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

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Abstract

Edward Cattermole has a background in Business, European Law, and Anthropology. He has previously worked in investment banking, and is now a Telecoms analyst at McKinsey & Company, focusing on IP and regulatory issues.

The objective of this essay has been to explore why the concept of collective dominance has been developed, and to examine the implications of its acceptance. This paper is also available in pdf-format at CFE’s homepage: www.cfe.lu.se

The overriding impression remains one of lack of both clarity and consistency. The link to theory, and the lack of agreement among economists. The notion of collective dominance is seen as problematic given the greater importance of the regulatory framework. This is seen as problematic given the potential misuse of the abuse of dominance rule. The paper suggests that there is a need for a clearer and more consistent approach to the concept of collective dominance.

The paper begins with an examination of the concept in theory. It then reviews the case law and examines the practical implications. The case studies provide insight into the use of the concept in practice, and also suggest that difficulties in applying A81(1) to certain cases may be avoided by accepting the concept of collective dominance. By doing so, it is argued that the boundary between A82 and A81(1) has been awkwardly blurred, leading to difficulties in applying the Merger Regulation (Regulation 4064/89).

The paper concludes with a discussion of the implications of the concept for competition law. It suggests that there is a need for further clarification in order to improve the clarity and consistency of the law. The paper ends with a call for further research on the topic of collective dominance.
Introduction

The concept of ‘collective dominance’ has now been recognised under both Article 82 and the merger regulation. While the law has not technically changed, its application is affected significantly. In particular, the Court’s approach to the concept of collective dominance under the Articles Regulation is and application of collective dominance under the Treaty Regulation is a key finding. This paper will examine the scope of Article 82, the need to bridge the perceived gap in the Treaty concerning the concept of collective dominance, and in what ways, if any, the process of analysis is affected. In the pages that follow, a thorough analysis will be carried out in an attempt to provide answers to these questions. The introduction of the concept is then discussed in practice, from its early mention by the Commission, to its acceptance by the Court under Article 81.

The development of the concept is then traced in practice, from its early mention by the Commission, to its acceptance by the Court under Article 81. The need to bridge a perceived gap in the Treaty concerning the scope of Article 81 is seen as significant. Leading on from this, the application of collective dominance to the Commission’s approach to the concept is identified, and this concern is seen as central in explaining the emergence of collective dominance as a concept. 

The concept of collective dominance, as used in competition law, is seen as central in explaining the Commission’s approach to the concept. In particular, a concern with increasing levels of concentration in European markets is seen as driving the Commission’s approach to the concept. In contrast, the Commission is instead seen to cover a broad range of goals, with integration at the centre. Correspondingly, it is seen that the application of competition policy is needed to cover a broad range of goods, with integration framework 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 focus of competition theory is seen as central in explaining the gap in the Treaty concerning the concept of collective dominance. The need to bridge this gap in the Treaty concerning the concept of collective dominance is seen as significant. Leading on from this, the development of the concept is then traced in practice, from its early mention by the Commission, to its acceptance by the Court under Article 81.

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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 social science, and hence the number and hence the number of suppliers may be increased or decreased. The supply side of the market, and hence the number of suppliers, may be increased or decreased.

Collective dominance "is a legal concept with no direct equivalent in economics" 

but is closely related to oligopoly. Our understanding of oligopolies is informed by economic theory, and indeed this increasingly informs the law. During this chapter therefore, the concept of collective dominance is examined in detail. It is argued that the concept of collective dominance should be regarded as a form of contest. When theorising competition among firms for example, some argue that "it is through the constant struggle by several enterprises to conclude a contract with the consumer that the participating enterprises mark out their respective trade margins".

In a similar vein, competition has been described as a "contention for superiority...[which] in the commercial world...means a striving for...custom...in the market place". There also appears to be some innate assumption that competition is good. In line with the 'contest' analogy we can equally suggest that there should be 'rules of the game'. We may identify 'good' and 'bad' competition, as well as 'too little' and 'too much'. In fact, the presence of competition law is in defining these parameters. In judging what is acceptable or when to intervene, common arguments draw on the broad themes of 'fairness', and 'efficiency'. The issues to which they are commonly divided into those relating to States and those relating to firms. Our concern in this essay is with the latter area, since it is within this field that the concept of collective dominance is applied.

