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**Structural Links for the detection of Collective Dominance:
Analysis of Case Law under the EC Merger Regulation**

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Abstract

Adoption of ECMR 4064/89 filled a lacuna in European Merger Control. One of the key objectives behind the ECMR is to prevent a concentration leading to the creation or strengthening of a dominant position which may lead to the prohibition in Article 2 (3). The Commission of the European Communities gained some significant powers in order to protect the competitive structure of Common Market. But, Article 2 (3) of ECMR's indication to a single undertaking has raised a number of questions and complexities as to the applicability of the concept of collective dominance under the Regulation. Even where it is conceded that the concept is applicable, uncertainties remain as to the extent of applicability. However, neither the original rules on competition in the EC Treaty, nor the Regulation itself, are expressed so clearly as to put it beyond doubt that behavioural or structural controls could be used to prevent or police collective dominance in oligopolistic markets. Cartel prohibitions seek to preserve independent commercial behaviour among competitors but, main objective of the EC Merger Control is to keep the competitive structure of markets. The earlier versions of the compatibility criteria was only about the preservation of 'effective competition' without mentioning on 'dominance'. This concept is one of the fundamental notions of the EC competition law. As of the late 1970s, this concept was limited to the position of a single company by the ECJ rulings. Early definition of dominant position was not satisfactory since it was including two elements, the power to behave independently of competitors, customers and consumers and the ability to prevent effective competition being maintained on the market. However, the European courts had never drawn distinction between them.

One of important questions is whether the assessment of dominance by a group of undertakings is the same as the assessment of dominance by a single firm. The paper attempts to clarify this issue by analysing the relevant EC case law.

The concept of a “joint” dominant position is considerable only when the members of the oligopoly are linked by economic factors in such a way that they present themselves in the market as a single entity. Thus, the paper focuses on the analysis of structural links between the members of oligopoly in order to clarify the necessity of economic links for detection collective dominant position that is significantly impeding the effective competition within the Common Market, which is still unclear in EC Competition Law.

Keywords ; collective dominance, joint dominance, dominant position, abuse of dominance, abusive practices, merger control, tacit collusion, tight oligopoly, structural links.

Preface

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Abbreviations

CFI	Court of First Instance
CMLR	Common Market Law Review
EC	European Communities
ECJ	Court of Justice of the European Communities
ECLR	European Competition Law Review
ECMR	EC Merger Regulation
EU	European Union
MD	Market Dominance
OJ	Official Journal
SIEC	Significant Impediment to Effective Competition
SLC	Substantial Lessening of Competition

CHAPTER 1

1. INTRODUCTION

Is the assessment of dominance by a single undertaking same as, the assessment of dominance held by a group of undertakings sharing the same relevant market? The first time that collective dominance was considered by the Courts was in *Flat Glass* case, where the CFI suggested the following: “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.”¹ But, only in *Gencor v. Commission*², it was the first case where merger was prohibited on the grounds of collective dominance and significant impediment of competition where, the CFI confirmed the Commission Decision to block a concentration that would have led to the creation of a duopoly in global market for platinum and rhodium. In *Kali und Salz*, the Court kept the ambiguity of ‘links’. It referred to links by the words ‘in particular’, and come to a conclusion that, links may not be necessary to establish the joint dominance. There is a considerable doubt whether these economic and correlative factors could be indicators of collective dominance under the Merger Regulation.

1.1. Purpose

Main purpose of this paper is to analyse judicial argumentations in order to explain the development of the collective dominance from past to present and clarify whether, how and on what grounds Community courts detected and prohibited

¹ Joined Cases T68, 77 & 78/89, *Società Italiana Vetro SpA and others v. Commission*, [1992] ECR II1403 para 358.

² Case T-102/96, *Gencor Ltd. v. Commission*.

collective dominant positions. Furthermore, analyse what the legal rules are and how they are applied in judgments. This paper aimed to evaluate the concept under the law of EC merger control, deeply taking into consideration the evolution of Merger Regulation. The concept of collective dominance and the elements related to this concept will be assessed in detail from the legal perspective; development of collective dominance within the Community, landmark decisions effecting this development, especially, those made in *Gencor/Lonrho* and *Airtours/First Choice* cases, and level of importance of the structural links between undertakings enjoying joint dominance, and necessity for these links in order to decide on compatibility of the proposed mergers. In the same case, CFI made clear that structural links are not a necessary condition for the establishment of collective dominance.

1.2. Method

The method which, this essay is construed on, is consisting of phases of analysing relevant case law, determining concepts that is searched for, and specifying legal corner stones.

Initially, argumentation starts with the explanatory information about the concept of dominance in the light of the case law, and goes further, making clearer the collective dominance. After comparing single dominance and collective dominance, EC merger control mechanism will be examined in order to find out relevant statements made under the concerned regulation. While, referred to ECMR, market compatibility of concentrations will be clarified comparing the jurisprudence of old compatibility test and the new test. In Chapter 5, the issue of the economic links, that lay the groundwork for the collective dominant position, will be assessed according to the most important case law.

1.3. Delimitation

In order to achieve substantial conclusions, more than one delimitation shall be made here in this essay, since, the concept of collective dominance is very broad, and is touching on different areas. Thesis is restricted to the legal argumentation of the 'collective dominance' concept, further to, importance of structural links between undertakings enjoying collective dominance, and necessity for these links in order to decide on the compatibility of the proposed mergers.

CHAPTER 2

In this chapter I will first examine both the dominance and the collective dominance concepts, focusing on them from legal aspect, and then explain how collective dominance can be abused.

Concept of Dominance

2.1. Definition of Dominance

The notion of “dominance” is fundamental in EC competition law. The Commission described the concept of dominance in its *Continental Can*³ decision, as “undertakings are in a *dominant position* when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers.”⁴

Then the ECJ stated in *United Brands*⁵ and *Hoffmann-La Roche*⁶ cases by defining the dominance as ;

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately its consumers.”

³ Case 6/72 Europemballage Corporation and Continental Can Co.Inc. v Commission [1973] ECR 215

⁴ Ryan, Patrick S. European Competition Law, Joint Dominance, and the Wireless Oligopoly Problem, Columbia Journal of European Law, Vol.11 2005, 353-371 Referred as; Case 6/72 Continental Can v.Commission, [1972] 57 C.M.L.R. D11 (emphasis added)

⁵ Case 27/76 United Brands Co. and United Brands Cont.BV v Commission,[1978] ECR 207, para 65

⁶ Case 85/76, Hoffmann La Roche v. Commission, [1979] E.C.R. 461, para. 38.

So, as of the late 1970s, the concept of dominance was limited to the position of a *single company* in a determined market.⁷ This definition has then been repeatedly used by the European courts in most Article 82 EC judgments.⁸

Some authors have seen two elements in this definition, (1) the power to behave independently of competitors, customers and consumers; and (2) the ability to prevent effective competition being maintained on the relevant market. However, we can claim that on the legal ground, these elements are simply the same thing. Also in their rulings, the EC Courts have never drawn any distinction between these elements.⁹

Moreover, the formulation used by the ECJ is not entirely satisfactory. The concept of “acting independently” does not render an enough basis for discrimination between dominant firms and non-dominant ones. No firm can act to an appreciable extent independently, since every firm will be constrained by its respective demand curve, as well as, firms are limited in their commercial behaviour to some extent by competitors since the presence of these competitors affects those firms’ demand curve. This is valid by definition, for firms operating in a competitive market and for a dominant firm of that market. All firms, including those that are held to be dominant, will rise prices to the point that further price increases would be unprofitable. In this sense, competitors do constrain the behaviour of firms so that even a dominant firm does not act independently of its competitors.¹⁰ Then, an individual firm’s demand curve is equally affected by the behaviour and preferences of its customers. Firms’ demand curves usually sloping downward, indicating that a

⁷ Ryan, P.S., *Columbia Journal of European Law*, Vol.11 2005, 353-371

⁸ *Ibid* referred as; Case C-171/05, *Piau v. Commission* para. 109; Case T-219/99, *British Airways v. Commission* para. 189, Case T-65/98, *Van den Bergh Foods v. Commission*, [2003] E.C.R. II- 4653, para. 154, Case C-396/96 *Compagnie Maritime Belge Transports v. Commission*, [2000] E.C.R. I-1365 para. 34, Case T-128/98 *Aéroports de Paris v Commission* [2000] E.C.R. II-3929, para. 147.

⁹ Geradin D, Hofer P, Louis F, Petit N, Walker M, *The Concept of Dominance in EC Competition Law*, Research Paper on the Modernization of Article 82 EC, Global Competition Law Centre, College of Europe, July 2005, Brugge.

¹⁰ *Ibid*.

higher price comes at the expense of fewer sales: it is not generally open to a firm to raise prices and sell the same quantity as before. In *Continental Can*¹¹ the Court implicitly accepted the Commission's definition of a dominant position based on the economists' concept of power over price.¹² Later, it was seen that a dominant position in the EC is different from the economists' concept of power over price, such as, it is a legal concept developed by Commission and courts. The ECJ in all its judgments since *United Brands*¹³ case, used the same definition¹⁴ for dominant position.¹⁵

2.2. Abuse of Dominant Position

Article 82 EC does not prohibit dominant positions, but only when the abuse of such a position in a specific market when it is likely to affect trade between Member States.¹⁶ The main indicator of dominance is a large market share. The other factors are the economic weakness of competitors, the absence of latent competition and control of resources and technology. Under the EC Treaty, dominant positions are assessed throughout the Community market, or at least a substantial part of it. Dimension of the relevant market depends on the nature of the product, substitute products and consumers' perception.¹⁷

¹¹ Case 6/72 *Continental Can v. Commission*.

