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The Development and Implications of 'Collective Dominance' in EC Competition Law

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EC Competition Law
of Collective Dominance
The Development and Implications
Abstract

The objective of this essay has been to explore why the concept of collective dominance has been developed and to examine the implications of the lack of agreement amongst economists. The overriding impression remains one of lack of both clarity and consistency, and a call is therefore made for further clarification.
The concept of ‘collective dominance’ has now been recognised under both A82 and the merger regulation. While the law has not technically changed, its application is significantly affected. This is because the existence of collective dominance is determined under the A82 Treaty, whereas under the merger regulation it is determined under A87. The need to bridge a perceived ‘gap’ in the Treaty concerning the scope of A87 is seen as significant. Leading on from this, the development of the concept is then discussed in practice, focusing on how it is implemented.

The thesis begins with a review of competition theory in an economic framework. A key finding in the context of oligopoly is the lack of a commonly accepted ‘model’. In addition, a question is raised about the nature of competition informing this application. Nonetheless, no consistent evidence is found for the use of such a framework by either the Commission or the Community Courts.

The development of the concept is then traced in practice, from its early mention by the Commission to its acceptance by the Court under A82. The need to bridge a perceived ‘gap’ in the Treaty concerning the scope of A81(1) is seen as significant. Leading on from this, the concept of collective dominance is then discussed in practice, focusing on how it is implemented.
as noted above, an attempt is made to reflect on these findings, so as to offer some guidelines for businesses.

The broad approach taken in the thesis is to proceed from an examination of theory to an analysis of practice, concluded by a reflection on their relationship and interplay. The theoretical discussion draws from both economics and business, as well as from law, as well. The complex decision making process should be based on one that is well thought out and is methodical. Good and bad competition, as well as right and wrong, should be identified and not simply assumed.

In the wide, the concept of collective dominance can quickly suggest that there may be something suspicious with the market price, it appears to be some form of market power. In contrast, market power has been described as "the ability of a single firm or a group of firms to control the market's supply and price."

Similarly, the presence of more than one firm allows for market power, which is greatest in the economy environment, being the idea of a market which is less the market dominance. A fundamental concern with competition is that of demand and supply, which is the focus. The economic framework is widely used in the study of monopolistic competition. The idea of a market is central to the concept of competition. The idea of a market is essentially no more than the interaction of demand and supply, and for a given market to be competitive, there must be a number of firms or bidders, which is greater than one. The competitive framework is characterized by diversity rather than uniformity of opinion in many areas. While certain mainstream approaches can be identified, it remains the case that different economists have different perspectives, and the same empirical facts may be interpreted in different ways, giving widely different policy recommendations on the same issues.

The most basic element in the economic framework is the idea of a market, which is essentially no more than the interaction of demand and supply, for a given market to be competitive, there must be a number of firms or bidders, which is greater than one. The competitive framework is characterized by diversity rather than uniformity of opinion in many areas. While certain mainstream approaches can be identified, it remains the case that different economists have different perspectives, and the same empirical facts may be interpreted in different ways, giving widely different policy recommendations on the same issues.

Although economic insights are available in the EC, all three types of competition theory are used, including the interaction of demand and supply, for a given market to be competitive, there must be a number of firms or bidders, which is greater than one. The competitive framework is characterized by diversity rather than uniformity of opinion in many areas.

Competition & Markets

The European Union's economic framework is one where the concept of collective dominance, as defined in the article 'Collective Dominance', is used. In the context of competition law, collective dominance is a broad-ranging discipline, and although economic insights may be considered, the concept is not universally accepted. The concept is governed by the Competition Act, which provides a legal framework for competition law. The concept is defined as the interaction of demand and supply, for a given market to be competitive, there must be a number of firms or bidders, which is greater than one. The competitive framework is characterized by diversity rather than uniformity of opinion in many areas. While certain mainstream approaches can be identified, it remains the case that different economists have different perspectives, and the same empirical facts may be interpreted in different ways, giving widely different policy recommendations on the same issues.

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petition, which are seen as the two "polar market structures"12 at opposite ends of a continuum. These provide vital reference points in appraising competition issues, although it is important to note that "most markets...lie between the two extremes,...in the realm of imperfect competition".

Monopoly refers to a market in which there is a single supplier. According to the theory, monopoly is deemed 'inefficient' for two reasons. Firstly, the price charged by the monopolist will be higher than the marginal cost of production, leading to a deadweight loss in the economy. Secondly, the monopolist may engage in anti-competitive behavior such as price-fixing or predatory pricing. As a counterpoint, 'perfect competition' describes a market in which there are an infinite number of equally sized suppliers. There are several other specifications, including that competition is assumed to be decentralized and knowledge concerning the supply and demand is perfectly shared. Several other specifications, including that competition is assumed to be decentralized and knowledge concerning the supply and demand is perfectly shared. In addition, the model assumes that firms are price-takers, meaning they cannot influence market prices. As referred to previously therefore, other theories have been developed to model situations of 'imperfect competition'.

The term oligopoly refers to a market which is dominated15 by a few suppliers. This definition is much looser than that of monopoly or perfect competition, and leaves it open to determine the number of firms. Correspondingly, there are a variety of theories, rather than a universally accepted model. As a result, "there is no generally agreed paradigm to identify dominant oligopolies and separate them from situations of oligopolistic supply resulting in a competitive market".

One of the most important theories of oligopoly concerns the 'interdependence' that is assumed to exist between the oligopolists. Accordingly, it is assumed that the price and output decisions made by each firm will be influenced by the actions of the other firms in the market. Thus, "each firm must take into account the effects of its own actions on the actions of other firms", and a certain 'anti-competitive' pressure is expected. Based on this idea therefore, a common assumption is that prices should tend to remain stable for long periods, and parallel behavior therefore be witnessed on the market. In practice however, keen price competition is seen in some oligopoly markets, such as supermarkets and petrol. Related to the notion of interdependence is the idea that the possibility, indeed likelihood, of oligopolists colluding to effectively form a 'joint-monopoly' is considered great in comparison to other markets. This is a crucial issue, and much theory tries to explain or understand why collusion occurs in some oligopolies and not in others.

