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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 use. The analysis begins with an examination of competition theory, followed by a review of developments in EC competition policy and the application of competition law. An attempt is made to find an underlying framework used to guide EC competition law, but no evidence of such a framework is found. Rather, flexibility and adaptation are seen to characterise the law's application, and collective dominance is seen as an example of such adaptation. Examining 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 greater importance on its reliability. This is seen as problematic given the poor link to theory, and the lack of agreement amongst economists. The overriding impression remains one of lack of both clarity and consistency, and a call is therefore made for further clarification.

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 this fact. For the lawyer, an important question is to examine why this concept has been developed, and hence what it is 'trying to accomplish'. Furthermore, it is important to understand how it fits into the existing framework of EC competition law, and in what ways, if any, the process of analysis is affected. In the pages that follow, a thorough analysis will therefore be carried out in an attempt to provide answers

The thesis begins with a review of competition theory in an economic framework. A key finding in the context of oligopoly is the lack of a commonly accepted 'model'. In addition, a question over the roles of structure and behaviour is discussed. Competition policy and the application of EC competition law are then examined. Of particular interest is a search for an underlying theory or framework of competition informing this application. Nonetheless, no consistent evidence is found for the use of such a framework by either the Commission or the Community Courts.[1] Competition policy is instead seen to cover a broad range of goals, with integration at the centre. Correspondingly, it is seen that the application of EC competition law has been adapted continuously to meet new needs. The application of A81 & A82 to forms of 'concentration' are given as a prime example. In particular, a concern with increasing levels of concentration in the Community is identified, and this concern is seen as central in explaining the emergence of collective dominance as a concept.

The development of the concept is then traced in practice, from its early mention by the Commission, to its acceptance by the Court under A82. The need to bridge a perceived 'gap' in the Treaty concerning the scope of A81(1) is seen as significant. Leading on from this, the acceptance and application of collective dominance under the Merger Regulation is then examined. In this regard in particular, the importance of the predictive ability of the analysis is highlighted, and questions raised over its theoretical foundation. The piece is then concluded with a reflection on the theory and practice discussed, highlighting a number of problematic issues, as well as recognising progress made. Insights from strategy are applied, and as noted above, an attempt is made to reflect on these findings, so as to offer some guidelines for businesses.

The broad approach taken in the thesis is to proceed from an examination of theory to an analysis of practice, concluded by a reflection on their relationship and interplay. The theoretical discussion draws from both economics and business, as well as from competition policy which forms a bridge to the practical application of the law. The analysis of practice is based on an appraisal of the decisional practice of the Commission and the jurisprudence of the Community Courts. As the only 'true' interpreter of the law, the 'final word' is obviously given to the Courts. In attempting to objectively criticise the products of this analysis, core economic concepts and insights from business strategy are used.

Competiton & Marktes

Collective dominance "is a legal concept with no direct equivalent in economics"[2], 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 background will be examined. Competition 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".[3] In a similar vein, competition has been described as a "contention for superiority...[which] in the commercial world...means a striving for...custom...in the market place".[4] There also appears to be some innate assumption that competition is good.

In line with the 'contest' analogy we can equally suggest that there should be 'rules of the game'. We may identify for example 'good' and 'bad' competition, as well as 'too little'[5] and 'too much'.[6] In fact, the essence 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 covered by competition law are diverse, although they are commonly divided into those relating to States and those relating to firms. Our concern in this essay is with the

latter area, since it is within this field that the concept of collective dominance is applied.

As with all areas of law, there is no universally accepted definition of 'right' and 'wrong', and hence prohibitions, exceptions and exemptions are essentially matters of policy choice.[7] Nonetheless, competition law can be distinguished as an area of law by virtue of the close connection it has developed with economics.[8] 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[9], 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.[10] 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".[11] The most basic element in the economic framework is the idea of a market, which is essentially no more than the interaction of demand and supply for a given resource. In a market of the more 'traditional' kind, such as that for a physical good for example, the terms demand and supply are essentially synonymous with 'buyers' and 'sellers'. However, the framework can equally be applied to examine the interaction of 'supply' and 'demand' for more abstract 'resources' such as the 'market' for education, management skill, or even democracy. A fundamental means of categorising a market is by reference to the number of suppliers present. Following this approach, a number of theories or models have been developed to describe, analyse and explain a variety of different market structures. Implicit in the idea of a defined market though, is the existence of boundaries.

The supply side of the market, and hence the number of suppliers, may be restricted by the existence of 'barriers to entry'. However, opinion is divided as to what does and what does not constitute a barrier to entry in reality, and over what timescale such barriers may be effective. There is no clear 'answer', and it is important to bear this in mind. Nonetheless, two extremely important such models are those of monopoly and perfect competition, which are seen as the two "polar market structures"[12] at opposite ends of a continuum. These provide vital reference points in appraising 'competition' issues, although it is important to note that "most markets...lie between the two extremes,...in the realm of imperfect competition".[13]

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 encouraging costs towards their lowest possible level, since there are no other suppliers in the market. For these reasons monopoly is generally condemned, though particularly where economies of scale are important, it may be considered justifiable. For this very reason, national 'monopolies' may be created and run by regulation. 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, but the main characteristic of a 'perfectly competitive' market is that it is efficient. Such markets are rarely found in reality, and related to this, a key criticism is that this model is 'static', allowing no room for innovation and the entrepreneur, or indeed rivalry between individual firms.[14] As referred to previously therefore, other theories have been developed to model situations of 'imperfect competition'.

The term oligopoly refers to a market which is dominated[15] by a few suppliers. This definition is much looser than that of monopoly or perfect competition, and leaves it open to determine how many firms are constituted by the term 'few', for example, as well as their relative size. As a result, oligopoly covers a potentially large number of situations and in practical terms, this includes "a considerable portion, perhaps a large majority, of markets in modern industrial nations".[16] Correspondingly, there are a variety of theories, rather than a universally accepted model. As a result, "there is no generally agreed paradigm to identify dominant oligopolies and separate them from situations of oligopolistic supply resulting in a competitive market".[17]

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. Thus, "each firm must take into account the effects of its own actions on the actions of other firms"[18], and a certain 'anti-competitive' pressure is expected. Based on this idea

therefore, a common assumption is that prices should tend to remain stable for long period, and parallel behaviour therefore be witnessed on the market.[19] In practice however, keen price competition is seen in some oligopoly markets, such as supermarkets and petrol.[20] 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.[21] This is a crucial issue, and much theory tries to explain or understand why collusion occurs in some oligopolies and not in others. Overall, in so far as monopoly is deemed inefficient, collusion by oligopolists is thus also seen as undesirable. A related implication is that as the number of suppliers decreases, the more inefficient the market is likely to become, and vice versa. As will be seen further below, this is a key basis for concerns with high levels of concentration.

As collusion forms such a vital element of concerns over oligopoly, a brief examination of collusion theory is necessary. Collusion is theoretically possible amongst any number of firms, and is basically a synonym for agreement[22] or co-ordination of actions, with some suggestion of secrecy, and as such may also be considered as the essence of a 'cartel'. A distinction is frequently made between 'active' and 'tacit' collusion, the difference basically relating to whether the agreement to co-ordinate actions is formal or informal, respectively. Nonetheless, many economists would suggest that this distinction is largely cosmetic, arguing rather that they are based on the same elements. The essence of collusion is a relationship between firms, and thus the important factors to consider are those affecting how it is established, and those determining how it can be sustained. Following this framework, some economists refer to 'co-ordination', and 'credibility of co-ordination', which refer to how easily an agreement is made and how it is maintained respectively. Co-ordination is thus 'credible' if no one has the incentive to deviate or 'cheat'.

