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Collective Dominance under
Article 82 EC Treaty
– an Effective Tool to Control Oligopolies?

Master Thesis
20 points

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EC Competition Law

Summer 2001

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Abbreviations

AG	Advocate General
CFI	Court of First Instance
CMLR	Common Market Law Report
CMLRev	Common Market Law Review
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Report
ERT	Europarättslig Tidskrift
LIEI	Legal Issues in European Integration
OJ	Official Journal
W.Comp	World Competition
YBEL	Yearbook of European Law

1 Introduction

1.1 Background

1.1.1 The EC Competition Rules

The EC competition rules work to achieve the fundamental objectives set out in the Treaty. According to Article 2, one of the most important tasks of the Community is to promote a "harmonious development of economic activities" and a "high degree of competitiveness" by establishing a common integrated market. Article 3 specifies measures necessary to achieve the objectives of Article 2 and provides in paragraph (g) for an institution of a system ensuring that competition in the common market is not distorted. This system is essentially provided by Articles 81 to 89 of the EC Treaty. The goal of the competition rules to defend and develop effective competition is essential in order to achieve economic integration in accordance with the objectives of the Treaty.¹ The competition rules do not aim at achieving perfect competition, but at maintaining "workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market."²

With a view of safeguarding the objectives of the Treaty Article 81 and Article 82 prescribe that undertakings have certain obligations not to distort competition. Article 81 prohibits anti-competitive collusion between undertakings, whereas Article 82 prohibits anti-competitive behaviour by firms in dominant positions. Further competition rules are provided by the Merger Regulation.³ Article 2 of the Regulation prevents the creation of market structures which are harmful to effective competition, since a proposed concentration will be blocked if it will have anti-competitive effects.

1.1.2 Article 82

Article 82 EC provides as follows:

¹ See e.g. Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paras 23-25.

² Case 26/76 *Metro SB-Grossmärkte v Commission* [1977] ECR 1875, para. 20.

³ Council Regulation (EEC) No 4064/89 on the control of Concentrations between undertakings, OJ 1990 L 395, as amended by Council Regulation (EC) No 1310/97, OJ 1997 L 180/1.

”Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

There are several criteria that have to be determined in order to conclude that there has been an abuse of a dominant position. Article 82 only applies where one or more undertakings have a dominant position. In order to establish a dominant position, it is necessary to consider a series of complex issues. Since a dominant position can only exist in relation to a market, the relevant market must be determined. This assessment is made from mainly two perspectives: the product market and the geographical market. A relevant product market consists of products which are interchangeable, that is similar for example in price, physical characteristics and intended use. A geographical market consists of the area within which the product is marketed and where the conditions of competition are principally the same for all the traders.⁴ Then the undertaking’s market power in the relevant market must be determined. When assessing market power the essential issue is whether the undertaking is able to act to an appreciable extent independently of competitors, customers and consumers. This is measured by reference to several factors, among which the market share is highly significant.⁵ It must also be assessed whether the dominant position is held in a substantial part of the common market. Having concluded that one or more undertakings hold a dominant position it has to be ascertained whether the alleged abuse constitute an infringement of Article 82. The list of abuses in Article 82 (2) is not exhaustive and there are many behaviours which may constitute an abuse. Moreover, the abuse must satisfy the criterion of effect on inter-state trade, which aims at delimiting the scope of the Article in relation to the Member States’ domestic laws.⁶

1.1.3 The Concept of Collective Dominance

Article 82 states that an ”abuse by one *or more* undertakings of a dominant position” is prohibited. The question of whether that phrase encompass a dominant position held by two or more legally and economically independent undertakings together, that is whether it refers to collective

⁴ On determination of a relevant market, see e.g. Case 27/76 *United Brands v Commission* [1978] ECR 207.

⁵ On market power, see e.g. *United Brands*, cited *supra* note 4 and Case 85/76 *Hoffman-La Roche v Commission* [1979] 461.

⁶ On Article 82 in general, see e.g. Whish, *Competition Law* pp. 247-268.

dominance, has been a controversial issue. Today it is clear that Article 82 does apply to the concept of collective dominance. The concept is also applicable under Article 2 of the Merger Regulation, which prohibit concentrations that will create or strengthen a dominant position. The remaining controversial issues concern how the concept should be defined and applied. Particularly disputatious is the question whether or not collective dominance can or should be applicable to oligopolistic interdependence and tacit collusion.

Behaviours on the part of undertakings which together possess market power, may have effects which are very similar to the anti-competitive effects a single dominant firm might cause. Through the development of the concept of collective dominance, undertakings which are able to exercise market power jointly can be constrained by the same restrictions as those imposed on single dominant firms not to distort competition.

There is some inconsistency in the terms used to describe dominance by two or more undertakings. Besides "collective dominance", also "joint dominance" and "oligopolistic dominance" have been used. These expressions have been used interchangeable by the EC competition authorities and it is not absolutely clear which is most adequate. It might be argued that whereas the word "joint" simply means "shared" the word "collective" has connotations of a group working together or an enterprise to share benefits from it and is therefor more appropriate adjective in this context.⁷ Oligopolistic dominance, mainly used by the Commission under the Merger Regulation, can be regarded as too narrow.⁸ Moreover, the ECJ most often uses the term collective dominance.⁹ For these reasons this thesis will refer to the term collective dominance, unless discussing cases or literature in which other terminology is used.

1.1.4 Oligopolistic Markets

Oligopolistic markets are characterised by the presence of few undertakings each with a relatively large market share, but without being in a position of market dominance. Today many markets are structured oligopolistically and the trend points towards an increase in industrial concentration which means that oligopolistic markets will be even more common in the future.¹⁰

The EC competition authorities have significant difficulties in dealing with oligopolistic market structures. Traditionally the approach taken has been directed towards the behaviour of the undertakings, rather than towards the

⁷ Whish/Sufrin, p. 59.

⁸ Monti, p. 131.

⁹ The Opinion of AG Fennely, para. 15, in Cases C-395 and 396/96P *Compagnie Maritime Belge Transports and Others v Commission*, [2000] ECR I-165. The case is referred to as *CMB*.

¹⁰ Stroux, p. 3.

market structure. The Commission has focused on whether there exist restrictive practices between the oligopolists, in the sense of those prohibited by Article 81. However, the main problem with oligopolies is that they may benefit from parallel behaviour which has anti-competitive effects, without actually colluding. This is referred to as tacit collusion and may be the result of intelligent and rational reaction to the particular market conditions. Such behaviour does not fall within the scope of Article 81. Instead the EC competition authority has tried to address non-collusive parallel behaviour by means of the concept of collective dominance.

1.2 Purpose

The purpose of this thesis is to analyse the case law on collective dominance under Article 82 in order to conclude what may constitute a collective dominant position and to what situations the concept may apply. The main focus lies with the question to what extent the concept of abuse of a collective dominant position is applicable to oligopolies and whether it is an adequate and effective tool to control competitive problems arising in oligopolistic markets.

In order to reach a conclusion on whether Article 82 may provide an adequate and effective tool to control oligopolistic markets, there are several issues that have to be considered. It must first be ascertained to what extent oligopolies cause competitive problems and why traditional competition law does not suffice to control these. In order to apply the concept of collective dominance to independent undertakings it must of course be determined what facts can constitute a collective dominant position under Article 82: Are or should consensual links between the undertakings concerned be a pre-requisite for a finding of collective dominance? If not, what else might put several undertakings in a collective dominant position? Should the definition depend solely on the existence of certain links or apply an effects-based approach? Can a collective dominance be established on the relation between oligopolies emerging from oligopolistic interdependence caused by certain market conditions?

It must further be considered what consequences a finding of a collective dominant position have for the undertakings concerned, that is what kind of behaviour on part of the undertakings can constitute an abuse. Must all undertakings be engaged in the abusive behaviour or is it enough that one of them individually and unilaterally act in a abusive manner for there to be an infringement of Article 82? In relation to oligopolies it is of particular interest to determine whether tacit collusion can constitute such an abuse.

1.3 Method and Material

This thesis is mainly based on case law of the EC Courts, through which the concept of collective dominance has developed, and a study of literature dealing with the matter. Cases and literature dealing with collective dominance under the Merger Regulation have also been employed.

Commentaries and analyses made in the doctrine are above all found in European law journals. It seems as most authors who have dealt with the questions of collective dominance in different journals, have done that in relation to the Merger Regulation. Although I have made use of some articles discussing collective dominance in merger cases, the ones regarding Article 82 has naturally been of greater interest and importance. Unfortunately, most of the articles I have found deal merely with the question regarding what can constitute a collective dominant position, and not with the question concerning an abuse of such a position. In the years 1999 and 2000 the CFI and ECJ handed down two important judgements on collective dominance. I have therefore chosen to focus on articles in which also these cases are discussed.

Some, but not all, textbooks on competition law in general, deal with the concept of collective dominance in some depth. I have unfortunately not been able to study such books written after 1999. As much has happened in the area of collective dominance after 1999, I have made use of these books mainly in dealing with general questions of competition law and Article 82 and as references to relevant material.

Notwithstanding the facts that economic theories is presented in the beginning of the thesis and that the concept of collective dominance is very closely connected to these, I have not used any purely economic literature. This is due to the fact that economic literature naturally deal with the issues merely from the economic, and not the legal, perspective and on a level which is more complex than necessary to described basic elements of economic theories, which is what is done in this thesis. Therefore, I have relied on lawyers' articles describing economic theories.

This thesis applies a descriptive as well as analytical approach. Some chapters and sections are mainly descriptive, presenting the relevant case law and different general principles concerning Article 82. The case law is assessed in a separate chapter and some analysis is integrated in the other chapters. The main concluding analysis is gathered in the last chapter.

The Treaty of Amsterdam, which entered into force 1 May 1999, lead to a renumbering of the articles of the Treaty establishing the European Community, signed in Rome 1957. Article 81 and Article 82 had before number 85 and Article 86. In the thesis I will deal with cases and as well as literature emerging from the time prior to May 1999. In order to avoid

reiterations of the fact that the articles have been renumbered, they will be referred to as Article 81 and Article 82, except when I quote documents in which reference is made to the old numbering.

1.4 Limitations

There are, as pointed out earlier, different complex criteria that have to be determined in order to apply Article 82. I will examine when undertakings are collectively dominant, that is when they are to be assessed as a collective entity and when they possess market power as well as when they abuse their position. The criteria concerning the determination of the relevant market, the substantial part of the common market and effect on inter-state trade will thus not be considered.

Although attention is drawn to case law under the Merger Regulation, this case law will be analysed only in relation to Article 82, and no conclusion on what it means for the application of the Regulation will be made.

1.5 Disposition

The outset of this thesis applies an economic point of view on oligopolistic markets and the problems these might cause to effective competition. The different possibilities to control them will be discussed. The rest of the thesis is divided in three parts dealing with the establishment of a collective position, the market power constituting a dominant position respectively the abuse of a collective dominant position. The first issue is the most complex and hence the part dealing with that issue is more extensive than the two latter.

Chapter three is mainly descriptive, presenting decisions and cases through which the concept of collective dominance has developed in order to deduce what may constitute a collective dominant position. The main facts of the cases will be pointed out. Emphasis is however put on what the Commission or the Court has stated on the definition of a collective position. A short conclusion follows the presentation of each case. The main assessment of the case law on collective dominance is made in chapter four.

After having concluded when undertakings can be regarded as having a collective position, the assessment that has to be made to determine whether the collective entity holds a dominant position on the market is discussed. Dominance in general is described and some differences between the assessment of single dominance and that of collective dominance will be pointed out.

The last stage in an Article 82 case, whether an abuse has been committed, is dealt with in chapter six. Some general points of the concept of an abuse

will be made before discussing what and how behaviours can constitute an abuse of a collective dominant position and in particular when members of an oligopoly may infringe Article 82.

Finally a concluding analysis as to what situations the concept of abuse of a collective dominant position can apply is carried out. In particular I will try to provide an answer to the question of whether the concept confers upon the competition authorities an adequate and effective legal instrument to control oligopolies.

2 Oligopolistic Markets

Economists illustrate the workings of the competitive process by reference to models which are designed, given certain assumptions, to show what would be the rational behaviour of undertakings under two extreme sets of conditions. The two extremes are monopoly and perfect competition. In reality it is extremely rare to find any of them, but they represent the two ends of the spectrum between which the market structures in the real world vary. Oligopolistic markets are found between these two extremes, how close to either of them depends on the market conditions in the particular case.¹¹

2.1 Monopoly and Perfect Competition

A perfect monopolistic market exists when there is only one supplier present in the market. This supplier has 100 per cent of the market control and there is no other or even similar product or service in the market.¹² The monopolist is thus free to set its own price which then becomes the market price.¹³ Since the buyer cannot choose to purchase products or services from other suppliers there is a risk that the monopolist will limit its output and raise its prices to anti-competitively levels.¹⁴ Such behaviour constitutes an abuse of a dominant position contrary to Article 82 of the Treaty

The opposite of pure monopoly is perfect competition. In reality no or extremely few markets are perfectly competitive. For a perfect competitive market to exist, the number of competitors must be so great that the market share of each is very small, so that none alone has sufficient influence to alter price levels or the balance of supply and demand. In such a market undertakings could, at least in theory, remain totally uninterested in the behaviour of their competitors.¹⁵ The supplier has no choice about at what price to sell since the market by way of interaction between supply and demand determines the price, so that in the end prices will equal marginal cost. Anti-competitively high prices could exist as a consequence of co-ordination between the suppliers in the market.¹⁶ Such co-ordination is prohibited by Article 81 of the Treaty.

¹¹ Goyder, p. 10.

¹² Ibid.

¹³ Monti, *Oligopoly*., p. 4.

¹⁴ Stroux, p. 3.

¹⁵ Goyder, p. 11.

¹⁶ Stroux, p. 3.

2.2 Characteristics of Oligopolistic Markets

Oligopolistic market structure is characterised by the presence of a few suppliers, none of which individually is in a position of market dominance, but each of which is relatively large. However, oligopolistic markets vary greatly from one another. Some are close to a perfectly competitive market while some are close to a monopolistic market. There are considerable problems in deciding exactly what constitutes an oligopoly, for example how many firms a "few" are, as well as their relative size.¹⁷ Economic theory fails to describe precisely the attributes of oligopolistic markets and there is no generally agreed paradigm to identify dominant oligopolies and separate them from situations of oligopolistic competitive market.¹⁸

An oligopolist's choice about output and price is different from that faced by a supplier in a perfectly competitive market or a monopolist. The difficulty for an oligopolist, when making these choices, is that it has to take into account a variable factor, namely the decisions which the other firms may make as a result.¹⁹ This phenomenon, that the firms are interdependent, is the key feature of an oligopoly and referred to as oligopolistic interdependence.

2.3 The Theory of Oligopolistic Interdependence

According to the theory of oligopolistic interdependence, in an oligopolistic market each oligopolist is aware of the fact that its market strategy is dependent on the market strategy of the other oligopolists. If one oligopolist attempts to increase its market share, by cutting its prices, the other firms will do the same in order not to lose customers and market shares. Therefore no firm will actually increase its market share or make more profits. Instead they will earn lower profits as a consequence of decreased prices. Similarly, no firm will gain profits by increasing its prices, since the customers then would choose to purchase from another supplier. The theory thus runs that the oligopolists are interdependent. Through their mutual awareness of each other's presence they are constrained to match their market strategies and will not compete on price and have little incentive to compete in other ways as well. According to the theory oligopolists will therefore naturally end up pricing at the same level. Since all firms wish to maximise their profits and profits are greater in monopolistic markets there is a risk that the prices in oligopolistic markets will be set at a supra-

¹⁷ Whish, p. 467. If the concentration is on the demand side, the market would be oligopsonistic. Ibid.

¹⁸ Briones-Alonso.