As with all areas of law, there is no universally accepted definition of 'right' and 'wrong', and hence prohibitions, exceptions and exemptions are essentially matters of policy choice. Nonetheless, competition law can be distinguished as an area of law by virtue of the close connection it has developed with economics. For, given the complex issues at stake, economics provides a useful framework for examination. Significantly, this association between disciplines is a longstanding one in the US, to which the 'Law & Economics' movement bears clear witness. This movement has long promoted economics as a framework for interpretation and analysis in all areas of law. By contrast, there is no such established tradition in the EC, although economic insights may be considered equally valid in the European context.

The 'dismal science' of economics is a broad-ranging discipline, and importantly is characterised 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. In a market of the more 'traditional' kind, such as that for a physical good for example, the terms demand and supply are essentially physical goods for example, the demand and supply curves are well defined, and the result of the interaction of demand and supply is easily predicted. However, the interaction of demand and supply is not as easy to predict in many cases, where the interaction of demand and supply is governed by factors other than price.

The concept of a market is therefore a broad-ranging discipline, and

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petition, which are seen as the two "polar market structures" at opposite ends of a continuum. These provide vital reference points in appraising competition issues, although their importance to potential "monopolists" lies between the two extremes. In the realm of imperfect competition, the price charged by the monopolist is deemed inefficient for two reasons. Firstly, the price charged by the monopolist is higher than marginal cost. Secondly, in long-run there can be no pressure on costs towards their lowest possible level, since there are no other suppliers in the market towards their lowest possible level, since there are no other suppliers in the market.

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 marginal cost. Secondly, in long-run there can be no pressure on costs towards their lowest possible level, since there are no other suppliers in the market.

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Having referred to the relevant theory, more detailed analysis is now required to evaluate the implications of collective dominance in competition law. From a practical point of view, it is then a question of identifying the variables that affect these two factors, and ideally relating them to the factors that can be identified. In mainstream economic terms, the factors commonly suggested as 'favouring' collusion include transparency, similar production methods and products, significant barriers to entry, and stable conditions. Nonetheless, there is far from widespread agreement, and there are no 'magic numbers' or simple 'checklists', as it is the interaction of such factors that is important.

Returning to the broader level, it should be noted that the concern with increasing levels of concentration that is implied by a concern with oligopoly is the subject of debate for two main reasons. Firstly, it is argued that higher levels of concentration may in fact be the sign of greater efficiency, as the 'good' firms compete away the 'bad' ones. Secondly, related to the 'barriers to entry' debate noted above, some argue that the arrival of new entrants will reduce the high levels of concentration that are currently imposed. The debate is therefore over whether or not increasing levels of concentration reflect an underlying competition problem, and on what criteria such concentration is or should be measured.

More recently, a body of theory has been developed, forming an approach referred to as the 'Chicago School'. In the context of the present discussion, the critical argument is that industry structures reflect the different cost structures, and economies of scale achievable by firms. Rather than seeing structure as the determinant of firm conduct, it is seen as its result. Thus, high levels of concentration are the result of efficient behaviour. Moreover, there are significant problems in determining when parallel behaviour is based on collusion, and when not.

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Applying EC Competition Law

It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement. Is collective dominance an underlying influence, or is it just a factor that can be identified? The greater effect of the approach will depend on the relative strength of each model's explanatory potential. The Chicago School is based on the premise that firms are driven by the desire for profit maximization, and that competition is an exogenous determinant of firm conduct. The EU approach, on the other hand, is based on the premise that competition is an endogenous determinant of firm conduct.

Evidence used to judge the application of competition law in the EC. Such evidence may be obtained from various sources, including market studies, expert reports, and court decisions. In addition, the Commission may use its powers of investigation to collect information from firms, and to impose fines and other sanctions on firms that are found to have violated competition law.

