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# **Appraisal of Joint Dominance in the Landscape of Co-opetition**

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## **Abstract**

The accusation of an abuse of joint dominance on the basis of behaviour has been found groundless in *Italian Flat Glass*. In *Airtours*, the Commission Decision referring to creation of a joint dominant position and finding that the merger in question was incompatible with the Common Market, has been annulled by the Court as well. Proving the existence of a collusive oligopoly at a fix point of time is not enough in order to sustain the finding of joint dominance; the parties of the collusive oligopoly have to be economically interconnected in such way that the collective strategy adopted is sustainable during a long period of time.

This study asserts that the contemporary undertakings can be economically interconnected by means of participation in interfirm networks and co-opetitive interplay. This kind of interaction gives birth to a new form of anticompetitive behaviour, hereby named the implicit collusion.

**Keywords:** Joint Dominance, Implicit Collusion, Network Governance, Process Interoperability, Economic Links.

## Sammanfattning

Anklagelsen för missbruk av kollektiv dominans med utgångspunkt i marknadsuppförande avkunnades grundlös i *Italian Flat Glass*. I *Airtours* har Förstainstansrätten likväl annullerat Kommissionsbeslutet beträffande skapande av en kollektiv dominerande ställning som förklarade koncentrationen i frågan oförenlig med den gemensamma marknaden. Bevisen som visar existensen av ett samförståndsoligopol vid en viss tidpunkt räcker inte till att stödja anklagelsen för kollektiv dominans. Deltagarna i ett samförståndsoligopol måste vara ekonomiskt sett sammanlänkade sålunda som den gemensamt införda strategin ska kunna upprätthållas under en lång tidsperiod.

Denna undersökning hävdar att nutidens företag kan sammanlänkas ur ett ekonomiskt perspektiv genom deltagande i mellanbolagliga nätverk och kooperativa samspel. Den här sorten av interaktion ger upphov till en ny form av konkurrensfientligt uppförande, som härmed kallas för implicit samförstånd.

**Nyckelord:** Kollektiv Dominans, Implicit Samförstånd, Nätverksstyrning, Processinteroperabilitet, Ekonomiska Förbindelselänkar.

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## Glossary

<b>Advocate General (A-G)</b>	Member of the ECJ who delivers an opinion before the judgment in order to help the other judges to focus on the essential issues.
<b>Anglo American Corporation (AAC)</b>	See Case No IV/M.754 - AAC/Lonrho, OJ L 149, 20.5.1998
<b>B2B (business-to-business)</b>	commercial transaction between enterprises, in contrast to B2C, business-to-customer and B2G, business-to-government
<b>Cartel</b>	agreement that infringes 101 (1) FEU
<b>CFI (Court of First Instance)</b>	EU Civil Service Tribunal composed of 7 Judges appointed by the Council for a period of 6 years which may be renewed. The CFI has become the General Court since the Lisbon Treaty came into force.
<b>Complementarities (negative)</b>	negative effects caused by the interdependence between business processes (interference)
<b>Complementarities (positive)</b>	positive effects caused by the interdependence between business processes
<b>Complementary product</b>	additional sales of product A implies more demand for the complementary product B and less demand for the substitute C
<b>Concentration</b>	mergers, acquisitions and concentrative joint ventures
<b>Concentrative joint venture</b>	full-function joint venture subject to more lenient criteria by EUMR
<b>Conglomerate merger</b>	merger between undertakings supplying complementary products where several product markets are affected
<b>Contingency</b>	the state of being conditioned by something else
<b>Cooperative joint venture</b>	cooperation between undertakings which may take any legal form: joint subsidiary, cross technology licenses etc
<b>Co-opetition (coopetition)</b>	Cooperation between direct competing undertakings by explicit, implicit or tacit agreement; co-opetition is not meant to replace competition, rather just the opposite to develop the competitive advantages by cooperative tactics.
<b>Coordinated effects</b>	Facilitation of cooperative behaviour between competitors as result of a merger. Note that this notion is not synonym with joint dominance.
<b>De Beers Consolidated Mines Ltd (DBCM)</b>	See Case No IV/M.754 - AAC/Lonrho, OJ L 149, 20.5.1998
<b>Dominance</b>	substantial and sustainable economic power that gives the possibility to counteract effective competition
<b>ECJ (European Court of Justice)</b>	EU Court of appeal composed of 27 Judges and 8 Advocates General. The Judges and Advocates General are appointed by common accord of the governments of the EU Member States.

<b>EIASM (European Institute for Advanced Studies in Management)</b>	An international network for management research and teaching that includes more than 40 000 management scientists from all over the world.
<b>Embedded network</b>	a matrix network configuration fostering interdependence on multiple levels
<b>EU Merger Regulation (EUMR)</b>	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings
<b>EURAM (European Academy of Management)</b>	A professional association for scholars in the field of management organized by EIASM.
<b>Exclusionary Strategy</b>	hindering maintenance of the degree of competition existing on the market or the growth of that competition
<b>Fédération Internationale de Football Association (FIFA)</b>	An association governed by Swiss law founded in 1904 and based in Zurich. It has 208 member associations and its goal, enshrined in its Statutes, is the constant improvement of football.
<b>Foreclosure</b>	excluding competitors from the market by dominant undertakings
<b>Game Theories</b>	analysis of a situation involving conflicting interests in terms of losses and benefits obtained by the opposing parties
<b>Group Economic Unit</b>	group of legal entities being subordinated to a central entity and therefore incapable of adopting independent commercial policy
<b>Hold Up Problem</b>	risk implied by mutual investments, that one partner may adopt an opportunistic behaviour and the other will not be able to recover its investment
<b>IMEDIPA (Institute of Studies in Competition Law &amp; Policy)</b>	non-profit organization which aims to promote a strong competition law community in SE Europe by organizing events and advancing the debate among competition law and economics scholars, policymakers and Competition authorities, the judiciary, practitioners, consumer associations as well as the business community.
<b>Information Agreement</b>	agreement between competitors to reduce the uncertainty that may facilitate joint dominance and collusion
<b>Intangible Asset</b>	identifiable non-monetary asset without physical substance
<b>In-Sourcing</b>	the opposite of out-sourcing, procurement from internal sources by delegation within the group economic unit
<b>IPR</b>	intellectual property rights, such as patent and copyright
<b>Joint (Collective) Dominance</b>	situation where a group of undertakings jointly hold market power giving rise to market coordination
<b>Liner Conference</b>	administrative organization of liner shipping companies serving a specific route
<b>Monopoly</b>	market with a single seller
<b>Oligopoly</b>	market with few sellers

<b>Out-Sourcing</b>	procurement under supply contract with other undertakings
<b>Rationale for Article 102 FEU</b>	preventing competition distortion by prohibiting certain types of non-coordinated and coordinated conduct by dominant undertakings
<b>Single Dominance (SD)</b>	monopoly position or substantial market power held by one single undertaking
<b>SIEC-test</b>	“Significantly impede effective competition” is the new substantive test for concentration control implemented by the EUMR, test that replaces the previous dominance test.
<b>Single Economic Unit</b>	legal entity capable of adopting an independent commercial policy
<b>Spillover Effects</b>	harmful consequence of a merger consisting in facilitation of coordinated behaviour between undertakings that remain independent after the merger
<b>SSO (standard setting organisations)</b>	organization composed of IPR holders and manufacturers in a particular industry
<b>Treaty on European Union</b>	One of the two Treaties on which the Union is founded. The Union replaces and succeeds the European Community. (2008/C 115/01)
<b>Treaty on the Functioning of the EU (FEU)</b>	One of the two Treaties on which the Union is founded. Both Treaties shall have the same value. (2008/C 115/01)
<b>Trust Facilitating Device</b>	practices that encourage the abandon of genuine competitive strategies and foster the involvement in cooperation agreements on the pursuit of risk sharing and price stabilization
<b>Undertaking</b>	any collection of resources carrying out economic activities
<b>Unilateral effects (Non-Coordinated)</b>	The merged undertakings and some other market powerful independent competitors on a concentrated market will be able to unilaterally charge anticompetitive prices as a result of the market features.

## 1. Introduction

### 1.1. Introduction

The co-opetition strategy is a field of practice, research and teaching, which is progressively emerging in management studies.<sup>1</sup> I have been acquainted with the co-opetition as study object during my management education. The present study is concentrated on the area of joint dominance, since I have observed several points of similarity between the co-opetition as strategy of management and joint dominance as legal concept. A cooperative market is similar with a trial where the prosecutor, the judges and the defence counsel have reached an agreement outside the Court and the defendant has no idea about it. The consumer interests can be impaired as well if the consumer is found in the situation where the “defence counsel”, i.e. the effective competition, is not able to accomplish its duties. Moreover, a sound market economy cannot exist without competition, exactly as a fair trial cannot exist in the absence of divergent arguments.

### 1.2. Topic

The Internet revolution and trade globalization have changed the face of B2B transactions and the Competition Authorities need to apply established principles to new phenomena, such as embedded networks and co-opetition. The permanent social interaction involved by the new co-opetitive mindset may facilitate the alignment of commercial conduct between the main competitors on the market.

Joint dominance is a matter of interdependence among the undertakings concerned. The undertakings are separate organisms capable of competing on the market by themselves. However, in order to reduce the uncertainty risk, they tend to coordinate their commercial conduct and sometimes seem to act together on the market, as a single entity. Despite certain conflicting interests, they also share strong common values and are exposed to common risks. They are capable to counteract the competition if they jointly hold substantial market power and the sphere of their common interests is clearly defined and persistent.

It's well-known that the oligopolistic markets by definition engage a high level of transparency and therefore provide favourable conditions for tacit coordination. However, there are non-oligopolistic markets where the information exchange is very intensive and the market transparency is not a matter of structure, but rather a matter of commitment in constant information exchange.

According to one legend, Diogenes of Sinope (412-323 B.C.) has been seen roaming about Athens with a lantern in broad daylight and looking for an honest man but never finding one. The Competition Authorities might find themselves in a similar position, looking for explicit or oligopolistic collusion in cases where the nature of the collusion is not explicit and not oligopolistic either. However, it is often clear as daylight that continuous, non-binding and wide-spread communication occurs on the specific market.

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<sup>1</sup> An increasing number of workshops and tracks on this theme have been lately organized: EURAM Stockholm 2002, EIASM Catane 2004, EURAM Paris 2007 and EIASM Madrid 2008. The forthcoming workshop “Focus on cooperation and innovation” will take place in Montpellier, June 17-18 2010.

### 1.3. Purpose

The purpose of this study is to explore the legal concept of joint dominance and to reconsider the sphere of economic links supporting joint dominance. The following questions have to be answered in order to achieve this purpose. What is the difference between collusion under Article 101 and respectively Article 102 FEU? Do the co-opetitive markets satisfy the *Airtours* criteria? Which criteria shall be considered by an appraisal test appropriated to identify joint dominant positions?

### 1.4. Delimitations

I have decided to focus on horizontal and conglomerate relations, since the most harmful anti-competitive effects concern the restrictive agreements engaged either by the direct competitors or by the suppliers of complementary products. The group economic unit doctrine<sup>2</sup> has been considered by this study without accounting for it in detail since this matter belongs to a distinct legal field, i.e. the concept of undertakings. The area of enforcement has not been discussed by the present study since the core issue is the relevant substantive law. A complete comprehension of this study requires previous knowledge in the field of EU Competition Law and, strategic and financial management.

### 1.5. Method and material

According to the comprehension, that exposing old associations between old matters is no scientific drift, I've found myself obliged to search for supporting evidence outside the case law box, in the field of business management and return to the traditional legal instruments in order to translate the economic findings into a line of legal reasoning. The research method used can be defined as proceeding on observing and analyzing the legal and the economic matters considered relevant for the scope of this study, in order to reveal new correlations and to deliver a more adequate definition of the legal matter under review, i.e. the concept of joint dominance.

The study pursues to enhance the comprehension of the joint dominant conduct by importing the most recent findings from the management science into the legal frame of thinking. I have used both books and articles from reputable journals such as *Revue Française de Gestion*, *International Studies of Management & Organization* and *DePaul Business & Commercial Law Journal*.

