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Collective Dominance Under the EC Merger Regulation

- an Analysis of Commission Decisions

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1 INTRODUCTION	4
2 ECONOMIC THEORY	6
2.1 INTRODUCTION.....	6
2.2 PERFECT COMPETITION.....	6
2.3 MONOPOLY.....	7
2.4 OLIGOPOLY.....	7
2.4.1 <i>Competitive Problem of Oligopolies</i>	9
2.4.2 <i>Do All Oligopolies Distort Competition?</i>	10
2.4.3 <i>Conflict of Interest</i>	11
2.4.4 <i>Conclusion on Oligopoly</i>	12
3 OLIGOPOLY CONTROL UNDER THE EC MERGER REGULATION	12
3.1 INTRODUCTION.....	12
3.2 DEVELOPMENT OF THE DOCTRINE OF COLLECTIVE DOMINANCE.....	14
3.2.1 <i>The Oligopoly Blind Spot</i>	15
3.2.2 <i>Awareness of Collective Dominance</i>	16
3.2.3 <i>Nestlé/Perrier – Application of the Doctrine of Collective Dominance</i>	18
3.2.4 <i>The Kali & Salz Judgment of the European Court of Justice</i>	21
3.2.5 <i>The Gencor Judgment of the Court of First Instance</i>	23
4 THE ANALYSIS OF COLLECTIVE DOMINANCE	23
5 THE CHECKLIST	26
5.1 INTERNAL COMPETITION BETWEEN OLIGOPOLISTS.....	26
5.1.1 <i>Market Concentration</i>	26
5.1.1.1 Multi-Firm Parallel Behaviour.....	28
5.1.2 <i>Distribution of Market Shares</i>	29
5.1.3 <i>Stability of Market Shares</i>	31
5.1.4 <i>Increase of Market Concentration</i>	32
5.1.4.1 Removal of a Firm in Quantitative Terms.....	32
5.1.4.2 Removal of a Firm in Qualitative Terms.....	33
5.1.5 <i>Market Transparency</i>	35
5.1.6 <i>Similar Cost Structures</i>	37
5.1.7 <i>Vertical Integration</i>	39
5.1.8 <i>Excess Capacity</i>	41
5.1.8.1 Destabilising Effect.....	41
5.1.8.2 Stabilising Effect.....	42
5.1.9 <i>Links Between Suppliers</i>	43
5.1.9.1 Harmless Links.....	45
5.1.9.2 Harmful Links.....	45
5.1.9.3 Links on a Third Market.....	46
5.1.10 <i>Multi-Market Contacts</i>	46
5.1.11 <i>Product Homogeneity</i>	47
5.1.12 <i>Elasticity of Demand</i>	50
5.1.13 <i>Stagnant Demand</i>	50
5.1.14 <i>Past Behaviour</i>	51
5.2 COUNTERVAILING POWER OF COMPETITORS AND CUSTOMERS.....	52
5.2.1 <i>Actual and Potential Competition</i>	53
5.2.1.1 Actual Competition.....	53

5.2.1.2 Potential Competition.....	54
5.2.2 <i>Purchasing Power of Customers</i>	56
6 DISCUSSION ON GUIDELINES	58
6.1 REQUIREMENT FOR GUIDELINES.....	58
6.2 LEGAL INSTRUMENT FOR GUIDELINES.....	62
6.3 CONTENT OF A GUIDANCE NOTICE.....	63
6.3.1 <i>Concentration Ratios</i>	63
6.3.2 <i>Punishment Mechanism</i>	64
7 CONCLUSION.....	66
BIBLIOGRAPHY	70

1 Introduction

The EC Merger Regulation¹ ('Regulation') entered into force 21 September 1990. Thus, the Commission was empowered to control concentrations with 'community dimension', i.e. concentrations that reach the turnover thresholds set out in Article 1. Under Article 2(3) of the Regulation, a concentration that creates or strengthens a dominant position with the result that effective competition is significantly impeded within the common market or a substantial part of it is prohibited.

The control of concentrations is based on the concept of dominance and the wording in Article 2(3) refers to 'a concentration which creates or strengthens a dominant position'. Although the Regulation contains no definition of 'dominant position' there was never any doubt that single dominance was included in the definition and thus, allowing the Commission to prohibit a concentration that would have given the parties to the concentration a dominant position on the market. However, for more than two years after the entry into force of the Regulation it was not clear whether collective dominance² was embraced by Article 2(3). Collective dominance refers to a situation where the parties to the concentration together with one or more third parties collectively dominate a market. This situation arises on certain oligopolistic markets on which the structure and conditions are such that the oligopolists simply through accommodation of each other's behaviour are able to exert collective dominance vis-à-vis their competitors and customers³.

In 1992 the Commission, in its examination of a concentration under the Regulation, decided to include oligopolistic markets under the enforcement of the Regulation, i.e. a concentration could be prohibited if it resulted in the creation or strengthening of collective dominance⁴. The outcome of the assessment of the concentration was affected by the fact that the parties to the concentration together with another third supplier would have been able to collectively dominate the market post concentration. By this decision the Commission had made clear its jurisdiction and intention to prohibit concentrations

¹ Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1990], O.J. L257/13, as amended by Council Regulation 1310/97, [1997], O.J. L180/1.

² The Commission uses the term interchangeably with joint dominance and occasionally also with oligopolistic dominance.

³ See below point 2.4.

⁴ Case No IV/M.190-Nestlé/Perrier of 22.07.1992, see below point 3.2.3.

that resulted in highly concentrated market structures without a clear single market leader but, nevertheless, had negative effects on competition. In March 1998 the European Court of Justice ('ECJ') delivered a judgment⁵ in which the Commission's interpretation of the applicability of the Regulation to collective dominance was confirmed. One year later, in March 1999, the Court of First Instance ('CFI') reconfirmed this applicability of the Regulation⁶.

The doctrine of collective dominance has been developed by the Commission through case law and increasingly defined by praxis in a 'learning-by-doing-process'. It is recognised that the Commission has developed an established approach to the oligopoly issue. However, regardless requirements from industry and practitioners guidelines have not yet been issued⁷. Since the above-mentioned judgment of the ECJ, the Commission initiated a review of its approach to collective dominance⁸. Thus, the Commission is nevertheless aware of the need to make its approach to collective dominance more clear. The need for a review is also recognised as needed by factors of more general nature such as the ongoing globalisation of competition and the trend towards mega mergers, i.e. concentrations between competitors in a priori highly concentrated markets⁹.

This thesis aims at analysing the present approach of the Commission to collective dominance and whether there is a need for guidelines on the assessment of oligopolies under the Regulation. The issue of guidelines raises two questions: first, which is the most suitable legal instrument for guidelines and second, what should be their content. Before focusing on these issues, a brief outline of economic theory and the development of the doctrine of collective dominance will be given.

This thesis does not deal with the definition of a relevant market nor with undertakings or obligations of the parties to break up collective dominance. Neither does it deal with the relationship between collective dominance under the Regulation and under Article 82 of the EC Treaty.

⁵ Joined Cases C-68/94 and C-30/95 – French Republic and others v. Commission of 31 March 1998, [1998] ECR I-1375, see below point 3.2.4.

⁶ Case T-102/96 Gencor v. Commission of 25 March 1999, see below point 3.2.5.
See below point 6

⁷ XXVIIIth Report on Competition Policy (1998), p. 66.

2 Economic Theory

2.1 Introduction

For an understanding of the Commission's analysis of collective dominance economic theory is of importance for two reasons. First, it explains why there is a need to control certain oligopolies whose members are able to collectively dominate a market. Thus, it explains the problem caused by such oligopolies to competition. Second, it places the appraisal criteria applied by the Commission in its analysis of collective dominance in their context¹⁰

There are many theories on different market structures in economic theory. For an understanding of why some oligopolies cause a problem to competition the following three markets structures will be examined: perfect competition, monopoly and oligopoly. On the one range is the market with perfect competition and on the other range is the monopoly on which there is no competition at all. In between these two extremes there is the oligopolistic market structure which, depending on the closeness to either outer range, can have varying degrees of competition between the suppliers. When there are only two firms in the market it is a duopoly.

2.2 Perfect Competition

A market with perfect competition is characterised by the presence of a large number of suppliers and no or low barriers to entry. Due to the large number of suppliers no firm has power to influence the price on the market. Instead, each firm has to take the price as it is decided according to the conditions of demand and supply. Further, individual behaviour in the form of a competitive action of one firm does not have any influence on the behaviour and decision-making of the others. For instance, if one firm were to lower its price this would not have any influence on the price or sales possibilities of the other firms. In short, there is no interdependence between firms a market with perfect competition.

¹⁰ Competition Policy Newsletter 1998 Number 3 October, pp. 33-34.

¹¹ Juan F. Briones Alonso, Economic Assessment of Oligopolies Under the Community Merger Control Regulation, [1993] ECLR, p. 118.

If the number of suppliers would not be large enough to cover demand this would result in supra-competitive prices and profits on the market. However, since such prices and profits indicate that demand and supply are not in balance, i.e. there is a shortage in supply, the market situation would attract new firms to enter the market in order to receive a share of the profits. Consequently, as there are no barriers to entry, firms would enter the market until demand and supply are in balance and the levels of price and profit have decreased to a competitive level.

Thus, in a market with perfect competition entry and exit of firms work perfectly, which automatically leads to economic efficiency. The competitive environment forces firms to work efficiently in terms of production and consequently, there is no waste of raw material. In addition, balanced supply and demand price keep prices at a competitive level. This is the optimal market structure which produces ideal results¹¹.

2.3 Monopoly

A monopoly is a market structure on which there is only one producer, the monopolist. High entry barriers and few or no substitutes to the product protect the monopolist from meeting competition. Thus, contrarily from the market with perfect competition, the monopolist does not have to take the price from the market but instead, can raise and maintain the price at a supra competitive level.

The non-competitive market structure gives the monopolist no incentive to invest in innovation or to improve production techniques and decrease costs. The inefficient production is a waste of raw material. Moreover, the monopolistic market structure is detriment for consumer welfare as the price is at a supra competitive level and product choice is limited. Thus, monopoly leads to economic inefficiency and higher prices.

2.4 Oligopoly

The oligopolistic market structure is found between perfect competition and monopoly. An oligopolistic market structure is characterised by the presence of a few firms each of which has a comparably large share of the market however, none of which is dominant

¹¹ Doris Hildebrand. The Role of Economic Analysis in the EC Competition Rules. p. 142.

alone. The market share of each oligopolist is nevertheless large enough to allow the behaviour of one of them to have a noticeable impact on the other oligopolists' competitive positions. This phenomenon, that the firms are interdependent, is the key feature of an oligopoly and referred to as oligopolistic interdependence.

The interdependence has the result of making the decision on price and output of each firm to a more or less extent dependent on the expected behaviour of the other oligopolists. This results in the fact that when a firm is planning its strategic behaviour on the market it has to take into account, not only its own economic situation, but also the situation and behaviour of the other firms.

Oligopolistic interdependence can be explained by the following two scenarios. In the first scenario it is shown that if one firm, as part of a strategy to increase its market share and profits, were to lower its price this would result in a perceptible change in the sales possibilities of the other firms and thus affect their competitive positions. Customers as well as suppliers would detect the initial price reduction. The former ones would swift to the supplier offering less expensive products, whereas the latter ones would have to react and adapt themselves to the new situation in order not to lose market shares and lower their prices to the new level. The effect of the adaptation on the firm initiating the price reduction would be that its attempt to gain a higher market share and increase profits would prove fruitless. In sum, the outcome of the scenario would be that the market share of each oligopolist would remain the same. The price, however, would be at a lower level, which would result in a loss of profit generally for all firms.

The second scenario reflects in the situation which a firm restricts output and raises its price in an attempt to maximise profits. However, again customers as well as other oligopolists would become aware and affected of the price raise. Customers would, naturally, abandon the expensive firm and turn to other suppliers offering a lower price and as a result, the firm raising the price would lose market share and profit at the gain of the other oligopolists. Consequently, in order not to lose market share, the price-raising firm would have to lower its price to the initial level to regain customers.

Consequently, a supplier in an oligopoly cannot undertake a competitive action without affecting the other suppliers. The fact that a competitive action of a firm in the end would

be detrimental for the firm itself results in the fact that there is no or little incentive for the suppliers to compete with each other. Thus, oligopoly produces non-competitive stability¹².

2.4.1 Competitive Problem of Oligopolies

The disincentive to compete due to the oligopolistic interdependence does not in itself amount to a problem for competition. However, a problem arises when the oligopolists, through the awareness of their interdependence, recognise that it is to their mutual advantage to avoid competition and aim at a joint profit maximisation. This can be explained by the fact that, as well as the firms recognise their interdependence, they recognise their own self-interest¹³. Thus, '...instead of abusing existing dominance, oligopolists will be tempted to align their behavior, reduce competition between themselves, discourage potential competition by raising barriers to entry, cut down on R&D and innovation and so make a comfortable cushion of certainty about their market positions and profits'¹⁴.

Parallel behaviour does not require agreements or explicit concerted practices but comes about naturally in certain market structures as a result of a rational collective mode of behaviour of the individual firms on the market¹⁵. Each firm's behaviour is a response to the situation on the market by which the behaviour of competitors is taken into account. The oligopolistic interdependence creates an incentive for each undertaking to engage in parallel behaviour in the aiming at joint profit maximisation. The accommodation of behaviour is the result of a tacit agreement between firms to behave in a similar manner and, as such, is not caught under Article 81(1) of the EC Treaty under which explicit collusion is prohibited. The ECJ has ruled that parallel behaviour has to be differentiated from concerted practices prohibited in Article 81(1) of the EC Treaty:

'A dominant position must also be distinguished from parallel behaviour of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the

¹² Richard Whish, *Competition Law*, p. 468.

¹³ *Ibid.*

¹⁴ Timothy G. Portwood, *European Community Law Series 7, Mergers under EEC Competition Law*, p. 80.

¹⁵ Erhard Kantzenbach, Elke Kottman, Reinald Krüger, *New Industrial Economics and Experiences from European Merger Control – New Lessons About Collective Dominance?*, p 22.

undertaking which derives profits from that position is to a great extent determined unilaterally'¹⁶.

Further the ECJ has ruled that taking into account the responses of competitors when a firm decides its price does not amount to a concerted practice under Article 81(1):

'Although every producer is free to charge his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with its competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.'¹⁷

Nevertheless, parallel behaviour serves as a proof for concerted practices but if there is no other explanation than interdependence, as a mere result of the market structure, such behaviour is legal. Intelligent adaptation to the anticipated conduct of competitors is lawful and does not amount to a concerted practice caught under Article 81(1)¹⁸.

2.4.2 Do All Oligopolies Distort Competition?

Not all oligopolies reach a stadium of lack of competition and tacit collusion among their members. As outlined above, oligopolistic markets are found between the two extreme market structures perfect competition and monopoly. Thus, depending on the closeness to either of these two market structures, oligopolies can, by measures of competitiveness, take different shapes and be anything from highly competitive towards non-competitive. Where on the scale an oligopoly is found depends on a number of factors one of which is the strength of the oligopolistic interdependence.

The strength of the interdependence is influenced by the number of firms and the conditions on the market. Generally, a number between two and five oligopolists, each

¹⁶ Case 85/76 Hoffmann-La Roche v. Commission of 13 February 1979, [1979] ECR 461, para 39.

¹⁷ Cases 48/69, etc., ICI v. Commission of 14 July 1972, [1972] ECR 619, para 118.

¹⁸ Stephen Weatherill, Paul Beaumont, EC Law, p. 680.

with a large market share¹⁹, in combination with market conditions such as transparency, market maturity, product homogeneity, barriers to entry, elasticity of demand, etc., raise the likelihood that the oligopolists will recognise their ability to maximise profits multilaterally and exclude competition among themselves.

With reference to the strength of the interdependence an oligopoly is defined as either tight or wide. The stronger the interdependence, the tighter the oligopoly and thus, the greater the possibility that the oligopoly has the same effects on economic efficiency and consumer welfare as a monopoly. A wide oligopoly, on the contrary, has less interdependence between the firms and consequently, the firms are less likely to adapt their actions to each other. Instead, individual competitive action is the strategy for a firm on the market to maximise profits, i.e. the behaviour of the other oligopolists is not a factor taken into account. A wide oligopoly is closer to perfect competition and hence, there is a likely hood for competition between the oligopolists.

