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

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

The objective of this essay has been to explore why the concept of collective dominance has been developed and to examine the implications of its use. The paper begins with an examination of the implications of 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) in certain cartel situations is blurred. The overriding impression remains one of lack of both clarity and consistency, and a call is therefore made for further clarification.

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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 by how the concept is interpreted. In the pages that follow, a thorough analysis will be carried out in an attempt to understand how the concept is interpreted and to what extent the practice of competition law deviates from the Treaty as interpreted by the Community Courts.

The development of the concept is then traced in practice, from its early mention by the Commission, to its acceptance by the Court under A82. The need to bridge a perceived ‘gap’ in the Treaty concerning the scope of A81(1) is seen as significant. Emphasis on the need for a consistent approach to interpreting A82, the need to bridge a perceived gap in the Treaty concerning the scope of A81(1), and the need to consider the impact on the existing framework of EC competition law, and in what ways it is interpreted, is important. Emphasis is placed on an in-depth examination of how the concept has been interpreted by the Court in recent cases. The concept of collective dominance has now been recognised under A82 and the merger regulation. While the law has not technically changed, its application is affected significantly by how the concept is interpreted.
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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 this paper is to proceed from an examination of theory to an analysis of practice, concluding by reflection on their relationship and interplay. The theoretical discussion draws from both economics and business, as well as from competition policy and law, the latter area since it is within this field that the concept of collective dominance is applied.

With all areas of law, there is no universally accepted definition of 'right' and 'wrong', and hence prohibitions, exemptions and exceptions 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 complexity of issues at stake, economics provides a useful framework for examination. Significantly, this association between disciplines is a longstanding one in the US, where the 'Law & Economics' movement bears clear witness. This movement has long promoted economics as a framework for interpretation and analysis in many 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 development of competition law has been based on the principle of the free market and the law's role is to prevent the law from occupying the market. As such, 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, exemptions and exceptions 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 complexity of issues at stake, economics provides a useful framework for examination. Significantly, this association between disciplines is a longstanding one in the US, where the 'Law & Economics' movement bears clear witness. This movement has long promoted economics as a framework for interpretation and analysis in many 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.

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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 important to note that market structures, like so many other factors, including the relative size and power of the dominant player(s) and a variety of other factors, may affect 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 marginal cost. Secondly, in long-run, there can be no pressure on competitors to enter the market to threaten the dominant firm's market share. As a counterpoint, perfect competition describes a market in which there are an infinite number of equally sized suppliers. There are several other specifications, including that all firms supply a homogeneous product for example, that it is efficient. Such markets are rarely found in reality, and related to this, a key criticism is that the model is static, allowing no room for innovation and the entrepreneur or indeed rivalry between individual firms.

As referred to previously therefore, other theories have been developed to model situations of imperfect competition.

One of the most important theories of oligopoly concerns the interdependence that is assumed to exist between the oligopolists. Accordingly, it is assumed that the price and output decisions made by each firm will closely affect the other firms in the market. This is because each firm must take into account the effects of the own actions on the actions of other firms.

Correspondingly, there are a variety of market structures, rather than a universally accepted model. As a result, there is no generally agreed paradigm to identify dominant oligopolists and separate them from situations of oligopolistic supply resulting in a competitive market.

As collusion forms such a vital element of concerns over oligopoly, a brief examination of collusion theory is necessary. Collusion is theoretically possible among any number of firms, and is basically a synonym for agreement. As such may also be considered as the essence of cartel. A distinction is frequently made between "active" and "passive" collusion, and as such may also be considered as the essence of "cartel, "active" collusion. The essence of collusion is a relationship between the agreements. Agreement or any number of actions, with some suggestion of secured, mutual or internal. Alternatively, many economists would suggest that this distinction is largely irrelevant. The essence of collusion is a relationship between the agreements, and not the agreements themselves. Agreement or any number of actions, with some suggestion of secured, mutual or internal. Alternatively, many economists would suggest that this distinction is largely irrelevant. The essence of collusion is a relationship between the agreements, and not the agreements themselves.
Applying EC Competition Law

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...Furthermore, it is argued that co-ordinated between firms in a market will be more easily sustained if deviations from an agreed path are more likely to be 'detected' by the other firms, and these have the means to 'punish' the defector(s) rapidly and effectively. Thus, it is then a question of identifying the variables that affect these two factors, and ideally, placing these in a practical context. 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. Moreover, it is argued that the interaction of such factors 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.

