The Development and Implications of "Collective Dominance" in EC Competition Law

Cattermole, Edward

2001

Citation for published version (APA):
The Development and Implications of 'Collective Dominance' in EC Competition Law

Edward Cattermole

edward.cattermole@telia.com
Abstract

The objective of this essay has been to explore why the concept of collective dominance has been developed, and to examine the implications of its use. The analysis begins with an examination of competition theory, followed by a review of developments in EC competition law. In recent years, the concept of collective dominance has been developed in order to address the lack of agreement amongst economists. The overriding impression remains one of lack of both clarity and consistency, and a call is therefore made for further clarification.

Edward Cattermole has a background in Business, European Law, and Anthropology. He has previously worked in investment banking, and is now a telecoms analyst at McKinsey & Company, focusing on IP and regulatory issues.
CFE Working paper series no. 14

The Development & Implications of 'Collective Dominance' in EC Competition Law

Introduction

The concept of 'collective dominance' has now been recognized under both A82 and the merger regulation. While the law has not technically changed, its application is affected significantly. A key finding is the lack of a commonly accepted model, highlighting a number of problematic issues. The development of the concept is traced in practice, from its early mention by the Commission, to its acceptance by the Court under A82. The need to bridge a perceived 'gap' in the Treaty concerning the scope of A81(1) is seen as significant. The development of the concept is seen as central in practice.

The thesis begins with a review of the existing framework of competition informing this application. Nonetheless, no consistent evidence is found for the use of such a framework by either the Commission or the Community Courts. The development of the concept is traced in practice, from its early mention by the Commission, to its acceptance by the Court under A82. The need to bridge a perceived 'gap' in the Treaty concerning the scope of A81(1) is seen as significant. The development of the concept is seen as central in practice.
as noted above, an attempt is made to reflect on these findings, so as to offer some guidelines for businesses. The broad approach taken in the thesis is to proceed from an examination of theory to an analysis of practice, concluded by a reflection on their relationship and interplay. The theoretical discussion draws from both economics and business, as well as from law. Core economic concepts and insights from business strategy are used.

"Collective dominance" is a legal concept with no direct equivalent in economics, but is closely related to oligopoly. Our understanding of oligopolies is informed by economic theory, and indeed this increasingly informs the law. During this chapter, therefore, the theoretical discussion is paralleled by an analysis of practice. The term "collective dominance" is commonly conceived of as a form of contest. When theorising competition among firms, some argue that "it is through the constant struggle by several enterprises to conclude a contract with the consumer that the participating enterprises mark out their respective trade margins". In a similar vein, competition has been described as "contention for superiority...[which] in the commercial world...means a striving for...custom...in the marketplace". There also appears to be some innate assumption that competition is good. In line with the "contest" analogy we can equally suggest that there should be "rules of the game". We may identify "good" and "bad" competition, as well as "too little" and "too much". In fact, the absence of competition law is in defining these parameters. In judging what is acceptable or when to intervene, common arguments draw on the broad themes of "fairness", and "efficiency". The issues...they are commonly divided into those relating to States and those relating to firms. Our concern in this essay is with the latter area since it is within this field that the concept of collective dominance is applied.

As with all areas of law, there is no universally accepted definition of "right" and "wrong", and hence prohibitions, exceptions and exemptions are essentially matters of policy choice. Nonetheless, competition law can be distinguished as an area of law by virtue of the close connection it has developed with economics. For, given the complex issues at stake, economics provides a useful framework for examination. Significantly, this association between disciplines is a longstanding one in the US, to which the "Law & Economics" movement bears clear witness. This movement has long promoted economics as a framework for interpretation and analysis in all areas of law. By contrast, there is no such established tradition in the EC, although economic insights may be considered equally valid in the European context.

The "dismal science" of economics is a broad-ranging discipline, and importantly is characterised by diversity rather than uniformity of opinion in many areas. While certain mainstream approaches can be identified, it remains the case that "different economists have different perspectives, and the same empirical facts may be interpreted in different ways, giving widely different policy recommendations on the same issues". The most basic element in the economic framework is the idea of a market, which is essentially no more than the interaction of demand and supply. Following this approach, a number of different market structures are identified, including perfect competition, monopoly, and oligopoly. However, the concept of competition can be defined in different ways, depending on the context. In many cases, competition is understood in terms of "competition among firms", where the focus is on economic theory, and the underlying assumptions are those of monopoly and perfect competition.

The Development & Implications of 'Collective Dominance' in EC Competition Law

Competition & Markets

Collected dominance is a legal concept with no universally accepted definition in the EC. While the concept is not used, similar ideas are considered by the EC, albeit in a different context. The law of competition in the EC is based on the notion of "collective dominance", which refers to a situation where a number of firms cooperate to achieve a degree of market power that is not normally associated with individual firms. The implication of this is that competition law is used to prevent such behavior, as it is seen as anti-competitive and harmful to consumers. The concept is often used in cases where there is evidence of collusion or other forms of anti-competitive behavior on the part of firms. Despite this, there is still some debate as to the precise meaning of the term and how it should be applied.
The Development & Implications of 'Collective Dominance' in EC Competition Law

petition, which are seen as the two "polar market structures" at opposite ends of a continuum. These provide vital reference points in appraising competition issues, although it's important to note that markets lie between the two extremes. The realm of imperfect competition, for example, is characterized by imperfect competition, where there are an infinite number of small suppliers. There are several other specifications, including that all firms supply a homogeneous product, which is efficient. Such markets are considered "pure" competition.

Monopoly refers to a market in which there is a single supplier. According to the theory, monopoly is deemed 'inefficient' for two reasons. Firstly, the price charged by the monopolist will be higher than marginal cost. Secondly, in long-run there can be no pressure exerting costs towards their lowest possible level, since there are no other suppliers in the market. Therefore, a common assumption is that prices tend to remain stable for long periods, and parallel behavior is witnessed on the market. This is a crucial issue, and much theory tries to explain why collusion occurs in some oligopolies and not in others. Overall, in so far as monopoly is defined in this way, collusion is generally considered desirable. Related theories include those suggesting that in some oligopolies, such as supermarkets, keen price competition is seen. Related to the notion of oligopoly is the idea that the possibility, indeed likelihood, of oligopolists colluding to form a 'concern' is considered great in comparison to the concern in other markets. This is a crucial issue, and much theory tries to explain why collusion occurs in some oligopolies and not in others. Overall, in so far as monopoly is defined in this way, collusion is generally considered desirable. Related theories include those suggesting that in some oligopolies, such as supermarkets, keen price competition is seen.
The Development & Implications of 'Collective Dominance' in EC Competition Law

Having reflected on the relevant theory, a more detailed analysis is now needed of the concept of 'collective dominance'. Evidence will be sought for an underlying competition theory of 'firms'. Firstly, evidence will be examined in an attempt to determine two issues. Firstly, the development and application of competition law in the EC has moved from the concern of the present to the concern of the future. More explicitly, a body of theory has been developed, forming an approach referred to as the 'Chicago School'. In the context of the present discussion, the critical argument is that industry structures reflect the different cost structures, and economies of scale achievable by firms. Rather than seeing structure as the determinant of firm conduct, it is seen as its result. Thus, high levels of concentration are the result of efficient behaviour. Moreover, the concept of 'collective dominance' is seen as being relevant to the determination of firm conduct. It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement.

