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Legal Test for Finding of a
Collective Dominant Position
under Article 102 TFEU

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Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Purpose	6
1.2 Method	6
1.3 Disposition	7
1.4 Delimitation	7
2 BASIS FOR COLLECTIVE DOMINANCE	8
2.1 Scope of the provisions	8
2.1.1 <i>One or more undertakings</i>	8
2.1.2 <i>Conditions</i>	9
2.1.3 <i>Explicit collusion</i>	12
2.2 Implicit collusion	14
3 PARALLEL DEVELOPMENT	18
3.1 Background	18
3.2 Single entity	19
3.3 Ex ante development	20
3.3.1 <i>Structural links</i>	21
3.3.2 <i>Behavioural links</i>	22
3.3.3 <i>Pre-existing collective dominance</i>	24
3.4 Ex post development	26
3.4.1 <i>Legal links</i>	26
3.4.2 <i>Tendency towards behavioural links</i>	27
3.4.3 <i>Sufficient links</i>	31
4 PROCEDURAL RISKS	33
4.1 Probability of error	33
4.2 Remedies	34
4.2.1 <i>Fines</i>	34
4.2.2 <i>Termination of the infringement</i>	35

5 ANALYSIS	38
BIBLIOGRAPHY	43
TABLE OF CASES	46
LEGISLATION	49
GUIDELINES AND NOTICES	50
OTHER SOURCES	51

Summary

The purpose of the thesis is to investigate whether it is appropriate to use Article 102 TFEU, through the application of the abuse of collective dominance, against implicit collusion. In order to fulfill the purpose, the thesis aims to examine what is the definition of collective dominance, how the collective dominant position may be established and what are the practical difficulties related to the concept of collective dominance.

The definition of the collective dominance is described together with legislation and economic theories. The basis for the notion of a collective dominance comes from the Article 102 TFEU. The collective dominance refers to a situation of oligopoly *i.e.* sales by few sellers. It is suggested that Article 102 TFEU may ensure the effective economic competition in the oligopoly markets. Article 101 TFEU may be simultaneously applied, but only when there is an agreement or concerted practices between the undertakings. Undertakings in an oligopolistic market may behave as if they have an agreement on common conduct. The oligopoly markets are complex and difficult to analyse. Economic models of oligopoly recognize the problem of implicit collusion. However, the economic theories does not provide definite answer to the legal problem.

In order to apply the concept of collective dominance under Article 102 TFEU it must be established that the two undertakings are behaving as a collective entity. The test for finding of a collective dominant position has been developed through the *ex ante* and *ex post* cases. The essential part of the thesis analyses the legal test for establishing collective dominance under Article 102 TFEU. The case law clarifies the scope of collective dominance, but the application of the concept under Article 102 TFEU has proved to be complex. In order to find collective dominance the undertakings must have certain economic connection between them. The basic requirement for the existence of collectivity is that the undertakings must be connected with sufficiently strong links, which enables them to act or present themselves as a collective entity with common policy. The sufficient link or connection between the undertakings is the core concept of the case analysis. The *ex ante* connection seems to be wider than the *ex post* connection. In theory, the legal test for finding of a collective dominant position is the same for *ex ante* and *ex post* cases. In reality, such an interpretation seems to be impractical and inappropriate.

Preface

The internship at Krogerus Attorneys Ltd inspired me to write the thesis on the collective dominance under Article 102 TFEU. The forthcoming traineeship at the Finnish Competition Authority inspired me to analyse the topic also from the procedural perspective.

I would like to express my appreciation towards the Master's Programmes at the Faculty of Law at Lund University. I would like to emphasize my gratitude towards Professor Hans Henrik Lidgard for his guidance through the work of the thesis.

Abbreviations

AG	Advocate General
CFI	Court of First Instance
CJ	Court of Justice
CJEU	Court of Justice of the European Union
DG COMP	Directorate General for Competition
GC	General Court
EC	European Community
ECMR	European Community Merger Regulation
ECR	European Court Reports
EU	European Union
OJ	Official Journal of the European Union
SIEC	Significantly impede effective competition
SLOC	Sufficient links of collectivity
TFEU	Treaty on the Functioning of the European Union

1 Introduction

Article 102 of the Treaty on the Functioning of the European Union (TFEU)¹ implies that a dominant position may be held by two or more legally independent economic entities that act or present themselves as a collective entity *i.e.* collective dominance.² The concept of collective dominance refers to an oligopoly.³ The application of Article 102 TFEU to oligopolies is one of the most complex issues in competition law.⁴

If two undertakings agree to increase their prices, companies may infringe Article 101 of the TFEU which prohibits anti-competitive agreements and concerted practices. Problems arise when operators are able to derive benefits from their collective market power without an agreement or concerted practices within the meaning of Article 101 TFEU.⁵ If the market is divided between two or more undertakings, the price agreement may constitute abuse of a collective dominant position. The question is whether there is need to use Article 102 TFEU, through the application of the abuse of collective dominance, if the practice would be caught under Article 101 TFEU anyway. The undertakings might be able to adjust their behaviour so that they could create a situation in which they could behave as they would have an agreement to increase their prices.⁶ Therefore, the firms may act cooperatively rather than competitively.⁷

The principle of collective dominance under Article 102 TFEU may fill this gap and catch behaviour outside of the scope of the Article 101 TFEU. The problem is whether Article 102 TFEU is suitable to catch such behaviour.⁸ It may be difficult to define whether such conduct should be tackled under Article 101 TFEU or Article 102 TFEU, through collective dominance, or could such conduct constitute infringement of one provision with support from another. Therefore, it is necessary to analyse whether Article 102 TFEU can contribute beyond the scope of Article 101 TFEU and whether

¹ Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/01.

² Cases C-395/96 P and C-396/96 P *Compagnie Maritime Beige Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365, para. 36. See also Case No IV/M.190 *Nestlé/Perrier* [1992] OJ L 365/1, para.115; the ECMR must be interpreted as covering both single firm and oligopolistic dominance.

³ Whish, Richard and Bailey David, *Competition Law*, 7 ed., Oxford University Press, 2012, p. 560-561.

⁴ *Ibid.*, p. 571.

⁵ *Ibid.*, p.559.

⁶ Furse, Mark, *The Law of Merger Control in the EC and the UK*, Portland, Hart Publishing, 2007, p.143.

⁷ *Ibid.*, p.143.

⁸ Jones, Alison and Brenda Sufrin, *EC Competition Law*, 3rd ed., Oxford University Press, 2008, p.1026.

the Article 102 TFEU can be used as a standalone provision, without reliance on Article 101 TFEU.⁹

In order to find whether a conduct can constitute an abuse of a collective dominance, it is necessary to first establish that the two or more undertakings are forming a collective entity. The Article 102 TFEU does not define the circumstances in which the undertakings may be considered to be in a collective dominance position. The European Commission has not set out a framework for the application of collective dominance under Article 102 TFEU. The Commission has not issued guidelines or methodology for the assessment of abuse of collective dominance in antitrust cases. The Commission refers to the concept of collective dominance in some of its antitrust guidelines, but these merely summarise the case law without further analysis of the interpretation.¹⁰

The principle of collective dominance and the requirements for proving the existence of a collectivity have been developed in parallel by the Commission and Court of Justice of the European Union (CJEU) in the cases decided both under Article 102 TFEU and the Merger Regulation (ECMR).¹¹ Despite the different legal context between the merger and antitrust cases, namely the retrospective analysis under Article 102 TFEU and prospective analysis under ECMR, the case law provides basis for the principle of collective dominance and its abuse. However, it has been argued that the case law does not provide a reliable legal and economic standard for addressing abuse of collective dominance.¹² Furthermore, to contribute legal certainty, it might be necessary to have separate criteria for the assessment of collective dominance depending on the legal context.¹³

When the test for finding abuse of a collective dominance may prove vague and intricate to apply it is possible that the test will be misused.¹⁴ There is a possibility that the Commission and competition authorities may convict innocent firms.¹⁵ Furthermore, without sufficiently certain legal test, the companies do not know how they may avoid abusive actions prohibited

⁹ Mezzanotte, Félix, *Interpreting the Boundaries of Collective Dominance in Article 102 TFEU*, *European Business Law Review*, Volume 21, Issue 4, p.519-537, 2010, p.537.

¹⁰ See *e.g.* Commission Notice on the application of the competition rules to access agreements in the telecommunications sector [1998] OJ C 265/2, paras 76-80; Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] OJ C 165/6, para. 86-94. For mergers see *e.g.* Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings [2004] OJ C31/5.

¹¹ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

¹² Vitziliaiou, Lia and Constantinos Lambadarios, *GCP: The Antitrust Chronicle, The Slippery Slope of Addressing Collective Dominance Under Article 82 EC*, *Competition Policy International*, October 2009, Release 1, p.10, available at <www.competitionpolicyinternational.com>

¹³ *Ibid.*

¹⁴ Mezzanotte Félix, *Interpreting the Boundaries of Collective Dominance in Article 102 TFEU* 2010, p.537.

¹⁵ *Ibid.*

under Article 102 TFEU.¹⁶ The principle of legal certainty requires that the legal rules are clear, precise and predictable in their effects, in particularly when the legal rules may have negative consequences on undertakings.¹⁷ Furthermore, the principle requires that a company can know from the wording of the provision, with the assistance of the Courts interpretation, what conduct would make it liable.¹⁸ Legal certainty for undertakings contributes to the promotion of innovation and investment.¹⁹ Therefore, it is necessary to analyse whether the test for finding an abuse of collective dominant position is sufficiently clearly defined by the law.

1.1 Purpose

The purpose of the thesis is to investigate whether it is appropriate to use Article 102 TFEU, through the application of the abuse of collective dominance, against implicit collusion. In order to fulfill the purpose, the thesis concentrates on the following questions:

- (i) What is the legislative definition of collective dominance?
- (ii) What is the applicable legal test for finding a collective dominance under Article 102 TFEU?
- (iii) What are the procedural risks related to the application of the concept of collective dominance under Article 102 TFEU?

The aim of the thesis is to provide understanding of the practical difficulties and procedural risks related to establishment of collective dominance under Article 102 TFEU.

1.2 Method

The traditional legal method is used to interpret the legislation and case law. The sources consist of European Union (EU) legislation, case law and academic writings. The primary sources are the Treaty on the Functioning of the European Union (TFEU), the EU legislative acts and the decisions by the European Commission as well as the Court of Justice of the European Union (CJEU). The case law is supported by academic writings in order to clarify the interpretation of the Commission and CJEU.

¹⁶ Vitziliaiou, Lia and Constantinos Lambadarios, 2009, p.10.

¹⁷ Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507, para 67 and Case T-398/07 *Kingdom of Spain v Commission* [2012] not yet published, para.107.

¹⁸ Case T-99/04 *AC-Treuhand AG v Commission* [2008] ECR II-1501 para.140.

¹⁹ Council Regulation (EC) No.1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, para. 38.