In determining the ease or desirability of co-ordination, the degree of 'asymmetry' between firms is argued as relevant, since high levels of asymmetry may imply conflicting interests.[23] Thus, in the context of mergers for example, the effect on how assets in general, and production capacity in particular, are distributed between firms has been seen as important. Nonetheless, it is argued that factors affecting firms' ability to enforce an agreement are more important than those affecting how such an agreement is reached. The ability for a firm to 'cheat' without being caught, and the ability to take action against such firms are seen as key in determining the likelihood of collusion. Thus, many would argue "that co-ordination 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".[24] From a practical point of view, it is then a question of identifying the variables that affect these two factors, and ideally some means of measuring them. Broadly, these variables may relate to the firms, products and 'transactions' involved. In mainstream economic terms, the factors commonly suggested as 'favouring' collusion include transparency, similar production methods and products, significant barriers to entry, and stable conditions. Nonetheless, there is far from widespread agreement, and there are no 'magic numbers' or simple 'checklists', as it is the interaction of such factors which 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, in the long run. According to this view, the 'threat' posed by oligopoly is therefore seen as temporary. In practice, these arguments form part of a broader debate, seen in the US policy context in particular, between two different approaches. Developed from work done in the early part of the last century, a central argument of the 'Harvard 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 "but a small step...to argue that monopoly profits will increase the more concentrated is the market".[25] Under this approach, the main analytical task is therefore to measure industry concentration levels, and in policy terms, it is argued that where high market shares are shown, an assumption can be made that restrictive agreements are in place.

More recently, a body of theory has been developed, forming an approach referred to as the 'Chicago School'. In the context of the present discussion, the critical argument is that industry structures reflect the different cost structures, and economies of scale achievable by firms. Rather than seeing structure as the determinant of firm conduct, it is seen as its result. Thus, high levels of concentration are the result of efficient behaviour. Moreover, the only barriers to entry that are considered to be an obstacle in the long run, are those that can be legally enforced. The key aspect of analysis following the 'Chicago' approach is therefore to examine companies' prices in relation to their costs, to measure efficiency. However, the approach has been criticised for its emphasis on long-run effects at the expense of the short run economic losses and social costs caused by 'efficiency-enhancing' behaviour.[26]

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 influence, although it also appears that greater efficiency has led to increased market share in some industries. A crucial determinant may actually be the timescale adopted, however this forms part of a more extensive debate which is beyond the scope of our present concerns. At a general level, a debate has been identified over the relative influence of structure and behaviour. There are important implications for competition law since if structure is seen as the key factor, an emphasis should be placed on 'structural measures', such as merger regulation. Conversely, if the market outcome is seen as primarily determined by firm behaviour, the focus should then be on defining what constitutes 'anti-competitive' behaviour. As has been seen, economic theory is diverse, and in the area of oligopolies, it does not appear to be uniform enough to "warrant a major attack on oligopolistic markets". Furthermore, from a practical point of view, there are significant problems in determining when parallel behaviour is based on collusion, and when not.

Applying EC Competition Law

Having reflected on the relevant theory, a more detailed analysis is now merited. The development and application of competition law in the EC will therefore be examined, in an attempt to determine two issues. Firstly, evidence will be sought for an underlying competition theory or framework used to guide the application of competition law in the EC. Secondly, 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. This is all the more reinforced by the fact that the Court has tended to use the teleological method when interpreting the law in 'landmark' cases.[27]

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".[28] In contrast to the US therefore, it appears that neither the Commission nor the Community Courts follow any consistent theoretical framework.[29] 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".[30]

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".[31]

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".[32]

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".[33] 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". Related to A81(3), general notions of innovation and economic development are also apparent in the reference 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'.[34] 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[ed]...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".[35] 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"[36] 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 Commision reports are used as an alternative source.

In the very first 'Report on Competition Policy' [1972][37], competition is described as "the best stimulant of economic activity since it guarantees the widest possible freedom of action to all". This enables "enterprises continuously to improve their efficiency, which is the *sine qua non* for a steady improvement in living standards and employment prospects within the countries of the community".[38] 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".[39] While the overall tone is close to 'standard economic' arguments, the emphasis on both employment prospects and on consumers, suggests a broader agenda. At the end of the 1970's, it was also noted that the "conditions under which competition takes place remain subject to the principle of fairness".[40]

Similarly, in the early 1980's, the "market economy, in which fair undistorted competition is supposed to ensure that available resources are allocated to the most productive sectors"[41] was seen as central. While, at the same time, it was stressed that competition "policy is not based on a laissez-faire model, but is designed to maintain and protect the principle of 'workable competition'".[42] Fair, 'workable competition', balancing efficiency with social concerns, laissez-faire with interventionism, is a recurring theme. However, more recent policy has spoken of 'free competition', and its role in preserving "the freedom and right of initiative of the individual economic actor and it...[fostering] the spirit of enterprise"[43], arguably reflecting a stronger 'efficiency' bias. In a similar vein, the Commission referred in the early 1990's, to "the link between competition and economic efficiency...[which has been]...generally recognised".[44]

From the above, it appears that a 'balanced' approach to competition is considered desirable, on the basis that "untrammelled market forces" should not always be given a "free rein"[45], since they can "stifle or even eliminate competition".[46] Adopting a more poetic turn of phrase, it is therefore held that "competition carries within it the seeds of its own destruction".[47] As a result it is considered that, an "excessive concentration of economic, financial and commercial power can produce such far reaching structural changes that free competition is no longer able to fulfil its role as an effective regulator of economic activity".[48] The direction and focus of EC competition policy has emerged more clearly over time[49], although an early indication was given by the 'Consten & Grundig' case [1966][50] 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[51], and as such, "sails under the flag of market integration".[52] This is widely documented[53], and is for example reflected in the preamble to the merger regulation which notes that the system of undistorted competition "is essential for the achievement of the internal market".[54]

Integration is also central to EC law in general. In the early years, A28-30, removing legal barriers to the free movement of goods[55] were the most important tools. However, it would clearly "be of little use to abolish government restrictions...if traders in different member states were allowed to replace them by cartels, under which they agreed reciprocally to keep out of each other's home market".[56] As a result, the competition articles have played an increasing role in promoting integration, though emphasis has varied according to the circumstances. During times of economic crisis for example, Integration received lower emphasis, when the 'battle' against protectionism became politically more difficult. Nonetheless, in the wake of the 'Single European Act'[57], and also the 'Treaty on European Union'[58], it is clear that 'market integration' was returned to centre stage.[59] Importantly however, a range of other goals have also been pursued. An important legal precedent in this respect was in the 'Walt Wilhelm' case [1969][60] where it was stated that "while the Treaty's primary object is to eliminate [by A81(1) proceedings]...the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also commits the community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonised

development of economic activities within the whole community in accordance with A2".[61]

Thus, during the 1970's for example, policy emphasis was placed on competition as a tool to fight inflation, considered to be a 'structural obstacle' to adaptation, and hence the creation of a common market. Similarly, the broader economic goals of promoting innovation, productivity[62] and also 'competitiveness'[63] have gained greater focus over the last decade, arguably in response to the effects of 'globalisation'. In addition, protecting the consumer has also been a recurring policy theme, as has the 'fight' against unemployment. In relation to this objective in particular, promoting SME[64] development has also been pursued. SME's are also valued as a source of 'innovation'. Understandably, it has been argued that pursuit of such a broad range of objectives has caused "tension" and even "conflict".[65] While there are potentially many examples, an important one is the problematic relationship between integration and concentration. Thus, although integration brings overall gains in efficiency, it is also likely to bring increased concentration.