Under this approach, evidence of collective dominance is gathered in two ways. First, through market studies and expert reports, which are designed to identify the key factors that contribute to the formation of collective dominance. Second, through court decisions, which provide examples of how collective dominance has been identified in practice. This evidence is then used to inform the development of competition policy in the EC, and to guide the application of competition law in the EC.
Finally, an attempt will be made to establish the policy focus pursued. Both issues should shed light on why the concept of collective dominance has been 'created'. In looking for an underlying theoretical framework, 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. 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".

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 explicitly to "imposing unfair purchase or selling prices or other unfair trading conditions". Similarly, reference is also made to limiting production, markets or technical development "to the prejudice of consumers". A81(3) also exempts agreements on certain conditions providing that they allow "consumers a fair share of the resulting benefit". Broadening the interpretation, we may also reflect on comments made from an examination of the preamble to the EEC Treaty, and also the 'Spaak Report'.

On this basis it was argued in 1965 for example that "the repeated use of terms like economic progress, continuous expansion, harmonious development, and increased stability reveal...a recognition of the significance of enterprise growth in a larger market - that concentrations are necessary for the accomplishment of the technological renewal which leads to increasing productivity and greater welfare". While such sources must clearly be used with care, it is nonetheless of interest to bear them in mind. There appears to be no explicit definition of competition in case law. Although early mention was made of the "principle of freedom of competition" in the 'Consten & Grundig' case [1965], this actually concerned the distinction between intra- and inter-brand competition that arose in the case. As a result, the Commission reports are used as an alternative source.

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 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 possible benefit of the economy as a whole, and for the benefit, in particular, 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, the number of complaints under Article 81(1) of the Treaty increased, suggesting a broader agenda. However, the focus remained on the protection of consumers, the principles of freedom and non-discrimination.

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The link between competition and economic efficiency, often referred to "the seeds of its own destruction". As a result, it is considered that 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".

Integration is also central to EC law in general. In the early years, A28-30, 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 1970s, 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, and "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. SMEs are also valued as a source of "innovation". Understandably, it has been argued that pursuing 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, although integration brings overall gains in efficiency, it is also likely to bring increased concentration. 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 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 related 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 required 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 1980s that "competition within the whole community in accordance with Article 85(1) of the Treaty is the only means of maintaining an effective competition policy". 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 required 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".

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the Community [was] marked by an ever-increasing tendency towards oligopoly. 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 response to this ‘threat’ is evident in the announcement of a ‘policy of special vigilance’ for “monitoring the formation of tight oligopolies” due to concerns that “anti-competitive parallel behaviour” 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 correspondingly adapted to meet these changes. 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, and the concept of collective dominance can also be considered in this light.

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”. Although a ‘Proposal for Merger Regulation’ was submitted in 1973, such regulation did not come into force until 1990. The ‘Continental Can’ case [1973] was a landmark from this point of view as it established that mergers between competitors could infringe A82 when the acquirer was already in a dominant position. Significantly, the Commission had earlier held that A81 did not apply to “agreements whose purpose [was] the acquisition of total or partial ownership of enterprises or the reorganisation of the ownership of enterprises”. However, by the beginning of the 1980’s it began to take a more active role, marked in particular by the ‘BAT/Reynolds’ case [1985]. Specifically, BAT/Reynolds established that the “acquisition [by an undertaking] of an equity interest in a competitor” does not in itself constitute a restriction on competition contrary to A81(1), but that it may do so in certain circumstances. The application of the competition articles was therefore ‘adapted’, to gain added scope, in this case by allowing the application of A82 and A81 to forms of ‘concentration’.

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. Given that collusive behaviour is seen as the main threat, a gap can be identified in the scope of the competition articles, as traditionally applied. While collusion by agreement 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 clearly fulfils this function, and may in this way be seen as an adaptation or response to the emerging situation. It is in this light perhaps that Karel van Miert pointed to the Court’s acceptance of the collective dominance concept as a key recent development, although the Commission had intermittently pursued it since the early 1970’s. Significantly, collective dominance has been recognised under both A82 and the Merger Regulation. In order to gain a deeper understanding of the concept, we now turn to a detailed examination of its use and development, through the decisional practice of the Commission and the jurisprudence of the Court.