The legal concept of joint dominance has been chiefly developed by the following cases: *Italian Flat Glass (1992)*, *CEWAL*, *Irish Sugar*, *Almelo*, *French Republic*, *Gencor*, *Airtours* and recently *Impala*. *CEWAL* and *Irish Sugar* constitute infringements under Article 102 FEU and the last four, investigations under EUMR. *Almelo* is a preliminary ruling concerning the interpretation of Articles 101(1), 102 and 106(2) FEU. This study comprises discussions of all these cases, while it dedicates closer attention to *Italian Flat Glass (1992)*, *CEWAL* and *Airtours*. The leading cases targeted by the Article 102 FEU are *Italian Flat Glass (1992)*, *CEWAL* and *Irish Sugar* and in all these cases, the nature of collusion is explicit, based on contractual links. The leading cases under the Merger Regulation describe the situation of the tight oligopolies. In *CEWAL*, A-G Fennelly provided the case of

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<sup>2</sup> Furthermore see Goyder & Albors-Llorens 2009, pp. 27-32

interlocking directorates as example for structural links between joint dominant undertakings. In order to illustrate this legal configuration, I have used two merger cases, *AAC/Lonrho* and *Generali/Ina*.

The relation between the Articles 101 and 102 FEU has been further discussed by referring to *Continental Can*, *Tetra Pak I*, *Wood Pulp* and *Almelo*. The aim of this discussion is to achieve better understanding of the notion of collusive conduct in oligopolistic configurations. Henceforth, I will also underline the relation between the two legal fields concerned with dominance, namely Article 102 FEU and the Merger Regulation, since the concept of joint dominance has been coherently developed by both, until *Airtours*. The judgment in *Airtours* laid the foundation for the current SIEC-test that considers the impact of the unilateral anticompetitive effects even in the absence of dominance. This turning point has to be marked. Moreover, I have used two cases of monitoring competitors' conduct, *Italian Flat Glass* (1981) and *MoDo*, in order to illustrate the situation where the competitors delegate illegal activities to third-parties, since the coordination in network relations is often organized by specialized research and or suchlike firms. The definition of tight oligopoly is drawn from *Gencor/Lonrho* case. The term has been previously used in *Italian Flat Glass* (1992), but a practicable definition of this concept is not delivered before the judgment in *Gencor/Lonrho*.

The exclusionary practices supported by intangible assets exploited jointly by groups of undertakings are exemplified by referring to *Microsoft* and *IMS Health*. The in-house generated intangible assets involved in these two cases present many points of similarity with the intangible assets usually involved in the co-opetitive configurations; the facts in *Microsoft* have been extrapolated in order to illustrate the case of co-opetitive interoperability.

I have paid major attention to the relevant acts of regulation and to the interesting issues discussed by the A-G Opinions on precedential case law. Informative material from Directorate General for Competition, Commission and OECD Roundtables has been considered also. In order to provide an accurate definition of some essential terms, I have used the Oxford Reference Dictionary. The study uses the article numbering of the Lisbon Treaty.

## 1.6. Outline

The rest of the paper is organized as follows. In Chapter 2, I introduce the legal concepts of joint dominance and of trust-facilitating device; afterwards I disclose the supporting connection between collusive information schemes and abusive conduct and finally discuss the findings related to joint dominance in *Italian Flat Glass* (1992) and *CEWAL*. Chapter 3 illustrates the conceptual duality of joint dominance and discusses the relevant case law governed by the Merger Regulation, being nevertheless pertinent to the application of Article 102 FEU. Further, in Chapter 4 I introduce the notion of embedded networks and discuss the interfirm communication within networks, by referring to the case law and management literature. In chapter 5, I revise the legal definition of joint dominance and identify a set of dominance supporting links, i.e. the sphere of collective interests that may support joint dominance. Chapter 6 concludes this study.

## 2. Joint Dominance for the scope of Article 102 FEU

### 2.1. Definition of Joint Dominance

Joint or collective dominance has been treated by the Competition Authorities as equivalent to oligopolistic dominance. As general rule, joint market power exercised by a limited number of undertakings corresponds to the market of tight oligopoly. The concept of joint dominance has been developed under both Article 102 of the Treaty on the functioning of EU, named FEU in this paper, and the regulations on the control of concentrations between undertakings.

Based on the economic links that competitors might share with each other, joint dominance can be defined as a relationship of mutual interdependence. The joint dominant competitors are interdependent to each other, though able to act independently of the other competitors and the rest of market actors. The case law provides following examples of connecting links:

- ✓ Contractual links such as cooperation or license agreement, which might be a matter of explicit collusion and,
- ✓ Oligopolistic interdependence, result of the market structure, which is an issue of tacit collusion.<sup>3</sup>

It is not necessary that the undertakings in question adopt identical conduct on the market in every respect.<sup>4</sup> What matters is that they are able to adopt a common commercial strategy and act to a considerable extent independently of their competitors, their customers, and also of consumers.<sup>5</sup>

Table 1- Coordination within organizational collectives- recast Yami 2006

	Non-concentrative associations		Concentrative associations	Group Economic Unit
<b>Legal scope</b>	Article 101 FEU Article 102 FEU	Article 102 FEU	Merger Regulation (ex-ante) Article 102 FEU (ex-post)	Internal allocation of resources is always lawful.
<b>Economic Links</b>	Contractual	Social	Structural	Hierarchic
<b>Knowledge exchanged</b>	Explicit	Explicit & Tacit	Explicit & Tacit	Explicit & Tacit
<b>Forms of control</b>	Economic sanction	Social sanction	Legal sanction	Hierarchic sanction
<b>Coordinative structure</b>	Cartels, Trade & Professional Associations	Collusive oligopolies & Informal leadership	Interlocking Directorates Cross Shareholdings	Internal set of rules & regulations

In the table above, Yami<sup>6</sup> has used collective strategies as main criterion for the classification of inter-organizational conduct. The implicit threat of social sanction as a consequence of the contingency planning and the strategic ambiguity employed by the undertakings concerned is not yet considered by law. Another

<sup>3</sup> Goyder & Albors-Llorens, p 378 referring to Italian Flat Glass, para 45

<sup>4</sup> Irish Sugar, T-228/97, ECR 1999 Page II-02969, para 66

<sup>5</sup> French Republic v. Commission, supported by Federal Republic of Germany, C-68/94 and Société Commerciale des Potasses et de l'Azote (SCPA) and Entreprise Minière et Chimique (EMC), C-30/95, para 221

<sup>6</sup> Yami, Fondements et perspectives des stratégies collectives, Revue française de gestion – N° 167/2006

observation is that both single and joint dominance might occur within the social linked groups. If the group has an informal leader, then single dominance is more probable. Otherwise, it is likely to disclose a collusive oligopoly and subsequently, a joint dominant position.

## 2.2. Trust Facilitating Devices

According to the Oxford English Dictionary, the first definition of the word “trust” is following: “[c]onfidence in or reliance on some quality or attribute of a person or thing or the truth of a statement”<sup>7</sup>. The term of trust facilitating devices refers to this definition of the word “trust”.

The trust has increasingly replaced the formal agreements between the undertakings and become a lower-cost, higher-value substitute. The general trends show that business strategy moves away from the adversarial perspective on transactions. Brandenburger and Nalebuff wrote a popular business-press book<sup>8</sup>, in which they promoted this trend. The game-theory inspired strategy promoted in this book has become an integral part of the contemporary canon of business strategy.<sup>9</sup>

### 2.2.1. Trust via Interlocking Directorates

Despite the fact that the personnel turns over all the time within an undertaking, the institutional memory may lead the new managers to repeat the policy of the retired ones without even fully understanding it. The institutionalization of trust among competitors facilitates that the individuals employed are able to internalize economic interests shared by the competitors and by that may learn to trust each other.<sup>10</sup>

Detailed knowledge about the other firms may support the establishing of coordination. It has been proved that the existence of interlocking directorates<sup>11</sup> strengthens the connection, enhances the trust and facilitates the coordination between the undertakings.

In *AAC/Lonrho*<sup>12</sup>, seven out of the 15 directors of De Beers Consolidated Mines Ltd, henceforth named DBCM, were members on the directorate board of Anglo American Corporation, henceforth named AAC, and the same persons held the posts of Chairman and Deputy Chairman in both companies. Members of the boards of the AAC and DBCM were also on the board of the EOS or other companies controlled by the Oppenheimer family. Moreover a number of the directors on the AAC and DBCM boards were paid by EOS. The Oppenheimer family would have gained the control over Lonrho due to the multitude of cross-shareholdings and interlocking directorates. AAC and its allies have been required to retain only 9,9 % of the shares in Lonrho and the rest of

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<sup>7</sup> Oxford Reference Dictionary 1986

<sup>8</sup> Brandenburger & Nalebuff 1996; look inside link: [http://www.amazon.com/Co-Opetition-Revolution-Combines-Competition-Cooperation/dp/0385479506#reader\\_0385479506](http://www.amazon.com/Co-Opetition-Revolution-Combines-Competition-Cooperation/dp/0385479506#reader_0385479506)

<sup>9</sup> Rabkin 2009, p. 94

<sup>10</sup> Footnote 9, pp. 71-73

<sup>11</sup> The situation where one person is a director of two different legal entities has been defined under the term of interlocking directorate.

<sup>12</sup> Case No IV/M.754 - AAC/Lonrho, OJ L 149, 20.5.1998, p 21-45, para 9

shares had to be transferred to an independent trustee.<sup>13</sup> The Commission has not decided that the AAC would undertake to eliminate the interlocking directorates from its board of directors.

In *Generali/INA*<sup>14</sup>, the Commission went a step further and cleared the merger of two insurance companies, on the condition that the merging undertakings would assure that directors of the INA and Generali would not sit on the boards or exercise control of other insurance firms in Italy. The Commission emphasized the risk implied by the access to commercially sensitive information and the exchange of information among competing undertakings. However, as Monti<sup>15</sup> accentuated, it would be much more effective if the Commission could prevent the creation of interlocking directorates instead of only acknowledging it ex-post. Once a joint control position has been created, the power of the Competition Authorities to attack it under the Article 102 FEU is limited. A-G Fennelly<sup>16</sup> remarked that the connecting links necessary for the foundation of a joint dominant position might be provided by the use of pattern conditions of supply established by interlocking directorships. FEU interlocking directorates can only be penalized if they create a joint dominant position, which subsequently is abused. By contrast, the US Law prohibits the interlocking directorates per se.<sup>17</sup>

Cross-directorships, participation in joint ventures or similar arrangements can facilitate monitoring of the competitors' behaviour on markets with a lower degree of structural transparency and by that they can enhance the institutionalized trust.<sup>18</sup>

### 2.2.2. Trust via Trade Associations

The trade association activities benefit often from statutory and non-statutory privileges, such as exemptions and clearances, which permit them to perform their beneficial roles.<sup>19</sup> On the other hand, the trade associations offer opportunities for the direct competitors to meet on regular basis. This could easily spill over into anticompetitive activities and facilitate collusive or/and exclusionary conduct.<sup>20</sup>

There may be a collective action to compel the distributors not to enter in any business relations with non-members or with members that do not agree with the association's decisions; this action is also known under the term of horizontal boycott.<sup>21</sup>

### 2.2.3. Trust via Standard Setting Organisations

*“Anytime there’s a player in your game who’s also a player in another game, the two games are potentially linked. The player in common could be ...any of your competitors.”*<sup>22</sup>

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<sup>13</sup> Footnote 12, paras 126-138

<sup>14</sup> Case IV/M.1712 Generali/INA, OJ C 058, 01/03/00 P. 0006 – 0016, paras. 75-76.

