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The Development and Implications of ‘Collective Dominance’ in EC Competition Law

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Abstract

The objective of this essay has been to explore why the concept of collective dominance has been developed, and to examine the implications of its use.

Edward Cattermole has a background in Business, European Law, and Anthropology. He has previously worked in investment banking, and is now a Telecoms analyst at McKinsey & Company, focusing on IP and regulatory issues.
The concept of 'collective dominance' has now been recognised under both A82 and the merger regulation. While the law has not technically changed, its application is affected significantly. The development of the concept is then assessed in practice, focusing on the acceptance of collective dominance under the merger regulation.

The thesis begins with a review of competition theory in an economic framework. A key theme in this application is a concern that there is no consistent evidence for the use of such a framework by either the Commission or the Community Courts. Nonetheless, competition policy is instead seen to cover a broad range of goals, with integration at the centre. Correspondingly, 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 of collective dominance under Article 82 of the Treaty is then assessed, focusing on the Commission's acceptance of the concept under Article 82.

The development of the concept is then traced in practice, from its early mention by the Commission to its acceptance by the Court under Article 82. 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 of collective dominance under Article 82 of the Treaty is then assessed, focusing on the Commission's acceptance of the concept under Article 82.
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as noted above, an attempt is made to reflect on these findings, so as to offer some guidelines for businesses.

The broad approach taken in the thesis is to proceed from an examination of theory to an analysis of practice, followed by a reflection on their relationship and interplay. The theoretical discussion draws from both economics and business, as well as from current legal developments.

Collective dominance "is a legal concept with no direct equivalent in economics" but is closely related to oligopoly. Our understanding of oligopolies is informed by economic theory, and indeed this increasingly informs the law. During this chapter, therefore, the focus is on the concept of collective dominance as it is commonly conceived of as a form of contest. When theorising competition among firms for example, some argue that "it is through the constant struggle by several enterprises to conclude a contract with the consumer that the participating enterprises mark out their respective trade margins."

In a similar vein, competition has been described as a "contention for superiority...[which] in the commercial world...means a striving for...custom...in the market place." There also appears to be some innate assumption that competition is good.

In line with the 'contest' analogy we can equally suggest that there should be 'rules of the game'. We may identify for example 'good' and 'bad' competition, as well as 'too little' and 'too much'. 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 are commonly divided into those relating to States and those relating to firms. Our concern in this essay is with the latter area, since it is within this field that the concept of collective dominance is applied.

As with all areas of law, there is no universally accepted definition of 'right' and 'wrong', and hence prohibitions, exceptions and exemptions are essentially matters of policy choice. Nonetheless, competition law can be distinguished as an area of law by virtue of the close connection it has developed with economics.

For, given the complex issues at stake, economics provides a useful framework for examination. Significantly, this association between disciplines is a longstanding one in the US, to which the 'Law & Economics' movement bears clear witness. This movement has long promoted economics as a framework for interpretation and analysis in all areas of law. By contrast, there is no such established tradition in the EC, although economic insights may be considered equally valid in the European context.

The 'dismal science' of economics is a broad-ranging discipline, and importantly is characterised by diversity rather than uniformity of opinion in many areas. While certain mainstream approaches can be identified, it remains the case that "different economists have different perspectives, and the same empirical facts may be interpreted in different ways, giving widely different policy recommendations on the same issues." The most basic element in the economic framework is the idea of a market, which is essentially no more than the interaction of demand and supply. In a market of the more 'traditional' kind, such as that for a physical good for example, the terms demand and supply are associated with physical goods and prices. The demand curve, the supply curve and the market equilibrium are all key economic concepts.

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 present, may be restricted by the existence of 'barriers to entry'. However, the nature of entry barriers is a key issue in determining the degree of competition that exists in a market. If entry is easy, the market is said to be competitive; if entry is difficult, the market is said to be non-competitive.

In the world of the competition analyst we can equally suggest that there is a need to identify the products of this analysis, core economic concepts and insights from business strategy are used to describe 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 present, may be restricted by the existence of 'barriers to entry'. However, the nature of entry barriers is a key issue in determining the degree of competition that exists in a market. If entry is easy, the market is said to be competitive; if entry is difficult, the market is said to be non-competitive.

The importance of economic concepts is increased by economic theory, which helps to understand the motives and conduct of economic agents. However, the economic concepts used in competition analysis are not always straightforward. For example, the concept of 'competition' is used in a number of different ways in competition law.

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In this chapter, we will examine the concept of collective dominance as it is applied in the EC. This involves examining the legal definition of collective dominance, the implications of this definition, and the practical application of this concept.

Collective dominance is a legal concept with no universally accepted definition in law. It refers to a situation where a group of firms cooperate in a manner that is likely to result in less competition than in a competitive market. This may take the form of a collusive agreement, or a situation where firms act in concert to achieve a particular outcome.