¹² Korah, Valentine, *An Introductory guide to EC Competition Law and Practice*, 7th Ed, Hart Publishing, 2000 p. 94

¹³ Case 27/76 *United Brands v Commission*

¹⁴ Case 27/76 *United Brands v Commission*, para 65 and Case 85/76, *Hoffmann La Roche v. Commission*, para. 38.

¹⁵ Korah, V., p.82

¹⁶ The ECJ's definition in Case 27/76 *United Brands Co. & United Brands Continental B.V. v. Commission*

¹⁷ European Parliament Fact Sheets, "Abuse of a dominant position and investigation of mergers", 16.07.2002, http://www.europarl.europa.eu/factsheets/3_3_2_en.htm

2.2.1. Abusive Practices

Article 82 EC does not give the definition of dominance, but gives examples of "abusive practices", such as; (1) imposing unfair prices or other unfair trading conditions, (2) limiting production, markets or technical development to the prejudice of consumers, (3) applying dissimilar conditions to equivalent transactions with other trading parties, (4) imposing supplementary obligations which have no connection with the purpose of the contract. Naturally those practices may indeed take various forms, and the Commission and the Court have added other examples of abusive practices to those main ones mentioned in the EC Treaty; (1) geographical price discrimination, (2) loyalty rebates which discourage customers from using from competing suppliers, (3) low pricing in order to eliminate a competitor, (4) unjustified refusal to supply, (5) refusal to grant licenses.¹⁸

2.2.2. Effects on intra-Community trade

For the behaviour to be considered as an abuse of a dominant position, must adversely affect trade between MSs or likely to do so. A national market is excluded from consideration under the EC Treaty's competition rules.¹⁹

In *Commercial Solvents*²⁰ the Court, referring to Article 81 EC, held that the condition should be applied in the light of Articles 2 and 3(g) of the EC Treaty. The abuse of dominant position alleged in that case was about refusing to supply raw materials to a small pharmaceutical producer which competed downstream. Argue was that, this did not affect trade between MSs, since 90% of the final product was exported to non-member countries and most of the rest was sold in Italy, where the complainant manufactured it. In paragraph 33 the Court stated that, "... when an

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Joined cases 6 & 7/73 Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission, [1974] E.C.R. 223, para. 32

undertaking in a dominant position within the common market abuses its position in such a way that a competitor ... is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the common market, once it has been established that this elimination will have repercussions on the competitive structure within the common market." But the important part of this statement is that, in fact, the victim of the abuse had been exporting part of its production to France and Federal Republic of Germany. And this statement shows us that, some members of the Court wanted to establish a broad definition, while others were prepared to go no further than was required by the case facts.²¹

2.3. The basic legal concept of dominance

The concept of collective dominance is based on the economic proposition that in highly concentrated markets it is likely that if only a small number of firms survive, they will recognize their interdependence and the futility of aggressive behaviour.²² Although based on an economic proposition, there is no concept of collective dominance in economics, that means, the legal concept has no direct equivalent in economics. Here by the legal concept meant the economic concept of oligopolies and the concept of coordinated effects.²³ Dominance in law implies that a firm is highly immune from the normal disciplining forces of rivals' competitive reactions and consumer behaviour.²⁴ The working definition that is established in *United Brands*²⁵ and approved in *Hoffmann-La Roche*²⁶ as I pointed above, although the ECJ added the caveat that "such a position does not preclude some competition ... but enables the undertaking ... if not to determine, at least to have an appreciable influence on the

²¹ Korah, V. p. 58

²² C.J. Cook , C.S. Kerse, E.C. Merger Control, Sweet & Maxwell, London , 3rd edition, 2000, p. 171

²³ Motta, Massimo, 'E.C. Merger Policy and the Airtours Case', E.C.L.Rev. ,2000, p. 203

²⁴ O'Donoghue,R and Padilla, A Jorge, The Law and Economics of Article 82 EC, Hart Publishing,Oxford and Portland, 2006 p. 107

²⁵ Case 27/76 *United Brands v. Commission*, para 65

²⁶ Case 85/76, *Hoffmann La Roche v. Commission*, para 38.

conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.”²⁷

In *Continental Can v. Commission*²⁸, the ECJ held that the acquisition by a dominant firm of a potential competitor might infringe Article 82 EC, although the shareholders in the target company had not been harmed; nor was it alleged that they had been forced to sell their shares because *Continental Can* enjoyed a dominant position. Buyers may be harmed indirectly by the reduction of competition. So the ECJ construed the words ‘abusive exploitation of a dominant position’ to include conduct that affects the structure of the market by absorbing the potential competitor, and not only conduct that exploits the lack of competition. The increased concentration of the market might lead to the detriment of consumers.²⁹

The concept of dominance contained in Article 82 EC relates to a position of economic strength on a properly-defined relevant market, that is therefore provides a framework for analyzing whether an undertaking holds a dominant position. The techniques used in this regard are similar to those used under Article 81 EC and EC merger control: a detailed analysis of the category of products that consumers regard as effective substitutes based on characteristic, use, or price.³⁰

2.4. Dominance and Competitive Structure

Dominance is fundamentally an economic concept, indicating the ability of an undertaking to act without regard to its competitors, actual and potential, or its

²⁷ Ibid, para 39.

²⁸ Case C-6/72 *Continental Can Co. Inc.v.Commission*

²⁹ *Korah,V.*, p 4.

³⁰ O’Donoghue,R. and Padilla, A. J., p. 3

customers, and in particular, to set prices as it chooses. The behaviour of a dominant firm cannot be constrained effectively by the reactions of actual or potential competitors, suppliers or customers. The ECJ has tended to express the concept of dominance in such terms. Court held in *Gottrup-Klim* that ;

“The concept of a dominant position is defined in settled case-law as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its costumers and ultimately of the consumers”.³¹

But, if the concept is easy to formulate, then, determining dominance in practice is rather less straightforward. Dominance is not a black and white concept, it occurs not only where the competitive restraints on an undertaking are absent but also where are too weak in practice to affect its behaviour. The picture is blurred further by the recognition of degrees of market power.³²

Cartel prohibitions seek to preserve independent commercial behaviour among competitors but, main objective of the EC Merger Control is to keep the competitive structure of markets. The earlier versions of the compatibility criteria was only about the preservation of ‘effective competition’ without mentioning on ‘dominance’. But, later on political and legal objectives led to the wording being modified as; Article 2(3) of the Merger Regulation prohibits any “concentration which is creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in substantial part of it”. The introduction of the dominance concept inevitably signaled in the direction of the jurisprudence of the Court in Article 82 EC cases, even though that jurisprudence

³¹ Case C-250/96 *Gottrup-Klim v. Dansk Landbrugs Grovvarereselskab Amba* [1994] E.C.R. 207, para 47 ,(Also see Case 27/76 *United Brands* paras 65-66)

³² Cook , C.J. and Kerse, C.S., p. 130

focuses on abusive commercial behaviour by dominant firms rather than the preservation of competitive market structures.³³

2.5. Single Dominance v. Collective Dominance

The great majority of notifications under the Merger Regulation raise only the issue of whether the acquisition or joint venture concerned will lead to the creation of a single entity dominant in one or more markets. It is known, however, that markets characterized by the presence of only a small number of firms with significant market shares may operate as uncompetitively as a market dominated by a single undertaking. However, neither the original rules on competition in the EC Treaty, nor the Regulation itself, are expressed so clearly as to put it beyond doubt that behavioural or structural controls could be used to prevent or police collective dominance in oligopolistic markets.³⁴ Only in 1998, the ECJ in its judgment of *Kali und Salz*³⁵, were the doubts laid to rest. It was held that :

“... the Regulation, unlike Articles 81 and 82 of the Treaty, is intended to apply to all concentrations with a Community dimension in so far as they are likely, because of their effect on the structure of competition within the Community, to prove incompatible with the system of undistorted competition envisaged by the Treaty...

A concentration which creates or strengthens a dominant position on the part of the parties concerned with an entity not involved in the concentration is liable to prove incompatible with the system of undistorted competition which the Treaty seeks to secure. Consequently, if it were accepted that only concentrations creating or strengthening a dominant position on the part of the parties to the concentration were covered by the Regulation, its purpose

³³ Ibid. p. 131

³⁴ Cook , C.J. and Kerse, C.S.,p. 132

³⁵ Joined cases C-68/94 and C-30/95, French Republic and Société commerciale des potasses et de l'azote (SCPA) and (EMC) v Commission, [1998] ECR I-1375, para 170 - 178

as indicated in particular by the abovementioned recitals would be partially frustrated. The Regulation would thus be deprived of a not insignificant aspect of its effectiveness, without that being necessary from the perspective of the general structure of the Community system of control of concentrations.

