IMT Institute for Advanced Studies, Lucca

Lucca, Italy

Collective Dominance in Competition Law

PhD Program in Economics, Markets, Institutions

XX Cycle

By

Marilena Filippelli

2008

The dissertation of Marilena Filippelli is approved

Program Coordinator:

Professor Fabio Pammolli, Università di Firenze – Firenze, Italy

Supervisors:

Professor Mario Libertini, Università degli Studi di Roma "La Sapienza" – Rome, Italy

Professor Rudolph J.R. Peritz, New York Law School - New York, US

Tutor:

Professor Carlo Cambini, Politecnico di Torino – Torino, Italy

IMT Institute for Advanced Studies, Lucca

2008

Contents

VITA

February 9, 1979	Born, Cariati (CS), Italy
2004	Degree in Law Final marks: 110/110 cum laude Università degli Studi di Roma "La Sapienza" Rome, Italy
2005-2008	Ph.D. in Economics, Markets and Institutions IMT Institute for Advanced Studies Lucca, Italy
2006-2007	Doctoral Visiting Student New York Law School New York, US
2005-2008	Full Ph.D. Scholarship Italian Ministry of Education, University and Research

PUBLICATIONS

- *Abusi di impedimento dell'impresa dominante e regolazione di settore: il caso Telecom Italia*, (Exclusionary abuses and sector Regulation: the Telecom Italia case), in *Rivista di Diritto Industriale*, 4-5/2007, pp. 183-269.

- *Telecom Italia e Trinko: la dialettica tra norme antitrust generali e disciplina regolatoria delle telecomunicazioni in Europa e negli Stati Uniti*, in *Rivista di Diritto Industriale*, 2008 (forthcoming).

Abstract

This thesis analyses how competition law deals with the category of collective dominance. Collective dominance describes a market situation where more firms, by acting together as if they were a single entity, jointly exert market power. This phenomenon is relevant in the preventive control of mergers and in the repressive control of abuses of dominant position and it usually involves oligopolistic markets. The economic framework of my analysis is the Game theory.

This thesis consists of three parts. In the first part, I analyse the evolution of collective dominance in the European competition law. In this exposition, I follow a chronological order, at the scope of highlighting the mutual influence between abuses of dominance and mergers. In the second part, I analyse how the US competition policy has approached the matter of oligopolistic parallelism. In this case, I distinguish *ex post* and *ex ante* control on tacit collusion, because the different theoretical framework, especially in terms of economic theories, which characterizes the preventive and repressive control on collusion, results in different antitrust policies. As a conclusion of parts 1 and 2, I compare the results obtained in the two systems and I seek to demonstrate that their relationship, with regard to collective dominance, is, at once, one of tension and overlap. In the third part, I propose a solution to deal with collective dominance. First of all, I remark the complexity of the category at issue and, for this reason, I define collective dominance in a conceptual and classificatory way. Then, I suggest addressing the matter of post-merger coordination by a three-step test, which focuses in the firms' ability to stably collude, on the convenience of colluding, and on the incapability of addressing the competitive concerns by the parties' commitments. In this scenario, prohibitions constitute an extreme solution. With regard to the abuses, I distinguish the case of collective dominance coming from the mere oligopolistic parallelism from the other sources. As for the latter, I critically analyse the relationship between articles 81 and 82 in the area of collective dominance; as for the first, I suggest bringing tacit collusion within the control of article 82, on the grounds of the objective notion of abuses. I also argue that the category of tacit collusion should also embrace the phenomenon of semi-collusion, when they lead to the same outcome. Finally, with regard to the possible remedies, I emphasize the role of injunctions in the case of anti-competitive oligopolistic parallelism, together with the possibility for competition authorities to impose monetary sanctions, whenever they find out culpable conducts.

Introduction

In 1994, the biggest local newspapers in the New York area (New York Post and Daily News) charged the identical price-40 cents. In the summer of that year, the New York Post raised its price to 50 cents. The Daily News decided not to follow the rival's strategy and maintained its original price. This reaction got the New York Post to lose subscribers and advertising revenues. As a response to the Daily News' strategy, the New York Post lowered its price to 25 cents in the sole area of Staten Island. This was a signal for the Daily News: the Post was trying to show that it had the financial resources to start a price war, if necessary. In response, the Daily News raised its price to 50 cents: in this way, it saved itself from a price war and, at once, gained higher profits than before. The price of both, at the end of the game, switched from 40 to 50 cents[1]. Competitors realized cartel-like effects, without talking with each other.

This is an example of tacit collusion: being aware of their interdependence, oligopolists may find a way to maximize their joint profits, by developing standards of behaviours, or *modus operandi*, which allow them to gain monopolistic profits. Tacit collusion represents the core of collective dominance.

Collective dominance describes a market situation where more firms, by acting together as if they were a single entity, jointly exert market power. It is a multiform phenomenon that, although may take place in every kind of market, typically characterizes oligopolies. There is, in fact, a strong, although not deterministic, link between the market environment and the collusive outcome: in the presence of few

[1] This episode is reported in A.M. BRANBENBURGER, B.J. NALEBUFF, *Co-opetition*, Currency Dubleday, New York, 1996, pp. 202-203.

players, it is easy for the concerned firms to align their strategy, without any need of communicating with each other.

It was the Game theory that rationalized the phenomenon of tacit collusion in terms of firms' strategy and, therefore, of firms' choices. In this way, this theory broke with the idea that suboptimal outcomes were quite unavoidable in oligopoly. The Game Theory also provided the means to understand how and under which conditions firms may tacitly reach and maintain a collusive equilibrium. Its contribution was determinant in evolution of the category at issue, and the matter itself of collective dominance appeared in the European case law only when Courts adhered to the Game theory approach. For this reason, the analysis of collective dominance needs to rest on this economic basis.

The evolution of collective dominance is largely guided by case law: competition authorities and judges inferred this category from competition laws and progressively determined its limits and its contents. Despite this evolution, some remarkable questions remain open. In this thesis, I seek to draw the evolution of collective dominance in both the EU and US antitrust systems and in the both areas of abuses of market power and mergers. Then, I seek to suggest an appropriate way to deal with collective dominance.

This thesis consists of three parts, organized as follows.

The first part analyses the evolution of collective dominance in the European competition law, by focusing, in particular, on how the Commission and the European Courts have been establishing the category at issue in the two areas of relevance. This examination follows a chronological order, which emphasizes the progressive evolution and the mutual influence between abuses of dominance and mergers. The starting point is the failed attempt of controlling the oligopolistic parallelism under article 81, and the subsequent debate about an alternative solution that would be both practicable and workable. Then, the analysis shifts on the applicability of article 82 to the multilateral, anticompetitive conducts, by moving from the *Flat Glass* case. In the first stage of application of the category at issue, the case law on abuses of dominance played a crucial role, essentially because of the greater expertise of competition authorities with this area of investigation. When the Commission and the European Courts

became more familiar with the merger control, they began applying collective dominance to oligopolistic mergers, by giving an essential contribution to the evolution of the category at issue. It was about the merger decisions, in fact, that the Courts recognized that collective dominance embraces the phenomenon of tacit collusion. One of the most debated decisions, in the evolution of collective dominance, was the *Airtours* case, where the Court of First Instance, with the scope of clarifying the contents of this category, listed three essential conditions for prohibiting merger projects on the grounds of coordinated effects. This was a path-breaking case, which influenced the New Merger Regulation and the application of article 82. At the end of this evolution, and thanks to the mutual influence of antitrust policy for abuses of collective dominance and for coordinated effects of mergers, there is a unitary notion of collective dominance.

The second part of this thesis analyses how the US competition policy has approached the matter of oligopolistic parallelism. With regard to this, it is necessary to distinguish the *ex post* from the *ex ante* control on tacit collusion. The theoretical framework, especially in terms of economic theories guiding the antitrust analysis, changes and, consequently, the policy approach is different in these two areas. The repressive control of conscious parallelism rests principally on Section 1 of the Sherman Act and has followed essentially two directions: at first, Courts sought to infer agreements from circumstantial evidence; later, they put the emphasis on plus factors as an indirect evidence of collusion. In this area, the jurisprudential evolution was strongly influenced by the debate between Posner and Turner. This debate posed the basis for the structural approach to tacit collusion, characterized by a radical refusal of the dynamic theories on oligopolies. Since Section 1, as interpreted in the US Courts, could not deal with tacit collusion, several scholars suggested applying Section 2 of the Sherman Act. However, this attempt failed too, because of the little willingness of applying the rule of monopolization to more than one firm. The Sherman Act does not exhaust the range of the available means to address tacit collusion: nowadays, there is a potentially more workable solution, that is, bringing tacit collusion within the control of the Section 5 of the Federal Trade Commission Act. If applied in the Courts, this rule may allow overcoming the real or presumed difficulties of applying the Sherman Act, and might ensure

an effective antitrust policy against collusion. Conversely, in the merger control, the approach to conscious parallelism was quite different. The original perspective, which rested on the structural presumption, left space to a dynamic approach that influenced the *1968, 1982,* and *1992 Merger Guidelines* on the merger policy. Thanks to the influence of the Game Theory, both at the normative and the applicative level, the antitrust policy about the coordinated interaction appears really effective.

The comparison between the US and EU approaches to conscious parallelism reveals that the relationship between these systems, with regard to the category at issue, is one of overlap and, at once, of contrast. Despite the significant divergences, in fact, there may be common paths, not only in the merger control, but also in the abuses of market power, if the antitrust policy is built around the restrictive behaviour in itself, rather than on the elements of intentionality or consciousness of the conduct.

The third part of this thesis focuses on the feasible and workable solutions for dealing with collective dominance.
Although the recent evolution in the EU case law has remarked the centrality of tacit collusion, the category of collective dominance is wider and includes various phenomena, all resting on the same paradigm: more firms that act together as if they were a single entity and jointly exert market power. Therefore, it is preventively necessary to define collective dominance in a conceptual and classificatory way for determining its boundaries and its contents.

My proposal moves from the merger control, where collective dominance concerns oligopolistic mergers that may raise coordinated effects. With regard to this, I suggest following a dynamic approach that views prohibitions as the extreme solution. In particular, I argue that the burden of proof incumbent upon the Commission is extremely high: the Commission, in fact, has to rebut the presumption of efficiency and legality of mergers, by alleging cogent and consisting evidence of foreseeable coordinated effects. This inference should rest on a three-step test, which focuses on the firms' ability to stably collude, on their convenience to collude, and on the ineffectiveness of addressing the collusion concerns by commitments. About the internal stability of collusion, I question the role of deterrent

mechanisms for countervailing the tendency to defect because, depending on the characteristics of the specific equilibrium at issue, other factors may serve the same scope. In other words, deterrence is not always a necessary condition for the existence of stable collusion, as the Commission suggests. Sometimes, it is the convenience itself to stay in the game that ensures stable cooperation.
The mergers' analysis should combine the assessment of quantitative data (all market factors that, according to the economic theory, facilitate collusion) with the evaluation of qualitative data, such as the role of the acquired firm in the market, the eventual efficiency gains, and the past relationship between the concerned firms. Since each step of this test is essential for inferring collusion, prohibitions may derive from evidence of both capability and incentive to collude, and from the absence of workable commitments. This prudent approach increases the risk of authorizing operations that, once implemented, might generate anti-competitive results. However, against this failure, competition authorities may apply article 82 and condemn the eventual anticompetitive conducts as abuses of the collectively dominant entity and, in the most serious cases, they may impose measures of deconcentration.

With regard to the abuses of collective dominance, I move from delineating the possible sources of collective dominance, by distinguishing the market structure from the other kinds of links. In particular, I identify three models of collective dominance, depending on its source: first, collective dominance deriving only from economic links; second, collective dominance deriving from economic links and a market prone to collusion; third, collective dominance coming from the mere oligopolistic parallelism. In the first and the second models, abuses of collective dominance may also imply infringements of article 81. I examine how Courts have solved the matter of interaction between article 81 and article 82 and I remark the critical point of the current, cumulative approach (inference of multiple infringements coming from a single conduct, but imposition of only one fine). I also seek to rationalize the case law on this point, by defining articles 81 and 82 as two segments of the same rule. As for the third model, I remark that the anti-competitive oligopolistic parallelism escapes the reach of article 81, because there is neither direct nor circumstantial evidence of conspiracy. Therefore, I suggest controlling the anti-competitive, oligopolistic parallelism under article 82, thanks to the

objective notion of abuses. This phenomenon mirrors that of coordinated effects in the merger control, therefore, its ascertainment may rest on a similar parameter, although the methodological approach has to change, consistently with the repressive nature of the enforcement of article 82. Finally, I argue that this model of collective dominance embraces the phenomenon of semi-collusion: in this case firms compete on some variables and collude on the other; in this way, they may realize collusive outcomes. In other words, despite the mix of competition and collusion, the possible identity in the final results justifies the inclusion in the realm of collective dominance.

As for the applicable remedies, I emphasize the role of injunctions in the case of oligopolistic parallelism: in the absence of any proof of culpable or intentional conducts, no monetary fine may be imposed, therefore, the enforcement is necessary partial. However, I argue that injunctions may ensure remarkable benefits, such as restoring competition and deterring from future infringements. In the case of culpable conducts, on the contrary, competition authorities may also impose monetary sanctions and may ensure, in this way, a stronger deterrence.

At the end of this work, several questions remain open, and several issues require deeper and more careful examination. It is my hope that I will have the opportunity of working on these crucial matters.

PART 1

COLLECTIVE DOMINANCE IN EU COMPETITION LAW

Chapter 1

Oligopolistic Parallelism: Evidence of the Problem

1.1 Oligopolistic parallelism

At the end of seventies, legal and economic debate centred on the same topic, the "oligopoly problem", that is, the possible anticompetitive outcome–in terms of price increases or output reduction–resulting from individual, non-concerted actions in oligopolistic markets.

In a few decades, the need to compete in global markets had led firms to expand their size for benefiting economies of scope and scale. This process involved in particular economic sectors requiring high investments. It was in this way that the oligopoly became the typical market structure of the most relevant industries.

Industrial economics immediately made clear that oligopolies are not a problem in themselves: by overturning the Neo-Classical paradigm of perfect competition, the theories based on a dynamic approach highlighted the great efficiencies potentially coming from oligopolies. On the one hand, in fact, larger productive scale allows oligopolists to reduce costs and, therefore, to set lower prices. On the other hand, greater financial resources enable them to invest in R&D programs and to improve both quality and quantity of supply.

These theories also underlined that the interaction of firms in oligopolistic markets may cause different equilibria, ranging from competition to collusion. The likelihood of competitive functioning cannot be ruled out at all, but then the high market concentration, by intensifying the relationship among the oligopolists, may induce firms to collude.

Within this framework, 'oligopolistic interdependence', perceived as an ontological market feature, was suspected to be the primary cause of anticompetitive results. In a market with few companies, each of them determines its own strategy by taking account of the known or foreseeable behaviour of its rivals, with the consequence that market conducts are, to a certain extent, mutually influenced. Moreover, the oligopolists, being aware that individual choices automatically affect rivals, may exploit their interdependence in a way to increase their joint profits. Collusive equilibria, therefore, when some facilitating factors are present, do not require explicit agreements, but may result even from observation and tacit adaptation to the rivals' conduct.

This dynamic, which was explained by economic models of collusion, required a legal solution, because parallel conducts, even in the absence of agreements properly-called, may generate cartel-like effects.

The identification with the effects of cartels naturally led competition authorities to explore the possibility of bringing tacit collusion within the control of Article 85 (now, Article 81).

Lacking explicit arrangements, the legal category of agreements properly called could not apply. Therefore, competition authorities sought to verify whether tacit collusion could be attacked under the concerted practices category.

1.2 Finding a solution: concerted practices and their jurisprudential evolution

Since the *Dyestuffs* case, European jurisprudence had sought to progressively clarify the legal concept of concerted practices. According to the CJ, concerted practices represent "*a form of coordination between undertakings which, without reaching the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*"[1].

[1] Court of Justice, case 48/69, 14 July 1972, *Imperial Chemical Industries Ltd.* v. *Commission* (hereinafter *Dyestuffs* case), in *ECR*, 1972, 619, here § 64.

Parallel conducts, therefore, are a characteristic, although not the sole component, of concerted practices, as well as their typical manifestation. This way, "*although parallel behaviour may not in itself be identified with a concerted practice, it may however amount to a strong evidence of such a practice*" (§ 65), in the presence of competitive conditions different from the normal market functioning.

The subsequent case law progressively implemented the basic definition, with the objective of figuring out when parallel behaviours infringe article 81.

In *Suiker Unie*[2], the CJ handed down that "*although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*" (§ 174).

The concept of concerted practices coming from this jurisprudence, and confirmed also in subsequent statements[3], is built around evidence of conscious, parallel behaviours producing anticompetitive effects.

In commenting this case law, most of the legal scholars remarked the crucial role of intentionality, whose demonstration would be a *sine qua non* for Article 81 to apply. The word "*knowingly*", used in *Dyestuffs* and in the subsequent cases, would be the key point of the definition of concerted practices, with the consequence that "*companies accused of collusion should at least be conscious of the possible anti-competitive effects of their conducts*"[4].

---

[2] Court of Justice, joined cases 40 to 48, 50, 54 to 56, 111, 113, 114/73, 16 December 1975, *Coöperative vereniging "Suiker Unie" UA and others* v. *Commission*, in *ECR*, 1975, 1163.

[3] See, for example, Court of Justice, case 172/80, 14 July 1981, *Gerhard Züchner* v. *Bayerische Vereinsbank Ag.*, in *ECR*, 1981, 2021; European Commission, case IV/31.149, 23 April 1986, *Polypropylene*, in *OJ*, 1986, L-230/1-66.

[4] M. GUERRIN, G. KYRIAZIS, *Cartels, proofs and procedural issues*, in *Fordham Int'l L.J.*, 1992/1993, p. 280. T. SOAMES, *An Analysis of the Principles of Concerted Practices and Collective Dominance: A Distinction without a Difference?*, in *ECLR*, 1996, p. 26, highlights that, by using the word "*knowingly*", the Court automatically excluded that unconscious

According to other scholars, on the contrary, the reference to consciousness would simply confirm the need for coordination[5]. The Court's remark, in this perspective, would be superfluous, because coordination, by requiring a certain consciousness or a "meeting of minds", would be included by definition in the concept of concerted practices[6].

However, the CJ effort of clarifying the contents of a legal category still not as well known as the agreements properly-called, was anything but superfluous: starting from the *Dyestuffs* case, the EU Courts sought to identify all requirements that make parallel conducts unlawful concerted practices.

As for the substantive viewpoint, we can reasonable presume that consciousness is an indefectible component of coordination, because oligopolists are at least aware of their conduct and of results they intend to realize[7]. As for the probatory viewpoint, on the contrary, the Commission's explanation appears quite necessary[8], because it

---

parallel conducts can constitute a concerted practice. Also F. ALESE, *The economic theory of non-collusive oligopoly and the concept of concerted practices under article 81*, in *ECLR*, 1999, asserts that "*Unless there is documented evidence of collusion between identifiable parties, it now seems that the Commission would be reluctant to bring parties to book for concerted practice*" (p. 383). J.M. JOSHUA, S. JORDAN, *Combinations, concerted practices and cartels: adopting the concept of conspiracy in European Community competition law*, in *Nw. J. Int'l L. & Bus.*, 2004, pp. 665-666 firmly contest the opposite interpretation, and deduce from the European jurisprudence that something more than the mere alignment is required to prohibit parallel prices under Article 81.

[5] See, with regard to this, C. OSTI, *Antitrust e oligopolio*, Il Mulino, Bologna, 1995, p. 153.

[6] O. BLACK, *Concerted Practices, Joint Action and Reliance*, in *ECLR*, 2003, p. 222.

[7] The *Gencor* case upholds this approach: the CFI expressly recognized that oligopolists, being aware of their interdependency, can easily figure out that colluding is more convenient than competing. See, on this point, *infra*, Part 1 - Chapter 3.

[8] These remarks leads to prefer the expression "*oligopolistic parallelism*" to "*conscious parallelism*", because the latter highlights a characteristic of parallelism (i.e. its ontological intentionality), but not the critical point of the matter at issue (i.e. the oligopoly problem). In other words, if one wonders whether conscious parallelism can be encompassed in the Article 81 area, under the category of concerted practice, the answer must be positive. Conscious parallelism, in fact, deals with knowing aligned conducts; therefore, once competition authorities have proved all elements included by definition in this concept, they may infer an article 81 infringement. On the contrary, if one wonders whether the mere oligopolistic parallelism may be brought within the article 81 control, the answer is negative. In this case, in fact, the sole evidence involves oligopolistic, parallel behaviour, producing anticompetitive effects, without implying any subjective elements, whose demonstration is indispensable for a prohibition under Article 81.

causally links the inference of an article 81 infringement to the demonstration, among the other things, of a subjective element.

Proving concerted practices is anything but easy: on the one hand, the Commission may rely simply on parallel behaviours[9], on the other hand, it is required to show that there is either intentionality or consciousness behind the firms' actions.

In this framework, the Commission's ascertainment needs to rest on indirect proofs, or on circumstantial evidence. Therefore, preventive announcements about price changes or other future conducts[10], as well as information exchanges[11] demonstrate the existence of a contact[12], which, in turn, expresses a meeting of minds[13], or the firms' intention to behave in an anticompetitive manner.

R. WHISH, *Competition Law*, 5th Edition, LexisNexis, London, 2003, remarks, in this respect, that in the legal terminology the expression "conscious parallelism" implies "*something sufficiently conspiratorial that it should be really investigated under* […] *the article 81*" (p. 508).

[9] M. GUERRIN, G. KYRIAZIS, *Cartels: proofs and…cit.*, p. 289.

[10] See *Dyestuffs*, § 112.

[11] *Suiker Unie*, § 175; *Züchner*, § 22.

About the attempt of inferring concerted practices from an information exchange, see V. KORAH, *Competition Law of Britain and the Common market*, 3rd Revisited Edition, Martinus Hijhoff Publishers, The Hague, 1982, p. 204. The A. strongly contests the tendency to condemn price announcement to customers as a form of indirect announcement aimed at influencing rivals' decision. More generally, according to Korah, prohibiting parallel conducts has little sense, because they can also result from external factors, such as a general costs' increase involving an entire industry, which necessarily affect the price level of all concerned firms.

It seems to me that, by bringing parallel conducts within the article 82 control, the risk of punishing all parallel conducts, regardless of their causes and their effects, may reasonably decrease. The notion of abuse, in fact, may select legal and illegal parallelism: this way, unavoidable parallelism, coming from global industry's change, may escape from the prohibition, because objectively justifiable. As to this point, see Part 3 – Chapter 3.

[12] Such approach leads to consider that "*any contact, directly between competitors constitutes per se evidence of a concerted practice*", S. STROUX, *US and EC Oligopoly Control*, Kluwer Law International, The Hague, 2004, p. 76. According to the A, this would be the result of the *Dyestuff* case, where the judges expressly qualified as unlawful those conducts removing the uncertainty about the future behaviours strategies.

Understanding when a given behaviour embodies a contact relevant for finding concerted practices is always difficult, especially in industries with an unavoidable degree of transparency. See, on this point, D.G. GOYDER, *EC Competition Law,* 3rd edition, Oxford University Press, Oxford, 2003, pp. 74-75.

[13] See, C. OSTI, *Antitrust e oligopolio, cit.*, p 153. According to the A, the resulting system would reflect, in the concerted practices area, the typical scheme proposal-acceptance characterizing the agreements properly-called.

Despite the recourse to indirect proofs, and the progressive lowering of the required threshold, obtaining enough evidence of concerted practices was still difficult[14].

Concerning this matter, the *Wood Pulp II* judgment introduced a significant new element. According to the CFI, "*in determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct*"[15].

To facilitate the demonstration of concerted practices, the Court introduced a rebuttable presumption about the existence of concertation behind parallel conducts. In this way, the judges implicitly confirmed that, in a tight oligopoly, parallelism might result from collusion as well as from the mere interdependence of behaviours[16].

The analysis of the case law reveals that the overlap between concerted practices and mere parallelism is only partial and involves solely the requirements of parallel behaviours and anticompetitive effects. Therefore, mere oligopolistic parallelism, lacking, by definition, any subjective elements, cannot fall under the control of article 81.

As a result, there is an evident gap in the oligopoly control: as far as proof of intentionality is a requirement for article 81 to apply, the parallelism of conducts, based on tacit understanding and deriving from mutual adaptation to market conditions, though able of affecting market functioning, would escape the reach of antitrust prohibitions[17].

---

[14] T. SOAMES, *An Analysis of the Principles of Concerted Practices…cit.*, p. 27.

[15] Court of First Instance, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, 31 March 1993, *A. Ahlström Osakeyhtiö and others* v. *Commission,* in *ECR*, 1993, I-1307, § 71.

[16] S. STROUX, *US and EC…cit*, p. 80.

[17] *Ex plurimis*, see B.J. RODGER, *The oligopoly problem and the concept of collective dominance: EC developments in the light of the U.S. trends in antitrust law and policy*, in *Colum. J. Eur. L.*, 1996, p 38; S. STROUX, *US and EC…cit.*, p. 85.

1.3 Parallel conducts and the alternative between article 81 and article 82: early doubts

The leading factor in the jurisprudential evolution of concerted practices was the pragmatic need to remove the anticompetitive effects deriving from tacit parallelism.

While the European Courts were broadly defining concerted practices, in such a way as to include some kinds of anticompetitive alignments among oligopolists, the legal debate began focusing on an alternative means for solving the same problem. Article 82, in fact, because of the express reference to "*abuse by one or more undertakings of dominant position*", seemed to perfectly fit the matter at issue.

The Commission and the European Courts, therefore, began taking account of this approach, which appeared also consistent with several earlier decisions. In *Deutsche Grammophon*[18], for example, the CJ, in a preliminary ruling about abuses of dominance, had mentioned the manufacturer's capability, "*alone or jointly with other undertakings in the same group*", to impede competition (§ 17). Analogously, the European Commission had already applied Article 82 to two independent sugar producers that, holding "*a dominant position on the Dutch market* […] *have acted in a uniform manner and always appear as single entity*"[19]. By literally interpreting article 82, the Commission described a situation perfectly matching the collective dominance's category as defined later, in the jurisprudence subsequent to the *Flat Glass* case[20]: firms, legally and economically independent, had arranged agreements falling under the Article 81 provision, and, at the same time, enabling them to act independently from clients, customers and rivals. However, the importance of the *Sugar Industries* statement in the evolution of collective dominance should not be overemphasized: although substantially correct, this outcome seems

[18] Court of Justice, case 78/70, 8 June 1971, *Deutsche Grammophon Gesellschaft mbH* v. *Metro-SB-Großmärkte GmbH & Co. KG.*, in *ECR*, 1971, 487.

[19] European Commission, case IV/26.918, 2 January 1973, *European Sugar Industry*, in *OJ*, 1973, L-140/17-48, Section E, § 2.

[20] See *infra*, Part 1- Chapter 2.

to result from an intuitive application, rather than from a deep conceptualization, of article 82[21].

The matter itself of bringing oligopolistic conducts within the control of Article 82 did not arise as an autonomous problem, but appeared in cases primarily concerning the legal evaluation of concerted practices under Article 81.

In assessing whether articles 81 and 82 could jointly apply to the same material conduct, competition authorities, at first, sought to well delineate the area where each of those rules individually applied. The CJ, for example, drew a clear distinction between dominant position and oligopolistic parallelism: "*in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally*"[22]. This structural difference influences the legal treatment: article 81 applies to parallel conducts

---

[21] As a confirm, we have to note that, when scholars suggested controlling oligopolies though Article 82 ET, the competition authorities' approach was very critical, to the point of denying in principle such a possibility.
A few years after *European Sugar Industry* decision, the Commission faced the conduct of some oil companies, which reduced to supply to ABG the same quantity sold before, without any reasonable justifications. Instead of applying the joint dominance category, the Commission considered each firm individually dominant with respect to its own customers (European Commission, case IV/28.841, 19 April 1977, *ABG* v. *Oil Companies operating in the Netherlands*, in *OJ*, 1977, L117/1-16, lett A last paragraph). The Commission ideally divided the whole market situations in a series of individual conducts, even if the firms' strategies clearly acted in a common framework, and made economic sense only whether jointly analysed. It follows that, however in the *Report on the behaviour of the Oil Companies in the Community during the period from October 1973 to March 1974* (COM 675, 20 December 1975), the Commission had already admitted that oil companies were collectively dominant, the *ABG* decision, cannot be perceived as the original precedent for collective dominance.
Contra, M. SCHODERMEIER, *Collective Dominance Revisited: an Analysis of the EC Commission's New Concepts of Oligopoly Control*, in *ECLR*, 1990, p. 29.

[22] Court of Justice, case 85/76, 13 February 1979, *Hoffmann – La Roche & Co AG* v. *Commission*, in *ECR*, 1979, 461, § 39. The Court suggests focusing on the unilateral or concerted nature of the conduct at issue, but does not take account that unilateral conducts may come from, and may imply, joint market power.
R. WHISH, *Competition Law…cit.*, pp. 520-521, explains the Court's statement on the ground of the traditional reluctance to prohibit and fine those conducts that, however restrictive, come merely from the rational adaptation to the market conditions, without any concertation. In the absence of collusion in the meaning of Article 81, "*the Court was not prepared to characterize the economist's notion of tacit collusion as abusive under Article 82*" (here, p. 521).

presenting all requirements for concerted practices; Article 82 deals only with dominance (that is, single dominance)[23].

The original European approach to the oligopoly control, therefore, is built around the concept of collusion and aimed at assimilating the legal treatment of tacit collusion to that of express collusion.

Under the influence of the economic theories, which had explained that collusive mechanism is the same in tacit and express coordination, the punitive reaction in case of tacit collusion naturally tended to equal that of express cartels, without undervaluing the unquestionable differences between the two categories.

In the competition policy perspective, article 81, with its range of internal hypotheses, seemed to be the sole means consistent with these premises[24]. However, the alternative solution, that the European jurisprudence refused to apply, was not ignored at all, but was examined in cases involving concerted practices, at first marginally, as an argumentation *a contrario* to support the thesis favourable to the Article 81 application, and later directly.

At the end of Eighties, the concrete difficulties of demonstrating intentionality behind parallel behaviours resulted in a substantial impunity to those conducts, even in presence of unquestionable anticompetitive effects.

Such ineffectiveness of the antitrust policy pushed to look for an alternative solution to solve this problem.

---

[23] *Züchner,* § 10. The CJ followed the advice of Advocate General Slynn, who upheld the difference between parallel conducts and dominance, and suggested adopting the reported solution.

[24] P. TRIMARCHI, *Il problema giuridico delle pratiche concordate tra oligopolisti*, in *Riv. Soc.*, 1969, pp. 19-20 strongly contested the idea that identical effects require identical legal discipline, because, by ignoring the methods whereby parallelism is obtained, even the alignment that derives from competitive and lawful actions may be sanctioned.

1.4 The application of article 82: a feasible solution?

With Article 81's failure to deal with the oligopoly problem, competition policy pointed towards the application of Article 82[25].

According to European case law, abuse of dominance is an objective notion, which does not imply, for its establishment, any subjective elements. In this manner, competition authorities could skip the main obstacle for an effective restraint of anti-competitive parallelism. Obviously, this solution could be implemented only after admitting that article 82 applied to conducts expressing joint market power.

Competition authorities were all theoretically prone to apply this rule to "more firms", since the formulation itself of Article 82 supported such an interpretation. However, the substantial contents given to the concept of "plurality of firms" radically changed.

This expression, in fact, despite its apparent linearity, is compatible with a range of different meanings, and choosing one specific interpretation, among all those plausible, implies the pre-selection of market phenomena to bring within the antitrust control.

The practical consequences of the semantic divergence, which actually characterized the EC and CJ interpretation, are evident in comparing two statements, *Alsatel* and *Bodson*, that have both arisen within the context of preliminary rulings.

1.4.1 *Alsatel*

The case at issue took place in the French telecommunications market, based on a monopolistic regulation that allowed sector

[25] In my view, such a shift in the European approach to oligopolistic parallelism derives from the concrete need to capture the anticompetitive effects coming from pure parallelism and which do not fall under article 81.
According T. SOAMES, *An Analysis of the Principles of Concerted Practices…cit.*, p. 31, there are political reasons behind this choice. The collective dominance issue appeared in the EU case law only in 1987, when the Commission was asserting its competence to evaluate mergers. In the *Philip Morris* case, in particular, the Commission stated that operations, such as acquisition of a minority shareholder in a rival, may be scrutinized under Article 81. In the debate following this decision, the Commission strategically used the collective dominance matter to increase legal uncertainty and to force all Member States to recognise its power in the control of mergers.

authorities to delegate specific activities (such as manufacturing, establishment and maintenance of telephone installation) to private firms[26].

In this market the Commission investigated the conduct of the authorized firms (Alsatel was one of these), which apparently agreed to tacitly divide the market, so that each of them could exercise a significant economic power in a specific region. Moreover, they engaged in parallel conducts, involving price and other conditions included in long-lasting contracts, which deprived customers (Novasam was one of them) of any feasible alternative.

In the preliminary ruling, EC and Novasam put the emphasis on the likely contrariety of the conduct at issue to both article 81 (as concerted practice) and article 82 (as abuse of collective dominance). As to the latter hypothesis, the EC asked the CJ to "*consider whether parallel behaviour on the part of several independent undertakings* […] *which does not leave their customers any possibility of negotiating the terms of the contracts to be concluded, may place those undertakings collectively in a dominant position coming within the scope of Article 86 of the Treaty*" (§ 21).

The explicit mention of "independent firms" signals that, in the Commission's view, collective dominance involves autonomous entities, capable of choosing their own market strategy, without any external, conditioning powers[27].

Such an interpretation rests on the knowledge that more companies, subjected to a common and determinant control, may be perceived, in a substantial perspective, as a single undertaking, whose market power should eventually be ascribed to the single dominance's category. In this manner, the Commission's interpretation also equals the concept of firms under article 82 and article 81[28].

---

[26] Court of Justice, case 247/86, 5 October 1988, *Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel)* v. *SA Novasam*, in *ECR*, 1988, 5987.

[27] *Contra*, *Opinion of Advocate General Mancini* delivered on 31 May 1988, in *ECR*, 1988, 5987, § 6. In his opinion, dominant position implies the presence of several undertakings that belong to the same group, or that arrange agreements which hinder competition. In other words, there must be a links as strong as to deprive firms of any capability to autonomously determine their market strategy.

[28] The leading case, in this respect is *Adriaan de Peijper* [Court of Justice, case 15/74, 31 October 1974, *Centrafarm BV et Adriaan de Peijper* v. *Sterling Drug Inc.*, in *ECR*, 1974,

In solving the preliminary ruling, the CJ deliberately ignored the matter of collective dominance, and built the case around the ascertainment of Alsatel's single dominance on the national market.

1.4.2 *Bodson*

The preliminary ruling at issue arose in the framework of a proceeding between Pompes Funèbres Générales (hereinafter, PFG), a group holding concessions for funeral services in several Belgian communes, and Bodson, which had operated in the area reserved to PFG. The judge *a quo* asked whether Article 81 and 82 could apply to a group of undertakings[29].

As for article 81, the CJ confirmed that intra-group conducts, which, by a case-by-case analysis, result in merely internal relationships, escape the scrutiny of antitrust authorities.

As for Article 82, the CJ focused on the PFG group, taken as a whole, and stated: "*Article 86 of the Treaty applies in a case in which a number of communal monopolies are granted to a single group of undertakings whose market strategy is determined by the parent company,* […] *where the group of undertakings occupies a dominant position characterized by a position of economic strength which enables it to hinder effective competition on the market in funerals*" (operative part, § 2).

This statement, taken alone, is substantially correct, because it upholds that article 82 applies to the group's conducts. As for the topic of the preliminary ruling (the applicability of article 82 to more firms), on the contrary, it does not change the current state of the art: the CJ, in fact, defined a plurality of firms as the sum of single, economic entities, without taking account of their effective relationship.

1147], where the CJ stated that "*article 85 is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings*" (§ 46).

[29] Court of Justice, case 30/87, 4 May 1988, *Corinne Bodson* v. *SA Pompes funèbres des régions libérées*, in *ECR*, 1988, 2479.

As a result, the CJ judgement should be ideally included in the category of single dominance, for the same reasons Article 81 does not apply when the concerned firms lack economic independence. Therefore, this statement, although theoretically favourable to bring oligopolies within the control of Article 82, could not obtain this goal.

The comparison between the *Alsatel* and *Bodson* cases reveals a certain Commission's favour for including collective dominance within the scope of Article 82. However, such a tendency was still marginal, since in other cases the Commission chose not to apply the collective dominance's category, even if the market features seemed to perfectly fit it.

The *Magill* case[30], for example, involved three firms (ITP, BBC and RTE), each publishing a weekly TV guide which included only its own programs. All undertakings refused to supply the advance weekly listing information to Magill, and, consequently, impeded a new product–a comprehensive TV guide including all programs–to appear.

In its appraisal, the EC moved from the idea that each company held the monopolistic power to produce and to publish its weekly listings[31]. As a consequence, "*ITP, BBC and RTE each hold a dominant position within the meaning of Article 86*" (§ 22).

Therefore, the Commission ideally divided the whole market interaction in sets of individual conducts, and focused on each of them, independently from the others. As a result, it found several single dominances[32].

However, evidence about oligopoly, parallel conducts, absence of individual dominance, and exclusionary behaviours could justify the

[30] European Commission, case IV/31.851, 21 December 1988, *Magill TV Guide / ITP, BBC and* RTE, in *OJ*, 1989, L-78/43-51.

[31] It was both legal and *de facto* monopoly: the first came from the copyright on the TV guides, the other from the material availability of information.

[32] According to S. STROUX, *US and EC…cit.*, p. 94, it was the lack of evidence about actual collusion among oligopolists that pushed the Commission to apply the single dominance category.
However, the specific framework of the case at issue leads to reasonably presume that the ultimate decision was influenced by idea itself that intellectual property rights attribute monopolistic power, and, therefore, that the holder is a monopolist.

application of collective dominance category: the Commission could conclude that, on the relevant market of weekly TV guides, ITP, BBC, and RTE held a joint dominance and that they abused of their market power by collectively refusing to deal with a newcomer[33].

The situation described above reveals an important ambiguity surrounding collective dominance: even in the presence of the same market framework, competition authorities qualified the market power position held by more firms sometimes as collective dominance properly called (market power jointly held), sometimes as a set of individual dominant positions.

Two main factors impeded a coherent view of collective dominance: on the one hand, the difficulty of bringing under the control of Article 82 a range of conducts to which such a rule had never applied before; on the other hand, the weakness, or the absence of legal theories about collective dominance.

However, the absence in the ET of any evident solutions for the oligopoly problem, together with the substantial inapplicability of article 81, under the category of concerted practices, led some scholars to progressively perceive Article 82 as the only feasible means to deal with oligopolistic parallelism[34]. They began suggesting that if proofs come short of collusion, but there is evidence of parallel,

---

[33] See, B.J. RODGER, *Oligopolistic Market Failure: Collective Dominance versus Complex Monopoly,* in *ECLR*, 1995, p. 23; R. WHISH, *Competition Law, cit.*, p. 520.
M. SCHODERMEIER, *Collective Dominance Revisited…cit.*, pp. 29-30, highlights that collective dominance represents the theoretical framework of the *Magill* case, even if the EC did apply this category directly. The final decision rests on those elements (parallel conducts, absence of internal competition, and customers' dependency) embodying the requirements for an article 82 prohibition on the grounds of collective dominance.
Such an interpretation seems to change the optimal theoretical framework for the evaluative scheme really applied: while collective dominance would surely be the most appropriate means to deal with the case at issue, the Commission's decision unequivocally points towards single dominance.

[34] A. JONES, *Woodpulp: concerted practice and/or conscious parallelism*, in *ECLR*, 1993, p. 279.
By anticipating this debate, at the end of sixties, P. TRIMARCHI recognized the possibility of applying Article 82 when more firms, not involved in competitive relationship, hold together a dominant position. Article 81 would apply usefully only in non-concentred markets, while Article 82, if extensively interpreted, would be able to attack anticompetitive parallelism leading to price leadership, reduction in supply or in innovation, and other anticompetitive results. (P. TRIMARCHI, *Il problema giuridico…cit.*, p. 23).

anticompetitive conducts, the Commission could apply article 82, by qualifying the anticompetitive conduct as an abuse, causally linked to a joint economic power[35].

This solution, however, could annul the difference between parallelism coming to firms' choices and parallelism coming only from the market structure. According to someone, deep analysis of parallelism may overcome this limit: if it results that each firm seeks to improve its market share, parallelism would be competitive; if, on the contrary, firms seek to exclude rivals, parallelism would be an abuse of collective dominance[36].

---

[35] G. SPROUL, *Article 85 and 86: first application to maritime transport*, in *ECLR*, 1992, p. 220. According to A, Article 82 can be useful for the oligopoly control as far as it applies to collective dominant situations coming from oligopolistic parallelism; on the contrary, it makes little sense to also apply article 82 whenever article 81 applies.
Analogously, M. JEPHCOTT, C. WITHERS, *Where to go now for the EC oligopoly control*, in *ECLR*, 2001, recognize that mere oligopolistic parallelism, which can not be caught under article 81, may be "*used to establish a finding of collective dominance (although not abuse) under Article 82*" (p. 300). They seem to suggest that parallel conduct demonstrate collective dominance, but not abuses.
However, we have to note that, although conducts require a case-by-case assessment, it normally happens that, among the article 82 requirements, it is the anticompetitive effect that is immediately evident. The same antitrust scrutiny in the *ex post* perspective usually moves from evidence of a market injury, and then scrutinizes its possible causes. It is, therefore, easier to infer from parallel conducts the proof of abuse, than the proof of collective dominance.

[36] M. SCHODERMEIER, *Collective Dominance Revisited…cit.*, p. 33.
The A refers, and partially modifies the opinions already expressed by R. JOILET, *Monopolization and abuse of dominant position*, Martinus Hijhoff Publishers, The Hague, 1970, p. 240. Joliet suggested focusing on the anti-competitiveness, rather than the mere existence, of parallelism. Thus, whether parallelism results from the mere adaptation to objective market's changes, there is no collective dominance; whether alignment brings some benefits to the involved firms, their strategy is unlawful because it seeks to control the market.
While the idea of focusing on the effects seems reasonable, drawing the distinction between legal and illegal parallelism around the parameter of the attainable benefits seems to make little sense. A sort of convenience, even indirect, also characterizes the adaptation to market changes; otherwise firms would have no reason to modify their strategy. In any event, the matter seems to involve the abuse, rather than the existence itself of collective dominance – that may be found in both cases.
Moving from such a premise, Schodermeier suggests inserting the problem in a Game theory framework, and posing a set of presumptions about the existence of collective dominance. In particular, collective dominance should be presumed to exist when parallelism harms an external competitor; on the contrary, mere oligopolistic parallelism, should be presumed when the alignment involves the relationship with clients or customers.

However, bringing the oligopoly control within article 82 does not solve all problems. Since this rule may deal with both tacit and conscious parallelism (that is, with the alignment coming only from mutual observation and imitation, and which result from a meeting of minds, relevant in itself under article 81), the question of the joint application of article 81 and 82 would remain open[37].

Since neither article 82 could completely solve the oligopoly problem, many scholars questioned the appropriateness of changing the original approach, and remarked upon the limits and difficulties of bringing the matter at issue within the category of collective dominance.

First of all, sanctions and injunctions, as remedies provided for abuses, would not be effective for the oligopoly problem, because they apply only when anti-competitive behaviours have already taken place. An alternative system, based on the preventive detection and correction of suspected conduct would be much more effective[38].

Moreover, since each oligopoly presents its own features, and may raise specific, anticompetitive concerns, no rule providing *ex ante* a complete discipline would be suitable for every oligopoly. The antitrust policy, therefore, should rest on generic principles and should imply a sufficient degree of operative flexibility, so that

---

This opinion pays great attention to the assessment of effects, by refusing the regime of a *per se* condemnation under Article 82, even in the presence of perfectly aligned strategies, because the typical method for the ex post analysis, which moves from finding cartel-like effects, minimizes the risk of condemning positive or neutral conducts. However, the suggested system of presumptions seems to imply that only exclusionary abuses may take place in the case of collectively dominant, but it is self evident that undertakings jointly dominant may exploit their market power by charging supra-competitive prices, that is, by a conduct that harms only clients or customers.

[37] See, on this point, T. SOAMES, *An Analysis of the Principles of Concerted Practices…cit.*, p. 39. He foresees that European Authorities will use the concept of collective dominance. However, in his view, Article 82 should apply only when Article 81 cannot apply; therefore the main question is whether effective links exist, other than agreements or concerted practices. See on this point, infra, …

[38] See J.B. RODGER, *The oligopoly problem and the concept…cit.*, p. 44; R. WHISH, *Competition Law, cit.*, chap 14; J. SHAW, *Collective Dominance or Concerted Practices*, in *E.L. Rev.*, 1989, p. 99.

These objections involve the enforcement itself of abuses of dominance: antitrust actions based on Article 82 imply, by definition, the finding of either actual or highly probable anticompetitive effects, and lead to that kind of remedies.

competition authorities to choose the most appropriate remedy for the specific case at issue[39].

[39] B.J. RODGER, *Oligopolistic Market Failure: …cit.*, p. 24.
The A. suggests adopting a UK-like system that, by applying the typical method of the monopolies' analysis, seeks to detect the market injury and, therefore, to choose the most appropriate remedy.
The UK antitrust system, at that time resulting from the 1973 Fair Trade Act and the 1976 Restrictive Trade Practices Act, provided specific rules dealing with the oligopoly problem. Oligopolies were addressed by the category of "complex monopolies", and their legal regime, which sought to protect public interests and national priorities, rested on a global evaluation, which included both structural and dynamic aspects. A set of behavioural and structural remedies strengthened the antitrust enforcement in this area.
In many cases, UK Competition Authority had imposed successful remedies for anticompetitive conducts: in the case of evident supra-competitive prices, for example, it imposed the duty to set costs-oriented prices; in the case of foreclosure, it defined the quota of access to the distribution system that each oligopolist was required to grant.
According to Rodger, shifting to a UK-like system would be a practicable and workable way for the European authorities to address the oligopoly problem.
In my view, the centrality of remedies, sometimes pervasive and detailed, would push the antitrust enforcement towards a regulatory system. It is true that the category of oligopolies includes market extremely different one from the other, and that some of them require both detailed antitrust rules, and sector regulation (for example, in the liberalized sectors still involved in a process of creation of competitive conditions). However, when the market framework, although oligopolistic, is competitively structured, and competition rules may prevent and repress the eventual market injuries, article 82, with its enforcement's system, may ensure effective protection.
Abuse of dominance, in fact, is a flexible means, which may cover a wide range of market power's misuses. The European competition authorities have applied antitrust rules consistently with the market peculiarities, and refused a *per se* approach. The range of available measures against infringements contributes to the effectiveness of the entire system: injunctions, in particular, may be extremely powerful in case of exclusionary abuses, by offering immediate protection to injured rivals (for example, against a refusal to deal, the primary interests of rivals is to obtain an injunction imposing a duty to supply).
The UK system seems not to ensure more advantages than those coming from a flexible application of article 82. On the contrary, shifting to that system would imply the adoption of a set of concept and categories only partially matching the actual European competition law, with the consequence of increasing both theoretical and applicative doubts.
The evolution of competition policy denied Rodger's expectation, since the UK system aligned itself to the European system. The *1998 Competition Act,* in fact, is strictly modelled on EU antitrust rules, and expressly impose to the antitrust authorities the duty to follow the EC precedents. Section 18, in particular, introduced the concept of dominant position. For a full exam of the Act at issue, see J. FLYNN, J. STRATFORD, *Competition: Understanding the 1998 Act*, Palladian Law Publishing, Isle of White, 1999.

Finally, by applying article 82, the Commission is not required to demonstrate the conducts' intentionality or consciousness, because finding anticompetitive effects and parallel conducts would be enough to infer infringements. Some scholars have contested this theory, by pointing out that no European rule supports this reduction in the standard of proof[40].

1.5 An expansion in the problematic area: the merger control

At the beginning of the nineties, the debate about oligopoly control also involved the ECMR. Applying the category of collective dominance in the merger control appeared even more difficult because the ECMR lacked any reference to a plurality of firms[41].

According to some scholars, the effectiveness of the entire merger control would be compromised by literally interpreting the ECMR: excluding the preventive scrutiny of those operations which, without creating a single dominance, may increase the market concentration and enhance the risk of anticompetitive effects, would result in a substantial impunity for a wide range of potentially anti-competitive conducts[42]. According to other scholars, all operations that give rise to symmetrical-sized firms holding together high market shares, fall out from the prohibition of Article 2, even when it is highly likely that they will not compete[43].

---

[40] J. SHAW, *Collective Dominance or…cit.*, p. 99.
It is easy to overcome this objection by applying the principle of proportionality between the required proof and possible sanctions: since, in the case of pure oligopolistic parallelism, no fine may be imposed, it is reasonable to lower the burden of proof incumbent upon competition authorities.

[41] Regulation 4064/89, at Article 2, § 3 states that "*a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market*".

[42] D. RIDYARD, *Joint Dominance and the Oligopoly Blind Spot under the EC Merger Regulation*, in *ECLR*, 1992, p. 164.

[43] See, J. COOK, C. KERSE, *EEC Merger Control*, Sweet & Maxwell, London, 1991, p. 80.
They make the example of an oligopoly with three large firms each holding a market share of 25%, and three smaller-sized firms sharing the residual quota. If a larger-sized firm acquires the control on its smaller rival, the operation could not be prohibited, because it would not hinder competition. From such a premise, the As infer the general inapplicability of the collective dominance concept under Article 2 ECMR.

The Commission at first denied that the ECMR could apply to collective dominance, although it had admitted such double articulation of dominance in Article 82.

In *Renault-Volvo*[44], for example, the Commission analysed only the suspicion of post-merger single dominance, while it did not take account that in most of the national markets involved in the operation, the notified merger created a new entity, symmetrical to another one already active in the same market, and that, consequently, the operation at issue could facilitate collusion[45].

The first decision where the Commission admitted, although theoretically, that the post-mergers competitive concerns may involve tacit coordination, was the *Varta/Bosch* case[46]. The notified operation would have created a new entity with a market share around 44%, and "*the existence of an equally strong competitor, Tudor SA, could lead for several reasons to alignment of the behaviour of both competitors*" (para 32), especially in the absence of any countervailing powers. However, the Commission did not deeply evaluate the likelihood of post-merger coordination, but perceived the presence of two equal-sized firms a sure source of competition[47].

However, this example seems to be anything but determinative for excluding the applicability of collective dominance in the merger control. In the described situation, in fact, there is no evidence of post-merger coordination, but probably there is a pre-merger collusion. The notified operation, therefore, may increase the joint market share of the bigger-sized firms, but may also introduce an important asymmetry in the market equilibrium and, therefore, may destabilize previous collusion. The ultimate outcome will depend on the specific market conditions and on their interaction.

By following the As' opinion, on the contrary, Article 2 would apply only in the case of single dominance, even when it is sure that the operation at issue will raise coordinated effects.

[44] European Commission, case IV/M.0004, 7 November 1990, *Renault / Volvo*, in *OJ*, 1990, C-281.

[45] See, D. RIDYARD, *Joint Dominance and the Oligopoly…cit.*, p. 162.

In substantive terms, the ultimate decision would probably have been the same (authorization) even with an assessment of the likelihood of post-merger coordination. The presence of products technically differentiated, high levels of innovation, and significant buyers power represent, in fact, important obstacles to collusion.

[46] European Commission, case IV/M.012, 31 July 1991, *Varta / Bosch*, in *OJ*, 1991, L-320/26-34.

[47] D. RIDYARD, *Joint Dominance and the Oligopoly…cit.*, pp. 162-163.

The theoretical restraints about controlling, under the ECMR, the oligopolistic parallelism progressively decreased, from the *Alcatel /AEG* decision[48]. The market of power cables, because of its high concentration, maturity, transparency, and stagnant demand, appeared particularly prone to collusion.

Concerning the possible application to the ECMR in the case at issue, the Commission clarified: "*in contrast to the German law on restrictive practices (Section 23a, paragraph 2 GWB) EC merger control does not contain a legal presumption of the existence of a collective dominant oligopoly as soon as certain companies attain a certain combined market share*. [...] *Under the Regulation such a presumption which amounts to a reversal of the burden of proof does not exist. On the contrary, the Commission would have to demonstrate in all cases that effective competition could not be expected on structural grounds between the leading companies in a highly concentrated market.*" (§ 22)[49].

Thus, the Commission explicitly admitted that the notion of dominance, under the ECMR, also encompasses the category of collective dominance.

As for the case at issue, according to the Commission, the merger could increase the concentration, but could not eliminate the dynamics of competition. Moreover, strong buyers, in most cases, public utilities, could impede collusion. Since not all the market factors converged towards collusion, the Commission approved the merger project[50].

The evaluative lacuna in the analysis of collective dominance is much more evident if compared to the detailed exam about the suspect of post-merger single dominance in the German market.

[48] European Commission, case IV/M.165, 18 December 1991, *Alcatel / AEG Kabel*, in *OJ*, 1991, C-006.

[49] C.J. COOK, C.S. KERSE, *E.C. Merger Control,* 2nd Edition, Sweet & Maxwell, London, 1996, p. 134, note that this statement is perfectly consistent with economic theory teaching. The Commission, in fact, denied that oligopolies are presumably anti-competitive, and remarked the need for carefully examining the current and past market dynamics, to correctly predict the effects of the increased concentration. Such an approach, according to the As, is only a declaration, since the Commission has never used economic instruments, such as the index measuring market concentration.

[50] "*It thus seemed that the Commission was waiting for a clear-cut case to introduce the concept of collective dominance under the Merger Regulation*", S. STROUX, *US and EC…cit.*, p. 204.

In any event, this decision opened the door to the extensive ECMR interpretation, which would ensure a more effective antitrust policy.

1.6 Conclusions

The overview about the evolution of the European approach to the oligopoly problem reveals that the matter at issue involved, on different grounds, all three macro-areas which competition law consists of.

Anti-competitive, cartel-like effects may be addressed either under Article 81 (when there is enough evidence of a meeting of minds), under Article 82 (when there is no proof of concertation), or under both (when all their requirements are satisfied). The Commission, although in a contradictory way, recognized the important role of Article 82 for dealing with the oligopoly problem, and broadly interpreted the concept of dominance under Article 82, so as to also include collective dominance.

At the beginning of the nineties, however, it was anything but certain that the European Courts would have followed the Commission's choice, and would have widely interpreted Article 82, although this rule represented the best means to attack the oligopolistic parallelism. Since abuse of dominance is an objective notion, it may apply to mere, anticompetitive parallelism, substantially unpunished under Article 81. Moreover, the concept of abuse encompasses an implicit reference to something illegal, so it immediately characterizes a conduct in a negative way: by acting as a filter for unlawful parallelism, Article 82 may therefore ensure more effective and precise antitrust enforcement.

The potentiality of collective dominance, at first evident in the abuses, was quickly also perceived in the merger control. However, the favourable signals about the applicability of the collective dominance category did not imply formal acceptation. In a few years, the European Courts adhered to the Commission's view and recognized the collective dominance application in the *ex post* antitrust enforcement. In the preventive control, on the other hand, Courts had never prohibited any operations because of the likelihood of post-merger coordination.

Although the debate on collective dominance had begun several years before, this category officially entered in the European competition system in 1992 when the CFI confirmed, as an *obiter dictum*, the applicability of Article 82 to abusive conducts realized by independent firms which were jointly dominant. Such a statement also influenced merger control and supported the Commission's willingness to challenge those operations resulting in coordinated effects.

Chapter 2

The First Stage in the Evolution of Collective Dominance

The leading role of the case law on abuses of collective dominance

2.1 Introduction

After the Commission began systematically applying article 82 to anti-competitive parallelism, European Courts also recognized that the category of collective dominance was consistent with antitrust law. This policy resulted in an evolutionary trend that has made of collective dominance the principal means to address the competition concerns in oligopolies.

Competition authorities at first exploited the potentials of this category in the enforcement of article 82, an area where they had greater expertise. By applying this rule since the ET had come into force, in fact, they developed a wide realm of theoretical means and methodological criteria for dealing with dominance.

In the control of mergers, on the contrary, competition authorities were more cautious: even if they rested on the same parameter of dominance applied in abuses, the preventive nature of assessment, together with a new area of competence, refrained from extensively interpreting the ECMR.

It was in the enforcement of article 82 that for the first time Courts widely interpreted the concept of dominance, by including in its

realm market power positions jointly held by more independent companies. In this area there also appeared the first remarks about the need of connecting factors between the involved firms.

All results obtained in the decisional praxis about abuses were progressively expanded to the control of mergers.

Only later, when the Commission became more familiar with merger control and developed more precise methods to address the preventive analysis of oligopolistic mergers, the original trend reversed, and innovative decisions about mergers began influencing the scrutiny of abuses of collective dominance.

In the following paragraphs, I will analyse the first stage of the evolution of collective dominance, where article 82 played a propulsive role.

2.2 *Flat Glass*

2.2.1 The premise: the EC decision

In 1988 the Commission sanctioned the three major Italian producers of flat-glass, namely Società Italiana Vetro (hereinafter SIV), Fabbrica Pisana (hereinafter FP) e Vernante Pennitalia (hereinafter VP)[1].

The market of flat glass consisted of two segments, "automotive" (used in the transport industry) and "non-automotive" (intended for construction and furnishing industries). It was a tight oligopoly, with little competition, both actual and potential, because of technological maturity, high start-up investments, and demand stagnation.

As for the "non-automotive" glass sector, the Commission found out a set of anticompetitive conducts, such as simultaneous publication of identical price lists[2], alignment of discounts' rates, and a praxis of forcing wholesalers to pass price increases to their final customers.

---

[1] European Commission, case IV/31.906, 7 December 1988, *Flat Glass*, in *OJ*, 1989, L-33/44-73.

[2] According to the Commission, price alignment resulted neither from product homogeneity nor from the oligopolistic market structure, but from circumstances imputable to the suspected firms. Firms knew that individual strategies of price increase were effective only if followed by the others. In this way, one firm, which

As for the "automotive" segment, the Commission showed that SIV and FP had infringed article 81, by agreeing on prices for their most important clients, that is, FIAT and Piaggio.

The economic analysis demonstrated that firms held high market shares[3], likely to be maintained in the future, since high barriers to entry, and the expected demand stagnation[4] would have impeded new entries.

Moreover, specific mechanisms artificially increased market transparency and strategic homogeneity: systems of information sharing allowed firms to align their prices; products exchanges ensured to each manufacturer a portfolio of supply that included all glass products, although each produced only specific items[5]. In this way, companies impeded the competitive reactions based on manufacturers' specialization, and strengthened their mutual interdependence.

According to the Commission, in such a scenario, firms could behave independently of rivals, clients, and consumers. In other words, the involved firms held a collective dominant position[6], which they abused by engaging in those conducts infringing upon Article 81 too.

Without implementing the probatory evidence alleged about unlawful agreements, the Commission found out an anti-competitive conduct that violated at the same time both Article 81 and Article 82.

---

intended to increase its price, preventively verified the others' willingness to follow the same strategy (§ 19).

[3] Market shares amounted to 79% in "non-automotive" sector, and 95% in "automotive" segment (§ 79).

[4] Two other factors excluded the external countervailing pressures: on the one hand, the leading role these firms played in the Italian market, on the other, their participation to international organizations that controlled the overall production and distribution of flat glass.

[5] Such mechanism allowed firms to divide the relevant market either in geographical areas or in customers' classes, and, therefore, allowed to maintain their individual market shares.

[6] R. RICHARDSON, C. GORDON, *Collective Dominance: the Third Way?* in *ECLR*, 2001, p. 418. Authors note that "*Although the case concerned a tight oligopolistic market, the Commission did not argue that the undertakings acted collectively because of their structural interdependence but sought to argue that the collective behaviour was shown by their co-ordinated conduct on the market*" (p. 418).

The plurality of infringements raised the matter of correctly quantifying sanctions. The Commission recognized that the principle of proportionality between injury and punishment would lead to impose the fines provided for the most serious infringement. This way, it sanctioned firms only for the infringement of Article 81, but adduced, in this respect, a highly questionable explanation: "*in view of the fact that the concept of collective dominant position is being used for the first time under Article 86, the Commission considers that no fines should be imposed under Article 86*" (§ 84, lett. a).

By this statement, the Commission, therefore, confirmed that Article 82 may apply to a plurality of firms economically independent, although connected by economic or structural links. It also stated that article 81 and 82 could cumulatively apply, but it did not explain the reasons of impunity for an anticompetitive conduct.

Some scholars justified this statement by the stronger effectiveness of fines for Article 81 infringement, and by the little familiarity with a legal category that was in its early evolutionary stages[7]. In my view, all these justifications did not explain why the Commission, after showing two infringements and admitting the cumulative application of articles 81 and 82, imposed only one fine.

2.2.2 The CFI judgement

2.2.2.1 Confirming the Commission's theory on collective dominance

In the appeal that fined firms brought before the CFI, the European judges faced the matter of collective dominance[8].

---

[7] R. PARDOLESI, *Nota a Tribunale di Primo Grado 10 marzo 1992, Società Italiana Vetro e altri v. Comm*, in *Foro It.*, 1992, IV, p. 433.

[8] Court of First Instance, case T-69-77-78/89, 10 March 1992, *Società Italiana Vetro SpA, Fabbrica Pisana Vetro SpA and PPG Vernante Pennitalia SpA* v. *European Commission*, in *ECR*, 1992, II-1043.
As for the infringement of article 81, the Court declared insufficient the alleged proofs, and annulled, on this point, the appealed decision.

By departing from the previous approach, the CFI confirmed that the expression "more firms" *ex* Article 82 has to be interpreted consistently with the meaning of "firm" under article 81. The European jurisprudence had spelt out that article 81 applies only to independent economic entities, capable of choosing their own market strategy; on this basis, Courts had usually excluded the antitrust relevance of intra-group coordination.

By overcoming the UK objections[9], the Court stated that, for companies to be relevant under article 82, either as single or as a plurality, they must be independent.

Moving from this premise, the Court upheld, however as *obiter dictum*, the collective dominance theory: "*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*" (§ 358).

2.2.2.2 Links between firms

The CFI built collective dominance around specific elements: a plurality of independent firms, in the awareness that the joint market power of members of a group is a case of single dominance; the strategic convergence of market conducts, so that firms present themselves as a unitary block; the presence of specific economic links creating a joint entity.

As to the links, the CFI made the example of agreements or licences for the technological advantages sharing, which enabled all concerned firms to jointly behave in an independent way[10].

---

[9] "*Only in very special circumstances* […] *two or more undertakings may jointly hold a dominant position within the meaning of Article 86, namely, when the undertakings concerned fail to be treated as a single economic unit in which the individual undertakings do not enjoy a genuine autonomy in determining their conduct on the market and are not to be treated as economically independent of one another.* […] *The United Kingdom points out that, according to the case-law of the Court of Justice, Article 85 does not apply to an agreement between a parent and its subsidiary which, although having separate legal personality, enjoys no economic independence.* […] *When undertakings form part of one and the same economic unit, their conduct must be considered under Article 86*" (§§ 342-343).

[10] In this way, the Court upheld the definition of dominance as behavioural independence, laid down in *Hoffmann-La Roche* [Court of Justice, case 85/76, 13 February 1979, *Hoffmann-La Roche & Co AG* v. *Commission*, in *ECR*, 1979, 461].

The emphasis put on economic links, presented necessary for collective dominance to exist, reflects the theoretical need to clarify that the equilibrium at issue came from non-concerted strategies. The overall conceptualization, affected by the weakness of scholars' reflections and of the jurisprudential expertise, rested on the presence of links that allowed firms to align their market behaviour, without eliminating their independence.

Such a statement, on the one hand, is a hallmark in the evolution of collective dominance, since in the past cases Court had applied article 82 either to single dominance or to group dominance (which, in legal terms, is a case of single dominance too). On the other hand, it refrained the Commission's attempt to insert collective dominance in an objective framework, and to recognize that oligopoly itself, under specific conditions, may be the primary case of the alignment, without any need either of agreements or of concerted practices[11].

The statement about the role of licences or agreements as *economic links* connecting firms gives just an example of the kind of factors that may actually create collective dominance. In other words, the category of links, necessary for collective dominance to appear, includes, but is not limited to, licenses and agreements.

2.2.2.3 Joint application of articles 81 and 82

Whether the link connecting firms is an anticompetitive agreement, and firms abused of their joint dominance, they infringe at once articles 81 and 82.

---

[11] In the appeal, the Commission itself corrected such opinion and admitted that collective dominance can not result simply from the structural and dynamic market features, but it requires some links among firms."*The Commission* […] *applied the concept of collective dominant position to the undertakings in question because, not only did they hold collectively a very large share of the market, they presented themselves on the market as a single entity and not as individuals. That emerges not from the structure of the oligopoly but from the agreements and concerted practices which led the three producers to create structural links amongst themselves, such as, in particular, the systematic exchanges of products. The Commission defends itself for having adopted the position that Article 86 may be applied to undertakings in an oligopolistic position regardless of whether or not there are agreements or concerted practices among them*" (§ 350).

The matter of joint application of Articles 81 and 82 can take different forms: on the one hand, an agreement (unlawful, as well as lawful *ex* paragraph 3 of Article 81) can be the primary cause–and not simply a facilitating factor- of collective dominant; on the other hand, the same, material conduct can be simultaneously unlawful coordination under Article 81 and abuse of collective dominance[12].

By upholding the Commission statement, the CFI recognize that the same material conduct may produce multiple infringements, but made clear that, in this case, the Commission is required to allege evidence of all the requirements of each contested conduct. "*For the purposes of establishing an infringement of Article 86 of the Treaty, it is not sufficient […] to «recycle» the facts constituting an infringement of Article 85, deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market, that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position*" (§ 360).

According to the CFI, the analysis of collective dominance has to focus on the firms' capability to act as a unitary economic entity. Since evidence alleged by the Commission came short of this demonstration, "*it follows that, even supposing that the circumstances of the present case lend themselves to application of the concept of «collective dominant position» (in the sense of a position of dominance held by a number of independent undertakings), the Commission has not adduced the necessary proof*"(§ 366).

2.2.2.4 Critical remarks

This judgement represents a milestone in the evolution of collective dominance: the CFI built solid basis for the future development of this theory, by avoiding annulling it in the phenomenon of the group's dominance.

The scholars' opinions on this judgment were extremely various: most of them perceived the *Flat Glass* case as a revolution in the

[12] About the criteria that regulate the joint application of articles 81 and 82, see *infra*, Part 3 – Chapter 2.

oligopolies control[13]; others recognized the abstract importance of the collective dominance theory, but denied both its actual applicability and its practical relevance[14].

In the middle of these two extremes, there is a moderate opinion which views *Flat Glass* as a judgment "*exciting and frustrating at the same time*": on the one hand, it officially brought the collective dominance of independent firms within the control of article 82 and admitted that article 81 and article 82 may apply to the same material conduct. On the other hand, it clarified neither the definition nor the function of collective dominance[15].

However, this judgment is only the first step towards an effective antitrust control of oligopolistic parallelism: consciousness and intentionality of coordination, although defined by circumstantial evidence, appear still essential to support the allegation of collective dominance: "*the requirement of the existence of «economic links», although is not clear what they had to consist of, seemed to inhibit the use of article 82 for controlling pure oligopolies*"[16].

---

[13] See, R. PARDOLESI, *Nota a Tribunale di Primo Grado 10 marzo 1992… cit.,* p. 435; D. POPE, *Some Reflections on Italian Flat Glass case*, in *ECLR*, 1993, p. 175.

[14] A. FRIGNANI, *Abuso di posizione dominante*, in A. FRIGNANI, R. PARDOLESI, A. PATRONI GRIFFI, L.C. UBERTAZZI, *Diritto antitrust italiano*, Zanichelli, Bologna, 1993, p. 316.

In the premise of this reasoning, the A recognizes that there is no legal obstacle in applying both Articles 81 and 82 to the same conduct when no firm is individually dominant. However, he seems to build the theory of collective dominance around the idea of group, with stable links and strong internal coordination. Only resting on this premise, some doubtful expressions make sense: "*Certo, le parti non costituiscono un'unica entità economica. Esse rimangono indipendenti e sono in grado di riacquisire la loro intera libertà d'azione nel caso di scioglimento dell'intesa*" (*ibidem*, p. 315).

Moreover, according to Frignani, the annulment of the EC decision was quite unavoidable, because proofs of unlawful agreements had established only a collective dominance, but not its abuse. In other word, proving an article 81 infringement is not enough to show also abuses of collective dominance.

Finally, he disagrees with the idea of cumulatively applying articles 81 and 82, because it would simply duplicate the prohibitions, by condemning as an abuse the unlawful agreements that create collective dominance, but that are already sanctioned under article 81. In his view, article 82 should apply only when one member of the collectiveness, taken alone, holds a single dominance.

[15] R. WHISH, *Competition Law*, 5th Edition, LexisNexis, London, 2003, p. 522.

[16] S. STROUX, *Is EC Oligopoly Control Outgrowing Its Infancy?* in *World Competition*, 2000, p. 20; also R. WHISH, *Competition law…cit.*, p. 522 considers the *Flat Glass* judgment quite cryptic about role and meaning of economic links. Analogously, A. JONES,

Such a cautious approach probably reflects the difficulties of dealing with oligopolies, and of discerning competitive failures imputable to firms' conducts from those ascribable to market features.

In the CFI statement, economic links appear both as prodrome of coordination and as means for identifying all firms involved in collective dominance. Therefore, insofar as links are present, the set of firms involved in collective dominance may be more easily identified than in the case of mere oligopolistic parallelism[17].

This judgment, with such a prudently innovative approach, will affect the subsequent evolution of collective dominance, to the point that all subsequent decisions about abuses of collective dominance have always also involved infringement of article 81.

2.3 *Nestlè/Perrier*

The CFI statement that the notion of dominance embraces the case of several firms holding together significant market power, affected the merger control[18]. Since, at that time, the ECMR relied on the

---

Woodpulp: concerted practice and/or conscious parallelism, in *ECLR*, 1993, p. 278, remarks that, in the light of this statement, it would be clear that market structure alone cannot gives rise to collective dominance, because economic links –in the form of agreements- are always required.

B.J. RODGER, *Oligopolistic Market Failure: Collective Dominance versus Complex Monopolies*, in *ECLR*, 1995, p. 24, gives a broader definition of economic links. In his view, the theory of oligopolistic interdependence would demonstrate that also oligopolies could act as an economic or structural link. At the same time, the category of collective dominance, as resulting from the case at issue, by focusing on the requirement of links between firms, could not embrace oligopolistic dominance.

[17] According to G. MASINA, *Osservazioni a Trib. di primo grado CEE, 10 marzo 1992, in tema di posizione dominante collettiva*, in *Giur. Comm.*, 1993, II, p. 619, one of the most complex matters of collective dominance is to identify its members. By anticipating questions that appear in the subsequent case law, the A. also wonders whether the oligopolistic interdependence itself could act as a link for firms.

Analogously, E.A. RAFFAELLI, *Antitrust, tra diritto nazionale e diritto comunitario*, Giuffrè, Milano, 1996, p. 44. In his opinion, the evolution from a group to a plurality of undertakings would not be enough to apply collective dominance to the mere oligopolistic parallelism, also because it was still unclear whether parallelism could act as a link between oligopolistic undertakings.

[18] Several Authors predicted this outcome. See, D. POPE, *Some Reflections on Italian Flat Glass case*, in *ECLR*, 1993, p. 175, given the common parameter of a "dominant position"; R. PARDOLESI, *Nota a Tribunale di Primo Grado 10 marzo 1992… cit., p.* 435, suggested

creation or strengthening of dominance, the Commission at first expressed a theoretical favour for including collective dominance into the merger control, and later applied this notion in the *Nestlè/Perrier* case[19].

In the French market of bottled mineral water[20], a tight oligopoly dominated by three big operators -Nestlè, Perrier and BSN-, Nestlè notified a merger project at the scope of acquiring the control over Perrier and its affiliates.

Since the operation at issue was very likely to create single dominance, at the aim of reducing the competition concerns, Nestlè committed to sell the Volvic source (owned by Perrier) to its rival BSN.

This commitment, by creating a competitor similar to the merged entity, reduced the likelihood of post-merger single dominance, but increased the likelihood of post-merger coordination. The merger at issue, in fact, would have created a duopoly (Nestlè-BSN), with high market shares (more then 70%[21]), which controlled several water sources and could effectively react to an eventual increasing of market demand.

Moreover, specific market features suggested that neither actual rivals (all small producers that, in a marker where products' imagine played a significant attractive role, lacked financial resources to invest in marketing and advertising) nor potential competitors (whose

---

paying attention, in the assessment of oligopolistic mergers, on the increase of market shares jointly held by the oligopolists, because it can help finding out cases where a concentration may strengthen a collective dominant position.

[19] European Commission, case IV/M.190, 22 July 1992, *Nestlé / Perrier,* in *OJ*, 1992, L-356/1-31.

[20] The definition of relevant market is paradigmatic of the difficulties to decide the case at issue. The parties suggested including in the relevant market also soft drinks, but the EC scrutinized product substitution on both demand (mineral water and soft drinks are different in taste, intended use, prices, and elasticity of the demand) and supply side (production and distribution of mineral water are subjected to detailed rules which make it difficult to switch production from one good to the other; the differences also involve the criteria adopted for defining prices), and limited the product market to the sole water.