The concept of collective dominance is closely related to the concept of an 'oligopoly'. An oligopoly is a market structure in which a small number of firms control a significant portion of the market. In an oligopoly, the firms may have the power to coordinate their activities in order to achieve a particular outcome. However, the concept of collective dominance goes beyond the concept of an oligopoly, as it refers to a situation where firms act in concert to achieve a particular outcome, even if the firms are not part of the same market.

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

Accordingly, there are several other market structures in which there are an infinite number of equally sized suppliers. These are described under the term oligopoly, which is characterized by a few large suppliers that dominate the market. This structure is much looser than that of monopoly or perfect competition, and leaves it open to determine the terms of transactions. As a result, "there is no generally agreed paradigm to identify dominant oligopolies and separate them from situations of oligopolistic supply resulting in imperfect competition." 

As referred to previously, other theories have been developed to model situations of 'imperfect competition.' The term oligopoly refers to a market which is dominated by a few suppliers. This definition is much looser than that of monopoly or perfect competition, and leaves it open to determine the terms of transactions. As a result, "there is no generally agreed paradigm to identify dominant oligopolies and separate them from situations of oligopolistic supply resulting in imperfect competition." 

One of the most important theories of oligopoly is 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.

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. 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 the 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 therefore, a common assumption that prices should tend to remain stable for long periods, and parallel behaviour is observed on the market.

As collusion forms such a vital element of concerns over oligopoly, a brief examination of collusion theory is necessary. Collusion is theoretically possible among any number of firms, and is basically a synonym for agreement or co-ordination of actions, with some suggestion of secrecy, and as such may also be considered as the essence of 'cartel.' A distinction is frequently made between 'active' and 'tacit' collusion, the former refers to the agreement to co-ordinate actions and how it is maintained, respectively. Conversely, 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 as such must also be considered as the essence of 'cartel.' In such cases, to 'cheat' without being caught, and the ability to take action against such firms are seen as key in determining the potential, which are seen at the two "polar market structures," at opposite ends of a continuum. These provide vital reference points in appraising 'competition' issues, although it is important to note that "most markets...lie between the two extremes...in the realm of imperfect competition." 

Monopoly refers to a market in which there is a single supplier. According to the theory, monopoly is deemed 'inefficient' for two reasons. Firstly, the price charged by the monopolist will be higher than marginal cost. Secondly, in long run, there can be no pressure on costs towards their lowest possible level, since there are no other suppliers in the market.
Having recapitulated the essential theme, more specific analysis is now in order.

## Applying EC Competition Law

When it comes to EC Competition Law, it is important to note that the use of empirical evidence in support of conclusions is crucial.

### The Development of 'Collective Dominance'

The Development of 'Collective Dominance' in the context of EC Competition Law involves understanding the concept of market power and how it can be used to determine whether a company has engaged in anticompetitive behavior.

### More Specifically, the Problem of Defining Dominance

While it is generally accepted that the EC Commission has the authority to determine whether a company has over 20% market share, there is a lack of consensus on the definition of market dominance.

### The Role of Economic Theory

Economic theory plays a significant role in the application of EC Competition Law. The 'Structure-Conduct-Performance' (SCP) model is often used to analyze the relationship between industry structure and firm behavior.

### The Chicago School

The Chicago School, which emphasizes the role of market structures, is another important perspective in the application of EC Competition Law. This approach suggests that market structure is a key determinant of firm performance, and that monopolistic competition is the natural outcome of market competition.

### Empirical Evidence

Empirical evidence is crucial in the application of EC Competition Law. It is generally accepted that evidence from economic analysis is used to support conclusions about anticompetitive behavior.

### Conclusion

In conclusion, the application of EC Competition Law involves a balance between the use of economic theory and empirical evidence. The development of dominated markets is a crucial aspect of this analysis, and understanding the concept of 'Collective Dominance' is essential for effective enforcement of competition law.
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An attempt will be made to establish the policy focus pursued. Both issues should shed light on why the concept of collective dominance has been ‘created’. In looking for an underlying theoretical framework, the key question is how competition is perceived. Drawing on the three interpretations below, no obvious, consistent approach is suggested. Indeed, the overall impression is one of inconsistency. The fact that the Court has tended to use the teleological method when interpreting the law in ‘landmark’ cases.

Significantly, this impression is backed up by recent research, which has concluded after extensive analysis that “no competition theory is used as a reference model in the EC competition law.” In contrast to the US, therefore, it appears that neither the Commission nor the Community Courts follow any consistent theoretical framework. Indeed, as stated clearly in one of the earlier Commission reports, “the principle of competition, so basic to the common market, is...by no means rigid or dogmatic.”

A81(1) prohibits “all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.”

A82 prohibits “[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it...as incompatible with the common market insofar as it may affect trade between Member States.”

A general reading of the articles, noting the stipulation in regard to ‘trade between Member States’, would suggest an obvious concern with integration from the very outset. In addition, ideas of ‘fairness’, and some form of consumer welfare are also suggested. More specifically, A82 refers explicitly to “imposing unfair purchase or selling prices or other unfair trading conditions.”