178 It follows from the foregoing that collective dominant positions do not fall outside the scope of the Regulation.

The application of the Regulation to positions of collective dominance and the assessment of oligopolies under Article 2 of Merger Regulation raises a number of questions and complexities beyond those which arise in the hitherto more typical case where a notified concentration risks creating a single dominant firm.³⁶

2.6. Merger Regulation

2.6.1 EC Merger Regulation 4064/89

In *Continental Can*³⁷, the ECJ gave the Commission power under Article 82 (ex 86) EC to forbid an acquisition by a firm already dominant of an actual or potential competitor when this would virtually eliminate the competition within the relevant market. But the Commission, however, wanted to be able to monitor mergers before they were consummated and was concerned by mergers that might lead to a dominant position. In 1973, the Commission proposed that, the Council should adopt a **regulation** requiring the parties to a merger to notify it in advance and giving the Commission to restraint mergers. Finally, the Council adopted so called Merger Regulation³⁸ in 1989 giving the Commission those powers.³⁹

³⁶ Cook, C.J. and Kerse, C.S., p. 132

³⁷ Case 6/72, *Continental Can Co. Inc. v. Commission*, para 26-27

³⁸ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L395, 30.12.1989

³⁹ *Korah, V.*, p 5.

2.6.2. Renewed Regulation 139/2004

The revised Merger Regulation forms the centerpiece of a reform programme period that started in 2001. The Commission started its formal review of the ECMR 4064/89 by publishing a Green Paper⁴⁰ which was waiting comments on the proposal of revising its text. After the consultation phase, the Commission published the draft of a new ECMR. The Green Paper contained a number of suggestions for possible changes in both formal and substantial issues. It also invited comments on the effectiveness of the MD test compared to the Substantial Lessening Competition test used in several jurisdictions (and especially in the USA) which dealt with the problematic issues that mergers may cause. In 2001, the Commission expressed that the greater degree of international convergence that would be achieved with the SLC jurisdictions had to be counterbalanced against the rift that might be opened with those MSs and Accession countries that have recently adopted the MD test.⁴¹ So, in 20 January 2004 the Council adopted the new Regulation on the control of concentrations between undertakings.⁴²

2.6.3. Appraisal of concentrations under The Merger Regulation

Article 2 of Merger Regulation is headed as “Appraisal of Concentrations” and Article 2(1) requires the Commission to assess the notified concentrations to it and to establish their compatibility as;

⁴⁰ Green Paper on the Review of Regulation (EEC) no 4064/89/*COM/2001/0745 final/*, European Union preparatory Acts, COM (2002 745).

⁴¹ Stirati, G., The Appraisal of Collective Dominance and Efficiency Gains Under The Substantive Test Of The New EU Merger Regulation, Erasmus Law and Economics Review 1, no. 3 ,November, 2004, 249–286

⁴² O.J., L24/1, 29.01.2004

“Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establish whether or not they are compatible with the common market.”

In contrast of this, if any concentration does create or strengthen a dominant position, the Commission must declare it incompatible with the Common Market⁴³, and the Commission shall determine this incompatibility in direction of Article 2(1)(a) and (b) by taking into account a number of general factors that are mostly familiar from the jurisprudence of Article 81 EC.⁴⁴

In this area two important developments can be observed. First one is judicial and substantive development that is, the ECJ has confirmed that the Regulation does apply to so-called collective dominance or oligopoly and the other one is legislative and procedural development that is the Article 81 appraisal of the coordination effects of structural joint ventures has been brought within the Regulation by an amendment to the compatibility test in Article 2.⁴⁵

In *Kali und Salz*⁴⁶ we can observe the effective decision of the Court on the application of the Merger Regulation to collective dominant positions;

“165 The Court finds, first of all, that the applicants' submission, to the effect that the choice of legal bases in itself militates in favour of the argument that the Regulation does not apply to collective dominant positions, cannot be accepted. As the Advocate General observes in point 83 of the Opinion, Articles 87 and 235 of the Treaty can in principle be used as the legal bases of a regulation

⁴³ Council Regulation, 139/2004 Article 2(3)

⁴⁴ Cook, C.J. and Kerse, C.S., p. 124

⁴⁵ Ibid.

⁴⁶ Joined cases C-68/94 and C-30/95, France and others v. Commission. paras 165-166

permitting preventive action with respect to concentrations which create or strengthen a collective dominant position liable to have a significant effect on competition.

166 it cannot be deduced from the wording of Article 2 of the Regulation that only concentrations which create or strengthen an individual dominant position, that is, a dominant position held by the parties to the concentration, come within the scope of the Regulation. Article 2, in referring to 'a concentration which creates or strengthens a dominant position', does not in itself exclude the possibility of applying the Regulation to cases where concentrations lead to the creation or strengthening of a collective dominant position, that is, a dominant position held by the parties to the concentration together with an entity not a party thereto."

The assessment of concentrations under the ECMR relies on a concept of oligopoly inspired in the modeling by economists of collusion in stable, mature and transparent markets. When concentration is high in this type of market, barriers to entry are significant and customers enjoy limited or no countervailing power, the Commission regards the members of the oligopoly as being in a collective dominant position, provided that there are overall symmetric conditions among them. The logic underlying this combination of factors comes from the stress between the objective interests of the members of an oligopoly to collude in order to attain collectively monopoly profits, and the individual interest of each member of the oligopoly to cheat and deviate from the collusive behaviour in order to maximise its own individual profits.⁴⁷ When establishing a collective dominant position, the Commission analyses most of the factors that facilitate collusion in economic terms, such as the level of supply concentration, the stability and symmetry of market shares, the degree of similarity of cost structures, stable demand, low level of technological innovation and transparency.⁴⁸

⁴⁷ Briones, J.; Padilla, A.J., *The Complex Landscape of Oligopolies under EU Competition Policy - Is Collective Dominance Ripe for Guidelines?* *World Competition* 24(3): 307–318, Kluwer Law International, 2001.

⁴⁸ *Ibid.*

2.6.3.1. Compatibility with the Common market - Article 2(3) ECMR

If any merger does, 'create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it', it should be blocked. The test in merger control can be allocated to two main categories:⁴⁹

- (i) the creation or strengthening of a dominant position;
- (ii) as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it.

As regards the relationship between the two limbs of the test of compatibility in Article 2 the Commission has not adopted a mechanic approach in applying the ECMR. The requirement that the dominant position must significantly impede competition in practice is a two-part composite test, and is a formulation broadly consistent with existing case law under Article 82 EC. The Commission has the flexibility and discretion it clearly needs when making assessments under Article 2. It is doubtful, whether it is helpful to think in terms of the shifting of the burden of proof, or the creation of a presumption against the notifying party once the criterion of dominance is established. As an example, an undertaking with a 40% market share in the Community may acquire a competitor with a 2 % share of the market. Furthermore, there is some aggregation of market share but such a concentration would be unlikely of itself to result in competitive detriment because the reality is that no significant competition has been eliminated as a result of the concentration.⁵⁰

The Commission published a Green Paper where it analysed the proposed reforms to the European merger regime. The "dominance test" was the legal substantive test

⁴⁹ Lindsay, A., *The EC Merger Regulation: Substantive Issues*, Sweet & Maxwell, London, 2003, p. 28

⁵⁰ Cook, C.J. and Kerse, C.S., p. 128

that was applied under the old regulation⁵¹. After a long debate the Commission adopted the new "significant impediment to effective competition" (SIEC) test.⁵² The Commission also considered that the aim of improving legal certainty and enhancing transparency regarding the scope of the dominance test is best served by clarifying the new ECMR itself.⁵³

2.6.3.2. Significant Impediment of Effective Competition (SIEC) Test

Perfect competition rarely exists outside economists' models, and this is recognised in setting the Commission's objective as protecting effective competition. The phrase '**effective competition**' describes the ability of imperfect markets to deliver products efficiently and at reasonable cost. In other words, it gives the Commission the justification to reject rather theoretical or fanciful propositions advanced by notifying parties to counter allegations of dominance. The fact that a significant impediment must also be shown has the effect of raising somewhat the level at which the Commission will intervene to prohibit a concentration, or attach conditions to its implementation. At the same time it may give the Commission a peg on which to hang the remedial measures acceptable as a condition of clearance. In *Kali und Salz*⁵⁴, the ECJ explained the second part of the test in Article 2 of ECMR as serving emphasize the need for a causal link between the dominance created or strengthened by a merger and the detriment to competition.⁵⁵

⁵¹ Council Regulation 4064/89, [1989] O.J. L395/1, Article 2(3); "a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."

⁵² The new SIEC test is set in Article 2(3) of the new ECMR 139/2004 as: "a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

⁵³ Kokkoris, I., Do Merger Simulation and Critical Loss Analysis Differ Under The SLC and Dominance Test? ,E.C.L.Rev.,2006, 27(5), 249-260

⁵⁴ Joined cases C-68/94 and C-30/95, France and others v. Commission, para. 110 to 116

⁵⁵ Cook , C.J. and Kerse, C.S., p.152

The CFI has confirmed that a merger may only be prohibited under the ECMR if it results in a ‘substantial alteration’ to competition which is such as significantly and lastingly to impede competition in the relevant market. The reference to a substantial alteration to competition introduces into the ECMR a *de minimis* defense; in other words, a transaction which creates or strengthens a dominant position will nevertheless be cleared if its effect on competition is not substantial.⁵⁶

The phrase ‘substantial part of the common market’ is the other important criteria of the test under ECMR. It is set in Article 2 as a link to Article 82 EC that is prohibiting an abuse of a dominant position within a substantial part of the common market. So, even if dominance established in a global market, it is only abuse within the common market that is forbidden. It is not entirely clear how large an area, or what proportion of the supply amounts to ‘a substantial part of the common market’. Advocate General Warner expressed in *Pigs and Bacon Commission v. McCarren* that the limitation need not to be purely geographic and he added that particular current of trade, such as the export of Irish bacon to Great Britain, did not constitute a ‘part of’ the common market.⁵⁷