2.4.3 Conflict of Interest

The stability of a tacit, as well as an explicit, agreement in which suppliers agree to behave in a certain manner as regards price and output is closely related to the 'conflict of interest' facing each supplier. The conflict of interest refers to the contradiction between collective and individual rationality²⁰. The contradiction arises in the recognition of a firm that, in the short-term, it might be possible to make a larger profit individually by undercutting the tacitly agreed price. Thus, the individual rationality of each oligopolist induces a temptation to deviate from the expected collectively rational behaviour with secure long-term advantages. The outcome of the conflict of interest of the oligopolists has a decisive influence on whether their parallel behaviour will be successful or not.

There are several factors that influence the incentive and probability for deviation from a parallel behaviour. The two basic conditions are the threat of retaliation and market transparency. Before cheating a supplier must take into account the threat of retaliation as a response of the other suppliers to his deviation. The retaliation takes the form of expansion of output that causes a decline in price; a punishment the cheating supplier

¹⁹ Erhard Kantzenbach, Jörn Kruse, Kollektive Marktbeherrschung, Das Konzept und Seine Anwendbarkeit für die Wettbewerbspolitik, p. 11.

²⁰ See supra note 20, p. 23.

might not sustain. The more over capacity that can be used for retaliation the stronger is the punishment and thus, the less is the incentive to cheat. Transparency is also important since, without a certain degree of transparency on the market, a deviation from the parallel behaviour will not be discovered quickly enough to enable an effective punishment mechanism.

2.4.4 Conclusion on Oligopoly

In certain oligopolies the oligopolists, through awareness of the interdependence between them, come to the recognition that it is better to avoid competition and instead accommodate each other's behaviour. Thus, through anti-competitive parallel behaviour they are able to multilaterally maximise profits. In conclusion, the tacit collusion of the oligopolists has the same effects on economic efficiency and consumer welfare as a monopoly.

3 Oligopoly Control under the EC Merger Regulation

3.1 Introduction

Article 2 of the Regulation sets out the criteria according to which the Commission can declare a concentration compatible or incompatible with the common market.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and

ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

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

The reference in the third paragraph to ‘a concentration which creates or strengthens a dominant position’, naturally, covers and prohibits, a concentration through which the new entity formed by the parties to the concentration gets a dominant position or when an already dominant position is strengthened. But what about dominance held together by two or more firms, none of which is dominant alone? At an early stage of after the entry into force of the Regulation it was not clear whether the Commission had power to prevent a concentration that resulted in the creation or strengthening of collective dominance. For almost two years it seemed as if collective dominant positions held by an oligopoly evaded the Commission’s application of Article 2.

The concept of dominance is not defined in the Regulation. However in 1987, prior adoption of the Regulation²¹, a group of economists issued a report on collective dominance and its effects on competition on the common market to the Commission²². It was proposed in the report that an *a priori* control of concentrations at Community level was the most effective legal instrument to safeguard competition from distortions resulting from collective dominance²³

²¹ See supra note 1.

²² Erhard Kantzenbach, Jörn Kruse supra note 19.

²³ Erhard Kantzenbach, Jörn Kruse supra note 19, p. 146.

3.2 Development of the Doctrine of Collective Dominance

At an initial stage after the entry into force of the Regulation the Commission had to assess the compatibility of a concentration that took place in a concentrated market²⁴. The concentration Renault/Volvo would have resulted in a reduction of the significant suppliers from four to three, each of which would have had a comparably similar market share of about 25%. The Commission did not reflect upon the concentrated supply structure, but only stated that the market share of the new entity would not have reached a level that would have allowed it to dominate the market alone, since other major suppliers were present on the market.

In the Digital/Kienzle decision the Commission referred to the aggregate market share of the leading suppliers²⁵. It was observed that the market was very concentrated even before concentration: three major suppliers, one of which was Digital, had an aggregate market share of 80%. However, the Commission did not explicitly mention that it was examining collective dominance, but it might be suggested considering some of the factors taken into account in clearing the concentration. Firstly, it was held at high market shares on a new developing market was not unusual and did not necessarily indicate market power. Secondly, it was recognised that changes of the market shares of the three leading firms in the past indicated that the market was competitive.

A later decision concerned a concentration of two suppliers on the Spanish market for petrol and diesel fuel²⁶. It was observed that post concentration would the new entity have had a market share of 20.7% on the market for petrol and 25.3% on the market for diesel fuel. However, on both the markets there was another competitor present whose market share on each of the markets was 66%. The Commission found that the concentration did not give rise to any concern regarding competition, as the new entity had a significantly smaller market share than its larger competitor.

In Varta/Bosch the Commission showed a first sign of a discussion on collective dominance²⁷. The concentration took place on the market for car batteries. After

²⁴ Case No IV/M.4-Renault/Volvo of 07.11.1990, para 14.

²⁵ Case No IV/M.57-Digital/Kienzle of 22.02.1991, para 19.

²⁶ Case No IV/M.98-Elf/BC/CEPSA of 18.06.1991, para 23.

²⁷ Case No IV/M.12-Varta/Bosch of 31.07.1991, para 32.

concentration the new entity would have reached a market share of 44.3% on the German market, which was more than 25% more than the market share of its largest competitor. This structure of supply raised concern considering the possibility for the new entity to receive a single dominant position. On the Spanish market two large suppliers of equal size would have been present, i.e. the new entity with a market share of 44.5% and another supplier of equal size. The Commission noted that this structure 'could lead for several reasons to the alignment of the behaviour of both competitors'.

The concentration could nevertheless be cleared due to changes that had taken place on the German market and thus, no longer raised the concern of the new entity receiving a dominant position. However, regardless the fact that no changes had taken place on the Spanish market, the initial observation concerning this market seemed to have been left aside. Instead, the conclusion of the Commission was the assumption that, with the presence of two large suppliers of equal size, the new entity and the other supplier, competition was safeguarded²⁸.

3.2.1 The Oligopoly Blind Spot

The Commission decisions referred to above in point 3.2 initiated a debate on the ability/inability of the Regulation to control the creation or strengthening of collective dominant positions. Specifically, criticism was forwarded of the Commission's analysis in the decisions Renault/Volvo, Elf/BC/CEPSA, and Varta/Bosch²⁹. With regard to the market structures of these concentrations, the omission of an examination of collective dominance in these decisions was argued to be inconsistent with economic theory. Economic theory, on the contrary, would have alarmed in each case a non-competitive oligopolistic market and the likelihood of alignment of the behaviour of the suppliers.

²⁸ Derek Ridyard, *Joint Dominance and the Oligopoly Blind Spot Under the EC Merger Regulation*, [1992] 4 ECLR, p. 163.

²⁹ 'Under any merger control régime which took oligopoly problems seriously, it seems certain that each of these mergers would have been subjected to some very searching questions and a detailed assessment of pricing behaviour and competitive conduct, but there is no evidence of such scrutiny having taken place. Such questions seem to have been considered redundant because the mergers did not lead to a situation of single firm dominance.' Ibid. p. 163.

In economic theory it is recognised that regardless the fact that the market structures of monopolies and oligopolies are different, they can have the same effect on economic efficiency and consumer interests. However, the Commission did neither regard nor express a view whether the post merger market structure would have given rise to risks of collusion between the remaining suppliers.

The criticism aimed at giving the word dominance in Article 2 an extensive interpretation in order to cover collective dominance. If the Regulation were narrowly interpreted, the Commission would only have had the power to prohibit a concentration through which single dominance was created or strengthened, whereas highly concentrated markets without a single market leader would have been left uncontrolled. The inability to control oligopolistic market structures was referred to as the 'oligopoly blind spot' of the Regulation.

To let collective dominant positions evade the regulative control of concentrations could not have been meant and the Commission was urged to encompass such positions in its application of the Regulation. 'The primary economic objective of merger control is to prevent the creation of uncompetitive market structures. The pursuit of this objective is as much concerned with the threat of greater collusion after merger as with the possibility that a merger will lead to market domination by a single firm. However, if the Commission defines 'dominance' purely in the latter context, it results in the possibility that the Regulation may contain a serious blind spot'³⁰. It could be questioned whether the Commission was afraid of using its powers to control concentrations or whether it was unaware of the dangers to effective competition of tacit collusion likely to arise in highly concentrated markets.

3.2.2 Awareness of Collective Dominance

In *Alcatel/AEG Kabel*³¹ the Commission, under the hypothetical assumption of the applicability of the Regulation to collective dominance, examined whether the concentration created collective dominance. The case concerned the acquisition by

³⁰ Derek Ridyard *supra* note 28, p. 161.

³¹ Case No IV/M.165-Alcatel/AEG Kabel of 18.12.1991.

Alcatel of AEG Kabel's cable business. Post concentration on the German market would the new entity have reached a market share of 25%. Its two largest competitors held 23% respectively 10% of the market and the rest of the market was divided among a large number of smaller suppliers.

Under German competition law (Article 23Aa (2) Gesetz gegen Wettbewerbsbeschränkungen) there is a presumption for collective dominance when three firms hold more than 50% of the market. This threshold was fulfilled as the combined market share of the three firms was 58% and consequently, the Commission received a request for referral under Article 9 from the German Bundeskartellamt. The Commission rejected the request, since it had not found that a collective dominant position would have been created or strengthened on the German market. Thus, the question whether the Regulation applied to collective dominance was left open. Nevertheless, the Commission recognised that had the Regulation been applicable:

- (i) there is no presumption for collective dominance under EC law;
- (ii) the Commission must in every case demonstrate that on structural grounds oligopolists are likely to avoid competition among themselves³².

However, the Commission conducted a hypothetical application of the Regulation to collective dominance on the facts of the concentration. At first it was recognised that the increase of the concentration of the combined market share of the three firms, from 48% to 58%, did not in itself indicate that competition would disappear between them. Instead, an examination of the overall market structure had to be undertaken. The Commission denied the probability of anti-competitive parallel behaviour of the three leading firms on the grounds that the demand side was concentrated, 20 large customers accounted for about 80% of total purchases, and the strong countervailing purchasing power assured that there would be no possibility for the leading suppliers to engage in parallel behaviour.

³² Ibid. para 22.

Regardless the fact that the Commission did not explicitly provide an answer to the applicability of the Regulation to collective dominance, a first insight into its approach to collective dominance had been given. In addition, the Commission was aware of the question raised by such dominance to the application of the Regulation to the creation or strengthening of collective dominance³³.

Henkel/Nobel³⁴ is important since this is the first decision in which the Commission explicitly examined collective dominance in its assessment of a concentration under the Regulation. It was noted that the new entity would not enjoy a position of single dominance. Instead, the Commission's attention was drawn to some of the markets in France and Germany on which the degree of concentration was high; post concentration would the new entity together with two respectively three competitors reach a combined market share of 50% to 70%. After having examined these markets the Commission, nevertheless, was assured they would remain competitive³⁵. Thus, once again the question concerning the Regulation's applicability to collective dominance was left open.

The concentration Thorn EMI/Virgin Music³⁶ also invoked the Commission to examine collective dominance. After having reached the conclusion that the parties would not enjoy single dominance, it was however observed by the Commission that the 'structural features of the market(s) (...) could indicate a situation of collective dominance'³⁷. Collective dominance was nevertheless denied, since it was found that the market would remain competitive after the concentration.

3.2.3 Nestlé/Perrier – Application of the Doctrine of Collective Dominance

The end of the debate on the Commission's intention to deal with non-competitive oligopolies came with the cardinal decision Nestlé/Perrier³⁸ on 22 July 1992. This was the first decision in which the Commission applied the concept of collective dominance

³³ XXth Report on Competition Policy (1991), p. 362.

³⁴ Case No IV/M.186-Henkel/Nobel of 23.02.1992.

³⁵ First, the markets were dynamic and had high growth rates through the introduction of new products as well as the opening of new geographic areas. Second, close substitutes existed and third, there were strong competitors next to the leading suppliers and lastly, concentration on the demand side was increasing. *Ibid.* para 17

³⁶ Case No IV/M.202-Thorn EMI/Virgin Music of 12.05.1992.

³⁷ *Ibid.* para 21.

³⁸ See *supra* note 4.

in such a way that it had an impact on the outcome of the assessment of the concentration.

The decision concerned a concentration between two suppliers of bottled water in France, whereby Perrier was acquired by Nestlé. After concentration Nestlé would sell off a brand of Perrier to the other major producer on the market, BSN. The market was highly concentrated already before concentration with three producers holding 82.3 % of the market in terms of value. This high market share would have been held by two producers, Nestlé and BSN, after the concentration. In the assessment of the case the Commission found that the concentration would have given rise to a collective dominant position held by the two producers.

The finding of collective dominance was based on the following factors: symmetrical and stable market shares of the duopolists, similar cost structures, market transparency, inelastic demand, mature technology, high entry barriers, and the lack of countervailing power of competitors and customers in the past. In addition, the fact that BSN had supported Nestlé in its bid for Perrier constituted a joint deterrence action aiming at countering the bid of another company for Perrier. Thus, taking this action into account, the likelihood of future competition between the duopolists was decreased. Nevertheless, after undertakings from Nestlé to sell off springs to a third party competition was safeguarded and the concentration could be cleared.

The analysis in the decision differs from the earlier approach of the Commission to oligopolistic market structures. In previous decisions dominance had been denied due to the fact that a strong competitor was present which prevented the new entity from dominating the market alone. In this decision, however, the Commission was aware of the negative effects on economy resulting from collective dominance. However, since the issue whether collective dominance was covered under the Regulation had not been settled by the Commission it first had to undertake an interpretation of the Regulation's applicability to collective dominant positions (paras 110-116).

The Commission came to the conclusion that collective dominance is covered by the Regulation. Firstly, by referring to Article 3(f) of the Treaty, now Article 3(g), which provides for a system to safeguard competition, it was concluded that a concentration that

resulted in a dominant position could not be cleared by the mere fact that the position was held by more than one firm. Secondly, the absence of an explicit reference to collective dominance in Article 2(3) could not be interpreted as excluding such dominance from the Regulation. It was recognised that were only the creation or strengthening of dominance held by one firm prohibited, would this ‘...create a loophole in the fundamental Treaty objective of maintaining effective competition...’. In addition, referring to the anti-trust systems of the United States, France, Germany and the UK, it was observed that they all contained a provision under which collective dominance could be prevented. Thus, it could not be assumed that concentrations that created collective, which prior to the adoption of the Regulation would have been controlled by Member States, were left unregulated under the EC rules on concentrations.

The Opinion of the Advisory Committee forwarded different views on the applicability of the Regulation to collective dominance³⁹. The majority held that the Commission had made a correct interpretation of the applicability of the Regulation to collective dominance. However, two minority opinions represented views according to which the Commission’s application of the Regulation to collective dominance was incorrect. One of the minority opinions followed the reasoning of the CFI in the ‘Italian Flat Glass’⁴⁰ judgment concerning collective dominance under Article 82 of the EC Treaty. The CFI ruled that links between firms are required for the finding of collectively dominance. The other minority of the Committee opposed in full the applicability of the Regulation to markets on which a dominant position was held collectively by the oligopolists.

Notwithstanding the fact that the Commission had made clear its intention to take into account collective dominance in its assessment of concentrations, jurisdiction on the applicability of the Regulation to collective dominance was not clear. The issue had not yet been settled by the ECJ. Eventually, in 1998 the ECJ had the opportunity to rule on the question.

³⁹ Advisory Committee Opinion. O.J. 1992, C319/3.

⁴⁰ T-68, 77 and 78/89 Società Italiana Vetro SpA v. Commission of 10 March 1992. [1992] ECR II-1403. 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’, para 258.

3.2.4 The Kali & Salz Judgment of the European Court of Justice

In reaching a judgment in the Kali & Salz case⁴¹ on 31 March 1998, the ECJ had the opportunity to rule on the applicability of the Regulation to collective dominance. The opportunity came before the Court as appeals (from a third party and from France) against the Commission's decision Kali & Salz/MdK/Treuhand⁴². In the decision the Commission had found that, as a result of the concentration the parties and the third party Société commerciale des potasses et de l'azote ('SCPA'), would have become collectively dominant on the market. However, after undertakings by the parties securing competition on the market the concentration could be thus cleared.

With the concentration the potash and rock salt activities of Kali & Salz and MdK was brought together in a joint venture. The Commission found that on the community market apart from Germany the new entity and the French producer SCPA would have had enjoyed a duopolistic dominant position. In reaching this conclusion the Commission took into account the following factors: the combined market share of the new entity and SCPA would have been 60% with the rest of the market fragmented among smaller suppliers; several characteristics on the market such as market transparency, the homogeneous nature of the product, absence of technical innovation and past infringements of EC competition rules by the duopolists were deemed as to facilitate parallel behaviour; and the long-existing and close links between the duopolists in the forms of a joint venture in Canada and the participation in an export cartel in Vienna as well as the existence of a distribution agreement by which all Kali & Salz's sales in France was distributed by SCPA.

