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

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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 its acceptance in competition policy and the law in general. A lack of development and no legal or economic ground for the concept in practice, it also appears connected to difficulties in applying A81(1) to certain cartel situations. By accepting the concept, it is argued that the boundary between A82 and A81(1) has been awkwardly blurred. Under the Merger Regulation (Regulation 4064/89), the prospective nature of the analysis is seen to place even less emphasis on the concept. The lack of agreement amongst economists and the over-riding impression remains one of lack of both clarity and consistency, and a call is therefore made for further development.
Introduction

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 affected significantly. The development of the concept is shown to be rooted in the Treaty provisions of A82. The need to bridge a perceived 'gap' in the Treaty concerning the scope of A81(1) is seen as significant. Learning from this, the application of collective dominance reflects the economic scope of A81(1) to reflect a large group, compared to the Treaty concept of the 'unity of undertaking'.

The development of the concept is then traced in practice, through the case law. In particular, the concern is seen to be central in explaining why the competition authorities are giving a range of forms of competition policy, in terms of their approach to the application of EC competition law. The concept of 'collective dominance' is seen to be central in explaining why the competition authorities are giving a range of forms of competition policy, in terms of their approach to the application of EC competition law.
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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 the relationship and interplay of the two. The theoretical discussion draws from both economics and business, as well as from law. There is an attempt to criticise the products of this analysis, and core economic concepts and insights from business strategy are used.

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 theoretical discussion is informed by economic analysis, which is commonly conceived of 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 “contention for superiority...[which] in the commercial world...means a striving for...custom...in the marketplace”. It also appears to be an 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 are commonly divided into those relating to States and those relating to firms. Our concern in this essay is with the former.

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. The terms demand and supply are important in defining the market environment in which the law operates. The concept of differentiation provides a useful mechanism for examining competition. However, the law is concerned not with whether a product is differentiated, but with whether the law can be applied. The law can be applied where there is no universally accepted definition of 'legal competition', and later areas since it is within this field that the concept of collective dominance is developed.

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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 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 that which would be charged under competitive conditions, leading to a lower level of consumer surplus. Secondly, the monopolist may engage in 'price discrimination', charging different prices to different customers for the same product.

Perfect competition describes a market in which there are an infinite number of equally sized suppliers. This model is 'static', allowing for neither innovation nor entrepreneurship. 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".

Oligopoly refers to a market which is dominated by a few suppliers. This definition is much looser than that of monopoly or perfect competition, and leaves it open to determine terms. In practice, oligopolies are often characterized by "a considerable portion, perhaps a large majority, of markets in modern industrial nations".

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 of one firm are influenced by the actions of other firms in the market. Thus, "each firm must take into account the effects of its own actions on the actions of other firms". Based on this idea therefore, a common assumption is that prices should tend to remain stable for long periods, and parallel behaviour 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.

Collusion is theoretically possible amongst any number of firms, and is basically a synonym for agreement or coordination of actions, with some indication of secrecy. A distinction is frequently made between 'active' and 'passive' collusion, according to whether 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 factors that they are testing for are the degree of collusion and the necessary conditions of collusion theory are necessary. Collusion is viewed as a way to maintain or extend oligopolistic market power.

In determining the ease or desirability of coordination, the degree of 'asymmetry' between firms is argued as relevant, since high levels of asymmetry may imply conflicting interests. This is particularly relevant in the context of mergers, where the effect on how assets in general, and production capacity in particular, are distributed between firms has been a key concern. For example, the ability of one firm to 'cheat' without being caught, and the ability to take action against such firms are seen as critical factors in determining the feasibility of collusion.
work used to guide the application of competition law in the EC. Yet, evidence will be sought for an underlying competitive theory or framework, with the development and application of competition law in the EC necessarily reflected in the evolution of the theoretical framework.

Having reflected on the theoretical theory, a more detailed analysis is now required.

Applying EC Competition Law

When applying competition law, it is essential to consider the context and purpose of the provisions. From a practical perspective, there are significant differences between the US and the EC. The US approach is generally focused on preventing anticompetitive behavior, while the EC focuses on ensuring fair and efficient competition.