Defining the geographical relevant market was easier, because it was evident that product features-especially in terms of transportation costs and low value for unity-and barriers to entry protected the French market from external competition.

[21] Nestle and BSM would have controlled 82% (in value) and 75% (in volume) of the relevant market.

entrance appeared improbable because of the product features, which made unprofitable the imports, and because of the difficulties to accede to a distribution system already mature in terms of brands and range of products) could effectively countervail the economic power of the post-merger duopoly. Moreover, downstream competitors, who needed of the Nestlè and BSN products, were economically dependent from the dominant manufacturers; therefore, they could not reduce the expected market power of the post merger duopoly.

Rigid demand, resulting from both low price sensibility and high fidelity to brands and imagine, also reduced the dynamism of the market.

In such a scenario, already prone to collusion, the concerned firms adopted facilitating practices, such as public price lists, which indicated the specific rates of discount for each amount of quantity, and mechanisms ensuring that ultimate prices corresponded to the announced price.

2.3.1 Bringing collective dominance under the ECMR control

Although the market contest raised the serious danger of post-merger coordination, the decision was anything but easy. Prohibiting this merger, in fact, would have implied recognizing that article 2 paragraph 3 ECMR could apply to operations which hinder competition by the coordination between the resulting firm, individually non-dominant, and its closer rivals, already active in the same market.

The result was an unexpected[22] innovation: "*The Commission considers that the distinction between single firm dominance and oligopolistic dominance cannot be decisive for the application or non-application of the Merger Regulation because both situations may significantly impede effective competition under certain market structure*

[22] The final decision resulted from the balance between different opinions arisen in the Advisory Committee about Mergers. On the one hand, the majority was favourable to the extensive interpretation of the ECMR; on the other hand, the minority either denied in principle the applicability of Merger Regulation to collective dominance, or conditioned its application to evidence of links between firms, as the CFI stated in the *Flat Glass* precedent.
See, on this point, *Advisory Committee Opinion*, in *OJ*, 1992, C-319/3.

conditions" (§ 112). On the contrary, since the antitrust policy seeks to protect the market functioning, "*the restriction of effective competition which is prohibited if it is the result of a dominant position held by one firm cannot become permissible if it is the result of more than one firm*" (§ 113).

Against the principal objection to the extensive interpretation of the ECMR, the Commission stated: "*In the absence of explicit exclusion of oligopolistic dominance by Article 2 (3) it cannot be assumed that the legislator intended to permit the impediment of effective competition by two or more undertakings holding the power to behave together to an appreciable extent independently on the market* […]. *If, in order to avoid the application of the Merger Regulation, it sufficed to divide the dominant power between for instance two companies in order to escape the prohibition of Article 2 (3), then, in contradiction to the basic principles of the common market, effective competition could be significantly impeded*" (§ 114).

Finally, the Commission pointed out that several Member States had been already applying internal merger statutes to coordinated effects; consequently, the restrictive solution could determine, in shifting from internal to centralized merger control, substantial impunity for operations potentially more restrictive than single dominance.

Concerning the case at issue, according to the Commission, the resulting duopoly could hinder the effective competition, by creating a collective dominance[23].

However, structural and dynamic market features, past aligned conducts[24] and evidence of exclusionary abuses[25] seem to demonstrate

[23] The likelihood of post merger collusion was inferred from a careful exam that combined structural data (marker shares, capacity, technological maturity, and demand features) and dynamic market factors. The theoretical basis for the prohibition echoes the behavioural economic approach: "*the reduction from three to only two national suppliers would make anticompetitive parallel behaviour leading to collective abuses much easier*" (§ 120). The same is true about the reference to coordination of prices policies (121) and information exchange, which permitted "*immediate detection of any deviation by any single major brand of the expected performance*" (§ 122).
B. ETTER, *The assessment of mergers in the EC under the Concept of Collective Dominance. An Analysis of the Recent Decision and Judgments - by an Economic Approach*, in *World Competition*, 2000, p. 126 perceives all these remarks as evidence of a *favor* for the Game Theory approach.

that collective dominance already existed[26]. Therefore, the Commission should have scrutinised the possible effects that acquisition of Perrier would have generated on the pre-existent coordination. With regard to this, there were theoretically two possibilities: either the operation at issue would have destabilized the previous collusion, or it would have strengthened the strategic interdependence of the involved firms.

At the aim of avoiding the prohibition, merger parties submitted some commitments[27], which led the Commission to approve both the acquisition of Perrier and cession of the Volcic source to BSN.

According to some economists, those commitments could not remove the danger of post-merger coordination in a quite static industry, but they probably increased the likelihood of collusion[28].

---

[24] "*The prices* […] *of the five major still mineral waters of the three national suppliers have constantly increased in a parallel way since at least 1987* […] *whoever first increased its price was always followed by the other two suppliers*" (§ 59).

[25] "*Nestlè and BSN have together reacted strongly to the attempt by an external actor to acquire Perrier*" (§ 127)

[26] Some scholars agree on the pre-existence of coordination. See, for example, F. STELLA, *Posizione dominante collettiva e concentrazioni: il caso Rhône-Poulenc / Snia*, in *Dir. Comm. Internaz*., 1994, p. 169; S. BASTIANON, *L'abuso di posizione dominante,* Giuffrè, Milano, 2001, p. 26.

[27] Parties proposed both positive, structural commitments (such as selling an amount of capacity and cessing some brand) and negative, behavioural commitments (such as duty not to divulge market data about the amount of Nestlè sell in the previous year) [§ 137].

[28] See E. COMBE, *Èconomie et politique de la concurrence*, Dalloz, 2005, pp. 321-322.
The A adopts the *Nestlè / Perrier* case as a paradigm for examining the effectiveness of commitments in the merger control. The choice of colluding or competing depends on the balance between future profits deriving from stable collusion and immediate revenues deriving from defection. The A indicates with δ the parameter that quantifies the convenience of collusion. This variable may assume values ranging from 0 (collusion easy to be maintained) and 1 (difficulties of a stable collusion). By applying these criteria to *Nestlè/ Perrier* case, the A measures the likelihood of collusion coming from every possible EC choice. In his model, authorization with simultaneous cession of Volcic to BSN would have resulted in a symmetrical oligopoly, with actual possibility of retaliation and, therefore, with high risk of tacit collusion (δ = 0.50). The EC decision – dismissing Volcic and transferring part of its activity to a third firm- could not significantly reduce the symmetry between the two bigger-sized firms operators, so it could not impede collusion (δ=0.61). The better choice to reduce the probability of collusion would have been an unconditioned authorization, because BSN did not have enough capacity to react to the Nestlè defection and asymmetries in retaliation precluded collusion's stability (δ=0.75).

Doubts involved, in particular, the effectiveness of deconcentrative remedies (selling sources and brands to a new operators, who were supposed to jeopardise the oligopolists' attempt of increasing prices), intended to eliminate the information exchanges[29].

Despite its limits, the *Nestlè* decision is properly a hallmark in the collective dominance evolution: by admitting that the ECMR may apply to collective dominance, the Commission increased the range of means to deal with the oligopoly problem[30] and contributed to close the gap between the EU and US merger control[31].

However, because of the exiguity of the case law about collective dominance, which had involved only article 82, some uncertainties, especially about the preservation of legal certainty remained[32]. The subsequent case law will provide satisfactory answers about both substantive and probatory aspects of the preventive control over collusion.

However, the A did not take account that this solution would have created single dominance.

Despite the necessary caution in evaluating the suggestion of economic models -since they are based on stylized assumption not matching the complexity of the economic relationship-, this analysis clearly highlights how difficult may be to define structural remedies.

[29] A. WINCKLER, M. HANSEN, *Collective dominance under the EC Merger Control Regulation*, in *CML Rev*. 1993, p. 815. According to AA, "*the commission apparently considered that the loss of transparency which should follow from this measure would render tacit collusion unlikely*" (p. 815).

[30] See, *ex plurimis*, D.G. GOYDER, *EC Competition Law, cit.,* p. 365. He also remarks that the factual framework in this case provided the perfect bases for the development of the collective dominance doctrine.

[31] M. LA NOCE, M. FERRERO *Controllo delle concentrazioni tra imprese e criteri di valutazione*, in *L'Industria*, 1996, p. 115.

[32] A. WINCKLER, M. HANSEN, *Collective dominance …cit.*, p. 828. They suggest preferring legal certainty to protection of competition: "*Since, however, there is a clear case in favour of using the merger regulation as a tool to control the concentration of the market power and preventing the creation of market structures that are conducive to tacit and non-cooperative collusion more generally, clear rule […] are urgently needed*" (p. 828).

2.4 *Almelo*

In the *Almelo* case[33], the CJ upheld the theory of collective dominance defined in *Flat Glass* and, as a consequence, eliminated any divergences in the approach of European authorities to the topic at issue[34].

This judgment was pronounced, as a preliminary ruling, in a proceeding between the Municipality of Almelo and other local distributors of electric power on the one hand, and a regional distributor *Energiebedrijf IJsselmij NV (hereinafter IJM)* on the other hand.

The Dutch market of electricity distribution, where parties were active, presented a pervasive regulation based on non-exclusive concessions, which granted to regional distributors the right to supply local distributors. These firms, in turn, supply electricity to the final customers. Moreover, the *Association of Operators of Electricity Undertakings* imposed exclusive purchasing clauses that *de facto* impeded new entry[35].

The CJ was asked to clarify, *inter alia*[36], whether an exclusive purchasing clause, contained in the general conditions of sale and prohibiting a local distributor from importing electricity for public supply purposes, contrasted with Articles 85, 86 and 90 ET (now respectively articles 81, 82, and 86).

As for article 81, the CJ, by evaluating together the economic and legal contest, stated that the clause at issue could compartimentalize the national market and could impede the entrance of foreign producers; therefore, it contrasted with article 81.

---

[33] Court of Justice, case C-393/92, 27 April 1994, *Municipality of Almelo and others* v. *NV Energiebedrijf Ijsselmij*, in *ECR*, 1994, I-1477.

[34] In previous cases where raised the question about the applicability of Article 82 to abuses of collective dominance, CJ and Commission always disagreed: see, for example, the *Alsatel* case.

[35] This system, based on standard contracts, involved all streams of the electricity distribution, and practically annulled the non-exclusivity nature of administrative concessions.

[36] Another question involved the possible qualification of the national judges who decide an appeal against arbitration decisions as "national court or tribunal" *ex* article 177 ET.

As for article 82, the CJ explained that non-exclusive concessions do not automatically imply a dominant position for each of those firms, if their exclusivity involves only part of the State territory. However, according to the Court, "*a different assessment must apply where that undertaking belongs to a group of undertakings which collectively occupy a dominant position*" (§ 41).

The joint effect of legal provisions, not restrictive in themselves, and contractual regime was the establishment, in the Dutch market[37], of a unitary block of regional distributors, holding together a substantial market power.

The CJ clarified that "*In order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market*" (§ 42).

The explicit mention of *group* of firms could arise the suspect that, in the Court's view, collective dominance meant joint market power of firms subjected to unitary control and management. By quoting the *Bodson* case, where article 82 had applied to a plurality of undertakings not strategically independent, the Court strengthened this suspect[38]. However, the systematic interpretation of this statement reveals that the CJ intended "group" just as a plurality of firms, in a non-technical, rather than legal, meaning[39]. It was a linguistic imprecision, directly consequent to the quoted precedent.

In *Almelo,* the Court built the concept of collective dominance around the presence of links between firms: although their substantial contents were still unclear, connecting factors already appeared as essential elements for collusive equilibria[40].

---

[37] In delimitating the geographical market, the Commission indicated the entire Dutch market, although specific economic data, such as absence of external competitive pressures and low demand substitutability, could also suggest a narrow delimitation, involving the single regions.

[38] See *supra*, Part 1 – Chapter 1.

[39] S. BASTIANON, *L'abuso di posizione dominante, cit.*, p. 88.

[40] The CJ did not pronounce about the inclusion of standard contracts in the category of links, but attributed to the national Courts the power of deciding on this point.
On this point, S. STROUX, *Is EC Oligopoly Control… cit.*, remarks that "*If the Court were to accepted this in is future case law, it would mean that a new type of factor can constitute the required link between the undertakings, as for these «externally imposed» links, no behaviour of the undertakings is required as to willingly adopt the same conduct on the market*"(p. 22).

Moreover, the remarks about effectiveness of links, as well as the elimination of the adjective *economic*, which appeared in the previous statements, seem to anticipate the requirement of internal stability of collusion, highlighted in the subsequent case law.

Concerning the infringement, the CJ admitted that the same material conduct may infringe both Article 81 and Article 82. It follows that behaviours aimed at tying clients by obligation or promise to buy all their product from that firm are unlawful under article 81, and also abusive under article 82[41].

About the infringement of article 90, the CJ did not evaluate the compatibility between Dutch law and competition rules, but recognized to national judges the power of assessing whether the concerned restrictions were indispensable for distributors to perform their economic function. In this way, the Court indirectly laid down, consistently with prior case law, that legal monopolies or exclusive licences do not impede the inference of collective dominance.

2.5 *Centro Servizi Spediporto; DIP; Sodemare*

These decisions, handed down in the contest of preliminary rulings, involve the same topic, that is, the impact of national rules in the establishment of collective dominance.

The *Centro Servizi Spediporto* case[42] involved an internal law attributing the power to set shipping rates to a committee which included the representatives of the concerned trade associations.

According to R. WHISH, *Competition law, cit.*, p. 523, this judgment introduced the idea that links are relevant for collective dominance as far as they enable firms to align their market strategy.

[41] Several scholars strongly criticised this statement, because it would annul the difference between abuses of collective dominance and concerted practices. See L. VASQUES, *Nota a CG 27 aprile 1994 -Comune di Almelo-*, in Foro It., 1995, IV, p. 48. On the overlap between the two categories at issue and on the cumulative application of article 81 and 82, see *infra*, Part 3 – Chapter 2.

[42] Court of Justice, case C-96/94, 5 October 1995, *Centro Servizi Spediporto Srl* v. *Spedizioni Marittime del Golfo Srl*, in *ECR*, 1995, I-2883.

In assessing internal law through the lens of European competition rules, the CJ stated, as a principle, that States rules cannot deprive community antitrust law of its effectiveness.

Concerning collective dominance, the Court remarked the essential role of links for establishing such an equilibrium, but denied that national rule, in the case at issue, really gave rise to this result. As a consequence, the implementation of granted rights did not embody an abuse.

In the *DIP*[43] case, the Court of Justice confirmed the previous statement about links and remarked the difficulties of showing collective dominance: competition authorities are required to demonstrate both the substantial independence of dominant firms - as in case of single dominance- and the existence of economic links enabling undertakings to adopt the same market conduct.

In the *Sodemare* case[44], the CJ denied that national rules may infringe article 81 and 82 if they do not "*place individual undertakings* […] *in a dominant position or result in the creation of sufficiently strong links between them as to give rise to a collective dominant position*" (§ 47).

In the judgments at issue the CJ confirmed that links are essential conditions for collective dominance to appear and wondered whether national rules may allow firms to adopt the same market conduct. By pronouncing always about "*national rules of the kind at issue*", the denial that internal rules could create collective dominance seems to involve only the specific case at issue, and it does not seem to exclude, in principle, that this kind of factor may give rise to collective dominance[45]. In other words, the Court seems to indirectly recognize

[43] Court of Justice, joined cases C-140, 141, 142/94, 17 October 1995, *DIP* v. *Comune di Bassano del Grappa* e *Comune di Chioggia*, in *ECR*, 1995, I-3257.

[44] Court of Justice, case C-70/95, 17 June 1997, *Sodemare Spa, Anni Azzurri Holding Spa, Anni Azzurri Rezzato Spa* v. *Regione Lombardia*, in *ECR*, 1997, I-3395.

[45] In the *DIP* case, for example, the CJ stated that "*Articles 3(g), 5 and 86 of the Treaty could apply to rules such as those contained in the Italian Law only if it were proved that that law creates a position of economic strength for an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, the consumers*" (§ 24).

that legislative or administrative acts may establish collective dominance.

By admitting that even external factors can correlate firms, the CJ reduced the traditional emphasis put on consciousness and intentionality of links and contributed to insert the assessment of abuses in a more objective perspective.

In *Sodemare*, the analysis became more detailed and the CJ recognized that internal rules may bring about joint market power either by directly connecting firms or by creating favourable conditions for collective dominance to appear. In any event, according to the CJ, for internal rule to infringe article 82, they need to create collective dominance and also force firms to behave in an anti-competitive manner[46]. It is the same approach applied for assessing private behaviours: the market dominance is one, but not the sole, requirement of article 82, therefore evidence parallel conducts, without any assessment of their impact on the market functioning, does not allow the inference of abuses of collective dominance.

Some scholars questioned the propriety of equalling the assessment of private and State conducts: in their view, when collective dominance derives from internal rules, a more stringent regime of antitrust liability should apply, because the existence itself of joint market power menaces the effectiveness of Article 82. Moreover, in their view, the CJ should react to the article 82 infringements that derive from normative or administrative measures by imposing structural remedies, which realize the same result of the preventive merger control[47].

2.6 *Kali und Salz*

At the end of the nineties, collective dominance appeared as a well-developed category in the area of abuses. Competition

[46] In *Centro Servizi Spediporto*, the CJ declared that if internal law had created a dominant position, it would have infringed article 82 because granted to the involved firms the right to set prices, that is one of the most serious and typical antitrust infringement.
[47] G. MONTI, *The scope of collective dominance under article 82*, in *CML Rev.*, 2001, pp. 153-155.

authorities agreed that article 82 embraced abuses of joint market power, and the legal debate shifted on qualitative matters, such as role and characteristics of links among firms as well as the possible influence of market functioning in establishing collective dominance.

In the merger control, on the contrary, collective dominance was in its first stages: the Commission had applied this category only in one case, and Courts had serious doubts on the practicability of this approach. This result depended on various factors, such as modest expertise with the merger control and difficulties of dealing with a variable–the oligopolistic market-of unpredictable impact on competitive dynamics.

Moreover, the implicit and diffuse *favour* for the expansion of firms resulted in a restrictive interpretation of the ECMR, which left little space to collective dominance.

This trend changed after the CJ expressly recognized that the merger control has to also address post-merger coordination. Once it was removed the main obstacle for applying collective dominance in the merger control, the subsequent, legal debate focused on the methodological issues.

2.6.1 The EC decision

The Commission applied the category of collective dominance in deciding about a project of joint venture between Kali und Salz (hereinafter, K&S) and Mitteldeutsche Kali AG (hereinafter, MdK)[48].

According to the Commission, the relevant market was that of potash products for agriculture, geographically divided in two segments: on the one hand, Germany, on the other hand, the rest of European Community[49].

---

[48] European Commission, Case IV/M.308, 14 December 1993, *Kali und Salz/MdK/Treuhand*, in *OJ,* 1994, L-186/38-56.

[49] The EC analysis, confirmed by the Advocate General Tesauro in his conclusion on the case, was consistent with the *Commission Notice on the definition of the relevant market for the purpose of community competition law*, in *OJ*, 1997, C-372.
The competitive dynamics in the German market were different than in the rest of the Europe for several reasons: imports substantially lacked, because internal demand concerned potash products that include also magnesium, and only German undertakings produced this kind of goods; high levels of transport costs favoured local

As for the German market, the Commission applied the *failing company defence*[50] and authorized the operation, although it would have granted a *de facto* monopoly to the merged firm.

As for the rest of EU, according to the Commission, the joint venture controlled by K&S could establish a collusive duopoly between the merged entity and Société commerciale des potasses et de l'azote (hereinafter, SCPA).

High joint market shares (around 60%), that have been also increasing in the absence of any effective competitive pressures by the outside, market maturity, lack of technical innovation, product homogeneity, transparency on all the relevant market parameters, and pre-existent agreements about prices and quantity of the exported goods raised the suspect of post-merger collusion.

In such a scenario, already prone to coordination, the Commission also found a pre-existent relationship between K&S and SCPA: they run a joint venture, participated to an export cartel and were linked by distributional agreements. Evidence of such links between the merged firm and its closer rivals were determinative for the Commission's willingness to prohibit the notified operation.

However, the merger parties submitted commitments that, according to the Commission, would have impeded the post-merger coordination[51].

---

producers; internal supply exceeding demand discouraged imports, although German prices were higher than the European average level.
In the rest of the European Community, on the contrary, high product substitutability on the demand side, low rigidity in distributive systems, homogeneity in both transport costs and prices had created equal competitive conditions (§§ 12-45).

[50] This doctrine enables competition Authorities to ratify merger projects that involve failing firms, even if they create or strengthen a dominant position. The case at issue presented all requirements of the failing firm defence: MdK was in a critical economic situation so as to withdraw from the market. K&S, which was the sole purchaser, would have acquired MdK market shares even in the absence of the merger at issue. There was no less restrictive solutions. All these elements, by excluding the causal link between merger and lessening of competition, impeded challenging the notified operation (§§ 70-90).

[51] The merged entity committed to withdraw from the export cartel, to interrupt distribution contract with SCPA, and to modify the structure of the Potacan joint venture so that each firm could operate independently from the others (§§ 63-67). These commitments were perceived as effective to escape the risk of post merger coordination because they eliminated the most significant links between the resulting firm and its closer rival. This reasoning shows that, in the Commission's view, those links were the determinative factor for collusion.

2.6.2 The opinion of Advocate General Tesauro

The application of ECMR to collective dominant raised two lines of opinions. On the one hand, there was a certain favour for the extensive interpretation, which could bring collective dominance within the ECMR control. On the other hand, several scholars strongly criticized such a possibility, on several grounds, summarized in the opinion of the Advocate General Tesauro[52].

First of all, the ECMR does not expressly allude to dominance held by several undertakings, as article 82 does. Therefore, in the light of the adage *ubi lex voluit, dixit, ubi noluit, tacuit*, Merger Regulation may apply only to operations that create or strengthen individual dominance. However, the literal formulation of laws is anything but determinative, because it excludes neither extensive nor analogical interpretation.

Secondly, the ECMR provides that merger projects involving firms with market shares less than 25% are presumably compatible with the Common market[53]. Tesauro recognized that market shares are not determinative in the antitrust analysis and that the presumption at issue is rebuttable (or *iuris tantum*). However, in his view, for a correct interpretation of ECMR, also of this factor should be taken into account, because it expresses the legislative intention to not encompass oligopolistic dominance, which is normally connected to higher market shares, in the Merger Regulation

Thirdly, Tesauro reminded that, although the issue of collective dominance was debated during preparatory works, the approved draft of ECMR does not mention collective dominance. This evidence, in his view, would clearly demonstrate the willingness to limit merger control to single dominance.

Fourthly, the applicability of ECMR to collective dominance is an open question that can not be solved by the Commission under a case

---

[52] See *Opinion of Advocate General Tesauro*, joined cases C-68/94 and C-30/95, 6 February 1997, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC)* v *European Commission*, in *ECR*, 1998, I-1375.

[53] This presumption derives from the joint interpretation of Art. 2 and Recital 15 ECMR. In the case at issue, the resulting firms would have held 23% market share and, therefore, by applying this criterion, it would be presumably compatible with the common market.

by case approach. Otherwise, the Commission would be empowered with wide subsidiary functions replacing legislative powers.

Finally, the absence of procedural guaranties for those undertakings not directly involved in the operation, but likely to be members of the post-merger collusive oligopoly, would strengthen the idea that coordinated effects are not included in the ECMR application.

The need itself to protect the market functioning, by avoiding the application of articles 81 and 82 in a preventive way to control oligopolistic mergers[54], according to Tesauro, would be not enough to support an extensive interpretation. Moreover he highlighted the consistency of his opinion with *Nestlè / Perrier* precedent, which had admitted the control over collective dominance, but had inferred this doctrine by article 3 (now article 4) of the ET.

It follows that, according to Tesauro, only the restrictive interpretation would be consistent with these premises. "*While finding some justification in economic terms for the opposite solution, it would have a number of negative consequences; and above all, in view of the absence of similar reference parameters in the form of legislation and/or regulations to those existing in other antitrust systems, it would ultimately foster uncertainty*" (§ 98).

According to Tesauro, the only way to bring collective dominance within the ECMR control, without hindering legal certainty and without empowering the Commission with normative functions, would be an amendment to article 2.

[54] AG Tesauro alluded to the attempt of controlling mergers by article 81 and article 82. European Courts excluded the applicability of article 81 in the case of partial or whole ownership obtained by agreements, but recognized that, under specific circumstances, article 81 could apply to agreements leading to legal or *de facto* control. Article 82 was applied for the merger control in oligopolistic markets: intention of dominant firm to acquire control on a rival was perceived as an abusive conduct, with the effect of reducing competition

For a brief discussion on this topic, see, R. WHISH, *Competition law, cit.*, pp. 793-796.

2.6.3 The CJ judgement

Against the radicalism of Tesauro's view, the CJ better balanced the tension between legal certainty and *ex ante* oligopoly control[55].

The Court, in fact, interpreted the ECMR in an extensive way, so as to embrace collusion, and clarified both criteria and burden of proof required for prohibiting mergers on the grounds of collective dominance.

The CJ, on the one hand, it denied that both the words of ECMR and preparatory works could be determinative for excluding control over oligopolistic mergers[56]; on the other hand, suggested solving this interpretative matter by the teleological criterion. The purpose of preserving market competition, in its view, is better served by applying the ECMR to all operations raising effects incompatible with the system of undistorted competition. Therefore, applying the Merger Regulation only to single dominance would significantly reduce its effectiveness.

Concerning the lack of procedural rights, the CJ questioned that the eventual prohibition could harm firms not directly involved in the operation but members of the post-merger collective dominance. However, if such an effect would appear, firms could exert their right to be heard, which represents a basic principle of the European law and, therefore, can always be invoked, even when it is not directly provided in the law regulating specific proceedings.

Moreover, the CJ clarified that the critical threshold of 25% market share applies only in the case of single dominance, because in the case of collective dominance market shares of the resulting firm are not significant in themselves, but only in comparison with that of rivals.

In so stating, the Courts rejected all arguments listed in the Opinion of the Advocate General and recognized the applicability of

---

[55] Court of Justice, joined cases C-68/94 and C-30/95, 31 March 1998, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC)* v *European Commission*, in *ECR*, 1998, I-1375.

[56] As for the formulation of ECMR, the CJ adopted the same argumentation of the Commission in *Nestlè/Perrier*: the generic reference to creation or strengthening of dominant position does not amount to explicit exclusion, and then it cannot impede by itself the applicability of ECMR to collective dominance.
As for the preparatory work, the CJ highlighted that they could not clearly show the intention of legislator, and even if they did, they would have simply a confirmative role.

the ECMR to collusive oligopolies. On this basis, the CJ examined the qualitative matter of the post merger coordination, with the scope of identifying its components and ensuring legal certainty.

2.6.4 Substantive matters

All doubts about the applicability of ECMR to collective dominance had impeded establishing a legal parameter, but in the economic studies the issue of post merger collusion had deeply analysed.

Under the influence of economic theories, which suggested building the merger control on dynamical basis, the CJ departed from the structural approach and applied a more complex assessment that, by analysing both behavioural and structural data, sough to predict whether incentives to collude will prevail on incentives to compete (and vice versa)[57].

As for the case at issue, the Court focused on the foreseeable merger's impact on competitive relationship between firms, and reduced the collusive significance of structural market factors[58].

---

[57] S.B. BISHOP, *Power and Responsibility: The ECJ's Kali-Salz Judgment,* in *ECLR*, 1999, highlights that such a balance, although necessary, is anything but easy: "*While most firms have an incentive to co-ordinate their behaviour, this is not to say that co-ordination actually takes place in most markets. It is well established in both the economic and legal literature that successful tacit co-ordination between firms is not inevitable. This is true even in high concentrated industries protected by insurmountable barriers to entry*" (p. 38).

[58] According to the CJ, joint market share close to 60% (respectively 23% for K&S and 37% for SPCA) did not represent by itself evidence of post merger collusion: MdK, althought holding low market shares, was the second major potash manufacturer in the EC and had a significant amount of unused capacity. By acquiring MdK, the market leader (K&S), could strengthen its competitive advantages on SPCA, whose reserves were exhausting. Under this perspective, the proposed operation would have increased the asymmetries between the duopolists and, therefore, would have impeded stable coordination. The same effect came for the general decrease of market demand. The CJ also remarket the countervailing power of both foreign and smaller rivals (§§ 226-248).

For an exhaustive economic analysis of this decision, see J. VENIT, *Two steps forward and no steps back: economic analysis and oligopolistic dominance after* Kali & Salz, in *CML Rev.* 1998, pp. 1101- 1134.

Other scholars remarked that the CJ missed the scope of deeply analysing mergers on microeconomic bases: "*Overall, both the Commission's decision and the ECJ's judgment fall short of a systematic economic evaluation of the likely impact of the merger on the firms' incentives to co-ordinate their actions*", J. YSEWYN, C. CAFFARRA, *Two's Company, three's*

Therefore, the Court converted economic intuition in a legal parameter to deal with collective dominance: "*In the case of an alleged collective dominant position, the Commission is therefore 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*" (§ 221).

The definition of dominance in the case of collective market power matches that of single dominance (that is, capability of independently behaving), but the presence of several firms led competition authorities to analyse an element extraneous to the scrutiny of single dominance: connecting factors allowing parallel behaviours.

In *Kali und Salz*, the CJ did not mention *economic links* but *correlative factors*, an expression that, without any further specifications, raises several doubts about the meaning itself of economic factors[59], the eventual identity with the concept of links[60] as well as necessary[61] or supplementary role[62] of connecting elements for establishing collective dominance.

---

a Crowd: the Future of Collective Domiance aflter the Kali & Salz Judgements, in *ECLR*, 1998, p. 470.

[59] According to S. STROUX, *Is EC Oligopoly control… cit.*, "*It is not clear from the case whether the existence of structural links between undertakings is necessary for the existence of oligopolistic dominance or whether arguments based on the concentration and market structures could suffice to come to the conclusion of the existence of an oligopolistic dominance*" (p. 32).

[60] C. TESAURO, *Crisi dell'impresa e posizione dominante collettiva nella disciplina delle concentrazioni*, in *Foro it.*, IV, 1999, p. 194. The A. denies that agreements, relevant under the Article 81, could act as correlative factors establishing a collective dominance, because in this case only Article 81 should apply. Moreover, he remarks that correlative factors cannot be as strong as to result in a control properly called, because, in this case, the link itself would amount to a merger.

[61] J. YSEWYN, C. CAFFARRA, *Two's Company… cit*, note that: "*The ECJ's judgment would thus appear to confirm that, even in mergers, the existence of tight clusters of structural links is still essential in finding a collective dominant position, and that the Commission needs to analyse carefully the effect of those links on the competitive behaviour of the members of the oligopoly*" (p. 470).

[62] S. BISHOP, *Power and Responsibility…cit.*, highlights, on this point, that "*The judgment states that assessing whether a merger gives rise to oligopolistic dominance requires «a close examination in particular of the circumstances which, in each individual case are relevant for*

However, all these doubts may be reduced by systematically interpreting the statement at issue. First of all, the new expression "*correlative factors*" seems to signal a certain discontinuity with previous structural approach. Moreover, this formulation emphasizes the effects of links (that is, aligning market strategies of independent firms[63]) and, therefore, defines a category which may also include connecting factors other than structural links.

In this manner, the CJ indirectly denied the indefectible role of structural links for collective dominance to appear and confirmed its previous jurisprudence. In *Almelo*, in fact, it recognized normative acts as source of collective dominance; in *Nestlè / Perrier* there was no structural link between firms. In this framework, the choice of mentioning correlative factors instead of structural links in the core of the judgment, may be perceived as the CJ's attempt to clarify its previous statements and to align the category of collective dominance in merger control to that, better conceptualized, of abuses.

Under this perspective, the analytical assessment about links reflects their relevance for establishing collective dominance[64].

Many indicia in this judgement suggest that neither structural links nor correlative factors are indispensable for prohibiting mergers. As for the literal formulation, in fact, the expression adopted (*in*

---

assessing the effects of the concentration on competition in the reference market». It does not say that establishing structural links is essential" (p. 39).

Analogously, J. BRIONES, A.J. PADILLA, *The Complex Landscape of Oligopolies under EU Competition Policy – Is Collective Dominance Ripe for Guidelines?*, in *World Competition*, 2001, p. 315.

J. VENIT, *Two steps forward and no steps back…cit.*, is more cautious on this point: "*The emphasis placed by the Court on the interdependence suggests that structural links are probably not even necessary. Nevertheless, where present, structural links and mutual commitments can, in appropriate case, be significant factor enhancing the likelihood of collusion*" (p. 133).

C.J. COOK, C.S. KERSE, *E.C. Merger Control,* 2nd Edition, Sweet & Maxwell, London, 1996, pp. 137-138, highlight that the Commission was right in recognizing that the kind of links required under Article 82 are not "*the only indications that an oligopolistic market can at uncompetitively*", but that a global exam of the industry is strictly required. They deny that the control of oligopolistic mergers rests on solid, normative basis, especially as far as the real assessment primarily relies on structural data.

[63] By *Kali und Salz*, this effect that became the key-parameter for assessing collective dominance under the ECMR. See, R. WHISH, *Competition law, cit.*, p. 533.

[64] See, at this respect, C. RIZZA, *La posizione dominante collettiva nella giurisprudenza comunitaria*, in *Concorrenza e Mercato*, 2000, p. 541; S. BISHOP, *Power and Responsibility… cit.*, p. 39.

particular because of correlative factors) does not fit the idea of indefectibility: correlative factors between independent firms may help reaching collusion, but they are not essential, since other means may facilitate coordination. As for the economic analysis, CJ itself suggests examining collective dominance on the basis of the market's peculiarities. In this theoretical framework, the collusive impact of links depends on their specific nature, as well as on the interaction with the other market factors.

It follows that links between firms cease to be *condicio sine qua non* and become factors facilitating collusion. Their weight in the merger control changed: on the one hand, their lack is not enough to exclude collusion; on the other hand, those links are only a component of a probabilistic assessment which infers the likelihood of post merger coordination by balancing elements facilitating and impeding collusion.

Therefore, correlative factors are neither necessary (collusion may take place even without links) nor sufficient from collusion[65]: pro-competitive factors may offset their collusive potential and impede stable coordination[66].

By this judgement, the CJ realized a significant development in the issue of collective dominance, by replacing the idea of indefectibility of structural links between colluding firms with the knowledge that no one connection is prejudicially necessary, but the EC decision has to evaluate the entire market and has to focus on the predictable changes following the merger at issue.

2.6.5 Burden of proof incumbent upon the Commission

The *Kali und Salz* judgment signals the need of a dynamic merger control, which infers ultimate decisions from the analysis of behavioural and structural data. This assessment is anything but easy

---

[65] J. BRIONES, *Oligopolistic Dominance: Is there a Common Approach in Different Jurisdictions? A Review of Decisions Adopted By the Commission under the Merger Regulation*, in *ECLR*, 1995, p. 339. He also notes that "*Certain categories of links require a particular assessment because they may affect the transparency of the market or otherwise reinforce the likelihood of parallel behaviours*" (p. 339).

[66] This conclusion is consistent with the Game Theory and will be confirmed in the subsequent case law. See, on this point, the *Gencor* case, *infra,* Part 1 - Chapter 3.

especially in the case of collective dominance, where competition authorities face the ontological difficulties of a preventive analysis, and the need of including, in the area of scrutiny, the likely interaction between the resulting firm and its closer rivals.

Inference of ultimate decision requires, in and by itself, the exercise of discretional power and evaluative flexibility which, on the one hand, allows decisions to perfectly fit the market characteristics, and on the other hand, may result in decisions not always consistent with the precedents and, therefore, capable of hindering legal certainty.

One way to overcome this limit is to list specific criteria for the mergers' assessment (factors that economic theory indicates as facilitating collusion) and to impose the Commission to allege adequate evidence of post-merger coordination. The CJ is perfectly aware that merely finding factors facilitating collusion is not enough to prohibit merger, unless there is convincing proof that they may lead to coordination. Based on these premises, the CJ annulled the original decision, because the Commission did not demonstrate that factors facilitating collusion were really likely to create collective dominance[67].

However, the real capability of these measures to preserve legal certainty is anything but sure: the CJ sought to discipline the discretional power of prohibiting mergers by increasing the burden of proof, without providing competition authorities with clear, evaluative criteria. Moreover, by eliminating the regime of presumptions, the Court made the final decision much more unpredictable[68].

---

[67] In particular, the CJ declared insufficient the proofs about the core of the Commission's prohibition, which is the collusive impact of structural links. See, with regards to this, D.G. GOYDER, *EC Competition Law… cit.*, p. 366; R. WHISH, *Competition law, cit.*, p. 533.

[68] M. GARCIA PEREZ, *Collective Dominance Under the Merger Regulation*, in *E.L.Rev.*, 1998, p. 480. The A. remarks the need of reviewing ECMR or enacting guidelines for dealing with collective dominance.
Analogously, C.J. COOK, C.S. KERSE, *EC Merger Control*, Sweet & Maxwell, London 2002: "*There is a real need to guidelines as soon as practical experience permits*" (p. 170).

Chapter 3

The Second Stage in the Evolution of Collective Dominance

The creative role of decisions about mergers

3.1 Introduction

By overcoming all doubts about bringing collective dominance within the merger control, the *Kali und Salz* judgment opened a new era for the evolution of the category at issue. Under the influence of the Game Theory, the legal debate began focusing on the role of links in collusive equilibria, and the European Courts recognized that the market structure itself may play a crucial role for establishing collective dominance.

This trend especially involved the mergers' control, where the concrete need of predicting the impact of notified operations on the market functioning stimulated systemic reflections. Later, knowledge acquired in this area also influenced the antitrust policy for abuses of collective dominance, with the final result of unifying the evaluative criteria of collective dominance in the *ex ante* and *ex post* control.

3.2 *Gencor/Lonrho*

3.2.1 The original decision

In 1996, the European Commission prohibited a merger between

Gencor and Lonrho, firms active in metal industries, because it could create collective dominance[1].

The merger project involved mining and refining activities of all platinum group metals[2], but the Commission focused its attention solely on the platinum market where Gencor and Lonrho intended to acquire the joint control over Implats. According to the business plans of parties, Implats, in turn, would have acquired the exclusive control of Lonrho Platinum Division (hereinafter, LPD).

All these operations would have resulted in decreasing the number of independent suppliers in the South Africa and in increasing the risk of coordination between Implats, the second largest producer, and Amplats, the market leader. According to the Commission, high transparency in terms of prices and quantities sold, low price-elasticity, moderate demand growth, technology maturity, significant barriers to entry (in the form of requested capitals and sunk costs), financial links between suppliers, multi-market contacts, past tendencies toward collusion, and insignificant buyers' power could prevent future competition between firms. Moreover, the examination of past competitive dynamics showed that only Lonrho had provided some competition in this market. Consequently, the planned operation, by aligning the commercial strategies of the concerned undertakings, could eliminate the most significant source of competitive pressures.

In this framework, oligopolists could easily be aware of their interdependence and could engage in parallel conducts hindering competition. Hence, the Commission prohibited that merger, on the grounds of collective dominance. In its decision, the Commission spelt out that post-merger coordination deals with a situation where "*a mere adaptation by a member of an oligopoly to market conditions causes anti-competitive behaviours whereby the oligopoly become dominant. Active collusion would therefore not be required for the member of an oligopoly to become dominant*" (§ 140).

[1] Commission, case IV/M.619, 24 April 1996, *Gencor/Lonrho*, in *OJ*, 1997, L-11/30-72.

[2] According to the Commission, although naturally similar, each metal of this group constituted a separate market, because distinct uses and different factors driving prices excluded their interchangeability (§§ 19-67). From a geographical point of view, the notified operation affected the world market (§§ 68-73).

3.2.2 Action before the CFI

Against the original prohibition, Gencor and Lonrho brought an action of annulment before the CFI[3]. Claimants contested, first of all, the EC jurisdiction over this merger as well as the ECMR applicability to collective dominance.

The Court rejected all arguments about the presumed extraterritorial application of the ECMR[4] and, at the same time, confirmed that Merger Regulation could apply to collective dominance. By following the CJ's approach in *Kali und Salz*, the CFI recognized that the teleological interpretation of ECMR is consistent with "*the choice of neutral wording of the kind found in Article 2(3) of the regulation*" (§ 126)[5]. Consequently, a few years after the *Nestlé/Perrier*

---

[3] Court of First Instance, case T-102/96, 25 March 1999, *Gencor Ltd* v. *Commission*, in *ECR*, 1999, II-753.

[4] This claim rested on the fact that merger's parties were both established in South Africa-where their main economic activities were also located-and South African authorities had already approved the project at issue.
The CFI rejected this claim by remarking that Article 1 of ECMR provides the Commission with the power of scrutinizing all concentrations with community dimension and it does not require, with regard to this, establishment or productive localization in the European Union. Concerning the case at issue, the Commission intervened because of the reasonable likelihood "*of immediate and substantial effects in the Community*" coming from the notified operation. The worldwide dimension of relevant geographic market implicitly confirmed that merger would substantially affect the European market, with an immediate effect, given the expected exhaustion of Russian stock in the medium terms. By quoting the leading case *Woodpulp*, the CFI held that the volume of Community sales could satisfy the requirement of «*substantial implementation with the European community*».
E.M. FOX, *The merger regulation and its territorial reach*, in *ECLR*, 1999, p. 336 strongly contested this point of the judgment. According to the A., this approach would equal the requirements of implementation and anticompetitive effects, because anticompetitive effects usually become evident through the sale of involved products.
For a general comment on jurisdictional matters, see also G. PORTER ELLIOT, *The* Gencor *judgment: collective dominance, remedied and extraterritoriality under the Merger Regulation*, in *E.L.Rev.*, 1999, pp. 640-642; M.P. BROBERG, *The European Commission's Jurisdiction to Scrutinize Mergers*, Kluwer Law International, The Hagues, 1998.

[5] The CFI quoted the CJ's arguments based on the legislative history of ECMR, in comparison with some national laws (which expressly prohibited mergers capable of creating collective dominances), on thresholds of market shares presumably compatible with the common market, on the safeguard of legal certainty and rights of defence. For general analysis on these arguments, see *Kali und Salz, supra*, Part 1 – Chapter 2.

decision, all European authorities concur on bringing oligopolies within the ECMR control.

About the substantive aspects, parties contested the EC prohibition, by remarking that the notified merger could not create a dominant position and that the expected market share of the Amplats and Implats, close to 70%, could legitimize an authorization: in several previous cases, the Commission had approved concentrations even in the presence of higher market shares.

The CFI highlighted that in the case of oligopolistic dominance, market shares are not as significant as in the case of single dominance, "*nevertheless, particularly in the case of a duopoly, a large market share is, in absence of evidence to the contrary, likewise a strong indication of the existence of a collective dominant position*" (§ 206).

The CFI also confirmed that the foreseeable exhaustion of Russian stocks could increase joint market shares of the concerned undertakings and could widen the gap with other competitors. Moreover, the judges emphasised the need of deep economic analysis and the inconsistency of comparison based solely on the grounds of market shares.

The CFI remarked the importance of market transparency in collusive equilibria[6] and upheld the inference of likely post-merger coordination. According to the judges, in the market where the merger took place, "*anti-competitive parallel conducts would, economically, have constituted a more rational strategy than competing each other, thereby adversely affecting the prospect of maximizing combined profits*" (§ 236).

Moreover, the CFI denied the significance of doubts expressed by several Member States for the merger control to embrace collective dominance (§ 130).

[6] "*Price transparency is a fundamental factor in determining the level of market transparency where there is an oligopoly. By means of the price mechanism, the members of an oligopoly can, in particular, immediately discern the decisions of other members of the oligopoly to alter the status quo by increasing their market share and they may take such retaliatory measures as may be necessary in order to frustrate actions of that kind*" (§ 227). The Court also seems to recognize the impact of transparency on retaliation and, therefore, on the stability of collusion.

In so stating, the CFI implicitly adhered to the check-list approach and recognized that some market features, because of their impact on the strategies of firms, may facilitate collusion[7].

In deciding the claim about the lack of structural links, the CFI clarified ambiguities still surrounding this notion[8]. The CFI stated that the expression "*structural links*", adopted in *Flat Glass*, is only an example of connecting factors, rather than a necessary requirement for collective dominance. The Court, in other words, did not intend to restrict the notion of economic links to that of structural links. Thus, the CFI laid down that "*there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximize their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels*" (§ 276)

"*That conclusion is all the more pertinent with regard to the control of concentrations, whose objective is to prevent anti-competitive market structures from arising or being strengthened. Those structures may result from the existence of economic links in the strict sense argued by the applicant or from market structures of an oligopolistic kind where each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice*" (§ 277).

Therefore, according to the Court, economic links are necessary to establish collective dominance, but this category is wide enough to

[7] C. RIZZA, *La posizione dominante collettiva,* cit., p. 536.

[8] The role of links in collective dominance is ambiguous: on the one hand, they seem to be necessary to establish collective dominance; on the other hand, they may be too strong, to the point of depriving firms of their independence. In this case, the category of single dominance applies. See, on this point, V. KORAH, *Gencor v. Commission: collective dominance*, in *ECLR*, 1999, p. 340.

include the relationship of interdependence between members of tight oligopolies[9]. In other words, the crucial point is not the kind of links, whether structural or economic, but their capability of facilitating tacit collusion[10]. As a result, the category of relevant links is built around their effects on coordination.

The preventive exam of mergers, therefore, seeks to predict the real likelihood of coordinated effects, by focusing on the impact of notified operations on the market functioning. By moving from this premise, the CFI held that, before the merger, structural links between Implats and LPD did not prevent LPD from competing with Implats. However, this kind of competitive pressure would have ceased after– and because of–the notified merger. Therefore, the operation at issue, by depriving LPD of its independency, could substantially affect the pre-existing market structure. On this basis, the CFI confirmed the original decision, also about the effectiveness of proposed commitments[11], and, therefore, prohibited the merger project on the ground of collective dominance[12].

---

[9] This statement is also consistent with *Notice on the Application of competition rules to access agreements in the telecommunication sector* (*Access Notice*), in *OJ*, 1998, C-265/2-28: "*for two or more companies to be jointly dominant it is necessary, though not sufficient, for there to be no effective competition between the companies on the relevant market. This lack of competition may in practice be due to the fact that companies have links such as agreements* […]. *The Commission does not, however, consider that either economic theory or Community law implies that such links are legally necessary for a joint dominant position exist. It is a sufficient economic link if there is the kind of interdependence which often comes about in oligopolistic situations*" (§ 79).

[10] R. WHISH, *Recent developments in Community competition law 1998/99*, in *E.L.Rev.*, 1999, p. 239.

[11] Gencor and Lonrho proposed some commitments: to develop extra capacity, to maintain actual levels of output, to create a new firm active in the same market. According to the Commission, commitments at issue could not modify in a pro-competitive manner the post-merger market, therefore could not solve the competitive concerns.

About the effectiveness of behavioural commitments, the CFI states that "*the possibility cannot automatically be ruled out that commitments which prima facie are behavioural* […] *may themselves also be capable of preventing the emergence or strengthening of a dominant position*" (§ 319).

Therefore, by the Gencor judgment, it became clear that parties may propose, and that the Commission may accept, behavioural commitments for addressing the competitive concerns.

[12] Previous cases about collective dominance were concluded with an approval submitted to specific conditions.

3.2.3 Critical remarks

This sentence is a path-breaking case in the area of collective dominance, because the court stated that decisions about merger result from the balance of all factors that characterize the concerned market.

From an economic point of view, references to oligopolistic interdependence, cheating, and retaliation confirm that the Game Theory is the theoretical framework of collective dominance[13]. According to several scholars, this judgment equals the legal category of collective dominance with the economic concept of tacit collusion[14] and made clear that scope of the merger control "*is preventing coordination in circumstances where it looks likely that it could be sustained*"[15]. Concerning this points, economists suggest focusing, in particular, on two aspects: likelihood of reaching an agreement, even without any communication between firms, and durability of the eventual collusive equilibrium. Therefore, competition authorities should prohibit mergers on the ground of collective dominance only if the notified operation is likely to reduce firms' incentives to deviate from collusion.

Stability of collusion depends in particular on the presence of credible and effective retaliation, which makes the short-run gains from deviation less attractive than future losses from punishment[16]. In the light of this knowledge, the sustainability of collusion in *Gencor* case is questionable, because expansion of capacity in South Africa was quite improbable and, even if it had been realized, would have been not immediate, because such a plan in the metal industry requires high levels of investments[17]. In the case at issue, therefore, the

---

[13] B. ETTER, *The Assessment of merger in the EC…*, p. 31.

[14] AA.VV. *Merger Control in the EU – A Survey of European Competition laws*, 3rd Edition, Kluwer International Law, The Hague, 1999, p. 31. In this judgement, according to the AA, collective and oligopolistic dominance overlap.

[15] K.U. KUHN, C. CAFFARRA, *Joint Dominance: the CFI Judgement on Gencor/Lonrho*, in *ECLR*, 1999, p. 356.

[16] Economists assess the probability of a price war (which represents the most frequent kind of retaliation) in the light of actual level and expected expansion of capacity. As a general rule, given the inverse relationship between prices and supply, only increases of output may lower prices.

[17] In other words, given the sector characteristic, punitive reactions could be realized only in the long term.

expansion of capacity did not represent a serious threat of retaliation[18].

Beyond its specific contents, the adherence to the Game Theory approach led to build collective dominance around the concept of coordination. The more flexible economic analysis, suggested in this judgement, on the one hand, allows authorities to harmonize decisions with market peculiarities, but, on the other hand, may generate legal uncertainty. The interaction of market factors, in fact, may lead to different results, depending on the specific market conditions. Consequently, final decisions become more unpredictable and the likelihood of mistakes, implicit in the perspective analysis of mergers, increases.

Moreover, the CFI, by quoting *Kali und Salz* judgment, confirmed that discretional power is essential in the merger control and that it affects the judicial review[19].

In such a framework, some legal scholars emphasized the importance of legal certainty as a factor which influences the strategies of firms, and, therefore, asked for the introduction of clear guidelines for the assessment of horizontal mergers, following the US model. They also highlight the risk of the narrow application of the *Gencor* approach, which could lead to prohibitions, whenever the involved firms hold high market shares and there is market transparency, technological maturity, and barriers to entry[20].

Finally, by assuming coordination as a keystone of collective dominance, scholars also wondered whether the *Gencor* principles might apply to abuses of dominance.

---

[18] K.U. KUHN, C. CAFFARRA, *Joint Dominance: the CFI Judgement*…p. 538, remark that, in any event, the long time required to implement the planned increase of capacity, together with the easy detection of this plane of investment, reduced the effectiveness of punitive reactions.

[19] §§ 164-165.

[20] See G. PORTER ELLIOT, *The* Gencor *judgment…cit.,* pp. 644-645. He remarks the danger of prohibiting all mergers that take place in consolidated commodity industries, where the ontological market characteristics in themselves may raise the suspect of collective dominance, especially if, as it was stated in *Gencor*, there is no need to show the existence of structural links. Against this risk, the A. hopes that the Commission will continue to follow a case-by-case approach.

Favour for the unitary notion of collective dominance appears from the quoting, in the statement about economic links, the *Flat Glass* case, which involved abuses. In the same direction it seems to point the expression: "*that conclusion is all the more pertinent with regard to the control of concentrations*": in other words, the inclusion of oligopolistic interdependence in the category of economic links (which are the sole kind of correlative factors required for finding collective dominance), made with reference to abuses (in interpreting its *Flat Glass* judgment), also covers merger cases. This interpretation, shared by the most of the scholars[21], will be confirmed in the subsequent jurisprudence.

3.3 *Irish Sugar*

Abuses of collective dominance usually concern relationships between direct competitors that, without necessarily entering into agreements or concerted practices in the meaning of Article 81, act as a single economic entity. Moreover, the entire procedure that leads to ultimate decisions usually comes from evidence of anti-competitive conducts jointly committed by independent firms.

In the *Irish Sugar* case this typical framework is completely overturned: collective dominance involves firms active on different market streams and some of the abusive conducts, however related to joint dominance, are individually realized.

This case involved the sugar market, affected by a stringent European Regulation, which allows the European Council to define, by a system of caps, both the maximum amount of output for each Member State and criteria for defining prices.

In the mid-1980s, Irish Sugar (hereinafter IS) was the only Irish processor of sugar beets and the main supplier of sugar; it distributed its own products by Sugar Distributor Limited (hereinafter SDL). These two firms were strictly linked: IS controlled 51% of SDL shares,

[21] V. KORAH, *Gencor v. Commission*…p. 341, for example, hopes that such an extension, theoretically possible, will affect the application of Article 82, with the result of skipping the narrow perspective of structural links and focusing on oligopoly conditions.
Contra, M. GIORDANO, *Comments on Gencor case*, in *Foro It.*, IV, 2000, pp. 327-333. According to the A, this statement concerns only collective dominance in the merger contest, where the oligopolistic structure of the market has a central role; about the abuses, on the contrary, structural links are still a necessary requirement.

and had its representatives in the SDL board; they also arranged exclusive agreements and communicated with each other. According to the Commission, such a strong relationship had generated parallelism of interest in the Irish market of retail and industrial granulated sugar.

This framework, according to the Commission, was compatible either with the single dominance of IS or with the collective dominance of IS and SDL, at least until February 1990, when IS acquired the complete control on the distributor.

As a consequence, exclusionary conducts–border and export rebates, fidelity discounts, selective prices reductions– realized in part jointly, in part individually by the two firms, constituted abuses of a vertical, collective dominance[22].

3.3.1 Vertical collective dominance

The appeal of IS against this decision rested essentially on the argument of vertical, collective dominance and involved, in particular, the definition of relevant market, the effectiveness of economic links, the requirements for establishing collective dominance, and the peculiarity of a vertical competitive relationship.

The logical premise for the existence of vertical collective dominance is a broad market definition, which includes both production and distribution or, more generally, market segments vertically correlated. According to the applicant, there would be a contradiction between the operative part of the appealed decision, where the Commission generically referred to sugar market, and the premises about a difference between industrial and retail markets[23].

Several scholars questioned the inclusion of both upstream and downstream segments in the relevant market: IS was the dominant producer, and SDL was active only on the distribution level, but they were perceived as collectively dominant on the generic sugar

[22] European Commission, case IV/34.621, 35.059/F-3, 14 May 1997, *Irish Sugar plc*, in *OJ*, 1997, L-258/1-34.

[23] This claim is the only rational strategy for the applicant, since excluding the distribution level would be equal to recognize the IS individual dominance.

market[24]. This inference would be inconsistent with the factual situation and with the traditional approach that, in similar cases, limits market definition to one or the other level.

Concerning the absence of collective dominance, the applicant highlighted that economic links were not strong enough because, despite the existence of a shareholding relationship and contractual obligations, the concerned firms maintained their independence. The CFI rejected this claim and remarked: "*the case-law* […] *shows that the mere independence of the economic entities in question is not sufficient to remove the possibility of their holding a joint dominant position*"[25].

This statement reveals that deep uncertainty still surrounded the notion of links: since the independence of firms is perceived as an impediment for collective dominance, some economic links, which reduce independence of firms, must exist for allowing them to collude. The previous case law described both the independence of firms and economic links as necessary conditions for collective dominance: the first would provide the required plurality for joint market power to exist; the second would make possible an alignment of conducts. Stressing the first element may lead to the perception that the concerned firms constitute a unitary entity and, therefore, that their market power is a case of single, rather than collective, dominance. On the contrary, it seems more reasonable to put the emphasis on links in the awareness that they constitute required conditions for collective dominance insofar as they do not eliminate the economic independence of firms.

IS also contested the applicability of the category of collective dominance in the case of vertical relationships: it argued that while lack of competition in horizontal competition may signal collusion, it is not enough to infer the existence of joint power in a vertical relationship, where normally weaker competitive dynamics take place.

---

[24] S. BASTIANON, *I nuovi lati oscuri dell'antitrust: posizione dominante collettiva verticale e sconti selettivi*, in *Foro It.* 2000, IV, pp. 64-65. In his view, such a market definition was a means to establish vertical collective dominance and therefore, to attack those (anticompetitive) conducts.

[25] Court of First Instance, case T-228/97, 7 October 1999, *Irish Sugar plc* v. *Commission on the European Communities*, in *ECR*, 1999, II- 2969, here § 49.

On this point, the CFI stated that: "*Nor does the case-law contain anything to support the conclusion that the concept of a joint dominant position is inapplicable to two or more undertakings in a vertical commercial relationship. As the Commission points out, unless one supposes there to be a lacuna in the application of Article 86 of the Treaty, it cannot be accepted that undertakings in a vertical relationship, without however being integrated to the extent of constituting one and the same undertaking, should be able abusively to exploit a joint dominant position*" (§ 63).

The Court seems to suggest that the main difficulty is not to abstractly conceptualize vertical collective dominance, but it is to identify the specific conditions that enable indirect competitors to adopt the same strategies.

As a general matter, antitrust analysis has to rely on the peculiar dynamics affecting that market. This implies that a vertical relationship, by involving indirect competitors, naturally appears less competitive than a relationship between firms active on the same level of the market and involved in equal activities.

However, the jurisprudential definition of collective dominance, in terms of capability of behaving in the same way, without agreements, is compatible with several market frameworks. Required conditions for collective dominance represent, in themselves, a flexible parameter, stable in its basic characters, but at the same time, capable of being harmonized with the peculiarities of markets and with the specific relationship between collectively dominant firms. However, the requirements adopted in horizontal relationship may not perfectly fit vertical relationship. In this area, in particular, the absence of direct competition and the peculiarities of vertical relationship increased the burden of proof required to establish collective dominance. Moreover, parallelism in a vertical relationship does not imply coincidence of behaviours, as it happens in a horizontal relationship; on the contrary, parallelism is compatible with a certain degree of conducts differentiation, depending on the specific market stream.

It follows that the expression "*parallelism of interests*" adopted in the original decision, is an appropriate way to characterize parallelism in a vertical relationship, in the awareness that the component of identical behaviours may be lacking.

Therefore, the parameter for assessing vertical collective dominance should be that of convergence in interests, which derives from conducts that, although materially different, pursue the same

scope and result in cartel-like effects. This situation mirrors that of vertical agreements unlawful under article 81: they generate anti-competitive effects by different conducts; analogously, companies involved in vertical collective dominance may behave abusively by adopting different conducts, all causally linked to their joint market power.

3.3.2 Individual abuses of collective dominance

In the described scenario, individual abuses of collective dominance appear as quite a natural outcome of the interaction between vertically related firms. "*Whilst the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, undertakings occupying a joint dominant position may engage in joint or individual abusive conduct. It is enough for that abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market*" (§ 66).

In so stating, the CFI confirmed the double form –individual and joint– of abuses of collective dominance and, by not limiting its statement to the case at issue, it implicitly expanded this principle to horizontal abuses.

However, in the case of vertical relationships, it is easier to admit that even different conducts may express joint market power because upstream and downstream rivals realize different economic activities and, therefore, adopt different behaviours. In the case of horizontal competition, on the contrary, parallel interests usually lead to parallel conducts. Moreover, at horizontal levels, the real capability of individual conducts to realize an abuse of dominance depends on the specific behaviour at issue. For example, members of joint dominance may individually drive rivals out of the market, by refusing to deal, but they cannot individually raise prices. This abuse, in fact, requires the alignment of all dominant firms, because individual actions would simply deprive active firms of their own customers. As a general principle, scholars explained that, in the case of collective dominance,

only exclusionary abuses might be individual, while exploitative abuses always imply convergence of the parties' behaviours[26].

However, the category of individual abuses of collective dominance is a useful means for the oligopoly control, because it allows attacking individual, abusive conducts, which are not linked to single market dominance, but which hinder competition[27]. It also ensures a more workable enforcement, by sanctioning only those firms that really abused their market power, without expanding this liability to the entire oligopoly[28].

Some scholars remarked the tension between collective dominance and individual abuses: for several firms to present themselves as a single economic entity, they need to act in the same way; therefore, their behaviours also have to be collective, rather than individual[29].

In summary, the main purpose of this statement is that of ensuring a more effective oligopoly control: whenever a non-dominant distributor is linked a dominant producer (this was what happened in *Irish Sugar* case), he is perceived as a member of collective dominance; therefore, even conducts which seek to protect its own market power may constitute an abuse of collective dominance[30].

---

[26] See J. TEMPLE LANG, *Oligopolies and Joint Dominance in Community Antitrust Law*, in *International Antitrust Law & Policy*, 2001, p. 285.

[27] G. MONTI, *The scope of collective dominance under Article 82 EC*, in *CMLR*, 2001 p. 143. This judgment would also be consistent with the regime of special responsibility of singly and jointly dominant firms: in such a scenario, even unilateral actions, such as restrictive contractual clauses, may be qualified as abuses of collective dominance.

[28] P.S. RYAN, *European Competition Law, Joint Dominance and the Wireless Oligopoly problem*, in *Colum. J. Eur. L.*, 2005, p. 365.

[29] R. WHISH, *Competition Law*, 5th Edition, LexisNexis, London, 2003, p. 529. According to Whish, individual abuse of collective dominance may exist only when a firm adopts unilateral, exclusionary conduct intended to keep out a rival. This scenario, according to the A., would not contrast with the general principle of collective abuses in collective dominance, because the behaviour at issue, although individual, seeks to protect the entire oligopoly, rather than the sole active firm.

[30] G. MONTI, *The scope of collective dominance…cit*, pp. 142-143. He noted that, by combining conducts and effects on the market, in the case at issue, there could be three different scenarios. First, the Commission could qualify the concerned firms as a single entity: this solution was not practicable, because it was not sure that partial control could exclude the independence of subsidiary firms (while it was sure that total control realized such an effect). Second, the Commission could demonstrate that alleged

3.4 *Compagnie Maritime Belge*

At the end of 1992, the European Commission fined several maritime conferences for infringements of articles 81 and 82 ET[31].

The competitive regime of liner conferences was influenced by Regulation 4056/86[32] that, at the scope of improving efficiency in maritime transports, provided an article 81 exemption for some kinds of agreements between shipping firms. In particular, agreements intended to fix uniform prices or equal contractual conditions or to coordinate transport timetables, were automatically exempted, because they ensured technical improvements and cooperation, both necessary to reach economies of scale. Agreements with different objects, on the contrary, could obtain individual exemptions under article 81(3)[33].

According to the Commission, in the market of liner services between North European and West African ports, three conferences (Cewal, Cowac and Ukwal) had engaged in conducts intended to portion shipping routes, in a way that members of a conference refrained to act as independent companies in the area reserved to another conference. These agreements had an object not encompassed in the Regulation and generated anti-competitive effects; therefore they infringed upon article 81.

In particular, it resulted that routes between European and Zairean ports were reserved to Cewal, whose members, according to

---

behaviours constituted concerted practices relevant under article 81, but there were not enough proof on this point. Finally, it could evaluate each conduct as an abuse of single dominance, but it was not sure that SDL held a dominant position. In this framework, the only suitable solution for attacking all anti-competitive effects was to apply the category of vertical collective dominance.

[31] European Commission, 23 December 1992, cases IV/32.448-32.450, *Cewal, Covac, Ukwal*, in *OJ*, 1993, L-34/20-43.

[32] Council Regulation n. 4056/86, 22 December 1986, in *OJ*, 1986, L-378/4-13.

[33] For a comparison between European and American shipping competition systems, see M.A. NESTEROWICZ, *The Mid-Atlantic view of the Antitrust Regulation of Ocean Shipping*, in *University of San Francisco Maritime Law Journal*, 2004-2005, pp. 45-88. The A. points out that Regulation 4056/86 expressly confirms the applicability of general competition rules to conducts not included in the exemption; the US Shipping Act expressly excludes the application of the Sherman Act (p. 72).

the Commission, held a collective dominant position[34] and abused of such a market power by several conducts. They arranged with Ogefrem (Zairian Maritime Freight Administration) agreements which granted exclusive rights on the Zairean ports and insisted on their compliance; they adopted the "fighting ships" method[35] to drive a competitor out of the market; finally, they signed loyalty contracts that conditioned rebates to the shippers' duty to entrust all their goods to the conference.
On these bases, the Commission imposed high fines to the members of the conference[36].

The CFI substantially confirmed the appealed decision, but reduced the amount of sanctions[37].

The appeal that Compagnie Maritime Belge (hereinafter CMB), Compagnie Maritime Belge Transports (hereinafter CMBT) and Dafra, all components of Cewal, proposed before the CJ referred only to Article 82 infringements, since the legal basis for sanctions was essentially the finding of abusive conducts.

The CJ rejected the appeal about the substantial pleas, but annulled fines because the Commission did not unequivocally specify which companies were sanctioned and, in calculating the amount of

[34] According to the Commission, liner agreements constitute an effective link that allows firms to behave parallelly, without eliminating their independence. Elements of both independency and unitary action of firms induced the Commission to reject the alternative scenario, although theoretically reasonable, about the single dominance of the Cewal conference, taken as a whole.

[35] "Fighting ships" were Cewal vessels that sailed in dates closer to the rival's dates and offered special low rates, not justified by economic reasons, but aimed only at eliminating the principal competitor.

[36] The Commission fined all members of the three maritime conferences for infringements of Article 81. About conducts illegal under Article 82, the Commission considered that, even though all Cewal members were jointly dominant, only four of them (CMB, Dafra-Lines, Nedlloyd Lijnen and Deute Afrika Linien-Woermann Linie) had implemented abusive conducts. The Commission sanctioned solely these firms and, in this way, it confirmed the *Irish Sugar* statement about individual abuses of collective dominance.

[37] Court of First Instance, 8 October 1996, cases T-24,25,26,28/93, *Compagnie Maritime Belge Transports SA* and *Compagnie Maritime Belge SA, Dafra-Lines A/S, Deutsche Afrika-Linien GmhB & Co* and *Nedlloyd Lijen BV* v. *Commission of the European Communities*, in *ECR*, 1996, II-1201.

fines, it did not take into account the degree of individual participation to the alleged infringement[38].

Since the CJ judgement was *res judicata* about substantive issues, the Commission redefined the amount of fines, considering both legal criteria enacted to this purpose and the remarks of CJ[39].

3.4.1 The CJ judgement

This judgement raised several substantial issues, all built around the intersection of article 81 and article 82 ET, in the framework of collective dominance.

First of all, it was unquestionable that the exemption *ex* Regulation 4056/86 did not impede applying article 82; therefore, the real matter involved the existence, in this specific case, of all conditions required for the conduct of Cewal members to be sanctioned as abuse of collective dominance.

By reminding previous statements about the role of economic links in collective dominance, applicants lamented that neither the Commission nor the CFI had demonstrated the existence of correlative factors other than mere agreements or concerted practices. Therefore, the CJ was required to preliminarily pronounce about the possibility that a conduct, already unlawful under article 81, may create market conditions facilitating collusion and, consequently, may be relevant under article 82.

Advocate General Fennelly, in his opinion on the case, remarked the ontological difference between articles 81 and 82: in his view, the first involves conscious, multilateral conducts which may potentially take place in every kind of market; the latter involves only those markets already less competitive, because of the existence of dominant positions. This difference, however, could not exclude the joint application of the rules at issue: on the contrary, the formulation itself of article 82, according to Fennelly, suggests that agreements which infringe article 81 may also generate a dominant position.

---

[38] Court of Justice, 16 March 2000, joined cases C-395, 396/96P, *Compagnie Maritime Belge Transports SA* and *Compagnie Maritime Belge SA, Dafra-Lines A/S* v. *Commission of the European Communities*, in *ECR*, 2000, I-1365.

[39] European Commission, 30 April 2004, cases COMP/D/32.448-32.450, *Compagnie Maritime Belge SA*, in *OJ*, 2005, L-171/28-30.

About the burden of proof, Fennelly reminded the *Flat Glass* statement and denied that proof of joint market power is automatically included in the proof of agreements: "*a conclusion of collective dominance between independent firms must be supported by more than a mere cartel-like agreement, whether fixing prices is other collusive market behaviours*"[40].

The CJ, in its judgement, confirmed the simultaneous applicability of articles 81 and 82 to the same material conduct and clarified role and nature of relevant links. It spelt out that "*the mere fact that two or more undertakings are linked by an agreement, a decision of associations of undertakings or a concerted practice within the meaning of Article 85(1) of the Treaty does not, of itself, constitute a sufficient basis for such a finding*" (§ 43).

"*On the other hand, an agreement, decision or concerted practice (whether or not covered by an exemption under Article 85(3) of the Treaty) may undoubtedly, where it is implemented, result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers*" (§ 44).

"*The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question*" (§ 45).

In a few sentences, the CJ summarized the state of art about collective dominance and provided an important device that will influence the subsequent evolution.

[40] Opinion of Advocate General Fennelly, 29 October 1998, joined cases 395-396/96, *Compagnie Maritime Belge Transports SA* and *Compagnie Maritime Belge SA, Dafra-Lines A/S* v. *Commission of the European Communities*, in *ECR*, 2000, I, 1365.

3.4.2 Links between firms

Following the previous case law, the CJ built the notion of dominance around the capability of firms to act independently from clients, customers, and consumers. In the case of collective dominance, this capability involves several undertakings that, although legally independent, are correlated in a way that they present themselves as a single economic entity.

By focusing on the effects of links, in terms of alignment of conducts, the CJ correctly stated that agreements between independent firms are not a condition for establishing collective dominance: on the one hand, the implementation of an agreement does not produce, as unavoidable consequence, parallelism of conducts (it is not the mere presence of an agreement that gives rise to parallelism, but this eventually results from its contents); on the other hand, parallelism may result from factors other than agreements or concerted practices.

Joint dominance may derives from several factors, such as agreements, structural or legal links, market structures or whatever can correlate independent firms, allowing them to adopt a common course of conducts. In other words, the relationship between collusion and its causes is not one of exclusivity: in the presence of market conditions which, taken alone, allow collusion, it is not necessary to also show the existence of economic links; on the contrary, "*where a market is highly heterogeneous and characterized by a high degree of internal competition* […], *collective dominance would not be found in absence of structural links*"[41]. By denying that agreements are essential for collective dominance to rise, the CJ officially recognized that oligopolistic market structure might be the primary cause of coordination[42].

General remarks about links go further the need to decide the case at issue, and reveal the intent of clarifying their role and their nature

[41] R. WHISH, *Competition Law, cit.*, p. 529.
[42] C. RIZZA, *La posizione dominante collettiva …cit.* p. 551.

in general terms[43]. Moreover, the Court, by following an effects-based approach, rejected the narrow and static perspective about the nature of links–whether structural, economic, or legal–and focused on their capability to align strategies of independent undertakings. This favour for a dynamic assessment ensures flexible and market-specific evaluation, but may also generate legal uncertainty, given the impossibility of defining in advance the category of links[44].

3.4.3 *Compagnie Maritime Belge* and *Gencor:* analogies and differences. A unitary notion of collective dominance in abuses and mergers

The CJ judgment echoes the opinions already expressed in the *Gencor* and *Kali und Salz* cases: the statement that there is no need to show the existence of agreements, concerted practices or other forms of structural or legal links, because the market structure itself is enough to create a favourable ground for collective dominance, reflects what the European Courts had already held about the merger control.

Therefore, even for abuses of collective dominance, market power may derive from interaction between a few firms, perfectly aware that it is collusion, rather than competition, which is the profit-maximizing strategy. Market structure became the first variable that competition authorities are required to analyse in case of collective dominance: as for the merger control, deep analysis is required in the case of oligopolistic mergers; as for abuses, oligopoly represents the typical market framework where both single and collective dominance take place.

---

[43] P.M. FERNANDEZ, *Increasing powers and increasing uncertainty: collective dominance and pricing abuses*, in *ECLR*, 2000, p. 648. The A. remarks that the CJ could pronounce only about the effectiveness of links in the specific case, instead of pronouncing about the kind of links generically required.

[44] See P.R. RYAN, *European Competition Law, joint dominance…cit.,* p. 363; M. JEPHCOTT, C. WITHERS, *Where to go for EC oligopoly control*, in *ECLR*, 2001, p. 300.

By adopting, in the core of its judgement, a formula close to that already adopted in *Gencor*[45], the CJ manifests the intention of aligning the notion of collective in abuses to that of mergers[46].
However, identical definition does imply identical assessment: in the merger control, the European Commission is required to prevent anti-competitive effects; under Article 82, it seeks to remove an anticompetitive conduct already implemented or still in progress[47]. These differences also influence the object of proof: likelihood of collusion, given the presence of facilitating factors, in the case of mergers; real coordination of conducts with anticompetitive outcome in abuses.

3.4.4 Consequences in the oligopoly control

The most relevant question arising from the *Compagnie Maritime Belge* case involves its consequences on the oligopoly control.
The essence of this judgment is that in oligopolies structural or legal links are not necessary: unless market is highly competitive in itself (as it happens in high-tech markets), profits usually go up because of price increases, rather than because of demand increases. In this framework, collusion represents the best profits-maximizing strategy.

Scholars remark that this judgment closes the *Woodpulp* lacuna, that is, the inapplicability of Article 81 when parallel conducts producing anticompetitive consequences come short of the standard of proof required under this rule[48]. However, the need of intervening

---

[45] S. PREECE, *Compagnie Maritime Belge: missing the boat*, in *ECLR*, 2001, highlights that, despite the substantial equivalence between the two statements, *Compagnie Maritime Belge* seems to narrow the definition of collective dominance: "*expressions as «collective entity» as used in CBM could imply that there can be no price competition between the constituents of a collective dominant position. This in turn is different from the CFI's reference to the «interdependence» and «strong encouragement» in Gencor, which could suggest that continual parallel pricing was not necessary*" (p. 390).