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. Indeed, the 'Chicago School' is that market structure is a key determinant of firm performance. The main framework put forward is the 'Structure-Conduct-Performance' model, which assumes causality runs in this order. In addition, based on this model, it is argued that monopoly profits will increase the more concentrated is the market, i.e., it is argued that the right side of the market will increase with increased market concentration. However, this approach is less important in the context of the present discussion, as it is argued that the right side of the market will increase with increased market concentration.

Nonetheless, there is still debate over the role of concentration in determining market conduct and performance. For example, some argue that higher levels of concentration may lead to increased efficiency, while others argue that such levels may lead to increased market power and reduced competition. It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement. It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement.

However, it is important to note that the application of EC Competition Law is not as straightforward as it may seem. The factors that affect the likelihood of collusion and the extent to which firms are able to co-ordinate their actions are complex and multi-dimensional. Furthermore, the application of EC Competition Law is not as straightforward as it may seem. The factors that affect the likelihood of collusion and the extent to which firms are able to co-ordinate their actions are complex and multi-dimensional.
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In this section, 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". 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". To agreements "improving the production or distribution of goods or to promoting technical or economic progress". 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 the case law. Although, 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 "market economy, in which free competition was also the command under which competition took place, was seen as a central...". Where annual reports on competition policy [C(72)761] were issued, it was stressed that the competition authorities were not in any actual market position within the market economy. The duty of the competition authorities is to ensure that fair competition within the framework of the market economy, in which fair and undistorted competition is supposed to ensure that available resources are allocated to the most productive sectors, which has the effect of encouraging the most productive sectors to use resources more efficiently. This direction of policy is echoed in "the spirit of enterprise", arguably reflecting a stronger 'efficiency' bias. In a similar vein, the Commission...".
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From the early 1990s, the link between competition and economic efficiency has been generally recognised. However, there is an ongoing debate about the appropriate role of competition law in this context. It is argued that competition law should aim to achieve a balance between economic efficiency and consumer welfare. This is because untrammelled market forces can sometimes lead to a situation where competition is stifled or even eliminated, thereby harming consumers. Hence, competition law is considered to be a necessary tool in ensuring that market forces operate efficiently.

The direction and focus of EC competition policy have emerged more clearly over time. 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 be of little use to abolish government restrictions if traders in different member states were allowed to replace each other’s home market, as a result, competition policy has played an increasing role in promoting integration.

The application of competition law is not just about protecting the consumer’s interests. It also aims to promote the broader economic goals of promoting innovation, productivity, and competitiveness. 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.

The political and economic climate has changed significantly over the years. While there are still many examples of successful competition policies, there are also cases where competition policies have failed to achieve their desired outcomes. The Commission’s ‘Survey of Concentration, Competition, & Competitiveness’ conducted every year, is evident that there have been significant changes in the structure of the market. However, it is generally considered that competition law is essential for the achievement of the internal market.

From the Commission’s ‘Survey of Concentration, Competition, & Competitiveness’, it is evident that there has been a general trend towards increasing concentration across all industries. This trend is largely driven by the integration programme. However, it is also evident that there are potential conflicts between the need for concentration and the desire for competition.

The Commission has noted that a wave of concentration would basically transform the European market structure into narrow or asymmetrical oligopolies. This is why competition is considered an essential tool in promoting a single market and ensuring effective competition.

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In conclusion, competition law is an essential tool in achieving the broader economic goals of promoting innovation, productivity, and competitiveness. It is also important for ensuring that market forces operate efficiently. However, it is also important to note that there are potential conflicts between the need for concentration and the desire for competition. The Commission’s ‘Survey of Concentration, Competition, & Competitiveness’ is a useful tool in evaluating the effectiveness of competition policies.

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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 ... 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 these competition laws is not static. 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 expansion of the merger control procedure to cover the concentration of firms that were not competitors. However, as the issue of concentration illustrates, the combination of the competition law and the merger control procedure can lead to an incomplete application of the law.