As collusion forms such a vital element of concerns over oligopoly, a brief examination of collusion theory is necessary. Collusion is theoretically possible amongst any number of firms, and is basically a synonym for agreement or co-ordination of actions, with some suggestion of secrecy, and as such may be considered as one of the 'essential' forms of 'anti-competitive' conduct in the market. A distinction is frequently made between 'active' and 'passive' collusion. When the agreement to co-ordinate actions is formal or informal, respectively. Nonetheless, many economists would suggest that this distinction is largely cosmetic, and that the key factor that may lead to the formation of collusion is the degree of 'asymmetry' between firms. High levels of asymmetry may imply conflicting interests. Thus, in the context of mergers for example, the effect on how assets in general, and production capacity in particular, are distributed between firms has to be considered. A common assumption is that prices should remain stable and parallel behavior witnessed on the market. In practice however, keen price competition is seen in some oligopoly markets, such as supermarkets and petrol.
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Having reflected on the relevant theory, a more detailed analysis is now in order. The development and application of competition law in the EC has, in recent years, been considerably influenced by the economic theory of imperfect competition. The concept of market power and the ability of firms to influence prices and output through strategic behavior is central to this analysis. In particular, the notion of 'collective dominance' has received substantial attention in the context of competition law.

A key aspect of market power is the ability of firms to engage in collusion. Evidence suggests that the likelihood of collusion increases as the likelihood of detection decreases. Firms are more likely to engage in collusive behavior when deviations from an agreed path are more likely to be detected by other firms and when the means to 'punish' the defector(s) are more effective.

From a practical perspective, it is crucial to identify the variables that affect these factors. In mainstream economic terms, factors such as transparency, similar production methods, significant barriers to entry, and stable conditions are commonly suggested as 'favoring' collusion. However, there is no universal agreement on these factors, and there are no 'magic numbers' or simple checklists.

Returning to the broader level, it is important to consider the implications of increasing levels of concentration for competition law. The concern with oligopoly is not primarily about market structure per se but rather about the conduct of firms within the market. The 'structure-conduct-performance' model, for instance, assumes a causal relationship between market structure and firm behavior.

Unlike this approach, the 'Chicago School' argues that high levels of concentration may be the result of efficient behavior. The arrival of new entrants is expected to reduce the concentration and increase competition.

It is generally accepted that empirical evidence lies somewhere between these two approaches. Concentration is undoubtedly an important factor, but there is a lack of agreement on its exact significance. Empirical studies suggest that concentration levels are not always indicative of anti-competitive behavior.

In the context of EC competition law, the focus is on the prevention of collusion and the maintenance of competition. The application of competition law in the EC is guided by a competition theory or framework. Recent developments in the field of antitrust have led to a more nuanced approach, with greater emphasis on 'supply-driven' behavior and the role of market conditions in shaping market outcomes.

In conclusion, it is clear that the application of competition law in the EC is complex and requires a deep understanding of market dynamics and firm behavior. The development of a comprehensive approach to competition law in the EC is crucial for ensuring effective market governance.
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The key question is how competition is perceived. Drawing on the three interpretations below, no obvious, consistent approach is suggested. Indeed, the overall impression is one of inconsistency. This is all the more reinforced by the fact that the Court has tended to use the teleological method when interpreting the law in 'landmark' cases.

Significantly, this impression is backed up by recent research, which has concluded after extensive analysis that "no competition theory is used as a reference model in the EC competition law." In contrast to the US therefore, it appears that neither the Commission nor the Community Courts follow any consistent theoretical framework. Indeed, as stated clearly in one of the earlier Commission reports, "the principle of competition, so basic to the common market, is...by no means rigid or dogmatic." A81(1) prohibits "all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market." A82 prohibits "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it...as incompatible with the common market insofar as it may affect trade between Member States." A81(3) also exempts agreements on certain conditions providing that they allow "consumers a fair share of the resulting benefits." Related to A81(3) are the references to the idea of fairness, and some form of consumer welfare, which are also suggested. More specifically, A82 refers to "imposing unfair purchase or selling prices or unfair trading conditions." Likewise, reference is also made to limiting production, markets, or technical development, as in the earlier Commission reports, "the principle of competition, so basic to the common market, is...by no means rigid or dogmatic." The Court has tended to use the teleological method when interpreting the law in 'landmark' cases.

A general reading of the articles, noting the stipulation in regard to 'trade between Member States', would suggest an obvious concern with integration from the very outset. In addition, ideas of 'fairness', and some form of consumer welfare are also suggested. More specifically, A82 refers to "imposing unfair purchase or selling prices or unfair trading conditions." Likewise, reference is also made to limiting production, markets, or technical development, as in the earlier Commission reports, "the principle of competition, so basic to the common market, is...by no means rigid or dogmatic." The Court has tended to use the teleological method when interpreting the law in 'landmark' cases.

Broadening the interpretation, we may reflect on comments made by the Commission, noting the idea of fairness, and some form of consumer welfare, which are also suggested. More specifically, A82 refers to "imposing unfair purchase or selling prices or unfair trading conditions." Likewise, reference is also made to limiting production, markets, or technical development, as in the earlier Commission reports, "the principle of competition, so basic to the common market, is...by no means rigid or dogmatic." The Court has tended to use the teleological method when interpreting the law in 'landmark' cases.

In the very first 'Report on Competition Policy' [1972], competition is described as "the best stimulant of economic activity since it guarantees the widest possible freedom of action to all." This enables "enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the community." Mention is also made of the fact that competition "encourages the best possible use of productive resources for the greatest benefit of the consumer." While the overall tone is close to 'standard economic' arguments, the emphasis on both employment prospects and on consumers suggests a broader agenda. At the end of the 1970's, it was also noted that the 'conditions under which competition takes place remain subject to the principle of fairness.' Similarly, in the early 1980's, the 'market economy, in which fair and undistorted competition is supposed to ensure that available resources are allocated to the most productive sectors...is seen as central.' While at the same time, it was stressed that competition policy is not based on a 'laissez-faire model, but is designed to maintain and protect the principle of competition, encouraging the best possible use of productive resources for the greatest benefit of the consumer.' While the overall tone is close to 'standard economic' arguments, the emphasis on both employment prospects and on consumers suggests a broader agenda. At the end of the 1970's, it was noted that the 'conditions under which competition takes place remain subject to the principle of fairness.'
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The Commission referred in the early 1990's, to "the link between competition and economic efficiency...[which has been]...generally recognised." It appears that a 'balanced' approach to competition is considered desirable, on the basis that "untrammelled market forces" should not always be given a "free rein", since they can "stifle or even eliminate competition". Adopting a more poetic turn of phrase, it is therefore held that "competition carries within it the seeds of its own destruction". As a result it is considered that, "an excessive concentration of economic, financial and commercial power can produce such...changes that free competition is no longer able to fulfil its role as an effective regulator of economic activity".