In order to reach a judgment, the ECJ first had to rule on the question whether the Commission had power under the Regulation to prohibit concentrations that resulted in collective dominant positions. It was recognised that the legal grounds of the Regulation, Articles 84 and 235 of the EC Treaty, could be used as means to prevent the creation or strengthening of collective dominance. Moreover, the travaux préparatoires did not bring any clearness to the intended scope of the wording 'dominant position'. Neither could a textual interpretation of Article 2 of the Regulation provide the ECJ with sufficient

⁴¹ See supra note 5.

⁴² Case No IV/M.308-Kali & Salz/MdK/Treuhand of 14.12.1993.

guidance. Thus, the wording ‘a concentration which creates or strengthens a dominant position’ could not in itself lead to the conclusion that the Regulation only embraced single dominance with the exclusion of collective dominance.

Through a teleological interpretation of the Regulation the ECJ concluded that the Regulation was based on the premise that there is a need for an instrument that can safeguard effective competition within the common market, recitals one and two of the Regulation, for the achievement and development of the internal market by 1992. Further, the outcome of the systematical interpretation was that, according to recitals six, seven, ten, and eleven of the Regulation, the role of the Regulation in the system of EC competition rules to, contrarily to Articles 81 and 82, be applicable to every concentration with a community dimension that was contrary to the system of effective competition provided for in Article 3(g) of the EC Treaty.

Consequently, the ECJ ruled that: ‘A concentration which creates or strengthens a dominant position on the part of the parties concerned with an entity not involved in the concentration is liable to prove incompatible with the system of undistorted competition which the Treaty seeks to secure. Consequently, if it were accepted that only concentrations creating or strengthening a dominant position on the part of the parties to the concentration were covered by the Regulation, its purpose as indicated in particular by the above mentioned recitals would be partially frustrated. The Regulation would thus be deprived of a not significant aspect of its effectiveness, without that being necessary from the perspective of the general structure of the Community system of control of concentrations’⁴³.

Neither the argument of the applicants referring to the lack of procedural rights in the Regulation for third parties, nor the reference to recital 15 of the Regulation in which there is no assumption for dominance when the combined market share of the parties to the concentration post concentration is below 25%, could prevent the ECJ from reaching the conclusion that: ‘...collective dominance do not fall outside the scope of the Regulation’⁴⁴. However, in its judgment the ECJ annulled the Commission’s decision on

⁴³ See supra note 5, para 171.

⁴⁴ See supra note 5, para 178.

the grounds that it was adequately established in the analysis of the Commission that the concentration would have resulted in collective dominance⁴⁵.

3.2.5 The Gencor Judgment of the Court of First Instance

In March 1999, almost one year after the Kali & Salz judgment, the CFI ruled on the question regarding the applicability of the Regulation to collective dominance in its Gencor judgment⁴⁶. The question arose before the CFI in an appeal of the Commission's decision Gencor/Lonrho⁴⁷ to prohibit a concentration since it would have created a collective dominant position for the new entity and a third party. One of the pleas the CFI had to consider was the applicability of the Regulation to collective dominance.

Notwithstanding the fact that the ECJ already had delivered a ruling in favour of the applicability of the Regulation to collective dominance and, consequently, had settled the question⁴⁸, the CFI undertook an interpretation of its own. The conclusion of the interpretation of the CFI (paras 123-158) was the same as the one reached by the ECJ. Thus, taking into account that the interpretation of the CFI was coherent with the one of the ECJ and the recognition of the CFI that '...the Commission was not required to include in its contested decision any reasoning on the applicability of the Regulation to collective dominant positions, in particular as it had already expressed its view on that subject both in annual reports on competition policy and in other concentration cases...' ⁴⁹, the debate on the scope of the Regulation was exhausted.

4 The Analysis of Collective Dominance

The Commission has defined oligopolistic dominance in the following terms: 'Oligopolistic dominance refers to a situation where the oligopolists simply by adapting to the prevailing market conditions are likely to behave in an anti-competitive parallel way rather than compete against each other. Active collusion, for example in the form of a cartel, is therefore not required. However, due to the lack of competition, a dominant

⁴⁵ First, the links were not close enough to induce an incentive for parallel behaviour. Second, the over capacity of a competitor with a 10% market share had unduly not been taken into account. Third, demand was declining which is a factor that generally promote competition.

⁴⁶ See supra note 6.

⁴⁷ Case No IV/M.619-Gencor/Lonrho of 24.04.1996.

⁴⁸ Competition Policy Newsletter 1999 Number 2 June, p. 20.

⁴⁹ See supra note 6, para 157.

oligopoly results in similar negative effects on the market, as would result from a dominant position held by a single firm⁵⁰.

The Commission's analysis of collective dominance aims at making a forecast of the market structure post concentration. The key question is whether the companies on the market will be able to act in a co-ordinated fashion, avoiding competition among themselves, without entering into more or less formal and explicit agreements which could be considered as cartels⁵¹. Thus, the likelihood of tacit co-ordination on the market post concentration has to be analysed⁵². The analysis of collective dominance is based on two basic premises⁵³:

1. There is no presumption for collective dominance based on concentration ratios or other factors⁵⁴. Such a presumption would be inconsistent with the recognition in economic theory of competitive oligopolies as well as non-competitive oligopolies in which the suppliers are collectively dominant on the market (see supra point 2.4).
2. The analysis of collective dominance is an individual examination in which the specific market conditions of each case have to be taken into account. Further, an overall assessment of the market conditions has to be made by assessing the various factors from a multi-criteria approach. The importance of a certain factor is influenced by the presence or absence of other factors on the market, therefore, it is not enough to check whether one or several certain factors are present, since the particular combination of the factors must be analysed⁵⁵.

⁵⁰ See supra note 48, p. 29.

⁵¹ Juan F. Briones Alonso supra note 10, p. 119.

⁵² See supra note 48, p. 23.

⁵³ Juan Briones, *Oligopolistic Dominance: Is there a Common Approach in Different Jurisdictions? A Review of Decisions Adopted by the Commission under the Merger Regulation*, [1995] 6 ECLR, p. 336.

⁵⁴ Recognised in *Alcatel/AEG Kabel* supra note 31, see above point 3.2.2.

⁵⁵ XXIVth Report on Competition Policy (1994), p. 152.

The analysis can be divided into two steps, each of which represents an examination of factors for a conclusion on the possibility and sustainability of tacit collusion and joint profit maximisation of the suppliers. The two questions to be examined are:

1. Internal competition between the oligopolists

In the first of the analysis it has to be examined whether there will be internal competition between the oligopolists. This step focuses on whether the presence of oligopolistic interdependence on the market will give the suppliers the incentive and possibility to accommodate each other's behaviour and tacitly come to an agreement on how to behave. In addition, it is analysed whether parallel behaviour will be stable considering the conflict of interest faced by each member of the tacit agreement. Thus, the likelihood of a deviation to be detected and the retaliatory means available for the other oligopolists is of importance in the assessment.

2. Countervailing power from competitors and customers

The second step of the analysis aims at examining whether potential competition and/or customers are able to exert countervailing power vis-à-vis the oligopolists. If there is enough countervailing power, the collective dominance of the oligopolists can be constrained. Thus, powerful competitors and customers can be able to prevent the parallel behaviour from sustaining by bringing about internal competition between the oligopolists.

As explained above in point 2.4 not all oligopolies are collectively dominant. The question is thus, how the Commission makes the distinction between those oligopolies whose members are likely to compete with each other and those oligopolies in which there is a risk for tacit collusion on price and avoidance of competition among the oligopolists? In a study prepared for the Commission it has been recognised that the assessment of oligopolies for purposes of competition policy involves an analysis of a number of factors which inhibit or encourage tacit collusion⁵⁶. Regardless the fact that there is no agreed test for collective dominance in the sense of guidelines, a series of factors have been outlined in praxis of the Commission to be of importance in the

examination of collective dominance. Thus, through case law the Commission has established an approach to collective dominance. The approach is given in the form of a 'checklist' applied in the analysis (see below point 5). The checklist contains a number of factors that are typically recognised to influence the likelihood of tacit collusion. So far, the closest to guidelines are published personal conclusions of an official of the Merger Task Force, Directorate General Competition, on the approach to the oligopoly issue under the Regulation⁵⁷.

5 The Checklist

5.1 Internal Competition Between Oligopolists

5.1.1 Market Concentration

The level of concentration on the supply side is the primary criterion taken into account in the analysis. Thus, market concentration serves as a starting point and a trigger of an examination of collective dominance⁵⁸. A highly concentrated market with a few large firms with the rest of the supply fractured between smaller suppliers provides a first indication of the risk of collective dominance.

The Commission has examined, more or less in depth depending on other factors present on the market, collective dominance when a market has had the following concentration ratios:

- **two** suppliers - combined market share of 50%
- **three** suppliers - combined market share above 60%⁵⁹
- **four** suppliers - combined market share of 80%
- **five** suppliers - combined market share of 80%

⁵⁶ Erhard Kantzenbach, Elke Kottman, Reinald Krüger *supra* note 15, p. 72.

⁵⁷ Juan F. Briones Alonso (presently official in Directorate General Competition/Transport): Economic Assessment of Oligopolies under the Community Merger Control Regulation. [1993] 3 ECLR; Oligopolistic Dominance: Is there a Common Approach in Different Jurisdictions? A Review of Decisions Adopted by the Commission under the Merger Regulation. [1995] 6 ECLR.

⁵⁸ See *supra* note 55, p. 152.

⁵⁹ In Case No IV/M.630-Henkel/Schwarzkopf of 18.10.1995, para 2, were certain markets examined with regard to collective dominance. It was observed that on some of the markets the two largest suppliers would hold almost 58% of the market and the combined market share of the three largest supplier would reach a level of 65% to 75%. However, on two other markets the combined market share of the three leading producers would reach a size of 53% to 56% and considering the relatively low combined market share on

- six suppliers - combined market share above 90%

However, market concentration is not a criterion of decisive importance of its own but other factors must be taken into account in the analysis. In Alcatel/AEG Kabel it was recognised that the Regulation contains no presumption for collective dominance based on concentration ratios (see above point 3.2.2)⁶⁰. The Commission has in several decisions denied collective dominance regardless of very high market concentrations, e.g. Tyco International Ltd/US Surgical Corporation⁶¹ and American Home Products/Monsanto⁶² in which two respectively three suppliers had a combined market share of 90% and 95%. In both decisions it was observed that the presence of other criteria made such dominance unlikely.

However, the Commission has recognised that as a general rule, collective dominance is unlikely between more than three or four suppliers⁶³. This is due to the fact that tacit collusion would be unstable and untenable in the long term considering the complexity of the inter-relationships involved and the temptation to cheat. This conclusion was drawn in the light of an examination of collective dominance in a six-firm oligopoly in the case Price Waterhouse/Coopers & Lybrand. Similarly, in the TWD/Akzo Nobel-Kuagtextil case in which six suppliers of similar size in terms of market shares were present on the market collective dominance was rejected with the statement that such a market structure rather indicated a wide oligopoly without interdependence⁶⁴.

However, such general statements on market concentrations have not prevented the Commission from pursuing examinations of five-firm oligopolies for the risk of collective dominance. In Enso/Stora⁶⁵ the market was rather concentrated with six firms accounting for about 75% of the market and post concentration this market share would be held by five suppliers. The market concentration, in combination with other factors,

these markets, it is questionable whether they themselves would have raised concern about collective dominance.

⁶⁰ For a discussion on the importance of market concentration in the analysis of collective dominance see below point 6.3.

⁶¹ Case No IV/M.1223-Tyco International Ltd/US Surgical Corporation of 07.08.1998, para 11.

⁶² Case No IV/M.1229-American Home Products/Monsanto of 28.09.1998, para III.A.3.

⁶³ Case No IV/M.1016-Price Waterhouse/Coopers & Lybrand of 20.05.1998, para 103.

⁶⁴ Case No IV/M.533-TWD/Akzo Nobel-Kuagtextil of 10.02.1995, para 26.

⁶⁵ Case No IV/M.1225-Enso/Stora of 25.11.1998.

triggered the Commission to open a detailed investigation. In another case⁶⁶ a five-firm oligopoly would hold a market share of about 80% post concentration. The concentration on the supply side raised the Commission's attention for the risk of collective dominance in the two cases. However, neither of the two concentrations would have given rise to a situation in which collective dominance would have been created or strengthened.

The Commission has also discussed the possibility of dominance from the viewpoints of single as well as collective dominance in the same concentration. In Danish Crown/Vestjyske Slagterier⁶⁷ the Commission found that single as well as collective dominance would have been created. The concentration was cleared only after undertakings of the parties that ensured effective competition.

5.1.1.1 Multi-Firm Parallel Behaviour

One interesting feature to mention in the discussion on market concentration and the combined size of the suppliers enjoying a collective dominant position is the phenomenon multi-firm parallel behaviour. This type of parallel behaviour was examined in the decision Price Waterhouse/Coopers & Lybrand⁶⁸. In this case the Commission investigated whether duopolistic dominance could be created between the new entity and another supplier which would vary between three different ones according to the Member State at issue.

However, the conclusion of the Commission was that it would not have been possible for the new entity to engage different firms in parallel behaviour according to the Member State in question. This was due to the fact that each firm that in a given Member State was part of the dominant duopoly would feel its detriment effects in other Member States. If such multi-parallel behaviour nevertheless was adopted, it would not remain stable over time

⁶⁶ Case No IV/M.1174-RWE-DEA/Hüls of 11.06.1998.

⁶⁷ Case No IV/M.1313-Danish Crown/Vestjyske Slagterier of 09.03.1999.

⁶⁸ See supra note 63, paras 114-118.

5.1.2 Distribution of Market Shares

The distribution of market shares among firms is a factor that can affect the incentive of suppliers to engage in anti-competitive parallel behaviour. An oligopoly in which the suppliers' market shares are symmetrical, i.e. of similar size, may provide an incentive to engage in parallel behaviour. This is due to the fact that each oligopolist feels that it has a 'fair' share of the market and, therefore, does not have the need to increase its market share in order to catch up size-wise with the larger suppliers. The Commission recognised in Mannesmann/Vallourca/Ilva⁶⁹ that '...the resultant high level of concentration and the close similarity of the market shares of the two principal producers, there is *prima facie* a strong incentive for these producers to act together to sell the same volumes at higher prices, rather than to compete with each other on price in order to obtain higher market shares' (emphasis added).

In markets where economies of scale are important symmetries between market shares probably reflect similar cost-structures and similar price-preferences regarding what price to launch on the market. Thus, this makes parallel behaviour easier⁷⁰.

In an asymmetric oligopoly on the other hand, the market shares are not in balance but of different sizes. Asymmetry between the market shares of the leading firms is generally regarded as a factor rendering parallel behaviour less likely⁷¹. However, the effects of an asymmetric distribution of market shares on the behaviour of the leading firms must be examined in each individual case. Thus, asymmetric market shares does not in itself exclude the possibility of collective dominance⁷². In Pilkington-Techint/SIV the market shares of the oligopolists were asymmetrical but, nevertheless, the Commission undertook an examination of the risk of collective dominance.

Asymmetries in market shares might have the effect of inducing smaller suppliers with an incentive to compete in order to make their market shares larger and lessen the distance to

⁶⁹ Case No IV/M.315-Mannesmann/Vallourca/Ilva of 31.01.1994, para 55.

⁷⁰ Juan Briones *supra* note 53, p. 343.

⁷¹ See Case No IV/M.523-Akzo Nobel/Monsanto of 19.01.1995, para 47.

⁷² Juan Briones *supra* note 53, p. 338.

larger suppliers. This was taken into account in the decision Nestlé/Dalgety⁷³ in which the Commission relied largely on the asymmetrical market shares of the two leading firms in reaching the conclusion that duopolistic dominance would neither be created nor strengthened.

Nestlé/Dalgety concerned Nestlé's acquisition of Spillers' pet food business from Dalgety. Post concentration the combined market share of the leading two competitors, one of which was the new entity, would be more than 70%. The high market concentration in combination with the fact the new entity would receive a position similar to the other party of the duopoly by virtue of range of brands, production and logistic structure and thus, be on equal footing, raised the issue of duopolistic dominance.