Applying EC Competition Law

Having reflected on the relevant theory, a more detailed analysis is now warranted. Evidence will be sought for an underlying competition theory of 'firms'. Firstly, evidence will be examined in an attempt to determine two issues. Firstly, the development and application of competition law in the EC has moved from the concern of the present to the concern of the future. More explicitly, a body of theory has been developed, forming an approach referred to as the 'Chicago School'. In the context of the present discussion, the critical argument is that industry structures reflect the different cost structures, and economies of scale achievable by firms. Rather than seeing structure as the determinant of firm conduct, it is seen as its result. Thus, high levels of concentration are the result of efficient behaviour. Moreover, the concept of 'collective dominance' is seen as being relevant to the determination of firm conduct. It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement.

Implications

It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement. It is generally accepted that empirical evidence is important in determining firm conduct. It is seen as being relevant to the determination of firm conduct. It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement.

Less clear is whether widespread agreement and there are, however, some differences in the concept of 'collective dominance'. The concept of 'collective dominance' is seen as being relevant to the determination of firm conduct. It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement.

Having reflected on the relevant theory, a more detailed analysis is now warranted. Evidence will be sought for an underlying competition theory of 'firms'. Firstly, evidence will be examined in an attempt to determine two issues. Firstly, the development and application of competition law in the EC has moved from the concern of the present to the concern of the future. More explicitly, a body of theory has been developed, forming an approach referred to as the 'Chicago School'. In the context of the present discussion, the critical argument is that industry structures reflect the different cost structures, and economies of scale achievable by firms. Rather than seeing structure as the determinant of firm conduct, it is seen as its result. Thus, high levels of concentration are the result of efficient behaviour. Moreover, the concept of 'collective dominance' is seen as being relevant to the determination of firm conduct. It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement.

As a result, the likely levels of concentration are of particular relevance to the determination of firm conduct. It is generally accepted that empirical evidence lies somewhere between the two approaches, the point being that there is a lack of agreement.
The Development & Implications of ‘Collective Dominance’ in EC Competition Law

... an attempt will be made to establish the policy focus pursued. Both issues should shed light on why the concept of collective dominance has been ‘created’. In looking for an underlying theoretical framework, the key question is how competition is perceived. Drawing on the three interpretations below, no obvious, consistent approach is suggested. Indeed, the overall impression is one of inconsistency. The fact that the Court has tended to use the teleological method when interpreting the law in ‘landmark’ cases. Significantly, this impression is backed up by recent research, which has concluded after extensive analysis that “no competition theory is used as a reference model in the EC competition law.” In contrast to the US, therefore, it appears that neither the Commission nor the Community Courts follow any consistent theoretical framework. Indeed, as stated clearly in one of the earlier Commission reports, “the principle of competition, so basic to the common market, is...by no means rigid or dogmatic.”

A81(1) 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 common market.” A82 prohibits “[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it...as incompatible with the common market insofar as it may affect trade between Member States.”

A general reading of the articles, noting the stipulation in regard to ‘trade between Member States’, would suggest an obvious concern with integration from the very outset. In addition, ideas of ‘fairness’, and some form of consumer welfare are also suggested. More specifically, A82 explicitly refers to “imposing unfair purchase or selling prices or other unfair trading conditions.” A81(3) also exempts agreements on certain conditions providing that they allow “consumers a fair share of the resulting benefit”. Similarly, reference is also made to limiting production, markets or technical development “to the prejudice of consumers.” A81(3) also exempts agreements “to agreements improving the production or distribution of goods or to promoting technical or economic progress.”

Broadening the interpretation, we may also reflect on comments made from an examination of the preamble to the EEC Treaty, and also the ‘Spaak Report’. On this basis it was argued in 1965, for example, that “the repeated use of terms like economic progress, continuous expansion, harmonious development, and increased stability reveal...a recognition of the significance of enterprise growth in a larger market - that concentration is necessary for the accomplishment of the technological renewal which leads to increasing productivity and greater welfare.” While such sources must clearly be used with care, it is nonetheless of interest to bear them in mind. There appears to be no explicit definition of competition in case law. Although early mention was made of the “principle of freedom of competition” in the ‘Consten & Grundig’ case [1965], this actually concerned the distinction between intra- and inter-brand competition that arose in the case. As such, the Commission reports are used as an alternative source.

In the very first ‘Report on Competition Policy’ [1972], competition is described as “the best stimulant of economic activity since it guarantees the widest possible freedom of action to all.” This enables “enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the community.” Mention is also made of the fact that competition “encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole, and for the benefit, in particular, of the consumer.”

While the overall tone is close to ‘standard economic’ arguments, the emphasis on both employment prospects and on consumers suggests a broader agenda. At the end of the 1970’s and early 1980’s, the focus of policy switched to promoting the development of the Community’s industrial, agricultural, and nuclear sectors. These sectors were those most closely related to the Community’s economic objectives, which were to increase the Community’s competitiveness in terms of EC/EEC market power. While the ‘Spaak Report’ had suggested that competition should be focused on trade between Member States, the ‘Commission’s Report of 1973’ included provisions for the promotion of competition within the Community.

Similarly, in the early 1980’s, the “market economy, in which fair and undistorted competition is supposed to ensure that available resources are allocated to the most productive sectors” was seen as central. While, at the same time, it was stressed that competition “policy is not based on a laissez-faire model, but is designed to maintain and protect the principle of ‘workable competition’.” Fair, ‘workable competition’, balancing efficiency with social concerns, laissez-faire with interventionism, is a recurring theme. However, more recent policy has placed a strong emphasis on the ‘freedom and right of initiative of the individual economic actor’ and innovation. While the latter is certainly a laudable aim, this has led to a certain degree of self-contradiction.