The direction and focus of EC competition policy has emerged more clearly over time, although an early indication was given by the 'Consten & Grundig' case [1966] which made clear that the application of competition law was not just about prohibiting 'anti-competitive' behaviour. Rather, competition law has been used to create a single market, and as such, "sails under the flag of market integration". This is widely documented, and is for example reflected in the preamble to the merger regulation which notes that the system of undistorted competition "is essential for the achievement of the internal market".

Integration is also central to EC law in general. In the early years, removing legal barriers to the free movement of goods were the most important tools. However, it would clearly "be of little use to abolish government restrictions...if traders in different member states were allowed to replace them by cartels, under which they agreed reciprocally to keep out of each other's home market". As a result, the competition articles have played an increasing role in promoting integration, though emphasis has varied according to the circumstances. During...the 'battle' against protectionism became politically more difficult. Nonetheless, in the wake of the 'Single European Act' and also the 'Treaty on European Union', it is clear that 'market integration' was returned to centre stage. Importantly however, a range of other goals have also been pursued. An important legal precedent in this respect was in the 'Walt Wilhelm' case [1969] where it was stated that "while the Treaty's primary object is to...eliminate...the obstacles to...the community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonised development of economic activities within the whole community in accord with A2".

Thus, during the 1970's for example, policy emphasis was placed on competition as a tool to fight inflation, considered to be a 'structural obstacle' to adaptation, and hence the creation of a common market. Similarly, the broader economic goals of promoting innovation, productivity, also 'competitiveness' have gained greater focus over the last decade, arguably in response to the effects of 'globalisation'. In addition, protecting the consumer has also been a recurring policy theme, as has the 'fight' against unemployment. In relation to this objective in particular, promoting SME development has also been pursued. SME's are also valued as a source of 'innovation'. Understandably, it has been argued that pursuit of such a broad range of objectives has caused "tension" and even "conflict". While there are potentially many examples, an important one is the problematic relationship between integration and concentration. Thus, during the 1970's for example, it was explicitly recognised "that the Common Market require[d] larger enterprises to achieve the advantages of mass production and resource development". Thus "greater concentration of enterprises" was generally considered "desirable". However, as the process moves forward the policy concern arises that "a wave of concentration would basically transform the European market structure into narrow or asymmetrical oligopolies, so that the process of effective competition would be greatly weakened". Similarly, the Commission remarked at the beginning of the 1980's that "competition within...".

Concentration is essential for the achievement of the internal market. Concentration refers to the degree of control exercised by a single decision maker, and is often used in EU competition law as a proxy for market power. From the Commission's 'Survey of Concentration, Competition, & Competitiveness' conducted every year, it is evident that there has been a general trend towards increasing concentration across all industries. In addition, this trend gained significant momentum from both the 'single market programme', and the liberalisation that has characterised the 'global' environment. While the economic notion of concentration must be separated from the legal concept, the two are clearly...in an international context. Accordingly, a marked increase in mergers and acquisitions has been seen in the EC. From the point of view of the individual business, the act of 'concentration' can be seen as "one of the means to master the uncertainties of business life stirred up by the competitive process". In fact, during the early years it was explicitly recognised "that the Common Market require[d] larger enterprises to achieve the advantages of mass production and resource development". Thus "greater concentration of enterprises" was generally considered "desirable". However, as the process moves forward the policy concern arises that "a wave of concentration would basically transform the European market structure into narrow or asymmetrical oligopolies, so that the process of effective competition would be greatly weakened". Similarly, the Commission remarked at the beginning of the 1980's that "competition within...".
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the Community [was] marked by an ever-increasing tendency towards oligopoly.71 Increasing levels of concentration may lead to one firm dominating an industry, in which case any abuse can clearly be attacked by A82. However, it may equally, and perhaps more probably, lead to a group of similarly sized firms emerging, in which case collusion rather than unitary monopolisation is perceived as the main threat. In addition, SME’s may also suffer in an environment characterised by progressively larger firms.

Somewhat paradoxically therefore, the success of the single market has promoted greater levels of concentration, which in turn are perceived as a potential threat to its success. An explicit concern has been expressed that ‘anti-competitive parallel behaviour’72 might ensue. As the issue of concentration illustrates, concerns develop over time, and the goals pursued similarly vary. An important observation is thus that the application of competition law is context-dependent. As the environment alters, or the focus of policy shifts, the law can be applied in new ways. The examples are numerous, although the development of the merger regulation is an important and striking one.

There are no explicit provisions for ‘merger control’ in the EC Treaty. This may well be because it is a very politically sensitive issue for Member States, among whom there has historically been a wide divergence of opinion. Nonetheless, the Commission clearly felt the need for some form of merger control at a Community level, and hence it “took steps to apply the more general provisions of competition law under the Treaty to the mergers context”.75 Although a ‘Proposal for Merger Regulation’76 was submitted in 1973, such regulation did not come into force until 1990. The ‘Continental Can’ case (1973) was a landmark in this context, as it established that mergers between competitors could infringe A82 when the acquirer was already in a dominant position.77

Following the distinction observed in the previous chapter between behaviour and structure, a similar distinction can be made between the competition articles, and the merger regulation, which broadly apply to firm behaviour and market structure respectively. For this reason, the emergence and development of collective dominance will be examined separately. As noted before, the Commission has long been concerned about ‘concentrated markets’, where the market tends towards oligopoly, and the problem is seen as the likelihood of collusion. Increasing levels of concentration are an increasing tendency towards oligopoly.71

As identified above, increasing levels of concentration have attracted growing concern. Importantly, where concentration leads to oligopoly, the scope of the competition articles may be found wanting. While collusion by agreement84 may technically fall under A81(1), proof in some cases may be highly problematic. On the other hand, A82 had only captured abusive behaviour by a single firm. The result is clearly a reduced ability or effectiveness in ‘fighting’ the dangers of concentration. In these circumstances, any innovation to broaden the scope of the available legal tools would seem welcome. The concept of collective dominance is an example in this context, although the development of the merger regulation has been more recent. It is in this light that Karel van Miert pointed to the Court’s acceptance of the collective dominance concept as a key recent development.85