The Commission observed that the market shares of the two duopolists were asymmetric; the size of the new entity was only two thirds of that of its larger competitor in the overall market for cat food. This market was a moderately growing market with certain degree of innovation in terms of product development and packaging. It was recognised that the asymmetric distribution of market shares would serve as an incentive for the new entity to compete in order to increase its market share on this market. Moreover, it was taken into account that whereas the new entity was the market leader in dry cat food, a sub-market to the overall market for cat food, Mars was the leader in wet cat food. As the former food segment had a dynamic growth prospect, Mars would have an incentive to compete and catch up in this segment if it were to remain market leader in the cat food market.

An asymmetric distribution of market shares might reduce the likelihood of collective dominance since it may reflect different cost structures and thus, invoke different views of the suppliers on the optimal level of quantity and price⁷⁴. This would consequently make parallel behaviour more difficult.

⁷³ Case No IV/M.1127-Nestlé/Dalgety of 02.04.1998, para 26.

⁷⁴ Case No IV/M.390-Akzo/Nobel Industrier of 10.01.1994, para 18.

5.1.3 Stability of Market Shares

Fluctuation of the market shares in the past is a factor of importance in the forecast of competition on the market. If the market shares of the suppliers have not been stable but subject to fluctuations in the past it is an indication that the market has been competitive. This factor is of importance in forecasting competition since it is not only a sign of existing competition in the past, but also an indication of probable future competition.

Henkel/Schwarzkopf⁷⁵ provides an example of the importance of fluctuations of market shares in the examination of collective dominance. The concentration concerned the acquisition of Schwarzkopf by Henkel and the markets under examination with regard to collective dominance were certain markets for hair cosmetic products. Several markets raised the issue of creation of collective dominance, as these markets would be structured with two firms accounting for almost 58% or three firms for between 65% and 75% of the market. Nevertheless, accommodation of the behaviour of these firms was not likely, one of the reasons being that the market shares of leading suppliers had not remained stable. It was observed that in a time period of two years there had been yearly fluctuations of +/- 5%, which indicated that the market had been competitive in the past and there was no indication that contradicted an assumption that the firms would continue to act in a competitive fashion.

However, in observing the fluctuations of the market shares of the two leading suppliers in Pilkington-Techint/SIV⁷⁶, the Commission recognised that 'the level of aggregation is so large that it dampens or masks changes in market share at national levels which are indicative of past competition'.

When the markets shares of the firms in question of enjoying collective dominance have remained stable in the past it is an indication of missing internal competition between the suppliers. Thus, the probability for the supplier's accommodation of each other's behaviour post concentration is increased. This presumption is strengthened if the market shares have remained unchanged regardless of external changes in the market conditions.

⁷⁵ See supra note 59, paras 29-30.

⁷⁶ Case No IV/M.358 Pilkington-Techint/SIV of 21.12.1993, para 28.

such as strong constant reduction in demand⁷⁷. The ECJ has recognised that falling demand is a factor that typically promotes competition between the suppliers⁷⁸.

5.1.4 Increase of Market Concentration

An important factor for the finding of collective dominance is that the increase of market concentration brings about a significant change of the conditions of competition on the market, i.e. the conditions between the oligopolists as well as between the oligopoly group and firms not belonging to the oligopoly⁷⁹. In *Thorn EMI/Virgin Music*⁸⁰ it was recognised that the structural characteristics of the market were typical for collective dominance. Nevertheless, the Commission cleared the concentration since there were '...no indications that the proposed acquisition will fundamentally change conditions of competition in the market(s)...'.

Thus, it is not enough that the concentration brings about a reduction of suppliers but the competitive conditions on the market have to change significantly. Such a change can occur if the concentration involves a removal of a competitor of importance in terms of assuring effective competition on the market. For this reason, a competitor can be of importance either in quantitative terms or in qualitative terms.

5.1.4.1 Removal of a Firm in Quantitative Terms

There is no clear-cut minimum market share a competitor must have to be considered important. However, as a general rule, the more concentrated the supply structure was before the merger the more important is the remaining of individual competitors to the larger firms. In a highly concentrated market the removal of a fringe-firm with a market share of 10% should be enough to be considered important for maintenance of competition⁸¹.

⁷⁷ Ulrich Immenga, Ernst-Joachim Mestmäcker, *EG-Wettbewerbskommentar*, Band 1, p. 905.

⁷⁸ *Kali & Salz Judgment* supra note 5, para 238.

⁷⁹ Case No IV/M.284-Höchst/Wacker of 10.05.1993, para 17. Similar in Case No IV/M.460-Holdercim/Cedest of 06.07.1994, para 29, the concentration did not change the supply structure significantly, which was one of the reasons for clearing the concentration.

⁸⁰ See supra note 36, para 40.

⁸¹ Juan Briones supra note 53, p. 338.

In Nestlé/Perrier the Commission took into account that the concentration would eliminate the supplier with the largest capacity sales volume and thereafter would its assets be divided between the two remaining large suppliers. This scenario was a factor that would facilitate parallel behaviour of the two large suppliers on the market⁸². In several decisions, however, strengthening or creation of collective dominance has been denied because of an insignificant increase of concentration of the supply structure. This was the situation in Mercedes Benz/Kässbohrer⁸³ in which two suppliers had a combined market share of 87.2%. However, the combined market share would only be increased by 1.6% and, regardless the highly concentrated structure of supply, a creation or strengthening of collective dominance was dismissed.

A similar situation was observed in Höchst/Wacker⁸⁴ in which five oligopolists accounted for more than 80% of the market. Already before concentration the market had an oligopolistic structure. However, since the concentration gave rise to a less than 10% increase of the market share of Höchst, the Commission did not undertake an examination as to whether the leading firms already acted in an anti-competitive fashion, as the strengthening of a possible collective dominant position would be too insignificant.

Another case⁸⁵ in which the outcome of the analysis was similar concerned a concentration which resulted in a combined market share of about 70 to 75% for the two largest suppliers. The rest of the market was highly fragmented among smaller suppliers. Notwithstanding the high concentration on the supply side collective dominance would not be created or strengthened, since the concentration only brought about an insignificant increase of market concentration. The acquired supplier namely had a market share of only 0-5%.

5.1.4.2 Removal of a Firm in Qualitative Terms

The removal of a firm of significance in qualitative terms for the maintenance of effective competition involves the removal of a so-called 'maverick firm'. A maverick firm is characterised as a firm that acts independently of the behaviour of larger firms and has an

⁸² See supra note 4, para 120.

⁸³ Case No IV/M.477-Mercedes Benz/Kässbohrer of 14.02.1995, para 102.

⁸⁴ Case No IV/M.284-Höchst/Wacker of 10.05.1993, para 17.

⁸⁵ Case No IV/M.1440-Lucent Technologies/Ascend Communication of 06.04.1999, para III.C.

aggressive competitive strategy regarding price and output. Thus, the presence of such a firm disturbs the oligopolists in their attempt to engage in as well as maintain anti-competitive parallel behaviour.

Akzo/Nobel Industrier⁸⁶ was cleared even though the concentration involved the removal of the low price supplier Nobel, the only remaining non-integrated supplier with no downstream business. Past increases in the sales and market share of Nobel provided evidence of it having behaved competitive in the past. However, Nobel's market share had remained below 10%. Nevertheless, the Commission came to the conclusion that "even if the removal of Nobel as an independent supplier was significant in qualitative terms", the concentration would not create or strengthen a collective dominant position held by the three leading suppliers. The structural characteristics of the market were not such as to facilitate the suppliers' accommodation of each other's behaviour.

Gencor/Lonrho⁸⁷ concerned the concentration of the respective platinum activities of the parties, Implats of Gencor and LPD of Lonrho. The concentration was blocked by the Commission because it would have created duopolistic dominance for the new entity and another platinum producer. One factor of major importance that affected the conditions of competition to change significantly enough to allow collective dominance to be created was the fact that the concentration involved the removal of a maverick firm, LPD.

Regardless the fact that the platinum market a priori concentration was highly concentrated with four suppliers together accounting for 90% of the market (Amplats: less than 40%, Implats: less than 20%, LPD: less than 15% and Russia: 23%), there had been competition between the four large suppliers. The competition had been provided by LPD and Russia. The Commission noted that LPD was of significant importance for providing competition on the market. Firstly, contrarily to the other major producers LPD was a producer with a low-cost structure and low-price strategy. Secondly, LPD was an aggressive competitor and had been expanding its production and this was forecast to continue. Thirdly, notwithstanding the fact that also Russia provided competition, LPD was of particular importance for the maintenance of competition, as most of the sales from Russia came from stock (of its market share of 23% only 10% came from

⁸⁶ See supra note 74, paras 15-16, 18.

⁸⁷ See supra note 47, para 206.

production). Moreover, Russian mines were in a deplorable state and it was observed that Russia's stock would be emptied in two years at present sales rate. Consequently, Russia's ability to compete and affect a decrease in price would decline in coming years.

The Commission came to the conclusion that after the concentration the conditions of competition would change significantly and the competitive character of the market would disappear. Implats' absorption of LPD in combination with the foreseeable decline in Russia's sales, would result in the fact there would be no producer present on the market to safeguard competition. Considering Implats' high-cost structure the new entity, Implats/LPD, would have no incentive to expand its production and act in a competitive manner. Thus, in the Commission's own words: 'The removal of LPD would mean a qualitative important difference in the marketplace'.

5.1.5 Market Transparency

A very important factor for the likelihood of parallel behaviour is the degree of transparency of the market. Without a certain degree of transparency that enables the suppliers access to information on price and sales of the other oligopolists, mutual monitoring of parallel behaviour is not possible⁸⁸. However, transparency is not only necessary for reaching a tacit agreement but also of vital importance for its sustainability. A tacit agreement on price between oligopolists induces a conflict of interest in each oligopolist. The conflict concerns whether the oligopolist should stay within the expected parallel behaviour or undercut the price agreed upon (see above point 2.4.3). Thus, since it is only possible to detect deviations from a tacit price agreement if the market is transparent, market transparency, in the combination with the threat of retaliation, might deter the oligopolist from deviating from the tacit collusion.

The Commission examines market transparency from the view of price and sold quantity since these are, typically, the most important parameters of competition⁸⁹. In a market that is not, or only to a little degree, transparent it would not be possible for the suppliers to monitor each other's behaviour and to reach a tacit agreement on price.

⁸⁸ Akzo/Nobel Industrier supra note 74, para 18.

⁸⁹ Enso/Stora supra note 65, para 68.

Further, since a market with a low degree of transparency would make deviations from the price discipline possible without being detected, parallel behaviour would be unstable.

In Gencor/Lonrho⁹⁰ both price and sold quantity were for several factors deemed highly transparent. Firstly, the trading of the product on the stock exchange made affected the transparency of price and quantity. In addition, this practise also made releases of new quantities publicly known. Secondly, statistics on production and sales were regularly published. Thirdly, the sales contracts on the market contained a clause that prohibited resale of platinum. This clause limited the number of sellers, which further increased the transparency of quantity. Moreover, the fact that the number of customers was small and all suppliers met the same customers meant that the suppliers could easily keep in contact with all customers and receive feedback on sales and quantity⁹¹.

The existence of price lists is of importance in the assessment of market transparency. Price lists and systems for information exchange between suppliers are only a few instruments suppliers can develop to increase transparency and facilitate the reaching of tacit price agreements. This was the practice of the suppliers in Nestlé/Perrier in which price lists with information about price as well as discounts were published by the suppliers⁹². In addition, the respective unions of the suppliers exchanged information on monthly sales. Publicly available statistics and studies have also been taken into account as possible means of influencing the transparency of price and sales⁹³. However, the existence of price lists does not increase market transparency when suppliers negotiate substantial and variable discounts individually with customers⁹⁴.

The Commission has recognised that market transparency is low, if at all existing, on markets where customers use tenders as a bidding process. This has been considered in a number of cases in which price has been deemed not transparent enough to enable accommodation of behaviour of the suppliers⁹⁵. Also the fact that suppliers negotiate contracts individually with each customer generally results in the market lacking enough

⁹⁰ See supra note 47, paras 144-145.

⁹¹ Similar in Nestlé/Perrier supra note 4, para 62 and Mannesmann/Vallourec/Ilva supra note 69, para 92.

⁹² See supra note 4, paras 62, 121-122.

⁹³ Nestlé/Dalgety supra note 73, para 28.

⁹⁴ Pilkington-Techint/SIV supra note 76, para 36.

⁹⁵ See e.g. Case No IV/M.1363-DuPont/Hochst/Herberts of 05.02.1999, para 37; Case No IV/M.368-Snecma/TI of 17.01.1994, para 27, Case No IV/M.1245-Valco/ITT Industries of 30.07.98, para 54.

transparency for monitoring and maintaining of parallel behaviour⁹⁶. Furthermore, secret discounts given by suppliers decrease transparency. This was taken into account in the decision Enso/Stora in which the Commission observed that the market was not transparent particularly as concerned price, since the customers received secret discounts by the suppliers⁹⁷. The effect of product heterogeneity on transparency is that it generally results in a less transparent market. This follows from the fact that with a presence of a variety of products with multiple pricing, price comparisons become very difficult (see below point 5.1.11).

5.1.6 Similar Cost Structures

Similar cost structures of suppliers is regarded as a factor that gives the suppliers the incentive to engage in parallel behaviour. The cost structure can affect the price preference of the supplier. Thus, when the cost structures of the suppliers are similar they, consequently, have the same price references which facilitates their reaching of a tacit agreement on price. In addition, similarities of cost structures have a stabilising effect on the parallel behaviour. In such a situation where the cost structures are similar, none of the suppliers enjoy a significant cost advantage that would invoke the incentive to to behave competitively. In the competitive assessment of the concentration between Enso and Stora⁹⁸ the Commission observed that one of the factors that pointed in the direction of collective dominance was that the cost structures of the oligopolists were similar.

In Gencor/Lonrho⁹⁹ the Commission took into account similarities in the cost structures of the leading two firms as a factor that increased the likelihood of parallel behaviour. The concentration would in the medium term result in two large producers of platinum, each with a market share of 30-35% and together controlling 90% of the world reserves of platinum. The circumstance that the concentration would bring about similar cost structures of the two large producers was recognised by the Commission as a factor that would reduce their incentive to compete.

⁹⁶ See e.g. Case IV/M.1342-Knorr-Bremse/Bosch of 14.12.1998, para V.A.6. Case No IV/M.478-Voith/Sulzer (II) of 29.07.1994, para 33, Case No IV/M.337- Knorr Bremse/Allied Signal of 15.10.1993, para 45

⁹⁷ See supra note 65, para 68.

⁹⁸ See supra note 65, para 67.

⁹⁹ See supra note 47, para 184.

The greater the similarities of cost structure are, the greater is the likelihood that the suppliers will be affected by as well as response in the same way to market developments, e.g. in decisions concerning production. The effect on profits of a price increase would be similar for the two producers and thus, they would have a common interest in the development of the market. The Commission found that anti-competitive parallel behaviour was very likely to be launched on the market and prohibited the concentration.

Parallel behaviour is more difficult to launch when suppliers have different cost structures since this would lead to different views of the suppliers on the price to be set on the market. Thus, an agreement on price would be very difficult to reach without explicit co-ordination of price policies and that it 'can reasonably be considered an element that would hinder the implementation of tacit parallel behaviour'¹⁰⁰. Moreover, different cost structures implies that the firms would respond differently to market changes and thus, have different incentives to increase or decrease production.

The Commission has recognised that differences in cost structures give firms different incentives to compete. Differences in cost structures, gives a low-cost producer cost advantages compared to the other firms and thus, serves as an incentive for the producer to act competitively. Thus, a firm with low production costs has an incentive to expand its production, whereas a high-cost producer does not have such an incentive¹⁰¹.

However, if parallel behaviour were launched it would not be stable, as a firm with an inefficient use of scale would want to increase its production even if it results in a decrease of price. The Commission has taken into account the relation fixed-variable costs in the examination of the stability of anti-competitive parallel behaviour¹⁰². In an industry where fixed costs represent a large part of total costs, the fact that variable costs differ between the suppliers would not give a supplier with of low variable costs a cost advantage, since the overall impact on price of these low costs would be very small¹⁰³.

¹⁰⁰ Nestlé/Perrier supra note 4, para 125.

¹⁰¹ Gencor/Lonrho supra note 47, para 176.

¹⁰² Gencor/Lonrho supra note 47, para 138 (b).