⁵⁶ Lindsay, A., p. 43 – Author referred to cases: T-2/93 *Air France v. Commission* [1994] ECR II- 323 (paras 78-79), T- 102/96 *Gencor v. Commission* [1999] ECR II-753 (paras 170,180 and 193), T-342/99 *Airtours plc v. Commission* [2002] ECR II-02585 (paras 58 and 82)

⁵⁷ Korah, V., p.102, referred to: Case 77/77 *Pigs and Bacon Commission v Mc Carren and Company Limited* [1979] ECR 2161

CHAPTER 3

3. Defining collective dominance

It can be asked whether the assessment of dominance by a group of undertakings is the same as the assessment of dominance by a single firm. Intuitively, the answer to this question should be in the affirmative, which means that the Commission should look for whether the undertakings are in a position of economic strength that gives them the power to behave independently of other competitors, customers and consumers.⁵⁸ The Commission took this view in its *Transatlantic Conference Agreement Decision (TACA)*.⁵⁹ On that basis, the Commission held that the very high collective market share of members to a liner conference (approximately 70%) created a presumption that the undertakings were collectively dominant.⁶⁰

Participation in liner conference agreements constituted the links which made the undertakings act collectively, and the presumption of dominance was confirmed by other factors which the Commission took into consideration, all of which are usually considered in cases of single firm dominance: the undertakings' conduct on the market (especially the implementation of a system of unjustifiable differentiated prices), the limited ability of customers to switch to alternative suppliers given the size of other competitors, the fact that *TACA* members are price setters and other competitors follow *TACA* prices, and high barriers to entry. Moreover, as under single firm dominance, the Commission **can find** collective dominance even if there is a "possible degree of competition between the parties." This is because

⁵⁸ Based on the definition in Case 27/76, *United Brands v. Commission*, para 65

⁵⁹ O.J. 1999, L 95/93 para 532.

⁶⁰ *Ibid.* para 533, Referred to : Case C-62/86, *Akzo Chemie BV v. Commission*, [1991] ECR I-3359, para 60.

undertakings may act as a single unit in relation to price, but may still compete at the margins on factors other than price (e.g. on the basis of quality).⁶¹

In its *Nestlé/Perrier*⁶² decision, the Commission explicitly decided to incorporate the analysis of oligopolistic markets into its merger control system. Since then, several other decisions have explored in-depth the possibility that a notified concentration creates or reinforces an oligopolistic or collective dominant position. The issue of oligopolies from the perspective of a structural approach to competition, is known to be a particularly difficult one. There is not a precisely established approach to the analysis of oligopolies in economic literature, and competition authorities have not been intellectually productive in publishing general guidelines on these point.⁶³

The result is that, there is no generally agreed paradigm to identify dominant oligopolies and separate them from situations of oligopolistic supply resulting in a competitive market. However, there is less dispute on the factors that should be examined to determine whether a concentration might be objectionable on the grounds of collective dominance. Terms and concepts differ in different jurisdictions, but essentially, those jurisdictions with an established approach to this issue aim to prevent that the post-concentration structure of supply will lead the remaining competitors to accommodate each other's behaviour and avoid competition among themselves. Jurisdictions in Europe tend more to develop specific concepts (conscious parallelism, tacit collusion, anticompetitive parallel behaviour) whose purpose is unclear, but probably related to an implicit will to distinguish between infringements to Article 81 EC and the control of concentrations.⁶⁴

⁶¹ Monti, G., The scope of collective dominance under Art. 82 EC, *Common Market Law Rev.* 38: 131–157, 2001

⁶² Case IV/M190, *Nestlé/Perrier*, Commission Decision of 22 July 1992, [1992] OJ L356/1

⁶³ Oligopolistic Dominance. Is there a common approach in different jurisdictions? A review of decisions adopted by the Commission under the Merger Regulation. Briones-Alonso. European Study Conference, Brussels, 18/11/1995

http://ec.europa.eu/comm/competition/speeches/text/sp1995_036_en.html

⁶⁴ *Ibid.*

In a market, companies are collectively dominant if they can raise prices significantly above the competitive level by coordinating their actions. This collective behaviour may apply to all parameters of corporate policy making (e.g. level of productive capacity, specialisation and allocation of selected products or regional markets).⁶⁵ About half of the cases examined in detail by the Commission involve questions of collective dominance.⁶⁶ The concept bears a close and growing resemblance to the US antitrust principle of “coordinated interaction”. This includes both the hypothesis of a (fully-developed) cartel where firms explicitly coordinate, and the case of “tacit collusion”, where they can achieve coordination without direct communication because their long practice and knowledge of the market means they know how to “play the game”.⁶⁷

So, collective dominance is a concept of competition law, which is based on the economic proposition that in highly concentrated markets it is likely that if only a small number of firms survive, they will recognise their dependence and the futility of aggressive behaviour. Firms are collectively dominant if they can raise the prices significantly above the competitive level by coordinating their actions concerning parameters of corporate policy-making.

3.1. When do undertakings hold a collective dominance?

We can see two discrete factors to collusion in the economic sense. First is how undertakings agree (e.g. how they decide what price they should charge). Generally this behaviour is called as ‘coordination’. The second factor is how to make sure that no-one is going to deviate from that price. Economists describe this as the credibility

⁶⁵ Etter, Boris, *The Assessment of Mergers in the EC under the Concept of Collective Dominance An Analysis of the Recent Decisions and Judgments—by an Economic Approach*, *Journal of World Competition*, 2000, 23(3): 103-139.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* Referred to; Ysewyn, J, Caffarra, C, *Two’s Company, Three’s a Crowd: The Future of Collective Dominance After the Kali & Salz Judgment*, [1998] 7 ECLR 469.

of the coordination. Enforcement against explicit collusion is generally aimed at the coordinating mechanism - firms are punished for just 'trying to talk'. Preventive merger policy should be based on the second element, the credibility of sustaining collusive prices in future.⁶⁸

The first time that collective dominance was considered by the Courts was in *Flat Glass* case, where the CFI suggested the following:

“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.”⁶⁹

Referring to economic links, the CFI suggested agreements or licenses which give undertakings a technological lead over others, or agreements between members of liner conferences.⁷⁰ However, neither of such scenarios exemplify these links, rather they show that contractual or structural links between firms can create conditions of collective dominance. If collective dominance is simply created by agreements, decisions or concerted practices among a group of undertakings that together hold significant market power, then collective dominance in Article 82 EC does not cover much more ground than the rules under Article 81 EC. Collective dominance must have a more extensive reach if its incorporation into Article 82 is to be meaningful.⁷¹ The ECJ in *Compagnie Maritime Belge v. Commission (Cewal)*⁷², offered broader definition:

⁶⁸ Caffarra, C., Kuhn, K.U., Joint Dominance: The CFI Judgment On Gencor/Lonrho, E.C.L.R. 1999, 20(7), 355-359

⁶⁹ Joined Cases T68, 77 & 78/89, Società Italiana Vetro SpA and others v. Commission, [1992] ECR II1403 para 358.

⁷⁰ Monti, G., Common Market Law Rev. 38: 2001, 131-157.

⁷¹ Ibid.

⁷² Joint Cases C-395 & 396 /96 P, Compagnie Maritime Belge SA / Dafra-Lines A/S v Commission, para 36

“two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves *or* act together on a particular market as a collective entity.”

If a collective position exists by virtue of an oligopolistic market structure and not because of structural links, the case law which has considered collective dominance under the Merger Regulation, demonstrates that there are two differences with the general approach to defining dominance under Article 82 EC.⁷³ First, the significance of high market shares is not the same: while a single dominant firm can be presumed to have market power if it has a very large market share,⁷⁴ the same presumption cannot be made with respect to oligopolists because other factors are relevant to determine whether the oligopolists can act as a group independently of other competitors, customers and consumers.⁷⁵ For example, if two firms producing differentiated products in a market where there is no price transparency, jointly have 60% of the marketshare, then the tacit coordination is more difficult in that market and the ability to exercise market power is diminished by the other market conditions, despite the large collective market share. Second, the Court and the Commission have inspected in considerable detail the market power of other competitors when identifying oligopolistic dominance under the Merger Regulation. This is a feature which distinguishes the case law under Article 82 and the Merger Regulation in general. One explanation for this is that under Article 82 the Commission is punishing the parties for past abuses, in merger control the Commission is trying to predict the future trends in the market.⁷⁶

So, it would be sufficiently valuable for the Commission to consider the significance of potential competition in all assessments of dominance, collective or single, under Article 82 or the Merger Regulation.

⁷³ Monti, G., *Common Market Law Rev.* 38: 2001, 131–157.

⁷⁴ *Ibid.*, Referred to: Case C-62/86, *Akzo Chemie BV v. Commission*, [1991] ECR I-3359

⁷⁵ Case T-102/96 *Gencor Ltd. v. Commission*, ECR 1999, II-753, para 206.

⁷⁶ Monti, G., *Common Market Law Rev.* 38: 2001, 131–157.