[46] See R. WHISH, *Competition Law, cit.* p. 529. In this way, the CJ admitted that the *Gencor* formula could embrace abuses of collective dominance.

[47] G. MONTI, *The scope of collective dominance…cit.*,, p. 156; R. WHISH, *Competition Law, cit.* p. 525.

[48] P.M. FERNANDEZ, *Increasing powers and…cit.*, p. 649.
F.E. GONZALEZ DIAZ, *Recent Developments in EC Merger Control Law: the Gencor Judgment*, in *World Competition*, 1999, argues that "*in case like Wood Pulp, the Commission*

against anticompetitive, oligopolistic effects should not be as emphasized as to apply article 82 to all interdependent conducts[49]. Infringements of article 82, in fact, require not only a dominance, held by one or several firms, but also anticompetitive effects: parallel behaviours, taken alone, may allow the inference of collective dominance, but do not demonstrate the existence of abuses too. Therefore, the *Woodpulp* lacuna is partially closed: otherwise, qualifying the mere oligopolistic interdependence as abusive would mean perceiving oligopoly itself, because of its peculiarities, as unlawful per se.

The judgement at issue may actually bring this risk because, although pronounced with regard to a tight oligopoly, it seems to enact general rules applicable to all oligopolies. Generalizing the antitrust policy for this kind of market would be a mistake, because oligopoly may result either in competition or in collusion[50]. However, a case-by-case assessment, based on market dynamics, may sensitively reduce this risk.

In my view, the primary scope of the CJ in this judgement is to highlight the strong relationship between joint dominant and oligopolies, by signalling a direction for the Commission. The lack of specific clarification about market conditions supporting collective dominance is not a source of uncertainties, as someone argued[51], but

---

can use a combination of both article 81 and article 82 to eradicate anticompetitive practice" (pp. 16-17).

[49] In this sense, P.M. FERNANDEZ, *Increasing powers and … cit.*, p. 650 points out that parallel price increases in prices may derive, for example, from cost increases.
F. BAVASSO, *Gencor: a judicial review of the Commission's policy and practice: Many lights, some shadows*", in *World Competition*, 1999, p. 63, highlights that, under the *Wood Pulp* jurisprudence, parallel conducts were not perceived as illegal per se, either as concerted practices or as abuse of collective dominance, but their anti-competitive effects must always be shown.

[50] L. Mc GREGOR, *The future for the control of oligopolies following Compagnie Maritime Belge*, in *ECLR*, 2001, p. 436. Also M. JEPHCOTT, C. WITHERS, *Where to go now for the EC…cit.*, remark: "*As a consequence, however, the concept of conscious parallelism, founded on the theory of intelligent adaptation as a legitimate explanation for parallel behaviour by competitors, is likely to become an endangered juridical species*" (p. 300).

[51] L. Mc GREGOR, *The future for the control of oligopolies. cit,* p. 437. According to the A, this decision does not clarify questions as the maximum number of firms consistent with the oligopolistic interdependence or how Article 82 can apply to asymmetric oligopolies.

rather expresses the awareness that describing general rules, suitable for each oligopoly, makes little sense.

3.4.5 Conclusions

All criticism about this judgment involves the relationship between articles 81 and 82, from the possibility of jointly applying those rules to the opportunity of recurring to article 82 to close the gap in the oligopoly control. Most of the scholars admit that both rules may apply to the same factual situation and in the area of overlap the requirements of both have to be met. The most interesting questions, still unsolved by the jurisprudence, concerns the legal discipline to apply: it is not clear whether, once the burden of proof required under article 81 is satisfied, it still makes sense to also apply Article 82 (cumulative application) or whether it would be better to apply them alternatively.

Compagnie Maritime Belge is the last significant step in the evolution of abuses of collective dominance. It made clear that joint dominance may be a useful, or probably an unsubstitutable, means for the oligopoly control, but its effectiveness strongly depends on how the Commission will apply it.

Chapter 4

The *Airtours* Case.

4.1 Introduction

The *Airtours* case is probably the most paradigmatic example of the expansive approach of the Commission to the preventive control of collective dominance. At the scope of avoiding the anti-competitive effects coming for the notified merger, the Commission sought to include in the category of collective dominance every kind of anticompetitive effect other than creation or strengthening of single dominance. This decision highlighted an evident failure in the merger control and generated a wide debate about the effectiveness of Regulation 4064/89.

The consequences of the *Airtours* case have been remarkable. The CFI clarified the basic requirements of collective dominance and, in this way, increased the legal certainty, but also introduced a significant rigidity in the merger control. Changes also involved the normative level, where the old Merger Regulation was replaced with a new Regulation, capable of addressing anticompetitive effects other than single and collective dominance.

4.2 The EC decision

In 1999 Airtours launched a takeover bid with the purpose of obtaining the whole control of First Choice.

In the preventive exam of the notified operation, the EC distinguished two relevant markets: on the one hand, production of short-haul foreign package holidays, which include return travel and accommodation; on the other hand, distribution of airlines services,

that is, supplying seats on charter flights to the tours operators. The relevant product market, according to the Commission, did not include holidays that the consumers organized by themselves, by buying each single service, and long-haul foreign package holidays[1].

4.2.1 Market functioning and predictable merger effects

According to the Commission, the correct definition of the amount of output was a crucial factor in the market functioning. On the one hand, firms could reduce their unitary costs and, therefore, offer at lower prices, only by operating at high levels of capacity; on the other hand, since packages holidays are perishable goods, an excessive production could enhance the risk of unsold.

The concerned market was characterized by a double-stage functioning: during the planning period, firms defined the amount of output that would be sold at least one year later, during the selling period. Because of this gap between the two seasons, decisions on output necessarily rested on a prevision about the level of demand during the subsequent selling period. These decisions were quite definitive, since in the selling period there was a little space for adjustments (only modest increases of the output). As a consequence, in the case of divergence between expected and real demand, the only strategic leverage that firms could use to restore market equilibrium was price.

In this scenario, according to the Commission, firms were perfectly aware that "*any decision by a tour operator to try to increase market share by increasing capacity (i.e. offering more holidays for sale) will lead to a fall in prices unless competitors reduce their share by an equivalent amount by cutting capacity*" (§ 66).

At the scope of reducing both production costs and risk of insufficient capacity, the biggest firms had vertically integrated in air travel supply and in retail distribution. Moreover, they were well connected in the down-stream market, by using each other's chains of travel agency. The smaller-sized undertakings, on the contrary, were not vertically integrated and needed to use the major firms'

[1] European Commission, 22 September 1999, case IV/M.1524, *Airtours/First Choice*, in *OJ*, 2000, L-93/1-33, here §§ 5-42. The geographical relevant market included Ireland and UK.

distribution channels; consequently, they could not countervail the market power of their larger-sized rivals.

As for the demand side, according to the European Commission, package holidays were substantially homogeneous goods, chosen on the basis of price; the demand was not very price-sensitive and presented low rates of growth. Moreover, its evident volatility could facilitate collusion, by inducing firms to limit the planed capacity, and to increase it, in the case of necessity, during the selling period[2].

The Commission also found evidence of significant symmetry and reciprocal transparency between the four bigger companies (Airtours, First Choice, Thomson Travel and Thomas Cook) in both the planning period (because decisions about capacity rested on previous season's sale, so the examination of those data was enough for each firm to predict the level of capacity that its rivals was planning) and the selling season (because catalogues indicated the price of each service). Given this two-stage functioning of the market and the central role of decisions on capacity, firms could establish collusion simply by aligning their decisions about capacity during the planning period, without any need of cooperating on price during the selling season.

Moreover, according to the Commission, the concerned market was impermeable to the external, competitive pressures. On the supply side, the control on the two key-factors of distribution (access to airlines seats and travels agencies) was an actual barrier to entry, which would have been higher after the merger. On the demand side, individual buyers were not strong enough to exert an effective countervailing power and professional buyers were vertically integrated with the major firms.

"*On the basis of the foregoing, in the Commission's view, the tour-operating market already displays a number of characteristics which are conducive to the creation of a collective dominant position among the main players following the merger.* […] *There is at present already some exercise of market power by the integrated operators.*" (§ 127)

By eliminating First Choice, the sole medium-sized, independent operator, which was also developing in a more powerful and vertical

[2] See §§ 93-97. This interpretation about the impact of demand volatility on collusion is quite questionable: irregular fluctuations of demand are usually perceived as a factor impeding collusion, rather than as one facilitating it, because they make it difficult to evaluate the convenience of collusion compared to the convenience of defection.

integrated competitor, Airtours, the second largest firm active in the market, would have increased its own market share (from 21% to 37%) without reaching the threshold of single dominance.

However, the acquisition of First Choice would have especially affected the three largest operators taken together: they would have increased their joint market share (from 70% to 83%), strengthened their mutual dependency, and widened the gap with the smaller-sized competitors.

4.2.2 Post-merger collective dominance: an anomalous definition

In the Commission's view, the high likelihood of anticompetitive post-merger effect made it necessary to prohibit the operation at issue. Collective dominance, interpreted in an appropriate manner, appeared as the most appropriate means to this end. Thereby, the Commission stated: "*It is not a necessary condition of collective dominance for the oligopolists always to behave as if there were one or more explicit agreements (e.g. to fix prices or capacity, or share the market) between them. It is sufficient that the merger makes it rational for the oligopolists, in adapting themselves to market conditions, to act, individually, in ways which will substantially reduce competition between them, and as a result of which they may act, to an appreciable extent, independently of competitors, customers and consumers*" (§ 54).

Airtours questioned the possible establishment of post-merger collusion, by remarking the difficulties in detecting defections (given both products heterogeneity and demand volatility), and in implementing immediate and low-cost punishments (because of the biphasic market functioning).

With regard to this, the Commission spelt out that "*certain features of market structure and operation* [may make] *anti-competitive outcomes, and in particular collective dominance, more likely* […]. *However, the Commission did not suggest, nor does it consider, that all of the features have to be present and/or aggravated by the merger in order for collective dominance to arise in a given case. Nor does it regard a strict retaliation mechanism, such as that proposed by Airtours* […] *as a necessary condition for collective dominance in this case; where as here, there are strong incentives to reduce competitive action, coercion may be unnecessary*" (§ 55).

According to the Commission, the merged firm and its closer rivals might collude on capacity during the planning period, by setting a suboptimal level of output, inferior to the competitive one, and impose supra-competitive prices in the selling period. The peculiarity of this equilibrium, in the Commission's view, was that alignment on prices, given the specific market functioning, did not require active collusion on this point. Decisions about production were taken 12-18 months before the selling season; therefore, it was enough for firms to observe, in the rivals' catalogues, the current level of price for deducting the amount of production planned the year before. Since supply decisions changed only a little in the years, this hypothesis about rivals' output represented a proxy of the amount of capacity planned for the subsequent season. This mechanism, according to the Commission, ensured high transparency about the most important, strategic variable (quantity) and, consequently, could facilitate collusion.

In the light of this market functioning, according to the Commission, reducing the amount of planned output would be for each firm the best strategy: in the case of rivals' alignment, in fact, prices would increase; in the case of erroneously low previsions, each firm could, although marginally, increase the amount of output during the selling phase.

Therefore, in the Commission's view, the entire post-merger collusion would have rested on the production stage, regardless of active coordination during the selling season when, by moving from already supra-competitive prices, firms would have tried to offer holiday packages at the highest tariffs as possible. Moreover, in the case of a gap among demand and supply, they would have recreated the equilibrium simply by decreasing prices. Therefore, even in the presence of discounts, which apparently are a signal of competition on price, firms would have been involved in a collusive relationship leading to anti-competitive effects.

In the Airtours case, the Commission gives an unusual interpretation of collective dominance, by focusing on the individual incentive to restrict capacity: the more this incentive is strong, the less punishment is necessary. In other words, ontological instability of cartels and incentives to collude are inversely related; therefore, the risk of cartels' collapse is reduced either by credible punitive

mechanisms, that can counteract the tendency to defect, or by strong incentives and high convenience to collude: if cooperation is highly profitable by itself, cartels are self-maintaining, so retaliations become redundant[3].

This description of collective dominance is quite anomalous, especially if compared to the previous case law on this point, and even the methodological approach is different. Instead of verifying the real risk of coordination by moving from the market analysis, the Commission apparently presupposed post-merger collusion and tried to demonstrate that this outcome could not be excluded at all in the market at issue. Shift from inductive to deductive method affected the entire evaluation: the Commission moved from the suspect of post-merger anticompetitive effects and sought to address them by the category of collective dominance; then, it looked for a justification in the market conditions. It was for this reason that, for example, the Commission held that differences between products were not enough to impede collective dominance, and that the volatility of the demand, usually viewed as an obstacle for collusion, could facilitate the alignment[4].

By moving on these premises, the Commission prohibited the merger at issue because it would have created collective dominance[5].

4.2.3 Critical remarks

The unusual definition of collective dominance and the evident change in the general approach to this matter generated a wide debate about the basic characteristics of category at issue, its perfect or partial overlap with the economic concept of tacit collusion, and the capability of Regulation 4064/89–and its parameter of dominance–of addressing all kinds of post-merger anticompetitive effects.

---

[3] About the factors that may address the internal instability of collusion, see *infra*, Part 3 – Chapter 1.

[4] Respectively, § 90 and § 97.

[5] Evidence of past collusive relationship could raise the suspect that the merger at issue could strengthen, rather than create, collective dominance.

Scholars criticized almost every point of this judgment, from the definition of the relevant product market to the under-evaluation of the potential competitive pressures of domestic holidays, non-package holidays, and foreign package holidays[6].

However, the most debated point was the relationship with the previous case law: on the one hand, the Commission, by relying on the market factors included in the check-list and by recognizing that active collusion was not a requirement for collective dominance, seems to follow the previous case law[7]; on the other hand, it described the functioning of collusion and the role of retaliation in a different way than in the previous case law.

Some scholars, in particular, argued that the emphasis that the Commission, in the decisive paragraph of its decision, put on the individual incentive to avoid competition would contrast with the precedent view. This statement, in fact, would lead to the inclusion, in the category of collective dominance, of unilateral conducts which reflect the power of each oligopolists to adapt his strategy to the market conditions[8]. With regard to this, scholars remark the difference between parallelism coming from individual adaptation and parallelism coming from parallelism coming from a collective strategy, which rests on the reiterated interaction in the absence of active coordination.

---

[6] G.VON GRAEVENITZ, D. HARBORD, *Market definition in oligopolistic and vertically related markets: some anomalies*, in *ECLR*, 2000, pp. 153-154. The Authors questioned that the SSNIP test results (i.e. the expected price increases realized by the largest tour operators, which jointly hold 80% market share) were enough to deduct post-merger coordination. In their view, on the one hand, in that kind of scenario, with a few firms and high concentration, the SSNIP test could only conclude that a hypothetical monopolist can rise prices (in other words, that inference was quite implicit in the application of the SSNIP tests); on the other hand, the inference of post merger coordination was wrong "*because if firms with only 80 per cent of the market are able to increase prices via parallel or collusive conduct, then the antitrust market should have been defined more narrowly to include just their output*" (p. 154).

[7] According to C. GORDON, R RICHARDSON, *Collective Dominance: the Third Way*, in *ECLR*, 2001, p. 420, the Commission clearly recall *Gencor* judgment: this would proved a continuity with the traditional evaluation.

[8] J. LANGER, *The Airtours judgement: a welcome lecture on oligopolies, economics and joint dominance*, in *Colum. J. Eur. L.*, 2003, p. 110; I. KOKKORIS, *The reform of the European Control Merger Regulation in the Aftermath of the Airtours case – The Eagerly Expected debate: SLC* v. *Dominance test*, in *ECLR*, 2005, p. 38.

Even the statement about retaliation seems to contrast with both economic theory and the precedent case law, which had always emphasized this element for the stability of collusion. In the balance between incentives to collude (aimed at increasing the overall prices level and, therefore, at maximizing profits) and impulse to deviate (intended to gain short-run profits by undercutting rivals and attracting higher demand), the stability of collusion had been connected to the presence of real and credible mechanisms of deterrence that make future losses from punishment more relevant than immediate profits from deviation.

Conversely, in the *Airtours* case, the Commission declared the irrelevance of punitive mechanism for stable collusion, and not just about the case at issue (where, on the contrary, effective retaliation could take place), but with regard to every kind of collusive equilibria. Several scholars interpreted this statement as a departure from the Game theory teachings[9], and contested the final decision, by arguing that all relevant factors seemed to exclude post-merger collusion. In their view, the Commission undervalued asymmetry between firms (especially the different degree of the vertical integration), product differentiation, and the importance of transparency for both creating and maintaining collusion[10].

Other scholars, on the contrary, remark the consistency of the *Airtours* decision with the previous case law. In particular, according to Christensen and Rabassa, the Commission followed exactly the traditional approach and inferred the merger's impact from the structural and dynamic analysis of market conditions[11]. Moreover, the substantial evaluation of factors was almost the same of the pre-

[9] See, B. ETTER, *The Assessment of Merger under the EC Concept of Collective Dominance – An Analysis of the Recent Decisions and Judgements – by an Economic Approach*, in *World Competition*, 2000, p. 135. In his opinion, this decision can be rationalized by recognizing either a change in the Commission's view about collective dominance, or a need to block a merger that would have hindered competition without creating single dominance. "*If the latter is the case, the Commission has risked a confusion in Europe about collective dominance and put the credibility of the whole concept at stake*" (p. 136).

[10] J. BRIONES, A.J. PADILLA, *The complex Landscape of Oligopolies under the EU Competition Policy – Is Collective dominance a Ripe for Guidelines?*, in *World Competition*, 2001 pp. 310-311.

[11] V. RABASSA, P. CHRISTENSEN, *The Airtours Decision: Is there a New Commission Approach to Collective Dominance?*, in *ECLR*, 2001, pp. 229-230.

Airtours cases: the concerned market was already prone to collusion[12] and this tendency would have increased in consequence of the merger at issue; the significant gap among small and big undertakings would have facilitated collusion among the bigger-sized firms and, at once, would have excluded every countervailing reactions by the outsiders. Consistently with the previous jurisprudence, that had never perceived complete collusion as necessary, the Commission recognized that an alignment only on capacity, if correctly justified and rationally supported, could be enough to block a merger.

About the role of, the Authors remark that, by citing the menace of over-production, which is one of the most effective forms of retaliation, the Commission indirectly recognized the importance of retaliation for durable collusion[13].

Moreover, in the Authors' view, the collusive mechanism described by the Commission (reduction of capacity at the scope of increasing prices) "*represents a refinement of the Commissions economic analysis beyond the mechanical application of a «checklist» in oligopoly cases*"[14].

Some economists perceive the *Airtours* decision as a paradigmatic example of the Game Theory approach: an anticompetitive equilibrium realized by output restrictions as a mutual best response

[12] Several factors demonstrated that the market was already prone to collusion: transparency, symmetry in costs and market shares, absence of countervailing power, and product homogeneity.

[13] The paragraph about retaliation, in their reconstruction, would be a consequence of the Airtours' attempt to deny any difference between implicit and explicit cartels. In this way, Airtours sought to distinguish this decision from a recent case about express cartel in the cement industry, where there was convincing evidence of strong retaliation (40% oversupply). The need to differentiate, on the legal basis, tacit and express collusion, led the Commission to explain what was necessary, in the light of market peculiarities, to create a collective dominance. In this framework, the Commission, by rejecting Airtours defence, recognized that weak punishments may be compensate by strong incentive to collude.
About the menace of overproduction, the As remind that this reaction is rarely adopted, because its consequences-significant price reduction-involve all firms active in the market. In other words, being a non-punctual remedy, it is normally implemented when its benefits outweigh its costs. See, on this, V. RABASSA, P. CHRISTENSEN, *The Airtours Decision:…cit.*, pp. 235-236

[14] V. RABASSA, P. CHRISTENSEN, *The Airtours Decision:…cit.*, p. 236.

in a repeated interaction would be, in fact, the perfect description of a Nash equilibrium[15].

One of the most frequent comments about the *Airtours* decision is that the real menace for market competition derived from unilateral effects, rather than from post-merger coordination. The opinion of professor Motta is paradigmatic in this regard[16]. By moving from a careful exam of the involved market, in both a dynamical and structural perspective[17], he concluded that the mechanism of collusion described by the Commission is abstractly consistent with economic theory[18]. However, the question is whether, in the case at issue, there was an effective risk of collusion, since the collusive impact of some factors (high concentration level, transparency, symmetry, barriers to entry) was balanced by other factors, such as demand volatility, product heterogeneity, lack of an immediate punitive response. As a consequence, it was not sure that the proposed merger would have resulted in a tacit collusion.

---

[15] S.C.S. LEE, J. NIEBERDING, D.A. WEISKOPF, *Game Theory*, in *Antitrust*, Spring 2006, p. 99.

[16] M. MOTTA, *E.C. Merger Policy and the Airtours case*, in *ECLR*, 2000, pp. 199-207. Similarly, C. RIZZA, *La posizione dominante collettiva… cit.*, at p. 544, notes that the *Airtours* approach would lead to attack all mergers that make it rational to unilaterally restrict the amount of output or increase prices. Also, P. SABBATINI, *Concentrazioni. Le tra sconfitte della Commissione in Tribunale*, in *Mercato concorrenza regole*, 2003, pp. 161-162, remarks that, in the case of collective dominance, it makes no sense to mention the rationality of individual actions or the superfluity of retaliation; therefore, this would demonstrate that the analytical framework for the *Airtours* case was not one of collective dominance. C.D. EHLERMANN, S.V. VOLCHER, G.A. GUTERMUTH, *Unilateral Effects: The Enforcement Gap under the Old EC Merger Regulation*, in *World Competition*, 2005, p. 194 note that the reference to the unilateral conducts at § 54 of this decision seems to echo non-coordinated effects, although by an ambiguous formula.
Contra, V. RABASSA, P. CHRISTENSEN, *The Airtours Decision…cit.*, pp. 235-236, remarked that, in the case of unilateral effects, the Commission's exam would be different. However, I find it difficult to figure out how the Commission could deal with the control of unilateral effects, given that this category had never applied in the European merger control.

[17] M. MOTTA, *E.C. Merger Policy… cit,* pp. 204-205.

[18] MOTTA reminds the result of an economic study realized by R.W. STAIGER and F.A. WOLAK (*Collusive Pricing with Capacity Constrains in the Presence of Demand Uncertainty*, in *Rand Journal of Economics*, 1992, pp. 203-219) which demonstrates that a price decrease, and even price wars, in the selling season, would not exclude collusion in the planning period.

However, Motta concurs on the choice of prohibiting the merger, because it would have increased the market power of the merged firms that, therefore, would have raised its price. This effect, in the absence of efficiency gains, would have reduced the consumer welfare[19]. According to Motta, the questionable point in the Commission's decision is whether the ultimate prohibition, which is coherent with the economic analysis, is also consistent with the ECMR parameter. The expected anticompetitive effects would have resulted from the exercise of market power by the merged firm–not individually dominant–and would have not implied the co-operation with its rivals. This economic effect does not match the parameter of either single or collective dominance.

The gap between economic and legal approach to mergers, together with the knowledge that, in the case at issue, the category of unilateral effects would be more appropriate to describe the competitive concerns, according to Motta, induced the Commission to fill the ECMR lacuna about unilateral effects by extending the boundaries of collective dominance. To conclude, he remarks: "*a possible interpretation of this decision is that, whether consciously or not, by extending the use of the joint dominance concept to this «border-line» case, the Commission is trying to cope with a distortion of the Merger Regulation which does not prohibit mergers detrimental to welfare unless they create or reinforce dominance*"[20].

---

[19] High concentration and vertical integration left no space to competitors' reactions or to external disciplining powers; these negative effects were not balanced by the efficiency gains.

[20] M. MOTTA, *E.C. Merger Policy…* cit, at p. 207. In conclusion, the A suggests introducing in the ECMR an express prevision about unilateral effects, which would close the gap between legal and economic assessment.
Similarly, R. WHISH, *Recent developments in Community Competition Law 1998/99*, in *E.L.Rev.*, 2000, p. 242. According to the A, the Commission seems to adopt a softer parameter for finding collective dominance, because it took account only of the capability of a single oligopolist to obtain supra-competitive profits from its own unilateral conduct, regardless of the rivals' response. See also B. RODGER, A. MAC CULLOCH, *Competition Law and Policy in the European Community and United Kingdom*, 2nd Edition, Cavendish Publishing, London- Sydney, 2001. C.D. EHLERMANN, S.V. VOLCHER, G.A. GUTERMUTH, *Unilateral Effects…cit.*, remark that in the *Airtours* decision, the European Commission "*appeared to have viewed non-coordinated effects as a category of collective dominance*" (p. 195).
Finally, H. HUSER, F. DEPOORTERE, *Substantive enforcement standards in horizontal merger under the EC merger Regulation*, in *Antitrust,* Fall, 2002, p. 46, view this decision as an expansion of collective dominance beyond the standard of tacit collusion.

Moreover, several scholars remark the inadequacy of the alleged evidence to demonstrate the likelihood of post-merger coordination[21].

In any event, by prohibiting a merger because of the risk of coordination between three firms–when all previous case had dealt with the suspect of a collusive post-merger duopoly–the Commission, on the one hand, reduced the traditional weight of market concentration and, on the other hand, expanded the reach of the category of collective dominance[22]. However, this tendency to enlarge the boundaries of collective dominance has to stop at the critical point where the number of firms is no more consistent with durable collusion. The European Commission had fixed this limit in no more than three or four firms[23]. However, this criterion does not constitute a fixed standard, because the real sustainability of collusion depends on the global interaction of all relevant market features, therefore, it has to be analysed case-by-case[24].

---

[21] In this decision, not only the interaction of factors, but the presence itself of certain market features represented a controversial point. With regard to this point, it is emblematic what happened about symmetries: according to some scholars, there was no symmetry between the concerned firms (see note 12, J. BRIONES, A.J. PADILLA, *The complex Landscape of Oligopolies…cit.*, at p. 310); according to other scholars (see, for example, M. MOTTA, *E.C. Merger Policy…* cit, p. 206), and to the Commission (§ 99), firms were symmetrical.
D. PARKER, *A Screening Device for Tacit Collusion concern*, in *ECLR*, 2006, pp. 424-433, elaborated a new test for coordination, based on the examination of the internal asymmetry (the 'Tacit Collusion Asymmetry Index', TCAI) and demonstrated that there was a significant symmetry supporting the suspect of tacit collusion.
About the insufficient proof of coordination, see B.C.HARRIS, C.G. VELJANOVSKI, *Critical Loss Analysis: Its Growing Use in Competition Law*, in *ECLR*, 2003, p. 217; J. KOKKORIS, *The reform of the European Control Merger Regulation…cit*, p. 41; E. FOX, *Collective dominance and the message from Luxembourg*, in *Antitrust*, Fall 2002, p. 57.

[22] J. BRIONES, A.J. PADILLA, *The complex Landscape of Oligopolies…cit.*, say: "*The jump from 2 to 3 means in fact that the perimeter of what the commission may consider as a dominant oligopoly has become much more blurred and potentially vastly more ample. If three players may constitute a dominant position, so may four players or even more*" (p. 309).

[23] European Commission, 20 May 1998, case IV/M. 1026, *Price Waterhouse / Coopers & Lybrand*, in *OJ*, 1999, L-50/27-49. "*From a general viewpoint, collective dominance involving more than three or four suppliers is unlikely simply because of the complexity of the interrelationships involved, and the consequent temptation to deviate; such a situation is unstable and untenable in the long term*" (§ 103).

[24] With regard to this point, B. ETTER, *The Assessment of Merger under the EC Concept…cit.,* p. 135 remarks the rigidity of an approach that seeks to prejudicially indicate the maximum number of colluding firms.

The same expansive tendency seems to characterize the statement that collective dominance would derive from the *individual, rational* adaptation to market conditions–which is the substance of the oligopolistic interdependency. In this way, the Commission could bring pure oligopolistic interdependence under the ECMR control. Concerning this point, scholar remarks that interdependence, let alone, is a necessary condition for collective dominance, but probably is not sufficient. Durable collusion equilibrium, in fact, would require not only the awareness that higher profits may come from coordination, but also the possibility to observe the rivals' strategy and strong incentives to not defect[25]. Focusing only on interdependence means to take account only of the possibility of creating collusion and to prohibit almost all oligopolistic mergers[26]. Therefore, in its decision, the Commission confused "*the normal functioning of an oligopolistic market with oligopolistic dominance*"[27].

4.2.4 Conclusions

The analysis of the market at issue raises the reasonable suspect of anticompetitive post-merger effects. In the concerned industry, First Choice was the only medium-sized firm, it was involved in a process of vertical integration, and was already distributing the products of the smaller firms. By following its developing tendency, First Choice could become serious competitive constraint for the bigger-sized firms: by strengthening its market power, First Choice could reduce the rivals' competitive advantage from vertical their integration. Conversely, acquiring the control on First Choice would have eliminated every source of competitive pressures. The Commission demonstrated that only firms active on both the production and distribution level could effectively compete with the market leaders Therefore, only new entries on both segments of the market would

[25] S. STROUX, *Collective Dominance under the Merger Regulation: a Serious Evidentiary Reprimand for the Commission*, in *E.L.Rev.*, 2002, p. 737; J. KOKKORIS, *The reform of the European Control Merger Regulation…cit*, p. 37; G. COLANGELO, *Comments on Airtours Judgment*, in *Dir. Industriale*, 2003, p. 273.

[26] J. LANGER, *The Airtours judgement: a welcome lecture on oligopolies…cit*, p 110; J. BRIONES, A.J. PADILLA, *The complex Landscape of Oligopolies…cit.*, p. 311.

[27] J. KOKKORIS, *The reform of the European Control Merger Regulation…cit.*, p. 41.

have represented a serious competitive constrain, but there was no indicium about the possible implementation of such a project, which required long time and high start-up investments.

However, while the firms' strategy behind merger project is clear, it is highly questionable that prohibiting the merger at issue on the grounds of coordinated effects was consistent with the parameter of dominance, as interpreted in the EU case law. Moreover, the possibility of post-merger collusion was a doubtful scenario even under the Game theory analysis, given the tension between factors facilitating and impeding collusion. These uncertainties also affected the alleged proofs because, in a framework not clearly conducive collusion, there can be no convincing evidence of likely post-merger coordination.

Since in Airtours case the risk of coordination was less evident than in the previous cases and, therefore, the alleged evidence of collective dominance fell short of the usual standard, the only way to prohibit a merger that, in all probability, would have reduced the consumers welfare was to modify the evaluative criterion. In this way, the Commission enlarged the boundaries of the category of collective dominance, with the consequence of reducing the legal certainty and of making final decisions much more unpredictable.

4.3 The CFI judgement

Airtours appealed the original decision on different grounds: the market definition, the inference of collective dominance, and the alleged evidence about the likelihood of post-merger coordination[28].

With regard to the first claim, the CFI stated that, since the definition of product market rests on the concept of substitutability, it includes all products that, although not identical, are enough interchangeable with those directly involved in the merger project. Therefore, it confirmed the EC decision about the relevant market.

[28] Court of First Instance, case T- 342/99, 6 June 2002, *Airtours plc* v. *Commission*, in *ECR*, 2002, II- 2585.

4.3.1 Definition and required conditions for collective dominance: a substantial point of view

By this judgement, the CFI sought to clarify the category of joint dominance, at the scope of reducing doubts and uncertainties that the original decision had generated.
By relying on the pre-*Airtours* jurisprudence, the CFI recognized that, in the presence of specific conditions, mergers may modify the market structure and may allow firms to collude even in the absence of agreements or concerted practices. Against the applicative failures that may derive from such a generic formula, which had been expressed in the *Gencor* judgment, CFI sought to specify its contents, by listing three conditions generating the suspect of post merger coordination.

First of all, according to the judges, transparency of the market has a crucial role: since tacit coordination requires mutual observation, transparency appears as a *sine qua non* for both creating and maintaining collusion. "*Each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. As the Commission specifically acknowledges, it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving*" (§ 62)

Second, the anticompetitive relevance of post-merger collusion depends on its stability; therefore, the CFI stated that: "*the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. As the Commission observes, it is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. In this instance, the parties concur that, for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy,*

which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative" (§ 62).

Finally, according to the CFI, "*to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy*" (§ 62).

In brief, the analysis of oligopolistic mergers has to focus on the real likelihood of creating and maintaining collusion. This outcome presupposes three conditions: first, market transparency, which allows firms to establish collusion and to detect defections; second, internal stability of collusion, which derives from lower incentives to defect compared to the incentive to collude; third, external stability, in terms of absence of any destabilizing pressure. All these conditions seek to predict whether there is a real likelihood of adopting a durable common policy[29].

With regard to the substantial contents, these conditions seem to summarize the results obtained in the pre-*Airtours* jurisprudence. Both economic theory about collusion and the case law before *Airtours*, in fact, had recognized that market transparency is an essential condition for tacit collusion[30]. Moreover, the previous case law had already clarified that the internal stability of collusion depends on the presence of an effective mechanism of retaliation that, under the menace of future losses, may limit the short-term incentive to deviate[31]. Similarly, the potential destabilization of collusion

---

[29] H. HAUPT, *Collective Dominance under Article 82 E.C. and the E.C. Merger control in the light of the Airtours Judgment*, in *ECLR*, 2002, p. 442.

[30] In *Nestlè/Perrier,* for example, the EC emphasized the artificial increase of market transparency by the publication of price lists (§ 62); also in the *Gencor/Lonrho* judgment transparency was listed among the conditions of collective dominance (§ 275).

[31] See, for example, the *Gencor* case. A. NIKPAY, F. HOUWEN, *Tour de force or little local turbulence? A heretical view on the Airtours judgment ECLR,* 2003, noted that the first two conditions of Airtours derive from the *Gencor* judgment. "*This does not, however, diminish the importance of this part of the judgment. Its significance lies in the relative clarity with which the CFI set out the steps that have to be followed--the nature of the language should prove to be*

coming from external competitors and consumers had been already recognized as a crucial factor for collusion.

4.3.2 The analysis of the *Airtours* decision by the enacted parameter

In applying the theoretical parameter to the case at issue, the CFI moved from the analysis of the appealed decision.
With regard to this, the Commission had recognized that, even in the absence of collusion, in the concerned industry there was a tendency towards planning capacity in a cautious way, because of both the demand volatility and the possibility to react to an eventual demand growth by enhancing the production during the selling period. According to the CFI, this evidence would demonstrate that the involved market was competitive, despite the under-production during the year before the merger notification, and which depended on the erroneous calculation of the future demand (§§ 88-89).

Moreover, in the original decision, vertical integration had been perceived as crucial for establishing collusion. In the CFI's view, on the contrary, it could have an ambiguous impact on collusion because it was also a possible source of efficiency gains (§§ 105-106).
On these bases, the CFI denied that the market at issue was already characterized by a tendency toward collusion on capacity.

The CFI also contested the evaluation of the market demand, because, on the one hand, there was proof of growing market demand; on the other hand, the Commission did not demonstrate that the demand volatility could facilitate collusion.

Moving from this premise, the CFI verified the presence of the three conditions listed before.

According to the Court, the different composition of holiday packages, the complexity of market functioning, and the demand volatility make it difficult to observe and to interpret the rivals' conducts. Therefore, the Commission was wrong in judging the current level of market transparency as enough for tacitly reaching collusion.

---

of assistance to companies and their advisers as it will force the Commission to deal with these issues in detail" (p. 198).

About the internal stability of collusion, the CFI recognized that the low transparency, by impeding an immediate detection of defections, also reduced the effectiveness of retaliation. Moreover, the implementation of punitive mechanism would be quite difficult and not immediate, because of the biphasic functioning of the market. Therefore, the CFI contested the Commission's statement about the presence of incentives not to depart from a tacit collusion. "*The Court notes that the Commission adopted a somewhat ambiguous approach in the Decision, since it initially stated that a strict retaliation mechanism founded on coercion is not a necessary condition for collective dominance in this case* […]*, while also stating that it does not agree that there is no scope for retaliation in this market and that* [r]*ather there is considerable scope for retaliation, which will only increase the incentives to behave in an anti-competitive parallel way*" (§ 191).

In general terms, the judges spelt out that "*the Commission must not necessarily prove that there is a specific retaliation mechanism involving a degree of severity, but it must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of conduct to the detriment of the other oligopolists*" (§ 195).

Although the CFI recognized the role of retaliation for collusion to arise and, in this way, it remarked the difference with the Commission's assessment, it focused on the presence of incentives to maintain collusion, rather than on the presence of punitive mechanisms. Many scholars perceive this approach as both contradictory[32] and difficult to apply: they remark that the assessment of effective retaliation cannot be merely abstract, but requires deep examination and whole understanding about its functioning, at the purpose of predicting whether it can really contribute to maintain a collusive equilibrium[33].

---

[32] Many scholars concur on this point: see, among all, J. KOKKORIS, *The reform of the European Control Merger Regulation…cit*, pp. 39-40.

[33] A. NIKPAY, F. HOUWEN *Tour de force or little local turbulence...cit,* p. 198. In their opinion, the CFI demonstrated that there was an actual possibility of retaliating in the case of defection. Since, according to the As, there is no need of demonstrating in an analytical way the amount of losses required for punitive mechanisms to deter from defections, the CFI statement on this point was consistent with its theoretical premises. However, in this opinion echoes the EC statement about the not indispensability of retaliation for sustaining collusion, especially when the strong convenience of

Finally, about external competitive pressures, according to the judges, the Commission over-emphasized the economic weakness of smaller firms and undervalued the countervailing power of the new comers, which, in the CFI's view, could enter the market, despite the high barriers, and set lower tariffs. Since price was the basic factor in the choice of the package holidays, this conduct could deprive the larger-sized firms of a significant part of their profits. Moreover, the consumers' reaction to the lower price could undermine the stability of collusion, by determining a demand shift towards less expensive package holiday.

As a result, according to the CFI, all requirements of collective dominance were lacking: even if the notified operation could increase the market concentration, there was no proof about its pro-collusive, long-run impact.

Some scholars highlight a tension between the theoretical parameter and its actual application[34]: while, in the tripartite test, the CFI clarified the importance of focusing on two dimensions –past and future-, in its judgement it put the stress only on the pre-existing collusion, rather than on the likely evolution of market dynamics. In this way, it applied only the first part of the parameter (past competition) and did not consider the requirement of predictable developments, which is essential in the forward-looking perspective that should characterize the merger control.

---

alignment already acts as an incentive to not deviate. In other words, the balance of incentives leads to recognize that lack of retaliation can be compensated by a high convenience in colluding (prevalence of one incentive on the other).

[34] A. SCOTT, *"Winter talk by the Fireside?" Tacit Collusion and the Airtours Case*, in *ECLR*, 2003, pp. 310-311. According to the A, the operation at issue could not hinder competition; therefore, the prohibition would be unjustifiable. In any event, the A noted that, once competition authorities have recognized that the merger at issue may have this impact, they should have applied the other parts of the test, and verify whether the collusive equilibrium could be durable. Despite its theoretical premise, the CFI stop its evaluation to the first step, and did not correct the Commission's approach of inferring the ultimate decision only from the past and the current market dynamics. As a result, "*having posited a clarification of the test for collective dominance, the CFI then failed properly to follow its own prescription*"(p. 311).

4.3.3 New thresholds of proof

Demonstrating collective dominance is never easy: even in the case of perfect parallelism in prices, the inference of collusion is complicated, since the same mechanism also characterizes the model of perfect competition[35]. This inference is even more complicated in the *ex ante* control of mergers, which rests on a prognostic examination and implies the exercise of discretional power. These features enhance the risk of both power misuses and evaluative mistakes and make it necessary to identify an appropriate remedy.

For limiting this risk, the CFI suggested increasing the burden of proof incumbent upon the Commission: "*where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof*" (§ 63).

However, the CFI did not specify what *convincing evidence* means and how such a criterion can fit the standard of 'manifest error' that the judges applied in reviewing the market definition.

The general impression is that judges sought to reduce the wide discretion that the Commission has adopted in the merger control, but "*unfortunately, the CFI did not take the opportunity afforded by Airtours to establish a clear test for the standard of proof*"[36].

In any event, by imposing to the Commission the duty to allege convincing evidence about every aspects of the operation, the CFI seems to signal that "*the prospective assessment of competition leaves no scope for speculation and that the Commission has to show in detail the reasons why the existence of specific structural features of the market is likely to entail a future impairment of external and internal competition*"[37].

This increase in the burden of proof, on the one hand, is consistent with the trend characterising the previous case law[38]; on the other

---

[35] G. ROBERT, C. HUDSON, *Past co-ordination and the Commission Notice…cit.*, p. 164.

[36] A. NIKPAY, F. HOUWEN *Tour de force or little local turbulence...cit.*, pp. 196-197.

[37] H. HAUPT, *Collective Dominance under Article 82 E.C. and the E.C. Merger control…cit.* p. 443.

[38] See, for example, *Kali und Salz*. According to H. HAUPT, *Collective Dominance under Article 82 E.C. and the E.C. Merger control…cit.* p. 443, the CFI in *Airtours* refused to apply the *Gencor* standard of proof and relied on the *Kali und Salz* paradigm; therefore, it

hand, it seems to contrast with the original approach to the merger control, which rested on a standard of proof lower than the one required under article 81 and 82 ET[39].

Moreover, the CFI seems to suggest that the standard of proof is not homogeneous, but it may change, depending on the kind of collusive equilibrium at issue. In particular, since it is easier to demonstrate an increase in the risk of collusion, rather than the shift from competition to collusion, the burden of proof should be higher in the case of creation rather than in the case of strengthening collective dominance. This is especially true in the presence of factors that may impede collusion, because post-merger coordination implies to overcome this further difficulty[40].

However, this difference cannot result in a completely different approach, which would imply a presumption of anti-competitiveness for all merger projects realized in a market already conducive collusion, and which would impose to the merging parties the duty to rebut this presumption, by demonstrating that the notified operation would undermine the coordinative equilibrium[41].

4.3.4 Methodological suggestion

The CFI recognized the pro-collusive role of factors that economic theory and previous case law had already indicated as facilitating collusion. For this reason, the judge analysed the demand evolution and demand volatility, together with fluctuation in market shares, all elements perceived as a proxy of the competitive relationships between firms[42]. Moreover, the analysis of the collusive impact of

---

remarked the need of demonstrating also the causal link between competitive harms and the operation at issue.

[39] A. SCOTT, *"Winter talk by the Fireside?"…cit.*, p. 309.

[40] G. ROBERT, C. HUDSON, *Past co-ordination and the Commission Notice on the Appraisal of Horizontal Mergers*, in *ECLR*, 2004, p. 165.

[41] G. ROBERT, C. HUDSON, *Past co-ordination and the Commission Notice…cit.*, p 165. The main idea behind the presumed anti-competitiveness of mergers realized in markets already affected by coordination is that, in this framework, concentrations cannot be competitive neutral, but they can either increase the pre-existent dangers of coordination (hence, a prohibition is strictly required) or destabilize collusion (with a probatory onus incumbent on the parties).

[42] Several scholars lament the absence of any reference to the product homogeneity. S. STROUX, *Collective Dominance under the Merger Regulation: a Serious…cit.*, at p. 744 notes

vertical integration indirectly suggests that the real impact of market factors on collusion may change, depending on the specific market equilibrium at issue.

The CFI also emphasized the need of carefully examining the factual background by an appropriate methodology, in order to reduce the uncertainties of the preventive merger control[43].

4.3.5 Conclusions

In the *Airtours* judgment, for the first time, European Court expressly indicated the minimal contents of collective dominance.

The tripartite test, which stresses the importance of balancing behavioural incentives that often point in different directions, implies to refuse static and structural-based approaches, which would also be inconsistent with the prognostic nature of merger control.

The required conditions listed by the CFI seem to rest on the economic concept of tacit collusion: transparency, lack of incentive to abandon collusion, and absence of external forces destabilizing coordination match the concept of collusion as elaborated by the Game Theory.

By building the legal concept of collective dominance around the economic category of tacit collusion, the CFI automatically excluded any references to the unilateral effects. In this way, it corrected the expansive trend coming from the appealed decision and restored the harmony between collective dominance and both normative rules and jurisprudential evolution. An opposite solution, intended to address the unilateral effects by the means of collective dominance, would have resulted in a misinterpretation of the ECMR, which dealt only with creation or strengthening of dominance: "*The Court of Justice has interpreted «dominance» to include «collective dominance» and has identified tacit collusion scenarios as collective dominance, but has thus far gone no further to address entrenched oligopoly*"[44].

Moreover, the inclusion of unilateral effects would also contrast with the tendency to create homogeneity between abuses and

---

that in the *Gencor* and in *Kali und Salz* cases, European Courts had already recognized the crucial role of products' homogeneity in a collusive equilibrium.

[43] A. OVERD, *After the Airtours appeal*, in *ECLR*, 2002, p. 376

[44] E. FOX, *Collective dominance and the message…cit.*, p. 57

mergers: with regard to this, in the *Kali und Salz* case, the CJ, by following the interpretative trend which had characterized Article 82, excluded from the merger contest every reference to unilateral price increases realized by a non-dominant firm. By recognizing that unilateral effects are different from dominance, there lacks any basis for applying the category of collective dominance to this kind of anticompetitive effects[45].

In summary, as for the substantive aspects, the *Airtours* judgment summarized and clarified the results reached in the case law about coordinated effects. As for the probatory ground, on the contrary, there is a discontinuity with the previous approach, because judges remarked that prohibitions rest on the convincing evidence that the merger at issue, in all probability, will result in collective dominance[46]. Therefore, after *Airtours*, scholars have been wondering whether, given this remarkable increase in the burden of proof, an effective prohibition is still feasible[47].

In conclusion, despite the clarification on both the substantial and probatory issues connected to collective dominance, some questions remained open: it was not clear, for example, whether the listed conditions, defined as necessary for collusion to arise, were also sufficient, and if they could apply to abuses of dominance too; it was also unpredictable how competition authorities will apply them.
To solve all these doubts, most of the scholars have auspicated the adoption of merger Guidelines, at the scope of consolidating the evaluative praxis of the Commission and providing a guide for the merger parties[48].

---

[45] S. B. VOLCKER, *Mind the Gap: Unilateral effects analysis arrives in EC Merger control,* in *ECLR*, 2004, p. 408. He suggests overcoming this difficulty by defining the relevant market in a narrow way, as to include only the products of the merger entities.
[46] A. NIKPAY, F. HOUWEN *Tour de force or little local turbulence?...cit.*, p. 202.
[47] See A. SCOTT, *"Winter talk by the Fireside?"…cit.*, p. 298 and 313; J. VICKERS, *Merger Policy in Europe: retrospect and prospect*, in *ECLR*, 2004, p. 459.
[48] S. STROUX, *Collective Dominance under the Merger Regulation: a Serious…cit.*, p. 747; E. FOX, *Collective dominance and the message…cit.*, pp 57-58; H. HUSER, F. DEPOORTERE, *Substantive enforcement standards in Horizontal mergers under the EC Merger regulation*, in *Antitrust,* Fall 2002, p. 46.

Chapter 5

Recent Developments – Following the *Airtours* Saga

5.1 Introduction

The Airtours judgement caused important consequences in the EU competition law about both abuses and merger. On the one hand, the wide debate that took place around the *Airtours* case, resulted in a movement of reform in the European system of merger control. On the other hand, the effect of changes in the antitrust policy for mergers also involved the abuses of dominance, on several grounds. First, the Commission and Courts have relied on the same conditions of mergers for demonstrating the existence of collective dominance. Moreover, it raised a debate about reforming the enforcement of article 82, by adopting a more effects-based approach, which would be particularly important for the matter of collective dominance.

In the next paragraphs, I will analyse the normative and jurisprudential evolution in the European antitrust policy about collective dominance in both the *ex ante* and *ex post* perspective.

5.2 The legislative evolution in the merger control

After the *Airtours* case, the legal debate about the possibility of addressing all the post-merger anticompetitive effects by the category of dominance developed parallelly to the politic debate about the opportunity of changing the original merger test and adopting a SLC-type standard.

In the Green Paper on the ECMR review, the Commission remarked the effectiveness of dominance in the merger control and, therefore, denied the existence of a gap in the current standard[1].

The whole framework, where the project of reviewing the ECMR was taking place, changed in a few months, as a consequence of the *Airtours*, *Schneider*[2], and *Tetra Laval*[3] judgements, which overturned the original merger prohibitions. Although different one from the other, all these statements demonstrated that the standard of dominance, in its current application, was inadequate for the merger control[4]. The Commission, in fact, at the scope of avoiding post-merger anticompetitive effects, sought to expand, by an inductive

---

[1] *Green Paper on the review of Council Regulation (EEC) N. 4064/89*, 11 December 2001. According to the Commission, the unilateral effects matter is merely theoretical: "*While interesting as hypothetical discussion, the Commission has so far not encountered a situation of this kind*" (§ 166).

For a comment on the *Green Paper*, see M.G. EGGE, M.F. BAY. J.R. CALZADO, *The New EC Merger Regulation: a Move to Converge*, in *Antirust*, Fall, 2004, pp. 37-41 and M.J. REYNOLDS, *Merger Control in the European Union: Draft Reforms to the EC Merger Regulation*, in *Antirust*, Spring 2003, pp. 77-83.

[2] Court of First Instance, case T-310/01, 22 October 2002, *Schneider Electric SA* v. *European Commission*, in *ECR* 2002, II-4071.

The CFI annulled the merger prohibition by lamenting, among the other things, that the assessment of the merger's impact on each involved market had been neither careful nor specific. In that occasion, the judges remarked the need of a whole application of the merger standard, by paying attention to both the likelihood of creating or strengthening dominant positions and the expected negative impact on the market functioning. For a summary on this case, see S. O'KEEFFE, *Court Scathing of Commission's merger analysis*, in *EU Focus,* 2002, pp. 4-5.

[3] Court of First Instance, case T-5/02, 25 October 2002, *Tetra Laval BV* v. *European Commission*, in *ECR*, 2002, II-4381.

The CFI stated that the danger of anti-competitive effects, although plausible in principle, had been not supported by enough allegations and remarked the Commission's duty to demonstrate, in the case of prohibition, the real likelihood, rather than the mere potentiality, that the merged entity will act in an anticompetitive manner. For a comment on this case, see J. TEMPLE LANG, *Two Important Merger Regulation Judgments: the implication of Schneider and Tetra Laval- Sidel*, in *E.L. Rev.*, 2003, pp. 263-269.

[4] According to P. SABBATINI, *Concentrazioni. Le tre sconfitte della Commissione in Tribunale*, in *Mercato concorrenza regole*, 2003, pp. 156-161, the CFI judgements demonstrate that the test of dominance could not deal with both unilateral (*Airtours*) and multilateral effects (*Schneider*) and could not focus on the real matter of the merger control, that is, the price increase (*Tetra Laval*).

Analogously, T. WESSELY, *EU Merger control at a turning point – The Court of First Instance's Schneider and Tetra Judgments*, in *Zwer*, 2003, p. 319 interprets these judgements as the CFI's reaction, by an increase in the probatory thresholds, to an inadequate merger control.

method, the concept of dominance beyond its traditional and reasonable limits and, in this way, it reduced both legal certainty and decisions' predictability.

In this contest, the CFI's annulments increased the pressures towards reviewing the entire merger control system[5], and gave rise to a broader debate involving the substantive test, the opportunity of strengthening the role of economic analysis, the lack of regularity in the decisional process, the role of judicial review, and the need of increasing the probatory thresholds in the case of prohibition[6].

In particular, evidence of a lacuna about the treatment of the anti-competitive but not collusive oligopolistic mergers[7], raised the need of changing the current approach, by adopting an SLC-type standard or by expanding the parameter of dominance.

5.2.1 Towards a change: the 2002 Horizontal Merger Guidelines and the 2002 Proposal for a new Merger Regulation

In the debate on the ECMR review, the Commission joined a conservative view. In its Proposal, in fact, it suggested expanding the

[5] The CFI intervention in this debate confirms the propulsive role of Courts in the development of the European merger control. The need itself of adopting a specific regulation for the process of concentration arose after the *Philip Morris* case [Court of Justice, joined cases 142 and 156/84, 17 November 1987, *BAT* v. *Commission*, in *ECR*, 1987, 4487], where the Court attempted controlling mergers under articles 81 and 82 ET.

[6] See J.L. MCDAVID, *Proposed reform of the EU Merger Regulation: a US perspective*, in *Antitrust*, Fall 2002, pp. 52-55.

[7] This reasoning rests on the substantial difference between dominance and unilateral effects. The concept of dominance, in fact, is built around the idea of monopolistic power, held either by a single firm or by a plurality of economic entities acting in a parallel way; unilateral effects, on the contrary, describe a kind of market power, in terms of ability to raise prices, which does not reach the threshold of dominance and, therefore, is incompatible with the idea of the monopolistic market domain. It follows that the parameter of dominance, although developed for purely monopolistic scenarios, may be expanded to the case of several colluding firms acting as a monopolist, but it is not suitable for all oligopolies. With regard to this, J. FINGLETON, *Does Collective Dominance provides suitable housing for all anti-competitive oligopolistic mergers?*, in *International Antitrust Law & Policy*, 2003, remarks: "*the dominant concept, when applied to oligopoly risks being overly structural* […] *and limiting oligopolistic mergers generally*" (p. 195).

category of dominance and amending the art. 2 ECMR, at the scope of clarifying that it also embraced unilateral effects[8].

The 2002 Horizontal Mergers Guidelines confirmed this perspective. The Commission distinguished three categories of anticompetitive effects: single dominance, collective dominance, and unilateral effects[9], all falling in the category of dominance. However, this change appeared only formal: the category of dominance, which still constituted the legal parameter for controlling mergers, could embrace only '*paramount market positions*' and coordinated effects— that is, single and collective dominance- but not the other, softer forms of market power[10].

In any event, by distinguishing anti-competitive effects coming from collusion or coming from the individual conducts of non-dominant firms, the Commission indirectly recognized that different dynamics may take place in oligopolies[11].

---

[8] In the *Proposal for a Council Regulation on the control of concentrations between undertakings*, in *OJ*, 2003, C-20/4-57, the Commission suggests this amendment to article 2: "*For the purpose of this Regulation, one or more undertakings shall be deemed to be in a dominant position if, with or without coordinating, they hold the economic power if influence appreciably and sustainably the parameters of competition, in particular prices, production quality of output, distribution or innovation, or appreciably to foreclose competition*".

[9] *Commission notice on the appraisal of Horizontal Merger under the Council Regulation on the control of concentrations between undertakings*, in *OJ*, 2002, C-331/18-31, here § 11.

[10] According to S. STROUX, *US and EC Oligopoly control*, Kluwer Law International, Les Hague, 2004, the choice of maintaining dominance would lead to "*highly artificial constructions and contortions of the term «dominance» to make it cover the anticompetitive effects which can raise from a merger*" (p. 231).

[11] The dividing line between single dominance and unilateral effects, on the contrary, appears less justifiable. They rely on the same kind of market power and are different only about the power degree, which is higher in the case of dominance, to the point of resulting in the substantial independency of the concerned firms, while it is less strong but still significant in the case of unilateral effects. With regard to this, the American scholars wonder "*what is in a single dominant firm that cannot be captured simply by an application of unilateral effects? Is not the case that a dominant firm has the incentive and ability to raise its prices alone, without regard to what other competitors in the market do?*". See, L. COPPI, M. WALKER, *Substantial convergence or parallel path? Similarities and differences in the economic analysis of Horizontal Mergers in US and EU Competition Law*, in *Antirust Bull.*, 2004, p. 134.

In the current economic and politic contest, the Commission's view appeared as an attempt of clarifying, beyond reasonable doubts, that the European merger control dealt with all kinds of anti-competitive merger effects, even the ones apparently excluded from the category of dominance.

Moreover, some scholars perceived the choice of maintaining the parameter of dominance as an attempt of protecting competitors more than competition. The

The Commission identified four necessary conditions for the coordinated effects: coordinating mechanism, transparency, credible enforcement, and absence of countervailing powers. Moreover, the Commission emphasized the analysis of the pre-existent market functioning and argued, with regard to this, that mergers taking place in already collusive markets are improbable to be authorized, unless there is evidence that the operation at issue might destabilize the original equilibrium[12]. This approach reveals a persistent structuralism in the merger control, which focused on the current competitive environment, rather than on the predictable post-operation changes. Moreover, it is not clear, in the light of this proposal, how to discern competitive from collusive markets and whether the Commission alluded to the collusion properly-called or simply to the mutual firms' influence in determining their market strategy[13].

Finally, the Commission suggested adopting an economic-based approach in the merger control at the scope of addressing the methodological failures evident in the *Airtours*, *Tetra Laval* and *Schneider* cases, and accommodating also the efficiency gains[14].

---

centrality of dominance, in fact, would expresses the idea that positions of market leader constitute the main source of competitive harms; therefore preserving a balanced market would be the best way to preserve competition. See L. COPPI, M. WALKER, *Substantial convergence or parallel path…cit.*, pp. 151-152.

[12] *HMG* para 41. This provision results in the rebuttable presumption of anti-competitiveness for mergers taking place in collusive contest and, consequently, in the inversion of the probatory burden. This approach is inconsistent with the traditional merger policy, which is built around the default compatibility of the notified operations with the common market (see, on this point, Part 3 – Chapter 1), and "*positively invites the Commission to blur the distinction between the state of premerger competition in an industry and how the merger affects that competition. This could seriously prejudice analytical clarity and predictability*" (S. BISHOP, A. LOFARO, *A legal consensus? The theory and practice of coordinated effects in EC merger control*, in *Antirust Bull.*, 2004, p. 243). According to the As, this approach would result in a regulatory use of the merger control, against the pre-existent positions of market power.

[13] S. BISHOP, A. LOFARO, *A legal consensus? The theory…cit.*, p. 232 note that the prevalence of the last interpretation would unreasonably expand the merger enforcement as far as to presume that every oligopolistic merger will cause anti-competitive effects.

[14] S. BISHOP, D. RIDYARD, *Prometheus Unbound: increasing the scope for intervention in EC Merger Control*, in *ECLR*, 2003, remark the risk that "*such theory will be applied mechanistically*[…]. *Whilst theoretical models provide a valuable framework for the competitive assessment of mergers, any theory of competitive harm must be tested rigorously against the facts*" (357). As for the risk of post-merger coordination, the *Notice* reported directly the

5.2.2 The new Merger Regulation

Among the various proposals on how to change the merger standard, the Council chose an intermediate solution between dominance and a SLC-type test: "*A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market*"[15].

Although this parameter mentions the market dominance and maintains the same words of the previous standard (*Significant Impediment to the Effective Competition*, SIEC)[16], the mere replacement of the old test resulted in a new substantive criterion, compatible with a wide range of interpretations.

According to most of the scholars, the new merger regulation is a one-limbed test, which seeks to ascertain only whether the notified operation might or not result in a significant impediment to the effective competition[17]. Dominance, on the contrary, would represent

---

Airtours' conditions, without clarifying if they will be assumed as exhaustive or solely as the first step of the merger control.

N. VON HINTEN.REED, P.D. CAMESASCA, *European Merger Control: Tougher, Softer, Clearer*, in *ECLR*, 2003, perceive the *HMG* as the proof that the Commission learned the Airtours' lesson, but they recognize that "*In summary, therefore the inclusion of the noncollusive oligopoly category in the Notice is capable of introducing a new and potentially far-reaching increase in the degree of intervention in EC merger control. No convincing case has been made for such increased intervention, and at the very least this aspect of the Notice will generate substantial costs in the form of greater uncertainty*" (p. 360). These remarks may be expanded to the matter of collective dominance, for identity of *ratio*.

[15] *Council Regulation (EC) No 139/2004*, in *OJ*, 2004, L-24/1-22, article 2 (3).

[16] According to K. FOUNTOUKAKOS, *A New Substantive Test for EU Merger Control…cit.*, the choice of the word "impede", instead of "lessen", "hinder" or "restrict", "*underlined the Council's determination both to maximise continuity and legal certainty by the preservation of existing language, and at the same time not to simply copy the language used in other jurisdictions but to preserve the "European" character of the new test*" (288).

[17] While scholars concur that the merger control under the new test will focus only on one element -the SIEC- it is still debated whether the previous test was a one or a two-limber test, i.e. whether the Commission was required to show only the likelihood of a post-merger dominance or also its capability of affecting competition. The CFI, especially in the last cases, seems to interpret the old test as a sequential, two-part test, although it has never spelt out what the Commission was required to demonstrate under each limb. The Commission, on the contrary, has perceived the reference to the significant impediment to competition as a mere clarification of the concept of dominance, therefore as a part of the first limb. See on these points, F.E. GONZALEZ

a mere example, although the principal and probably the most frequent, of the anti-competitive effects that the regulation intends to address. Although no longer viewed as the necessary condition to prohibit a merger, dominance seems to remain enough to this scope[18]: "*The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned*" (recital 25), in the awareness that "*a significant impediment to effective competition generally results from the creation or strengthening of a dominant position*" (recital 26).

This continuity with the previous standard of dominance, now perceived merely as the most frequent embodiment of a SIEC, preserves the validity of the case law handed down under the old regulation[19]. At the same time, the SIEC, aiming at predicting the

---

DIAZ, *The Reform of European Merger Control:* Quid novi sub sole*?,* in *World Competition*, 2004, p. 186; and C. VELJANOVSKI, *EC merger policy after the GE/Honeywell and Airtours*, in *Antitrust Bull.*, 2004, p. 178.

[18] According to E. FAGERLUND, *Collective Dominance under EC Merger Regulation No 139/2004*, Lund University, 2005, p. 41 (available at www.jur.lu.se), the evidence of post-merger dominance, however no longer necessary for the prohibition, would decrease the burden incumbent upon the Commission to demonstrate the likelihood of SIEC.

On the contrary, J. SCHMIDT, *The new ECMR: "Significant Impediment" or "Significant Improvement"?* in *CML Rev.*, 2004, states that "*not every creation / strengthening of a dominant position does necessarily significantly impede effective competition: a merely marginal increase in the market share of a dominant undertaking might actually hardly affect competition at all*" (p. 1567). Consistently with the interpretation of SIEC and dominance as cumulative conditions, the A remarks that the harms of competition are the highly likely, rather than an unavoidable, consequence of a dominant position.

While such an approach, in my view, is reasonable in the case of strengthening dominance, because the mere increase in the market share cannot support the sure inference of a SIEC, it is less sustainable in the case of creation of dominance. With regard to this, it is hard to believe that a merger resulting in a single or collective dominance, without any positive, countervailing effects, would be cleared under the new Regulation.

[19] C.B. GOLDFARB, *Telecommunications Act: Competition, Innovation, and Reform*, in *Practising Law Institute-PAT*, 2005, pp. 726-727 foresees that the Commission will not change its evaluating method, since at first it will verify whether the notified operation will create or strengthen a dominant position and, in case of positive answer, it will assume the emersion of a SIEC. Analogously, S. MAUDHIUT, T. SOAMES, *Changes in EU Merger Control: Part 2*, in *ECLR*, 2005, note that "*Even if it can be expected that the Commission will, from now on, focus more on the competitive harm of a proposed transaction rather than on the dominance issue, its decision practice should not dramatically change, since it*

merger impact on the market functioning, pays more attention to the dynamic rather than to the structural market data and adopts, for this reason, a method more consistent with the nature of the mergers' scrutiny[20]. Moreover, this flexible standard does not sacrifice legal certainty: reference to the '*significant*' harm of competition, in fact, implies proving the real likelihood of anti-competitive effects capable of affecting the market functioning in a significant or substantial way[21]. The new European parameter for the merger control, despite the texteual difference, mirrors the SLC test: they seem to share the same meaning and the same nature of economic-based tests[22].

Most of the commentators argue that the new merger regulation may achieve its planned purpose of improving the merger control, making it more effective and more predictable, but they also recognize that the real wideness of the change will depend, rather than on the new formal wording, on the accommodated factors and on the assessment criteria applied case-by- case[23].

---

had already interpreted the dominance test in such a way that the market power issue was the main focus of its assessment" (p. 77).

[20] K. FOUNTOUKAKOS, *A New Substantive Test for EU Merger Control…cit.*, remarks: "*The Merger Regulation now contains not only a pure competition test but also one which is drafted in terms that reflect accurately the underlying objectives of competition policy*". In his view, the dominance test was not inadequate in itself, but "*the language of the old test was not optimally suited to merger analysis*" (p. 289).

[21] K. FOUNTOUKAKOS, *A New Substantive Test for EU Merger Control…cit.*, pp. 291-293, notes that the new merger regulation, by its effects-based parameter, prohibits all mergers with a significantly adverse impact on competition. "*In our view, however, this change should not be characterised as a "lowering" of the intervention threshold but, at most, as a "widening" of the scope of the test*" (p. 292). Furthermore, he highlights that the "*significance*" element "*is not an unknown quality*", being already used under the old merger regulation and still strongly correlated to the dominance parameter.

[22] See S. ZHU, *Converge? Diverge? A Comparison of Horizontal Merger Laws in the United States and European Union*, in *World Competition*, 2006, pp. 636-637; I. KOKKORIS, *Do Merger Simulation and Critical Loss Analysis Differ under the SLC and Dominance Test?*, in *ECLR*, 2006, pp. 249-252.

[23] A. RIESENKAMPFF, *The New EC Merger control test under Article 2 of the Merger Control Regulation*, in *Northwestern Journal of International Law and Business*, 2004, p. 716.

5.2.3 The 2004 Horizontal Merger Guidelines

The 2004 Horizontal Merger Guidelines (hereinafter, HMGs)[24], by following the same Regulation's perspective of innovating without breaking with the previous tradition, recognized the centrality, but the non-exclusivity, of dominance.

As for the analytical method, the Commission emphasized the need of assessing all factors affecting the market functioning, taken as a whole[25], and suggests following a logic sequence, starting from the market definition. The first stage of the merger control is typically a structural exam, which focuses on the current market shares and on the foreseeable changes in the market concentration. These elements are simply *prima facie* indicia about the impact of the merger at issue on the market competiton[26]. Ultimate decisions, in fact, presuppose the preventive exam of other variables, such as the countervailing power of customers and both actual and potential rivals[27].

Moreover, the new system of merger control implies balancing negative and positive effects of the merger at issue on the competitive

---

[24] *Guidelines on the assessment of horizontal mergers under the Council Regulation in the control of concentrations between undertakings*, in *OJ*, 2004, C-31/5-18.

[25] Instead of building the final decisions on a mechanical check list exercise, the Commission opts for an overall assessment, in the knowledge that "*not all the element will always be relevant to each and every horizontal merger and it may not be necessarily to analyze all the element of a case in the same detail*" (§ 13).

[26] "*Market shares and concentration levels provide a useful first indication of the market structure and of the competitive importance of both the merging parties and their competitors*" (§ 14) and that the HHI levels "*may be used as an initial indicator of the absence of competition concerns*" (§ 21).

[27] HMG, §§ 64-67.

The examination of potential competition implies the assessment of the possible entry. Entry is relevant for excluding the risk of anti-competitive effects insofar it is likely, timely and sufficiently strong.

Entry is plausible if it is profitable at the pre-merger price level. Specific markets features, such as economies of scope and scale, long-terms contracts, vertical integration, targeted pre-emptive discounts, high sunk costs, expected decline in the demand, may significantly reduce the likelihood of entry (§§ 69-73)

As for the time, the critical benchmark of two years after the merger may be expanded or reduced, depending on the case (§ 74).

The assessment of entry's sufficiency requires a very careful exam of the role of the merging firms in the market. If they control essential assets, for example, it is difficult that entry, although possible and timely, will be profitable and, therefore, that it will be able to restore the competitive condition, by reporting prices to the pre-merger level (§ 75).

process or, lately, on the consumers welfare. In this perspective, the New Merger Regulation, at para 29, directly addresses the efficiencies matter[28] and the HMGs define the cumulative conditions that allow apparently anti-competitive mergers to escape the prohibition[29].

Finally, specific rules address the issue of failing firms, by focusing on the absence of causality between the merger at issue and the negative market changes[30].

---

[28] The direct mention of the efficiency gains, and the express Commission's duty of including such a variable in the whole operations' assessment may be viewed as precautionary remarks, aimed at eliminating every doubt about their relevance. Even in absence of this prevision, the Commission would be required to take account of the eventual efficiencies: the new test, in fact, applies an effects-based model of analysis, built around the final merger's impact on the relevant market, which implies, by definition, the balance between positive and negative consequences. "*In so far, the SIEC test and the consideration of efficiencies can be said to be «complementary»*" (J. SCHMIDT, *The new ECMR…cit.*, p. 1571).

[29] Post mergers efficiencies are relevant insofar as they are passed on consumers and offset the negative effects. According to the Commission, such a condition is highly improbable in the case of monopoly or market power positions close to monopoly (§§ 79-84). They also must be timely and incapable to be achieved, to a similar extent, by less anti-competitive alternatives (§ 85). Where possible, the most effective efficiency defence should quantify both efficiencies and the resulting benefits on consumers (§§ 86-88). Harms and advantages to consumers appear as two faces of the same scope of protecting or preserving consumers welfare. While the US antitrust policy is clearly intended to pursue this scope, the EU policy seems to catch the more general scope of protecting competition in itself, as the economic process that may ensure the highest total welfare. These two purposes, although not incompatible, only partially overlap: protecting competition is a means to reach consumers welfare too, but the focus on the sole consumers' welfare sometimes is an obstacle for protecting the long run market's efficiencies. Therefore, it seems more reasonable to assess the efficiencies gains on the ground of the parameter typically applied in the merger control (i.e. preserving the correct market functioning), rather than mechanically importing the US standard.
The express provision of an efficiency defence represents something new for the merger control; however, even under the old system, the Competition authorities could evaluate such a variable, by applying the second part of the merger test, about the impediment to the effective competition.
The real impact of the efficiency defence on the final decisions is unpredictable: by reminding the US experience on this point, we can conclude that their impact is likely to be minimal, especially because the preventive demonstration of all required conditions is extremely difficult. See, on this respect, A. RIESENKAMPFF, *The New EC Merger control test…cit.*, p. 726.

[30] According to the new rules, mergers are not likely to create or increase a market power position when they involve an insolvent firm in such financial difficulties so that it be would imminently driven out the market; when there is no alternative purchaser, and when, absent the acquisition, the failing firm's asset would exit the relevant market. (§§ 89-91).

In defining how horizontal mergers may affect competition, the new guidelines focus on the dichotomy between coordinated and non-coordinated effects and, by departing from the previous approach, include the paramount market position in the category of non-coordinated effects, given their basic homogeneity.
Since the analysis of non-coordinated effects falls out of the scope of this work, in the next pragraphs I will focus only the category of coordianted effects.

5.2.3.1 Coordinated effects

The EU merger control addresses the danger of post-merger coordination in the double perspective of creation and strengthening, and links prohibitions to the serious suspect of a durable market change, inferred from the whole exam of all elements affecting the firms' behaviours. Following the economic theory's devise, the Guidelines draw an exemplificative list of factors that may affect, to a certain extent, both the creation and the sustainability of collusion.

Moreover, the Commission intends to follow a multi-phases approach, which deals with the question of reaching an agreement, monitoring deviations, deterring defections, and assessing the possible outsiders' reaction.

5.2.3.1.1 Reaching the terms of coordination

The tacit alignment between firms is a market equilibrium based on the observation and the adaptation to the each other's conducts, thus it presupposes the ability of figuring out what kind of strategy– whether collusive or non-collusive- rivals are implemening. With regard to this, the less complex and the more stable the market function is, the easier is to reach a common understanding. It follows that factors such as high concentration levels, homogeneous product, stable price and stable demand conditions, symmetries on market shares, on capacity and on costs are usually deeemed to facilitate the alignment.

On the other hand, even when markets work in a more complex way, coordination cannot be excluded at all, because firms may be engaged in practices, such as information exchanges or the establishment of trade associations, that facilitate collusion[31].

5.2.3.1.2 Monitoring deviations

Since the convenience of collusion involves the long-run profits, firms are constantly attracted to deviate, by setting lower prices at the scope of increasing the short run profits. Stable collusion, therefore, has to deal with this matter, and can survive to the internal disruptive tendency only when there are specific conditions ensuring timely detection of defections. Basically, the behavioural nature of collusive equilibrium, built around the tacit and reciprocal adaptation strategies, implies a sufficient degree of transparency, necessary to raise and to monitor collsuion. The ability of identifying conducts resulting from defections is necessary and complex: especially in the case of large and frequent fluctuation of demand and costs, in fact, market transparency is indispensable for understanding if the eventaual changes in the firms' strategies result from defections or from the mere evolution of the economic environment.

The inference of transparency is in itself the consequence of a whole assessment, which summarizes and interprets a set of market features, in the knowledge that some elements may positively affect this finding.

The centrality of transparency for tacit collusion may push firms to artificially increase it, by engaging in practices that, without necessarily violating the antitrust rules, may improve the mutual observability[32].

5.2.3.1.3 Punishing defections

The mere possibility to detect deviations would be meaningless in the absence of a credible punishment to be timely activated against defections: the threat of retaliation, by implying a temporary depature

[31] HMGs §§ 44-48.
[32] HMGs §§ 49-54.

from the collusive equilibrium, annuls the expectation of short-run supra-collusive gains and makes coordination more convenient than competition.