<sup>15</sup> Monti 2001, pp. 139-141

<sup>16</sup> Opinion of A-G Fennelly delivered on 29 October 1998 related to CEWAL joined cases, ECR 2000 Page I-01365, para 28

<sup>17</sup> Footnote 15, pp. 140-141

<sup>18</sup> Draft Commission notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 331 , 31/12/2002 P. 0018 - 0031, para 59

<sup>19</sup> OECD Roundtables, DAF/COMP(2007)45, p. 7

<sup>20</sup> Footnote 19, p. 8

<sup>21</sup> Footnote 19, p. 238

The two “games” of trade representation and standard setting are often linked in this way. The main ingredient is the contingency, defined by Brandenburger and Nalebuff as the belief that what happens in one game influence the trend of events in the other game. The mutual investment and risk sharing are examples for contingencies created purposely to foster the interdependence between the competitors. The trust facilitating devices created by networking allow the player to appreciate the “larger game” and the benefits of this “larger game” will compensate the potential decreasing of benefits on the specific market where the competition is distorted.<sup>23</sup> The industry standards increase the degree of comparability between the competitors’ products and thereby may facilitate the tacit coordination. In addition, the evaluation and validation of industry standards imply a lot of information exchange between the members of the trade organizations.<sup>24</sup>

### 2.3. Abuse of Joint Dominance

Article 102 FEU targets the “*abuse by one or more undertakings of a dominant position*”. The undertakings concerned are under a special responsibility not to allow their conduct to impair the undistorted competition.<sup>25</sup> According to the EU competition law, it is not illegal per se to hold a dominant position and the dominant undertakings are entitled to compete on the merits.<sup>26</sup> An appropriate form of competition on the merits is as an example, competing on price or quality.<sup>27</sup>

#### 2.3.1. Transparent Markets and Consumer Prejudice

The prohibition laid down in Article 102 FEU has been justified by the consideration that harm should not be caused to the consumer<sup>28</sup>, either directly or indirectly by undermining the effective competition<sup>29</sup>. The harm for the consumers in oligopolistic markets, is the fact that equilibrium, occurs at a higher price level than under workable competition, since cutting prices is a futile initiative for an oligopolist; any other oligopolist can monitor the other’s actions and react almost instantly by undercutting this price. In the oligopolistic markets, the competitors are able to coordinate their actions without entering in any agreements, due to the specific anticompetitive features which have been defined by *Gencor/Lonrho*<sup>30</sup>.

The market transparency facilitates the price comparison and alignment of sales conditions, both by conscious and unconscious parallel conduct. The oligopolistic markets are naturally transparent. This type of transparency is induced by the market structure and the best way to deal with it is ex-ante, by controlling and preventing the potentially harmful mergers or other forms of market concentrations<sup>31</sup>.

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<sup>22</sup> Brandenburger & Nalebuff 1996, p 219

<sup>23</sup> Co-opetitors calculate the profit over a longer period of time and aggregated on a web of markets instead of quarter/annual reported profits on each and every market. This is the 1+1=3 strategic line of conduct. In a competition law jargon I will express this as 1+1+ spillover =3.

<sup>24</sup> Korah 2007, p. 127

<sup>25</sup> Jones & Sufrin 2007, p. 323 with reference to Irish Sugar, para 112

<sup>26</sup> Communication from the Commission, OJ C 045 , 24/02/2009 P. 0007 – 0020, para 1

<sup>27</sup> Case COMP/C-3/37.990 — Intel, OJ C 227 , 22/09/2009 P. 0013 – 0017, paras 39-42

<sup>28</sup> Europemballage and Continental Can v Commission, Case 6/72, ECR 1973 215, para 26; Suiker Unie, ECR 1975 Page 01663, joined cases 40-48, 50, 54-56, 111, 113, 114-73, paras 526-527

<sup>29</sup> Hoffmann-La Roche, Case 85/76, ECR 1979 Page 00461, para125

<sup>30</sup> See further chapter 3.2

<sup>31</sup> The oligopolistic market has a high degree of concentration. The Herfindahl-Hirschmann index (HHI) is the measure used by the Competition authorities, in order to assess market concentration. HHI is calculated as the sum of the squared markets shares for all

The market transparency might be obtained by collusive agreements that grant access to the competitors' pricing strategy and by that facilitate coordination. This type of market transparency is an artificial one, obtained through collusive conduct. In order to deal with this harmful phenomenon, the Competition Authorities have to prevent the unlawful exchange of information between the competitors, because the simple possession of knowledge about the others' course of conduct constitutes no infringement even if the effective competition is obviously impaired. An infringement can be proved only by bringing evidence on either the concurrence of wills under article 101 or the existence of correlative economic links under article 102 FEU.

### 2.3.2. The relation between Collusive and Exclusionary Conduct

The Italian glass suppliers were three independent economic entities united by links affording them to behave independently of their competitors, customers and consumers. The main lesson of the *Italian Flat Glass (1992)* is the following: If the parties to an unlawful restrictive practice under Article 101(1) FEU also hold a substantial market share, simply by virtue of these facts alone is not possible to assert that they hold a joint dominant position. It is not possible either to assert that the unlawful practice by itself represents an abuse of joint dominant position, according to this case of law.

According to the protocol on the internal market and competition<sup>32</sup>, which is an integral part of the Treaty on European Union, the internal market shall include a system ensuring that the competition is not distorted. In *Continental Can*<sup>33</sup> case, the Court emphasized that the articles 101 and 102 FEU have been included in the Treaty for the same reason. The same conduct or practices may involve breach of both Articles. A-G Fennelly in his opinion<sup>34</sup> concluded that "Articles [101 FEU] and [102 FEU] do not exist in watertight compartments".

If the anticompetitive behaviour can be explained as being the result of economically rational reactions of oligopolists, then Article 101 is not applicable according to *Wood Pulp's* judgment.<sup>35</sup> Consequently, the ECJ cannot affirm that the same evidence which offers a defence under Article 101 also constitutes evidence of an abuse under Article 102 FEU. This would conflict with the legitimate expectations of the undertakings, according to the ex-Commissioner, Mario Monti.<sup>36</sup>

In *Tetra Pak I*<sup>37</sup>, the CFI upheld that the acquisition of exclusive license by a dominant undertaking constituted a breach of the Article 102 FEU, due to its effects on the structure of competition. The applicant argued that the acquisition was allowed by the then Patent Block Exemption<sup>38</sup>. The court pointed out that the block exemption

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the competitors in a specific market. The monopoly market will have a concentration of 10 000 HHI and an oligopoly of four competitors with equal market shares will have a concentration of  $25^2 + 25^2 + 25^2 + 25^2 = 2 500$  HHI. An index over 1 800 shows a high level of concentration, whilst an index of 1 000 to 1 800 shows a moderate market concentration. In markets with cross-shareholdings or joint ventures the Commission may use a modified HHI, which reveals the impact of cross-shareholdings on the market structure. See case IV/M.1383 - Exxon/Mobil, point 256

<sup>32</sup> Protocol (No 27) on the internal market and competition, Official Journal 115 , 09/05/2008 P. 0309 - 0309

<sup>33</sup> Europemballage Corporation and Continental, Case 6-72, ECR 1973 Page 00215

<sup>34</sup> Opinion of A-G Fennelly delivered on 29 October 1998 related to CEWAL joined cases, ECR 2000 Page I-01365, para 22

<sup>35</sup> A Ahlstrom Oy v. Commission, Cases C89,104, 114, 116,117,125,129/85, ECR1993 I1307, paras 64-65

<sup>36</sup> Monti 2001, p.145

<sup>37</sup> Tetra Pak I, Case T-51/89, ECR 1990 Page II-00309

<sup>38</sup> Commission Regulation 2349/84 on the application of Article [101 FEU] (3) of the Treaty to certain categories of patent licensing agreements, OJ L 219, 16.8.1984, p. 15-24

as secondary legislation had lower priority in comparison with the Article 102 FEU.<sup>39</sup> The conflict between the block exemption and primary legislation may occur because there is no positive assessment of the market situation and no case-by-case examination of the circumstances. The positive clearance from the Article 101 by block exemptions has no binding effect upon the Commission; the dominant undertakings still can be charged for infringements of Article 102 FEU.

The Block Exemptions under Article 101 may strengthen or create dominant positions.<sup>40</sup> The Competition Authorities may withdraw the exemption<sup>41</sup> or turn to Article 102 FEU and search to establish abuse of joint dominant position. Article 102 FEU can be applied to undertakings benefiting from a block exemption when<sup>42</sup>:

- ✓ The joint dominant position is the result of the exempted agreement
- ✓ The existence of a dominant position is established by the Court and
- ✓ The dominant position is abused.

In *Almelo*<sup>43</sup>, IJM the regional distributor of electricity, supported by the Trade Association of Electricity Operators in the Netherlands, required the local distributors, into an exclusive purchasing obligation. The exclusive purchasing clause had been included in the general conditions for the supply of electric power drawn up by the Trade Association of Electricity Operators. According to the judgment in *Almelo*, the application of an exclusive purchasing clause is precluded by both Article 101 and Article 102 FEU, but may be permitted by Article 106(2) if the clause is absolutely necessary in order to enable the undertakings to perform a task of public interest. An exclusive purchasing clause amounts to abuse of joint dominance and to engagement in collusive conduct, if the task assigned by the public authorities can be performed even without enforcing such a clause.

## 2.4. Case law within Article 102 FEU defining Joint Dominance

### 2.4.1. Joint Production: Italian Flat Glass

In *Italian Flat Glass (1992)*<sup>44</sup> the Commission imposed fines on three glass suppliers on both automotive and non-automotive market, under article 101, but also made a separate finding that the suppliers were in breach of the Article 102 FEU by abuse of joint dominance. Even if on appeal the Court overruled this last finding of the Commission, the decision provided a useful definition of joint dominance:

- ✓ High joint market shares fairly stable for several years;
- ✓ Capable of acting independently of the market trends and the conditions of competition;
- ✓ New producers have difficulties to penetrate the market because of the inelastic demand and high initial investment;
- ✓ The undertakings present themselves on the market, as a single entity and not as individuals;

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<sup>39</sup> Footnote 37, para 25

<sup>40</sup> See CEWAL C-395/96 P and C-396/96 P and Atlantic Container Line T-191/98, T-212/98 to T-214/98

<sup>41</sup> Commission Regulation (EC) No 823/2000 on the application of Article [101(3)] of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies, Art 12 c)

<sup>42</sup> See CEWAL, C-395/96 P and C-396/96 P, ECR 2000, Page I-01365, para 40.

<sup>43</sup> Gemeente Almelo and Others v. Energiebedrijf NV, C-393-92, ECR 1994 I-1477, paras 42-43; See also the opinion of Advocate-General Darmon, para 117.

<sup>44</sup> Case IV/ 31. 906, flat glass, OJ L 33, 4.2.1989, p. 44–73, para 78-79; 2<sup>nd</sup> Commission's decision concerning the flat glass cartel.

- ✓ The suppliers jointly maintain special links with a group of main distributors;
- ✓ A marked degree of interdependence with regard to prices & terms of sale, relations with customers and business strategies.

On appeal<sup>45</sup> the Commission sought to prove that the restrictive agreements might be linked to the joint dominant position. The CFI considered that in principle, there was no reason to prevent two or more independent economic entities from being united by such economic links permitting them to hold a joint dominant position; two or more independent undertakings may achieve, through agreements or licences as an example, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers.<sup>46</sup>

#### 2.4.2. Shipping Conference: *CEWAL*

The most discussed example of joint dominance is the one of shipping conferences, owing to the close economic links between the ship-owners who can act as a single entity.<sup>47</sup> “United by such economic links<sup>48</sup>” is a phrase that many legal commentators tried to interpret in order to ascertain which kind of links or factors allow undertakings to act together independently of their competitors, their customers and consumers.<sup>49</sup>

Whilst the trade associations are not allowed to discuss prices, the carriers within a liner conference have been permitted to agree on a common rate structure and a regular schedule of service on specific routes, during a long period of time<sup>50</sup>. The conferences used also to periodically publish their tariffs and announce desired rate increases.<sup>51</sup> The economic theorists predict that non-conference carriers are inclined to mimic the conference prices. If the non-conference and conference carriers compete for the same shippers on the same routes, they tend to respond in the same way to market information. Maintaining the price above the competitive level suits the interests of both conference and non-conference carriers and they tend to reach tacit agreements on sustaining this level of price.<sup>52</sup>

Even if the shipping lines were allowed a block of exemptions, concerning matters such rate-fixing, allocation of sailings and cargo between members, the Commission has taken an action against three liner shipping conferences operating tours between North Sea and West Africa, on the accusation of abuse of joint dominance. The abuse consisted in loyalty contracts outside the liner conference, involving the shippers. The contracts

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<sup>45</sup> Italian Flat Glass, joined cases, T-68/89, T-77/89 & T-78/89, ECR1992 Page II-01403

<sup>46</sup> Footnote 45, para 358; see also Hoffmann-La Roche, Case 85/76, ECR 1979 Page 00461, paras 38 and 48

<sup>47</sup>CEWAL OJ L 34, 10.2.1993, p. 20–43; Compagnie maritime belge, C-395/96P & C-396/96P ECR 2000 Page I-01365, paras 41-42; Atlantic Container Line, joined cases T-191/98, T-212/98 to T-214/98, ECR 2003 Page II-03275

<sup>48</sup> Italian Flat Glass, T-68/89, T-77/89 & T-78/89, para 358; Irish Sugar 97/624/EC, para 112; Opinion of Advocate General Fennelly on C-395/96 P and C-396/96 P, para 27; P & I Clubs 1999/329/EC, para 120; Atlantic Container, T-191/98, T-212/98 to T-214/98, para 641.