¹⁹ Monti, *Oligopoly...*, p. 4.

competitive level. In oligopolistic markets there is therefore a risk that prices will rise towards prices significant to monopolistic markets.²⁰

An instrument of analysing the dilemma of oligopolistic interdependent behaviour is given by the "game theory". Each oligopolist is assumed to be a rational player on the market and will pursue its "best strategy" depending on the "best strategies" of its competitors. In the "game situation" each firm has the choice to price competitively or not. It will not know immediately what its profits will be. Because of the interdependence each firm's decision on price is dependent on the expected behaviour of the other oligopolists. If both choose the competitive price neither firms' profit is likely to be very high. If only one firm raises its price, its profits will decrease and the other's will increase. Only if both raise their prices by the same amount there is a chance that both raise their profits.

Thus, by recognising their interdependence as well as their own interest and by matching their behaviours, oligopolists will be able to achieve and charge profit-maximising prices. The structure of the market might be such that, through interdependence and mutual self-awareness, prices rise towards monopolistic levels. The uniformity of prices, even at a supra-competitive level, can thus be the result of rational and natural adoption to the market conditions by the members of the oligopoly and there need not be any explicit collusion between the oligopolists.²¹ Economists refer to the phenomenon that undertakings are able to enjoy supra-competitive benefits of a particular market structure without colluding as tacit collusion.²²

2.4 Oligopolies and Competition

Not all oligopolies distort competition. The risk for anti-competitive behaviour depends on how the particular market is structured and the degree of interdependence. Where on the spectrum between monopoly and perfect competition the oligopoly is found is subject *inter alia* to the strength of the oligopolistic interdependence. The stronger the interdependence the greater is the oligopolists' incentive to collude and thereby maximise the profits at the expense of effective competition.

There are many market characteristics which economists' have considered leading to and stabilising oligopolistic anti-competitive behaviour by way of collusion, explicit or tacit. A first indicative factor of collusion is the number of supplier and the degree of concentration. The lower the number

²⁰ Whish, *Competition Law*, p. 468

²¹ Craig/de Búrca, p. 897.

²² An alternative expression used by lawyers is "conscious parallelism". Whish suggests that a better expression would be "tacit co-ordination". Using that phrase the associations often made by lawyers, of the words "collusion" and "conscious" with something conspiratorial which should be dealt with under Article 81, are avoided. See Whish, *Collective Dominance*, p. 584.

of suppliers and the higher the concentration, the easier it is for oligopolists to recognise their interdependence and co-ordinate their behaviour. The main market characteristics that facilitate collusion are high transparency of prices, homogeneity of products, similar cost structures, high barriers to entry, inelastic demand and stagnant demand growth. It should also be assessed whether there exists some significant degree of competition from suppliers outside the oligopoly. If that is the case the profits from parallel behaviour might be lower, which decrease the incentive for the oligopolists to co-ordinate their behaviours.²³

Within an oligopoly in a market conducive to collusion, the interdependence between the oligopolists is strong. Such an oligopoly is defined as a tight oligopoly. The stronger the interdependence, the tighter the oligopoly and accordingly, the greater the risk that the oligopoly has the same anti-competitively effects as a monopoly. In a wide oligopoly, on the other hand, the degree of interdependence is lower and the undertakings are less likely to co-ordinate their behaviour and it is more likely that there will be competition between them.

In many oligopolistic markets competition is actually intense. The competition may take various forms. Open price competition may be limited but secret price-cutting may occur. For example this is the case where the oligopolist grant discounts or rebates to individual customers. Furthermore, non-price competition, such as offering better quality goods and after-sales service, may be especially strong in oligopolistic markets.²⁴

2.4.1 The Oligopoly Problem

The fact that undertakings enjoy supra-competitive benefits of a particular market structure without colluding causes considerable problems for the competition authorities. Economists have no interest in how the supra-competitive benefits are enjoyed, in other words if they are achieved through tacit or explicit collusion. It is the effect that matters. As a matter of law, however, this is highly significant. For a parallel behaviour to be illegal there need to be some sort of conspiracy between the undertakings. Tacit collusion is not illegal, even if it economically gives rise to the same anti-competitive effects as explicit collusion. Moreover economists' recognise that oligopolists due to their interdependence enjoy market power.²⁵ They may thus, just as monopolists or a single dominant undertaking, cause distortion to competition. It is around these considerations and assumptions that the concept of collective dominance has been developed. The purpose is to provide an useful legal instrument to control oligopolistic anti-competitive behaviour.

²³ See e.g. Stroux, pp. 7-12.

²⁴ Whish, *Competition Law*, p. 470.

²⁵ Etter, p. 103.

2.5 Oligopoly Control in EC Competition Law

There are different ways through which the EC competition authorities has tried to deal with competitive problems arising in oligopolistic markets. By means of the Merger Regulation the Commission can prohibit concentrations which will lead to the creation or reinforcing of collective dominant positions and thus prevent anti-competitive oligopolies from arising in the first place. Where oligopolists unlawfully co-operate, Article 81 of the Treaty will apply. Another potential way to address oligopolists' anti-competitive behaviours is by applying collective dominance under Article 82. Since the latter is the subject of this thesis, Article 82 will not be dealt with in this section.

2.5.1 Article 81

Article 81 prohibits agreements, decisions and concerted practices between undertakings when they may effect trade between Member States and have as their object or effect to prevent, restrict or distort competition within the common market. Surely the Article catches agreements between oligopolists, but it may be difficult to prove that one exists. Then the Commission has to rely on the concept of concerted practises. In the *Dyestuffs* case the European Court of Justice defined concerted practise as:

“... a form of co-ordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.”²⁶

The Commission has attempted to rely on the concept of concerted practises in order to catch oligopolistic parallel behaviour. Oligopolists may engage in parallel behaviour, causing anti-competitive effects, because they each individually perceive that to be in its own interests without colluding or communicating at all. It has thus been discussed whether tacit collusion is prohibited by Article 81.

The European Court of Justice has recognised the concept of tacit collusion. In *Dyestuffs* it stated that “...parallel behaviour may not by itself be identified with a concerted practice”.²⁷ The mere existence of parallel behaviour will thus not be enough to prove the existence of concerted practice, since collusion must also be proved. The formal burden of proving that Article 81 has been infringed lies with the Commission. Still, the Court will not easily permit arguments that uniformity of prices is the inevitable effect of an oligopolistic market structure. If the facts do not indicate that the market structure naturally will result in parallel behaviour, and if there are other facts indicating collusion, then the burden of proof may shift to the

²⁶ Cases 48, 49, and 51-57/89 *ICI and Others v Commission* [1972] ECR 619 et seq., para. 64. The case is referred to as *Dyestuffs*.

²⁷ *Ibid.*, para. 66.

undertakings to show how identity of prices came about without any collusion.²⁸

In *SuikerUnie* the ECJ held that Article 81 "does not deprive an economic operator of its right to adapt itself intelligently to the existing and anticipated conduct of their competitors". However, any direct or indirect contact, with the object or effect to distort competition, between such operators is strictly prohibited.²⁹ Separating anti-competitive intent from rational and intelligent behaviour is very difficult since the "line between illegal cartel behaviour and lawful intelligent adoption to rival's behaviour is a fine one".³⁰ Most cases of concerted practices have thus concerned the presence or absence of explicit collusion and the evidence required to prove it.³¹

In *Wood Pulp* the ECJ agreed with the Commission's view in principle that concerted practice can be found on economic evidence alone. It declared that "parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the *only plausible explanation* for such conduct".³² The Court had hired two economists to provide a report of the market. The report found alternative explanations for the parallel conduct and the Court thus concluded that concertation was not the only plausible explanation. In the absence of a "firm, precise and consistent body of evidence" of concertation, the Commission's decision was overruled in this respect.³³

In conclusion, the concept of concerted practise does not extend to the concept of tacit collusion. The Court will accept existence of concerted practice within Article 81 despite the absence of proof of actual contact between the undertakings only where there is no other sustainable explanation for the parallel behaviour than collusion. In other words, pure parallel behaviour is not itself prohibited by Article 81, it can merely constitute a proof of collusion where there is no other explanation for the parallel conduct. Where there is no apparent contact between the undertakings, a thorough economic analysis will have to be done in order to decide whether there is another plausible explanation for the conduct of the undertakings. The Commission will have to be prepared to defend its presumptions against experts who present other explanations than collusion.³⁴ It is thus very difficult for the Commission to prove that the parallel conduct in question is caught by Article 81.

²⁸ Craig/de Búrca, p. 901.

²⁹ Cases 40-48/73 *Coöperatieve Vereeniging Suiker Unie v Commission* [1975] ECR 1663, para. 174.

³⁰ Bishop, p. 38.

³¹ Whish/Sufrin, p. 63.

³² Case C-85/89 *Ahlström and Others v Commission* [1988] ECR 5193, para. 71 (emphasis added). The case is referred to as *Wood Pulp*.

³³ *Ibid.*, paras 126-127.

³⁴ Craig/de Búrca, pp. 901-902.

Since non-collusive parallel behaviour often comes about in oligopolistic markets, EC competition Law would be severely constrained when dealing with those markets if there was no other legal instrument applicable to such behaviour. It would therefore be of great importance if the concept of collective dominance could provide such an instrument.

2.5.2 The Merger Regulation

Just as in the case of Article 82 it has been debated whether or not the Merger Regulation applied to the concept of collective dominance. The Merger Regulation does not explicitly refer to collective dominance. It lacks, as opposed to Article 82, the specific reference to dominance enjoyed by "one or *more*" undertakings. Article 2(3) of the Regulation provides that:

"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 a substantial part of it shall be declared incompatible with the common market."

The first time the concept of collective dominance position was relied on to block a concentration, as proposed, was in the *Nestlé/Perrier* decision.³⁵ The Commission argued that the distinction between single and collective dominance could not be decisive for the application of the Merger Regulation since both situations may significantly impede effective competition, which is one of the goals of the Treaty, and concluded that collective dominance was covered by the Regulation. The parties did not appeal, probably because they were content with the commitments that the Commission had required in order to clear the concentration. The Court had the opportunity to answer the question 1998, in the *Kali & Salz* case.³⁶ Since France was a party in the case it came directly before ECJ. France argued that Article 2(3), due to the fact that it does not refer to dominance by more undertakings, was only applicable to single dominance. Against the view of AG Tesouro,³⁷ the ECJ affirmed the Commission's finding that the concept of collective dominance falls within the scope of the Merger Regulation. If that was not the case, the purposes of the Treaty would be frustrated and the Merger Regulation deprived of an important aspect of its effectiveness. The conclusion was based on a teleological interpretation of the fundamental goal embodied in Article 3 (g) of the Treaty.³⁸

Hence, a concentration will be declared incompatible with the common market if it creates or strengthens a collective dominant position. Merger control applies a prospective view and can only prevent the creation or strengthening of collective dominant positions. It is the impact of a

³⁵ Decision 92/553/EEC, IV/M.190 - *Nestlé/Perrier*, OJ 1992 L 356/1.

³⁶ Cases C-68/94 and 30/95 *France and Others v Commission* [1998] ECR I-1375. The case is referred to as *Kali & Salz*.

³⁷ *Ibid.*, paras 78 et seq. of the Opinion of AG Tesouro.

³⁸ *Kali & Salz*, cited *supra* note 36, paras 169-172.

concentration on the future market structure and future conduct of the undertakings that must be evaluated. Any explicit collusion or any other form of abuse which may appear after the merger, must be dealt with under Articles 81 and 82 of the Treaty.³⁹ The Commission must assess whether “the concentration leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to an considerable extent independently of their competitors, customers and consumers”.⁴⁰ The relevant question is thus whether the concentration will facilitate explicit or tacit collusion between the firms involved in the merger and other firms which are major players in the same market.⁴¹ If that is the case the merger will be blocked. The assessment relies on structural factors such as market concentration, barriers to entry, product differentiation and the degree of vertical integration, but must also include the possible future behaviour of the undertakings.⁴²

By affirming that oligopolistic interdependence can be relied upon to conclude that a collective dominant position will be created or strengthened, as the Court did in the *Gencor* case,⁴³ the Merger Regulation can be used to prevent oligopolistic market structure conducive to tacit collusion from arising or reinforcing. However, they can only be prevented and where tacit collusion impeding effective competition actually occurs, it must be condemned by means of the provisions prohibiting anti-competitive behaviour by undertaking, that is by Article 81 or Article 82 of the Treaty.

³⁹ Etter, p. 108.

⁴⁰ *Kali & Salz*, cited *supra* note 36, para. 221.

⁴¹ Ysewyn/Caffarra, p. 469.

⁴² Etter, pp. 109-110.

⁴³ Case T-102/96 *Gencor v Commission* [1999] II-753.

3 Defining Collective Dominance under Article 82

Article 82 prohibits “any abuse by one or more undertakings of a dominant position”. It was not until the CFI judgement *Italian Flat Glass* that it was confirmed that that passage of Article 82 apply to collective dominance, that is to dominance possessed by two or more legally and economically independent undertakings. Despite the fact that the concept of collective dominance was used by the Commission and the CFI and the ECJ in several cases after *Italian Flat Glass*, the nature of the concept and what facts can make a group of undertakings collectively dominant was not made clear. In particular, since the Court based the collective dominance on the presence of different links between the undertakings, it seemed as collective dominance could not be established by the relationships emerging from oligopolistic interdependence, that is by market conditions alone. This would be detrimental to the Commission since in order to address anti-competitive behaviour by oligopolists under Article 82, these must first be held to have a collective dominant position. However, in the recent years the Court appears to have confirmed that collective dominance can be established by the existence of oligopolistic interdependence.

3.1 The Economic Entity Doctrine

A “narrow view” to the reference to “one or more undertakings” in Article 82, is that the expression refers merely to separate legal undertakings constituting one “economic entity”. The abusive conduct of one of the undertakings is then attributable to the group as a whole. According to this approach Article 82 would not apply to the concept of collective dominance, i.e. dominance enjoyed together by independent firms, but only to undertakings within a economic entity or co-operate group. Most frequently it would involve the attribution of abusive conduct by a subsidiary to the parent company.⁴⁴

Situations where the dominant position is held by a number of firms which are part of the same corporate group or economic unit and together have the power to impede competition, have been aggregated and dealt with under Article 82 in a number of cases, for example in *Continental Can*⁴⁵ and *Commercial Solvents*.⁴⁶ In these cases more than two respectively three distinct legal undertakings were involved in the abuse alleged by the

⁴⁴ Rodger, p. 15.

⁴⁵ *Continental Can*, cited *supra* note 1, ECJ overturned the Commissions decision on the grounds that the definition of the relevant market was not adequate.

⁴⁶ Cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223.

Commission. The key issue was whether the undertakings were so closely related to one another that they should be regarded as essentially one economic unit. If that were the case, Article 82 would apply to their behaviour.⁴⁷

It has been argued that in the case of applying Article 82 merely to economic units, the reference to more undertakings becomes superfluous. In the *Bodson* case the ECJ pointed out that Article 81 is not concerned with agreements or concerted practises between firms forming an economic unit. Anti-competitive behaviour on the part of an undertaking within an economic unit should therefore be considered in the light of Article 82.⁴⁸ This indicates that an economic unit should be regarded as one undertaking falling under Article 81. In the later *Italian Flat Glass* judgement the Court declared that the term "undertaking" in Article 82 has the same meaning as the one in the context of Article 81.⁴⁹ This leads to the conclusion that the use of the phrase "more undertakings" in Article 82 is not needed to tackle problems in the case of economic units.⁵⁰

Moreover, if Article 82 were intended to apply only to situations where an economic entity abuses its dominant position, it would be of little help for the Commission when dealing with oligopolistic markets. It is a characteristic of an oligopolistic market that no individual undertaking is holding market power and Article 82 would thus have no application in most cases if it could not apply to independent undertakings.⁵¹

3.2 Development on the Concept of Collective Dominance

A wider meaning of the phrase "one or more undertakings" result in a possible way to control the behaviour of undertakings economically and legally independent from one another. The Court confirmed such an application of collective dominance under Article 82 in the important *Italian Flat Glass* case.⁵² Even though the application of Article 82 to collective dominance was affirmed, the precise meaning of the concept remained unclear. There has been considerable uncertainty as to what may constitute a collective dominant position and, in particular, whether oligopolistic interdependence could be relied on for that purpose. If oligopolists could hold a collective dominant position in that way, their behaviour could be

⁴⁷ Whish, *Collective Dominance*, p. 586.