To be workable, retaliation must be credible and timely, features scrutinized case-by-case, in the light of the specific functioning of the coordinated equilibrium. Generally speaking, retaliation usually implies a temporary abandonment of collusion, it usually results in short run losses for every coordinating firm, therefore its credibility depends on the balance between losses from retaliation and benefits from the subsequent return to a collusive equilibrium[33].

Moreover, while a rapid reaction reduces the incentive to defect, when retailiation requires significant time to be implemeted, it could not effectively deter from cheating.

Finally, in the case of multi-market presence, retaliation may take place either in the same market of the defection or in another one, where the same firms are active[34].

5.2.3.1.4 Reactions of outsiders

The collusive equilibrium may be undermined by external competitive pressures, capable of jeopardizing the expected outcome of coordination. This risk is stronger when collusion implies under-production and non-coordinated firms or t potential competitors have enough capacity to restore the market competition.

5.3 The first step toward a normative change in the area of abuses: the 2005 Discussion Paper on the exclusionary conducts

The definition of collective dominance in the *Discussion Paper* reflects the *Compagnie Maritime Belge* formula: two or more firms, even if legally independent, may present themselves in the market as a

[33] It seems to me that the benefits involve two dimensions: on the one hand, the future and eventual establishment of the same coordinative equilibrium, that will presumably be more stable after defections have been punished; on the other hand, the general incentive to collude, since implementing retaliation signals that coordination may be maintained in the long period, despite the possible defections, and, therefore, it strengthens the reputation mechanisms.

[34] HMGs, §§ 52-55.

unitary economic entity and may adopt a common policy. If they can behave independently from competitors, consumers, and clients, they are collectively dominant.

According to the Commission, proof of collective dominance relies on the presence of market factors, such as agreements or structural links or the market structure itself, which may connect the concerned firms and may allow them to behave in a parallel manner. By focusing only on oligopolistic parallelism, the Commission conditioned the inference of collective dominance to the demonstration of the *Airtours*' conditions, but did not clarify how those criteria, handed down in the merger control, may adapt to the *ex post* scrutiny.

Moreover, consistently with the *TACA* judgement[35], the Commission remarks that proof of collective dominance requires proof of collusion about the suspected conduct, while proof of collusion about all market variables is not required.

Finally, by quoting the *Irish Sugar* judgement, the Commission admitted that, in the case of exclusionary conducts, there may exist unilateral abuses of collective dominance.

5.4 The new paradigm of collective dominance in the current decisional practice

5.4.1 The merger control

The recent changes in the merger control have been also influencing the decisions handed down under the old framework. In assessing the merger projects, in fact, the Commission has been following a two-stage procedure, which moves from a purely structural exam, focused on market definition and market concentration, and seeks to predict, by a dynamic-based analysis, the impact of the merger at issue on the market functioning. As for the first stage, although there is no threshold of market shares connected to the presumption of collective dominance, all prohibitions have involved duopolies with high market shares[36].

[35] Court of First Instance, joined cases T-191/98, T-212/98 to T-214/98, 30 September 2003, *Atlantic Container Line AB* v. *Commission*, in *ECR*, 2003, II-3275.

[36] In this respect, N. LEVY, *European Merger Control Law: a guide to the Merger Regulation*, Matthew Bender, London, 2004, § 14, reports that the critical threshold is usually a joint

When market shares appear compatible with the post-merger coordination, the Commission evaluates whether the involved market is transparent enough to allow firms to tacitly reach a common understanding and to monitor with each other. This assessment is carried out case-by-case a level, in the awareness that the necessary level of transparency depends on the specific market features and on the current relationships between firms. In evaluating whether the market is sufficiently transparent, the Commission takes account of a range of factors, such as the complexity of the market functioning and the nature of market transitions. Since transparency is perceived as a *sine qua non* for tacit collusion, the Commission, in its current decisional praxis, has been excluding the likelihood of post merger coordination when the market is not enough transparent[37].
In the other cases, the Commission passes to examine other market conditions affecting the likelihood of collusion, such as demand fluctuations, symmetries between firms, past collusion, links or other connecting factors. This examination is also connected to the identification of credible and effective mechanisms of retaliation, which would ensure stable collusion. In several cases, it was the evidence of impracticable retaliation that impeded the prohibition[38].

In any event, after *Airtours*, the Commission has never prohibited a merger for the likelihood of coordination. This outcome probably results from two factors: on the one hand, the stringent requirement of the collective dominance, now expressly defined as cumulative; on the other hand, an increase in the burden of proof incumbent upon the Commission in the case of prohibitions.

After *Airtours*, the Commission only in one case—*BAT/ETI*–found evidence of out all necessary conditions to prohibit a merger, but

---

market share above 60%, but only in the case of duopoly. On the contrary, there is no collusion concern if three or more firms jointly held that market share.

[37] See, with regard to this point, European Commission, case M.2499, 21 November 2001, *UPM- Kymmene/Haindal*, in *OJ*, 2002, L-233/38-61; European Commission, case IV/M.3197, 29 July 2003, *Candover/Cinven/Bertelsmann-Springer,* in *OJ*, 2003, L-207/25; European Commission, case M.3625, 13 July 2005, *Blackstone/Acetex*, in *OJ*, L-312/60.

[38] See, for example, European Commission, case M.3512, 15 September 2004, *VNU/WPP/JV*, [available in www.europa.eu] where the nature of market transactions was viewed as impeding retaliation.

parties submitted several commitments that, according to the Commission, could annul the competitive concerns[39].

In the last years, the previous tension between the Commission and the CFI on the assessment of collective dominance reappeared, although with overturned roles: the Commission authorized a merger project that the CFI annulled, by inserting in its judgement important remark about co-ordinated effects.

5.4.1.1 *Impala*

5.4.1.1.1 The original EC decision

On July 2004, the Commission cleared a merger project between Sony Corporation of America and Bertelsmann AG, which would result in a 50-50 joint venture, called Sony-BMG[40].

The merger at issue involved three product markets: first, recorded music, divided in two segments based on genre and compilation; second, the online music, which includes the wholesale market for licences for the online music, and the retail market for distribution of online music; third, the music publishing.

In the statement of objections the Commission argued that the operation at issue in all probabilities would have been incompatible with the common market because it would have strengthened the collective dominant position of the bigger-sized firms (the 5 'majors', Sony, BMG, Universal, EMI, and Warner).

The Commission focused, in particular, on the market of recorded music market, at the scope of figuring out whether, during the last three or four years, the five music majors had held a dominant position and had coordinated their price policy. Econometric analysis

---

[39] European Commission, case M.3248, 23 October 2003, *BAT/ ETI*, [available at www.europa.eu]. According to the Commission, the notified operation would have resulted in a duopoly with 80-90% market shares, in a very transparent market, with homogeneous products and mature technology. Moreover, links between firms, in the forms of agreements about production and distribution, would have facilitated both tacit understanding and mutual retaliation.

[40] European Commission, case M.3333, 19 July, 2004, *Sony/BMG*, in *OJ*, 2005, L-62/30-33.

of net wholesale price revealed parallelism in price, and the examination of the price lists (Published Prices to Dealers, PPDs) showed that some indicators could facilitate the alignment of conducts. However, according to the Commission the market was not transparent enough to establish collusion. In particular, the authority remarks that the variability on the discounts campaigns, which were suspected to facilitate collusion, and the heterogeneity of the products, would have made it difficult for firms to monitor each other[41]. Finally, the Commission found no evidence of past retaliation.

By relying on this analysis, the Commission concluded that there was not enough evidence that the five majors held a collective dominant position in the recorded music market[42].
Then, after a brief analysis, it also excluded that the notified merger was likely to create collective dominance.

5.4.1.1.2 The CFI judgement

By quoting the *Airtours* precedent, the CFI confirmed the need of forward-looking and market-specific merger control; however, it also recognized that the analytical approach to the control of oligopolistic mergers is quite different in the case of strengthening of collective dominance. The Commission, in fact, has to demonstrate the pre-existence of collective dominance, before carrying out a prognostic analysis that seeks to predict the future evolution of the market towards collusion.

The CFI remarks, in this regard, that even the Airtours conditions, as theoretical indicators of collective dominance, apply in a different manner in the case of strengthening collusion: "*in the appropriate circumstances,* [they may] *be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to signs, manifestations and phenomena inherent in the presence of a collective*

[41] According to the Commission, heterogeneous products and discounts campaigns decreased the market transparency, because the analysis of rivals behaviours would have necessary implied monitoring each album (§§ 20-21). Therefore, despite the publication of weekly charts, the stability of the common customers base, and the weekly reports about the retail market, according to the Commission, there was not enough transparency to establish collusion (§ 22).
[42] The Commission drew the same conclusion about the wholesale market for licences for online music (§§ 30-31).

dominant position"[43]. In particular, the Court remarks that, even the market transparency, which is deemed a *sine qua non* for tacit alignment, may be shown by indirect evidence.

Therefore, in this perspective, evidence of price parallelism, although in the presence of heterogeneous products, and evidence of stable, high price, despite of a significant fall in demand, "*might, in the absence of an alternative explanation, suggest, or constitute an indication, that the alignment of prices is not the result of the normal play of effective competition and that the market is sufficiently transparent in that it allowed tacit price coordination*" (§ 253).

Then, the CFI analysed the elements of market transparency and retaliation, which were determinative in the assessment of the Commission. According to the judges, campaigns discounts and monitoring of retail prices, together with the publication of weekly hit charts, which provided information on sales for each title, showed that the market was enough transparent. Therefore, the Commission's conclusions on this point were declared "*imprecise, unsupported, and indeed contradicted by other observations in the decision*" (§ 320).

About deterrence and retaliation, the Court recognized, consistently with the economic models of collusion, that it is enough to demonstrate the mere existence of such a mechanism, while proof of its real implementation is not required. When the plea deals with strengthening collective dominance, the authorities may verify "*whether there have been any breaches of the common course of conduct which have not been followed by retaliatory measures*" (§ 468). By moving on these remarks, the judges concluded that the Commission's assessment on retaliation was erroneous.

As a conclusion, the CFI annulled the appealed decision.

5.4.1.1.3 Critical remarks

The case at issue has a remarkable importance for the scope of our analysis, for several reasons. First, it is the only case, after *Airtours*, where the matter of collective dominance has been deeply and carefully analysed, at the scope of clarifying the terms of its applicability. Second, it is the first case where the CFI annulled a

[43] Court of First Instance, T-464/04, 13 July 2006, *Independent Music Publishers and Labels Association (Impala)* v. *Commission*, in *ECR*, 2006. II-2289, here § 251.

clearance decision. Third, it relies on the suspect of strengthening, rather than of creating, collective dominance.

Moreover, the substantive contents of the CFI statement contributed to attract the attention of scholars, who commented the decision at issue on several grounds.

First, some scholars and the court itself remark the excessive weight the Commission put on the past market data, under a backward-looking perspective. Although demonstrating the pre-existence of collective dominance, by a deep analysis, is the logical premise for contesting the post-merger strengthening of collective dominance, in their view, the subsequent analysis about the crucial question of the case–that is, the expected effects in the market-was weak and insufficient[44].

A wide debate also involved the CFI statement that collective dominance could be demonstrated in an indirect way, by a "*mixed series of facts*", or by "*signs, manifestations, and phenomena*" that usually occurred in the case of collective dominance. Several scholars remark that it is not clear what these elements may consist of, and under which circumstances they may demonstrate the existence of collective dominance, because in several cases, the same indicia may be consistent with both collusion and competition[45]. Moreover, the effects of this statement on the subsequent application of collective dominance are quite unpredictable. Some scholars argue that this judgment will lower the rigorous standard fixed in Airtours for prohibitions, with the ultimate result of expanding the area of application of collective dominance[46]. Other scholars, on the contrary, deny that any change will occur, because the Court simply admitted that, in the case of pre-existent collusion, the Airtours conditions may be demonstrated indirectly by empirical evidence: "*it is a question of*

---

[44] Court of First Instance, T-464/04, 13 July 2006, *Independent Music Publishers and Labels Association (Impala)* v. *Commission…cit.*, §§ 525-528. See also G. AIGNER, O. BUDZINSKI, A. CHRISTIANSEN, *The Analysis of Coordinated effects in EU Merger Control: Where Do We Stand after* Sony/BMG *and* Impala*?*, 2006, [available at www.ssrn.com] p. 22.

[45] S.B. VOLCKER, C.O'DALY, *The Court of First Instance's Impala Judgement: a Judicial Counter-Reformation in EU Merger Control*, in *ECLR*, 2006, p. 593.
Similarly, E.A. RAFFAELLI, D. OTTOLENGHI, *La Posizione Dominante Collettiva: Quali Prospettive dopo Airtours?*, in *Concorrenza e Mercato*, 2004-2005, p. 444.

[46] A. TAJANA, *EC Merger Control: Music Publishing*, in *ECLR*, 2006, p. 194.

the mature of the evidence, rather than standard of proof"[47]. The reason is that, in this kind of cases, the Commission deals with an already implemented collusion, and the analysis involves the legal qualification of the existent market reality, rather than the prevision of what it might appear. Therefore, it is possible to rely on indicia, facts, or behaviours that, taken together, may indirectly establish collective dominance. This paradigm applies to mergers suspected to strengthen collusion and to abuses of dominance, but it does not apply to mergers likely to create coordination[48].

On these bases, the Court established a presumption of market transparency, whenever there is evidence of parallel conduct, anti-competitive effects, and other factors usually present in the case of collective dominance. Consequently, under these circumstances, the burden of proof will shift from the Commission to the parties, that are required to provide an alternative reasonable explanation.

The annulment of a clearance decision will also influence the subsequent merger control. Normally, when the Commission authorizes a merger, the parties are faithful that the notified project is consistent with the competition law and, therefore, they implement it. After *Impala*, on the contrary, it is clear that third parties may appeal the clearance decision and the court may annul it. This leads to two consequences: first of all, it might decrease legal certainty; second, it might lead to lengthy analysis about merger, because the Commission, even in the case of authorization, will carry out a careful and detailed examination of the projects, at the scope of reducing the possibility of annulments[49].

---

[47] K. WRIGHT, *Perfect Symmetry? Impala v. Commission and Standard of Proof in Mergers*, in *E.L. Rev.*, 2007, p. 414.

[48] K. WRIGHT, *Perfect Symmetry? Impala v. Commission…cit.*, pp. 414-415, highlights that the *Impala* case is consistent with the previous case law, which requires a higher standard of proof in the case of creation of collective dominance.
Moreover, judges in this case applied the same paradigm of the judicial review adopted for scrutinizing prohibition of mergers; therefore, they seems to suggest that the standard of proof for authorization is symmetrical to that provided fro prohibitions. On this point, see Part 3 – Chapter 1.

[49] A. TAJANA, *EC Merger Control: Music Publishing…cit.*, p. 195.
S.B. VOLCKER, C.O'DALY, *The Court of First Instance's Impala Judgement…cit.*, note that "*from the merging parties' point of view, there is now low certainty that a clearance decision will be permanent*" (p. 595).

The real consequences of the decision at issue will be evident in the forthcoming decisions. The merging parties appealed the CFI judgement before the CJ, which has not yet pronounced on this point, and re-notified the merger project to the Commission, which authorized the merger.

5.4.1.1.4 The new EC decision

After the CFI's annulment, the parties re-notified the joint venture, which had been implemented after the clearance decision. The Commission analysed the merger's impact on all the involved markets and always denied the likelihood of post-merger coordination[50].

In carrying on its analysis, the Commission applied the Airtours conditions and focused on market transparency, retaliation, and countervailing powers. In particular, it analysed, by econometric methods, all market conditions that could affect collusion, and inferred the final assessment from the balance of factors pointing in different directions.

However, this assessment rests on the current market conditions and, in several parts, the Commission itself recognized that significant changes have occurred in the years between 2004 and 2007. In particular, wholesale pricing structure and agreements gained in complexity and diversity, and the majors applied more divergent short and long run strategies than in the past.

The Commission combined these changes, which are hardly compatible with the existence of tacit collusion, with evidence of market conditions impeding the alignment, such as low transparency, and concluded: "*the merger has neither led nor will lead to the creation or strengthening of a collective dominant position* ". In other words, according to the Commission, the cleared and implemented merger had not hindered the market competition. However, it is not clear whether the change in the majors' strategies was the result of the merger, and therefore, the operation at issue, once implemented, actually increased the market competition, or whether it strongly depended from the pendent proceeding before the CFI and the majors' awareness of an antitrust scrutiny on their conducts.

[50] European Commission, case M.3333, 3 October 2007, *Sony/BMG*, in *OJ*, 2008, C-94/19-28.

5.4.2 Abuses of dominant position

5.4.2.1 *Piau*

The last relevant decision on abuses of collective dominance is the *Piau* case, which involves a suspected infringement of both articles 81 and 82 of the Treaty[51].
Piau denounced to the European Commission that the FIFA Statute's rules, which impeded players and clubs using agents not licensed by FIFA, violated articles 81 and 82 ET. After the Piau's complaints, the FIFA partially changed its rules for granting the licenses. As a consequence, the Commission maintained the license requirement, because based on qualitative and non-discriminatory criteria, and recognized that the all the other restrictive provisions were eligible for an exemption *ex* art. 81(3). Conversely, according to the Commission, art. 82 did not apply in this case, because FIFA was not directly active on the market for the provision of advice to players.

The CFI's opinion on this point was different: according to the judges, in the market of services' provision, where players and clubs are buyers, and agents are sellers, FIFA is an emanation of clubs and, therefore, it holds a collective dominant position. By quoting the *Compagnie Maritime Belge* case, the Commission built the proof of collective dominance around evidence of more firms, acting together and behaving in an independent manner. In demonstrating collusion, the CFI relied on the *Airtours* conditions and, consequently, focused on market transparency, on incentives not to depart from collusion and on the lack of outsiders' reactions capable of jeopardising the expected outcome. On this basis, the CFI stated that the FIFA regulations, because of their compulsory nature, were a strong link capable of aligning the market conducts of the association's members. Therefore, it concluded that it was the FIFA itself, rather than its members, that held a collective dominant position[52], but its regulations did not embody an abuse, for the same reason they could be exempted *ex* article 81 (3).

---

[51] Court of First Instance, case T-193/02, 26 January 2005, *Laurent Piau* v. *Commission*, in *ECR*, 2005, II-209.
[52] More correctly, the joined clubs, rather than the grouping association, held a collective dominance in the market.

One of the most interesting aspects of this statement is that the judges, at least formally, linked the proof of collective dominance to the *Airtours* criteria, enacted for the case of collective dominance dealing with the oligopolistic interdependence. For this reason, such a paradigm does not seem to perfectly fit the case at issue, where collective dominance came from contractual links between the football clubs, rather than from the market structure itself. In fact, consistently with peculiarities of the case, the CFI did not examined the market through the *Airtours*' criteria, but inferred the FIFA's dominance from the terms and the strength of its regulations. On the contrary, if the CFI had applied those criteria, probably it would have found no collective dominance, given the presence of more than 200 undertakings active in the relevant market[53].

The main danger coming for such an approach is that, in the willingness of creating a unitary category of collective dominance, the CFI tralatitiously relied on the Airtours formula and ignored the gap between the different kinds of collective dominance and, consequently, the different ways to ascertain their existence[54].

[53] See, on this point, D. WAELBROECK, P.I. COLOMO, *Comments on the Piau case*, in *CMLR*, 2006, p. 1754. *Contra*, T. SOAMES, *Towards a "smart" article 82* – Qui audit adipiscitur, in *International Antitrust Law & Policy*, 2005, pp. 457-493. According to the A, the inference of collective dominance in the case at issue is based only on the market structure, following the same approach adopted in the merger control, with the consequence that "*behaviour which a non-dominant undertaking can lawfully engage in would have the potential of becoming abusive due to the fact that the market may held by a competition agency or court to have certain economic characteristics that give rise to coordinated effects*" (p. 468)

[54] See on this point chapter Part 3 – Chapters 1-2.

PART 2

OLIGOPOLISTIC PARALLELISM IN US COMPETITION LAW

Chapter 1

The Repressive Control of Conscious Parallelism

1.1 Introduction

In the years following the New Deal, US economic policy dealt with market abuses of large undertakings. In that period, the competitive dynamics was characterized by a remarkable asymmetry between undertakings. On the one hand, big-sized firms--which resulted from an economic policy favourable to the Associationism and the dimensional expansion of undertakings--could benefit from significant, competitive advantages; on the other hand, smaller-sized rivals could not effectively compete and, in most of the cases, risked exiting the market.

In this framework, the larger-sized undertakings were perceived as the primary menace for competition; therefore, Congress decided to enact a series of statutes intended to restore the equilibrium among large and small firms and, consequently, to preserve the correct market functioning[1]. Even the knowledge about benefits of expanding the scale of production, especially in terms of output increase, did not reduced the legislative concern toward protection of small business.

The commitment toward commercial equality also affected the competition policy that, since the time of Roosevelt's presidency, had expanded the antitrust enforcement against cartels, perceived as the

[1] For the whole historical background, see R.J.R. PERITZ, *Competition Policy in America: History, Rhetoric, Law*, Revised Edition, Oxford University Press, New York, 2000, (here, p. 147). According to the A., statutes enacted between 1935 and 1938 shared the purpose of equalizing small and large-sized firms in order to promote consumer welfare.

paradigmatic expression of market power[2]. At the same time, new economic theories about oligopolies were rationalizing the intuition that, in this kind of market, cartel-like effects do not presuppose overt communication, but may simply result from mutual observation and adaptation[3].

In this context, Courts also began scrutinizing tacit, oligopolistic parallelism, as a species of the wider category of cartels. This ambitious scope immediately appeared anything but easy, since there was no antitrust rule directly addressing the oligopoly problem. To fill this (apparent) lacuna, competition authorities and Courts suggested three possible means: Sherman Act section 1 and 2, and Federal Trade Commission Act Section 5.

In the debate about conscious parallelism, scholars played an important role and the famous tension between the Chicago and the Harvard schools strongly influenced the antitrust policy on this topic. Because of this osmosis between laws, case law, and theories on conscious parallelism, more evident in the US than in EU system, in the following paragraphs I will examine both the jurisprudential evolution and scholars' theories about the control of conscious parallelism under each of those rules.

1.2 Sherman Act Section 1

Sherman Act Section 1 deals with "*contract, combination* […] *or conspiracy in restraint of trade*". This formulation reminds the common law concept of *agreements*, which is built around three elements: fist of all, unity of purpose, evoked by expressions such as "meeting of minds", "common design", or "mutual assent"; second, plurality of participants; third, coordinative methods[4].

In oligopolistic markets, sometimes there is no evidence that anti-competitive conducts derive from explicit agreements among rivals.

---

[2] A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective: Cases, Concepts and Problem in Competition Policy*, Thomson West, St. Paul, 2002, p. 246; R.J.R. PERITZ, *Competition Policy in America…cit.*, pp. 168-169.

[3] J. SKOCILICH, *Narrower is better- The Third Circuit's latest word on Conscious Parallelism and the problem of Plus Factors: In Re Flat Glass*, in *Vill. L. Rev.*, 2005, pp. 1664-1665

[4] J.A. RAHL, *Conspiracy and the Anti-Trust Law*, in *Illinois L.Rev.*, 1950. p. 752.

Therefore, the formalistic application of Section 1, based on these rigid requirements, may impede an effective and complete antitrust enforcement against poor economic performances in oligopolies[5].

Courts were required to balance the tension between the need of intervening against the collusive outcome resulting from oligopolistic interdependence, on the one hand, and need of alleging proof of intentional or conscious alignment for establishing a section 1 infringement. To overcome this difficulty and to strengthen the antitrust policy against collusion, the Supreme Court suggested several approaches seeking to infer tacit agreements from parallelism of conducts.

1.2.1 The first line of case law: inferring agreements from circumstantial evidence

In order to facilitate proof of section 1 infringements, Supreme Court at first authorized the inference of agreements from circumstantial evidences. Under this approach, proof of express agreements is still essential for successful Section 1 actions; therefore, in the case of tacit collusion, where there lacks by definition any evidence of overt communication, antitrust rule cannot be enforced.

1.2.1.1 *Interstate Circuit*

The *Interstate Circuit*[6] case involved unlawful arrangements between distributors and exhibitors of movies. Interstate Circuit (hereinafter, IC) and Texas Consolidated Theatre (hereinafter, TCT), both exhibitors affiliated with each other, substantially dominated the market where they operated[7] and, by a territorial partition, avoided to directly compete. The suspected conduct concerned a letter whereby a

---

[5] H. HOVENKAMP, *Federal Antitrust Policy – The Law of Competition and its Practice*, 3rd Edition, Thomson West, St. Paul, 2005, pp. 166-167.

[6] *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208 (1939).

[7] According to the Supreme Court, IC held a *de facto* monopoly on first-run picture theatres in six cities of Texas, and TCT did not have any effective competitors for first and subsequent run pictures theatres in several Texas and New Mexico cities. Moreover, contracts involving IC or TCT represented more than 74% of the overall fees paid for movies exhibitions in those territories.

manager of IC and TCT suggested to each distributor inserting specific clauses in their exhibition contracts. In particular, he suggested increasing the minimum price of tickets for subsequent-run shows and prohibiting the exhibition of first-run pictures together with another feature movie[8]. Each distributor included both clauses in his contracts with the subsequent-run theatres and, in this way, carried into effects all recommended restrictions.

In analysing this conduct, the District Court found out two different infringements: on the one hand, a network of vertical agreements between the exhibitors and each distributor; on the other hand, a horizontal agreement between distributors, accused of conspiracy to align their response to the IC suggestion[9]. According to the Court, since the letter clearly indicated all the addressees, each distributor was perfectly aware that the same proposals were sent to all its competitors and that those restrictions would result in a profit-maximising strategy only if unanimously accepted.

The Supreme Court, by focusing its attention on horizontal agreements, partially corrected the appealed judgement: "*While the District Court's finding of an agreement* […] *is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.*[…] *It's elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.*[…] *Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate*

[8] G.J. WERDEN, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust law with Oligopoly Theory*, in *Antitrust L. Journal*, 2004, p. 738, observes that, by this strategy, IC intended to eliminate competition in exhibition with the help of distributors, which were compensated by higher fees for films.

[9] This conducts is usually defined as a 'hub and spoke' agreement, which is characterized by the presence of a firm (cartel manager) that coordinates its suppliers or its customers. The main legal question in this kind of case is whether distributors, by engaging in parallel and identical vertical agreements, also realize a horizontal arrangement infringing Section 1. See A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective…cit.*, p 247.
The same coordinative scheme characterizes the *Toy R Us* case (*infra*).

commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act" (226-227).

On these bases, the Supreme Court considered *unavoidable* the finding of a conspiracy infringing the Sherman Act Section 1, because only previous concertation among rivals could explain that parallelism[10].

Scholars noted incongruence in this judgement because, in the first part, the Supreme Court seems to state that a conspiracy may exist also in the absence of arrangements, but in the second part, it confirmed the requirement of agreements, although inferred by circumstantial evidences. However, this seems to be an apparent tension, since in the first passage the Supreme Court clearly alluded to express or formal agreements[11]: while an agreement is still perceived as *condicio sine qua non* for section 1 infringement, the plaintiff is no longer required to demonstrate the presence of express agreements.

1.2.1.2 *Theatre Enterprises*

A few years after *Interstate Circuit*, the Supreme Court analyzed another case of suspected conspiracy in the movies distribution. In the *Theatre Enterprises* case[12], the plaintiff, who owned a suburban Baltimore movie theatre, brought an action for treble damages and injunctions against some producers and distributors of movies. He alleged a conspiracy to limit the first-run pictures to downtown theatres and to exhibit in the suburban theatres only the subsequent-

---

[10] G.J. WERDEN, *Economic Evidence on the Existence of Collusion…cit.*, pp. 738-739, contests the statement that the IC proposal was profitable for each distributor only in the case of an unanimous acceptance, because the Court did not demonstrate the divergence between collective and individual interests, on which the reasoning itself was based.
Analogously, G.A. HAY, *Oligopoly, Shared Monopoly and Antitrust Law*, in *Cornell L. Rev.*, 1982, pp. 460-461, remarks that parallel behaviours were individually rational. In his view, the oligopoly structure of market affected individual profit-maximizing strategy and led each firm to take account of the likely reaction of rivals. In this framework, according to Hay, the alleged conduct resulted from the oligopoly functioning, rather than from agreements.

[11] E.M. FOX, L.A. SULLIVAN, R.J.R.PERITZ, *Cases and Materials on U.S. Antitrust in a Global Market*, 2nd Edition, West Thomson, St. Paul, 2004, p. 147.

[12] *Theatre Enterprises Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

run movies. According to the petitioner, each distributor refused to sell his first-run pictures by knowing that the others were acting in the same way.

The Supreme Court, in assessing whether the alleged parallelism resulted from independent actions or from agreements, stated: "*Business behaviour is admissible circumstantial evidence from which the fact finder may infer agreement. But this Court has never held that proof of parallel business behaviours conclusively establishes an agreement or* […] *that such behaviour itself constitutes a Sherman Act offence. Circumstantial evidence of consciously parallel behaviour may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely*" (540-541).

Each distributor justified his refusal by alleging evidence that the exhibition of first-run movies in suburban theatres would have been an unsuccessful operation, and that higher revenues came from the downtown theatres, which competed with the suburban ones[13]. Since every firm would be worth off by dealing with the plaintiff, the finding of parallel conducts, according to the Supreme Court, was not a conclusive evidence of agreements, but reflected individually rational choices.

Several scholars concurred with the Supreme Court, by observing that the competitive nature of the alleged conducts left no space for inferring conspiracy[14]. Other scholars remarked that the theoretical background of this decision was still the common law idea of conspiracy and freedom of contract[15].

---

[13] According to G.J. WERDEN, *Economic Evidence on the Existence of Collusion…cit.*, p. 745, these argumentations, however economically questionable, were not legally unreasonable in the normative framework of that period.

[14] G.A. HAY, *Oligopoly, Shared Monopoly…cit.*, p. 461.

Similarly, P.E. AREEDA, H. HOVENKAMP, *Antitrust Law – An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, Vol. VI, 2nd Edition, 2002, p. 191. They note that in this case success of the plan did not require common actions: "*the most plausible view of the fact of* Theatre Enterprises *suggested that each distributor's decision would not depend on what its rivals did*"(p. 70); therefore, oligopolistic conducts were not interdependent.

[15] R.J.R. PERITZ, *Competition Policy in America…cit.*, p. 201.

With the *Theatre Enterprises* case, "*the formative period of agreement decision ended*"[16] and the jurisprudence about conscious parallelism drew three conclusions: first, concerted actions do not require direct exchanges of assurances; second, Courts can infer agreements from circumstantial evidences suggesting that the alleged conduct more likely results from coordination than from individual actions; third, conscious parallelism–in terms of conscious interdependence and mutual adaptation—let alone, does not infringe section 1[17].

Consequently, independent reactions to the same market conditions, although resulting in uniform behaviours and leading to sub-optimal economic outcomes, are not enough to prove an infringement of Section 1[18]. Since proof of agreements is still required, this judgement innovates only on the probatory grounds, by expanding the realm of practicable means to infer agreements.
Moreover, the implicit equivalence between conscious parallelism and oligopolistic interdependence stressed the role of market structure as a possible cause or a facilitating factor of collusion, and influenced the subsequent debate.

1.2.2 Conscious parallelism and antitrust laws in the scholars' debate

The first jurisprudential trend about conscious parallelism clearly reflects the Harvardian paradigm of "structure-conduct-performance"[19]: evidence of cartel-like effects, absent any proof of express agreements, was justified by the intuition that, in oligopolies, concertation does not imply formal exchanges of assurances, or that the "*«meeting of the minds» does not require meeting of the bodies*"[20]. In this markets, the awareness of mutual influence and the knowledge that competition may decrease individual profits, naturally would

[16] W.E. KOVACIC, *Antitrust Policy and Horizontal Collusion in the 21st Century*, in *Loyola Consumer L. Rep.*, 1997, p. 100.
[17] W.E. KOVACIC, *Antitrust Policy and Horizontal Collusion…cit.,* p. 100; A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective…cit.*, p. 255.
[18] D.F. SHORES, *Narrowing the Sherman Act through an Extension of Colgate: the Matsushita case*, in *Tenn. L. Rev.*, 1988, p. 277.
[19] N.G. LEVIN, *The Nomos and Narrative of Matsushita*, in *Fordham L. Rev.*, 2005, p. 1672.
[20] J.A. RAHL, *Conspiracy and the Anti-Trust Law…cit.*, pp. 758-759.

raise a "*habit of doing business which produce non-competitive parallelism*"[21].

By anticipating the Turner's opinion, this reasoning highlighted limits and possible failures coming from the application of Section 1 to behaviours that, according to a certain economic theory, are natural and substantially unavoidable in oligopoly.

1.2.2.1 Turner and Structuralism

In *Theatre Enterprises*, judges admitted that oligopolistic parallelism may be consistent with both competitive behaviours and collusion; therefore, evidence of alignment, taken alone, could not demonstrate an infringement of Section 1.

Turner moved from this judgement to figure out whether the concept of agreement, required under Section 1, is broad enough to include the conscious parallelism which characterizes oligopolies[22].
In examining oligopolistic pricing, Turner observed that the basic mechanism is very close to that used in a market with a large number of undertakings: in both cases, in fact, sellers set prices and output in a way to maximize their profits under the current market conditions. Because of their ontological interdependence, oligopolists naturally take into account one more factor–the competitors' reaction to the individual price changes–that lacks in competitive structures, where firms are price-takers and individual actions do not affect rivals.

According to Turner, "*oligopoly price behaviour can be described as individual behaviour –rational individual decision in the light of relevant economic facts- as well as it can be described as «agreement»*" or, in other words, non-competitive prices result solely from the individual awareness that it is better not to compete. Therefore, "*it seems questionable to call the behavior of oligopolists in setting their prices unlawful when the behavior in essence is identical to that of sellers in a competitive industry*". Different outcomes would reflect different market conditions: the specific variable affecting the oligopolistic setting of profit-maximizing prices–the mutual influence of individual choices–would be the only cause of supra-competitive prices. Finally,

[21] J.A. RAHL, *Conspiracy and the Anti-Trust Law…cit.*, p. 760.
[22] D.F. TURNER, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, in *Harv. L. Rev.*, 1962, pp. 665-706.

Turner observed that the opposite solution would be inconsistent with the current interpretation of Section 2: "*If monopoly and monopoly pricing are not unlawful per se, neither should oligopoly and oligopoly pricing, absent agreement of the usual sort, be unlawful per se*"[23].

Moving from these premises, he concluded that if conscious parallelism and non-competitive, oligopolistic pricing are not unlawful, then the mere interdependency of price decisions is not a conspiracy *ex* Section 1.

Furthermore, according to Turner, remedies provided for Section 1 violations would be ineffective against interdependent prices. On the one hand, injunctions would result in the order not to consider the price decisions of competitors or to equal prices to marginal costs, consistently with the teachings of the perfect competition model. However, both orders result impracticable[24]. On the other hand, dissolutions or divestiture of the dominant firms would definitely solve the problem of oligopolistic pricing, by acting on the market structure, but they would indirectly confirm that it is the oligopoly itself, rather than the behaviours of firms, the primary source of sub-optimal results. Consequently, "*the finding of liability on the ground of conspiracy is dubious at best*"[25].

By expanding this reasoning to exclusionary conducts, Turner arrived at completely different conclusions. While oligopolistic pricing reflects the market structure, thus it cannot establish conspiracy, exclusionary parallelism, on the contrary, implies active collusion between undertakings. In this perspective, behaviours intended to drive a rival out of the market, to impede its entrance or to strengthen the monopoly power, lacking of individual rationality and causal links with the market structure, presuppose a previous agreement among competitors. Moreover, condemning this type of behaviour as a Section 1 violation would not give rise to remedial

[23] D.F. TURNER, *The Definition of Agreement under the Sherman Act…cit.,* pp. 666-667.
[24] D.F. TURNER, *The Definition of Agreement under the Sherman Act…cit.,* pp. 668-670. The first kind of injunction, in his view, imposes such an irrational behaviour that full compliance would be virtually impossible; the second is not practicable, because it requires the quantification the marginal costs and the constant control about the respect of obligations. It also raises the need of preserving firms from the risks of bankrupt, which naturally derives from prices equal to marginal cost.
[25] D.F. TURNER, *The Definition of Agreement under the Sherman Act…cit.,* p. 671.

problems, because an injunction, with negative contents, may be easily understood and implemented[26].

1.2.2.2 The opposite view: the influence of the Chicago School and the Posner's theory about conspiracy

After the *Theatre Enterprises* decision, Courts and most of the scholars, by emphasizing the link between conducts and market structure, remarked that structural remedies were the only way to deal with oligopolistic behaviours.

Against this belief, other scholars began highlighting the significant difficulties of creating and maintaining collusion. Stigler, in particular, demonstrated that cartels are instable structures, constantly menaced by the short run profitability of defections. Because of the difficulties to enforce both express and tacit collusion[27], "*the conspiracy must recognize its weakness: it must set prices not much above the competitive level so the inducements to price-cutting are small, or it must restrict the conspiracy to areas in which enforcement can be made efficient*"[28].

In this new economic framework, which questioned the cartels self-maintenance, the evaluative approach to oligopolistic performances radically changed and new theories appeared.

Professor Posner, in particular, suggests solving the issue conscious parallelism by applying the theory of cartels: in his view, tacit and express collusions, which the Structuralism had separated through the theory of oligopolistic interdependency, share the same nature and rest on the same mechanism [29]. In his view, the rationality of both express and tacit collusion depends on a set of factors: elasticity of demand to prices; conditions of entry in the concerned

---

[26] D.F. TURNER, *The Definition of Agreement under the Sherman Act…cit.,* pp. 673- 681.

[27] G.J. STIGLER, *A Theory of Oligopoly*, in *Jour. Pol. Economy*, 1964, pp. 46-48 observes that all solutions abstractly feasible to stabilize cartels are unworkable: by fixing individual market shares, for example, oligopolists may internally stabilize collusion, but, at the same time, they create a mechanism that competition authorities may easily detect. In addition, dividing the market in geographical areas or in categories of clients is a mechanism that, even if kept secret, may be destabilized by external factors, such as demand fluctuations.

[28] G.J. STIGLER, *A Theory of Oligopoly...cit.*, p. 46.

[29] R.A. POSNER, *Oligopoly and the Antitrust Laws: a Suggested Approach*, in *Stan. L. Rev.*, 1969, pp. 1562-1606.

market; costs of collusion, in the double form of costs of coordination (that depend on the number of sellers and on the differences in products and costs of the involved firms) and costs of enforcement (that concern the mechanism for preventing, detecting, and punishing cheatings). Since the attractiveness of collusion is limited by its costs and since costs directly depend on the number of sellers, oligopoly appears as a necessary condition of collusion (the less the number of the involved firms is, the more the convenience of collusion). However, this condition, taken alone, is not sufficient, because does not eliminate the tendency to defect. This knowledge generates two consequences: "*first, that oligopolists cannot be presumed always or often to charge supracompetitive prices. Like atomistic sellers, they must (with an exception shortly to be noted) collude in one fashion or another and the costs of collusion will frequently exceed the returns. Second, it seems improbable that prices could long be maintained above cost in a market, even a highly oligopolistic one, without some explicit acts of communication and implementation*"[30].

According to Posner, both tacit and express coordination always requires intentional actions: the basic mechanism of tacit collusion, in fact, reflects the contractual scheme of proposal and acceptances, realized by behaviours, rather than by formal or express negotiations[31].

Against the *Theatre Enterprises* formula, which denies the equivalence between concerted actions and conspiracy, Posner reminded the legislative intention of prohibiting, under Section 1, agreements to gain monopolistic profit by jointly setting supra-competitive prices. The substantial identity of both effects and purposes between explicit and tacit collusion should lead to an equal treatment: whether Section 1 is the appropriate means against overt cartels, the same rule has to apply against tacit, anti-competitive arrangements.

The most relevant problem of this approach concerns the possible inference of conspiracy, as an essential requirement for Section 1 to

[30] R.A. POSNER, *Oligopoly and the Antitrust Laws…cit.*, p. 1573.

[31] R.A. POSNER, *Oligopoly and the Antitrust Laws…cit.*, p. 1576. According to Posner, if each seller reduces his output in the expectation that rivals will act in the same way, there is a meeting of minds or a mutual understanding which reflects concerted, rather than unilateral, actions.

apply, from parallel conducts. With regard to this, Posner listed several kinds of evidence that may confirm the suspect of tacit collusion: systematic prices discrimination[32]; stable excess of capacity on demand[33]; abnormal profits; price leadership[34].

Finally, according to Posner, once collusion is demonstrated, judges can impose both punitive and remedial sanctions and, in the extreme cases, even dissolution (when fines are inadequate to prevent new infringements). In any event, according to Posner, an effective antitrust policy must address the matter of tacit collusion in order to remove and restrain the anti-competitive alignments on prices.

1.2.2.3 Alternative approaches: Markovits

The debate between Turner and Posner about the antitrust policy for conscious parallelism reflects the tension between Harvard and Chicago Schools, between the structural and the behavioural perspectives to look at the same topic. By shifting the emphasis from the market structure to conducts, the policy framework radically changes, leading to a different assessment. The dialectic between these opinions contributed to improve both economic and legal studies about oligopolies and gave rise to alternative proposals.

With regard to this, it is interesting to analyse the approach that Markovits suggested in a series of papers[35]. He contested the

---

[32] Since price discrimination implies monopoly power, evidence of this conduct in oligopolies demonstrates that independent firms collectively exert market power.

[33] According to Posner, reductions of output, as a reaction to demand changes or as an attempt to increase prices, usually implies cuts of capacity. Conversely, maintaining stable capacity, despite the change in the amount of production, would demonstrate the presence of deterrent or punitive mechanisms against defections.

[34] Posner recognized that all these evidences are compatible with a wide range of market conducts, even with non-collusive behaviours, and that the economic nature of this sort of evidence reduces their probatory relevance. R.A. POSNER, *Oligopoly and the Antitrust Laws…cit.*, pp. 1578-1587.

[35] R.S. MARKOVITS, *Oligopolistic Pricing Suit, the Sherman Act and Economic welfare*: Part I, *Oligopolistic Price and Oligopolistic Pricing: their Conventional and Operational definition*, in *Stan. L. Rev.*, 1974, pp. 493-548; Part II, *Injurious Oligopolistic Pricing Sequences: their Description, Interpretation and Legality under the Sherman Act*, in *Stan. L. Rev.*, 1974, pp. 717-771; Part III, *Proving (Illegal) Oligopolistic Pricing: A Description of the Necessary Evidence and a Critique of the Received Wisdom about its Character and Cost*, in *Stan. L. Rev.*,

equivalence between non-competitive and collusive prices, by observing that prices above the competitive level can result either from competitive advantages (as in the case monopoly power legally reached) or from collusion. Equalling those phenomena could lead to the erroneous inference of conspiracy.

Moreover, Markovits distinguished 'natural' from 'contrived' oligopolistic pricing: natural oligopolistic prices are the direct consequence of the oligopoly functioning, and result from the individual adaptation to the market conditions, in the awareness that colluding is more profitable than competing. Contrived oligopolistic prices, on the contrary, reflect a process whereby each player seeks to influence the expectations of its rivals, by signalling the intention of punishing their non-cooperation or rewarding their alignment[36].
Since natural oligopolistic pricing involves neither agreement nor anti-competitive threats, it does not fall under Section 1, although a prohibition would be desirable[37]. On the contrary, in the case of contrived oligopolistic pricing, workable menaces or rewards manifest the existence of an agreement, element that justifies a prohibition under section 1[38].

The conflict between Markovits and Posner's views, therefore, concerns primarily the establishment of agreements on the basis of parallel conducts: according to Posner, for inferring an agreement, it is enough to demonstrate conscious parallelism and the expectation of a mutual alignment to realize an anti-competitive scope. According to Markovits, on the contrary, both the statutory language and the case

---

1975, pp. 307-331; Part IV, *The Allocative Efficiency and Overall Desirability if Oligopolistic Pricing Suits*, in *Stan. L. Rev.*, 1975, pp. 45-60.

[36] R.S. MARKOVITS, *Injurious Oligopolistic Pricing Sequences…cit.*, p. 721 or, explained in terms of oligopolistic margins, R.S. MARKOVITS, *A Response to Professor Posner*, in *Stan. L. Rev.*, p. 923.
R.A. POSNER, *A Reply to Professor Markovits*, in *Stan. L. Rev.*, 1976, p. 908 strongly criticizes the idea of contrived oligopolistic pricing, because it would represent a theoretical, rather than a real, phenomenon.

[37] R.S. MARKOVITS, *Injurious Oligopolistic Pricing Sequences…cit.*, p. 738; R.S. MARKOVITS, *A Response to Professor Posner…cit.*, pp. 933-934. While the notion of natural, oligopolistic prices seems to remind the Turner's theory, the remark about the opportunity of a prohibition makes the Markovits' view on this point closer to the Posner than to the Turner's opinion.

[38] R.S. MARKOVITS, *Injurious Oligopolistic Pricing Sequences…cit.*, pp. 740-744.

law exclude the inference of conspiracy from conscious parallelism[39]. Moreover, in the Markovits' view, the method suggested by Posner to demonstrate tacit collusion is extremely complicated and probably impracticable, because is based on economic, and often ambiguous, evidence[40].

1.2.3 The joint effect of case law and doctrinal debate on the subsequent evolution

The statements of the Supreme Court about the possible inference of conspiracy from parallel conducts raised a wide debate concerning the oligopoly problem. Moreover, the tension between Harvard and Chicago Schools demonstrated that there may be different solutions for the matter of conscious parallelism, depending on the basic assumptions of each theoretical approach and on the policy purposes behind the antitrust control.

This theoretical debate strongly affected the subsequent case law. Courts continued assessing conscious parallelism under Section 1, consistently with Posner's opinion, and continued looking for evidences of tacit collusion; at the same time, they refused to infer conspiracy from mere parallelism, especially because of the ambiguity of economic evidences[41].

From the mid-1970s and especially in the first 1980s, several authors suggested new approaches to oligopolistic parallelism.

---

[39] R.S. MARKOVITS, *A Response to Professor Posner…cit.*, p. 935.

[40] R.S. MARKOVITS, *Proving (Illegal) Oligopolistic Pricing…cit.*, pp. 310-314 suggests demonstrating oligopolistic pricing by the comparison with the prices set in the same market but at a different time, or in similar markets at the same time. Another way would be to demonstrate the retaliation of a seller against a lower-price competitor. Both cases rest on the comparison with the hypothetical, highest non-oligopolistic price that a seller would have charged in the absence of restrictions.
According to R.A. POSNER, *A Reply to Professor Markovits…cit.*, p. 913, it would be impossible to determine this parameter.

[41] J.E. LOPATKA, W.H. PAGE, *Economic Authority and the Limits of Expertise in Antirust Case*, in *Cornell L. Rev.*, 2005, pp. 677-678; R.D. MARKS, *Can Conspiracy Theory Solve the 'Oligopoly Problem'?*, in *Maryland L. Rev.*, 1986, p. 430. The scepticism of Courts about this inference is confirmed by M.M. BUNDA, *Monsanto, Matsushita and "Conscious Parallelism": Towards a Judicial Resolution of the "Oligopoly Problem"*, in *Washington Univ. L. Rev.*, 2006, p. 181.

Hay, in particular, noted that economic theories linked collusive results either to the presence of market so prone to collusion that the oligopolistic interdependence would be enough for a successful coordination, or to the implementation of specific practices intended to remove the impediments to collude. He also remarked that Courts had focused their attention on the requirement of agreements, and gave a wide definition of this category, capable of including the behavioural convergence coming from the oligopoly functioning. In this way, they had substantially equalled agreements and meeting of minds, but "*although there is nothing conceptually repugnant in labelling such perceived interdependence as a «meeting of the minds» implying the presence of an agreement, major equitable and practical concerns arise when section 1 liability is attached to behavior that is not plausibly avoidable*"[42]. In other words, under this method, it is substantially impossible to discern when non-competitive results are imputable solely to the market functioning and when they depend on the conduct of firms.

With regard to this, Hay suggested applying the criterion of *indirect collusion*: this expression defines a conduct aiming at removing the obstacles to coordination by the adoption of facilitating practices. Evidence of this kind of behaviour, in his view, would demonstrate the existence of culpable conducts, therefore, would generate antitrust liability[43].

In summary, Hay suggests that, for section 1 to apply, something more than oligopolistic parallelism has to be demonstrated. This approach, by relying on the jurisprudential reluctance to prohibit pure parallelism, facilitated the establishment of a jurisprudential trend that attacks the oligopolistic alignment only if accompanied by other indicia of collusion.

1.2.4 The alternative doctrine: 'parallelism plus'

The rejections of all claims about section 1 infringements when the alleged proofs involved only parallelism, made clear that, for a successful action, the plaintiff needed to allege further elements.

---

[42] G.A. HAY, *Oligopoly, Shared Monopoly…cit.*, p. 466.

[43] G.A. HAY, *Oligopoly, Shared Monopoly…cit.*, pp. 468-470.
Analogously, J. KATTAN, *Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment*, in *Antitrust L. J.*, Fall 1994.

The '*parallelism plus*' doctrine began developing parallelly to the other tendency: on the one hand, Courts sought to bring tacit coordination under the control of Section 1, by admitting the inference of conspiracy from indirect evidence; on the other hand, they sanctioned conscious parallelism only if it was supported by further allegations of collusion.

The *American Tobacco*[44] case demonstrates the simultaneous development and the intersection between these doctrines.
Some producers of cigarettes were accused of conspiracy to monopolize a part of the tobacco industry and to stabilize prices above the competitive level. Firms active in this market held high, joint market shares, were linked by long-term relationships, were perfectly aware of their common interests, and parallel behaved. The Court also found evidence of preventive announcements about price increases, made by one competitor and implemented by all the concerned firms.
According to the Supreme Court, "[It] i*s not the form of combination or the particular means used but the result to be achieved that the statute condemns*. […] *Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are* […] *relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy.* […] *The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified*" (809-810).
Therefore, illegal conspiracy is the synthesis of parallel conducts and practices facilitating the alignment[45].

The basic idea behind the 'parallelism plus' approach is that an oligopolistic-structured market, however prone to collusion it may be, rarely can ensure in and by itself stable and durable coordination.

[44] *American Tobacco* v. *United States*, 328 U.S. 781 (1946).
[45] L.B. SCHWARTZ, *New Approaches to the Control of Oligopoly*, in *University Pennsylvania L. Rev.*, 1960, interpreted this judgement as an attempt "*to make «price leadership» presumptive evidence of conspiracy between the price leader and his rivals*" (p. 40).

Conversely, successful collusion usually implies active conducts aimed at removing the impediments to collude or at creating a market framework more favourable to coordination. Therefore, the antitrust enforcement should focus on evidence of conducts facilitating collusion and, on this basis, infer conspiracy, even in the absence of formal agreements.

Economic and legal studies began rationalizing this knowledge in the mid-1960s, but a similar intuition, probably unconscious, had already appeared in a series of Supreme Court decisions handed down in the first decades of the Sherman Act application. There are, in fact, two stages in the 'parallelism plus' approach and the dividing line between one and the other is a statement that conceptualized the category of plus-factors.

1.2.4.1 The first stage: the 1920s

In the period of Associationism[46], the Supreme Court pronounced some judgements dealing with those conducts later defined as 'facilitating practices'. Despite the presence of a policy framework favourable to the information sharing and to the cooperation among competitors, the Supreme Court did not ignore the anti-competitive effects of certain practices and often condemned them under the Section 1.

1.2.4.1.1 *American Column & Lumber*

The case at issue involved a trade association joining about four hundreds hardwood producers, active in the Southwest of the United States. Each member was required to provide the association with specific information about its own business and, at the same time,

[46] By the 1920s, trade associations were perceived as private means for the market administration, because, by organizing information exchanges between their members, they could promote collaboration and avoid ruinous competition. The theory of cooperative competition rested on the belief that increasing output was the best profits-maximizing strategy.
For a summary about theories, policies, and case law of that period, see R.J.R. PERITZ, *Competition Policy in America…cit.*, pp. 59-110.

received periodical reports indicating prices and sales that its competitors had realized in every transaction[47]. Moreover, monthly meetings and advice of the trade association about prices and quantity completed the successful alignment of the market strategies.

According to the Court, "*the purpose and the effect of the activities* […] *under discussion were to restrict competition* […] *by concerted actions in curtailing production and in increasing prices* [...] *It constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Anti-trust Act of 1890*" (412).

1.2.4.1.2 *Maple Flooring*

A few years later, the Supreme Court examined a similar case involving a trade association of lumber and flooring manufactures[48].

The association at issue was intended to collect the information that each member provided, and to organize it in weekly reports for the joined firms. In deciding this case, the Court stated that "*competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction*" (583).

The Supreme Court recognized the positive effects potentially deriving from information exchanges and denied that, at least in the case at issue, they could facilitate agreements[49]. Moreover, absent

---

[47] *American Column & Lumber* v. *United States*, 257 U.S. 377 (1921).
According to the Supreme Court, these reports intended to facilitate agreements and detect defection from the common path (410-411).

[48] *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563 (1925).

[49] The Supreme Court deeply examined the information exchange, to figure out their effective influence on individual behaviours, and concluded, in this regard, that the method of disclosure was incompatible with collusion, because information concerned essentially past sales, were disseminated in an aggregate way, and were available to the public. Consequently, the Court excluded the hypothesis of collusion, even if the concerned firms held higher marker share than in the *American Column* case (respectively 70% and 33%). For a comparative analysis of these cases, see A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective…cit.*, pp. 267-272.

evidences of a clear impact on prices, the Supreme Court excluded a Section 1 violation[50].

1.2.4.2 The second stage

By facing the difficulties of showing conspiracy in the case of oligopolistic conducts, judges of the Ninth Circuit, even before the *Theatre Enterprises* judgment, admitted that something more than parallel practices is required for inferring conspiracy. The Court indicated these further requirements by the expression '*plus factors*', defined as elements that "*standing alone and examined separately, could not be said to point directly to the conclusion that the charges of the indictment were true beyond a reasonable doubt, but which, when viewed as a whole, in their proper setting, spelled out that irresistible conclusion*"[51].

By formalizing the concept of 'plus factors', this statement provided a theoretical basis for applying the 'parallelism plus' theory in the subsequent case law about conspiracy.

1.2.4.2.1 *Monsanto*

Monsanto is the first case in which the Supreme Court applied the 'parallelism plus' theory[52].

The case involved Monsanto, a manufacturer of herbal pesticide for corns, and one of its distributors, who brought an action under section 1 by alleging a conspiracy between the manufacturer and the other distributors to fix the resale prices. According to the plaintiff, the scheme of conspiracy also included the retaliation of the non-aligned distributors: since he sold the Monsanto's products at lower prices than the aligned distributors, the manufacturer refused to renovate his distribution contract and the other wholesalers refused to sell him all product he demanded and for the season he needed it.

---

[50] Consistently with the previous case, the Court examined the system of information exchange under Section 1, to verify whether it could have provided the basis for agreement or concerted actions.

[51] *C-O-Two Fire Equipment Co.* v. *Unites States*, 197 F. 2d 489, 493 (9th Circ., 1952).

[52] *Monsanto Company* v. *Spray-Rite Service Corporation*, 465 U.S. 752 (1984).

Monsanto denied any accuse of conspiracy and alleged some business justifications for the refusal to deal.

In solving the crucial question about the possible inference of vertical price-fixing conspiracy from the mere termination of distributive relationships, the Supreme Court confirmed that mere parallelism is not enough to find a section 1 infringement. It its view, "*the correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective*" (768).

According to the Court, evidence of conscious parallelism, take alone, falls short of the Section 1 infringement, but it is necessary to allege further evidence that excludes independent actions. In the case at issue, even if parties had acted as though in agreement and there was indirect evidence of arrangement, in the absence of a manufacturer coercion upon its dealers, there was no section 1 infringement[53].

In commenting this judgement, scholars remarked the establishment of a new and more stringent probatory burden, consistent with both the hostility for applying the *per se* in the case of vertical relationships[54] and the scope of preserving the freedom of individual actors. This statement also seems to contrast with the broad statutory language defining the concept of conspiracy[55].

Many commentators lamented that the negative formulation of this statement–that is, the requirement of evidences excluding independent actions–does not explain what kind of parallel behaviours may integrate an unlawful conspiracy and, therefore, does

---

[53] D.F. SHORES, *Narrowing the Sherman Act…cit.*: "*Absent coercion, words speak louder than action"* (p. 272).

[54] J.B. Mc ARTHUR, T.W. PATERSON, *The effects of Monsanto, Matsushita and Sharp on the Plaintiff's Incentive to Sue*, in *Connecticut L. Rev.*, 1991, pp. 335-338. He also notes a change in the evaluation of vertical restraints: before *Monsanto*, they were lawful if imposed from top to down, after *Monsanto,* if asked by distributors (here at p. 354).
According to D.F. SHORES, *Narrowing the Sherman Act…cit.*, p. 304, this judgment is consistent with the *Colgate* doctrine that allows the inference of vertical conspiracy from indirect evidences only if all proofs point toward collusion.

[55] C.D. FLOYD, *Vertical Antitrust Conspiracies after Monsanto and Russell Stover*, in *Univ. Kansas L. Rev.*, 1985, p. 300.

not provide a clear guide for distinguishing legal from illegal parallelism. In this framework, the only certainty seems to be that plus factors concerning communication or agreements are enough to infer conspiracy[56].

Posner firmly criticises this judgement, remarking in particular that the ambiguous expression '*independent actions*' may induce Courts to identify the category of collusion with that of express agreements and to perceive tacit collusion as an independent behaviour. This would paradoxically result in increasing the burden of proof incumbent upon the plaintiff when the market is more conducive to collusion, therefore when the need of express communications is significantly lower[57].

1.2.4.2.2 *Matsushita*

The *Matsushita* case[58] involved a supposed conspiracy, between Japanese manufacturers of televisions, to fix and maintain high prices in Japan and low prices in the United States. The American manufacturers denounced the predatory scheme and alleged evidence of conspiracy.

The Supreme Court remarked that proof of both unlawful conspiracy and injurious effects is essential for inferring infringements of section 1, and spelt out that "*antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.* […] *Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.* […] *To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence «that tends to exclude the possibility» that the alleged conspirators acted independently.* […] *Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents*" (588).

---

[56] C.D. FLOYD, *Vertical Antitrust Conspiracies…cit.*, p. 301. He remarks that this conclusion is not so different than requiring proof of written or oral agreements on prices: with regard to this, therefore, *Monsanto* would contrast with the previous jurisprudence that had denied the need of proving overt arrangements.

[57] R.A POSNER, *Antitrust Law,* 2nd Edition, University of Chicago Press, Chicago and London, 2001, p. 100.

[58] *Matsushita Electric Industrial Co.* v. *Zenith Radio Corporation*, 475 U.S. 574 (1986).

Resting on this premise, the Supreme Court denied in the case at issue the presence of both plausible motives to conspire[59] and direct evidences of conspiracy. Therefore, "*if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy*" (596-597) [60].

Several scholars lamented the ambiguity of the enacted parameter, which would make the final statements almost unpredictable. This standard would require, on the one hand, evidence that tends to exclude independent actions and, on the other hand, proof of the reasonableness of collusion in the presence of conflicting inferences. This would generate a significant inconsistency, because, under the first proposition, judges can submit to a jury only those cases of conspiracy where independent actions appear improbable; under the second, on the contrary, they can submit all cases consistent with the inference of both conspiracy and independent actions[61].

This statement is remarkably influenced by the specific conduct at issue (price cutting, defined as "*the essence of competition*"[62]) and reflects the policy purpose of reducing the evaluative mistakes

---

[59] According to the Supreme Court, predation is a high-risk conduct because it implies the sacrifice of immediate profits in the expectation of monopoly gains when rivals will exit the market. While immediate losses are certain, future profits depend on the capability of firms to monopolize the market and to maintain this power as long as to recoup the losses and get additional revenues. Predation, therefore, is improbable as an individual strategy and would be substantially impracticable in a collective way, because the incentive to cheat exacerbates all those obstacles.
By applying this reasoning to the case at issue, the Supreme Court handed down that reaching monopoly power was quite improbable and the fact that firms could not obtain this result in two decades of the asserted operations would demonstrate the absence of conspiracy (588-593).

[60] L. MECKFESS JUDSELON, *Kodak v. Image Technical Services: the Taming of Matsushita and the Chicago School*, in *Wisconsin L. Rev.*, 1993, p. 1648, strongly criticizes these statements on the grounds that Court focus on the economic theory about predation, rather on the factual evidences of predation, and inferred this decision from theoretical, economic models. This deductive method spoiled the overall evaluation because it created the presumption of implausibility of the claim and imposed to Zenith the burden to allege evidence capable to rebut that presumption.
Analogously, D.F. SHORES, *Narrowing the Sherman Act…cit.*, p. 287.

[61] In other words, according to D.F. SHORES, *Narrowing the Sherman Act…cit.*, p. 294, these two sub-criteria would lead to different results.

[62] *Matsushita*, at p. 594.

coming the over-expansion of the liability standard in antitrust cases. Therefore, under the influence of the *Monsanto* precedent, the Court raised the probatory threshold for establishing conspiracy[63], at the scope of eliminating all claims not supported by strong, economic evidence[64]. Furthermore, the Court expanded the *Monsanto* standard to horizontal relationships and, in this way, unified the criterion applied for inferring conspiracy between direct and indirect competitors[65].

1.2.5 The new standard for conscious parallelism and its application in the lower Courts

By the *Monsanto* and *Matsushita* judgements, the Supreme Court sought to clarify which standard of allegation is required to infer unlawful conspiracy. In particular, it clarified two points: first, the final decision, built around the parameter of reasonableness, derives from the balance of evidences consistent with different scenarios[66]. This means that the inference of conspiracy does not rest on a wholly collusive framework[67]. Secondly, in doubtful cases, a claim of

---

[63] M. LEIGH, *Antitrust – High Standard of proof required to Show the Existence of Conspiracy*, in *American J. International L.*, 1986, p. 958; analogously, R. SHERMAN, *The Matsushita case: Tightened Concepts of Conspiracy and Predation?*, in *Cardozo L. Rev.*, 1987, pp. 1335-1336 remarks the departure from the pre-*Monsanto* standard and highlights the evident scepticism around circumstantial evidences in Section 1 actions. According to the A, in fact, if the *Interstate Circuit* case was decided by the *Matsushita* standard, there would be no inference of tacit agreements.
B.S. LEVINE, *Predatory Pricing Conspiracies after Matsushita Industrial Co. v. Zenith Radio Corp.: Can an Antitrust Plaintiff Survive the Supreme Court's Skepticism?*, in *International Lawyer*, 1988, p. 541 argues that the real scope of the Supreme Court was to discourage from bringing antitrust cases about conspiracy, because they are complex, costly and long-lasting.

[64] Several scholars perceived this judgement as an expression of the Chicago School's approach. See L. MECKFESSEL JUDSON, *Kodak v. Image Technical Services…cit.*, p. 1649; D.F. SHORES, *Narrowing the Sherman Act…cit.*, p. 315; E. CREW, *Matsushita v. Zenith: the Chicago School teaches the Supreme Court a Dubious Lesson*, in *Antitrust*, Fall 1986, pp. 11-16.

[65] D.F. SHORES, *Narrowing the Sherman Act…cit.*, p. 304.

[66] See D.F. SHORES, *Narrowing the Sherman Act…cit.*, highlights: "*where an inference of conspiracy or independent action would be equally reasonable*, […] *the judge must weigh the probability of conspiracy against the probability of independent action*" (pp. 294-295).

[67] P.E. AREEDA, H. HOVENKAMP, *Antitrust Law – An Analysis…cit.*, vol. VI, 2nd Edition, 2002, p. 24, note that plaintiff is not required to show that all conducts point

conspiracy is automatically rejected whether the plaintiff alleges evidence of parallel behaviours without any plus factors.

According to several scholars, the resulting increase in the burden of allegation would hinder the antitrust policy towards collusion, which would reserve a more lenient treatment to tacit agreements, although they may be even more harmful than express cartels[68].

In any event, the ambiguity of the new standard for the inference of conspiracy gave rise to conflicting judgments, which reflect the variety of interpretations consistent with that parameter. The most debated questions concerned essentially when and how the *Monsanto-Matsushita* parameter could apply.

1.2.5.1 Antitrust cases covered by the *Monsanto-Matsushita* standard

In determining when claims of Section 1 infringements satisfy the '*tends to exclude*' standard, Courts and commentators suggested a realm of possibilities.

At the one extreme, there is the theory of *universal applicability* of that parameter to all claims concerning section 1 infringements[69]. At the other extreme, there is the theory about the *precautionary nature* of the standard at issue, which would apply only in the presence of serious risks of condemning innocent conducts. This situation would occur, for example, in the case of pro-competitive conducts, such as collective price reductions, which produce the same evidence of unlawful conspiracy (in this case, joint predation). In other words, only those cases that potentially deter positive conducts fall under the '*tends to exclude*' provision[70].

---

toward collusion, because the assessment is based on the parameter of reasonable likelihood.

[68] According to T.A. PIRAINO Jr., *Regulating Oligopoly Conduct under the Antitrust Laws*, in *Minnesota L. Rev.*, 2004, pp. 29-31, tacit collusion would be not only more durable than express collusion (because based on market conditions that naturally lead to coordination), but more difficult to be detected, since there is no need of communication or meeting to reach and maintain a cooperative equilibrium.

[69] N.G. LEVIN, *The Nomos and Narrative of Matsushita…cit.*, p. 1646. This interpretation reflects the opinion of dissenting judges in *Matsushita*.

[70] This interpretation is consistent with the factual framework of *Monsanto*.

A medium approach suggests bringing under the *Monsanto-Matsushita* criterion all cases where, although allegations are compatible with both conspiracy and competitive conducts, the hypothesis of conspiracy appears, for factual or theoretical reasons, less founded than competition[71].

Finally, someone has suggested cumulatively applying these approaches and, therefore, excluding the inference of collusion when specific claim at issue is factually implausible and the concerned behaviour usually enhances competition[72].

1.2.5.2 Possible contents of the *Monsanto-Matsushita* standard

In applying the *Monsanto-Matsushita* standard, Courts needed to clarify the significance of the alleged plus factors for inferring of collusion. With regard to this, the Circuit Courts have interpreted the requirement of plus factors either in a broad and stringent way, or in a narrow and more relaxed manner[73].

Courts following the first approach usually have required the plaintiff to show both parallelism and one or more plus factors that could strengthen the likelihood of coordination against the opposite possibility of independent actions. Once both elements are demonstrated, it arises the rebuttable presumption of collusion. Other Courts, on the contrary, interpreted in a narrower way the need of alleging plus factors and examined those factors in a more flexible way, by focusing, in most of the cases, on their existence, rather than on their effective role in supporting collusion.

The approach to the evaluation of plus factors strongly influences the ultimate decisions, which may radically diverge, even in case of similar factual situations. The comparison between *Williamson oil* v. *Philip Morris* case and *High Fructose Corn Syrup* case appears paradigmatic in this regard.

---

[71] D.F. SHORES, *Narrowing the Sherman Act…cit.*, pp. 294- 295.
[72] N.G. LEVIN, *The Nomos and Narrative of Matsushita…cit.*, pp. 1650-1651.
[73] J. SKOCILICH, *Narrower is better- The Third Circuit's…cit.,* p. 1318.

In *Williamson Oil*[74], the Eleventh Circuit evaluated a claim of conspiracy to fix the wholesale prices[75]. Since the factual and probatory framework was consistent with both collusion and independent actions, the Court applied the *Matsushita* standard and required the allegation of plus factors supporting conspiracy.

Plaintiffs demonstrated parallel prices increases and alleged evidence of mechanisms to communicate with each other, tradition of conspiracy, actions contrary to individual interests, and a system of information sharing.

According to the Court, the alleged plus factors were not indicia of collusion: in particular, the preventive announcement of market strategies constituted a permitted "*dissemination of pricing information* [that] *can have economic benefit*" (1305), rather than a mechanism to increase market transparency and to facilitate both establishment and enforcement of tacit collusion. Moreover, the rivals' alignment to the announced conduct was a "*rational pricing behaviour*" (1307) justified by the current market conditions. In this way, the Court adhered to Turner's opinion and applied the new standard as broadly as to substantially preclude the inference of conspiracy from plus factors.

The Eight Circuit followed the same approach: in *Blomkest fertilizer*[76], the Court dismissed the claim of horizontal conspiracy among potash producers because the alleged plus factor did not rule out the possibility of independent actions[77].

---

[74] *Williamson Oil Company Inc.* v. *Philip Morris USA*, 346 F. 3d 1287 (11th Circ., 2003). For a comment, see D.R. SHULMAN, *Williamson Oil v. Philip Morris: Whatever Happened to Jury Trials?*, in *Sedona Conf. J.*, Fall 2004, pp. 81-91.

[75] The case at issue involved manufacturers of cigarettes. According to the plaintiff, Philip Morris at first tried to raise the price of the discount cigarettes, but it was an unsuccessful strategy because its rivals did not follow it. Therefore, Philip Morris changed its strategy and announced a price cut for its leading brand, at the scope of moving the market demand from discount to premium brands. At that point, its rivals, threatened by the loss of market shares, decided to follow the Philip Morris strategy, by causing a general increase of wholesale prices.

[76] *Blomkest Fertilizer Inc.* v. *Potash Corporation of Saskatchewan*, 203 F.3d 1028, (8th Circ., 2000).

[77] There was an interesting contrast, internal to the Court, about the weight of the alleged plus factors. According to the majority, the specific features of communication impeded any influence on the prices level; moreover the lack of both formal agreements and actions contrary to self-interests excluded the inference of conspiracy. The minority, on the contrary, focused on the market features already conducive to collusion, on

Also the Third Circuit in several decisions adhered to the broad interpretative trend. In *Petruzzi*[78], the plaintiff, who lamented a conspiracy to divide the market, alleged proof of actions contrary to self-interests and, thus, reasonable only by presuming a strategic alignment. This allegation, according to the Court, eliminated all uncertainties about the collusive nature of the conduct at issue.

Similar principles applied in the *Baby Food* case[79], where the Court rejected a claim of conspiracy because there were evidences neither of information exchanges nor of conduct contrary to the individual interest. In other words, no additional factors showed that parallelism was an illegal conspiracy.

An opposite trend characterized the jurisprudence of the Seventh Circuit.

In the *High Fructose Corn Syrup*[80] case, judge Posner observed that American courts had always required direct or circumstantial evidence of explicit agreements among competitors for establishing Section 1 infringements. According to the Court, there are several ways to show the existence of agreements: by testimony, by economic evidence suggesting that markets are not competitively working, and by non-economic evidence, advising that firms agreed not to compete[81].

The plaintiff, in this case, alleged circumstantial, economic evidence about the existence of a market contest favourable to collusion (especially because it was highly concentred, and with homogeneous products), parallel price increases, and stable market shares in the period of alleged conspiracy.

In evaluating whether those proofs satisfied the *Monsanto-Matsushita* standard, Posner explained that "*more evidence is required,*

---

parallel conducts and on facilitating practices, and judged the alleged evidence as enough to infer conspiracy.

[78] *Petruzzi's IGA Supermarkets Inc.* v. *Darling-Delaware Company Inc.*, 998 F.2d 1224 (3rd Circ., 1993).
Defendant was accused of refraining from bidding aggressively on the accounts already served by other defendants.

[79] *In re Baby Food Antitrust Litigation*, 166 F.3d 112 (3rd Circ., 1999).

[80] *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Circ., 2002). The conduct at issue was a suspected conspiracy to fix prices between corn syrup manufacturers.

[81] The emphasis on market functioning and price level reflects the theories of the Chicago School.

the less plausible the charge of collusive conduct" (661). According to the Court, the alleged evidence, although not enough for inferring conspiracy (given their incapability of showing an overt agreement not to compete), suggested that the market at issue was functioning in a collusive way. This knowledge necessarily would affect the evaluation of non-economic evidences–essentially communications among competitors–which, "*considered as a whole and in combination with the economic evidence*" (661), allowed the inference of an express agreement. "*The evidence that we have summarized would have been enough to enable a reasonable jury to infer that the agreement to fix prices was express rather than tacit. The evidence is not conclusive by any means--there are alternative interpretations of every bit of it--but it is highly suggestive of the existence of an explicit though of course covert agreement to fix prices*" (663) [82].

In this passage, Posner relaxed the probatory burden for Section 1 violations, by considering the '*tend to exclude*' standard as fulfilled when the alleged proofs create a strong impression of agreements[83]. In such a case, according to the Court, agreements on price list can result only from express communication. Since, in the case at issue, the alleged communication was ambiguous, they do not allow the inference of agreements.

In the *Flat Glass*[84] case, the Third Circuit balanced these two approaches. In assessing a claim of conspiracy between manufacturers of flat glass, Court considered parallel conducts, awareness of oligopolistic interdependence, and plus-factors. According to the Court, it is necessary to analyse these elements whenever parallelism

---

[82] M.M. BUNDA, *Monsanto, Matsushita and "Conscious Parallelism"…cit.*, p. 203 remarks the different significance attributed in HFCS and in Williamson to similar communication. Such a divergence reflects, on the one hand, opposite theoretical backgrounds (Chicago or Harvard School), on the other hand, differences in market performances: while in HFCS, in fact, the suspect of collusion was supported by evidence of stable market shares, in Williamson, defendants demonstrated significant fluctuations in the individual quota, element that strengthened the plausibility of competition.