<sup>49</sup> Almelo C-393/92 ECR 1994 I-1477, para 43; Kali und Salz, joined Cases C-68/94 & C-30/95, para 22; Compagnie maritime belge, joined Cases C-395/96 P & C-396/96 P, paras 41-42 ; Wouters, C-309/99, para 114.

<sup>50</sup> Recently, the Commission has issued a new regulation, EC No 906/2009 that is going to replace Council Regulation (EEC) No 4056/86.

<sup>51</sup>von Hinten-Reed, Chipty & Scott Morton, June 2004 p. 4

<sup>52</sup> Carlton & Perloff 1999, p. 200

provided for substantial rebates where a shipper used only CEWAL<sup>53</sup> for their shipping requirements. Another abuse was the “fighting ships” strategy, by which the members of CEWAL matched and under-cut the prices of the only competitor on the relevant market, with sharing of both earnings and loss between them.

An agreement exempted by a block exemption may constitute an economic link for the purpose of finding joint dominance<sup>54</sup>. The legal background of *CEWAL*'s appeal in front of the ECJ was the Regulation No 4056/86<sup>55</sup>. Article 3 of this regulation exempted certain agreements between members of liner conferences from the prohibition in Article 101 FEU. However, the article 8(2) of the previously named regulation stipulated that the Commission might withdraw the benefit of the block exemption and “take the appropriate measures for the purpose of bringing to an end the infringement of Article [102 FEU]”, if the conduct of conferences benefiting from the exemption laid down in the Article 3 were found to be in breach with the Article 102 FEU.

The ECJ affirmed that the implementation of an agreement, decision or concerted practice, where the undertakings are linked in such a way that allows them to present themselves on the market as a collective entity constitutes a legal ground to establish the existence of joint dominance.<sup>56</sup> According to the findings in *CEWAL*, the cooperation fostered by the liner conference might facilitate market coordination.<sup>57</sup>

## 2.5. Summary View on Ex-Post Analysis of Joint Dominance

Article 102 of the FEU Treaty is used to capture the anticompetitive effects of the past actions of jointly dominant undertakings coordinating their conduct on the market. Article 102 FEU prohibits the jointly dominant undertakings from engaging in certain types of conduct, i.e. exclusionary and exploitative.

In order to establish joint dominance, one needs to do more than recycle the facts constituting an infringement of Article 101 FEU.<sup>58</sup> Joint dominance may occur as result of joint policies or activities<sup>59</sup>, even if those are only partially congruent<sup>60</sup>. Joint, collective and oligopolistic dominance are treated as equivalents by law. Privileges of law, such as exemptions, concessions, exclusive rights foster cohesion and collusion between the main competitors and the outsiders have no other choice than to follow the leaders of the market. Complying with the leaders' commercial policies is enforced by trust facilitating devices that propagate implicit threats about what can happen if one undertaking deviates from the common policy. The consumer might suffer indirect damages under the form of higher price and limited range of choice, regarding products, service and other terms & conditions.

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<sup>53</sup> *CEWAL*, joined cases C-395/96 P and C-396/96 P, ECR 2000 Page I-01365

<sup>54</sup> Goyder & Albors-Llorens, p 378

<sup>55</sup> Council Regulation No 4056/86 of 22 Dec. 1986 laying down detailed rules for the application of Articles [101 FEU] and [102 FEU] of the Treaty to Maritime Transport O.J. 1986, L 378/4. The 28<sup>th</sup> of September 2009 has been issued the Commission Regulation No 906/2009 on the application of Article [101 FEU] (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia). Fixing prices and/or capacity is no longer allowed. However, the justifications for a block exemption for liner consortia are still valid. Regulation No 906/2009 enters into force the 26<sup>th</sup> of April 2010 and applies until 25<sup>th</sup> April 2015.

<sup>56</sup> *CEWAL*, Joined cases C395-396/96P, ECR 2000, Page I-01365, paras 43-45.

<sup>57</sup> Footnote 56, paras 48-49.

<sup>58</sup> *Italian Flat Glass*, T-68/89, ECR1992 Page II-01403

<sup>59</sup> Footnotes 56-57

<sup>60</sup> *Irish Sugar*, T-228/97, ECR1999 Page II-02969

### 3. The Relationship between the Article 102 FEU and the Merger Regulation

#### 3.1. Anticompetitive effects: projection of the past or prediction of the future?

It's almost redundant to emphasize the importance of preventing the creation or strengthening of market structures that might foster harmful anticompetitive behaviour. However, the ex-ante analysis<sup>61</sup> is a simulation exercise, which requires expertise in using prospective analysis and implies taking into account several possible future scenarios. On the other hand, the ex-post analysis deals with facts finding, on the pursuit to disclose a concrete situation and that's why it involves less speculative reasoning.

According to the judgment in *French Republic*, creation or strengthening of joint dominance came within the scope of Article 2 of the first merger regulation<sup>62</sup>, even if the dominant position in question was held by the parties to the concentration together with an entity not a party thereto.<sup>63</sup>

The judgment in *Airtours* led to changes in the first merger regulation. The new substantive test, SIEC implemented by the current merger regulation<sup>64</sup>, henceforth named EUMR is more flexible than the previous one and provides a clear basis to challenge harmful mergers.<sup>65</sup> Under the first merger regulation a merger was likely to be blocked if either led to single or joint dominance. The current merger regulation closes the gap by capturing the non-collusive oligopolies or mergers leading to non-coordinated effects.

Under the EUMR the Commission has also issued draft guidelines on horizontal and non-horizontal mergers which aim to provide more predictability for the merging undertakings on how such mergers will be examined.<sup>66</sup> The guidelines on the assessment of horizontal mergers established several factors to be considered in the analysis of anti-competitive effects of non-coordinated nature: substantial market shares, suppliers of direct competing or close-related products, elimination of an important competitor, weak buyers, strong entry barriers, inelastic supply and high switching costs faced by customers.<sup>67</sup> The guidelines on the assessment of non-horizontal mergers makes evident that the impending implicit threats become reality in the context of the conglomerate mergers, when the foreclosed rivals are not excluded from the market. Instead, the rivals are left with no other choice, than enjoying the shelter of the increased price level<sup>68</sup>, according to the motto: If you can't beat them, join them!

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<sup>61</sup> Ex-ante analysis of anticompetitive effects is concerned with two aspects: coordinated and non-coordinated effects. The first implies market coordination by conscious parallel conduct and the latter deals with market foreclosure by unilateral conduct.

<sup>62</sup> Council Regulation (EEC) No 4064/89 of 21<sup>st</sup> December 1989 on the control of concentrations between undertakings, OJ L395, 30.12.1989, p.1

<sup>63</sup> *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission*, Joined cases C-68/94 and C-30/95, ECR1998 Page I-01375, paras 166-8.

<sup>64</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22

<sup>65</sup> Röller & De la Mano 2006, p. 11

<sup>66</sup> Lidgard, ECPL 2009

<sup>67</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–18, para 26–38

<sup>68</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6–25, para 120

### 3.2. Case law under the Merger Regulation defining Joint Dominance

In *French Republic*, the ECJ has affirmed that the European Commission is entitled to stop mergers if they create a joint dominant position, irrespective of the nature of links existing between the oligopolists. However the Commission has to prove that the undertakings involved in the merger together with one or other undertakings on the market are capable of adopting a common strategy and acting independently of other actors, in particular because of the correlative factors which exist between them.<sup>69</sup>

The Court asserted in *Hoffmann- La Roche* that a dominant position is different from parallel conduct specific to oligopolies, because the conduct of dominant undertakings is non-coordinated while oligopolistic behaviour implies interaction.<sup>70</sup> However ten years later, the CFI in *Gencor*<sup>71</sup> upheld the opposite and included the relationship of interdependence existing between the members of a tight oligopoly, in the notion of dominance.<sup>72</sup> The Commission issued in its decision<sup>73</sup>, the frame definition for the notion of anti-competitive oligopolistic market:

*a) on the demand side, there is moderate growth, inelastic demand and insignificant countervailing buyer power. Buyers are therefore highly vulnerable to a potential abuse;*  
*(b) the supply side is highly concentrated with high market transparency for a homogeneous product, mature production technology, high entry barriers (including high sunk costs) and suppliers with financial links and multi-market contacts. These supply side characteristics make it easy for suppliers to engage in parallel behaviour and provide them with incentives to do so, without any countervailing checks from the demand side.*

Whenever the market has the features described by the frame definition and the competitors are aware that adopting a common strategy is more profitable than developing a peculiar strategy and deviating from the coordinated course of action, then a joint dominant position might arise according to the judgment in *Gencor*<sup>74</sup>, which has been later confirmed by *Airtours*<sup>75</sup>.

The Commission based its argumentation in *Airtours* decision on three grounds. Firstly, the merger facilitated the coordination between the oligopolists. Secondly, the retaliation mechanism was not absolutely necessary for the finding of joint dominance. Thirdly, the merger caused enhancement of market transparency, weakened the position of the actual and potential competitors and facilitated the elimination or the reduction of competition between the merged parties. The court held that the transparency was not as high as the Commission argued and the rational coordination between the oligopolists was perfectly justified and therefore lawful. The market shares

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<sup>69</sup> French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission, Joined cases C-68/94 and C-30/95, ECR1998 Page I-01375, para 221. ECJ decided to annul IV/M.308, Kali & Salz/MdK/Treuhand.

<sup>70</sup> Hoffmann- La Roche, Case 85/76, ECR 1979 Page 00461, para 39

<sup>71</sup> Gencor, T-102/96, ECR1999 Page II-00753

<sup>72</sup> Footnote 71, para 270

<sup>73</sup> Case No IV/M.619 - Gencor/Lonrho, OJ L 11, 14.1.1997, p. 30–72, para 14. The definition has been confirmed on appeal, Case T-102/96, ECR 1999 Page II-00753

<sup>74</sup> Footnote 71, para 276

<sup>75</sup> Airtours plc v Commission, T-342/99, ECR2002 Page II-02585, paras 60-61 CFI decided to integrally annul IV/M.1524 Airtours/First Choice.

had been fluctuating over the years before the merger and that's why the market was dynamic and the new entries were likely to occur.<sup>76</sup>

The judgment in *Airtours* is considered to be a milestone in the development of the doctrine of joint dominance since the CFI provided a set of three conditions to be fulfilled in order to find a joint dominant position. Firstly, each member of the dominant oligopoly must possess knowledge of the other competitors' conduct in order to monitor whether or not they are adopting the common strategy. Therefore, the market must be transparent enough to facilitate monitoring. Secondly, there must be an incentive not to depart from the common strategy on the market and adequate deterrents<sup>77</sup> ensuring that this incentive is sustainable over the time. Finally, it is necessary to prove that the other market actors, current and future competitors, as well as consumers, have no possibility to jeopardise the results expected from the common strategy.<sup>78</sup>

An immediate consequence of the *Airtours* is the change of the dominance test included in the first merger regulation, for the SIEC-test (Significantly impede effective competition) comprised by Article 2(3) of the current merger regulation. The table<sup>79</sup> below illustrates the gap left uncovered by the dominance test but considered by the SIEC:

Table 2 SLC/SIEC vs. Dominance: The gap- Kokkoris 2007

Case law	Dominance test	Draft Commission Notice	Mergers Guidelines
Single Dominance	Included	Paramount Market Position	Non-coordinated effects
The gap	Excluded	Non-collusive oligopolies	
Joint Dominance	Included	Collusive oligopolies	Coordinated effects

In *Laurent Piau*<sup>80</sup>, collective dominant football clubs were contractually linked via the FIFA organization. The CFI confirmed that the three cumulative conditions in *Airtours* must be present for a finding of joint dominance. This would seem to mean that the notion of joint dominance is for all intents and purposes identical under Article 102 FEU and the first merger regulation.<sup>81</sup>

The CFI's approach has been endorsed by the ECJ in *Impala*<sup>82</sup>, a case concerning the clearance of the Sony/BMG joint venture. The CFI had annulled the Commission decision to clear the joint venture, but the ECJ overturned this judgment and confirmed once again the *Airtours* criteria<sup>83</sup>. The key issue in this case was whether or not the five major record companies had held a joint dominant position before the merger between BMG and Sony.