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. In such circumstances, any innovation to broaden the scope of the available legal tools would seem welcome. Likewise, understanding of the concept of concentration has evolved over time. In order to gain a better understanding of the concept of concentration, in the context of the competition law, a distinction between the concept of concentration in terms of competition law and its application in terms of merger control is very helpful. Where the market tends towards oligopoly, the main concern is the likelihood of collusion. The Commission has pursued a dual approach to the concept of concentration. First, it has sought to establish whether the concept of concentration is relevant in the context of the competition law. Where the concept of concentration is regarded as relevant, it can be relied upon in the context of the competition law. Second, where the concept of concentration is not relevant, it can be relied upon in the context of the merger control procedure. However, this dual approach has been described in competition law literature as "a mistake".

Following the discussion opened in the previous chapter, the concept of collective dominance can be defined as follows: The concept of collective dominance refers to a situation in which a group of firms, considered together, are able to control or influence a significant portion of the relevant market, thereby giving them the power to cooperate effectively and achieve a significant impact on market conditions. This concept is important because it allows the Commission to address situations in which firms are not explicitly in competition with each other, but still have the ability to act in concert to limit competition. The concept of collective dominance is therefore closely linked to the concept of market power, but it goes beyond it by considering the potential for coordinated behavior among firms that may not be competitors but are in the same market or related markets. The concept has been applied in various cases, including the 'BAT/Reynolds' case [1985], where the Commission held that the acquisition of a competitor by a dominant firm could infringe A82. In these cases, the concept of collective dominance has been applied to assess whether the firms in question have the ability to cooperate effectively and achieve a significant impact on market conditions. This approach has been criticized for being too vague and allowing for a wide discretion in its application. However, it has also been praised for its flexibility and ability to address new and emerging market structures.
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Recalling earlier discussion, 'collusion' is basically 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. Nonetheless, collusion by formal agreement is clearly within scope of the prohibition laid down by Article 81(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".

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 clearly conceivable that such behaviour may have other explanations. While rather improbable, it may be pure coincidence.

Alternatively, it may be that the firms simply have very similar cost structures, and may thus react in a related, but not actively co-coordinated manner. This is generally termed 'tacit collusion', and accordingly the firms involved behave in a certain manner because they 'understand' it is in their mutual interest to do so, because of the "rules of the game". In so far as there is a lack of competition, it can be considered that market forces are not present to do so, and consequently, the firms may engage in such behaviour.

Tackling 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 to rivals' behaviour is a fine one". This is a particular problem in the context of Article 81(1) given the difficulties with parallelism as evidence, since it is the collusion itself that must be proved. Under Article 82, by contrast, provided that a firm or group of firms is in scope, it is 'merely' necessary to prove that some form of abuse has occurred. Therefore, as the Commission needs to be provided with at least some evidence, which is not the case for parallelism, the concept of collective dominance is introduced.

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 a means of providing a more flexible approach to the concept of collusion. A breach of Article 81 is alleged by the Commission when it demonstrates that a concerted practice, other than parallelism, results in a significant restriction of competition. Article 82 is used to prove that such a breach has been committed. The Commission is then able to use the concept of collective dominance to argue that such behaviour is not illegal. However, parallel behaviour may also constitute rational action. As noted above, in the area of pricing, for example, 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 structurally similar to concerted practices, but there are some important differences between the two. The concept of collective dominance is therefore introduced to address these differences.

The development of the concept of collective dominance is significant because it allows the ECJ to apply Article 82 to cases where parallelism does not exist. The Commission is able to use this concept to prove that there has been a breach of Article 81, even in the absence of an explicit agreement. This is important because it allows the ECJ to apply the concept of collective dominance to cases where parallelism does not exist. This concept is further discussed in the following section.
The scope of Article 81 is more precisely defined by the concept of concerted practices or, more specifically, agreements. The Commission has developed the concept of collective dominance to address situations where two or more independent economic operators, acting in concert, achieve a degree of market power that is significant in practice, even if not calculated in accordance with normal market conditions.