1.3 Disposition

Theoretical part of the thesis clarifies the reasons behind the development of the concept of abuse of collective dominance. The purpose of the relevant competition provisions and economic theories are briefly addressed. In order to distinguish collusive activities from collective dominance, the scope and relationship of Article 101 TFEU and Article 102 TFEU are assessed in more detail. To illustrate the interdependence of dominant undertakings, specific features of oligopoly markets are outlined. The essential part of the thesis presents the development of the concept of collective dominance in the decisional practice. The case analysis presents the development of the concept of collective dominance in merger and antitrust cases. The last part of the thesis demonstrates the procedural risks related to application of the concept of collective dominance with the focus on remedies and fines. The main analysis is conducted in the end of the paper.

1.4 Delimitation

The sources of law are limited to EU jurisprudence. Jurisdictional matters are beyond the purpose of the thesis. The jurisdictional limit to the application of Articles 101 TFEU and Article 102 TFEU and the level of the cross-border effect are left outside of the scope of the thesis. In addition, procedural issues and merger control are outside of the scope of the thesis, and they are considered only in the scope necessary to present the development of the concept of collective dominance.

The thesis does not include explanation of the purpose and effect of the EU legislative acts and instruments. Furthermore, as the focus is on the case law, only essential parts of the competition provisions are considered. The analysis of the possible effects of an anti-competitive behaviour is left outside of the scope of the thesis. The thesis does not analyse the notion of abuse or the requirements for finding an abuse.

The thesis analyses the oligopoly problem purely from a legal perspective. The existence of economic theories is only introduced in the scope necessary to outline the importance of the economics related to the assessment of the oligopoly markets.

Taking into account the number of academic writings on collective dominance, the thesis focuses on the literature published within ten years. The main focus is on sources published after the ECMR came into force.

2 Basis for collective dominance

2.1 Scope of the provisions

Article 101 and Article 102 of the TFEU constitutes basic provisions of competition law. These provisions ensure that competition in the internal market is not distorted.²⁰ The words of Article 102 TFEU add something to the Article 101 TFEU.²¹ The provisions do not contradict each other²² and they could be simultaneously applied to the same agreement or conduct.²³ However, these two provisions are independent instruments and apply to different commercial situations.²⁴

In order to establish what conduct would sufficiently indicate a position of collective dominance, it is necessary to distinguish the objective pursued by each of these two provisions.²⁵ Article 102 TFEU focuses on the unilateral behaviour of dominant undertakings whereas Article 101 TFEU focuses on the agreements and concerted practices between the undertakings.²⁶ It is important to understand the difference between the agreements and concerted practice as well as the interdependence of the collective dominants.

2.1.1 One or more undertakings

In EU, the basis for the notion of a collective dominance comes from Article 102 of the TFEU.²⁷ The legislative definition of the collective dominance exists in legislation. According to the Article 102:

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

²⁰ Council Regulation (EC) No.1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] para 1.

²¹ Temple Lang, John, European Community Antitrust Law: Innovation Markets and High Technology Industries, Fordham International Law Journal, Volume 20, Issue 3, 1996, p.793.

²² Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215, para 25.

²³ Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, para 116.

²⁴ Faull, Jonathan and Ali Nikpay, *The EC Law of Competition*, 2nd ed., Oxford University Press, 2007, p.407.

²⁵ Cases C-395/96 P and C-396/96 P *Compagnie Maritime Beige Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365, para. 33.

²⁶ Jones, Alison and Brenda Sufirin, 2008, p.294

²⁷ Hereinafter Article 102.

Essential part of the Article 102 is the phrase ‘one or more undertaking’. A dominant position may be held by two or more undertakings *i.e.* by a collective dominance.²⁸ The phrase ensures that the Article 102 may be applied to legally and economically independent undertaking, and not only to undertakings belonging to same economic unit.²⁹

In some EU jurisdictions the definition exists in the legislation, whereas in some jurisdictions the wording of collective dominance comes from case law.³⁰ Jurisdictions outside EU have different approaches to the concept of collective dominance. The express legislative definition of collective dominance is used in some jurisdictions, whereas in others, only abuses that take a form of agreement or arrangements are prohibited.³¹ For example in United States, the provision that prohibits single dominance does not have express reference for abuse by two or more undertakings.³² The conduct of two or more undertakings may be controlled only under §1 of the Sherman Act. However, Sherman Act §1 requires that there is a contract, combination or conspiracy between the companies.³³

2.1.2 Conditions

In order to address collective dominance, it is necessary to analyse separately three elements, namely the collective position, the dominant position and the abuse of such a position.³⁴

Article 102 can be applied only to undertakings which have a dominant position. It should be noted that dominance is not synonym to monopoly.³⁵ According to the case law dominance is a position that:

²⁸ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking [2009] OJ C 045/7, para 4.

²⁹ Jones, Alison and Brenda Sufirin, 2008, p.302; Whish, Richard and David Bailey, 2012, p.573. See also Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992] ECR II-1403, para.358 and Case 15/74 *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.* [1974] ECR 1147 para 41.

³⁰ See Concurrences: Review of Competition Law, Does the definition exist in legislation?, available at http://www.concurrences.com/rubrique.php3?id_rubrique=577.

³¹ Gudofsky, Jason, Evangelia Litsa Kriaris and Lucian Vital, Abuse of Joint Dominance is the Cure Worse than Disease? Canadian Bar Association 2010 Annual Competition Law Conference, Gatineau, Quebec, September 30 - October 1, 2010, available at <http://www.cba.org/cba/cle/PDF/COMP10_Gudofsky_paper.pdf > See also Stroux, Sigrid, US and EC Oligopoly Control, Kluwer Law International, The Netherlands, 2004, p.37-66.

³² Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

³³ Sherman Act § 1, 15 U.S.C. § 1 as amended by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

³⁴ See Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000], para 40.

³⁵ Faull, Jonathan and Ali Nikpay, The EC Law of Competition, 2nd ed., Oxford University Press, 2007, p.321.

“relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers.”³⁶

Dominance refers to a situation of independent undertaking that have power within the market. In order to establish the market power, it is necessary to define the relevant market where the undertakings operate.³⁷ After defining the relevant market,³⁸ it is possible to assess the actual market power of undertakings within the defined market. The point of departure for the assessment is often the market share of the undertaking.³⁹ Market shares for finding a single firm dominance have been in range of 40-50 per cent.⁴⁰ Furthermore, a single dominance is not likely if the undertaking’s market share is below 40 per cent.⁴¹

In case of finding a collective dominance, the market shares may need to be higher than market shares related to a single firm dominance.⁴² It is more likely that a collective dominant position requires a market share considerably in excess of 40 per cent.⁴³ In the collective dominance cases, the undertakings have held together the most shares of the market.⁴⁴ However, the market share is not the sole or decisive factor in finding a dominant or a collective dominant position.⁴⁵ For instance, the Court of Justice (CJ) has addressed that a market share of two undertakings of approximately 60% cannot of itself point conclusively to the existence of a collective dominant position.⁴⁶

The dominant position may be assessed by taking into account a combination of several factors, which take separately, are not necessarily determinative.⁴⁷ It should be noted that mere creation or existence of a

³⁶ Case 27/76 *United Brands Co and United Brands Continental BC v. Commission* [1978] ECR 207, para. 65 and Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, para. 38.

³⁷ Jones, Alison and Brenda Sufrin, 2008, p.312; See also Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973], para. 32.

³⁸ See Commission Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ C32/5.

³⁹ Jones, Alison and Brenda Sufrin, 2008, p.303.

⁴⁰ *Ibid.*, p.399.

⁴¹ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking, para.14.

⁴² Jones, Alison and Brenda Sufrin, 2008, p.406.

⁴³ *Ibid.*, p.407.

⁴⁴ See e.g. Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, paras.70-71.

⁴⁵ Jones, Alison and Brenda Sufrin, 2008, p.305. For collective dominance see e.g. Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992], para. 360 and Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998], para. 226.

⁴⁶ Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* para. 226.

⁴⁷ Case 27/76 *United Brands Co and United Brands Continental B v. Commission* [1978], para. 66, and Case 85/76 *Hoffman-La Roche & Co AG v Commission*, para. 39.

dominant position is not illegal.⁴⁸ However, those who hold a dominant position have a special responsibility not to allow its conduct to impair competition⁴⁹ and they need to comply with other competition rules as well.⁵⁰ The same principle applies to undertakings which hold a position of collective dominance.⁵¹

Article 102 does not provide actual definition of what constitutes an abuse of dominance. Article 102 gives four examples of when abuse may occur.⁵² This list is not an exhaustive enumeration of the prohibited abuses⁵³ and merely indicative.⁵⁴ These abuses can be categorized as exclusionary *e.g.* eliminating and preventing competition by refusal to supply or price discrimination, and exploitative *e.g.* reduce output and charge high prices of its products, thereby exploiting customers.⁵⁵ It is still debated what is the ultimate purpose for abuse control under Article 102. Some argue that conduct that reduces consumer or total welfare should be prohibited whereas others believe that the provision protects the process of competition from which economic benefits are derived.⁵⁶

The concept of objective justification has been developed to exempt actions which are prohibited under Article 102 but pursued for legitimate commercial reasons.⁵⁷ If the conduct is objectively justified and proportionate it is outside of the scope of Article 102.⁵⁸ The burden of proof might shift to the undertaking,⁵⁹ but at the preliminary point the burden of establishing that the conduct is within the meaning of Article 102 is borne by the Commission or competition authority.⁶⁰ In order to be exempted from

⁴⁸ Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461, para.57.

⁴⁹ *Ibid.*

⁵⁰ Faull, Jonathan and Ali Nikpay, 2007, p.314-315.

⁵¹ Cases C-395/96 P and C-396/96 P *Compagnie Maritime Beige Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission*, para. 38.

⁵² According to Article 102, abuse may occur when a company or companies (a) directly or indirectly imposing unfair purchase or selling prices or other 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.

⁵³ Case 6-72 *Europemballage Corporation and Continental Can v Commission*, para. 26.

⁵⁴ Eilmansberger, Thomas, How to distinguish good from bad competition under Article 102 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses, *Common Market Law Reviv*, Volume 42, Issue 1, pp. 129-177, 2005, pp.132-133. See also Faull, Jonathan and Ali Nikpay, 2007, p.315.

⁵⁵ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking para. 7. See also Whish, Richard and David Bailey, 2012, p.201.

⁵⁶ Faull, Jonathan and Ali Nikpay, 2007, p.348.

⁵⁷ Jones, Alison and Brenda Sufrin, 2008, p.331.

⁵⁸ Case 27/76 *United Brands Co and United Brands Continental BV v Commission*, paras 189-190. See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking, paras. 28-31.

⁵⁹ Jones, Alison and Brenda Sufrin, 2008, p.338.

⁶⁰ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para. 688.

Article 102, the undertakings must raise a plea with adequate arguments and evidence.⁶¹

2.1.3 Explicit collusion

Article 101 (1) of the TFEU⁶² prohibits collusion between undertakings and it is aimed at to catch all types of explicit collusion whatever form it takes.⁶³ Article 101 prohibits

“all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”⁶⁴

It should be noted that agreements between undertakings belonging to the same economic unit cannot constitute infringement of Article 101.⁶⁵ When it is established that action falls within the definition of an agreement or concerted practice it must have its object or effect the prevention or distortion of competition. Therefore, collusive practices are not prohibited as such, unless they have negative impact on competition within the meaning of Article 101.⁶⁶ Similarly to Article 102, Article 101 includes indicative list of prohibited actions.⁶⁷

The degree of market power required for the finding of an infringement under Article 101 is less than the degree of market power required finding dominance under Article 102.⁶⁸ However, if the undertakings have weak position on the market or a low market share, it is unlikely that a possible agreement have restrictive effects to competition.⁶⁹

⁶¹ Ibid.