⁴⁸ Case 30/87 *Corinne Bodson v Pompes Funebres des Régions Libérées* [1988] ECR 2479, paras 19-21.

⁴⁹ Cases T-68, 77 and 78/69 *Società Italiano Vetro and Others v Commission* [1992] ECR II -1403, para. 358. The case is referred to as *Italian Flat Glass*.

⁵⁰ See Stroux, p. 18.

⁵¹ Whish/Sufrin, p. 66.

⁵² *Italian Flat Glass*, cited *supra* note 49.

controlled under the head of abuse, despite the impossibility of proving collusion for the purpose of Article 81.⁵³

3.2.1 Pre the *Italian Flat Glass Case*

The Commission tried to apply the concept of collective dominance to oligopolies already in the 1970s.⁵⁴ A first indication of this is found in its Oil Companies Report⁵⁵ where it considered that several refiners held a dominant position collectively in the oil market. In its *European Sugar* decision⁵⁶ the Commission found that two Dutch sugar producers had abused their collective dominant position. The Commission considered that they held a collective dominant position since they, because of close co-operation in most of their activities, acted in a uniform manner and always appeared as a single entity towards other undertakings. Together with their market dominance this enabled them to act independently of their competitors. On appeal the Court did pronounce on this, because it did not consider that there had been any abuse.⁵⁷

The Court first rejected the idea to apply the concept of collective dominance under Article 82 to oligopolistic markets. In *Hoffman-La Roche* it made clear that it did not consider Article 82 to be applicable to tacit collusion, as it stated that:

"[A] dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally."⁵⁸

The Court repeated this approach in several cases. In the *Züchner* case it pointed out that:

"Article 86 deals with the abuse of a dominant position and does not cover the existence of concerted practises, to which solely the provisions of Article 85 apply [...] a concerted practise [...] implies a series of independent acts which between them substitute co-operation for competition. In contrast, one of the hallmarks of a dominant position covered by Article 86 is its unilateral nature."⁵⁹

In *Alstel*,⁶⁰ an Article 234 [ex 177] reference, the Commission intervened and argued that Article 82 applied to the concept of collective dominance, and held that a dominant position occupied by several firms collectively, may arise from parallel behaviour. The Commission suggested that

⁵³ Whish/Sufrin, p. 67.

⁵⁴ Whish, *Collective Dominance*, p. 586.

⁵⁵ Commission Report COM (75) 675 of 10 December 1975 on the behaviour of the oil companies in the Community during the period from October 1973 to March 1974.

⁵⁶ Decision 73/109/EEC, IV/26.918 - *European Sugar*, OJ 1973 L 140/17.

⁵⁷ *Suiker Unie*, cited *supra* note 29.

⁵⁸ *Hoffman-La Roche*, cited *supra* note 5, para. 39.

⁵⁹ Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021, para. 10.

⁶⁰ Case 247/86 *Alsatel v Novasam* [1988] ECR 5987.

collective dominance was established since a group of undertakings, which held approximately two-thirds of the relevant product in the market, was empowered by legislation governing the business of its members to control new entrants onto the market, and a large portion of the members acted in an identical manner.⁶¹ AG Mancini suggested in his opinion that Article 82 should apply to "abusive practices pursued by one or more undertakings which enjoy a position of economic strength within the common market [...] which enables them to hinder the maintenance of effective competition by allowing them to behave to an appreciable extent independently of their competitors and customers and ultimately of consumers".⁶² The Court repeated its view that concerted practice could only be dealt with under Article 81, but did not refer to the question of collective dominance at all. It was, as in many Article 234 cases, unclear whether that meant that it rejected the idea or that it simply decided it to be irrelevant for the purpose of answering the question referred to it.

Another case, in which the Court did not expressly refer to collective dominance although it might be deduced that the Court was thinking of the possibility,⁶³ was *Ahmed Saed*.⁶⁴ The Court stated that where a dominant undertaking imposes a fare on other undertakings, this could amount to an abuse of dominant position. The case concerned airlines which most often are not individually dominant, but normally operate in duopoly of two national airlines on routes between two Member States.⁶⁵ Hence collective dominance might have been relevant. The Court's negligence to pronounce on the issue could however also be explained by the fact that this too was an Article 234 case, and that the issue of collective dominance did not form part of the relevant part of the judgement.⁶⁶

The *Magill* cases⁶⁷ concerned three Irish television companies which refused to supply Magill, a publication company, with listings of their television programs. The Commission and the CFI regarded that each firm was individually dominant in respect of its own listing *vis-à-vis* its customers. By defining the product market too narrowly the problems with oligopoly and collective dominance could be avoided.⁶⁸ However, this way of arguing

⁶¹ *Alsatel*, cited *supra* note 60, p. 5995.

⁶² *Ibid.*, para. 7 of the Opinion of AG Mancini.

⁶³ Whish/Sufrin, p. 68.

⁶⁴ Case 66/86 *Ahmed Saed Flugreisen and Silver Line Reisebüro v Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803.

⁶⁵ AG Lenz suggested that this could amount to a joint dominant position. See para. 34 of his Opinion in *ibid.*

⁶⁶ See Soames, p. 33, note 76.

⁶⁷ Case T-69/89 *RTE v Commission* [1991] ECR II-485, Case T-70/89 *BBC v Commission* [1991] ECR II-535 and Case T-76/89 *ITP v Commission* [1991] ECR II-575. The cases are referred to as *Magill*.

⁶⁸ Whish/Sufrin p. 69. For other examples of narrow market definitions, see Decisions 91/297/EEC, IV/33.133-A - *Soda-ash/ICI*, OJ 1991 L 152/40 and 91/298/EEC, IV/33-B - *Soda-ash/Solvay*, OJ 1991 L 152/21. There is a danger with this approach. By defining the market too narrowly an oligopolist may falsely be characterised as individually dominant and therefore discouraged or prevented from competing. See Whish/Sufrin, p. 66.

cannot cover the fact that it was the anti-competitive effect caused by the parallel behaviour between the companies refusing the supply, that the Commission was most concerned about. It has therefore been argued that these cases must be interpreted as cases of abuse of collective dominant positions.⁶⁹

In the above mentioned *Bodson* case⁷⁰ the Court applied Article 82 to more than one undertaking. However, since the undertakings formed part of an economic unit, it was merely an application of the "narrow view" doctrine.

3.2.2 The *Italian Flat Glass* Case

In the *Italian Flat Glass* judgement⁷¹ the Court of First Instance for the first time affirmed that legally and economically independent undertakings, without being part of an economic unit or co-operate group, could hold a collectively dominant position. The case concerned an appeal of the Commission's *Flat Glass* decision,⁷² in which the Commission had found that three Italian producers of flat glass held a collective dominant position which they had abused. The Commission argued that the undertakings "as participants in a tight oligopolistic market [...] enjoy a degree of independence from competitive pressure that enables them to hinder the maintenance of effective competition, notably by not having to take account of the behaviour of the other market participants".⁷³ The Commission considered that the undertakings had a joint market share for non-automotive glass and automotive glass of 79 per cent respectively 95 per cent and held that this was sufficient to give the undertakings a dominant position. Besides that, the finding of collective dominance was based on the fact that the undertakings were able to pursue a commercial policy which was independent of ordinary market conditions, and that they "present[ed] themselves on the market as a single entity and not as individuals".⁷⁴ The elements in the latter were that the undertakings collectively maintained common and special links with a group of wholesalers and that they had established between themselves structural links relating to production through the systematic exchange of products.⁷⁵

Both these conducts also constituted agreements and concerted practices infringing Article 81(1). Hence the finding of an abuse of a collective dominant position made no particular difference to the result. Still, the decision opened up the possibility to attack the conduct of oligopolists under Article 82 in situations where the conduct in question cannot be captured by Article 81.

⁶⁹ Schödermeier, p. 30 and Whish/Sufrin, p. 66.

⁷⁰ *Bodson*, cited *supra* note 48.

⁷¹ *Italian Flat Glass*, cited *supra* note 49.

⁷² Decision 89/93/EEC, IV/31.906 - *Flat Glass*, OJ 1989 L 33/44.

⁷³ *Ibid.*, para. 78.

⁷⁴ *Ibid.*, para. 79.

⁷⁵ *Ibid.*

Before the CFI the Commission explained that it had not applied the concept of collective dominance to the undertakings solely on the grounds that they held a collectively very large share of the market and were members of a tight oligopoly. The concept was applied because the undertakings presented themselves on the market as a single entity and not as individuals and that emerged not from the oligopolistic structure of the market but from the agreements and concerted practices which led the undertakings to create structural links amongst themselves.⁷⁶

In its assessment of the question of collective dominance the CFI first pointed out that there is no legal or economic reason to suppose that the term "undertaking" in Article 82 has a different meaning from the one given to it under Article 81. It thereafter rejected the view of the British Government that the concept of collective dominance only refers to the economic entity doctrine and held that:

"There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such *economic links* that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers."⁷⁷

The Court thus affirmed the application of collective dominance under Article 82. The existence of the collective dominant position was based on the presence of *links* between the firms, and not on the market structures itself. The CFI considered that its interpretation was further supported by Regulation (EEC) No 4056/86,⁷⁸ which provides block exemptions for certain liner conferences. If the conduct of an exempted conference has effects incompatible with Article 82 the Commission may withdraw the benefit of the block exemption. The CFI mentioned shipping conferences as an example of agreements between economically independent entities that could constitute economic links given rise to a collective dominant position.⁷⁹

The CFI pointed out that in order to establish an infringement of Article 82 it is not sufficient to simply "recycle" the facts relied on as constituting a breach of Article 81. It cannot be argued that the parties to an agreement or unlawful concerted practice, only by virtue of the fact that they jointly hold a substantial share of the market, hold a collective dominant position and that their illegal behaviour constitutes an abuse of that position.⁸⁰

⁷⁶ *Italian Flat Glass*, cited *supra* note 49, para. 350.

⁷⁷ *Ibid.*, para. 358 (emphasis added).

⁷⁸ Council Regulation No (EEC) 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the treaty to maritime transport, OJ 1986 L 378/4.

⁷⁹ *Italian Flat Glass*, cited *supra* note 49, para. 359.

⁸⁰ *Italian Flat Glass*, cited *supra* note 49, para. 360.

The Commission's decision regarding Article 82 was annulled because the Commission had simply recycled the facts in the above mentioned way, instead of properly analysing the market and had thus not presented the necessary proof of a collective dominant position.

The case was very important because of its acceptance of the application of Article 82 to collective dominance in principle. The possibility to use Article 82 to control oligopolies where the oligopolists possess a collective dominance was thus confirmed. However, the collective dominance was not based on oligopolistic market structure, but on economic links. The links consisted of practises which were also in breach of Article 81. The definition of economic links was not further explained and it was not made clear whether Article 82 could be invoked to control oligopolistic parallel practices not infringing Article 81(1).

3.2.3 The *French-West African Shipowners' Committees* Decision

A few weeks after the *Italian Flat Glass* case the Commission adopted the *French-West African Shipowners' Committees* decision,⁸¹ a decision concerning the maritime transport sector. The Commission imposed substantial fines on various shipping companies for infringing both Article 81 and Article 82. It chose to rely on both articles even though it was not necessary it to use Article 82 since the case concerned a number of formal agreements to which Article 81 applied.⁸²

The undertakings were shipowners which had formed committees to share out amongst themselves the liner cargo between ports in France and those in West and Central Africa. The Commission held that the market position of the shipowners should be assessed collectively as they were connected with each other in varying degrees due to their membership to the committees. The undertakings were also members of liner conferences and as such they presented a united front towards shippers.⁸³ The fact that the undertakings were organised in an operative body constituted links between them, with the result that they adopted the same conduct on the market and the Commission therefore concluded that they were in a collective dominant position.⁸⁴ Since the imposed fines were later reduced the decision was not appealed and the Court did not get the opportunity to pronounce on this kind of link.

⁸¹ Decision 92/262/EEC, IV/32.450 - *French-West African Shipowners' Committees*, OJ 1992 L 134/1.

⁸² Whish/Sufrin, p. 71.

⁸³ *French-West African Shipowners' Committees*, cited *supra* note 81, paras 56- 57.

⁸⁴ *French-West African Shipowners' Committees*, cited *supra* note 81, para. 66.

3.2.4 The *Almelo* Case

The *Almelo*⁸⁵ case of 1994 was the first case in which the ECJ affirmed the concept of collective dominance. A Dutch court had asked the ECJ a number of preliminary questions, *inter alia* one concerning the existence of abuse of a collective dominant position. The principal case before the national court was between the municipality of Almelo and other local distributors of electricity and a regional distributor. Regional Dutch distribution undertakings supplied local distribution undertakings with electricity, prohibiting them by means of an exclusive purchasing clause, to import electricity. The clause was contained in standard contracts for the supply of electric power, which was drawn up by the Association of Operators of Electricity Undertakings in the Netherlands. The clause was found to be in breach of Article 81.

Regarding the question whether the regional distributors held a collective dominant position the ECJ held that:

”...[I]n order for collective dominance to exist, the undertakings in the group must be *linked* in such a way that they *adopt the same conduct on the market*” [...] It is for the national court to decide whether there exist between the regional electricity distributors links which are sufficiently strong for there to be a collective dominant position in a substantial part of the common market.”⁸⁶

Just as the CFI in *Italian Flat Glass* the ECJ held that the existence of links between undertakings might put them in a collective dominant position. The new formula however indicated that the significance of the link is whether it results in the undertakings adopting the same conduct on the market.

The ECJ did not itself pronounce on whether the parallel use of imposed standard contracts could constitute the links required to establish a collective dominance. AG Darmon, however, held that ”...a common factor in relation to the regional electricity distributors established in the Netherlands is that they are bound to the local distributors by the same type of contracts”.⁸⁷ He thus appears to have supported that the links present in the case could constitute links required for the establishment of a collective dominant position. If the Court were to accept such ”externally imposed” links it would mean that a new type of links could constitute the links required to put undertakings in a collective dominant position, since no behaviour of the undertakings is required as to willingly adopt the same conduct on the market.⁸⁸ Consequently, the applicability of Article 82 could extend to situations where the undertakings were connected by something more than

⁸⁵ Case C-393/92 *Municipality of Almelo and Others v Energiebedrijf Ijsselmij* [1994] ECR I-1477.

⁸⁶ *Ibid.*, paras 42-43 (emphasis added).

⁸⁷ *Ibid.*, para. 118 of the Opinion of AG Darmon.

⁸⁸ Stroux, p. 22. Model conditions of supply drawn up by a trade association was later mentioned by AG Fennelly in his Opinion, para 28, in *CMB*, cited *supra* note 9.

the fact that they operate on the same oligopolistic market, without however being linked by ways of agreements or concerted practises.

3.2.5 The *Spediporto*, *DIP* and *Sodemare* Cases

Three subsequent cases in which the ECJ dealt with the concept of collective dominance were the *Spediporto*, *DIP* and *Sodemare* cases.⁸⁹ Regarding the definition of collective dominance the Court repeated the formulation stated in *Almelo* that the undertakings must be linked in such a way that they adopt the same conduct on the market.⁹⁰ It did not pronounce on what sort of links must be forehanded.

These cases concerned the question whether national legislation could constitute links which place the undertakings in a collective dominant position, as another type of "externally composed links". According to the ECJ, the national legislation at stake in the two first cases could not be regarded as placing the undertakings in a collective dominant position.⁹¹ The Court did not pronounce on whether national legislation, in principle, could constitute links required between undertakings. In *Sodemare*, however it seemed to accept this possibility as it stated that:

"[In] this case, there is no reason to infer that national rules of the kind at issue [...] result in the creation of sufficiently strong links between them as to give rise to a collective dominant position."⁹²

This would mean that national legislation in itself could establish links required for the establishment of collective dominance. What such legislation would have to consist of was not further explained. Again such externally imposed links do not require any behaviour of the undertakings as to willingly adopt the same conduct on the market.

