give effect to a functioning monitoring system (paras. 133).

2.1 Case-law

- ***Conclusions***

➢ Much of the logic established by the General Court in the *Impala Case* remains untouched by the Court of Justice on appeal.

➢ Greater nuance is applied to the *Airtours* criteria by the Court of Justice, with respect to: (1) the assessment of interdependence between oligopolists (in terms of market concentration, transparency and product homogeneity); (2) the existence of incentives to align conduct to earn higher profits; (3) whether the parties are in a position to anticipate one another's behaviour and to respond quickly; and (4) whether a common policy is sustainable by way of identified monitoring mechanisms.

➢ Emphasis is placed on the relative ease with which parties in a tight oligopoly could understand how the coordination would work in practice, especially in terms of focal points.

➢ The onus of proof is on the party alleging the existence of the different elements of the *Airtours* test.

2.2 Horizontal Mergers – coordinated effects

➢The *Horizontal Merger Guidelines* are very much aligned to the *Airtours* "check list" approach, as they were published before the *Impala* Judgment

Coordinated Effects in Telecoms Merger Cases:

➢Under the SIEC test, establishing dominance (either single or collective) is not a legal condition to prohibit a concentration.

- ***T-Mobile/Tele.ring***: Without finding collective dominance, the concentration was found to lead to a SIEC situation because the acquisition of a maverick operators reduced competitive pressure on two market leaders with symmetric market characteristics.

➢Concentrations in the telecoms sector involve an assessment of whether the elimination of important competitive constraints amongst the merging firms would lead to an SIEC situation.

2.2 Horizontal Mergers – coordinated effects

- There are some cases in which the Commission did consider whether collective dominance would arise post-concentration:
  - ***T-Mobile/Orange Netherlands***: No price transparency on the retail market, and hence no collective dominance
  - ***Hutchison 3G Austria/ Orange Austria*:** proposed remedies furthered MVNO market entry, thereby addressing any preliminary concerns of collective dominance.

- Commission is able to ask for remedies addressing potential coordinated effects without formally proving collective dominance, due to lack of sufficient evidence (*e.g.*, ***Telefonica Deutschland / E-Plus***).

- More recent case-law has affirmed the principle that the response to a SIEC finding is the introduction of a new competitor, and not the provision of behavioural access remedies (*e.g.*, ***Hutchison 3G Italy/WIND, TeliaSonera/Telenor***).

- In ***Hutchinson 3G Italy/WIND***, great emphasis was placed on internal documents of the Parties explaining the way in which they positioned themselves in the market.

2.2 Horizontal Mergers – coordinated effects

- ***Liberty Ziggo*:** Even in the presence of factors that lend themselves to tacit coordination, evidence that the market moves towards product bundles (multi-play services) and the absence of past market failures derived from parallel conduct, can negate a finding of coordinated effects, and thus a finding of SIEC. (Note also the extraction of an OTT-related remedy.)

Non-Telecoms Merger Cases:

- ***ABF/GBI Business merger**:* price monitoring may be easier in a stable demand situation and where frequent information exchanges occur with customers that reveal the prices of competing suppliers. This would also enable more effective retaliation. By contrast, strong countervailing buyer power and large distribution channels can reduce transparency and, therefore, coordinated effects.
- ***Holcim/Cemex***: market characteristics that facilitate coordination: A stable economic environment, a small number of competitors, a homogeneous product, inelasticity of demand and a relative symmetry of competitors are all factors that facilitate competitors realising their terms of coordination.

2.2 Horizontal Mergers – coordinated effects

The Relationship between the SIEC Test and Collective Dominance:

- The evidentiary standard for the SIEC test is clearly lower than the *Airtours/Impala* approach to collective dominance, especially given its focus on "gap" cases under the EUMR.

- There seems to be no sound analytical basis to adopt the SIEC standard as a workable *ex ante* principle unless it embraces expressly the standard of collective dominance, which is rarely the case in practice.

- The resolution of complex "gap" cases under the SIEC standard is either for mergers to be blocked or for remedies to be provided by the merging parties (rather than the unilateral imposition of access remedies by an NRA), which changes fundamentally the role of a traditional burden of proof in collective dominance cases.

3. Tacit coordination and parallelism under Article 101 TFEU

- *Richard A. Posner* (1969): "There is little difference between tacit and explicit collusion - the main difference is a matter of proof."

- The Court of Justice has, since the 1960s, limited any scope for the concept of tacit collusion to be directly applicable under Article 101 TFEU.

- ***Zinc Producer Group* (Commission Decision, 1984):** "*Parallel pricing behaviour in an oligopoly producing homogeneous goods will not be in itself sufficient evidence of a concerted practice*" (Recital 75).

- ***Sugar Case* (CJEU, 1975):** "*Does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors"* (para. 174).

3.1 The legal concept of collusion

- ***Sugar Case*** (CJEU, 1975)

  - *"The fact that a vendor aligns his price on the highest price charged by a competitor is not necessarily evidence of a concerted practice but may be explained by an attempt to obtain the maximum profit"* (para. 285).

  - Thus, a concerted practice is established if competitors knowingly substitute the uncertainties of competition with practical cooperation.