¹⁰³ Pilkington-Techint/SIV supra note 76, para 41.

Moreover, in order for a supplier to be tempted to break out of the parallel behaviour, the differences in cost structures must, nevertheless, be significant enough to allow the earning of higher profits through deviation as opposed to staying within the parallel behaviour. The Commission has recognised that the higher the market shares of the firms possible being collectively dominant, the higher would the profit be resulting from parallel behaviour and joint profit maximisation. Consequently, in such a situation must the cost differences between the suppliers be significant in order for an oligopolist to have the incentive to break out of the tacit collusion¹⁰⁴.

5.1.7 Vertical Integration

Differences or similarities in the degree of vertical up-stream or down-stream integration of the suppliers might affect their incentive to engage in parallel behaviour as well as the stability of such behaviour. This follows from the fact that vertical integration may have an influence on cost structures and thus, may reflect different cost situations. However, it is presumed that the choice of vertical integration of each supplier is based on rationality and that there is no general certain degree of integration that would reflect an optimal cost advantage because if that were true, all firms would be vertically integrated in the same way¹⁰⁵. Thus, it has to be examined in each individual case whether different degrees of vertical integration reflect cost advantages or disadvantages that may influence the likelihood of parallel behaviour.

It is recognised by the Commission that, generally, different vertical integration of suppliers undermines their possibility to act in a parallel way¹⁰⁶. Similar vertical integration, on the contrary, facilitates parallel behaviour. Thus, concentrations through which the vertical integration of the oligopolists is made more similar may strengthen their interdependence and increase the likelihood of parallel behaviour.

A thorough examination of the effects on cost structures of different degrees of vertical integration was undertaken in Mannesmann/Vallourec/Ilva¹⁰⁷. The arguments of the parties, i.e. the new entity, were that the differences of the vertical integration between

¹⁰⁴ Mannesmann/Vallourec/Ilva supra note 69, para 68.

¹⁰⁵ Juan Briones supra note 53, p. 344.

¹⁰⁶ Akzo/Nobel Industrier supra note 74, para 18.

¹⁰⁷ See supra note 69, paras 70-75.

the new entity and the other major supplier on the market resulted in different cost situations. Therefore, this reduce their incentive to avoid competition and engage in anti-competitive parallel behaviour. The Commission, however, came to a contrary conclusion. The Commission held that there was no evidence that differences in vertical integration resulted in different cost structures that would give the suppliers certain cost advantages or disadvantages. It was observed that raw material was available on the market at a competitive price and therefore, the fact that the new entity was not vertically integrated upstream did not impose on it a disadvantage in comparison to its upstream vertically integrated competitor.

Differences in vertical upstream integration can be an obstacle for parallel behaviour if the choice of integration reflects different strategic interests. This is the case if the vertically integrated supplier might has a preference for maximising output of raw material rather than aiming for a stable joint profit maximisation in a downstream market¹⁰⁸.

Different degrees of downstream vertical integration might affect on market transparency and consequently, the likelihood and success of parallel behaviour. Differences in downstream integration may result in a situation where the suppliers, as a result of the fact that they are not active on the 'same downstream market', will meet customers on different markets with different price levels. This will reduce the transparency of the price and sales of each supplier and make parallel behaviour of the suppliers very difficult. In addition, customers may have a preference to purchase from a non-integrated supplier who they will not meet as a competitor, in form of a subsidiary, on a downstream market¹⁰⁹. Thus, suppliers without downstream integration were recognised to enjoy a competitive advantage over their customers with such integration and this undermined the likelihood for parallel behaviour.

¹⁰⁸ Juan Briones supra note 53, p. 344.

¹⁰⁹ Pilkington-Techint/SIV supra note 76, para 47.

5.1.8 Excess Capacity

Excess capacity can have different effects on the likelihood of parallel behaviour. Its effects depend on the distribution of market shares as well as on other market conditions. Depending on factors such as the size of marginal profits on additional sales and the threat of retaliation, excess capacity can either have a destabilising or stabilising effect on tacit collusion between the suppliers.

5.1.8.1 Destabilising Effect

Parallel behaviour is unlikely when the excess capacity of a supplier is combined with the possibility to earn high marginal profits on additional sales. The supplier would thus have an incentive to increase production and undercut the price of its competitors in order to increase its individual profits. This was taken into account by the Commission in the decision *Glaverbel/PPG*¹¹⁰. Notwithstanding the highly concentrated supply structure, four suppliers would account for more than 85% of the market for raw float glass post concentration, the Commission found that there was no risk for creation of collective dominance. It was observed that future increases in capacity in combination with significant high marginal profits on additional sales for each supplier would invoke an incentive to sell as much as possible. A similar conclusion was drawn on the market for automotive glass on which three suppliers would have a combined market share of more than 75% and the rest of the market would be fragmented among minor competitors. Creation of collective dominance was dismissed also on this market, one of the reasons being that the excess capacity in the industry would make the suppliers try to sell as much as possible in order to gain large profits on additional sales.

Also short-term available excess capacity for a supplier constitutes an obstacle to parallel behaviour, as this would induce an incentive to depart from the tacit price arrangement and sell this extra quantity and increase the profits. Besides, there may not only be the mere desire to gain a larger market share that lies behind the price-cutting action, but also a need to sell the extra stock¹¹¹.

¹¹⁰ Case No IV/M.1230-Glaverbel/PPG of 07.08.1998, paras 22, 26.

¹¹¹ See supra note 74, para 48.

Parallel behaviour might be hindered if a minor competitor, not party to the oligopoly, has large excess capacity and thus, is able to expand production without additional investment if prices were increased by the oligopolists¹¹². However, this is not the case when demand is stagnant or declining and the leading firms also have excess capacity. In Mannesmann/Vallourec/Ilva it was recognised that a smaller firm would have to take into account the threat of retaliation before using its excess capacity, since the market share that could be gained would be at the cost of the leading firms. Thus, if the smaller supplier were to use its excess it is likely that the response of the oligopolists the launch of a joint retaliation action that would be very effective punishment¹¹³.

5.1.8.2 Stabilising Effect

On the contrary, when there is excess capacity in the industry as a whole it might give the suppliers the incentive to engage in parallel behaviour. This is due to the fact that such behaviour is likely to remain stable and not jeopardised by individual price cutting actions, taking into account the fact that the response from the other suppliers to deviations could be significant since there is large over capacity in the industry. Thus, the threat of retaliation diminishes the temptation to cheat on the other suppliers.

When the suppliers have made large investments for entering the market there is a need to protect them, especially as they may be irreversible on exit. Thus, when there is excess capacity in the industry in combination with stagnant demand, the suppliers would have an incentive to engage in parallel behaviour in order to protect themselves from competition that could threaten the investments were they not to sustain a competitive environment¹¹⁴. Excess capacity might also facilitate parallel behaviour when the excess capacity, such as an installation, is written off and not costly itself.

Thus, with regard to the threat of retaliation, excess capacity can have a stabilising effect on parallel behaviour by discouraging deviations. This effect is further strengthened if price is inelastic¹¹⁵. In Akzo Nobel Industrier excess capacity among the leading firms was regarded as reducing the likelihood of parallel behaviour¹¹⁶. It was observed that any

¹¹² Akzo Nobel/Monsanto supra note 71, para 47.

¹¹³ See supra note 69, para 98.

¹¹⁴ Erhard Kantzenbach, Elke Kottman, Reinald Krüger supra note 15, p. 18.

¹¹⁵ Juan Briones supra note 53, p. 343.

¹¹⁶ See supra note 74, para 18.

of the leading suppliers could expand production in the short term. Further, since the capacity and market shares were unevenly distributed among the suppliers, they would have different views on production level as well as on price.

5.1.9 Links Between Suppliers

Contrarily to the praxis of Article 82, according to which economic links are required for the finding of a collective dominant position, the Commission does not regard links between suppliers as a necessary condition for a finding of such a position under the Regulation¹¹⁷. Nevertheless the issue of the requirement of links for collective dominance under the Regulation was raised with the *Kali & Salz* judgment of the ECJ.

The ECJ ruled that the Commission must analyse if the concentration ‘...leads to a situation in which effective competition is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of *factors giving rise to a connection between them*, are able to adopt a common policy on the market and to act to a considerable extent independently of other competitors, their customers and also of consumers’¹¹⁸ (emphasis added). These correlative factors were not defined by the ECJ, but it seems as if they must be close enough to induce an engagement in parallel behaviour of the firms¹¹⁹. The fact that the reference to connecting factors is prefaced by the words ‘in particular’ is not equivalent with a requirement for links for a finding of a collective dominant position but, nevertheless, give rise to doubts whether there could be a situation of collective dominance under the Regulation in the absence of links¹²⁰.

The significance of links for collective dominance was also dealt with by the CFI in the *Gencor* judgement¹²¹. With reference to the *Italian Flat Glass* judgment, in which it was ruled in an examination of collective dominance under Article 82 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

¹¹⁷ See supra note 55, p. 153. See eg: *Mannesmann/Vallourec/Ilva* supra note 69.

¹¹⁸ *Kali & Salz* Judgment supra note 5, para 221.

¹¹⁹ EC Competition Law Reporter, ¶57-47 (4).

¹²⁰ Valentine Korah, *Gencor v. Commission: Collective Dominance*, [1999] 6 ECLR, p. 337.

¹²¹ See supra note 6.

hold a dominant position vis-à-vis the other operators on the same market'¹²², the appellants argued that the presence of links, such as agreements or licences, was a prerequisite for collective dominance. The ruling of the CFI in the Gencor judgment was nevertheless clear; '...the Court (in Italian Flat Glass) referred to links of a structural nature only by way of example and did not lay down that such links must exist in order for a finding of collective dominance...'123. Thus, with the Gencor judgment it was settled that there is no requirement for links for a finding of collective dominance under the Regulation. The CFI further ruled that there was no legal or economic reason for excluding, from the expression of links, the relationship of oligopolistic interdependence between firms in a tight oligopoly that leads to alignment of behaviour for joint profit maximisation¹²⁴.

The approach that links are not a prerequisite for collective dominance is coherent with competition policy objectives for two reasons¹²⁵. Firstly, economic theory, which underlies the legal examination of collective dominance, does not regard links to be of decisive importance for the possibility of anti-competitive parallel behaviour among oligopolists. Secondly, the effect on competition of a certain link has to be examined in each specific case. Thus, the importance and effect of a particular link depends on its nature and context, i.e. it is a case specific question. The existence of structural, economic or personal links between firms may increase the possibility and stability of parallel behaviour. This is the situation if the links increase transparency and reduce uncertainty of the suppliers of each other's production plans, strategies concerning marketing and pricing or otherwise facilitate tacit collusion.

The Commission occasionally mentions that there are no structural links between the suppliers as a support for the finding that the market is competitive¹²⁶. Nevertheless, such a statement should not be interpreted as a requirement for links for the finding of an anti-competitive oligopoly. The presence of links, as any other factor of relevance in the

¹²² See supra note 40.

¹²³ See supra note 6, para 273.

¹²⁴ See supra note 6, para 276.

¹²⁵ Barry E. Hawk, Henry L. Huser, *European Merger Control: A Practitioner's Guide*, p. 225.

¹²⁶ See e.g. Knorr-Bremse/Bosch supra note 96, para V.A.(6); Valco/ITT Industries supra note 95, paras 54-55.

analysis of collective dominance, is not of decisive influence of its own. In Nestlé/Perrier collective dominance was found even in the absence of links between the suppliers.

5.1.9.1 Harmless Links

Pilkington-Techint/SIV¹²⁷ provides an example of harmless links, i.e. harmless in the sense that they do not facilitate parallel behaviour. The technology licensing links in the case concerned basic production process and the cross supply arrangements between the oligopolists were commonplace on the market and necessary for economic business considerations. These links did not affect the transparency of the market. Moreover, the links in the form of a joint venture between the two leading suppliers was regarded as harmless. The operation of the joint venture was pure manufacturing and the amount of output was sold on a 50/50 basis to the parent companies.

In CCIE/GTE¹²⁸ the suppliers used the practice of cross licensing, which resulted in that most suppliers used the same or similar research data. However, these links were not of such nature as to give the suppliers the incentive to accommodate each other's behaviour and avoid competition. In fact, the suppliers actively competed in terms of quality, product characteristics, design, attributes and efficiency of production.

5.1.9.2 Harmful Links

Structural links between the suppliers in Price Waterhouse/Coopers & Lybrand¹²⁹ were regarded as harmful since they gave the suppliers an incentive to engage in parallel behaviour. The suppliers were self-regulated via institutions which the suppliers themselves were members to. The decisions on regulative issues were crucial all suppliers

and since the largest suppliers had a major influence in the decision-making, they could use their influence in a manner that could facilitate parallel behaviour among them.

The cooperative and distribution/marketing links between the suppliers in Thorn EMI/Virgin Music¹³⁰ were taken into account by the Commission in the assessment of

¹²⁷ See supra note 76, paras 38-39,49.

¹²⁸ Case No IV/M.258- CCIE/GTE of 25.09.1992, para 28.

¹²⁹ See supra note 63, para 101.

¹³⁰ See supra note 36, para 37.

collective dominance in the case. However, but after an overall examination it was concluded that collective dominance would not be created.

5.1.9.3 Links on a Third Market

In *Gencor/Lonrho*¹³¹ structural links existed between the duopolists on other markets than on the relevant one. The Commission found the links on the third market was of importance in the assessment of collective dominance as they increased the likelihood of parallel behaviour on the relevant market. In the appeal to the decision, this was confirmed by the CFI which ruled that: 'Links between the principal platinum producers relating to activities outside PGM production (paragraph 156 of the contested decision) were taken into account by the Commission not as factors attesting to the existence of economic links in the strict sense given to that notion by the applicant, but as factors contributing to discipline over the members of an oligopoly by multiplying the risks of retaliation should one of its members act in a manner considered unacceptable by the others'¹³².

5.1.10 Multi-Market Contacts

For many years the opinion of the Commission regarding the effect of multi-market contacts between firms on the likelihood of parallel behaviour was not clear. In doctrine, however, it was suggested that such contacts could increase the stability of anti-competitive collusive behaviour¹³³. This was based on the presumption that the presence of the same firms on a neighbouring market as on the market on which there is interdependence, i.e. the relevant market, invokes an incentive to stay with the parallel behaviour on the relevant market. Thus, the presence of the same firms on a neighbouring market may intensify the interdependence between the firms on the relevant market. The threat of retaliation on a neighbouring market as well as on the relevant market increases the incentive to stay with the parallel behaviour.

However, this effect of multi-market contacts may have been recognised by the Commission in *Nestlé/Perrier*. The Commission concluded that the situation of common

¹³¹ *Gencor/Lonrho* supra note 47, para 156.

¹³² See supra note 6, para 281.

¹³³ Erhard Kantzenbach, Elke Kottman, Reinald Krüger supra note 15, p.57, Ulrich Immenga, Ernst-Joachim Mestmäcker supra note 77, p. 908, Barry E. Hawk, Henry L. Huser supra note 125, p. 250.

interest of the duopolists (Nestlé and BSN) giving them the incentive to engage in tacit collusion, was ‘... further reinforced by the fact Nestlé and BSN are (...) both active in the wider food industry and already cooperate in some sectors of that industry’¹³⁴.

In the decision *Gencor/Lonrho* the Commission fully aligned with the view on multi-market contacts that had been forwarded in doctrine. In this decision it was recognised that the fact that the suppliers had multi-market contacts and met each other on the relevant market as well as on other markets induced and facilitated the engagement in anti-competitive parallel behaviour¹³⁵. Moreover, it was observed that the multi market contacts increased the stability of parallel behaviour; ‘multi-market contacts (and structural links) may have a disciplinary effect on the members of the oligopoly by increasing the risks of retaliation, due to the existence of a high number of possibilities for retaliation if a member of the oligopoly were to behave unacceptably for the other members’¹³⁶.

5.1.11 Product Homogeneity

Co-ordination of pricing policy and parallel behaviour is easier to achieve and maintain on markets where products are homogeneous. On a market with a homogenous product it is easier to compare prices and thus, easier to reach unity on what price the product should have on the market. In addition, deviations from a tacit agreement would be easier to detect, which makes it is less attractive for the oligopolists to cheat and undercut the price they have tacitly agreed upon. Homogeneous products were recognised for instance in *Gencor/Lonrho*, a commodity¹³⁷, and in *Waterhouse/Coopers & Lybrand* the product, auditing services, was standardised according to national as well as institutional regulatory requirements¹³⁸.