In sum, collective dominance applies to groups of undertakings where Commission can find certain factors which allow the group to present themselves on the market as a single dominant entity, or are able to exercise market power collectively. It is therefore submitted that the focus on ‘economic links’ imposes an immoderate formalism because collective dominance should be assessed by a close appreciation of the relevant market and market participants and the effects that the particular factors have on the undertakings.⁷⁷

3.2. Legal Principles Governing Collective Dominance

Although the principle of collective dominance is relatively well-established under Article 82 EC, the applicable legal conditions have evolved significantly over the years. Earlier case law concerned firms that were united by structural links such as cross-shareholdings or other agreements. This led to a misapprehension that structural links were necessary for collective dominance and raised the possibility that ‘mere’ oligopolistic interdependence was not covered. Subsequent case law clarified that structural links were not essential: the key point was the absence of effective competition between the oligopolists, whether due to structural or other links, which led the firms concerned to behave in a coordinated fashion. The interpretation of collective dominance under EC merger control was then clarified in *Airtours*⁷⁸. But it remained unclear following *Airtours* whether the same basic principles would also apply under Article 82 EC. Apart from certain inevitable differences between the two regimes, the basic principles for defining collective dominance are essentially the same under both Article 82 EC and EC merger control.⁷⁹

⁷⁷ Monti, G., *Common Market Law Rev.* 38: 2001, 131–157.

⁷⁸ Case T-342/99 *Airtours plc v. Commission*, [2002] ECR II-02585

⁷⁹ O’Donoghue, R. and Padilla, A.J., p. 147

3.3. Abuse of Collective Dominance

We assessed the Article 82 EC's prohibition of the abuse of a dominant position 'by one or more undertakings'. While dominance and abuse by **one undertaking** are now well understood, the European Courts have considered the concept of **collective dominance**. Thus, the concept of collective dominance greatly extends the powers of the Commission.⁸⁰

Collective dominance can be abused in the following circumstances: (1) abuse of collective dominance can be used to catch certain concerted action that cannot be reached under Article 81 EC; (2) the abuse need not be collective, so that one undertaking may be liable for its actions if they exploit or protect a collective dominant position; (3) as a matter of law and policy, the concept of collective dominance cannot be used to catch **all** anticompetitive behaviour resulting from oligopolistic interdependence, but that **some** conduct by members of an oligopoly might be prohibited by applying to concept of collective dominance; (4) the concept of collective dominance applies (in certain circumstances) more extensively where a Member State is found responsible for creating a position of collective dominance under Article 86 (ex 90) EC or Article 10 (ex 5) EC, without a requirement that the dominant position be abused. In *Gencor v. Commission*⁸¹ the CFI confirmed the Commission Decision to block a concentration that would have led to the creation of a duopoly in global market for platinum and rhodium. It was the first case where merger was prohibited on the grounds of collective dominance and significant impediment of competition.⁸²

⁸⁰ O'Donoghue, R. and Padilla, A.J., p. 10, Referred as: Art. 82 can also be enforced by national courts and certain national competition authorities, but for brevity, the rest of this article only refers to the Commission as a possible regulator.

⁸¹ Case T-102/96, *Gencor Ltd. v. Commission*.

⁸² Etter, B., *World Competition*, 23(3): 103-139, 2000.

CHAPTER 4

4. Analysis of Collective Dominance in The EC Case Law

4.1. Early case law on collective dominance

Article 82 EC refers to an abuse by one or more undertakings of a dominant position. The Commission has been trying to establish collective dominance when two or more firms act under a cartel agreement. It also has been trying to establish collective dominance when a merger will leave few suppliers or buyers, which are unlikely to compete in ways that can be copied easily and fast.⁸³ It was generally accepted that capturing collective dominances was useful, there was uncertainty as to how and when it would actually apply. The first case to address collective dominance in detail under Article 82 EC was *Italian Flat Glass*⁸⁴ in 1992.⁸⁵ The Commission found that three Italian producers of flat glass had infringed Article 82 by virtue of holding a collective dominant position as they operated in a ‘tight oligopoly’ that enabled them to impede the maintenance of effective competition by not having to take into account the behavior of the other market participants.⁸⁶ On appeal, the CFI stated that collective dominance might exist when, two independent undertakings shared a technological advantages giving them chance to behave to an appreciable extent independently of their competitors. The CFI denied that the Commission could

⁸³ Korah, V., p. 98

⁸⁴ Joined cases T-68/89, T-77/ 89 and T-78/89, *Società Italiana Vetro SpA and others v. Commission*, ECR, 1992,II-1403

⁸⁵ O’Donoghue,R. and Padilla, A.J., p. 147

⁸⁶ Ibid.

renew those facts from which it had established an agreement contrary to Article 81(1) EC to establish abuse of dominant position. It also pointed that, before finding a dominant position, the Commission would have to define the relevant market realistically and establish a lack of imports from outside the geographical area accepted.⁸⁷ In *Italian Flat Glass*, the CFI insisted on the Commission establishing that Italy was the relevant market despite a considerable quantity of imports. In *European Night Services*⁸⁸ it quashed a decision under Article 81(1) EC, *inter alia*, for not giving sufficient reasons for its definition of the market.⁸⁹

4.2. Gencor/Lonrho

4.2.1 Factual background of the *Gencor/Lonrho*

This judgment of the CFI deals with an appeal against a Commission decision declaring incompatibility of Gencor and Lonrho merger with the common market. The proposed concentration was a joint venture among Gencor, a South African mining company and a British company, Lonrho. With the proposed joint venture Gencor and Lonrho planned to acquire joint control on Implats and, and by this way, on Eastplats and Westplats. Implats was carrying out Gencor's platinum activities and Lonrho's platinum activities are carried out by Lonrho Platinum Division "LPD". The planned merger would give Gencor and Lonrho joint control of Implats, that was previously controlled by Gencor. In turn Implats was to be granted sole control of Eastplats and Westplats (LPD) so far controlled by Lonrho. The third and biggest player in this market is Amplats, controlled by Anglo American. After the concentration, Implats and Amplats would each have a market share of about 30% to

⁸⁷ Korah, V., p. 99

⁸⁸ Joined Cases T- 374, 375, 384 and 388/94, *European Night Services (ENS) and others v. Commission*, [1998], ECR II- 3141

⁸⁹ Korah, V. p. 104

35% and a combined market share of approximately 60% to 70% in the world PGM market.⁹⁰

Gencor Ltd. challenged the jurisdiction of the Commission to rule on the proposed concentration since the economic activities of the companies involved, namely the mining and refining of platinum group metals, taking place in South Africa. The CFI rejected this challenge and ruled that the Commission had jurisdiction in the case. This conclusion of the CFI is open to criticism. Rather, the CFI's first question is, whether the Regulation covers the concentration on the basis of the *Wood pulp* test⁹¹, and then asks the question whether the application of the Regulation by the Commission to the concentration is contrary to public international law. No appeal was lodged against the CFI judgment. The judgment in *Gencor* also dealt at length with the issue of joint dominance following closely the judgment of the ECJ in *Kali und Salz*.⁹² Finally, the Court proceeded with the question whether the Commission can accept behavioural undertakings in the case of proposed concentrations.⁹³

A Commission decision prohibiting a concentration under the Merger Regulation on the basis that it would lead to the creation or strengthening of a collective dominant

⁹⁰ "Case T-102/96, *Gencor Ltd v. Commission*, Judgment of 25 March 1999 of the Court of First Instance, Fifth Chamber, extended composition, [1999] ECR II-753", *Common Market Law Review* 38: 1573–1586, Kluwer Law International, 2001.

⁹¹ The ECJ stated (in "Wood Pulp" - Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission* [1998] ECR-5193, paras 11,12) that, " the submission concerning the infringement of Article 85 (now 81) EC itself is concerned, it should be recalled that that provision prohibits all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market ... the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions . Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market ."

⁹² Case Review (Case T-102/96, *Gencor Ltd v. Commission*) *Common Market Law Review* 38: 1573–1586, 2001, Referred as: Joined Cases C-68/94 & C-30/95, *France and Others v. Commission*, [1998] ECR I-1375. This issue was also raised in Joined cases C-395 & 396/96P, *Compagnie maritime belge transports v. Commission*, [2000] ECR I-1365, commented by Stroux, 37 *CML Rev.* (2000),1249–1264.

⁹³ *Ibid.*

position, for the first time was upheld by the CFI. The CFI referred to the statement of the ECJ in *Kali und Salz* that the Commission is obliged to establish, using a prospective analysis, whether the concentration would lead to a situation of collective dominance.⁹⁴ . The CFI held that in a context of oligopoly, large market shares of parties do not have the same significance compared to the analysis of single firm dominance. However, in the case of a duopoly, a large market share is, in the absence of evidence to the contrary, likewise a strong indication for the existence of a collective dominant position.⁹⁵

In *Gencor*, the CFI largely followed the ECJ in *Kali und Salz*⁹⁶, but went further. It held in paragraph 273 that no links⁹⁷ are necessary to establish joint dominance under the ECMR, although they may be relevant. At paragraphs 275 and 276, it held that links include oligopolistic interdependence as well as links of ownership or agreement. If so, the need for links to establish joint dominance becomes of minor importance.⁹⁸

4.2.2. Insignificance of Market Transparency

Concerning transparency the CFI crucially held that, “Price transparency is a fundamental factor in determining the level of market transparency where there is an oligopoly. By means of the price mechanism, the members of an oligopoly can, in particular, immediately discern the decisions of other members of the oligopoly to alter the status quo by increasing their market share and they may take such retaliatory measures as may be necessary in order to frustrate actions of that kind.”⁹⁹

⁹⁴ Etter,B., Referred to: Case T-102/96, *Gencor Ltd v. Commission* para. 163 and Joined Cases C-68/94 & C-30/95, *France and Others v. Commission*, para.221

⁹⁵ Etter,B., Referred to: Case T-102/96, *Gencor Ltd v. Commission* para. 206

⁹⁶ Joined Cases C-68/94 & C-30/95, *France and Others v. Commission*, [1998] ECR I-1375

⁹⁷ This subject is assessed under Chapter 5 – Structural links

⁹⁸ Korah, V., *Gencor v. Commission : Collective Dominance*, E.C.L.R. 1999, 20(6), 337-341

⁹⁹ Etter,B., *World Competition*, 23(3): 103-139, 2000. Referred to: Case T-102/96, *Gencor Ltd v. Commission* para. 227.