In summary, although the Commission reports are used as an alternative source, there is a clear contrast between the Commission’s early reports and the later reports. The early reports, which were written by the Flemish Community Commission, were more concerned with protecting the interests of the Community as a whole. The later reports, which were written by the French Community Commission, were more concerned with protecting the interests of the individual Member States. This has led to a certain degree of self-contradiction, and has raised questions about the effectiveness of the Commission’s policy. Some argue that the Commission’s policies have been too interventionist, while others argue that they have been too laissez-faire. Whatever the case may be, it is clear that the Commission’s policy has been a subject of much debate and controversy.
The Development & Implications of 'Collective Dominance' in EC Competition Law

The process moving forward the policy concern that the 'untrammelled market forces' should not always be given a "free rein" since they can "stifle or even eliminate competition". It is therefore held that "competition carries within it the seeds of its own destruction". As a result, it is considered that an "excessive concentration of economic, financial and commercial power can produce such changes that free competition is no longer able to fulfil its role as an effective regulator of economic activity".

The direction and focus of EC competition policy has emerged more clearly over time, although an early indication was given by the 'Consten & Grundig' case [1966] which made clear that the application of competition law was not just about prohibiting 'anti-competitive' behaviour. Rather, competition law has been used to create a single market, and as such, "sails under the flag of market integration".

Integration is also central to EC law in general. In the early years, removing legal barriers to the free movement of goods were the most important tools. However, it would clearly "be of little use to abolish government restrictions...if traders in different member states were allowed to replace them by cartels, under which they agreed reciprocally to keep out of each other's home market". As a result, the competition articles have played an increasing role in promoting integration, though emphasis has varied according to the circumstances. During the 'battle' against protectionism became politically more difficult. Nonetheless, in the wake of the 'Single European Act' and also the 'Treaty on European Union', it is clear that 'market integration' was returned to centre stage.

Importantly however, a range of other goals have also been pursued. An important legal precedent in this respect was in the 'Walt Wilhelm' case [1969] where it was stated that "while the Treaty's primary object is to eliminate...the obstacles to...the community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonised development of economic activities within the whole community in accordance with A2".

Thus, during the 1970's for example, policy emphasis was placed on competition as a tool to fight inflation, considered to be a 'structural obstacle' to adaptation, and hence the creation of a common market. Similarly, the broader economic goals of promoting innovation, productivity and 'competitiveness' have gained greater focus over the last decade, arguably in response to the effects of 'globalisation'. In addition, protecting the consumer has also been a recurring policy theme, as has the 'fight' against unemployment. In relation to this objective in particular, promoting SME development has also been pursued. SME's are also valued as a source of 'innovation'. Understandably, it has been argued that pursuit of such a broad range of objectives has caused "tension" and even "conflict".

While there are potentially many examples, an important one is the problematic relationship between integration and concentration. Thus, although integration brings overall gains in efficiency, it is also likely to bring increased concentration. From the Commission's 'Survey of Concentration, Competition, & Competitiveness', conducted every year, it is evident that there has been a general trend towards increasing concentration across all industries. In addition, this trend gained significant momentum from the single market programme, and as such, "conflicts between the policies of integration and concentration, and the protection of the industries that have served up to now"

The Commission, therefore, has taken the initiative to reform existing concentration controls in order to protect the growth of intra-market competition and bring about a more widespread internal market. This has involved the introduction of new measures to prevent concentration, and has been reflected in the 'Merger Guidelines'. The European Commission has also been active in using its powers to intervene in mergers and acquisitions.

From the point of view of the individual business, the act of 'concentration' can be seen as "one of the means to master the uncertainties of business life stirred up by the competitive process". In fact, during the early years it was explicitly recognised "that the Common Market require[d] larger enterprises to achieve the advantages of mass production and resource development". Thus "greater concentration of enterprises" was generally considered "desirable". However, as the process moves forward the policy concern arises that "a wave of concentration would basically transform the European market structure into narrow or asymmetrical oligopolies, so that the process of effective competition would be greatly weakened". Similarly, the Commission remarked at the beginning of the 1980's that "competition within the Community is not only an end in itself, but is also a means to an end, namely the achievement of the objectives of the Community".

The development of economic activities within the whole Community in accordance with the Treaty of the European Community is also an important objective. In the context of this, it is necessary to ensure that the application of competition law is consistent with the objectives of the Community. It is therefore important that the Commission takes a consistent approach to the application of competition law, and that it is able to ensure that the application of competition law is consistent with the objectives of the Community.

The Commission has also been active in using its powers to intervene in mergers and acquisitions. This has involved the introduction of new measures to prevent concentration, and has been reflected in the 'Merger Guidelines'. The European Commission has also been active in using its powers to intervene in mergers and acquisitions.
The Development & Implications of 'Collective Dominance' in EC Competition Law

The Community [was] marked by an ever-increasing tendency towards oligopoly. Increasing levels of concentration may lead to dominance by a single firm. However, it may equally, and perhaps more probably, lead to a group of similarly sized firms emerging, in which case collusion rather than unitary monopolisation is perceived as the main threat. In addition, SMEs may also suffer in an environment characterised by progressively larger firms.

Somewhat paradoxically, therefore, the success of the single market has promoted greater levels of concentration, which in turn are perceived as a potential threat to its success. An explicit concern of the Commission was that the environment in the single market would facilitate the formation of 'tight oligopolies', due to concerns that "anti-competitive parallel behaviour" might ensue. As the issue of concentration illustrates, concerns develop over time, and the goals pursued similarly vary. An important observation is thus that the application of the competition law is critical in this context.

There are no explicit provisions for 'merger control' in the EC Treaty. This may well be because it is a very politically sensitive issue for Member States, among whom there has historically been a wide divergence of opinion. Nonetheless, the Commission clearly felt the need for some form of merger control at a Community level, and hence it "took steps to apply the more general provisions of competition law under the Treaty to the mergers context". Although a 'Proposal for Merger Regulation' was submitted in 1973, such regulation did not come into force until 1990. The Commission had already held that A81 did not apply to "agreements whose purpose is the acquisition of total or partial ownership of enterprises or the reorganisation of the ownership of enterprises". However, by the beginning of the 1980's, it began to take a more active role, marked particularly by the BAT/Reynolds case [1985]. Significantly, the Commission established that mergers between competitors could amount to A82 when the acquirer was already in a dominant position. As the issue of concentration illustrates, the goals pursued similarly vary. An important observation is thus that the application of the competition law is critical in this context.

The concept of collective dominance was first recognised under both A82 and the Merger Regulation. In order to gain a deeper understanding of the concept, we now turn to the decisional practice of the Commission and the jurisprudence of the Court.