⁶² Hereinafter Article 101.

⁶³ Jones, Alison and Brenda Sufrin, 2008, p.124.

⁶⁴ Consolidated version of the Treaty on the Functioning of the European Union, [2008] OJ C 115 /01.

⁶⁵ Case 15/74 *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.*, para.41.

⁶⁶ Jones, Alison and Brenda Sufrin, 2008, p.181.

⁶⁷ According to Article 101 (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply;(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make 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. See also Alison Jones and Brenda Sufrin, 2008, p.124 and pp. 206-207.

⁶⁸ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, para. 42.

⁶⁹ Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, [2011] para 44. See also Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) [2001] OJ C 368/13.

In contrast to Article 102, Article 101 (3) provides exemption that the prohibition may be declared inapplicable to agreements when the beneficial aspects of the agreement outweigh its restrictive effect.⁷⁰ It should be noted that an agreement exempted under Article 101 (3) may fall within the meaning of Article 102.⁷¹ In addition, Article 101 may apply despite the objective justification from Article 102 as those who hold a dominant position within the meaning of Article 102 need to comply with other competition rules as well.⁷²

The most essential part of the Article 101 relates to the definition of a concerted practice. The scope and definition of the concerted practice is to some extent still uncertain.⁷³ The term concerted practice is designed to catch looser forms of collusion.⁷⁴ Therefore, Article 101 may apply when undertakings have an informal agreement to coordinate their behaviour and reduce effective competition between them.⁷⁵ However, it can be difficult to distinguish explicit collusion, as a form of concerted practice, from the parallel behaviour which arises as a result of oligopoly.⁷⁶

In case of the undertakings destroy all incriminating evidence of emails, meetings and written agreements, the competition authority may try to establish the existence of a concerted practice from circumstantial evidence such as parallel conduct.⁷⁷ This type of coordination may have similar impact on the market as explicit collusion.⁷⁸ However, it is necessary to note that parallel conduct alone cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such parallel conduct.⁷⁹

According to the case law, the object of the term concerted practice is to catch “a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of completion.”⁸⁰ Furthermore, concerted practice may be

⁷⁰Article 101 (3) provides exemption to agreements “which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.” See also Jones, Alison and Brenda Sufirin, 2008, p.121.

⁷¹ Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309.

⁷² Faull, Jonathan and Ali Nikpay, 2007, p.314-315.

⁷³ Jones, Alison and Brenda Sufirin, 2008, p.179.

⁷⁴ *Ibid.*, p.173.

⁷⁵ *Ibid.*

⁷⁶ Whish, Richard and David Bailey, 2012, p.566.

⁷⁷ *Ibid.*, p.112.

⁷⁸ Jones, Alison and Brenda Sufirin, p.873.

⁷⁹ Cases C-89/85, C-104/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-1307, paras 71-72.

⁸⁰ Cases 48/69 *Imperial Chemical Industry Ltd. (ICI) v. Commission* [1972] ECR 619, para 64.

coordination which becomes apparent from the behaviour of the undertakings.⁸¹

It should be noted that there is a difference between collusion and normal intelligent competition.⁸² The Court has confirmed that a requirement of acting independently from other operators “does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.”⁸³ The danger is that the CJEU or national competition authorities could argue that parallel behaviour means that there is explicit collusion. In order to find whether parallel conduct is collusive, it is necessary to analyse the position from a purely economical perspective.⁸⁴

2.2 Implicit collusion

The difference between a monopoly and an oligopoly is that there are only few operators *i.e.* ‘oligo’ in the market instead of ‘mono’ *i.e.* one operator.⁸⁵ Many markets are oligopolistic and there is a general trend towards an increase in industrial concentration.⁸⁶ There are only few markets that are perfectly competitive.⁸⁷ The competition authorities have faced difficulties to control the behaviour of undertakings in these markets.⁸⁸ It should be noted that the few operators are not in itself the problem.⁸⁹ Horizontal cooperation between undertakings may be beneficial to the competitive structure of the market.⁹⁰

Specific feature of the oligopoly is that none of the undertakings are individually dominant, but normally each of them is relatively large.⁹¹ The problem in the oligopoly market is that the operators do not compete with each other on price and will have only a little incentive to compete in other ways.⁹² Competition problems arise when the operators are able to behave in parallel manner and derive profits as well as benefits from their collective market position.⁹³ They can gain profits without entering into an actual

⁸¹ Ibid., para 65.

⁸² Cases 40-48, 54-56, 111, and 113-114/73, *Cooperatieve Vereniging ‘Suiker Unie’ UA and others v. Commission* [1975] ECR 1663, para.174.

⁸³ Ibid., para.,174. See also Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, [2011], paras 60-62.

⁸⁴ Whish Richard and David Bailey,2012, p. 566.

⁸⁵ Ibid., p. 560-561.

⁸⁶ Whish Richard and David Bailey,2012, p. 560.

⁸⁷ Ibid.

⁸⁸ Jones, Alison and Brenda Sufrin,2008. p. 1026.

⁸⁹ Whish Richard and David Bailey,2012, p. 561.

⁹⁰ Jones, Alison and Brenda Sufring, 2008, p.859.

⁹¹ Vechhi, Teresa, Unilateral Conduct in an Oligopoly according to the Discussion Paper on Art.82: Conscious Parallelism or Abuse of Collective Dominance? *World Competition: Law and Economics Review*, Volume 31, Number 3, p.385-400, 2008, p.387.

⁹² Whish Richard and David Bailey,2012, p. 561.

⁹³ Ibid., p.559.

agreement.⁹⁴ In oligopoly an operator cannot increase prices unilaterally, because the customers would then buy from the rivals.⁹⁵ Undertakings may act in parallel because their failure to match a competitor's strategy could be detrimental to them.⁹⁶ Therefore, the rivals are interdependent.⁹⁷ The undertakings usually try to find an equilibrium that allows them to behave similarly. Usually such equilibrium can be found in a collusive non-competing environment.⁹⁸

Cooperation may take two forms. Undertakings might enter into agreements by explicit collusion or they may adapt their own behaviour to that of other undertakings.⁹⁹ Economics define this latter type of behaviour as tacit collusion.¹⁰⁰ Similarly terms such as implicit collusion, tacit coordination, coordinated effects, oligopolistic interdependence may be used.¹⁰¹ Economists have no interest whether collusion is in fact implicit or explicit; they concentrate on the effect of the collusion.¹⁰² However, in the legal sense there is a difference.¹⁰³ Explicit anti-competitive agreements are prohibited under Article 101 whereas implicit collusion would be outside of the scope of the provision.¹⁰⁴

Almost in all oligopolistic markets there is a possibility of explicit collusion and implicit collusion.¹⁰⁵ Explicit collusion occurs when undertakings collectively agree on exploiting their economic power whereas tacit or implicit collusion means that the undertakings set their future prices as if they have concluded explicit collusion.¹⁰⁶ It is questionable whether intelligent reactions of the members in a tight oligopoly can be considered as an abuse of collective dominant position.¹⁰⁷ At least the application of the abuse of collective dominance against an anticompetitive behaviour in an oligopoly must be sensitive. The concept of collective dominance may apply to tight oligopolies only in well-defined circumstances.¹⁰⁸

The oligopolistic markets are complex and difficult to analyse.¹⁰⁹ The oligopoly problem is often described together with economic theories. However, even the economic models of oligopoly cannot illustrate all of the

⁹⁴ Ibid., p. 561.

⁹⁵ Ibid.

⁹⁶ Ibid., p.112.

⁹⁷ Ibid., p. 561.

⁹⁸ Vechhi, Teresa, 2008, p.387.

⁹⁹ Ibid.

¹⁰⁰ Whish Richard and David Bailey, p.559.

¹⁰¹ Ibid.

¹⁰² Monti, Giorgio EC Competition Law, Cambridge University Press, 2007, p.309, Whish Richard and David Bailey, p.570.

¹⁰³ Whish Richard and David Bailey,2012, p.562.

¹⁰⁴ Vechhi, Teresa, 2008, p.388.

¹⁰⁵ Jones, Alison and Brenda Sufrin,2008, p.1026.

¹⁰⁶ Jones, Alison and Brenda Sufrin,2008, p. 859.

¹⁰⁷ Monti, Giorgio, The scope of collective dominance under Article 82 EC, Common Market Law Review, Volume 33, pp.131-157, 2001, p.144.

¹⁰⁸ Ibid., p.146.

¹⁰⁹ Faull, Jonathan and Ali Nikpay, 2007, p.24.

oligopoly problems.¹¹⁰ These theories recognize the fact that operators take into account the behaviour and likely actions of the competitors before making a decision on how it should behave or act.¹¹¹

The Game Theory deals with strategic interaction of firms. The theory explains and predicts the behaviour of oligopolies.¹¹² The model of Prisoner's Dilemma¹¹³ is usually used in connection with oligopolies. When two firms choose prices they may choose only once and without communicating with one another. If two companies X and Y charge high prices, the profits are same. If both charge low, they gain less profit. If X sets prices low and the Y charges high, the latter gets no profit. Eventually both of the companies realize independently, without any communication, that they achieve most profitable outcome if they both charge high prices. The most efficient result may be achieved even when they behave as if they have agreed to maximize the profits.¹¹⁴ Therefore, because oligopolists may easily predict the likely outcome, they have high awareness of other firms' behaviour on the market.¹¹⁵

While some of the economic theories help in determining whether the behaviour of undertakings is collusion or competition, they fail to capture a situation of uncoordinated or unconscious parallel conduct.¹¹⁶ In addition, economic theories do not clearly explain how it is possible to collude without any communication in the process.¹¹⁷ Furthermore, there is no economic model that takes into account all of the possible factors within the market.¹¹⁸ The theories concentrate on the effects and interaction of some factors, but are far from realistic settings.¹¹⁹ The theory of oligopolistic interdependence has been also criticized.¹²⁰ It has been argued that the theory tends to overstate the interdependence of the oligopolists. It gives too simplistic picture of real-life markets and it excludes the fact that in some concentrated markets competition is intense despite the oligopolistic market structure.¹²¹ If there are no significant barriers to entry, the situation could increase competition in the long run *i.e.* the market could self-correct the problem.¹²²

In summary, both Article 101 and Article 102 may apply to the anticompetitive conduct by oligopolies. Whereas Article 101 catches

¹¹⁰ Ibid.

¹¹¹ Whish Richard and David Bailey, 2012, p. 561.

¹¹² Jones, Alison and Brenda Sufirin, 2008, p.860.

¹¹³ Ibid., p.860.

¹¹⁴ Ibid., p. 872

¹¹⁵ Ibid.

¹¹⁶ Mezzanotte, Felix, Using Abuse of Collective Dominance in Article 102 TFEU to Fight Tacit Collusion: The Problem of Proof and Inferential Error, World Competition: Law and Economic Review, Volume 33, Number 1, pp. 77-102, 2010, p. 87.