From the Commission's 'Survey of Concentration, Competition, & Competitiveness', conducted every year, it is evident that there has been a general trend towards increasing concentration across all industries. In addition, this trend gained significant momentum from both the 'single market programme', and the liberalisation that has characterised the 'global' environment. While the economic notion of concentration must be separated from the legal concept, the two are clearly related, since firms increasingly choose other methods than organic growth when expanding, particularly in an international context. Accordingly, a marked increase in mergers and acquisitions has been seen in the EC.[66] From the point of view of the individual business, the act of 'concentration' can be seen as "one of the means to master the uncertainties of business life stirred up by the competitive process".[67] In fact, during the early years it was explicitly recognised "that the Common Market require[d] larger enterprises to achieve the advantages of mass production and resource development".[68] Thus "greater concentration of enterprises" was generally considered "desirable".[69]

However, as the process moves forward the policy concern arises that "a wave of concentration would basically transform the European market structure into narrow or asymmetrical oligopolies, so that the process of effective competition would be greatly weakened".[70] Similarly, the Commission remarked at the beginning of the 1980's that "competition within the Community [was] marked by an ever-increasing tendency towards oligopoly".[71] Increasing levels of concentration may lead to one firm dominating an industry, in which case any abuse can clearly be attacked by A82. However, it may equally, and perhaps more probably, lead to a group of similarly sized firms emerging, in which case collusion rather than unitary monopolisation is perceived as the main threat. In addition, SME's may also suffer in an environment characterised by progressively larger firms.

Somewhat paradoxically therefore, the success of the single market has promoted greater levels of concentration, which in turn are perceived as a potential threat to its success. An explicit response to this 'threat' is evident in the announcement of a 'policy of special vigilance' for "monitoring the formation of tight oligopolies" due to concerns that "anti-competitive parallel behaviour"[72] might ensue. As the issue of concentration illustrates, concerns develop over time, and the goals pursued similarly vary. An important observation is thus that the application of competition law is correspondingly adapted to meet these changes. As the environment alters, or the focus of policy shifts, the law can be applied in new ways. The examples are numerous[73], 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.[74] Nonetheless, the Commission clearly felt the need for some form of merger control at a Community level, and hence it "took steps to apply the more general provisions of competition law under the Treaty to the mergers context".[75] Although a 'Proposal for Merger Regulation'[76] was submitted in 1973, such regulation did not come into force until 1990. The 'Continental Can' case [1973][77] 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.[78] 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".[79] However, by the beginning of the 1980's it began to take a more active role, marked in particular by the 'BAT/Reynolds' case [1985].[80] Specifically, BAT/Reynolds established that the "acquisition [by an undertaking] of an equity interest in a competitor" does not in itself constitute a restriction on competition contrary to A81(1)[81], but that it may do so in certain circumstances.[82] The application of the competition articles was therefore 'adapted', to gain added scope, in this case by allowing the application of A82 and A81 to forms of 'concentration'.[83]

As identified above, increasing levels of concentration have attracted growing concern. Importantly, where concentration leads to oligopoly, the scope of the competition articles may be found wanting. Given that collusive behaviour is seen as the main threat, a gap can be identified in the scope of the competition articles, as traditionally applied. While collusion by agreement[84] may technically fall under A81(1), proof in some cases may be highly problematic. On the other hand, A82 had only captured abusive behaviour by a single firm. The result is clearly a reduced ability or effectiveness in 'fighting' the dangers of concentration. In these circumstances, any innovation to broaden the scope of the available legal tools would seem welcome. The concept of collective dominance clearly fulfils this function, and may in this way be seen as an adaptation or response to the emerging situation. It is in this light perhaps that Karel van Miert pointed to the Court's acceptance of the collective dominance concept as a key recent development[85], although the Commission had intermittently pursued it since the early 1970's. Significantly, collective dominance has been recognised under both A82 and the Merger Regulation. In order to gain a deeper understanding of the concept, we now turn to a detailed examination of its use and development, through the decisional practice of the Commission and the jurisprudence of the Court.

Firm Behaviour

Following the distinction observed in the previous chapter between behaviour and structure, a similar distinction can be made between the competition articles, and the merger regulation, which broadly apply to firm behaviour and market structure respectively. For this reason, the emergence and development of collective dominance under the two different provisions will be examined separately. As noted before, the Commission has long been concerned about 'concentrated markets'. Where the market tends towards oligopoly, the 'problem' is seen as the likelihood of collusion, which may be either 'active' or 'tacit'. Recalling earlier discussion, 'collusion' is basically a synonym for agreement[86], 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 A81(1). A clear and separate interpretation of the three individual elements of the article[87] is difficult. In the 'Dyestuffs' case [1972][88], 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".[89] Drawing on this judgement, it can therefore be said that A81(1) essentially covers a range of anti-competitive relationships from a strictly formalised 'agreement' to the looser 'concerted practice'. Thus active collusion is obviously within scope, leaving the question of the extent to which 'tacit' collusion is also covered, through the concept of 'concerted practice'. This is an area in which it proves highly problematic to apply competition law. Firms may 'agree' not to compete against each other on price in certain markets, or indeed not to supply certain markets at all. In the case of pricing agreements, the typical 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 co-incidence.

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. It would clearly be unreasonable to prohibit firms for pursuing such 'rational' behaviour. However, a further possibility is that the firms involved avoid price competition for example, not because of any formal agreement to do so, but because they are simply familiar with the 'rules of the game'. 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. In so far as there is a lack of competition, it can be deemed inefficient from an economic point of view. Nonetheless, the previous example may also have been 'inefficient', and thus the crucial issue distinguishing it from tacit collusion is surely the question of anti-competitive 'intent'. Proving such intent may be extremely difficult, unless it is possible to prove by implication from 'parallel behaviour' on the market. In this case though, there is a clear and unfortunate overlap as parallel behaviour may result from both scenarios.

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, tacit collusion may now be approached using A82. For a more detailed understanding, these issues will now be examined in turn. As seen above, firms may collude tacitly, deciding for example not to compete against one another. Parallel market behaviour would then be observed. In the area of pricing, such parallel behaviour may also involve the maintenance of stable price levels. However, parallel behaviour may also constitute rational action. As noted above, in the area of pricing again 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 to be expected commercially even in the absence of collusion".[90]

Separating anti-competitive intent from rational and intelligent behaviour is extremely difficult. As the 'Wood Pulp' [1993] and 'Soda Ash' [1989][91] cases emphasised, the "line between illegal cartel behaviour and lawful intelligent adaptation to rivals' behaviour is a fine one".[92] This is a particular problem in the context of A81(1) given the difficulties with parallelism as evidence, since it is the collusion itself that must be proved. Under A82 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 been committed. The issue with parallelism is thereby side-stepped. By recognising the concept of collective dominance therefore, an alternative avenue is opened. Furthermore, as the first 'Compagnie Maritime Belge' case [1996][93] brought to light, the concept also allows "cartel behaviour [to be reached], which would otherwise come within a group exemption".[94]

Nonetheless, this interpretation would not imply that A81(1) is no longer applicable to such cases. In fact, it appears that both articles are potentially applicable in the same instance. This is backed up by the Commission's penchant for prosecuting the same behaviour under A81(1) and A82, as witnessed in the 'Italian Flat Glass' case [1992] for example. Specifically, in this case, it was alleged by the Commission that three producers of 'flat glass' had infringed A81(1)[95] and A82[96] in the automotive and non-automotive markets. While the CFI accepted the concept of collective dominance required to find a breach of A82 in this case, it rejected the finding, stipulating firmly that a separate analysis is required for each provision. To find a breach of A82 it is therefore insufficient to 'recycle' the facts used under A81.