In the context of the present discussion, it is argued that industry structures reflect the different cost structures and economies of scale achievable by firms. Moreover, high levels of concentration are often considered to be indicative of anticompetitive behavior. However, this is not necessarily the case. In some instances, high levels of concentration may be the result of efficient behavior, such as in the case of oligopolistic markets.

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 behavior.

It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement. Concentration is undoubtedly an important consideration, but there are important implications for competition law, and it is important to consider the context and purpose of the provisions. From a practical perspective, there are significant differences between the US and the EC. The US approach is generally focused on preventing anticompetitive behavior, while the EC focuses on ensuring fair and efficient competition.

Having reflected on the relevant theory, a more detailed analysis is now required. The development and application of competition law in the EC necessarily reflected in the evolution of the theoretical framework.
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1. 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.

2. 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." 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 other unfair trading conditions". Likewise, 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".

3. 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 reveals...a recognition of the significance of enterprise growth in a larger market - that concentration is 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.

4. 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". The overall impression is one of consistency in the treatment of competition as a principle of economic activity, rather than a specific legal provision.

5. 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" was seen as the key to the conditions under which competition takes place.

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9. 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" was seen as the key to the conditions under which competition takes place. In particular, the consumer is close to mind, in particular the consumer. The overall impression is one of consistency in the treatment of competition as a principle of economic activity, rather than a specific legal provision.

10. The underlying principle of economic activity, once it is defined, can be used as a reference model in the interpretation of competition law. 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". The overall tone is close to 'standard economic' arguments, the emphasis on both employment prospects and on consumers, suggests a broader agenda. Albeit of the 1960's, it is clear that the Commission's roles are reflected in both the emphasis on competition and the principle of economic activity, rather than as a specific legal provision.

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The link between competition and economic efficiency, often referred to as "collective dominance" in EC competition law, has been generally recognised since the early 1990s. From the late 1970s, 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".

From the Commission's Survey of Concentration, Competition, and Productivity, conducted in 1992, it is evident that there has been a general trend towards increasing concentration across all industries. In addition, this trend towards increasing concentration within the individual businesses has been seen in the accompanying mergers and acquisitions that have been used as the 'means to master the uncertainties of business life' and to facilitate the process of integration. The liberalisation that has characterised the global environment, and the need to master the uncertainties of business life, have been important factors in the process of integration. While there are potentially many examples, an important one is the "source of innovation". We have seen an increase in the number of companies that are engaged in developing new products and processes, and this has been accompanied by an increase in the number of mergers and acquisitions. This has led to a wave of concentration that has been seen in the EC, and the trend has been exacerbated by the fact that the economic notion of concentration must be separation into narrow or asymmetrical oligopolies, so that the process of concentration brings overall gains in efficiency, and it is also likely to bring increased competition.

While there are potentially many examples, an important one is the "source of innovation". We have seen an increase in the number of companies that are engaged in developing new products and processes, and this has been accompanied by an increase in the number of mergers and acquisitions. This has led to a wave of concentration that has been seen in the EC, and the trend has been exacerbated by the fact that the economic notion of concentration must be separation into narrow or asymmetrical oligopolies, so that the process of concentration brings overall gains in efficiency, and it is also likely to bring increased competition.
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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 concern is therefore that '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 the competition law, as well as the underlying competition policy, are not static, but rather evolve as the environment alters, or the focus of policy shifts. 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 thereorganisation 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 continuous development of case law on the application of A82, which included decisions on "concerted practices" and "agreements whose purpose [was] to accommodate existing competition in a market". 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 to be insufficient to deal with the problem. Where the market tends towards oligopoly, the 'problem' is seen as the likelihood of collusion. Where the market tends towards a few large firms, the 'problem' is seen as the likelihood of "abuse", which includes the possibility of "collusion". However, under the competition law, an "abuse" refers to a conduct that is prohibited by the competition law, while "collusion" refers to conduct that is not necessarily prohibited by the competition law, but is prohibited by the merger regulation. Where the market tends towards oligopoly, the 'problem' is seen as the likelihood of collusion. Where the market tends towards a few large firms, the 'problem' is seen as the likelihood of "abuse", which includes the possibility of "collusion". However, under the competition law, an "abuse" refers to a conduct that is prohibited by the competition law, while "collusion" refers to conduct that is not necessarily prohibited by the competition law, but is prohibited by the merger regulation.
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1. The concept of 'collusion' is essentially a synonym for 'agreement', with some suggestion of secrecy, and may be considered as the essence of a 'cartel'. Importantly, neither cartel nor collusion correspond directly to any term in EC law.