[83] W.H. PAGES, *Communication and Concerted Action*, in *Loyola U. Chi. L.J.*, 2007, p. 62.
D.L. MEYER, *The Seventh Circuit's High Fructose Corn Syrup Decision – Sweet for the Plaintiffs, Sticky for Defendants*, in *Antitrust*, Fall 2002, strongly criticises this statement because it "*alters or eliminates the basic Matsushita test when the oligopolistic interdependence is present*" (p. 72).

[84] *In re Flat Glass Antitrust Litigation*, 385 F.3d 350 (3rd Circ., 2004).

is consistent with both collusion and permissible competition. In this way, the Third Circuit upheld the broad interpretation of *Monsanto-Matsushita* standard[85].

In the case at issue, plaintiffs alleged a series of plus factors, such as interests to enter in price fixing agreements, conducts against self-interests, tradition of conspiracy, and communication. The Third Circuit denied any probatory relevance to the first two factors, because, according to the Court, they rarely would show something more than mere interdependency. On the contrary, it attributed pro-collusive significance to communication and tradition of conspiracy, following the same method suggested by Posner in *High Fructose Corn Syrup*[86].

Moving from this basis, the Court concluded that manufacturers had conspired, even if the involved market was in itself not favourable to collusion.

The *Flat Glass* case confirmed that the increase in the burden of proof for the plaintiff, consistently with the *Monsanto-Matsushita* judgement, concerns only those cases of competing inferences. By increasing the importance of economic evidence in the antitrust claims of conspiracy, judges suggested a more equilibrate solution, capable of protecting both defendants, against the erroneous finding of conspiracy, and plaintiffs, against an excessive burden of proof, which would make it impossible to demonstrate collusion[87].

1.2.6 Conscious parallelism and section 1 infringement: the revival of Matsushita in the recent *Twombly* case

Twenty years after the *Matsushita* case, the US Supreme Court examined a claim of conspiracy under Section 1. The case at issue involved the market of local phone and high-speed internet services. According to the plaintiffs, after the 1996 *Telecommunication Act* came in force, four of the so-called *Baby Bell* companies that supplied those services, conspired to restraint trade by two sets of conducts: on the

[85] This approach indirectly confirms that "*The strictures of Matsushita do not apply when a plaintiff provides direct evidence of a conspiracy*" (p. 357).

[86] This is particularly evident with regard to the collusive significance of communications between rivals.

[87] J. SKOCILICH, *Narrower is better- The Third Circuit's…cit.*, p. 1330.

one hand, they engaged in parallel conducts to inhibit the entry of other companies in each of their markets; on the other hand, they agreed not to compete with each other and to allocate customers and markets.

The substantive question of the case was whether the alleged anti-competitive conducts derived from independent decisions or from agreements, express or tacit.

The Supreme Court, by quoting the *Theatre Enterprise* precedent, confirmed that evidence of parallel conducts, standing alone, cannot establish an infringement of Section 1: "*Inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behaviour: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market*"[88].

This ambiguity of parallel conducts raises the risk of false inference of antitrust infringements. For this reason, the plaintiff needs to also allege evidence of plus factors which tend to rule out the possibility of independent actions[89].

This substantive premise is linked to the procedural matter about the amount of evidence the plaintiff needs to allege for stating a Section 1 claim and avoiding a dismissal at the pleading stages. According to the Court, the plaintiff must provide "*enough factual matter* […] *to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirements at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement*" (9)[90].

---

[88] *Bell Atlantic Corp.* v. *William Twombly*, 550, U.S. ___ (2007), 7.
For a critical analysis of this judgement, see R.A. DUNCAN, B.S. McCORMAC, *If It Takes Two Tango, Do They Con spire? Twombly and Standards of Pleading Conspiracy*, in *Sedona Conf. J.*, 2007, pp. 39-55.

[89] In so stating, the Court confirmed the *Matsushita* standard about parallelism plus other factors supporting the collusive scenario.

[90] This passage of the statement seems to contrast with the *Conley* precedent [*Conley* v. *Gibson*, 355 U.S. 41, (1957)] about Rule 8 of Federal Rule Civil Procedure: "*a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief*" (45-46). By reminding all critics about the expression "*no set of facts*", the Supreme Court interpreted the *Conley* precedent in these terms: "Conley *described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival*" (16-17).
Dissenting Judge Stevens and Ginsburg strongly criticized this statement by arguing that "*the* Conley *Court was interested in what a complaint* must *contain, not what it* may

With regard to this, according to the majority, even at the pleading stage, "*an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy* […]. *When allegations of parallel conduct are set out in order to make a §1 claim, they must be placed in a contest that raises a suggestion of a preceding agreement, not merely parallel conducts that could just as well be independent action*" (10) [91].

By applying this standard to the case at issue, the Court rejected both claims, because the suspected conducts were consistent with rational, independent actions[92].

---

contain" (11), therefore, it dealt with the sufficiency of complaint. According to dissenting judges, the prudential approach to dismissing complaints is consistent with the need not to deprive the plaintiff of his right to prosecute and to defend. Moreover, they noted that rules about treble damages seek to encourage the private enforcement of the Sherman Act. Therefore, the Court could dismiss a claim only if no agreement may be alleged at all. Since the plaintiffs alleged evidence of parallel conducts and other indicia consistent with conspiracy [in particular, a statement of Richard Notebaert, chief executive office of one involved companies, saying that competing in the territory of another local incumbent "*might be a good way to turn a quick dollar, but that doesn't make it right*" (*Complaint*, ¶ 42, App.22)] the decision to dismiss the claim contrasts with the scope itself of the Sherman act.

[91] The amount of evidence required at the pleading stage for an action of conspiracy under Section 1 is one of most debated points of the case.

According to the District Court, evidence of parallel conducts, standing alone, are not enough to establish a section 1 infringements, but the plaintiff must allege additional facts that makes parallelism "*suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest*" [*Twombly* v. *Bell Atlantic Corp.*, 313 F.Supp. 2d, 174, 178 (S.D.N.Y., 2003)]. In the case at issue, the judges acknowledged that the alleged conducts were consistent with the economic interest of each player and were a normal way to compete.

The Court of Appeal reversed the original statement, by arguing that "*plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal*". In the pleading stage, it is enough that the alleged evidence includes "*conspiracy among the realm of 'plausible' possibilities*" [*Twombly* v. *Bell Atlantic Corp.*, 425, F. 3d 99, 113-114 (2nd Circ., 2005)].

[92] As for the first claim, according to the Court, "*the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance*" (19). Avoid dealing with the new comers and keeping them out of its own market was consistent with the self-interest of each firm, rather than being rational only under a collusive scheme.

As for the second claim, the choice not enter each other's service territories despite the attractive business opportunities, according to the court, is the direct consequence of the previous, monopolistic regime, which leads firms to sit "*tight, expecting their neighbours to do the same thing*" (21). Moreover, "*firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable*" (22). In any event,

1.2.6.1 The foreseeable effects of this judgment in the antitrust policy about conscious parallelism

In the case at issue, the Supreme Courts needed to balance two conflicting interests: on the one hand, the need to filter frivolous antitrust claims, especially because the antitrust proceedings are very long and expensive; on the other hand, the need not to dismiss founded claims.

As for the first need, the Court raised the amount of allegation required to support complex antitrust claims, by requiring evidence which offers a reasonable hope of successful action. Several scholars contested this point, because it may discourage antitrust actions for conspiracy and anticipates in the pleading stage the typical burden of allegation required in the discovery[93].

As for the second need, the Court focused on the conduct at issue and identified in the agreements the appropriate element to discern founded claims. In this statement it echoes the idea that parallelism is never meaningful in itself, because it is consistent with both perfect competition and collusion: agreement is the critical factor that may distinguish unlawful from innocent parallelism.

In summary, the *Twombly* statement confirms the *Matsushita* standard, therefore, parallel conducts are not enough for inferring conspiracy, but some plus factors have to be alleged. The ultimate result is a clear signal for plaintiffs: antitrust claims of conspiracy resting only on evidence of parallel conducts will be unsuccessful and, in the most of the cases, they will be dismissed before getting the discovery stage. There is, in fact, the reasonable expectation that the lower Courts will apply the *plausibility* standard in the case of parallel conducts and will dismiss claims of conspiracy founded only on parallel conducts.

---

plaintiffs did not allege evidence that competition in the rivals' territory would be the most profitable business strategy that defendants could pursue.

[93] J.H. BOGART, *The Supreme Court Decision in Twombly: a New Federal Pleading Standard?*, in *Utah B.J.*, 2007, pp. 20-22.
According to A.S. BLUMSTEIN, *'Twombly" requires More for Notice Pleading*, in *Tenn. B.J.*, August 2007, pp.14-15, this new standard is potentially applicable in every civil case.

The *Twombly* case is the last step of the jurisprudential trend of inferring conspiracy from parallel conduct and, therefore, of linking the antitrust enforcement of parallelism to the establishment of section 1 infringements. The willingness of attacking only culpable conducts, however, excludes the antitrust control over the anti-competitive, oligopolistic parallelism.

1.2.7 The double relevance of information exchange: as a plus factor and as a Section 1 infringement. The *Todd - Exxon* case

The case law about conscious parallelism made clear that Section 1 infringements, in the typical form of unlawful conspiracy, require either circumstantial evidence of agreements or proof of parallel conducts and specific market factors supporting the suspect of collusion. The range of conducts theoretically compatible with these standards is extremely wide and the dividing line between infringements and proofs sometimes is anything but rigid and evident. The same conduct, in fact, in some cases may constitute only evidence of conspiratorial parallelism, and in other cases, may constitute an infringement in itself.

With regard to this, it is paradigmatic the role of information exchange: in most of the cases about tacit collusion, Court have perceived information exchanges as a plus factor, but sometimes they also have scrutinized this conduct as a suspected conspiracy in itself.

In *Todd-Exxon*[94], for example, the Second Circuit examined a claim of information exchange intended to artificially depress salaries of managerial, professional, and technical (MPT) employees.
The Supreme Court had already admitted that, under Section 1, the cause of action may be directly a system of information exchange, without any need of proposing an action also about the adaptation of the market strategies to the shared data. The plaintiff rested on this jurisprudence and lamented that the conduct of Exxon and of the

[94] *Roberta Todd* v. *Exxon Corporation*, 275 F.3d 191 (2nd Circ., 2001).

other oil companies (periodical meetings to exchange information and to choose a common strategy) constitutes an unlawful agreement[95].

Judges scrutinized the accused conducts under the rule of reason approach: sharing sensitive data, in fact, may facilitate anti-competitive parallelism but, under certain circumstances, may also increase the overall market efficiency, by offering to the firms a set of useful information that prevents erroneous strategies.

The information at issue concerned present, past, and future level of salaries; data were available both in aggregate and for sub-set of 3 firms; and there was no public disclosure: the exchange, in fact, took place during specific meeting where firms discussed about salaries and promised each other to determine them consistently with the obtained information. According to the Court, such a system of information exchange, in a market already prone to collusion[96], had facilitated coordination among competitors.

Finally, since the anti-competitive outcome deriving from those behaviours affected the entire market functioning, the suspected information exchange seemed to present all characteristics of an unlawful agreement.

1.3 Sherman Act Section 2

Sherman Act section 2 deals with "*monopolization*", "*attempt to monopolize*", and "*conspiracy to monopolize*".

Section 2 violations consist of two elements: on the one hand, monopoly power, defined as the power to control market prices; on the other hand, specific conducts intended to monopolize a market.

---

[95] Parallel conducts and information exchanges may result in both agreements to align the market behaviours on prices, and agreements to share information. In both cases, there is a Section 1 infringement, but the object of proof is different: if the plaintiff laments an agreement on price, he is not required to also allege evidence of arrangement to share information; if he laments a system of information sharing, there is no need of demonstrating agreements on prices. See, with regards to this, G.A. HAY, *Horizontal agreements: concept and proofs*, in *Antitrust Bull.*, 2006, p. 909.

[96] Court found out a set of conditions favourable to collusion: few companies holding high market shares, a sufficient degree of product homogeneity and, finally, inelasticity of supply (the Court evaluated the supply elasticity instead of the demand elasticity because this case involved an oligopsony: there was a suspect alignment between employers –demand side– to depress salaries -that is, to lower prices-. Therefore, the conduct at issue manifested a *prima facie* pro-competitive effect).

Moreover, while Section 1, by addressing anti-competitive, concerted conducts, requires by definition a plurality of firms, Section 2 was thought of as a means of attacking unilateral, anti-competitive behaviours.

In this framework, the application of Section 2 to conscious parallelism, may obviate the need of demonstrating agreements among competitors, but raises other kinds of difficulties, especially in terms of application to collective conducts of evaluative parameters originally enacted for individual behaviours. The requirement of monopoly power, in fact, is normally inferred from high, individual market shares (around 70%); therefore, it does not fit oligopolies, because, on the one hand, it is quite improbable that an undertaking, taken alone, may reach that threshold and, on the other hand, that threshold may be reached only by one firm[97]. Moreover, oligopolistic conducts, such as oligopolistic pricing, are perceived, in most of the cases, as a rational and quite unavoidable behaviour, rather than as an attempt to monopolize.

In this scenario, there is no kind of section 2 infringements that, if applied consistently with the traditional case law, may address anticompetitive, oligopolistic conducts. On the one hand, conspiracy to monopolize may address multilateral conducts–since conspiracy implies by definition a plurality of actors–but requires the inference of conspiracy from tacit parallelism, so it raises the same difficulties of Section 1[98]. On the other hand, attempt to monopolize requires the plaintiff to allege not only evidence of market power and relevant conducts, but also probability of successful actions, and specific intent

---

[97] L. GOLDMAN, *Oligopoly Policy and the* Ethyl Corp. *case*, in *Oregon L. Rev*., 1986, p. 91. If the requirement of market power is assessed at the individual level, by relying to the 70% threshold, the possibility itself of finding several dominant firms is excluded by definition.

[98] Several scholars perceive the category of conspiracy to monopolize as a redundant provision, by arguing that every kind of conspiracy can be attacked under Section 1. See, on this point, C.J. GOETZ, F.S. MCCHESNEY, *Antitrust Law – Interpretation and Implementation*, 3rd Edition, 2006, Foundation Press, New York, p. 260; P.E. AREEDA, H. HOVENKAMP, *Antitrust Law – An Analysis…cit.*, vol. IIIA, 2nd Edition, 2002, p. 390. However, the Supreme Court in *American Tobacco* clarified that the overlap is only partial: according to the Court, a conspiracy claim under section 2 "*is different from the crime that is object of the conspiracy*". Judges emphasized that conspiracy to monopolize focuses on concerted action and intent to monopolize, rather than on a conspiratorial scheme. Significant differences, according to the Supreme Court, would involve also the burden of proof, lower under Section 2 than under Section 1.

to monopolize[99]. Demonstrating the reasonable probability that an attempt to monopolize will result in a successful monopolization is never easy, and demonstrating a specific intent is even more complicated, especially in the case of oligopolistic conducts, where the inference should rest only on evidence of parallel conducts.
In this framework, it is quite impossible to control oligopolistic conducts under section 2.

1.3.1 Scholars' proposals

At the aim of overcoming the difficulties coming from the traditional application of Section 2, scholars suggested the 'shared monopoly' theory[100].

This theory recognizes that in a tight oligopoly, the active firms, although not individually holding market power, may coordinate their strategies and may realize monopoly-like outcomes, in terms of absence of price competition, supra-competitive profits, output decrease, and inefficiencies[101]. Identical results would allow authorities to equal pure and shared monopoly and, therefore, to control shared monopoly under Section 2. According to this theory, the requirement of monopoly power, defined as the capability of firms to influence prices, could be satisfied either by a single company or by a group of undertakings acting as a unitary entity.

This approach overcomes the difficulty of demonstrating market power in oligopolies, but it leaves open the problem of qualifying oligopolistic prices as an anticompetitive conduct.

With regard to this point, some scholars elaborate the 'no-fault' oligopoly theory[102]. Instead of approaching the matter of oligopolistic pricing by the concept of conscious parallelism, this theory focuses on the market structure, perceived as the primary cause of the

---

[99] P.E. AREEDA, H. HOVENKAMP, *Antitrust Law – An Analysis…cit.,* vol. IIIA, 2nd Edition, 2002, pp. 337-343, and 359-386.

[100] This theory was formulated at first by D.F. TURNER, *The Scope of Antitrust…cit.*, p. 1225 ss., and later was clarified by P.E. AREEDA, H. HOVENKAMP, *Antitrust Law – An Analysis…cit.,* vol. IIIA, 2nd Edition, 2002, pp. 393-405.

[101] D.F. TURNER, *The Scope of Antitrust…cit.*, pp. 1225-1226.

[102] This proposal was originally formulated by P. NEAL in the *Report of the White House Task Force on Antitrust policy*, printed in *Antitrust Law & Economic Review*, 1968-1969, pp. 26-27 and in *Trade Reg. Reps.* n. 415, 1969.

anticompetitive effects. This relationship produce two consequences on the oligopoly control: on the one hand, lacking any cause-effect relationship between conducts and anti-competitive results, firms escape antitrust liability; on the other hand, given the determinative role of market structure, the only way to address this kind of failures is the adoption of structural remedies.

Moving from this basis, the theory at issue suggests to the legislator enacting sector-specific legislations that, by imposing dissolutions or divestitures, could change oligopolies in competitive-structured markets[103].

Although these theories overcome the difficulties about the possibility of controlling oligopolies under Section 2, they cannot solve the matter of imposing effective and practicable remedies against infringements[104]. In the case of unculpable conducts, in facts, judges may impose only injunctions and structural remedies, but neither the first nor the second remedy is deemed appropriate against oligopolistic pricing. As for the injunctions, duties not to agree would be ineffective because too generic: "*it is impossible to formulate a more specific injunction that is both judicially administrable and consistent with the rules governing monopolist*"[105]. As for structural remedies, this kind

---

[103] All scholars supporting this theory concur on the opportunity of adopting specific legislations that could deconcentrate oligopolies, but there was a certain disagreement about which market conditions could legitimate the adoption of such measures. P. NEAL, in the *Report of the White House…cit.*, for example, suggests intervening when four or fewer firms jointly have held at least a 70% market, for 4 of the last 5 years. According to C. KAYSEN, D.F. TURNER, *Antitrust policy: an economic and legal analysis*, Harvard University Press, Cambridge, 1959, p. 111, structural remedies should apply when there is an "*unreasonable market power*". This requirement is presumed to exist in the so-called '*Type One Oligopolies*', where the first eight firms have at least the 50% of market sales, and the first 20 firms have at least 75% of total sales. Under these circumstances, according to the AA, interdependence is highly likely. L.B. SCHWARTZ, *New Approaches to the Control of Oligopoly…cit.*, p. 47, proposes to impose structural remedies when a firm, active in a basic industry, has an excess of capacity and holds 20% market share, or when it is one of the four firms jointly controlling more than 50% of the national market.

[104] The sector-specific measures suggested by the '*no-fault oligopoly*' are different from the general remedies applicable under Section 2. In the absence of this kind of legislative measures, the theory at issue generates effective results only if the general remedies, available for Section 2 infringements, are practicable and workable in the case at issue.

[105] P.E. AREEDA, H. HOVENKAMP, *Antitrust Law – An Analysis…cit.*, vol. IIIA, 2nd Edition, 2002, p. 396. With regard to this conclusion, they allege the same

of measures may be easily defined, but may negatively impact on firms' efficiency, by impeding economies of scope and scale or by depriving companies of the minimum efficient size[106]. They also raise a matter of proportionality between a strong reaction and the absence improper conducts.

Moreover, it was clear that monopoly and shared monopolies, although similar, do not perfectly overlap: in the case of oligopoly, in fact, price and non-price competition, however improbable they may be, cannot be excluded at all, while they cannot exist, by definition, in the case of monopoly. Therefore, the reasons that justify the application of structural remedies in the case of monopoly (that is, the need of creating a plurality of economic entities, which is a *condicio sine qua non* for competitive dynamics to exist) are not necessary valid for oligopolies too: in this kind of market, the primary need is not to increase the number of companies[107], but to push them to effectively compete[108].

In summary, oligopolistic pricing, taken alone, does not fulfil the requirements of Section 2 either under the traditional doctrine or under the new, extensive interpretations. While it is quite easy to adapt the notion of market power to several firms, it is highly

---

argumentation that Turner suggested about the inapplicability of Section 1 to oligopolistic pricing: injunctions would impose irrational conduct, would imply the judicial control on prices, and would reserve to the oligopolists a more stringent treatment than to monopolist (a monopolist who legally reached this position can charge monopolistic prices, thus he can exploit all advantages coming from this position, while oligopolists could not).

[106] R.H. BORK, *The Antitrust Paradox – A Policy at War with Itself*, 2nd Edition, The Free Press, New York, 1993, pp. 178-196. Moving from the idea that "*antitrust should not interfere with any firm size created by internal growth*" (p. 178), Bork identified three elements that may legitimate dissolutions: first, significant reduction of output resulting from the industry structure; second, efficiency losses; third, barriers to entry that impede the natural deconcentration of markets by the entry of new companies. Since oligopolies probably do not restrict output, and since firms' sizes may reflect efficiency, deconcentrative measures in the most of the cases would be unjustifiable. Finally, he notes that even the authors favourable to the adoption of structural measures, recognized the possible relationship between efficiency and size, and elaborated the category of efficiency defence against dissolution or divestitures.

[107] The Supreme Court in *United States* v. *National Lead Co.* 332 U.S. 319 (1947) admitted that there is "*no showing that four major competing units would be preferable to two*" (332).

[108] L. GOLDMAN, *Oligopoly Policy and … cit.*, pp. 92-97.

questionable that the oligopolistic price-setting mechanism constitutes an unlawful conduct.

This approach reflects the Turner's opinion that it would be "*not unreasonable*" to describe oligopolistic pricing as an attempt to monopolize or as monopolization, but no remedies could apply[109]. A few years later, by implementing his original theory, Turner recognized that some kinds of oligopolistic conducts could be attacked under Section 2. In the framework of the 'shared monopoly' theory, he observed that there is no reason to reserve a different treatment to the same kind of restrictive conduct, depending on the facts that it results from the action of a single firm or a plurality of economic entities substantially holding monopolistic power. In this perspective, evidence of parallel exclusionary conducts "*would suggest that there had been actual communicated agreement among the firms, for it is unlikely that a policy apparently against the interest of any single firm going it alone would have been commonly adopted without advance assurance that all would do the same*"[110].

According to Turner, the legal assessment of sub-optimal, oligopolistic outcomes must take account of the relationship between conducts and market: if a behaviour derives only from the market functioning, no infringement may be established; on the contrary, whether the restrictive conducts is only facilitated by a certain market structure, but it remains substantially imputable to oligopolists' strategies, the conduct at issue constitutes a Section 2 infringement[111].

[109] D.F. TURNER, *The Definition of Agreement under the Sherman Act…cit.,* p. 683. The arguments in favor of the impunity are the same already adduced about the control of conscious parallelism under section 1, and basically rest on the imputableness of sub-optimal results to the market structure, rather than to the firm' behaviours.

[110] D.F. TURNER, *The Scope of Antitrust…cit.*, p. 1229.

[111] The divergent assessment of exploitative and exclusionary abuses seems to reflect the difference between non-competitive and anti-competitive conducts: oligopolistic prices, being greater than the marginal cost, constitutes a non-competitive (that is, other than competitive) behaviour; exclusionary conducts, on the contrary, are perceived as anti-competitive, because they come from market strategies conflicting with competition on merits and imputable to the suspected firms.

1.3.2 Jurisprudential approaches

The examination of US jurisprudence reveals that Courts have never exploited the potentialities of the "shared monopoly" theory and have always refused controlling oligopolies under Section 2.

In most of the cases, the traditional idea that Section 2 deals with individual conducts was determinant; therefore, Courts, instead of focusing on the entire set of oligopolists' conducts, have focused on the single behaviour of each undertaking and have ignored the strategic interdependence[112]. In other cases, Courts directly examined the 'shared monopoly' theory and either denied at all its practicability or excluded its application in the specific case at issue.

In *Rebel Oil*, the Ninth Circuit stated: "*Section 2* […] *does not govern single-firm anticompetitive conduct aimed only at creating an oligopoly. Congress authorized scrutiny of single firms only when they pose a danger of monopolization. We recognize that a gap in the Sherman Act allows oligopolies to slip past its prohibitions* […] *but filling that gap is the concern of Congress, not the judiciary*"[113].

The radicalism of this statement, which rejected in principle the 'shared monopoly' theory, is inconsistent with a precedent judgement where the same Court refused to apply this theory because the involved market seemed to work in a competitive way, but observed that: "*We need not decide whether the shared monopoly theory may be viable under some circumstances. Suffice it to say that in this case, involving a small market with numerous sellers, no claim is stated under Section 2*"[114].

---

[112] In *Dimmitt Agri Industries Inc.* v. *CPC international Inc.*, 679 F.2d 516 (5th Circ., 1982), for example, the Fifth Circuit, despite evidence of anti-competitive effects coming from the oligopolistic parallelisms, dismissed the claim of Section 2 infringement because the defendant, individually considered, had a 25% market share. Quantitative data about the market share, therefore, prevailed over the qualitative evidence that the defendant could really affect prices.

[113] *Rebel Oil Company Inc.* v. *Atlantic Richfield Company*, 51 F.3d 1421, 1443 (9th Circ., 1995).

This judgement is consistent with the jurisprudence of several lower courts: in *Consolidated Terminal Systems Inc.* v. *ITT World Communications Inc.*, 535 F. Supp. 225 (S.D. New York, 1982), the District Court had held that "*An oligopoly, or a shared monopoly, does not in itself violate Section 2 of the Sherman Act; rather, in order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a particular defendant*" (228-229).

[114] *Harkins Amusement Enterprises Inc.* v. *General Cinema Corporation*, 850 F.2d 477, 490 (9th Circ., 1988).

1.4 Federal Trade Commission Act Section 5

Section 5 of the Federal Trade Commission Act (hereinafter, FTCA) prohibits "*unfair methods of competition*". By this Stature, the legislator sought to supplement the Sherman and Clayton Acts, by allowing an administrative authority (Federal Trade Commission, hereinafter FTC) to attack unfair conducts in competitive relationships.

Nevertheless, the FTCA is not a mere means to better implement the Sherman and the Clayton Acts, but the area of applicability of these Statutes partially overlaps. Conducts that violate the Sherman and Clayton Act, in fact, also infringe the FTCA, but business practices, which escape liability under the Sherman and Clayton Acts, may infringe Section 5 of the FTCA, as unfair methods of competition[115].

This knowledge, together with the broad statute language that does not mention agreements, makes section 5 an effective means to attack conscious parallelism[116]: this rule, in fact, does not require proof of intentional or culpable parallelism, thus it overcomes the main obstacle of the antitrust policy for tacit collusion[117].

The FTC decisions about oligopolistic parallelism rest on two approaches, which also influenced the judicial review of the decisions at issue.

---

[115] E.W. KINTNER, W.P. KRATZKE, *Federal Antitrust Law*, vol. VII, Anderson Publishing Co., Cincinnati, 1988, pp. 3- 14. Courts have recognized that Section 5 applies to behaviours that contrast with the spirit, however not with the letter, of antitrust laws.

These statutes are different also about the applicable remedies: while in the case of Sherman and Clayton Acts infringements, judges may impose damages and even imprisonment (because they are criminal statutes), the FTC may react to Section 5 violations only by cease and desist orders, while private parties cannot bring any suit under Section 5.

[116] H. HOVENKAMP, *Federal Antitrust Policy… cit.*, pp. 184-185.

[117] The required proof of intentionality is evident in the case law that seeks to infer agreements from parallel conducts, and characterizes also the plus factors doctrine: parallelism is not enough unless further elements demonstrate that the suspected behaviours are not imputable to the sole market structure, but imply willingness or meeting of minds among parties.

1.4.1 Agreements infringing Sherman Act Section 1 as an unfair method of competition. The *Toy R US* case

The traditional approach of the FTC to the conscious parallelism rested on the inference of agreements and was built around the principle that conducts infringing the Sherman Act also constitute unfair methods of competition.

Toys "R" US[118] is the most representative case of this decisional line.

The FTC found that Toy "R" Us (hereinafter, TRU), the major toys distributor in the United States, had organized a boycott against the warehouse club stores by a network of vertical agreements with the toys manufacturers. Each producer, in particular, dealt not to supply his own product to the warehouses, on the condition that the others would have done the same: in this way, TRU had promoted a horizontal cartel between manufactures, which agreed to collectively boycott the warehouses.

The FTC demonstrated that the suspected behaviours, not justifiable by the sole market functioning, implied certain intentionality[119], and resulted in three infringements. First of all, TRU had coordinated manufacturers toward a collective boycott, conduct that is illegal per se; second, it established a series of vertical agreements, illegal under the rule of reason, due to their anticompetitive effects; finally, it had promoted horizontal agreements between manufacturers, resulting in an effective boycott: this behaviour was illegal under the rule of reason because it generates anticompetitive effects outweighing its efficiency gains.

According to the FTC, agreements contrary to the Sherman Act section 1 also fulfilled requirements of Section 5 FTCA, therefore, it imposed a cease and desist order.

TRU appealed this decision before the second Circuit, which focused on the evaluation of horizontal agreements. In assessing whether there was enough evidence of conspiracy, the Court

---

[118] *Toys "R" US Inc.* v. *FTC*, 221 F.3d 928 (7th Circ., 2000).

[119] According to the Commission, by decreasing sales to the clubs, the manufactures acted against their self-interest and radically changed their market strategies: before the suspected conduct, in fact, they tried to expand the number of retail outlets at the scope of reducing their dependence from TRU. This strategy strongly contrasts with the subsequent suspected conducts.

reminded the *Interstate Circuit* case, where judges had inferred a Section 1 infringement on the one hand, from evidence of the proposal of a vertically related firm followed by the acceptance of each oligopolist, on the other hand, from the awareness that only the adherence of all firms to the restrictive scheme would have increased joint profits. Since the conduct at issue satisfied all conditions required under the *Interstate Circuit* standard and there was also proof of communication, judges upheld the FTC decision.

1.4.2 Evidence of facilitating practices supporting the suspect of unfair conducts. The *Ethyl* case

In several decisions, the FTC stated that practices facilitating coordination constituted unfair methods of competition.

The most representative case on this point is *Ethyl*.
According to the FTC, four manufacturers of lead antiknock gasoline additive had behaved in an anticompetitive manner at the scope of rising prices. In particular, the Commission contested the preventive announcements of price increases, the use of "the most-favoured nation" clause in standard contracts, and the policy of selling only at tariffs that included the transportation costs[120].

FTC observed that the relevant market, in itself prone to collusion (because of high concentration, product homogeneity, low demand elasticity, and high barriers to entry), was characterized by non-competitive performances, in terms of uniform price, stable market shares, and high profits. According to the Commission, although the alleged conducts were not unfair in them and also were unilaterally adopted, in the market at issue had encouraged non-competitive performance[121]. In the absence of any countervailing pro-competitive effect, the FTC issued a cease and desist order[122].

---

[120] *Ethyl Corp.*, 101 F.T.C. 425 (1983)
J.J. SIMONS, *Fixing Prices with your Victim: Efficiency and Collusion with Competitor-Based Formula Pricing Clauses*, in *Hofstra L. Rev.*, 1989, pp. 599-639, recognizes the anti-competitive potential of the 'most-favoured nation' clause, especially in the case of oligopolies, but he remarks that this clause would be better scrutinized under the Sherman Act Section 1, rather than under Section 5 of the FTCA.

[121] In so stating, the FCT also demonstrated the existence of a causal link between facilitating practices and non-competitive results. *Contra,* L. GOLDMAN, *Oligopoly Policy and … cit.* According to the A, in oligopolies, poor economic performances or

In the appeal promoted by Ethyl and du Pont, the Second Circuit[123] faced the question whether some business conducts, being able of facilitating conscious parallelism, could represent unfair methods of competition.

The Court preliminary remarked that, no matter how flexible the FTCA may be, the Commission is not allowed to exert an arbitrary power, but its decisions must be consistent with the unfairness standard. With regard to this, the Court indicated two requirements for section 5 to apply: first, conducts contrary to fair methods of competition –that usually take the form of predatory, exclusionary or collusive behaviours– secondly, the effect of lessening competition[124].

---

parallel prices do not presuppose any facilitating practices, thus "*there is no way to demonstrate with certainty that 'but for' the practices the market would behave competitively*" (p. 104). Analogously, J. KATTAN, *Beyond Facilitating Practices…cit.*, p. 134 notes that, since in a market already prone to collusion, facilitating practices may be superfluous, there was no proof that adverse effects came from those practices, therefore, there was no proof about the supposed causality between contested conducts and adverse effects. Furthermore, the A remarks that the FTC did not adequately take account of the efficiency gains coming from those conducts.

[122] H. STEINBERG, *Oligopolistic Interdependence: the FTC adopts a "No Agreement" Standard to Attack Parallel Non-Collusive Practices*, in *Brooklyn L. Rev.*, 1984, p. 295, strongly criticizes this decision, because it focuses solely facilitating practices, and removes the need of demonstrating agreements. In this way, the FTC "*has adopted a tool that, if upheld, would allow it to attack virtually any concentrated industry in which there were standard practices that could conceivably be viewed as anticompetitive. By using a broad brush to characterize these practices, the Commission is overlooking their historical development, the reasons they have been adopted by industry, and any pro-competitive effects they may have*". Moreover, the entire decision would demonstrate the fallacy of economic models, incapable of embracing all factors that can effectively influence the functioning of a specific market (here at p. 298).

On the contrary, R.A. POSNER, *Antitrust Law…cit.*, p. 98 considers this decision as "*a powerful case*" because the FTC recognized that a Section 1 case may be based on "*evidence of purely tacit collusion*".

[123] *E.I. Du Pont De Nemours & Company* v. *Federal Trade Commission*, 729 F.2d 128 (2nd Circ., 1984).

[124] The emphasis put on anti-competitive effects is consistent with the jurisprudence of the Ninth Circuit: "*parallel behavior, without more, does not trigger the per se treatment which is given to overt agreement. Under our antitrust laws, we begin with the assumption that decisions are made independently and competitively. The debate over conscious parallelism comes down to whether it is ever appropriate for evidence of the anticompetitive effect of certain types of parallel conduct to serve as a substitute for the Sherman Act requirement of agreement* […]. *Without proof that the practice exerts an anticompetitive effect on the price* […], *we have no reason to make such an assumption*" [*Boise Cascade Corporation* v. *Federal Trade Commission*, 637 F.2d 573 (9th Circ., 1980)].

In applying this test to the case at issue, the Second Circuit remarked the absence of proof of agreements and improper conducts and stated that "*at least some indicia of oppressiveness must exist*" for an oligopolistic conduct to be qualified as unfair. Judges indicated, as an example of relevant indicia, evidence of anti-competitive purpose or absence of a legitimate business justification[125]. Since this case missed any indicia of this kind, the requirement of improper conduct was not satisfied[126]. About the requirement of anticompetitive effects, according to the Court, the challenged practices had a marginal impact on the market functioning, therefore they could not lessen competition.

Nevertheless, judges admitted that, despite the alleged proofs came short of the unfairness standard, they would have confirmed the appealed decision, if the FTC had unequivocally demonstrated that the market were so favourable to collusion that the adoption of the alleged practices would have facilitated parallelism.

This judgement opened new perspectives for the control of conscious parallelism under Section 5: the Circuit Court recognized that the oligopolistic alignment may constitute an unfair method of competition even in the absence of agreements and that certain behaviours can be pro-collusive even if unilaterally adopted[127]. The core of the analysis, therefore, shifted on the anti-competitive effects on the market functioning, regardless of the possibility to infer agreements[128]. On the contrary, the traditional jurisprudence on this

---

[125] In footnote 10, the Court admitted that "*The requirement is comparable to the principle that there must be a "plus factor" before conscious parallelism may be found to be conspiratorial in violation of the Sherman Act*".

[126] According to the FTC, the alleged conducts derived from an individual determination, was supported by legitimate business reasons, and there was no evidence of anticompetitive purpose.

[127] S.S. DESANTI, E.A. NAGATA, *Competitor Communications: Facilitating Practices or Invitation to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, in *Antitrust L. J.*, 1994 p. 100.

[128] G.A. HAY, *Oligopoly, Shared Monopoly…cit.*, pp. 479-480. In his view, the *Ethyl* case in as example of inference of 'indirect collusion', because the FTC is not required to establish a tacit or express agreement if it demonstrates that facilitating practices, even unilaterally adopted, hinder competition. He also notes that, although more flexible, the threshold of proof remains higher than that required in a standard conspiracy case: under Section 5, in fact, the FTC has to show non-competitive performances, their causal derivation from the practices at issue, and the absence of countervailing efficiencies. In a conspiracy case, on the contrary, the *per se* rule would have applied.

point, under the influence of the Turner's theory, had condemned facilitating practices as an unfair method of competition only if they could create a cartel.

This case also suggests building the ultimate evaluation of alleged conducts around the balance of its collusive and pro-competitive effects, therefore, it transformed "*a tradition of antitrust hostility toward business pricing practices into a new era of cautious acceptance without destroying the broader reach of section 5*"[129].

This approach, according to most of the scholars, may ensure a more effective antitrust enforcement against oligopolistic parallelism, by depriving some kinds of anti-competitive alignments of the impunity that the system based on the inference of agreements had often ensured[130]. According to other scholars, on the contrary, this judgement could reduce the antitrust control on parallelism. In their view, when the Court denied that economic evidence of anti-competitive effects could be determinative for inferring section 5 infringements, it indirectly confirmed the need of demonstrating agreements[131].

1.5 Conclusions

The absence of a rule directly dealing with conscious parallelism has oriented antitrust enforcement in a triple direction, reflecting the laws theoretically applicable to this problem. This approach has produced specific consequences in case law: first of all, there are three macro-areas of judgements dealing with conscious parallelism, but different for requirements, methods and, sometimes, for substantial assessment; secondly, and more important, each jurisprudential line comes from the adaptation of a standard originally enacted to pursue a different, although close, scope. As a result, every suggested

---

[129] S. LACROIX, W. MIKLIUS, J. MAK, *The New Standard of Unfair Competition: an Economic Analysis of the* du Pont v. FTC *Litigation*, in *Univ. Hawaii L. Rev.*, 1987, pp. 471-472.

[130] This criterion, in other words, avoids both Type 1 (erroneous immunity) and Type 2 (erroneous condemn) errors.

[131] J. GRIMMOND, *E.I. du Pont de Nemours v. FTC: Facilitating Practices under FTC Act Section 5*, in *Iowa L. Rev.*, 1985, p. 1060. In his opinion, the most workable solution would be a "*rational use of economic theory*".

solution does not perfectly fit conscious parallelism but presents its own limits and failures.

About Section 1, for example, the case law based on the inference of agreements has to face the difficulties of demonstrating intentionality of parallel conducts. The other approach, based on the finding of facilitating practices, may cover a wider spectrum of conducts (all the anticompetitive alignments supported by pro-collusive and business-unjustified conducts), but does not solve at all the problem of conscious parallelism: as far as facilitating practices are *condicio sine qua non* for Section 1 to apply, this doctrine leaves substantially unpunished those forms of tacit, anti-competitive parallelism arising in markets as conducive to collusion as to make superfluous every facilitating behaviour. Such an outcome, in respect to the antitrust enforcement of conscious parallelism, is quite paradoxical, because it does not catch the most paradigmatic and pure manifestations of this phenomenon.

On the other hand, the main failure of the control under Section 2 is the incapability of closing the gap between monopoly and oligopoly, whose differences concern market dynamics rather than the number of competitors. In this framework, although the control of conscious parallelism--as joint monopolization or joint attempt to monopolize--is not unreasonable, its effective implementation appears quite improbable, lacking adequate and workable remedies.

On the contrary, Section 5 FTCA, with the flexible standard of unfair methods of competition, focuses on the market impact of the alleged conducts and does not require proof of intentionality or consciousness of parallelism. In this way, it may result in being a very effective means for the antitrust policy against conscious parallelism.

Chapter 2

The Preventive Control of Tacit Collusion: The US Mergers Policy

2.1 Introduction

At the beginning of the past century, the concerns about the process of concentration that was affecting the US economy, and the knowledge that many of the trusts involved in monopolization cases arose from mergers among rivals, induced Congress to enact a specific legislation, the Clayton Act, with the scope of controlling the phenomenon of firms' growth by acquisition.

Originally, this Statute applied only to stock acquisitions and to horizontal mergers[1]. In 1950, Congress amended it in a way to also cover asset acquisitions as well as vertical and conglomerate mergers.

The actual Act version provides, at Section 7, that "*no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital* […] *or any part of the assets of another* […] *where* […] *the effect of such acquisition may be substantially to lessen competition, or to tend to create monopoly*"[2].

---

[1] The first version of the Clayton Act prohibited the acquisitions of stock or other share of capital capable of substantially lessening competition between the acquiring and the acquired company.
Asset acquisitions, on the contrary, were controlled under the Sherman Act Section 1 or Section 2: in general terms, in fact, mergers may take the form of agreements restraining the trade or may result in monopolization or in an attempt to monopolize. Mergers may also be unfair method of competition, infringing Section 5 of the FTCA. See, on this point, H. HOVENKAMP, *Federal Antitrust Policy… cit.*, pp. 497-498.

[2] By prohibiting mergers that "*may*" lessen competition, the Clayton Act allows competition authorities to challenge incipient, anti-competitive effects and to block

Several years later, under the influence of Structuralism, the Congress enacted the Hart-Scott-Rodino Act that imposed a system of pre-mergers notification, with the scope of preventing market concentration by an *ex ante* control[3].

The main purpose behind the merger control is to maintain a certain level of market fragmentation, indispensable for competitive dynamics, and to avoid an excessive concentration. The enacted system reflects a preference for the preventive control over market power positions, rather than for an intensive, *ex post* control over the firms' behaviours[4].

Merger control deals with unilateral and coordinated anti-competitive effects. The fist category alludes to the capability of the merger entity of individually increasing prices, without any need of cooperating with the rivals. The second category, on the contrary, concerns the possible collusion between the merged entity and its competitors, as a consequence of the post-merger competitive environment.

The scope of this chapter is to analyse the evolution of the US control over the post-merger coordination, paying attention to the normative and jurisprudential developments under the influence of the scholars' theories.

2.2 The first stages: the structural presumption

In predicting the likelihood of post-merger coordination, competition authorities focus on the consequences of the disappearance of one or more firms on the competitive dynamics, in

---

suspect operations before they are concluded. See A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective…cit.*, p. 419.

[3] Under the previous system, in force until 1976, the merger control took place after the operation was concluded. This mechanism reduced the legal certainty for the merging firms and posed serious concerns about remedies, since the natural reaction against anti-competitive operations was to separate assets and activities that a merger had integrated. See, A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective…cit.*, p. 420.

[4] F.M. SHERER, *Merger Policy in the 1970s and 1980s*, in AAVV, *Economics & Antitrust policy*, Greenwood Publishing, Oxford, 1989, p. 1.
See also D.C. BOK, *Section 7 of the Clayton Act and the merging of law and economics*, in *Harv. L. Rev.* 1960, pp. 260-365.

the knowledge that, in general terms, the less the number of independent firms is, the easier it is to collude.

The specific methods applied to predict the probability of collusion have changed under the influence of the dominant theoretical views.

With regard to this, when Structuralism was the prevalent theory, the preventive assessment about the likelihood of post-merger coordination in already concentrated markets was deemed as quite superfluous. In light of the Harvard School's teachings, given the strong relationship between structure (concentrated markets), conducts (alignment on supra-competitive prices), and performance (increase of firms' profits, loss of consumers' welfare), there was no need of further investigation to predict collusive outcomes.

The widespread concerns about the dangers of high market concentration and the political commitments toward the protection of smaller firms induced the Courts to perceive the merger control merely as a means to prevent the increase of market concentration[5]. The idea that coordination was the unavoidable consequence of the increased market concentration, in fact, influenced the US merger policy in the 1960s to the extent that Courts seemed to substitute "*bare conjecture for the statutory standard of a reasonable probability that competition may be lessened*"[6].

2.2.1 *Philadelphia National Bank*

The most representative example of the structural approach to the merger control is the *Philadelphia National Bank* case. It concerned a merger between Philadelphia National Bank and Girard Trust Corn Exchange Bank, respectively the second and the third largest commercial banks in the Philadelphia metropolitan area[7].

The Supreme Court sought to assess this case in a forward-looking perspective and to predict the long-run merger effects, but it relied

[5] J.B. BAKER, *Mavericks, Mergers and Exclusion: Proving Coordinated Competitive Effects under the Antitrust Laws*, in *N.Y.U.L. Rev.*, 2002, p. 143.

[6] *United States* v. *Von's Grocery Company*, 384 U.S. 270, 286 (1966).

[7] *United States* v. *The Philadelphia National Bank*, 374 U.S. 321 (1963). Once implemented, this operation would have created the largest firm in that area.

essentially on market structure. By quoting the *Brown Shoe*[8] precedent, it admitted that the political concerns with the trend toward concentration would dispense, in certain case, from proving anti-competitive behaviours. "*Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects*" (363).

About the case at issue, according to the Court, the high market share of the merged firms (around 30%) constituted a serious "*threat*" for competition and there was "*nothing in the record of* [the] *case to rebut the inherently anticompetitive tendency manifested by these percentages*" (366).

In this way, the Supreme Court codified the so-called '*structural presumption*' doctrine[9] and confirmed the potential harms for competition coming from the market evolution toward oligopoly[10]. This conclusion results in a sort of *prima facie* illegality for mergers which raise the market concentration: it follows that, once the plaintiff has demonstrated high market concentration, the burden of proof shifts on the defendant, who is required to show that the supposed anti-competitive effects will not emerge[11].

2.2.2 *Von's Grocery*

A few years after the *Philadelphia National Bank* judgement, the Supreme Court confirmed and strengthened the structural

---

[8] In *Brown Shoe* v. *United States,* 370 U.S. 294 (1962), the Supreme Court identified the scope of the 1950 Clayton Act Amendment in the "*erection of a barrier*" against the economic for this reason, the FTC and the courts would be allowed to arrest this process since its incipiency. (317-318)

[9] This expression synthesizes the presumption of post-merger coordination in the case of high market concentration. See, on this point, A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective…cit.*, p. 424.

[10] J.B. BAKER, *Mavericks, Mergers and Exclusion…cit.*, deducts from this case law that "*Oligopoly conduct might have to be tolerated in industries that were already concentrated, but it could be kept from spreading to contaminate the rest of the economy through a tough merger policy*" (p. 243).

[11] H. HOVENKAMP, *Federal Antitrust Policy… cit.*, p. 526.

presumption, by prohibiting an operation between firms with low market shares and in a low concentrated market.

In the *Von's Grocery* case, in fact, the merger project involved the third and the sixth largest firms, holding respectively 4.7% and 4.2% market share, against the 8% quota of the market leader. The Supreme Court focused on both the decrease in the amount of single stores and the simultaneous increase of number and sizes of chains. By moving from this basis, it inferred a Clayton Act Section 7 infringement, and remarked that "*the facts of this case present exactly the threatening trend toward concentration which Congress wanted to halt*"[12].

In other words, the Court seems to suggest prohibiting every merger capable of increasing the market concentration, regardless of both the basic market structure (that is, even in not concentrated markets) and the quantitative increase in the concentration level. As a result, "*the structural presumption* [appears] *virtually conclusive*"[13].

2.3 The 1968 Merger Guidelines

The 1968 Merger Guidelines, aimed at clarifying the legal and economic standards for scrutinizing mergers, were issued by Turner; therefore, they incorporated the Harvardian idea that, when industries become more concentrated, firms naturally find it more rational to collude rather than to compete[14].

Moving from this theoretical basis, the Guidelines established a threshold of market concentration presumptively leading to coordination: in this way, they upheld the Supreme Court's method of inferring collusion from high market shares, even if the Guidelines relied on lower standard than the *Von's Grocery* case.

---

[12] *United States* v. *Von's Grocery Company…cit.*, here at 277. The Supreme Court followed the same approach of the *Pabst Brewing Company* case [*United States* v. *Pabst Brewing Company*, 384, U.S. 546 (1966)], where low joint market share, that in one of the three involved markets was only 4.49%, did not impede the prohibition. According to the majority, in fact, even a small increase in the concentration would have caused an anti-competitive effect, given the market trend toward the reduction of the US independent brewing.

[13] J.B. BAKER, *Mavericks, Mergers and Exclusion…cit.*, p. 144.

[14] T.E. KAUPER, *The 1982 Horizontal Merger guidelines: of Collusion, Efficiency and Failure*, in *Cal. L. Rev.*, 1983, p. 506. Analogously, A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective…cit.*, p. 438.

This approach, on the one hand, had the merit of increasing legal certainty, by making it easier to predict the ultimate decision; on the other hand, introduced an important rigidity in the merger control: even in the case of dynamic markets, an immediate increase in the concentration up to the prescribed thresholds would have justified a prohibition.

2.4 Overcoming the structural presumption: the *General Dynamics* case

A few years after the Guidelines were enacted, the theoretical framework began changing, with evident consequences in the Supreme Court jurisprudence.

In 1974, the Court examined a merger between Material Services (later acquired by General Dynamics) and United Electric Coal, both producers and distributors of coal, active in the Easter Interior Coal province, an area which included Illinois, Indiana and parts of six neighbouring States[15].

The Government, by taking into account both the low number of independent firms in that industry and the trend towards concentration, had decided to challenge the operation. The District Court, on the contrary, denied the injunction in the light of the changes occurred in the market after the Second World War and the long-term contracts adopted for the coal sales.

Despite the high market shares of the involved firms, the Supreme Court recognized that the merger at issue would not have hindered competition. In its view, the original estimation of market shares on the basis of past sales was not determinative, because the crucial element was the amount of reserves, factor that affected the market dynamics, by influencing the negotiation of contracts.

In this framework, although the structural data, consistent with the *Von's Grocery* precedent, could have supported a prohibition, the Supreme Court stated that "*Irrespective of the company's size when viewed as a producer, its weakness as a competitor was properly analyzed by the District Court and fully substantiated that court's conclusion that its*

[15] *United States* v. *General Dynamics Corporation*, 415 U.S. 486 (1974).

acquisition by Material Service would not «substantially […] *lessen competition»"* (504).

By this statement, the Supreme Court seems to erode the structural presumption and to base the prognostic merger control on the assessment of all relevant factors affecting the competitive dynamics between rivals. Such an approach reflects the new theoretical paradigm that breaks the equivalence between anti-competitive results and high market concentration: without denying that collusion is easier in the presence of a few firms, the Chicago School, in fact, recognized that high concentration does not preclude in itself competitive relationships, but may even increase the market efficiency, being an essential condition to achieve economies of scope and scale[16].

2.5 The 1982 Merger Guidelines

While the legislative approach to the mergers control still rested on a structural method, the case law on merger had already introduced dynamic factors in the judicial review. Since the famous paper of Stigler about oligopoly[17], in fact, it has been clear that, even when markets become more concentrated, collusion cannot be presumed, because it always implies active coordination among rivals. Moreover, Chicagoan scholars remarked that collusion is neither a self-maintaining nor stable equilibrium that the market itself may perpetuate, but is a weak structure, constantly menaced by the incentive to cheat.

These theoretical perspectives could generate evaluative errors: on the one hand, the structural approach may lead to prohibit pro-competitive mergers simply because they take place in concentrated industries. On the other hand, the complete departure from the structural presumption may result in the opposite risk of permitting anti-competitive mergers[18].

The 1982 Guidelines tried to balance the tension among the traditional conclusiveness of structural data and the new device about the influence of non-structural factors on the post-merger collusion.

---

[16] H. HOVENKAMP, *Federal Antitrust Policy… cit.*, p. 499.
[17] G.J. STIGLER, *A Theory of Oligopoly...cit.*, pp. 44-61.
[18] J.B. BAKER, *Mavericks, Mergers and Exclusion…cit.*, p. 141.

However different, these two theoretical paradigms were not incompatible at all: many Chicagoan scholars, in fact, recognized the crucial role of market concentration in collusive equilibria, given the inverse relationship between the number of independent firms and the sustainability of coordination[19]. The innovative point of the behavioural approach, therefore, was to break the previous correspondence among concentration and collusion: high market shares or oligopoly structures are necessary conditions for the collusion, but they are not enough, since other factors influence the market functioning.

The new Guidelines embodied this teaching, without radically breaking with the previous approach: while market shares remained a crucial factor for the merger control and represented the only market data directly quantifiable[20], the Guidelines admitted that other elements may increase the success of collusion and that, consequently, their impact on the future behaviours of the suspected firms cannot be ignored[21].

According to some scholars, the Guidelines' approach to collusion rested "*on the same faulty premise as those of 1968*[:] *because mergers in highly concentrated market may enhance the likelihood of collusion, they are presumptively suspect*"[22]. On the contrary, other scholars remarked a

---

[19] See, *inter alios*, R.A. POSNER, *Oligopoly and the Antitrust Laws…cit.*, pp. 1562-1606

[20] The 1982 Merger Guidelines adopted a new test for the market concentration measurement, the so-called "Herfendahl–Hirshman Index" (hereinafter, HHI) which replaced the previous "Four Firms Concentration Ratio" (hereinafter, CR4). The HHI method, based on the sum of the squares of the sellers' market shares, intends to measure the level of concertation level before the merger and the increase brought by the operation. The HHI and CR4 are very close, since both rely on the structural oligopoly theory; however, the HHI may provide more information about the state of the market, because it considers a wide range of firms. See, on this point, R.J.R. PERITZ, *Competition Policy in America…cit.*, p. 280; W.F. BAXTER, *Responding to the Reaction: the Draftsman's view*, in *Cal. L. Rev.*, 1983, p. 625.

[21] W.F. BAXTER, *Responding to the Reaction:…cit.*, p. 629; see also T.E. KAUPER, *The 1982 Horizontal Merger guidelines... cit.*, p. 505.
A.I. GAVIL, W.E. KOVACIC, J.B. BAKER, *Antitrust Law in Perspective…cit.*, p. 424, note that the new Merger Guidelines, by confirming the structural presumption and by making it rebuttable synthesized the conflicting judgements of *Philadelphia National Bank* and *General Dynamics*.

[22] T.E. KAUPER, *The 1982 Horizontal Merger guidelines... cit.*, p. 506. The A. recognizes that the new Guidelines were partially different from the 1968 Guidelines, primarily because they express a "*more favorable attitude towards mergers*" (here at p. 505), however, he denies any relevant changes about the evaluative role of structural data. Analogously, L.B. SCHWARTZ, *The New Merger Guidelines: Guide to Governmental*

significant change in the role of market concentration: although still influential, this element ceased to be relevant in and by itself and became a mere component of a complex evaluation, with an importance dependent on its collusive impact. In other words, "*the Guidelines view anticompetitive effects as flowing not from increased concentration per se, but from increased opportunities for collusion*"[23].

A careful exam of the 1982 Merger Guidelines reveals an important methodological change in the merger review: market concentration becomes a preliminary stage of the merger analysis, with the function of selecting those cases where mergers have such a little impact on the market functioning that there is no need of further investigation to authorize the notified project. In the other cases, the analysis has to involve all relevant market conditions, in the awareness that "*the presumption that market transactions are efficient should be abandoned only when likelihood of collusion is clear and proximate, not when it is speculative and remote*"[24].

Despite the tension in the scholars' opinions, the judgments handed down under the new framework seem to rest on a more complete analysis.

2.5.1 *Hospital Corporation of America*

Hospital Corporation of America (hereinafter HCA), the largest US hospital chain, proposed to acquire two rival firms. Once implemented, this project would have attributed to HCA the control

---

Discretion and private Counseling or Propaganda for revision of the Antitrust Laws, in *Cal. L. Rev.*, 1983, p. 595, remarks that non-structural factors, although formally introduced in the merger control, have a secondary role, since they are analysed only in a few cases and only when they increase the suspect of collusion –that is, they were supplementary, rather than conclusive, evidence of collusion.

[23] D.I. BAKER, W. BLUMENTHAL, *The 1982 Guidelines and Preexisting law*, in *Cal. L. Rev.*, 1983, p. 316. Similarly, J.B. BAKER, *Mavericks, Mergers and Exclusion…cit.*, recurred to a Chicagoan expression to summarize the change in the merger control: "*The likelihood of collusion became a matter of analysis rather than one of assumption*" (p. 138). By introducing more elements in the merger control, in fact, collusion is viewed as more probable, rather than unavoidable, when the level of concentration raises.

[24] W.F. BAXTER, *Responding to the Reaction:…cit.*, p. 630. This conclusion is based on the premise that "*If there is no indication that a particular proposed merger creates a significant likelihood of lessening competition, it is unacceptable to sacrifice the potential efficiencies associated with the merger based solely on mere speculation that other mergers in the future might lessen competition*" (p. 630).

of five of eleven hospitals active in the Chattanooga area[25]. According to the FTC, this operation infringed the Clayton Act section 7, because it attributes to four firms the substantial control of that market.

In reviewing the merger project, the Seventh Circuit followed a strictly economic approach, intended to predict whether the acquisition was "*likely to facilitate collusion*" (1386). By moving from a structural analysis, judge Posner admitted that the reduction of competing hospitals was not meaningless, since fewer firms may more easily collude. However, according to the Court, the relevance of this reduction for collusion also depends on the role of the acquired firms in the competitive process. In the case at issue, the acquired firms, by jointly holding 12% market share, had a remarkable weight in that market. Moreover, there was no actual possibility to replace that loss, since the exercise of the activity at issue required an administrative authorization, which acted as a barrier to entry.

By going on its analysis, the Court found out several factors facilitating collusion: first of all, low demand elasticity, coming from the fact that patients neither choose the hospital treatment or pay the bill (respectively doctors and insurance companies or the federal Government do it); second, past successful coordination, which showed a market's tendency toward collusion; finally, evidence of information exchanges. In this framework, the pressures that insurances companies and federal agencies were exerting over the hospitals to obtain tariffs' decreases, would have facilitate collusion among these companies, perfectly aware that their collective counteraction would be more effective than individual actions.

The Court did not ignore the possible influence of factors impeding collusion, such as the complexity and heterogeneity of the supplied services (which were defined on individual basis and depended on the particular needs of each patient), different ownership regimes, and significant technological developments. However, according to the judges, these elements were not conclusive to exclude the likelihood of collusion, because either they were common to several markets or they have a doubtful collusive impact[26].

---

[25] *Hospital Corporation of America* v. *Federal Trade Commission*, 807, F.2d 1381 (7th Circ., 1986).

[26] According to Posner, in fact, the product heterogeneity cannot exclude collusion in itself; the collusive impact of different ownership forms is not clear, and the

By resting on these premises, Posner concluded: "*Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger creates an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for*" (1389).

Given that all those market factors seemed to support the suspect of collusion, the Court upheld the Commission's assessment.

This statement reveals a change in the merger review, which began focusing on a wider range of factors and, consequently, reduced the absolute weight of market concentration. Despite the merger at issue considerably lowered the number of independent players in a market already concentrated, the Court did not stop its investigation to this stage, but sought to figure out whether other market forces could reduce or increase the collusive impact of such a high market concentration.

It is unquestionable, however, that this judgment, which represents the paradigm of the new guidelines' scopes, is strongly influenced by the personal opinions of judge Posner; therefore, it is probable that other Courts followed a different approach.

2.6 The 1992 Horizontal Merger Guidelines

The last, general revision of the Merger Guidelines[27] confirmed the criterion of "*substantial lessening of competition*" for the merger control and upheld the previous methodological approach. The merger scrutiny follows a well-defined scheme which considers, first of all, the analysis of both the original market concentration and its changes after the operation; second, the eventual barriers to entry; third, the possible efficiency gains coming from the merger, and, finally, the likelihood of firms' failing in the absence of the merger.

---

technological developments may jeopardise the attempt of collusion as well as make coordination more urgent, before the change will happen.

[27] The 1992 Horizontal Merger Guidelines were marginally amended in 1997, about the assessment of the efficiency gains. Then, in March 2006, the DoJ and FTC published a *Commentary on the Horizontal Merger Guidelines*, with the aim of making more transparent the decisional process.

Despite the intention of eliminating burden of proof[28], some residual presumptions remain[29]: to simplify the litigation and to reduce the probability of errors, for example, the guidelines confirm the structural presumption[30], which may be rebutted either by evidence of efficiency gains countervailing the negative merger effects, or by evidence of real incapability of the suspected effects to rise.

Some scholars do not disapprove the persistence of some presumptions, since neither the praxis of Court nor the economic theories were so well developed to make them superfluous[31].

Concerning the post-merger co-ordination, the 1992 Guidelines changed the expression '*collusion*' with that of '*coordinated interaction*' and strengthened the trend of reducing the absolute centrality of market concentration[32].

The new Guidelines build the merger control around a broader range of market factors, included all structural and dynamical data that influence collusion. The inference of post-merger coordination rests

---

[28] The FTC and the DoJ enacted the Guidelines at the scope of clarifying the method applied for the merger control and, consequently, of making more predictable the mergers' decisions. Being a self-regulatory mechanism, the Guidelines are not directly mandatory for Courts; nevertheless, they influence the judicial mergers' review, creating a remarkable homogeneity.

Their administrative nature, however, does not fit a regime of presumptions, and the correspondent probatory burden incumbent upon the parties. This element, in particular, seems to be much more appropriate for litigation. See in this respect, P.E. AREEDA, H. HOVENKAMP, J.L. SOLOW, *Antitrust Law – An Analysis…cit.*, vol. IV, 2nd Edition, 2006, p. 39.

[29] The paragraph 1.51 (c) provides, for example, a presumption of anti-competitive effects in the case of mergers increasing by 100 points the concentration, as well as in the case of post-merger HHI higher than 180.

[30] This provision reminds the *Philadelphia National Bank* presumption. See, on this point, L.A. SULLIVAN; W.A. GRIMES, *The Law of Antitrust: an Integrated Handbook*, 2nd Edition, 2006, Thomson West, St. Paul, p. 628.

[31] P.E. AREEDA, H. HOVENKAMP, J.L. SOLOW, *Antitrust Law – An Analysis…cit.*, vol. IV, 2nd Edition, 2006, p. 40. According to the AA, if the market is sufficiently concentrated and there are relevant barriers to entry, the notified operation is supposed to be anti-competitive; the burden of proof, therefore, shifts on the parties, who are required to show the absence of real dangers for competition.

[32] According to the P.E. AREEDA, H. HOVENKAMP, J.L. SOLOW, *Antitrust Law – An Analysis…cit.*, vol. IV, 2nd Edition, 2006, p. 41, the specific sequence provided by the Guidelines expresses the operative scheme of merger control, rather than a hierarchy of factors.

on a qualitative assessment[33] about the interaction of all the relevant factors, rather than on their mere finding. However, the real implementation of this complex and flexible method requires the exercise of discretional power.

As a result, the new merger control, on the one hand, may ensure a greater consistency of decisions with the market contest where the operation takes place; on the other hand, it may decrease the legal certainty, because of the possible conflicting statements.

2.6.1 *Heinz / Beech-Nut*

This case, because of the difficulties in the market's assessment and the decisional contrast between authorities and Court, may be assumed as the paradigm of the modern US merger control.

In 2000, Heinz Company and Beech-Nut, respectively the second and the third largest firms active in the US baby-food industry, notified to the FTC a merger agreement. In the market at issue, Gerber, with a 65% share, acted as price leader and was present in every retail store. Heinz and Beech-Nut, on the contrary, held smaller market shares (respectively, 17.4% and 15.4%) and were almost never found in the same supermarkets, and only rarely were present in the same metropolitan area[34]. Once consummated, this operation would have lowered the number of independent firms in an already

[33] E. ELHAUGE, D. GERADIN, *Global Antitrust Law and Economics*, Foundation Press, New York, 2007, pp. 915-916, mention an alternative method, based on the empirical evidence of firms' capability of pricing above the marginal costs. This approach, which neither assumes collusion nor infers it from a qualitative assessment, could ensure a more precise prediction about the merger impact.
Behind the appearance of scientific rigor, such a method seems to present applicative obstacles not easy to overcome: first of all, it presupposes the availability of sensitive market data, as prices, costs, demand elasticity, normally kept secret. Furthermore, once this measurement is done, the need of a qualitative assessment remains, at least in the border-line case (for example, when the likely future prices are just a little above the marginal costs).

[34] Usually supermarkets carried two of the three major brands; while Gerber, the dominant operator, was always present, the other two firms competed for the second position on the retailers' shelves.

concentrated market[35] and would have reduced the gap with the leading company.

According to the FTC, this scenario raised a founded suspect of post-merger collusion between the merged entity and the market leader. Therefore, the Commission filed a motion for a preliminary injunction.

The District Court[36], by upholding the parties' arguments about the lack of competitive concerns, rejected the FTC request on different grounds. First of all, according to the Court, Heinz and Beech-Nut neither effectively competed on prices and on products' innovation and differentiation, nor were perceived as rivals by the consumers, being present in the same retail stores. Second, the Court found no actual competition among the merging firms and Gerber, since the dominant firm had always jeopardized every rival's competitive action. The defendants also alleged evidence of efficiencies coming from the merger and that may countervail the pro-collusive significance of structural data. They demonstrated, on the one hand, a significant reduction in the production cost that would have strengthened price competition; on the other hand, a relevant improvement in the distribution system, which will facilitate the new product launches and, consequently, would have increased the product differentiation.

The Court viewed this merger as the only means to reduce the dominance of Gerber; therefore, it found "*more probable than not that consummation of the Heinz / Beech-Nut merger will actually increase the competition in jarred baby food in the United States*" (200).

The District of Columbia Circuit, in pronouncing on the appeal brought by the FTC, reversed the denial of a preliminary injunction and rebutted all argumentations alleged by the merging parties[37].

Against the supposed absence of internal competition between Heinz and Beech-Nut[38], the Court noted that the merging firms

---

[35] The FTC demonstrated both high concentration before the operation (4775 HHI points) and a post-merger increase of 510 HHI points.

[36] *Federal Trade Commission* v. *H.J. Heinz Company*, 116 F. Supp.2d, 190 (D.D.C., 2000).

[37] *Federal Trade Commission* v. *H.J. Heinz Company*, 246 F.3d 708, (D.D. Circ., 2001).

[38] By this argument, the merging parties intended to demonstrate that the notified operation was not a 3-2 merger, because the competitive relationships in the market involved Gerber and either Beech-Nut or Heinz. In other words, they sought to show that, despite the loss of a firm, no substantial changes would have occurred in the

effectively competed on prices in the metropolitan areas where they were simultaneously present, and this competition led to lower prices. Moreover, the operation would have reduced the wholesale competition between the merging entities for the second shelf position[39] and would have decreased the competitive pressures on Gerber.

The Court rejected also the efficiency defence, by adducing several justifications. First of all, the alleged reduction in the production costs, according to the Court, concerned only the variable conversion costs, with a minimum impact on the overall costs. Moreover, the alleged evidence of this supposed advantage involved only the merging firms individually assessed, but there was no proof that this advantage would have passed to the merged entity. Secondly, the Court denied the existence of a necessary link between the notified operation and the post-merger products' innovation, and remarked that there were different means to obtain the same effect.

Therefore, by moving on the premise that "*the high market concentration level present in this case require, in rebuttal, proof of extraordinary efficiencies*" (720), the District Circuit concluded that the parties did not adequately show the presence of such high efficiencies to rebut the presumption of collusive post-merger duopoly.

In interpreting this judgement, scholars usually focus on two correlated aspects: the role of market concentration in the merger control, on the one hand, and the practicability of the efficiency defence, on the other hand.

As for the first point, scholars remark that relevant increases of concentration in oligopoly still support the suspect of post merger

---

market dynamics, since the baby-food industry has been already functioning as a duopoly. Against this argumentation, T.B. LEARY, *An Inside Look at the Heinz case*, in *Antitrust*, Spring, 2002, p. 34 remarks that missing the proof of easy entry, of failing firms or distressed industry, it is hard to believe that this operation would not have created a (collusive) duopoly.

[39] J.B. BAKER, *Efficiencies and High Concentration: Heinz Proposes to Acquires Beech-Nut*, in J.E.KWOKA, L.J. WHITE, *The Antitrust Revolution- Economics, Competition and Policy*, Oxford University Press, New York, Oxford, 4th Edition, 2004, pp. 164-164, denies that the loss of wholesale competition between the merging firms may exclude at all competition about the space on the shelves, since the new entity would compete more effectively with Gerber for the prime shelf position. Moreover –continues the A- given the link among wholesale and retail competition, the benefits produced at retail level may compensate the upstream loss of competition.

collusion and impose to the merging parties the duty to demonstrate the absence of real, competitive menaces. The District Circuit, in fact, recognized the application of a structural presumption that, consistently with the recent jurisprudence and with the 1992 Merger Guidelines, has a rebuttable nature[40]. Moreover, the data concerning market structure were still crucial, but not determinative, given that other elements, included in the evaluative process, could reduce or exclude their influence over the final assessment. Among those factors, efficiency gains play a central role: however high the market concentration may be, there is always, at least theoretically, a possibility that efficiency gains balance its anti-competitive significance. The main problem, in this respect, is to figure out when efficiencies may represent an appropriate countervailing factor. The Merger Guidelines, as amended in 1997, in fact, adopt a so-called '*moderate version*' of the efficiency defence, which cannot justify the authorization of anti-competitive merger, but may be used to demonstrate that the effective implementation of a *prima facie* anti-competitive operation will not hinder competition[41].

---

[40] In particular, J. MEHTA, R.J. HARRIS, R. ZAKAR, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit – Antitrust Law*, in *Geo. Wash. L. Rev.*, 2002, p. 325 and J.B. BAKER, *Mavericks, Mergers and Exclusion…cit.*, p. 150 note a certain homogeneity with the *Baker Hughes* case [*United States* v. *Baker Hughes*, 908 F.2d 981, (D.D. Circ., 1990)], where the Court of Appeal, in interpreting the *General Dynamics* precedent, spelt out that "*The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition. That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness; the Supreme Court has never indicated that a defendant seeking to rebut a prima facie case is restricted to producing evidence of ease of entry*" (here at 984).

[41] See, on this point, R. DAVIS, *FTC v. Heinz: Two Views on the Role of Efficiencies in Merger Analysis*, in *Antitrust,* Fall 2001, p. 73. Similarly, M.B. COATE, *Efficiencies in Merger Analysis: an Institutionalist View*, in *Sup. Ct. Econ. Rev.*, 2005, pp. 230-231 highlights that the link between the structural presumption and level of efficiency would change the probatory burden incumbent on the defendants, since they are required to allege strong, quantitative evidence of efficiencies, capable of countervailing the negative merger effect, instead of qualitative evidence of pro-competitive effects. The result, according to the A, would be the substantial impossibility for very large firms of invoking the efficiency defence.

In the case at issue, since the operation raised significant collusion concerns, the threshold of sufficient efficiencies would be so high that it would "*virtually impossible*" for the parties to satisfy that standard[42].

With regard to this point, several scholars lamented the lack of clarification about the meaning and the measurement of "extraordinary efficiencies"[43]. Kovacic, in particular, remarked that the formalism in the Court's approach was inappropriate for an economic evaluation and would be also inconsistent with the rule of reason test. In this case, in fact, the balance among positive and negative effects, which is the same that Courts do in the case of efficiency defence, takes account of the likely price increase, consequent to the exercise of market power, and the plausible price decrease resulting from the expected efficiencies[44]. The efficiency gains, by affecting the post-merger performance of the involved market, should be included in the global assessment of mergers. In this perspective, Courts and competition Authorities cannot abstractly predict the prevalence of positive or negative effects, but they need to carefully examine both plausibility and impact of the supposed efficiency gains.

2.7 Conclusions

The heterogeneous case law about the merger control reveal the difficulties of predicting the future conducts of firms in consequence of actual market changes. This assessment, naturally probabilistic, cannot exclude evaluative mistakes, in the double form of authorizations for anti-competitive mergers, and prohibitions for neutral or even positive operations.

The first solution adopted to overcome this failure was the establishment of presumptions: the automatic correspondence between structural changes and final decisions, based on the knowledge that some conducts are unavoidable in a given market structure, was perceived for a long time as a workable remedy.

---

[42] J. MEHTA, R.J. HARRIS, R ZAKAR, *Recent Decisions of the United States…cit.*, p. 326.

[43] See T.B. LEARY, *An Inside Look at the Heinz case… cit.*, p. 34.

[44] W.J. KOLASKY, *The Role of Efficiencies in Merger Review*, in *Antitrust*, Fall 2001, pp. 85-86. One of the failures in the Court's approach, in his view, was to reject the thesis about costs saving, without quantifying its effective amount.

With the progressive development of the economic theories, however, it was clear that the market functioning is the result of the interaction of several factors, and that the variety of outcomes was incompatible by itself with a regime of strong presumptions.

When this theory became the dominant framework for the antitrust matters, the merger control begun assessing also the dynamic factors, viewed as possible means to rebut the structural presumption. The result was a more flexible merger control, capable of better fitting the peculiarities of the concerned market.

The discretional power of assessing merger project, that appears *condicio sine qua non* for the practicability of such new method, posed the matter of its possible abuse. With regard to this, the reintroduction of a regime of strong presumptions, which would however radically solve the problem, seems an unreasonable solution: if it may be justifiable in the first stages of the merger control, because of the low expertise with a preventive scrutiny based on market data, it appears obsolete in the light of the actual experience of courts and authorities.