Based on the above, the articles seem to have an area of overlap, and thus a closer look at the concepts of 'concerted practice' and 'collective dominance' is called for. As noted above, concerted practice was defined in the 'Dyestuffs' case [1972].[97] This was further nuanced in the 'Suiker Unie' case [1975] which clarified that there can be no concerted practice if the undertakings operate independently.[98] In the more recent 'Polypropylene' case [1991][99], the CFI in fact established that the concepts of 'agreement', 'decision' and 'concerted practice' overlap with one another. Specifically, it stated that a cartel is both an 'agreement' and a 'concerted practice'. Regarding parallel behaviour, the 'Dyestuffs' case also established that while it "may not by itself be identified with a concerted practice, it may however amount to strong evidence of such practice".[100] Notably, the decision under appeal had made heavy use of parallel behaviour as evidence of concerted practice[101], and reflecting the very issue discussed previously, the firms being prosecuted actually argued that any parallel pricing was 'rational' behaviour in an oligopolistic market

The definition was carried forward by another cartel case, 'Suiker Unie' [1975].[102] One contemporary critic argued, this definition of 'concerted practice', allowed parallel behaviour itself to be condemned under A81(1).[103] 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.[104] This issue was most comprehensively clarified by 'Wood Pulp' [1993][105] in which the ECJ established that parallel conduct "cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct".[106] Otherwise proof of overt communication is required. While the Commission argued that parallelism was proof of concertation[107], the undertakings argued it was due to 'the normal operation of the market'.[108] This was backed up by the 'expert report'.[109] On this issue, the Court noted that "parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct".[110]

Thus 'economic operators' still have 'the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors'.[111] Furthermore, as a result of such a firm ruling on the parallel behaviour question, the scope of A81(1) is more plainly limited by the heavy burden

of proof. Perhaps reflecting the perceived difficulties regarding A81(1), the Commission developed the concept of collective dominance at a relatively early stage. However, early judgements by the Court were unsympathetic. The concept's first appearance was in the 'Sugar Cartel' decision [1973][112], where the Commission argued that two Dutch producers had a joint dominant position. On appeal however, the Court made no comment on these arguments, holding that there had been no abuse. When the concept was next tested, in the 'Hoffman La Roche' case [1979][113], the Court was more firm in its dismissal[114], holding that "a dominant position must...be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly, the courses of conduct interact, while in the case of an undertaking occupying a dominant position, the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally".[115]

Accordingly, the use of A81(1) seemed to be reserved for such situations. This apparent hostility towards acceptance of the concept was again evidenced in the 'Alsatel' case [1989] dealing with an A177 referral. It was argued that Alsatel's contracts "in practice prohibit[ed] customers from dealing with another supplier of equipment throughout the[ir] duration".[116] Thus, the question referred asked whether such contracts were "evidence of its abuse of a dominant position" in view of its "major share of the regional market".[117] As the ECJ held, if this "large share of the regional market" was due to an "agreement between authorised installers to share out regional markets between them"[118], it would be caught by A81(1). 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".[119] However, the Court simply stated that it could not "consider that possibility" as it was "unconnected with the facts before the national court", and was "based solely on information in the Commission' s possession which, on its own admission, [was] not sufficiently precise".[120]

Nonetheless, despite the apparently "clear words"[121] uttered previously, the concept has since been recognised by both Community Courts, given certain conditions. Specifically, in the 'Italian Flat Glass' case, [1992][122] the CFI accepted the possibility of collective dominance under A82 where there were economic links between the firms[123], although, as noted, no collective dominance was found on the facts. Specifically, it was stated that "there is nothing, in principle, to prevent two or more independent 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".[124] 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".[125] 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.[126]

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 ways, in so far as it concerns evidence of co-ordination between the firms in question, the links doctrine mirrors the need to show some kind of relationship under A81(1). This issue of relationship is new to A82, and sits uneasily in the context of case law regarding the notion of 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][127] 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".[128] Furthermore, such links must be "sufficiently strong".[129] The policy on links was then repeated in the 'Centro Servizi' case [1995][130] and the 'DIP' case [1995][131], and use of the concept was again upheld in the 'Compagnie Maritime Belge' case [1996][132], appealing Commission decision 93/82/EEC[133] made under Articles 81 and 82. In this case, the principal actor was 'Associated Central West Africa Lines'[134], a shipping conference, which was made up of companies operating services between Northern Europe, Zaire and Angola. A number of members of 'Cewal' were also part of the Compagnie Maritime Belge group of companies. The investigations leading to the decision were instigated after complaints by members of the Association of Independent West African Shipping Interests, when it began services between Northern Europe and Zaire (*sic*.).

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".[135] Furthermore, the Commission held that this distribution was based on agreements between the conferences to ensure that if a company was to operate a route, it first had to join the relevant conference. As an agreement to partition the market, this was therefore found to breach A81(1). In addition, the members of the Cewal conference were found to hold a collective dominant position, which they had abused by practices implemented "with a view to eliminating its main competitor".[136] A82 had thus also been breached. Citing the Italian Flat Glass judgement, the Commission stated that it was "no longer possible to deny the existence of jointly held dominant positions".[137] In line with this, the Court again confirmed that A82 can apply where "several undertakings together hold a dominant position", and that for a position to exist, they "must be linked in such a way that they adopt the same conduct on the market".[138] It was also stressed that this was "settled case-law".[139]

In the case in hand, the Court held that, "[a]s a result of the close relations which shipping companies maintain with each other within a liner conference, they are capable together of implementing in common on the relevant market practices such as to constitute unilateral conduct".[140] It was then found that "Cewal present[ed] itself on the market as one and the same entity".[141] The abuse was thus in the fact that, "the practices described in the Decision...reveal[ed] an intention to adopt together the same conduct on the market in order to react unilaterally to a change, deemed to be a threat, in the competitive situation on the market on which they operate".[142] Although this judgement has recently been overruled by the ECJ[143], who found that the fines should not have been set individually, the grounds of the CFI's judgement still appear to be valid. Indeed, the same line was followed in the 'Irish Sugar' case [1999][144] 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 connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers".[145] Furthermore, the test for "a joint dominant position held by linked undertakings" was stated clearly to be "the adoption of the same conduct on the relevant market".[146] 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".[147] The case also represented the first time collective dominance was applied to a vertical rather than horizontal relationship.[148] Thus, it has been made clear that "two independent economic entities" may hold a "joint dominant position"[149] 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 singly" as per the 'Viho' case [1996].[150] Where these links are contractual, A81 would usually apply. As noted above, there is therefore usually no need to use A82.[151] An interesting exception is clearly provided by the 'Cewal' decision [1993][152], referred to previously, in which the firms in question could not be prosecuted under A81(1) because they held a group exemption under A81(3). Irish Sugar also contained further detail as to the relationship between 'joint dominant position' and 'abuse'. Having clarified that "the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market", the Court laid down that "the abuse does not necessarily have to be the action of all the undertakings in question".[153] 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".[154] 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".[155] 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".[156] 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 bare prohibitions represent the appropriate legal instrument for managing the complex phenomenon of oligopoly".[157]

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 success of the integration process itself. Indeed, as noted in recitals 7 and 9 of the regulation, "the dismantling of internal frontiers is resulting and will continue to result in major corporate re-organisations in the Community... [H]owever, it must be ensured that the process of reorganisation does not result in lasting damage to competition".[158] The regulation's purpose and concerns are explicitly structural, applying in the first place to "significant structural changes"[159], and their "effect on the structure of competition".[160] Accordingly, as set down by A2(3), where a concentration would 'create or strengthen a dominant position' so that "effective competition would be significantly impeded" it is deemed "incompatible with the common market". Thus, in contrast to the 'abuse' focus of A82, no behavioural element is involved in the analysis. Arguments under the merger regulation are therefore be predicated on the idea that certain structural forms are inherently anti-competitive. Application 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 merger regulation operates on an *ex ante* basis, in contrast to A82 which operates *ex post*. It therefore involves what is essentially a form of forecasting, and correspondingly, the analytical framework used as a basis is all the more important.