<sup>76</sup> Lidgard, ECPL 2009

<sup>77</sup> Gencor, T-102/96, ECR 1999 Page II-00753, para 276

<sup>78</sup> *Airtours plc v Commission*, Case T-342/99, ECR2002 Page II-02585, para 62

<sup>79</sup> Kokkoris, June 1-2, 2007

<sup>80</sup> *Laurent Piau*, T-193/02, ECR 2005 Page II-00209

<sup>81</sup> Faull & Nikpay 2007, p. 341

<sup>82</sup> *Bertelsmann AG and Sony Corporation of America v Commission, Impala*, C-413/06 P, ECR2008 Page I-04951

<sup>83</sup> *Laurent Piau*, T-193/02, judgment of 26 January 2005 has used the term "Airtours Criteria" for the first time.

Treating the tacit collusion in the context of pre-existent joint dominance, gives the legal basis to enforce tacit collusion in Article 102 FEU.<sup>84</sup>

### 3.3. Summary View on Ex-Ante definition of Joint Dominance

The European Merger Regulation provides an ex-ante method of using merger control to prevent market structures which may facilitate tacit collusion. The method consists in analyzing the non-coordinated and coordinated effects of a horizontal or a non-horizontal concentration. In the context of the non-horizontal/conglomerate mergers, the outsiders are maybe not excluded but persuaded tacitly to follow the dominant strategy. Confirming *Airtours* criteria in *Laurent Piau* demonstrates that the definition of joint dominance under Article 102 FEU is coherent with the concept of joint dominance under the EUMR. In *Impala*, the pre-existence of a joint dominant position has been disclosed, fact which may entitle the application of the Article 102 FEU on tacit collusion. However, the scope of the current EUMR is larger than the scope of Article 102 FEU, since the first includes besides dominance also the case of non-collusive oligopolies.

Note that the legal notion of joint dominance has not been derived directly from the wording of either article 102 FEU or the EUMR. Therefore, it is left to the Courts and the Commission to extend and interpret these provisions in order to disclose the imminence of anticompetitive behaviour.

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<sup>84</sup> Mezzanotte, E.C.L.R. 2009, pp. 137-142

## 4. Information Exchange Schemes as Compliance Monitoring Devices

### 4.1. Introduction

The information exchange makes possible institutional learning, innovation and technical progress. On the other hand, the information exchange may represent unlawful conduct under Article 101(1) FEU which under certain circumstances, might be individually exempted by the Article 101(3) FEU or also collectively exempted by block exemption regulations. The occurrence of collusive oligopolies requires compliance monitoring devices i.e. information exchange schemes. However, one may be surprised that cases of information exchange engaged by undertakings with an appreciable market power, have almost invariably been dealt with under the Article 101 (1) rather than Article 102 FEU.

### 4.2. Intra- and Interfirm Networking

In the last two decades, we have witnessed the occurrence of new forms of inter-organizational relationships, allowing access to tacit knowledge of others and fostering interdependent coordination, both horizontally and vertically. The typology of the inter-organizational networks includes a large variety of tasks, but also a large number of organizations involved. The most common forms of networks are the joint ventures and the strategic alliances. The networks represent a new form of organization and not some halfway point between hierarchical<sup>85</sup> and market coordination<sup>86</sup>. The networking differs both from hierarchical and market coordination, because in the case of hierarchical coordination, the subordinate legal entities lack autonomy and in the case of market coordination the decision making is unilateral, spontaneous and ongoing. The networking involves multilevel elaborated decision making made by several visible hands.<sup>87</sup> The decision making within networks is both coordinated and non-coordinated and frequently involves a third party<sup>88</sup> to ensure the enforcement of the cooperative agreements.

The interfirm interdependencies have been seen through two different perspectives: competitive and cooperative. The competitive paradigm is represented inter alia by Smith, McNulty, Porter, Wernelfelt, Barney and Peteraf<sup>89</sup>. A main implication of the competitive paradigm is that the undertakings hold divergent interests that prompt them to adopt a self-interest-oriented and aggressive conduct. The other paradigm, the cooperative one is represented by Contractor & Lorange, Norman & Ramirez, Hakansson & Snehota, and Powell et al etc.<sup>90</sup> The implication of the cooperative paradigm is that the undertakings hold convergent, fully aligned interests fostered by the mutual benefits and “return of the favour”<sup>91</sup> mindset. The co-opetition represents a synthesis of these two theoretical models.

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<sup>85</sup> Situation within an economic group where the members have no freedom to determine their own conduct on the market, Case 30/87 Bodson, Opinion of A-G Fennelly delivered on joined cases C-395/96 P and C-396/96 P para 24.

<sup>86</sup> Market coordination may arise where competitors are able, without entering into an agreement or resorting to a concerted practice within the meaning of Article 101 of the Treaty, to identify and pursue common objectives, avoiding the normal mutual competitive pressure by a coherent system of implicit threats. OJ C 265, 18/10/2008 P. 0006 – 0025, para 80

<sup>87</sup> Casper & van Waarden 2005, p.97-98

<sup>88</sup> Footnote 87, p. 97

<sup>89</sup> Smith 1937, McNulty 1968, Porter 1980, Wernelfelt 1984, Barney 1991, Peteraf 1993

<sup>90</sup> Contractor & Lorange 1988, Norman & Ramirez 1993, Hakansson & Snehota 1995, Powell et al 1996

<sup>91</sup> Blau 1964

#### 4.2.1. Embedded Networks Firms

In management science, the formal and informal links between the units within an economic group composes the intrafirm network and the connecting link with external actors, the interfirm network<sup>92</sup>. In competition law, the usual approach taken is that each company within the group is a single undertaking. However this approach is conditioned by the fact that these companies are capable of an independent economic policymaking. If the parent company has legal and actual control and the power to allocate functions within the corporate group, then this condition is not satisfied. There is no effect on competition if an agreement within the group is not made by independent economic policymaking units. This assertion cores the “group economic theory” elaborated by the ECJ. The theory enables the Commission to apply a test to the relationship between the undertakings within the corporate group and reveal the actual economic relationships between them.<sup>93</sup>

The social capital might be seen as a collective intangible asset, and in this view, trust, reciprocity and strong social norms facilitate the cooperative conduct.<sup>94</sup> The social capital facilitates the pursuit of collective goals by sharing resources with actors which not necessarily have participated in their creation.<sup>95</sup> The use of this kind of capital has anticompetitive effects, according to Adler & Kwon because one actor’s use does not diminish the others’ access to the resource in question, while the use is exclusively allowed to the members of the network. The benefits of the foreclosure accrue to the undertakings involved, both individually and as a group.<sup>96</sup> Moreover, the strong social cohesion facilitates information exchange, creation of obligations and expectations, and sanctions on those who fail to fulfil their obligations.<sup>97</sup>

The co-opetition can be defined as a system of actors who interact on the ground of partial congruence of wills. The mutual benefits of the parties are not necessary equitable. The co-opetition is a new strategic doctrine that comprises an ensemble of competitive and cooperative manoeuvres permitting the undertakings to develop competitive advantages.<sup>98</sup> By focusing on a co-opetitive perspective,<sup>98</sup> the cooperation moves from a fully to a partially convergent interests structure and the competition moves from a fully to a partially divergent structure.<sup>99</sup>

#### 4.2.2. Strategic Non-verbal Communication

The co-opetitive agreements should employ strategic ambiguity, according to Brandenburger & Nalebuff, who suggest also that it is wise to maintain fog over what could happen if the relation breaks down. This means that some thoughts are never spoken and some threats remain implicit.<sup>100</sup> The implicit threat, as an expression of unspoken thoughts makes possible that the risk sharing and other implicit contingencies function effectively as

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<sup>92</sup> J Walter et al 2007, referring to Hansen 1999, p. 700

<sup>93</sup> Goyder & Albors-Llorens 2009, pp. 80-101; Commission Decision of 15.07.1992, Case IV/32.725 - Viho/Parker Pen, OJ L 233, 15.8.1992, p. 27–32

<sup>94</sup> J Walter et al 2007, referring to Putnam 1993, p. 700

<sup>95</sup> J Walter et al 2007, referring to Kostova & Roth 2003, p. 700

<sup>96</sup> Adler & Kwon 2002, p. 19, 154 cited references on EBSCO

<sup>97</sup> J Walter et al 2007, referring to Coleman 1988 and 1990, p. 700

<sup>98</sup> Dagnino et al, Aug/Sep 2007, pp. 88-95

<sup>99</sup> Padula & Dagnino 2007, pp. 32–52

<sup>100</sup> Brandenburger & Nalebuff 1996, pp. 127-132

trust facilitating devices.<sup>101</sup> In order to distinguish market, hierarchical and social relations, as components of the social structure, Adler & Kwon have drawn a tri-dimensional matrix that I will reproduce hereafter.<sup>102</sup>

Table 3- The relational mix- Adler & Kwon 2002

Dimension	Market relations	Hierarchic relations	Social relations
What is exchanged?	Goods and services for money	Obedience for material/spiritual security	Favours of today for favours of tomorrow
Are the terms of exchange made explicit?	Explicit and specific	Explicit though diffuse	Tacit and diffuse
Is the exchange symmetrical?	Symmetrical	Asymmetrical	Symmetrical (The favours are supposed to be returned)

The new mindset based on trust and mutual favours employs tacit and diffuse terms of exchange and even if the time horizon is not determined there is a tacit understanding that the favours will be returned sooner or later even if the terms of exchange are not specific. In the meanwhile the joint dominant conduct doesn't have to be either identical or specific. The requisite evidence is the reciprocity of the relation between the jointly dominant undertakings that is reflected by the symmetry of the exchange.

#### 4.2.3. Out-sourcing & In-sourcing

The outsourcing decisions are driven often by the need to procure specialised skills. The economic performance of manufacturing and service enterprises, related to price, quality or market positioning can be linked to "make or buy" decisions. The outsourcing allows focus on core business and improves the competitiveness. However, in parallel with the outsourcing of services by manufacturing firms, there is also a phenomenon of manufacturing firms increasingly becoming service providers for the knowledge intensive activities, such as coordination, management, quality control and design.<sup>103</sup> From the business process viewpoint, the outsourcing involved in partnership relations between competitors causes both positive and negative complementarities.<sup>104</sup> For the present study, it is foremost important to know that the co-opetitors must adjust the business processes among them, fact that requires granted access to a large range of information concerning the other market players' commercial policies. This course of action might increase the degree of transparency on a market where the co-competition is a widespread business practice. Moreover, the competitors may employ a third party as joint outsourcing company.