The Commission had extensively analysed the structural conditions under which the members of an oligopoly could sustain non-competitive behaviour to maximize its profits. The stability of the accommodating or parallel behaviour as a prerequisite to a finding of collective dominance, depended crucially in those decisions on the transparency of the market. The logic being that transparency is required to detect cheating in order to punish it or at least deter it where a mechanism of credible threat is available.¹⁰⁰

The CFI declared that checklist criteria¹⁰¹ are not absolute, as well as, the Court made clear that structural links are not necessary for establishing collective dominance. The measure of price transparency was pointed as of importance in the detection and punishment of ‘cheating’. Detection and punishment are most important factors in the game theoretic approach to collective dominance. The CFI considered that “there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly”. This is exactly the interdependence emphasized by economists and this is the core of the infinitely repeated prisoner’s dilemma. Therefore we can consider *Gencor/Lonrho* as a strong statement confirming that the game theory is the underlying economic concept of collective dominance.¹⁰²

¹⁰⁰ Briones, J.;Padilla, A.J., *World Competition* 24(3): 307–318, 2001

¹⁰¹ moderate growth of the market, inelastic demand, high concentration, high market transparency, homogeneous product, mature production technology, high entry barriers, structural links between suppliers.

¹⁰² Etter, B., Referred to: Korah, V., *Gencor v. Commission : Collective Dominance*, E.C.L.R. 1999, 20(6), 337-341.

4.3. Airtours/First Choice

4.3.1. Background

Until *Airtours/First Choice*¹⁰³, the Commission has considered issues of collective dominance in over 75 cases, including two prohibition decisions.¹⁰⁴ One of this prohibitions was *Gencor/Lonrho* in which the Commission prohibited a merger that would have reduced the number of players on certain global precious metal markets from three to two and facilitated coordinated behaviour between the remaining two players. The other prohibition was *Airtours/First Choice*, in which the Commission prohibited the merger of two U.K. tour operators, Airtours and First Choice, which together, Airtours/First Choice and the other two important vertically-integrated tour operators, Thomson and Thomas Cook, planned to share approximately 85% of the short-haul package holiday in the U.K. market. The Commission's case was that the resulting structure of the market for the supply of short-haul package holidays in the United Kingdom would create an incentive and make it rational for the remaining three suppliers to restrict overall capacity put onto the market and thereby ultimately increase the prices for package holidays to above a competitive level.¹⁰⁵ Airtours appealed the Decision in December 1999.

¹⁰³ Case IV/M.1524, Commission decision of 22 Sept. 1999, O.J. 2000, L 93/1

¹⁰⁴ Case Review, "Case T-342/99, Airtours plc v. Commission, Judgment of the Court of First Instance of 6 June 2002, nyr", *Common Market Law Review* 39: 1171–1185, Kluwer Law International, 2002, Referred as: At least two other significant transactions have been abandoned due, inter alia, to collective dominance concerns: see Time Warner/EMI (Case IV/M.1852, notification withdrawn on 5 Oct. 2000) and Alcan/Pechiney (Case COMP/M.1715, notification withdrawn on 14 March 2000).

¹⁰⁵ Ibid. Referred to: Case IV/M.1524, 22 Sept. 1999, O.J. 2000, L 93/1, para. 147

4.3.2. Clarification of the legal conditions

Collective dominance may occur in a sufficiently transparent and concentrated market where the market participants take parallel behaviour on the market by selling at above competitive prices, without their having to enter into an agreement or concerted practice to this effect.¹⁰⁶ The Commission decision prohibiting *Airtours/First Choice* merger, gave the CFI the opportunity to clarify a number of principles concerning the interpretation of collective dominance under the EC merger regulation.¹⁰⁷ The Commission prohibited the merger of two UK tour operators, Airtours and First Choice. Together, Airtours/First Choice and the other two vertically-integrated leading tour operators, Thomas Cook and Thomson, would have accounted for approximately 85% of the UK short-haul package holiday market. The Commission's case was that "the resulting structure of the market for the supply of short-haul package holidays in the UK would create an incentive and make it rational" for the remaining three suppliers to restrict overall capacity put onto the market and thereby ultimately increase the prices for holiday packages to above a competitive level.¹⁰⁸

4.3.3. The Commission's approach to Collective Dominance after *Airtours/First Choice*

The *Airtours* decision¹⁰⁹ has expanded traditional approach of the Commission to collective dominance;

¹⁰⁶ Case Review, "Case T-342/99, *Airtours plc v. Commission*", CMLRev. **39**: 1171–1185, 2002

¹⁰⁷ O'Donoghue, R and Padilla, A.J., Referred to: Case T-342/99 *Airtours plc v. Commission* [2002] ECR II-02585

¹⁰⁸ O'Donoghue, R. and Padilla, A.J., Referred to: Case T-342/99 *Airtours plc v. Commission* [2002] ECR II-02585, para 147

¹⁰⁹ 2000/276/EC: Commission Decision of 22 September 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case IV/M.1524 - *Airtours/First*

(1) cover situations where there are more than just two oligopolistic players. In *Airtours/First Choice*, the Commission has for the first time forbidden a merger on oligopolistic grounds where the members of the oligopoly were three. However, in its previous decisions, the Commission had forbidden concentrations, or imposed conditions, only in duopoly situations. The change from two to more players is very significant. There is a sensitive lacuna between “two” and “more than two” for the purposes of establishing the sustainability of an anticompetitive conduct be it three or four, or even five. The meaning of this jump from two to three is that the perimeter of what the Commission may consider as a dominant oligopoly has become much more dimmed after *Airtours/First Choice*. If three players may constitute a dominant position, so four or even more players may also. This does not mean that, as a policy decision, it would not be the right one. It is perfectly imaginable that larger groups of players attain a collectively dominant position, rather, it means that the issue of oligopolies has to be tackled much more often by companies submitting a notification under the Merger Regulation.¹¹⁰

(2) *Airtours/First Choice* has also extended the application of collective dominant positions to a set of situations that may be very different from the market’s point of view. (I), with regard to the overall market conditions that must hold the relevant market for consideration of collective dominance possibility. (II), there were some significant asymmetries among the members of the oligopoly in terms of the degree of vertical integration, both upstream (such as: flight and charter route companies) and downstream (such as: travel agencies), although each member of the oligopoly presented a certain degree of vertical integration in both directions. In its previous decisions, the Commission would pay significant effort to assess the degree of symmetry among the members of the oligopoly in terms of market shares, cost conditions, technology and capacity.

Choice) (notified under document number C(1999) 3022, *Official Journal L 093*, 13/04/2000 P. 0001 - 0033, p. 1

¹¹⁰ Briones, J.; Padilla, A.J., *World Competition* 24(3): 307–318, 2001.

Different than Gencor/Lonrho, in *Airtours/First Choice*, transparency plays a very secondary role compared to the ‘incentives’ and ‘rational behaviour’.¹¹¹

One of the key points in *Airtours/First Choice* is that the merger did indeed increase the symmetry among the leading suppliers with respect to vertical integration. The less integrated company was merging with an integrated one. This seems paradoxical and appears that symmetry is not of importance any more, the increase in symmetry arising from the merger suffices to compensate for the asymmetries in vertical integration.¹¹²

Test for assessing the collective dominance in the *Airtours/First Choice* decision entailed very substantial consequences. It enlarged immensely the dimension of collective dominance theory. It is hard to consider a situation where the undertakings holding a collective dominant position would not have an objective incentive to capacity down to the level of optimal production by a monopolist. Probably the overall profits of the oligopoly, is higher in the context of no effective competition by fringe firms and no potential entry. Otherwise they would not constrain the capacity.¹¹³

The Commission considered that in the context of substantial concentration of the market structure and increased transparency, “... the weakened ability of the smaller tour operators, and of potential entrants to compete, will make it rational for the three

¹¹¹ Etter, B., *World Competition*, 23(3): 103-139, 2000.

¹¹² Briones, J.; Padilla, A.J., *World Competition* 24(3): 307-318, 2001.

