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Merger Regulation No 139/2004**

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# Summary

The previous substantive test in Article 2(3) of the Merger Regulation 4064/89 had as its cornerstone the concept of dominance. The test that is also referred as dominance test, declared incompatible with the common market concentrations that would create or strengthen a dominant position as a result of which competition would be significantly impeded. The wording of the Article referred initially to a position of single dominance. It soon became evident that mergers that would not fill the dominance threshold but would have negative effects on competition would escape merger control if Article 2(3) were to be interpreted literally according to its wording. The concern was raised in relation to oligopolistic markets where the amount of competitors is low and competitive environment makes it easy for the undertakings to monitor each other's competitive strategies and to engage in non-cooperative strategic interaction without engaging in an agreement or other form of collusive conduct that is prohibited in the Community law under Article 81 EC. This led to the development of the concept of collective dominance in the case law of the Community Courts and decision-making practice of the Commission.

The case law shows that there has been evident difficulties in defining the scope of the doctrine and to establish a criteria based on which it would be possible to intervene on anti-competitive concentrations on oligopolistic markets while at the same time provide the business with some level of legal certainty. The need to re-evaluate the substantive test was raised particularly in relation to the concept of collective dominance.

1st of May 2004 came into force reviewed Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. The reform led to the rewording of the test of compatibility with the common market in Article 2(3). The second limb of old Article 2(3) was turned into the principle test while the old dominance criterion was maintained as a key indicator of such an effect on competition. It meant a

change from the traditionally used dominance test to Significant Impediment to Effective Competition test (SIEC test). Open issue is whether the rewording will lessen the significance of the concept of collective dominance or whether it will retain its role in the EC merger control. Therefore, the question arises into which direction the merger control on oligopolistic markets will move from now on.

In the context of the merger reform the Commission published Guidelines on the assessment of horizontal concentrations. They are to enhance legal certainty and provide guidance on the criteria the Commission is using in its merger practice. The Horizontal Guidelines and the new EC Merger Regulation now clarify that competition may be impeded through the traditional concept of dominance and non-coordinated and coordinated effects. Comparison between the *Airtours* case and Horizontal Guidelines demonstrates that the latter corresponds closely to the doctrine of collective dominance as established in the case law.

However, neither the EC Merger Regulation 139/2004 nor the Horizontal Guidelines give any detailed guidance as to the future of the concept of collective dominance in practice. They both demonstrate a slight change from the concept of dominance as the central criteria in the appraisal of concentrations. The main purpose of this master thesis is to evaluate the possible outcomes of the merger reform. It is to take part on the debates around the concept of collective dominance and its future role in EC merger control. Answer to this paradigm is to be received from the future merger practice of the Commission and interpretation of the Community Courts.

# Preface

The year spent in Lund participating in the Master of European Affairs programme has been a year full of hard work and studies. Indeed, it has taught a lot and led to the interesting world of integration development within the European Union. The joy of learning new things has sometimes been overwhelming. For that, I am grateful to Lund University that has made this study opportunity possible for me. I want to express my thanks to the programme and to the teachers and course administrators for making it a joyful experience.

There are also very special persons in my life. I want to take this opportunity to express my sincere thanks to them. The support I have received on the way from my family and friends means a great deal to me.

My greatest thanks I want to dedicate to my mother and father who have always encouraged me to face new challenges and showed faith in me and in my abilities. The example you have given me keeps me thriving forward.

# Abbreviations

CFI	Court of First Instance
EC	European Communities
ECJ	Court of Justice of the European Communities
EU	European Union
OJ	Official Journal
SIEC	Significant Impediment to Effective Competition
SLC	Substantial Lessening of Competition

# 1 Introduction

## 1.1 Background

Efficient merger control is elemental in preserving and safeguarding a market structure that is competent of providing the benefits that follow from competition.<sup>1</sup> Effective competition will lead to development of economy, innovation on product markets and ultimately to the benefit of the consumers. Market concentration is increasing in today's industrial structure. If as a result the intensity of competition between remaining undertakings is decreasing, it can have negative effects on competition.

Merger control on the Community level has been built on the concept of dominance. Notified concentrations are appraised according to substantive test. Under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Merger Regulation 4064/89)<sup>2</sup> the substantive test had as its cornerstone the creation or strengthening of a dominant position. Initially, this referred only to single dominant positions. It soon became evident that there was a need to extend the scope to cover situations where two or more undertakings would engage in collusive market behaviour, which enabled them to act independently of other market factors to a considerable extent. This led to the introduction of the concept of collective dominance in EC merger control. The doctrine of collective dominance gives a good example of how the EC competition law adapts to the changing competitive environment through teleological interpretation by the Commission and the Community Courts.

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<sup>1</sup> Kokkoris, *The reform of the European Control Merger Regulation in the aftermath of the Airtours case- The eagerly expected debate: SLC v Dominance test*, E.C.L.R. 2005, 26(1), 37-47, p. 47.

<sup>2</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L395, 30.12.1989.



At the same time with the enlargement of the European Union from 15 Member States to 25 on the 1st of May 2004, came into force reviewed Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation)<sup>3</sup>. The reform addressed some jurisdictional and procedural changes. On the substance level, the reform led to the rewording of the test of compatibility with the common market in Article 2(3). It meant a change from the traditionally used dominance test to Significant Impediment to Effective Competition test (SIEC test). The new substantive test is supposed to cover more efficiently all anti-competitive effects of concentrations. It has as its key question whether sufficient competition will remain on the relevant market post merger and whether it will provide consumers with sufficient choice.<sup>4</sup>

## 1.2 Purpose

The main purpose of this master thesis is to evaluate the concept of collective dominance under Article 2(3) of the new EC Merger Regulation 139/2004 and the Commission Guidelines on the assessment of horizontal mergers (Horizontal Guidelines)<sup>5</sup>. Now at the time of the introduction of the new substantive test, it is interesting to evaluate what kind of effects this change will have on the concept of collective dominance. It has been argued that the extending of the concept of dominance to cover collusive market behaviour could have been originally avoided by an amendment of the Merger Regulation and by introducing a new test of compatibility that would have allowed more economically based analysis instead of legally termed dominance test.<sup>6</sup> Now that the possibly more flexible SIEC test is at

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<sup>3</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L24, 29.01.2004.

<sup>4</sup> New Merger Regulation frequently asked questions, European Commission Press Releases, MEMO/04/9, date: 20/01/2004. Available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/04/9&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>5</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

<sup>6</sup> For example, Mr Advocate General Tesouro suggested an amendment of the Merger Regulation in *France v Commission*. See the opinion of Mr Advocate General Tesouro delivered on 6 February 1997. Joined cases C-68/94 and C-30/95. *French Republic and*

hand, the question arises into which direction the merger control on oligopolistic markets will move from now on.

As it is hard to predict the future and indeed, there has traditionally been some legal uncertainty when it comes to collective dominance, this master thesis will have as its rationale to take part on the debates around the concept of collective dominance and offer some views of possible future outcomes in EC merger control on oligopolistic markets.

### **1.3 Method**

In this master thesis, I am approaching the question of collective dominance using traditional legal dogmatics as my method.<sup>7</sup> No additional benefits will be gained from historical interpretation of the intent of the legislator, as characteristic as it is to the European Union law and drafting of legislative texts within the EU.

Regarding the sources used, this master thesis can be divided into two parts. The first part, chapters 2 and 3, concern the previous Merger Regulation 4064/89 and the Court decisions given on its interpretation. The reformed EC Merger Regulation 139/2004 and Horizontal Guidelines will be used as a basis for the analysis in chapters 4 and 5. No court case law concerning collective dominance yet exists under the EC Merger Regulation.

Recent Law Reviews have been a useful source for information. The amount of books relating directly to the topic is low. This is due to the level chosen for my analysis. I shall primarily approach collective dominance from the concept itself, instead of using economical theories or concentrating on establishing sufficient economical criteria for the Commission's appraisals.

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*Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375.

<sup>7</sup> See Aarnio, *Laintulkinnan teoria*, p. 53.

## 1.4 Delimitations

The case law is chosen purely to serve the main purpose of this master thesis. It will be used in order to demonstrate the development of the doctrine of collective dominance.

This thesis approaches the concept of collective dominance from the legal perspective. It does not therefore concentrate on economic theories despite their otherwise high importance in appraisal of concentrations.

## 1.5 Relevant terms

The term *merger* shall be used as a synonym for the term concentration used in the Merger Regulation. It therefore covers various types of transactions such as mergers, acquisitions, takeovers and certain types of joint ventures.<sup>8</sup>

In order to make a separation between Merger Regulation 4064/89 and Merger Regulation 139/2004, the latter is referred with the term *EC Merger Regulation*.

## 1.6 Disposition

This master thesis begins by reviewing the doctrine of collective dominance and how it was introduced and formulated into the EC merger control. The development will be demonstrated through the case law of the European Court of Justice and the Court of First Instance. In addition, the most relevant Commission Decisions will be viewed.

Chapter three then describes conclusions on the case law. It outlines what kind of problems the use of the concept of collective dominance has included and why the question of legal uncertainty has been evident.

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<sup>8</sup> It therefore corresponds to the terms used in Horizontal Guidelines. See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), footnote 5.

Chapter three builds up the premises for the reform of the substantive test by showing that the introduction of the doctrine of collective dominance in EC merger control has not entirely succeeded to solve the problems resulting from concentrations on oligopolistic markets.

The new substantive test is then covered in chapter four. Some comparison between the old dominance test and the SIEC test will be made in this context. The purpose is to evaluate possible consequences of the rewording of the test and value the weight to be given to the old dominance criteria that is now maintained as the second limb of Article 2(3) of the EC Merger Regulation 139/2004. The impact to be given to dominance criterion in EC merger control is elemental in order to assess the future of collective dominance, i.e. to move from general to specific, from dominance to collective dominance. Chapter therefore outlines the possible influences of the new substantive test on the concept of collective dominance. Underlying question is whether the term will maintain its role in EC merger control.

Comparison between the EC Horizontal Guidelines and the doctrine of collective dominance as established by the Court of First Instance in *Airtours*<sup>9</sup> will then be made in chapter five in order to evaluate whether a change in the approach to mergers with a likelihood of collective dominance is to be expected. The *Airtours* case is chosen because it represents the most recent case law on collective dominance.

Chapter six concludes this master thesis.

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<sup>9</sup> Case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585.

# 2 Development of the doctrine of collective dominance in EC merger control

## 2.1 Structural changes as a key criterion

The test of compatibility of a concentration with the common market under Article 2 (3) of the Merger Regulation 4064/89 had as its primary evaluation point whether a concentration created or strengthened a dominant position as a result of which effective competition would have been significantly impeded.<sup>10</sup> The concept of dominance has been developed in the case law in the context of Article 82 EC. Classical definition was confirmed in case *Hoffman La Roche v Commission*<sup>11</sup>. The Court stated:

“[A] dominant position... relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”<sup>12</sup>

The notion of independence of action highlights the central aim of the Community merger control to avoid the development of market structures where a firm will not be subject to the competitive pressures that promote innovation and efficiency and the benefit of consumers.<sup>13</sup> Dominant

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<sup>10</sup> Article 2(3) of the Merger Regulation 4064/89 stated:

“A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.”

<sup>11</sup> Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, [1979] E.C.R. 461.

<sup>12</sup> *Ibid.*, para 38.

<sup>13</sup> Jones- González-Díaz, *The EEC Merger Regulation*, p. 131.