3.2.6 The *Gencor* Case

Not until March 1998, when the ECJ handed down the *Kali & Salz* judgement,⁹³ was it made clear that the Merger Regulation is applicable to collective dominance. The *Gencor* judgement⁹⁴ came a year later and for the first time a concentration was prohibited on the basis of collective dominance. Definitions of collective dominance made under the Merger Regulation have relevance in cases under Article 82, and vice versa. This is shown *inter alia* by the fact that the CFI in *Gencor* referred to the ruling in *Italian Flat Glass*.

⁸⁹ Case C-96/94 *Centro Servizi Spediporto v Spedizione Maritima del Golfo* [1995] ECR I-2883, Cases C-140-142/94 *DIP and Others v Comune di Bassone del Grappa and Comune di Chioggia* [1995] ECR I-3257 and Case C-70/95 *Sodemare and Others v*

⁹⁰ *Spediporto*, para. 33, *DIP*, para. 26 and *Sodemare*, para. 46. Cases cited *supra* note 89.

⁹¹ *Spediporto*, para. 34 and *DIP*, para. 27. Cases cited *supra* note 89.

⁹² *Sodemare*, cited *supra* note 89, para. 47.

⁹³ *Kali & Salz*, cited *supra* note 36.

⁹⁴ *Gencor*, cited *supra* note 43.

The case came before the CFI in an appeal against the Commission's *Gencor/Lonrho* decision,⁹⁵ which concerned the concentration of the respective platinum activities of the parties, Implats of Gencor and LPD of Lonrho. The Commission had blocked the concentration because it would have created a collective dominant position for the new entity and a third party, Amplats. The applicant argued before the CFI that the Commission had failed to follow the CFI's *Italian Flat Glass* judgement, since it had not proven the existence of any structural links which, in the applicant's opinion, the court had held as a prerequisite for a finding of collective dominance under Article 82.⁹⁶ The CFI rejected this by declaring that:

"In its judgment in the Flat Glass case, the Court referred to links of a structural nature only by way of example and it did not lay down that such links must exist in order for a finding of collective dominance to be made [...] Nor can it be deduced from the same judgment that the Court has restricted the notion of economic links to the notion of structural links referred to by the applicant."⁹⁷

The Court then pronounced on "economic links":

"[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 align their conduct on the market..."⁹⁸

It went on to note that:

"[T]he fact that these links can be constituted purely from oligopolistic interdependence is all the more pertinent with regard to the control of concentrations, whose object is to prevent anti-competitive structures from arising or being strengthened. Those structures may result from the existence of economic links in the strict sense or from the market structure of an oligopolistic kind in which each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practise."⁹⁹

The Court affirmed that the Commission was entitled to conclude, relying on the envisaged changes in the market structure and on the similarity of the costs of Amplats and Implats/LPD, that the concentration would create a collective dominant position which would significantly impede effective competition.¹⁰⁰ Hence, the concentration was blocked. This case is very important since it recognises that a finding of a collective dominance, given certain market characteristics, can be based on the existence of oligopolistic interdependence alone. This depends on the market structure and it seems as

⁹⁵ Decision 97/26/EC, IV/M 619 - *Gencor/Lonrho*, OJ 1997 L 11/30.

⁹⁶ *Gencor*, cited *supra* note 43, para. 264.

⁹⁷ *Ibid.*, paras 273 and 275.

⁹⁸ *Ibid.*, para. 276 (emphasis added).

⁹⁹ *Gencor*, cited *supra* note 43, para. 277.

¹⁰⁰ *Ibid.*, para. 279.

there need not be any structural links or "links with an expression of the will of the undertakings to adopt the same conduct on the market".¹⁰¹

3.2.7 The *Irish Sugar* Case

Irish Sugar was the main supplier of sugar in Ireland and held a dominant position on the market. Between 1985 and 1990 the distribution was in the hands of Sugar Distributors Ltd (SDL). The Commission had found that these two undertakings under the relevant period together had held a collective dominant position which had also been abused.¹⁰² The applicant, Irish Sugar, appealed to the CFI arguing that the Commission had erred in law by failing to adhere to the *Italian Flat Glass* judgement. The CFI pointed out that the ECJ in *Kali & Salz* had, following its earlier case law and the case law of the CFI, confirmed that:

"A joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers."¹⁰³

The CFI rejected the applicant's objections and held in conformity with the Commission that there had existed very close links between the two undertakings, which gave them the power to adopt a common market policy. Therefore, the SDL and Irish Sugar had possessed a collective dominant. The links taken into account were *inter alia* the facts that Irish Sugar held 51 per cent of the shares in SDL's parent company, the managing director of Irish Sugar was on the board of SDL and there was a direct economic tie, as SDL was committed to buy all its sugar from Irish Sugar.¹⁰⁴

Irish Sugar appealed against the decision of the CFI but, by order of 10 July 2001, the ECJ dismissed the appeal on the grounds that it was in part clearly inadmissible and clearly unfounded.¹⁰⁵

The undertakings in *Irish Sugar* were clearly structurally linked to each other and the finding of a collective dominance was thus based on the existence of links. This does not mean that that must be a rule. In its definition of collective dominance the CFI referred to *Kali & Salz* and used the word "factors" instead of "links", which indicates that structural links are not a prerequisite to the existence of collective dominance under Article 82. Furthermore, again the key feature is that the undertakings are able to adopt a common policy. Instead of the "factors giving rise to a connection between them" constituting the essence of collective dominance, they are taken as "merely" particularly important in determining whether the

¹⁰¹ Stroux, p. 35.

¹⁰² Decision 97/624/EC, IV/34.621, 35.059/F3 - *Irish Sugar*, OJ 1997 L 258/1.

¹⁰³ *Irish Sugar v Commission*, [1999] ECR II-2969, para. 46.

¹⁰⁴ *Ibid.*, paras 47-68.

¹⁰⁵ Case C-497/99 P *Irish Sugar v Commission*, Order of the ECJ of 7 July 2001.

undertakings are able to adopt a common policy on the market. This case also made clear that a collective dominant position might be held by undertakings in a vertical relationship.

3.2.8 The *Compagnie Maritime Belge* Case

The *Cewal* decision,¹⁰⁶ like the *French-West African Shipowners' Committee* decision, concerned the maritime transport sector. In this decision the Commission found that the members of the Associated Central West Africa Lines shipping conference, Cewal, had infringed Article 81 as well as abused their collective dominant position contrary to Article 82. The Commission referred to the CFI's statement in *Italian Flat Glass* that shipping conferences serves as an example of economic links establishing a collective dominant position.¹⁰⁷ It considered that the conference agreement between the members of Cewal created very close links between them, which was evidenced *inter alia* by the existence of a common scale of freight weight.¹⁰⁸

Three of the conference member companies appealed to the CFI for annulment of the Commission decision. The CFI agreed with the Commission that, given the links between the undertakings, their market position should be assessed collectively. It concluded that the companies formed a common entity, Cewal, which presented itself as one single entity since the members adopted the same overall strategy.¹⁰⁹ The application was thus dismissed and the companies appealed to the ECJ.

Before the ECJ the applicants argued that the CFI had simply "recycled" concerted practices within the meaning of Article 81 and that it had failed to explain why a committee system constituted "economic links" as defined by the CFI in the *Italian Flat Glass* case. AG Fennelly considered that the phrase "united by such economic links" should be understood in the light of the formulation from *Kali & Salz*,¹¹⁰ as "factors giving rise to a connection", which in his view was the same as economic links.¹¹¹

AG Fennelly asserted that it should not be impermissible for the Commission to consider agreements or concerted practices within the meaning of Article 81, when assessing whether there exists a collective dominance. He also held that it was unnecessary to specify exhaustively the nature of such relationships or economic links. The key issue was to look at

¹⁰⁶ Decision 93/82/EEC, IV/32.448 and 450 - *Cewal*, OJ 1993 L 34/20.

¹⁰⁷ *Ibid.*, para. 49.

¹⁰⁸ *Ibid.*, para. 61.

¹⁰⁹ Cases T 24/93-26/93 and 28/93 *Compagnie Maritime Belge Transports v Commission* [1996] ECR II-1201, para. 67.

¹¹⁰ *Kali & Salz*, cited *supra* note 36.

¹¹¹ *CMB*, cited *supra* note 9, para 27 of the Opinion of AG Fennelly.

their economic *effect*, i.e. whether they resulted in a situation where a group of independent firms acted as a single market entity.¹¹²

The ECJ adopted a similar approach which, in comparison with the CFI judgement in *Italian Flat Glass*, resulted in a broader definition of the concept of collective dominance:

”...[A] dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity.”¹¹³

It went on to point out that a finding of a collective dominant position held by two or more undertakings must proceed upon an economic assessment of the position in the market of the undertakings concerned, prior to any examination whether there has been an abuse. For the purpose of analysis under Article 82 it was therefore necessary first to consider whether the undertakings concerned constituted a collective entity towards their competitors, their trading partners and consumers. The ECJ then held that:

”[In] order to establish the existence of a collective entity as defined above, it is necessary to examine those economic links or factors which give rise to a connection between the undertakings concerned. In particular, it must be ascertained whether economic links exist between the undertakings concerned which enable them to act together independently of their competitors, customers and consumers.”¹¹⁴

The ECJ further explained the fact that two or more undertakings are linked by agreements or concerted practices within the meaning of Article 81(1) is not, in itself, a sufficient ground for a finding of collective dominance. But such agreements or concerted practices may be implemented in such a way as they result in the undertakings being so linked as to their conduct that they present themselves on a particular market as a collective entity.¹¹⁵ It went on to note that:

” Nevertheless, the existence of an agreement or of other links in law, is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment of the structure of the market in question.”¹¹⁶

The ECJ concluded that a shipping conference such as Cewal presented itself as a collective entity on the particular market *vis-à-vis* its users and competitors. This also followed from the nature and objective of Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport.¹¹⁷

¹¹² *CMB*, cited *supra* note 9, para 28 of the Opinion of AG Fennely.

¹¹³ *CMB*, cited *supra* note 9, para. 36.

¹¹⁴ *Ibid.*, paras 41-42, emphasises added.

¹¹⁵ *CMB*, cited *supra* note 9, para. 44.

¹¹⁶ *Ibid.*, para. 45.

¹¹⁷ *CMB*, cited *supra* note 9, para. 48. Regulation (EEC) No 4056/86, cited *supra* note 80.

Just as in *Almelo* and *Irish Sugar*, the definition of collective dominance laid down in *CMB* focus on whether the links enable the undertakings to present themselves or act as a collective entity. Although the ECJ, remarkable as it may be, did not refer to *Gencor* it concluded that a finding of collective dominance need not to be based agreements or concerted practices or other links in law, but may be based on other connecting factors relying on an economic assessment and in particular on an assessment of the market. This seems to support the possibility to establish a finding of collective dominance on oligopolistic interdependence.

3.2.9 The *Airtours* Decision

The *Airtours* decision¹¹⁸ is the most recent finding under the Merger Regulation of a creation of a collective dominant position. The Commission prohibited a proposed acquisition by Airtours of First Choice, concluding that the acquisition would create a collective dominant position in the relevant market on part of the new entity, Airtours/First Choice, and the two other leading tour operators. In order to determine whether the market was conducive to oligopolistic dominance, the Commission assessed the concentration on the market, different market characteristics and the existence of commercial links between oligopolists.¹¹⁹ On the basis of this assessment, and a review of the past competition in the industry, the Commission concluded that the concentration would result in an oligopolistic market in which it would be rational for the three collectively dominant undertakings to constrain supply to the market, thereby increasing prices. It stated that:

”[I]t is not a necessary condition of collective dominance for the oligopolists always to behave as if there were one or more explicit agreements [...] between them. It is sufficient that the merger makes it rational for the oligopolists in adapting themselves to market conditions, to act - individually - in ways which will substantially reduce competition between them, and as a result of which they may act, to an appreciable extent independently of competitors, customers and consumers.”¹²⁰

In *Kali & Salz* and *Gencor* the Court seemed to establish that the key issue in a case of collective dominance is whether the concentration would enable the firms to adopt a common policy on the market and act to an considerable extent independently of competitors, customers and consumers, i.e. whether the concentration would facilitate collusion. In *Airtours* the Commission seems to suggest that there need not be a risk for tacit collusion, it would be enough if the concentration would make it rational for the oligopolists to individually and unilaterally take actions which reduce competition between them. Such an approach would introduce a stricter control of oligopolies since it would lower the threshold for a finding of collective dominance. It is not fully clear whether the Commission intended to extent the notion of

¹¹⁸ Decision 00/267/EC, IV/M 1524 - *Airtours/First Choice* OJ 2000 L 93/1.

¹¹⁹ *Ibid.*, para. 87.

¹²⁰ *Ibid.*, para. 54.

collective dominance in this way.¹²¹ Airtours appealed against the decision and it remains to be seen whether the CFI will accept the Commission's conclusion.

¹²¹ Whish, p. 604.

4 Assessment of the Practice on the Definition of Collective Dominance

4.1 The Relationship between Collective Dominance under Article 82 and Collective Dominance under the Merger Regulation

In *Kali & Salz* the appellants claimed that the Commission's finding of collective dominance flawed since it did not follow the criteria stated by the Court in case law on collective dominance under Article 82 in for example *Italian Flat Glass*. The Commission declared that it did not accept that the criteria for determining the existence of collective dominance must be the same under the Merger Regulation as under Article 82, since an analysis in the context of Article 82 refers to the past and has as purpose to put an end to abusive behaviour, whereas in the case of the Regulation the analysis is directed to the future, aiming at maintaining effectively competitive market structures.¹²² The Court did it not refer to the *Italian Flat Glass* case and did not comment on the relationship between Article 82 and the Merger Regulation regarding the definition of collective dominance.

In line with the Commission's statement, it has been discussed whether the definition of collective dominance is or should be different under the two instruments. Venit seems to have suggested that there should be a difference between the two, since he considered the existence of behavioural links to be a necessary requisite for a finding of collective dominance under Article 82 but not under the Merger Regulation.¹²³ Now the Court in *CMB* seems to have proven that that line cannot be drawn since such links are not a necessity under Article 82.

The way in which the case law under respective provision "interact" seems to show that no difference is intended. The CFI referred to *Kali & Salz* in *Irish Sugar*, and so did the AG in *CMB* when he held that links should be understood in the light of the notion laid down in *Kali & Salz*. In *Gencor* the CFI made no difference between collective dominance under Article 82 and collective dominance under the Merger Regulation. It not only referred to *Italian Flat Glass*, but also explained what the Court had meant in the former case to prove that its conclusion in *Gencor* did not contradict the *Italian Flat Glass* formula. Furthermore, its wording that "these links can be

¹²² *Kali & Salz*, cited *supra* note 36, para. 180.

¹²³ Venit, pp. 1115-1116.

constituted purely from oligopolistic interdependence *is all the more pertinent with regard to the control of concentrations*”¹²⁴ seems to prove that the Court’s definitions of collective dominance under the Merger Regulation is also applicable to collective dominance under Article 82.¹²⁵ Most authors agree with this and accordingly they evaluate not only cases under Article 82, but also cases under the Merger Regulation when analysing collective dominance under Article 82.

The coherent treatment of the definition of collective dominance under both legal instruments seems logical. The opposite opinion, that there should be a difference since Article 82 deals with past abusive behaviour and the Merger Regulation with future market structure, appears difficult to combine with the fact that a finding of a collective dominant position does not pronounce on whether the undertakings concerned have also abused that position. If it can be concluded under the Merger Regulation, that several undertakings due to the future existence of certain market characteristics will hold collective dominant position, it would indeed be odd if the actual existence of the same market characteristics in the past, was not capable of constituting a collective dominant position. The undertakings will be punished for past abusive behaviour, not for the fact that they together held a collective dominant position. Hence, there seems to be no reason to define collective dominance under Article 82 and the Merger Regulation differently in this respect.