Perhaps reflecting the comments made so far, the application of the merger regulation "to oligopolistic market structures" has been variously described as "contentious"[161] and "controversial".[162] To gain a clearer understanding, an examination of the use and definition of collective dominance under the regulation will now follow. By recognising a concept of collective dominance under the Merger regulation, its scope is significantly increased, as its prohibition is no longer confined to 'concentrations' affecting dominance by a single firm. Nonetheless, there is no express mention of collective dominance in the merger regulation. Thus the legal question of whether the Commission had jurisdiction to prohibit mergers leading to collective dominance was hotly debated before the ECJ accepted it in the 'Kali & Salz' case [1998]. In particular, the wording of A2, which refers to a 'concentration which creates or strengthens a dominant position' presented a greater 'problem' than that of A82 which explicitly mentions a 'dominant position by one or more undertakings'. On this point, the ECJ argued that a 'textual interpretation' did not 'in itself' exclude the possibility of the merger regulation applying to situations of collective dominance. Thus, interpreting the regulation 'by reference to its purpose and general structure', it was concluded that its purpose would be frustrated, if collective dominance were to be excluded. In doing so, the Court also "reaffirmed the continuing vitality of the teleological 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][164] and the 'Mannesman/Vallourec/Ilva' decision [1994][165] 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 the situation of relatively low concentration case involved in the 'Kali & Salz' decision a "virtual audit of the entire sector"[167] 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].[168] The concept was then applied explicitly in the 'Nestle/Perrier' decision [1993].[169] 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 characterised as mature, with a predominance of brands and a high degree of concentration. It was argued that even without the merger, a narrow oligopoly of three suppliers existed, 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.[171] The conclusion was that a duopolistic dominant position would be created which would significantly impede effective competition.[172]

Of interest, duopoly has in fact been highlighted as the Commission's favoured interpretation of collective dominance.[173] 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.[174] Correspondingly, in the 'Pilkington/SIC' decision [1994][175], and also the 'PriceWaterhouse/ Coopers & Lybrand' decision [1998][176], 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 place 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".[177] Acceptance of the concept came in the 'Kali & Salz' case [1998][178], stating simply that "in the light of its purpose and general structure...[the regulation]...applie[d] to collective dominant positions".[179]

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".[180] Specifically, it was stated that the assessment should focus on whether "effective competition in the relevant market...[would be]...significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them,...[would be]...able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers".[181] 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 however, did not share this opinion, arguing that the absence of 'express' safeguards was insufficient 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', in the form of a joint venture[182] and other 'agreements' indicated that they would not compete effectively. The condition for the merger to proceed 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 the significance of...[the alleged structural links between K&S and SCPA]...as evidence of the creation of a collective dominant position on the part of the two undertakings are well founded".[183] Thus, while the Court held that the links on which the Commission had based its decision were 'not sufficient', it did not state explicitly whether such links were in fact necessary for a finding of collective dominance.

Since there is no economic basis for considering links to be a necessary condition for co-ordination to occur, their only relevance appears to be regarding their effect on the firms' incentive to collude. Following the uncertainty left by the 'Kali & Salz' case, the 'Gencor' case [1999][184] provided important clarification. In this case, the CFI upheld the 'Gencor/Lonrho' decision [1996][185] which used the concept of collective dominance to fully block a merger. A vital element in the clarification was the establishment that the existence of 'structural links' is neither a necessary nor sufficient condition for a finding of collective dominance, and in this respect, it has been dubbed "the 'new learning' on the application of oligopoly theory to merger control".[186] In detail, Gencor and Lonrho "proposed to acquire joint control of Implats and, through that undertaking, of Eastplats and Westplats (LPD)"[187], previously managed by 'Lonrho Management Services'.[188] Following the Commission's analysis, the "world platinum and rhodium markets" were considered as mature, being based on homogeneous products for which demand was "price inelastic", and were 'surrounded' by high entry barriers. Buyers were seen as weak relative to suppliers, who were both highly concentrated and involved in "financial links and contacts".[189] Hence, it was argued that there was an overall "low level of competition".[190]

The substantive element of collective dominance was then defined as whether "effective competition in the relevant market would be significantly impeded" by those involved in the concentration and "one or more other undertakings".[191] In line with standard case law on dominance under A82, this would occur if the undertakings involved were able to "act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers".[192] In addition however, they would have to be able "to adopt a common policy on the market".[193] This may be possible, "in particular because of factors giving rise to a connection between"[194] them. Based on this line of argument, the assessment of the proposed merger was therefore seen to hinge on how it would change "the degree of influence" which Gencor could exercise over LPD.[195] In this regard, it was noted that the marketing policy of LDP would fall "under the joint control of Lonrho and Gencor"[196] after the merger, and that "a greater convergence between the[ir] views"[197] would be brought about. The Court argued that this would "allow a duopolistic structure...to be created"[198], highlighting in particular, the fact that 'Implats/LDP' and Amplats would gain high and similar market shares, opening up 'a gap' with those of the remaining platinum producers.

Overall, the Court held that a dominant position "would result, in particular, from the very characteristics of the market and the alteration of its structure"[199], rather than depending on "the future conduct of the undertaking[s]".[200] Thus, a distinction was made between "abuses of dominant position...which might or might not be controlled by means of Articles [81] and/or [82]...and the alteration to the structure of the undertakings and of the market".[201] While the "concentration would not necessarily lead to abuses immediately", it would have "creat[ed] the conditions in which abuses were not only possible but economically rational".[202] Furthermore, clarifying the 'links' doctrine under both A82 and the Merger Regulation, the Court ruled that "links of a structural nature" were only referred to "by way of example"[203] in Italian Flat Glass.[204] Thus "two or more independent economic entities...[may in principle be]...united by economic links in a specific market...[so that they together hold]...a dominant position".[205] However, the notion of 'economic links' is not restricted to that of "structural links"[206], and importantly includes "the relationship of interdependence existing between the parties to a tight oligopoly".[207] According to the Court, the key element of this 'relationship' is that those involved "are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market". The basic assumption is that the firms involved believe that 'highly competitive action'[208] will "provoke identical action by the others", producing no net benefit. Such action is therefore seen as pointless.

Overall therefore, it is considered that the 'anti-competitive market structures' which the merger regulation aims to prevent "arising or being strengthened"[209], may result from either "the existence of economic links" or from "market structures of an oligopolistic kind".[210] 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".[211] As the case made clear then, the focus of the merger regulation is on whether a concentration will increase the likelihood of tacit collusion, through its effect on the feasibility of co-ordination.[212] 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.[213]

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].[214] In this instance, Airtours proposed to acquire "the whole of the equity of First Choice".[215] As the Commission put it, their "activities overlap[ped] mainly in the supply of leisure services to customers in the United Kingdom and Ireland".[216] 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 United Kingdom on the part, collectively, of Airtours/First Choice and the two other leading tour operators - Thomson Travel Group plc and the Thomas Cook Group Limited".[217] 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[218], 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".[219] Airtours itself argued that collective dominance "could be thought of as a cartel, but without an explicit cartel agreement, cartel meetings etc.".[220] 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".[221] 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...between them. It is sufficient that the merger makes it rational for the oligopolists, in adapting themselves to market conditions, to act - individually - in ways which substantially reduce competition between them".[222] 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".[223] 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 collective dominance emerged, and when it might be applied. With regard to economics in general it was noted that disagreements abound, and in the field of oligopoly theory in particular, there were found to be a variety of models rather than a single dominant one. As a notion, oligopoly covers a large number of potential situations, and is more loosely defined than other market concepts such as monopoly 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, creating in effect a form of quasi-monopoly which would be inefficient. However, collusion is by no means implicit in the definition of oligopoly, though building on the idea of interdependence a variety of theories would suggest that oligopoly structure is prone to collusion as each firm's actions have a direct effect on the other firms.

It was also noted that oligopoly is in part defined with reference to the key models of monopoly and perfect competition. These models are particularly important since their relationship forms the basis for a concern with increasing levels of concentration, according to mainstream competition theory. Hence the 'general rule' that as markets become more concentrated they tend to become less efficient is derived. As was seen in later chapters, concern with levels of concentration has been an important theme driving adaptation of EC competition law, and was also seen as key in 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 reviewed, leading to the related finding that while some associate certain market characteristics with an increased likelihood of collusion, there are no 'magic numbers' or simple 'checklists'. Interaction, and hence behaviour is clearly the unknown variable.[224]

Moving on from the theoretical discussion and examination of policy, the analysis then turned to collective dominance in practice, looking at the concept under A82 and under the 'Merger Regulation'. As became clear there is a crucial difference in that collective dominance under A82 is a necessary, but not sufficient condition, since the main focus is on the existence of 'abuse', whereas under the merger regulation it can itself constitute a reason for blocking a concentration. In addition, from a technical legal perspective, recognition of collective dominance under the merger regulation, was seen to be more problematic, due in particular to A2 and recital 15. 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 its likelihood. As a result, a greater number of activities are potentially open to scrutiny, and this at a time when 'strategic alliances' are widely promoted as an important strategic tool, especially where crossing borders is concerned.