Azevedo and Walker criticize the legal definition given to dominance stating that it has noticeable problems in terms of meaning and measurement. See Azevedo- Walker, *Dominance: Meaning and measurement*, E.C.L.R. 2002, 23(7), 363-367.

position enjoyed by an undertaking permits it to profit from the advantages of monopolistic nature.<sup>14</sup>

## 2.2 Oligopolistic markets and collective dominance

Effective competition may also be threatened in other ways than by single dominant firms. This can be apparent when two or more undertakings engage in what economists refer to as tacit collusion, as a result of which their behaviour may approximate that of a single dominant firm.<sup>15</sup> Characteristic is that none of the undertakings holds a dominant position by themselves, but the strong position on the relevant market is based on their collective market power. Collective maximization of profits is permitted by avoiding mutual competition and acting to some extent independently of their clients and consumers.<sup>16</sup> For the undertakings involved, it entails balancing between long-term benefits that can be achieved through common understanding and short-term profits that can be gained by deviating from the strategy adopted on the relevant market.<sup>17</sup>

Tacit collusion can be apparent especially on oligopolistic market structures where the amount of undertakings competing with each other is low and they are all relatively large without any of them being in a position of single dominance.<sup>18</sup> The competitive environment makes it easy for the undertakings to monitor each other's competitive strategies and to engage in non-cooperative strategic interaction without engaging in an agreement or

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<sup>14</sup> Navarro- Font- Folguera- Briones, *Merger control in the European Union*, p. 146.

<sup>15</sup> Ivaldi- Jullien- Rey- Seabright- Tirole, *The Economics of Unilateral Effects*, IDEI, Toulouse, November 2003, Interim Report for DG Competition, European Commission, p. 3. Available at [http://europa.eu.int/comm/competition/mergers/review/the\\_economics\\_of\\_unilateral\\_effects\\_en.pdf](http://europa.eu.int/comm/competition/mergers/review/the_economics_of_unilateral_effects_en.pdf).

<sup>16</sup> Navarro- Font- Folguera- Briones, *Merger Control in the EU*, p. 146.

<sup>17</sup> Von Hinten-Reed- Camesasca, *European merger control: Tougher, softer, clearer*, E.C.L.R. 2003, 24(9), 458-462, p. 460.

<sup>18</sup> Stroux, *Collective dominance under the Merger Regulation: A serious evidentiary reprimand for the Commission*, E.L.Rev. 2002, 27(6), 736-746, p. 736.

other form of collusive conduct that is prohibited in the Community law under Article 81 EC.

It can be hard to find legal remedies to avoid anti-competitive effects resulting from such market behaviour. Since the behaviour falls outside the scope of Article 81 EC in the absence of an agreement and no single dominance in the meaning of Article 82 EC exists, this legal lacuna led to the development of the concept of collective dominance in the EC law.<sup>19</sup>

The concept of collective dominance has developed in relation to Article 82 EC. In case law, the concept was applied for the first time in *Italian Flat Glass*<sup>20</sup>, where the Court stated that Article 86 [82 EC] was applicable to independent companies, which together held a dominant position on the relevant market. Collectively held dominant position was supported by existing economical links between the undertakings concerned, such as agreements or licences that would result as a technological lead affording them the power to behave to appreciable extent independently of their competitors, their customers and ultimately of their consumers.<sup>21</sup> Later it became apparent in practice that there was a need for such a concept in merger control as well. Despite some underlying differences between the rationale of Article 82 and EC merger control, the concept of collective dominance has the same legal basis in both contexts.

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<sup>19</sup> No absolute consensus of the right term thus exists. Tacit collusion has been referred to with the term oligopolistic dominance, which can however be misleading since not all oligopolistic markets are uncompetitive. It has been also dealt with under the notion of joint dominance in a number of important Court decisions of the ECJ and CFI. In the following, I shall use the term collective dominance since it is seen to be the most legally based notion. This will be in line with the delimitations of this master thesis.

<sup>20</sup> Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities*, [1992] E.C.R. II-1403.

<sup>21</sup> See *ibid.*, para 358.

## 2.3 Open wording of Article 2 of the Merger Regulation 4064/89

Unlike Article 82 EC, Article 2 of the Merger Regulation 4064/89 did not refer to a dominant position held by two or more undertakings.<sup>22</sup> Since the provision did not offer an answer whether its scope covered creation or strengthening of collective dominance, it was initially considered as a controversial issue.<sup>23</sup> If the appraisal of concentrations would have been done strictly according to the wording of Article 2(3) of the original Merger Regulation 4064/89, would some concentrations that had harmful effects on competition, but which did not sufficiently fill the dominance criteria, have escaped merger control. This is because the provided dominance test declared concentration incompatible with the common market only if it created or strengthened a dominant position as a result of which effective competition would have been significantly impeded. Under this two-fold test, it was possible that the question of significant impediment to competition was not considered if the concentration escaped the threshold required for dominance.<sup>24</sup>

This gap in the Merger Regulation was problematic in relation to product markets with notably oligopolistic features where auxiliary concentration could lead to lessening of competition by facilitating further cooperation among undertakings that already held substantial market shares.<sup>25</sup> Under the dominance test, the only way to address this issue was to consider whether a group of undertakings could be considered to hold a dominant position

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<sup>22</sup> This is also true concerning Article 2 of EC Merger Regulation 139/2004.

<sup>23</sup> Heiko, *Collective dominance under Article 82 E.C. and E.C. merger control in the light of Airtours judgment*, E.C.L.R. 2002, 23(9), 434-444, p. 439.

<sup>24</sup> Vickers, *Merger policy in Europe: Retrospect and prospect*, E.C.L.R. 2004, 25(7), 455-463, p. 458.

There are however differing opinions whether this was actually problematic and whether two stages of appraisal could be identified. This is evident in decisions in cases T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753 and T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585 where the Court emphasized impediment of competition in its reasoning.

<sup>25</sup> Goyder, *EC Competition Law*, p. 405.



collectively.<sup>26</sup> The need to extend the concept of dominance was therefore evident. It started over a decade lasting process of formulating the doctrine of collective dominance in the Commission's decision-making and in the case law of the Community Courts.

## **2.4 Development of the doctrine of collective dominance in the case law**

### **2.4.1 Landmark decision in *Nestlé/Perrier***

The Commission based its decision on collective dominance for the first time in year 1992 in *Nestlé/Perrier*<sup>27</sup>. The Commission argued that the post-merger situation would be more likely to be cooperative between Nestlé/Perrier and BSN and would lead to collectively held dominant position on the French market for bottled water.

The mere creation of duopoly or oligopolistic market structure did not justify a prohibition of a concentration; additional factors were needed to establish that the concentration would lead to probability of tacit collusion.<sup>28</sup> Market characteristics that would make tacit collusion more likely were transparent market that allowed the firms to control and monitor each other, price-inelastic demand and low countervailing power from consumers, similar cost structures of the firms, mature technology, symmetry of the remaining undertakings, product homogeneity, high barriers of entry and absence of potential competition.<sup>29</sup> There was only little disagreement that the facts in this case were able to fulfil the requirements for establishing collective dominance.<sup>30</sup> The concentration

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<sup>26</sup> Weitbrecht, *EU merger control in 2004- An overview*, E.C.L.R. 2005, 26(2), 67-73, p. 67.

<sup>27</sup> Case IV/M190, *Nestlé/Perrier*, Commission Decision of 22 July 1992, [1992] OJ L356/1.

<sup>28</sup> Dutilh- van der Woude- Landes, *European Union*, p. 50.

<sup>29</sup> Case IV/M190, *Nestlé/Perrier*, Commission Decision of 22 July 1992, [1992] OJ L356/1, paras 121-131.

<sup>30</sup> Goyder, *EC Competition Law*, p. 406.

was declared compatible with the common market under certain conditions and obligations on the merged entity.<sup>31</sup>

The Commission Decision in *Nestlé/Perrier* was a natural response to the noticeable problems resulting from the open wording of Article 2(3) and it expanded the concept of dominance to achieve the broadly agreed policy goal.<sup>32</sup> The decision stated that the distinction between single and oligopolistic dominance could not be decisive for the application of the Merger Regulation because both situations were able to impede effective competition. Negative effect on competition would result particularly of significant increase of concentration on oligopolistic market structures where the competition was already weakened before the merger.<sup>33</sup>

The Commission's reasoning is interesting since it approached the widening of the scope of the Merger Regulation from the perspective of significant impediment to effective competition. It stated that the dominance was only the means by which effective competition can be impeded. It was therefore reasonable that impediment of competition would be prevented despite the number of firms in accordance with the general aim of Article 3(f) of the EEC Treaty [3(g) EC] and the principal goal of maintaining effective competition. The Commission went on by concluding that it cannot be assumed in the absence of explicit exclusion of oligopolistic dominance by Article 2(3) that the intention of the legislator was to permit the impediment of effective competition by two or more undertakings that were holding the power to behave together to an appreciable extent independently on the market.<sup>34</sup>

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<sup>31</sup> See more about conditions and obligations on the case. Case IV/M190, *Nestlé/Perrier*, Commission Decision of 22 July 1992, [1992] OJ L356/1, para 136.

<sup>32</sup> Vickers, *Merger policy in Europe: Retrospect and prospect*, E.C.L.R. 2004, 25(7), 455-463, p. 458.

<sup>33</sup> Case IV/M190, *Nestlé/Perrier*, Commission Decision of 22 July 1992, [1992] OJ L356/1, para 112.

<sup>34</sup> *Ibid.*, paras 113-114.

The Commission Decision widened the scope of the Merger Regulation from single dominance to cover also situations where two or more undertakings would hold dominant market position collectively. Since then, there has been an administrative practice that the scope of the Merger Regulation reaches also cases of collective dominance and allows the Commission to intervene against mergers that lead to the creation or strengthening of certain oligopolistic market structures.<sup>35</sup>

The Commission Decision did not however stop debates of the scope of the Merger Regulation 4064/89. It was argued whether the Commission had exceeded its powers when it had applied the Merger Regulation in terms of collective dominance.<sup>36</sup> This involved some legal uncertainty around EC merger control.

## **2.4.2 Confirmation in the ECJ case law in**

### ***France v Commission***

The European Court of Justice finally confirmed the applicability of the Merger Regulation to collective dominance in its 1998 judgement in *France v Commission*<sup>37</sup>. The Commission had concluded in its decision that because of the proposed concentration, two entities, K+S/MdK and Société Commerciale des Potasses et de l'Azote, would enjoy a dominant position on a market for mineral fertilizer kali.<sup>38</sup> The Commission's analysis was based on the fragmentation of the supply side and a combined market share of 60 per cent held by the duopoly. According to the Commission, there was a strong probability that there would be no effective competition between K+S/MdK and Société Commerciale des Potasses et de l'Azote post merger.

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<sup>35</sup> Heiko, *Collective dominance under Article 82 E.C: and E.C. merger control in the light of Airtours judgement*, E.C.L.R. 2002, 23(9), 434-444, p. 439 and Fountoukakos- Ryan, *A new substantive test for EU merger control*, E.C.L.R. 2005, 26(5), 277-296, p. 281.

<sup>36</sup> See Navarro- Font- Folguera- Briones, *Merger control in the European Union*, p. 200-201.

<sup>37</sup> Joined cases C- 68/94 and 30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375.

<sup>38</sup> See Case IV/M308, *Kali + Salz/MDK/Treuhand*, Commission Decision of 9 July 1998, [1994] OJ L186/38.

This view was supported by the past behaviour and existing commercial links between the undertakings as well as by the characteristics of the potash market. The level of market transparency was high and there was existing product homogeneity and lack of technical innovation.<sup>39</sup>

The Commission Decision led to debates concerning the applicability of the Merger Regulation to collective dominance and to division of opinions. It was questionable whether the decision adopted in this case was in conflict with literal interpretation of Article 2 of the Merger Regulation. This view was supported by the Council's actual purpose to limit the powers delegated to the Commission to concern only single dominance.<sup>40</sup> At the time of the adoption of the Regulation, the Member States represented in the Council could not reach a common understanding of merger control on oligopolistic markets.<sup>41</sup>

The French Government that was supporting the concentration and the parties thereof stated that the wide interpretation of Article 2 would lead to legal uncertainty. Moreover, the Government concluded that if the legislator had intended to cover situations of collective dominance, such provision would have been expressly introduced in Article 2 of the Merger Regulation.<sup>42</sup>

This was also the view of Mr Advocate General Tesauro who recognized the existing gap in the Merger Regulation and the restrictions the wording of Article 2 withheld concerning oligopolies. However, he was of the opinion that the right way to tackle this problem was through amendment of the

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<sup>39</sup> See joined cases C- 68/94 and 30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375, paras 12-13.