To avoid power misuses without renouncing to a complete and, consequently, more correct, merger assessment, a useful solution may be to reduce the discretional approach by imposing adequate burdens of proof required to prohibit an operation. This method may balance the concerns about the possible anti-competitive effects coming from mergers and the commitment toward the preservation of all benefits, in terms of reduced prices of better products, which mergers may ensure.

CONCLUSIONS ON PART 1 AND PART 2

Comparing EU and US Approaches to Conscious Parallelism

The relationship between the EU and US competition systems is one of overlap and, at once, of contrast.

On the one hand, the literal formulation of their rules substantially coincides. In particular, article 81 mirrors Section 1 and deals with multilateral conducts, while article 82 mirrors Section 2 and focus on monopolization or attempt to monopolize, thought as an individual conduct.

On the other hand, EU and US antitrust policies in some cases point towards divergent directions and lead to different outcomes. Conscious parallelism is one of these cases.

The US antitrust policy about conscious parallelism, developed under the Sherman Act, failed to deal with this matter. On the one hand, judges have denied that Section 1 could apply in the absence of any proof of conspiracy; on the other hand, they have refused to apply Section 2, even if there is no insurmountable obstacle in expanding to the multilateral, cartel-like effects a rule that literally may address only unilateral conducts.

On the contrary, the EU antitrust policy has suggested a practicable solution of dealing with the matter of conscious parallelism. By recognizing, as the US system, that article 81 cannot apply when there is no evidence of conspiracy, the European Court suggested applying article 82, by condemning the anticompetitive,

parallel conducts as abuses of collective dominance. According to the Court, in particular, article 82 could apply to the mere oligopolistic parallelism, even in the absence of evidence of communication. This approach, although never applied in the EU competition policy, could solve the matter of conscious parallelism even for those cases where the anti-competitive results seem to be imputable to normal market functioning –that is, seem to result from mere interdependency.

This scenario raised the obvious question of why there is such a gap and what is its source. In my view, two elements may explain this gap: the different nature of the Statutes at issue and the different economic theories applied in the antitrust enforcement.

As for the first, the criminal nature of the Sherman Act significantly influences its interpretation and, therefore, its application. In the case of criminal laws, in fact, the extensive interpretation is substantially excluded, because the need to preserve constitutional rights and freedom of active people evidently prevails over the conflicting need of preserving the market functioning. As a result, although in the case of antitrust laws judges are aware that infringements rarely lead to imprisonment, the criminal nature of the Statute automatically inhibits a flexible interpretation. This element partially explains the difficulties of dealing with conscious parallelism, and its impact is even more evident in comparison with the EU experience, where the category itself of collective dominance derived from an interpretative evolution of article 82. By recurring to flexible, interpretative criteria, judges inferred this category from the EU Treaty and progressively have determined both boundaries and contents.

As for the second, the economic theories that guide the application of competition rules make a strong difference. With regard to this, in the repressive control of conscious parallelism, there is a tremendous trade off between the EU and US antitrust approach. The US Supreme Court, in fact, still applies the Neo-Classical theory and the instruments of the Neo-Classical analysis, based on the static view of the market and of the firms' relationship. This theory rests on the dichotomy competition-monopoly, and describes the competitive market as one with a myriad of sellers who are individually incapable of influencing the market outcome. In this scenario, the existence of intermediate forms of markets, where the few active firms act together

and influence with each other, is ruled out. The effect of this approach in the antitrust policy about the conscious parallelism is remarkable: by undervaluing the qualitative difference between atomistic competition and oligopoly, this approach is incapable of addressing the phenomenon of oligopolistic interdependence as a structural element of oligopoly, and cannot deal with the consequence that it generates on the relationship between firms.

Interdependency is an ontological feature in oligopoly, because the competitive dynamic involves a few firms, each capable of affecting market functioning and, therefore, aware that the effectiveness of its own conduct depends on what the other firms do. This mechanism naturally leads firm to co-ordinate with each other: every undertaking defines its own profit-maximizing strategy by taking into account the actual and foreseeable strategy that its rivals adopt. However, repeated interaction may lead firms to develop a common strategy to maximize their joint profits. In this case, the ontological co-ordination becomes pathological co-operation, and result in parallel conducts (as in the case of co-operation) with anti-competitive effects[1]. This equilibrium requires neither communication nor contacts between the concerned firms: it is the repeated interaction itself that, with a mechanism of progressive and mutual adaptation leads firms to develop a common *modus operandi*, a kind of set of tacit rules, capable of strongly conditioning their conducts[2].

This explanation derives for the Game Theory that approaches the market analysis by a dynamic perspective and, instead of focusing on single conducts, looks at the market as an ecosystem where firms interact and strategically operate[3].

Such a theory has tremendous impact on the antitrust policy: only by resting on this premise, in fact, is it possible to attack conducts that,

---

[1] M. GRILLO, *The Economic Analysis of Collusion and the Detection of Collusive Behaviour: New Perspectives for Antitrust Policy and Law*, in AA.VV., in AA.VV., *Antitrust between EC Law and National Law*, Giuffrè, Milano, 2000, pp. 29-30.

[2] A. MAS-COLELL, M.D. WHINSTON, J.R. GREEN, *Microeconomic Theory*, Oxford University Press, Oxford, 1995 spell out: "*A particular way to play a game might arise over time if the game is played repeatedly and some stable social convention emerges. If it does, it may be "obvious" to all players that the convention will be maintained. The convention, so to speak, becomes focal*" (p. 249).

[3] R.J.R. PERITZ, *Doctrinal cross-dressing in derivative aftermarkets:* Kodak, Xerox *and the copycat game*, in *Antitrust Bull.*, 2006, p. 226

although perfectly rational and apparently resulting from the market functioning, harm competition. Conversely, as long as the antitrust policy refuses to adopt this theoretical perspective, the conscious parallelism will escape antitrust liability.

The evolution of the EU approach to collective dominance offers strong evidence of this thought: only when courts began applying the Game Theory as a means for understanding the market, did they develop a policy capable to deal with the oligopoly problem. The entire evolution of collective dominance in the EU antitrust system is built around the Game theory and, in the most of the cases, case law is simply the translation, in legal terms, of what economists had demonstrated in their models. Conversely, refusing the Game theory approach equals refusing to address the oligopoly problem[4].

I have described the relationship between the US and EU antitrust policy on conscious parallelism in terms of dichotomy: on the one hand, the refusal to attack this phenomenon, on the other hand, theoretical solution to deal with this matter. However, this scenario partially matches the reality, because a careful examination of the entire antitrust policy on our topic reveals that some points of convergence exist.

First of all, the tension between EU and US antitrust policy towards tacit collusion does not involve the merger control. With regard to this, there is a remarkable convergence about laws, methods, approaches, and decisional outcomes. The reason is simple: both systems address the preventive control of conscious parallelism by the means of the Game theory. Therefore, the merger control in both systems relies on the impact of the operation at issue on the firms' incentives, and seeks to foresee whether, after the implementation of

[4] American scholars remark the need for the Supreme Court to change its economic framework: "*Because the Sherman and Clayton Acts are framed in general terms (barring unreasonable restraints of trade, monopolization, and acquisitions that may tend to substantially lessen competition) rather than proscribing narrowly defined conduct* […], *they derive their meaning largely from judicial application. Given the statutes*[1] *focus on economic concepts such as competition, these applications often focus on economic facts and are often rooted in economic principles. Because the relevant economic thinking has evolved considerably over recent decades, judicial interpretations need to be updated, lest antitrust become fossilized and discourage rather than promote competition*". J. ANGLAND, *Spring 2007 from the Section Chair*, in *Antitrust*, Spring 2007, p. 3.

the merger project, incentives to collude will prevail over incentives to compete.

Secondly, also in the *ex post* control over collusion there is an area where the tension is lower and the possibility of convergence is more realistic. This area does not involve the Sherman Act that, in the light of the recent judgements, appears strongly linked to the Neo-Classical tradition, and, therefore, incapable to attack tacit collusion under the Section 1. The possibility of convergence, on the contrary, involves Section 5 FTCA. In this area, the FTC and Courts recognized that anti-competitive, parallel conducts, arising in oligopolies prone to collusion, represent unfair methods of competition, therefore infringe Section 5. This result derives from the combination of several factors: first, the FTCA may be interpreted in a more flexible way than criminal statutes; secondly, there is a developing trend towards expanding the boundaries of the FCTA, at the scope of addressing suspected conducts that escape the other prohibitions; finally, the objective structure of Section 5 allows overcoming most of the difficulties about the application of the Sherman Act.

Section 5, in fact, may focus directly on conducts and market effects, and does not require any proof of intentional or culpable behaviours: it is enough for the Commission to show that the suspected conduct is unfair and that it may lessen competition.

However, the qualification of conscious parallelism as an unfair conduct presupposes a theoretical framework where the alignment towards anti-competitive results is perceived as a strategic choice, rather than as the mere consequence of oligopoly itself. By applying Section 5 to conscious parallelism, the FTC and the Courts implicitly adhered to the Game theory approach and realized the first step towards an effective antitrust policy about the oligopoly problem.

This trend offers a remarkable contribution to the convergence of US and EU approach to the *ex post* control over collusion: in both systems there is a tendency to insert the antitrust policy in a more objective framework which focuses on the anticompetitive effects imputable to more firms acting together as a single entity. In my view, it is this ground that competition authorities should adopt as a starting point for dealing with the oligopoly problem.

PART 3

DEALING WITH COLLECTIVE DOMINANCE:

A PROPOSAL

Introduction

European Commission and Community Courts have played a crucial role for the evolution of collective dominance, by inferring this category from the EU Treaty and by progressively clarifying its contents. Thanks to their contribution, collective dominance has progressively become a useful means for dealing with one of the most complex matters of the current antitrust policy, the oligopoly problem.

The approach to collective dominance reveals an effort of theoretically elaborating this category: in the absence of solid normative bases, the Courts have always sought to go further the peculiarities of the case at issue and to elaborate more general principles[1]. It was an important and difficult function, because the Courts were required to balance the tension between the need to eliminate any anti-competitive effects, on the one hand, and the duty to preserve legal certainty and consistency with the Treaty rules, on the other hand.

This process started from the *incipit* of article 82 "*any abuse by one or more undertakings of a dominant position*". For a long time, competition authorities had applied only the first limb of this rule and developed the notion of dominance around the paradigm of single, monopolistic power. In this framework, the EU case law defined dominance as the power to behave independently of the other

[1] The frequency and significance of the *obiter dicta* confirms the creative efforts of European Courts: both the first jurisprudential admission of the collective dominance theory and the inclusion of conscious parallelism in this category took, in fact, the form of incidental remarks.

players[2], and identified a set of factors signalling its existence. First of all, market shares are deemed to play a crucial, although not determinative, role: on the one hand, they are connected to a rebuttable presumption of dominance; on the other hand, their significance for the inference of dominance depends on both their fluctuation and the gap between the larger-sized firm and its closer rivals. Other indicia may support the inference of dominance, especially when market shares, taken alone, are not meaningful. Competition authorities focus, in particular, on barriers to entry, absence of potential competitors, superior technology, control over essential facilities, vertical integration, well-developed distribution systems, financial resources, customers' loyalty, economies of scope and scale, and opportunity costs[3].

When the debate about collective dominance rose, the category of single dominance presented already well-defined boundaries and contents, while the application of article 82 to several undertakings required specific interpretative choices. The expression "*more undertakings*", in fact, could allude either to the members of a dominant group, or to independent firms, individually or jointly dominant. Each of these alternatives is consistent with competition law and really corresponds to established categories[4].

After some initial uncertainties, the interpretative choice fell on the last option (more firms, legally and economically independent, but jointly dominant on a certain market), which may distinguish the category of collective dominance from both unlawful agreements under art. 81 and single dominance[5]. It also allows competition

---

[2] See, Court of Justice, C-27/76, 14 February 1978, *United Brands* v. *Commission*, in *ECR*, 1978, 207. "*The dominant position referred to this article relates to a position of economic strength enjoyed by an undertaking which enable it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*" (para 65).
Independence of behaviours reflects the freedom from competitive constraints. See *Commission Notice on the Definition of the Relevant market for the Purposes of Community Competition Law*, in *OJ*, 1997, C-372/5.

[3] R. WHISH, *Competition Law*, 5th Edition, LexisNexis, London, 2003, pp. 183-188.

[4] In the light of the actual knowledge, they would be classified respectively in terms of single dominance, multiple dominance, and collective dominance.

[5] M. LIBERTINI, *Posizione Dominante Individuale e Posizione Dominante Collettiva*, in *Riv. Dir. Comm.*, I- 2003, pp. 567-569.

authorities to deal with some anti-competitive effects coming short of the enforcement threshold required under article 81.

Through a progressive evolution, competition authorities have filled the notion of collective dominance with the well-defined meaning of more "*undertakings* […] *so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers*"[6].

The ability of several firms, legally independent, to act together *as if* they were a single entity is the essence of the collective dominance category. By focusing on the market effect–aligned behaviours–, this definition stresses the unitary notion of collective dominance, which, therefore, appears suitable for controlling both abuses and mergers. In the case of collective dominance, in fact, *ex ante* and *ex post* antitrust enforcements may be simply perceived as different perspectives–repressive and preventive–for looking at the same market phenomenon. However, the ascertainment of collective dominance, as well as the policy approach to this matter, changes in the two areas.

It is a common opinion that controlling mergers is much more complicated than repressing abuses of dominance. In the merger control, the Commission deals with the mere likelihood, however plausible it may be, that coordination might arise, while in the abuses, it deals with implemented conducts that generated anticompetitive effects.

However, the matter of collective dominance nowadays seems to be more linear, at least theoretically, in the merger control than in the abuses of dominance. In the merger control, in fact, collective dominance alludes only to the phenomenon of post-merger alignment that may take place in oligopolies and derives from the mutual understanding between the merged firm and its closer rivals. In the area of abuses, on the contrary, collective dominance is a multiform phenomenon, which embraces several species, ranging from cartels to mere oligopolistic parallelism. Depending on its main source, the resulting equilibrium, although involving always more firms parallelly behaving, present specific characteristics that requires an adequate approach in terms of antitrust policy.

[6] See *Compagnie Maritime Belge*, § 44 for abuses and, similarly, *Gencor*, §§ 274-277 for mergers. The Commission recently upheld this definition in the *Discussion Paper*.

In any event, collective dominance coming from oligopolistic interdependency and resulting in the phenomenon of *conscious parallelism* is currently the frontier of the problem at issue.
European Courts recognized, at least theoretically, that the category of collective dominance embraces conscious parallelism: in their view, the notion of economic links includes the relationship of interdependence between the members of a tight oligopoly, and, in the presence of particular market conditions, such a relationship may lead to tacit alignment.

This approach implicitly overcomes the Structuralist objection that the alignment of conducts would be imputable to the market functioning and that there would be nothing firms can do to avoid it. If this would be the case, we cannot understand why some oligopolies work in a competitive manner and others work in a collusive way. On the contrary, the fact that strategic incentives of firms and, therefore, profits maximizing strategies change from one market to another, does not exclude the intentional, or at least, conscious, nature of the firms' behaviours.

By applying modern economic theories, legal scholars have recognized that, in a concentrated market, firms may be easily aware of their interdependency and may seek to exploit it: they "*learn to act on their common interests and seek to avoid at least some kinds of competition*"[7]. A dynamic approach to oligopolies may overcome the apparent irrationality of the individual conducts and may explain why, in some cases, imitating rivals' conduct is a profit maximizing strategy for both copying and copied companies[8].

---

[7] R.J.R. PERITZ, *Doctrinal cross-dressing in derivative aftermarkets: Kodak, Xerox and the copycat game*, in *Antirust Bull*, 2006, p. 218.

[8] A.M. BRANBENBURGER, B.J. NALEBUFF [*Co-opetition*, Currency Dubleday, New York, 1996, pp.135-146] mention the case of the frequent-flyer program that American Airlines introduced as an incentive for loyalty, and that United copied. American increased its customer basis, by attracting passengers from the other airlines, and the other companies followed the same strategy. As a result, once each airline has its own base of loyal travellers, competition on price becomes less attractive. On the one hand, business plans for attracting customers by undercutting rivals are less effective, because each player may gain only a few new customers. On the other hand, price increases are less risky, because customers are more loyal, and because when one company raises its price, it gives the others the opportunity to raise their price too.

It follows that there is no deterministic relationship between market and outcome, but it is the rationally chosen strategy which, by acting as a medium link, may drive the market towards competition or collusion. This is to say that in most of the cases, active conducts are the primary cause of a certain market outcome and, all things being equal, they may differentiate competitive from collusive oligopolies.

The antitrust enforcement, therefore, should not overlook the contributions of firms, in term of both awareness of the market conditions and reactions to the choices of rivals.

The EU jurisprudence recognized that oligopolistic parallelism may be the main component of collective dominance, but it has practically addressed this matter in a different manner in abuses and mergers.

As for the abuses, the Courts have recognized the function of oligopolistic interdependency only as an *obiter dictum*. All judgments about collective dominance, in fact, have involved non-oligopolistic economic links, alone or together with oligopolistic market structures. Mere oligopolistic interdependence, in other words, has never been determinative for the inference of abuses of collective dominance[9].

As for mergers, on the contrary, the Commission has rejected several projects because of the likelihood of coordinated effects, even in the absence of other connecting factors. Moreover, for contingent reasons (the *Airtours* case and the changes in the ECMR), the issue of oligopolistic parallelism has been deeply debated in the merger control, and has led to the elaboration of a specific paradigm to deal with coordinated effects. Although difficult to implement, this

---

In the Game theory analysis, the frequent-flyer programs are an example of win-win strategy, and "*imitation of win-win strategy is healthy, not harmful*" (p. 146) for each player: the more the competitors that adopt the same strategy, the better it is for everyone.
This strategy also represents a two-limbed conduct: on the one hand, competition between airlines, to sign up new members, on the other, coordination of the price strategy. Such findings confirm the As' idea that companies may have a double role in the same game: cooperators, in creating the market, and competitors in dividing it. About the analysis of market conducts that combine collusion and competition, see *infra*, Part 3- Chapter 3.

[9] In *Compagnie Maritime Belge*, for example, the Court inferred the existence of collective dominance from both contractual links and the oligopolistic market. More recently, in the *Piau* case, collective dominance derived from contractual links in a non-oligopolistic market.

criterion, which summarizes the device of economic theories on collusion, represents a theoretical basis to evaluate oligopolistic mergers.

Such clarity still lacks in the enforcement of article 82, and to close this gap, legal scholars and Courts seek to apply to abuses the same criterion applied in the merger control.

The original trend has changed and nowadays it is the merger control that influences the enforcement of article 82 and offers materials and concepts to solve the matter of collective dominance in the area of abuses.

Following the evolutionary criterion that characterizes this work, in next chapters I will suggest a way to deal with collective dominance, beginning with the merger control. Then, I will analyse the abuse of collective dominance, in its puzzling articulation, by paying attention, in particular, to the phenomenon of conscious parallelism.

Chapter 1

How to Address the Issue of Coordinated Effects in the Merger Control?

1.1 Introduction

The preventive analysis of mergers is inherently speculative, since the Commission is required to predict the possible market evolution from the examination of current and past data. This time gap impedes building the merger control around a test of 'absolute certainty', but does not remove the need of careful examination about the foreseeable impact of mergers on the market functioning.

In the following paragraphs, I illustrate a possible approach to the preventive control of coordinated effects. With regard to this, I suggest applying a three-step analysis, which, by resting on the paradigm of ability-incentive-impact, focuses on the capability of firms to reach the terms of coordination, on the presence of real incentives to collude, and on the foreseeable anti-competitive effects coming from the post-merger market equilibrium.

This method combines negative and positive tests for collusion. The first stage focuses on market features that normally impede collusion; therefore it works as a filter and selects the operations that may really result in coordination. The second stage looks for market features that may uphold the suspect of post-merger coordination.

This approach rests on the premise that mergers are supposed to be lawful; therefore, the Commission is required to allege positive evidence about likelihood of anti-competitive effects. Moreover, consistently with the last case law, the standard of proof for this kind

of decision is that of high probability of collusion, inferred from cogent and consisting evidence.

Joint application of such a high standard of proof and the paradigm cited above leads to a prudent and dynamic approach to the preventive control on collusion, where prohibitions represent an extreme solution.

1.2 European approach to the merger control: arguments in favour of a presumption of legality

The ECMR article 4 para 1 imposes to the merging parties the duty to preventively notify concentrations with a Community dimension. If the Commission, through a brief exam, finds that the merger at issue raises serious doubts of compatibility with the common market, it may initiate a proceeding to better investigate the project. At the end of this phase, if competition concerns are confirmed and eventual commitments do not effectively address them, the Commission may prohibit the notified operation.

Such a proceeding reveals that mergers are not prohibited in themselves, because they signal certain dynamism in the market and may have a positive impact on welfare. By combining their assets, in fact, firms may achieve economies or scope and scale, may expand their distribution systems, improve the management's performance, easily access to loan and capital market, invest in R&D programs, and so on. If the benefits of increased efficiency, instead of being internalized, are passed on consumers, in the form of lower price, better quality, or new products, mergers may improve the entire market performance and increase competition[1].

Because of these potential benefits on the competitive process, mergers are not prohibited per se, but are subjected to a regime of preventive authorization. This mechanism expresses concerns about eventual misuses of this potentially positive instrument, because the specific market environment, combined with profit-maximizing functions of firms, may drive the market towards anti-competitive results.

---

[1] R. WHISH, *Competition Law*, 5th Edition, LexisNexis, London, 2003, pp. 783-785.
See also M. NEUMANN, *Competition Policy – History, Theory and Practice*, Edward Elgar, Cheltenham, UK, 2001, 111-113.

The current structure of merger control seeks to prevent likely failures and to protect the market functioning towards operations that, in themselves, are compatible with several outcomes.

The antitrust policy for mergers strongly contrasts with that applied in the case of cartels, which are supposed not to generate positive results; therefore, they are connected to a default rule of prohibition. However, this evaluation may change, if the concerned firms demonstrate the existence of positive effects offsetting the negative consequences[2].

With regard to the mergers, the idea of a default rule does not reach unanimous consent: although it is clear that mergers may produce significant benefits, often otherwise unreachable, the presumption of mergers' legality is contested on several grounds.
The main argument in this respect is the symmetrical formulation adopted in the ECMR for prohibitions and authorizations. It would suggest an equal burden of proof in the case of both compatibility and incompatibility of notified operations with the common market. As a result, the merger control would rest on the principle of neutrality, rather than on presumption of legality[3].

---

[2] The structure of article 81 confirms the negative perception about cartels: relevant cartels constitute, in themselves, infringements. However, the default negative assessment is other than a *per se* prohibition, because art. 81 at para 3 provides a list of cumulative conditions excluding the unlawfulness of cartels.

[3] Article 2(2) and 2(3) ECMR.
The debate about the default legality of mergers arose after the AG Tesauro, in his opinion on the *Kali und Salz* case, remarked that the ECMR does not contain any presumption of unlawfulness [*Opinion of Advocate General Tesauro*, joined cases C-68/94 and C-30/95, 6 February 1997, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC)* v *European Commission*, in *ECR*, 1998, I-1375]. This statement strengthened the debate of scholars about the existence of the opposite presumption. After the *Impala* case (see, *supra*, Part 1- Chapter 5), where the CFI applied, in the appeal against a clearance, the same standard of proof normally used for prohibitions, the principle of merger neutrality has reached more consents. Some scholars, in fact, have deducted from this judgement the existence of an identical standard of proof for prohibitions and clearances and, therefore, the absence of any presumption of legality. See, on this point, K. WRIGHT, *Perfect symmetry? Impala v. Commission and standard of proof in mergers*, in *Eur. Law Rev.*, 2007, pp. 415-416; G. AIGNER, O. BUDZINSKI, A. CHRISTIANSEN, *The Analysis of Coordinated Effects in EU Merger Control: Where do we stand after* Sony/BMG *and* Impala*?*, available at www.ssr.com, 2006, p. 19; D. BAILEY, *Standard of proof in EC merger proceedings: a Common Law perspective*, in *Common Market Law Rev.*, 2003, p. 878.

However, several and more substantive factors make it hard to deny the presumption of lawfulness. First of all, the principle of neutrality cannot deal with operations that give rise to competition concerns, but come short of the threshold of proof required for prohibitions[4]. Second, article 10(6) of the ECMR, that establishes an automatic authorization if the Commission does not decide within the provided time, would demonstrate that, in the case of uncertainty, favour for implementing the operation at issue, and interest of parties in merging should prevail[5]. Moreover, as a matter of fact, there would be a serious, provisional lacuna generating decisional immobility about doubtful mergers; in this case, the unavoidable inertia of competition authorities would be sanctioned under article 10(6) and would practically lead to the same result of a default authorization. As a matter of law, presumption of legality is consistent with both the *ratio* of merger enforcement and its system of preventive authorizations.

In my view, the *Impala* statement is not determinative for the matter at issue. While, in fact, it is true that the CFI equalled standard of proof for prohibitions and for authorizations, it is equally true that the *Impala* case deals with strengthening tacit collusion, so it requires proof of pre-existent collective dominance. Consequently, the standard of proof automatically increases, and tends to equal the higher threshold applied to abuses. In other words, application of a higher than expected standard seems to reflect the specific nature of the case at issue (strengthening of coordination), rather than the intention of equalling proof of prohibitions and proof of authorizations.

[4] See *Opinion of Advocate General Tizzano*, case C-12/03, *Commission* v. *Tetra Laval BV*, 25 May 2004, in *ECR*, 2005, I-987, §§ 76-77. The provisional lacuna about the mergers falling in the grey area has to be solved by an adequate ECMR interpretation. A default rule represents, in this respect, an adequate solution, since it provides that the Commission's incapability of demonstrating one of the alternatives amounts to prove the other (following the scheme, if not A, then B). Since mergers are likely to produce benefits on the market functioning, the presumption of compatibility should prevail over one of unlawfulness.

[5] *Opinion of Advocate General Tizzano*, *cit.*, §§ 78-79.

Contra, B. VESTERDORF, *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, in *Eur. Competition J.*, Mar. 2005, pp. 29-30, remarks that this rule would simply address and sanction inactivity of Commission, and would not establish any presumption of legality.

T. REEVES, N. DODOO, *Standards of proof and standards of judicial review in European Commission Merger Law*, in *Fordham International Law Jour.*, 2006, p. 1045, correctly note that article 10(6) is not in itself a workable criterion for distinguishing lawful and unlawful mergers, but it offers another argument in favour of the presumed legality of mergers.

In my view, merger control should mirror the enforcement of cartels: default rule in both cases, (of compatibility for mergers, of unlawfulness for cartels), with the possibility to rebut original presumptions by opposite proofs (about likelihood of anti-competitive effects, in the case of mergers; about pro-competitive effects, in the case of cartels). Consistently with this approach, the analysis of post-merger coordination should rest on the presumption that firms are not willing to infringe laws[6].

1.3 Rebutting the presumption of legality. The burden of proof incumbent upon the Commission in the case of prohibitions

The presumption of mergers' lawfulness, which reflects the presumption of mergers' efficiency, imposes to the Commission a positive duty to demonstrate that the operation at issue will significantly impede effective competition. With regard to this, it is preventively necessary to define the standard of proof required to prohibit operations presumably compatible with the common market.

1.3.1 The possible standards of proof

Far from being a fixed threshold, the standard of proof depends on the gravity of the infringements. As a general rule, the more serious the offence (or the more severe the punishment) is, the higher the standard of proof.

Basically, there are three different thresholds of proof: 'beyond reasonable doubts', 'balance of probability' and 'reasonableness'[7].

---

[6] C. VELJANOVSKI, *EC Merger policy after* GE/Honeywell *and* Airtours, in *Antitrust Bull.*, 2004, p. 190.

[7] The first standard is usually applied in criminal proceedings and demands cogent evidence to reject any possibility other than the conclusion of Court. The second standard, typical of civil procedures, focuses on more or less likelihood that the event at issue happened or will happen. It does not require absolute certainty, but it is enough that one of the conflicting scenarios results more probable than the other. The third standard, applied in administrative procedures, is even lower than the first two, and rests on the mere plausibility of a certain event. See, Y. BOTTEMAN, *Mergers, standard of proof and expert economic evidence*, in *Jour. Competition Law & Economics*, 2006, p. 74; D. BAILEY, *Standard of proof in EC merger proceedings…cit.*, pp. 852-854.

The merger Regulation neither clarifies which standard of proof is required for prohibitions nor fixes bounds and limits of the judicial review[8], with the consequence of increasing the congenital uncertainty about preventive control of mergers. Even the case law gives only a little guidance, because Courts have used different parameters: in *Kali und Salz*, for example, the annulment rested on lack of 'sufficient and consistent evidence'; in *Airtours*, on absence of 'cogent evidence'[9]. This matter has been deeply debated after the *Tetra Laval* decision, where the CJ implicitly upheld the 'convincing evidence' standard that the CFI had adopted in his decision[10].

1.3.2 'Balance of probabilities' test as the most appropriate standard for the merger control

Identifying the most appropriate standard of proof and of judicial review for mergers is not easy, because there are several, plausible alternatives. However, we can preventively exclude the 'beyond reasonable doubts' standard because it is typical of criminal proceedings and, even if adapted to the peculiarities of civil actions, it would not fit the characteristics of mergers. This high standard, in fact, would be proportionate neither to gravity of infringements nor to

---

Analogous range of standards characterizes the US system: see R.M. STEUER, *Standard of proof and judicial review: a US perspective*, in *International Antitrust Law & Policy*, 2005, p. 143 ss.

[8] Standards of proof and standards of judicial review are different but correlated concepts: "*Whatever the Commission has to prove is what the CFI is empowered to verify. Imposing a burden of demonstration on the Commission only makes sense if the failure to discharge this obligation is apt to cause judicial annulment*" [H. LEGAL, *Standards of proof and standards of judicial review in Competition law*, in *International Antitrust Law & Policy*, 2005, p. 113]. This means that the higher the standard of proof, the deeper the judicial review.

[9] See L. PRETE, A. NUCARA, *Standard of proof and scope of judicial review in EC Merger cases: everything clear after Tetra Laval*, in *ECLR*, 2005, p. 694 ss.

[10] Court of Justice, case C-12/03, 15 February 2005, *Commission* v. *Tetra Laval BV* (hereinafter, *Tetra Laval*), in *ECR*, 2005, I-987. After this judgement, the scholars' debate has focused on questions whether the standard of proof for the mergers' control has increased and what the correct standard for the merger control should be. See, *ex plurimis*, J. DAVIES, R. SCHLOSSBERG, "*Once more unto the breach, dear friends": judicial Review of antitrust agency merger clearance decisions*, in *Antirust*, Fall 2006, pp. 20-21; K. GUERRERO, *A New "Convincing Evidence" Standard in European Merger Review*, in *U. Cin. L. Rev.*, 2003, pp. 249-284.

the subsequent sanctions, given that no fine applies to the prohibitions of mergers. Moreover, this standard would contrast with the prognostic nature of merger control: any future event is speculative in itself, so the Commission cannot be required to show that anti-competitive outcomes will surely occur[11].

The lowest standard, on the contrary, would be theoretically practicable: merger control, in fact, implies a margin of discretion for the Commission and, usually, when administrative authorities exert discretional power, the judicial review rests on reasonableness or manifest erroneousness of the decision at issue[12]. However, the frequent use of expressions such as 'in all likelihood' or 'very plausible', or 'very probable' in the jurisprudence of EU courts seems to practically exclude this solution.

Conversely, even the last cases, and especially the CJ ruling in *Tetra Laval*, suggest that the standard of proof for mergers is one of 'balance of probability'. By relying on accurate, consistent and complete evidence, this test allows authorities to foresee which is the most likely impact of mergers. Therefore, it may ensure the highest level of certainty, reasonably expected in a preventive control[13].

The practical implementation of 'balance of probability' test implies the definition of the specific threshold of probability required to deny authorizations[14]. By relying on the expressions of judges mentioned above, it seems that something more than mere prevalence

---

[11] According to D. BAILEY, *Standard of proof in EC merger proceedings…cit.*, pp. 866- 870, the 'beyond reasonable doubts' standard may also apply in civil action, but only in the case of serious infringements, accompanied by rigorous sanctions, as it happens for cartels. It also could be reasonable in the case of abuses, because the backward-looking assessment does not requires great discretion, but would be inappropriate for the *ex ante* control.

T. REEVES, N. DODOO, *Standards of proof…cit.*, p. 1047, remind that this standard of proof would also be incompatible with the short time available for scrutinizing the notified operations.

[12] L. PRETE, A. NUCARA, *Standard of proof…cit.*, p. 695.

[13] There is a common consent about applying the balance of probability test in merger control. About the case law, see *Tetra Laval*, §§ 39-43. The European Commission relies on this standard at least in those cases arising complex economic issues: see E. PAULIS, *The Burden of Proof in Article 82 cases*, in *International Antitrust law & Policy*, 2005, p. 469. Most of the legal scholars concur on this preference: see, for example, L. PRETE, A. NUCARA, *Standard of proof…cit.*, pp. 697-699; Y. BOTTEMAN, *Mergers, standard of proof…cit.*, pp. 72-73; D. BAILEY, *Standard of proof in EC merger proceedings…cit.*, p. 867.

[14] In my reconstruction, the matter of the appropriate standard of proof involves only prohibitions, since mergers are presumed to be compatible with the common market.

(in terms of anything above 50%) is required. However, even in this case, there is no general threshold, but the necessary level of probability strictly depends on the case at issue[15]. With regard to this, two relevant factors have a crucial role: time necessary for effects to rise, and difficulty of assessment. As to the first, the wider the time gap between operation and expected effects, the higher the level of proof the Commission has to reach. Therefore, if anti-competitive effects do not immediately appear after the notified operation, but are expected to occur in the future, the standard of proof should be higher. As to the second, the more remote the likelihood of a certain event is, the higher the standard of proof. Sometimes it is easy to predict the impact of mergers: when, for example, horizontal mergers create a market leader holding large shares compared to its rivals, and when there is no expected change in the involved market, it is quite sure that the concerned operation will result in single dominance, potentially hindering competition. In this kind of operation, the significance of structural data may justify a probability level close to the threshold of 50%.

In other cases, the ontological characteristics of the expected post-merger equilibrium do not allow to infer sure conclusions, even in the presence of an equally complete set of information.

1.3.3 High probability level in the case of collective dominance

Some features of mergers may exacerbate the difficulties of inferring, from the current data, the real likelihood of significant impediments of competition. This is, for example, the case of conglomerated mergers, which are supposed to be neutral or beneficial for competition on the concerned markets[16].

---

[15] See E. PAULIS, *The Burden of Proof in Article 82 cases...cit.*, p. 469.
Similarly, D. BAILEY, Scope of judicial review under article 81 EC, in Common Market law Rev., 2004, observes: "*the standard of proof in merger cases is not uniform. On the contrary, much will depend on the merger concerned, the economic theory applied, the evidence available and the scope for value judgement*" (p. 864).

[16] For this reason, "*the Commission's analysis of a merger transaction which is expected to have an anti-competitive conglomerate effect calls for* a particularly close examination *of the circumstances which are relevant for an assessment of that effect on the conditions of competition in the reference market*". Court of First Instance, case T-5/02, *Tetra Laval BV* v. *Commission*, 25 October 2002, in *ECR*, 2002, II-4381, § 155.

Analogously, predicting post-merger coordinated effects is extremely difficult, because they deal with a behavioural equilibrium coming from mutual adaptation that, in turn, derives from the convergence of individual, profits-maximizing functions. Structural data appear less significant and less determinative in this scenario where, on the contrary, it is the dialectic between incentives of firms that plays a crucial role. Since, in this area, the merger control, inherently speculative, becomes much more unpredictable, the threshold of probability the Commission has to reach for lawful prohibitions should rise too[17].

It follows that the amount of cogent and consisting evidence necessary to prohibit collusive or conglomerated mergers is the highest possible, compatibly with both the 'balance of probabilities' standard and the prognostic nature of this scrutiny. It is necessary, in other words, to adapt the basic standard to the peculiarities of the kind of operation at issue[18].

1.3.4 Consequence of this parameter: cautious approach to prohibitions resting on coordinated effects

The general rules about proof of mergers, as inferred from the European case law, express a preference for a probabilistic standard, resting on the inference that one outcome is more realistic to appear than another. Since predicting coordinated effects is one of most speculative deductions in the merger control, it seems reasonable to choose a probatory threshold capable to address these additional difficulties. The control of coordinated effects, therefore, should involve the highest level of certainty reachable in a preventive and prognostic assessment. Consequently, the Commission has to

---

[17] T. REEVES, N. DODOO, *Standards of proof…cit.*, say, with regard to this, that "*theories of harm based on the parties' alleged future behavior require more convincing evidence for the merger to be prohibited, and this is the decisive factor in shaping the standard of proof, rather than the fact that the merger in question is a horizontal one*" (p. 1050).

[18] In the *Tetra Laval* case, the CFI expressly equalled the standard of proof for conglomerated and coordinated effects: "*The Commission's analysis of a merger producing a conglomerated effect is conditioned by requirements similar to those defined by the Court with regard to the creation of a situation of collective dominance* […] *Such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effect (see, by analogy, Airtours v. Commission, paragraph 63)*" (§ 155).

demonstrate, by solid and convincing evidence, that the merger at issue will cause, in all probability, post-merger coordination.

The implicit risk of a cautious approach to collective dominance is one of imposing to the Commission a sort of *probatio diabolica*, which would *de facto* impede an effective control on collusion. This failure could also result from an over-expansion of the judicial review, which erodes the discretional power of Commission that, on the contrary, is necessary for a preventive and economics-based control[19]. For overcoming this limit, the actual implementation of that standard of proof has to balance the tension between the discretional power, required by the nature itself of merger analysis, and an effective judicial review over enacted decisions. In the case of coordinated effects, this means inferring prohibitions from a complete and meaningful set of evidence, which demonstrates the high likelihood of post merger coordination, and means ensuring the control of Courts over trueness, relevance and coherence of the alleged evidence[20].

1.4 SIEC and 'high probability' standard: a three-step test for coordinated effects

Judges, scholars and practitioners concur that the *Airtours* judgment represents a keystone for collective dominance, especially because it drew a clear distinction between unilateral and coordinated effects and suggested a method for approaching tacit collusion.

---

[19] Advocate General Tizzano emphasizes the limits of judicial review: "*The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the judicature to go further, and particularly* […] *to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution*". See *Opinion of Advocate General Tizzano*, *cit.*, § 89.

[20] This approach is consistent with the most recent doctrine: see, CJ in *Tetra Laval* judgement, § 39: "*Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature*".
Legal scholars welcome such a solution, because it preserves the margin of discretion required by an economic, perspective, and complex assessment, but prevents the risk of arbitrary decisions. See D. GERADIN, N. PETIT, *Judicial Remedies under EC Competition Law: complex issues arising from the "modernization" process*, in *International Antitrust Law & Policy*, 2005, pp. 430-431.

After the *Airtours* case, it was clear that the competitive concerns arising from oligopolistic mergers could involve either coordinated or unilateral effects. The difference between these categories is well known to the industrial economics, which spelt out that coordination alludes to the common policy adopted by the merged entity and its rivals and it implies foregoing to short-run profits, in the expectation that rivals will do the same and that, consequently, the level of market prices will go up. Multilateral effects, on the other hand, deal with unilateral and non-coordinated strategies: by removing a competitive constraint, mergers may induce the new entity to maximize its short-run profits by an immediate price increase[21]. Although the post-merger change in the firms' incentives directly involves the sole merged entity, in concentrated markets, with high strategic interdependency among companies, the result may be an increase of market price[22]. The final outcome, therefore, is quite similar to

---

[21] The risk of unilateral effects is typically linked to mergers between producers of closely substitutable goods and creating the second or the third largest firm, which is suspected to raise its price.
However, for these price increases to be profitable, It is necessary a certain degree of product differentiation, otherwise it will result in a loss of customers who, in the case of high elasticity of the demand, will buy the rivals' products. Therefore, the degree of price increase depends on the consumers' willingness to move to their second choice. For a basic description and estimation of the unilateral effects, see B. DUBOW, D. ELLIOT, E. MORRISON, *Unilateral Effects and Merger Simulation Models*, in *ECLR*, 2004, pp. 114-117.
This scenario, according to the economists, is perfectly compatible with the exercise of market power, but it does not fit the legal concept of dominance. For the second or the third firm to be characterized as dominant, in fact, it would be necessary either to assume that all oligopolists are collectively dominant, by applying the notion of tacit collusion, or to qualify each oligopolist as individually dominant. Both solutions seem to be neither plausible nor practicable: the first proposal, in fact, would include non-collusive dynamics in a category expressly created to deal only with the coordinative equilibria; the second proposal would imply a plurality of dominant firms in the same market. The result, in other words, would be an over-extension of dominance, which would not match its expected meaning.
[22] On this point, J. FINGLETON, *Does Collective Dominance provides suitable housing for all anti-competitive oligopolistic mergers?*, in *International Antitrust Law & Policy*, 2003, notes that the generic reference to oligopolistic mergers may be deceptive: "*Interdependence and the presence of a small number of suppliers are common to all oligopoly models. They are not useful in predicting outcomes and simply tell us that we are talking about oligopoly*" (p. 187).
The difference among the two models involves the basic dynamic: while, in the case of tacit collusion, price increases presuppose the alignment of all or, at least, the major part of the oligopolists, in the case of non-collusive oligopolies, the merged entity, although not dominant, may individually exercise market power. See also K.U. KUHN, *Closing*

coordinated effects: in both cases, oligopolists present themselves as a single entity and behave in an anticompetitive manner. However, their functioning is different, because in the case of unilateral effects there lacks, by definition, symmetry between firms: the market leader chooses its strategy and the other firms find it more convenient to follow the leader' strategy than deviating. The reason is that smaller firms normally are capacity constrained, therefore they could neither increase their output, in a way to reduce the market price, nor resist to an eventual price war. On the contrary, the bigger-sized firm may exert a remarkable pressure upon its smaller rivals, even without recurring to a price war. It normally happens, in fact, that the bigger firm is more efficient than smaller firms, therefore, it may increase its market share by a loss-free strategy, which implies charging price above its own marginal costs, but below the rivals' marginal costs. This is to say that, in the case of unilateral effects, the anticompetitive consequences exist insofar the market leader decides to implement a certain strategy.

In the case of coordinated effects, the mechanism is quite different, because the merger could make it more convenient for all firms to collude, and only if the most relevant players decide to follow a collusive strategy, they may increase their profits. Collusion, in other words, rests on the awareness that prices increase is a profits-maximizing strategy for each firm if the other firms will act in the same way[23]. In the case of unilateral effects, on the contrary, price increase may be a profits-maximizing strategy for the merged entity, regardless of the behaviour of its rivals.

This difference allows competition authorities to address the potential coordinated-like effects that rest on a different mechanism than collusion and help eventually selecting remedies appropriate to the specific market equilibrium at issue.

In the *Airtours* case, the CFI expressly declared that stable coordination rests on market transparency, sufficient incentives not to deviate, and absence of external pressures undermining the collusive

---

Pandora's box? Joint Dominance after the "Airtours" judgement, 2002, pp. 3-4 (available at http://ssrn.com/abstract_id=349521).

[23] This phenomenon is compatible with the presence of smaller, not-aligned rivals, which usually operate in small niches of the market and have a minimal weight for the market functioning.

equilibrium. Before this judgement, the Commission had been relying on the same substantive elements, but the lack of a systematic, analytical framework made it actually difficult to predict the final decision[24]. Then, the *Airtours* conditions have become the primary means to assess all cases involving concerns about tacit collusion. However, economists spelt out that those requirements represent only essential, rather than sufficient, conditions for coordinative equilibria. They simply describe when markets are prone to collusion, but they cannot ensure that, under all those circumstances, collusion will surely appear. On the contrary, to support the suspect of post merger collusion, something more is required.

Practicable tests for post-merger collusion should combine economic theories with the legal test of SIEC, and the appropriate probatory threshold. As a synthesis of these elements, I suggest building the control of collective dominance around a three-step analysis, which takes account of both the quantitative and qualitative dimensions that affect the case at issue, as well as the intra-proceeding negotiations for remedies, in the form of parties' commitments.

1.4.1 The first stage: the firms' ability to stably collude

By recalling the *Airtours*' conditions, the Horizontal Mergers Guidelines recognize that the significance of coordination in the merger control depends essentially on the stability of expected market changes. This automatically excludes all post-merger alignments that cannot durably affect the market functioning.

The practical application of the *Airtours* criteria reveals that each of them is a complex element, which depends, in turn, on a set of market factors, the same included in the check-list and supposed to facilitate collusion. Therefore, each of those requirements should be viewed as a key-point of collusion, rather than as a single market factor in itself.

---

[24] See N. LEVY, *European Merger Control Law: a Guide to the Merger Regulation*, Matthew Bender, 2004, § 14.05. Similarly, S. BISHOP, A. LOFARO, *A legal and economic consensus? The theory and practice of coordinated effects in EC merger control*, in *Antitrust Bull.*, 2004, p. 230.

By departing from the traditional terminology, I indicate the three macro-requirements for collusion in terms of market prone to collusion and both internal and external stability of collusion.

1.4.1.1 Market prone to collusion

Collective dominance is a behavioural equilibrium, coming from the repeated interaction between firms, and resulting in the alignment of strategies. This outcome presupposes a favourable environment that industrial economists sought to theorize[25], by listing a series of market factors facilitating tacit coordination:

- High level of market concentration and stability of market shares
- Market transparency
- Product homogeneity
- Demand stability
- Barriers to entry
- Structural and contractual links
- Market stability (absence of growth)
- Low innovation
- Multi-market contacts
- Symmetry on costs, market shares, capacity, structure.

Evidence of these factors gives a positive signal about the feasibility of collusion in the market at issue, but it does not describe how large the potential for post merger coordination is[26]. With regard to this, the analysis has to go on and has to focus on other elements.

[25] About the role of each factor for collusion and the effects of their interaction, see M. MOTTA, *Competition Policy*, Cambridge University Press, Cambridge, 2004, pp. 142-159; S. FEUERSTEIN, *Collusion in Industrial Economics – A Survey*, in *Journal of Industry, Competition and Trade*, 2005, pp. 163-198.

[26] M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE *The Economics of Tacit Collusion*, Final Report for DG Competition, European Commission, 2003, p. 6, available at www.europa.eu.

1.4.1.2 Internal stability of collusion

In a behavioural equilibrium, stable anti-competitive behaviour rests on a system of beliefs about the convenience of colluding or competing: firms choose to collude if collusion may ensure higher profits than competition. In balancing these elements, competition authorities usually emphasize the importance of retaliation, as a factor that reduces the profits of competition and, consequently, strengthens the incentive to collude[27].

However, deterrent mechanisms are one, but not the sole, means which ensure internal stability to collusion, by reducing the tendency of cheating. Depending on the specific characteristics of the collusion at issue, retaliation may be either an essential or a superfluous condition for strengthening collusion from within. Sometimes, other elements may address the internal pressures towards defecting. Therefore, the analysis of factors that may ensure internal stability of collusion should take account of deterrent mechanisms, on the one hand, strong incentives to stay in the game, on the other hand.

1.4.1.2.1. Deterrent mechanisms

In most of the cases, firms collude on price, by reducing the amount of output and charging supra-competitive tariffs. This mechanism could implode, because of the internal tension between the incentive to stay in the game and the opposite incentive to depart from collusion. In the case of homogenous products and supra-competitive prices, in fact, each firm may undercut its rivals and, in this way, may attract more customers. Since this increase in the demand may more than compensate losses from lower prices, cheating represents a constant menace for collusion, because it increases the short-run profits. For this reason, colluding firms need to develop specific mechanisms that reduce the incentive to deviate. In the case of price collusion, the menace of a price war may be an effective means to this end, because it introduces in the profit-

[27] S. FEUERSTEIN, *Collusion in Industrial Economics – A Survey*…cit., pp. 163-164, remarks that for both tacit and express cartels to be sustainable, they must be self-enforcing: the first kind, because rests on a system of signals and has to address the firms' temptation to deviate; the second kind, because cannot be enforced in the Courts.

maximizing strategies of firms a further variable-losses from retaliation-that may reduce the convenience of defecting.

For this reason, economic theories about collusion spell out that the stability of this kind of equilibrium depends on the tacit understanding that any defection from coordination will be punished. It is for the same reason that Commission is required to include in the scrutiny about the likelihood of post merger collusion the existence of a punitive mechanism allowing firms to maintain coordination.

However, the mere existence of retaliatory mechanisms is not enough to ensure stable collusion, because the effective deterrence of threats depends on the amount of losses consequent to retaliation and on their capability of outweighing the likely profits of deviation[28]. For deterrents to provide real incentives not to cheat, they must be credible, timely, and easy to be implemented. Credible and effective mechanism must impose losses large enough to prevent defections, but not as costly as to annul interest of rivals to implement it, given that the effects of price decreases will invest all firms active on the concerned market[29].

In the preventive control of coordinated effects, and especially in the case of creation, rather than strengthening, of collective dominance, the Commission may approach proof of deterrence in terms of potentiality. In other words, the Commission is not supposed to demonstrate that actual retaliation has already occurred, but simply that, if one firm departs from collusion, its rivals will be able to retaliate[30].

---

[28] M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE *The Economics of Tacit Collusion…cit.*, p. 5.

[29] The matter of the optimal punishment to sustain collusion is widely debated in the economic literature. Scholars recognize that deterrent mechanisms must fit the specific market at issue, therefore, there cannot exist a single mechanism suitable for all markets. However, even with regard to the same market, scholars do not concur on which could be the optimal level of punishment for maintaining collusion. With regard to this, see P. ABREU, *External Equilibria of Oligopolistic Supergames*, in *Journal of Economic Theory*, 1986, pp. 191-225; J.W. FRIEDMAN, *A non-cooperative equilibrium for supergames*, in *Review of Economic Studies*, 1971, pp. 1-12; L. COLOMBO, P. LABRECCIOSA, *The Suboptimality of Optimal Punishments in Cournot Supergames*, in *Economics Letters*, 2006, pp. 116-121.

[30] See, as the most recent example, the *Impala* judgement [cit. *supra*, Part 1- Chapter 3], where the CFI spelt out that "*the mere existence of effective deterrent mechanisms is sufficient, in principle, since if the members of the oligopoly conform with the common policy, there is no need to resort to the exercise of a sanction*" (§ 466).

1.4.1.2.2 Strong incentives to stay in the game

Sometimes the internal stability of collusion does not depend on the existence of any punitive mechanisms that firms may implement in the case of defection, because it is the intrinsic convenience to collude that reduces the firms' tendency to defect. This scenario relies on the cases where departing from collusion results in an immediate loss, rather than in increased profits, as it happens in the previous model.

For example, in the case of market division by a mechanism of customers' lock-in, oligopolists may compete on the primary market to attract customers and, then, collude on the derivative market by charging supra-competitive prices for the replacement parts. In this case, the temporary departure from collusion, given the strong correlation between the primary and the secondary market (customers are locked-in, because the replacement parts are incompatible with each other), means to forego the supra-competitive profits coming from collusion, without any possibility of future recoupment or compensation.

The neutrality of retaliation for the stability of this kind of collusion is evident and makes it superfluous for the Commission to focus on the capability of firms to react to defection by increasing the amount of output. Conversely, lack of punitive mechanisms would lead the Commission to erroneously exclude the possibility of stable collusion[31].

The Commission itself, in one of its most criticized statements, admitted that retaliation might be superfluous: "*where* […] *there are strong incentives to reduce competitive action, coercion may be unnecessary*" (§ 55). Although *Airtours* was not one of these cases, this knowledge should guide the future application of collective dominance: by focusing only on deterrence, there is the serious risk of applying the *Airtours* conditions even to the cases where stable collusion does not imply retaliation.

[31] The importance of recognizing that retaliation is not the sole means to ensure stable collusion and, therefore, to infer the actual or future existence of relevant collective dominance is more evident in the *ex post* perspective. See, on this point, Part 3- Chapter 2

1.4.1.3 External stability of collusion

Menaces for the stability of collusion may also come from external factors, such as not aligned rivals and customers. Since the control of coordination relies on medium and long-term effects, the exam of countervailing constraints has to involve actual as well as potential customers and outsiders[32].

1.4.2 The assessment of market factors: interaction and mutual influence

The issue of collusion has been deeply examined in economic studies, but there is no empirical test we can use to predict the likelihood of collusion in every market. Economic researches may give just any advise about the market factors to be examined in the analysis of joint dominance. Moreover, the basic difficulties of the preventive examination of mergers are exacerbated, in the case of collusion, by the knowledge that there is neither single market factor nor presumption based on market shares ensuring that collusion will certainly happen[33].
Therefore, the Commission should address this matter by a multi-criteria approach, which embraces all factors that, in the market at issue, are likely to influence post-merger coordination. Concerning to this point, economic models help figuring out which factors may affect collusion and how they affect coordinative equilibria[34]. All these

[32] About the countervailing power of consumers, W. KOLASKY, *Coordinated effects in merger review: from dead Frenchmen to beautiful minds and mavericks*, 2002, p. 18 (available at www.usdoj.gov), advises not to overvalue the buyers' sophistication, because the experience in prosecution of cartels demonstrates that in many successful cases of collusion, customers were large buyers.
[33] See, for example, J. BRIONES, *Oligopolistic Dominance: Is There a Common Approach in Different Jurisdictions? A Review of Decisions adopted by the Commission under the Merger Regulation*, in *ECLR*, 1995, p. 336; K.U. KUHN, *Closing Pandora's box? Joint dominance after the Airtours judgment*, in *The Pros and Cons of Merger Control*, 2002, Swedish Competition Authority, p. 57.
[34] M. STENBORG, *Forest for the Trees: Economics of Joint Dominance*, in *European Journal of Law & Economics*, 2004, p. 377.

elements are included in an ideal checklist[35] that had represented, for a long time, the theoretical framework for the preventive control of collusion.

Nowadays, such an approach, in its pure form, appears no more workable to catch collusion and, therefore, no longer practicable, because of its failures about contents and method. As for the contents, it is frequent the objection that there is no exhaustive checklist and that some factors included in the original version contrast with modern, economic models[36]. As for the method, the idea itself of a check on–check off approach to collusion makes little, if any, sense, for many reasons. First of all, it does not clarify how to decide those cases where only some, but not all, factors are found. This scenario represents the rule, rather than the exception, since only rarely markets satisfy or miss all points of the checklist[37]. Moreover, the checklist approach emphasises the mere existence of factors, but undervalues the matter of their sufficiency and their significance for the suspected collusion. A mere list of factors may also raise the erroneous perception that all factors have the same weight in collusive equilibria. On the contrary, even theoretically, only some of those elements are in themselves necessary for collusion. Finally, the checklist does not fit well the purpose of predicting the post-merger changes in the market equilibrium: it may only reveal the presence of some factors, but, let alone, cannot disclose if and how the operation at issue may affect them[38].

As an alternative to the checklist approach, competition authorities may address the merger control from a dynamic perspective, where each factor is a component of a broader mechanism and, therefore, needs to be assessed in the light of the

---

[35] F.M. SHERER, D. ROSS, *Industrial Market Structure and Economic Performance*, 3rd Edition, Houghton Mifflin Company, Boston, 1990, listed a set of factors facilitating collusion.

[36] K.U. KUHN, *An economist's guide through the joint dominance jungle*, 2001, [University of Michigan – John M. Olin Center for Law & Economics, working paper #02-014, available at www.ssrn.com] p. 19; I. KOKKORIS, *The Development of the Concept of Collective Dominance in the ECMR. From its Inception to its Current Status*, in *World Competition*, 2007, p. 444.

[37] S. BISHOP, A. LOFARO, *A legal and economic consensus…cit.*, p. 231.

[38] L. COPPI, M. WALKER, *Substantial convergence or parallel paths? Similarities and differences in the economic analysis of horizontal mergers in US and EU competition law*, in *Antitrust Bull.*, 2004, p. 142.

whole market functioning. This approach rests on the awareness that the relationship between factors and market is complex and double: on the one hand, the specific market contest influences the actual weight of each factor; on the other hand, the market functioning results from the interaction of economic factors. This knowledge narrows the analytical perspective and induces to focus on the specific market involved in the operation, with its own dynamics and its own functioning. It follows that the approach for coordinated effects must necessarily be one case-by-case.

However, by connecting economic teachings and case law, we can draw some, general devices about the predictability of coordinated effects in every market.

1.4.2.1 Focus on transparency

First of all, the analysis of Commission should involve market transparency, factor that represents, in my opinion, the sole *condicio sine qua non* for tacit collusion. Coordinated effects, in fact, deal with a behavioural equilibrium where firms observe and adapt with each others, without explicitly communicating. Therefore, transparency plays a crucial role in both reaching and maintaining collusion: lacking adequate observability, firms cannot easily capture and decode the rivals' signals to behave in a certain way, thus there are a few, if any, opportunities to tacitly collude.

Even when, for specific, conjunctural, or stochastic reasons, firms may tacitly align their strategies, this equilibrium would have no chance to be durable. Tacit collusion, in fact, requires, by definition, behavioural flexibility and, without adequate transparency, rivals cannot distinguish the necessary adjustments from cheating[39]. Analogously, since each industry is influenced by external forces and by the general, economic conjuncture, in the case of low transparency, changes of conducts imputable to external factors may be perceived as defections[40]. In a nebulous market, it is high the possibility of misunderstanding, and this risk easily disrupts collusion.

[39] J. A. ORDOVER, *Coordinated effects in merger analysis: an introduction*, in *Columbia Business Law Rev.*, 2007, pp. 425-426.

[40] For example, price decrease may come either from demand shocks or from defection.

From a methodological point of view, the assessment of market transparency rests on real and concrete bases. There is no general parameter suitable for every market, but the Commission has to verify, case by case, if firms, given the specific market functioning, may infer, from the available data, all information they need to sustain collusion[41]. It follows that, even the market transparency, although crucial, is not an independent variable, but it is conditioned by products' features, kinds of transactions, and market stability.

If the economic analysis leads to perceive that market transparency is not enough to support the suspected post-merger collusion, there is, in my view, a sufficiently solid argument to approve the notified project[42].

1.4.2.2 Focus on symmetry

Dynamic methods for the merger control focus on the incentives of firms to anti-competitively behave. In the case of coordinated effects, the analysis of incentives rests on double perspective: on the

---

[41] M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE *The Economics of Tacit Collusion… cit.*, p. 25, remark that transparency is not a matter of observation in itself, but one of deductions from observation. They also spell out that transparency is unlikely to change because of the merger, thus its exam rests on the current and past market data, without involving a forward-looking perspective.

[42] In my view, the correct perspective to assess the market transparency is that suggested in the *Airtours* case. The CFI listed transparency among the essential conditions for tacit collusion, with the implicit consequence of rejecting claims about collective dominance in case of insufficient observability. Horizontal Merger Guidelines, on the contrary, reduced the role of transparency, which is no longer perceived as a condition in itself for tacit collusion, but simply as a variable affecting the ability of firms to monitor deviations. In other words, market transparency is simply a requirement to identify and punish deviations.

This approach echoes in the opinions of some scholars, which tend to confine the relevance of transparency to the durability of collusion. See, for example, R. O'DONOGHUE, A.J. PADILLA, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford and Portland, Oregon, 2006, p. 153.

On the contrary, before the last reforms of mergers, legal scholars and economists concurred on the crucial role of transparency for collusion to rise. With regard to this, they remark that some kinds of organizations, such as joint ventures, are typically created to increase market transparency, by intensifying the frequency of contacts and by improving the mutual observability. See, on this point, V. RABASSA, *Joint ventures as a mechanism that may favour co-ordination: an Analysis of the aluminium and music mergers*, in *ECLR*, 2004, p. 773.

one hand, the individual perspective, to figure out whether for each firm is more convenient to collude or to compete; on the other hand, the joint perspective, to predict whether incentives of firms might point toward the same direction.

When firms are close each other, these two aspects are likely to converge: similar firms usually have similar incentives. This knowledge is crucial when more firms are suspected to act together as if they were a single entity: it is intuitive, in fact, that the closer each other the firms, the easier the coordination. On the contrary, diversity of firms makes it unlikely, or at least difficult, to find a market strategy suitable for all of them.

All relevant similarities for coordination may be expressed by the parameter of symmetry, which embraces a realm of factors, such as internal organization, costs of production, growth expectation, product homogeneity and, more important, dimensions of firms[43].

Modern studies about collusion stress the importance of similar capacities within the coordinated group, because small and large

[43] In some markets, internal structures, such as vertical integration, may be a significant barrier for collusion. The same is true for costs of production, which affect the level of output and profits and result, for this reason, in different profits maximizing functions.
B.C. HARRIS, C.G. VELJANOVSK, *Critical loss analysis: its growing in competition law*, in *ECLR*, 2003, pp. 213-218, propose to use the critical loss test for coordinated effects. According to their model, competition authorities are required to identify the profits maximizing strategy that will prevail in the post-merger scenario. Firms might choose to increase profits either by setting higher prices and reducing output, or by increasing the amount of sales, by reducing prices (given the inverse relationship between demand and prices, and between prices and output, and given that profits depend on both price and sales). For each firm, choosing one or the other depends on its own critical loss level, i.e. the level of sales that a firm may lose before price increase becomes unprofitable. It follows that firms will not adhere to collusion if they expect to lose more sale than their critical loss, and will cheat on collusion if the increase of sale is above the critical loss. The level of critical loss depends on individual demand and costs' functions, therefore asymmetry on these parameters may impede collusion: firms with higher costs or lower demand, in fact, are likely to reach the critical point when for the others it is still convenient to collude.
Even differences in the firms' supply, in terms of range and homogeneity of products, make more complicated to reach the terms of an agreement on prices, and reduce the incentive to collude for the high quality producers.
Moreover, growing firms have fewer incentives to collude with declining rivals, being more convenient to wait that rivals will exit the market. See R. O'DONOGHUE, A.J. PADILLA, *The Law and Economics…cit.*, pp. 140-141.
Finally, the concept of dimensions of firms embraces capacity, market shares and resources, all factors that describe the weight of each firm in the market.

firms have surely different incentives to stay in the game[44]. Basically, bigger-sized firms, with larger, unused capacity, have greater incentives and an actual possibility to undercut their rivals by increasing the output. On the contrary, smaller firms, with greater capacity constraints, have weaker incentives to defect, being able to gain only small profits from deviation. Moreover, the menace of retaliation by the smaller-sized firms represents a weak deterrence against the defection of bigger rivals: first of all, the intensity of such a reaction would be modest, given the difference in available capacity; second, the gap between smaller and larger firms would lower the incentive of smaller rivals to really implement a punitive mechanism. Retaliation, in this case, would damage the smaller firms much more than their bigger competitors, which have greater, available resources to bear a price war. On the contrary, bigger firms may react to the defection of smaller rivals by the most powerful punishment, that is, by producing at full capacity.

This knowledge has immediate consequences in the analysis of price collusion. Defections and retaliations imply an increase of supply, which depends, in turn, on capacity of firms. Since asymmetrical capacity or asymmetrical capacity constraints result in different incentives to maintain collusion, they impede stable coordination[45].

---

[44] This theory is probably the most interesting contribution of K.U. KUHN to the studies about collective dominance. It has been refined in a series of papers: *Closing Pandora's box…cit.*, p. 55 ss; *An economist's guide…cit.*, pp. 11-13; *Fighting collusion – Regulation of communication between firms*, in *Economic Policy*, 2001, pp. 169-204.

[45] O. COMPTE, F. JENNY, P. REY, *Capacity constraints, mergers and collusion*, in *European Economic Review*, 2002, pp. 12-14. According to the As, "*the main problem for collusion is to prevent the largest firm from deviating*" (p. 13).

Several recent decisions emphasize the role of symmetry in the case of price collusion. The *Sonaecom* decision [Autoridade da Concorrencia, Processo AC-I- 08/2006, *Sonaecom/PT*, available at

http://www.concorrencia.pt/Download/2006_08_final_net.pdf] appears paradigmatic in this regard. The Portuguese Competition Authority examined a merger project involving Portugal Telecom and Sonaecom, two mobile phone operators. The market at issue was a tight oligopoly controlled by three players: Portugal Telecom, (40-50%), Sonaecom (10-20%), and Vodafone (30-40%), all network-based operators.

This market presented high barriers to entry, in terms of administrative authorizations, radio spectrum restraints, network effects (because of the lower costs of calls originated and terminated on the same network), switching costs (because of the absence of number portability), economies of scale (deriving form the high level of investiments and the minimum efficient scale of production). However, according to the Authority,

However, symmetry is not a *sine qua non* for collusion, and coordination may appear even between not perfectly symmetrical firms. Collusive price leadership offers a clear example of collusive outcome coming from an asymmetrical equilibrium. In this case, the market leader decides its own strategy, in the awareness that its rivals will follow the same pattern. As a result, non-symmetrical firms align their behaviours and give rise to market collusion. The assessment of symmetry, in fact, is a matter of degree: it is intuitive that the higher symmetry, the easier coordination, but there is a level of asymmetry still compatible with collusion. The critical threshold of asymmetry, beyond which collusion is not likely to arise, depends on the market at issue and on the interaction between all the relevant factors. In other words, asymmetrical oligopolies may theoretically be compatible with collusion, but for actual collusion to occur, there must be other market factors balancing weak symmetry.

Because of its complex nature, symmetry requires a global and synthetic examination, which focuses on two aspects: sufficiency and evolution. Symmetry, in fact, is one of those factors directly influenced by mergers: by reducing the number of market actors and by transferring capacity, each merger changes the architecture of market. The crucial point in the merger control is evaluating how this change will affect the ability of firms to collude, in a dynamic perspective which moves from pre-merger symmetry and seeks to figure out the post-merger scenario.

It follows that, in already asymmetric markets, mergers between a bigger-sized firm and its smaller rival, although increasing market concentration, will reduce the likelihood of collusion. On the one

---

there were such relevant asymmetries between the merged entity and its closer rival (Vodafone) that collusion would have been quite improbable. In particular, there would be asymmetries on scale (Vodafone is an international group), on national dimensions (in the Portugal market, the merged entity would be bigger than Vodafone), on business models (Vodafone is active only on the mobile phone market, while the merged entity would act in the fixed phone market too), on technologies (Vodafone is the market leader in developing technologies). All these elements, according to the Authorities, would have excluded the risk of post-merger coordination.
For a critical comments on this case, also with regard to the economic models created for foreseeing the merger effects, see N. ATTENBOROUGH, F. JIMENEZ, G. LEONARD, *Are Three to Two Mergers in Markets with Entry Barriers Necessarily Problematic?*, in *ECLR*, 2007, pp. 539-552.

hand, in fact, the merged entity increases its capacity and will have a greater incentive to undercut its rivals; on the other hand, the capacity of rivals to retaliate will decrease or, if the acquired firms were significantly capacity constrained, will not change[46].
Therefore, in the merger control, the analysis of market trends towards symmetry or asymmetry really helps to better predict the impact of operations on collusion and erodes the primacy of market shares and structural data. It is clear, in fact, that collusion is less likely to appear in highly concentrated but asymmetrical markets, than in less concentrated but more symmetrical markets[47].

Therefore, asymmetries between members of the supposed collusive group make unlikely cooperation, especially when the tendency is towards widening the gap.

1.4.2.3 Other factors

Since all mergers, at least in the short run, usually result in price increases, prohibitions have to rely on the stability, rather than on the mere existence, of this change[48]. Higher prices, in fact, attract new firms capable to hinder the collusive equilibrium and to restore competition. This remark puts automatically the stress upon the presence of barriers to entry, which may reduce the reaction of possible outsiders, even in highly profitable markets.

The preventive analysis of this factor involves, on the one hand, the mere likelihood of entry, given the expected, post-merger conditions; on the other hand, the likelihood that new comers will not

---

[46] See W. KOLASKY, *Coordinated effects in merger review…cit.*, pp. 11-12; O. COMPTE, F. JENNY, P. REY, *Capacity constraints, mergers and collusion…cit.*, p. 17; M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE *The Economics of Tacit Collusion…cit.*, pp. 67-68.

[47] M. LIBERTINI, *Posizione Dominante Individuale e Posizione Dominante Collettiva*, in *Riv. Dir. Comm.*, I-2003, p. 582; K.U. KUHN, *An economist's guide…cit.*, p. 13.
According to F. JENNY, "*the fact that a merger makes the cost conditions of the oligopolists more similar and/or leads to a more equal distribution of excess capacity among oligopolists may be a factor leading to the creation of a credible treat against non-cooperating oligopolists*". See F. JENNY, *Collective dominance and the EC merger regulation*, in *International Antitrust Law & Policy*, 2001, p. 373.

[48] M, MOTTA, *EC Merger Policy and the Airtours case*, in *ECLR*, 2000, p. 200 spells out that "*in general, the merger increases (by some degree) market power of the merging firms, which in turn will favour an increase in prices*".

go along, but will exert competitive constraints on coordinated entities. Both economic studies and experience in cartels enforcement reveal that such this factor, although important, it is not essential for collusion, because cartels may stably operate even in open markets[49]. This remark confirms that the assessment of market factors other than transparency rests on the knowledge that no one of them is, taken alone, is essential for collusion[50]. Their absence or their weakness, in fact, does not exclude coordination, as conversely it happens with transparency.

Admitting that factors other than transparency may mutually offset means focusing on their weigh, rather than on their existence. Moreover, some factors do not have a stable impact upon collusion but, depending on the interaction with the other market features, sometimes may facilitate, and sometimes may impede coordination[51].

Since it is evident that market factors influence each other, competition authorities should focus on their interaction and on their combined effect on the market functioning[52] and, by this method, should verify whether, in the balance, they point toward collusion.

---

[49] W. KOLASKY, *Coordinated effects in merger review…cit.*, pp. 20-21.

[50] Even high market concentration, perceived for a long time as a *sine qua non*, is not necessary in and by itself for collusion, because collusion may involve a large number of firms. Professors Colombo and Grillo [L. COLOMBO, M. GRILLO, *Collusion when the Number of Firms is Large*, in *Quaderni dell'Istituto di Economia e Finanza - Università Cattolica del Sacro Cuore, Milano*, n. 66, March 2006, available at http://www.unicatt.it/Istituti/EconomiaFinanza/Quaderni/660306.pdf], in particular, demonstrated that tight oligopoly is not necessary for collusion. In their model, collusion can also be sustained in dispersed oligopolies and, under certain conditions, regardless of the number of players. Moreover, they remind that firms may overcome the difficulties of colluding by adopting specific mechanisms, such as facilitating practices. Similarly, W. KOLASKY, *Coordinated effects in merger review…cit.*, in reviewing the approach of the US Antitrust Division to coordinated effects, remarks that, similarly to the case of express cartels, tacit collusion may involve a large number of firms, sometimes more than ten.

[51] For example, demand growth may both facilitate collusion (because future, expected profits from collusion outweigh actual profits from defection) and impede collusion (by attracting new entries). Barriers to entry may determine the prevalence of one or the other result. See M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE *The Economics of Tacit Collusion…cit.*, pp. 26-28.

[52] Almost all economists interested in collusion concur that evidence of facilitating factors is not a determinative step in this analysis, but it is only a means to assess their interaction. See, for example, J. BRIONES, *Oligopolistic Dominance: Is There…cit.*, p. 336; I. KOKKORIS, *The reform of the European Control Merger Regulation in the Aftermath of the Airtours case – The Eagerly Expected Debate: SLC v. Dominance Test*, in *ECLR*, 2005, p. 41.

1.4.2.4 Assessment's results: cogent and convincing evidence?

The dynamic analysis of factors facilitating co-ordination seeks to figure out whether the involved market is prone to collusion. This examination, based on the specific type of coordination at issue[53], is carried out by a global and synthetic analysis, which usually requires a balance of conflicting evidences. The purpose is to collect cogent and convincing evidence that firms can tacitly reach the terms of agreements, can monitor collusion, and that neither internal nor external pressures can destabilize this equilibrium.

If the collected proofs come short of the required threshold, the likelihood of post merger collusion must be ruled out: being requirements for legally relevant collusion, those conditions must necessarily be fulfilled[54].

The first stage of the analysis is simply a primary filter for merger projects apparently arising collusion concerns. It is determinative only in a negative way: taken alone, it may only exclude the possibility of post merger collusion, when market conditions are unlikely to support stable coordination. This happens, first of all, when there is insufficient market transparency and inadequate symmetry. But even when these factors are met, collusion may be still excluded by the countervailing effects of other market factors. On the contrary, if the fist stage leads to positive results and the standard of proof is satisfied, the Commission may infer the possibility of firms to collude. However, this does not means that collusion will actually occur: even when all factors are present, in fact, it is still possible that incentives to compete will actually outweigh incentives to collude[55].

---

[53] S. BAXTER, F. DETHMERS, *Collective Dominance under the EC Merger Control- After Airtours and the Introduction of Unilateral Effects is there still a Future for Collective Dominance?*, in *ECLR*, 2006, p. 154 remark on this point that economic studies usually assumes price coordination, so theorizations about collusion normally rest on this scheme. According to the As, coordination on variables other than price would require a different analysis.

[54] L. COPPI, M. WALKER, *Substantial convergence…cit.*, p. 141; S. BISHOP, A. LOFARO, *A legal and economic consensus…cit.*, pp. 230-231.