Firm Behaviour

Following the distinction observed in the previous chapter between behaviour and structure, a similar distinction can be made between the competition articles, and the merger regulation, which broadly apply to firm behaviour and market structure respectively. For this reason, the emergence and development of collective dominance will be examined separately. As noted before, the Commission has long been concerned about ‘concentrated markets’, where the market tends towards oligopoly, and the problem is seen as the likelihood of collusion. Increasing levels of concentration are an increasing tendency towards oligopoly.71
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The concept of 'collective dominance' as a legal construct was developed to address the difficulties in proving collusion under EC competition law. Collusion, which may be either 'active' or 'tacit', Recalling earlier discussion, neither cartel nor collusion correspond directly to any term in EC law. Nonetheless, collusion by formal agreement is clearly within the scope of the prohibition laid down by A81(1). The 'Dyestuffs' case [1972] established that 'concerted practice' refers to "a form of co-ordination between undertakings which, without having reached the stage of an agreement properly so-called, knowingly substitutes practical co-ordination for the risks of competition".

Drawing on this judgement, it can therefore be said that A81(1) essentially covers a range of anti-competitive relationships from a strictly formalised 'agreement' to the looser 'concerted practice'. Thus, active collusion is obviously within scope, leaving the question of how to interpret cases where parallel behaviour is observed on the market.

Parallel behaviour may be due to various reasons. It may be the case that firms are acting in a 'co-ordinated' manner because they have a common understanding, or because they are simply familiar with the norms of the market. This is known as 'tacit collusion'. Alternatively, it may be that firms have similar cost structures, and thus behave in a related, but not actively co-ordinated manner. This is known as 'parallel behaviour'. The challenge lies in distinguishing between these two scenarios, especially in situations where there is a lack of formal agreements.

The concept of 'collective dominance' was developed to address these issues. It allows for the examination of parallel behaviour in a more nuanced way, considering whether such parallelism is due to collusion or simply the result of firms understanding the market's rules. This approach is particularly useful in cases where formal agreements are not present, as it allows for a clearer assessment of whether there is a high degree of parallelism that suggests collusion.

However, separating anti-competitive intent from other forms of parallelism is extremely difficult. As the 'Wood Pulp' [1993] and 'Soda Ash' [1989] cases emphasised, the line between illegal cartel behaviour and lawful adaptation to market conditions is fine. This is a particular problem in the context of A81(1), given the difficulties with parallelism as evidence.

Nevertheless, this concept can be applied to instances where formal agreements are absent or not adequately proven. It allows for a more flexible interpretation of the law, focusing on whether there is a high degree of parallelism that suggests a collusive intent. This approach is important in cases where formal agreements are not present, as it allows for a clearer assessment of whether there is a high degree of parallelism that suggests collusion.

The concept of 'collective dominance' is therefore crucial in the determination of whether parallel behaviour is due to collusion or merely the result of firms understanding the market's rules. It provides a framework for distinguishing between these scenarios, allowing for a more nuanced assessment of parallelism as evidence of collusion.
...
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'nomic entities from being, on a specific market, united by such economic
links that, by virtue of that fact, together they hold a dominant position
vis-à-vis the other operators on the same market'.

Defining the concept for the first time, the Court established that it refers to "a position of domi-
nance held by a number of independent undertakings".

As suggested by the discussion above, collective dominance allows A82 to be applied to conduct by a group of firms that has the same effect as that by a dominant firm.

The concept of 'abuse' under A82 is concerned with the effects of be-
haviour, rather than how such behaviour is achieved or organised. It is thus merely necessary to show collective dominance and abuse to catch the
same collusive behaviour that would elude A81(1). However, the inclu-
sion of the requirement that 'links' be shown to exist complicates the mat-
ter of finding collective dominance. In many ...

The ECJ then ruled in the 'Almelo' case [1994] that for a finding of
collective dominance, the "undertakings in the group
must be linked in
such a way that they adopt the same conduct on the market".

Furthermore, such links must be "sufficiently strong". The policy on links was
then repeated in the 'Centro Servizi' case [1995] and the 'DIP' case
[1995], and use of the concept was again upheld in the 'Compagnie

In this case, the principal actor was 'Associated Central West Africa Lines'1, a shipping conference, which
was made up of companies operating services between Northern Europe,Zaire and Angola. A number of members of Cewal were also part of the
same shipping conference. The Cewal network covered the trade between ports in western and northern Europe
and West Africa, with each conference operating a separate network of routes.

Furthermore, the Commission held that this distribution was based on agreements between the conferences to en-
sure that if a company was to operate a route, it would do so in a way that did not conflict with the conferences' practices.

Also, the Commission found that Cewal had abused its dominant position, which they hadabused by practices implemented "with a view to eliminating its main com-

petitor". A82 had thus also been breached. Citing the Italian Flat Glass
judgement, the Commission stated that it was "no longer possible to deny
the existence of jointly held dominant positions". In line with this, the
Court again confirmed that A82 can apply where "several undertakings to-
gether hold a dominant position", and that for a position to exist, they "must be linked in such a way that they adopt the same conduct on the market".

It was also stressed that this was "settled case-law".

In the case in hand, the Court held that, "as a result of the close
relations which shipping companies maintain with each other within a lin-
er conference, they are capable together of implementing in common
on the relevant market practices such as to constitute unilateral conduct".

It was then found that "Cewal present[ed] itself on the market as one and
the same entity". The abuse was thus that, "the practices
described in the Decision...reveal[ed] an intention to adopt together thesame conduct on the market in order to react unilaterally to a change,deemed to be a threat, in the competitive situation on the market on which they operate".

Although this judgement has recently been overruled by
the ECJ, who found that the fines should not have been given individually,
the grounds of the CFI's judgement still appear to be valid. Indeed, the
same line was followed in the 'Irish Sugar' case [1999] where the Com-
mission had found collective dominance, where the Court held that the Com-
mission's reasoning was "no longer possible to deny the existence of jointly held dominant positions". In line with this, the
Court stated that "a joint dominant
position consists in a number of undertakings being able together, in par-
ticular because of factors giving rise to a...on the market and act to a considerable extent independ-
ently of their competitors, their customers, and ultimately con-
sumers".