<sup>40</sup> Navarro- Font- Folguera- Briones, *Merger control in the European Union*, p. 201.

<sup>41</sup> Garcia Perez, *Collective dominance under the Merger Regulation*, E.L.Rev. 1998, 23(5), 475-480.

<sup>42</sup> Joined cases C- 68/94 and 30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375, paras 152-154.

Regulation and he rejected the idea of widening the scope of Merger Regulation by interpretation beyond its wording.<sup>43</sup>

The Court rejected the advice of Mr Advocate General Tesauo and concluded that the intended purpose of the Merger Regulation would be frustrated if a concentration creating or strengthening a dominant position on the part of the parties to the concentration would be ruled out of its scope.<sup>44</sup> The Court approached the controversial issue by remarking that neither wording of Article 2 or the legal bases of the Merger Regulation excluded its application to oligopolies. It also dismissed the preparatory works as guidance and emphasised that the interpretation should be made by reference to its purpose and general structure.<sup>45</sup> The Court therefore adopted a teleological interpretation to fill in the otherwise existing gap in the Merger Regulation.<sup>46</sup>

Even though the ECJ annulled the Commission Decision based on a failure to establish that the concentration would give rise to collective dominance, which would significantly impede effective competition, the importance of *France v Commission* lays in the development of doctrine of collective dominance in EC merger control. The Court ruling confirmed that the Merger Regulation is applicable also to cases of collective dominance.<sup>47</sup> The ECJ reached its decision despite the fact that prima facie, the dominance test may not be accurate for assessing oligopolistic market structures.<sup>48</sup>

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<sup>43</sup> Opinion of Mr Advocate General Tesauo delivered on 6 February 1997. Joined cases C-68/94 and C-30/95. *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375.

<sup>44</sup> Joined cases C-68/94 and 30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375, para 171.

<sup>45</sup> *Ibid.*, paras 165-178.

<sup>46</sup> Garcia Perez, *Collective dominance under the Merger Regulation*, E.L.Rev. 1998, 23(5), 475-480.

<sup>47</sup> Selvam, *The EC merger control impasse: Is there a solution to this predicament*, E.C.L.R. 2004, 25(1), 52-67, p. 56.

<sup>48</sup> *Ibid.*

The debates over doctrine of collective dominance did not however reach their conclusion even after the judgement in *France v Commission*. The Court did recognise that collective dominance falls under the ambit of EC merger control and confirmed the competence vested on the Commission on this area. Certain criticism was still in the air especially regarding the lack of clear guidelines for the appraisal of concentrations leading to collective dominance. The Court had limited the discretion enjoyed by the Commission in the economic assessment, but failed to establish clear rules.<sup>49</sup> Furthermore, oligopolies where no economic links existed might still fall outside the scope of EC merger control.<sup>50</sup>

### **2.4.3 Further clarification in *Gencor v Commission***

In *Gencor v Commission*<sup>51</sup> the Court of First Instance confirmed the Commission Decision to block a concentration that would have led to the creation of a duopoly in global market for platinum and rhodium. It was the first case where merger was prohibited on the grounds of collective dominance and significant impediment of competition.

In its judgment, the CFI approached the question of collective dominance taking the view already adopted in *France v Commission*<sup>52</sup> and highlighted that for there to be a position of collective dominance, the Commission was obligated to establish that the concentration would lead to significant impediment of competition. Such an effect would arise if the undertakings on the market would be able to adopt a common policy and act to a considerable extent independently of their competitors, customers and

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<sup>49</sup> Garcia Perez, *Collective dominance under the Merger Regulation*, E.L.Rev. 1998, 23(5), 475-480 and Cook- Kerse, *E.C. Merger Control*, p. 170.

<sup>50</sup> Garcia Perez, *Collective dominance under the Merger Regulation*, E.L.Rev. 1998, 23(5), 475-480.

<sup>51</sup> Case T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753.

<sup>52</sup> Joined cases C- 68/94 and 30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375, para 211.

consumers. The CFI referred to factors giving rise to a connection between undertakings as confirmatory evidence.<sup>53</sup> This definition given to collective dominance was similar to the traditional definition of single dominance, altered to fit into a situation of shared dominance.<sup>54</sup> Moreover, the CFI clarified that the requirement of threshold of 25 percent as stated in recital 15 of the Merger Regulation was not to be interpreted restricting the scope of merger control on oligopolistic markets since the threshold of undertakings on such market structures is rarely below 25 percent.<sup>55</sup>

One of the grounds on why the Commission Decision was appealed was the absence of structural links between the undertakings. The applicant claimed that the Commission had not done its assessment based on the previous case law of the CFI.<sup>56</sup> In *Italian Flat Glass*<sup>57</sup> case it had been stated that in order to establish collective dominance, structural links between undertakings were required. The Court rejected this argument by stating that the structural links between undertakings in *Italian Flat Glass* were merely an example and not a requirement for establishing a collective dominance.<sup>58</sup> It went on to clarify that:

“[T]here is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another’s behaviour and are therefore strongly encouraged to

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<sup>53</sup> Case T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753, para 163.

<sup>54</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 280.

<sup>55</sup> See Case T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753, para 134.

<sup>56</sup> Case T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753, para 264.

<sup>57</sup> Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities*, [1992] E.C.R. II-1403.

See para 274 of the judgment where the CFI stated:

“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>58</sup> Case T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753, paras 273-275.

align their conduct on the market, in particular in such a way as to maximize their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels.”<sup>59</sup>

By expressly stating that the relationship of interdependence between the parties of oligopoly in markets with certain characteristics was sufficient to show the existence of economic links between the undertakings, it can be argued that this statement extended the doctrine of collective dominance and widened the scope of merger control on oligopolistic markets.<sup>60</sup> It also set a methodology for assessment of collective dominance, mainly that there has to be certain market characteristics that allow the undertakings to anticipate one another’s behaviour and that departure from the common policy would not be beneficial.<sup>61</sup>

The CFI judgement also confirmed that the concept of collective dominance was equivalent to economic concept of tacit coordination.<sup>62</sup> This was established by reference to plus factors, collective maximization of profits and to the incentive to cheat.<sup>63</sup> The impact of economic assessment in appraisal of concentrations giving rise to a finding of collective dominance was to be strengthened in later judgment in *Airtours* case.

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<sup>59</sup> *Idid.*, para 276.

<sup>60</sup> Navarro, Font, Folguera and Briones emphasize that from the perspective of economic analysis, it is not essential to analyze whether links are essential to establish a situation of collective dominance but to instead concentrate on whether such links enhance the viability or sustainability of a collusive equilibrium. See Navarro- Font- Folguera- Briones, *Merger control in the European Union*, p. 213-214.

<sup>61</sup> Nikpay- Houwen, *Tour de force or a little local turbulence? A heretical view on the Airtours judgment*, E.C.L.R. 2003, 24(5), 193-202, p. 198.

<sup>62</sup> Bishop- Lofardo, *A legal and economic consensus? The theory and practice of coordinated effects in EC merger control*, Antitrust Bulletin, spring 2004; 49, ½, p. 223 and Fingleton, *Does collective dominance provide suitable housing for all anti-competitive mergers?* P. 187.

<sup>63</sup> Fingleton, *Does collective dominance provide suitable housing for all anti-competitive mergers?* P. 188.



## 2.4.4 Testing the limits of the doctrine of collective dominance- *Airtours* case

In 1999, the Commission prohibited a hostile acquisition of First Choice by Airtours.<sup>64</sup> Airtours and First Choice were the second and fourth largest tour operations for short-haul package holidays in the United Kingdom market. The Commission took the view that the proposed concentration would have led to the creation of a dominant triopoly together with the remaining operators on the market, Thomas Cook and Thomson. The decision was remarkable since it was the first time that the Commission blocked a concentration leading to a position of collective dominance held by more than two undertakings.<sup>65</sup> Previous merger practice had mostly concentrated on duopolies, even though in case law under Article 82 EC it was already clear that the concept of collective dominance went beyond duopolies.<sup>66</sup>

The Commission based its decision on the view that it would be likely that the remaining undertakings would avoid or reduce competition between them, in particular in a form of constraining overall capacity. It argued that it is not necessary that the oligopolists always behave as if there were one or more agreements between them, but it was sufficient that the merger makes it *rational* for them to adapt to market conditions and act individually in ways that will substantially reduce competition between the undertakings and allow them to act independently of competitors, customers and consumers. Furthermore, the Commission did not consider that a strict

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<sup>64</sup> Case IV/M.1524, *Airtours/First Choice*, Commission Decision of 22 September 1999, [2000] OJ L93/1.

<sup>65</sup> The Commission had investigated whether notified concentrations would lead to a collectively held dominant position between more than two undertakings in cases such as case IV/M.202, *Thorn EMI/Virgin*, Commission Decision of 27 April 1992, [1992] OJ C120; case IV/M.258, *CCIE/GTE*, Commission Decision 25 September 1992, [1992] OJ C258/15; case IV/M.358, *Pilkington/SIV*, Commission Decision of 21 December 1993, [1994] OJ L158/24; case IV/M.1016, *Price Waterhouse/Coopers & Lybrand*, Commission Decision of 20 May 1998, [1999] OJ L50/27. None of the investigations led to prohibition of a merger.

<sup>66</sup> See for example joined cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities*, [1992] E.C.R. II-1403.

retaliation mechanism is a necessary condition for collective dominance in cases where strong incentives to reduce competitive action existed.<sup>67</sup>

In its judgment in 2002 the CFI annulled the Commission Decision. The Court stated that Commission had erred in its assessments on the fundamental factors of establishing creation of collective dominance that was such as to significantly impede effective competition. The decision to block the merger had not been done in accordance to the requisite legal standard.<sup>68</sup> The significance of the judgment lays on the clarification it made on how collective dominance was to be assessed under the Merger Regulation.<sup>69</sup> It enhanced legal certainty by answering to open questions and blur around collective dominance and was therefore of high importance. In paragraph 61, the CFI gathered up the concept of collective dominance:

”A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC ... and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.”<sup>70</sup>

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<sup>67</sup> Case IV/M.1524, *Airtours/First Choice*, Commission Decision of 22 September 1999, [2000] OJ L93/1, paras 54-56.

<sup>68</sup> Case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 294.

<sup>69</sup> Selvam, *The EC merger control impasse: Is there a solution to this predicament*, E.C.L.R. 2004, 25(1), 52-67, p. 56.

Nikpay and Houwen argue that it did not represent a radical development of the law since it was more of a summation of the law as established in *Gencor v Commission*. See Nikpay-Houwen, *Tour de force or a little local turbulence? A heretical view on the Airtours judgment*, E.C.L.R. 2003, 24(5), 193-202, p. 193.

<sup>70</sup> Case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 61.

The CFI went on in paragraph 62 to set three conditions that are necessary for a finding of collective dominance:

- 1) *Market transparency*. All members of the dominant oligopoly must have the ability to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving.
- 2) *Adequate deterrents*. Deterrents ensure that there is a long-term incentive in not departing from the common policy. This means that each member of the dominant oligopoly must be aware that departing from the common policy through highly competitive action, which is designed to increase its market share, would provoke identical action by the others, so that it would derive no benefit from its initiative.
- 3) *No countervailing power*. The Commission needs to establish that there is no foreseeable reaction of current and future competitors and consumers that would jeopardize the results expected from the common policy.<sup>71</sup>

The judgment establishes that the post merger collective dominance should be ruled out if any of the three conditions would fail to hold.<sup>72</sup> These three conditions are similar factors to those taken into account by the US authorities when assessing likelihood of coordinated effects under the Substantive Lessening of Competition test (SLC test).<sup>73</sup>

The CFI held that the Commission had failed to prove that these three conditions were fulfilled in this case. It had made errors of assessment when concluding that the three major tour operators would have an incentive to cease competing with each other.<sup>74</sup> Market and product characteristics did

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<sup>71</sup> Ibid., para 62.