2. Nonetheless, collusion by formal agreement is clearly within the scope of the prohibition laid down by Article 81(1). A clear and separate interpretation of the three individual elements of this 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".

3. Drawing on this judgement, it can therefore be said that Article 81(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... pattern observed on the market will be one of parallelism, as firms behave in a 'co-ordinated' way. However, it is also clear that such behaviour may have other explanations. While rather improbable, it may be pure coincidence.

4. Alternatively, it may be that the firms simply have very similar cost structures, and may thus react in a related, but not actively co-ordinated manner, to changes in the costs of particular inputs. In such cases, it may be argued that the firms are responding to the same market forces, but in a manner that is coincidental.

5. Separating anti-competitive intent from rational and intelligent behaviour is extremely difficult. As the 'Wood Pulp' [1993] and 'Soda Ash' [1989] cases emphasised, the line between illegal cartel behaviour and lawful intelligent adaptation is a fine one. It is a particular problem in the context of Article 81(1), given the difficulties with proof, particularly in cases where the evidence provided is circumstantial.

6. Nonetheless, this interpretation would not imply that Article 81(1) is no longer applicable to such cases. In fact, it appears that both Article 81(1) and Article 82 are intended to address the same issue. In some cases, the Commission has alleged that Article 82 was breached, while in others, it has been argued that Article 81(1) was not applicable. The key to resolving this difficulty is through the concept of 'collective dominance', as developed by the ECJ in the 'Compagnie Maritime Belge' case [1996]. The concept also allows 'cartel behaviour' to be approached using a group exemption.

7. As indicated, this is obviously a very difficult area in which to apply the law, and it will be argued below that collective dominance can be seen as an attempt to resolve this difficulty. Through the concept of collective dominance, parallelism may now be approached using Article 82.

8. 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 exist if firms are pursuing competitive strategies which focus on non-price variables. In this way, parallel behaviour "is to be expected commercially even in the absence of collusion".
question, the scope of A81(1) is more plainly limited by the heavy burden "there is nothing, in principle, to prevent two or more independent eco-
Furthermore, as a result of such a firm ruling on the parallel behaviour collective dominance was found on the facts. Specifically, it was stated that the normal operation of the market was wrecked by the expert information in the Commission's possession which, on its own admission, [was] not sufficiently precise".
As seen above, if parallel behaviour itself is considered sufficient evidence of a concerted practice, there is a clear risk that collusion may wrongly be inferred.
Thus 'economic operators' still have 'the right to adapt themselves in-
nonetheless, despite the apparently "clear words" uttered previously, parallelism was proof of concertation the undertakings argued it was due to an "agreement between authorised installers to share out regional markets between them". In this regard however, the Commission asked the Court to "consider whether parallel behaviour on the part of several independent undertakings...may place...[them]...collectively in a dominant position". As the ECJ held, if this "large share of the regional market" was due to a cartel it could not "consider that possibility" as it was "uncon-
Regarding parallel behaviour, the 'Dyestuffs' case also established that while it "may not by itself be identified with a concerted practice, it may how-
The definition was carried forward by another cartel case, 'Suiker Unie' [1975].
The concept has since been recognised by both Community Courts, given certain conditions. Specifically, in the 'Italian Flat Glass' case, [1992]
This issue was most comprehensively clarified by 'Wood Pulp'
One contemporary critic argued, this definition of 'concerted
'&fract;:s;..."in practice prohibit[ed] customers from deal-
This apparent hostility towards acceptance of the concept was again evidenced in the 'Alsatel' case [1989]... "in practice prohibit[ed] customers from deal-
Accordingly, the use of A81(1) seemed to be treated as an abuse of market power which derives profits from that position is to a great extent deter-
In the more recent 'Polypropylene' case [1975] which clarified that there can be no concerted practice if the undertakings operate independently.
To return to the issue of proof, the Commission developed the concept of collective dominance a decade later, under A81.
Based on the above, the articles seem to have an area of overlap, and an area of A81 is therefore insufficient to recede the case used
The concept of proof however is important in understanding how the current law relates to parallel behaviour and collective concertation under A82...
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Economic 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 dominance 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 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 A81(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 this case, the relevant market 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.