Furthermore, the test for "a joint dominant position held by
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The term "linked undertakings" was stated clearly to be "the adoption of the same conduct on the relevant market". In this regard, "connecting factors" were found to exist in the 'Irish Sugar' case, which "showed" that the two economic entities had the power to adopt a common market policy. The case also represented the first time collective dominance was applied to a vertical rather than horizontal relationship. Thus, it has been made clear that "two independent economic entities" may hold a "joint dominant position" if they are linked. The terminology is unfortunate, and appears to beg the question that if oligopolists are so interdependent, should they not rather be considered as a single entity? However, if this is the case, there would be no need for the concept of collective dominance.

As argued in recent doctrine, it is difficult to see the relevance of links under A82. Specifically, "where a single person or firm controls more than one company" (as per the 'Viho' case [1996]), if these links are contractual, A81 would usually apply. An interesting exception is clearly provided by the 'Cewal' decision [1993], referred to previously, in which the firm in question could not be prosecuted under A81(1) because it held a group exemption under A81(3). Irish Sugar also contained further detail as to the relationship between 'joint dominant position' and 'abuse'. Having clarified that "the existence of a joint dominant position does not necessarily have to be the act of all the undertaking in question", the Court laid down that "the abuse does not necessarily have to be the action of all the undertakings in question". Thus, the abuse may be either single or joint, and it is simply necessary for "abusive conduct to relate to the exploitation of the joint dominant position which the undertaking holds in the market". A more significant contribution has been made by the 'Gencor' case [1999], described in detail below, in which a key question remains as to whether a considerable extension of...
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refers to a 'concentration which creates or strengthens a dominant position' presented a greater 'problem' than that of A82 which explicitly mentions a 'dominant position by one or more undertakings'. On this point, the ECJ argued that a 'textual interpretation' did not 'in itself' exclude the possibility of the merger regulation ... style of analysis”, which, as noted above, had been employed “in earlier landmark competition law judgements”.

An added complication is posed by ‘Recital 15’ of the regulation, which states that the threshold for a finding of dominance is a market share of 25%. Collective dominance however can involve individual undertakings with shares below 25%.

Reflecting these issues, the advisory committee in both the 'Nestle/Perrier' decision [1992] and the 'Mannesman/Vallourec/Ilva' decision [1994] was divided over whether the concept was possible under the Merger regulation. Likewise, the CFI reached the opposite conclusion to the Advocate General in the 'Kali & Salz' case [1998]. In addition to this apparent lack of agreement, inconsistency has been observed in the application of the concept. Thus, in some cases where there is... concentration, no examination for collective dominance has been made, and in others it has been made only briefly. By... relatively low concentration case involved in the 'Kali & Salz' decision a "virtual audit of the entire sector" was carried out.

The apparent 'dangers' of oligopoly in the context of merger control were first mentioned by the Commission in the 'Varta Bosch' decision [1991]. The concept was then applied explicitly in the 'Nestle/Perrier' decision [1993]. In this instance, Nestle wanted to buy 100% of the shares of Perrier. In the end it bought the majority of them but was restrained from exercising the voting rights. The market was... between whom price competition was considerably weakened and for whom the degree of market transparency was high.

Significant barriers and risks to entry were identified on the French market, based in particular on its maturity, the importance of brands, advertising costs, and the difficulty of access to distribution, due to an annual rebate system. The conclusion was that a duopolistic dominant position would be created which would significantly impede effective competition. Of interest, duopoly has in fact been highlighted as the Commission's favoured interpretation of collective dominance. Thus, in some cases where two large firms would hold a large share of sales in the post-merger market, emphasis has been placed on the "duopolistic" nature of the market, and the role of the smaller competitors accordingly downplayed.

Correspondingly, in the 'Pilkington/SIC' decision [1994] and also the 'PriceWaterhouse/Coopers & Lybrand' decision [1998], the Commission based decisions of 'no joint dominance' on the fact that duopoly would not result from the mergers in question. Moreover, in the 'Kali & Salz' decision, much emphasis was placed on the fact that the market share of two firms would equal 60%. As one writer has argued, in economic terms, "to call this a duopoly is almost abuse of terminology".

Acceptance of the concept came in the 'Kali & Salz' case [1998], stating simply that "in the light of its purpose and general structure...[the regulation]...applies to collective dominant positions".

Detailed definition of the concept was thin, and as a result, the judgment gave the Commission "considerable discretion in determining whether a concentration will give rise to a risk of oligopolistic dominance". Specifically, it was stated that the assessment should focus on whether "the competitors in the relevant market...are relatively constant, and a spell of the industry's competitive structure...the degree of freedom and independence with which the competitors can act...is considerable...under no special circumstances...leave the market...the competitors...must...act to a considerable extent independently of their competitors, their customers, and also of consumers".

Additionally, a 'problem' taken up in the case was the apparent lack of safeguards at the procedural level, to protect third parties. The Advocate General was especially concerned about this issue, since oligopoly cases, by their very nature, are likely to involve third parties. The ECJ... to make the merger regulation inapplicable, particularly because the right to defence is a general principle of EC law.

In the 'Kali & Salz' decision [1994], the Commission held that the new entity, 'K&S/MdK', and the French state-owned 'SCPA' would gain a collective dominant position in the market for potash products. Importantly, the Commission argued that links between 'K&S/MdK' and 'SCPA',...
The substantive element of collective dominance was then defined as whether "effective competition in the relevant market would be significantly impeded" by those involved in the concentration and "one or more other undertakings". The Court argued that this would "allow a duopolistic structure...to be created".

Generally, the emphasis was on the existence of economic links or the other, producing no net result, which the merger regulation aims to prevent "arising or being strengthened", and, ultimately, of consumers.