¹¹⁷ Ibid.

¹¹⁸ Faull, Jonathan and Ali Nikpay, 2007, p.25.

¹¹⁹ Ibid.

¹²⁰ Whish Richard and David Bailey, 2012, p.563.

¹²¹ Ibid., p.564.

¹²² Ibid., p.565.

anticompetitive agreements and concerted practices, Article 102 tackles abusive behaviour between the oligopolies. However, taking into account the specific features of the oligopolistic market behaviour and the problems related to tacit collusion, it is necessary to examine the scope of application of the concept of collective dominance.

3 Parallel development

3.1 Background

The concept of a collective dominance has been developed in parallel through merger and antitrust cases. Even though the Courts refer to common requisite legal standard to the application of the Merger Regulation and to antitrust cases, the procedures differ to a certain extent.¹²³ The differences are, *inter alia*, time of intervention, the possibility to impose sanctions, the direct applicability and the objective of the procedures.¹²⁴ Furthermore, unlike antitrust infringement, the decision-making under Merger Regulation is subject to short deadlines.¹²⁵

The main difference between the two procedures relates to the time of intervention.¹²⁶ In merger cases, the Commission analyses the future effects of the merger¹²⁷ whereas in Article 102 cases, the position of a collective dominance exists and the abusive conduct have already occurred.¹²⁸ Article 101 and Article 102 prohibits anti-competitive conduct in a particular situation (*ex post*) whereas in merger cases analysis is prospective. In other words, in a merger case the effects do not occur before the event (*ex ante*).¹²⁹

Horizontal Merger Guidelines¹³⁰ provide guidance on the assessment of collective dominance in merger cases, but there is no such guidance on the collective dominance under Article 102. The Directorate General for Competition (DG COMP) has published Discussion Paper that summaries the applicable legal test for collective dominance.¹³¹ However, the DG COMP Discussion Paper does not provide guidance on the how the case law should be interpreted. It merely summaries the case law without given any further guidance. Interestingly, the Commission Guidance on the Commission's enforcement priorities in applying Article 102¹³² left the

¹²³ Bailey, David, Standard of proof in EC merger proceedings: A common law perspective, *Common Market Law Review*, Volume 40, Issue 4, 2003, pp.858-869., p.858.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Jones, Alison and Brenda Sufirin, 2008, p.928. Wang, Wei, Structural Remedies in EU Antitrust and Merger Control, *World Competition: Law and Economics Review*, Volume 34, Number 4, 2011, pp. 571–596, Kluwer Law International, Netherlands, 2011, p.578.

¹²⁷ Guidelines on the assesment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, para.2.

¹²⁸ Jones, Alison and Brenda Sufirin, p.928.

¹²⁹ *Ibid.*, See also Wang, Wei, 2011, p.578.

¹³⁰ Guidelines on the assesment of horizontal mergers under the Council Regulation on the control of concentration between undertakings [2004] OJ C31/5.

¹³¹ Directorate General Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, available at <<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>>

¹³² Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking OJ [2009] C 045/7.

concept of collective dominance outside of the scope of the paper as the document only relates to abuses by an undertaking holding a single dominance.¹³³ This may be interpreted as a tacit acknowledgment that the Commission has no interest to establish applicable legal test for finding collective dominance under Article 102.¹³⁴

3.2 Single entity

The CJEU was first reluctant to accept the application of Article 102 to oligopolies.¹³⁵ However, the CJEU later opened the possibility to use Article 102 to control oligopolistic markets and has develop conditions for finding a collective dominant position in several cases.¹³⁶

In the case *Flatt Glass*,¹³⁷ the General Court confirmed the use of the notion of a collective dominance on the basis of Article 102. The case concerned three Italian manufactures that concluded agreements which were considered to be in breach of Article 101.¹³⁸ The Court confirmed that the term ‘one or more undertakings’ can be applied to two or more independent economic entities.¹³⁹ The Court accepted the notion of dominance¹⁴⁰ 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.”¹⁴¹ [Emphasis added]

The case established that the collective dominance can be applied to undertakings that are independent entities, but are enable to behave as independently from others.¹⁴² Companies must act or present themselves as

¹³³ Ibid., para. 4.

¹³⁴ Vitzilaiou Lia, and Constantinos Lambadors,2009, p.10.

¹³⁵ Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, para. 39.

¹³⁶ Cases T-68/89, T-77/89 and T-78/89 *SIV and Others v Commission* [1992] ECR II-1403. para.358. See also Whish, Richard and David Bailey, 2012, p.574.

¹³⁷ Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992].

¹³⁸ Ibid., para.1.

¹³⁹ Ibid., para.357-358.

¹⁴⁰ Supra note 36, Case 27/76 *United Brands Co and United Brands Continental BC v. Commission* [1978],para 65 and Case 85/76 *Hoffmann-La Roche* [1979], para. 38.

¹⁴¹ Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992], para.358.

¹⁴² Faull, Jonathan and Ali Nikpay,2007, p.338-339.

a collective entity with a common policy in the particular market.¹⁴³ This notion of a single or collective entity is an indispensable feature of a collective dominance test.¹⁴⁴

However, in this case the Court held that the Commission failed to provide adequate evidence of such collective dominance.¹⁴⁵ The Commission based its decision on “the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market, that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position.”¹⁴⁶ The Court pointed that for the purposes of establishing collective dominance and infringement of Article 102, it is not sufficient to recycle the same facts that constitute infringement of Article 101.¹⁴⁷ Moreover, the Court used the term ‘economic links’ in its decision, but it did not take into consideration whether there is a possibility to find such links in the absence of agreement within the meaning of Article 101.¹⁴⁸

3.3 Ex ante development

The substantive test under the ECMR is whether a concentration “would significantly impede effective competition in the common market or in substantial part of it, in particular as a result of the creation or strengthening of a dominant position.”¹⁴⁹ According to Merger Guidelines, the Commission considers the foreseeable impact of the merger¹⁵⁰ and assess whether any significant impediment to effective competition is likely to be caused by a concentration.¹⁵¹

The significantly impede effective competition test (SIEC-test) differs from the original test that required the Commission to determine whether a merger “creates or strengthens a dominant position as a result of which effective competition would significantly impede in the common market or substantial part of it.”¹⁵² The question of whether collective dominance

¹⁴³ Directorate General Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, p.16 See also Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000] para. 36, Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375, paragraph 221.

¹⁴⁴ *Ibid.*

¹⁴⁵ Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992] para. 366.

¹⁴⁶ *Ibid.*, para. 360.

¹⁴⁷ *Ibid.*

¹⁴⁸ Furse, Mark, 2007, p.145.

¹⁴⁹ ECMR Article 2 (2-3).

¹⁵⁰ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings [2004] OJ C31/5, para. 13.

¹⁵¹ *Ibid.*, para.2.

¹⁵² Council Regulation (EEC) No. 4064/89 of the 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1, corrected version published in OJ 1990 L257/13.

could be addressed against mergers was dealt in a chain of cases before the SIEC-test entered into force.¹⁵³ In fact, problems related to the interpretation lead to a change of the merger test.¹⁵⁴ The main concern was how to correctly identify situations where there is a possibility of coordinated effects.¹⁵⁵ However, the new merger test did not completely remove the problems related to the evaluation of a collective dominance.¹⁵⁶

3.3.1 Structural links

In the case *Kali und Salz*¹⁵⁷ the Court analysed whether the concentration would lead to a collective dominance between two undertakings, K+S¹⁵⁸ and SCPA,¹⁵⁹ that would significantly impede effective competition.¹⁶⁰ The Court held that for finding of a collective dominance the Commission must assess:

“whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of *correlative factors* which exist between them, are able to adopt a common policy on the market and act to a *considerable extent independently* of their competitors, their customers, and also of consumers.”¹⁶¹ [Empahsis added]

The Court recognized that a market share after a concentration of the two undertakings of approximately 60% cannot of itself point conclusively to the existence of a collective dominant position.¹⁶² The Court concluded that the Commission did not sufficiently prove the existence of the economic connection between the undertakings.¹⁶³ The Commission failed to establish “to the necessary legal standard the existence of a causal link between K+S and SCPA's membership of the export cartel and their anticompetitive behaviour on the relevant market.”¹⁶⁴ In addition, the alleged links arising from the distributorship between K+S and SCPA related to kieserite, a product that was not part of the relevant product market *i.e.* potash-based products.¹⁶⁵ Furthermore, the Court addressed that the cluster of structural

¹⁵³ Furse, Mark, 2007, p.144.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid., p.145.

¹⁵⁶ Ibid., p.144.

¹⁵⁷ Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375.

¹⁵⁸ Kali und Salz GmbH and Kali und Salz Beteiligungs-AG.

¹⁵⁹ French Republic and Société commerciale des potasses et de l'azote.

¹⁶⁰ Council Regulation (EEC) No.4064/89.

¹⁶¹ Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998], para 221.

¹⁶² Ibid., para 226.

¹⁶³ Ibid., para 228.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid., para. 229-231.

links between the undertakings was not in the end as tight or conclusive as the Commission presented.¹⁶⁶

The Court recognized that the Commission has a certain discretion with respect to economic assessments.¹⁶⁷ However, the assessment “flawed in certain respects which affect the economic assessment of the concentration.”¹⁶⁸ By using term ‘correlative factors’ it seems that the Court tried to avoid the term ‘links’ in its decision.¹⁶⁹ However, the Court especially refers to term ‘structural links’ and ‘causal link’ in its conclusion.¹⁷⁰ This case confirmed that the existence of a single entity could be established by examining the connection between the companies.¹⁷¹ These links must offer them the opportunity to adopt common policy on the market.¹⁷²

3.3.2 Behavioural links

In *Nestlé/Perrier*¹⁷³ the Commission assessed the *ex ante* oligopolistic dominance for the first time.¹⁷⁴ The Commission confirmed the applicability of the former Merger Regulation to oligopolistic dominance¹⁷⁵ and based the decision on anticompetitive parallel behaviour.¹⁷⁶ Nevertheless, the Commission concluded that the conditions and obligations set out in Nestlé’s commitment prevented the creation of the collective dominant position.¹⁷⁷

One year after *Kali und Salz*¹⁷⁸ the General Court clarified the assessment of a collective dominance in the case *Gencor*.¹⁷⁹ The case concerned the legality of decision adopted by the Commission, which prohibited a merger between two producers of platinum and rhodium. The Commission alleged that the as a result of the merger, producers would have a position of a collective dominance as a form of duopoly.¹⁸⁰ The main question of the case

¹⁶⁶ Ibid., para. 232.

¹⁶⁷ Ibid., para. 223.

¹⁶⁸ Ibid., para 225.

¹⁶⁹ Bektashi, Farid, Collective Dominance in EC Competition Law: Role of Structural Links, Case Law Analysis under the EC Merger Control, VDM Verlag Dr. Müller Aktiengesellschaft & Co.KG, 2008, p.50.

¹⁷⁰ Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375, e.g. paras. 227-228, 232, 239.

¹⁷¹ Ibid., para. 221. See also Faull, Jonathan and Ali Nikpay, 2007, p.338.

¹⁷² Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] para 221.