As the earlier discussion indicated, concerns with concentration and the collusive behaviour that is suspected as a corollary, translate in practice into an 'anti-cartel' policy of some form. However, as was seen, there is no single, all-embracing provision in EC law tackling cartels, although it was debated for some time whether A81(1) might not be used for this purpose. Accordingly, it was seen that the emergence of collective dominance under A82 cannot be seen in isolation, but must be understood in the light of A81(1) and its application in this area. The crux of the matter was argued to be the difficulty of approaching tacit collusion via A81(1) and the concept of 'concerted practice'. Although the distinction between active and tacit collusion is largely meaningless in economic terms, in EC competition law it has now clearly emerged that A81(1) deals with active collusion, and A82 with tacit collusion. This was seen as a useful tool for enforcement purposes, since it side-steps the heavy burden of proof under A81(1), which

the 'Wood Pulp' [1993] ruling made clear. Nonetheless, it is clear that blurring two provisions in this way is a very serious matter. As one commentator wrote prior to the Alsatel judgement [1989], "extending [A82] to cover parallel behaviour would undermine the system of competition rules by rendering the concept of a concerted practice under [A81(1)] virtually redundant".[225]

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 'experts' that it would be economically rational for the firms to behave as they did, thus exhibiting parallel behaviour in pricing. Rational action is therefore a valid 'excuse' under A81(1), but as was seen, it is extremely difficult to separate this from anti-competitive intent. This issue has not been directly confronted under A82, but in so far as setting the same prices as other firms may be rational behaviour, and yet may be seen as abusive it is still conceptually problematic. Nonetheless, case law has consistently made clear that 'dominant' firms have a form of 'special responsibility' in their conduct under A82. Under 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 was anticompetitive. In this respect, there appears to be no line drawn between tacit collusion and rational action, as the Commission seemed to hold in the more recent 'Airtours' decision, "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".[226]

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. Reflecting these findings, a prominent advisor has also characterised it as "an area very difficult for advisers to give clear advice on".[227] Clearly under A82, it is 'abuse' that is the target rather than collective dominance itself. Nonetheless, collective dominance under A82 appears to be more about catching what would traditionally be termed cartels, that slip through the net of A81(1).[228] However, advising firms to avoid cartels is not spectacularly illuminating.

Regarding mergers, the Commission has pointed to a number of 'market characteristics' which are seen to "make the market conducive to oligopolistic dominance".[229] In their most recent mention, they were listed as "product homogeneity, low demand growth, low price sensitivity of demand, similar cost structures of the main suppliers, high market transparency, extensive commercial links between the major suppliers, substantial entry barriers and insignificant buyer power (consumers)".[230] Where it is considered that a merger would reinforce some of these characteristics, collective dominance may be found, though the details of the analysis will vary in each case and it is therefore difficult to be more precise. The most recent clarification by the Court indicates that the market structures which are seen to "encourage oligopolistic conduct most" are those "in which two, three or four suppliers each hold approximately the same market share, for example two suppliers each holding 40% of the market, three suppliers each holding between 25% and 30% of the market, or four suppliers each holding approximately 25% of the market".[231]

Overall, the issues raised by collective dominance bear more generally on the topical question of role of economic analysis in EC competition law. From the examination above, it can be said that such analysis is improving, although there remains some way to go, and it appears that the 'checklists' have yet to be fully abandoned. While issues such as 'structural links' have now been 'solved' by recent case law, the use of collusion theory shows room for improvement. In the 'Gencor' case [1999] for example, the CFI emphasised that the market would increase in concentration, making collusion more feasible to initiate, but did not look at how easy it would have been to sustain.[232] 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 accepted, a lack of legal certainty is likely to result. This is not a desirable situation, however a more explicit theoretical grounding would be valuable, and in this regard some form of notice would be welcomed. Indeed, after the analysis above, it is perhaps not surprising that Mr Monti has recognised "the need to spell out in more detail his thinking in this area".[233] 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".[234]

Cases & Decisions

Établissements Consten S.à.R.L. & Grundig-Verkaufs-GmbH v Commission (56 & 58/64) [1966][235] 'Consten & Grundig'

Wilhelm et al. v. Bundeskartellamt (14/68) [1969][236] 'Walt Wilhelm'

Imperial Chemical Industries Ltd. v. Commission (48, 49, 51-7/69) [1972][237] 'Dyestuffs'

Europemballage Corporation & Continental Can Company Inc. v. Commission (6/72) [1973][238] 'Continental Can'

Coöperatieve vereniging 'Suiker Unie' UA v. Commission (40-8, 50, 54-6, 111 & 113-4/73) [1975][239] 'Sugar' or 'Suiker Unie'

United Brands Company et al v. Commission (27/76) [1978][240] 'Chiquita Bananas'

Hoffman LaRoche & Co. AG v. Commission (85/76) [1979][241] 'Vitamins'

NV Nederlandsche Banden-Industrie Michelin v. Commission (322/81) [1983][242] 'Michelin'

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

Solvay et Cie. v. Commission (27/88) [1989][243] 'Soda Ash'

Ahmed Saeed Flugreisen et al v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V. (66/86) [1989][244] 'Ahmed Saeed'

Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) v. SA Novasam (247/86) [1989][245] 'Alsatel'

SA Hercules Chemicals NV v. Commission (T-7/89) [1991][246] 'Polypropylene'

Società Italiano Vetro SpA v. Commission (T-68 & 77-8/89) [1992][247] 'Italian Flat Glass' or 'SIV'

Ahlström Osakeyhtiö & Others v. Commission (C-89/85, C-104/85, C-114/85, C-116-7/85 & C-125-9/85) [1993][248] 'Wood Pulp'

Almelo v Energiebedrijf IJsselmij (C-393/92) [1994][249]

Tetra Pak v. Commission (T-83/91) [1994][250] 'Tetra Pak II'

Centro Servizi Spediporto v. Spedizioni Marittima del Golfo (C-96/94) [1995][251]

DIP & Others v. Comune di Bassano del Grappa (C-140-2/94) [1995][252]

Compagnie Maritime Belge Transports SA & Compagnie Maritime Belge SA, Dafra-Lines A/S, Deutsche Afrika-Linien GmbH & Co. & Nedlloyd Lijnen BV v. Commission (T-24-26 & 28/1993) [1996][253] 'Compagnie Maritime Belge'

Viho Europe BV v. Commission (C-73/95) [1996][254] 'Viho'

Sodemare & Others v. Regione Lombardia (C-70/95) [1997][255]

France et al. v. Commission (C-68/94 & C-30/95) [1998][256] 'Kali Salz'

Gencor Ltd v. Commission (T-102/96) [1999][257]

Irish Sugar plc v. Commission (T-228/97) [1999][258]

Compagnie Maritime Belge SA v. Commission (C-395 & 396/96) [2000][259]

Decisions & Appeals

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

'ICI' Decision IV/26.267[261] [1969] Appealed in ICI & Others v. Commission (48, 49, 51-7/69) [1972] 'Dyestuffs'

'Sugar Cartel' Decision [1973][262] Appealed in Coöperatieve vereniging 'Suiker Unie' UA v. Commission (40-8, 50, 54-6, 111 & 113-4/73) [1975][263] 'Sugar'

'United Brands' Decision 76/353/EEC [1976][264], Appealed in United Brands Company et al v. Commission (27/76) [1978][265] 'Chiquita Bananas'

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

'Italian Flat Glass' Decision 89/93/EEC [1989][266] Appealed in SIV v. Commission (T-68 & 77-8/89) [1992][267]

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

'Alcatel/AEG Kabel' Decision [1991][269]

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

'French West-African Shipowners' Decision 92/262/EEC [1993][271]

'Cewal' Decision 93/82 [1993][272] Appealed in Compagnie Maritime Belge SA et al v. Commission (T-24, 26 & 28/93) [1996][273] Appealed in Compagnie Maritime Belge SA v. Commission (C-395 & 396/96) [2000][274].