<sup>72</sup> Bishop- Lofardo, *A legal and economic consensus? The theory and practice of coordinated effects in EC merger control*, Antitrust Bulletin, spring 2004; 49, ½, p. 231.

<sup>73</sup> Selvam, *The EC merger control impasse: Is there a solution to this predicament*, E.C.L.R. 2004, 25(1), 52-67, p. 56.

<sup>74</sup> Case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, paras 179-182.

not make creation of collective dominance conducive. As for the question of deterrents, the CFI stated that the Commission needs to establish that there exists a deterrent, which ensures that the members of the oligopoly do not depart from the common course of conduct. However, it is not necessary to prove that there is a specific retaliation mechanism.<sup>75</sup> As for the third criterion, the Commission had underestimated the countervailing force of the consumers, smaller tour operators, potential competitors and hotel owners that was capable of counteracting the creation of a collective dominant position.<sup>76</sup>

*Airtours* case demonstrates the difficulties there are to distinguish a non-competitive market behaviour from the normal function of an oligopolistic market.<sup>77</sup> The judgment provided clearer guidance on the standard of economic reasoning and emphasized that facts should be assessed carefully and related to the economic case being made.<sup>78</sup> However, it did not solve all the difficulties associated with predicting of future coordination.<sup>79</sup>

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<sup>75</sup> Ibid., paras 194-195.

<sup>76</sup> Ibid., para 277.

<sup>77</sup> Stroux, *Collective dominance under the Merger Regulation: A serious evidentiary reprimand for the Commission*, E.L.Rev. 2002, 27(6), 736-746, p. 744.

<sup>78</sup> Overd, *After the Airtours appeal*, E.C.L.R. 2002, 23(8), 375-377, p. 376.

<sup>79</sup> Ibid.

# 3 Analysis on the case law- Problems and controversies

## 3.1 Legal basis of collective dominance

### 3.1.1 Teleological interpretation in order to preserve undistorted competition

The development of the doctrine of collective dominance has significantly strengthened the Commission's competence to intervene in concentrations that are leading to noticeable threats to competitive environment on oligopolistic markets.<sup>80</sup> It has to some extent filled in the gaps that the open wording of the dominance test in Article 2 of the Merger Regulation had left. Fountoukakos and Kyriakos stress that open termed substantive test has been vital for the merger control to be able to evolve in line with the unforeseeable development and that the test was worded intentionally in general terms to be supplemented over time by interpretative precedent and complementing guidelines.<sup>81</sup> Indeed, the doctrine of collective dominance provides a good example of how the needs of securing a competitive environment have been achieved through adopted case law. The Commission and both the ECJ and the CFI have applied the dominance test in teleological manner in order to give effect utile to the preservation of the system of undistorted competition envisaged by Article 3(g) EC.<sup>82</sup>

On the other hand, teleological interpretation beyond the actual wording has raised discussions whether the doctrine of collective dominance has a sound

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<sup>80</sup> *Collective dominance: Trump card or a joker*, case comment France v Commission of the European Communities (C68/94) [1998] E.C.R. I-1375 (ECJ). E.L.Rev. 1998, 23(3), 199-200.

<sup>81</sup> Fountoukakos- Ryan, *A new substantive test for EU merger control*, E.C.L.R. 2005, 26(5), 277-296, p. 286.

<sup>82</sup> *Ibid.*, p. 281.

legal basis.<sup>83</sup> Moreover, the relationship with Article 82 has been problematic and open to interpretation and differing opinions.

### **3.1.2 Definition of dominance under Article 82 EC and the Merger Regulation**

Despite the fact that the starting point for analysis under Article 82 EC and under the Merger Regulation is different, the definition of dominance as formulated in the context of Article 82 EC [ex 86] has been accepted to merger control.<sup>84</sup> Its significance was emphasized with the development of the doctrine of collective dominance when the notion of dominance was extended to cover new variety of anti-competitive behaviour.

It can however be problematic that the same notion of collective dominance is used in two contexts that are fundamentally different. Article 82 EC prohibits the abuse of dominant position held by one or more undertakings but it does not prohibit dominant position per se. It deals primarily with behaviour rather than structure like the Merger Regulation does.<sup>85</sup> It is an ex post way to penalize past misconduct while Article 2 of the Merger Regulation is focusing on future effects resulting from a concentration.<sup>86</sup>

Taking into consideration the two different aims that Article 82 EC and Article 2 of the Merger Regulation have, the question of legal certainty arises. It is a matter of interpretation to which extent the concept of collective dominance should be considered identical in these two contexts. It can be uncertain what kind of responsibilities the use of the concept of collective dominance in merger control sets out for the undertakings operating on markets with oligopolistic structures. More specifically, does

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<sup>83</sup> See Hawk- Huser, *European Community merger control: A practioners guide*, p. 216.

<sup>84</sup> It was questionable whether this interpretation and division of powers to the Commission was intended by the drafters of Articles 85 and 86 [81 EC and 82 EC]. See for example Goyder, *EC Competition Law*, p. 379 and *Collective dominance: Trump card or a joker*, case comment *France v Commission of the European Communities (C68/94)* [1998] E.C.R. I-1375 (ECJ). E.L.Rev. 1998, 23(3), 199-200.

<sup>85</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 273.

<sup>86</sup> Goyder, *EC Competition Law*, p. 394-395.

the use of the concept mean that the members of an oligopoly have to bear the special responsibilities imposed on dominant undertakings in the context of Article 82 EC.<sup>87</sup> If these two concepts were to be considered identical, it could lead to the situation where the prohibition of abuse of dominance in Article 82 EC would appear to expand in scope.<sup>88</sup> On the other hand, having two different meanings for the word “dominance” would be rather confusing as well.<sup>89</sup> It would thus set higher demands for the case law to establish the differences between these two concepts.

Despite the same notion, the underlying differences have an impact on the assessment of mergers. In merger practice, the Commission cannot base its appraisal on the static nature of a market but also consider the future development of the market.<sup>90</sup> Moreover, a finding of collective dominance under Article 82 EC is concerned whether there is competitive pressure from outside the dominant position, while merger control is more concerned about the relationship between the members of collective dominance.<sup>91</sup> Temple Lang<sup>92</sup> emphasizes that it is necessary that antitrust policy does not prevent dominant positions arising from legitimate competition. The significance of Article 82 EC is then to prevent the abuse of such market position. Therefore, there has to be a causal link that the creation or strengthening of dominant position through market concentration will actually lead to lessening of competition. Temple Lang therefore suggests high criteria for blocking of mergers as a solution to the possible problems that arise from having one word for two differing purposes.<sup>93</sup>

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<sup>87</sup> Fountoukakos- Ryan, *A new substantive test for EU merger control*, E.C.L.R. 2005, 26(5), 277-296, p. 284.

<sup>88</sup> Vickers, *Merger policy in Europe: Retrospect and prospect*, E.C.L.R. 2004, 25(7), 455-463, p. 459.

<sup>89</sup> Ibid.

<sup>90</sup> Dutilh- van der Woude- Landes, *European Union*, p. 49.

<sup>91</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 314.

<sup>92</sup> Mr John Temple Lang has made a long career in Directorate General Competition and Legal Services of the European Commission. He is the author of various articles and a book on EC competition law. Now he is a counsel at Cleary Gottlieb Brussels office.

<sup>93</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 313.

## 3.2 Legal uncertainty of the doctrine of collective dominance

The case law shows that the doctrine of collective dominance has been ambiguous in practice. Even though teleological interpretation beyond the wording of Article 2 has evidently filled existing gaps left by the dominance test, the development has been problematic from the perspective of legal certainty. Sometimes the outcome of the appraisal of concentrations by the Commission or interpretation by the Community Courts has been hard to predict. Therefore, attempts to characterise non-cooperative strategic interaction on oligopolistic market structures in terms of collective dominance can jeopardise legal certainty. It can be hard to predict the scope of merger control this doctrine entails. Hawk and Huser see collective dominance only as a secondary option for the Commission to block a merger because of the concept's relative novelty and its uncertain economic and legal bases within EC jurisprudence.<sup>94</sup>

An example of this paradigm is the role of economic links as the connecting factor between independent undertakings. It seems that the doctrine of collective dominance was initially supposed to cover only cases where there were anti-competitive contractual or similar links between independent companies, such as structural links as established in *Italian Flat Glass*.<sup>95</sup> In *Gencor v Commission*, the CFI cleared that particularly on oligopolistic markets with high concentration level, product homogeneity and transparency, the mere existence of interdependence was enough to encourage parties to align their conduct on the market.<sup>96</sup> Admittedly, the extension was needed, for otherwise the scope of merger control would have been limited in practice. Nevertheless, the scope of collective dominance

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<sup>94</sup> Hawk- Huser, *European Community merger control: A practioners guide*, p. 216.

<sup>95</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 300.

<sup>96</sup> Case T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753, para 276.



differs remarkably between these two requirements. Concerns on legal certainty are comprehensible.

Indeed, as Temple Land criticises, there has been inconsistency with the development of collective dominance and the Commission has approached the first cases without having a clear concept of collective dominance. The ruling in *Airtours* case supports this. The CFI rejected practically all key criteria and evaluations on the effects of the proposed merger made by the Commission.<sup>97</sup> Furthermore, it has been argued that the attempt of the Commission in *Airtours* case was to extend the doctrine of collective dominance to apply to cases in which there is substantial lessening of competition instead of creation or strengthening of dominance.<sup>98</sup> Possibly, to extend it to even cover unilateral effects. Eventually, the CFI did not address the question of unilateral effects and arguably left the issue open.<sup>99</sup> It is clear that a need for controlling mergers leading to use of unilateral market power was apparent already at that time, but the existence of such a remedy under the Merger Regulation was not definite. To expand the scope of the Merger Regulation to this extent might have been questionable. Question of unilateral effects demonstrates the role that has been given to the doctrine of collective dominance as a gap-filling instrument in the EC merger control. The whereabouts of the boundaries of the doctrine have been unclear throughout the development process in the case law.

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<sup>97</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 300.

<sup>98</sup> Ibid. and 309-313 and Jenny, *Collective dominance and the EC Merger Regulation*, p. 367-368.

Jenny's argument is based on paragraph 150 of the Commission Decision where the Commission stated that:

"[T]he Commission does not consider that it is necessary to show that the market participants as a result of the proposed merger would behave as if there were a cartel, with a tacit rather than explicit cartel agreement ... In particular, it is not necessary to show that there would be a strict punishment mechanism... What matters for collective dominance in the present case is whether the degree of interdependence between the oligopolists is such that it is rational for the oligopolists to restrict output, and in this sense reduce competition in such a way that a collective dominant position is created."

See case IV/M.1524, *Airtours/First Choice*, Commission Decision of 22 September 1999, [2000] OJ L93/1, para 150.

<sup>99</sup> Nikpay- Houwen, *Tour de force or a little local turbulence? A heretical view on the Airtours judgment*, E.C.L.R. 2003, 24(5), 193-202, p. 195.

This can be due to policy reasons. The Court did not consider it necessary to step so far away from the literal interpretation as answering to this question would have required.

### 3.3 Checklist approach on collective dominance is not possible

Market factors on different oligopolies vary. To establish a clear checklist for collective dominance is not therefore rational. There is no economic model that would explain precise circumstances under which a change to coordination between the undertakings could be predicted.<sup>100</sup> Moreover, the test of collective dominance is based on a test of probability, which makes assessment even more complicated.<sup>101</sup> A finding of collectively held dominant position requires careful assessment of the reference market and of the specific factors therein. Different market factors affect each other and it is not possible to draw conclusions solely based on presence or absence of a particular factor.<sup>102</sup> Although this premise applies equally to the assessment of single dominant position, it achieves particular magnitude when analysing the relations between undertakings on oligopolistic markets.<sup>103</sup>

Similar wording has been used in the case law in relation to single and collective dominance. Collective dominance has been linked with the independence of action that is characteristic to single dominance. However, these two types of dominant market positions have some fundamental differences that also affect the evaluation of mergers. There is a difference on the relevance that can be given to the calculation of market shares as an indicator of a single or collective dominant position. In order to establish a position of collective dominance, other market factors need to be considered more carefully. This was noted by the CFI in *Gencor v Commission*:

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<sup>100</sup> Dubow, Elliot, Morrison, *Unilateral effects and merger simulation models*, E.C.L.R. 2004, 25(2), 114-117, p. 114.