The degree of product innovation is closely related to that of product homogeneity. A homogenous product could be an indication of ripeness of a market in terms of innovation and technical progress. In markets where technology is exhausted and research and development play a little role, price is the key parameter of competition.

¹³⁴ See supra note 4, para 123.

¹³⁵ See supra note 47, para 141(b).

¹³⁶ See supra note 47, para 158.

¹³⁷ See supra note 47, para 143.

¹³⁸ See supra note 63, para 100.

Consequently, parallel behaviour is easier to achieve and maintain on a mature market that is fully developed and stable. The market is 'under control' in the meaning that the parallel behaviour is not endangered by the introduction of new products that could threaten to erode reached market positions. The probability of a deviation, as a result of a competitive advantage gained through an invention, from the collusive behaviour is very little.

The fact that parallel behaviour is easier to achieve if the products are homogeneous is not altered if the products are slightly heterogeneous, especially not if there are clear references such as price lists, focal points or agreed scales¹³⁹. Homogeneity regarding the product does nevertheless not exclude the possibility of competition between suppliers. There is more than one way to compete and competition on price is only one possibility. Thus, apart from price, competition can focus on non-price criteria such as quality, technical competence, delivery, references and service etc. This has been taken into account in several decisions¹⁴⁰.

It is very difficult to reach a tacit agreement in a market with heterogeneous products due to multiple pricing. The Commission has recognised that product innovation leads to product differentiation, which complicates the engagement in anti-competitive parallel behaviour¹⁴¹. Product heterogeneity is found in markets where technology is not yet ripe and research and development are of importance in the innovation of new products. These markets are not 'stable', as there is constant entry of new products, which results in heterogeneity among products. Consequently, it is harder for the oligopolists to tacitly agree on price and engage in parallel behaviour.

Product heterogeneity was taken into account in *DuPont/Hoechst/Herberts*¹⁴² in the finding that the market would remain competitive even though the concentration would result in a high concentration on the supply side, two suppliers with 60% and three suppliers with 80%. A similar conclusion was reached in *American Home Products/Monsanto* in which three suppliers would have a combined market share of

¹³⁹ Juan Briones *supra* note 53, p. 339, see also *Mannesmann/Vallourec/Ilva* *supra* note 69, para 85.

¹⁴⁰ See e.g. *Case No IV/M.337-Knorr-Bremse/Allied Signal*, para 45; *Voith/Sulzer (II)*, para 33, *supra* note 96.

¹⁴¹ *Pilkington-Techint/SIV* *supra* note 76, para 42.

¹⁴² See *supra* note 95, para 37.

more than 95%. Notwithstanding the highly concentrated supply, oligopolistic dominance was not at risk due to the heterogeneous nature of the product and the dynamism of the market: innovation played an important role which resulted in frequent entry of new products¹⁴³. In *Unilever France/Ortiz-Miko (II)* the Commission, similarly, relied on factors such as product heterogeneity, innovation, and market dynamism to assure competition on the market¹⁴⁴.

Parallel behaviour is also made difficult when the final products have different technical solutions according to the wishes of the customer. Such products are uniquely developed for each individual customer, which results in heterogeneity among the products¹⁴⁵. Collective dominance was denied in *Valeo/ITT Industries*¹⁴⁶ regardless of the fact that the new entity and its main competitor would have about 70% or more of the market share post concentration. It was observed that the products were individually designed for each customer, which resulted in product homogeneity on the market and thus, decreased the likelihood of parallel behaviour.

However, product heterogeneity is not always an indication of presence of competition between the suppliers. In *Airtours/First Choice*¹⁴⁷ the Commission recognised that there were variations between the products, short haul foreign package holidays, and their prices differed. Nevertheless, the Commission found that the products were fundamentally similar and reached the conclusion that 'the product differences will not prevent the creation of collective dominance in this case...'¹⁴⁸ The decision has received much criticism. One of the criticised points was the assessment of the effects of the product heterogeneity on the likelihood and possibility of parallel behaviour (see below point 6). Moreover, differentiation among products may be part of a strategy of dividing up markets between the suppliers in order to avoid competition¹⁴⁹.

¹⁴³ See supra note 62, para III.A.3.

¹⁴⁴ Case No IV/M.422-*Unilever France/Ortiz-Miko (II)* of 15.03.1994, para 51.

¹⁴⁵ See e.g. *Voith/Sulzer (II)* supra note 96, para 33; *Snecma/TI* supra note 95, para 26 and Case No IV/M.937-*Lear/Keiper* of 22.07.1997, para V.

¹⁴⁶ See supra note 95, para 54.

¹⁴⁷ Case No IV/M.1524-*Airtours/First Choice* of 22.09.1999.

¹⁴⁸ *Ibid.*, para. 90.

¹⁴⁹ Juan Briones supra note 53, p. 340.

5.1.12 Elasticity of Demand

Low elasticity of demand increases the incentive for suppliers to engage in parallel behaviour. Low price elasticity would allow the suppliers to raise the price to a supra competitive level without suffering a decrease in sales, as the customers would buy the product at a higher price as well. The Commission has recognised that low price elasticity has the effect of creating a larger incentive of firms to engage in anti-competitive parallel behaviour, since all suppliers would lose from competing with each other¹⁵⁰.

It is recognised that price elasticity is low if the purchase cost of the product represents only a small fraction of the total cost of the purchased amount¹⁵¹. Elasticity of demand is also decreased when there are few or no substitutes to the product. This was the situation in *Price Waterhouse/Coopers & Lybrand*. The relevant product, auditing services, could only be provided by six, post concentration five, firms and there were no substitutes to the product available for customers. The absence of substitutes had the effect of making price the least important criteria in the customer's choosing of a supplier of auditing services¹⁵². Further, low price elasticity can be created by suppliers through effective advertising that creates market image and consumer loyalty¹⁵³.

On the contrary, high elasticity of demand, i.e. close substitutes exists for the customers, gives the suppliers little or no incentive to engage in parallel behaviour as they can not gain much profit from a joint price increase. This was observed in *RWE-DEA/Hüls* in which demand was elastic as customers regularly ordered from several suppliers in order to take advantage of price differences on the market between suppliers¹⁵⁴.

5.1.13 Stagnant Demand

A saturated market on which demand is stagnant or has a slow rate of growth gives the suppliers little or no incentive to compete. As the market is not growing anymore, or at best slowly growing, competition would only involve competing for market shares held by the other suppliers. Consequently, competition could be detrimental for every supplier.

¹⁵⁰ See e.g. *Gencor/Lonrho* supra note 47, para 149; *Pilkington-Techint/SIV* supra note 76, para 31.

¹⁵¹ *Holdercim/Cedest* supra note 79, para 27.

¹⁵² See supra note 63, para 99.

¹⁵³ *Nestlé/Perrier* supra note 4, para. 124.

¹⁵⁴ See supra note 66, para IV.C.6.

Thus, the suppliers may recognise that instead of competing, it is best for all of them to maintain their market shares as they are. The collective protection of their market shares from decreasing can increase the incentive to engage in parallel behaviour.

On the contrary, an expanding market with growing demand reduces the incentive to engage in parallel behaviour. Such a market offers new market shares to be gained and gives the suppliers the incentive to compete¹⁵⁵.

5.1.14 Past Behaviour

The past behaviour of the suppliers is of importance in the examination whether there will be competition on the market post concentration. The Commission analyses the developments of price and market shares in reaching a conclusion on the expected behaviour of the suppliers after the concentration¹⁵⁶. In *Akzo Nobel/Monsanto* it was observed that smaller firms had competed actively in order to increase their market shares and they had been successful, since their sales had increased rapidly¹⁵⁷. If the market was competitive a priori concentration, it suggests that the market will remain competitive or, at least, does not suggest the opposite on its own.

If the past market behaviour reveals that the suppliers have not been very competitive, it indicates an already existing co-operative attitude. Stability of price over time is a sign for the market not being very competitive in the past¹⁵⁸. In *Nestlé/Perrier* similarities in price policies between the suppliers as well as simultaneously launched price raises indicated that there had not been much competition between the leading suppliers in the past, which increased the probability for anti-competitive behaviour post concentration¹⁵⁹.

Furthermore, cartel relations between suppliers as well as the fact that the industry has been prone to tacit collusion might increase the risk for parallel behaviour and give rise to competitive concern in the appraisal of the concentration. This was regarded in

¹⁵⁵ See e.g. *Pilkington-Techint/SIV* supra note 76 para 30; *Unilever France/Ortiz-Miko (II)* supra note 144, para 51.

¹⁵⁶ *Nestlé/Dalgety* supra note 73, para 29.

¹⁵⁷ See supra note 71, para 47.

¹⁵⁸ Case No IV/M.1423-CRH/Ibstock of 01.03.1999, para V.

¹⁵⁹ See supra note 4, para 124.

Glaverbel/PPG¹⁶⁰, a concentration that brought together two of the suppliers in the float glass industry. An earlier decision, Pilkington-Techint/SIV¹⁶¹, concerning a concentration in the same industry, had raised concern on behalf of the Commission regarding the risk for parallel behaviour and collective dominance. This was taken into account in the assessment of the later decision. Both the concentrations were nevertheless cleared.

Past infringements of EC competition rules are also taken into account by the Commission. In *Kali & Salz/MdK/Treuhand* the fact that the two duopolists had entered into an agreement that was prohibited under Article 81(1) of the EC Treaty was of importance for the Commission's analysis of the concentration¹⁶². The ECJ, however, in its legal review of the decision ruled that the agreement was not of importance for the appraisal of the concentration since no less than 20 years had passed from the prohibition of the agreement¹⁶³. The Commission has also taken into account anti-trust decisions of national authorities. In *Pilkington-Techint/SIV* a decision from the German Bundeskartellamt condemning a price and discount cartel to which the parties were members was relevance in the Commission analysis¹⁶⁴.

However, missing competition between the suppliers before the concentration is not a necessary criterion for the finding of the likelihood of parallel behaviour in the future. Some markets with a competitive history might not in fact have been truly competitive. This can be the case when past competition was not seriously meant, in the meaning that

it was local, temporary, limited in time, or only focused on certain products. Neither does a price reduction that, as part of a tacit agreement, aims at repressing or driving an existing or entering competitor out from the market, indicate that parallel behaviour is not to be expected. It can however sometimes be difficult to judge whether the competition was seriously meant or a parallel action launched by the leading firms to protect the market from competitive pressure.

¹⁶⁰ See supra note 110, para 20.

¹⁶¹ See supra note 76.

¹⁶² See supra note 42.

¹⁶³ See supra note 5, para 241.

¹⁶⁴ See supra note 76, para 32.

5.2 Countervailing Power of Competitors and Customers

5.2.1 Actual and Potential Competition

5.2.1.1 Actual Competition

The Commission has recognised that the countervailing power from actual competitors must be strong enough to enable them to exert a competitive constraint on the oligopolists in the short term that prevents the oligopolists from succeeding in their parallel behaviour¹⁶⁵. Actual competition was regarded as a potential force against the collective power of the two leading firms in BAT/Rothmans¹⁶⁶. The concentration concerned the merging of the tobacco businesses of the parties. Post concentration the combined market share of the new entity and the largest competitor would reach a size of 60-80% on three national markets in the EC. Apart from the two large suppliers, there was a minor competitor with about 10% of the market and the rest of the market was divided among smaller suppliers. The high combined market share of the new entity and the main competitor raised the issue of duopolistic dominance. However, the Commission concluded that there would be no margin for anti-competitive parallel behaviour, one of the reasons being that the market had been competitive and important independent competitors were active on the market.

In another decision¹⁶⁷ the Commission took into account that the only remaining large competitor to the duopolists would not be able to compete effectively for long. The capacity of the competitor was declining and in the foreseeable future its sales would have reduced to an insignificant volume. Thus, its role as an actual competitor with an

ability to constrain the collective dominance of the duopolists and prevent their parallel behaviour was diminishing. Consequently, regardless of the fact that a competitor had countervailing power at the moment, the existence of competitive pressure that could control the behaviour of the oligopolists was denied.

¹⁶⁵ Nestlé/Perrier supra note 4, para 76.

¹⁶⁶ Case No IV/M.1415-BAT/Rothmans of 17.03.1999, para IV.C.a.

¹⁶⁷ Gencor/Lonrho supra note 47, para 178.

5.2.1.2 Potential Competition

If there are no actual competitors on the market, there may be potential competitors that can prevent the oligopolists from exerting collective dominance. A collective dominant position, and parallel behaviour of the oligopolists, must be of a lasting nature and not only temporary to be regarded as distorting effective competition on the market. Prices above a competitive level charged by suppliers with collective dominance signal that higher profits are earned in that market, which will attract other suppliers to enter the market in order to get a share of the high profits. Entry would continue until the price would be down at a competitive level. However, when there are high entry barriers on the market it may be impossible or merely not desirable for competitors to enter and thus, the supra competitive prices of the oligopolists would remain unchallenged.

The investigation of the existence of potential competition is not only a question of whether competitors have the possibility to enter. Also, it has to be examined whether competitors are likely to enter within a short time and with sufficient capacity so that the leading suppliers quickly could be constrained from charging supra competitive prices¹⁶⁸. Therefore, the likelihood of market entry of credible competitors in the medium term, i.e. two to three years, is recognised as a fact that can force oligopolists to break up their parallel behaviour and bring about competition on the market¹⁶⁹. When this scenario is likely, collective dominance is not created for the purpose of the Regulation, since 'a short-lived market share of some size in a market with no or low barriers to entry is not really a threat to competition at all'¹⁷⁰

The entering of new firms in the past as well as forthcoming market entry are indicators of market openness and low or non-existing entry barriers. However, in Thorn EMI/Virgin Music none of the competitors entering in the past had been able to develop into credible competitors and this reduced the likelihood of future potential competition¹⁷¹. Potential competition can be provided from suppliers within the EC as well as from third countries. In Akzo Nobel/Monsanto it was observed that the low transport costs and the trend towards global purchasing made the countervailing power of

¹⁶⁸ Nestlé/Perrier supra note 4, para 91.

¹⁶⁹ Barry E. Hawk, Henry L. Huser supra note 125, p. 223.

¹⁷⁰ Sir Leon Brittan, Competition policy and merger control in the single European market, p. 26.

¹⁷¹ See supra note 36, para 34.

potential competitors from outside the EC strong¹⁷². In another decision, producers from Eastern Europe and Japan were regarded as a competitive force that could constrain the creation of a collectively dominant position¹⁷³.

Barriers to enter are for instance high sunk costs, i.e. costs of initial large investments such as a plant or advertisement. High sunk costs make entry very risk-filled, since these costs are not retrievable on exit from the market. In addition, investments for entering a market can be not only costly but also very time consuming. In *Holdercim/Cedest* it was observed that new entrants would have to invest large costs in the construction of a plant which would be able to start full production only after two to three years¹⁷⁴. As regards advertisement costs, the stronger the fidelity of consumers to established brands on the market the larger the costs and the more time consuming will an entry for a new competitor be¹⁷⁵.

In the assessment of entry barriers it is also important to regard the grow rate of the market. It is observed that a low rate of market growth and limited grow of demand as a result of saturation of brands and product range, constitute barriers to entry. However, the Commission has recognised that a large market share is not unusual on an expanding market¹⁷⁶ to which entrants are attracted. Similarly, in *Akzo Nobel/Monsanto* it was recognised that successful anti-parallel behaviour would be hindered by the development of a new market¹⁷⁷.

Technical know-how affects the level of entry barriers. If the know-how is available only for the leading suppliers, potential competitors have a competitive disadvantage in that they cannot use the production technique required in order to be able to compete effectively¹⁷⁸. In the *Kali & Salz* decision a barrier to entry of regulatory nature was present, which excluded potential competitors from the market¹⁷⁹.

¹⁷² See supra note 71, para 48.

¹⁷³ *Mannesmann/Vallourec/Ilva* supra note 69, paras 130-131.

¹⁷⁴ See supra note 79, para 27.

¹⁷⁵ *Nestlé/Perrier* supra note 4, para 97.

¹⁷⁶ See *Henkel/Nobel* supra note 34.

¹⁷⁷ See supra note 71, para 23.

¹⁷⁸ *Pilkington-Techint/SIV* supra note 76, para 44.

¹⁷⁹ See supra note 42: one of the duopolists was a legal monopolist in France.