  - There are three key components used to establish a concerted practice:
    i. The phenomenon of concertation
    ii. Subsequent conduct on the market
    iii. A causal link between the coordination and market behaviour

3.2 Causal connection between concertation and market behaviour

➢Competitors have been presumed to be aware of price increases *unless they can advance evidence* that they had applied a price rise after concertation or had publicly distanced themselves from collusive behaviour:

- ***Eturas Case* (2016)**
- ***Hüls Case* (1999)**
- ***T-Mobile Case* (2009)**

(Although the implications of the closing of the ***CDS Investigation*** need to be considered.)

➢In the special case of the electronic communications sector, a very high level of transparency has been found to be sufficient to establish collusion on the basis of only one meeting: ***T-Mobile Case* (2009)**.

3.3 The distinction between concertation and parallelism

- Parallel pricing does not necessarily result from prior collusion, but can also occur due to the structure of the market. In oligopolistic market structures, competitors may align their prices by way of intelligent adaptation following the actions of their rivals. Hence, if a price leader increases its prices, it might be irrational for its rivals not to follow suit in order to realise the best possible margins.

- Three principles can be established to identify the dividing line between a concerted practice and tacit coordination ***(Dyestuff*, 1972)**:

  i. Mere parallel behaviour amongst competitors is not sufficient to evidence a concerted practice.

  ii. Parallelism, however, can provide strong evidence for a concerted practice.

  iii. Competitors are in principle entitled to adapt themselves intelligently to the existing and anticipated conduct of competitors, without infringing Article 101 TFEU.

3.3 The distinction between concertation and parallelism

- ***Woodpulp II*** *(1988):* Economics-based assessment of parallelism undertaken; *e.g.*, advance price announcements were necessary in order to provide buyers with certainty. This was reinforced by an active trade press that increased transparency. There was past evidence of market share fluctuations, which would have been an unusual phenomenon if a concerted practice had been implemented. Therefore, parallelism can only furnish sufficient proof of a concerted practice if there is *no other plausible explanation* for it.

- ***CISAC*** *(2013)*: The General Court emphasised that, where the Commission seeks to prove a concerted practice merely based on parallel behaviour, it will only discharge its burden of proof to the requisite legal standard if it can demonstrate that the parallelism cannot be explained by *any other plausible alternative than prior concertation* (*i.e.*, a "counterfactual" situation).

NCA examples
Assessment of Joint Dominance

Spanish Competition Authority: *Telefonica/Vodafone/Orange* (2012 – *ex post*)

- Three mobile operators found by the Spanish Competition Authority (SCA) to hold joint dominance in the wholesale market for Mobile Access & Call Origination ("MACO"). There was evidence of adopting a uniform pricing policy in MACO which reflected other wholesale markets (termination for SMS and MMS). The supra-competitive access prices raised persistent entry barriers for MVNOs, despite increased traffic and the reduction of costs. On 5 September 2017, the Audiencia Nacional overturned the Decision of the SCA on the basis that the mobile operators in question were not individually dominant on the markets for SMS termination. While this also meant that the finding of collective dominance in relation to MACO ultimately failed (because the collective dominance was supported by the individually held dominance in the SMS termination market), the Court did not specifically consider whether the legal analysis of collective dominance was substantively flawed.

Polish Office of Electronic Communications*: Polska Telefonia Cyfrowa/Centertel/Polkomtel* (2006 – *ex ante*)

- Direct relationship between the wholesale (MACO) and retail level meant that the downstream level reflected the wholesale market structure. Hence, joint SMP held on MACO implied potentially adverse effects at the retail level.

NCA examples
Assessment of Joint Dominance

Italian Competition Authority*: Tim/Vodafone/Wind* (2007 – *ex post*)

- The Italian Competition Authority dismissed allegations of abuse of joint dominance on the MACO market. The Authority found that the three mobile operators did not enjoy a jointly dominant position: *first*, the different cost structure reduced the incentive to collude tacitly; *second*, the presence of significantly different market shares was at odds with a joint dominance scenario; *finally*, the market was not considered to be sufficiently symmetric to support tacit coordination.

Finnish Competition Authority*: Nordea Bank/OP Bank/Sampo Bank* (2009 – *ex post*)

- Finding of collective dominance in cash dispensing market between banks and ATM network Automatia. Collective dominance based on converging interests to exclude potential entrants for ATM services: the joint venture between Automatia and the banks enabled the banks to offer cash withdrawal services to retail customers via Automatia. This incentivised the banks to align and coordinate higher withdrawal fees from ATMs outside the Automatia network.

NCA examples
Assessment of Joint Dominance

Maltese Competition Authority*: Bulco/Sea Malta Company* (2005 – *ex post*)

- Collective dominance of two shipping firms on a specific maritime route. Both companies had a common purpose to exclude new competitors by discouraging their customers from diverting business towards new entrants, *e.g.*, threats of tariff increases in relation to other maritime routes.

Irish Competition Authority*: Nurendale Limited v Dublin City Council and Others* (2009 – *ex post*)

- Collective dominance of local authorities on household waste collection market through their collaboration in relation to waste management plans. This was not negated by the fact that Irish law prescribed such cooperation (Irish Waste Management Act of 1996).

Paris Court of Appeal*: Lafarge Ciments-Vicat* (2010 – *ex post*)

- Paris Court of Appeal overturned the finding of joint dominance held by two cement producers. The French Competition Council failed to show that the cement producers had acted independently of third parties. The analysis should not have been limited to an analysis of structural links, common strategy and market structure, but should also have considered to the extent to which the producers were collectively immune to competitive constraints.