<sup>101</sup> Navarro- Font- Folguera- Briones, *Merger control in the European Union*, p. 146.

<sup>102</sup> *Ibid.*, p. 239.

<sup>103</sup> Briones Alonso, *Oligopolistic dominance. Is there a common approach in different jurisdictions? A review of decisions adopted by the Commission under the Merger Regulation*, para 8. Available at [http://europa.eu.int/comm/competition/speeches/text/sp1995\\_036\\_en.html](http://europa.eu.int/comm/competition/speeches/text/sp1995_036_en.html).

” [I]n the context of an oligopoly, the fact that the parties to the oligopoly hold large market shares does not necessarily have the same significance, compared to the analysis of an individual dominant position, with regard to the opportunities for those parties, as a group, to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers.”<sup>104</sup>

The CFI continued that particularly in the case of duopoly, large market shares should be considered as an indicator of a collective dominant position in the absence of evidence to contrary.<sup>105</sup> However, the approach adopted by the CFI illustrates the difficulties that the Commission faces regarding establishing of collective dominance. When none of the undertakings is in single dominant position, there needs to be other evidence that the concentration would actually lead to lessening of competition between the members of the oligopoly.

The underlying question is when is there such links between the undertakings that their market position and independence of market variables can be considered similar to the ones held by single dominant entity when none of the undertakings concerned fills the dominance threshold independently. The expansion of required links between undertakings in *Gencor v Commission* has led to difficulties to determine what “other connecting factors” will be sufficient to justify that two or more undertakings are analysed as a single dominant entity.<sup>106</sup> The judgment increased discretion on Commission and on the other hand, uncertainty, since the relevance given to links would depend on the case-by-case evaluation of the context of the case and on the specific nature of the links.<sup>107</sup>

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<sup>104</sup> Case T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753, para 206.

<sup>105</sup> *Ibid.*

<sup>106</sup> Withers- Jephcott, *Where to go now for E.C. oligopoly control*, E.C.L.R. 2001, 22(8), 295-303, p. 195.

This problem is not only relating to merger control, but it is also apparent in the use of doctrine of collective dominance under Article 82 EC cases. See *ibid.*, p. 295-303.

<sup>107</sup> See Briones Alonso, *Oligopolistic dominance. Is there a common approach in different jurisdictions? A review of decisions adopted by the Commission under the Merger Regulation*, para 21. Available at [http://europa.eu.int/comm/competition/speeches/text/sp1995\\_036\\_en.html](http://europa.eu.int/comm/competition/speeches/text/sp1995_036_en.html).

Furthermore, in cases *France v Commission* and *Airtours*, it was confirmed that when making its analysis whether proposed concentration is compatible with the common market, the Commission has to examine on case-by-case basis the circumstances that are relevant for assessing the effects of the concentration on competition in the reference market.<sup>108</sup> The Court added in *Airtours* that it is apparent that after taking a view that a concentration will create a situation of collective dominance, the Commission needs to provide convincing evidence thereof. Significant factors leading to such a finding are for example lack of effective competition between the implied members of the dominant oligopoly and weakness of any external competitive pressure.<sup>109</sup> There are however obvious difficulties to demonstrate that a decrease in the number of undertakings on a relevant market will increase or lead to collective dominance.<sup>110</sup> The overruling judgment in *Airtours* provides a good example of this. The Community Courts have set a high standard of proof for collective dominance. Hawk and Huser imply that the Commission recognizes this uncertainty of establishing coordination. Therefore, the Commission generally prefers to establish a creation or strengthening of a single dominant market power, then to refer to collusive market behaviour.<sup>111</sup>

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<sup>108</sup> Joined cases C- 68/94 and 30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375, para 222 and case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 63.

<sup>109</sup> Case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 63.

<sup>110</sup> Dubow- Elliot- Morrison, *Unilateral effects and merger simulation models*, E.C.L.R. 2004, 25(2), 114-117, p. 114.

<sup>111</sup> Hawk- Huser, *European Community merger control: A practitioners guide*, p. 216.

# **4 Article 2(3) of EC Merger Regulation 139/2004**

## **4.1 Reformed EC Merger Regulation 139/2004 and EC Horizontal Guidelines 2004**

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings is a long awaited solution to the problems that have been apparent in the Community merger control. The new EC Merger Regulation is supposed to increase predictability of the future appraisals of mergers.

EC Merger Regulation 139/2004 is especially targeting the problems that have been evident regarding oligopolistic market structures. The significance of sound merger control on oligopolistic markets is emphasized in relation to the concept on collective dominance. The EC Merger Regulation recognizes that not all oligopolistic markets are uncompetitive. However, it is clear that possible anticompetitive effects resulting from mergers, such as elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, can be more apparent on a market structure where the amount of competitors is low.<sup>112</sup>

In conjunction with the merger reform, Commission published Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. The rationale of the Horizontal Guidelines is to present guidance on the criteria the Commission

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<sup>112</sup> See recital 25 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

uses when the undertakings concerned are actual or potential competitors on the same relevant market.<sup>113</sup> Appraisal of concentrations will be made based on the economic framework of assessment as set out in the Horizontal Guidelines, which is to enhance the legal certainty.<sup>114</sup>

## **4.2 Substantive test in Article 2(3) of EC Merger Regulation 139/2004**

The question whether the dominance test was appropriate and the most effective test for EC merger control had been apparent since the introduction of the dominance test in year 1989.<sup>115</sup> It is said that the final confirmation for the need for a reform of the substantive test was the criticism the Commission received after the overturning CFI decisions in cases *Airtours*, *Schneider*<sup>116</sup> and *Tetra Laval*<sup>117</sup>. Noteworthy modification was finally launched in EC Merger Regulation 139/2004 with the rewording of the substantive test for appraisals of concentrations as set out in Article 2(3).

Article 2(3) of the EC Merger Regulation 139/2004 now states:

“A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”

The Council inverted the traditional dominance test and turned the second limb of old Article 2(3) into the principle test.<sup>118</sup> Article 2(3) now declares

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<sup>113</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para 5.

<sup>114</sup> Lowe, *Current issues of EU competition law- The new competition enforcement regime*, p. 8. Available at [http://europa.eu.int/comm/competition/speeches/text/sp2003\\_068\\_en.pdf](http://europa.eu.int/comm/competition/speeches/text/sp2003_068_en.pdf).

<sup>115</sup> The dominance test was a result of political and legal compromises. See Cook- Kerse, *E.C. Merger Control*, p. 126-127 and 130-131.

<sup>116</sup> Case T-310/01, *Schneider Electric SA v Commission of the European Communities*, [2002] E.C.R. II-04071.

<sup>117</sup> Case T-80/02, *Tetra Laval BV v Commission of the European Communities*, [2002] E.C.R. II-04519.

<sup>118</sup> Volker, *Mind the Gap: Unilateral effects analysis arrives in EC merger control*, E.C.L.R. 2004, 25(7), 395-409, p. 403.

incompatible a merger that leads to significant impediment of effective competition. The old dominance criterion is thus maintained in reworded Article 2(3) as a key indicator of such an effect on competition. As we recall, the previous test required creation or strengthening of dominant position as a result of which effective competition would be significantly impeded. The previous test therefore required both created or strengthened dominance and significant impediment to effective competition as a result.<sup>119</sup> Rewording of Article 2 therefore means a change from the dominance test to Significant Impediment to Effective Competition test. The premises are now built on the assessment how the proposed merger affects competition, not whether it reaches a threshold required for a finding of dominance.<sup>120</sup> The change is supposed to lead to a shift from legalistic approach to a more economically based analysis.

By rewording the substantive test and introducing the SIEC test, the Council aimed to establish a test that would initiate greater flexibility while maintaining the concept of dominance as a relevant part of the assessment of concentrations.<sup>121</sup> As recognized in the Commission Green Paper on the Review of Council Regulation (EEC) no 4064/89 turning into Substantive Lessening of Competition test as applied in other major jurisdictions such as Canada, Australia and the US would have made the existing massive EC case law to loose its significance to some extent.<sup>122</sup> The Commission appraises the new test as a truly European solution, which combines the best of the substantive standards of various jurisdictions, and preserves the existing precedent of the Commission Decisions and judgments of the European Courts. At this stage the Commission does not expect the change

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<sup>119</sup> Vickers, *Merger policy in Europe: Retrospect and prospect*, E.C.L.R. 2004, 25(7), 455-463, p. 460.

<sup>120</sup> Ibid.

<sup>121</sup> Maudhuit- Soames, *Changes in EU merger control: Part 2*, E.C.L.R. 2005, 26(2), 74-81, p. 76.

<sup>122</sup> Green Paper on the Review of Council Regulation (EEC) no 4064/89/\*COM/2001/0745 final/\*, European Union preparatory Acts, COM (2002 745), paras 160-161.

to alter the Commission's approach to the analysis of the competitive impact of mergers.<sup>123</sup>

### **4.3 Clarification of the concept of collective dominance**

According to the EC Merger Regulation and Horizontal Guidelines, there seems to be three different ways how effective competition can be significantly impeded. First, through the traditional concept of created or strengthened dominant position. A merger can also eliminate competitive constraints, which can lead to unilateral anti-competitive use of increased market power without resorting to coordinated behaviour.<sup>124</sup> The Horizontal Guidelines and the EC Merger Regulation refer to this by the term non-coordinated effects. It corresponds to the term unilateral effects. Another competition concern is that mergers can change the nature of competition in such a way that the likelihood of coordination increases between undertakings that did not previously coordinate their behaviour.<sup>125</sup> A merger may also make coordination easier and more stable or more effective among undertakings that were already coordinating their behaviour ex ante merger.<sup>126</sup> The latter is referred with a term coordinated effects and it closely corresponds to the effects of collective dominance as established in case law under Merger Regulation 4064/89.

A direct benefit resulting from the reform of the Merger Regulation is that it clarifies the concept of collective dominance to some extent.<sup>127</sup> Under the previous dominance test, there were concerns whether the EC merger

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<sup>123</sup> Merger control: Merger review package in a nutshell. Available at [http://europa.eu.int/comm/competition/publications/special/3\\_merger.pdf](http://europa.eu.int/comm/competition/publications/special/3_merger.pdf). It is however hard to derive definite conclusions solely based on the Commission's statements.

<sup>124</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para 22.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Kokkoris, *The reform of the European Control Merger Regulation in the aftermath of the Airtours case- The eagerly expected debate: SLC v Dominance test*, E.C.L.R. 2005, 26(1), 37-47, p. 44.



control would be able to capture concentrations leading to unilateral use of market power on differentiated product markets without the undertaking/s being in a single or collectively held dominant market position.<sup>128</sup> An example of this would be a situation where the second and third largest companies would merge. The merged entity would not reach the threshold required for a single dominance and even in the absence of coordination between the remaining undertakings, the merger could remove competitive constraints between the members of an oligopoly. It would be undesirable for the general aim of preserving effective competition if such concentrations would escape merger control, especially since there might be mergers where both elements, coordinated and non-coordinated effects, could be at hand.<sup>129</sup>

This concern was raised especially in relation to the *Airtours* case where it was implied that the Commission was trying to stretch the doctrine of collective dominance to cover unilateral effects.<sup>130</sup> Such an anticompetitive effect is likely on oligopolistic markets where the amount of competitors as well as level of competition can be low. That is why it was rational that the question of the scope of collective dominance was raised in the context of collective dominance.<sup>131</sup> Moreover, the dividing line between coordinated and non-coordinated behaviour can be hard to define. According to Temple Lang, collective dominance already exists in effect in a market in which undertakings can put an end to effective competition by their unilateral

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<sup>128</sup> See Fountoukakos- Ryan, *A new substantive test for EU merger control*, E.C.L.R. 2005, 26(5), 277-296, p. 287 and Lowe, *Current issues of EU competition law- The new competition enforcement regime*, p. 8. Available at [http://europa.eu.int/comm/competition/speeches/text/sp2003\\_068\\_en.pdf](http://europa.eu.int/comm/competition/speeches/text/sp2003_068_en.pdf).