'Kali & Salz/MdK/Treuhand' Decision IV/M.308 [1994][275] Appealed in France et al. v. Commission (C-68/94 & C-30/95) [1998][276] 'Kali Salz'

'Mannesman/Vallourec/Ilva' Decision IV/M.315 [1994][277]

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

'Gencor/Lonrho' Decision 97/26/EC [1996][278] Appealed in Gencor Ltd v. Commission (T-102/96) [1999][279]

'Irish Sugar' Decision 97/624/EC [1997][280] Appealed in Irish Sugar plc v. Commission (T-228/97) [1999][281]

'PriceWaterhouse/Coopers & Lybrand' Decision [1998][282]

'Airtours/First Choice' Decision IV/M.1524 [1999][283] Appeal pending

Endnotes

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

[2] Caffara, C & Kuhn, K. (1999), p.355.

[3] Flint, D. (1978), p.22.

[4] Whish, R. (1989), p.3.

[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 can be made for intervening to limit competition, in order to finance 'R&D' for example. In this way, 'foreign' competition may be restricted to 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.

[8] See eg. Swan, G. (1977), p.389; Agnew, J. (1985), p.vi; Samkalden, I. & Druker, I. (1965), p.173; Rahl, J. (1971), p.293; Agnew, J. (1985), p.47; As a result of this sometimes awkward linkage, one author suggests that "competition policy inhabits something of a no-man's land between the territories of economics and law"; Frazer, T. (1991), p.1.

[9] Burton, (1994), p.1; See also Halverson, J. (1992), p.51; Reynolds, (1996).

[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.

[11] Agnew, J. (1985), p.19; Good examples are the issues of 'predatory pricing' and 'dumping'. For further discussion of predatory pricing see eg. Smith, P. (1989); Burton, J. (1994); The Economist, 10/07/99, p.100; For discussion of dumping see eg. Vermlust, E. (1984), Vandoren, P. (1986; 1993); Niels & Kate (1997).

[12] Whish, R. (1989), p.7; See also DeJong, H. (1966), p.179.

[13] Sloman, J. (1994), p.239.

[14] See Agnew, J. (1985), p.37; Burton, (1994), p.6.

[15] Not used in the legal sense.

[16] Friedman, J. (1983), p.xiii.

[17] Briones-Alonso, J. (1995), para 1.

[18] Parkin et al., (1997), p.319.

[19] Bannock, et al. (1992), p.312.

[20] Sloman, J. (1994), pp.247-64.

[21] Rahl, J. (1971), p.284; Friedman, J. (1983), pp.1-18; Bannock, et al. (1992), p.74; Parkin *et al*. (1997), p.477.

[22] Not used in the legal sense.

[23] Venit, J. (1998), p.1113.

[24] Ysewyn, J. & Caffara, C. (1998), p.469.

[25] Reekie, W. (1989), p.38.

[26] eg. 'predatory pricing'. See Halverson, (1992), p.52; also Nicolaides (1997), p.128; Frazer, T. (1992), p.2; Burton (1994; p.19).

[27] See eg. Venit, J. (1998), p.1104.

[28] Hildebrand, D. (1999), p.429.

[29] *ibid.,* pp.423-4.

[30] Commission of the European Communities, (1977), p.9.

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

[32] *ibid*., p.71.

[33] Author's emphasis.

[34] 'Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères', Secretariat of the Intergovernmental Conference, Brussels, 21/04/56.

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

[36] Issue 2, Grounds, p.342.

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

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

[39] *ibid*., p.12.

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

[41] Commission of the European Communities, (1982), p.11.

[42] *ibid*.

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

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

[45] Commission of the European Communities, (1980), p.10.

[46] Commission of the European Community, (1985), p.11.

[47] Commission of the European Communities, (1980), p.10.

[48] Commission of the European Communities, (1980), p.10.

[49] Temple-Lang, J. (1981), p.335; See also Sierck, A. (1977), p.453.

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

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

[52] Rodger, B. (1994), p.6; Hornsby, S. (1987), p.79: Swan, G. (1977), p.390.

[53] See eg. Samkalden, I. & Druker, I. (1965), p.158; Carellos, P. & Silker, H. (1970b), p.166; Walsh & Paxton (1975), p.59; Sierck (1977; p.419; Whish, R. (1989), p.35; Evans, A. (1991), p.110; Ehlermann, C. (1992), pp.257-82; Commission of the European Community, (1993), p.13; Molle, (1994), p.355; Rodger, (1994), p.25; Maitland-Walker, (1995), p.3; Hildebrand, (1999), p.12.

[54] Council Regulation (EEC) No. 4064/89, 21/12/89, Recital 6.

[55] Such as customs barriers and quotas between member states.

[56] Korah, (1997), p.1.

[57] (1986); Hereafter referred to as the 'SEA'.

[58] (1992); Hereafter referred to as the 'TEU'.

[59] See eg. Commission of the European Community, (1987), p.13; Commission of the European Community, (1989), p.17; Commission of the European Community, (1990), p.17.

[60] (14/68).

[61] Motif 11; cited in Hornsby, S. (1987), p.101.

[62] Commission of the European Community, (1991), p.11.

[63] Commission of the European Community, (1994), p.22; See also eg. Hargreaves, D. (1999), p.5.

[64] ie. 'Small or Medium-sized Enterprise'.

[65] Hornsby, S. (1987), p.80.

[66] Molle, W. (1994), p.367.

[67] DeJong, H. (1966), p.178.

[68] Carellos, P. & Silker, H. (1970a), p.17.

[69] DeJong, H. (1966), p.167;

[70] Carellos, P. & Silker, H. (1970a), p.35; See also Rahl, J. (1971), p.311.

[71] Commission of the European Communities, (1982), p.15.

[72] 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

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 for example; Hornsby, S. (1987), p.90; See also Commission of the European Community, (1985), p.12; Molle, W. (1994), p.357; More generally, 'block exemptions', such as those issued during the 1980's to cover a broad range of 'vertical restraints' also provide a good illustration. In addition, while it failed to get the Court's approval in the end, the Commission's attempt to introduce 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.

[74] See eg. Weatherill & Beaumont, *op.cit.,* p.806; Wyatt & Dashwood, *op.cit.*, p.495-6; Kapteyn & Verloren, (1998), p.870.

[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 the fact that no prior notification is required. Nb. It is assumed that the reader is familiar with the details of the Continental Can case as it has been so widely commented on.

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

[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.

5. 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.

[90] Korah, V. (1998), p.3; also p.6; See also Hildebrand, (1999), p.32; Flint, D. (1978), p.78.

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

[92] Bishop, S. (1999), p.38.

[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.

[94] Korah, V. (1998), p.10-11.

[95] Judgement, para. 11; It was argued that A81(1) had been breached in the non-automotive market, due to a range of 'concerted practice' involving identical prices, discounts and customer classification, as well as product exchanges and market sharing arrangements; Judgement, para 17; Similarly, on the automotive market it was concluded that the three producers had breached A81(1) by virtue of agreements and concerted practices, mainly involving exchanges of glass; Judgement, para 27; FP & SIV had 80% of the automotive market, and with VP, had 95%; Judgement, para 26.