<sup>101</sup> Rabkin 2009, pp. 63-118

<sup>102</sup> Adler & Kwon 2002, p. 19, table 1, 154 cited references on EBSCO

<sup>103</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - The competitiveness of business-related services and their contribution to the performance of European enterprises COM/2003/0747 final

<sup>104</sup> Bonel & Rocco 2007, pp. 70-96

In *Italian Flat Glass (1981)*<sup>105</sup>, the cartel members had hired a trust company<sup>106</sup>, Fides Unione Fiduciaria SpA Milan<sup>107</sup> and used it in order to collect confidential information concerning their sales, broken down by customer and subsequently monitor the cartel agreement.<sup>108</sup> In *MoDo*, a group of main suppliers of carton board in the EU has built an illegal organization, named PG Paperboard to monitor and control the relevant market. The activities of the PG Paperboard were supported by monitoring devices provided by Fides, a secretarial company. The Commission held that most of the members of the PG Paperboard sent periodic reports on orders, production, sales and capacity utilisation to Fides. Under the Fides system, those reports were collated and the aggregated data were sent to the participants. CFI established that any scheme for exchange of general information to which the competitors may subscribe “shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified”.<sup>109</sup>

#### 4.2.4. Public exchange of strategic information

The common terms of coordination might be established by public exchange of strategic information through mass-media. Stating publicly how much the demand is expected to increase from one year to the next, can be a way to inform about how much extra capacity the competitors can put on the market, without decreasing the price. The more complex the market situation is, the more transparency or communication is needed in order to act as a single entity on the market.<sup>110</sup>

#### 4.3. Summary View on Information Exchanges Schemes

Some relevant factors can be identified from the case law in order to assess if an information exchange scheme is likely to damage the competition. The exchange of company specific information has been found to be anticompetitive. The exchange of information on daily basis is likely to harm the competition. However, public information is less likely to damage the competition. The networking enhances the social cohesion between undertakings and fosters the exchange of both tacit and explicit knowledge and the occurrence of collective memory. The anticompetitive information agreements under Article 101(2) FEU support the finding of collusive oligopoly under Article 102 FEU. The information exchange which does not fall under the scope of Article 101 FEU can still be illegal for the scope of Article 102 FEU. Since the Articles 101 and 102 FEU aim at maintaining effective competition, consistency requires that Article 101(3) be interpreted as preventing any application of

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<sup>105</sup> IV.29.988-Italian Flat Glass- 81/881/EEC: Commission Decision of 28 September 1981 relating to a proceeding under Article [101 FEU], OJ L 326, 13/11/1981 P. 0032 – 0043. 1<sup>st</sup> Commission’s decision concerning the flat glass cartel

<sup>106</sup> The actual definition of the trust is in this case expresses the duties and powers of the trustee and the rights of the beneficiary conferred by the settlor when he created the trust. The person who creates the trust is the settlor. The person who holds the property for another’s benefit is the trustee. The person who is benefited by the trust is the beneficiary, or cestui que trust. The property that comprises the trust is the trust res, corpus, principal, or subject matter. Trust companies may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies).

<sup>107</sup> [www.kpmg.it/fmknet/View.aspx?da\\_id=2487](http://www.kpmg.it/fmknet/View.aspx?da_id=2487) 2009-11-18, 16:00 Fides Unione Fiduciaria has been a part of KPMG network in Italy since 1958.

<sup>108</sup> The 31<sup>st</sup> January 1979, the Commission adopted a decision addressed to Fides in order to require its submission to investigations since Fides had refused to permit access to the corroborative information in its possession. (Official Journal L 057 , 08/03/1979 P. 0033 – 0035)

<sup>109</sup> MoDo, T-352/94, ECR 1998 Page II-01989, Para 239

<sup>110</sup> Draft Commission notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 331 , 31/12/2002 P. 0018 - 0031, para 52

exception rule to restrictive agreements that lead to abuse of a dominant position. Such an agreement was the acquisition of the exclusive licence to a new technology for filling packages in *Tetra Pak I*.

I have synthesized in the table below the similarities and dissimilarities between the four main types of business behaviour<sup>111</sup> identified by management science; three of them are likely to be alleged as being harmful for the competition:

Table 4- Business Behaviour Typology, Recast Dagnino 2007

<b>Business behaviour</b>	<b>Alleged illegal conduct</b>	<b>Interests</b>	<b>Wills</b>	<b>Resources employed</b>	<b>Innovation</b>
Monopolistic	Abuse of SD	Self-interest-oriented	One dominant will	Essential facilities	Monopolized
Competitive	None		Conflicting wills	Negative complementarities	Intensive, diverse and often radical
Cooperative	Collusion Abuse of joint dominance	Aligned by agreement	Congruence of wills obtained by agreement	Positive complementarities	Mutual benefits but also hold-up risk-taking
Coopetitive	Abuse of joint dominance	Partially aligned by contingency	Partial congruence of wills obtained by social cohesion	Embedded essential facilities	Process innovation

The legality or illegality of the coopetitive conduct has not yet been distinctly established by case law.

<sup>111</sup> Dagnino et al, Aug/Sep 2007, p. 89

## 5. Joint Dominance a matter of Co-opetition

### 5.1. Introduction

The practice of co-opetition continues to spread out as undertakings realize that the development costs and risks can be shared even with the rivals.

### 5.2. Trust, Reciprocity and Deterrence

Granted privileges, such as exemptions, special rights and benefits are classified as intangible assets in the financial accounting<sup>112</sup>, since they bring a concrete, substantial and long-term contribution to the undertaking's cash-flow. If a collective privilege guarantees exclusive access to essential facilities, then a joint dominant position has been probably created only in virtue of these facts. There are situations where access to a mix of essential facilities is absolutely necessary in order to compete in a specific industry. The owners of the privileged rights are dependent on each other and will probably exert to achieve joint control over all these essential facilities. This situation occurs in the case of conglomerate mergers, where complementary resources and competences are combined in a strategic mix. The main issue here is if this situation may occur in the absence of concentrative ventures, i.e. in the case of non-concentrative forms of association between undertakings.

The freedom of association, as privilege of law might be abused by the trade associations representing the interests of the competitors, within a specific economic field. The leading competitors on the market control the decision making within the trade organization. The meetings of the trade association board represent a good opportunity to promote common interests of all kind.<sup>113</sup> The social capital by itself might be treated as an essential facility in the entrepreneurial field of activity. The *Almelo* case illustrates well the state of things between privileges granted by public authorities and the exclusionary conduct vis-à-vis outsiders, exercised by the privileged undertakings.<sup>114</sup>

Setting the legal standards within a specific industry is a privilege and this privilege can be as well abused. SSO & Certification Organizations are often closely connected to the Trade Organizations, whilst the main actors and decision makers for both organizations are often the same undertakings. These actors hold joint control over the certificated standards coming into force and by that they gain control over the IPR to be included in the industry standards and consequently control over the cost structure of the regulated industry.<sup>115</sup> Therefore setting standards by a trade association may have an exclusionary effect. The ability to innovate and develop new standards might be restricted and the standard may be used to eliminate third parties which fail to comply with it. Agreements on environmental targets which cover an industry at national or EU level may have similar anti-competitive effects.<sup>116</sup> In order to enter the market, new competitors may face natural or artificial barriers. The artificial barriers are those regulations made by incumbent competitors within the Trade Associations. If a *de facto* industry standard is set by undertakings which are jointly dominant, it is important that the standard is as open as

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<sup>112</sup> <http://www.iasb.org/NR/rdonlyres/8A3C6720-AABE-4BE2-B776-0BBE51961AA0/0/IAS38.pdf> (2009-12-12 10:10)

<sup>113</sup> Chapter 2.3.2, Almelo case

<sup>114</sup> Chapter 2.2.2, Trade Associations as platform for collusive conduct

<sup>115</sup> Footnote 114

<sup>116</sup> Goyder & Albors-Llorens, p. 483-4

possible and applied in an open and non-discriminatory manner. The adoption of a standard does not justify restricting innovation beyond the standard.

A block of exemptions might be used in order to gain joint control on a specific market, since a certain degree of collusion is permitted and strong economic links exist between the undertakings. Both situations of monopoly and oligopoly are fostered by granted privileges of law.<sup>117</sup> If on the other side of the market there are powerful buyers, the situation might be balanced. Otherwise, it is very possible that the consumer will suffer indirect damages.<sup>118</sup> However, there might be situations where the *Gencor/Lonrho* criteria<sup>119</sup> are not satisfied, because the market is not enough concentrated in order to be able to establish an oligopolistic market. In this case, even if the economists have developed theories about social cohesion, networking and co-opetition, there is no case law supporting this allegation. The only examples of situations where the influence of flesh and blood individuals is taken into consideration are only few: shareholders, single entrepreneurs and directors, as formal decision makers. The influence of the informal decision makers is still not considered by law.

The benefits of the foreclosure accrue to the jointly dominant undertakings, both individually and as a group.<sup>120</sup> The anti-competitive foreclosing has an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.<sup>121</sup>

Exemptions and concessions are privileges granted by the public authorities. On the other hand, the exclusivity rights are often granted by private actors. The IPR granting access to certain information, as brick structure in *IMS Health*<sup>122</sup> or interface instructions in *Microsoft*<sup>123</sup> are strategic resources developed in-house. The social capital belongs also to the in-house generated strategic facilities. The direct benefits of the social capital are increased market power, joint control and access to strategic information.

### 5.3. Transparent Transactions in Co-opetitive Markets

The co-opetition implies granted access to a large range of information concerning the partners' commercial strategies. If the co-opetition become a widespread business practice on a certain market, then the degree of transparency is increased making easier for all the market players to monitor each other conduct. If on the market exists a strong social cohesion between the competing undertakings then the monitoring costs will be lower and the institutionalized trust will be enhanced. The need for formal binding agreements is reduced by the existence of strong social norms and beliefs.<sup>124</sup>

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<sup>117</sup> CEWAL/ Chapter 2.4.2 and Tetra Pak I/ Chapter 2.3.2, as examples for abuse of exemptions

<sup>118</sup> Chapter 2.3.1 & 2.5, indirect damages caused to the consumer in transparent markets

<sup>119</sup> Chapter 3.2, the definition of the anticompetitive oligopoly

<sup>120</sup> Chapter 4.2.1, based on Adler & Kwon 2002

<sup>121</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102 FEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20

<sup>122</sup> On this pursuit see also *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, C-418/01, ECR 2004 Page I-05039

<sup>123</sup> *Microsoft Corp. v Commission*, T-201/04, ECR 2007 Page II-03601

<sup>124</sup> Adler & Kwon 2002, pp. 29-30

The networks represent an alternative integral mode of coordination, which along with the state, are the dominant institutions of today in the mind of many. The undertakings involved have the economic strength to exercise profitable business conduct and are united by economic links. The exchange of both tacit and explicit knowledge is sustainable and the conduct is both coordinated and non-coordinated, in the context of networking. This frame seems to provide a perfect environment to cultivate joint dominance.<sup>125</sup>

The value of having the right connections in a certain field of business represents a standard measure for remuneration of chief personnel engaged in the interfirm interaction and in many cases makes all the difference on delegation, employment and promotion decisions.<sup>126</sup> The ability to build networks of social relations is much coveted and highly rewarded in the contemporary trade world. The economists describe synergy effects as  $1+1=3$ , by that stressing that the relations create extra-value. In competition law, the main question is who benefits of this extra-value. Furthermore, it is necessary to appreciate if the consumer receives a fair share of this extra-value. In some cases, the mathematic sentence may be in fact translated into  $1+1+ \text{spillover} = 3$ , because as discussed in *Microsoft*, the direct effect of the network embedment might be the foreclosure of competition and the limitation of innovation. The benefits of the joint dominant undertakings might be sometimes outweighed by the disadvantages created for the other market actors including the consumer.