In addition however, they would have contributed to the creation of the concept of the market structure, as referred to "by way of example". Instead, the notion of "economic links" is not restricted to that of "structural links", and importantly includes "the relationship of interdependence existing between the parties to a tight oligopoly". A vital element in the clarification was the establishment that the existence of "structural links" is neither a necessary condition for co-ordination to occur, their only relevance appears to be regarding their effect on the firms' incentive to collude. Following the uncertainty left by the "Kali & Salz" case, the "Gencor" case [1999] highlighted in particular, the fact that 'Implats/LDP' and "two or more independent economic entities...[may in principle be]...united by economic links in a specific market...[so that they together hold]...a dominant position". Since there is no economic basis for considering links to be a necessary or sufficient condition for a finding of collective dominance, the Commission had based its decision were 'not sufficient', it did not state explicitly whether such links were in fact necessary for a finding of collective dominance.

More important clarification. In this case, the CFI upheld the 'Gencor/Lonrho' decision [1996] that "the world platinum market...

The Court argued that this would "allow a duopolistic structure...to be created"...
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In the latter case, this is because of the possibility that a realization of 'common interests' could "in particular" lead to firms increasing prices "without having to enter into an agreement or resort to a concerted practice". As the case made clear then, the focus of the merger regulation is on whether a concentration will increase the likelihood of tacit collusion, through its effect on the feasibility of co-ordination.

Less positively, the 'Gencor' case also highlighted the issue of timing, as there are no binding limits for appeals. Thus while the original decision was being appealed, the target company was actually sold to another buyer, and cleared on the condition that the buyer decrease their shareholding.

Despite this issue, the continued 'vitality' of the concept is clear from its ongoing use by the Commission, most recently in the 'Airtours/First Choice' decision [1999].

In this instance, Airtours proposed to acquire "the whole of the equity of First Choice". As the Commission put it, their "activities overlap[ped] mainly in the supply of leisure services to customers in the United Kingdom and Ireland".

However, the concentration was blocked as it was believed it would "lead to the creation of a dominant market position in short-haul package holidays on the part, collectively, of Airtours/First Choice and the two other leading tour operators - Thomson Travel Group plc and the Thomas Cook Group Limited".

Generally, the Commission believed that "the substantial concentration in market structure, the resulting increase in its already considerable transparency, and the weakened ability of the smaller tour operators and of potential entrants to compete...[would]...make it rational for the three major players that would remain after the merger to avoid or reduce competition between them, in particular by constraining overall capacity".

Airtours itself argued that collective dominance "could be thought of as a cartel, but without an explicit cartel agreement, cartel meetings etc.". However, citing the 'Gencor' case, the Commission argued that "active collusive conduct of any kind is not a prerequisite for collective dominance to occur. It is sufficient that adaptation to market conditions causes an anti-competitive market outcome".

In addition, it was held that it is "not necessary...for the oligopolists always to behave as if there were one or more explicit agreements" or "commitments". Instead, "active collusive conduct of any kind is not a prerequisite for collective dominance to occur. It is sufficient that the merger makes it rational for the oligopolists, in adapting themselves to market conditions, to act - individually - in ways which substantially reduce competition between them".

The Commission made much reference to the 'Gencor' case [1999], however some commentators have questioned the degree of comparability. Specifically, in the 'Gencor' case, the merger would have given two companies control of the entire market for a simple commodity. By contrast, the Airtours/First Choice concentration would have given three companies a position of 'dominance' on a market for a "more complex service".

The decision has been appealed, and the case is thus likely to provide further welcome clarification.

Concluding Remarks

The study began with an examination of competition and the relevant economic theory in an attempt to better understand why...or perfect competition. Nonetheless, oligopoly represents a large proportion of 'real' markets. This is of obvious importance in that the concept of 'collective dominance' can be broadly identified with oligopolies. The main issue with oligopoly was identified as the 'threat' that oligopolists may collude, leading to increased prices and reduced output. This can be explained by the fact that each firm's actions have a direct effect on the other firms, leading to increased incentives to collude or engage in other forms of anti-competitive behavior.

It was also noted that oligopoly is in part defined with reference to the key models of monopoly and perfect competition. These models are particularly important since their relationship forms the basis for a concern with increasing levels of concentration, which have been an important theme driving adaptation of EC competition law, and were also seen as key in defining the development of EC competition law, and was also seen as key in defining the development of EC competition law.
explaining the emergence of the concept of collective dominance. The classic 'Harvard-Chicago' debate was then examined, highlighting the point that increasing levels of concentration have also been argued as signs of efficiency, as 'competitive' firms compete away less 'competitive' ones. During the discussion, collusion theory was also considered, but it was acknowledged that there are no 'magic numbers' or simple 'checklists'. Interaction, and hence behaviour, is clearly the unknown variable.

Moving on from the theoretical discussion and examination of policy, the analysis then turned to collective dominance in practice, looking at the concept under A82 and under the 'Merger Regulation'. As became clear, there is a crucial difference in that collective dominance under A82 is a necessary but not sufficient condition, since abuse does not actually have to be shown, merely its likelihood. As a result, a greater number of activities are caught by the 'Merger Regulation' on the other hand, the collective dominance can be used, as it was in the 'Gencor/Lonrho' decision, upheld by the CFI, to block a concentration because it was predicted that rational action would be anticompetitive. In this respect, there appears to be no line drawn in the Merger Regulation as to when behaviour can be considered collective dominance.

As the earlier discussion indicated, concerns with concentration and the collusive behaviour that is suspected as a corollary, translate in practice into an 'anti-cartel' policy of some form. However, as was seen, there is no single, all-embracing provision in EC law tackling cartels, although it was debated for some time whether A81(1) might not be used for this purpose. Accordingly, it was seen that the emergence of collective dominance under A82 cannot be seen in isolation, but must be considered in the context of the objectives of competition law. The 'Wood Pulp' ruling showed that collective dominance can be used to cover parallel behaviour, thereby undermining the system of competition rules by rendering the concept of a concerted practice under A81(1) virtually redundant.

A further issue, related to parallel behaviour, and which also featured prominently in the 'Wood Pulp' case concerns the approach taken towards 'rational' firm behaviour. In this case, it was argued that the firms were able to behave in a way that was consistent with their market conditions. However, as was seen, it is extremely difficult to separate anti-competitive intent from rational action. This issue has not been directly confronted under A82, but in so far as setting the market conditions, the Commission used the collective dominance to block a concentration because it was predicted that rational action was anticompetitive. In this respect, there appears to be no line drawn in the Merger Regulation as to when behaviour can be considered collective dominance. It is sufficient that adaptation to market conditions causes an anti-competitive market outcome.