Likewise, reference is also made to limiting production, markets or technical development “to the prejudice of consumers.” A81(3) also exempts agreements on certain conditions providing that they allow “consumers a fair share of the resulting benefit.”

Broadening the interpretation, we may also reflect on comments made from an examination of the preamble to the EEC Treaty, and also the ‘Spaak Report.’ On this basis it was argued in 1965 for example that “the repeated use of terms like economic progress, continuous expansion, harmonious development, and increased stability reveal[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.”

While such sources must clearly be used with care, it is nonetheless of interest to bear them in mind. There appears to be no explicit definition of competition in case law. Although early mention was made of the “principle of freedom of competition” in the ‘Consten & Grundig’ case [1965], this actually concerned the distinction between intra- and inter-brand competition that arose in the case. As a result, the Commission reports are used as an alternative source.

In the very first ‘Report on Competition Policy’ [1972], competition is described as “the best stimulant of economic activity since it guarantees the widest possible freedom of action to all.” In the very first paragraph, it is mentioned that “the conditions under which competition takes place, not only are closely linked to the functioning of the economy, but also to the principle of freedom of the individual actor and the protection of his economic interests.”
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The link between competition and economic efficiency, generally recognised. 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," since they can "stifle or even eliminate competition." Adopting a more poetic turn of phrase, it is therefore held that "competition carries within it the seeds of its own destruction." As a result, it is considered that an "excessive concentration of economic, financial and commercial power can produce such ... changes that free competition is no longer able to fulfil its role as an effective regulator of economic activity." The direction and focus of EC competition policy has emerged more clearly over time, although an early indication was given by the 'Consten & Grundig' case [1966] which made clear that the application of competition law was not just about prohibiting 'anti-competitive' behaviour. Rather, competition law has been used to create a single market, and as such, "sails under the flag of market integration." This is widely documented, and is for example reflected in the preamble to the merger regulation which notes that the system of undistorted competition "is essential for the achievement of the internal market." Integration is also central to EC law in general. In the early years, A28-30, removing legal barriers to the free movement of goods were the most important tools. However, it would clearly "be of little use to abolish government restrictions...if traders in different member states were allowed to replace them by cartels, under which they agreed reciprocally to keep out of each other's home market." As a result, the competition articles have played an increasing role in promoting integration, though emphasis has varied according to the circumstances. During the 'battle' against protectionism became politically more difficult. Nonetheless, in the wake of the 'Single European Act,' and also the 'Treaty on European Union,' it is clear that 'market integration' was returned to centre stage. Importantly however, a range of other goals have also been pursued. An important legal precedent in this respect was in the 'Walt Wilhelm' case [1969] where it was stated that "while the Treaty's primary object is to eliminate...the obstacles to...the community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonised development of economic activities within the whole community in accordance with A2." Thus, during the 1970s for example, policy emphasis was placed on competition as a tool to fight inflation, considered to be a 'structural obstacle' to adaptation, and hence the creation of a common market. Similarly, the broader economic goals of promoting innovation, productivity and also 'competitiveness' have gained greater focus over the last decade, arguably in response to the effects of 'globalisation.' In addition, protecting the consumer has also been a recurring policy theme, as has the 'fight' against unemployment. In relation to this objective in particular, protecting SME development has also been pursued. SME's are also valued as a source of 'innovation.' Understandably, it has been argued that pursuit of such a broad range of objectives has caused "tension" and even "conflict." While there are potentially many examples, an important one is the problematic relationship between integration and concentration. Thus, emphasis on integration brought overall gains in efficiency, it is the healthy to judge if these gains were in harmony with competition and concentration. There are prima facie many examples in particular, and one could argue that a strong trend towards innovation, productivity has been evident. However, if we consider the single market programme, this trend gained significant momentum from the single market programme, and the expectation that this programme would result in increased concentration in particular, and in the expectation that this programme would benefit from increased concentration. However, it would likely "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." It is clear that "sails under the flag of market integration," and "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." However, it would clearly "be of little use to abolish government restrictions..." In fact, during the early years it was explicitly recognised "that the Common Market require[d] larger enterprises to achieve the advantages of mass production and resource development." Thus "greater concentration of enterprises" was generally considered "desirable." However, as the process moves forward the policy concern arises that "a wave of concentration would basically transform the European market structure into narrow or asymmetrical oligopolies, so that the process of effective competition would be greatly weakened." Similarly, the Commission remarked at the beginning of the 1980's that "competition within...
the Community [was] marked by an ever-increasing tendency towards oligopoly. Increasing levels of concentration may lead to fundamental changes in the industry, in which case any abuse can clearly be attacked by competition law. 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 potential threat is evident in the development of the merger regulation, where the Commission has taken a more active role, marked in particular by the BAT/Reynolds case in 1985. Specifically, BAT/Reynolds established that the ‘acquisition of total or partial ownership of enterprises’ is within the scope of the merger regulation, and hence it is not a separate concept.