¹¹³ Briones, J.; Padilla, A.J., Referred to; Massimo Motta, *EC Merger Policy and the Airtours Case*, *E.C.L.Rev.*, April 2000.

major players that would remain after the merger to avoid or reduce competition between them, in particular by constraining overall capacity”.¹¹⁴

If the focus is to be placed primarily on the incentives to collude and the rational behaviour in terms of maximising collective profits, almost any oligopoly is at risk of constituting a collective dominant position. The main condition that distinguishes a competitive oligopoly from a dominant one is precisely whether market conditions make the collusive behaviour not so much rational, but possible and sustainable. And it has to be possible in at least two directions. Firstly, with regard to the position of each oligopolistic relative to the other members of the oligopoly: hence the criteria of assessing symmetries and asymmetries among them. Secondly, in relation to the sustainability of collusion, that is, with regard to (i) the facility with which an individual member is able to deviate from the collusive behaviour; and (ii) with regard to likely reactions to external shocks.¹¹⁵

The Commission mentioned about incentives for the oligopolists to avoid competition among themselves that are constitute the most outstanding feature of the decision in the *Airtours/First Choice* case. Commission clearly expressed that “it is sufficient that the merger makes it rational for the oligopolists, in adapting themselves to market conditions, to act, individually, in ways that substantially reduce competition between them ...”.¹¹⁶

In response to incentives, the Commission strongly emphasizes on “rational behaviour”. The decision states that “... where as here, there are strong incentives to

¹¹⁴ 2000/276/EC: Commission Decision of 22 September 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case IV/M.1524 - *Airtours/First Choice*) para 56

¹¹⁵ Briones, J.;Padilla, A.J., *World Competition* 24(3): 307–318, 2001

¹¹⁶ 2000/276/EC: Commission Decision of 22 September 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case IV/M.1524 - *Airtours/First Choice*) para 54

reduce competitive action, coercion may be unnecessary”.¹¹⁷ By this conclusion the Commission excluded the necessity of a retaliatory mechanism to find collective dominance. The main concern in the decision is therefore the interest the three oligopolists may objectively have to set capacity below the optimal competitive level, and thereby reap to a greater or lesser degree monopoly rents. According to the decision, the extent to which prices would approach the monopoly level would depend on the demand conditions met as the season proceeds in time, and suppliers may find it necessary to adjust prices to clear the market. It is assumed that this price competition arising from changes in demand or from misperceptions about anticipated demand would not be enough, under any circumstances, to bring prices down to the competitive level.¹¹⁸

As a result, the Court has definitively clarified many crucial issues with regard to oligopolies and collective dominance, starting with the very application of the Merger Regulation to oligopolies, and the role and importance of economic links in this respect. It has also granted a significant margin of discretion to the Commission for the assessment of the market conditions under which a finding of collective dominance may be reached. On the other hand, the Commission has adopted already a body of decisions in which oligopolies have been tackled.¹¹⁹

After the *Airtours/First Choice* decision, it is likely that the issue of collective dominance will become a frequent feature of decisions under the Merger Regulation. At the same time, the approach followed under the Merger Regulation and that followed under Article 82 appear to have certain significant differences.¹²⁰

¹¹⁷ Ibid., para 55

¹¹⁸ Briones, J.;Padilla, A.J., *World Competition* 24(3): 307–318, 2001.

¹¹⁹ Ibid.

¹²⁰ Ibid.

4.3.4. Punishment Mechanism

Finally, the necessity of a punishment mechanism was denied by the Commission. *Airtours* argued that punishment mechanism is an important condition, but not exists in this case, because the beforehand capacity was fixed. The Commission held that, even after this argument, it was not necessary to show a strict punishment mechanism. Collective dominance seems, not to be just about “tacit collusion” and to be considered as sufficient for oligopolists to “act independently in order to reduce competition”. *Airtours/First Choice* case caused to tremendous changes in the EC’s approach to collective dominance. Either the Commission has changed to a large extent its view of the concept, especially compared to the judgment of the CFI in *Gencor/Lonrho*.¹²¹

¹²¹ Etter, B., *World Competition*, 23(3): 103-139, 2000.

CHAPTER 5

5. Structural Links

5.1. CEWAL Case

The concept of a “joint” dominant position is considerable only when the members of the oligopoly are linked by economic factors in such a way that they present themselves in the market as a single entity. In *Cewal*¹²², the Commission found that a shipping conference enjoyed a collective dominant position owing to the close economic links between the ship-owners who met in the committees of the conference and that they acted to a large extent as a single entity.¹²³

The Court has stated in paragraph 39 of *Cewal* case that, “... for the purposes of analysis under Article 86(now 82)EC, it is necessary to consider whether the undertakings concerned together constitute a collective entity *vis-à-vis* their competitors, their trading partners and consumers on a particular market. It is only where that question is answered in the affirmative that it is appropriate to consider whether that collective entity actually holds a dominant position ...”. Unclear part of this judgment is whether “links” between the members of the oligopoly are necessary for the establishment of a collective dominant position.¹²⁴ However, considering links broadly, the Court adds in the following paragraphs that , the existence of an

¹²² Joined cases C-395 & 396/96P, *Compagnie maritime belge transports v. Commission*, [2000] ECR I-1365

¹²³ *Korah*, V. p. 99

¹²⁴ In paragraphs 41 and 42 of the judgement it is suggested that the links are necessary ; “41 ... in order to establish the existence of a collective entity as defined above, it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned ...” and “42 in particular, it must be ascertained whether economic links exist between the undertakings concerned which enable them to act together independently of their competitors, their customers and consumers”.

agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question. Since the conclusions are limited to the specific case of maritime conferences, it remains unclear whether links constitute, as a general rule, a necessary pre-requisite or a sufficient condition for the finding of collective dominance.¹²⁵

5.2. Italian Flat Glass “Links”

Statements of *Cewal* shaped the treatment of oligopolies under EU competition law, and has become the heart of the development of the notion of economic links among the oligopoly members for a finding of collective dominance. The question of links as a prerequisite for detection of collective dominance dates back to the judgment of the Court in the *Italian Flat Glass*¹²⁶ case. The question of whether independent firms could be found to be in joint dominance and jointly breach Article 82 EC by abusing their position was the content of the case.¹²⁷ Before the Commission's *Nestlé/Perrier* decision¹²⁸, the CFI made a landmark judgment regarding collective dominance under Article 82 EC in the *Italian Flat Glass* case. The Court ruled that “there is nothing in principle to prevent two or more independent entities operating in the same market from jointly holding a collective dominant position relative to

¹²⁵ Briones, J.; Padilla, A.J., *World Competition* 24(3): 307–318, 2001

¹²⁶ Joined cases T-68/89, T-77/ 89 and T-78/89, *Società Italiana Vetro SpA and others v. Commission*, ECR, 1992,II-1403.

¹²⁷ In paragraph 358, the Court 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. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers”, by citing to paragraphs 38 and 39 of the Case 85/76, *Hoffmann La Roche v. Commission*.

¹²⁸ Case IV/M190, *Nestlé/Perrier*, Commission Decision of 22 July 1992, [1992] OJ L356/1

that of the remaining enterprises in the market”.¹²⁹ In the Court's ruling, this dominant position arises from their jointly held economic links. It is not specified by the Court what constitutes such links except one example: that is, a technological lead held by two independent entities, through agreements or licenses allowing them to behave to an appreciable extent independently of their competitors, customers and consumers. This led to a high degree of opacity regarding the identification of economic links and left the operationalisation of this question to the Commission. Two different views have arisen as to what constitute economic links: a narrow view which sees economic links as purely structural links between entities holding the collective dominant position and a much wider view which looks at economic links in terms of economic or conscious interdependence that can arise out of a tight oligopoly. The latter can, but does not necessarily, incorporate structural links for it also includes indicators such as the level of concentration, market transparency and product homogeneity.¹³⁰

So, in the *Flat Glass* judgment, existence of economic links became a necessary condition for a finding of dominance.¹³¹

5.3. Necessity of “links” for detection of Collective dominance under ECMR

Both EC Courts have accepted a concept of collective dominance under both Article 82 EC and the ECMR, but only where there are commercial or economic links between the firms so that they act as a single unit. The CFI has implied that the Commission may restrain a concentration leading to a duopoly world wide, whether

¹²⁹ Joined cases T-68/89, T-77/ 89 and T-78/89, *Società Italiana Vetro SpA and others v. Commission*, para 404

¹³⁰ Davison, L., and Johnson, D., Beyond single dominance: the debate surrounding the extension of the scope of the EC merger control regulation, *European Business Law*, October 2000, Vol: 12, 5, 239-250

¹³¹ Briones, J.;Padilla, A.J., *World Competition* 24(3): 307–318, 2001

or not there are links between the two surviving firms. The approach was different in merger cases.¹³²

5.4 Kali und Salz

The first case was *Kali und Salz*¹³³ on the issue of how to treat oligopolies under the Merger Regulation. The main issue in the appeal was whether the ECMR could cover situations of collective dominance or was limited only to one-sided dominant positions. The Commission had based its decision particularly on the concept of ‘links’ between the two leading firms in the market. The Court expressly asked the question of links. This question could be interpreted as a confirmation that the Court requires the existence of links as a necessary condition to detect dominance. But, the Court obviously tried not to express the term ‘links’ in the judgment.¹³⁴ The Court annulled the Commission’s decision because the links those had been relied upon by the Commission were not considered founded from a material aspect. According to the statement in *Kali und Salz*¹³⁵, it did not seem that the Court has considered the existence of links as a necessary condition for a finding of collective dominance under the ECMR.¹³⁶

The CFI held that the Commission did not meet the requisite standard of proof because, it recycled the elements of Article 81 EC violation as also constituting proof of collective dominance under Article 82 EC and it made some broad statements on

¹³² Korah, V., *Gencor v. Commission : Collective Dominance*, E.C.L.R. 1999, 20(6), 337-341

¹³³ *Joined Cases C-68/94 & C-30/95, France and Others v. Commission*, [1998] ECR I-1375

¹³⁴ The Court clearly stated in paragraph 221 of *Kali und Salz*, that the Commission is obliged to assess “... whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular for correlative factors which exist between them, are able to adopt a common policy on the market”. Korah, V. In her article; *Gencor v. Commission: Collective Dominance*, Referred to this paragraph of judgment by pointing that: “The French text refers to ‘facteurs de corrélation’, which probably means ‘links’.”