Firm Behaviour

Following the distinction observed in the previous chapter between business and market structures, a similar distinction can be made between the competition articles, and the merger regulation, which broadly apply to firm behaviour and market structure respectively. For this reason, the emergence and development of collective dominance will be examined separately. As noted before, the distinction between the competition articles and the merger regulation has long been concerned about 'concentrated markets'. Where the market has long been concentrated, the 'problem' is seen as the likelihood of collusion. As identified above, increasing levels of concentration have attracted growing concern. Importantly, where concentration leads to oligopoly, the scope of the competition articles may be found wanting. Given that the concept of collective dominance is seen as the main threat, it may be identified in the emergence of a policy which facilitates the formation of 'tight oligopolies', due to concerns that "anti-competitive parallel behaviour" might ensue. The result is clearly a reduced ability or effectiveness in 'fighting' the dangers of concentration. In these circumstances, any innovation to broaden the scope of the available legal tools would seem welcome. The concept of collective dominance clearly fulfils this function, and may in this way be seen as an adaptation of the A82 concept to the circumstances of the Court. It is in this light that the collective dominance concept is clearly welcome. The concept of collective dominance is seen as the main threat, and may be identified in the emergence of a policy which facilitates the formation of 'tight oligopolies', due to concerns that "anti-competitive parallel behaviour" might ensue. The result is clearly a reduced ability or effectiveness in 'fighting' the dangers of concentration. In these circumstances, any innovation to broaden the scope of the available legal tools would seem welcome. The concept of collective dominance clearly fulfils this function, and may in this way be seen as an adaptation of the A82 concept to the circumstances of the Court.
The Development & Implications of 'Collective Dominance' in EC Competition Law

A form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-ordination between them for the risks of competition.

Active collusion is within scope, leaving the... of parallelism, as firms behave in a 'co-ordinated' way. However, it is also clearly conceivable that such behaviour may have other explanations. While rather improbable, it may be pure coincidence. Alternatively, it may be that the firms simply have very similar cost structures, and may thus react in a related, but not actively co-ordinated manner to changes in the costs of particular inputs. It would therefore be necessary to prove some form of these practices constituting elements of A81(1) and A82.

Separating anti-competitive intent from rational and intelligent behaviour is extremely difficult. As the 'Wood Pulp' [1993] and 'Soda Ash' [1989] cases emphasised, the 'line between illegal cartel behaviour and lawful intelligent adaptation to rivals' behaviour is a fine one'. This is a particular problem in the context of A81(1) given the difficulties with parallelism as evidence, since it is the collusion itself that must be proved. Under A82, however, if a firm or group of firms is in scope, it is 'merely' necessary to prove that some form of collective dominance is present. Therefore, collective dominance is the concept used to broaden the scope of A82, which covers other competition infringements.
question, the scope of Article 81(1) is more plainly limited by the heavy burden on the Commission to prove concerted practice. In the 'Suiker Unie' case [1993], the CFI accepted the possibility of collective dominance under Article 82 where the Commission alleged that economic links between the firms, the conduct was joint and not recognized by both Community Courts. Moreover, despite the seemingly 'clear, worded, and declarative' language of the Article, the CFI accepted the case. The concept has since been recognized by both Community Courts, given certain conditions. Specifically, in the 'Italian Flat Glass' case [1992], the Court stated that parallel conduct 'may not by itself be identified with a concerted practice, it may however amount to strong evidence of such practice'.

Nonetheless, despite the apparently "clear words" uttered previously, the Commission has not accepted the possibility of collective dominance under Article 81. In the 'Dyestuffs' case [1972], the Court held that a single firm's dominance could not amount to collective dominance. In the 'Alsatel' case [1989], the CFI in fact established that the concepts of 'agreement', 'concerted practice' and 'collective dominance' were distinct.

As seen above, if parallel behaviour itself is considered sufficient evidence of a concerted practice, there is a clear risk that collusion may wrongly be inferred. However, the Court has ruled that parallel conduct must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.

As the ECJ held, if this "large share of the regional market" was due to an "agreement between authorized installers to share out regional markets", it would be caught by Article 81. In this regard, the Commission's possession of information, even if lawfully obtained, does not constitute sufficient evidence of concertation. The Commission argued that the evidence showed that several independent undertakings had agreed to share out the regional market. However, the Court ruled that the evidence did not provide proof of concertation unless concertation constitutes the only plausible explanation for such conduct. The Court reiterated that the concept of 'collective dominance' is distinct from parallelism, and that parallel conduct must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.

In the 'Dyestuffs' case [1972], the Court established that while parallel conduct may not by itself be identified with a concerted practice, it may however amount to strong evidence of such practice. In the 'Sugar Cartel' decision [1973], the Court established that there can be no concerted practice if the undertakings operate independently. When the concept was next tested, in the 'Hoffman La Roche' case [1979], the Court upheld the Commission's findings that there had been no concerted practice.

To sum up, it can be said that the ECJ has developed the concept of collective dominance in a way that is consistent with the requirements of Article 81. The Court has ruled that parallel conduct must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. The concept has been applied consistently, and the Court has ruled that parallel conduct must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.

The Court has developed the concept of collective dominance in a way that is consistent with the requirements of Article 81. The Court has ruled that parallel conduct must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. The concept has been applied consistently, and the Court has ruled that parallel conduct must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.

The Court has developed the concept of collective dominance in a way that is consistent with the requirements of Article 81. The Court has ruled that parallel conduct must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. The concept has been applied consistently, and the Court has ruled that parallel conduct must be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.
It was found that, where competition in a specific market is weakened by such economic concentration that the users are forced to accept the terms and price levels imposed by the dominant position, the Commission has applied the provisions of Article 82 EC 1.

It was found that, where competition in a specific market is weakened by such economic concentration that the users are forced to accept the terms and price levels imposed by the dominant position, the Commission has applied the provisions of Article 82 EC 1.
The Development & Implications of 'Collective Dominance' in EC Competition Law

linked undertakings" was stated clearly to be "the adoption of the same conduct on the relevant market". In this regard, "connecting factors" were found to exist in the 'Irish Sugar' case, which 'showed' that the "two economic entities had the power to adopt a common market policy". The case also represented the first time collective dominance was applied to a vertical rather than horizontal relationship. Thus, it has been made clear that "two independent economic entities" may hold a "joint dominant position" if they are linked. The terminology is unfortunate, and appears to beg the question that if oligopolists are so interdependent, should they not rather be considered as a single entity? However, if this is the case, there would be no need for the concept of collective dominance.