4.2 Links between Undertakings

In the *Italian Flat Glass* case the CFI finally confirmed that collective dominance was applicable under Article 82. However, the case did not clarify what the concept of collective dominance actually consists of. Did the judgement require that collectively dominant entities must be economically linked, or did it simply say that links were an example of collective dominance? If links were required, what exactly did this mean? It was not clear whether economic links must always rise from some type of agreement since the CFI gave, as an example of economic links between undertakings that may put them in a collective dominant position, the existence of agreements or licences. If so, would not such agreements be likely to infringe Article 81 and what was then the purpose of the principle of collective dominance under Article 82?

The cases concerning collective dominance under Article 82 after *Italian Flat Glass*, did not shed much light on these questions. The Court repeatedly referred to “links” and although it presented the idea that the significance of the link is that it enables the undertakings to act as an entity or adopt the

¹²⁴ *Gencor*, cited *supra* note 43, para. 277 (emphasis added).

¹²⁵ Stroux, p. 35.

same conduct on the market,¹²⁶ it did not explain whether specific links were required or what they consisted of. The Commission adopted a number of decision on collective dominance but, since undertakings concerned de facto were economically linked in some way, the decisions did not advance the notion of collective dominance in that respect.¹²⁷

4.2.1 The Existence of Agreements, Decisions and Concerted Practises

In *Italian Flat Glass* the CFI mentioned as an example of economic links between undertakings that may put them in a collective dominant position, the existence of agreements or licences. In that case, as well as in most of the subsequent cases, the "links" consisted of agreements which fell within the scope of Article 81. For that reason it was not clear whether "economic links" must always rise from some type of agreement, and it was discussed whether the existence of agreements or concerted practises, i.e. links with an expression of the will of the undertakings to co-operate, were a necessary prerequisite for the finding of a collective dominant position.¹²⁸ Such agreements or collusive parallel behaviours would most often infringe Article 81 and the purpose of applying the concept of collective dominance under Article 82 would thus be limited to situations where an agreement was not caught by Article 81(1) or exempted by Article 81(3).

It is now evident from the Court's judgements in *Gencor* and *CMB* that such links are not a necessary requisite to a finding of collective dominance. In the first case the CFI explained that "economic links" may also consist of oligopolistic interdependence¹²⁹ and in *CMB* the ECJ explicitly stated that the existence of agreements or concerted practises within the meaning of Article 81 is not a prerequisite to collective dominance.¹³⁰

The ECJ also held that in situations where are agreements between two or more undertakings, it is not the existence of such agreements *per se* that constitute the collective dominant position. The implementation of such agreements, however, may result in the undertakings being so linked that they present themselves or act on the market as a collective entity. The existence of a collective dominant position may "flow from the nature and terms of an agreement, from the way it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it".¹³¹

¹²⁶ E.g. *Almelo*, cited *supra* note 85, *CMB*, cited *supra* note 9 and *Irish Sugar*, cited *supra* note 103.

¹²⁷ E.g. *French-West African Shipowner's Committees*, cited *supra* note 81.

¹²⁸ Discussed e.g. by Wish/Sufrin, pp.72-24.

¹²⁹ *Gencor*, cited *supra* note 43, para. 276.

¹³⁰ *CMB*, cited *supra* note 9, para. 45.

¹³¹ *Ibid.*, paras 43-45.

The existence of an agreement, decision or concerted practise in itself is thus neither necessary nor sufficient to create a collective dominant position. A collective dominance may be founded on other economic links and where there exists an agreement, the decisive issue is whether it enables the undertakings to present themselves as a collective entity

On the other hand, the existence of collective dominance can be proved by the existence of agreements, decisions or concerted practices which are implemented so as to enable the undertakings to act or present themselves on the market as a collective entity. This is particularly useful in situations where the agreement is exempted under Article 81(3), but nevertheless infringes Article 82. Article 82 will be applicable if the implementation of the agreement enables the undertakings to act or present themselves as a collective entity which is found to be in a dominant position, and this position is abused.¹³²

4.2.2 Definition of Structural Links and Economic Links

In *Italian Flat Glass* the Court spoke of "economic links", whereas the Commission in *Gencor* examined "structural links". The Court in the latter case did not explain whether it considered that there is a difference between structural and economic links, and if that is the case, what that difference consists of. It did, however, say that such anti-competitive market structures, which the control of concentrations aims at preventing, may "result from the existence of economic links in the strict sense argued by the applicant or from market structures...". In the prior paragraph it held that it did not exclude oligopolistic interdependence from the notion of economic links. This seems to suggest that links can be "merely" economic, resulting from the economic conditions on the market itself. However, they can also be "links in the strict sense", an expression which refers to such structural links which bind the firms to each other in some way, for example by agreements or licences, which was what the applicant had referred to. Whish suggest that structural links accordingly are "sub-species of economic links; [and] that the real question is whether the links are conducive to tacit co-ordination".¹³³ Monti argues that it is a too formalistic position since it is possible to envisage situations where the Commission finds both economic and structural evidence, which leads it to conclude that there is a collective dominance. Therefore a classification of links is not helpful. Besides that, he finds that it is underinclusive because in the case of structural links, these may facilitate express collusion as well, for example in the case of a horizontal agreement exempted under a block exemption.¹³⁴

The analysis made by Whish seems correct. Economic links would merely be the wider expression which corresponds with "factors giving rise to a

¹³² Monti, *The Scope of...*, p. 139.

¹³³ Whish, *Collective Dominance*, p. 600.

¹³⁴ Monti, *The Scope of...*, p. 136.

connection”,¹³⁵ which could result from the market structure. The finding of both structural and economic links does not seem to contradict that the former links are only a special kind of economic links, or factors, that can establish a collective dominance. Nor does the fact that structural links can facilitate express collusion as well. Furthermore, Whish seems to advocate an ”effects-based” definition, which is exactly what Monti does.¹³⁶

4.2.3 Different Categories of Links Considered in the Practise

In their practise on collective dominance different categories of links have been held to indicate an existence of a collective dominant position. Some of them are, as presented above, also capable of falling within the scope of Article 81. Among these we find different kinds of agreements and concerted practices between undertakings, for example agreements or licences affording the undertakings a technological lead, as mentioned by the Court in *Italian Flat Glass*. Another category of links within the scope of Article 81 are links that exist between the undertakings concerned due to the fact that they adhere to a co-operative body. It is not difficult to conclude that the effect and object for these links is the adoption of the same conduct on the market, since the bodies are constituted in order to co-ordinate the behaviour of the undertakings.¹³⁷ This kind of link was cited by the CFI in *Italian Flat Glass* as an example of an economic link, and was relied on by the Commission in the two decisions on shipping conferences, *French-West African Shipowners’ Committees* and *Cewal*, confirmed by the ECJ on appeal in *CMB*. Under the Merger Regulation such co-operative links have been found by the Commission in *Kali & Salz*, where the undertakings co-ordinated their behaviour in an export cartel. Although the Court held that the Commission had not sufficiently proved the existence of this link, it did not reject that an export cartel could constitute a link between undertakings in principle.

It is now clear that links not covered by Article 81 can constitute a collective dominant position. One category of these links are links which will have the effect and object the adoption of the same conduct on the market due to the fact that the same persons in the separate undertakings have influence in the determination of the behaviour on the market.¹³⁸ AG Fennelly held in his opinion in *CMB* that common directorship, voting rights on the directing board and cross-shareholding, provided that the shareholding does not amount to an economic entity, may create this kind of link where the effect is that the undertakings can act as a single entity.¹³⁹ Such relationships existed between the undertakings in *Irish Sugar*. Also unilateral

¹³⁵ *CMB*, cited *supra* note 9, para. 27 of the Opinion of AG Fennelly.

¹³⁶ Monti, *The Scope of...*, p 131.

¹³⁷ Stroux, p. 41.

¹³⁸ *Ibid.*, p. 40.

¹³⁹ See *CMB* cited *supra* note 9, para. 28 of the Opinion of AG Fennelly.

shareholding, as was the case in *Gencor* and mutually held joint ventures, found in *Kali & Salz* as well as in *Gencor*, may constitute this kind of link.¹⁴⁰

Another kind of links not within the ambit of Article 81, are externally imposed links which does not require any behavioural act on the part of the undertakings concerned. They are constituted by outside decided factors but have the effect of enabling the undertakings to act as a single entity. One example is the standard contracts imposed on the undertakings in *Almelo*. The Court did not pronounce on whether the standard contract constituted a link, but AG Fennelly later mentioned conditions of supply drawn up by trade organisations as an example of a link between undertakings.¹⁴¹ Furthermore, national legislation may also enable the undertakings to adopt a common policy. The question whether legislation could constitute a link was relevant in *Spediporto*, *DIP* and *Sodemare*. The Court did not explicitly answer the question, although in the last mentioned case it seemed to recognise in principle that national legislation may constitute a link between undertakings.

The last accepted link is the one emerging from the relation of oligopolistic interdependence. Since the acceptance of the possibility to establish the existence of a collective dominance in this way, is very important and furthermore one of the main issues in this thesis, this link will be dealt with separately bellow.

4.3 An Effects-Based Definition

Economists see no reasons to justify a requirement of links to determine whether a group of undertakings is in a dominant position. "Links should usually be regarded as an additional economic factor in the assessment of the competitive conditions on the market. The abstract term links might cover a wide number of different issues, which importance might range between nil and decisive depending on the specific nature of the link and the context of the case."¹⁴² Economists instead look at the adoption of the same conduct on the market or, in other words, at tacit or explicit collusion.¹⁴³ The concept of collective dominance is closely related to economic theories and it would be advantageous if its definition would correspond to the economists' point of view. This does not mean that the Court's referral to "links" is wrong, it merely means that it is their effect that should be decisive for the finding of a collective dominance, not their existence.

There are several factors that indicate that the Court is tending towards the economists' point of view. The formula laid down in *Almelo*, subsequently

¹⁴⁰ Stroux, p. 40.

¹⁴¹ *CMB*, cited *supra* note 9, para. 28 of the Opinion of AG Fennelly.

¹⁴² Briones-Alonso.

¹⁴³ Whish, *Collective Dominance*, p. 589.

repeated in several cases, that the undertakings must be link in such a way that they adopt the same conduct on the market, seems to suggest that the significance of the link is whether it may result in tacit collusion. Similarly the CFI in *Irish Sugar* held that it was necessary to examine whether the undertakings had the power to adopt a common market policy, by reason of connecting factors.

In *Gencor* the CFI suggested that, where links were relied upon for a finding of collective dominance, they may be "economic" or "structural" but the crucial question is whether the links result in a situation facilitating tacit collusion.¹⁴⁴

The definition of collective dominance given by ECJ in *CMB* seems to adopt an apparently effects-based approach to the matter. It makes clear that the economic effect of links must be scrutinised.¹⁴⁵ Undertakings may possess a collective dominant position, "provided that from an economic point of view they present themselves or act together [...] as a collective entity".¹⁴⁶ The "economic links or factors which give rise to a connection between the undertakings concerned" must be examined and it must be ascertained whether these enable the undertakings to act independently on the market. Furthermore, connecting factors, other than links in law, would depend on an economic assessment. That it is the effect of the links that is decisive, is also demonstrated by the way the ECJ explains that it is not the existence of an agreement that leads to a finding of a collective dominance, but the fact that it is implemented so as to enabling the undertakings to act as a collective entity.¹⁴⁷

An effects-based approach was supported by AG Fennelly in his opinion on *CMB*. He argued that it was unnecessary to specify exhaustively the nature of economic links or other relationships which lead to the existence of a collective dominance. Whether "links" confer collective dominance is "by reference to their *result*, namely the establishment of a situation where a group of undertakings performs as a single market entity".¹⁴⁸ The key issue should be to look at their economic effect, i.e. whether they resulted in a situation where a group of independent firms acting as a single market entity.¹⁴⁹

The more recent case law thus focus on whether links or factors facilitate the adoption of a common market policy or enable the undertakings to act or present themselves as a collective entity, and not on the existence of links *per se*. The definition is effects-based as the undertakings are regarded to be in a collective position when they present or act as a collective entity,

¹⁴⁴ *Gencor*, cited *supra* note 43, paras 276-277. See Whish *Collective Dominance*, p. 600.

¹⁴⁵ Preece, p. 388.

¹⁴⁶ *CMB*, cited *supra* note 9, para. 36.

¹⁴⁷ *Ibid.*, paras 44-45.

¹⁴⁸ *Ibid.*, para. 28 of the Opinion of AG Fennelly (emphasis added).

¹⁴⁹ *Ibid.*

regardless of the means by which they achieve either of those effects. This follows the economists' approach to oligopolistic markets and supports the extension of the concept of collective dominance to oligopolistic interdependence facilitating tacit collusion.

4.4 Oligopolistic Interdependence

That the relationship of oligopolistic interdependence between members of a tight oligopoly may be relied on to establish the existence of collective dominance was affirmed in the *Gencor* case. The case law prior to *Gencor* seemed to require the existence of links arising from some sort of collusive behaviour, that is something above pure oligopolistic interdependence caused by the market structure. Such a requirement would mean that Article 82 was not as an effective tool to control oligopolies, as the Commission wanted it to be. Indeed, the problem with oligopolies is that the oligopolists may enjoy anti-competitive benefits of a particular market structure without actually colluding, in other words through tacit collusion. The Commission had adopted a number of decisions on collective dominance but, since undertakings concerned de facto were economically linked in some way, it did not have to rely on oligopolistic interdependence in order to conclude that the undertakings concerned were in a collective dominant position. The Commission's view on the matter was however shown by its Notice on access agreements in the telecommunication sector, where it held that:

"The Commission does not, however, consider that either economic theory or Community law implies that [links such as agreement for cooperation, or interconnection agreements] are legally necessary for a joint position to exist. It is a sufficient economic link if there is the kind of interdependence which often comes about in oligopolistic situations."¹⁵⁰

In *Gencor* the CFI finally confirmed the Commission's view. The CFI rejected *Gencor*'s claim that the *Italian Flat Glass* case required that there were structural links between the undertakings in order to establish a collective dominance. The CFI pointed out that the Court in *Italian Flat Glass* had referred to links of structural nature only as an example of economic links that could constitute a collective dominance and accordingly structural links were not a prerequisite for such a finding. Furthermore, agreements or licences were only examples of structural links, but they were not the only economic link that might be found. Accordingly, *Italian Flat Glass* did not contradict the possibility to extend the concept of collective dominance to the interdependence between members of a tight oligopoly.

The CFI then went on to explicitly declare that the relationship of interdependence existing between the members of a tight oligopoly, within which the parties are able to anticipate one another's behaviour and thus are

¹⁵⁰ Commission Notice on the application of competition rules to access agreements in the telecommunication sector-framework, relevant markets and principles, OJ 1998 C 265/2, para. 79.

”strongly encouraged to align their conduct in the market”, are not excluded from the notion of economic links.¹⁵¹ Accordingly oligopolistic interdependence facilitating tacit collusion is capable of establishing a collective dominant position. Since, as discussed above, the Court has not made any difference between collective dominance under the Merger Regulation and Article 82, also Article 82 ought to be applicable to oligopolistic interdependence.

In the subsequent case under Article 82, *CMB*, the ECJ did not refer to *Gencor*. However, it held that the existence of an agreement or of other links in law was not indispensable to finding of a collective entity in a dominant position, and that such a finding may be based on other ”connecting factors which would depend on an economic assessment of the structure of the market in question”.¹⁵²

It could be argued that the approach taken by ECJ is narrower than the one taken by CFI. The term ”collective entity” as used in *CMB* could be regarded as implying, for example, that there could be no price competition between its members and therefore be narrower than the CFI’s references to ”interdependence” and ”strong encouragement” in *Gencor*.¹⁵³ However, it can also be submitted that the ECJ’s wording in *CMB* and that of the CFI in *Gencor* could be seen as saying the same thing, but in a different manner. This seems more probable since it is difficult to see how oligopolistic interdependence could be excluded from ”connecting factors which would depend on an economic assessment of the market structure”. Even if one argues that the *Gencor* judgement cannot apply to collective dominance under Article 82, *CMB* thus appears to have affirmed that a collective dominant position might be established on the interdependence between firms in a tight oligopoly also for the purpose of Article 82.¹⁵⁴ Moreover, there seems to be no reason why this should not be the case.