¹⁷³ Case IV/M.190 *Nestlé/Perrier* [1992] OJ L 365/1.

¹⁷⁴ Furse, Mark, 2007, p.145, See also Case No IV/M.165 *Alcatel / AEG Kabel* [1992] OJ C 6/23.

¹⁷⁵ Case IV/M.190 *Nestlé/Perrier* [1992], para 115.

¹⁷⁶ Ibid., para. 120.

¹⁷⁷ Ibid., para. 137.

¹⁷⁸ Supra note 157.

¹⁷⁹ Case T-102/96 *Gencor v Commission* [1999] ECR II-753.

¹⁸⁰ Case IV/M.619 *Gencor/Lonhro* [1997] OJ L 11/30 para. 219.

was whether the existence of economic links¹⁸¹ requires structural links.¹⁸² The Court referred to a *Flatt Glass*¹⁸³ case and held that the structural links are not necessary requirement for finding a collective dominance.¹⁸⁴ The Court concluded that the notion of the economic links can include “the relationship of interdependence existing between the parties to a tight oligopoly.”¹⁸⁵

The question of what can be considered as ‘a tight oligopoly’ was developed later in *Airtours*¹⁸⁶ case. The Court confirmed that the oligopolistic dominance, which significantly impedes effective competition, may exist without having to enter into an agreement or resort to a concerted practice within the meaning of Article 101 of the TFEU.¹⁸⁷ For finding a tight oligopoly that indicates collective dominance, the three conditions must be present:

- (i) the market must be transparent *i.e.* each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor others; and
- (ii) the situation must be sustainable over time *i.e.* there must be adequate deterrents to ensure that there is a long-term incentive not to depart from the common policy on the market; and
- (iii) the reaction of current and future competitors as well as consumers cannot jeopardize the benefits from the common policy.¹⁸⁸

The Court referred to previous case law and held that the assessment of collective dominance calls for close examination.¹⁸⁹ Furthermore, the Court recognised that the Commission have a certain discretion, especially related to the economic assessment.¹⁹⁰ In order to prove situation of a collective dominance the Commission has to provide convincing evidence.¹⁹¹ The Court concluded that:

¹⁸¹ Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992], para.358.

¹⁸² Case IV/M.619 *Gencor/Lonhro* [1997] OJ L 11/30 para. 264.

¹⁸³ *Supra* note 141.

¹⁸⁴ Case T-102/96 *Gencor v Commission* [1999] ECR II-753, para. 273.

¹⁸⁵ *Ibid.*, para. 276.

¹⁸⁶ Case T-342/99 *Airtours v Commission*, [2002] ECR II-2585.

¹⁸⁷ *Ibid.*, para. 62. See also Guidelines on the assesment of horizontal mergers under the Council Regulation on the control of concentration between undertakings [2004], paras. 39-41.

¹⁸⁸ Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, para 62.

¹⁸⁹ *Ibid.*, para. 63. See also Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998], para. 223.

¹⁹⁰ *Ibid.*,para. 64.

¹⁹¹ *Ibid.*, para. 63.

“the Decision, far from basing its prospective analysis on cogent evidence vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created.”¹⁹²

The Court held that the Commission’s did not prove to the requisite legal standard that all of the three conditions for finding a collective dominant position were present.¹⁹³

The Horizontal Merger Guidelines¹⁹⁴ confirms the *Airtours* approach for tight oligopolies. According to the Guidelines a merger in a concentrated market may have negative effects to competition, through the creation or strengthening collective dominant position, because of the likelihood that firms are able to coordinate their behaviour and raise prices, even without agreement or concerted practice prohibited under Article 101.¹⁹⁵

3.3.3 Pre-existing collective dominance

*International Association of Independent Music (Impala)*¹⁹⁶ case related to Sony and BMG’s intention to integrate recorded music business.¹⁹⁷ The case illustrates that the Commission may find difficult to establish conditions for finding collective dominance in cases which fall between Article 102 and Article 101.¹⁹⁸ Furthermore, the case reflects the difficulties that relates to the finding of collective dominance in a merger cases.¹⁹⁹ *Impala* is the first case where the Court assessed whether a merger strengthens a collective dominance. Therefore, the Court examined for the first time the test for pre-existing collective dominance.²⁰⁰ The judgment is significantly important in relation to *ex post* assessment of collective dominant position.

CJ held that the requirement for economic links or correlative factors²⁰¹ capable of constituting collective dominance include the relationship of interdependence between undertakings in a tight oligopoly.²⁰² The Court confirms that in *ex ante* cases, the concept of a collective dominance

¹⁹² Ibid., para 294.

¹⁹³ Ibid.

¹⁹⁴ Guidelines on the assesment of horizontal mergers under the Council Regulation on the control of concentration between undertakings [2004]

¹⁹⁵ Ibid., para 39.

¹⁹⁶ Case C-413/06 *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951.

¹⁹⁷ Case COMP/M.3333 *Sony/BMG* [2005] OJ L 62/30.

¹⁹⁸ Van Rompuy, Ben, *The Standard of Proof in EC Merger Control: Conclusion from the Sony BMG Saga*, Institute for European Studies, 2008, p.21, available at <http://www.ies.be/files/IES%20Working%20Paper%204_Ben%20Van%20Rompuy.pdf>

¹⁹⁹ Ibid., p. 17.

²⁰⁰ Mezzanotte, Felix, *Direct versus Indirect Proof of Airtours Criterion in Impala*, *World Competition: Law and Economics Review*, Volume 31, no 4, 2008, 523-540, p.524.

²⁰¹ See supra notes 141 and 161.

²⁰² Case C-413/06 *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951, para 120-121.

extends to situations where there are no actual structural or contractual links between the undertakings.²⁰³ The case illustrates that the essence of collective dominance is the implicit collusion or parallel behaviour within the oligopoly.²⁰⁴

The relevant part of the General Court's decision²⁰⁵ concentrated on the assessment of pre-existing collective dominant position. The Court highlighted that the case law on collective dominance had been development in the context of the assessment of the creation of a collective dominance not of the determination of the existence of a collective dominance.²⁰⁶ The General Court argued that there is a difference between the analysis of the pre-existing and creation of a collective dominance. In cases related to creation of collective dominance, the Commission must "carry out a delicate prognosis as regards the probable development of the market and of the conditions of competition on the basis of a prospective analysis, which entails complex economic assessments" whereas assessment of pre-existing collective dominance position "is itself supported by a concrete analysis of the situation existing", and the findings can be based on "a series of elements of established facts, past or present."²⁰⁷

The Court assessed the argument related to pre-existing collective dominance and held:

"Similarly, the investigation of a *pre-existing* collective dominant position based on a series of elements normally considered to be indicative of the presence or the likelihood of tacit coordination between competitors cannot therefore be considered to be objectionable of itself."²⁰⁸ [Emphasis added]

The CJ did not object the General Court's view on the difference between the assessment of a creation and pre-existing collective dominance position. However, the Court underlined that such investigation must be carried out with care,²⁰⁹ and when applying the criteria laid down in the *Airtours* case, "it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination."²¹⁰

²⁰³ Faull, Jonathan and Ali Nikpay, 2007, p.342.

²⁰⁴ Whish Richard and David Bailey, 2012, p.578.

²⁰⁵ Case T-464/04 *Impala v Commission* [2006] ECR II-2289.

²⁰⁶ *Ibid.*, para. 249.

²⁰⁷ *Ibid.*, para. 250.

²⁰⁸ Case C-413/06 *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008], para.129.

²⁰⁹ *Ibid.*, para.129.

²¹⁰ *Ibid.*, para.125.

3.4 Ex post development

After the *Flatt Glass*²¹¹ case, the requirements for establishing a single entity have been analysed in several cases. The main concerns in these cases have been the existence of a sufficient link between the undertakings. The CJ has confirmed that in order to find a collective dominance, “the undertakings in the group must be linked in such a way that they adopt the same conduct on the market.”²¹² There are several cases where the CJEU tried to some extent determine the requirements for finding the economic links to establish a single entity. Most of the cases include links that are derived from legal links *i.e.* links that are legally binding.

3.4.1 Legal links

In the *Trans-Atlantic Conference Agreement (TACA)*²¹³ the Commission alleged that the participants of the liner conference were in collective dominant position.²¹⁴ The case outlines the diversity of the notion of economic links. The Commission alleged that collective dominant position exist because the members are bound together by number of economic links which has led to a significant diminution of their ability to act independently from others.²¹⁵ More specifically, the Commission held that there are five very close economic links between the members, namely the agreement on tariff, extensive enforcement provisions, TACA secretariat, and publication of annual business plans and consortia arrangements.²¹⁶

The parties appealed the decision to General Court.²¹⁷ The parties claimed that the Commission made errors in the assessment in regarding the economic links between the TACA members and the internal competition between them.²¹⁸ They claimed that alleged economic links are not sufficient to justify a collective assessment of their position.²¹⁹ The Court referred to both merger and antitrust case law on collective dominance.²²⁰ The Court confirmed that in order to establish that the links allow them to act independently, “it is necessary to examine the links or factors of economic correlation between the undertakings.”²²¹ According to previous case law, a liner conference can be considered to be a collective entity and, therefore, the links resulting from the conference are capable of justifying a

²¹¹ See supra note 141.

²¹² Case C-393/92 *Gemeente Almelo and Others v Energiebedrijf IJsselmij NV* [1994] ECR I-1477, para. 42.

²¹³ Cases T-191/98, T-212 - T-214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275.

²¹⁴ Case No IV/35.134 *Trans-Atlantic Conference Agreement* [1999] OJ L 95/1, para.525.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*, paras.526-531.

²¹⁷ Cases T-191/98, T-212 - T-214/98 *Atlantic Container Line AB and Others v Commission* [2003] para.583.

²¹⁸ *Ibid.*, para.583.

²¹⁹ *Ibid.*, para.592.

²²⁰ *Ibid.*, para.595.

²²¹ *Ibid.*, para.595.

collective assessment of the position.²²² However, these links are capable of justifying the assessment only “in so far as those links are such as to allow them to adopt together, as a single entity which presents itself as such on the market vis-à-vis users and competitors, the same line of conduct on that market.”²²³

Furthermore, the Court referred to the *Airtours*²²⁴ case and held that although the lack of effective competition is a significant factor in determining the existence of collective dominant position, there is no requirement that the elimination of effective competition must result in the elimination of all competition between undertakings.²²⁵ Therefore, the Article 102 does not preclude all competition between the undertakings holding a collective dominant position and it does not require adoption of the same conduct for all aspects of competition in the market.²²⁶

3.4.2 Tendency towards behavioural links

The question of whether it is possible to establish a single entity without legally binding links was analyzed by the Court of Justice in *Compagnie Maritime Belge (CMB)*.²²⁷ The case concerned undertakings that tried to eliminate their competitor by cooperation agreement. The Commission alleged that the three members of shipping conference named Associated Central West Africa Lines (CEWAL) have infringed Article 101 TFEU by entering into non-competition agreement according to which the undertakings, *inter alia*, refrains from operating as an independent shipping company in the area of other members.²²⁸

The centre question of the decision was that whether the Commission can base the collective dominance position on the explicit collusion prohibited under Article 101.²²⁹ The Court confirmed that if the same practice constitute an infringement of Article 101 and Article 102, it is possible to apply both provisions simultaneously.²³⁰ However, it is necessary to distinguish the objectives pursued by each of the two provisions.²³¹

²²² Ibid., paras.601-602.