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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," and that...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' referred to the existence of a number of independent undertakings holding a position of dominance in a relevant market in such a way that they adopt the same conduct on the market. This concept was then used in other cases, such as in the 'Irish Sugar' case [1999] where the Commission had found collective dominance where Irish Sugar had legal but not management control over SDL, and where monthly meetings were held to co-ordinate the conduct of the two companies.

In clarifying earlier case law, the Court stated that "a joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a position of dominance on a relevant market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers". Furthermore, the test for "a joint dominant position held by...
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 economic concentration. Indeed, as noted in recitals 7 and 9 of the regulation, the purpose of the regulation is to ensure that "the process of reorganisation does not result in lasting damage to competition" (recital 9). The regulation's purpose is to prevent the concentration of economic power that may result in market foreclosure or the creation of a dominant position, thereby limiting competition. The regulation is explicitly structural, applying in the first place to "significant structural changes" (Article 2(3)) and their effect on the structure of competition (Article 2(4)). Accordingly, the application of the regulation is "contentious" and "controversial." To gain a clearer understanding, an examination of the use and definition of collective dominance under the regulation is now required.

Perhaps reflecting the comments made so far, the application of the merger regulation to oligopolistic market structures has been variously described as "contentious" and "controversial." To gain a clearer understanding, an examination of whether the Commission’s jurisdiction to proscribe mergers leading to collective dominance in the merger regulation was properly excluded under Article 2(3) of the regulation is now required.

The regulation’s purpose and concerns are explicitly structural, applying on the one hand to "significant structural changes" and, on the other, to "significant structural changes." The regulation’s purpose is to prevent the concentration of economic power that may result in market foreclosure or the creation of a dominant position, thereby limiting competition. The regulation is explicitly structural, applying in the first place to "significant structural changes" (Article 2(3)) and their effect on the structure of competition (Article 2(4)). Accordingly, the application of the regulation is "contentious" and "controversial." To gain a clearer understanding, an examination of the use and definition of collective dominance under the regulation is now required.

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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 being applied to situations where a 'dominant position' was created as a result of a merger of undertakings. However, the concept of 'collective dominance' was more complex, as it could involve smaller undertakings that individually did not have a market share of 25%

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 high concentration, no examination for collective dominance has been made, and in others it has been made only briefly. By way of example, in the 'Kali & Salz' decision \[1996\] 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 thereby divided into two segments 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 information due to annual rebate systems. 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 of the 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 language used was open to interpretation. But the clear conclusion was that there would be a "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...the market and act to a considerable extent independently of their competitors, and co-operate in practical effect to restrain competition".

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 held that the merger regulation inapplicable in such cases, since 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 “arising or being strengthened according to the Court, the key element of this ‘relationship’ is that those involved ‘are in a position to anticipate one another’s conduct in the market’.” The basic assumption is that the firms involved believe that ‘highly competitive action’ would not lead to abuses immediately, it would have ‘created the conditions in which abuses were not only possible but economically rational’. However, the notion of ‘economic links’ is not restricted to that of “structural links”, and importantly includes “the relationship of customers, suppliers, who were both highly concentrated and involved in financial management Services.” Following the Commission’s analysis, the “world platinum business 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. The condition for the merger to proceed in the form of a joint venture, before any agreement on the market, would not compete effectively. The condition for the merger to proceed, and that “a highly competitive action of their concentration, were considered ‘highly competitive action’.” The condition for the merger to proceed in the form of a joint venture, before any agreement on the market, would not compete effectively. The condition for the merger to proceed in the form of a joint venture, before any agreement on the market, would not compete effectively. The condition for the merger to proceed in the form of a joint venture, before any agreement on the market, would not compete effectively.
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In the latter case, this is because of the possibility that a realisation 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 coordination. 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 in 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". However, the case is 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 oligopoly, monopoly, and perfect competition are described as market structures of an oligopolistic kind. The Commission believe that competition can best be understood in terms of the market structure to be expected under a certain set of conditions, and that this set of conditions is described as being more or less competitive. However, the case is that there are two market structures of an oligopolistic kind, and that the market structure is one or more explicit agreements. Because there are two market structures of an oligopolistic kind, the Commission believe that competition can best be understood in terms of the market structure to be expected under a certain set of conditions, and that this set of conditions is described as being more or less competitive. However, the case is that there are two market structures of an oligopolistic kind, and that the market structure is one or more explicit agreements. Because there are two market structures of an oligopolistic kind, the Commission believe that competition can best be understood in terms of the market structure to be expected under a certain set of conditions, and that this set of conditions is described as being more or less competitive. However, the case is that there are two market structures of an oligopolistic kind, and that the market structure is one or more explicit agreements. Because there are two market structures of an oligopolistic kind, the Commission believe that competition can best be understood in terms of the market structure to be expected under a certain set of conditions, and that this set of conditions is described as being more or less competitive. However, the case is that there are two market structures of an oligopolistic kind, and that the market structure is one or more explicit agreements.
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 have been deemed less competitive ones.