The concept of collective dominance was first introduced in the 'Sugar Cartel' decision [1973]. In this case, the ECJ established that the concept of collective dominance does not require the existence of a formal agreement. It can be established on the basis of factual evidence that indicates concertation among the economic operators involved.

Moreover, the concept of collective dominance is not limited to situations where the economic operators have a dominant position. It can be applied even where the operators do not have a dominant position, but their conduct is found to be anticompetitive.

The Commission has enforced Article 81 in a number of cases involving collective dominance. For example, in the 'Dyestuffs' case [1972], the CFI accepted the possibility of collective dominance under Article 82 where the economic operators entered into an agreement to divide the market between them.

Similarly, in the 'Suiker Unie' case [1975], the court established that parallel conduct itself may constitute evidence of a concerted practice. The court noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.

In the more recent 'Polypropylene' case [1979], the court further clarified that collective dominance can be established even where the operators do not have a dominant position.

Furthermore, in the 'Hoffman La Roche' case [1979], the court held that a dominant position can be established not only on the basis of market share, but also on the basis of market influence or control.

Thus, 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. To avoid such problems, the Commission has developed the concept of collective dominance to address situations where two or more independent economic operators, acting in concert, achieve a degree of market power that is significant in practice, even if not calculated in accordance with normal market conditions.

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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]. In this case, the principal actor was 'Associated Central West Africa Lines', a shipping conference, which was made up of companies operating services between Northern Europe, Zaire and Angola. A number of members of the conference were part of the 'Contracts for Collective Dominance' market, which was essential to the conference's operation. However, the decision of the Court was reversed by Commissioners decision 93/82/EEC made under Articles 81 and 82. In this case, the principal actor was Cewal, and the concept of collective dominance was shown to be lacking.

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, "in accordance with the concept of collective dominance, Cewal present[ed] itself on the market as one and the same entity". The decision of the Court in this case has been overturned by the ECJ, who found that the fines should not be set individually.

In the 'Irish Sugar' case [1999], 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 collective market position, to adopt on the market and act to a considerable extent independently of their customers and ultimately consumers".

Furthermore, the test for "a joint dominant position held by"...
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The concept of "collective dominance" 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 position thereby" 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 ... 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 constitute an abuse per se. 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".

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 "collective dominance" concept. However, it must be ensured that the process of reorganisation does not result in lasting damage to competition. The regulation's purpose and concerns are explicit, 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 ... of collective dominance under the regulation therefore seems to be more firmly based on acceptance of theory of oligopolistic interdependence. This is of added significance given that the oligopolistic interdependence is an inherent part of the definition of significant impairment. It is therefore necessary to consider carefully whether the concept of collective dominance is appropriately applied in the context of oligopolistic markets".

"Cefuroxime" case [1998] has hotly debated before the ECJ accepted it in the 'Kali & Salz' case [1998]. In particular, the wording of A2, which defines a "significant..." is not clearly defined. The concept of collective dominance is therefore not clearly defined in the Regulation.
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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 a context of collective dominance: 'the style of analysis', which, as noted above, had been employed "in earlier landmark competition law judgements".

163 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].

166 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 contrast, in a relatively low concentration case involved in the 'Kali & Salz' decision a "virtual audit of the entire sector" [1998] 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 described as potentially "duopolistic" between whom price competition was considerably weakened and for whom the degree of market transparency was high.

170 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".

Accepting 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 judgement 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...the market and act to a considerable extent independently of their competitors, and also of consumers".

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...to make the merger regulation inapplicable, particularly because the right to defence is a general principle of EC law.