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 under the two different provisions will be examined separately. As noted before, the Commission has long been concerned about ‘concentrated markets’. Where the market tends towards oligopoly, the ‘problem’ is seen as the likelihood of collu-
sion, which may be either 'active' or 'tacit'. Recalling earlier discussion, collusion may be either active or tacit. Requiring earlier discussion, collusion may be either active or tacit. Non-active, not collusion corresponds to the essence of a 'cartel'. Importantly, neither cartel nor collusion correspond directly to any term in EC law. Nonetheless, collusion by formal agreement is clearly within scope of the prohibition laid down by A(1). A clear and separate interpretation of the three individual elements of the article is difficult. In the 'Dyestuffs' case [1972], the ECJ established that 'concerted practice' refers to "a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-ordination between them for the risks of competition." Thus, active collusion is obviously within scope of the concerted practice. This active collusion is also covered by the concept of collective dominance.

As indicated, this is obviously a very difficult area in which to apply the law, and it will be treated below that collective dominance can be seen as an attempt to resolve this difficulty. Through the concept of collective dominance, tacit collusion may be approached in a different way. While the concept of collective dominance is not new, it was not until recently that the Commission began to apply it in practice.

Nonetheless, this interpretation would not imply that A(1) is no longer applicable to such cases. Indeed, where both articles are applicable, the concept also allows 'tacit' behavior to be identified, which will be expected commercially even in the absence of formal agreement. This is particularly important in the context of A(1), given the difficulties with proving parallelism.

Separating anti-competitive intent from rational and intelligent behavior is extremely difficult. As noted above, in the area of pricing, similar cost structures may lead to similar pricing and price changes. Likewise, stable price levels may also result from pursuing competitive strategies which focus on non-price variables. In this way, parallel behavior is to be expected commercially even in the absence of formal collusion.

As noted above, parallel behavior may also involve the maintenance of stable price levels. However, parallel behavior should not only be observed in the context of specific products or markets. Rather, it may be a more general phenomenon, affecting a number of products or markets. For example, in the automotive market, the Commission has found evidence of parallel behavior in the pricing of car parts. This behavior is not confined to the car industry, but is also observed in other sectors, such as the pharmaceutical and electronics industries.

As a result, the concept of collective dominance has been expanded to cover a wider range of pricing behavior. This is particularly important in cases where evidence of parallel behavior is weak or inconclusive. In such cases, collective dominance can provide a useful alternative to formal agreement as evidence of anti-competitive intent.

In conclusion, the concept of collective dominance is an important tool in the EC's competition law. It allows the Commission to address cases where evidence of formal agreement is weak or nonexistent. By applying the concept of collective dominance, the Commission can more effectively address cases of anti-competitive behavior, and ensure that the market remains open and competitive.
There is nothing in principle to prevent two or more independent economic operators from acting in concert with each other to achieve a dominant position in a relevant market. However, the concept of "concerted practice" and "collective dominance" has been developed in European Competition Law to address the potential for anti-competitive behavior in such situations.

The concept of "collective dominance" was initially articulated by the Commission in its decision in the "Sugar Cartel" case [1973]. In this case, the Commission established that parallel conduct among independent economic operators could be condemned under Article 81 of the EC Treaty if it amounted to concerted practice.

The Commission has subsequently refined its approach to the concept of collective dominance, recognizing that mere parallel conduct does not necessarily constitute a concerted practice, particularly in cases involving independent economic operators. The Commission has emphasized the importance of considering the context and the nature of the conduct in question.

In the case of "Dyestuffs" [1972], the Commission established that parallel conduct may amount to strong evidence of a concerted practice, particularly where it is accompanied by other conduct, such as overt communication or the exchange of information. However, the Court of Justice in the "Alsatel" case [1989] made it clear that parallel conduct alone is insufficient to establish a concerted practice.

In the "Hoffman La Roche" case [1979], the Court of Justice further clarified that parallel conduct is only to be considered as evidence of a concerted practice where it is accompanied by overt communication or the exchange of information, and where the conduct is not justified by the normal operation of the market.

In the "Suiker Unie" case [1975], the Court established that parallel conduct can be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. However, the Court was clear that parallel conduct alone is insufficient to establish a concerted practice.