Overall, perhaps the most striking discovery of this piece has been the lack of any clear pattern. Correspondingly, there appears to be no agreement on what collective dominance is. While some firms may be seen to be colluding, others may be acting independently. Furthermore, where there is an 'anti-cartel' policy of some form, there is no consistent approach. In practice, this leads to contradictory results, and the concept of collective dominance is widely promoted as an important tool. A further issue is that the Commission is increasingly using collective dominance as a basis for its decisions, and this is likely to continue in the future.
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In their most recent mention, they were listed as "product homogeneity, low demand growth, low price sensitivity of demand, similar cost structures of the main suppliers, high market transparency, extensive commercial links between the major suppliers, substantial entry barriers and insignificant buyer power (consumers)."

Where it is considered that a merger would reinforce some of these characteristics, collective dominance may be found, though the ... conduct most" are those "in which two, three or four suppliers each hold approximately the same market share, for example two suppliers each holding 40% of the market, three suppliers each holding between 25% and 30% of the market, or four suppliers each holding approximately 25% of the market".

Overall, the issues raised by collective dominance bear more generally on the topical question of role of economic analysis in EC competition law. From the examination above, it can be said that the current emphasis on "structural links", with some way to go, and it appears that the 'checklists' have yet to be fully abandoned. While issues such as 'structural links' have now been 'solved' by recent case law, the use of collusion theory shows room for improvement. In the 'Gencor' case [1999], for example, the CFI emphasised that the market would increase in concentration, making collusion more feasible to initiate, but did not look at how easy it would have been to sustain.

As touched on previously, a fundamental problem may lie in the interaction of economic and legal analysis. For if the full complexity of the former is fully grasped, the latter is a desirable situation, however a more explicit theoretical grounding would be valuable, and in this regard some form of notice would be welcomed. Indeed, after the analysis above, it is perhaps not surprising that Mr Monti has recognised "the need to spell out in more detail his thinking in this area".

What is more, although further case law should also continue to improve our understanding of collective dominance, it is likely to remain one of the most "most significant innovation[s] in antitrust for many years".

Cases & Decisions

Établissements Consten S.à.R.L. & Grundig-Verkaufs-GmbH v Commission (56 & 58/64) [1966] 'Consten & Grundig'

Wilhelm et al. v. Bundeskartellamt (14/68) [1969] 'Walt Wilhelm'

Imperial Chemical Industries Ltd. v. Commission (48, 49, 51-7/69) [1972] 'Dyes'


Coöperatieve vereniging 'Suiker Unie' UA v. Commission (40-8, 50, 54-6, 111 & 113-4/73) [1975] 'Sugar' or 'Suiker Unie'

United Brands Company et al v. Commission (27/76) [1978] 'Chiquita Bananas'

Hoffman LaRoche & Co. AG v. Commission (85/76) [1979] 'Vitamins'


British American Tobacco Company Ltd. et al. v. Commission (142 & 156/84) [1985] 'Philip Morris' or 'BAT/Reynolds'


Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) v. SA Novasam (247/86) [1989] 'Alsatel'

SA Hercules Chemicals NV v. Commission (T-7/89) [1991] 'Polypropylene'

Società Italiano Vetro SpA v. Commission (T-68 & 77-8/89) [1992] 'Italian Flat Glass' or 'SIV'

Ahlström Osakeyhtiö & Others v. Commission (C-89/85, C-104/85, C-114/85 & C-116-7/85 & C-125-9/85) [1993] 'Wood Pulp'

Almelo v Energiebedrijf IJsselmij (C-393/92) [1994]

Tetra Pak v. Commission (T-83/91) [1994] 'Tetra Pak II'

Centro Servizi Spediporto v. Spedizioni Marittima del Golfo (C-96/94) [1995]

DIP & Others v. Comune di Bassano del Grappa (C-140-2/94) [1995]

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Decisions & Appeals

Consten & Grundig Decision 64/566/EEC [1964], Appealed in Consten & Grundig v. Commission (56 & 58/64) [1966] 260


Varta Bosch Decision IV/M.012 [1991] 268

Alcatel/AEG Kabel Decision [1991] 269

Nestlé/Perrier Decision IV/M.190 [1992] 270


Mannesman/Vallourec/Ilva Decision IV/M.315 [1994]

Pilkington/SIC Decision IV/M.358 [1994]


PriceWaterhouse/Coopers & Lybrand Decision [1998]

Airtours/First Choice Decision IV/M.1524 [1999] Appeal pending

Endnotes

1 Where necessary, the Court of Justice and Court of First Instance will be referred to as the ECJ and CFI.


5 As may arise in cases of 'price fixing' for example.

6 As in the case of 'dumping'; Traditionally defined as "price discrimination between national markets"; Vermlust, E. (1984), p.104; In addition, from the perspective of national or regional welfare, arguments ... allow 'domestic' companies to build up sales 'margin' so as to better compete abroad; Molle, W. (1994), p.362.

7 As one commentator argues therefore, "the basis of competition policy is one of political choice"; Rodger, (1994), p.25.


10 Reflecting this observation, it has also been suggested that "economists have never been wholly satisfied with any definition of their subject"; Bannock, et al. (1992), p.130.


15 Not used in the legal sense.


22 Not used in the legal sense.

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ibid., pp.423-4.


Consolidated Version of the Treaty Establishing the European Community, Part Three, Title VI, Chapter 1, Section 1 - 'Rules applying to undertakings', p.70.

ibid., p.71.

Author's emphasis.


Samkalden, I. & Druker, I. (1965), p.159; See also the Spaak Report, 21/04/56, pp.55-6.

Issue 2, Grounds, p.342.

Produced by the Commission, at the request of the European Parliament in 1971.

Commission of the European Communities, (1972), p.11.

ibid., p.12.

This is later equated with 'equity'. Commission of the European Communities, (1980), p.10.


ibid.

Commission of the European Community, (1986), p.11; The previous year "dynamic innovative competition, led by entrepreneurs" was also invoked. We might note that 'entrepreneur' often appears to equate with 'SME'.

Commission of the European Community, (1992), p.11; In more recent years still, there has been growing discussion of the link between competition and competitiveness, particularly in an era of 'globalisation'; Commission of the European Community, (1995), p.15.


Consten & Grundig Decision 64/566/EEC [1964], Appealed in Consten & Grundig v. Commission (56 & 58/64) [1966], 13/07/66, ECR 299.