²²³ Ibid., para. 602.

²²⁴ Case T-342/99 *Airtours v Commission*, [2002] See supra note 188.

²²⁵ Cases T-191/98, T-212 - T-214/98 *Atlantic Container Line AB and Others v Commission* [2003], para. 654.

²²⁶ Ibid., para. 655.

²²⁷ Joined cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000].

²²⁸ Cases IV/32.448 and IV/32.450 *Cewal, Cowac and Ukwac* and 86 IV/32.448 and IV/32.450 *Cewal* [1993] OJ L 34/20. Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000], para.1.

²²⁹ Joined cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission* [2000], para.32.

²³⁰ Ibid., para. 33.

²³¹ Ibid.

The Court confirmed that the term ‘one or more undertaking’ implies “that 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. That is how the expression collective dominant position, as used in the remainder of this judgment, should be understood.”²³² For finding the existence of a collective entity “it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned.”²³³ However, if two or more undertakings are linked by an agreement or decision or a concerted practice within the meaning of Article 101, it does not itself constitute a sufficient basis for finding a collective dominance.²³⁴ However, such agreement, decision or concerted practice may constitute a situation that Article 102 applies. The Court held that such agreement, decision or concerted practice may result to a conclusion that undertakings are in fact linked so that they present themselves as a collective entity.²³⁵ The essential part of the decision presents the necessity for careful assessment. The Court concluded that:

“The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. 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 and, in particular, on an assessment of the structure of the market in question.”²³⁶
[Emphasis added]

The Court’s consideration supports the idea of finding a connection without contractual links.²³⁷ It seems that the CJ considers that the test for the collective dominance is the same for merger and Article 102 cases *i.e.* there is no need to be agreements or links in law to establish a collective dominance.²³⁸

According the opinion of Advocate General (AG) Fennelly,²³⁹ it is not necessary to specify exhaustively all the possible forms of economic links. AG Fennelly addressed that that these links might take several forms.²⁴⁰ They may be in form of supply conditions drawn up by a trade association, cross-shareholdings, common directorships or family links with some

²³² Ibid., para. 36.

²³³ Ibid., para. 41.

²³⁴ Ibid., para. 43.

²³⁵ Ibid., para. 44.

²³⁶ Ibid., para. 45.

²³⁷ Jones, Alison and Brenda Sufirin, 2008, p.926.

²³⁸ Whish, Richard and David Bailey, 2012, p.578.

²³⁹ Opinion of AG Fennelly in *Compagnie Maritime Belge*, Cases C-395/96 P and C-396/96 P *Compagnie Maritime Beige Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365.

²⁴⁰ Ibid., para. 28.

economic consequences.²⁴¹ AG Fennelly suggests that there is no need to define them, except by reference to their result.²⁴²

It is confirmed that the same facts constituting infringement of Article 101 cannot be recycled for the purposes to establish abuse under Article 102.²⁴³ Therefore, AG Fennelly addressed that the weakness in evidence of concentration should not be overcome by using Article 102.²⁴⁴ It is evident that concerted behaviour alone does not satisfy the test of collective dominance position, but it is not precluded, by the Treaty or by principle of law or logic, to rely on such evidence.²⁴⁵

The Court concluded that there was an agreement within the meaning of Article 101 and that the grant of an exemption under Article 101 (3) does not prevent application of Article 102.²⁴⁶ The Court did not address clearly what kinds of economic interaction between firms may substantiate a collective entity in the absence of links in law.²⁴⁷ Moreover, the case seems to be consistent with the *Impala*²⁴⁸ case as it highlights the idea that the parallel behaviour is the core of the collective dominance in oligopoly.²⁴⁹ However, the existence of the shipping conference agreement was a clear contractual link between the undertakings, and therefore provides the basis for the required economic links.²⁵⁰

The collective dominant position was further analysed in the case *Laurent Piau*.²⁵¹ In *Laurent Piau* the General Court assessed the Commission's decision on alleged collective dominance between the members of the Fédération Internationale de Football Association (FIFA). FIFA is an association of undertakings that groups national association with football clubs.²⁵²

The General Court Court relied strongly on the cumulative conditions set out in *Airtours*²⁵³ and held that for finding a collective dominance with common policy:

²⁴¹ Ibid., para. 28.

²⁴² Ibid.

²⁴³ See supra note 147.

²⁴⁴ Opinion of AG Fennelly in *Compagnie Maritime Belge*, para 29.

²⁴⁵ Ibid., para 29.

²⁴⁶ Cases C-395/96 P and C-396/96 P *Compagnie Maritime Beige Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission* [2000], paras.130-136.

²⁴⁷ Mezzanotte Félix, *Interpreting the Boundaries of Collective Dominance in Article 102 TFEU*, 2010, p.526.

²⁴⁸ Case C-413/06 *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951.

²⁴⁹ Whish Richard and David Bailey, 2012. p.578.

²⁵⁰ Cases C-395/96 P and C-396/96 P *Compagnie Maritime Beige Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission* [2000], paras.130-136.

²⁵¹ Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209. See also Case C-171/05 *P Piau v Commission* [2006] ECR I-37, rejecting the appeal of the General Court.

²⁵² Ibid., para.71-72.

²⁵³ Case T-342/99 *Airtours v Commission*, [2002] ECR II-2585. See supra note 186.

- (i) each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they adopt the common policy;
- (ii) the situation of tacit coordination must be sustainable over time *i.e.* there is no incentive to depart from the common policy;
- (iii) the foreseeable reaction from outside must not jeopardise the result expected from the common policy.²⁵⁴

The Court concluded that FIFA can be regarded as acting on behalf of football clubs.²⁵⁵ FIFA holds a collective dominant position on the market for agent services for players, because the rules governing the market may result to a situation where clubs are so linked that they form a collective entity.²⁵⁶ Because the regulations are binding for national associations, which are members of FIFA, and the clubs forming them, these bodies are considered to be linked within the meaning of Article 102.²⁵⁷

It seems that the *Laurent Piau* case clarified the applicable legal test for finding a collective dominance.²⁵⁸ Furthermore, the case implies that the definition of the collective dominance in the context of ECMR can be transposed to cases under Article 102.²⁵⁹ By using the *Airtours* criteria, the Court seems to accept that the single entity can be formed in *ex post* cases by tacit coordination.²⁶⁰ However, the interpretation merely indicates the possibility of constituting economic links by tacit coordination, but the case is in fact wholly unrelated to tacit collusion.²⁶¹ The judgment does not explain why the *Airtours* conditions are relevant for the particular case and why the Court address the legal test related tacit coordination.²⁶² Despite the analysis related to the *Airtours* conditions, it is evident that the links between the associations and clubs where in fact links in law.²⁶³ Therefore, the *Laurent Piau* case does not define whether firms colluding tacitly are in fact abusing their collective dominance.²⁶⁴

²⁵⁴ Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209, para. 111.

²⁵⁵ *Ibid.*, para. 112.

²⁵⁶ *Ibid.*, para. 113.

²⁵⁷ *Ibid.*, para. 114.

²⁵⁸ Monti, Giorgio, 2007, p.336.

²⁵⁹ *Ibid.*

²⁶⁰ Mezzanotte, Felix, Tacit Collusion as Economic links in Article 82 EC revisited, *European Competition Law Review*, 30 (3), 137-142, 2009, p.137.

²⁶¹ *Ibid.*

²⁶² *Ibid.*, p.140-141.

²⁶³ *Ibid.*

²⁶⁴ Mezzanotte, Félix, Using Abuse of Collective Dominance in Article 102 TFEU to Fight Tacit Collusion: The Problem of Proof and Inferential Error, 2010, p.84.

3.4.3 Sufficient links

In *Irish Sugar*²⁶⁵ the General Court extended the scope of the notion to a vertical commercial relationship. The Commission alleged that there is a vertical collective dominant position when Irish Sugar held 51 per cent of the shares in SDL, which was one of its distributors. Interestingly, the Irish Sugar later acquired the rest of the shares in SDL, but the abuse of the collective dominance occurred prior the full acquisition.²⁶⁶ The Commission found that Irish Sugar and SDL collectively and individually abused their position, by, *inter alia*, rebates, selective pricing and shipping agreements.²⁶⁷ The Court concluded that if the vertically integrated companies are not integrated to the extent of constituting one and same undertaking, the notion may apply.²⁶⁸ Furthermore, the management relationship between the companies was sufficient to conclude that there was in fact a collective dominant position between the companies.²⁶⁹

Furthermore, the Court concluded that the position does not necessarily have to be abused by all undertakings in question. The Court accepted that undertakings occupying a joint dominant position may individually exploit the collective dominant position.²⁷⁰ Therefore, there is no need to establish that the abuse was collective. If one undertaking uses the collective dominant to exploit its position, liability may be imposed only to that particular undertaking.²⁷¹ The case confirms that “there is no need for a causal link between the dominant position and the abuse: the dominant position does not have to be used, so long as the conduct of a dominant firm has anticompetitive effect.”²⁷² Irish Sugar appealed the case to CJ and argued that the presence of certain connecting factors is not sufficient to demonstrate collective dominant position as the companies must also have the power to adopt a common market policy.²⁷³ Furthermore, it was claimed that General Court incorrectly conducted prospective analysis in the light of ECMR whereas it should have carried out a retrospective analysis.²⁷⁴ However, this argument was inadmissible as it was towards the analysis of the Commission and raised before General Court.²⁷⁵ Despite declaring the inadmissibility, the CJ referred to the *CMB*²⁷⁶ case but leaved out further analysis of the prerequisite for common market policy.²⁷⁷ Therefore, the

²⁶⁵ Case T-228/97 *Irish Sugar plc. v Commission* [1999] ECR II-2969. See also Case C-497/99 P *Irish Sugar v Commission* [2001] ECR I-5333.

²⁶⁶ Case IV/34.621, 35.059/F-3 *Irish Sugar plc.* [1997] OJ L258/1 paras 29-30.

²⁶⁷ *Ibid.*, paras 99-154.

²⁶⁸ Case T-228/97 *Irish Sugar plc. v Commission* [1999], para 63.

²⁶⁹ *Ibid.*, paras. 38-71.

²⁷⁰ *Ibid.*, para. 66.

²⁷¹ Monti, Giorgio, *The Scope of Collective Dominance Under Article 82 EC*, *Common Market Law Review*, 38, 2001, 131-157, p.156.

²⁷² *Ibid.* p.143-144. See also case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR-215, para. 27.

²⁷³ Case C-497/99 P *Irish Sugar v Commission* [2001], paras. 42-43.

²⁷⁴ *Ibid.*, para. 43.

²⁷⁵ *Ibid.*, paras. 44-46.

²⁷⁶ *Ibid.*, para. 46.