There are no explicit provisions for merger control in the EC Treaty. This may well be because the issue is very politically sensitive, and Member States have historically been averse to giving the Commission power in this area. Nonetheless, the Commission clearly felt the need for some form of merger control at a Community level, and hence it ‘took steps to apply the more general provisions of competition law under the Treaty to the mergers context’.

Although a ‘Proposal for Merger Regulation’ was submitted in 1973, such regulation did not come into force until 1990. The ‘Continental Can’ case established that mergers between competitors could infringe Article 82 when the acquirer was already in a dominant position. As the issue of concentration illustrates, concerns develop over time, and the goals pursued similarly vary. An important observation is that the application of the merger regulation is also adapted over time, and the goals are perceived similarly as a potential threat to its success. An explicit response to this potential threat is evident in the development of the merger regulation, where the Commission has taken a more active role, marked in particular by the BAT/Reynolds case in 1985. Specifically, BAT/Reynolds established that the ‘acquisition of total or partial ownership of enterprises’ is within the scope of the merger regulation, and hence it is not a separate concept.

The application of the competition articles is an important and striking one, and the concept of collective dominance can also be considered in this light. As identified above, increasing levels of concentration have attracted growing concern. Importantly, where concentration leads to oligopoly, the scope of the competition articles may be found to be insufficient. The concept of collective dominance is therefore an important consideration, and in this respect, the development of the merger regulation is to be welcomed. The concept of collective dominance has been introduced under Article 81 of the Treaty, and it is clear that the Commission and the Court have interpreted it in a similar manner.

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 earlier, the Commission has long been concerned about ‘concentrated markets’, where the market has moved towards oligopoly. The problem is seen as the likelihood of collusion, and the Commission has sought to combat this by applying the competition articles.

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 potential threat is evident in the development of the merger regulation, where the Commission has taken a more active role, marked in particular by the BAT/Reynolds case in 1985. Specifically, BAT/Reynolds established that the ‘acquisition of total or partial ownership of enterprises’ is within the scope of the merger regulation, and hence it is not a separate concept.
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question, the scope of A81(1) is more plainly limited by the heavy burden "there is nothing, in principle, to prevent two or more independent eco-

telligently to the existing and anticipated conduct of their competitors'.111

Thus 'economic operators' still have 'the right to adapt themselves in-

Nonetheless, despite the apparently "clear words"121 uttered previously,

Overt communication is required. While the Commission argued that par-

This apparent hostility towards acceptance of the concept was againevidenced in the 'Alsatel' case [1989] ... "in practice prohibit[ed] customers from deal-

This was further nuanced in the 'Suiker Unie' case [1975]. This clarification that there can be no concerted practice if the undertakings operate independently.

Based on the above, the articles seem to have an area of overlap, and

the CFI accepted the possibility of collective dominance under A82 where the

to a great extent determined unilaterally". An undertaking occupying a domi-

Concerning the concept of collective dominance as defined in the 'Dyestuffs' case [1972].

The concept of collective dominance was first introduced in another cartel case, 'Suiker Unie' [1975].

This was also exemplified in the 'Polypropylene' case [1991].

The concept of collective dominance, as defined in the 'Dyestuffs' case [1972], was later strengthened in the 'Hoffman La Roche' case [1979].

When the concept was next tested, in the 'Hoffman La Roche' case [1979], the Court was more sympathetic to the Commission's argument that there was indeed a concerted practice. The Court held that "a dominant position must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct".

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".

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".

It stated that a cartel is both an 'agreement' and a 'concerted practice'.

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", it would be caught by A81(1). In

Accordingly, the use of A81(1) seemed to be restricted to cartel-type agreements in an oligopolistic market where market shares are high, and where the conduct of the undertakings is dominated by a few large firms. This is in keeping with the "normal operation of the market".

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.

The Commission developed the concept of collective dominance as a response to perceived difficulties regarding A81(1) and its application in a "per se" or "clear cut" case, to "recapitulate the facts".

The scope of A81 is thus expanded by the concept of collective dominance. This is reflected in the "normal operation of the market".

Furthermore, as a result of such a firm ruling on the parallel behaviour

... "in practice prohibit[ed] customers from dealing with another supplier of equipment throughout their duration".

The definition was carried forward by another cartel case, 'Suiker Unie' [1975]. This case established that there can be no concerted practice if the undertakings operate independently.

One contemporary critic argued, this definition of 'concerted practice' was "in practice prohibiting parallel behaviour".

The concept of collective dominance was introduced at a relatively early stage.

However, early judgements by the Court were unsympathetic. The decision in the 'Sugar Cartel' decision [1991]99, the CFI in fact established that the concepts of 'agreement', 'concerted practice', and 'collective dominance' cannot be equated.

The concept has since been recognised by both Community Courts, given certain conditions. Specifically, in the 'Italian Flat Glass' case [1992], the Court held that "parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct".