[55] Most of the scholars concur on this opinion: see, among the others, M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE *The Economics of Tacit Collusion…cit.*, p. 63; M. GIORDANO, *Abuso di posizione dominante collettiva e parallelismo oligopolistico: la Corte di Giustizia tenta la quadratura del cerchio?*, in *Foro Italiano*, 2001, IV, p. 272; K.U. KUHN, *Closing Pandora's box…cit.*, p. 54.

By stopping the analysis to this stage, there would be the serious risk of prohibiting mergers simply because of the market features, and of applying a static test, which is inconsistent, in and by itself, with the behavioural nature of coordinated effects[56].

1.4.3 The second stage: is there a real likelihood of collusion? The firms' incentive to collude

When the first step reveals that the market is prone to collusion, the analysis should go on and consider whether a collusive equilibrium may actually be implemented. With regard to this, specific indicia may strengthen the suspect of post merger collusion.

1.4.3.1 Role of the acquired firm in the concerned market

To foresee the real likelihood of post-merger collusion, the Commission cannot ignore the role of the acquired firm in the pre-merger market equilibrium. There are at least two cases where this variable has a crucial weight for predicting the effects of mergers: when the acquired entity is a failing firm, and when it is an actual or potential maverick.

In the first case, the Commission should follow a more lenient approach, taking into account that failing firms in any event would exit the market. The so-called 'failing firm defence', which expresses

[56] *Contra*, M. GIORDANO, *Abuso di posizione dominante collettiva…cit.* p. 272. The A. compares merger and abuses' analysis, and states that the *ex post* control of tacit collusion cannot rest only on structural data, because it would result in a *per se* condemnation for every oligopoly. In the *ex ante* control, on the contrary, structural data are more significant, and evidence of market conditions favourable to collusion is enough for denying the authorization. In other words, the *per se* rule, contested for abuses, would apply in the merger control.
In my view, there is neither policy nor legal justification to support this approach, which, indeed, would result in prohibiting almost all oligopolistic mergers. It is true that oligopolistic markets increases the convenience of colluding: on the one hand, in fact, the lower the number of firms, the higher the individual share of collusive profits; on the other hand, the lower the number of firms, the lower the cost of collusion, in terms of monitoring and risk of defection. However, greater convenience or higher plausibility of collusion does not mean s that it will surely appear. The equivalence between oligopoly and collective dominance, which the A. denies about abuses, should be denied for mergers too.

the need to preserve economic efficiencies that would be surely get lost without the proposed merger, is suitable also in the case of collective dominance. Moreover, if the competition concerns involve the increase of market concentration, prohibiting the operation at issue is not an effective solution, because market shares of the failing firm, given its insolvency, would be, in any case, captured by its rivals. Increase in market concentration is, therefore, quite unavoidable, especially when significant barriers prevent new entries. If this is the case, authorizing that merger appears even the preferable solution because, for identical, negative effects, it offers the possibility to negotiate commitments with the involved parties and, therefore, to remove, or at least, to weak the competitive concerns[57].

When the acquired firm is an actual maverick, the likelihood of collusion becomes much more real. In this case, the merger at issue would not simply remove a collusion constraint, but will drive out of the game the firm that has refused to follow the rivals' strategies and, for this reason, has actually impeded coordination. Thus, mergers involving the maverick firm in a market prone to collusion will lead, in all probability, to post-merger coordination[58].

The same reasoning may apply to merger involving developing firms, suspected to impede coordination because of their growing process. They may be perceived, in fact, as potential mavericks, menacing the firms' alignment. It follows that also mergers involving this kind of firms remove an important collusion constraint and,

---

[57] For a detailed analysis of the failing firm defence and its *caveat*, see I.KOKKORIS, *Failing Firm Defence in the European Union. A Panacea for Mergers*, in *ECLR*, 2006, pp. 494-509.

[58] It is a case of probability, rather than one of certainty, because theoretically a merger may still reduce the likelihood of collusion. This may happen when the transaction generates significant savings of variable costs such as they prevail over the incentive to raise prices. See J.B. BAKER, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects under the Antitrust Laws*, in *New York Univ. Law Rev.*, 2002, pp. 135-203.

The A. proposes an entire test for coordinated effects built around the notion of mavericks, defined as firms with the necessary capacity and the sufficient incentive to deviate and that, for this reason, "*constrain coordination from becoming more likely or more effective without necessarily starting price wars or otherwise appearing observably disruptive.*" (p. 140). He seeks to predict the merger outcome when maverick firms are involved in the operation and when they are not. In particular, he notes that operations involving non-maverick firms may have different outcomes: they may create a maverick, or ma affect the maverick's incentive to act more or less competitively than before.

consequently, increase the serious likelihood of post-merger alignment.

1.4.3.2 Efficiency gains

The eventual efficiency gains that the new entity obtains from the merger may negatively affect its incentives to collude. Even in a market prone to coordination, efficiency improvements, in fact, may deter collusion by reducing the weight of future profits from coordination. Efficiency gains are usually accommodated as far as they can offset of anti-competitive effects and, in this way, they offer a legal basis to authorize a mergers that arise competitive concerns. In my view, the preventive control of coordinated effects should assess efficiency also at the individual level, as a factor deterring alignment. If the merged entity gains dynamic or innovative efficiencies ensuring higher profits, it will have lower incentives to collude, because it has new, lawful and asymmetric means to increase its profits[59].

In this stage of the merger control, efficiency represents a factor that, in a market where the likelihood of collusion cannot be excluded at all, moves the balance of probability toward competition. The scrutiny of efficiency, if taken simply as a factors impeding collusion, should rest on less stringent conditions than those provided for the 'efficiency defence' properly called.

1.4.3.3 Other data

Among the other elements which may strength the danger of post-merger collusion, we can list the behaviour of firms in a historical perspective. With regard to this, evidence of past collusion, if examined deeply and without prejudices, may result extremely useful for the merger control. Past collusion does not imply, in itself, anti-

[59] See, among the last papers on the mergers efficiency gains: D. GERARD, *Merger control policy: how to give meaningful consideration to efficiency claims?*, in *World Competition*, 2003, pp. 1367-1412; D.J. GIFFORD, R.T. KUDRLE, *Rhetoric and Reality in the Merger Standards of the United States, Canada and the European Union*, in *Antirust Law Jour.*, 2005, pp. 423-469; T.W. ROSS, R.A. WINTER, *The Efficiency Defence in Merger Law: Economic Foundations and Recent Canadian Developments*, in *Antirust Law Jour.*, 2005, pp. 471-502.

competitive impact of the merger at issue, because the market environment is likely to have changed, and to be no longer prone to collusion. Even when the market functioning is the same, it is still not sure that the merger will hinder competition: on the contrary, by introducing dynamism in a static market, the proposed operation may disrupt pre-existent collusion or, in market prone to collusion, may impede that coordination will appear. Changes in the market structure and in relationships between rivals generate consequent adjustments in the market equilibrium, which may shift towards competition[60].

1.4.4 The inference of high probability of post-merger collusion as a result of significant qualitative data: a 'quantitative plus' approach

The inference of post merger collusion comes from the balance between incentive to compete and to collude, both at the individual and joint level. This scrutiny rests on the awareness that tacit collusion is difficult to be reached but is easy to be disrupted. Knowledge about weakness of cartel and necessary prudence surrounding the preventive exam of collusion suggest a policy approach that denies the implementation of merger projects only when there is something more than quantitative and objective market data making the hypothesis of collusion much more plausible than the opposite prevision of neutral or pro-competitive outcomes.

The results of qualitative analysis are determinative in this respect, since they may either strengthen or decrease the suspect of post merger collusion. In particular, when the notified operation involves maverick or growing companies, the likelihood of post merger collusion becomes more real. On the contrary, when the acquired firm is failing, or the merged entity gains significant efficiencies, post-merger collusion becomes less plausible.

The focal point remains that collusion is the osmosis of the market environment, with its objective characteristics, and the firms'

[60] For the role of past collusion in the merger control, see G. ROBERT, C. HUDSON, *Past Co-ordination and the Commission Notice on the Appraisal of Horizontal Mergers*, in *ECLR*, 2004, pp. 163-168.

willingness to follow collusive, profit- maximizing strategies. On this basis, the Commission has to foresee the merger impact on both the market structure and the firms' incentives, and has to predict whether after the merger the involved market will function in a competitive or in a collusive way.

1.4.5 The third stage: parties' commitments

Parties' commitments represent a useful means to address the competition concerns coming from the mergers, because they may amend the original project in a way to save the merger's benefits without compromising the market competitiveness. The European Commission in many cases has adopted conditional clearances, with a preference for structural remedies, usually viewed as more effective than behavioural measures to restore market competition[61]. The basic reason is that structural remedies provoke permanent market changes, which directly address the competition concerns, and do not require further monitoring or adjustments[62].

While structural measures are usually preferable because they durably inhibit the potential anti-competitive effects of merger, sometimes non-structural remedies result more workable[63].

In case of coordinated effects, the prudent approach suggested in this is perfectly consistent with commitments. If the policy purpose is

---

[61] See *Commission Notice on remedies' acceptable under Council Regulation (EEC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004* (hereinafter, *Remedies Notice*), 2007, § 15.

[62] A. EZRACHI, *Behavioural Remedies in EC Merger Control – Scope and Limitations*, in *World Competition*, 2006, pp. 459-461; S. TURNBULL, S. HOLMES, *Remedied in Merger Cases: Recent Developments*, in *ECLR*, 2001, p. 506. For a classification of behavioural remedies, see D. WENT, *The acceptability of remedies under the EC Merger Regulation: Structural versus Behavioural*, 2006, pp. 461-462.
As for the US system, the FTC Divestiture Study reveals that deconcentrative measures were successful in the most of the cases and that they solved the competitive concerns in a reasonable period. See the results reported by M. VAN KERCKHOVE, *The EU Remedies Study: Toward Further Transatlantic Convergence in Merger Remedies?,* in *Antitrust*, Fall 2006, p. 67.

[63] D. WENT, *The acceptability of remedies…cit.*, p. 463, notes that, in the case of highly dynamic or technological industry, non-structural remedies are likely to better preserve competition. Structural remedies, on the contrary, may be disproportionate, may deprive firms of their minimum-efficient size, and may cause efficiency losses.

to prohibit mergers when anti-competitive consequences appear very probable, and if this conclusion is much more difficult to be reached in case of coordinated effects, it is reasonable to also explore the possible recourse to remedies, before prohibiting suspected operations.

However, choosing and actually implementing adequate remedies in the case of coordinated effects is extremely difficult. First of all, the Commission has to assess whether the proposed commitments, although conditioning solely the merged entity, may indirectly affect the conduct of the other firms, not involved in the operation but members of the suspected collusion. Second, the realm of feasible and actually workable remedies seems to be narrower than in the case of unilateral effects. In a behavioural equilibrium coming from the mutual adaptation, non-structural remedies face the dilution effect: the larger the oligopoly is, the less incisive the impact of individual conducts. Therefore, as a general principle, the commitment of the merger entity to behave in a certain way is the more powerful, the less are its colluding rivals. The enlargement of the collusive group will normally weaken the effectiveness of commitments.

In any event, the analysis of conditioned clearances reveals that the Commission has used both behavioural and structural measures to address the competitive concerns[64].

Acceptance of commitments depends on their capability of eliminating the competition problem at issue. There is, therefore, a strong link between the expected market failure and the more suitable remedy. For this reason, commitments usually involve the last stages of the merger control, when there is a clear perception about the competitive concerns: knowledge of market functioning and possible, anti-competitive effects, in fact, allows the parties to propose the more appropriate commitments, and allows the Commission to correctly assess their effectiveness.

[64] *Merger Remedies study* – for the DG Competition European Commission, October 2005, pp. 124-125, [available at www.europa.eu] shows that even in case of collective dominance, there is a prevalence of structural remedies. In particular, the most frequent measure is the parties' commitment to sever influence in a competitor. Moreover, the Commission has often cleared the notified merger also under the condition of exiting from a joint venture or transferring a market position. On the contrary, measures such as granting access, licensing patents or removing price transparency are very rare.

The starting point for the assessment of commitments is the post-merger scenario and, in particular, market variables arising competitive constraints. In the case of collective dominance, I explained the crucial role of symmetry and I also argued that collective dominance is quite implausible in case of relevant asymmetry. This knowledge may be very useful to define the appropriate remedy in the collective dominance case. Remedies that create or maintain a certain asymmetry, for example, may significantly impede tacit collusion. Therefore, assets' transfers and divestitures may result very effective[65].

Analogously, when contractual or structural links increase the firms' ability to collude, commitments to remove them may effectively address the competitive concerns[66].

As a part of the merger procedure, remedies require the same level of proof necessary to prohibit the kind of operation at issue, since the parties' commitments seek to remove the competition concerns and to avoid prohibition. It follows that there must be cogent and convincing evidence that the proposed remedies will impede in

[65] See O. COMPTE, F. JENNY, P. REY, *Capacity constraints, mergers and collusion…cit.*, p. 17; K.U. KUHN, *An economist's guide…cit.*, p. 11.

[66] See *Remedies Notice* §§ 58 ss.

The BAT/ETI case [Autorità Garante della Concorrenza e del Mercato, case C6133, *British American Tobacco / Ente Tabacchi Italiani*, 17 December 2003, in *Bollettino*, 51/2003] clearly shows how difficult it may be to assess the capability of commitments to address the likely, anti-competitive effect. The proposed merger between the second and third larger-sized firms would have reduced the number of independent tobacco producers and increased both market concentration and symmetry between the resulting firm and its closer rival. The merger project, implying the acquisition of an aggressive competitor, concerned a market already prone to collusion, because of the high level of price transparency, the fiscal regime affecting the functioning of cigarettes' market, and production agreements. According to the Commission, commitments not to renovate the production agreement with the closer rivals and to transfer part of their asset were not enough to address the competition concerns. On the contrary, the Italian Competition Authority, entrusted to deal with the case at issue because of its inherently national character, conditionally cleared the operation. In its view, the stability of post-merger collusion essentially depended on the structural links, which facilitate retaliation. For this reason, the commitment not to renovate the production agreement was enough, according to the Italian Authority, to impede the collusive equilibrium to raise and to preserve incentives to compete. The commitment to divest part of the asset, on the contrary, was deemed not necessary, once the first has been implemented.

all probability that the collusive scenario, resulting by the commission's analysis, will actually appear[67].

1.4.6 Summary of the suggested approach: when the Commission can lawfully prohibit mergers because of collusion concerns

As for every merger, the scrutiny of projects involving the risk of coordination may lead to three outcomes: authorization, conditioned clearance, and prohibition.
By admitting that the prognostic control is even more difficult in the case of collective dominance, I suggest addressing these mergers by an extremely prudent approach and to deny the implementation of notified projects only when there is high probability of post-merger collusion. In this perspective, competition authorities have to authorize mergers when the objective analysis does not demonstrate, under the required standard of proof, the firms' ability to collude. The result will take place when the collected evidence demonstrates a market tendency toward collusion, but they come short of the 'high level of probability' standard.

When both quantitative and qualitative analysis shows that the merger at issue is highly likely to generate stable collusion, it has to be considered the possibility to negotiate and accept commitments. When this solution is not practicable, the only feasible strategy to preserve the market functioning is to prohibit the notified merger.

1.5 The possible failures of the cautious approach. How to address the matter of false positives?

Cautious approach to coordinated effects expresses a favour for the dimensional growth of firms, unless it is quite sure, compatibly with the prognostic assessment, that the merger at issue will result in market collusion.

Perceiving prohibitions as the extreme solution implies preferring risk of false positives than risk of false negatives: authorizing anti-competitive mergers is better than prohibiting operations with positive or neutral effects on the market functioning. Erroneous

[67] See D. BAILEY, *Standard of proof in EC merger proceedings…cit.*, p. 885.

prohibitions, in fact, deprive both firms from the possibility of growing, and the market from likely efficiency gains, without any possibility to correct this failure. It is an irreversible loss of chance[68].

On the contrary, preference for false positive is, by itself, more consistent with the preventive nature of merger control and with the presumption of mergers legality. Moreover, if the cleared operation results in post-merger collusion hindering competition, there would be at least two feasible and workable solutions.

1.5.1 *Ex post* intervention *ex* art. 82: condemning the eventual abuses of the collectively dominant entity

When the analysis of a merger project focuses on the probability of coordinated effects, the Commission delimitates the group of firms that are likely to collude and seeks to measure their real incentive to align market strategies. Defining the boundaries of the colluding group remains useful even when the operation has been approved, because it makes clear that there is a subset of firms potentially aligning their strategies and, therefore, requiring to be carefully monitored[69].

If the Commission finds out anti-competitive behaviours imputable to that group, it may intervene *ex post*, through article 82, and condemn anti-competitive conducts as abuse of collective dominance[70]. In this case, the presence itself of the procedure whereby the Commission scrutinized the suspected operation, although it led

---

[68] Contra, G. AIGNER, O. BUDZINSKI, A. CHRISTIANSEN, *The Analysis of Coordinated Effects…cit.*, p. 20 remark the policy benefits to reduce type I errors and, therefore, the preference for symmetric standard of proof in case of prohibitions and clearance (principle of neutrality).

[69] W.E. KOVACIC, R.C. MARSHALL, L.M. MARX, S.P. SCHULENBERG, *Coordinated effects in Merger Review: quantifying the payoffs from collusion*, in *International Antitrust Law & Policy*, 2006, p. 284.

[70] The CFI, in the *GE/Honeywell* case [CFI, 14 December 2005, case T-210/01, *General Electric* v. *Commission*] states that the deterrence effect of article 82 is an important element the Commission has to take into account in assessing doubt mergers: "*the Commission necessarily had available all the evidence requires in this case to assess* […] *to what extent the conduct* [at issue] *would constitute infringements of Article 82 and be sanctioned such as. It therefore made an error in failing to take into account the deterrent effects which that factor might had have on the merged entity.*" (§ 311)
See, on this point, Part 3 – Chapter 3.

to an authorization, raises the presumption that both the merged firm and its close rivals, in a transparent market with a few players, were at least conscious of their power and, consequently, of their responsibility not to alter the competitive dynamics. Therefore, their abuse would result in a culpable conduct, allowing the Commission to also impose both injunctions and sanctions.

1.5.2 Measures of deconcentration *ex* Regulation 1/2003

Regulation 1/2003 at article 7 allows the Commission to impose, in the case of abuses of dominance, structural remedies, when there is no behavioural remedy equally effective. This provision may be indirectly exploited in the merger control, as a means to correct erroneous clearances. If the authorized merger, once implemented, results in a collusive equilibrium hindering competition, the Commission may open a procedure for abuse of collective dominance and order to some or to all firms to divest part of their assets.

This measure reaches the scope of protecting the market functioning, because it stably removes the collusive concerns[71] and seeks to restore competition. On the contrary, the purpose of changing the market as if the anti-competitive merger has been never approved may be only partially reached, for two reasons. First, because the implementation itself of a merger project has surely changed the market equilibrium, therefore even when remedies restore the pre-merger asset distribution, they act in a different contest, so they probably lead to quite different outcomes. Secondly, *ex post* structural remedies may involve all the collectively dominant firms and not solely the original merging parties or the merged entity.
I will carefully analyse structural remedies for abuses of collective dominance in the last chapter of this work.

[71] Normally all remedies are non-satisfactory by themselves, given the difficulties of choosing and implementing the most appropriate measure to address the competition failures. The only exception is the merger prohibition in the case of anticompetitive effects, because it prevents harms from arising. Thus, compared to the failure they seek to correct, deconcentrative measures are even less satisfactory. See M.E. FOX, *Remedies and the Courage of Convictions in a Globalized World: how Globalization Corrupts Relief*, in *Tulane Law Rev.*, 2005, pp. 571-594.

Chapter 2

Abuses of Collective Dominance

Section I

Collective Dominance Other Than Mere Oligopolistic Parallelism

2.1 Introduction

In the European case law, the concept of dominance indicates the capability of firms of independently behaving, that is, of implementing whatever market strategy they want, in the awareness that no countervailing power may jeopardise it.
This notion arose in the area of single dominance and its ascertainment has rested on a set of indicia, ranging from market shares, to financial, loyalty, and technological resources.

Nowadays, there is no doubt that dominance embraces both single and collective market power[1]. However, significant uncertainties still surround the notion of collective dominance; they result essentially

[1] See P.S. RYAN, *European Competition Law, Joint Dominance, and the Wireless Oligopoly Problem*, in *Columbia Jour. European Law*, 2005, pp. 355-373: "*Separated undertakings that present themselves as a single entity or conduct themselves unilaterally within a particular market should, at least theoretically, be collectively assessed in accordance with article 82*" (p. 369).
The sole doubts still involve the possibility that tacit collusion, or mere oligopolistic interdependence constitutes an abuse of collective dominance. See on this point, Section II of this chapter.

from the inapplicability of all criteria and methods developed for single dominance, and from a weak theorization on our topic.

Uncertainties have even increased after the *Discussion Paper* and the consequent debate about the most appropriate approach for assessing abuses of dominance. Under the influence of recent changes about the application of article 81 and about the merger control, the Commission seems to suggest that the application of article 82 might rest on an economic approach, which focuses on the effects of the conduct at issue and, in particular, on its impact upon the consumer welfare. This approach implies a balance between anti-competitive effects and efficiency gains deriving from the conduct at issue, and infers abuses from evidence of negative net effects[2]. This method is supposed to ensure a more effective antitrust policy, since the authorities would intervene only against behaviours capable of hindering competition and insofar as they raise real, anticompetitive effects. However, the parameter of consumer welfare, applied as a compass for the competition policy, is hardly coherent with the European tradition and might spoil the ultimate evaluation, by

[2] See J. GUAL, M. HELLWIG, A. PERROT, M. POLO, P. REY, K. SCHMIDT, R. STENBACKA, *An Economic Approach to Article 82*, in *Competition Policy International*, vol. 2, n. 2, 2006, p. 114 ss.
Several scholars remark the advantages of the economic or effects-based approach. See, with regard to this, E.M. FOX, *What is harm to competition? Exclusionary practices and anticompetitive effects*, in *Antitrust Law Jour.*, 2002,: "*Monopoly power is a concept that requires analysis of competitive effect*" (p. 381). Similarly, R. PARDOLESI, *Chi ha paura dell'interpretazione economica del diritto antitrust?*, in *Mercato concorrenza regole*, 2007, pp. 119-128, remarks that every antitrust theory rests on economic basis. About the presumable loss of legal certainty, M. POLO, *A favore di un approccio economico nell'applicazione del diritto antitrust*, in *Mercato concorrenza regole*, 2007, pp. 129-136, highlights that the economic approach would not exclude the emersion of legal standards. He also puts the emphasis on the need of updating the traditional criteria, by taking account of the more recent development in the economic analysis. In his view, this approach would not result in a case-by-case assessment, incapable of ensuring legal certainty, but would provide new standards, capable of guiding the antitrust policy.
Other scholars highlight the advantages of the form-based approach, which would ensure legal certainty, and remark the limits of focusing only on the consumer welfare. With regard to this, see F. DENOZZA, A. TOFFOLETTO, *Contro l'utilizzazione dell'"approccio economico" nell'interpretazione del diritto antitrust*, in *Mercato concorrenza regole*, 2006, pp. 562-579.

ignoring that some conducts may hinder competition even by increasing the consumer welfare. Moving from this premise, perhaps it is better to focus on the market effects at the scope of preserving competition as a process, rather than pursuing the sole scope of increasing the consumer welfare.

Under the effects-based approach, dominance seems to have a weaker, but still useful, role: on the one hand, in the presence of significant, anti-competitive effects, the need of separately verifying dominance is less stringent, since the effect itself represents a meaningful evidence of market power[3]. On the other hand, dominance helps to discern those conducts which, being actually capable to hinder competition, require deep antitrust analysis: when, in fact, active firms enjoy dominant power, it increases the likelihood that suspected conducts may significantly affect market functioning[4].

In the enforcement of article 82, the effects-based approach results in a circular process, built around evidence of anti-competitive effects. Article 82 proceedings, in fact, usually move from evidence of market distortions, already implemented or still unequivocally in progress. It is this element that raises the suspicion of article 82 infringements: the subsequent antitrust proceeding seeks to verify the original suspicion, with the scope of figuring out whether the conduct at issue really hindered market competition and whether it was connected to market power positions.

---

[3] See J. GUAL, M. HELLWIG, A. PERROT, M. POLO, P. REY, K. SCHMIDT, R. STENBACKA, *An Economic Approach to Article 82…cit.*, pp. 120-121.

[4] A. MAJUMDAR *Whither Dominance?* In *ECLR*, 2006, pp. 161-165, says, on this point, that "*in practice, it is sensible to focus only on those firms with substantial market power since the harm they may cause is correspondingly greater (some theories of harm do not work at all unless firms are near monopolists) and so the risk of chilling price competition by mistaken interventions is correspondingly lower*" (p. 164).

A. JORGE PADILLA, *From* Fairness *to* Welfare*: Implications for the Assessment of Unilateral Conduct under EC Competition Law*, [Speech at the 12th Annual Competition Law and Policy Workshop – Robert Schuman centre, 8-9 June 2007, EUI, Florence, available at www.iue.it. In EHLERMANN and MARQUIS, eds, *European Competition Law Annual 2007: A reformed Approach to Article 82 EC*, forthcoming 2008] p. 32, highlights that the parameter of dominance is still extremely useful, because it simplifies the enforcement of article 82 and increases the capability of firms to self-assess their conduct. In this way, it improves legal certainty and makes ultimate decisions much more predictable.

2.2 Shifting from single to collective dominance

In the case of collective dominance, *prima facie* evidence of abusive conducts is linked to several firms acting together as if they were a single entity.

Deep analysis of collective dominance reveals that this category partially overlaps that of abuse of single dominance. As for the kind of market power, in fact, single and collective dominance are substantially the same, because both deal with a *de facto* monopoly, allowing firms to behave independently. The sole difference involves the assessment: in the case of single dominance, market shares are significant, although not determinative; in the case of collective dominance, they play a smaller role, because the concerned firms usually join high market shares, more than 70%. Lacking any presumptions resting on structural data, antitrust analysis of collective dominance seeks to focus on dynamic elements. As for the subjective perspective, on the contrary, the presence itself of several firms sharing monopolistic power makes collective dominance different from single dominance. For individual decisions to result in a single market strategy there must be something that polarizes single actions towards a common point. In other words, the *reductio ad unum* only randomly may be a spontaneous effect; on the contrary, stable phenomena, the sole meaningful for the antitrust policy, rest on the presumption that something more than occasional and fortuitous events facilitates the parallelism of conducts. This remark explains why both theories and case law about collective dominance have focused on economic links between firms and on their impact upon the firms' strategies[5].

The relationship between links and collusive effects is quite complex: on the one hand, links are not significant for collective dominance unless connected to an actual or potential collusive outcome: it is the ultimate collusion that attributes relevance to economic links. On the other hand, these links, if significant, strongly

[5] See, on this regard, G. MONTI, *The scope of Collective Dominance under Article 82 EC*, in *CMLR*, 2001, p. 138. According to the A. "*the definition of collective dominance is effects-based, requiring a connecting factor (its form is irrelevant), which gives the undertakings the ability to adopt common strategies on the market and to act to a considerable extent independently of the other competitors, customers and consumers*" (p. 156).

affect the resulting equilibrium and influence, to a certain extent, its legal treatment.

The EU jurisprudence has recognized that several factors, such as structural, economic, or contractual links as well as the market structure itself, may work as links between undertakings. Although all these factors share the same function of allowing the adoption of a common strategy, undervaluing their heterogeneity would be a mistake: knowing the origin of collective dominance, in fact, helps in correctly identifying the target of proof and choosing the most appropriate remedies.

With regard to the nature of connecting factors, it is useful to distinguish market structure from the other kinds of links. In the first case, the determinative cause of the final alignment is the mere oligopolistic interdependence, something more impalpable than the other links, and which raises the traditional debate about antitrust policy in oligopolies. In the other cases, the analysis is easier and focuses on the impact of links upon collusion. Moreover, links may have a different impact on collusion: they may be either primary cause or facilitating factor for coordination to arise.

In the first section of this chapter, I will analyse collective dominance other than mere oligopolistic alignment.

2.3 Possible links other than market structure

European Courts have provided a wide definition of links, built around their capability of connecting independent undertakings so that they can follow a common strategy. As far as the category of links rests on their effect, no exhaustive list of connecting factors may be created. However, the exam of case law reveals that some of them are more common.

2.3.1 Structural and financial links

The most intuitive form of coordination results from cross-shareholding, minority shareholding, joint ventures, voting rights or

interlocking directorships[6].

Although all these factors may reduce to a certain extent competition between the involved firms, only a case-by-case analysis may reveal their actual impact on coordination. In general terms, structural links should be strong enough to affect the conducts of firms, but not as stringent as to deprive undertakings of their strategic independence, which is essential for collective dominance to exist.

The effectiveness of shareholding links, for example, depends on sizes of all involved firms and on real powers implied in that participation[7].

Joint ventures may have a significant role in establishing collusion when they control key competitive factors because they may limit the strategic independence of joined firms and may impede market entry by the outsiders[8].

2.3.2 Normative and administrative links

Sometimes, collective dominance derives from regulatory, legislative or administrative measures.

State rules, for example, may grant special powers to trade associations, may reserve some activities to categories of firms, may provide a system of limited licences, or may impose a mandatory duty to negotiate[9].

Several scholars questioned the relevance of this kind of links for collective dominance, because the main source of market power is external to, and independent from, the involved companies. As a consequence, the regime of special responsibility, connected to the market power, is externally imposed and there is nothing firms can do

---

[6] See, for example, *Irish Sugar* and *Gencor* (unilateral shareholding), or *Kali und Salz* (joint venture).

[7] J. TEMPLE LANG, *Oligopolies and Joint Dominance in Community Antitrust Law*, in *International Antitrust Law & Policy*, 2001, pp. 326-327.

[8] See V. RABASSA, *Joint Venture as a Mechanism that May Favour Co-ordination: an Analysis of the Aluminium and Music Mergers*, in *ECLR*, 2004, pp. 771-779.

[9] See *Centro Servizi Spediporto*, *DIP* and *Sodemare* judgments. See also the EU Regulation of Telecommunications market, which obliges companies to negotiate the contractual conditions for the interconnection.

to escape it. However, special responsibility is the other face of market power: it exists as far as there is a real possibility to affect the market functioning by exerting substantially monopoly power. Therefore, the attribution itself of this kind of power may compensate involved companies for the regime of special responsibility. Moreover, holding a dominant position does not raise any antitrust liability, because article 82 applies only when there is an abuse. This component strictly depends on behaviours and, therefore, on strategies of firms. As a consequence, the main element for antitrust liability is internal to companies, and linked to their strategic choices.

2.3.3 Contractual links

In many cases, abuses have involved collective dominance deriving from contractual or associative links, such as license agreements, infrastructural sharing, and agreements not to compete.

These links may raise by themselves competition concerns under article 81, when they embody unlawful agreements or concerted practices. However, their relevance under article 82 does not depend on their capability to also infringe article 81: even links perfectly consistent with antitrust law may create positions of joint market power.

Contractual links may take several forms: adherence itself to a common organization, for example, may put the joined firms in a collective dominant position; maritime conferences have represented, for a long time, a means for firms to align their market conduct[10]. Recently, the Commission inferred collective dominance from the

[10] See *Compagnie Maritime Belge* and *Kali und Salz* judgements.
F. MUNARI, *Il Diritto comunitario antitrust nel commercio internazionale: il caso dei trasporti marittimi*, CEDAM, Padova, 1993, pp. 329-330, recognized, even before the *Compagnie Maritime Belge* judgement, that article 82 could apply to maritime conferences. However, in his view, the great difficulties on this point involved the market definition and the possibility itself of qualifying as contestable the market of maritime transports, rather than the inference of a collective dominance, that would be evident in the exercise itself of significant market power by the involved firms.

affiliation to an association whose statute, once implemented, actually conditioned the conduct of companies[11].

Also multilateral links may generate collective dominance[12]. Patents pools, for example, may confer joint market power to the members, especially when pools control key-patents for a specific technology, or when the patent pool's technology becomes the market standard. The anti-competitive potential is extremely high, and includes both exclusionary and exploitative abuses. On the one hand, in fact, members of a pool may refuse to license patents to rivals, which, therefore, cannot compete for good incorporating the licensed technology. On the other hand, they may collectively raise or depress license fees, or may seek to influence prices of the downstream products[13].

Collusion concerns arise also from cross licensing, especially in the case of competing patents[14].

2.4 Resulting models of collective dominance

All links listed above may have a double impact upon collective dominance: they may be either determinative factors, which confer joint market power to the involved firms, or mere facilitating factors that allow firms to overcome the difficulties of tacitly colluding. This difference influences to a certain extent the resulting coordination that, in the first case, derives only from the economic links at issue, in

[11] See the *Piau* case. The same reasoning may also apply to professionals or firms' associations.

[12] See, for example, the *Vetro Piano* and *Kali und Salz* cases.

[13] P.B. NELSON, *Patent Pools: an Economic Assessment of Current Law and Policy*, in *Rutgers Law Journal*, 2007, pp. 549-551.

[14] Despite their potential anti-competitive effect, cross licences and patent pools provide an important incentive to innovate, and may enhance market efficiency, by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigations. See J.H. BARTON, *Antitrust Treatment of oligopolies with Mutually Blocking Patent Portfolios*, in *Antitrust L.J.*, 2001, pp. 851-882; M. ESWARAN, *Cross-licensing of Competing Patents as a Facilitating Devise*, in *Canadian Journal of Economics*, 1994, pp. 689-708.

the second case, implies also the presence of a market prone to collusion[15].

2.4.1 Collective dominance from economic links

Among the theoretical models of collective dominance defined in the EU case law, there is one that rests on economic links strong enough to create an alignment in the market conducts of several undertakings. In this scenario, connecting factors are both necessary and sufficient conditions for collective dominance: on the one hand, in the absence of these links, collective dominance does not appear; on the other hand, when these factors are strong enough, no further condition is required for collective dominance to rise.

In particular, strong economic links may coordinate the market strategy of a great number of firms, with the consequence that collective dominance may take place even in non-oligopolistic markets. For example, professional associations, joint ventures, or normative measures may allow a great number of firms to behave as a single entity, vis-à-vis to rivals or customers.

This scenario is anything but theoretical: in the *Piau* case, collective dominance resulted from adherence to the FIFA association, whose statute, by bidding the associated companies, lead firms to act in the same way.

The same mechanism may also apply in other cases: bank associations, for example, operate in all EU countries and join almost all companies active in this market. General devise or specific conduct rules, even though not mandatory for the associated, may *de facto* (contribute to) align their market conducts[16].

---

[15] The EU competition authorities recognized that there is another model of collective dominance, deriving from the sole oligopolistic interdependence, but they have never applied it. I will analyse mere oligopolistic dominance in the next section of this chapters.

[16] In the *Bagnasco* cases [Court of Justice, joined cases C-215/96 and C-216/96, 21 January, 1999, *Carlo Bagnasco* v. *Banca Popolare di Novara soc. Coop. arl and Cassa di Risparmio di Genova e Imperia SpA*, in *ECR*, 1999, I-135], the CJ was asked whether the Italian banks, by adopting the recommendations of the ABI (Italian Bank Association), act together as a single entity and could independently behave –that is, whether they were collectively dominant. In the cases at issue, the ABI suggested inserting some standard clauses in current account contracts and all the joined firms included those clauses in their contracts. However, the CJ did not pronounce on the question of collective dominance because, in its view, the practices at issue were not abusive.

2.4.1.1 Object of proof

In this model of collective dominance, economic links play an essential role and are enough to generate collusion. There is no need of other factors supporting this equilibrium. These features affect the probatory aspects: competition authorities should focus on links and, especially, on their significance for collusion. Conversely, there is no need to also show the *Airtours* conditions, which deal with mere oligopolistic parallelism.

Competition authorities should bear in mind this aspect: on the contrary, in the recent cases of abuses of collective dominance, they have related to those conditions, even if anti-competitive conducts took place in non-oligopolistic market[17].

2.4.2 Collective dominance from economic links and markets prone to collusion

Collective dominance may appear even when economic links are weaker but the involved market presents some, specific features. The typical scenario is that of oligopolies prone to collusion, but incapable of supporting stable and durable coordination. In this case, firms could not create or maintain collusion without adopting adequate mechanisms facilitating coordination.

Even in the case of facilitating factors, it would be impossible to define an exhaustive list: the specific elements necessary to create or to stabilize collusion depend on the market at issue and on the difficulties that the involved firms need to overcome.

However, courts and scholars highlighted that some of them are more frequent. First of all, economic links that act as primary source of collective dominance may also constitute facilitating factors. Joint ventures, for example, have a significant potential for collusion: they result in a stable channel of communication between firms, which may increase mutual transparency and, in this way, may reduce the uncertainty about future conducts of rivals. They also offer an

[17] See, for example, the *Piau* case.

occasion for retaliation and indirectly decrease the convenience to defect from collusion[18].

Normative, administrative, and regulatory links may contribute to establishing collective dominance by artificially changing the market conditions in a way to ease coordination.

Contractual and associative links may have the same effect on collusion: they increase the occasions for rivals to communicate with each other and, therefore increase market transparency. In this way, they may really facilitate alignments.

One of the most frequent and effective kinds of facilitating factors is information exchange, realized by various means, such as trade associations, public or private announcements, business meetings, and so on.

All these mechanisms seek to strengthen the weak element of coordination, and to allow firms to collude. Given the relevance of market transparency for this equilibrium to arise, facilitating factors usually act on this variable by making firms mutually more observable.

2.4.2.2 Object of proof

The specific role of oligopoly in this kind of collective dominance affects the object of proof: the market at issue is not supposed to be so prone to collusion that the mere interaction between a few firms may allow collective dominance to arise. In other words, the ultimate market equilibrium is other than mere oligopolistic parallelism: oligopoly is a necessary, but not sufficient condition, because without facilitating factors the market equilibrium could not evolve in coordination. Consequently, competition authorities have to allege evidence of anticompetitive parallelism, factors facilitating collusion, and market features favourable to the alignment of conducts.

[18] Several economic studies demonstrate the positive impact of joint ventures on collusion. See T.A. PIRAINO, *A Proposed Antitrust Analysis of Telecommunications Joint Ventures*, in *Wisconsin L. Rev.*, 1997, pp. 639-704; J. KATTAN, *Antitrust Analysis of technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, in *Antitrust L.J.*, 1993, p. 946.

Although oligopoly is a requirement for this kind of collective dominance, the ultimate equilibrium does not rest on mere parallelism, but implies some plus factors. It follows that competition authorities are not required to show the *Airtours* conditions, enacted for mere oligopolistic coordination.

2.5 Abuses of collective dominance and the interaction between articles 81 and 82

The case law about collective dominance reveals that there is an important intersection between abuses of collective dominance and infringements of article 81. The category itself of collective dominance arose around evidence of anti-competitive, cartel-like effects that escape the reach of article 81.

Nowadays, the overlap between articles 81 and 82 in the area of collective dominance takes two forms. On the one hand, the implementation of unlawful agreements may be cause of both collective dominance and abuse. On the other hand, unlawful agreements may simply be the means for dominant firms to abuse of their joint market power.

2.5.1 Article 81 infringements determine both creation and abuse of collective dominance

Arrangements arising competitive concerns under article 81, either as agreements or as concerted practices, may also play a determinative role in infringing article 82: they may create favourable conditions for parallelism between independent firms and, once implemented, they may also embody an abuse of collective dominance. The result is that the same conduct is unlawful under both article 81 and article 82.

However, the relationship between articles 81 and 82 in the area of collective dominance changes, depending on the presences of agreements or concerted practices.

2.5.1.1 Agreements

Competition authorities in many cases have faced unlawful agreements that also infringed article 82[19]. This happens when unlawful agreements link several, independent firms that together substantially control the market: once implemented, these agreements also constitute an abuse of collective dominance.

However, the overlap between unlawful agreements and abuses of collective dominance is partial. Abuses of collective dominance involve, by definition, all, or almost all, undertakings active in a certain market. Unlawful agreements, on the contrary, do not require the presence of a *de facto* monopoly, but even smaller cartels may arise competition concerns, and may justify the antitrust enforcement if they produce anti-competitive effects[20].

Therefore, not every cartel implies abuse of collective dominance, but only those involving several firms that jointly control the involved market.

When the Commission finds out unlawful, implemented agreements between firms that hold a *de facto* monopoly, it may deduce infringements of both article 81 and article 82[21].

2.5.1.2 Concerted practices

Nowadays, firms adopt more sophisticated means to realize cartel-like effects, without entering into formal agreements. To overcome the difficulties of showing the existence of cartels and to attack this softer form of coordination, antitrust law provides the category of concerted practices. They share with agreements properly called the requirement of parallel conducts and subjective element, but concerted practices, as a *de facto* alignment, always imply the implementation of arrangements.

---

[19] Paradigmatic, in this respect, is the *Compagnie Maritime Belge* case.

[20] J.TEMPLE LANG, *Oligopolies and Joint Dominance in Community Antitrust Law…cit.*, p. 329

[21] In this case, competition authorities have to allege evidence that the agreement at issue created collective dominance by connecting almost all firms active on the relevant market and that it produced anti-competitive effects. There is no need to separately verify whether that conduct is also abusive under article 82, because the criteria for examining anti-competitive effects are the same under articles 81 and 82.

The typical scenario where concerted practices take place is one of oligopolistic markets prone to coordination but, let alone, incapable to support tacit collusion. Firms, therefore, need to implement specific mechanisms to overcome obstacles to collude.

As a result, concerted practices manifest themselves as implemented arrangements between several firms, which substantially control the market. They also imply either intentionality or consciousness of the alignment, inferred from circumstantial evidence.

EU and US case law made clear, in this respect, that mere parallelism does not infringe article 81, unless some "plus factors" are met.

Several elements may act as plus factors: information exchanges, price announcements, and periodical business meetings, together with other kind of links between firms. In particular, all factors listed in the previous paragraph as possible sources of collective dominance may act, even in softer form, as factors facilitating the oligopolistic alignment[22]. They satisfy the requirement of contacts between firms, which is still necessary for concerted practices to be found[23].

Concerted practices may also embody abuses of collective dominance: they usually consist of parallel conducts that typically involve almost all firms on the market and result in anticompetitive effects. Even in this case, the same conduct infringes article 81 and article 82 ET.

---

[22] See F. LEVEQUE, *UK Tractors, Paris Luxury Hotels and French Mobile Telephony Operators: Are All Oligopoly Information Exchanges Bad for Competition?*, in *World Competition*, 2007, pp. 231-241.

[23] See A. ALBORS-LLORENS, *Horizontal agreements and concerted practices in EC competition law: Unlawful and legitimate contacts between competitors*, in *Antitrust Bull.*, 2006, p. 851; see R. TORINO, *Le intese restrittive della libertà di concorrenza: verso un superamento della distinzione tra accordi e pratiche concordate?*, in *Riv. Dir. Comm.*, II, p. 284. See also M. GRILLO, *Collusion and Facilitating Practices: A New Perspective for Antitrust Analysis*, in *European Journal of Law and Economics*, 2002, pp. 151-169: "*Given the difficulty of proving collusion through formal covenants, the recourse to the notion of "concerted practices", apart from reaffirming the need of evidence of reciprocal communication, in fact resulted in lower substantive requisites for illegal collusive behaviour*" (p. 159).

2.5.2 Agreements or concerted practices as mere abuses of collective dominance

Simultaneous application of article 81 and article 82 may also occur when jointly dominant undertakings arrange unlawful agreements.
The same material conduct, in this case, infringes both article 81, as unlawful agreements or concerted practices, and article 82, as an abuse of collective dominance[24].

Jointly dominant firms have the special responsibility not to harm competition; by implementing unlawful agreements they also realize an abuse. Substantive assessment of anti-competitive conducts under article 81 and article 82 rests on the same criteria, therefore there cannot be the case where behaviours are anti-competitive only under one, but not under the other rule. Moreover, conditions *ex* art. 81(3) for excluding unlawfulness of conducts also apply to article 82.

2.6 Antirust policy for conducts infringing both article 81 and article 82

Evidence of conducts embodying both unlawful agreements and abuses of collective dominance raises the matter of how to coordinate prohibitions of articles 81 and 82.

European courts have theorized this relationship in terms of interference: both articles may potentially apply to abuse of collusive, collective dominance.

At first, courts solved this interference by stating that, in practical terms, either one or the other rule applies. Later, courts shifted to the opposite approach and suggested cumulatively applying both articles.

2.6.1 Alternative application

Evidence of partial overlap between article 81 and article 82, about collective dominance, induced European Court to recognize that application of article 81 does not preclude the application of article 82,

[24] See S. STROUX, *US and EC Oligopoly Control*, Kluwer Law International, The Hagues, 2004, p. 112.

but "*in such cases the Commission is entitled* […] *to proceed on the bases of article 85 or article 86*" [25].
In other words, the original antitrust approach to the matter at issue was to divide the area of application of each rule, and to scrutinize conducts, theoretically falling within both articles, either under one or under the other provision.

Moving from this basis, some scholars held that bringing anticompetitive agreements within the control of article 82 would make little sense[26]. The main argument, with regard to this, was that under article 81 competition authorities had greater discretion, since they could exempt some conducts from the general prohibition, while analogous power was not granted under article 82[27].

This opinion is understandable insofar as the category of collective dominance did not have a clear and well-defined role, and significant doubts surrounded the opportunity itself to adopt it. In other words, as far as the application itself of collective dominance was questionable, it was quite normal that someone tried to define a clear dividing line between the two articles at issue. Conversely, nowadays collective dominance has its own space in the antitrust enforcement, therefore denying the applicability of article 82 simply because article 81 applies too, makes little sense.

However, this opinion still echoes in some recent works, which emphasize the different burden of proof, higher under article 81 than under article 82. Joint application of those rules would, therefore, impose closing this gap, either by increasing the standard for abuses

---

[25] Court of Justice, case 85/76, 13 February 1979, *Hoffmann-La Roche & Co. AG* v *Commission*, in *ECR*, 1979, 461, here at § 116. This statement involved the applicability of article 82 to block exemptions.

[26] See, for example, M. SCHODERMEIER, *Collective Dominance Revisited: an Analysis of the EC Commission's New Concepts of Oligopoly Control*, in *ECLR*, 1990, pp. 28-34: "*Undertakings linked by a cartel agreement cannot, at the same time, abuse a joint dominant position*" (p. 29).
This view arose around the possibility of applying article 82 to firms linked by agreements. The negative opinion expressed in this respect coupled with the approach to the joint application of article 81 and article 82.

[27] After Regulation 1/03 recognized that conditions of article 81(3) apply also to article 82, there is no reason to maintain this argument.

or by decreasing that of concerted practices. In any event, the result would be to make one of those articles superfluous[28].

2.6.2 Cumulative application

The opposite solution is to recognize that articles 81 and 82 may, in concrete, jointly apply to the same factual situation.
In the *Ahmed Saeed* case, the Court stated that: "*the possibility that Articles 85 and 86 may both be applicable cannot be ruled out*"[29], and in *Tetra Pak I* the Court admitted that article 81 and article 82 may apply cumulatively if the requirements of both are met[30].

This approach has characterized decisions about abuses of collective dominance coming from collusive links[31]. It expresses a better-developed case law that examined the relationship between articles 81 and 82 in the framework of abuses of collective dominance, rather than of block exemptions.

Several scholars agreed on the cumulative application of these rules[32], but some of them foresaw that, insofar as article 81 applied, the Commission would have had no incentive to adopt the category of collective dominance[33].

---

[28] A. FRIGNANI, *The Collective Dominant Position*, in AA.VV., *Antitrust between EC LAw and National Law*, Giuffre', Milano, 2006, p. 181.

[29] Court of Justice, case 66/86, 11 April 1989, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, in *ECR*, 1989, 803, here § 37. The question of the case was whether the implementation of agreements falling under article 81 could also constitute an abuse of dominant position.

[30] Court of First Instance, case T-51/89, 10 July 1990, *Tetra Pak Rausing SA* v *Commission*, in *ECR*, 1990, II- 309.

[31] See *Flat Glass, Almelo*, and *Compagnie Maritime Belge* cases.

[32] See G. SPROUL, *Articles 85 and 86: First Application to Maritime Transport*, in *ECLR*, 1992, pp. 215-221. T. SOAMES, *An Analysis of the Principles of Concerted Practices and Collective Dominance: a Distinction without a Difference*, in *ECLR*, 1996, pp. 24-39, recognizes that: "*To the extent that an agreement or concerted practice between undertakings, which can properly be regarded as jointly dominant, has adverse effects on competition then it could fall under both provisions simultaneously*" (p. 36).

[33] See T. SOAMES, *An Analysis of the Principles of Concerted Practices…cit.*, p 39.

2.6.2.1 Method for cumulative application in the EU case law

Competition authorities recognized that, in the case of abuses of collective dominance coming from collusive links, article 81 and article 82 apply and, since the *Flat Glass* case, they have clarified the conditions for this cumulative application.

According to the Courts, it is not enough to show the implementation of agreements or concerted practices to infer collective dominance and its abuse, but it must be proved that the concerned firms hold together a dominant position and that they behaved in an abusive manner. In other words, cumulative application implies to meet the requirements of both rules.

In explaining this approach, the CFI stated that "*for the purpose of establishing an infringement of Article 86 of the Treaty, it is not sufficient* […] *to 'recycle' the facts constituting an infringement of Article 85*"[34].

This statement raised a significant misunderstanding because several scholars interpreted the term "*facts*" in its pure meaning, that is, factual situations. As a result, in their view, the Commission could not rely on the same facts to infer both infringements[35]. However, impeding using the same facts would *de facto* preclude the cumulative application of articles 81 and 82 to the case at issue. Our premise, in fact, is that one material conduct infringes two provisions: identity of the factual background is, therefore in *re ipsa*. In other words, since the active behaviour is the same under the two cases, competition authorities have necessarily to rely on the same facts.

It is a different thing to infer proof of an infringement from evidence of the other. Articles 81 and 82 in the area of abuses of collective dominance partially overlap: basically, each rule presents its own requirements and, under certain circumstances, the same conduct may satisfy both. Competition authorities for cumulatively

---

[34] *Flat Glass* § 360. Also see *Compagnie Maritime Belge*: "*The mere fact that two or more undertakings are linked by an agreement, a decision of associations of undertakings or a concerted practice within the meaning of Article 85(1) of the Treaty does not, of itself, constitute a sufficient undertakings basis for such a finding*" (§ 43).

[35] See, on this point, A. FRIGNANI, *The Collective Dominant Position...cit.*: "*if, in order to prove the abuse the Commission uses the same facts which constitute the basis for establishing the collective dominant position* […] *this means the 'recycling the same facts' which the Court has warned against*" (p. 199).

applying articles 81 and 82 must demonstrate that the case at issue is one of them. Consequently, showing the implementation of agreements is not enough to also reach the proof of infringements of article 82, but it is necessary to demonstrate that firms, involved in agreements or concerted practices, are together jointly dominant and have behaved in an anti-competitive manner. This assessment rests on the economic analysis of all conditions required for abuses of collective dominance.

In applying this approach, competition authorities followed a contradictory reasoning. According to authorities, despite the possible overlap, there is an ontological difference between article 81 and article 82: article 81, in fact, deals with agreements or concerted practices and does not require that the involved firms hold monopoly power. Article 82, on the contrary, deals with anti-competitive effects necessarily linked to monopoly power.

By stressing this difference, the Commission and Courts stated that, in the area of overlap, there are two infringements and, therefore, articles 81 and 82 cumulatively apply.

This substantive premise is not consistent with the statement about sanctions: even if those rules cumulatively apply, Courts have always imposed only one fine, based either on article 81 or on article 82.

There is an internal tension in this approach: in identifying infringements, Courts emphasized the difference between articles 81 and 82, but in quantifying fines, they remark the unity of unlawful conduct. This gap essentially derives from the traditional idea that cartels are ontologically different from abuses of dominance and, in particular, that monopoly power is a requirement for article 82, but it is not equally necessary under article 81.

However, this remark is not determinative for the case at issue, because in the area of overlap between article 81 and article 82, firms joined by agreements also hold monopoly power. Thus, in this area, distinguishing the two provisions makes little, if any, sense.

Moreover, if the two rules were really different, the deduction of two infringements would lead to apply two sanctions[36].

2.6.2.2 Rationalizing the EU approach about the cumulative application of articles 81 and 82

In this framework, deep analysis of all elements involved this topic may help rationalizing the EU case law.

Unlawful agreements that also result in abuse of collective dominance may fall under both articles 81 and article 82, or, in other words, two separate rules apparently apply to the same conduct. In this scenario, it is preventively necessary to figure out whether *prima facie* conflict of rules is only apparent, and therefore solely one rule applies, or if it is real, and consequently several provisions concur to discipline the same material conduct.

As for the first possibility, all criteria typically applied to solve apparent conflict of rules appear anything but determinative for our case. Both chronological and hierarchical criteria are inapplicable at all, since articles 81 and 82 are included, from the beginning, in the same Statute. In addition, the criterion of specialty is also not really workable. It rests on the idea that one of the concurrent provisions presents the same requirements of the other, and a *quid pluris*, which makes it special and more appropriate to the case at issue. Abuses of collective dominance involving collusive links satisfy the applicative requirements of those rules, but neither article 81 nor article 82 presents any specific elements determining the prevalence of the one over the other[37].

---

[36] If the scenario is one of single conduct that infringes two, separate provisions, which cumulatively apply, the Court should have imposed two sanctions, or one sanction increased proportionally to the whole infringement.

[37] M. LIBERTINI, *Posizione dominante individuale e posizione dominante collettiva*, in *Giur. Comm.*, I-2003, p. 567 argues that, in general terms, article 82 may be a special rule, because it always includes implementation of agreement, element that, on the contrary, may lack under article 81. However, in our case, the matter of joint application of those articles is raised because agreements are implemented and, consequently, result in anticompetitive conducts. In other words, it is the implementation of unlawful agreements or concerted practices that generate collective dominance and its abuse. As a consequence, components of those articles perfectly overlap in the case at issue.

The relationship between article 81 and article 82 seems to be one of mutual specialty: there is a common area, where rules overlap, and there are other areas where one rule applies and the other does not. Abuses of collective dominance involving collusive links fall in the intersection between the two provisions.

To identify the legal treatment of these cases, one possibility is to apply the same criteria adopted in criminal law, such as subsidiarity or absorbability[38]. However, these approaches do not solve the conflict of laws: nothing in the articles at issue may support the inference that one rule is subsidiary facing the other, or that one rule absorbs the disvalue of the other too.

Consequently, at least for the case at issue, the overlap between those provisions seems to be complete and anything but apparent; therefore, both rules seem to equally apply to that factual situation.

The alternative scenario is that of concurrent rules and, therefore, the real matter is no longer to determine which rule applies, but how to coordinate two legal provisions equally applicable to the same case.

According to the Courts, articles 81 and 82 cumulatively, rather than alternatively, apply to unlawful agreements that also constitute abuse of collective dominance: it is a case of single conduct that produces multiple infringements.

---

[38] In criminal law, when the criterion of specialty, let alone, cannot solve conflicts of rules, scholars suggest integrating it by other standards, such as subsidiarity and absorbability. The first criterion applies when more rules protect the same interest but at different degree. The subsidiary rule has the function of integrating the principal rule and, therefore, applies insofar as the principal rule can not apply. Conversely, when subsidiary rule applies, the principal does not. As a result, the concurrent rules, although close each other, alternatively apply.
The second criterion describes a situation where one rule embraces a wider disvalue than the concurrent rules, so that the application of the first is enough to cover the entire case at issue. In other words, the same factual situation could fall under two rules, but applying also the softer rule does not make sense, since the stronger one includes and exhausts the disvalue of the other too.
With regard to the Italian criminal law, see F. MANTOVANI, *Concorso e conflitto di norme nel diritto penale*, Bologna, Zanichelli, 1966, pp. 230-231.
The same criteria applies in the Spanish penal system, where the 1995 Spanish penal code at article 8 provides a list of criteria to solve conflicts of rules and also clarifies their mutual relationship.

Member states usually enact specific rules governing this hypothesis. In the Italian legal system, for example, in the case of several rules that formally (that is, by a single conduct) concur to determine an offence, it applies only the fine provided for the most serious infringement, increased up to triple[39].

This approach seeks to balance the tension between multiple infringements and multiple offences, on the one hand, and single, material conduct, on the other hand. In particular, evidence of single, active behaviour pushes to reduce the amount of fines that would be imposed in the case of multiple conducts raising multiple infringements.

The case at issue is quite different because, according to the Courts, it consists of one conduct, two infringements, and one fine. This scenario implies the unexpressed element of the offence, which is only one and it is the same under both provisions. The implementation of monopolistic, anticompetitive agreements, in fact, generates, as an unavoidable effect, the infringements of both rules, and the involved undertakings can do nothing to avoid the double violation.

---

[39] See law 689/1981, art. 8.
Almost all systems of civil law provide specific rules for quantifying sanctions in the case of unitary conduct raising multiple infringements. There is a general concern about defining an amount of fines that takes account of the unitary nature of the conduct at issue. The result is, in most of the case, the imposition of only one fine–usually that provided for the most serious infringement–eventually increased of different percentages, but, in any event, with an ultimate amount smaller than the sum of fines provided for each infringed rule.
The German and Spanish penal codes, respectively at article 57 and article 77, impose only sanctions for the most serious infringement, without any increase. Similarly, French penal code remarks the *unite d'infractions* and provides that the higher fine absorbs the smaller one.
In the common law area, there are neither explicit rules nor established principles that address the matter of the application of concurrent laws. However, Courts seek to proportionally balance fines and conduct by treating correlated infringements as a single infringement.
Concerning the Italian system, the application of criminal reasoning in the area of competition law rests on article 31, law 287/90 (Italian competition law). This rule expands to fines for antitrust infringements the provisions of law 689/81, originally enacted for violation of criminal laws.

In this framework, the choice of imposing one fine is consistent with both conduct and offence, but it is inconsistent with the inference of two, separate infringements.

Evidence of single offence, despite of plurality of formal infringements and of a unitary conduct, excludes the application of criteria about concurring laws, which, conversely, relies to multiple offences coming from single or multiple conducts.

Moreover, single conduct and single offence justify the application of only one fine: the principle of proportionality, in fact, leads to define the amount of sanctions by focusing on substantive offence, rather than on the mere number of formal infringements[40].

Moreover, since article 81 and article 82 are mutually special and since the in case of abuse of collusive, collective dominance both apply, fining firms twice for the same conduct would contrast with the principle of *ne bis in idem*.

In this scenario, characterized by unity of conduct, offence and fine, the only conflicting element is the double infringement, which derives from the presumable dichotomy between article 81 and article 82.

The European legislator, following the example of the US Congress, distinguished the most frequent, and socially typical, anticompetitive behaviours in two wide categories. Moreover, a broad formulation allows articles 81 and 82 to deal with various and mutable kinds of anti-competitive conducts.

However, such a division does not eliminate the substantial unity of the rules at issue. The Court itself recognized that "*article 85 and 86 are complementary inasmuch as they pursue a common general objective* […] *'the institution of a system ensuring that competition in the common market is not distorted'. But they none the less constitute, in the scheme of the Treaty, two independent legal instruments addressing different situations*"[41].

Homogeneity of those provisions is even more evident in the light of recent trends in EU competition law, and in the alignment of

[40] See Court of Justice, joined cases 100-103/80, 7 June 1983, *Musique Diffusion française and others* v. *Commission*, in *ECR*, 1983, 133, § 127. The Court confirmed the decision of imposing only one fine when several, separate infringements pursue the same scope and realize a single offence.

[41] Court of First Instance, case T-51/89, 20 July 1990, *Tetra Pak Rausing SA* v. *Commission*, in *ECR*, 1990, II-309, § 22.

criteria for the substantive evaluation of infringements[42]. In this perspective, articles 81 and 82 may be perceived as a formal division of the same rule, which seeks to ensure a system of undistorted competition.

In other words, we should imagine that, behind the formal presence of two articles, it exists a general rule that prohibits a set of behaviours, ranging from express cartels to abuse of single dominance, which may generate anticompetitive effects. The formal articulation of the unitary provision in two articles, which reflects the most common kinds of unlawful conducts, does not eliminate the substantial unity of the prohibition itself. It is a case analogous to that of provisions divided in several sentences.

In this perspective, articles 81 and 82 appear as components of a wider rule, like that of Brazilian antitrust law, which does not distinguish cartels from abuses of dominance, but provides a general prohibition for every act that may hinder the market functioning. "*Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if such effects are not achieved, shall be deemed a violation of economic order*"[43].

Perceiving article 81 and 82 as a substantially unitary rule, rather than as two, opposite provisions, gives whole coherence to the jurisprudential solution of imposing one fine. This is, in fact, the most appropriate reaction against single conduct that determines single offence and a substantially unitary infringement. Judges intuitively arrived to the same solution, but relied on a contradictory reasoning.

[42] Regulation 1/2003, in particular, provides the application of art. 81 (3) also to abuses of dominance and aligns remedies for infringements of both rules.

[43] Law 8884/94 (Brazilian antitrust law), June 11, 1994, in *Official Gazette of the Federal Executive*, June 13, 1994, article 20. Articles 20 and 21 deal with all anticompetitive conducts other than mergers. Article 20 is a general provision that focuses on the anticompetitive effects, without distinguishing anticompetitive agreements from abusive conduct. Article 21 includes a non-exclusive list of acts qualified as anticompetitive insofar as they produce the effects forbidden in article 20.

2.7 Do abuses of collective dominance add something to article 81 prohibitions? Anticompetitive, oligopolistic behaviours which escape liability under article 81 as abuse of collective dominance

The described overlapping between articles 81 and 82 may raise the doubt that the category of collective dominance is substantially useless, because all anti-competitive effects linked to joint market power already fall within article 81.

However, deep analysis of the EU antitrust system reveals that collective dominance captures some anti-competitive effects that, in the light of the current evolution, do not fall under article 81.

In the first stages of the debate about the joint application of those rules, the plus value of article 82 was deemed to involve concerted behaviours exempted from article 81 but abusive under article 82[44]. Since the exemption provided in article 81(3) did not apply to article 82, some kinds of agreements included in the exemption could be attacked under article 82 if they resulted in abuses of collective dominance[45].

This principle no longer applies, because Regulation 1/2003 provides that the conditions listed in art. 81(3) also apply to abuses of dominance. This rule, together with the new regime of direct application of exemptions, closes the gap between those provisions, with the consequence that implemented agreements, lawful under article 81(3), do not embody any abuse under article 82.

Although article 82 lost this area of application, it remains very useful for dealing with several anticompetitive conducts that escape the reach of article 81.

---

[44] Regulation 4056/86 provides at art. 8.2 that "*where the Commission* […] *finds that any particular case of conduct of conference benefiting from the exemption* […] *nevertheless has effects which are incompatible with article 86 of the Treaty, it may withdraw the benefit of block exemption and take* […] *all appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty*".

[45] This possibility appears as merely theoretical, at least with reference to individual exemptions, which are not granted whether agreements at issue eliminate competition. This assessment includes, among the other things, the possibility of causing abuses of dominance. It was, therefore, quite improbable that exempted conducts could fall under article 82. See on this point, S. STROUX, *US and EC Oligopoly Control…cit.*, pp. 113-114.

2.7.1 Unilateral adoption of facilitating practices strengthening collective dominance from within

Competition authorities have always addressed facilitating practices in oligopoly by article 81. For information exchanges, contingency clauses, preventive price announcement fall under article 81, it is necessary to show that those conducts rest on, and express, concertation between the concerned undertakings. It follows that facilitating practices infringe article 81 when they are adopted by agreements or contribute creating concerted practices. Moreover, they constitute indirect evidence of concertation when this element is the only plausible explanation for the parallel adoption of those practices. In both cases, the antitrust significance of facilitate practices depends on the possible inference of concertation that, in turn, presupposes the multilateral adoption of that conduct. As a consequence, in the current case law, unilateral adoption of facilitating practices in oligopolies escapes liability under article 81.

According to some scholars, the category of abuses of collective dominance may be a useful means to attack this conduct that, to a certain extent, affect the competitive market functioning[46].

On this point, the most convincing proposal is that of Stroux. According to the A., unilateral adoption of facilitating practices in oligopoly constitutes a particular case of exclusionary abuse, which is aimed not at eliminating rivals, but at strengthening the collective dominance from within. This kind of conduct would be, in other words, the internal reflex of exclusionary abuses, which usually affect the outsider competitors[47]. If a member of a collective dominance unilaterally adopts a facilitating practice that may strengthen the joint

[46] See, A. BAVASSO, *Gencor: A Judicial Review of the Commission's Policy and Practice: Many Lights, some Shadows*, in *World Competition*, 1999, p. 64; V. KORAH, *Gencor v. Commission: Collective Dominance*, in *ECLR*, 1999, pp. 338-339.

[47] This is, in my view, the most important contribution of S. Stroux to the issue of collective dominance. She cites the *Continental Can* case [Court of Justice, case C-6/72, *Euroemballage and Continental Can* v. *Commission*, in *ECR*, 1973, 215] where the Court qualifies as an abuse the conduct whereby dominant firms seek to strengthen its market power and, in this way, substantially harm competition. See S. STROUX, *US and EC Oligopoly Control…cit.*, pp. 168-170.

market power, competition authorities may qualify this conduct as an individual abuse of collective dominance[48].

2.7.2 Mere oligopolistic parallelism

There is another area where collective dominance adds a plus value to the antitrust enforcement: mere oligopolistic parallelism. I will analyse this topic in the next section.

Section II

Collective Dominance From Oligopolistic Interdependence.

2.8 Introduction

To overcome antitrust prohibitions, firms have perfected their business strategies and, instead of expressly colluding, they may develop a common policy, a mutual understanding, or a *modus operandi*, which generates cartel-like effects.

This phenomenon is commonly known as tacit collusion or conscious parallelism. It rests on the oligopolistic interdependence, which the few, active sellers may easily recognize and exploit for anticompetitive purposes. The shared knowledge that each, individual action directly affects rivals and that, generally, coordination ensures higher profits than competition, may stabilize the market equilibrium on collusive standards.

[48] Joint dominance is admittedly compatible with individual, exclusionary abuses, while exploitative abuses require common action of all involved firms. The opinion of Stroux is, therefore, consistent with this scenario.

The awareness of this mechanism rises the double prejudice that oligopoly is essential for collective dominance and that every oligopoly results in collusion or, at least, in sub-optimal outcomes.

The first prejudice is denied by evidence itself of collective dominance in non-oligopolistic markets: this finding shows that oligopoly is the typical and probably the most common feature of collective dominance, but it is not a *sine qua non*[49]. The second prejudice is contradicted by evidence that the strongest and fiercest competition often takes place in oligopolistic markets[50].

Against the Structuralist approach[51], the modern economic theories suggest building the analysis around market dynamics, rather than market structure, and emphasize the variety of outcomes coming from oligopolistic interaction. Therefore, the correct perspective to deal with oligopoly is not to perceive it as a problem in itself, but it is to recognize that there are good and bad oligopolies.

Translating economic devise about functioning and outcomes of oligopolies in a feasible and workable antitrust policy is actually the core of legal debate. There is, in fact, a remarkable tension between two opinions: on the one hand, tacit parallelism is viewed as a direct consequence of the market functioning and, therefore, in the absence of proof of consciousness or intentionality, it should be immune from the antitrust liability, although it generates anti-competitive results.

---

[49] See B. VAN DE WALLE DE GHELCKE, G. VAN GERVEN, *Competition Law of the European Community,* Matthew Bender & Company, Newark, 2006: " *the concept of a collective dominant position is capable of applying, but is not restricted, to oligopolies*" (§ 3.03).

[50] See I. KOKKORIS, *The Development of the Concept of Collective Dominance in the ECMR. From its Inception to its Current Status*, in *World Competition*, 2007: "*because a market is oligopolistic* [this does not mean that] *the firms will necessarily collude and become collectively dominant*" (p. 423).

[51] The Structural approach still echoes in some recent papers. See, for example, J.W. BROCK, *Antitrust Policy and the oligopoly problem*, in *Antitrust Bull.*, 2006, pp. 227-280: "*perhaps it is time for the courts too to recognize that in oligopoly they confront not a condition but a structural malady rife with serious economic, political and social consequences, perhaps it is time for the antitrust courts and agencies to recognize that in the case of oligopolistic mutual interdependency, it is not freedom to compete they are protecting, but the license to collectively monopolize trade in ways that compound, rather than ameliorate, some of the nation's most pressing economic problems.*[…] *Perhaps it is time, that is, to re-establish merger law at the frontline of antitrust policy and the oligopoly problem*" (p. 280). The A. seems to suggest that oligopoly is a problem in and by itself and, therefore, that the only effective solution is to prevent, by the means of the merger control, the market evolution towards an oligopolistic scheme.

On the other hand, evidence of market distortions should induce competition authorities to adopt the available means to remove and deter infringements, although there is no evidence that firms intentionally behaved in an anticompetitive manner. These opinions correspond to specific proposals for antitrust policy in oligopolistic markets: some scholars suggest applying article 81, by inferring conspiracy from parallelism, and imposing antitrust liability insofar as the suspected conduct fall in the reach of article 81. Other scholars indicate the alternative way of applying article 82.

In the following paragraphs, I will object to the first proposal, which leaves open the gap in the oligopoly control, and I will seek to demonstrate that article 82 may ensure an effective antitrust policy against tacit collusion.

2.9 Tacit collusion under article 81: the gap in the oligopoly control

The idea of bringing tacit collusion within the control of article 81 implies that this article determines limits and contents of the antitrust policy for the oligopoly problem. Consequently, competition authorities may address the matter of oligopolistic parallelism only if the suspected conducts present all requirements of article 81. Since the subjective element is a *sine qua non* for article 81 to apply, in the case of oligopolistic parallelism, anticompetitive effects may be deemed unlawful only when there is evidence of common intention. In a behavioural equilibrium, there is neither direct proof of consciousness nor of intentionality, the subjective element may be only inferred from conducts. Proof of conspiracy behind parallelism derives for evidence of contacts that allow firms to reach the consensus on a common strategy and of the subsequent conducts that implement the planned scheme of action.

The idea of bringing the oligopoly problem under article 81 rests on the inference of conspiracy, which distinguishes mere oligopolistic parallelism from concerted actions. Scholars suggest applying two methods to get this result: on the one hand, focusing on

communications, on the other hand, strengthening the economic analysis.

2.9.1 Focusing on communication

The first approach relies on the essentiality of communication for stable collusion. Although economic models have shown that collusion may rise even in the absence of communication, several scholars remark that in the real-world markets communication is usually necessary for non-competitive strategies[52].

Most scholars recognize the usefulness of communication for collusion to appear[53], but only some of them perceive it as essential. In their view, stable collusion is difficult to exist without any contacts between the involved firms[54]. This is equal to say that stable parallelism would always presuppose communication between firms. Therefore, evidence of stable parallelism would also embody evidence of conspiracy and, consequently, would allow the inference of article 81 (or Sherman Act section 1) infringements.

However, economists suggesting the essentiality of communication do not express this inference, with the consequence

---

[52] W.H. PAGE, *Communication and Concerted Action*, in *Loy. U. Chi. L.J.*, 2007, p. 31. He notes that: "*The noncompetitive joint price increase is equilibrium that can* theoretically *be reached regardless of any communication*", but "*informed empirical estimates suggest that communication is usually if not variably necessary for successful cooperation in real-world markets*" (p. 38).
Similarly, J. LANGENFELD, J. MORSH, *Refining the Matsushita Standard and the Role Economics Can Play*, in *Loy. U. Chi. L.J.*, 2007: "*it is, after all, difficult to imagine a successful coordination of rivals without some type of communication back and forth between the participants*" (p. 508).
Also C. OSTI, *Diritto della Concorrenza*, Il Mulino, Bologna, 2007, pp. 211-213, remarks that it is quite improbable that collusion derives simply from the market functioning, but there is the reasonable suspect that, in the most of the cases, collusion is not completely tacit and unconscious.

[53] M.D. WHINSTON, *Lectures on Antitrust Economics*, Cambridge MA, MIT Press, 2006, p. 41. See also B. BAKER, *Identifying Horizontal Pricefixing in the Electronic Marketplace*, in *Antitrust L.J.*, 1996, pp. 47-48. According to the A., the case law about conspiracy would confirm the centrality of communication in collusive equilibria, because it looks for plus factors, which represent serious indicia of that firms communicate with each other before implementing the collusive scheme of conducts.

[54] X. VIVES, *Oligopoly Pricing: Old Ideas and New Tools*, Cambridge MA, MIT Press, 2000, p. 320.

that the idea of deducing concertation from mere parallelism, on the premise that stable parallelism implies communication, has never developed in a well-established theory.

As a result, this approach to the oligopoly problem is neither feasible nor workable.

2.9.2 What can economic theories and econometric techniques deduce from mere oligopolistic parallelism?

The alternative approach is to adopt economic analysis for inferring collusion from of parallelism of conducts.

In some cases, this approach allows inferring infringements of article 81: if, for example, collusion is the only plausible explanation for the conduct at issue, there is enough evidence of the common intention to behave in an anticompetitive manner. Similarly, when parallel conducts are contrary to individual interests and are rational only in a collusive scheme, the *Wood Pulp* jurisprudence justifies the deduction of concerted practices under article 81[55]. In these kinds of cases, the economic analysis and the econometric techniques highlight the presence of plus factors making the scenario of collusion more consistent with parallelism than the conflicting scenario of competition.