²⁷⁷ *Ibid.*, paras. 47-48.

interpretation suggests that the analysis of the strong links and common policy must be seen as interrelated requirements. Moreover, the case extends the jurisdiction of Commission under Article 102,²⁷⁸ but at the same time gives an opportunity to punish anticompetitive conduct by one undertaking in tight oligopoly.²⁷⁹

Furthermore, the case law provides some guidance on what cannot be considered a sufficient economic link between the undertakings. In *Price Waterhouse*²⁸⁰ the CJEU demonstrated that if a Bar of Member State does not carry economic activity it is not an undertaking within the meaning of Article 102.²⁸¹ Nor such Bar can be then categorized as a group of undertakings when registered members of the Bar are not sufficiently linked to each other to adopt same policy with the result that competition will be eliminated between them.²⁸² Moreover, when the market is not significantly concentrated, highly heterogeneous and characterized by high degree of internal competition the collective dominance position cannot be established in the absence of sufficient structural links between the undertakings.²⁸³

In addition, the CJEU has not yet found existence of a collective dominance if the national legislation is the main reason for adopting the same conduct in the market. The CJEU has held that collective dominant position does not always exist on the basis of the existence of certain national rules.²⁸⁴ In other words, it could be interpreted that not all links imposed or created by the national legislation put undertakings in a collective dominant position.²⁸⁵

Moreover, the *ex ante* and *ex post* case law provides guidance for defining the scope of collective dominance, but it still uncertain what may constitute a sufficient link for finding of a collective dominant position. Therefore, it is difficult to define whether implicit collusion as such is within the scope of collective dominance under Article 102. The case analysis suggests that there is no exact definition for a sufficient link. However, in order to address collective dominance under Article 102, it is necessary to define the existence of economic connection between the undertakings and the effect of such a connection. The case law illustrates the practical difficulties in developing solid legal test for addressing collective dominance. Therefore, it is necessary to investigate the procedural risks related to the application of the concept of collective dominance under Article 102.

²⁷⁸ Monti, Giorgio, 2001, p.143.

²⁷⁹ Monti, Giorgio, 2001, p.157.

²⁸⁰ Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

²⁸¹ *Ibid.*, para.112.

²⁸² *Ibid.*, para.113.

²⁸³ *Ibid.*, para.114.

²⁸⁴ Cases C-140/94 and 142/94 *DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chioggia* [1995] ECR I-3257 para.26.; Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* [1997] ECR I-3395, para.47.

²⁸⁵ *Ibid.*

4 Procedural risks

4.1 Probability of error

In the light of the practical difficulties, there is also a procedural risk.²⁸⁶ The burden of proving an infringement shall rest on the party or the authority alleging the infringement.²⁸⁷ According to *Impala*²⁸⁸ there is no difference in the standard of proof between a creation and pre-existing collective dominance.²⁸⁹ However, the investigation must always be carried out with particular care.²⁹⁰ When the Commission fails to prove that there is an agreement or concerted practice within the meaning of Article 101 the Commission may use the notion of a collective dominance to overcome the burden of proof in Article 101.²⁹¹ Therefore, there is a risk that the Commission may use Article 102 as to catch express collusion that it failed to prove.²⁹²

Furthermore, the uncertainty how to catch implicit collusion without damaging competitive market is questionable. In fact, it is arguable whether the problem can be solved by using case law, as the possibility of error in the assessment is considerably high.²⁹³ The high probability of error suggests that the Commission should not address abuse of collective dominance in cases where the explicit collusion cannot be established.²⁹⁴ This type of error may affect to social welfare as it could create incentive to firms that as lawful conduct will be punished anyway, it is better to at least make a profit from anti-competitive behaviour.²⁹⁵ In other words, the error may foster rather than preclude collusion.²⁹⁶ In order to avoid error and annulment of Commission's decision, the Commission has to produce additional evidence related to conduct of firms and carry out complex economic analysis, which may increase the already heavy and costly evidentiary burden.²⁹⁷ Furthermore, when the Commission makes an error in the assessment and allege that there is a link between the companies, the Commission might misdirect the investigation and use wrong remedies.²⁹⁸

²⁸⁶ Monti, Giorgio, 2007, p. 338.

²⁸⁷ Council Regulation (EC) No.1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, p.1-25, Article 2.

²⁸⁸ Case C-413/06 *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951.

²⁸⁹ *Ibid.*, para.129.

²⁹⁰ *Ibid.*

²⁹¹ Monti, Giorgio, 2007, p.338.

²⁹² *Ibid.*, See also Vitziliaiou, Lia and Constantinos Lambadarios, 2009, p.10.

²⁹³ Mezzanotte, Félix, *Using Abuse of Collective Dominance in Article 102 TFEU to Fight Tacit Collusion: The Problem of Proof and Inferential Error*, 2010, p.77.

²⁹⁴ *Ibid.*, p.102.

²⁹⁵ *Ibid.*, p.100.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

4.2 Remedies

Council Regulation 1/2003²⁹⁹ provides the Commission and the competition authorities of the Member States as well as the national courts the power to apply Article 101 and Article 102.³⁰⁰ Article 3 (1) of the Council Regulation, national competition authorities and courts must enforce Articles 101 and Article 102 when they apply national competition law to any action that may affect trade in EU within the meaning of the provisions.³⁰¹ In order to ensure the uniform application and effective enforcement of competition rules, as well as compliance with the principles of legal certainty, conflicting decisions with the Commission should be avoided.³⁰²

To ensure that provisions of the Treaty are followed, the competition authorities and Commission are able to adopt decision which brings the infringement of Article 101 and Article 102 to an end.³⁰³ The Commission may adopt a decision requiring termination of the infringement, secure it by behavioural or structural remedies and impose fines.³⁰⁴

4.2.1 Fines

The fines are normal remedy for competition infringement.³⁰⁵ According to Article 23 of the Council Regulation 1/2003 the fines may be imposed for the infringement of competition rules. In fixing the amount of the fine, the total turnover of the undertakings, the gravity and the duration of the infringement must be taken into consideration.³⁰⁶

The Council Regulation 1/2003 does not make any distinction between the fines imposed to cartel or abuse cases. It is impossible to address clear predictable pattern in the level of fines.³⁰⁷ The negative effects of an abuse *i.e.* the resulting damage to competition is less relevant factor than the object of the anti-competitive behaviour.³⁰⁸ It would be perhaps necessary to establish clear distinction between the fines imposed to cartel and abusive behaviour. One solution could be that the Commission would establish even a separate set of guidelines for each of the provisions.³⁰⁹

²⁹⁹ Council Regulation (EC) No.1/2003.

³⁰⁰ *Ibid.*, Articles 4-6.

³⁰¹ *Ibid.*, Article 3(1).

³⁰² *Ibid.*, paras. 8 and 22.

³⁰³ *Ibid.*, para 11.

³⁰⁴ *Ibid.*, Article 7 and Article 23. See also Articles 8-10 for interim measures, commitments and inapplicability.

³⁰⁵ Monti, Giorgio, 2001, p.145.

³⁰⁶ Council Regulation (EC) No.1/2003, Article 23.

³⁰⁷ Dethmers, Frances and Heleen Engelen, Fines under article 102 of the Treaty on the Functioning of the European Union, *European Competition Law Review*, Issue 2, 2011, p.90.

³⁰⁸ Dethmers, Frances and Heleen Engelen, 2011, p.90.

³⁰⁹ *Ibid.*, p.98. See also Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, OJ 2006, C 210/02.

The distinctive feature of the fines between Article 101 and Article 102 is related to the possibility for reduction or immunity from fines imposed under Article 101.³¹⁰ If there is alleged breach of Article 101, as a form of cartel, the Commission will grant immunity from fines if the undertaking is the first to submit evidence of the alleged infringement.³¹¹ Furthermore, undertaking that submits evidence which represent significant added value to the case, may benefit from reduction of fines.³¹² Such policy related to possibility for immunity or reduction of fines does not apply to cases raised on the basis of Article 102.³¹³ Therefore, there is no or at least less incentive to cooperate with the Commission in abuse cases.³¹⁴ Furthermore, appeals for reduction of fines imposed under Article 102 do not generally succeed.³¹⁵ The Commission rarely takes into account the presence of mitigating circumstances when determining the fine.³¹⁶ In contrast, the courts reduce the fines imposed under Article 101 on a regular basis.³¹⁷ Furthermore, in the absence of a clear legal basis for finding infringement, the Commission should refrain from imposing fines.³¹⁸

The problem in the oligopoly market is that the collective dominance might be just a result from the structure itself.³¹⁹ Therefore, it is uncertain how fines could really prevent the undertakings from reacting to each other's behaviour.³²⁰ When fines are imposed on the basis of Article 101 the purpose of the fine seems to be fulfilled, but for abuse of collective dominance other remedies seems to be more appropriate.³²¹

4.2.2 Termination of the infringement

According to Article 7 of the Regulation 1/2003 the Commission may impose behavioural or structural remedies which are proportionate and necessary.³²² Structural remedies are preferred in merger cases but rarely used in antitrust cases.³²³ One of the reasons for the different preference between merger control and antitrust cases is related to the time of intervention.³²⁴

³¹⁰ Commission Notice on immunity from fines and reduction of fines in cartel cases, [2002] OJ C745/3.

³¹¹ *Ibid.*, para.8.

³¹² *Ibid.*, para.20.

³¹³ Dethmers, Frances and Heleen Engelen, 2011, p.90.

³¹⁴ *Ibid.*, p.90-91.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, p.93.

³¹⁸ *Ibid.*

³¹⁹ Monti, Giorgio, 2001, p.145.

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² Council Regulation (EC) No.1/2003, Articles 4-6.

³²³ Wang, Wei, 2011, p.571.

³²⁴ *Ibid.*, p.578.

Structural remedies can only be imposed when there is no equally effective and less burdensome behavioural remedy available.³²⁵ Therefore, the structural remedy may be used only in limited circumstances.³²⁶ Furthermore, the Council Regulation 1/2003 address that

“Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.”³²⁷

This indicates that the market changes after the infringement.³²⁸ However, if undertakings in a collective dominance position act parallel in relation to pricing, the market does not change as the abuse is exploitative in nature.³²⁹ However, when the market structure itself is the core of the oligopoly problem, structural measures should be used as a remedy.³³⁰

The problem with behavioural remedy is whether the Commission is even able to enforce remedy that requires that undertakings do not respond to each other’s behaviour in the market.³³¹ In addition, such remedy might be inappropriate because it would be absurd to prohibit undertakings from acting in a parallel manner if this is a rational response to the structure of the market.³³² This would require that undertakings would behave irrationally.³³³

If the Commission uses Article 102 to tackle cases that it failed to fit within the meaning of Article 101, the competitors and the market may be harmed with unnecessary remedies.³³⁴ For example, the Commission may impose a structural remedy on a market where the result of the coordination was achieved through express collusion.³³⁵

Furthermore, the undertakings concerned may offer commitments to meet the concerns expressed by the Commission. The Commission may by decision make these commitments binding.³³⁶ The commitments offered by the parties, must be sufficient to remove the competition concerns.³³⁷ However, the commitment decision is not appropriate when fines are imposed.³³⁸ With the power to impose substantial fines for violations of the

³²⁵ Council Regulation (EC) No.1/2003, Article 7.

³²⁶ Monti, Giorgio,2007, p.336.