As argued in recent doctrine, it is difficult to see the relevance of links under A82. Specifically, "where a single person or firm controls more than one company, they would be treated as enjoying any dominant positions singly" as per the 'Viho' case [1996]. Where these links are contractual, A81 would usually apply. As noted above, there is therefore usually no need to use A82. An interesting exception is clearly provided by the 'Cewal' decision [1993], referred to previously, in which the firms in question could not be prosecuted under A81(1) because they held a group exemption under A81(3). Irish Sugar also contained further detail as to the relationship between 'joint dominant position' and 'abuse'. Having clarified that "the existence of a joint dominant ... the Court laid down that "the abuse does not necessarily have to be the action of all the undertakings in question". Thus, the abuse may be either single or joint, and it is simply necessary for "abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market".

A more significant contribution has been made by the 'Gencor' case [1999], described in detail below, in which it has now been established that "links of a structural nature" were only referred to in 'Italian Flat Glass' "by way of example". Nonetheless, a key question remains as to whether "a considerably extended interpretation of ... [A82 be permitted]... simply because of the inherent difficulty of applying [A81] to oligopolistic markets". Furthermore, extending A82 to cover parallel behaviour arguably undermines the relevance of the concept of 'concerted practice' under A81(1). In particular, "it is by no means clear whether the prohibition express the appropriate preventative instrument for any market structure". The regulation's purpose and concerns are explicitly structural, applying in the first place to "significant structural changes" and their "effect on the structure of competition". Accordingly, as set down by A2(3), where a concentration would 'create or strengthen a dominant position' so that "effective competition will be impaired", application of collective dominance under the regulation therefore seems to be more firmly based on acceptance of theory of oligopolistic interdependence. This is of added significance given that the merger regulation operates on an ex ante basis, in contrast to A82 which operates ex post. It therefore involves what is essentially a form of forecasting, and correspondingly, the analytical framework used as a basis is all the more important.

Perhaps reflecting the comments made so far, the application of the merger regulation "to oligopolistic market structures" has been variously described as "contentious" and "controversial". To gain a clearer understanding, an examination of the use and definition of collective dominance under the regulation will now follow. By recognising a concept of collective dominance under the Merger regulation, its scope is significantly increased, as its prohibition is no longer... was hotly debated before the ECJ accepted it in the 'Kali & Salz' case [1998]. In particular, the wording of A2, which...
CFE Working paper series no. 14

The Development & Implications of 'Collective Dominance' in EC Competition Law

refers to a 'concentration which creates or strengthens a dominant posi-
tion' presented a greater 'problem' than that of A82 which explicitly men-
tions a 'dominant position by one or more undertakings'. On this point,
the ECJ argued that a 'textual interpretation' did not 'in itself' exclude thepossibility of the merger regulation...style of analysis", which, as noted above, had been employed "in earlier landmark competi-
tion law judgements".

An added complication is posed by 'Recital 15' of
the regulation, which states that the threshold for a finding of dominance is
a market share of 25%. Collective dominance however can involve indi-
vidual undertakings with shares below 25%.

Reflecting these issues, the advisory committee in both the 'Nestle/
Perrier' decision [1992] and the 'Mannesmann/Vallourec/Ilva' decision
[1994] were first mentioned by the Commission in the 'Varta Bosch' decision[1991]. The concept was then applied explicitly in the 'Nestle/Perrier' decision [1993]. In this instance, Nestle's voting control over the French market, the market was characterized with a dominance of Perrier. In the end it bought the majority of them but was restrained by the Court of Justice to not exercise the voting rights of Perrier.

The apparent lack of agreement, inconsistency has been observed in the application of the concept. Thus, in some cases where there is prima facie high concentration, no examination for collective dominance has been made, and in others it has been made only briefly. By contrast, in the situation of relatively low concentration case involved in the 'Kali & Salz' decision a "virtual audit of the entire sector" was carried out.

The apparent dangers of oligopoly in the context of merger control were first mentioned by the Commission in the 'Varta Bosch' decision [1991]. The concept was then applied explicitly in the 'Nestle/Perrier' decision [1993]. In this instance, Nestle's voting control over the French market, the market was characterized with a dominance of Perrier. In the end it bought the majority of them but was restrained by the Court of Justice to not exercise the voting rights of Perrier.

In the 'Kali & Salz' decision [1994], the Commission held that the new entity, 'K&S/MdK', and the French state-owned 'SCPA' would gain a collective dominant position in the market for potash products. Importantly, the Commission argued that links between 'K&S/MdK' and SCPA, and the French state-owned 'SCPA' would gain a collective dominant position in the market for potash products. Importantly, the Commission argued that links between 'K&S/MdK' and SCPA, such as the Commission argued that links between 'K&S/MdK' and SCPA, such as the Commission argued that links between 'K&S/MdK' and SCPA, such as the Commission argued that links between 'K&S/MdK' and SCPA, such as the Commission argued that links between 'K&S/MdK' and SCPA, such as the Commission argued that links between 'K&S/MdK' and SCPA.
ened" may result from either "the existence of economic links" or from "the existence of structural links". In addition, they would have "the relationship of interdependence existing between the parties to a tight oligopoly". The substantive element of collective dominance was then defined as "the existence of structural links" and includes "the relationship of interdependence between the parties to a tight oligopoly". The condition for the merger to proceed in the form of a joint venture would result in a dominant position...which might or might not be controlled by means of Articles [81] and/or [82]...and the alteration to the structure of the undertakings and of the market." The Court argued that this would "allow a duopolistic structure...to be created...by means of common policy on the market." This may be possible, "in particular because of decisions giving rise to a common policy on the market." This may be possible, "in particular because of decisions giving rise to a common policy on the market." This may be possible, "in particular because of decisions giving rise to a common policy on the market."
The Development & Implications of 'Collective Dominance' in EC Competition Law

"market structures of an oligopolistic kind". In the latter case, this is because of the possibility that a realisation of 'common interests' could "in particular" lead to firms increasing prices "without having to enter into an agreement or resort to a concerted practice". As the case made clear then, the focus of the merger regulation is on whether a concentration will increase the likelihood of tacit collusion, through its effect on the feasibility of co-operation.

Less positively, the 'Gencor' case also highlighted the issue of timing, as there are no binding limits for appeals. Thus while the original decision was being appealed, the target company was actually sold to another buyer, and cleared on the condition that the buyer decrease their shareholding.

Despite this issue, the continued 'vitality' of the concept is clear from its ongoing use by the Commission, most recently in the 'Airtours/First Choice' decision [1999]. In this instance, Airtours proposed to acquire "the whole of the equity of First Choice". As the Commission put it, their "activities overlapped mainly in the supply of leisure services to customers in the United Kingdom and Ireland". However, the concentration was blocked as it was believed it would "lead to the creation of a dominant market position in short-haul package holidays in the part, collectively, of Airtours/First Choice and the two other leading tour operators - Thomson Travel Group plc and the Thomas Cook Group Limited".