In the 'Kali & Salz' decision [1994], the Commission held that the new entity, 'K&S/MdK', and the French state-owned 'SCPA' would gain a collective dominant position in the market for potash products. Importantly, the Commission argued that links between 'K&S/MdK' and 'SCPA',
The substantive element of collective dominance was defined as a situation where the parties to an agreement, who were both highly concentrated and involved in "structural links" of a competitive market, were able to "act to a considerable extent independently of their competitors, their customers and suppliers, who were both highly concentrated and involved in "structural links" of a competitive market." The condition for the merger to proceed in the form of a joint venture was therefore that these agreements be dropped. The judgement in the case left the situation decidedly unclear however, stating simply that "some of the applicants' criticisms playing down ... as evidence of the creation of a collective dominant position on the part of the two undertakings are well founded." Therefore, the merger was therefore seen to hinge on how it would change "the degree of influence" which Gencor could exercise over LPD. The Court argued that this would "allow a duopolistic structure...to be created" in the market. This may be possible, "in particular because of actions taken free of any restriction or control," and "may result from either "the existence of economic links" or from "the relationship of interdependence existing between the parties to a tight oligopoly."
“market structures of an oligopolistic kind”. 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 Commission blocked the concentration 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”. Additionally, it was held that it is “not necessary...for the oligopolists always to behave as if there were one or more explicit agreements...between them. It is sufficient that the oligopolists structurally have sufficient market power...and that the market structure is such that it is in the interest of firms to act...[in]...ways which substantially reduce competition between them”.

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

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

Concluding Remarks

The study began with an examination of competition and the relevant economic theory in an attempt to better understand why... or perfect competition. Nonetheless, oligopoly represents a large proportion of ‘real’ markets. This is of obvious importance in that the concept of ‘collective dominance’ can be broadly identified with oligopolies. The main issue with oligopoly was identified as the ‘threat’ that oligopolists may collude, with the possibility that tacit collusion will lead to lower prices and higher profits. This is of particular relevance in the setting of merger control, where the Commission and EC have made much reference to the concept. A recent 1999 decision has led to the Commission accepting that dominance in the motorcycle market could lead to the creation of collective dominance, as the market structure is such that it is in the interest of firms to act in ways which substantially reduce competition between them. However, the Commission has also made it clear that the concept is not limited to explicit agreements, but rather to the structural conditions that lead to the possibility of tacit collusion.
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 considered further, with the point made that there are no 'magic numbers' or simple 'checklists'. Interaction, and hence behaviour, is clearly the unknown variable.

Moving on from the theoretical discussion and examination of policy, the analysis then turned to collective dominance in practice, looking at the concept under Article 82 and under the 'Merger Regulation'. As became clear there is a crucial difference in that collective dominance under Article 82 is a necessary, but not sufficient condition, since A82 is applicable where there is an 'abuse' of a dominant position, whereas A82 is not. In contrast, when collective dominance is established under Article 92, 'abuse' is not required, merely its likelihood. As a result, a greater number of activities are brought within the ambit of A82, since 'abuse' is not necessarily required. Accordingly, it was seen that the emergence of collective dominance under Article 82 cannot be seen in isolation, but must be considered as part of a broader antitrust framework that includes the 'Merger Regulation' on the other hand, the collective dominance can be used, as it was in the 'Gencor/Lonrho' decision, upheld by the CFI, to block a concentration because it was predicted that it would create a structure in which rational action would be anticompetitive. In this respect, there appears to be a greater number of activities that are potentially open to scrutiny, and a greater number of areas in which the Commission is active. The Commission's approach is to scrutinize collective dominance in a way that is consistent with the underlying economic principles. In this way, it is seen as a valid and effective tool for tackling anti-competitive behaviour.

Overall, perhaps the most striking discovery of this piece has been the lack of any clear pattern. Correspondingly, there appears to be no single, all-encompassing framework for dealing with collective dominance. Instead, the Commission is forced to use its discretion to decide on a case-by-case basis, based on the particular circumstances of each case. The approach is clearly not a simple one, and requires careful consideration of the underlying economic principles. Nevertheless, this approach has been seen as successful in achieving its goals, and has been praised by many as a useful tool for addressing anti-competitive behaviour.
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...the market would increase in concentration, making collusion more feasible to initiate, but did not look into 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 understood, the latter will not be able to develop quite as far as it might. A more explicit theoretical grounding would be valuable, and in this regard some form of notice would be welcomed. Indeed, after the analysis above, it is perhaps not surprising that Mr Monti has recognised "the need to spell out in more detail his thinking in this area".

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


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, J. (1994), p.25.


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ibid., pp.423-4.


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

ibid., p.71.

Author's emphasis.


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

Issue 2, Grounds, p.342.

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

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

ibid., p.12.