Also, excess capacity among the oligopolists can in itself create a disincentive for entry¹⁸⁰. The oligopolists' excess capacity can be used to build up an entry barrier. Thus, the oligopolists could use their over capacities in a joint retaliation action against a new competitor about to enter the market. Thus, by increasing output they could decrease the price to a level that a potential competitor could not sustain. It is also recognised that a high supply concentration in itself can have the effect of a barrier to entry and deter new entry, since the likelihood of joint response to new entrants by the leading suppliers is increased¹⁸¹.

The Commission also takes into account the likelihood of potential competition from suppliers active in neighbouring markets¹⁸². In GECapital/Sea Containers the concentration gave rise to a high market concentration with two suppliers that accounted for a share above 60% of the market for leasing of dry freight special containers. However, it was observed that suppliers in neighbouring container markets could relatively easily create an important container capacity for the relevant product and enter the market¹⁸³.

5.2.2 Purchasing Power of Customers

The exercise of collective dominance of an oligopoly may be hindered by customers when they have significant purchasing power. Thus, when the purchasing power of the customers is stronger than the collective power of the suppliers, the former ones can force the latter ones to compete with each other and break up their anti-competitive parallel behaviour. It is recognised that the larger and more concentrated customers are, the stronger is their purchasing power. Powerful customers can be able to play the oligopolists off against each other and bring about internal competition among them.

The higher the concentration on the demand side is the more important becomes the order of each customer, since if a customer is lost to another supplier it can mean a significant loss of profits. The suppliers are thus forced to compete in making the best offer on the market. Highly concentrated demand was the main reason for clearing the concentration

¹⁸⁰ Pilkington-Techint/SIV supra note 76, para 44.

¹⁸¹ Nestlé/Perrier supra note 4, para 130.

¹⁸² See e.g. Henkel/Schwarzkopf supra note 59, para 30.

¹⁸³ Case No IV/M.1020-GECapital/Sea Containers of 28.04.1998, p. 19.

Snecma/TI¹⁸⁴. In this case three large customers accounted for 80% of civil purchases for landing gear for aircraft and as regarded military purchases, one single customer accounted for 70%.

Further, long-term contracts between suppliers and customers can strengthen the purchasing power of the latter ones. This follows from the fact that, since the customers are 'locked' to a certain supplier for a long time, the suppliers are limited in their sales possibilities. Thus, if a supplier loses a contract, it will be quite some time until he has the opportunity to 'win' the customer for the next contract period. In Lear/Keiper the Commission noted that '... the fact that a supply contract, once it is lost, can only be regained once a new car model is introduced, increases the competitive pressure in the market'¹⁸⁵. Thus, 'lumpy' demand, i.e. infrequent purchase in big volumes, has a competitive effect on the behaviour of the suppliers.

The power of the customers can also be increased by their choice of purchasing tactics. Customers' practice of sourcing has in many decisions been considered as a means to control the behaviour of the supply side, i.e. prevent parallel behaviour. In Pilkington-Techint/SIV there was a trend among customers towards single sourcing and the Commission observed that '... single sourcing as opposed to multiple sourcing means that suppliers receive all or none of order requirements and are therefore placed under greater competitive pressure to win the full order'¹⁸⁶. In addition, the purchasing power was further strengthened by the fact that it was relatively easy for customers to switch suppliers.

The threat of vertical integration on the demand side might decrease the likelihood of parallel behaviour. Customers with actual or potential 'in-house' production have a substantial power to control the market behaviour of the suppliers. In case market prices would rise to a supra competitive level, customers could turn to their in-house production to cover their demand. In Thyssen/Krupp¹⁸⁷ the creation of a collective dominant position was excluded due to the countervailing power of demand. It was observed that 60% of demand was covered by in-house production and the fact that customers had the

¹⁸⁴ See supra note 95, para 39.

¹⁸⁵ See supra note 145, para V.

¹⁸⁶ See supra note 76, para 56.

¹⁸⁷ Case No IV/M.1080-Thyssen/Krupp of 02.06.1998, para 25.

possibility to increase their own production was considered to give them power to constrain the largest firms from exerting collectively held market power and increasing prices. Similarly, in Valeo/ITT Industries it was observed that substitutes, in the form of alternative suppliers as well as in-house production, to well the known brands of the leading suppliers were available for the customers¹⁸⁸.

The fact that customers are well informed increases their purchasing power. The decision Allianz/AGF¹⁸⁹ contains an interesting approach to this aspect. Post concentration the new entity together with its main competitor would have a combined share of 88% of the insurance market for delcredere. Two other minor competitors, accounting for 5% respectively 3%, were also present on the market. However, despite the fact that the market was highly concentrated, it was excluded that a dominant duopoly would be created. One of the factors that decreased the likelihood of parallel behaviour of the two duopolists was the fact that brokers were present on the market. The brokers acted as intermediaries between clients and insurance firms and the profound market knowledge of the brokers increased the purchasing power of the clients. Moreover, the presence of brokers also decreased customer fidelity. Thus, any attempt by the two largest firms to engage in anti-competitive behaviour would provoke a loss of customers as supply side substitutability was high.

When the structure of demand is fractured and there are many small customers and products are bought frequently in small amounts, the purchasing power is not very strong.

6 Discussion on Guidelines

6.1 Requirement for Guidelines

The Commission has through case law identified that certain factors are characteristic for a market that is prone to anti-competitive parallel behaviour. These factors are commonly referred to as the checklist. Thus, regardless of the fact that there are no guidelines on collective dominance there is an established approach of the Commission to collective dominance. In addition, in the Gencor/Lonrho decision the Commission recognised

¹⁸⁸ See supra note 95, para 55.

¹⁸⁹ Case No IV/M.1082-Allianz/AGF of 08.05.1998, para 32.

certain characteristics of the market as *prima facie* triggering an analysis of collective dominance¹⁹⁰:

- Demand side
 - moderate growth
 - inelastic price
 - insignificant countervailing buying power

- Supply side
 - highly concentrated
 - high market transparency
 - homogeneous product
 - mature production technology
 - high entry barriers (including high sunk costs)
 - structural links between suppliers
 - multi-market contacts

These factors were also referred to in a later decision, Price Waterhouse/Coopers & Lybrand¹⁹¹. Their presence raised concern on behalf of the Commission and triggered an examination of collective dominance in the case¹⁹².

In the appeal of the Commission's decision Gencor/Lonrho, the CFI accepted the factors the Commission had based its decision on. By that, the CFI has recognised them as indicators to whether the leading suppliers are likely to engage in anti-competitive parallel behaviour. It is suggested that the Gencor judgment of the CFI has '...achieved the status of standard reference point for officials and practitioners alike'¹⁹³. Consequently, it can be concluded that the checklist provides a useful reference to the factors which the Commission bases its decision on collective dominance on.

The checklist is thus considered as representing an established approach to the oligopoly issue. However, it is less clear *how the Commission reaches a conclusion that collective dominance is created or strengthened*. Thus, the question remains how the Commission

¹⁹⁰ See supra note 47, para 141.

¹⁹¹ See supra note 63, para 95.

¹⁹² See supra note 63, paras 98-101.

¹⁹³ William Bishop, Recent EC Merger Cases: An Economic Perspective, IBC EC Competition Law Conference, London 9 & 10 November 1999, p. 2.

applies the checklist to actual cases. In the acceptance of the factors applied by the Commission in the Gencor/Lonrho decision, the CFI did not give guidance as to which of the factors it considered to be of particular importance for the conclusion that collective dominance was created¹⁹⁴.

Neither did the ECJ provide guidance in the Kali & Salz judgment on how the factors should be applied in the analysis of collective dominance. The ECJ did however rule that in the analysis the Commission is '... obliged to assess, using a prospective analysis of the reference market, 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'¹⁹⁵.

The interpretation of the Commission of the ruling of the ECJ is that it has a strong burden of proof for the finding of collective dominance and that it must support a finding of an interest of the oligopolists to avoid competition with strong evidence¹⁹⁶.

However, notwithstanding the existence of a set of factors recognised to typically facilitate parallel behaviour, guidelines on collective dominance are required mainly for two reasons. The first reason is that it is not clear how the Commission applies the checklist. It has been forwarded that the application must not become a 'mechanical box-ticketing' exercise in which each factor is regarded individually and when taken together, they represent a percentage ratio of factors in favour and against collective dominance. The factors applied in an analysis of collective dominance can not be divided into positive and negative ones in abstract, as a factor may cut both ways. Thus, a factor that facilitates tacit collusion on one market may well have a contrary effect on another market, such as excess capacity (see above point 5.1.8.). In addition, a too rigid application of the checklist results in the danger that the focus of the analysis will be on semantic interpretations of definitions of the factors such as 'stagnant demand', etc¹⁹⁷.

¹⁹⁴ See supra note 48, p. 22.

¹⁹⁵ See supra note 5, para 221.

¹⁹⁶ See supra note 8, see also Price Waterhouse/Coopers & Lybrand supra note 63, para 104.

¹⁹⁷ William Bishop supra note 193, p. 6.

It is important to remember that the purpose of the checklist is to provide a reference point in the assessment of the possibility of monitoring, deviating and retaliating. A careful application of the checklist is required. The assessment of collective dominance involves the 'building of a picture', i.e. whether the factors taken together provides a mechanism for higher prices¹⁹⁸. Consequently, the checklist only makes sense if it is applied in relation to economic theory on oligopolistic markets and in a dynamic case-by-case assessment aiming at analysing how the checklist factors are changed by the concentration¹⁹⁹.

The second reason why guidelines are required relates to the recent decision *Airtours/First Choice*²⁰⁰ of the Commission. In the assessment of the concentration the Commission found that the concentration would have created a collective dominant position for three large suppliers that had a combined market share of 80%. The decision was the first in which a concentration was prohibited on the ground that there was a risk that *three firms* would engage in anti-competitive behaviour.

However, the Commission's analysis leading to the finding of collective dominance gave rise to criticisms. It was held that several of the factors in the checklist were not met, e.g. products were heterogeneous with multiple pricing, demand was subject to fluctuations, there were low barriers to entry and there was no effective punishment mechanism present. Thus, the economic analysis of the Commission lacked stringency. It is held that the decision has given rise to confusion and, moreover, has damaged the credibility of the established approach to collective dominance: 'The commission should avoid the temptation to use collective dominance simply to block mergers it does not like'²⁰¹. Consequently, how the Commission applies the checklists and which factors it regards to be of importance for a finding for a dominant position is less clear than before. Guidelines are therefore urgently needed.

¹⁹⁸ Cristina Caffarra, Speech on Collective Dominance: An Economic Perspective, 'Advanced EC Competition Law', IBC's 6th Annual Conference, 10 November 1999.

¹⁹⁹ James S. Venit, Recent Merger Cases. II – Legal Aspects, IBC UK Conferences Limited, 1999, p. 26

²⁰⁰ See supra note 147.

²⁰¹ William Bishop supra note 193, pp. 7, 11.

6.2 Legal Instrument for Guidelines

Within the Commission it is recognised that a suitable legal instrument for guidelines on collective dominance needs to combine two criteria²⁰². Firstly, it must provide industry with sufficient predictability how the Commission assesses collective dominance. Secondly, it must increase the coherence of the Commission's approach to collective dominance over time.

Guidelines issued in the form of a regulation would have a binding effect on the Commission. The Commission would not be left with the discretion recognised by the ECJ to be necessary in order to make an accurate examination of collective dominance. Furthermore, the analysis of highly concentrated market needs to be done from a multi-criteria approach, according to which each factor is examined in the context of other factors. Taking into account the fact that oligopolies are consistent with competitive as well as non-competitive markets, it is not possible to outline certain factors as a basis for a finding of collective dominance. Instead, the analysis must be done on a case-by-case basis. Thus, it is impossible to judge in abstract which factors are of decisive importance for the analysis and which are only complementary²⁰³. The ECJ also ruled that the Commission needs to base its decisions on factors that are specific to the market on which collective dominance is examined²⁰⁴. Consequently, considering the binding effect of a regulation, it would not be a useful tool for guidelines on collective dominance.

A legal instrument in form of a guidance notice would not have a binding effect on the Commission. Nevertheless, it would impose a quasi-binding effect in the sense that, as a rule, the Commission would follow the notice. If the Commission would want to make use of the possibility to depart from the notice strong reasoning for doing so must be provided. Thus, a guidance notice constitutes the most suitable instrument for guidelines on collective dominance, since it would allow the Commission to analyse collective dominance on a case-by-case approach and to take into account the specific conditions and factors of importance in each concentration.

²⁰² Juan F. Briones Alonso, Directorate General Competition/Transport, former official of the Merger Task Force.

²⁰³ Juan F. Briones Alonso *supra* note 53, p. 347.

²⁰⁴ *Kali & Salz Judgment* *supra* note 5, para 222.

6.3 Content of a Guidance Notice

The question concerning the content of a guidance notice on collective dominance is complicated. The problem arises from the fact that, as recognised above in point 6.1, it is not possible to make a distinction of the checklist factors into positive and negative factors. It is impossible to judge in abstract whether a factor is of major importance or only complementary for the outcome of the analysis on collective dominance. Consequently, the effect of a factor on tacit collusion is influenced by the particular combination of factors of each market which makes it impossible to isolate the factors from each other.

6.3.1 Concentration Ratios

Considering the outcome in *Airtours/First Choice*²⁰⁵, it could be argued that a notice that provides guidance as to when the Commission considers it necessary to open an examination on collective dominance would be useful. As recognised by the Commission, the first factor that raises the risk for collective dominance is a highly concentrated structure of supply (see above point 5.1.1). Thus, it could be argued that market concentration ratios could serve as guidance to which concentrations that could trigger an analysis of collective dominance. Concentration ratios would provide industry with a clear reference point whether a concentration is likely to raise the concern of the Commission regarding collective dominance.

It has been recognised by the CFI that ‘...particularly in the case of a duopoly, a large market share is, in the absence of evidence to the contrary, likewise a strong indication of the existence of a collective dominant position’²⁰⁶. Also the ECJ has ruled on the significance of market concentration. In the *Kali & Salz* judgment it was denied that the combined market share of about 60% of the duopolists in the present case itself lead to a presumption that they enjoyed a collective dominant position²⁰⁷. Guidance on the approach to market concentrations levels that generally would trigger an examination of collective dominance have been given by the Commission as statements in decisions (see above 5.1.1). However, it is important to note that such statements are not definitive and

²⁰⁵ The first decision in which it was found that three firms would have been collectively dominant, *supra* note 147.

²⁰⁶ *Gencor Judgment supra* note 6, para 206.

²⁰⁷ See *supra* note 5, para 226.

should not be rigidly relied upon without taking into account the specific conditions in the concentration under examination. Similarly, it is important to observe the wording of the Commission in making the statements: 'collective dominance is unlikely...', i.e. not impossible.

Moreover, it is recognised in economic theory that '...characteristics of industries differ significantly from each other to such an extent that while tacit co-ordinated behaviour may be possible between firms in one concentrated market, in another concentrated market this may not be the case. Hence, formulating general rules which can be applied across all industries is problematic'²⁰⁸. The CFI has, in the context of a discussion on the relevance of market shares for the finding of a dominant position, recognised that '...the fact that the Commission has relied in other concentration cases on higher or lower market shares in support of its assessment as to whether a collective dominant position might be created or strengthened cannot bind it in its assessment of other cases concerning, in particular, markets in which the structure of supply and demand and the conditions of competition are different'²⁰⁹.

Thus, with regard to the fact that there are a large number of factors that influence the creation or strengthening of collective dominance, it is impossible to generalise the importance of certain concentration ratios in the analysis of collective dominance. Consequently, it is not possible to give precise benchmarks on the concentration ratios of the supply structure that will trigger an analysis of collective dominance. Thus, concentration ratios are not a suitable content for guidelines.

6.3.2 Punishment Mechanism

The Regulation aims at preventing distortions of competition that may result of a concentration. Such distortions are avoided by the prohibition of concentrations that creates or strengthens a dominant position, single or collective. In the examination of a collective dominant position the Commission applies a two-step analysis that aiming at reaching a conclusion on whether the concentration will give rise to a market structure on which tacit collusion among the oligopolists will be possible and sustainable. The first step of the analysis examines the presence or absence of internal competition between the

²⁰⁸ Simon B. Bishop, *Power and Responsibility: The ECJ's Kali-Salz Judgment*, [1999] 1 ECLR, p. 38.