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 in the earlier discussion, the existence of collective dominance under A82 is not sufficient, but necessary, for it to be considered an abuse of dominant position. As a result, a greater number of activities are considered as an ‘obstacle to effective competition’ under A82, as it is to the individual market that collective dominance extends. As the analysis showed, the availability of collective dominance extends the scope of A82 and, even more so, of the merger regulation, since in this case, ‘abuse’ does not actually have to be shown, merely the existence of a collective dominant.

As the earlier discussion indicated, concerns with concentration and the collusive behaviour that is suspected as a corollary, translate into an ‘anti-cartel’ policy of some form. However, as was seen, there is no single, all encompassing provision in EC law tackling cartels, as the concept of ‘collusive price fixing’ is not defined in EC law. Accordingly, it was seen that the emergence of collective dominance under A81(1) cannot be assessed in isolation, but must be understood in the light of the ‘Wood Pulp’ ruling [1993].

Overall, perhaps the most striking discovery of this piece has been the lack of any clear pattern. Correspondingly, there appears to be disturbingly little that can be said to advise firms on how to avoid being ‘caught’ by collective dominance. The Commission has generally been considered to be a useful tool for enforcement purposes, since it acts as a ‘checklist’. Interaction, and hence behaviour, is clearly the unknown variable.

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 by the ‘expert’ that it is not reasonable for the firms to behave as they did, exhibiting parallel behaviour in pricing. Rational action is therefore not sufficient to create a structure in which parallel behaviour would be anticompetitive. In this respect, there appears to be no direct action taken to address ‘smuggling’ collusive conduct of any kind. Instead, collective dominance plays a crucial role, as it is to the individual market that collective dominance extends. As the analysis showed, the availability of collective dominance extends the scope of A82 and, even more so, of the merger regulation, since in this case, ‘abuse’ does not actually have to be shown, merely the existence of a collective dominant.

Regarding mergers, the Commission has typically been seen to ‘make the market conductive in order to counteract any abuse of dominant position. Nonetheless, there appears to be disturbingly little that can be said to advise firms on how to avoid being ‘caught’ by collective dominance. Reflecting these findings, a prominent advisor has described collective dominance as ‘an area very difficult for advisers to give advice on’.

Overall, perhaps the most striking discovery of this piece has been the lack of any clear pattern. Correspondingly, there appears to be disturbingly little that can be said to advise firms on how to avoid being ‘caught’ by collective dominance. The Commission has generally been considered to be a useful tool for enforcement purposes, since it acts as a ‘checklist’. Interaction, and hence behaviour, is clearly the unknown variable.
In general, the need for 'collective dominance' in competition law is to identify and to some extent control a market situation in which a group of firms holds a significant market share and exercise collective market power. This 'collective dominance' is characterized by the following key factors:

1. Market share: At least two, three, or four suppliers each hold a significant 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.

2. Market concentration: The market is highly concentrated, with a few dominant players collectively controlling a large share of the market.

3. Market interdependence: The firms in the group are interdependent, and their collective actions have a significant impact on the market.

4. Market power: The group collectively exercises market power, which can lead to anticompetitive conduct.

5. Market barriers: There are significant barriers to entry, such as legal, economic, or technological barriers, which prevent new entrants from entering the market.