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Defining the concept for the first time, the Court established that it refers to "a position of dominance held by a number of independent undertakings". As suggested by the discussion above, collective dominance allows Article 82 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 Article 82 is concerned with the effects of behaviour, 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 Article 81(1). However, the inclusion of the requirement that 'links' be shown to exist complicates the matter of finding collective dominance. In many ... an undertaking, discussed below. In addition, as seen above, collusion theory focuses on the feasibility of initiating and maintaining co-ordinated action, rather than the mere existence of elements such as links.

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 Maritime Belge' case [1996], appealing Commission decision 93/82/EEC made under Articles 81 and 82 in the case, the principle was that ECJ made under Articles 81 and 82. In this case, the dominant actor was ... an undertaking, discussed below. In addition, as seen above, collusion theory focuses on the feasibility of initiating and maintaining co-ordinated action, rather than the mere existence of elements such as links.

It was found that "trade between ports in western and northern Europe and West Africa was distributed among three shipping conferences: Cewal, Continent West Africa Conference (`Cowac') and United Kingdom West Africa Lines Joint Service (`Ukwal'), with each conference operating a separate network of routes". Furthermore, the Commission held that "the practices described in the Decision...reveal the intention to adopt together the same conduct on the market in order to react unilaterally to a change, some degree of independence of the market on which they operate". It was then found that "Cewal presented itself on the market as one and the same entity". The abuse was thus in the fact that, "the practices described in the Decision...reveal the intention to adopt together the same conduct on the market in order to react unilaterally to a change, some degree of independence of the market on which they operate". In this case, the dominant actor was ... an undertaking, discussed below. In addition, as seen above, collusion theory focuses on the feasibility of initiating and maintaining co-ordinated action, rather than the mere existence of elements such as links.

The concept of 'collective dominance' is therefore of particular relevance in situations where a group of firms, each with a degree of independence, works together to achieve a common objective. In such cases, the conduct of the group as a whole is more likely to have a significant impact on the market than the actions of individual firms acting independently. The concept of collective dominance is thus important in ensuring that such conduct is subject to effective enforcement.
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, they would be treated as enjoying any dominant positions singly” as per the ‘Viho’ case [1996]. Where these links are contractual, A81 would usually apply. As noted above, there is therefore usually no need to use A82.

An interesting exception is clearly provided by the ‘Cewal’ decision [1993], referred to previously, in which the firms in question could not be prosecuted under A81(1) because they 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 is not sufficient to establish an abuse”, 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 undertakings hold in the market”.

A more significant contribution has been made by the ‘Gencor’ case [1999], described in detail below, in which it has now been established that “links of a structural nature” were only referred to in ‘Italian Flat Glass’ “by way of example”. Nonetheless, a key question remains as to whether “a considerably extended interpretation of...[A82 be permitted]...simply because of the inherent difficulty of applying [A81] to oligopolistic markets”.

Furthermore, extending A82 to cover parallel behaviour arguably undermines the relevance of the concept of ‘concerted practice’ under A81(1). In particular, “it is by no means clear that parallel behaviour may or should be considered under A82 for purposes of determining the applicability 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, they would be treated as enjoying any dominant positions singly” as per the ‘Viho’ case [1996]. Where these links are contractual, A81 would usually apply. As noted above, there is therefore usually no need to use A82.

Market Structure

Based on the foregoing discussion, it is evident that the emergence of the merger regulation is closely linked to a concern with increasing levels of concentration in the Community, driven largely by the drive for market integration and the pressures of global competition. The regulation’s purpose and concerns are explicitly structural, applying in the first place to “significant structural changes” and their “effect on the structure of competition”. Accordingly, as set down by A2(3), where a concentration would ‘create or strengthen a dominant position’ so that “effective competition is no longer possible”, the merger regulation’s prohibition is based on acceptance of the theory of oligopolistic interdependence. This is of added significance given that the merger regulation operates “ex ante” on a structural basis, and its application does not depend on the identification of exploitative conduct. Hence, the concept of collective dominance is important to the application of the regulation to oligopolistic market structures.

In particular, collective dominance is essential for the definition of the concept of collective dominance under the regulation. 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, they would be treated as enjoying any dominant positions singly” as per the ‘Viho’ case [1996]. Where these links are contractual, A81 would usually apply. As noted above, there is therefore usually no need to use A82.