The information may circulate on a variety of supports, from classic paper to data bases, but first at all the information circulates due to the flesh and blood individuals bearing it in their memory. The multilevel social interaction between these individuals may foster implicit collusion under the form of information exchange in B2B relations. It is absolutely unquestionable that the information possession can never be found illegal under Article 102 FEU. However, if a dominant undertaking or a group of undertakings uses this information on an illegal purpose such as exclusionary strategies then there might be a reason to investigate closer the specific situation. Knowing that the Article 101 FEU deals with congruent conduct, the information exchanged for the scope of Article 101 FEU has to be specific enough to assure the enforcement of the unlawful agreement. By contrast, Article 102 FEU deals with partially congruent conduct and the information exchanged doesn't have to be specific, but only guiding and supporting a quasi-coordinated conduct. In few words, the cartels demand and exert to enforce a specific conduct and the joint dominant groups have a softer approach to enforcement and exert after harmonized rather than identical conduct. Consequently, even information which is not specific enough to be anti-competitive under Article 101 FEU may have harmful effects for the competition under Article 102 FEU. The volume of information exchanged and the exchange frequency are more important than the precision for the scope of the Article 102 FEU. Further, I will explain the grounds for these assertions. In order to be able to express the differences between these two types of conduct, I need an accurate description of the semantic content of some significant words. Convergence has been defined as moving towards union or

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<sup>125</sup> Lechner 2006, Casper & Waarden 2005, Walter 2007, Adler and Kwon 2002

<sup>126</sup> There are many organizational studies available concerning career success and executive compensation, Gabbay & Zuckerman 1998 and Belliveau, O'Reilly & Wade 1996 e.g., creating a richer pool of recruits for firms, Fernandez, Castilla & Moore, 2000 etc

uniformity. Accord, on the other hand is defined as voluntary or spontaneous impulse to act that is based on the correspondence between parties.<sup>127</sup>

Article 101 FEU applies on collusive conduct and the substantiation of collusion requires by law to bring evidence on the parties “concurrency of wills”, by that meaning the existence of the parties’ common will.<sup>128</sup> By contrast, the Article 102 FEU does not require that the conduct in question expresses the parties’ common will, but rather the adopted conduct expresses the parties’ corresponding wills.<sup>129</sup> The difference between the collusive oligopolies under Article 101 and respectively 102 FEU is the one between convergence and accord, or between congruence and harmony. The joint dominant undertakings share a set of similar features and interests and may enjoy collective privileges enforced by law or generated by social cohesion. This configuration supports a form of implicit agreement between the parties, where a certain degree of deviation from the desirable or recommended conduct is tolerated. However, a line of conduct drastically diverging from these unwritten recommendations might be punished by exclusion from the group.<sup>130</sup>

The price announcements made by the suppliers to the users of pulp products in *Wood Pulp* didn’t constitute unlawful behaviour under 101(1) FEU, because the suppliers couldn’t be sure of the future conduct of the others. However, the same behaviour engaged by a jointly dominant group of undertakings may lessen each undertaking uncertainty. The existence of links between the competitors may assure that a certain conduct will be followed by all of them.

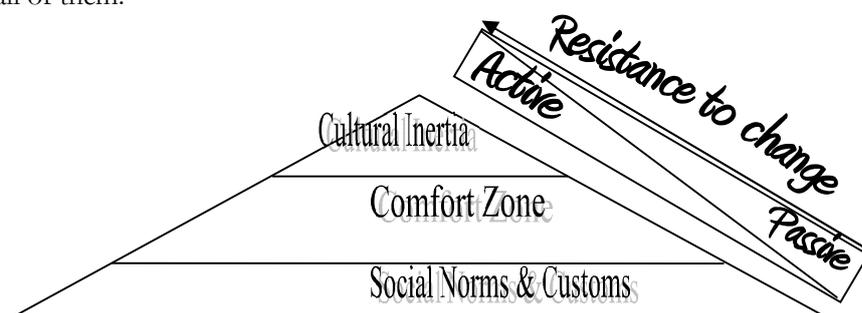


Figure 1: Change Pyramid based on Watson’s Theory of Resistance to Change (American Behavioral Scientist, 14, 5, 745-766, May 71)

A-G Kokott<sup>131</sup> emphasized that joint dominance does not necessarily require that the members of an oligopoly cooperate collusively within the meaning of Article 101 FEU.<sup>132</sup> By contrast, the joint dominance may arise from the tacit coordination of market behaviour. The members of the oligopoly are then contented with the market shares they have achieved, and the effective competition cannot be maintained under these circumstances.<sup>133</sup> This state of facts is described as the comfort zone in the figure above. According to all these arguments, the monitoring of the joint dominant partners doesn’t have to be as stringent and tight as the monitoring of cartels and the information exchanged might be less specific, nevertheless sufficient in order to disclose a serious deviation.

<sup>127</sup> Oxford Reference Dictionary (1986), definitions of correspondence p.191/accord p.4 versus converge p. 187/congruent p.182.

<sup>128</sup> Technische Unie BV v Commission, C-113/04 P, ECR 2006 Page I-0883, para 128

<sup>129</sup> Chapter 2.1, 3.1 see as an instance of French Republic v. Commission.

<sup>130</sup> Chapter 2.2.2-3 about the tight connection between the implicit collusion and exclusion; 4.2.2 about the unspoken threats

<sup>131</sup> Opinion of A-GKokott delivered on 13 December 2007 related to Impala case C-413/06 P, ECR 2008 Page I-04951, para 24

<sup>132</sup> See also Cewal, Joined cases C395-396/96P, ECR 2000, Page I-01365, para 45, related to Article 102.

<sup>133</sup> See generally Gencor, T-102/96, ECR1999 Page II-00753 para 276

#### 5.4. Appraisal of Joint Dominance in Co-opetitive Markets

The Article 102 FEU prohibits conduct on the part of one or more undertakings, which amounts to abuse of a dominant position. A dominant position may be held collectively when several legal independent undertakings are linked in such a way that they are able to adopt a common strategy on the market according to *Italian Flat Glass (1992)* principle: “*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.*”<sup>134</sup>

The first important issue is the presence of trust facilitating devices, by that understanding the nature of links connecting the joint dominant undertakings and allowing them to act as a single player on the market. This issue corresponds to the second criterion in *Airtours*. The economic links can be contractual, structural or oligopolistic. Examples for contractual links cited by the Court Cases are the licensing agreements in *Italian Flat Glass (1992)*, joint management contract in *CEWAL*, collective concession rights in *Almelo*, and participating in re-insurance pool in *P & I Clubs*. The contractual link between undertakings may represent unlawful agreements under Article 101(1) FEU that might be nevertheless exempted individually under Article 101(3) FEU or collectively under the block exemption regulations. This is inter alia the case of liner shipping conference, air transport, patent licensing agreements or financial services. Another situation is described by *Almelo*, where the agreement precluded by both Articles 101 and 102 FEU could be permitted by invoking public interest under Article 106(2).

The cross-shareholdings and interlocking directorates constitute examples of structural links.<sup>135</sup> The most recent cases confirm that joint dominance applies to oligopolies where the likelihood of tacit collusion can be demonstrated. It seems clear that joint dominance may exist even in the absence of structural or contractual links.

The first precedential case making the connection between the Article 102 FEU and first Merger Regulation<sup>136</sup> via tacit collusion is *CEWAL*<sup>137</sup> since the judgment in this case is fully consistent with the judgments in *French Republic*<sup>138</sup> and *Gencor*<sup>139</sup>. The findings on joint dominance in merger cases apply also to Article 102 FEU. The second essential case is *Laurent Piau*<sup>140</sup> where the CFI established that the three cumulative conditions found in *Airtours* applies also to Article 102 FEU. The third important case is *Impala*<sup>141</sup>, where it has been found that the five undertakings involved in the Sony/BMG merger enjoyed a dominant position prior to the merger. These findings entitle the Competition Authorities to attack tacit collusion under Article 102 FEU. In order to summarize, by competition law there are three kinds of economic links, namely structural, contractual and

<sup>134</sup> *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission*, Joined cases T-68/89, T-77/89 and T-78/89, ECR1992 Page II-01403

<sup>135</sup> Opinion of A-G Fennelly delivered on 29 October 1998 related to *CEWAL* joined cases, ECR 2000 Page I-01365, para 28

<sup>136</sup> Council Regulation No 4064/89 of 21<sup>st</sup> December 1989 on the control of concentrations between undertakings, OJ L395, 30.12.1989, p.1

<sup>137</sup> *Cewal*, Joined cases C395-396/96P, ECR 2000, Page I-01365

<sup>138</sup> *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission*, Joined cases C-68/94 and C-30/95, ECR1998 Page I-01375

<sup>139</sup> *Gencor*, T-102/96, ECR1999 Page II-00753

<sup>140</sup> *Laurent Piau*, T-193/02, ECR 2005 Page II-00209

<sup>141</sup> *Bertelsmann AG and Sony Corporation of America v Commission, Impala*, C-413/06 P, ECR2008 Page I-04951

recently confirmed oligopolistic<sup>142</sup>. The contractual links are in fact agreements that might be precluded by both Articles 101 and 102 FEU, though on different grounds. The conclusion is that both tacit and explicit collusion may facilitate creation and enhancement of joint dominance. The implicit collusion present in the co-opetitive agreements should be considered as a potential form of achieving knowledge about other competitors market conduct. The transactions might become transparent due to an intensive and continuous exchange of information. This transparency together with the existent social cohesion maintained by different trust facilitating devices make possible for the undertakings involved to predict each other conduct and to act accordingly with the common interests and expectations.

Another important issue related to the *Airtours* criteria is the existence of the compliance monitoring devices. If the collusion is suspected, it can be a case of tacit collusion and then the market structure must be analyzed or a case of explicit collusion and then the existence of anticompetitive exchange of information must be disclosed. In fact, it must be proved that the alleged unlawful conduct can be monitored according to *Airtours* first criterion. The same facts that make possible the harmonization of conduct can facilitate also the monitoring. It is reasonable to assume that the institutionalized trust and the transaction transparency are interconnected and complementary. More transparency will definitely strengthen the institutionalized trust. Moreover, the actors are the same, flesh and blood individuals who are involved in communication and play a multitude of roles within the embedded networks. The economists observed that co-opetition is about interaction and actor interface.<sup>143</sup> The individuals compose the interface of the inter- and intra-firm networks. In order to be efficient any network requires a high degree of interoperability between the business processes. That's why the contemporary firms are head- hunting chief personnel with a multilevel versatility, capable of interaction and holding a diverse portfolio of business contacts.

The co-opetition strategies encourage diffuse and implicit agreements, based on institutionalized trust and social cohesion instead for the classic contractual links. As long the undertakings are contented with the actual state of things, they will try to maintain it and oppose any prospective changes, in accordance with the findings of the behavioural science. If the undertakings, as in the case of the professional associations have developed a well defined organizational culture and a collective identity, they are going to actively counteract the prospective changes; this phenomenon known under the term of cultural inertia is also described in the figure above. The outsiders cannot even join the association and definitely cannot influence the common course of conduct.

### **5.5. An analogy between Software and Co-opetitive Interoperability**

In *Microsoft*, the CFI endorsed the Commission appraisal of the degree of operability and observed that non-Microsoft actors were foreclosed from the market. Therefore, the CFI decided that the other developers of operating systems must be provided with the interface information in order to be able to compete with Microsoft. The refusal to deliver this information has been considered unlawful under article 102 FEU and the

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<sup>142</sup> Bertelsmann AG and Sony Corporation of America v Commission, Impala, C-413/06 P, ECR2008 Page I-04951, paras 120-123, 125-126, 129

<sup>143</sup> Dagnino & Rocco 2009, p. 22 and p. 36

Court upheld that the refusal had indirectly harmed the consumer by preventing the emergence of new products for which there was an unmet demand. The CFI in *Microsoft* refers at paragraphs 228-229 in its judgment, to *Irish Sugar* and *CEWAL*, two cases of joint dominance, since the exclusion was in fact possible because of the collective use of the software. However, it was only Microsoft that held an appreciable large market power and all the other undertakings in the Microsoft group were only acting as followers. The definition provided to interoperability by Microsoft factual and technical findings is reproduced here: “*the ability to exchange information and mutually to use the information which has been exchanged*”.<sup>144</sup> The social capital involved in the organizational networking constitutes an essential facility which is represented by the actor interface that allows two independent undertakings to communicate strategically and coordinate their conduct on the market. A high degree of “interoperability” is required even in this case.