6. Market transparency: The market is transparent, with clear information about the market structure and the firms involved.

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 the use of economic analysis in competition law is a necessary and important tool. However, there are still 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], the CFI emphasized 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.

Furthermore, a fundamental problem may lie in the interaction of economic and legal analysis. For if the full complexity of the former is fully understood, the latter would be more easily interpreted. 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 recognized "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 innovations in antitrust for many years. The development and implications of 'collective dominance' in EC competition law are thus of particular importance.

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**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-114-7/85 & C-125-9/85) [1993] 'Wood Pulp'
- Centro Servizi Spediporto v. Spedizioni Marittima del Golfo (C-96/94) [1995] 'Compagnie Maritime Belge'
- Viho Europe BV v. Commission (C-73/95) [1996] 'Viho'
- Société des Yachting de la France et al. v. Commission (C-68/94 & C-30/95) [1998] 'Kali Salz'
- Gencor Ltd v. Commission (T-102/96) [1999] 'Gencor'
- Irish Sugar plc v. Commission (T-228/97) [1999] 'Irish Sugar'
- 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]


'Chiquita Bananas' Michelin Decision 81/969/EEC [1982], Appealed in Michelin v. Commission (322/81) [1983]


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

'Alcatel/AEG Kabel' Decision [1991]


'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.


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.  

'RAPPORT DES CHEFS DE DÉLÉGATIONS AUX MINISTRES DES AFFAIRES ÉTRANGÈRES', SECRETARIAT OF THE INTERGOVERNMENTAL CONFERENCE, BRUSSELS, 21/04/56.  

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.  


ibid., p.12.  

The Commission's proposals for the revision of the Treaty Establishing the European Community, hereafter referred to as the 'TEU'.  

An Expression of Confidence in the Ministers of the Member States, Secretariat of the Intergovernmental Conference, Brussels, 21/04/56.  


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

73 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 1970's 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.


75 Wyatt & Dashwood, op.cit., p.495. See also Weatherill & Beaumont, op.cit., p.806.

76 See Brown, op.cit., p.352; Wyatt & Dashwood, op.cit., p.495-8.

77 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).

78 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'"; 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.


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

81 Judgement, paragraph 37.

82 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.

83 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.

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

85 "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;

86 Not used in the legal sense.

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

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

89 Judgement, para.64.


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


93 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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98 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.

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150 (C-73/95).


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".

188 ibid.

189 The market was also deemed to be highly transparent.

190 ibid.

191 Judgement, para. 163.

192 Following France & Others v. Commission [1996] ECR I-1375 and the concentration was approved.

193 ibid.

194 ie.Implats/LDP, and Amplats. Significantly, this had been the argument of the applicant; ibid.
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Bibliography

Articles & Speeches


Anonymous, (1999) 'Preying on Theory: How often do companies engage in 'predatory pricing' - deliberately losing money to keep competitors out of their industry?', The Economist; Economics Focus, 10/07/99, p.100.


References

Accessed 15/12/00 via http://europa.eu.int/corpus/corpus.html

For further information, please contact the European Commission, Directorate-General for Competition.
The Financial Times exempt payments to small and medium-sized companies’, in European Law Review, 2, pp.269-78.


Law Review, 57, pp.86-93.


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Official Documents

Commission of the European Communities, (1972)

Commission of the European Communities, (1975)

Commission of the European Communities, (1975)
Report on the behaviour of the oil companies in the Community during the period from October 1973 to March 1974, COM(75) 675 10.12.75.

Commission of the European Communities, (1977)

Commission of the European Communities, (1979)

Commission of the European Communities, (1980)

Commission of the European Communities, (1981)

Commission of the European Communities, (1982)

Commission of the European Communities, (1983)

Commission of the European Communities, (1984)

Commission of the European Communities, (1985)

Commission of the European Communities, (1986)

Commission of the European Communities, (1987)

Commission of the European Communities, (1988)

Commission of the European Communities, (1989)

Commission of the European Communities, (1990)

Commission of the European Communities, (1991)

Commission of the European Communities, (1992)

Commission of the European Communities, (1993)

Commission of the European Communities, (1994)


Commission of the European Communities, (1996)

Commission of the European Communities, (1997)