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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 applying to the situation of 'collective dominance'. The 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 prima facie high concentration, no examination for collective dominance has been made, and in others it has been made only briefly. By considering one 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 therefore divided 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 distributors 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 "effective competition in the relevant market...would be...the market would develop a duopolistic type of structure".

An additional '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...
enced, may result from either the existence of economic links or from the existence of structural links. Overall, it is important to consider that the anti-competitive nature of a merger can be due to factors other than economic or structural links. The merger regulation aims to prevent market structures that can lead to anti-competitive behavior, and the court has clarified that the existence of structural links is neither a necessary nor sufficient condition for a finding of collective dominance.

The substantive element of collective dominance was defined as the relationship between the parties in a specific market, where the firms involved believe that their conduct in the market is influenced by the fact that they are part of a dominant position that might or might not be controlled by Articles 81 and 82. This relationship is significant because it affects the firms' incentives to collude.

The condition for collective dominance to occur is that there must be a low level of competition in the relevant market. The court has ruled that the concentration would not necessarily lead to abuses immediately, and that a finding of collective dominance requires a determination of 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 has noted that the Commission's decision to challenge the concentration indicated that the market was in a state of "high oligopoly," with the firms involved "in a position to anticipate one another's conduct in the market." Therefore, the firms were considered to be acting independently of their competitors, their customers, and suppliers.

The court has further clarified that the existence of structural links is important in determining whether there is a low level of competition. The court has noted that "structural links" are referred to "by way of example," and that the condition for co-ordination to occur is that there must be a low level of competition in the relevant market. The court has also noted that the condition for co-ordination to occur is that there must be a low level of competition in the relevant market.

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In the latter case, this is because of the possibility that a realization of 'collective dominance' in oligopoly, a large proportion of 'real' markets. This is of obvious importance in that the concept of 'collective dominance' can be broadly identified with oligopoly. It was also noted that oligopoly is 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 common driving adaptation of EC competition law, and was also seen as key in the study of oligopoly and perfect competition. These models are part defined with reference to the monopoly which represents a large proportion of 'real' markets. This is of obvious importance in that the concept of 'collective dominance' can be broadly identified with oligopoly. It is also of importance in that the concept of 'collective dominance' can be broadly identified with oligopoly. It was also noted that oligopoly is 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 common driving adaptation of EC competition law, and was also seen as key in the study of oligopoly and perfect competition. These models are part defined with reference to the monopoly which represents a large proportion of 'real' markets. This is of obvious importance in that the concept of 'collective dominance' can be broadly identified with oligopoly. It is also of importance in that the concept of 'collective dominance' can be broadly identified with oligopoly. It was also noted that oligopoly is 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 common driving adaptation of EC competition law, and was also seen as key in the study of oligopoly and perfect competition. These models are part defined with reference to the monopoly which represents a large proportion of 'real' markets. This is of obvious importance in that the concept of 'collective dominance' can be broadly identified with oligopoly.
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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 a sign of efficiency, as 'competitive' firms compete away less 'competitive' ones. During the discussion, collusion theory was also examined, leading to the conclusion 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 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 in this case, 'abuse' does not actually have to be shown, merely its likelihood. As a result, a greater degree of caution is required when using this tool, especially where crossing borders is concerned.

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-encompassing provision in EC law tackling collusion, although the existing A81(1) law may be used for this purpose. As a result, a greater degree of caution is required when using the law to tackle collective dominance, especially where crossing borders is concerned.

The 'Wood Pulp' [1993] ruling made clear that there is no single, all-embracing provision in EC law tackling collusion, although the existing A81(1) law may be used for this purpose. Nonetheless, it is clear that blurring two provisions in this way is a very serious matter. As one commentator wrote prior to the Alsatel judgement [1989], extending [A82] to cover parallel behaviour would undermine the system of competition rules by rendering the concept of a concerted practice under [A81(1)] virtually redundant. Moreover, regarding mergers, the Commission has joined the growing number of markets, the 'Woolmark' case concerns the approach taken towards 'rational' firm behaviour. In this case, the law was described as 'an area of great complexity, not only because of the difficulty of defining a concerted practice, but also because of the difficulty of defining the concept of collective dominance itself. Nonetheless, the concept has been the subject of much discussion and debate, and the issue of how to define collective dominance is a critical one. It is clear that the concept of collective dominance was not clearly defined in the 'Woolmark' case.