[96] The A82 breach was based on the fact that "the joint market shares of 79% for non-automotive glass and...95% for automotive glass [were] sufficient in themselves to give...[the 3 producers]...a dominant position on the Italian market in flat glass"; Judgement, para. 31; It was thus believed that the firms in question enjoyed "a degree of independence from competitive pressures that enable[d] them to impede the maintenance of effective competition"; Judgement, para. 30; Furthermore, it was noted that the undertakings presented themselves on the market as a single entity and not as individuals. The 'collective dominant position' that they thus occupied was abused in that the choice of supply and market outlets were restricted.

[97] ICI v. Commission 48/69; at Judgement, para 64.

[98] 16/21/75 ECR 1942; cited in Hildebrand, (1999), p.34; A key aim of 'cartel prohibitions' in general is seen to be "to preserve independent commercial behaviour among competitors"; Cook C. & Kerse, C. (1996), p.132.

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

[100] Judgement, para. 66.

[101] ICI Decision IV/26.267 [1969] 24/07/69, OJ 1969 L195/11; Appealed in ICI & Others v. Commission (48-9, 51-7/69) [1972] 'Dyestuffs'; For discussion, see Korah, V. (1998), p.6.

[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.

[103] Flint, D. (1978), p.73.

[104] Korah, V. (1998), p.6.

[105] 'Wood Pulp' decision, 85/202/EEC [1985], Appealed in Ahlström & Others v. Commission (C-89, 104, 114, 116-7 & 125-9/85). Judgement on Concerted Practices 31/03/93 [1993], ECR I 1307.

[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'.

[114] Whish, R. (1989), p.312; Korah, V. (1998), p.7.

[115] Judgement, para 39.

[116] Judgement, para 4.

[117] Judgement, para 5.

[118] Judgement, para 20.

[119] *ibid*.

[120] Judgement, para 22.

[121] Korah, V. (1998), p.8.

[122] The 'Italian Flat Glass' Decision 89/93/EEC [1989], 07/12/88, OJ 1989 L33/44; Appealed in SIV v. Commission (T-68 & 77-8/89) [1992], 10/03/92, ECR II-1403.

[123] para 258 or 358.

[124] Judgement, para. 358.

[125] Judgement, para. 366.

[126] Korah, V. (1998), p.6; Whish (1989; p.313) Rodger, B. (1994), p.2.

[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.

[150] (C-73/95).

[151] Korah, V. (1999), p.340; See also Korah, V. (1998), p.10; Whish, R. (1989), p.502; Flint, D. (1978), p.61.

[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.

[156] Goyder, D.(1993), p.382.

[157] Shaw, J. (1989), p.99; See also Hildebrand, D. (1999), p.53.

[158] Council Regulation (EEC) No. 4064/89, 21/12/89, Recitals 7-9.

[159] Council Regulation (EEC) No. 4064/89, 21/12/89, Recital 13.

[160] Council Regulation (EEC) No. 4064/89, 21/12/89, Recital 11.

[161] Cook C. & Kerse, C. (1996), p.132.

[162] Ysewyn, J. & Caffara, C. (1998), p.468; See also eg. Winckler & Hansen (1993); Foster, N. (1999), p.113.

[163] Venit, J. (1998), p.1104.

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

[165] IV/M.315 [1994], (31/01/94 OJ 1994, L102/15).

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

[167] Cook C. & Kerse, C. (1996), p.137.

[168] IV/M.012, 31/07/91, OJ 1991, L320/26 [1992].

[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.

[173] Ysewyn, J. & Caffara, C. (1998), p.470.

[174] See eg. the Mannesman/Vallourec/Ilva Decision IV/M.315 [1994]; 31/01/94 OJ 1994, L102/15.

[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.

[180] Zekos, G. (2000), p.40.

[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.

[186] Caffara, C & Kuhn, K. (1999), p.355.

[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"; Judgement, para. 6.

[188] Judgement, para 4.

[189] The market was also deemed to be highly 'transparent'; *ibid*.

[190] *ibid*.

[191] Judgement, para. 163.

[192] Following France & Others v. Commission [1998]; Judgement, para. 221.

[193] *ibid*.

[194] *ibid*.

[195] Judgement, para. 170.

[196] Judgement, para. 179.

[197] Judgement, para. 188; The "change in the parties' financial interests" was seen as important in this regard; Judgement, para. 186.

[198] ie. "[C]omprising, Gencor and Lonrho, on the one hand, and Amplats, on the other"; Judgement, para. 188.

[199] Judgement, para. 94.

[200] ie. Implats/LDP, and Amplats. Significantly, this had been the argument of the applicant; *ibid*.

[201] *ibid*.

[202] Judgement, para 276; For comment, see eg. Caffara, C & Kuhn, K. (1999), p.357.

[203] Judgement, para 273.

[204] Caffara, C & Kuhn, K. (1999), p.356.

[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*.

[212] Hildebrand, D. (1999), p.100; See also Caffara, C & Kuhn, K. (1999), p.356; Christensen, P. & Owen, P. (1999), p.23.

[213] AngloAmerican/Lonrho IV/M.754 [1998]; See Ysewyn, J. & Caffara, C. (1998), p.472.

[214] IV/M.1524, 22/09/99; For brief discussion, see Daneshkhu, S. & Hargreaves, D. (1999), p.1.

[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.

[223] Daneshkhu, S. & Hargreaves, D. (1999), p.1; See also Hargreaves, D. (1999), p.5;

[224] Bishop, S. (1999), p.38.

[225] Shaw, J. (1989), p.99.

[226] para 53.

[227] John Davies, co-managing partner at Freshfields-Deringer, Brussels; cited in Daneshkhu, S. & Hargreaves, D. (1999), p.1.

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

[229] 'Airtours/First Choice' decison [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; see Gencor/Lonrho, cited in footnote 41, and Commission Decision 1999/152/EC in Case IV/M. 1016, Price Waterhouse/Coopers & Lybrand, OJ L 50, 26.2.1999, p.27; *ibid*., footnote 63.

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

[232] Caffara, C & Kuhn, K. (1999), p.358.

[233] Hargreaves, D. (1999), p.5.

[234] Rodger, B. (1994), p.1.

[235] 13/07/66, ECR 299.

[236] ECR 185.

[237] ECR 619.

[238] ECR 215.

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

[240] 14/02/78, ECR 207.

[241] 13/02/79, ECR 461.

[242] ECR 3461.

[243] 18/10/89, ECR 3355.

[244] 11/04/89, ECR 803.

[245] 05/10/88, ECR 5987.

[246] ECR II-1711.

[247] 10/03/92, ECR II-1403.

[248] ECR I-1307.

[249] ECR I-1477.

[250] ECR II-755.

[251] ECR I-2883.

[252] ECR I-3257.

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

[254] ECR I-5457.

[255] ECR I-3395.

[256] ECR-1375, 31/02/98.

[257] 25/03/99.

[258] 07/10/99.

[259] 16/03/00.

[260] 13/07/66, ECR 299.

[261] 24/07/69, OJ 1969 L195/11.

[262] OJ 1973 2140/17, CMLR D65.

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

[264] 17/12/75, OJ 1976 L95/1.

[265] 14/02/78, ECR 207.

[266] 07/12/88, OJ 1989 L33/44.

[267] 10/03/92, ECR II-1403.

[268] 31/07/91, OJ 1991, L320/26.

[269] IV/M.165, 18/12/91, OJ 1991, C006/00, [1992]

[270] IV/M.190; 92/553 EEC, 05/12/92.

[271] 01/04/92, OJ 1992 L134/1.

[272] 23/12/92, OJ 1993, L34/20.

[273] 08/10/96, 4 CMLR 273.

[274] 16/03/00.

[275] OJ 1994 L 186, p. 38.

[276] ECR-1375, 31/02/98.

[277] 31/01/94 OJ 1994, L102/15.

[278] IV/M.619, 97/26/EC, 24/04/96.

[279] 25/03/99.

[280] IV/34.621, 35.059/F-3, OJ 1997 L 258, p. 1 14/05/97.

[281] 07/10/99.

[282] IP/98/454.

[283] 22/09/99.

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