<sup>129</sup> Vickers, *Merger policy in Europe: Retrospect and prospect*, E.C.L.R. 2004, 25(7), 455-463, p. 459.

<sup>130</sup> See Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 300 and 309-313; Vickers, *Merger policy in Europe: Retrospect and prospect*, E.C.L.R. 2004, 25(7), 455-463, p. 459; Jenny, *Collective dominance and the EC Merger Regulation*, p. 367-368 and Stroux, *Collective dominance under the Merger Regulation: A serious evidentiary reprimand for the Commission*, E.L.Rev. 2002, 27(6), 736-746, p. 738.

<sup>131</sup> Another question is whether the extension of the doctrine of collective dominance would have been the right way to tackle this problem. As Vickers criticizes, it is hard to justify how such unilateral market behaviour would fit into the boundaries of collective dominance and how would it be possible to consider undertakings enjoying such a market power to be acting as a one. See Vickers, *Merger policy in Europe: Retrospect and prospect*, E.C.L.R. 2004, 25(7), 455-463, p. 459.

effects and they all have an interest to do so.<sup>132</sup> Unilateral behaviour can also lead to multilateral effects on the market, i.e. due to the unilateral behaviour of an undertaking for example in the form of price increases, the other undertakings on the market adjust to the new situation by responding to the price increase in a similar manner.<sup>133</sup> The dividing line between collective dominance is that such effects are not conditional on the behaviour of the other companies i.e. whether they will change their market strategy and follow a common policy but a mere optimal response to the change in the competitive environment.<sup>134</sup>

The EC Merger Regulation now makes it possible to intervene even in the absence of a likelihood of coordination between the members of the oligopoly.<sup>135</sup> This therefore closes the gap in the EC merger control. It is also possible that the importance given to the doctrine of collective dominance in merger practice could diminish to some extent. At least there is no longer a need to stretch further the scope of the doctrine. From that perspective, the doctrine of collective dominance has possibly reached its end in development. This is clearly to the benefit of legal certainty.<sup>136</sup>

## **4.4 Significant Impediment to Effective Competition test and the concept of dominance**

It was highly controversial whether teleological interpretation and introduction of collective dominance was initially necessary or if it even had a sound legal basis. As Mr Advocate Generale Tesauro in *France v*

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<sup>132</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 333.

<sup>133</sup> Fingleton, *Does collective dominance provide suitable housing for all anti-competitive oligopolistic mergers?* P. 182-184.

<sup>134</sup> Verouden- Bengtsson- Albaek, *The Draft EU Notice on horizontal mergers: A further step toward convergence*, Antitrust Bulletin, spring 2004; 49, ½, p. 251-252.

<sup>135</sup> See recital 25 of the EC Merger Regulation 139/2004.

<sup>136</sup> Legal certainty has however enhanced solely from the perspective of collective dominance and what it entails. In the absence of case law and decision-making practice on non-coordinated effects, the extension/clarification that the merger control covers such effects includes a reasonable level of uncertainty for the business.

*Commission* suggested, the widening of the scope of the Merger Regulation with the doctrine of collective dominance could have been avoided by rewording of the dominance test.<sup>137</sup> Now over a decade after, the dominance test has been replaced with the SIEC test, a test that is likely to be more concentrated on the anti-competitive effects resulting from mergers instead of having legally inflexible dominance as its key criterion.

At this stage however, it is hard to be definite about what the reworded Article 2(3) of the EC Merger Regulation actually means. It is unsure whether the need for a concept of dominance, single or collective, will be the same as it was under the previous dominance test or will the SIEC test make market shares less evidential and place the emphasis on resulting competitive harms. The underlying question is does the rewording of the substantive test actually change anything. Under the dominance test it has been unclear whether the two limbs in Article 2(3) were actually independent steps in evaluation process or two elements of a single assessment.<sup>138</sup> The case law has not provided a sufficient answer. Even though the question is somewhat theoretical, it has a special impact when assessing the future significance of the doctrine of collective dominance.

The wording used in Article 2(3) of the EC Merger Regulation<sup>139</sup> includes three possible alternatives for the SIEC test and its relationship with the dominance criteria/test:

1. The test is an actual dual test with two criteria and two steps of evaluation.
2. The test is a combination of SIEC test and dominance test where both dominance and SIEC will be evaluated together and as meaning the same.

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<sup>137</sup> Opinion of Mr Advocate General Tesauro delivered on 6 February 1997. Joined cases C-68/94 and C-30/95. *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375.

<sup>138</sup> Fountoukakos- Ryan, *A new substantive test for EU merger control*, E.C.L.R. 2005, 26(5), 277-296, p. 280 and Selvam, *The EC merger control impasse: Is there a solution to this predicament*, E.C.L.R. 2004, 25(1), 52-67, p. 54-55.

<sup>139</sup> See supra p. 33.

3. The test is a pure SIEC test, where creation or strengthening of dominance will be used as a mere example.

#### **4.4.1 Dual test with two criteria**

The first alternative is built on the premises that the appraisal includes two different criteria and two steps of evaluation. If we are to suppose that the first limb of the Article 2(3) of the EC Merger Regulation resembles the US style SCL test, this theory is easier to comprehend.

Under the SIEC element, all concentrations that would lead to a significant impediment of competition would be prohibited. It would then be necessary to analyze whether created market power would enable the merged undertaking to influence on important parameters in a way that would weight the result of the competitive process.<sup>140</sup> The creation or strengthening of a dominant position would not be a requirement at this point of evaluation. The first limb would likely widen the scope of the merger control and the possibility to block concentrations after the first point of evaluation would then be greater than in comparison with the dominance criteria.

The dominance criteria in the second limb of Article 2(3) could then develop to be as a secondary point. The creation and strengthening of a dominant position would likely decrease the burden of proof on the Commission to show that the concentration leads to impediment of competition. Recital 25 of the EC Merger Regulation states that the notion SIEC extends beyond the concept of dominance only to the anti-competitive effects resulting from the non-coordinated behaviour of undertakings that would not have a dominant position. Mergers below dominance threshold could then be prohibited, but the absence of such a market position would likely increase the requirement for evidence that anti-competitive effects, mainly non-coordinated behaviour, would result from the concentration. On

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<sup>140</sup> Voigt- Schmidt, *Switching to substantial impediments of competition (SIC) can have substantial costs- SIC*, E.C.L.R. 2004, 25(9), 584-590, p. 584.

the other hand, dominance as a second evaluation point could offer de minimis kind of safe harbour to merging undertakings when thresholds of dominant position would clearly not be fulfilled and there would not be a likely risk of non-coordinated effects.

This theory resembles the opinion given by the former European Commissioner for Competition Policy, Mario Monti. He has emphasized that even though the new wording of Article 2 of the EC Merger Regulation focuses more directly on the effects on competition arising from a concentration than the old dominance test, it does not ignore the importance of structural factors in analyzing post-merger scenarios. This is supported by retaining of the notion of dominance in the said article as *a second evaluation point* when assessing compatibility of a concentration.<sup>141</sup>

#### **4.4.1.1 Dual assessment in relation to non-coordinated and coordinated effects**

Dual assessment is emphasized in relation to non-coordinated and coordinated effects. Dubow, Elliot and Morrison point out that from the economic point of view, it is harder to show cooperation than unilateral effects. Finding of coordination requires a post merger change in the behaviour of the undertakings. It is hard to provide evidence of such a change and of the circumstances that make undertakings that did not coordinate before to change their market strategies. Therefore US merger analysis has concentrated on unilateral effects on differentiated product markets unless there have been structural factors facilitating collusion or a history of collusion in the industry.<sup>142</sup>

In Interim Report for DG Competition Ivaldi, Jullien, Rey, Seabright and Tirole recognize this difficulty to evaluate likelihood of tacit collusion in

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<sup>141</sup> Speech by Mario Monti, European Commissioner for Competition Policy, *A reformed competition policy: achievements and challenges for the future*, SPEECH/04/477, date: 28/10/2004. Available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/477&format=HTML&aged=1&language=EN&guiLanguage=en>.

<sup>142</sup> Dubow- Elliot- Morrison, *Unilateral effects and merger simulation models*, E.C.L.R. 2004 25(2), 114-117, p. 114-115.

theory and practice. They therefore suggest that the assessment of mergers under the EC Merger Regulation is to be done in two separate parts by first starting with the evaluation on the effects the merger is likely to have on prices, outputs and on other important factors through the exercise of individual market power and without likelihood of engaging on tacit coordination. The second step would then be to evaluate whether the merger increases incentives for tacit coordination.<sup>143</sup>

Using dual assessment seems to be a reasonable way to approach market concentrations. Since the circumstances vary from market to market, this kind of assessment could offer more or less gapless control of mergers. The question therefore comes evident whether the non-coordinated or coordinated effects will be given priority as a reason to prohibit a merger. The non-coordinated effect could be used as a back door in cases where it would be hard to provide evidence of a collectively held dominant position. The standard of proof under the EC Merger Regulation could then be lower to establish that the merger would lead to anticompetitive effects. This scenario is relating to the *Airtours* case, where the merger might have been prohibited under a more competition-based test due to the possible unilateral effects resulting from the notified merger.<sup>144</sup>

#### **4.4.2 Combination of SIEC test and dominance test**

The second alternative is based on the view that the SIEC test and the dominance test are practically synonyms, i.e. the change does not alter significantly the appraisal as it was under the Merger Regulation 4064/89. The rewording would be made only to clarify the scope of the previous test

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<sup>143</sup> Ivaldi- Jullien- Rey- Seabright- Tirole, *The Economics of Unilateral Effects*, IDEI, Toulouse, November 2003, Interim Report for DG Competition, European Commission p. 7-8 and 25-26. Available at [http://europa.eu.int/comm/competition/mergers/review/the\\_economics\\_of\\_unilateral\\_effects\\_en.pdf](http://europa.eu.int/comm/competition/mergers/review/the_economics_of_unilateral_effects_en.pdf).

It is worth to acknowledge at this point that the report is not an official report of the Commission.

<sup>144</sup> Selvam, *The EC merger control impasse: Is there a solution to this predicament*, E.C.L.R. 2004, 25(1), 52-67, p. 59-60.

and to make clear that the EC merger control covers non-coordinated effects.<sup>145</sup> That would mean that the appraisal and the used criteria or checklist would remain primarily unchanged. Recital 26 of the EC Merger Regulation 139/2004 recognizes the overlap between SIEC and dominance and concludes that significant impediment to effective competition generally results from the creation or strengthening of a dominant position.

This view is supported by the case law under the Merger Regulation 4064/89, where the second limb, significant impediment to effective competition, has not received an independent position in appraisal of concentrations even though it has been mentioned as a possible result of creation or strengthening of a dominant position. Dominant position and SIEC have been considered as closely intertwined.<sup>146</sup>

On a dynamic interpretation of dominance as established in *Hoffman-La Roche v Commission*, the finding of creation or strengthening of a dominant position entails almost invariably a significant impediment to effective competition.<sup>147</sup> The Commission has referred to significant impediment of competition in relation to a lasting change in market structures.<sup>148</sup> As this is apparent in most of the mergers, it emphasises that SIEC is an integral part of the test of dominance and does not make independent finding of SIEC as necessary.<sup>149</sup>

The CFI's reasoning in *Airtours* supports this theory as it closely linked the finding of a collectively held dominant position with the effects on competition resulting from the merger:

“The Court observes, however, that *one of the questions* which the Commission is required to address where there is alleged to be collective dominance is whether the concentration referred to it would result in effective competition in the relevant

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<sup>145</sup> Clarification of the scope of Merger Regulation was obviously one of the aims when the substantive test was reformed. See Monti, *EU Competition Policy after May 2004*, p. 407.