Moreover, despite the apparently "clear words"121 uttered previously, the Court made no effort to adapt themselves in response to the fact that the Commission argued that two Dutch producers had a joint dominant position. On appeal however, the Court made no reference to this argument.

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In economic terms, the combining of economic power held by a group of firms creates the conditions for the exercise of collective dominance. The need for coordination and the potential for intensified competition between the members of the group have been identified as key factors in the establishment of collective dominance. The potential for abuse of collective dominance is highlighted by the adoption of collective agreements or concerted practices that facilitate the coordinated action of the group members.

The concept of 'collective dominance' was introduced in the 'Almelo' case [1994] where the ECJ held that for a finding of collective dominance, the 'undertakings in the group must be linked in such a way that they adopt the same conduct on the market'. Furthermore, such links must be 'sufficiently strong'. The policy on links was then repeated in the 'Centro Servizi' case [1995] and the 'DIP' case [1995], and use of the concept was again upheld in the 'Compagnie Maritime Belge' case [1996], appealing Commission decision 93/82/EEC made under Articles 81 and 82. In the case, the practice of 'externalisation' was denounced as an abuse of collective dominance.

It was found that 'trade between ports in western and northern Europe and West Africa was distributed among three shipping conferences: Cewal, Continent West Africa Conference (`Cowac') and United Kingdom West Africa Lines Joint Service (`Ukwal'), with each conference operating a separate network of routes'. Furthermore, the Commission held that if a company was to operate a route, it must be operated by all the companies in the conference. In this case, the principal actor was 'Associated Central West Africa Lines' (Cewal), a shipping conference, which was made up of companies operating services between Northern Europe, Zaire and Angola. The link between Cewal and its members was achieved through the adoption of a common schedule and a common pricing policy. This was found to be a collusive practice, amounting to the abuse of collective dominance.

The concept of 'collective dominance' has been further clarified by the Court in the 'Irish Sugar' case [1999] where the Commission had found that 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 this case, 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 situation of collective dominance, to hold a position in the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers." The test for "a joint dominant position" is thus whether the undertakings in question are able to coordinate their activities and adopt the same conduct on the relevant market.

It is worth noting that the concept of 'collective dominance' has been applied in a number of cases where the undertakings in question are able to coordinate their activities and adopt the same conduct on the relevant market. This has led to the application of Article 82 of the EC Treaty in a number of cases where the undertakings in question are able to coordinate their activities and adopt the same conduct on the relevant market.
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The concept of 'collective dominance' in EC Competition Law 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" if they are linked. The terminology is unfortunate, and appears to beg the question that if oligopolists are so interdependent, should they not rather be considered as a single entity? However, if this is the case, there would be no need for the concept of collective dominance.

As argued in recent doctrine, it is difficult to see the relevance of links under A82. Specifically, "where a single person or firm controls more than one company, they would be treated as enjoying any dominant positions singly" as per the 'Viho' case [1996]. Where these links are contractual, A81 would usually apply. As noted above, there is therefore usually no need to use A82. An interesting exception is clearly provided by the 'Cewal' decision [1993], referred to previously, in which the firms in question could not be prosecuted under A81 on the ground of collective dominance because of a group exemption under A81(3). Irish Sugar also contained further details as to the relationship between 'joint dominant position' and 'abuse'. Having clarified that "the existence of a joint dominant position...the Court laid down that "the abuse does not necessarily have to be the action of all the undertakings in question". Thus, the abuse may be either single or joint, and it is simply necessary for "abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market". The concept of collective dominance under the merger 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 A81 which operates ex post. Therefore, the analytical framework used as a basis is all the more important.

Market Structure

Based on the foregoing discussion, it is evident that the emergence of the merger regulation is closely linked to concern with increasing levels of concentration in the Community, driven largely by the success of the internal market. For example, market concentration is significantly increased, as its prohibition is more sharply focused on 'significant concentration' under the Merger Regulation. In addition, the debate about the application of A2(3) and collective dominance under the Merger Regulation has been largely confined to 'merger regulation' and "concerted practice" under A81, while the application of A82 to oligopolistic markets has been only occasionally addressed. This is in contrast to the abuse of dominant position, where the abuse must be considered whether or not the link exists.

Therefore, it is difficult to see the relevance of links under A82. Specifically, "where a single person or firm controls more than one company, they would be treated as enjoying any dominant positions singly" as per the 'Viho' case [1996]. Where these links are contractual, A81 would usually apply. As noted above, there is therefore usually no need to use A82. An interesting exception is clearly provided by the 'Cewal' decision [1993], referred to previously, in which the firms in question could not be prosecuted under A81 on the ground of collective dominance because of a group exemption under A81(3). Irish Sugar also contained further details as to the relationship between 'joint dominant position' and 'abuse'. Having clarified that "the existence of a joint dominant position...the Court laid down that "the abuse does not necessarily have to be the action of all the undertakings in question". Thus, the abuse may be either single or joint, and it is simply necessary for "abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market". The concept of collective dominance under the merger 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 A81 which operates ex post. Therefore, the analytical framework used as a basis is all the more important.
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refers to a 'concentration which creates or strengthens a dominant position' presented a greater 'problem' than that of A82 which explicitly mentions a 'dominant position by one or more undertakings'. On this point, the ECJ argued that a 'textual interpretation' did not 'in itself' exclude the possibility of the merger regulation applying to concentrations where the dominant position is shared among several undertakings.