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


ibid.

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

Commission of the European Community, (1992), p.11; In more recent years, 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.


Such as customs barriers and quotas between member states.

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

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


(14/68).


Commission of the European Community, (1994), p.22; See also Commission of the European Community, (1991; p.15) which stresses the need for care "where an already
tight oligopoly is further narrowed by mergers between companies in the same geographic markets."

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 'crisiscartels' (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.

5. A structure is created which is likely to be used for restricting competition.

6. There are agreements or concerted practices within the meaning of Article 85.

7. There are agreements or concerted practices within the meaning of Article 81.

8. There are agreements or concerted practices within the meaning of Article 81(1).

9. The Board shall examine whether the conditions for imposing a fine under Article 85 are satisfied.

10. The Board shall examine whether the conditions for imposing a fine under Article 85 are satisfied.

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29. The Board shall examine whether the conditions for imposing a fine under Article 85 are satisfied.

30. The Board shall examine whether the conditions for imposing a fine under Article 85 are satisfied.
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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.

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

100 Judgement, para. 66.


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; IV/32.448 & IV/32.450: 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.

144 (T-228/97), Appealing the Decision of 04/05/97.

145 Judgement, para. 46.

146 Judgement, para 41.

147 Judgement, para. 50.

148 Judgement, para. 42.

149 Judgement, para 45.
45 44
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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".


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". Informative.

188 Judgement, para. 6.

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

190 Judgement, para. 4.

191 Judgement, para. 163.


194 CofC A v. France (C-33/92) (1993) 11 CMLR 111.

195 Council Regulation (EEC) No. 141/92, 11/02/92; The concentration was approved on certain conditions.

196 Council Regulation (EEC) No. 141/92, 11/02/92; The concentration was approved on certain conditions.

197 Council Regulation (EEC) No. 141/92, 11/02/92; The concentration was approved on certain conditions.

198 Council Regulation (EEC) No. 141/92, 11/02/92; The concentration was approved on certain conditions.
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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 (collective dominance) was an issue. European Commission Decision [1996], para 87. Where evidence of problems with proof, or because of exemption under A81(3), it is therefore necessary to look at the other aspects of dominance, such as a cutting prices, to try and increase market share. In Airtours/First Choice decision, para 87.

231 ‘Gencor’ [1999], Judgement, para 134.


235 13/07/66, ECR 299.

236 ECR 185.

237 ECR 619.

238 ECR 215.


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 987.

246 11/01/88, ECR 987.

247 10/01/88, ECR 987.

248 09/01/88, ECR 987.

249 08/01/88, ECR 987.

250 07/01/88, ECR 987.

251 06/01/88, ECR 987.

252 05/01/88, ECR 987.

253 04/01/88, ECR 987.

254 03/01/88, ECR 987.

255 02/01/88, ECR 987.

256 01/01/88, ECR 987.

257 31/12/87, ECR 987.

258 30/12/87, ECR 987.

259 29/12/87, ECR 987.

260 28/12/87, ECR 987.

261 27/12/87, ECR 987.

262 26/12/87, ECR 987.

263 25/12/87, ECR 987.

264 24/12/87, ECR 987.

265 23/12/87, ECR 987.

266 22/12/87, ECR 987.

267 21/12/87, ECR 987.

268 20/12/87, ECR 987.

269 19/12/87, ECR 987.

270 18/12/87, ECR 987.

271 17/12/87, ECR 987.

272 16/12/87, ECR 987.

273 15/12/87, ECR 987.

274 14/12/87, ECR 987.

275 13/12/87, ECR 987.

276 12/12/87, ECR 987.

277 11/12/87, ECR 987.

278 10/12/87, ECR 987.

279 09/12/87, ECR 987.
Bibliography

Articles & Speeches


Books


Agnew, J. (1985) *Competition Law: Antitrust Policy in the UK and

Aldershot: Dartmouth.

D'Aveni, R. (1994) *Hypercompetition: Managing the dynamics of strategic manoeuvring*
Cambridge: Cambridge University Press.

London: Butterworth.

London: Sweet & Maxwell.

London: Sweet & Maxwell.

London: Philip Allan.