²⁰⁹ *Gencor Judgment* supra note 6, para 203.

oligopolists, i.e. whether they have an incentive to engage in anti-competitive parallel behaviour and whether it will be possible to reach a tacit agreement. The second step analyses whether the countervailing power of competitors and customers is strong enough to prevent the oligopolists from exerting their collective dominance. Taking the two steps together, it is not enough to reach a conclusion whether the firms will have an incentive to tacitly collude but it also has to be analysed whether the parallel behaviour is likely to be sustainable.

In economic theory the mechanism for tacit collusion is described in a two-steps model as well. The first step concerns the question whether there is an incentive among the leading suppliers to co-ordinate their behaviour and whether it would be possible to reach a tacit agreement. The second step analyses the sustainability of the tacitly agreed behaviour. This involves the examination of the existence of a punishment mechanism that will have a deterring effect on deviations from the tacit agreement. It is an established principle in economic theory that the sustainability of tacit collusion is facilitated if a deviation is likely to be detected and responded to by the others with an effective retaliation²¹⁰. Even in highly concentrated markets with high entry barriers oligopoly members are prone to act in self-interest, i.e. increase their individual profit by undercutting the price tacitly agreed upon. Thus, *successful tacit collusion is never inevitable*²¹¹.

Among economists it is argued that since merger policy is preventative, the focus of the analysis on collective dominance should be on the second question²¹². Thus, what matters is the risk for sustainable successful collective dominance. Successful anti-competitive parallel behaviour, i.e. supra competitive profits through a stand-off of high prices, will only be possible if there is a threat of retaliation that will deter the oligopolists from cheating. The sustainability is dependent on the existence of an effective punishment mechanism without which tacit collusion would not be possible to maintain. However, it has been recognised that: 'Market structure criteria are of course important, in assessing joint dominance, but the *key issue* is the extent to which co-ordinated action becomes significantly easier to sustain' (emphasis added). Thus, the question to be answered in the analysis is whether the concentration will change the situation on the market to such an

²¹⁰ Johan Ysewijn and Cristina Caffarra, *Two's Company, Three's a Crowd: The Future of Collective Dominance After the Kali & Salz Judgment*, [1998] 7 ECLR, p. 469.

²¹¹ Simon B. Bishop *supra* note 208, p. 38.

²¹² Johan Ysewijn and Cristina Caffarra *supra* note 210, William Bishop *supra* note 193, p. 5.

extent that anti-competitive behaviour would be easier to sustain. Thus, in the examination of collective dominance it does not have to be considered whether the firms will have an incentive to accommodate each other's behaviour but what is of importance is whether possible anti-competitive parallel behaviour would be sustainable.

However, the discussion on the sustainability of tacit collusion should also include the question whether the oligopolists will be able to exert collective dominance vis-à-vis their competitors and customers. It is recognised that the countervailing power of competitors, actual and potential, and customers are factors that can prevent the parallel behaviour among the leading suppliers from sustaining (see above point 5.2). Hence, these factors are of importance of the sustainability of collective dominance as well. In fact, this approach, i.e. countervailing power as a force to break up parallel behaviour among oligopolists, is already explicitly applied by the Commission.

In conclusion, guidance notices on collective dominance should focus on the factors that are of relevance for parallel behaviour to be sustainable. This includes factors relating to the punishment mechanism and the countervailing power of actual and potential competitors on the one hand and customers on the other.

7 Conclusion

In the early years of the assessment of concentrations under the Regulation it seemed as if the Commission was unaware or unwilling to deal with the dangers to competition that could arise from highly concentrated markets without a single dominant supplier. Thus, the appraisal of concentrations focused on whether the new entity would receive a dominant position that would allow the entity to dominate the market. Collective held market power, possible to be held by oligopoly members, was not considered. However, in 1992 the Commission explicitly included collective dominance in the application of the Regulation. Nevertheless, the interpretation of the Commission of its power under the Regulation to prevent the creation or strengthening of a collective dominant position was disputed. Thus, awaiting a confirmation by the ECJ, doubts as to the applicability the Regulation to collective dominance remained. In 1998 the Commission's power to include collective dominance in the application of the Regulation was confirmed by the ECJ.

Today, the concept of collective dominance is regularly applied in the assessment of concentrations. The Commission is aware of the need to deal with highly concentrated market structures without a single dominant firm; 'Similar negative effects which arise from a dominant position held by one firm arise from a dominant position held by an oligopoly. Such a situation can occur by a mere adaptation by the oligopoly members to the market conditions which leads to anti-competitive parallel behaviour whereby the oligopoly becomes dominant. Active collusion would therefore not be required for the members of the oligopoly to become dominant and to behave to an appreciable extent independently of their remaining competitors, their customers and, ultimately, the consumers'²¹³.

However, not all oligopolies result in the same effect as a monopoly and the dividing line between a competitive and a dominant oligopoly can be very subtle. Thus, at the same time as giving the Commission the power to prohibit a concentrations on the ground that collective dominance would have been created or strengthened, the ECJ also imposed on the Commission a substantial responsibility in its appraisal of oligopolies²¹⁴. The responsibility refers to the principles of legality and predictability. There are no guidelines on how the assessment of collective dominance under the Regulation should be made. However, the checklist developed by the Commission reflects an established approach to the oligopoly issue. The factors in the checklist are typically thought to increase the likelihood of parallel behaviour and a situation of collective dominance.

Notwithstanding the fact that it is clear which factors the Commission takes into account in the analysis, it remains unclear *how* the factors are applied. There is a risk that the application of the checklist will become mechanical and disconnected from underlying economic theory on oligopolistic markets. Moreover, with regard to the incoherent application of the checklist in the decision *Airtours/First Choice*²¹⁵, guidelines are needed in order to prevent that the Commission prohibits a concentration that does not meet the checklist criteria and diverts from its established approach without providing explanatory reasoning. Hence, there is a requirement for guidelines on how the analysis is done and what its focus is.

²¹³ *Gencor/Lonrho* supra note 47, para 140.

²¹⁴ *Simon B. Bishop* supra note 208.

²¹⁵ See supra note 147.

The most suitable legal instrument for guidelines is in the non-binding form of a guidance notice. A notice would provide industry with predictability as well as increase the coherence of the approach under the Regulation to collective dominance. The non-binding character of a notice would leave the Commission with the necessary discretion needed for examining collective dominance but, nevertheless, impose a duty on the Commission to support a departure from the notice with strong reasoning.

A highly concentrated market is a first indicator of a risk for collective dominance. However, as the analysis of collective dominance is done from a multi-criteria approach, it is impossible to give precise benchmarks on the concentration ratios that will trigger an analysis and lead to a finding of collective dominance. This has been recognised among economists as well as by the CFI.

Taking into account that the concept of dominance in the Regulation is part of the a priori protection of effective competition, the analysis of collective dominance should focus on factors that increase the likelihood of *sustainable* tacit collusion. Thus, for the finding that effective competition will be distorted post concentration a mere creation or strengthening of collective dominance, i.e. that the suppliers have an incentive to engage in tacit collusion and are able to do so, is not enough. The tacit collusion has to be sustainable as well. The focus of a guidance notice should therefore be on the likelihood of the parallel behaviour to sustain. Consequently, the question whether the suppliers will have an incentive to tacitly collude is of less relevance and is not necessary to answer in order to reach a conclusion on the assessment of collective dominance.

Thus, what matters in the analysis is the risk for a market structure which would make anti-competitive parallel behaviour sustainable. A guidance notice should focus on the issue whether parallel behaviour will be sustainable and leaving the question whether there is an incentive to tacitly collude aside. The sustainability of collective dominance is dependent on the following two factors; a punishment mechanism aimed at deterring deviations and the countervailing power of customers and actual and potential competitors.

An approach to collective dominance that focuses on the sustainability of anti-competitive parallel behaviour coincides with the Commission's intention to optimise the use of its merger control resources. Work within the Merger Task Force is currently

undertaken to streamline and simplify the treatment of concentrations that prima facie are unlikely to raise concern to competition²¹⁶.

In addition, announcements have been made from an official in the Merger Task Force that a guidance notice will be issued on the approach of the Regulation to highly concentrated market structures that raises the issue of collective dominance²¹⁷. Also, in the light of the Commission's present overview on collective dominance, in which it is recognised that many aspects have to be dealt with²¹⁸. It remains to be seen whether the Commission's conclusion on the focus and content of the analysis of collective dominance will be similar to what has been suggested in this thesis.

It will be interesting to follow the CFI's analysis in the event of an appeal by the parties to the concentration Airtours/First Choice²¹⁹ that was prohibited because it would have created collective dominance. It is possible that a coming judgment of the CFI will deliver new important guidance to the oligopoly issue under the Regulation. Concerning the issue of guidelines on collective dominance it is, nevertheless, important to bear in mind the statement of Juan F. Briones Alonso: 'It is possible to outline how different issues are tackled, but the analysis of a merger will always be individualised by the specific combination of conditions prevailing in a particular market or markets and at the point in time at which the merger takes place'²²⁰

²¹⁶ See supra note 9.

²¹⁷ Francisco Enrique Gonzales-Diaz, Head of Unit, Directorate General Competition/Merger Task Force, at IBC 6th Annual Conference on Advanced Competition Law, Brussels, 10 November 1999.

²¹⁸ See supra note 8, such as the assessment of cost structures.

²¹⁹ See supra note 147.

²²⁰ Juan Briones supra note 53, p. 347.

BIBLIOGRAPHY

- Bishop, Simon B., Power and Responsibility: The ECJ's Kali-Salz Judgment, [1999] 1 ECLR, pp. 37-39.
- Bishop, William, Recent EC Merger Cases: An Economic Perspective, IBC EC Competition Law Conference, London 9 & 10 November 1999.
- Bos, Pierre, Stuyck, Jules, Wytinck, Peter, Concentration Control in the European Economic Community, Graham and Trotman, London, 1992.
- Briones Alonso, Juan F., Economic Assessment of Oligopolies under the Community Merger Control Regulation, [1993] 3 ECLR, pp. 118-122.
- Briones, Juan, Oligopolistic Dominance: Is there a Common Approach in Different Jurisdictions? A Review of Decisions Adopted by the Commission under the Merger Regulation, [1995] 6 ECLR, pp. 334-347.
- Brittan, Sir Leon, Competition Policy and Merger Control in the Single European Market, Grotius Publications Ltd, Cambridge, 1991.
- Caffarra, Cristina, Collective Dominance: An Economic Perspective, 'Advanced EC Competition Law', IBC's 6th Annual Conference, 10 November 1999.
- Cook, C.J., Kerse, C.S., E.C. Merger Control, 2nd Edition, Sweet and Maxwell, London, 1996.
- Draus, Götz, Schröder, Dirk, Praxis der Europäischen Fusionskontrolle, 2. Auflage, Kommunikationsforum, Köln, 1995.
- EC Competition Law Reporter, ¶57-47 (4).
- García Pérez, Mercedes, Collective Dominance Under the Merger Regulation, (1998) 23 ELRev, pp. 475-480.
- González-Díaz, Francisco Enrique, Recent Developments in EC Merger Control Law, The Gencor Judgment, World Competition 3/1999, pp. 3-28.
- Harbord, David, The Airtours Case: 'Collective Dominance' and Implicit Collusion in European Merger Analysis, Market Analysis Ltd., 1999.
- Hawk, Barry E., Huser, Henry L., European Merger Control: A Practitioner's Guide to EC Competition Law, Kuwer Law International, the Hague, 1996.
- Hildebrand, Doris, The Role of Economic Analysis in the EC Competition Rules, European Monographs 17, Kluwer Law International, the Hague, 1998.
- Immenga, Ulrich, Mestmäcker, Ernst-Joachim, EG-Wettbewerbsrecht Kommentar, C.H. Beck'sche Verlagsbuchhandlung, München, 1997.

- Jones, Christopher, Gonzáles-Díaz, Francisco Enrique, *The EEC Merger Regulation*, Sweet and Maxwell, London, 1992.
- Kantzenbach, Erhard, Kruse, Jörn, *Kollektive Marktbeherrschung, Das Konzept und Seine Anwendbarkeit für die Wettbewerbspolitik*, EC. Commission, Luxemburg, 1987.
- Kantzenbach, Erhard, Kottmann, Elke, Krüger, Reinald, *New Industrial Economics and Experiences from European Merger Control - New Lessons About Collective Dominance?*, Luxemburg: Office for Official Publications of the European Communities, 1995.
- Kerber, Wolfgang, *Der EG-Fusionskontrollfall Nestlé/Perrier*, WuW 1/94, pp. 21-35.
- Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, 6th Edition, Hart Publishing, Oxford, 1997.
- Korah, Valentine, *Gencor v. Commission: Collective Dominance*, [1999] 6 ECLR, pp. 337-341.
- Morgan, Eleanor J., *The Treatment of Oligopoly under the European Merger Control Regulation*, *The Antitrust Bulletin*, vol. XLI, 1/Spring 1996, pp. 203-246.
- Nera Competition Brief, *When Three Is Not Enough? The Airtours/First Choice Decision*, September, 1999.
- Neven, Damien, Nutall, Robin, Seabright, Paul, *Merger in daylight: The Economics and Politics of European Merger Control*, Centre for Economic Policy Research, London, 1993.
- Portwood, Timothy G., *Mergers under EEC Competition Law*, European Community Law Series 7, The Athlone Press Ltd, London, 1994.
- Ridyard, Derek, *Economic Analysis of Single and Oligopolistic Dominance under the European Merger Regulation*, [1994] 5 ECLR, pp. 255-262.
- Ridyard, Derek, *Joint Dominance and the Oligopoly Blind Spot Under the EC Merger Regulation*, [1992] 4 ECLR, pp. 161-164.
- Schmidt, Ingo, Schmidt, André, *Europäische Wettbewerbspolitik*, Vahlen, München, 1997.
- Schrödermeier, Martin, *Collective Dominance Revisited: An Analysis of the EC Commission's New Concepts of Oligopoly Control*, [1990] 1 ECLR, pp. 28-34.
- Van Bael, Ivo, Bellis, Jean-François, *Competition Law of the European Community*, 3rd Edition, CCH Editions, Bicester, 1994.

Venit, James S., Recent Merger Cases, II – Legal Aspects, IBC UK Conferences Limited, 1999.

Weatherill, Stephen, Beaumont, Paul, EC Law, 2nd Edition, Penguin Books, London, 1995.

Whish, Richard, Sufirin, Brenda, Oligopolistic Markets and EC Competition Law, (1992) YBEL, pp. 59-83.

Whish, Richard, Competition Law, 3rd Edition, Butterworths, London, 1993.

Ysewyn, Johan, Caffarra, Cristina, Two's Company, Three's a Crowd: The Future of Collective Dominance After the Kali & Salz Judgment, [1998] 7 ECLR, pp. 468-472.

TABLE OF CASES

European Court of Justice

Cases 48/69, etc., ICI v. Commission of 14 July 1972, [1972] ECR 619.

Case 85/76 Hoffmann-La Roche v. Commission of 13 February 1979, [1979] ECR 461.

Joined Cases C-68/94 and C-30/95 – French Republic and others v. Commission of 31 March 1998, [1998] ECR I-1375.

Court of First Instance

Cases T-68, 77 and 78/89 Società Italiana Vetro SpA v. Commission of 10 March 1992, [1992] ECR II-1403

Case T-102/96 Gencor v. Commission of 25 March 1999.

Commission Decisions

Case No IV/M.4-Renault/Volvo of 07.11.1990.

Case No IV/M.12-Varta/Bosch of 31.07.1991.

Case No IV/M.57-Digital/Kienzle of 22.02.1991.

Case No IV/M.98-Elf/BC/CEPSA of 18.06.1991.

Case No IV/M.165-Alcatel/AEG Kabel of 18.12.1991.

Case No IV/M.1415-BAT/Rothmans of 17.03.1999.

Case No IV/M.1423-CRH/Ibstock of 01.03.1999.

Case No IV/M.1440-Lucent Technologies/Ascend Communication of 06.04.1999.

Case No IV/M.1524-Airtours/First Choice of 22.09.1999.

OPINIONS

Opinion of the Advisory Committee on Concentrations given at the 11th and 12th, meetings on 3 and 14 July 1992 concerning preliminary draft decision relating to case IV/M.190-Nestlé/Perrier, O.J. 1992, C319/3.

REPORTS

Commission Reports on Competition Policy

XXth Report on Competition Policy (1991).

XXIVth Report on Competition Policy (1994).

XXVIIIth Report on Competition Policy (1998).

Competition Policy Newsletter

Competition Policy Newsletter 1998 Number 3 October.

Competition Policy Newsletter 1999 Number 2 June.