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

Reflecting these issues, the advisory committee in both the 'Nestle/Perrier' decision [1992] and the 'Mannesman/Vallourec/Ilva' decision [1994] was divided over whether the concept was possible under the Merger regulation. Likewise, the CFI reached the opposite conclusion to the Advocate General in the 'Kali & Salz' case [1998].

In addition to this apparent lack of agreement, inconsistency has been observed in the application of the concept. Thus, in some cases where there is prima facie high concentration, no examination for collective dominance has been made, and in others it has been made only briefly. By contrast, in the relatively low concentration case involved in the 'Kali & Salz' decision a "virtual audit of the entire sector" was carried out.

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

Significant barriers and risks to entry were identified on the French market, based in particular on its maturity, the importance of brands, advertising costs, and the difficulty of access to distributors, due to an annual rebate system. The conclusion was that a duopolistic dominant position would be created which would significantly impede effective competition.

Of interest, duopoly has in fact been highlighted as the Commission's favoured interpretation of collective dominance. Thus, in some cases where two large firms would hold a large share of sales in the post-merger market, emphasis has been placed on the 'duopolistic' nature of the market, and the role of the smaller competitors accordingly downplayed. Correspondingly, in the 'Pilkington/SIC' decision [1994] and also the 'PriceWaterhouse/Coopers & Lybrand' decision [1998], the Commission based decisions of 'no joint dominance' on the fact that duopoly would not result from the mergers in question. Moreover, in the 'Kali & Salz' decision, much emphasis was placed on the fact that the market share of two firms would equal 60%. As one writer has argued, in economic terms, "to call this a duopoly is almost abuse of terminology".

Acceptance of the concept came in the 'Kali & Salz' case [1998] stating simply that "in the light of its purpose and general structure...[the regulation]...applies to collective dominant positions". Detailed definition of the concept was thin, and as a result, the judge gave the Commission "considerable discretion in determining whether a concentration will give rise to a risk of oligopolistic dominance". Specifically, it was stated that the assessment should focus on whether "effective competition in the relevant market...would be...suffocated" and whether the merger was in the public interest. In particular, the assessment should consider the likely outcome of the merger, including possible changes in the competitive structure of the market.

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, upheld the Commission's decision and rejected the appeal of the two firms involved in the merger.

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',...
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...and the necessity of the Commission to impose a competitive order on the market.
"market structures of an oligopolistic kind". In the latter case, this is because of the possibility that a realisation of "common interests" could "in particular" lead to firms increasing prices "without having to enter into an agreement or resort to a concerted practice". As the case made clear then, the focus of the merger regulation is on whether a concentration will increase the likelihood of tacit collusion, through its effect on the feasibility of coordination.

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

Despite this issue, the continued 'vitality' of the concept is clear from its ongoing use by the Commission, most recently in the 'Airtours/First Choice' decision [1999]. In this instance, Airtours proposed to acquire "the whole of the equity of First Choice". As the Commission put it, their "activities overlapped mainly in the supply of leisure services to customers in the United Kingdom and Ireland". However, the concentration was blocked as it was believed it would "lead to the creation of a dominant market position in short-haul package holidays in the part, collectively, of Airtours/First Choice and the two other leading tour operators - Thomson Travel Group plc and the Thomas Cook Group Limited". Generally, the Commission believed that "the substantial concentration in market structure, the resulting increase in its already considerable transparency, and the weakened ability of the smaller tour operators and of potential entrants to compete...[would]...make it rational for the three major players that would remain after the merger to avoid or reduce competition between them, in particular by constraining overall capacity". Airtours itself argued that collective dominance "could be thought of as a cartel, but without an explicit cartel agreement, cartel meetings etc." However, citing the 'Gencor' case, the Commission argued that "active collusive conduct of any kind is not a prerequisite for collective dominance to occur. It is sufficient that adaptation to market conditions causes an anti-competitive market outcome". Additionally, it was held that it is "not necessary...for the oligopolists always to behave as if there were one or more explicit agreements". Between them, it is sufficient for the market to be in such a state that the oligopolists, in adapting themselves to market conditions, could be expected to act in ways which substantially reduce competition between them.