The Microsoft operating system and the attached media player have distinct, though complementary functionalities. The co-opetitive agreements concern also distinct, though complementary business processes; any supporting business process can be out-sourced, in-sourced or managed via co-opetitive agreements. Microsoft had the option to deliver two separate products instead for an integral solution. The co-opetitive undertakings as well have the possibility to run the supportive business process via non-cooperative forms of agreement.

The co-opetition implies networking, actor interface, non-verbal communication and the “larger game” perspective. The core-business process can be compared with the software platform and the supportive business process with the Media Player. The suppliers specialized in the field of the complementary process will have difficulties to penetrate the market. High qualified competences will be eliminated from the market due to their inability to participate in more than one game, i.e. business process. Tying a supportive process to the dominant core-business, in a co-opetitive setting, exactly like tying a specific product to the dominant one can lead to competition foreclosure. In order not to foreclose competition, there are two ways of running the supportive process: either as a subordinate entity, being integral part of the same undertaking or under supply contract on arm’s length terms. The strategic ambiguity of the co-opetitive agreements has anti-competitive effects and may support joint dominance if the parties involved also hold substantial market power.

The radical form of innovation is not encouraged by the co-opetitive configurations. The co-opetition encourages merely process innovation, i.e. finding new ways to market old things. Trailblazing technologies involve a high hold-up risk and often a large initial investment, that’s why the terms of cooperation must be explicit, if any cooperation is to be involved between direct or potential competitors. The intangible assets can generate exclusionary effects in combination with substantial market power, as it has already been proved in *IMS Health* and *Microsoft*. The interoperability has an uncontested intern value for the co-opetitive undertakings; this interoperability can be nevertheless used in order to exclude other competitors or to hijack the technological development, and then the extern value is in fact negative. The interoperability between software processes is similar with the one between the business processes, since the interoperability is in fact an expression of the

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<sup>144</sup> Microsoft Corp. v Commission, T-201/04, ECR 2007 Page II-03601, para 228-229, para 157

positive complementarities between the processes concerned. The anticompetitive issue consists in the fact that the positive complementarities are not positive for all the players involved; these complementarities involve negative effects on competition, because they do not account for any efficiency improvement, at least not according to the financial accounting standard in force.

#### **5.6. Recommendations for future research**

The intangible assets enjoy different treatment in the field of financial and respective management accounting. The latter recognize always the in-house generated intangible assets, such as brands and customer lists while the first requires that the assets concerned have an extern value which can be reliably measured.<sup>145</sup> In order to conclude, the economists admit that the in-house generated intangible assets have an intern value, but most of them have no extern value; they cannot generate direct economic benefits, subsequently they generate no benefit for the consumer. There is an obvious need for continued studies aimed to identify the impact of the in-house generated intangible assets on consumer welfare and innovation, in terms of European Competition Law.

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<sup>145</sup> The financial accounting standards in the EU have been adopted in accordance with the Council Regulation No 1606/2002. More information about the intangible assets accounting can be obtained on IASB website <http://www.iasb.org/NR/rdonlyres/8A3C6720-AABE-4BE2-B776-0BBE51961AA0/0/IAS38.pdf>

## 6. Conclusions

Joint dominance as well as co-opetition is about interaction, actor interface, interdependence, institutionalized trust, and foremost about enhancing economic power and hedging the uncertainty risk. Joint dominance held by several undertakings is established when they are capable to present themselves or act together from an economic perspective, as a collective entity. Their joint strategies enable them to behave to a considerable extent independently of other market players.

Articles 101 and 102 FEU overlap and may apply simultaneous to the same practice. However, according to *Italian Flat Glass*, the Commission cannot recycle the facts constituting an infringement of Article 101 FEU and conclude by virtue of these circumstances alone that the parties of the restrictive agreement also hold a joint dominant position. The CFI in *Italian Flat Glass* refers to acquisitions of technology licences and A-G Fennelly in *CEWAL* to cross-shareholdings and interlocking directorates as examples of economic links. These commercial practices and examples of economic links constitute structural abuses as established by the judgments in *Continental Can* and *Tetra Pak I*.

I have presumed in the first chapter of this study that the Competition Authorities might look for explicit or oligopolistic collusion in certain cases where the nature of collusion is in fact implicit. The psychology of the concerted practices is different from the psychology of joint dominance and that's why the nature of collusion differs also. In order to sustain a common commercial strategy, jointly dominant undertakings must be connected by economic links. These links are contractual, structural or oligopolistic according to the case law. The present study has identified a new type of links, embodied by the social capital shared by these undertakings. The social capital is preserved by the collective memory, social cohesion and institutionalized trust. The need for formal binding agreements is reduced by the existence of strong social norms and beliefs and the proliferation of strategic ambiguous communication. The social capital embodied by the actor interface represents an in-house generated essential facility, which has been created in order to implement the non-adversarial approach to transactions.

This paper aimed to answer a set of questions, regarded as material in order to enhance the comprehension of the legal concept of joint dominance.

1. What is the difference between dealing with collusion under Article 101 FEU and respectively under Article 102 FEU?

The alignment of conducts under Article 101 FEU is obtained by concurrence of wills. The competitors who initiate the agreement are very much alike and that's why they compete against each other for the same customers. The products supplied by them are homogeneous substitutes. The demand is often inelastic; the initial investment required is high, but already recovered. It is easy to estimate the production costs and reach an agreement in order to stabilize the prices and reduce the uncertainty risk. However, the collusive agreements can

be easily broken; there is a strong incentive to cheat, since the market is mature drawing towards the decline phase on the product life cycle. The competitors participate together in only one game and they have to decide on either prolonging or exiting this game. On the other hand, the alignment of conducts under Article 102 FEU can be obtained by concurrence of wills, but also by reciprocity, trust and non-binding communication. The novelty of this study consists in disclosing the latter form of alignment. The parties engaged in information exchange supply both substitutes and complementary products and services. Their core competences are not fully congruent and their strong and respectively weak points are not the same. These distinct features give birth to positive complementarities and make the cooperation with competitors a profitable business, at least for some of them. The non-binding form of communication facilitates the cooperation between independent undertakings. In this case, cheating is not at all a good option since the advantages of cooperation exceed the profit obtained by cheating and the contingency of social sanction constitutes a very effective deterrence device. The players participate in several games, where they play different roles and share with each both divergent and convergent interests. These games can be analyzed in a larger view where the players will calculate the risks and profits at the multi level, instead for the single level game. The new players are more prone to comply with the rules of the “larger game” strategy than to adopt a non-cooperative strategy.

## 2. Do co-opetitive markets satisfy the *Airtours* criteria?

The monitoring, the sustainability of the recommended conduct and the lack of outside threats constitute the set of criteria imposed by *Airtours*. The co-opetition involves a profitable and closer form of collaboration taking place on multiple hierarchic levels and stretching on several playgrounds. When the co-opetitors exit a certain game, they are still interested in maintaining the social relations with their partners and open for the possibility of participating together in other games. The favours are paid sooner or later as well as the cheaters are punished by exclusion from the co-opetitive community. The monitoring is possible because of the permanent social interaction and the virtual communication systems. The new actors tend to comply with the co-opetitive rules. Though, the co-opetition represents a less attractive strategy for the promoters of a radical innovative technology because the hold-up risk is still too high for them. On the other hand, process innovation and institutional learning can be better off in the co-opetitive settings. The co-opetitive markets are dynamic and process innovative; the basic rules of play remain the same even though the combination of games is not constant. In the “larger game” view, the *Airtours* criteria can be easily met. By contrast, in a specific game perspective, due to the process innovative strategies, the market appears to be dynamic and then the criterion of sustainability is not fulfilled.

## 3. Which criteria shall be considered by an appraisal test appropriated to identify joint dominant positions?

The present study has identified five criteria to be considered by a potential appraisal test. The criteria are non-cumulative, except the first one which is eliminatory. The first criterion is the *independence*. If the legal entities under observation are integral parts of one and the same undertaking, then the allegation of joint dominance is unfounded. The second criterion is the *corporative structure*. Cross-shareholdings, interlocking directorates and joint venturing constitute structural links that may support a joint dominant position and enhance the market

concentration. The *market concentration* constitutes the third criterion; a high concentrated market facilitates the oligopolistic collusion. However, in most of the cases, this type of collusion is not sustainable for the reasons only anticipated in *Italian Flat Glass* and largely discussed in *Airtours*. The fourth criterion is represented by the *collective privileges*, such as licensing, concessions, membership in the trade associations, cleared/exempted cooperative joint ventures and other privileges by law that may support joint dominance. The agreement under review may as well be precluded by Article 101 FEU. The agreement is employed in order to convert the latent conflict of interests into convergent wills and subsequently into aligned conducts. Monitoring and deterrence are essential in order to enforce the agreement. If the supportive agreement covers a whole industry or trade field then it is almost unthinkable to succeed in jeopardizing the joint dominant position. The fifth criterion stands for the existence of the *in-house generated essential facilities*. Joint control over certain facilities can be granted by law, as discussed above or can be the result of the in-house development. Computer software and copyrights, as indispensable intangible assets have been only recently recognized as essential facilities. It has been proved that de facto industry standards support exclusionary practices. The social capital represents also an indispensable intangible asset that engages the same anti-competitive effect; the social capital does not generate any economic benefits for the external interested parties, the consumer being included. The social capital can be regarded as an in-house generated membership right; the membership in the co-opetitive communities is informal and it consists in the ability to employ the appropriate actor interface in order to get access to the co-opetitive community. The co-opetitive mindset is supported by the institutional memory, as Rabkin among others emphasized, and can be maintained despite the personnel turnover.

**Table 5- The typology of the economic links employed by joint dominant undertakings**

Links	Requires	Evidence	Aligned Interests by	Collusion	Monitoring Systems	Sanction	Decision Making
<b>Contractual</b>	Concurrent Wills	Anticompetitive Agreements	Agreement	Explicit	Information Exchange System	Economic	Comply/ Deviate/ Exit
<b>Oligopolistic</b>	Anticompetitive Oligopoly	High Market Concentration	Market Structure	Tacit	Transparent Market		
<b>Structural</b>	Joint Control	Embedded Corporative Structure	Cross/Joint Stockholding	Explicit & Implicit	Board of Directors	Legal	Corporate Governance
<b>Social</b>	Implementation of Co-opetitive Strategies	Actor Interface	Joint Social Capital	Implicit	Collective Memory	Social	Network Governance

According to the case law, joint dominance is more than concerted practices and anticompetitive oligopolies, because joint dominance has to be supported by a sustainable interdependence state that prevails among jointly dominant undertakings.

The business conduct is in fact nothing else than a form of social group behaviour, since the undertakings are social groups involved in economic activities. The behavioural science applied on strategic management has opened new possibilities for analysis and assessment of business conduct. The classical legal theories and the

arsenal of mathematical tools concerned with the economic assessment of the market structure cannot give a satisfactory account of the joint dominant conduct.

The economic links identified by the case law consist in structural abuses and often are one-off occurrences: licensing, mergers & acquisitions, concessions and corporate governance decisions. All the other exclusionary strategies under Article 102 FEU are essentially behavioural in nature and generally result in a repetitive line of conduct that subsequently fosters the occurrence of a collective memory. There is no other way to maintain such a collective behaviour than building an actor interface between the jointly dominant undertakings. The relations involved have to be essentially of social nature and have to be governed by appropriate management strategies.

This study has attempted to call the reader's attention to the business strategy, proposed by Brandenburger & Nalebuff, thirteen years ago. Their book has revolutionized the world of business strategic thinking. However, the book was written having in mind, only one side perspective, the manager's side. The sociologist, Richard Sennett, professor at the London School of Economics, in his keen sighted book "The Corrosion of the Character" disclosed some of the negative effects of team working, networking and corporate re-engineering, on the social community and individual integrity. The prospective harm on competition, welfare or innovation has not yet been considered by law. I argue in this study that the phenomenon of tacit collusion, peculiar to the tight oligopolies is no longer the main issue. The entities involved in networking are mostly prone to implicit collusion, i.e. non-binding communication, which facilitates the monitoring of other competitors' conduct. The incitement to deviate from the co-opetitive strategies is inhibited by the implicit threat of social sanction and by the cosiness of the comfort zone. The golden rule of competition on the merits is endangered by the co-opetitive mindset.

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