Overall, perhaps the most striking discovery of this piece has been the lack of any clear pattern. Correspondingly, there appear to be few rules for advising firms on how to avoid collective dominance. Reflecting these findings, a prominent advisor has characterised it as "an area very difficult for advisers to give clear, simple guidance on."

Regarding mergers, the Commission has joined the growing number of markets, the 'Woolmark' case concerns the approach taken towards 'rational' firm behaviour. In this case, the law was described as 'an area of great complexity, not only because of the difficulty of defining a concerted practice, but also because of the difficulty of defining the concept of collective dominance itself. Nonetheless, the concept has been the subject of much discussion and debate, and the issue of how to define collective dominance is a critical one. It is clear that the concept of collective dominance was not clearly defined in the 'Woolmark' case.

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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, the law was described as 'an area of great complexity, not only because of the difficulty of defining a concerted practice, but also because of the difficulty of defining the concept of collective dominance itself. Nonetheless, the concept has been the subject of much discussion and debate, and the issue of how to define collective dominance is a critical one. It is clear that the concept of collective dominance was not clearly defined in the 'Woolmark' case.
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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 "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 the role of economic analysis in EC competition law. From the examination above, it can be said that there is a 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 accounted for, 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 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"
- 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-114-7/85 & 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]
- Viho Europe BV v. Commission (C-73/95) [1996] "Viho"
- Wednesbury & Others v. Regione Lombardia (C-70/95) [1997]
- France et al. v. Commission (C-68/94 & C-30/95) [1998] "Kali Salz"
- Compagnie Maritime Belge SA v. Commission (C-395 & 396/96) [2000]"
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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]


'Airtours/First Choice' Decision IV/M.1524 [1999] 283 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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29 ibid., pp.423-4.
31 Consolidated Version of the Treaty Establishing the European Community, Part Three, Title VI, Chapter 1, Section 1 - 'Rules applying to undertakings', p.70.
32 ibid., p.71.
33 Author's emphasis.
34 'Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères', Secretariat of the Intergovernmental Conference, Brussels, 21/04/56.
36 Issue 2, Grounds, p.342.
37 Produced by the Commission, at the request of the European Parliament in 1971.
38 Commission of the European Communities, (1972), p.11.
39 ibid., p.12.
40 This is later equated with 'equity'. Commission of the European Communities, (1980), p.10.
42 ibid.
43 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'.
44 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.
50 Consten & Grundig Decision 64/566/EEC [1964], Appealed in Consten & Grundig v. Commission (56 & 58/64) [1966], 13/07/66, ECR 299.
51 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.
55 Such as customs barriers and quotas between member states.
57 (1986); Hereafter referred to as the 'SEA'.
58 (1992); Hereafter referred to as the 'TEU'.
60 (14/68).
64 ie. 'Small or Medium-sized Enterprise'.
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, through the concept of 'crisis cartels' (based on the German law concept of 'strukturkrisenkartel') during the late 1970's. 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".


See also Weatherill & Beaumont, op.cit., p.806.

In principle, this was a big step forward, but in practice A82 is not well suited to merger control, permitting, for instance "only an unstructured calculation of the costs and benefits of the merger through the application of the vague notion of 'abuse'";

Furthermore, A82 is only applicable where dominance exists, which may be particularly problematic in oligopoly situations, and creates commercial uncertainty, which is compounded by the fact that A82 is assumed that the reader is familiar with the details of the Continental Can case as it has been so widely commented on.


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 cooperation between the companies.

3. The acquiring company gains "legal or de facto control" over the "commercial Conduct" of the other.

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.


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 practice, there is little to suggest that the Court's conclusion is at odds with the underlying purpose of the Commission's Competition law; Weatherill & Beaumont, op.cit., p.806.

The acquisition of a competitor's customer list (a practice which had been prohibited in the past) is now allowed.