In *Airtours* the Commission seems to have tried to extend the notion of collective dominance even more. Instead of looking at whether a post-merger market structure would facilitate tacit collusion, the Commission argued that it is sufficient that the post merger market conditions will make it rational for the oligopolists to act individually in ways which will substantially reduce competition between them.¹⁵⁵ Hence, the Commission’s concern seems to be to prevent the individual unilateral adoption of each oligopolist to the market conditions, instead of the adoption of the oligopolists to each other’s behaviour, in the sense that they ”align their conduct”.¹⁵⁶ According to this decision a finding of a collective dominance would not have to emerge from the fact that oligopolistic interdependence

¹⁵¹ *Gencor*, cited *supra* note 43, para. 276.

¹⁵² *Ibid.*, para. 45.

¹⁵³ Preece, p. 390.

¹⁵⁴ Monti, *The Scope of...*, p.136.

¹⁵⁵ *Airtours*, cited *supra* note 118, para. 54.

¹⁵⁶ Stroux, p. 39.

will enable the oligopolists to adopt a common policy through tacit collusion. The Commission's new way of arguing is confusing and seems difficult to submit under the concept of collective dominance and theories of oligopoly problems, which are concerned about the possibility for oligopolists, simply by adhering to the market conditions, to act in a uniform way and thereby impede competition. It is the risk of collusion, explicit or tacit, that is the concern, not an individual unilateral behaviour.

It is not clear whether the Commission intended to change its view of the concept of collective dominance this radically or if it invoked collective dominance as an excuse to block a merger it did not approved with.¹⁵⁷ A clarification by the Court will be welcomed.

4.4.1 Factors Proving Collective Dominance Emerging from Oligopolistic Interdependence

In *Gencor* the Commission relied on several market condition to prove the existence of a collective dominant position. These conditions were market concentration, product homogeneity, price inelastic demand, market transparency, moderate growth in demand, similarity of cost structures of the oligopolists, mature production technology, high barriers to entry and lack of negotiating power of purchasers.¹⁵⁸ Since the Court has not made any difference between the case law on collective dominance under Article 82 and that under the Merger Regulation, the presence these market characteristics would be capable of constituting collective dominance under Article 82 as well.¹⁵⁹

The relevant factors in establishing a collective dominance are those which make an oligopolistic market conducive to tacit collusion. Thus, only a tight oligopoly will be capable of holding a collective dominance based solely on the market structure.

4.4.2 Justification of the Acceptance of Oligopolistic Interdependence Links

It has been argued that the establishment of collective dominance on the basis of oligopolistic interdependence would not be possible or fair due to the fact that it is caused by the market structure itself and not by the undertakings concerned. That conclusion has been suggested to follow logically from the fact that the Court under Article 81 has refused to condemn pure parallel behaviour and that it constitutes sufficient evidence of collusion only where it is the only plausible explanation.¹⁶⁰ This

¹⁵⁷ Etter, p. 136.

¹⁵⁸ *Gencor*, cited *supra* note 43, para. 159.

¹⁵⁹ Faull/Nikpay, p. 142.

¹⁶⁰ *Wood Pulp*, cited *supra* note 32, para. 126.

reasoning fails to take into account the fact that Article 81 deals solely with behaviour that must be proved collusive. Article 82, on the other hand, depends not only on a behavioural but also on a structural assessment. It is not the dominant position, single or collective, that is punished, but the abuse of that position. By concluding that oligopolistic interdependence may constitute a collective dominant position nothing has been condemned. It is only when the oligopolists have behaved abusively that they will be punished.

The establishment of a collective dominance based on the possibility for oligopolists to benefit from tacit collusion also seems appropriate from a competition policy perspective. From the economists' point of view no link in the strict sense should be necessary for an undertaking on a concentrated market to be able to abuse its position.¹⁶¹ The relation of interdependence between oligopolists can lead to the same anti-competitive effects as those resulting from the existing of a single dominant firm, and hence there does not seem to be any reason to treat those situations differently.¹⁶²

¹⁶¹ Karlsson/Hägglund, p. 23.

¹⁶² Faull/Nikpay, p. 140.

5 Collective Dominance and Market Power

After having concluded that two or more undertakings together constitute a collective entity *vis-à-vis* their competitors, their trading partners and consumers on a particular market, the next step is to consider whether that entity possesses market power so as to hold a *dominant* position on the market. The first "test" affirms whether the firms can act together as an entity *vis-à-vis* their competitors, customers and consumer and the second whether they have the market power to do so independently of these. As the ECJ held in *CMB*, it is only when the first question is answered in the affirmative that is appropriate to consider the second one.¹⁶³ Theoretically, these are two separate issues. However, where the collective entity is established on oligopolistic interdependence, factors that are relevant for the finding of the collective entity constitute factors that are normally dealt with when determining market power. The collective position emerges from market conditions and it is market conditions that are evaluated when determining market power. The Court have not yet established a collective dominant position on oligopolistic interdependence under Article 82, but since most factors seem to be relevant for both questions an integrated assessment will probably have to be done.

The case law on the assessment of dominance of a single firm is quite extensive and clear. The characteristics necessary to define a collectively held position as dominant, are the same as those which apply to single dominance.¹⁶⁴ In principle, the significance of these characteristics may also be the same.¹⁶⁵ Still, there are some differences and these will be pointed out.

5.1 Dominance in General

The standard definition to the concept of dominance was given in the famous *United Brands* case. It is evident from the case law that that definition of dominance applies to collective dominance as well. The Court has defined dominance, single or collective, as:

"... a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."¹⁶⁶

¹⁶³ *CMB*, cited *supra* note 9, para. 39

¹⁶⁴ Faull/Nikpay, p. 139.

¹⁶⁵ Monti, *The Scope of...*, p. 137.

¹⁶⁶ *United Brands*, cited *supra* note 4, para. 65.

The definition contains two elements, the ability to prevent competition and the ability to behave independently, but it is not explained how they relate to each other. It has been suggested that the essential issue is the power to act independently, and that the other element is merely descriptive, not prescriptive.¹⁶⁷

The Court has further explained that the finding of a dominant position is not precluded by the fact that there exist some competition between the dominant undertaking and its competitors. It has also made clear that the existence of a dominant position may derive from several factors which taken separately are not necessarily determinative.¹⁶⁸ These principles have been referred to also in cases of collective dominance.

5.2 Factors Indicating Collective Dominance

A finding that two or more undertakings hold a collective dominant position must proceed upon a economic assessment of the position on the relevant market of the undertakings concerned.¹⁶⁹ In *Italian Flat Glass* the Court held that it was not sufficient for the Commission to simply recycle the facts upon which it had found an infringement of Article 81 and to deduce collective dominance from the fact that the parties to the unlawful agreement together held a substantial share of the market.¹⁷⁰ The dominant position may derive from several factors and a proper market analysis is thus required, as it is in any Article 82 case.

5.2.1 Market Shares

Among the relevant factors to determine dominance, the actual size of the market share possessed by the undertaking is very significant. The higher the market share, the less additional factors have to be relied on to support a finding of dominance. The Court has held that a very large market share is, save in exceptional circumstances, in itself evidence of dominance.¹⁷¹ It is not possible to say exactly what market share will lead to a presumption of dominance but in the *Akzo* case the ECJ concluded that a market share of 50 per cent is very large, and hence serves as a presumption of dominance.¹⁷² In the cases on collective dominance the undertakings most often hold a very high market share. For example, in *Irish Sugar* the undertakings had a joint market share of over 90 per cent. The CFI concluded from the *Akzo* formula that it in principle could be deduced from the market share that the undertakings were collectively dominant. The applicant's claim that there existed exceptional circumstances which the Commission had not

¹⁶⁷ Whish, *Competition Law*, p. 260.

¹⁶⁸ See e.g. *Hoffman-la Roche*, cited *supra* note 5, para. 39.

¹⁶⁹ *CMB*, cited *supra* note 9, para. 38.

¹⁷⁰ *Italian Flat Glass*, cited *supra* note 49, para. 360.

¹⁷¹ *Ibid.*

¹⁷² Case 62/86 *Akzo Chemie v Commission* [1991] ECR I-3359, para. 60.

considered, was rejected.¹⁷³ The CFI in *CMB* concluded that Cewal had had a market share of between 70 and 90 per cent under the relevant time period. The Court pointed out that the Commission had actually taken also other factors into account and did not explicitly pronounce on exactly what market share would create a presumption of collective dominance.¹⁷⁴ In *Kali & Salz*, however, the ECJ held that a market share of approximately 60 per cent cannot itself point conclusively to the existence of a collective dominance and it therefore analysed other factors present in the case. The rule in *Akzo* must therefore be seen as applicable only in cases of single dominance.¹⁷⁵

The Commission stated in the *Transatlantic Conference Agreement* decision that the very high collective market share of approximately 70 per cent, held by the undertakings, created a presumption that the undertakings were collectively dominant. That presumption was confirmed by several other factors.¹⁷⁶

If a collective position exists by virtue of an oligopolistic market structure and not because of other links, the case law indicates that the significance of high market shares is not the same. A single dominant firm can be presumed to have market power if it has a very large market share. The same presumption cannot be made with respect to oligopolies because other factors are relevant to determine whether the oligopolies can act independently of other competitors, customers and consumers. For example, if two undertakings producing differentiated products in a market with no price transparency, together have 60 per cent of the market, then the market is one where tacit collusion is more difficult and the ability to exercise market power is decreased by the other market conditions, despite the large collective market share.¹⁷⁷

It can firstly be submitted that the *Akzo* formula is not applicable in cases of collective dominance. In order to create a presumption of dominance the market share will have to be higher. Secondly, where the collective dominant position is based on oligopolistic market structure, a large market share does not have the same significance since the finding of a dominance is more dependant of other factors. Accordingly, it seems difficult to introduce a presumption formula at all in such cases.

5.2.2 Other Factors

Other factors may confirm or contradict a presumption of dominance based on a large market share. Such factors usually considered in single

¹⁷³ *Irish Sugar*, cited *supra* note 103, paras 70-71, 92 and 104.

¹⁷⁴ *CMB*, cited *supra* note 9, paras 76-78.

¹⁷⁵ Whish, *Collective Dominance*, p. 596.

¹⁷⁶ Decision 99/624/EC, IV/35.134 - *Transatlantic Conference Agreement*, OJ 1999 L 95/93, para. 533-549.

¹⁷⁷ Monti, *The Scope of...*, p. 137.

dominance cases are *inter alia* the stability of market shares over time, relative market shares, possession of technical resources, barriers to entry, existence of vertical integration, degree of competition and the ability of customers to switch to alternative suppliers given the size of those.¹⁷⁸ Also behavioural factors, such as the allegedly dominant undertaking's conduct, have been examined, although merely as a complement to the analysis of the market structure.¹⁷⁹ The same factors are relevant as regards collective dominance,¹⁸⁰ which is evident from for example *CMB*.

These factors are the same as those making a market conducive to tacit collusion. If a collective entity exists by virtue of such factors, that question and the question of whether it is also dominant will have to depend on an integrated assessment.

5.2.2.1 Potential Competition to the Dominant Firms

The Court has concluded that potential competition on the particular market does not preclude a finding that a single firm holds a dominant position. Potential competition is not usually addressed in Article 82 cases. Market power of other competitors has, however, been examined thoroughly by the Commission and the Court when identifying a dominant position held by the members of an oligopoly under the Merger Regulation.¹⁸¹ However, the existence of other undertakings in an oligopolistic market with similar market shares to those undertakings united by economic links, might deprive the latter of their power to behave independently.¹⁸² In assessing dominance of an oligopoly competitive impact of other competitor is of crucial importance since the oligopolists would not have been able to act anti-competitively if the market was contestable. It has therefore been argued that it would be worthwhile for the Commission to consider the importance of potential competition in all assessments of dominance, collective or single, under Article 82 or the Merger Regulation.¹⁸³

¹⁷⁸ See, Bellamy/Child, pp. 400-404 and Craig/de Búrca, pp. 951-954.

¹⁷⁹ Faull/Nikpay, p. 135.

¹⁸⁰ *Ibid.*, p. 139.

¹⁸¹ Monti, *The Scope of...*, p. 138.

¹⁸² Whish, *Competition Law*, p. 488

¹⁸³ Monti, *The Scope of...*, p. 138.

6 Abuse of a Collective Dominant Position

A finding that an undertaking holds a dominant position is not in itself a ground for criticism but simply means that the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.¹⁸⁴ The same applies to undertakings holding a collective dominant position.

The issue of what behaviour that can constitute an abuse of a collective dominant position under Article 82 is still quite under-developed in the case law,¹⁸⁵ and there is uncertainty as to what types of behaviour can constitute an abuse of a collective dominant position. Under the extensive case law on abuse of a single dominant position, a number of general principles governing the concept of an abuse, have been developed. These will be pointed out prior to the analysis of abuses of collective dominance.

6.1 Abuse in General

In order to be capable of committing an abuse the firm must be in a dominant position. As already mentioned, a dominant firm "has a special responsibility not to allow its conduct to impair undistorted competition on the common market".¹⁸⁶ Thus, practises which may be permissible in a normal competitive market, may be prohibited when carried out by a dominant firm.¹⁸⁷ The actual scope of the special responsibility imposed on a dominant firm must be considered in the light of the specific circumstances of each case, which show that competition has been weakened.¹⁸⁸

Article 82 itself does not provide any definition of what constitutes an abuse. Article 82(2)(a)-(d) give a number of examples of conducts that constitute an abuse of a dominant position. For example, charging of unfair prices, limiting production and discrimination are prohibited. The list is however not exhaustive. In general, conducts which seriously and unjustifiably distort competition in the relevant market will be prohibited.¹⁸⁹ A teleological interpretation of the overall objectives expressed in Article 2

¹⁸⁴ Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission* [1983] ECR 3461, para. 57.

¹⁸⁵ Whish, *Collective Dominance*, p. 605.

¹⁸⁶ *Michelin*, cited *supra* note, para. 57.

¹⁸⁷ Bellamy/Child, p. 409.

¹⁸⁸ Case C-333/94P *Tetra Pak v Commission* [1996] ECR I-5951, para. 24.

¹⁸⁹ Bellamy/Child, p. 408.

and Article 3(f) of the Treaty have resulted in a broad definition. Hence, numerous kinds of conducts have been held to constitute an abuse.¹⁹⁰

The Court has stated that the concept of abuse is an objective concept.¹⁹¹ This means that it is not necessary to prove that the dominant firm intentionally committed an abuse.¹⁹² Moreover, there is no need for a causal link between the dominant position and the abuse. This followed already from *Continental Can* where the Court held that "the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86, regardless of the means and procedure by which it is achieved".¹⁹³ The effect of this is that the economic power enjoyed by the dominant firm does not have to be used, so long as the conduct of the dominant undertaking has anti-competitive effects.¹⁹⁴

6.1.1 Exploitative and Anti-Competitive Abuses

Generally, abusive conducts are described as either exploitative or anti-competitive. The distinction is however not watertight. Exploitative abuses sometimes follow anti-competitive ones and other abuses might be at the same time both exploitative and anti-competitive.¹⁹⁵

Exploitative abuses concerns conducts where the dominant firm exploits the advantages provided by its market strength in order to harm suppliers, customers and consumers. Thus, these situations involve the use of the market power to commit an abuse. Examples of such abuses are excessive pricing and other unfair conditions, discrimination and inertia.

Anti-competitive abuses have been defined as conducts of an dominant firm, which have the effect of hindering the maintenance or the growth of the degree of competition still existing in a market. The dominant position is strengthened at the expense of competitors. In many cases the anti-competitive behaviour has been aimed at new entrants to a market. This kind of abuse does not require that the dominance is used to commit the abuse, as it constitutes an abuse regardless of the means by which the it is achieved. Anti-competitive abuses may consist of different exclusionary practises such as refusal to supply, predatory pricing, loyalty rebates and other kinds of price discrimination.¹⁹⁶

¹⁹⁰ Whish, *Competition Law*, p. 270.