<sup>146</sup> Fountoukakos- Ryan, *A new substantive test for EU merger control*, E.C.L.R. 2005, 26(5), 277-296, p. 292.

<sup>147</sup> *Ibid.*

<sup>148</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, p. 312-313.

<sup>149</sup> See Jones- González-Díaz, *The EEC Merger Regulation*, p. 166-167.

market being significantly impeded... If there is no significant change in the level of competition obtaining previously, the merger should be approved because it does not restrict competition... It follows that the level of competition obtaining in the relevant market at the time when the transaction is notified is *a decisive factor* in establishing whether a collective dominant position has been created for the purposes of Regulation No 4064/89.”<sup>150</sup>

The Court did not refer to SIEC as another criteria but merely as one of the questions to address or as a decisive factor. The approach is similar to the one used in *France v Commission*<sup>151</sup> and *Gencor v Commission*<sup>152</sup>. The phrase “significant impediment to competition” then emphasises the dynamic view of the market to be taken when assessing compatibility of a concentration with the common market.<sup>153</sup> Significant impediment to competition was one of the arguments that the Commission used when collective dominance was introduced in EC merger control in *Nestlé/Perrier*.<sup>154</sup>

The view that the rewording will not change significantly the appraisal of concentrations is supported by comparison between the decisions made in EC merger control under the dominance test and in US where Substantive lessening of Competition test is applied. The main difference between EC merger control and its US counterpart is that the dominance test has required the establishment of market dominance as a central part, otherwise they are relatively similar.<sup>155</sup> Despite their different wording, both tests have the same objective of preserving undistorted competition. Moreover, neither one is tied to a specific and uniform criterion and the differently worded

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<sup>150</sup> Case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 82.

<sup>151</sup> Joined cases C- 68/94 and 30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities*, [1998] E.C.R. I-1375, para 221.

<sup>152</sup> Case T-102/96, *Gencor v Commission of the European Communities*, [1999] E.C.R. II-753, para 161.

<sup>153</sup> See Jones- González-Díaz, *The EEC Merger Regulation*, p. 166.

<sup>154</sup> See case IV/M190, *Nestlé/Perrier*, Commission Decision of 22 July 1992, [1992] OJ L356/1, para 121.

<sup>155</sup> Schmitz, *How dare they? European Merger control and the European Commission's blocking of the General Electric/Honeywell Merger*, *Journal of International Economic Law*, volume 23, spring 2002, number 2, p. 347.



concepts that are used in appraisals have similarities in their actual substance.<sup>156</sup> Market shares, market structure, market phase, countervailing power from suppliers and consumers, barriers to entry etc. form the essential substantive criterion in both jurisdictions.<sup>157</sup> In addition, the actual meaning given to market power in US Merger Guidelines and for dominance in EC merger control is in reality similar.<sup>158</sup> The economic rationale behind the merger control is the same and as a result, both tests have been interpreted similarly in practice.<sup>159</sup> Therefore, it is sufficient to ask whether there are two possible criteria available or actually just one possible to achieve the results of effective merger control. Then wording of the test or terms used in appraisal are irrelevant for other reasons than to strengthen the legitimacy of the merger control by wording the test in a way that corresponds to the current practice.<sup>160</sup>

In addition, the relevant question actually is how the test will be converted into practice. In the context of EU, it is likely that it will happen on the terms of dominance. Massive case law will give guidance and principally lead to a situation, which remains closely the same as before. Voigt and Schmidt argue that US style SLC test as a substantive criterion for merger policy provides competition authorities with more discretion. Economic concepts used in SLC test are however hard to turn into practice. In comparison, benefit gained from dominance test is the predictability in identification of dominant position and therefore transparency.<sup>161</sup> The SIEC test could then combine the benefits of the both tests. Discretion trusted on Commission will enable it to tackle anti-competitive market concentrations

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<sup>156</sup> Bundeskartellamt, Discussion paper for the meeting of the Working Group on Competition Law on 8 and 9 October 2001, *Prohibition Criteria in Merger Control- Dominant Position versus Substantial Lessening of Competition?* Page 15. Available at <http://www.bundeskartellamt.de/wEnglisch/download/pdf/ProftagText-engl.pdf>.

<sup>157</sup> *Ibid.*, page 34.

<sup>158</sup> Selvam, *The EC merger control impasse: Is there a solution to this predicament*, E.C.L.R. 2004, 25(1), 52-67, p. 55.

<sup>159</sup> Kokkoris, *The reform of the European Control Merger Regulation in the aftermath of the Airtours case- The eagerly expected debate: SLC v Dominance test*, E.C.L.R. 2005, 26(1), 37-47, p. 42.

<sup>160</sup> This theory would not be problematic in relation to unilateral/ non-coordinated effects if a view is taken that the old dominance test could have covered such effects.

<sup>161</sup> Voigt- Schmidt, *Switching to substantial impediments of competition (SIC) can have substantial costs- SIC*, E.C.L.R. 2004, 25(9), 584-590, p. 585.

more efficiently, while the maintained dominance requirement will increase certainty among business.

### **4.4.3 SIEC test, where the creation or strengthening of dominance will be used as a mere example**

The third alternative is that the substantive test will be based solely on the criteria of SIEC and the listing of creation or strengthening of a dominant position is a mere example.<sup>162</sup> Having SIEC as a sole evaluation criterion would then attach the SIEC test with the SLC test. Despite the difference in wording, it would be likely that the two tests would be similar or the same.<sup>163</sup>

Fountoukakos and Ryan emphasize the words “in particular” before the dominance limb in the EC Merger Regulation. Wording places emphasis on the SIEC element and transforms the test into unitary one with one central standard. That is to declare incompatible with the common market all concentrations that lead to an impediment to effective competition. According to their view, dominance would indeed be just a mere example. Finding of a SIEC would thus be possible below the dominance criteria and apparently blocking of a merger should then be possible based solely on SIEC.<sup>164</sup> A clear benefit gained from a pure SIEC test would then be that it would detach the substantive test from the Article 82 EC and thus clarify the difference between merger control and the control of abusive power. It would also provide the Commission with more discretion and make

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<sup>162</sup> This view seems to be supported by Volcker, Maudhuid and Soames. See Volcker, *Mind the Gap: Unilateral effects analysis arrives in EC merger control*, E.C.L.R. 2004, 25(7), 395-409, p. 403; Maudhuid- Soames, *Changes in EU merger control: Part 2*, E.C.L.R. 2005, 26(2), 74-81, p. 76.

<sup>163</sup> The SIEC element has not received independent position in EC merger control under the Merger Regulation 4064/89. It is therefore hard to give a precise answer at this point. Fountoukakos and Ryan consider that the intention of the legislator was to ensure continuity with the existing language in the Regulation. They see that the intention was not to make a distinction between these two tests. See Fountoukakos- Ryan, *A new substantive test for EU merger control*, E.C.L.R. 2005, 26(5), 277-296, p. 295.

<sup>164</sup> *Ibid.*, p. 288.

appraisal of concentrations more flexible than the strict legalistic approach under dominance test did.<sup>165</sup>

Even this option would not render the existing case law useless in future interpretation. As concluded before, the results of both the dominance test and the SLC test have been quite similar. In addition, the dominance test is not solely based on a schematic calculation of market shares. During the last decade, the merger practice has increasingly adapted to economic theory and used it as a tool to measure market power instead of relying robustly on imprecise market share test.<sup>166</sup> The development has undermined the differences between two types of substantive tests. It is more a question of which of the different relevant criteria, high market shares or market power, is to be given more weight or taken as a starting point in the appraisal. The change to SIEC will possibly increase the relevance given to the resulting effects to the competition or at least anchor the test into a wording that corresponds to the currently evolving practice.

## **4.5 Conclusions on the effects of Article 2(3) of EC Merger Regulation 139/2004**

This chapter has evaluated the weight to be given to the second limb of the new substantive test, old dominance criteria i.e. creation or strengthening of a dominant position. The impact of the dominance criteria is a key element in evaluating the future of the concept of collective dominance.

It is likely that the relevance of the dominance criteria will not totally diminish despite the new wording and the increased status of economic assessment in appraisal of mergers. The case law as established under Merger Regulation 4064/89 shall provide guidance in the application of the new substantive test. In addition, there might be a slight reluctance to

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<sup>165</sup> Jenny, *Collective dominance and the EC Merger Regulation*, p. 365.

<sup>166</sup> Green Paper on the Review of Council Regulation (EEC) no 4064/89/\*COM/2001/0745 final/\*, European Union preparatory Acts, COM (2002 745), para 163.

remarkable change. Such a change could lead to difficulties in forecasting the likely outcome of merger controls.<sup>167</sup> This view is also supported by the fact that most of the Member States have aligned their merger control with the previous dominance test, which is why a remarkable change could lead to some disparity within the Community.<sup>168</sup> Therefore it is expected that the Commission's decision-making and the interpretation of the Community Courts will be cautious and based on old case law at least during the first years after the EC Merger Regulation has come into force. Created or strengthened single or collective dominance, as secondary evaluation point, prime instance or integral part of SIEC, is therefore likely to have some significance in the future interpretation.

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<sup>167</sup> Ibid., para 161.

<sup>168</sup> Ibid.

# 5 Coordinated effects under the EC Horizontal Guidelines 2004

## 5.1 The EC Horizontal Guidelines 2004

In the context of the new EC Merger Regulation, the Commission published Guidelines on the assessment of horizontal mergers, i.e. concentrations where the undertakings concerned are actual or potential competitors on the same relevant market. The need for sufficient guidelines has been long acknowledged in order to guarantee legal certainty for the business.<sup>169</sup> The Guidelines preserve their guidance from the past case law of the Community Courts and decisional practice of the Commission. In other words, they codify the Commission's analytical approach to concentrations.

However, Horizontal Guidelines are not legally binding on the Commission and without prejudice to the interpretation of the Community Courts. In addition, their success to enhance legal certainty lies on the future practice by the Commission.<sup>170</sup>

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<sup>169</sup> See to that effect for example Anderson, *Collective Dominance Under the EC Merger Regulation*, p. 56-66.

<sup>170</sup> Bishop- Ridyard, *Prometheus unbound: Increasing the scope for intervention in EC merger control*, E.C.L.R. 2003, 24(8), 357-363, p. 363-364.

## 5.2 Coordinated effects under the doctrine of collective dominance as confirmed in the *Airtours* case

### 5.2.1 Increased likelihood of coordination

Analysis on the Horizontal Guidelines in the light of the CFI judgment in *Airtours* shows that the Commission has tied its approach on coordinated effects on the criteria established by the Court. The notion of coordinated effects is clarified in paragraph 39 of the Horizontal Guidelines. The Guidelines state that coordination is likely on market structures where the firms consider it possible, economically rational and hence preferable to adopt on a sustainable basis a course of action aimed at selling at increased prices. Concentration on such a market structure can increase the likelihood that the firms are able to coordinate their behaviour and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 EC.<sup>171</sup>

The wording used is for the most part similar or the same as the one used by the CFI in *Airtours* judgment.<sup>172</sup> There is, however, a slight difference in the nuance used. While the *Airtours* judgment refers to “a collective dominant position significantly impeding effective competition”<sup>173</sup>, approaches the Horizontal Guidelines apparently the issue from the perspective of the new substantive test, the SIEC test. The Guidelines state that “[a] merger in a concentrated market may significantly impede effective competition, through the creation or the strengthening of a collective dominant position”<sup>174</sup>. Though the difference is a slight one, it may indicate that

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<sup>171</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para 39.

<sup>172</sup> See case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 61.