¹³⁵ *Joined Cases C-68/94 & C-30/95, France and Others v. Commission*, [1998] ECR I-1375 paras 221-224

¹³⁶ Briones, J.; Padilla, A.J., *World Competition* 24(3): 307–318, 2001.

the concept of collective dominance.¹³⁷ However, the precise scope of collective dominance under Article 82 EC remained unclear. There were two confusion points. First, it was not clear whether the presence of structural links between the alleged collectively dominant oligopoly members in *Italian Flat Glass* was necessary or sufficient. Although the Court spoke more generally about ‘economic links’, this led to a degree of confusion as to whether cases exhibiting tacit coordination, but not involving structural links between the coordinating firms, were covered by the notion of collective dominance under Article 82 EC. A second problem was the suggestion in certain case law that undertakings dominant on related, but separate, markets could be collectively dominant under Article 82 EC. Following *Italian Flat Glass*, it had been understood that collective dominance implied the absence of effective competition between two or more firms on the same relevant market. However, in *Almelo*, the issue was whether a series of regional electricity distributors in the Netherlands occupied a collective dominant position on the market for public supply of electricity to local distributors. Although the ECJ cited the correct basic principle for collective dominance – that the undertakings must be linked in such a way that they adopt the same conduct on the market.¹³⁸ Similarly in *La Crespelle*, the ECJ appeared to consider that the establishment of local monopoly artificial insemination centers that were territorially limited but together covered the entire territory of France might create collective dominance. Both cases caused confusion as to whether Article 82 EC recognised a broader concept of collective dominance than had generally been understood in economics and merger control rules.¹³⁹

¹³⁷ O’Donoghue, R. and Padilla, A.J., p.148; Referred to; Joined cases T-68/89, T-77/ 89 and T-78/89, *Società Italiana Vetro SpA and others v. Commission*, ECR, 1992,II-1403, para358

¹³⁸ O’Donoghue, R. and Padilla, A.J., p.148 Referred to: Case C-393/92 *Gemeente Almelo and others v NV Energiebedrijf Isselmij* [1994] ECR I-1477 paras. 42,43

¹³⁹ *Ibid.*, Referred to: Case C-323/93, *Societe Civile Agricole du Centre d’Insemination Artificielle du Department DE la Mayenne* [1994] ECR I-5077

5.5. Towards clearer reliance on economic links leading to tacit collusion.

Developments in the application of collective dominance under the ECMR during the 1990s had significant consequences for clarifying the interpretation of collective dominance under Article 82 EC. *Gencor* concerned the legality of a decision adopted by the Commission under the EC Merger Regulation which prohibited a particular merger in platinum industry on the grounds that it would lead to the creation of a duopoly market conducive to a situation of oligopolistic dominance.¹⁴⁰ On appeal, it was argued that the Commission had failed to prove the existence of ‘links’ between the members of the alleged duopoly within the meaning of *Italian Flat Glass*, i.e. structural links. The CFI responded by stating, *inter alia*, that there was no support for the notion that ‘economic links’ were restricted to structural links between the undertakings concerned.;¹⁴¹

“276 Furthermore, there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no

¹⁴⁰ Ibid., Referred to: Case T-102/96 *Gencor v. Commission* [1999] ECR II-753

¹⁴¹ Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753, paras 276-277

benefit from its initiative. All the traders would thus be affected by the reduction in price levels.

277 That conclusion is all the more pertinent with regard to the control of concentrations, whose objective is to prevent anti-competitive market structures from arising or being strengthened. Those structures may result from the existence of economic links in the strict sense argued by the applicant or from market structures of an oligopolistic kind where each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice.”

In other words, mere oligopolistic interdependence without structural links was covered by EC merger control rules. This corrected a misapprehension that had arisen following *Italian Flat Glass* that collective dominance necessarily required structural links. *Gencor* clarified that market structure *alone* could give rise to collective dominance.

In particular, the Court clarified that structural links are not a pre-requisite under Article 82 EC for collective dominance: the key point is that the undertakings constitute a collective entity vis-à-vis their rivals and together hold a dominant position on the relevant market.¹⁴²

5.6. Conclusion on “Links”

The CFI openly expressed the possibility of punishment and stated that “anti-competitive parallel conduct would, economically, have constituted a more rational strategy than competing with each other, thereby adversely affecting the prospect of maximising combined profits”.¹⁴³

¹⁴² Joined cases C-395 & 396/96P, *Compagnie maritime belge transports v. Commission*, para 45

¹⁴³ *Etter, B.*, Referred to: Commission decision of 24 April 1996, *Gencor/Lonrho* (Case No. IV/M.619), [1997] OJ L11/30; Judgment *Gencor/Lonrho* of 25 March 1999, in case T-102/96, *Gencor v. Commission*, para 236

The CFI made clear that structural links are not a necessary condition for the establishment of collective dominance.¹⁴⁴ The Court stated in *Gencor/Lonrho* that: “... there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another’s behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share ... would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction of price levels.”¹⁴⁵

In *Kali und Salz*, Advocate General Tesouro said that collective dominance had not been mentioned in the debates leading to the adoption of the Merger Regulation and the court should not construe it extensively, although from an economic viewpoint there was much to be said for such a concept (paragraphs 81;98). The ECJ disagreed and held that collective dominant positions do not fall outside the scope of the Regulation (paragraphs 165;178). The reference to links is expressed by the words ‘in particular’, so links may not be necessary to establish the joint dominance. The Court, however, quashed the decision on the basis that the Commission had not adequately established the links it had alleged. There was at least considerable doubt whether there could be collective dominance under the Merger Regulation in the absence of links.¹⁴⁶

¹⁴⁴ Ibid, Referred to: [1997] OJ L11/30; Judgment in Case T-102/96, *Gencor v. Commission*, para 273

¹⁴⁵ Ibid, Referred to: [1997] OJ L11/30; Judgment in Case T-102/96, *Gencor v. Commission*, para 276

¹⁴⁶ Korah, V., E.C.L.Rev. 1999, 20(6), 337-341

CHAPTER 6

6. Conclusion

In my opinion 'dominance' itself is contrary to the nature of competition, and as it is mentioned above, the objective of ECMR is to prevent those concentrations that are creating or strengthening their dominant position, rather to deal with past abuses that can be assessed under Article 82 EC. For the behaviour to be considered as an abuse of a dominant position, must adversely affect trade between MSs or likely to do so. A national market is excluded from consideration under the EC Treaty's competition rules. In *United Brands*¹⁴⁷, the ECJ defined dominant position as of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately its consumers. At that time, this concept was limited to the position of a single company by the ECJ rulings. Yet, there still exist number of uncertainties as to the concept of dominance as defined in this way, which have not been clarified by the case-law. Then another question related with dominance which examined, was whether collective dominance has to be assessed under the same conditions as single firm dominance. Some cases/decisions have answered this question in the affirmative.¹⁴⁸ The first time that collective dominance was considered by the Courts was in *Italian*

¹⁴⁷ Case 27/76 *United Brands Co. v Commission*, [1978] ECR 207, para 65

¹⁴⁸ For instance Commission decision in *Transatlantic Conference Agreement Decision (TACA)*

*Flat Glass*¹⁴⁹, where the CFI suggested 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. After *Italian Flat Glass*, I tried to analyse the two rulings on Commission decisions: *Gencor/ Lonrho*¹⁵⁰ and *Airtours/First Choice*¹⁵¹. In *Gencor*, the CFI held that that no links are necessary to establish joint dominance under the ECMR, although they may be relevant. It also held that links include oligopolistic interdependence as well as links of ownership or agreement. Hence, the need for links to establish joint dominance becomes of minor importance. In *Airtours*, the Commission expanded its approach to collective dominance to cover situations where there are more than just two oligopolistic players and to a set of situations that may be very different from the market's point of view. One of the key points in *Airtours/First Choice* is that the merger increased the symmetry among the leading suppliers with respect to vertical integration. The less integrated company was merging with an integrated one. The focus is to be placed primarily on the incentives to collude and to avoid competition among each other and the rational behaviour in terms of maximizing collective profits.

It is not possible to have the exhaustive explanation of the collectively dominant undertakings' positions in the latest Merger Regulation. But the doctrine of collective dominance is on the border of its ripeness after number of different but complementary case law within the last 40 years. As it is not without lacuna, it is not perfectly established yet, as well. But this is a normal process, because in European Union, every Member State has its own competition policy. To have a fully integrated common competition policy, is very high peak to reach and will take time. Both Community courts sometimes used the phrase of 'links', in order to characterize the collective dominance. The precise for links that appeared to be not

¹⁴⁹ Joined Cases T68, 77 & 78/89, *Società Italiana Vetro SpA and others v. Commission*, [1992] ECR II1403 para 358.

¹⁵⁰ T-102/96, *Gencor Ltd. v. Commission*, [1999] ECR II-753

¹⁵¹ T-342/99, *Airtours plc v. Commission* [2002] ECR II-02585

important provided they are sufficient to enable the undertakings behave in a coordinated manner and dominate the relevant market. But it differs from case to case. Since, the size of the proposed concentration, expected and unexpected effects on Common Market derived from this size would be different in every sector. However, the CFI has implied in *Gencor* that, the Commission may restrain a concentration leading to a dominant position world wide, whether or not there are links between the two surviving firms.

By focusing on the causal links, this paper aimed to make more clear for the reader, the necessity needed and appeared for those links in different cases. The new Merger Regulation 139/2004 has been adopted three years ago. It will be useful to follow the Commission's decision on proposed mergers in the future, in order to be able to interpret the meaning of the structural links oligopolistic market members.

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