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

Concluding Remarks

The study began with an examination of competition and the relevant economic theory in an attempt to better understand why competition 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, potentially leading to "ineligible prices" and a reduction in competition. The Commission believed that "the substantial concentration in market structure, the resulting increase in its already considerable transparency, and the weakened ability of the smaller tour operators and of potential entrants to compete...[would]...make it rational for the three major players that would remain after the merger to avoid or reduce competition between them, in particular by constraining overall capacity". Airtours itself argued that collective dominance "could be thought of as a cartel, but without an explicit cartel agreement, cartel meetings etc." However, citing the 'Gencor' case, the Commission argued that "active collusive conduct of any kind is not a prerequisite for collective dominance to occur. It is sufficient that adaptation to market conditions causes an anti-competitive market outcome". Additionally, it was held that it is "not necessary...for the oligopolists always to behave as if there were one or more explicit agreements". Between them, it is sufficient for the market to be in such a state that the oligopolists, in adapting themselves to market conditions, could be expected to act in ways which substantially reduce competition between them.

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explaining the emergence of the concept of collective dominance. The classic 'Harvard-Chicago' debate was then examined, highlighting the point that increasing levels of concentration have also been argued as a sign of efficiency, as 'competitive' firms compete away less 'competitive' ones. During the discussion, collusion theory was also examined, drawing attention to the fact that there are no 'magic numbers' or simple 'checklists'. Interaction, and hence behaviour is clearly the unknown variable.

Moving on from the theoretical discussion and examination of policy, the analysis then turned to collective dominance in practice, looking at the concept under A82 and under the 'Merger Regulation'. As became clear, there is a crucial difference in that collective dominance under A82 is a necessary, but not sufficient condition, since it indicates the potential for collective dominance, but does not rule out all forms of competition. On the other hand, collective dominance under A82 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 captured, 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 might not be used for this purpose. Accordingly, it was seen that the emergence of collective dominance under A81 cannot be seen in isolation, but must be understood in the context of the broader picture of competition law and policy. Overall, the analysis revealed that collective dominance under A81 is a concept that is closely tied to the concept of collective dominance under A82, which is seen as a necessary, but not sufficient condition. As one commentator wrote prior to the Alsatel judgement, "extending [A82] to cover parallel behaviour would undermine the system of competition rules by rendering the concept of a concerted practice under [A81(1)] redundant." Nonetheless, it is clear that blurring two provisions in this way is problematic, as it can be difficult to separate anti-competitive intent from rational action.

A further issue, related to parallel behaviour, and which also featured prominently in the 'Wood Pulp' case, concerns the approach taken towards 'rational' firm behaviour. In this case, it was argued that the firms had behaved in a way that was consistent with market conditions. However, 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 standards for conduct under A82 is concerned, the collective dominance case of Gencor/Lonrho, upheld by the CFI, can be seen as a useful tool for enforcement purposes, since it provides a way of avoiding the heavy burden of proof under A81(1), which was made clear in the Wood Pulp case.

Overall, perhaps the most striking discovery of this piece has been the lack of any clear pattern. Correspondingly, there appears to be no clear consensus on how to approach collective dominance. However, it is clear that collective dominance under A81 is a concept that is closely tied to the concept of collective dominance under A82, which is seen as a necessary, but not sufficient condition. As one commentator wrote prior to the Alsatel judgement, "extending [A82] to cover parallel behaviour would undermine the system of competition rules by rendering the concept of a concerted practice under [A81(1)] redundant." Nonetheless, it is clear that blurring two provisions in this way is problematic, as it can be difficult to separate anti-competitive intent from rational action.

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In their most recent mention, they were listed as "product homogeneity, low demand growth, low price sensitivity of demand, similar cost structures of the main suppliers, high market transparency, extensive commercial links between the major suppliers, substantial entry barriers and insignificant buyer power (consumers)". Where it is considered that a merger would reinforce some of these characteristics, collective dominance may be found, though the... conduct most" are those "in which two, three or four suppliers each hold approximately the same market share, for example two suppliers each holding 40% of the market, three suppliers each holding between 25% and 30% of the market, or four suppliers each holding approximately 25% of the market".

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

As touched on previously, a fundamental problem may lie in the interaction of economic and legal analysis. For if the full complexity of the former is fully... 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 the full complexity of the economic analysis that is most significant innovation in antitrust for many years.

Cases & Decisions

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

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

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


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

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

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


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


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

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

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

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

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

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

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

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


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

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

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

Gencor Ltd v. Commission (T-102/96) [1999] 'Gencor Ltd'

Irish Sugar plc v. Commission (T-228/97) [1999] 'Irish Sugar plc'