<sup>173</sup> *Ibid.*

<sup>174</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para 39.

analysis will be more concentrated on the resulting effects on competition. Moreover, while paragraph 61 of the judgment contained a reference to power to act independently of competitors, customers and consumers, this notion has been dropped from the text adapted to Horizontal Guidelines.<sup>175</sup> This also reflects that the Guidelines move away from the concept of dominance as understood under Article 82 EC. The independence of external factors has been one of the cornerstones in the Community case law when establishing that a company holds a dominant position.<sup>176</sup>

## 5.2.2 Various forms of coordination

Paragraph 40 of the Guidelines is assessing the possible form of coordination. Keeping prices above the competitive level is mentioned as a most likely form of coordination. This is in line with the decision practice of the Commission. Paragraph also mentions limiting of capacity brought to market by the undertakings as a form of coordination.<sup>177</sup> The Commission Decision to prohibit the merger in *Airtours* was precisely based on this and therefore it was a new approach adapted at the time. The CFI in its judgment did not comment on whether implied limiting of capacity could be basis for a blocking of a merger. There is, however, no justifiable reason why this would not be possible despite the attention this particular point got in relation to *Airtours* case.<sup>178</sup> The list in Horizontal Guidelines is not formulated as to be exhaustive. It gives out a mere example of possible forms of coordination by identifying that the coordination can take various forms.

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<sup>175</sup> Compare *ibid.* and case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 61.

<sup>176</sup> Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, [1979] E.C.R. 461, para 38.

<sup>177</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para 40.

<sup>178</sup> Compare Cook- Kerse, *E.C. Merger Control*, p. 173.

### 5.2.3 Reaching the terms of coordination

According to the Horizontal Guidelines, the examination whether coordinated effects are in question can be divided into two parts. The Commission examines whether it is possible to reach the terms of coordination and whether coordination is likely to be sustainable. This requires assessment on the changes in the competitive environment the merger brings about.<sup>179</sup> Coordination is more likely on markets where it is easy to reach a common understanding on how the coordination is to be done in practice. The Guidelines mention as an example factors that make coordination easier:

1. Similar views of the coordination
2. Simplicity of the market
  - Only few undertakings on the market
  - Homogeneous product
3. Stable nature of the market
  - Stable demand and supply conditions
  - Low level of innovation
4. Simple characteristics of customers
5. Relatively symmetric undertakings
  - Symmetry of cost structures, market shares, capacity levels and vertical integration
6. Structural links
  - Cross-shareholding, joint ventures.<sup>180</sup>

The Horizontal Guidelines do not add new to the appraisal of concentrations at this point. The factors are similar to the ones used by the Commission under Merger Regulation 4064/89. The fact that they correspond to the earlier practice demonstrates that the appraisal of the concentrations and the criteria to be used under the new substantive test are not supposed to change dramatically despite the rewording of the Article 2(3). The objective of the

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<sup>179</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para 42.

<sup>180</sup> Ibid., paras 44-48.



EC merger control remains the same and no reason for a dramatic change of the approach exists. It therefore does not matter whether substantive test has dominance or SIEC as its key criterion. Moreover, the guidance to be deprived from the case law remains key element in enhancing legal certainty.

#### **5.2.4 Conditions for a sustainable coordination**

Paragraph 41 concludes that coordination is more likely on markets where it is relatively simple to reach a common understanding on the terms of coordination. For coordination to be sustainable, three conditions are necessary. First, the market needs to be transparent so that the coordinating firms are able to monitor to sufficient degree the behaviour of the other firms and that they are complying with the coordination. The level of transparency is related to the relevant market factors. The Guidelines emphasize the availability of information of the behaviour of the other members. Secondly, there needs to be available some form of deterrent mechanism that prevents the firms of departing from the cooperation. A deterrent mechanism is crucial to lasting coordination since it prevents the undertakings from departing from the common policy in order to receive short-term profits. The coordinating firms can benefit only through the continuity of the coordination. For the deterrent mechanism to be credible, the market has to be transparent enough for the other coordinating undertakings to be able to react. Substantial delay of the deterrence may influence its sufficiency and credibility. Thirdly, the countervailing power of current or future competitors or customers should not be able to jeopardize the cooperation.<sup>181</sup>

These necessary conditions correspond to the three-step evaluation as established in the *Airtours* case for a finding of collective dominance.<sup>182</sup>

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<sup>181</sup> Ibid., para 41.

<sup>182</sup> See case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 62. For deterrent mechanism, see also paras 193-195 of the judgment.

Very slight change on the wording is not likely to be of significance at this point.

### 5.2.5 Past coordination

In its assessment on the concentrations and the likelihood of coordination, the Commission shall take into account both structural features and the past behaviour of the firms. According to the Horizontal Guidelines, evidence of the past behaviour will be important if the relevant market characteristics have not changed appreciably or are not likely to change in the future.<sup>183</sup> Maudhuit and Soames point out that logically the reference to past coordination refers to tacit coordination and not to cartels, since firms will not engage in express coordination in the circumstances where the market makes tacit coordination possible.<sup>184</sup>

The CFI concluded in *Airtours* that the Commission had erred when it treated cautious capacity planning as evidence of a tendency towards collective dominance without denying the competitiveness of the market. According to the Court, the Commission therefore needs to establish that the market is characterized by low competition for the past behaviour to be evidential for the creation of collective dominance.<sup>185</sup> The Commission is obligated to analyse the dynamics of competition in detail and prove a significant alteration in the market structure and competition to establish that the merger leads from competitive environment to collective dominance.<sup>186</sup> This relates to the difficulty in recognizing a change in market behaviour leading to coordination from the natural characteristics of an oligopolistic market structure.

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<sup>183</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para 43.

<sup>184</sup> Maudhuit- Soames, *Changes in EU merger control: Part 2*, E.C.L.R. 2005, 26(2), 74-81, p. 79-80.

<sup>185</sup> See case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 92.

<sup>186</sup> Nikpay- Houwen, *Tour de force or a little local turbulence? A heretical view on the Airtours judgment*, E.C.L.R. 2003, 24(5), 193-202, p. 199 and Stroux, *Collective dominance under the Merger Regulation: A serious evidentiary reprimand for the Commission*, E.L.Rev. 2002, 27(6), 736-746, p. 742.

On the other hand, the view adopted in Horizontal Guidelines is apparently dependant on whether the merger is to strengthen a behaviour established on the market ex ante merger. This seems to be in line with the practice in the US. On differentiated product markets the analysis concentrate on unilateral effects instead of coordinated effects in the absence of history of collusion or such structural factors that facilitate collusion.<sup>187</sup> However, it can be hard to distinguish in practise a competitive market from one subject to coordination.<sup>188</sup> This is especially true on oligopolistic market structures. In addition, it can be questionable whether it is possible to strengthen already existing coordination.<sup>189</sup> It can be argued that the undertakings either coordinate or they do not and separating different stages can be misleading.<sup>190</sup> In the light of that argument, it would thus seem that the merger control would be approaching in its purpose Article 82, i.e. punishing past misconduct resulting from collective dominance.

## 5.3 Conclusions on the Horizontal Guidelines

The Horizontal Guidelines are based on the case law of the Courts and on the decision-making practice of the Commission. It primarily follows the assessment as established under Merger Regulation 4064/89 and therefore does not reflect a remarkable change on the Commission's approach despite the rewording of the substantive test in Article 2(3) of the EC Merger Regulation 139/2004.

Moreover, the Horizontal Guidelines demonstrate that the finding of coordinated effects makes no substantial difference in the appraisal of concentrations in comparison with collective dominance. The differences

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<sup>187</sup> Dubow- Elliot- Morrison, *Unilateral effects and merger simulation models*, E.C.L.R. 2004, 25(2), 114-117, p. 114-115.

<sup>188</sup> Bishop- Ridyard, *Prometheus unbound: Increasing the scope for intervention in EC merger control*, E.C.L.R. 2003, 24(8), 357-363, p. 360.

<sup>189</sup> Jenny, *Collective dominance and the EC Merger Regulation*, p. 369.

<sup>190</sup> *Ibid.*

are subtle and the analysis and criteria to be used for establishing coordinated effects correspond to the ones needed for showing creation or strengthening of collective dominance under Merger Regulation 4064/89. This is possibly due to the practice that the concept of collective dominance has been used in cases of coordinated effects.<sup>191</sup> This reflects that collective dominance and coordinated effects would not be identical, but the latter has been a condition for a position of collective dominance to exist. It could then be argued that in practice there has been used an effects based approach in the evaluation of concentrations on oligopolistic market structures. That would actually more or less correspond to the SIEC criteria. The impact of the merger reform could then be in practice of a minor change. As Maudhuit and Soames conclude, the only thing the Community legislature has done is to reformulate a test that better corresponds to prior merger control practice.<sup>192</sup>

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<sup>191</sup> Nikpay- Houwen, *Tour de force or a little local turbulence? A heretical view on the Airtours judgment*, E.C.L.R. 2003, 24(5), 193-202, p. 202.

<sup>192</sup> Maudhuit- Soames, *Changes in EU merger control: Part 2*, E.C.L.R. 2005, 26(2), 74-81, p. 77.

## 6 Concluding remarks

Neither the EC Merger Regulation 139/2004 nor the EC Horizontal Guidelines give any detailed guidance as to the future of the concept of collective dominance in practice. They both demonstrate a slight change from the concept of dominance as the central criteria in the appraisal of concentrations. It can be possible that the development of the doctrine of collective dominance has to that effect come closer to its boundaries.

The doctrine of collective dominance has showed not be a totally gapless and legally certain concept. To treat two or more undertakings as if they were acting as one dominant entity, can thus be artificial for the purposes of merger control. Comparison between coordinated effects in the EC Horizontal Guidelines and doctrine of collective dominance as established in *Airtours* confirms that these two closely correspond to each other. It can be asked whether it is now convenient to concentrate on coordinated effects as the right term to describe anti-competitive collusive market behaviour and move away from the concept of collective dominance in EC merger control. This would solve the existing problem in relation to Article 82 EC, i.e. the use of the same word in different contexts. Change in the emphasis would lead to the use of the concept of collective dominance in the framework of abuse of a market position in Article 82 EC while merger control would concentrate on the use of the term coordinated effects. Coordinated effects would likely be more flexible for the purposes of controlling market concentration than legally termed collective dominance. Moreover, it would allow the case law on mergers to develop independently from the outside pressures of Article 82 EC, for it would no longer be necessary to take into consideration the impact that interpretation of collective dominance in these two different contexts have on each other. In addition, there would no longer be a need to extend the concept of dominance to mean something else than it was initially supposed to.

Even this would not render the existing case law to lose its significance. The Commission decision-making practice and Court interpretation in relation to collective dominance has formulated sufficient guidelines for the purposes of establishing coordinated effects, as it is evident from *Airtours*. Even if the new approach would be considered to concentrate more on market power like the SLC test as used in other major jurisdictions, the dividing line between market shares as an indicator of dominance and market power in relation to effects on competition is more in the terms used than their actual difference in practice.

Moreover, a parallel use of terms collective dominance and now introduced coordinated effects would be somewhat misleading and confusing in merger practice. The reform of the Merger Regulation would not be for the benefit of legal certainty and clarity, quite the opposite.

On the other hand, this would not entirely solve the problems there have been evident in merger control on oligopolistic markets. The underlying problem is not solely the terms or tests used, but the difficulty to make a distinction between collusive and competitive oligopolies. The dividing line between anti-competitive behaviour and a behaviour that is a natural consequence of an oligopolistic market structure is hard to establish in practice. In the end, the actual key issue in merger policy is not therefore the criteria to be followed by the Commission in its merger control activity but rather to provide the Commission with competence and instruments that are sufficient to tackle structural changes on oligopolistic markets.<sup>193</sup>

It can be concluded that from legislative perspective the new EC Merger Regulation and substantive test in Article 2(3) appears to provide the Commission means to tackle anticompetitive effects of concentrations on oligopolistic markets on an improved level. It has closed the possible gap that existed in relation to non-coordinated effects and therefore clarified some of the uncertainties around the doctrine of collective dominance even

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<sup>193</sup> Raffaelli, *European Union competition policy subsequent to the Airtours case*, p. 142.

though it has still left some relevant questions open. Now it is for the Commission and Community Courts to provide practical meaning to the status of collective dominance through future decision-making and interpretation.

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