¹⁹¹ *Hoffman-La Roche*; cited *supra* note, para. 91.

¹⁹² Faull/Nikpay, p. 147.

¹⁹³ *Continental Can*, cited *supra* note 1, para. 27.

¹⁹⁴ Bellamy/Child, p. 409.

¹⁹⁵ Faull/Nikpay, p.146.

¹⁹⁶ See e.g. Whish, *Competition Law*, pp. 271-280 and Bellamy/Child, pp. 409-429.

6.2 Tacit Collusion

The interdependence between the members of a tight oligopoly can, as a result of *Gencor* and *CMB*, be enough to establish collective dominance. Hence, an anti-competitive act by the oligopolists in a collective dominant position established in that way, is an abuse under Article 82. The economic theory, around which the concept of collective has developed, suggests that undertakings, given certain market conditions, may be able to derive benefits from tacit collusion. Under the Merger Regulation the very reason why the Commission might prohibit a concentration that would create or strengthen a collective dominant position, is that it would facilitate for undertakings to benefit from this tacit collusion. It could be argued that it follows from the fact that the risk of tacit collusion can be relied on to prohibit a concentration under the Merger Regulation, that tacit collusion, when actually practised, should be condemned as an abuse of collective dominant position under Article 82.¹⁹⁷

If that was the case the Commission could condemn for example non-collusive parallel of pricing, refusals to supply or discriminatory treatment of customers, when the parallelism has anti-competitive effects. If such tacit collusion could constitute an abuse of a collective dominant position, the Commission would not have to prove the existence of collusion, a requisite inevitable for a finding of a concerted practise under Article 81.

In *Suiker Unie* the Court held that undertakings have the right to adapt themselves intelligently to the conduct of their competitors.¹⁹⁸ The *Wood Pulp* judgement confirmed that if anti-competitive behaviour can be explained to be the result of economically rational reactions of oligopolists to the market, then Article 81 does not apply.¹⁹⁹ It would be highly illogical for the Court to say that the evidence that offers a defence under Article 81 could constitute evidence of abuse under Article 82.²⁰⁰ Moreover, if rational behaviour were condemned as abusive, it would mean that the undertakings would have to behave irrationally in order to comply with Article 82.²⁰¹ This would indeed be an inappropriate interpretation of the Article and would clearly go against the legitimate expectations of the undertakings. Accordingly, tacit collusion cannot constitute an abuse.

The fact that potential, future tacit collusion can be condemned under the Merger Regulation does not mean that the same behaviour, when actually carried out, must be condemned as an abuse under Article 82. On the contrary, the difference in treatment is perfectly logical. It is precisely because of the difficulty that the competition authorities have in addressing

¹⁹⁷ Whish, *Collective Dominance*, p. 605.

¹⁹⁸ *Suiker Unie*, cited *supra* note 29, para. 174.

¹⁹⁹ *Wood Pulp*, cited *supra* note 32, para. 126.

²⁰⁰ Monti, *The Scope of...*, p. 145.

²⁰¹ Whish, *Collective Dominance*, p. 606.

tacit collusion when it occurs, that they through merger control try to prevent a market structure that will facilitate tacit collusion, from arising in the first place.²⁰²

The concept of collective dominance appears to have been developed in order to catch oligopolistic behaviour that cannot be condemned under Article 81. The fact that tacit collusion cannot constitute an abuse of a collective dominant position in itself, might seem as rendering the application of collective dominance to oligopolies vastly less useful. Collusive anti-competitive behaviour is indeed already prohibited under Article 81. However, as will be shown below, there are several situations in which the Commission can apply the concept of abuse of collective dominance. First, it can be used as a supplement to Article 81 in situations where an agreement or concerted practice is exempted by means of Article 81(3). Secondly, there are various unilateral behaviours on the part of one of the firms within a collective dominant position that can constitute an abuse.

6.2.1 Remedial concerns

The Commission should only address oligopolies where it can prescribe a remedy that will put an end to the anti-competitive effects of an alleged abuse. There would be no effective remedy for the Commission to impose, after having decided that the oligopolists have abused their collective dominant position by intelligent adaptation to their competitors' behaviour. A fine would hardly prevent the undertakings from reacting to each other's behaviour. Even if it were possible for the Commission to order the undertakings not to respond to each other's behaviour, there would not exist any adequate remedy to enforce the order.²⁰³

An alternative for the Commission would be to make a structural order and divest the undertakings and thereby remove the oligopoly. The Commission currently lacks the power to order divestitures for breaches of Article 82. However, according to Article 7 in its proposal for the amending of Regulation No 17/62,²⁰⁴ the Commission would in the future be allowed to impose structural remedies, including divestiture.²⁰⁵ Even if the Commission is given the power to dissolve undertakings, such aggressive intervention in the market structure seems risky. It could involve considerable restructuring of industry through divestitures, and considerable intervention into the business practices of the undertakings. It would

²⁰² Whish, *Collective Dominance*, pp. 606-607.

²⁰³ Monti, *The Scope of...*, 2001, p. 145.

²⁰⁴ Council Regulation No 17/62 First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 13/204.

²⁰⁵ Commission Proposal COM (2000) 582 for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations Nos (EEC) 1017/1968, 2988/1974, 4056/1986 and 3975/1987, OJ 2000 C 365 E/28.

furthermore be very difficult for the Commission to be certain that the benefits of the divestiture outweigh the risks.²⁰⁶

6.3 Situations where Undertakings are Immune from Article 81

The abuse of collective dominance can be used as a supplement to Article 81 in situations where that Article does not apply. The undertaking's anti-competitive behaviour may be the result of an agreement which has been exempted by Article 81(3) or by a Block Exemption. The Commission may take steps to withdraw the exemption but it has no power to fine the undertakings for infringement of Article 81. Instead, it may turn to Article 82 and penalise the undertakings for abusing their collective dominant position, provided, of course, all elements of Article 82 are satisfied.

This was the case in *CMB*. Certain agreements between members of a liner conference are exempted from the prohibition in Article 81 by Article 3 in Regulation 4056/86 and Cewal benefited from such a block exemption. According to Article 8(2) of that Regulation the Commission may withdraw the benefit of the block exemption if the behaviour of conferences nevertheless has effects which are incompatible with Article 82 and may take all appropriate measures in order to bring the infringement to an end. The members of Cewal used their legitimate links within the framework of the liner conference to participate jointly in activities which went far beyond its legitimate goals.²⁰⁷ Their attempts to exclude competitors from their shipping routes by price cuts and loyalty contracts were held to be an abuse and the members of the liner conference were fined for collectively abusing their dominant position.²⁰⁸

Thus, in a situation where exempted agreements are implemented in a way which enables the undertakings to present themselves on the market as a collective entity and they are found also to hold a dominant position, Article 82 can be used to capture anti-competitive behaviour. This confers upon the Commission powers, not only to withdraw an exemption, but also to fine the undertakings.

6.4 Individual Abuse of a Collective Dominant Position

In the cases prior to *Irish Sugar*, the abusive conducts were carried out by all the undertakings which together held a collective dominant position. Consequently, it was discussed in the doctrine whether that had to be the

²⁰⁶ Monti, *The Scope of...*, pp. 145-146.

²⁰⁷ Goyder, p. 373.

²⁰⁸ *CMB*, cited *supra* note, paras 43-45.

case.²⁰⁹ In *Irish Sugar* the CFI made clear that it is not necessary that all the undertakings forming the collective entity must take part in the abusive behaviour. The Court stated that:

”Whilst the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, undertakings occupying a joint dominant position may engage in joint or individual abusive conduct. It is enough for that abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market.”²¹⁰

According to the CFI collective dominance is thus applicable in a situation where an abusive act is carried out by one of the undertakings that hold the collective dominant position. Hence, the fact that undertakings have a collective dominant position because they are able to act as a collective entity, does not mean that they have to act as a entity, but only that they are able to do so. The abuse therefore need not be a result of a parallel behaviour within the scope of Article 81. It is sufficient that the abusive act is designed to protect the collective dominant position, i.e. that it constitutes an anti-competitive abuse. As will be discussed further bellow a single non-dominant firm will not be able to commit an exploitative abuse on its own. The CFI’s conclusion clearly extends the jurisdiction of the Commission under Article 82. It is now empowered to apply the concept of abuse of a collective dominance to unilateral conducts by one firm. That firm, although not dominant itself, will be liable under Article 82 for abusing the collective dominant position and the Commission does not have to fine the other undertakings in the collective dominant position.

The approach taken by the CFI is consistent with well-established principles drawn up by the Court. It is coherent with the fact that a causal link between the dominance and the abuse is not required as long as the abusive behaviour strengthens a dominant position and thus has anti-competitive effects. The result is an effects-based application of Article 82, since a conduct with anti-competitive effects consolidating the collective dominance constitute an abuse, notwithstanding the fact that it is not committed by a individually dominant undertaking. This approach is also consistent with the special responsibility imposed on dominant firms not to impede competition.²¹¹

The fact that an abuse can be committed by only one of the firms within a collective dominant position, means that the special responsibility not to distort competition, is not a responsibility that the firms have collectively. It will be imposed on them individually. Hence, it will apply not only to single dominant undertakings, but also to undertakings which are ”merely” dominant together with others. The responsibility is thus extended to

²⁰⁹ See e.g. Whish/Sufrin, p. 75 and Treacy/Feaster, p. 471.

²¹⁰ *Irish Sugar*, cited *supra* note 103, para. 66.

²¹¹ Monti, *The Scope of...*, p. 144.

encompass more undertakings. This conclusion will be useful for the Commission in a variety of situations.

6.5 Exploitative Abuse of a Collective Dominant Position

Exploitative abuses consist of behaviours that aims at impeding competition at the expense of consumers, in which dominant firms uses its market power to obtain advantages which it could not obtain in a normal competitive market. If a firm is only dominant together with others the freedom it will have for individually indulging in exploitative behaviour is limited.²¹² One undertaking alone will not have the necessary market power commit such an abuse. Still, it would be enough if some of them were engaged in the abusive conduct, provided that they have the necessary market power. Hence, the undertakings may engage in uniform behaviour and be condemned under Article 82 not for the parallelism *per se*, but for the fact that the behaviour constitutes an exploitative abuse. The undertakings holding a collective dominant position may thus be punished for committing typical exploitative abuses such as excessive pricing, discriminatory treatment and unjustified refusals to supply. The argument about interdependence is moreover less convincing as an explanation of parallel conduct as regards behaviours like the two latter.²¹³

6.5.1 Excessive Pricing

The oligopolists within a tight oligopoly have little incentive to compete on price. Excessive or supra-competitive pricing is therefore a great risk and a common result of oligopolistic interdependence. Article 82(2)(a) mentions "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" as an example of an abuse. In *United Brands* the ECJ stated that prices with "no reasonable relation to the economic value of the product", are excessive prices, and that Article 82 could be infringed if the consumers suffered as the result of such pricing policies, even if no effect on competition could be shown.²¹⁴ There are considerable difficulties in determining what constitute an excessive price and a detailed cost analysis will have to be done in every case. It will always be difficult for the Commission to establish the necessary evidence to prove that the price is excessive in the particular case. It will have to produce well-researched economic evidence showing that the margin between prices charged and cost involved is not within the normal commercial range of profit and cannot be regarded as reasonable in comparison with prices charged for identical products.²¹⁵ Cases on excessive pricing have thus been few, not

²¹² Whish/Sufrin, p. 75.

²¹³ Ibid.

²¹⁴ *United Brands*, cited *supra* note 43, para. 250 et seq.

²¹⁵ Goyder, pp. 340-341.

least because the Commission would not want to establish itself as a *de facto* price regulator.²¹⁶

As concluded above, tacit collusion cannot itself constitute an abuse since it comes about as the result of the undertakings behaving rationally according to the conditions of the particular market. Where the oligopolists charge parallel supra-competitive prices and the Commission cannot prove that they are the result of collusion, the oligopolists cannot be condemned for the fact that they act uniformly.

However, collectively dominant undertakings could be held to have abused their position by charging excessively high prices. The abuse then lies in the price level, not in the parallelism. Single dominant undertakings obviously infringes Article 82(2)(a) if they charge unfairly high prices and it would be difficult to justify why a collective dominant firm should enjoy immunity from this offence.²¹⁷ As the abuse consists of the charging of an excessively high price, the Commission would not have to prove any collusion. Still, such cases will, for reasons stated above, probably be rare.

6.6 Anti-Competitive Abuse of a Collective Dominant Position

Article 82 is applied much more often to anti-competitive abuses.²¹⁸ Anti-competitive abuses are those which aim at further impairing the already weakened competitive market structure. Examples of such behaviours are exclusive purchasing, loyalty rebates, tie-ins and predatory pricing. The purpose of these abuses is to obstruct competition on the part of actual or potential competitors. When the collectively dominant undertakings engage in such conducts they may thus abuse their position. Whereas exploitative abuses rarely can be committed by only one firm within the collective dominant position, an anti-competitive abuse is a different matter because it does not depend on the use of market power. Hence, such an abuse can be committed individually by only one undertaking within the collective dominance.²¹⁹ For instance, Article 82 can apply to a situation where only one of the firms, in order to hinder a new competitor from entering the market, engages in predatory pricing or other exclusionary practises.²²⁰ In *Irish Sugar* a product swap imposed by one of the undertakings, SDL, was regarded as an abuse of the collective dominant position, because its effect was to consolidate the collective dominance by excluding potential competitors.²²¹

²¹⁶ Whish, *Collective Dominance*, 606.

²¹⁷ Whish, *Collective Dominance*, p. 606.

²¹⁸ Whish/Sufrin, p. 75.

²¹⁹ Whish, *Competition Law*, p. 490.

²²⁰ Monti, *The Scope of...*, p. 143.

²²¹ *Irish Sugar*, cited *supra* note 103, para 231.

However, a conduct that would be an anti-competitive abuse of a single dominant position would not always be an abuse of a collective dominant position. For example, whereas the granting of loyalty rebates would normally constitute an abuse when carried out by an individually dominant firm, such a behaviour on the part of one of the undertakings in a collective dominant position could be pro-competitive insofar as it is aimed at the other oligopolists and means that there is price competition between them.

²²² Identical or similar loyalty rebates given by several or the majority of the undertakings might well be an abuse, just as a loyalty rebate granted by one undertaking with the purpose of excluding a new competitor from the market. Whether or not a specific behaviour constitutes an anti-competitive abuse, thus depends on the facts of the particular situation.²²³

Where the alleged anti-competitive abuse is directed towards a new entrant the dominant firms might defend itself by arguing that they have the right to meet competition from potential competitors. Dominant firms are indeed allowed to protect their commercial interests if they are attacked and take reasonable steps to protect these interests. However, such behaviour is not allowed if the real purpose is to strengthen the dominant position and thereby abuse it.²²⁴

A new entrant on a market conducive to tacit collusion will make it more difficult for the incumbent oligopolists to benefit from that phenomenon. This serves the Commission a good reason to condemn anti-competitive abuses by a collective dominant firm, and the Commission will most likely examine thoroughly allegations of such behaviour, where actual or potential competitors which might be able to subvert tacit collusion on the market are the complainants.²²⁵

6.6.1 Signalling

One explanation to how oligopolists can set anti-competitive prices without actually colluding is offered by economic theories of price leadership. The price leader increases its prices and this acts as a signal to the competitors to follow suit.²²⁶

Monti argues that certain signalling practises can be held to constitute an anti-competitive abuse of a collective dominant position.²²⁷ It is not the price raise itself that is condemned, but the fact that it is announced.

²²²This was the case *Hoffman-La Roche*, cited *supra* note 5.

²²³ Whish/Sufrin, p. 75.

²²⁴ Case T-65/89 *BTB Industries and British Gypsum v Commission* [1993] ECR II-389, para. 69.

²²⁵ Whish, *Collective Dominance*, pp. 607-608.