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Decisions & Appeals

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


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

'Alcatel/AEG Kabel' Decision [1991] 269

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


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

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


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

Endnotes

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


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

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

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


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


15 Not used in the legal sense.


22 Not used in the legal sense.

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29 ibid., pp.423-4.
31 Consolidated Version of the Treaty Establishing the European Community, Part Three, Title VI, Chapter 1, Section 1 - 'Rules applying to undertakings', p.70.
32 ibid., p.71.
33 Author's emphasis.
34 'Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères', Secretariat of the Intergovernmental Conference, Brussels, 21/04/56.
36 Issue 2, Grounds, p.342.
37 Produced by the Commission, at the request of the European Parliament in 1971.
38 Commission of the European Communities, (1972), p.11.
39 ibid., p.12.
40 This is later equated with 'equity'. Commission of the European Communities, (1980), p.10.
42 ibid.
43 Commission of the European Community, (1986), p.11; The previous year "dynamic innovative competition, led by entrepreneurs" was also invoked. We might note that 'entrepreneur' often appears to equate with 'SME'.
44 Commission of the European Community, (1992), p.11; In more recent years still, there has been growing discussion of the link between competition and competitiveness, particularly in an era of 'globalisation'; Commission of the European Community, (1995), p.15.
50 Consten & Grundig Decision 64/566/EEC [1964], Appealed in Consten & Grundig v. Commission (56 & 58/64) [1966], 13/07/66, ECR 299.
51 In this respect it has been noted that competition in the EC is "not an end in itself"; Carellos, P. & Silker, H. (1970a), p.5.
55 Such as customs barriers and quotas between member states.
57 (1986); Hereafter referred to as the 'SEA'.
58 (1992); Hereafter referred to as the 'TEU'.
60 (14/68).
64 ie. 'Small or Medium-sized Enterprise'.
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
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73 As an example of this adaptation, A81(3) was used as a support to industrial policy, by authorising agreements to reduce what was considered to be 'structural overcapacity' in certain industries, such as steel ... the concept of 'crisiscartels' (based on the German law concept of 'strukturkrisenkartel') during the late 1970's can also be seen as evidence of this process of adaptation; Sharpe, T. (1980), p.76; The prevailing situation of shortage was such that "a dominant position...[could]...be provoked...in which all customers become dependent on their suppliers and in which there is no more competition between suppliers"; Steindorff, E. (1978), p.35.


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

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

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

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


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

81 Judgement, paragraph 37.

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.


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


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

94 Korah, V. (1998), p.10-11. When it is asserted that a company is in a position of dominance, the important point to remember is that dominant position in terms of competition law is not the same as market power, which can be possessed by a company without being dominant in terms of competition law.

95 Judgement, para. 11; It was argued that A81(1) was breached in the non-automotive market, and in the automotive market the case was taken to the Court under A82. The Court accepted the Commission's view that the three producers had an overwhelming market share (79% for non-automotive glass and 95% for automotive glass) that was sufficient to give them the power to impose significant conditions on their customers, which were not justified by the need for the production of high-quality glass.

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...which 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.
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1. The 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.


5. 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.


9. 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.


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

16. (85/76) 13/02/79, ECR 461; ‘Vitamins’.


22. ibid.


25. para 258 or 358.


27. Judgement, para 366.


29. (C-393/92).

30. Judgement, para 41. Author’s emphasis.

31. Judgement, para 42.

32. (96/94).

33. (142/94).

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

35. Judgement, para 12.


37. Judgement, para 55.


40. Judgement, para 64.


42. Those practices were found to constitute “aspects of an overall strategy of pooling members which Cewal identified...” ibid.

43. Those practices were found to constitute “aspects of an overall strategy which Cewal members pooled their forces in order to implement...” ibid.
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150 (C-73/95).


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

153 Para 50.

154 Judgement, para. 66.

155 Judgement, para. 273.


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


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


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

170 Judgement, para. 57.

171 Judgement, para. 92.

172 Judgement, para. 108.


175 IV/M.358.

176 IP/98/454.

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

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

179 Judgement, para 14 [178].


181 Judgement, para 221.

182 Operating in Canada.

183 Judgement, para 227.

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

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


187 Judgement, para. 5; Implats was to have sole control of Eastplats and Westplats, and was itself to be held "32% by Gencor, 32% by Lonrho and 36% by the public", Infra, page 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 [1999], p.222.

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, ibid.

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

199 Judgement, para 94.

200 ie. "[I]mpacts/LDP, and Amplats. Significantly, this had been the argument of the applicant; ibid."
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203 Judgement, para 273.
205 Judgement, para 274.
206 Judgement, para 275.
207 Judgement, para 276; For discussion, see eg. Korah, V. (1999), p.337.
208 Such as a cutting prices, to try and increase market share.
209 ibid.
210 Judgement, para 277.
211 ibid.
215 para 2.
216 para 4.
217 para 51
218 Referred to as the 'fringe'; para 171.
219 para 56.
220 para 52.
221 para 53.
222 para 54.
225 para 53.
226 John Davies, co-managing partner at Freshfields-Deringer, Brussels cited in Daneshkhu,
227 either because of problems with proof, or because of exemption under A81(3).
228 'Airtours/First Choice' decison [1999], para 87.
229 'Gencor' [1999], Judgement, para 134.
230 As the Commission notes, "the characteristics listed are substantially those employed in previous Commission decisions in Merger Regulation cases where oligopoly (collective dominance) could be identified in this context."

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203 Judgement, para 273.
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