Generally, the Commission believed that "the substantial concentration in market structure, the resulting increase in its already considerable transparency, and the weakened ability of the smaller tour operators and of potential entrants to compete...[would]...make it rational for the three major players that would remain after the merger to avoid or reduce competition between them, in particular by constraining overall capacity".

Airtours itself argued that collective dominance "could be thought of as a cartel, but without an explicit cartel agreement, cartel meetings etc.". However, citing the 'Gencor' case, the Commission argued that "active collusive conduct of any kind is not a prerequisite for collective dominance to occur. It is sufficient that adaptation to market conditions causes an anti-competitive market outcome".

In addition, it was held that it is "not necessary...for the oligopolists always to behave as if there were one or more explicit agreements". Between them, it is sufficient if the market structure and the market conditions are such that it is rational for them to act in ways that substantially reduce competition between them.

Evidently, the Commission made much reference to the 'Gencor' case [1999], however comments have expressed doubt as to the degree of comparability. Specifically, in the 'Gencor' case, the merger would have given two companies control of the entire market for a simple commodity. By contrast, the Airtours/First Choice concentration would have given three companies a position of 'dominance' on a market for a "more complex service".

The decision has been appealed, and the case is thus likely to provide further welcome clarification.

Concluding Remarks

Pandl, and the case is thus likely to provide further welcome clarification. On a number of "market structure, and therefore competition size, than those with fewer firms...\[and...\]the concentration effect of each firm's actions is greater in oligopolistic markets. By contrast, the potential for a cartel to occur is greater in the case of a monopoly or a duopoly, where firms have relatively more market power."

The study began with an examination of competition and the relevant economic theory in an attempt to better understand why competition is necessary, or perfect competition. Nonetheless, oligopoly represents a large proportion of 'real' markets. This is of obvious importance in that the concept of 'collective dominance' can be broadly identified with oligopolies. The main issue with oligopoly was identified as the threat that oligopolists may collude, and the tendency towards tacit collusion.

It was also noted that oligopoly is in part defined with reference to the key models of monopoly and perfect competition. These models are particularly important since their relationship forms the basis for a concern with increasing levels of concentration, and the relationship between levels of concentration and the competition effect of firms. In particular, it was noted that oligopolists have the potential to increase market transparency and reduce competition between them.

The study began with an examination of competition and the relevant economic theory in an attempt to better understand why competition is necessary, or perfect competition. Nonetheless, oligopoly represents a large proportion of 'real' markets. This is of obvious importance in that the concept of 'collective dominance' can be broadly identified with oligopolies. The main issue with oligopoly was identified as the threat that oligopolists may collude, and the tendency towards tacit collusion.
explaining the emergence of the concept of collective dominance. The classic 'Harvard-Chicago' debate was then examined, highlighting the point that increasing levels of concentration have also been argued as a sign of efficiency, as 'competitive' firms compete away less 'competitive' ones. During the discussion, collusion theory was also considered, arguing that there are no 'magic numbers' or simple 'checklists'. Interaction, and hence behaviour is clearly the unknown variable.

Moving on from the theoretical discussion and examination of policy, the analysis then turned to collective dominance in practice, looking at the concept under A82 and under the 'Merger Regulation'. As became clear, there is a crucial difference in that collective dominance under A82 is a necessary, but not sufficient condition, since A82 can come into play in situations where an 'abuse' does not have to be shown, merely its likelihood. As a result, a greater number of activities are sanctioned under the 'Merger Regulation', especially where crossing borders is concerned. As the analysis showed, the availability of collective dominance extends the scope of A82 and, even more so, of the merger regulation, since in this context 'abuse' does not actually have to be shown, merely its likelihood. As a result, a greater number of activities are sanctioned under the 'Merger Regulation', especially where crossing borders is concerned.

As the earlier discussion indicated, concerns with concentration and the collusive behaviour that is suspected as a corollary, translate in practice into an 'anti-cartel' policy of some form. However, as was seen, there is no single, all-embracing provision in EC law that tackles cartels, although it was debated for some time whether A81(1) might not be used for this purpose. Accordingly, it was seen that the emergence of collective dominance under A82 cannot be seen in isolation, but must be considered in the context of the entire EC competition policy framework, including the 'Wood Pulp' case. As one commentator wrote prior to the Alsatel judgement, 'extending A82 to cover parallel behaviour would undermine the system of competition rules by rendering the concept of a concerted practice virtually redundant'.

A further issue, related to parallel behaviour, and which also featured prominently in the 'Wood Pulp' case, concerns the approach taken towards 'rational' firm behaviour. In this case, it was argued that there was no evidence to support the claim that the firms acted 'rationally' and that their actions were therefore excusable under A81(1). It was argued that the firms acted in a 'concerted fashion' and that the concept of collective dominance should be extended to cover this type of behaviour. This issue has not been directly confronted under A82, but in so far as setting the stage for the 'Gencor/Lonrho' decision, upheld by the CFI, collective dominance can be used to stop activities that are considered to be anti-competitive.

Overall, perhaps the most striking discovery of this piece has been the lack of any clear pattern. Correspondingly, there appears to be much confusion over the definition of collective dominance, and a failure to distinguish between the various concepts. In this context, it appears that the concept of collective dominance is not well understood, and that the terminology is not always clear. As a result, there is a lack of specificity and clarity in the way in which collective dominance is used. The lack of a clear definition of collective dominance makes it difficult to understand how to avoid being 'caught' by it.

Clearly under A82, it is 'abuse' that is the target rather than collective dominance itself. Nonetheless, collective dominance under A82 appears to be more about catching what would traditionally be termed cartels, that slip through the net of A81(1). However, advising firms to avoid cartels is not spectacularly illuminating. Regarding mergers, the Commission has pointed to a number of 'market characteristics' which are seen to make the market conducive to 'concentrated' behaviour. However, defining firms as "concentrated" in terms of market power is seen to be an important factor in determining whether a concerted practice is likely to be considered 'abuse'.
The Development & Implications of 'Collective Dominance' in EC Competition Law

229 In their most recent mention, they were listed as "product homogeneity, low demand growth, low price sensitivity of demand, similar cost structures of the main suppliers, high market transparency, extensive commercial links between the major suppliers, substantial entry barriers and insignificant buyer power (consumers)."

230 Where it is considered that a merger would reinforce some of these characteristics, collective dominance may be found, though the ... conduct most" are those "in which two, three or four suppliers each hold approximately the same market share, for example two suppliers each holding 40% of the market, three suppliers each holding between 25% and 30% of the market, or four suppliers each holding approximately 25% of the market".