The application of A82 to the case would have been problematic, as the majority of the mergers would have occurred before the full application of the Treaty of Rome.

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

The acquisition of a competitor's customer list (a practice which had been prohibited in the past) is now allowed.

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In an article of the 'Soda Ash' Case, (27/88) [1989], 18/10/89, ECR 3355, Bishop, S. (1999), p.38.
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98 16/21/75 ECR 1942; cited in Hildebrand, (1999), p.34; A key aim of 'cartel prohibitions' in general is seen to be "to preserve independent commercial behaviour among competitors"; Cook C. & Kerse, C. (1996), p.132.

100 Hercules v. Commission (T-7/89) [1991].


102 Suiker Unie v. Commission (40-8, 50, 54-6, 111 & 113-4/73) [1975] 'Sugar'; The Court also held that even communicating price rises to customers constituted 'indirect contact' with competitors; Judgement, para 64.


106 Judgement, para. 71; It is worth noting that a team of 'economic experts' was retained to advise the Court on this issue; For discussion, see Alese, F. (1999), p. 379; Hildebrand, D. (1999), p.216.

107 Judgement, para 66.

108 Judgement, para. 38.

109 See Judgement, para 102.

110 Judgement, para 71.

111 Wood Pulp, Judgement, para. 71.

112 OJ 1973 2140/17, CMLR D65; Appealed in Suiker Unie (40-8, 50, 54-6, 111 & 113-4/73) [1975] 'Sugar'

113 (85/76) 13/02/79, ECR 461; 'Vitamins'.


115 Judgement, para 39.

116 Judgement, para 4.

117 Judgement, para 5.

118 Judgement, para 20.

119 ibid.

120 Judgement, para 22.


123 para 258 or 358.

124 Judgement, para. 358.

125 Judgement, para. 366.


127 (C-393/92).

128 Judgement, para 41. Author's emphasis.

129 Judgement, para 42.

130 (96/94).

131 (142/94).

132 (T-24-6 & 28/93), 08/10/96, ECR II-1201.

133 23/12/92, OJ 1993 L 34, p. 20; CMLR D65 & D66: Cewal, Cowac and Ukwal.

134 'Cewal'.

135 Judgement, para 12.

136 Judgement, para 15.

137 Judgement, para 55.

138 Judgement, paras. 17 & 62.

139 Judgement, para 60.

140 Judgement, para 64.

141 Judgement, para 65; For discussion, see eg. Korah, V. (1998), p.4.

142 Those practices were found to constitute "aspects of an overall strategy which Cewal members pooled their forces in order to implement; ibid.

143 (C-395-6/96), 16/03/00.
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152 (93/82) 23/12/92, OJ 1993, L34/20; Appealed in Compagnie Maritime Belge v. Commission (T24, 26 & 28/93) [1996], 08/10/96, 4 CMLR 273; Appealed in (C-395/96) [1998]?

153 Para 50.

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 deemed to be highly transparent; 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 (or near-oligopoly) conduct in the relevant market was an issue...” (see, eg, Förenation Anglaise/Lonrho, cited in footnote 41, and Commission Decision 1999/152/EC in Case IV/M.1016, Price Waterhouse/Coopers & Lybrand, OJ L 50, 26.2.1999, p.27; ibid., footnote 63.

231 'Gencor' [1999], Judgement, para 134.


235 13/07/66, ECR 299.

236 ECR 185.

237 ECR 619.

238 ECR 215.

239 'European Sugar Cartel' [1975] ECR 1663.

240 14/02/78, ECR 207.

241 13/02/79, ECR 461.

242 ECR 3461.

243 18/10/89, ECR 3355.

244 11/04/89, ECR 803.

245 05/10/88, ECR 5987.

246 11/01/90, ECR 68.

247 26/12/90, ECR 3355.

248 18/02/91, ECR 207.

249 13/07/91, ECR 299.

250 10/03/92, ECR II-1403.

251 ECR I-2883.

252 ECR I-3257.

253 08/10/96, ECR II-1201.

254 ECR I-5457.

255 ECR I-3395.

256 ECR-1375, 31/02/98.

257 25/03/99.

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