³²⁷ Recital 12 of the Council Regulation (EC) No.1/2003.

³²⁸ Monti, Giorgio,2007, p. 336.

³²⁹ Ibid.

³³⁰ Whish Richard and David Bailey,2012, p. 562.

³³¹ Monti, Giorgio, 2001, p.145.

³³² Whish Richard and David Bailey,2012, p. 566.

³³³ Ibid.

³³⁴ Monti, Giorgio, 2007, p. 338.

³³⁵ Ibid.

³³⁶ Council Regulation (EC) No.1/2003,Article 9.

³³⁷ Faull, Jonathan and Ali Nikpay, 2007, p.413.

³³⁸ Council Regulation (EC) No.1/2003, para., 13.

commitments, the commitment decision could combat cases that fall within the gap between Article 101 and Article 102.³³⁹

As a last resort remedy the competition authorities should consider whether the reason for competitive problems arises from the state itself *i.e.* through legislation or restrictive licensing policies.³⁴⁰ Instead of attacking oligopoly under Article 102, the competition authorities could improve the situation by regulatory approach. Regulatory approach may be possible after in-depth investigation of the market.³⁴¹ If the Commission or competition authorities cannot find appropriate remedies, there is no sense to accuse undertakings abusing their collective dominant position.³⁴² Moreover, the competition authorities should avoid any unnecessary remedies because the risks of damaging a market, that is oligopolistic but competitive, is significantly greater than the benefits of creating more competitive market.³⁴³

³³⁹ Mezzanotte, Félix, Can the Commission use Article 82EC to Combat Tacit Collusion, Centre for Competition Policy Working Paper 09-5, 2009, p.36. available at <http://www.uea.ac.uk/polopoly_fs/1.111282!ccp09-5.pdf>

³⁴⁰ Whish, Richard and David Bailey, p. 567.

³⁴¹ Ibid.

³⁴² Monti, Giorgio, 2001, p.157.

³⁴³ Monti, Giorgio, 2007, p. 338.

5 Analysis

I. Legislative definition of collective dominance

The legislative definition for abuse of collective dominance comes from Article 102 TFEU. Article 102 TFEU implies that dominant position may be held by two or more undertakings that are legally and economically independent of each other. The wording of Article 102 does not include legal test for finding collectivity, dominance or abuse. The latter two elements seem to be easier to establish than the first one *i.e.* finding of the existence of a collective dominant position.

In order to define the notion of a collective dominance it is necessary to understand the distinction between the application of Article 101 and Article 102. Both provisions may be applied to infringement by two or more undertakings. There might be an agreement or concerted practice between two undertakings that may lead to a finding of collective dominance. However, the conduct within the meaning of Article 101 does not directly imply collective dominance under Article 102. If the market structure consist of only few undertakings, with strong market power, the application of Article 102 may be possible. The application of the provisions depends also on the purpose of the intervention.

It is suggested that parallel conduct in an oligopolistic market may be caught under Article 102. This type of behaviour can be assessed in the light of economic theories, which highlights the anticompetitive effect of implicit collusion *i.e.* situations where the few undertakings can without communication behave as if they had an agreement within the meaning of Article 101. Theories outline the problem, but do not provide a single correct answer to the oligopoly problem. This suggests that the theories could be applied only by case by case basis.

II. Applicable legal test for finding collective dominance under Article 102 TFEU

The definition of collective dominance has been developed in parallel in merger and antitrust cases. The indispensable element for finding collectivity is the existence of two independent entities which are enable to behave collectively. The CJEU has used terms such as entity, collective entity, united entity and tight oligopoly to describe the collective dominance. The case analysis clarifies the interpretation of what can constitute collectivity. The current test for finding of a collective dominance does not clearly define what form of connection is required in order to allege that the companies are able to act as a collective entity. The basic requirement for the existence of collectivity is that the undertakings must be connected with sufficiently strong links, which enables them to act or present themselves as a collective entity and to adopt common policy or

conduct independently from its competitors, customers and consumers. The existence of connecting factors and same line of conduct are interdependent requirements, which together could be named as requirement of sufficient links of collectivity (SLOC). Therefore, the analysis of the strong links and common policy must be seen as a one concept.

The case analysis shows that the SLOC is normally in form of economic link. The economic links are usually links in law such as licensing agreements, liner conferences, management relationship, export agreement or other types of business relationship. If the economic links are outside of the scope of Article 101, *e.g.* because the arrangement do not have its object or effect to restrict, prevent or distort competition, such links could still be defined as SLOC, because they are links in law. Article 102 does not set requirement for explicit collusion within the meaning of Article 101 nor does it refer to a requirement for legal links. In the light of the purpose of the thesis, it is necessary to determine whether SLOC should include other than links in law.

The case analysis shows the diversity of the possibly connecting factors that may be used. In *ex ante* merger cases the CJEU has used, *inter alia*, economic, structural or contractual links, causal links, correlative factors, tight links, parallel behaviour, tight oligopoly and tacit coordination. Therefore, *ex ante* collective dominance does not require an agreement or a concerted practice within the meaning of Article 101 of the TFEU. In the *ex ante* cases, the concept of a collective dominance extend to situations where there are no actual explicit collusion between the undertaking. Merger case law has established three step procedure for a finding of tacit coordination *i.e.* so-called *Airtours*-test. The CJEU has referred to the *Airtours*-test in its collective dominance decisions under Article 102 TFEU. However, so far none of the abuse cases have been established solely on the basis of *Airtours*-test.

In *ex post* cases the CJEU has followed the approach in *ex ante* cases, but has not find collective dominance without links in law. The implicit collusion could constitute SLOC in merger cases, but so far the *ex post* cases have concentrated only on explicit collusion. As seen in cases *CMB* and *Laurent Piau* the court suggests that the links in law are not indispensable for finding collectivity. It seems that the court confirms that there is a possibility to use the *ex ante* approach in *ex post* cases. However, the links in these cases took the form of cooperation agreement and regulations. Therefore, the cases do not really confirm the *ex ante* approach for finding a collective dominant position. However, in the light of AG Fennelly's opinion in *CMB* case, it may be suggested that there is no need to define all the possible links constituting SLOC, as the end result of the links really matters.

It should be noted that when the existence of the collective dominance has been established, there is still at least one difficult step ahead *i.e.* prove the existence of anticompetitive abuse.

III. Procedural risks related to the application of the concept of collective dominance under Article 102

When there is no solid legal test for finding a collective dominant position under Article 102, the detailed investigation and economic assessment becomes more important. In *ex ante* cases the assessment is related to prediction and the likelihood of anticompetitive effect. In *ex post* cases the analysis is based on facts not predictions. According to the *Impala* case the required level of the analysis is the same for both situations. It would probably be easier to establish *ex post* collective dominance because the position actually exists whereas in *ex ante* cases the assessment is based more on probabilities. However, it is arguable whether it would be more difficult to assess implicit collusion in *ex post* cases as the Commission needs to prove that the situation actually happened, whereas in *ex ante* cases the mere likelihood of tacit coordination is required. Therefore, the implicit collusion could be in fact more difficult to prove *ex post* than *ex ante*. It would probably be easier to establish the likelihood of implicit collusion than the existence of implicit collusion. This assessment requires detailed analysis of the market, especially from the economic perspective.

It is arguable whether there is a need to apply Article 102 when the links in law are already tackled under Article 101. However, when two or more undertakings form a collective dominance the market structure might be anticompetitive. Without application of Article 102 the negative effects of the collective dominance may continue and the situation may require remedies. It is necessary to define whether the structure of the market is so formed, that as a result of the explicit collusion, the companies are able to continue their anticompetitive practices as if they had an agreement. Therefore, even if the explicit collusion is detected the market structure may require remedies to ensure a competitive market. If the structure of the market has changed as a result of the abuse, the Commission should consider structural remedies. However, if the structure has not changed due to the agreement between the companies, it is arguable whether such remedies may be imposed. When the collectivity is based on tacit coordination, structural remedies would seem to be the most appropriate way to correct the anticompetitive problem. The application of behavioural remedies seems to be more ineffective. If the conduct is a result of tacit behaviour, such behaviour would probably continue tacitly even after behavioural remedies are imposed.

The assessment of the procedural risks in the light of fines releases another problem. The fines seem to be inappropriate without establishing a real connection between the oligopolies, because the fines would not prevent or stop the infringement. When the abuse of collective dominance can be established without applying Article 101, the undertakings cannot use leniency as a gateway from the fines. When there is no possibility to get relief from the fines, except in commitment decisions, the decision of whether Article 101 applies alone or together with Article 102 is relevant for

the accused. If the both provisions are used to tackle tacit coordination undertakings would not have the possibility for similar gateway as if they would have if only Article 101 applies. Therefore, instead of finding collective dominance on the basis of implicit collusion and imposing fines, the commitments decisions or regulatory measures should be considered.

In addition, it is necessary to consider the aim of the market intervention. It is important to assess whether there are any remedies that would enhance effective competition in the market. It is necessary to investigate whether the benefits of the intervention would be greater than the procedural risks. The Commission should enhance the guidance on collective dominance under Article 102 so that the operators in oligopoly markets know how to behave properly, and thereby reduce the possible need for market intervention. This would increase the overall aim of the competition law *i.e.* to ensure effective economic competition.

IV. Conclusion

Based on the analysis of the *ex ante* merger case law, the purpose of the thesis, namely whether it is appropriate to use Article 102 TFEU, through the application of the abuse of collective dominance, against implicit collusion, should be answered affirmative. However, the analysis of the *ex post* case law and academic writings imply that more critical approach seems to be appropriate. In theory, the legal test for finding of a collective dominant position is the same for *ex ante* and *ex post* cases. In reality, such an interpretation seems to be impractical and inappropriate.

The analysis suggests that it is inappropriate to apply the *ex ante* test to *ex post* cases because of their different legal context. In order to ensure effective competition in future it is appropriate that the scope of the *ex ante* collective dominance is wide. Furthermore, the wider approach seems to be appropriate *ex ante* as the analysis is based on probabilities not on actual and concrete facts. In addition, the merging undertakings will not be fined for their merger notification. Furthermore, the wider legal test seems to be acceptable in *ex ante* cases because it could prevent the creation of anticompetitive oligopolistic markets.

In *ex post* cases the assessment of the case is based on actual infringement. Therefore, the likelihood of implicit collusion would not be adequate evidence under Article 102. It is questionable how the Commission could even prove the implicit collusion under Article 102 as the prediction of the alleged implicit collusion is not sufficient grounds for intervention. Furthermore, the uncertainties related to the appropriate remedies and suitability of the fines suggests that the *ex ante* approach should not be used in *ex post* cases. Moreover, it would be against the principle of legal certainty to apply the same approach to different legal situations.

In order to ensure legal certainty, the Commission should clarify the applicable legal test for finding of a collective dominant position under

Article 102. The analysis suggests that the Commission should develop a framework for the application of collective dominance under Article 102, clarify the legal and economic analysis carried out in case law, and set out methodology for the assessment of collective dominance and its abuse.

Hitherto, there has been no *ex post* case that confirms the application of implicit collusion under Article 102. Taking into account the increase in industrial concentration, it will be interesting to see whether Commission will tackle such case in near future.

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