231 Overall, the issues raised by collective dominance bear more generally on the topical question of role of economic analysis in EC competition law. From the examination above, it can be said that while the CFI and other tribunals have made some progress in this area, there is still much to be desired. In particular, the use of collusion theory continues to lag behind other areas of competition law, and it appears that the 'checklists' have yet to be fully abandoned. While issues such as 'structural links' have now been 'solved' by recent case law, the use of collusion theory shows room for improvement. In the 'Gencor' case [1999], for example, the CFI emphasised that the market would increase in concentration, making collusion more feasible to initiate, but did not look at how easy it would have been to sustain.

232 As touched on previously, a fundamental problem may lie in the interaction of economic and legal analysis. For if the full complexity of the former is fully understood by the latter, it would be desirable. However, a more explicit theoretical grounding would be valuable, and in this regard some form of notice would be welcomed. Indeed, after the analysis above, it is perhaps not surprising that Mr Monti has recognised "the need to spell out in more detail his thinking in this area".

233 What is more, although further case law should also continue to improve our understanding of collective dominance, it is likely to remain one of the most significant innovation[s] in antitrust for many years.

Cases & Decisions

Établissements Consten S.à.R.L. & Grundig-Verkaufs-GmbH v Commission (56 & 58/64) [1966] 'Consten & Grundig'

Wilhelm et al. v. Bundeskartellamt (14/68) [1969] 'Walt Wilhelm'

Imperial Chemical Industries Ltd. v. Commission (48, 49, 51-7/69) [1972] 'Dye-stuffs'


Coöperatieve vereniging 'Suiker Unie' UA v. Commission (40-8, 50, 54-6, 111 & 113-4/73) [1975] 'Sugar' or 'Suiker Unie'

United Brands Company et al v. Commission (27/76) [1978] 'Chiquita Bananas'

Hoffman LaRoche & Co. AG v. Commission (85/76) [1979] 'Vitamins'


British American Tobacco Company Ltd. et al. v. Commission (142 & 156/84) [1985] 'Philip Morris' or 'BAT/Reynolds'


Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) v. SA Novasam (247/86) [1989] 'Alsatel'

SA Hercules Chemicals NV v. Commission (T-7/89) [1991] 'Polypropylene'

Società Italiano Vetro SpA v. Commission (T-68 & 77-8/89) [1992] 'Italian Flat Glass' or 'SIV'

Ahlström Osakeyhtiö & Others v. Commission (C-89/85, C-104/85, C-114/85, C-116-7/85 & C-125-9/85) [1993] 'Wood Pulp'


Viho Europe BV v. Commission (C-73/95) [1996] 'Viho'


Compagnie Maritime Belge SA v. Commission (C-395 & 396/96) [2000]
The Development & Implications of 'Collective Dominance' in EC Competition Law

Decisions & Appeals


'Verata Bosch' Decision IV/M.012 [1991] 268

'Alcatel/AEG Kabel' Decision [1991] 269

'Nestlé/Perrier' Decision IV/M.190 [1992] 270


'Mannesman/Vallourec/Ilva' Decision IV/M.315 [1994]


'Airtours/First Choice' Decision IV/M.1524 [1999] Appeal pending

Endnotes

1 Where necessary, the Court of Justice and Court of First Instance will be referred to as the ECJ and CFI.


5 As may arise in cases of 'price fixing' for example.

6 As in the case of 'dumping'; Traditionally defined as "price discrimination between national markets"; Vermlust, E. (1984), p.104; In addition, from the perspective of national or regional welfare, arguments ... allow 'domestic' companies to build up sales 'margin' so as to better compete abroad; Molle, W. (1994), p.362.

7 As one commentator argues therefore, "the basis of competition policy is one of political choice"; Rodger, (1994), p.25.


10 Reflecting this observation, it has also been suggested that "economists have never been wholly satisfied with any definition of their subject"; Bannock, et al. (1992), p.130.


15 Not used in the legal sense.


22 Not used in the legal sense.

The Development & Implications of 'Collective Dominance' in EC Competition Law

29 ibid., pp.423-4.
31 Consolidated Version of the Treaty Establishing the European Community, Part Three, Title VI, Chapter 1, Section 1 - 'Rules applying to undertakings', p.70.
32 ibid., p.71.
33 Author's emphasis.
34 'Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères', Secretariat of the Intergovernmental Conference, Brussels, 21/04/56.
36 Issue 2, Grounds, p.342.
37 Produced by the Commission, at the request of the European Parliament in 1971.
38 Commission of the European Communities, (1972), p.11.
39 ibid., p.12.
40 This is later equated with 'equity'. Commission of the European Communities, (1980), p.10.
42 ibid.
43 Commission of the European Community, (1986), p.11; The previous year "dynamic innovative competition, led by entrepreneurs" was also invoked. We might note that 'entrepreneur' often appears to equate with 'SME'.
44 Commission of the European Community, (1992), p.11; In more recent years still, there has been growing discussion of the link between competition and competitiveness, particularly in an era of 'globalisation'; Commission of the European Community, (1995), p.15.
50 Consten & Grundig Decision 64/566/EEC [1964], Appealed in Consten & Grundig v. Commission (56 & 58/64) [1966], 13/07/66, ECR 299.
51 In this respect it has been noted that competition in the EC is "not an end in itself"; Carellos, P. & Silker, H. (1970a), p.5.
The Development & Implications of 'Collective Dominance' in EC Competition Law

A tight oligopoly is further narrowed by mergers between companies in the same geographic markets.

As an example of this adaptation, A81(3) was used as a support to industrial policy, by authorising agreements to reduce what was considered to be 'structural overcapacity' in certain industries, such as steel...the concept of 'crisis cartels' (based on the German law concept of 'strukturkrisenkartel') during the late 1970's can also be seen as evidence of this process of adaptation; Sharpe, T. (1980), p.76; The prevailing situation of shortage was such that "a dominant position...[could]...be provoked...in which all customers become dependent on their suppliers and in which there is no more competition between suppliers"; Steindorff, E. (1978), p.35.


Wyatt & Dashwood, op.cit., p.495. See also Weatherill & Beaumont, op.cit., p.806.


Case 6/72; Continental Can itself actually argued that the treaty drafters had not intended to cover merger control. The Advocate General agreed, but the Court begged to differ. (Brown, op.cit., p.351).

In principle, this was a big step forward, but in practice A82 is not well suited to merger control, permitting, for instance "only an unstructured calculation of the costs and benefits of the merger through the application of the vague notion of 'abuse'"; Weatherill & Beaumont, op.cit., p.807; Furthermore, A82 is only applicable where dominance exists, which may be particularly problematic in oligopoly situations, and creates commercial uncertainty, which is compounded by...is assumed that the reader is familiar with the details of the Continental Can case as it has been so widely commented on.