²²⁶ Stroux, p. 6 and Whish *Competition Law*, p. 470. Whish argues that the theories provide an unsatisfactory explanation. *Ibid.*

²²⁷ Here a brief summary of Monti's reasoning will be given. For a thorough analysis, see Monti, *The Scope of...*, pp. 146-152.

According to Monti this conclusion can be drawn from the finding in *Irish Sugar* that a behaviour which relates to the exploitation of a collective dominant position, carried out by one of the undertakings concerned, constitutes an abuse. A price leader may infringe Article 82 if he announces a price increase to the other oligopolists well in advance. The time is important in order to allow the others to choose to follow, or allow the price leader to change his prices if they choose not to. The price leader can be regarded as trying to exploit the collective dominant position as the price announcement will facilitate tacit price co-ordination which strengthens the collective dominance. He would be liable for initiating the price increases and could be condemned under Article 82 for "further weakening of the structure of the competition". Since it is not prohibited to intelligently adapt oneself to others' behaviour, the undertakings which follow the price leader are not acting contrary to Article 82.²²⁸

Monti considers that there are several practises unilaterally performed by an oligopolist, that can facilitate price co-ordination, *inter alia* most-favoured-nation (MFN) clauses and meeting competition clauses. In a MFN clause a seller promises a customer that, for example, a discount offered to other customers, will be granted retroactively to the first customers as well. In a meeting competition clause a seller promises a customer that if he can show that he has been offered a like product at a lower price by another seller, the first seller will meet that price. Both clauses can according to Monti act as signal devices. The MFN clause can signal to others that they can raise their prices to the level of the seller with the MFN clause, who is indicating that he will not fight a price war if the other follow suit. The meeting competition clause puts its user in a position of price leadership and the competitor will be reluctant to set low prices since the clause guarantees that a price war will break out.²²⁹

The signalling practises may thus facilitate non-collusive parallel pricing and Monti concludes that they can constitute an abuse since it may serve to exploit and strengthen the collective dominant position. The effect of the practises falls within the generally accepted definition of abuse laid down in *Hoffman-La Roche*, which requires "the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".²³⁰ In order for these practises to constitute an abuse, the price announcement or the clauses must be made known to the other competitors. It is only where an oligopoly is sufficiently tight to be collective dominant that Article 82 will apply since if the members are too many or the barriers to entry are low, the signalling practises will not be feasible. Further, if the undertakings are able to establish either an objective justification or positive

²²⁸ Monti, *The Scope of...*, p. 146. Quotation from *Hoffman-La Roche*, cited *supra* note 5, para. 123.

²²⁹ Monti, *The Scope of...*, pp 147-149.

²³⁰ *Hoffman-La Roche*, cited *supra* note 5, para. 91.

welfare effects for the signalling practises, a finding of an abuse is precluded.²³¹

This approach has in Monti's opinion several advantages. It is consistent with the rules established under Article 81, as the intelligent reaction to the price leadership is not unlawful. This method also satisfies the criteria of remediability. The Commission can prohibit public, advance price announcements and order firms to remove MFN and meeting competition clauses. From the perspective of the firms, this approach would grant them sufficient economic freedom, since only measures which facilitate anti-competitive behaviour that cannot be objectively justified will be condemned as an abuse.²³² If the Commission could prohibit these kind of behaviours it would probably render it more difficult for the members of a tight oligopoly to reach an anti-competitive level of prices without colluding, and the reasoning is therefore attractive.

6.7 Conclusion on Abuses by Oligopolists

It is evident that the concept of abuse of a collective dominant position under Article 82 cannot catch all oligopolistic behaviours causing anti-competitive effects. In order to condemn oligopolistic parallel behaviour the Commission will have to rely on Article 81 and accordingly only collusive parallel behaviour can be addressed. Tacit parallel behaviour which comes about in tightly oligopolistic markets due rational and intelligent adaptation to the specific market conditions, cannot constitute an abuse. However, the concept may apply to some non-collusive behaviour on the part of the oligopolists. Article 82 may be relied on to punish behaviours where oligopolists together engage in exploitative abuses or together or individually commit anti-competitive abuses.

²³¹ Monti, *The Scope of...*, pp. 149-151.

²³² Monti, *The Scope of...*, p. 147.

7 Concluding Analysis

It has been clear since the *Italian Flat Glass* judgement that the concept of collective dominance is applicable under Article 82. Undertakings legally and economically independent from one another may therefore together hold a collective dominant position. It however remained unclear what facts may constitute a collective dominant position, that is what the concept actually consists of. For a long time it was argued that *Italian Flat Glass* as well as the subsequent case law for the establishment of a collective dominant position, required that the undertakings were linked to one another by some kind of structural, contractual or behavioural links. The definition laid down in *Almelo* introduced the idea that the existence of links was not the decisive criterion *per se*. What should be determined was instead whether the links enabled the undertakings to adopt the same conduct on the market. That case also provided a first indication that there did not have to exist links which involve any behaviour of the undertakings as to willingly co-operate or adopt a common policy on the market, an idea that was also supported by the *Sodemare* case. These cases seemed to prove that consensual links were not a prerequisite for a finding of collective dominance and that what should be concluded was whether the links facilitated the adoption of a common conduct, or in other words tacit collusion. However, the Court still referred to links without explaining what they could consist of. Therefore it was doubted whether it would suffice that a group of undertakings within an oligopoly could hold a dominant position solely by virtue of the interdependence existing between them.

In *Gencor* the CFI expressly affirmed that a collective dominance under the Merger Regulation may be established by the existence of interdependence between oligopolists. In the subsequent case under Article 82, *Irish Sugar*, the CFI instead of links referred to "factors which give rise to a connection". In *CMB* the ECJ explained that such factors, or economic links, which cause undertakings to present themselves or act as a collective entity, would depend on an economic assessment of the market structure. It expressly stated that agreements or other links in law are not a prerequisite for the establishment of a collective dominance, but it did not pronounce on exactly what other economic links or factors based on an assessment of the market structure, could consist of. Most importantly, it did not repeat what CFI had stated in *Gencor*, which was unfortunate. However, the practise of the Courts shows that the decisions under respectively legal instrument are relevant for each other and the dicta in *CMB* is moreover coherent with conclusion reached in *Gencor*.

It is therefore suggested that the existence of oligopolistic interdependence between firms now suffice for the Commission or the Court to conclude that they hold a collective dominant position for the purpose of Article 82. Market conditions such as high barriers to entry, homogeneity of products

and price transparency, which are conducive to tacit collusion, may thus create sufficient connections between the oligopolists for there to be a collective dominant position. Whether the rather confusing definition of collective dominance set out by the Commission in its *Airtours* decision will extend the applicability of the concept even more, remains to be seen.

The collective dominance can thus depend solely on the market structure. It is only where the market conditions are such as to create a tight oligopoly, where the capacity to collude tacitly is evident, that a collective dominance should be possible to prove this way. Where the oligopoly is not that tight, additional connecting links or factors would have to exist for there to be a collective dominant position. But it is within tight oligopolies that competitive problems arise. The extended definition of collective dominance may therefore provide a new powerful weapon to control oligopolies.

In order to determine whether a collective entity is able to act to an appreciable extent independently of its competitors, customers and consumers its market power must be assessed. The assessment will in principle depend on the same factors as those indicating single dominance. It is however submitted that the size of market shares will not be as significant. The presumption of dominance, which can be made when a single undertaking's market share exceeds 50 per cent, will not apply. For a collective dominance to be deduced from the size of the market share, the market share will have to be significantly higher. Where the collective position exists by virtue of oligopolistic interdependence the existence of a high market share might be even less decisive. This is due to the fact that the ability of oligopolists to act independently of competitors, customers and consumers, is to a great extent dependent on the factors which facilitate tacit collusion.

The main purpose of the development of the concept of collective dominance was to find a way to control oligopolistic non-collusive parallel behaviour in the market. It is however clear that tacit collusion cannot itself constitute an abuse. A parallel behaviour not illegal under Article 81 cannot be illegal under Article 82. Hence, in order to apply Article 82 to parallel behaviour, it still have to be proved that the behaviour is collusive. Where that is the case Article 81 will probably apply. Article 82 can however be useful in situations where the abusive behaviour is the result of parallel practices, or agreements, which are exempted by Article 81(3) or by a Block Exemption. This means that the Commission is able not only to withdraw the exemption, but also to penalise the undertakings by means of Article 82.

If an abuse of a collective dominant position could only consist of collusive parallel behaviour, the purpose of applying the concept would be very limited. Another alternative could be that an abuse of a collective dominant position would have to be collective. No collusion would have to be proved, that is the illegality would not lie in the parallelism *per se*, but all the undertakings within the collective dominant position would nevertheless

have to be involved in the abusive behaviour. It is evident from *Irish Sugar* that that is not required. Unilateral behaviour on the part of only one of the undertakings can constitute an abuse. This extends the applicability of Article 82. Not only single dominant firms, but also a firm merely dominant together with others, i.e. non-dominant by its own, has the special responsibility imposed on dominant firms not to distort competition.

Collective dominant undertakings may be punished for committing typical abuses, exploitative or anti-competitive. However, an exploitative abuse can only be committed where, all or at least several, of the undertakings concerned, are engaged in the abusive conduct. A single undertaking, not dominant by its own, will not have sufficient market power to carry out such an abuse. Since anti-competitive abuses do not require the exploitation of market power these types of abuses it may be committed by all, some or one of the undertakings within the collective dominant position. It suffices that the conduct aims at strengthening the dominant position. However, it is important to note that a conduct which would most likely constitute an abuse when carried out by a single dominant firm, or uniformly by collective dominant firms, not necessarily is an abuse when completed by a single member of a group of collectively dominant firms. If the conduct is directed towards the other undertakings within the collective dominant position, it could rather have pro-competitive effects since it would mean that there is competition between the undertakings concerned. For there to be an abuse the conduct must be designed to hinder potential competition, a question which will depend on the facts of the particular case.

7.1 A Broader Effects-Based Application

The conclusions reached above show that the concept of abuse of collective dominance today clearly is broader than in the beginning of its development period. There need not exist any links in the sense of agreements or other additional factors involving a will on part of the undertakings concerned to act as a entity. Oligopolists may hold a collective dominant position in the market solely because of the interdependence existing between them. They are thus brought within the scope of Article 82, which they would not be if additional links were a requirement for a finding of collective dominance.

The fact that each firm within a collective dominant position is capable of abusing the collective dominant position by its own, further extends the applicability of Article 82 regarding all kinds of collective dominance. The special responsibility is imposed on the collective dominant firms individually, and the Commission is not limited to apply the concept of collective dominance only to situations where all the undertakings concerned are engaged in the abusive behaviour.

The definition of collective dominance as it stands today also result in a effects-based application of the concept. Although additional connecting

links or factors will have to be present in order to establish a collective dominant position where the undertakings are not members of a tight oligopoly, it is not their existence of *per se* that is decisive. Collective dominance thus does not depend on a formalistic definition of different links or other connecting factors. What matters is whether the undertakings are able to act or present themselves as an collective entity independently of competitors, customers and consumers, regardless of the means by which this is achieved. This corresponds with the economists' point of view, which merely concerns the question whether a group of undertakings adopt the same conduct on the market and what effect that has on the market.

There is no reason why the definition of collective dominance should depend on a formalistic definition of links. Article 82 is designed to address abusive behaviours by dominant firms because these behaviours may be harmful to effective competition. If an undertaking *de facto* is capable of distorting competition contrary to Article 82, it should not matter whether it is capable thereof because of the presence of certain links or not. Furthermore, just as single dominant firms can distort competition by acting in anti-competitively, so can collective dominant firms. By interpreting Article 82 in an effects-based way, single and collective dominant firms are treated coherently and the aim of Article 82 to defend and develop effective competition, can be protected.

7.2 Is Article 82 an Effective Tool to Control Oligopolies?

The main problem with oligopolists is that they may cause anti-competitive effects in the market without colluding. Article 82 is still not capable of prohibiting tacit collusion, since it cannot constitute an abuse. Nor should that be possible. From a legal perspective a parallel behaviour must emerge from some kind of conspiracy to be illegal. Undertakings must be allowed to act intelligently and rationally. A non-conspiratorial parallel behaviour resulting from intelligent and rational adjustment to the market condition should never amount to an illegal conduct. A behavioural approach to tacit collusion is therefore not adequate. The behaviour depends on the structure and must be addressed by structural measures. It is difficult to say what kind of measures this could or should be. The Merger Regulation only provides the possibility to prevent oligopolistic markets conducive to tacit collusion from arising, which of course is advantageous and should be frequently used, but cannot condemn tacit collusion when it actually occurs.

An alternative is to give the Commission the possibility to order divestitures to restructure the particular market. This would, however, not automatically solve the problems of tacit collusion. For the Commission to order any remedy according to a regulation implementing Articles 81 and 82, breaches of the Articles must have been committed. Tacit collusion does not constitute an abuse, or a breach of Article 81 for that matter. Whether a

structural order such as a divestiture is recommendable, when an abuse has occurred or based on other provisions of EC law, is doubtful. Market structures are complex and vary greatly from one another and it might be difficult to determine exactly what factors contribute to the competitive failure. A divestiture would be a great intervention in business life and there would be considerable risks involved in determining whether the divestiture will actually have pro-competitive effects. The market structure may be the result of efficiency. Although the result is prices set at an anti-competitive level a restructuring of the market does not necessarily result in lower prices. Lack of efficiency could result in lost profits for the undertakings, which then would raise their prices.

However, there is nothing wrong in concluding that a number of oligopolists together have a collective dominant position by virtue of their possibility to act jointly due to certain market conditions. By concluding that oligopolists hold a collective dominant position nothing has been condemned. It is first when they behave in a way which constitutes an abuse that they will be punished.

Since unilateral behaviour on the part of only one of the oligopolists may constitute an abuse, the oligopolist's individual freedom to act is restricted by the requirement not to distort competition. If the oligopolist were not in a collective dominant position, certain conducts would amount to "normal" competitive behaviours. Where the abuse has as its effects to hinder potential competitors from entering the market, or obstruct potential or actual competition in other ways, the Commission may act by means of Article 82 and order the abusive conduct to cease. It might thus be more difficult for the oligopolists to prevent new firms from entering the market. Obstacles to new entrants can be "removed", which will have positive effects in the market since new competitors render it more difficult for the incumbent oligopolists to align their behaviour and benefit from tacit collusion. Similarly, conducts which aims at eliminating actual competition can be prohibited. For example, if conducts acting as signal devices may constitute an abuse, it will be more difficult for the oligopolists to price uniformly and thereby reach anti-competitive prices.

The oligopolists may defend themselves by arguing that they are merely acting rational, by protecting its commercial interest or by adjusting their actions to the market conditions. Where the oligopolists actually only adopt themselves intelligently to the market they should not be punished. However, if the real purpose is to strengthen the dominant position the behaviour should not be justified. Some behaviours such as discriminatory treatments and unjustified refusals to supply are moreover not likely to come about naturally due to market conditions.

The new concept of collective dominance under Article 82 might be applicable to oligopolies in a way which would not be possible if a tight oligopoly could not hold a collective dominant position by virtue of an

existing interdependence. Moreover, the Commission does not have to prove any collusion at all, at any level, in order to punish some oligopolistic behaviours, which facilitate the application of Article 82 since collusion often is difficult to prove. The powers of the Commission is thus vastly extended in applying Article 82 to oligopolies. There are many behaviours on the part of oligopolists that can constitute an abuse which may act as rendering it more difficult for the oligopolists to act in a parallel way and to charge anti-competitive prices. In that respect Article 82 may constitute an effective and powerful tool to control anti-competitive oligopolistic markets.

Still, anti-competitive effects arising in a tightly oligopolistic market are often the result of tacit collusion caused by the market structure. Although, Article 82 may well be an effective tool to control behaviours constituting an abuse and work to make it more difficult for oligopolists to benefit from tacit collusion, it does not seem to be the ultimate tool to control oligopolies. Article 82 is directed towards abusive behaviours and tacit collusion is not abusive. The problems arise from and lie with the market structure. Most effective would therefore be if there existed an additional alternative for the Commission to address oligopolistic markets by some kind of structural measure.

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