In this respect it has been noted that competition in the EC is "not an end in itself"; Carellos, P. & Silker, H. (1970a), p.5.


Such as customs barriers and quotas between member states.

(1986); Hereafter referred to as the 'SEA'.

(1992); Hereafter referred to as the 'TEU'.


(14/68).


ie. 'Small or Medium-sized Enterprise'.


Commission of the European Community, (1997), p.7; See also Commission of the European Communities, (1991), p.15 which stresses the need for care "where an already
tight oligopoly is further narrowed by mergers between companies in the same geographic markets.

As an example of this adaptation, A81(3) was used as a support to industrial policy, by authorising agreements to reduce what was considered to be 'structural overcapacity' in certain industries, such as steel. The concept of 'crisis cartels' (based on the German law concept of 'strukturkrisenkartel') during the late 1970s can also be seen as evidence of this process of adaptation; Sharpe, T. (1980), p.76; The prevailing situation of shortage was such that "a dominant position...[could]...be provoked...in which all customers become dependent on their suppliers and in which there is no more competition between suppliers"; Steindorff, E. (1978), p.35.


Case 6/72; Continental Can itself actually argued that the treaty drafters had not intended to cover merger control. The Advocate General agreed, but the Court begged to differ. (Brown, *op.cit.*, p.351).

In principle, this was a big step forward, but in practice A82 is not well suited to merger control, permitting, for instance "only a structured calculation of the costs and benefits of the merger through the application of the vague notion of 'abuse'"; Weatherill & Beaumont, *op.cit.*, p.807; Furthermore, A82 is only applicable where dominance exists, which may be particularly problematic in oligopoly situations, and creates commercial uncertainty, which is compounded by...is assumed that the reader is familiar with the details of the Continental Can case as it has been so widely commented on.

'Le problème de la concurrence dans le marché commun', *Serie Concurrence*, No.3, Brussels. Paragraph 58; For discussion, see eg. Bos et al. (1992), p.69-70.

Case 142 & 156/84; See Broms, (1991), p.5.

Judgement, paragraph 37.

As laid down by the Court, this was "in particular" (the list may therefore not be exhaustive) where:

1. The acquiring company gains "legal or de facto control" over the "commercial conduct" of the other.
2. The agreement provides for co-operation between the companies.
3. A structure is created which is likely to be used for restricting competition.
4. The acquiring company gains the right to take effective control of the company at a later stage; Judgement, paragraph 38.

Regarding A82, it was stated that 'abuse' could only occur where the acquisition gained "effective control of the other company or at least influence on its commercial policy"; Brown, *op.cit.*, p.435.

The legal concept is used here. It is clearly important to differentiate the general, economic idea of concentration, from the specific legal concept, essentially referring to mergers, acquisitions and some forms of joint venture.

Used in the general sense, to encompass all forms of collusion.

"Les situations de dominance oligopolistique" discussed by Van Miert, K. (1999), p.9; The concept is seen as particularly important in the analysis of concentrations.

Not used in the legal sense.

Namely 'agreements', 'decisions' and 'concerted practices'.

ICI & Others v. Commission (48, 49, 51-7/69) [1972] 'Dyestuffs'.

Judgement, para.64.


The 'Soda Ash' Case, (27/88) [1989], 18/10/89, ECR 3355.


Compagnie Maritime Belge v. Commission (T-24, 26 & 28/93) [1996]; 08/10/96, 4 CMLR 273; Appealed in (C-395 & 396/96) [2000]; 16/03/00.

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150 (C-73/95).


154 Judgement, para. 66.

155 Judgement, para. 273.


164 IV/M.190; 92/553 EEC, 05/12/92.


166 Joined cases C-68/94 and C-30/95. [1998], 31/02/98.


169 92/553/EEC; IV/M.120, 22/07/92, OJ 1992, L356/1; The concentration was approved on certain conditions.

170 Judgement, para. 57.

171 Judgement, para. 92.

172 Judgement, para. 108.


175 IV/M.358.

176 IP/98/454.

177 Ysewyn, J. & Caffara, C. (1998), p.471; In the authors' view, this reflects the "present uncertainty of the Commission as to what [collective] dominance really means".

178 France & Others v. Commission (C-68/94 & 30/95) [1998], ECR I-1375; Appealing the Kali-Salz Decision IV/M.308 [1994. 179 Judgement, para 14


181 Judgement, para 221.

182 Operating in Canada.

183 Judgement, para 227.

184 (T-102/96), 25/03/99.

185 IV/M.619 [1996]; 97/26/EC, 24/04/96.


187 Judgement, para. 5; Implats was to have sole control of Eastplats and Westplats, and was itself to be held "32% by Gencor, 32% by Lonrho and 36% by the public". The market was also deemed to be highly transparent; ibid.

188 Judgement, para 4.

189 The market was also deemed to be highly transparent; ibid.

190 ibid.

191 Judgement, para. 163.


193 The market was also deemed to be highly transparent; ibid.

194 ibid.

195 Judgement, para 170.

196 Judgement, para 179.

197 Judgement, para 188; The "change in the parties' financial interests" was seen as important in this regard; ibid.

198 ie. "[C]omprising, Gencor and Lonrho, on the one hand, and Implats/LDP, and Amplats. Significantly, this had been the argument of the applicant; ibid.

199 Judgement, para 94.

200 ie. Implats/LDP, and Amplats. Significantly, this had been the argument of the applicant; ibid.
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203 Judgement, para 273.


205 Judgement, para 274.

206 Judgement, para 275.

207 Judgement, para 276; For discussion, see eg. Korah, V. (1999), p.337.

208 Such as a cutting prices, to try and increase market share.

209 ibid.

210 Judgement, para 277.

211 ibid.


215 para 2.

216 para 4.

217 para 51.

218 Referred to as the 'fringe'; para 171.

219 para 56.

220 para 52.

221 para 53.

222 para 54.


225 para 53.

226 para 53.


228 Either because of problems with proof, or because of exemption under A81(3).

229 'Airtours/First Choice' decision [1999], para 87.

230 As the Commission notes, “the characteristics listed are substantially those employed in previous Commission decisions in Merger Regulation cases where oligopoly (cooperation...
Bibliography

Articles & Speeches