Case 142 & 156/84; See Broms, (1991), p.5.

Judgement, paragraph 37.

As laid down by the Court, this was "in particular" (the list may therefore not be exhaustive) where:

1. The acquiring company gains "legal or de facto control" over the "commercial conduct" of the other.
2. The agreement provides for co-operation between the companies.
5. A structure is created which is likely to be used for restricting competition.
The Development & Implications of 'Collective Dominance' in EC Competition Law

The Development & Implications of 'Collective Dominance' in EC Competition Law

98 ECR 1942; cited in Hildebrand, (1999), p.34; A key aim of 'cartel prohibi-

99 Hercules v. Commission (T-7/89) [1991].

100 Judgement, para. 66.


102 Suiker Unie v. Commission (40-8, 50, 54-6, 111 & 113-4/73) [1975] 'Sugar'; The Court also held that even communicating price rises to customers constituted 'indirect contact' with competitors; Judgement, para 64.


106 Judgement, para. 71; It is worth noting that a team of 'economic experts' was retained to advise the Court on this issue; For discussion, see Alese, F. (1999), p. 379; Hildebrand, D. (1999), p.216.

107 Judgement, para 66.

108 Judgement, para. 38.

109 See Judgement, para 102.

110 Judgement, para 71.

111 Wood Pulp, Judgement, para. 71.
The Development & Implications of 'Collective Dominance' in EC Competition Law

150 (C-73/95).


152 (93/82) 23/12/92, OJ 1993, L34/20; Appealed in Compagnie Maritime Belge v. Commission (T24, 26 & 28/93) [1996], 08/10/96, 4 CMLR 273; Appealed in (C-395/96) [1998],

153 Para 50.

154 Judgement, para. 66.

155 Judgement, para. 273.


164 IV/M.190; 92/553 EEC, 05/12/92.


166 Joined cases C-68/94 and C-30/95. [1998], 31/02/98.


169 92/553/EEC; IV/M.120, 22/07/92, OJ 1992, L356/1; The concentration was approved on certain conditions.

170 Judgement, para. 57.

171 Judgement, para. 92.

172 Judgement, para. 108.


175 IV/M.358.

176 IP/98/454.

177 Ysewyn, J. & Caffara, C. (1998), p.471; In the authors' view, this reflects the "present uncertainty of the Commission as to what [collective] dominance really means".

178 France & Others v. Commission (C-68/94 & 30/95) [1998], ECR I-1375; Appealing the Kali-Salz Decision IV/M.308 [1994,]

179 Judgement, para 14.


181 Judgement, para 221.

182 Operating in Canada.

183 Judgement, para 227.

184 (T-102/96), 25/03/99.

185 IV/M.619 [1996]; 97/26/EC, 24/04/96.


187 Judgement, para. 5; Implats was to have sole control of Eastplats and Westplats, and was itself to be held "32% by Gencor, 32% by Lonrho and 36% by the public".

188 The market was also deemed to be highly transparent; ibid. 

189 The market was also deemed to be highly transparent; ibid. 

190 The market was also deemed to be highly transparent; ibid. 

191 Judgement, para. 163.


193 Judgement, para. 170.

194 Judgement, para. 179.

195 Judgement, para. 188; The "change in the parties' financial interests" was seen as important.

196 Judgement, para. 179.

197 Judgement, para. 188; The "change in the parties' financial interests" was seen as important.

198 ie. "[C]omprising, Gencor and Lonrho, on the one hand, and Implats/LDP, and Amplats. Significantly, this had been the argument of the applicant." ibid.

199 Judgement, para 94.

200 ie. Implats/LDP, and Amplats. Significantly, this had been the argument of the applicant; ibid.
The Development & Implications of 'Collective Dominance' in EC Competition Law

Judgement, para 273.


Judgement, para 274.

Judgement, para 276; For discussion, see eg. Korah, V. (1999), p.337.

Such as cutting prices, to try and increase market share.

ibid.

ibid.


para 2.

para 4.

para 51

Referred to as the 'fringe'; para 171.

para 56.

para 52.

para 53.

para 54.


para 53.


Either because of problems with proof, or because of exemption under A81(3).

The Commission notes, “the characteristics listed are substantially those employed in previous Commission decisions in Merger Regulation cases where oligopoly (collective dominance) was an issue (Gencor, Airtours/First Choice decisions [1999], para 87).

The Commission notes, “the characteristics listed are substantially those employed in previous Commission decisions in Merger Regulation cases where oligopoly (collective dominance) was an issue (Gencor, Airtours/First Choice decisions [1999], para 87).


ibid.

ibid.

As the Commission notes, "the characteristics listed are substantially those employed in previous Commission decisions in Merger Regulation cases where oligopoly ('collective dominance') was an issue; see Gencor/Lonrho, cited in footnote 41, and Commission Decision 1999/152/EC in Case IV/M. 1016, Price Waterhouse/Coopers & Lybrand, OJ L 50, 26.2.1999, p.27; ibid., footnote 63.

'Gencor' [1999], Judgement, para 134.


13/07/66, ECR 299.

ECR 215.

ECR II-1711.

ECR II-1017.

ECR II-1171.

ECR 298.

ECR 88.

ECR 185.

ECR 619.

ECR 359.

ECR 1216.

ECR 3461.

ECR II-1711.

ECR II-1017.

ECR II-1171.

ECR 298.

ECR 88.

ECR 185.

ECR 359.

ECR 1216.

ECR 3461.

ECR II-1711.

ECR II-1017.

ECR II-1171.

ECR 298.

ECR 88.

ECR 185.

ECR 359.

ECR 1216.

ECR 3461.

ECR II-1711.

ECR II-1017.

ECR II-1171.

ECR 298.

ECR 88.

ECR 185.

ECR 359.

ECR 1216.

ECR 3461.
Articles & Speeches


Bibliography

The Development of 'Collective Dominance' in EC Competition Law

Bibliography


books

Agrawal, J. (1994) 'The new European Union approach to mergers and market
integration', in European Competition Law Review, 15/1, pp.32-44.


Akerlof, G. & Yellen, J. (1986) 'Liquidity and aggregate economic activity', in

law on the global dissemination of new products' in Technology & Culture, 26,
pp.73-96.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Albrecht, M. (1989) 'Economic policy and industrial growth in Europe', in
Economics of the European Community: Theory, practice, policy; 2nd. Edn.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.

Ethernet in the European community', in Marketing Intelligence & Planning, 11,
pp.6-15.