In all the other cases, when economic analysis does not reveal any evidence of plus factors, may economic theory and econometrical evidence allow the inference of conspiracy?

Several economists are confident in the role of a deep and careful economic analysis for collusion.

---

[55] See O. ODUDU, *The Boundaries of EC – The Scope of Article 81*, Oxford University Press, Oxford, 2005, p. 77.
The A. analyses two conceptions of concerted practices, one dealing with the inference of common intention by conducts, the other dealing with those conducts seeking to reduce uncertainty about future strategies of rivals. He criticizes the first conception and remarks that concerted practices do not require the existence of a common plan between firms. Moreover, "*the conception of concerted practices as common intention captures no more activity than is already caught within the meaning of agreements*" (p. 81). For these reasons, he suggests following the other conception and focusing on conducts that allow firms to reduce uncertainty about future conducts, because this approach may capture anticompetitive effects that escape the reach of agreements.

Professor Grillo, for example, suggests widening the reach of the analysis and scrutinising both short-run decisions on price and quantity and long-run decisions on capacity, investments, advertising and other, less reversible strategic choices. Since long-run decisions depend on the expected behaviours in the short time, they may embody evidence of the following collusion. Deep and careful analysis of the whole set of variables affecting the decisions of firms could, therefore, allow the inference of collusion from mere parallelism.
However, he remarks that there currently exists only "*descriptive models and their result lack, as they now stand, a definite normative conclusion* […]. *In absence of further work the results surveyed are to be handled with care*"[56]. Consequently, even economic models that perfectly fit the market at issue cannot provide unambiguous evidence of collusion[57].

Moreover, the inference of conspiracy from market data, and especially from price patterns, suffers from remarkable difficulties: availability of data, estimation of demand and costs' functions, influence of the assumptions on the final results, correspondence of the real market to the theoretical models, and modelling mistakes[58].

---

[56] M. GRILLO, *The Economic Analysis of Collusion and the Detection of Collusive Behaviour: New Perspectives for Antitrust Policy and Law*, in AA.VV., in AA.VV., *Antitrust between EC Law and National Law*, Giuffrè, Milano, 2000, pp. 27-42, here at p.41. The A. spells out that "*while we have theorems based on 'if' conditions – such as 'provided that collusion ensues in the short run, then the long-run decisions will be such and such'- we still are strongly in need of theorems based on 'only if' conditions*" (p. 41).

[57] M. MOTTA, *Competition Policy – Theory and Practice*, Cambridge University Press, Cambridge, 2004. He highlights that "*Perhaps in the future there will be more consensus on how to design and assess econometric exercises of this type, but for the time being, econometrics is more likely to give complementary evidence, rather than conclusive proof, of collusion*" (p. 189).
Similarly, M.D. WHINSTON, *Lectures on Antitrust Economics…cit.*, p. 20 emphasises the difficulties of inferring conspiracy only from market information on parallel conducts.

[58] K.U. KUHN, notes that "*In the vast majority of cases the available data will not allow making such inference* [of monopolistic prices]. *This will often be the case even when price and quantity data is available, in the few cases in which behaviour can in theory be inferred from the data, estimates of behaviour may also be extremely sensitive to the specification of the model*". K.U. KUHN, *Fighting collusion – Regulation of communication between firms*, in *Economic Policy*, 2001, p. 171. According to Kuhn, economic theories and econometric techniques, under specific circumstances, may allow the inference of collusion, but the risk of mistakes is still high. Uncertainties also derive from lacking of a general consensus on these models, which are always based on assumptions and imply the interpretation of economic data. Because of this complexity and of the little expertise with econometric

Furthermore, in most of the cases, there exists no economic model designed for the market at issue; therefore, evidence of collusion or conspiracy from mere parallelism should derive from the adaptation of economic models created for similar markets, with the consequence of reducing the conclusiveness of those models.

To conclude, the most significant obstacle for controlling the oligopolistic parallelism under article 81 is to demonstrate the element of conspiracy. Since this rule seeks to address multilateral, anticompetitive conducts, it implies proof of common intention or mutual understanding, elements that reflect, at different degrees, the scheme of agreements. The suggested approaches for controlling oligopolies under article 81, by focusing on the inference of conspiracy, are incapable of addressing all anticompetitive effects that derive from mere parallelism, in the absence of any proof of communication or contacts between the involved undertakings. In other words, as far as there lacks any (proof of) subjective element changing unilateral, unlawful interdependence in culpable cooperation, all anticompetitive effects deriving from oligopolistic interaction escape the reach of article 81 and create a gap in competition policy.

2.10 The alternative approach: applying article 82 to fill the gap in the oligopoly control. Doubts of scholars

The alternative approach to deal with anticompetitive effects coming from mere oligopolistic interdependence is to apply article 82, by qualifying all concerned firms as collectively dominant and their conduct as an abuse.

Several scholars contest the idea of applying article 82 to overcome the difficulties of proving the existence of concertation behind parallel conducts. Professor Grillo contested the applicability

---

methods, according to the A., Courts should not address parallelism by the analysis of behaviours, but they should focus on communication. Professor Kuhn notes, in this regard, that "*it is far more frequent that we can observe communication between firms than that we have appropriate economic data to be able to infer behaviours on the product market*" (p. 180). Moreover, tacit collusion cannot take place in games compatible with multiple equilibria, where "*in absence of communication about planned conduct, players cannot figure out what the rival will play*" (p. 181).

of article 82 by highlighting the difference between co-ordination and co-operation. Under the Game theoretical approach, co-ordination is an ontological characteristic of oligopoly: given the interdependence among oligopolists, each player, to rationally behave, needs to take account of, and to behave consistently with, the conduct of the other players. Co-operation, on the contrary, implies the joint selection of a common scheme of actions for maximizing joint profits. In his view, departing from the approach which focuses on co-operation and collusion would undervalue this difference and would increase the risk of attacking co-ordination, which involve the market equilibrium itself and does not necessarily imply collusion or cooperation[59].

Professor Monti highlights the potential utility and the attractiveness of controlling oligopolies by article 82, but highlights, at the same time, all applicative difficulties behind this apparently simple solution. In his view, applying article 82 to anticompetitive effects of oligopolies faces, first of all, the difficulty of identifying abuses, especially in the case of price abuses: authorities neither have the ability to define excessive prices, nor may intervene by regulating this market conduct, because such a power is confined to liberalized sectors. Second, it would be extremely difficult to choose and impose adequate remedies: in his view, tacit collusion derives solely from the market structure; therefore, neither behavioural nor structural remedies are adequate. Finally, he remarks the risk that Commission may use article 82 even for express collusion, as a means to lower the standard of proof required under article 81[60].

These remarks remind the Structuralist objections against the oligopoly control and highlight important questions in the antitrust approach to tacit collusion. First of all, there are great doubts about the lawfulness and the appropriateness of intervening to intervene in oligopolistic markets against unculpable conducts–that is, when there is no evidence of consciousness or intentionality of restrictions. In this framework, the suspected behaviours are imputed to the market itself, as the direct consequence of a certain market functioning and as an expression of rational conducts. Moreover, such a strong link between suspected behaviours and market structure also raises significant

[59] M., GRILLO, *The Economic Analysis of collusion…cit.*, pp. 29-30, 35.
[60] G. MONTI, *EC Competition Law*, Cambridge University Press, Cambridge, 2007, pp. 335-338.

problems about the effectiveness of remedies, because cease and desist orders would be not workable at all, but structural remedies directly affecting the market functioning would be effective. Finally, intervention under article 82 is denied on the grounds of a serious inconsistency that it would generate in the system of antitrust policy. According to some scholars, it would be unreasonable to qualifying the same conduct as lawful under article 81 and unlawful under article 82[61].

All these objections lead to deny the possibility itself to intervene by article 82 against anticompetitive, oligopolistic parallelism[62].

Although these *caveat* highlight important matters about the attempt of controlling tacit collusion under article 82, they do not appear determinative for denying the possibility itself to intervene against this market failure. The most of the objections–such as identifying excessive prices or imposing adequate remedies–rely on the same difficulties that may involve single dominance. The other difficulties may be overcome by a careful economic analysis and a prudent approach,

In the following paragraphs, I will seek to address these objections, by demonstrating that applying article 82 may be a feasible and workable solution for the oligopoly problem, and that this approach does not compromises the whole rationality of the competition law system.

---

[61] C. OSTI, *Diritto della Concorrenza…cit.*, p. 222-223.
This argumentation does not seem determinative: article 81 and article 82, although share the same purpose, present different requirements, so the same factual situation may satisfy the applicative conditions of one, but not of the other rule. In particular, in our case, there is an important difference: the subjective element, which is essential for article 81 to apply, is not required under article 82. Since anticompetitive, tacit parallelism lacks of proof of consciousness, it does not fall under article 81, but it may fall under article 82, thanks to the objective notion of abuse that the A himself reminds (p. 127).

[62] R.W. DAVIS, J.M. DRISCOLL, *The urge to converge – The new EU Discussion Paper on Abuse of a dominant position*, in *Antitrust*, Spring 2006, pp. 82-88 still wonder: "*But if undertakings have not entered an explicit agreement to act in concert, what conduct will give rise to article 82 liability?*" (p. 88). Also T. SOAMES, *Towards a Smart Article 82 – Qui audet adipiscitur*, in *International Antitrust Law and Policy*, 2005, pp. 457-493, defines tacit collusion as a "*theory whose potential for causing mischief is troubling*" (p. 468).

2.11 Article 82 as a feasible and workable means to address anti-competitive, oligopolistic parallelism.

Evidence of behaviours that hinder market competition requires an antitrust intervention that removes the failure and deters from future infringements.

In the case of mere parallelism that, although unculpable, generates anticompetitive effects, the only available means to intervene is an objective rule, which does not presuppose, for its applicability, proof of any subjective elements.

Article 82 fits this situation, because of the objective notion of abuses, and the capability to deal with positions of joint market power. As for the remedies, no fine may be imposed for unculpable conducts, but cease and desist orders, together with both behavioural and structural remedies, represent effective measures to end the infringement, to remove its effect and to deter from new violations.
In the next paragraphs, I will explain and examine this approach, by moving on the objective notion of abuse.

2.11.1 The objective notion of abuse

The enforcement of article 82 traditionally rests on the premise that abuse is an objective notion and that, therefore, the intention of firms to hinder competition is irrelevant for this rule to apply.

This knowledge resulted from the combination of two factors: on the one hand, the lack, in the article 82 words, of any reference to intent; on the other hand, the EU case law, and in particular, the CJ statement that "*the concept of abuse is an objective concept*"[63]. Scholars infer from this statement that intent of weakening competition is not a component of the category of abuses[64].

---

[63] Court of Justice, case 85/76, 13 February 1979, *Hoffmann-La Roche & Co. AG* v. *Commission*, in *ECR*, 1979, 461, § 91. The current case law still applies the same formula. See, Court of First Instance, case T-65/98, 23 October 2003, *Van den Bergh Foods Ltd* v. *Commission*, in *ECR*, 2003, II-4653, § 157.

[64] See P.J. LOEWENTHAL, *The Defence of "Objective Justification" in the Application of Article 82 EC*, in *World Competition*, 2005, p. 459.
T. EILMANSBERGER, *How to distinguish good from bad competition under Article 82 EC: in search of clearer and more coherent standards for anti-competitive abuses*, in *CMLR*, 2005,

Several reasons may support this idea: first of all, European competition laws are not criminal laws, so their applicability requires, in principle, neither the proof of intentionality nor the proof of fault. Second, an intent-based approach would increase the risk of false positives, because businessperson tend to overemphasize their attitude to strongly compete and to harms rivals. Finally, antitrust policy would be less effective: competition authorities would be required to also show intent of hindering competition, even when economic evidence clearly demonstrates an infringement[65].

Objective notion of abuse implies that the antitrust policy has to focus on the effects of conducts, rather than on intent of firms, and that, in the most of the cases, article 82 applies even when there is no evidence of intent. However, the idea that intent is always irrelevant under article 82 is not true at all, since for some kind of abuses intent is properly a requirement. This happens when it is not easy to discern anticompetitive effects coming from a market conduct, or may be a tension between immediate and long-term impact of a given behaviour upon the market functioning. In this class of cases, intent may be an appropriate criterion for distinguishing and repressing only those conducts that actually harm competition[66]. When the conduct at issue is *prima facie* consistent with competition on the merits but arises the suspect of anti-competitive, long term effects,

---

distinguishes intent and fault and highlights about the *Hoffman – La Roche* statement, that "*the only conclusion, which can safely be derived from this passage is that there is no fault requirement under Article 82 EC. The issue of fault, which basically involves the firm' awareness of the illegality of its conduct, must be distinguished from the question of whether the illegality of a given practice should turn on its underlying intent. It is highly questionable whether, by calling the concept of abuse an objective concept, the Court indeed intended to discard the significance of intent in the latter meaning*" (pp. 146-147).

[65] A. BAVASSO, *The Role of Intent under Article 82 EC: from "Flushing the Turkeys" to "Spotting Lionesses in Regent's Park"*, in *ECLR*, 2007, p. 618. In his view, "*The correct aim of article 82 is to prevent and punish behaviour that distorts competition, not simply the intentions of the alleged perpetrators*" (p. 619).

[66] T. EILMANSBERGER, *How to distinguish good from bad competition…cit.*, spells out that, in those cases, intent is the factor that "*causes normal commercial conduct to lose its innocent character and metamorphose into non-performance related and improper behaviour*" (149).

Similarly, A. BAVASSO, *The Role of Intent under Article 82 EC…cit.*, p. 622.

deriving from the exclusion of rivals, competition authorities are required to complete the proof of conduct by evidence of intent[67].

As a result, in the EU case law, Courts sometimes apply both effects-based and intent-based tests to infer article 82 infringements. This happens, for example, for suspected predatory prices falling in the grey area[68], and for discounts[69], all behaviours with potential, future anticompetitive effects.

In all the other cases, the application of article 82 does not require proof of subjective element, neither as intentionality nor as fault.

In the framework of an objective notion of abuses, competition authorities may infer article 82 infringements from a purely objective assessment, which combines market dominance, individually or jointly held, and anticompetitive conduct, without any need to also demonstrate the firm's awareness about the illegality of its behaviour.

This principle also applies in the case of collective dominance: demonstrating both oligopolistic dominance and anti-competitive conduct (that is, conduct with anti-competitive effects), is enough to infer an article 82 infringement, out of the cases where proof of intentionality is a condition to demonstrate the abuse itself.

---

[67] T. EILMANSBERGER, *How to distinguish good from bad competition…cit.*, remarks that, in this kind of cases, for abuses to be established "*competition authority, or a plaintiff in a civil case,* […] *needs to provide evidence that, rather then being the mere consequence of the practice, the suspect change of the market structure was one of the goals pursued, or inversely, that the practice was not completely motivated by objectives other than the manipulation of the market mechanism*" (p. 170).

[68] In the *AKZO* case, [Court of Justice, case C-62/86, 3 July 1991, *AKZO Chemie* v. *Commission*, in *ECR*, 1991, I-3359] the Court built the test for predation around the intent of the dominant firms to eliminate its competitors. In this way, prices below the average variable costs are abusive because aimed only at driving the rivals out of the market. There is no need to allege proof of intent, because the exclusionary scope is the sole, plausible explanation for the concerned conduct. On the contrary, prices above the average variable costs, but below the average total costs are not abusive in themselves but only "*if they are determined as a part of a plan for eliminate a competitor*" (§ 71). This means that they "*are only to be considered abusive if an intention to eliminate can be shown*" [Court of Justice, case C-388/94, 14 November 1996, *Tetra Pak International SA* v. *Commission*, in *ECR*, 1996, I-5496, § 41].
The *Discussion Paper* upholds such an approach: see §§ 111-112.

[69] In several discounts cases, the analysis focused on the firms' purpose behind the rebate strategy. See Court of First Instance, case T-65/89, 1 April 1993, *BPB Industries and British Gypsum* v. *Commission*, in *ECR*, 1993, II-389; Court of First Instance, case T-203/01, 30 September 2003, *Manufacture Francaise des Pneumatique Michelin* v. *Commission*, in *ECR*, 2003, II-4071.

2.12 Finding oligopolistic, collective dominance

The *ex post* control on tacit collusion rests the premise that not every oligopoly is prone to coordination and that, even when collusion is theoretically feasible and convenient, this does not mean that it actually occurred. Consequently, when the Commission faces more firms that parallelly behave, as if they were a single entity, and cause anticompetitive effects, it has to prove all article 82 requirements, before inferring abuses of collective dominance. First of all, the Commission must show that firms are collectively dominant. This demonstration is not easy, because the structural presumption, based on the market shares and very useful in the case of single dominance, makes little, if any, sense in the case of collective dominance, given that the joint market share of the involved firms easily reaches the critical thresholds provided for individual dominance.

Therefore, for correctly finding collective dominance it is necessary to rely on dynamic criteria and to focus on both the market functioning and the interaction between firms. The favour for a dynamic approach to tacit collusion has progressively been increasing after the *Airtours*' saga and the ECMR reforms: this evolution has led to the definition of basic criteria for addressing oligopolistic mergers. As to the abuses of collective dominance, on the contrary, many substantive questions are still open. In particular, a widely debated antitrust issue involves the applicability of the *Airtours*' conditions in the repressive exam of tacit collusion.

These conditions rest on the economics of tacit collusion, which spelt out that collusive equilibria may derive from mutual observation and alignment between independent firms, even in the absence of communication. However, according to these theories, cartels are instable structures, constantly menaced by defection; the stability of this equilibrium rests on the firms' belief that every departure from collusion will be adequately punished. Retaliation, usually implying the return to competition, realizes both punitive and deterrent function. Furthermore, for collusion to be successful, external stability is also required: in other words, neither the outsiders nor consumers can jeopardise the expected results of coordination. The *Airtours* judgement summarized this teaching in its three conditions: capability

of reaching and monitoring collusion, existence of deterrent mechanisms, and absence of countervailing constraints.

Legal scholars[70] and recent doctrine seem to concur that the *Airtours* condition may also apply to abuses of collective dominance. The CFI, in particular, in the *TACA* case and, later, in the *Piau* case, made clear that the basic conditions to establish collective dominance are the same under the ECMR and art. 82[71]. Also the *Discussion Paper on the exclusionary abuses* relies on the *Airtours*' conditions to establish collective dominance[72].

However, the possibility of translating the *Airtours* conditions in the area of abuses of collective dominance should be critically examined. In particular, two aspects should be born in mind. On the one hand, the market equilibrium described in terms of tacit collusion is the same in the *ex ante* and *ex post* perspective: in both cases, in fact, it alludes to several, independent firms that behave in the same way, as if they were a single entity, and in the absence of (proof of) communication. On the other hand, the different perspective of the analysis–potential and forward-looking for mergers, actual and backward looking for abuses–causes a remarkable gap in the antitrust approach to tacit collusion. Differences, in particular, involve the method, which needs to fit the preventive or repressive perspective of the examination, and the substance too, since the specific scope of the antitrust policy for collusion changes, depending on the question at issue. In the case of abuses, competition authorities seek to remove anticompetitive effects and to restore market competition against a

---

[70] See, for example,, R. O'DONOGHUE, A. JORGE PADILLA, *The Law and Economics…cit.*, p. 150 ss; D. GERADIN, P. HOFER, F. LOUIS, N. PETIT, M. WALKER, *The Concept of Dominance in EC Competition Law*, [Research Paper on the Modernization of Article 82 EC, available at www.coleurop.be], 2005, pp. 27-29.

[71] Court of First Instance, joined cases T-191/98 and T-212-213-214/98, 30 September 2003, *Atlantic Container Line AB and Others* v. *Commission*, in *ECR*, 2003, II-3275, §§ 652-654.

Court of First Instance, case T-193/02, 26 January 2005, *Laurent Piau* v. *Commission*, in *ECR*, 2005, II-209, § 111.

Also the National Authorities apply the *Airtours* conditions to abuses of collective dominance: see, for example, Autorità Garante della Concorrenza e del Mercato, A357, 8 August 2007, *Tele2* v. *TIM-Vodafone-Wind,* in *Boll.*, 29/2007.

[72] The *Discussion Paper* at §§ 48-50 relies on the market transparency, on the presence of a punitive mechanism, and on the absence of competitive constraints. See, on this point, Part 1 – Chapter 5.

specific harm; in the case of mergers, they deal with a potential failure that derives from the establishment of stable market equilibrium.

Because of these differences, the *Airtours* conditions, appropriate for the merge control, may not automatically apply to abuses of collective dominance. In the following paragraphs, I will analyse whether, and how, the evaluative parameter that I suggested for the merger control may apply to abuses of oligopolistic collective dominance.

2.12.1 The applicability to the abuses of collective dominance of the paradigm adopted for the merger control

The question of whether there exists a common paradigm for dealing with collective dominance implies the examination of the differences between mergers and abuses' control. In the merger control, the analysis focuses on market changes deriving from the notified operation. The examination moves from the suspect that, once the operation has been implemented, the market competition will be hindered. Therefore, in the case of mergers, the analysis focuses on the durable changes in the market equilibrium as a result of a specific event. In the case of abuses, the assessment focuses on the conduct hindering competition, rather than on the specific event where collusion comes from. In most cases, and in the typical collusive equilibria, in fact, there is no specific event changing the market architecture that gave rise to collective dominance. On the contrary, coordination usually results from repeated interaction between firms and progressive, mutual adaptation thereby firms develop a specific *modus operandi* and stabilize the market on a collusive equilibrium. Moreover, in the case of abuses, the stability of collusion is less relevant than in the merger control: since the focus is the anticompetitive conduct, stability of collusion is significant insofar as it represents a condition for that conduct to exist.

These differences affect the approach to collusion, and especially the interpretation of market factors. When, for example, collusion results from a stable praxis to behave in certain manner, it is reasonable to presume that firms have found a way to overcome the difficulty of reaching an agreement, and to compensate the absence or the weakness of some facilitating factors. Consequently, despite a

basic uniformity about the weight of factors facilitating collusion and the result of their interaction, some differences remain.

2.12.1.1 Market prone to collusion

The assessment about the capability of firms to collude rests on the same elements listed for the merger control[73].
Market transparency, in particular, saves its role of essential condition for oligopolistic dominance, because of the ontological characteristics of collusive equilibria. Even in the *ex post* control, evidence that firms could not easily infer from the available data all information they need, is enough to rule out the hypothesis of tacit collusion[74].

The other market factors, crucial for foreseeing post-merger coordination, appear important, although not determinative, in the repressive control on tacit collusion. In the *ex post* analysis, for example, finding significant asymmetries between the suspected members of collective dominance is not an obstacle for inferring abuses, given that collusion may result from a long process thereby firms found a common strategy, despite of their asymmetries.

In a tight oligopoly with high barriers to entry, for example, on the one hand, the bigger-sized firm, by acting as market leader, may find it inconvenient to expand its own quota and capture the market shares of its rivals[75]. On the other hand, menace of retaliation, together with capacity constraints, may refrain the smaller-sized undertakings from aggressively compete. In such a scenario, supra-competitive prices represent for each undertaking the best profit-maximizing strategy and tacit collusion takes place between significantly asymmetrical firms[76].

---

[73] See Part 3 - Chapter 1.

[74] This is not equally true for non-oligopolistic collusion, where economic or structural factors connecting firms may offset the lack of transparency.

[75] Because, for example, this expansion would imply great investments in capacity.

[76] In the previous chapter, I noted that a certain degree of asymmetry does not impede in itself post-merger coordination. In case of abuses, I think that the threshold of asymmetry still compatible with collusion is higher than in the merger control, since the more available time to get an alignment allows firms to better fill this lacuna.
The most frequent hypothesis of tacit coordination among asymmetrical companies is the market division in geographic or customers-based quota, where each oligopolist controls its own quota and all of them charge supra-competitive prices.

Moreover, in shifting from preventive to repressive control, historical data gain a greater role, while the future and potential evolution of some market variables is less significant. The *ex post* analysis of collective dominance, therefore, cannot ignore past behaviours of the concerned firms. Stable parallelism or fluctuations from supra-competitive to competitive prices–that is, from collusion to competition or to price war–represent significant evidence of tacit collusion. On the contrary, the same data in the merger control constitute mere indicia either of past collusion or of a market tendency towards collusion, but are not directly determinative, because the notified merger, once implemented, may alter such a framework, and impede or weaken collusion.

The same reasoning leads to analyse some variables only in a backward looking perspective: in the case of barriers to entry, for example, foreseeing the future evolution makes little, if any, sense, for the purposes of the *ex post* antitrust control.

2.12.1.2 Internal stability of collusion

In the previous chapter, I argued that mergers' prohibitions on the grounds of collective dominance imply proof of stable, expected collusion: since post-merger price increases are quite normal[77], only stable anticompetitive changes in the market are meaningful and relevant for prohibiting the operation at issue. In the case of coordination effects, therefore, competition authorities need to demonstrate the reasonable expectation of durable collusion and to allege, with regard to this, proofs about the absence of internal forces capable to destabilize collusion. For this reason, in the case of mergers, internal stability of collusion is a *sine qua non* for prohibitions.

On the contrary, in the case of abuses of collective dominance, durable collusion is not always essential. The category of abuses of collective dominance embraces multiform phenomena, ranging from stable alignment on price to episodic parallelism for reacting to an exogenous shock. In the latter case, demonstrating stable collusion

[77] M. MOTTA, *EC Merger Policy and the Airtours case*, in *ECLR*, 2000, p. 200.

makes little sense, because anticompetitive conducts represent a common, collusive reaction to a certain event, such as unexpected rivals' attempts of entry in the concerned market, shocks of demand, division of a new, available resource, and so on. In these cases, neither history of alignment nor stable collusion is required: the only relevant thing is that, with regard to the conduct at issue, there is evidence that the concerned firms could act together as a single entity and that they behaved in an independent manner.

Therefore, given that abuses of collective dominance may involve punctual and episodic conducts, the condition about the stability of collusion cannot apply to all cases of abuses of collective dominance. On the contrary, by requiring always proof of mechanism stabilizing collusion from within, some abuses of collective dominance would unavoidably escape antitrust prohibitions.

However, in the most of the case, and probably in the most typical cases of collusion, the suspected conduct is the result of stable market equilibria, which derive from well-established social norms of behaviour. In this case, competition authorities have to allege convincing evidence that firms could maintain collusion, either by internal mechanisms which weakened the incentive to deviate, or by the expectation of short and long-run losses which make no attractive the eventual defections.

2.12.1.2.1 Deterrent mechanisms

When the supposed cartel relies on a market equilibrium where defection is an attractive possibility to increase short-run profits, the demonstration of stable collusion implies alleging proof of established mechanisms that, under the menace of retaliation, strengthens the incentive to collude. Proof of punitive mechanisms, in this class of cases, is essential to explain why oligopolists found it more convenient to collude even if each of them could undercut its rivals and get more profits from its demand increase.

For this element to be shown, it is necessary to allege evidence that firms could effectively react to defections by retaliating, while

evidence that retaliation already occurred is not required[78]. Lack of concrete retaliation, in fact, constitutes the most significant proof that a strong punitive mechanism existed, rather than the proof of that firms could not maintain collusion: the most effective retaliation, in fact, is one never implemented, because it exerts such a deterrence to impede defections[79]. Therefore, the analysis of retaliation, even in the case of abuses, may rest on the mere plausibility of punishing defections–as it happens for the mergers too–rather than on actual punishments.

Conversely, evidence that defections did not generate a punitive reaction is hardly compatible with the inference of collusion: in this case, in fact, the menace of retaliation would be not credible, and therefore, it could not strengthen the incentive to maintain collusion.

2.12.1.2.2 Strong incentives to stay in the game

There are some collusive equilibria where deterrent mechanisms are not required, because the eventual departure from collusion would lead to long and short run losses, rather to immediate supra-profits. In this case, demonstrating the presence of deterrence–in terms of mechanisms menacing price wars–makes little sense. Conversely, the internal stability of collusion relies on different conditions, such as evidence that, with regard to the suspected conduct, firms had a strong incentive not to deviate. In other words, in some kinds of collusive equilibria deterrence is necessary for strengthening the incentive to collude; in other kinds, the balance of profits from collusion and losses from defection constitutes in itself a strong evidence for excluding the possible implosion of collusion.

Two American cases–*Kodak*[80]and *Xerox*[81]--offer a good example in this regard. Although analysed as individual claims of monopolization, these cases show a possible scenario of collusion that, in the actual European perspective, would escape antitrust liability, given the absence of proof of deterrence. These cases involve the

[78] The conditions for the punitive mechanisms to provide a real incentive not to defect are those described for the merger control. See Part 3 – Chapter 1.
[79] See R. O'DONOGHUE, A. JORGE PADILLA, *The Law and Economics…cit.*, p. 158.
[80] *Eastman Kodak Co.* V. *Image Technical Services, Inc.*, 504 U.S. 451 (1992).
[81] *In re Independent Service Orgs. Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir., 2000).

market of photocopiers and the downstream market of replacements parts and services. The primary market was a tight oligopoly where three undertakings–Kodak, Xerox, and IBM–held a substantive monopoly. All of them refused to sell their patented replacement parts to independent service providers. This market strategy produced several consequences: first, lock-in of customers, given the incompatibility between the replacement parts; second, supra-competitive prices for replacement parts and services (by excluding the competition of independent service providers, each manufacturer had a *de facto* monopoly on the secondary market for its own products); third, collusion between manufacturers. With regard to this element, the Supreme Court in the *Kodak* case expressly recognized that "*in an equipment market with relatively few sellers, competitors may find it more profitable to adopt the Kodak's service and part policy than to inform consumers*"[82].

In this scenario, with a substantial division of the primary market and a complete alignment in the secondary market, there can be no evidence of retaliation, and retaliation itself is not essential for collusion: all manufactures find it more convenient to follow this strategy than to opening the secondary market, by supplying patented replacement parts to independent service providers, and by informing consumers about the inconvenience of buying rivals' photocopiers. Such a strategy could break collusion, but would also have resulted in losses for the active firm that should have invested in informative campaigns for customers, and renounced to monopolistic profits in its secondary market. Awareness of losses consequent to this strategy automatically strengthens the incentive of collusion[83].

This case demonstrates that, under certain circumstances, stable collusion may exist even in the absence of retaliation.

---

[82] *Eastman Kodak Co.* V. *Image Technical Services, Inc.*, 504 U.S. 451, (1992), here 474, FN21.

[83] For a wide comment on these cases, see R.J.R. PERITZ, *Towards a Dynamic Antitrust Analysis of Strategic Market Behaviour*, in *N.Y.L. Sch. L. Rev.*, 2003, pp. 101-118, and *Doctrinal cross-dressing in derivative aftermarkets:* Kodak, Xerox *and the copycat game*, in *Antitrust Bull.*, 2006, 215-226. According to the A., "*the Kodak and Xerox cases, taken together, look more like interdependent conscious parallelism under Section 1 of the Sherman Act than separate monopolization offences under Section 2*" (p. 221).

2.12.1.3 External stability of collusion

The absence of competitive constraints embodies the essence of dominance: firms are substantially independent and capable to realize whatever strategy they want, if there is no external force that may undermine their choices. In the case of abuses of collective dominance, evidence of anticompetitive conducts may represent indirect proof of the condition at issue[84].

Countervailing, competitive powers have a narrower space than in the merger control. The *ex post* scrutiny moves from the suspect of an implemented collective dominance, which results in abuses, already committed or still unequivocally in progress. It follows that the necessarily backward looking analysis leaves no space for the potential reactions undermining the actual collusion, which conversely play a pivotal role in the merger control[85].

2.13 The inference of oligopolistic dominance

If analysed by a dynamic approach, factors facilitating collusion help understanding whether the involved market is prone to collusion. In balancing the market factors, I think the same criteria suggested for the merger control should apply[86]. Therefore, in the case of positive ascertainment, the Commission should not stop the analysis and directly infer the presence of collective dominance; otherwise, given the frequency of those conditions in oligopolies,

---

[84] In other words, evidence of anticompetitive effects demonstrates that no countervailing power could refrain dominant firms from abusing of their market power.

[85] In the case of *ex post* control over collusion, each factor should be examined in the current and in the past perspective. The parameter of potentiality relies on the future aspect of the antitrust analysis, therefore it plays an important role in the merger control, but it makes little sense in the repressive control on collective dominance. *Contra*, D. GERADIN, P. HOFER, F. LOUIS, N. PETIT, M. WALKER, *The Concept of Dominance in EC Competition Law…cit.*,: "*Nevertheless this does not means that the commission should not analyse the question of potential competition within article 82 proceedings*"(28).

[86] See Part 3 – Chapter 1.

there would be the serious risk of finding collective dominance in every, not strongly competitive oligopoly[87].

On the contrary, this first step appears determinative only in a negative way: if the market is not prone to collusion, it is very improbable that firms could reach coordination without communicating with each other. It follows that either the market equilibrium is not collusive, or collusion is not pure, oligopolistic coordination (it could be a case of collective dominance from structural or contractual links).

For merger projects to be prohibited, I suggested in the previous chapter that qualitative data should be added to the quantitative elements, to uphold the suspect of post merger coordination. Also in the repressive analysis, qualitative elements are required, but they do not rely on the incentive of firms to collude, as a future possibility, coming from the qualitative, post-merger changes in the market functioning. Tacit collusion, once implemented, is presumed to embody and actualize the incentive to collude. Therefore, the Commission should put the emphasis upon the actual convenience of collusion, as a source of supra-competitive profits for the involved firms.

The main critic for such an approach is that in oligopolistic markets, it is frequent to find out factors facilitating collusion as well as greater payoff from coordination than from competition. As a result, the traditional prejudice about anticompetitive performances in oligopolies would be strengthened and every tight oligopoly would be equalled to collective dominance.

However, the nature itself of scrutiny about abuses reduces this risk: the background of every proceeding is evidence of anti-competitive, parallel, conducts, and the entire procedure seeks to verify the hypothesis of abuses of collective dominance. This method implies a substantive difference with the *ex ante* analysis: while, in the case of mergers, there is no negative suspect, but the Commission is

[87] See, on this point, R. O'DONOGHUE, A. JORGE PADILLA, *The Law and Economics…cit.*, p. 152. The As contested the *Discussion Paper* approach, because it seems to suggest that proof of possible and sustainable tacit collusion is enough to establish collective dominance. According to the As, on the contrary, the *Airtours* conditions "*are simply indicators of tacit collusion, but without more, there is still no real proof that collusion is taking place*" (p. 152).

required to assess a new, future event, presumably lawful, the scrutiny of abuses, on the contrary, takes place in a framework already conditioned by evidence of anti-competitive effects. The entire assessment is built around the suspect of infringements. Evidence of parallelism and evidence of anti-competitive effects act as a benchmark for the antitrust control. This method may reduce the risk of arbitrarious decisions.

To conclude, if the Commission finds parallel conducts, often contrary to the self-interest and arising anticompetitive effects, and if there is cogent and consisting evidence that firms could reach the terms of an agreement without communicating, can effectively react to the eventual defections, and gain supra-competitive profits from coordination, then the Commission may conclude that those firms, in all probability, colluded.

This approach mirrors that based on section 5 FTCA. In both cases, the need of addressing the non-collusive coordination leads to focus on the objective effects of parallelism and to attack them by mere injunctions. In both cases, the absence of any proof of consciousness, although it impedes applying sanctions, it is not sufficient to deny the antitrust intervention against anti-competitive effects.

The comparison with the US system, therefore, confirms the potential of this approach in dealing with one of the most complex matters of the antitrust policy.

2.14 The further step: semi-collusion or partial collusion

The economic models of tacit collusion, which have offered the theoretical basis for the legal elaboration, usually assume that firms collude on all the competitive variables. However, this premise may result erroneous: in the most of the cases, in fact, complete collusion is difficult to be reached or is superfluous, therefore collusion involves only some factors. For this reason, economists have recently elaborated more detailed models, in which firms compete on some

variables and collude on others. They called this phenomenon as *semi-collusion* or *partial collusion*[88].

2.14.1 The economic models

Sometimes, theoretical models derived from actual evidence of a mix of collusion and competition: this is the case of some Japanese cartels[89] and of the Norwegian cements cartels[90]. In other cases, economists seek to theoretically measure the net effect of partial collusion on the profits of firms, and to figure out whether the suspect of collusion on a certain market could be reasonable, in the light of its convenience[91].

---

[88] S. FEUERSTEIN, *Collusion in Industrial Economics – A Survey*, in *Journal of Industry, Competition and Trade*, 2005, p. 171.
Economic models about semi-collusion take the form of two-stage games, where firms are assumed to collude in the first stage (usually the organizational or constitutive phase) and to compete in the second (in selling products or services). The specific variables affected by collusion or competition may change, depending on the market features. For example, A. BROD, R. SHIVAKUMAR, *Advantageous Semi-collusion,* in *International Jour. of Industrial Organization*, 1999, pp. 221-230 elaborated a model where in the first stage firms collude on both R&D activities and output; in the second stage, they compete on R&D and collude on output. Ø.FOROS, B. HANSEN, J.Y. SAND, *Demand-side Spillovers and Semi-collusion in the Mobile Communications Market*, in *Jour, Industry, Compet. Trade*, 2002, pp. 259-278, assumes collusion only about the investments' decision. A.K. GOEDDEKE, *Strategic profit sharing in a unionized oligopoly*, elaborated a model about the labour market with collusion on the labour contracts and competition on quantity [working paper 2006, available at www.ssrn.com]

[89] A. MATSUI, *Consumers-benefited Cartels Under Strategic Capacity Investment Competition*, in *International Jour. of Industrial Organization*, 1989, pp. 451-470.

[90] F. STEEN, L. SØRGARD, *Semicollusion in the Norwegian Cement Market*, in *Eur. Economic Rev.*, 1999, 1775-1796.

[91] One of the most quoted models about semi-collusion is that of C. FERSHTMAN, N. GANDAL, *Disadvantageous semicollusion*, in *International Journal of Industrial Organization*, 1994, 141-154. The As. analyse two scenarios: in the one model, they assume that firms invest in cost-reducing R&D in the first stage and in determining the level of production in the second; in the other model, firms invest in capacity in the first stage and set prices in the second. They also assume that firms compete in the first stage and collude in the second (products market). The As demonstrate that semicollusion leads to lower cost of production and to larger capacity than non-cooperative interaction, but investiments in the first stage may be as large as to reduce the overall profits coming from semicollusion. In this scenario, non-cooperative strategies would ensure larger profits than semicollusion; therefore firms would be better off if they choose not to collude.

In this kind of models, firms collude on the market variable that it is easy to observe and to adjust: for this reason, collusion usually involve price[92].

According to the economists, partial collusion is characterized, on the one hand, by the incentive of firms to overuse those market variables free of collusion[93] and, on the other hand, by an unpredictable net effect on the total welfare. The balance between positive effects from competition and negative effects from collusion may result in the prevalence either of the first or of the second: it cannot be excluded, in fact, that in the case of price collusion, for example, advantages in terms of variety and quality of products can offset disadvantages of higher prices[94].

However, despite the likelihood of positive externalities, semi-collusion may result in the same bad effects of whole collusion, especially when there is no benefit that can compensate the negative impact of coordination.

---

[92] C. FERSHTMAN, N. GANDAL, *Disadvantageous semicollusion…cit*, pp. 142-143 cite the case of the US cigarette industry, where three producers in the 1920s and 1930s held joint market share between 70% and 90%. Empirical evidence shows that they colluded on prices but intensely compete in advertising their premium brands.

[93] M. STENBORG, *Forest for the Trees: Economics of Joint Dominance*, in *Eur. Journ. Law & Economics*, 2004, p. 375.

[94] Dealing with semi-collusion is even more complex than assessing collusion. In the case of collusion, in fact, it is difficult to predict whether there will be a negative outcome, because collusion may result in positive effects which prevail over the negative consequences. For this reason, it is inappropriate to apply a *per se* rule. See on this point, C. FRESHTMAN, A. PAKES, *A Dynamic Oligopoly with Collusion and Price Wars*, in *RAND Jour. Economics*, 2000, pp. 207-236. In the case of semi-collusion, the mixture of collusion and competition makes the final evaluation much more difficult and some economic models demonstrate that positive effects may overcome the negative one. For example, A. BROD, R. SHIVAKUMAR, *Advantageous Semi-collusion…cit.*, showed that under certain circumstances both firms and customers are better off with collusion. Ø, FOROS, B. HANSEN, J.Y. SAND, *Demand-side Spillovers and Semi-collusion…cit.*, demonstrated that partial collusion may be better than competition: in their model, in fact, when firms collude on investments, their interest coincides with that of the regulator, while there is a divergence when investment decisions are non-cooperative.

2.14.2 The legal implications

The economic theorizations about semi-collusion raise the legal question of whether the category of collective dominance also embraces semi-collusion.

There are two arguments supporting the positive answer: the possible collusive outcome and the European jurisprudence.

As for the first, it seems reasonable to impose the same legal treatment to equally dangerous phenomena: there is, in fact, no reason to leave unpunished an anticompetitive effect only because, in the presence of certain market conditions, firms do not need to collude on every variable, but they may maximise their profits by colluding only on some of them.

As for the legal basis, both the European Commission and the CFI recognized that tacit collusion does not imply the complete lack of competition. In the *Airtours* case, in fact, the Commission built its decision around the likelihood of post-merger collusion on capacity, despite it admitted that firms could not collude on price.

The CFI at first upheld this opinion only indirectly, when in the *Airtours* appeal it did not rejected the hypothesis that price competition may coexist with collusion on capacity. More recently, in the *TACA* case, the CFI expressly stated that "*Although the possibility that one undertaking may align its conduct with that of one or more competitors necessarily implies that competition between them is significantly restricted, such a possibility to align competitive conduct in no way implies that competition between the undertakings concerned is completely eliminated*"[95].

By this statement, the CFI clearly spells out that eliminating the effective competition between the supposed collectively dominant firms does not imply eliminating all their competitive relationships.

Moreover, the economic concerns about the unpredictable market outcome of semi-collusion do not spoil this thesis, given that a balance between competitive and collusive effects seems to characterize the current antitrust policy. As to the abuses, the substantive approach, strengthened in the last years, includes by itself a comparison between

[95] Court of First Instance, joined cases T-191/98 and T-212-213-214/98, 30 September 2003, *Atlantic Container Line AB and Others* v. *Commission*, in *ECR*, 2003, II-3275, § 653.

restrictive and pro-competitive effects, against the *per se* prohibition. As to the merger control, there cannot be any prohibitions when the positive effects deriving from the operation at issue are expected to outweigh the anti-competitive consequences.

In brief, semi-collusion, taken as a species of the collusion, falls under the legal category of collective dominance and constitutes one of its possible manifestations. Nowadays it is not infrequent to find cooperative relationships behind the appearance of competition, and this phenomenon is expected to become more frequent, given that the progressive strengthening of the antitrust enforcement will push firms to elaborate more sophisticated forms of collusion.

Therefore, evidence of competitive relationships on some market variables does not exclude the existence of collusion and, therefore, does not preclude the inference of collective dominance. In extreme cases, the mixture of competition and collusion may concern even the same variable: firms in fact may compete, for example, only on one factor which determine the final price, rather than on all.

2.15 Conclusions

The above analysis seeks to delineate the set of cases where the category of collective dominance may apply. In this regard, EU jurisprudence has identified three main areas. First of all, collective dominance may concern unlawful, implemented agreements between several firms that substantially control the market: in this case, rivals, consumers, and customers face a set of undertakings which behave in the same manner and generate anticompetitive results. Secondly, there is the case of concerted practices in oligopolies prone to collusion. They imply the adoption of specific practices to facilitate coordination, in the awareness that this equilibrium is more profitable than competition. In this case, there is no formal agreement, but competition authorities find parallel, anti-competitive conducts, together with some plus factors allowing the inference of consciousness. In both cases, the same (set of) conduct(s) may infringe both articles, and competition authorities may cumulatively apply article 81 and article 82 if their requirements are met. Finally, there is the case of mere, oligopolistic parallelism that results in

anticompetitive effects. Lacking any (proof of) communication or contacts, article 81 could not apply, but article 82, thanks to the objective notion of abuse, may address this market failure.

Collective dominance is, therefore, a composite category embracing various phenomena that share a common nature. Differences in the kinds of collective dominance lead to different legal treatments. In the case of abuses of collective dominance that also embody unlawful conducts under article 81, there is, by definition, proof either or intentionality or of consciousness of the alleged conduct. Therefore, competition authorities may react to infringements by imposing both injunctions and fines. On the contrary, in the case of tacit collusion, there is only evidence of conducts, market power, and anticompetitive effects. If cogent and consisting evidence on these points are enough to infer infringements of article 82, they are not enough to fine the active firms; consequently, the Commission may impose only injunctions.

Chapter 3

Competition Policy for Abuses of Collective Dominance

Ultimate inference of abuses and practicable remedies

3.1 Introduction

Inference of abuses of collective dominance rests on whole assessment that combines evidence of dominance and of anti-competitive conducts causally linked to the market power position[1], with the analysis of eventual gains deriving from the suspected parallelism. Conversely, the objective notion of abuses excludes both consciousness and intentionality from the list of *sine qua non*, although evidence of these elements influences the enforcement of collective dominance, by including monetary sanctions in the realm of the available remedies.

Moreover, the entire procedure rests on a certain standard of proof that the Commission is required to respect as a condition for lawful decisions.

In this chapter, I will analyse negative conditions for the ultimate inference of agreements, the standard of proof required for abuses of

[1] The CFI in the *Irish Sugar* case clarified that abuses reflect market dominance; therefore prohibitions under article 82 involve only those abusive conducts specifically related to market power.
The majority of scholars concur on the need of causal link between economic effects and market power. See, for example, T. EILMANSBERGER, *How to distinguish good from bad competition under Article 82 EC: in search of clearer and more coherent standards for anti-competitive abuses*, in *CMLR*, 2005, pp. 129-177: "*A causal connection either in form of an instrumental causality or, if the abuse is about the manipulation of the market structure, a link between this effect and the dominant position of the firm engaging in the relevant act, may be required*" (p. 142).

collective dominance, and practicable measures for reacting to infringements.

3.2 The ultimate inference of abuses of collective dominance: absence of objective justifications and efficiency defence

Ultimate decisions on infringements of article 82 rest on a whole assessment that includes both positive and negative elements: abuses of collective dominance require, on the one hand, positive proof of market power, conducts, and anticompetitive effects; on the other hand, absence of both objective justifications and efficiency gains. In this way, *prima facie* anti-competitive behaviours may escape article 82 prohibitions if firms allege either evidence of objective justification for their conducts or evidence of efficiency gains outweighing negative effects on competition[2].

As for efficiency gains, their assessment echoes the conditions of article 81(3); therefore, restrictive conducts must be indispensable to generate efficiencies that, in turn, must improve consumer welfare, without eliminating all market competition. For efficiency defence to be implemented, it is necessary to preventively define the specific welfare parameter assumed as a benchmark: efficiency, in fact, rather than being a parameter in itself, is a means to an ultimate end that competition policy seeks to pursue. This preventive requirement complicates the efficiency evaluation[3] and contributes to *de facto* exclude efficiency defence for dominant firm.

As to objective justifications, in the *Discussion Paper* the Commission relies, on the one hand, on conducts that may be necessary because of factors external to the concerned firms ('objective

---

[2] *Discussion Paper*, § 77.

[3] M. DREHER, M. ADAM, *Abuse of Dominance under Reform – Sounds Economic and Established Case law*, in *ECLR*, 2007, spell out: "*Legitimate objectives can be pursued in an efficient manner. But if there is no external objective to achieve, efficiency does not go anywhere* […] *However, an illegitimate purpose can never be justified by efficiencies because this would lead to the efficient achievement of an undesired aim, and thus in the end to an unwarranted result. This ambiguous character of an efficiency defence in its pure sense may be the reason why the European Courts have constantly refrained from acknowledging it in their case law*" (p. 280).

necessity defence'); on the other hand, on conducts that constitute the loss-minimising reaction to rivals' competition ('meeting competition defence')[4]. However, Courts have defined neither boundaries nor contents of this category, but they have been assessing case-by-case the objective justifications that the concerned firms alleged. The analysis of case law with regard to this reveals that objective justification may be every plausible element demonstrating that the suspected conduct either reflects competition on merits or produces positive, net effects[5]. In this way, the category of objective justification is deemed to embrace defences based either on efficiency gains or on non-economic factors[6].

After the recent reforms in European competition law, and especially after the *Discussion Paper*, the difference between efficiency defences and objective justifications is more evident. In the first case, the suspected conduct does not generate net, anti-competitive effects on the market functioning, since efficiency gains at least outweigh negative effects. Moreover, article 81(3) provides that, for the defence to apply, there must be, among the other things, an ultimate increase of consumer welfare. This condition prevents dominant firm from internalizing efficiency gains, such as cost saving.

In the case of objective justification, on the contrary, there remains a negative market impact, which, however, is not imputable to the active firms. Objective justification, in fact, does not involve effects,

---

[4] *Discussion Paper*, §§ 80-81.

[5] R. NAZZINI, *The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 cases*, in *E.L. Rev.*, 2006, p. 534.

[6] P.J. LOEWENTHAL, *The Defence of "Objective Justification" in the Application of Article 82 EC*, in *World Competition*, 2005, pp. 455-477, explains: "*the "objective justification" defence encompasses, but it is not limited to, the grounds for exemption under Article 81(3). Article 82 accepts not only efficiency defence for abusive conduct, but also the objective justification that the conduct amounts to legitimate business behaviour or pursues a legitimate public interest objective, regardless of its pro-competitive effects*" (462).
In drawing the evolution of the objective justification defence, the A. reminds that, at first, Courts denied any defence for abuse of dominance [see, Court of Justice, case 66/86, 11 April 1989, *Ahmed Saeed Flugreisen – Silver Line Reisebuero Gmbh* v. *Zentrale Zur Bekaempfung Unlauteren Wettbewerbs*, in *ECR*, 1989, 803] but later, they perceived the objective justification as an element to take into account for inferring abuses of dominance [Court of Justice, case C-333/94, 14 November 1996, *Tetra Pak International* v. *Commission*, in ECR, 1996, I-5951]. As a result, if there is an objective justification, the conduct at issue, although *prima facie* anti-competitive, escapes the reach of article 82 because it is not abusive.

but the character itself of conducts and excludes any contrariety to normal competition.

Substantive differences among efficiency gains and objective justifications also affect the methodological approach. As for efficiency defences, the Commission should follow the same approach of article 81(3), with a balance between positive and negative effects. In this way, it should rule out the suspect of an article 82 infringement if the alleged conduct generates positive, net effect. This method is consistent with that applied in article 81(3): if efficiency gains may really countervail negative consequences, it would make no sense, under an effects-based approach to article 82, to condemn that conduct as an abuse[7].
As for objective justification, its finding directly excludes any inference of article 82 infringement, without any need to balance impact of conduct and strength of justification. In this case, in fact, there lacks a method different from the ones applied in normal competition[8].

Since these negative elements represent a defence for the suspected firms, the burden of proof is on the firms that invoke it[9]. By

[7] M. LIBERTINI, *L'abuso di posizione dominante*, in C. CASTRONOVO, S. MAZZAMUTO, *Manuale di Diritto Privato Europeo*, Vol. III – Impresa e Lavoro, Giuffrè, Milano, 2007, Chapter LVI, here p. 271.
P.J. LOEWENTHAL, *The Defence of "Objective Justification"…cit.*, remarks that, after Regulation 1/03 introduced a system of direct applicability of article 81(3), conducts eligible for an exemption cannot realize any abuse. On the contrary, when the application of article 81(3) rested on the preventive exam of conducts, the different perspective of analysis (*ex ante* and *ex post*) could result in different evaluation.
[8] P.J. LOEWENTHAL, *The Defence of "Objective Justification"…cit.*, reminds that in the case of rebates, for example, the objective justification may be that cost savings cover discounts.
[9] See, *Discussion Paper*, §§ 77-79 and Regulation 1/03 recital 5 and art. 2.
R. NAZZINI, *The Wood Began to Move…cit.*, pp. 535-536, denies that both objective justifications and efficiency gains are technically defences, however, he argues that the positive elements require to be assessed after the *prima facie* establishment of abuses and lead to a shift in the burden of proof from competition authorities to firms. According to A. JORGE PADILLA, *From* Fairness *to* Welfare*…cit.*, p. 30, allocation of burden of proof in EU creates a significant asymmetry between dominant firms and competition authorities: since measuring pro-competitive effects it is extremely difficult, it is hard for the concerned firms to demonstrate that conducts at issue generate positive, net effects.

combining all positive and negative elements, the Commission evaluates whether the concerned firms abused of their joint market power[10].

3.3 The burden of proof incumbent on the Commission in the case of abuses of collective dominance

Neither the *Discussion Paper* nor the case law has clarified which standard of proof should apply to abuses of collective dominance[11].

In the preventive control over coordinated effects, I suggest applying the 'balance of probability' test and fixing the level of probability to the highest threshold, still compatible with a probabilistic and prognostic assessment. In my view, the same parameter should apply to abuses of collective dominance. Several remarkable reasons, in fact, lead to the exclusion of the applicability of both 'beyond reasonable doubts' and mere 'reasonableness' standards.

On the one hand, the highest standard of proof does not perfectly fit the analysis of collusion. When abuses of collective dominance result from the implementation of agreements properly called, it is possible to find documental evidence and, therefore, to apply such a high standard. Nowadays, this scenario is quite rare, and collective dominance deals with less evident phenomena, such as behavioural equilibria coming from tacit, mutual understanding. Therefore, in

---

As for the efficiency defence, the US system provides different rules about the burden of proof: if a monopolist alleges efficiency gains coming from the suspected conduct, the plaintiff is required to show that anti-competitive effects offset pro-competitive effects.

[10] E. PAULIS, *The burden of proof in article 82 cases*, in *International Antitrust Law and Policy*, 2005, pp. 469-476, explains that, although the defending parties are required to allege evidence of positive effects supposed to countervailing the negative ones, the Commission maintains the duty to balance all significant factors, because "*the authority has the burden of proving the ultimate violation to article 82*" (p. 472). This premise clarifies the subsequent statement: "*The decision maker may only conclude there is an abuse if he demonstrates two things: one, the likely negative effects, and two, that these negative effects outweigh the demonstrated positive effects*" (p. 473). Taken alone, this expression would generate the equivocal perception that, according to the A, the Commission would be required to show both positive and negative elements.

[11] A. JORGE PADILLA, *From* Fairness *to* Welfare*…cit.*, wonders on this point: "*It is a function of: the degree of market power of the dominant company, the existence of countervailing efficiencies, or the degree of certainty of its potential anti-competitive effects?*" (p. 28).

most of the cases, the inference of collective dominance is a matter of interpretation rather than one of mere mechanical collection of data. It often results from the critical synthesis of market factors pointing in different directions (collusion or competition). The 'beyond reasonable doubts' standard, therefore, would result, at least in the case of mere oligopolistic parallelism, in a sort of *probatio diabolica* for competition authorities: the ontological impalpability of this mechanism, evident only in and because of its effects, would never allow every doubt to be removed. This standard would also be hardly compatible with the administrative nature of both original decisions and judicial review.

On the other hand, the parameter of 'mere reasonableness' would be inadequate to the kind of infringement at issue: abuses of dominance may result in serious competitive harms and, for this reason, may incur heavy sanctions. Moreover, in a systematic perspective, given that objects of proof, at least potentially, are available, and that the *ex post* analysis is, by itself, less speculative than the *ex ante* analysis, enforcement of article 82 in case of collective dominance cannot rely on a lower standard of proof than mergers.

Abuses of collective dominance are usually very complex cases, implying serious economic issues; thus, it is reasonable to follow the general rule and to apply, as it happens for other competition cases, the 'balance of probability' standard of proof.

For such a parameter to apply, it is necessary to preventively define the degree of probability assumed as a benchmark. Frequent reference to expressions such as 'in all likelihood', 'very plausible', and 'very probable in the case law on collective dominance seems to suggest a particularly high probability. However, in the case of abuses[12] there is no fixed threshold of proof, but the appropriate level depends on the specific case at issue. As general rule, the more complex the assessment is, the higher the burden of proof for the Commission. Concerning the topic at issue, inference of collective dominance, even in the *ex post* perspective and even with a complete set of information, is never easy, especially when this equilibrium derives from mere interdependence. Moreover, abuses of collective

[12] With regard to the mergers control, see Part 3 - Chapter 1.

dominance generate serious consequences, in terms of injunctions and fines for the concerned firms.

Therefore, it seems appropriate to define a high burden of proof, which results in the Commission's duty to justify the inference of abuses of collective dominance by the allegation of the highest amount of cogent and consisting evidence reachable in the specific case at issue.

In brief, as to the kind, I suggest applying the 'balance of probability' standard, which perfectly mirrors the one applied in the merger control. As for the real degree of probability, in absolute terms, the maximum level of probability reachable in the antitrust control is, by definition, higher in the repressive than in the preventive scrutiny.

Most of the scholars concur that the standard of proof should be higher in abuses than in mergers' control, because preventive exam rests on the potential convenience to collude, while abuses rely on the suspicion that collusion is taking, or has taken, place[13]. Requiring, in concrete, a higher level of certainty in the enforcement of abuses is also reasonable in the light of the serious remedial consequences and less speculative scrutiny which characterize the *ex post* control[14].

---

[13] R. O'DONOGHUE, A.JORGE PADILLA, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford and Portland, Oregon, 2006, p.152. Similarly, D. BAILEY, *Standard of proof on EC merger proceedings: a common law perspective*, in *CMLR*, 2003, pp. 855-856.
T. REEVES, N. DODOO, *Standards of proof and standards of judicial review in European Commission Merger Law*, in *Fordham International Law Jour.*, 2006, pp. 1047-1049 also highlight that authorities have more time for completing article 82 proceedings.

[14] In the TIM, Vodafone Wind case [Autorità Garante della Concorrenza e del Mercato, case A357, 3 August 2007, *Tele2/TIM-Vodafone-Wind*, in *Bollettino*, 29/2007] the AGCM recognized that collective dominance may exist even in the absence of structural or contractual links, but it admits that, in theses cases, the burden of proof should be higher: authorities are required to allege convincing evidence about a stable convergence in the firms' strategies and about the consequent alteration of the competitive dynamics. By resting on this premise, the AGCM excluded that the concerned firms held a collective dominant position in the wholesale market of access to mobile network, despite significant factors pointed towards collusion. In particular, the concerned firms controlled all mobile networks infrastructures with national coverage, had symmetrical market shares and capacity, were vertically integrates, and were linked by interconnections agreements. Moreover, there was no possibility for similar operators to entry in that market, because of the high barriers (first of all, administrative authorizations). However, according to the AGCM, the presence of some asymmetries, about costs structures and use of the spectrum for mobile communication, together with

By applying the principle of proportionality between difficulties of assessment and required burden of proof, the amount of cogent and consisting evidence to be alleged is even higher for partial collusion. In this case, competition authorities have to demonstrate that, despite of competitive elements in the relationship between firms, the suspected conduct constitutes an abuse of collective dominance.

If the Commission demonstrates the existence of positive conditions and the absence of negative ones, under the standard of proof described above, it may correctly infer abuses of collective dominance. The subsequent step is, therefore, to design appropriate remedies for this failure.

In the following paragraphs, I will analyse the practicable remedies for abuse of collective dominance by paying attention, in particular, to injunctive relief as the sole available means against tacit collusion.

3.4 Objective notion of abuses and remedial consequences after Regulation 1/2003

In the framework of objective notion of abuses, fault is no longer a requirement for article 82 to apply. This way, even inculpable conducts may be qualified as abuses and may legitimize the application corrective measures.

Regulation 1/2003 provides the Commission with two means for protecting market functioning against article 81 or article 82 infringements: injunctive remedies, on the one hand, administrative sanctions, on the other hand. These kinds of measures are different for scopes and for applicative requirements.

Fist of all, antitrust enforcement primarily seeks to end infringements, to restore the market functioning, and to punish active firms[15]. While remedies serve the injunctive and restorative scopes,

---

certain volatility in the market shares impeded reaching the standard of proof required for abuse of cull dominance (§§ 360-367).

[15] In enforcing antitrust rules, the Commission may also pronounce declarative decisions that ascertain the infringement, without imposing either orders or fines. The

fines pursue a punitive scope. Both generate, as an indirect effect, deterrence against future infringements[16].

Concerning the requirements, both remedies and sanctions imply cogent and consisting evidence of infringements, under the required standard of proof. While this element is enough for remedies to be imposed, monetary sanctions also require proof that undertakings "*either intentionally or negligently*" infringed article 81 or article 82[17].

This remark has extremely important effects on the abuse of mere oligopolistic dominance: lacking any proofs of subjective element, either as consciousness or as intentionality, no fine may be imposed. However, this does not prevent the Commission to impose injunctive relief, if there is evidence of anticompetitive effects and collective dominance. Admittedly, competition laws pursue the primary scope of protecting the market functioning, by finding infringements and removing their effects; therefore, denying the possibility, or the mere opportunity, for the Commission to intervene against proved violations would make no sense.

However, most of the scholars strongly contest the antitrust intervention based only on injunctions, as a reflex of the more general reluctance toward the antitrust enforcement of unculpable conducts. This approach contrasts with Regulation 1/2003 that provides antitrust intervention, in the form of mere injunctions and behavioural or structural remedies, against violations of articles 81 or 82 and does

---

ratio behind mere declaratory relief is to facilitate and to promote private enforcement before national courts for damages request. Even if civil courts are not prevented to directly apply antitrust laws and, consequently, to grant compensation for damages, administrative decisions, which ascertained unlawfulness of conducts, facilitate successful actions for private litigants. See on this point, R. ALLENDESALAZAR, *Remedies and Sanctions for Unlawful Unilateral Practices, with particular reference to exclusionary abuses*, Speech at Fordham, July 2007, p. 2.

[16] See, OECD – Directorate for Financial and Enterprise Affairs Competition Committee, *Remedies and Sanctions in Abuse of Dominance Cases*, 15 May 2007, DAF/Comp(2006)19, [hereinafter *OECD Study*, available at www.oecd.org] "*Remedies cure, correct, or prevent unlawful conduct, whereas sanctions penalise or punish it*" (p. 7).

[17] Regulation 1/2003, art. 23(2)(a).

See on this point, M. LIBERTINI, *I procedimenti e i provvedimenti dell'autorita' antitrust*, in C. CASTRONOVO, S. MAZZAMUTO, *Manuale di Diritto Privato Europeo*, Vol. III – Impresa e Lavoro, Giuffrè, Milano, 2007, Chapter LVIII, here pp. 344-352.

not submit the exercise of this power to the simultaneous imposition (or possibility to impose) of monetary sanctions[18].

Bringing infringements to an end means to prohibit anticompetitive conduct, to eliminate its consequences, and to prevent its repetition. To ensure injunctive relief, the Commission may enact different measures, such as cease and desist orders, behavioural remedies, and structural remedies.

3.4.1 'Cease and desist' orders

The primary and simplest means to end infringements is to obligate the involved firms to refrain from a certain conduct and from similar future conducts. In fact, whenever the Commission ascertains violations of competition rules, it requires undertakings to cease the concerned infraction and to desist from reiterating the same conduct[19].

Because of their minimal contents, usually resulting in mere duties not to continue the anticompetitive practice, these orders *de facto* give firms the power to define in concrete their contents and to choose the way to implement them. According to most of the scholars, such discretion is likely to facilitate strategic behaviours aimed at skipping the order itself. According to others, on the contrary, this problem would be only apparent: the consequentiality between investigative procedure and inhibitory order would avoid any abuses, since the

[18] Regulation 1/2003, article 7 says: "*Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end*".

[19] See, for example, the *Flat Glass* case: "*Fabbrica Pisana, SIV and Vernante Pennitalia shall immediately put an end to the infringements established in Articles 1 and 2 (if they have not already done so) and shall in future refrain, in their flat-glass activities, from entering into any agreement or concerted practice that may have an identical or similar object or effect, including any exchange of information of the type generally covered by professional secrecy such as would allow them to monitor the implementation of any express or tacit agreement or any concerted practice relating to prices or to market sharing*" (article 3).

decision itself, by contesting a specific conduct, indirectly defines the contents of cease and desist orders[20].

In any event, sometimes prohibiting the continuance of anticompetitive behaviours is not enough to restore competition, but other, more detailed measures are required. For this reason, Regulation 1/2003 provides the Commission with the power to also impose behavioural and structural remedies.

3.4.2 Behavioural remedies

Behavioural remedies consist in orders for the concerned undertakings to do or not to do something. Therefore, they seek to restore competition by influencing future conducts of companies. They usually result in negative orders, such as duty to terminate exclusive dealing, to stop bundling goods, not to discriminate. As for the kind of duties, behavioural remedies and cease and desist orders may overlap each other. Conversely, their contents may significantly change: mere cease and desist orders usually have minimal contents and result in the sole duty to refrain from repeating or continuing the contested conduct; behavioural remedies, on the contrary, even when result in obligation not to do something, usually have more articulated and better defined contents.

Competition authorities may also impose positive duties, such as the duty to deal, or the duty to align characteristics of products to industry standards[21]. Ultimately, they are extremely useful in the case of market foreclosure coming from infrastructural barriers to entry as well as from intellectual property rights[22].

This kind of remedy is particularly appropriate in the case of abuses, because, by influencing behaviours of undertakings, it may directly attack anti-competitive conducts. Moreover, it is more flexible

---

[20] P. FATTORI, M. TODINO, *La disciplina della concorrenza in Italia*, Il Mulino, Bologna, 2004, p. 372.

[21] E. CANAVAGH, *Antitrust Remedies Revisited*, in *Or. L. Rev.*, 2005, p. 189. On the positive injunctions, see next paragraphs.

[22] T. SULLIVAN, *Antitrust remedies in the US and EU: advancing a standard of proportionality*, in *Antitrust Bull.*, 2003, pp. 399-400, remarks that the duty to provide an adequate access at reasonable conditions may be very effective against this kind of barrier to entry.

and more various than divestiture, so it may be designed to perfectly fit the features of both firms and market[23].

On the other hand, behavioural remedies may only deal with future conducts; therefore, they cannot remove market power already accumulated, but may only inhibit its anti-competitive exercise. This knowledge gave rise to a remarkable scepticism concerning this kind of remedy, especially among those scholars who perceive market concentration as a problem in and by itself.

Behavioural remedies also require constant oversight and progressive updating[24], and may be easily neutralized by strategic actions[25].

All these loopholes strengthen doubts about the effectiveness and net effects of behavioural remedies on competition[26].

3.4.3 Structural remedies

Regulation 1/2003 views structural remedies as an extreme means to restore competition, practicable only when there is no behavioural remedy equally effective, or when behavioural remedies would be more burdensome for firms than structural remedies. Moreover, changing the structure of dominant company makes sense only if structure is causally linked to the violation, so that maintaining the same structure would imply to maintain the danger of lasting or repeating infringement[27].

Structural remedies overcome most of the objections involving behavioural remedies: they remove the source itself of the antitrust problem, by eliminating the market power position; they are easy to be designed, do not require oversight, have long-term effects, and

---

[23] *OECD Study*, pp. 38-39; R. ALLENDESALAZAR, *Remedies and Sanctions for Unlawful Unilateral Practices…cit.*, p. 6.

[24] According to R. POSNER, *Antitrust Law*, University of Chicago Press, 2nd Edition, 2001, p. 273, these remedies should expire after a certain period: their indefinite duration implicitly reveal incapability to restore competition.

[25] *OECD Study*, p. 3.9

[26] E. CANAVAGH, *Antitrust Remedies Revisited…cit.*, p. 190.

[27] With regard to this, the *OECD Study* spelt out that sometimes "*it simply may not be possible to restore competition by enjoining the conducts or imposing a fine, and no affirmative conduct may be sufficient*" (p. 30).

leave the management of firms to those that are competent to do it[29]. But then, structural remedies pose their own matters: they may generate market fragmentation, losses of economies of scope and scale, and therefore, losses of efficiency. Competition authorities also face the problem of how to allocate assets without harming the concerned company[30].

Moreover, the real long-run effects of structural remedies are never sure, and some of them actually resulted inadequate[31].

Despite these limits, EU antitrust enforcement have preferred structural to behavioural remedies, because they better deal with the purpose of preventing dominance[32].

3.5 Guidelines for designing injunctions for abuses of oligopolistic dominance

In defining appropriate remedies for abuses of dominance, competition authorities should move from market characteristics and industry evolution, in a forward looking perspective. Deep knowledge about market functioning, in fact, is necessary to correctly address the competitive matter and to predict the impact of remedies on the market functioning[33]. Moreover, it helps preventing the

---

[29] See *OECD Study*, p. 31. In particular, divestiture measures leave business governance to the managers of firms, without any interference of antitrust authorities.
E. CANAVAGH, *Antitrust Remedies Revisited…cit.*, p. 191, builds his preference for structural remedies around the parameter of consumer welfare: "*Consumer welfare is better served by competition than by regulation. From the perspective of antitrust remedies, this suggests that structural remedies, which normally entail little or no regulation, are superior to conduct remedies, which are by their nature regulatory*" (p. 205).

[30] W.E. KOVACIC, *Designing Antitrust Remedies for Dominant Firm Misconduct*, in *Conn. L. Rev.*, 1999, pp. 1294-1295.

[31] W. COMANOR, *The problem of remedy in monopolization cases: the Microsoft case as an example*, in *Antitrust Bull.*, 2001, pp. 119-120.

[32] T. SULLIVAN, *Antitrust remedies in the US and EU…cit.*, p. 400 explains that: "*Because this goal is facially structural, divestiture is a direct way to achieve this end*". This opinion seems not to fit recent changes in EU competition law. Shift from dominance to SIEC in the Merger Regulation, the new approach to the assessment of agreements, with *ex lege* exemptions for all arrangements generating positive net effects, and finally, the effects-based approach suggested in the *Discussion Paper* on exclusionary abuses clearly reflect a certain favour for dynamic, rather than for merely structural, analysis.

[33] W.E. KOVACIC, *Designing Antitrust Remedies…cit.*, pp. 1310-1314.

strategy that dominant firms may implement to undermine the impact of remedies. In this way, injunctive relief may be more effective and more workable.

In the process for defining injunctions, the principle of proportionality between injury and corrective measures plays a pivotal role[34]. First, it embodies the scope itself of injunctions, that is, stopping failures and restoring competition; second, it reduces risks of under and over-deterrence. In this way, the principle of proportionality may really increase the effectiveness of remedies[35].

Moreover, in defining remedies, it is necessary to also take account of administration costs, which may significantly undermine benefits of remedies. Higher costs of administration make more difficult to oversight on the compliance of duties, and, therefore, increase the likelihood of abuses. Moreover, complete and deep monitoring sometimes needs of great resources, therefore this activity may offset the expected results of imposed measured.

Optimal policy for remedies should also prefer the less intrusive measure, because it minimizes competitive harms and preserves valuable efficiencies. In this perspective, behavioural measures should be preferred to structural measures[36].

Effectiveness of injunctive remedies strictly depends on economic reality at issue. The same remedy, in fact, may generate different

---

[34] In EU competition law, the principle of proportionality is expressly codified: see Regulation 1/2003, recital 12 and article 7.
In the US system, on the contrary, there is no explicit reference to proportionality, however, at least for remedies, the principle of reasonableness may ensure the same result. T. SULLIVAN, *Antitrust remedies in the US and EU…cit.*, reminds that this principle imposes applying "*the 'less restrictive alternative' doctrine as used to assess compatibility of the regulation or remedy to the underlying harm*" (p. 418).

[35] With regard to this, T. SULLIVAN, *Antitrust remedies in the US and EU…cit.*, remarks: "*an antitrust remedy cannot be efficient in an economic sense unless it is proportional to the anti-competitive harm and relevant to returning the industry to a competitive posture. Generally we say the remedy must fit the illegal conduct. In competition law, the ultimate goal also should be to restore competition*" (p. 425).

[36] This proposal rests on the premise that behavioural remedies are less intrusive than structural remedies, even if, in some cases, the contrary may be true. See P. LOWE, F. MAIER-RIGAUD, *Quo Vadis Antitrust Remedies*, Speech at Fordham, July 2007 (Forthcoming).

results in the case of single or collective dominance, since they present different, internal dynamics.

Structural remedies, for example, being the most appropriate measures against competition concerns involving market concentration, seem to perfectly fit abuses of oligopolistic dominance. However, this opinion rests on structural theories of oligopolies, and does not adequately take into account that oligopoly is not a problem in itself and tacit collusion is not only a matter of market concentration. Thus, measures of deconcentration are not a panacea for oligopolistic dominance: increasing the number of independent firms makes more difficult to tacitly collude, but does not preclude this possibility at all. Other market factors, in fact, may offset loss of concentration and may allow coordination to survive. In other words, acting only on the structure of firms, without changing market dynamics, is not an effective method of dealing with tacit collusion.

To save the utility of structural measures, divestitures should directly focus on the functioning of collusive equilibrium and identify its critical aspects. In a symmetrical equilibrium, for example, remedies that create significant asymmetry between oligopolists may alter individual incentives of firms and impede collusion.

The likelihood of effective injunctive relief increases by recognizing the admissibility of both positive and negative orders. Positive injunctions for a long time were deemed to contrast with the nature itself of injunctive relief: since injunctions seek to inhibit unlawful conducts, they could only result in negative orders.

Civil courts overcame this objection, at first, by reverting mandatory injunctions in a negative formula, and later, by directly imposing positive injunctions[37]. Injunctions, in fact, rather than being new orders, translate on the remedial side the substantive precepts of

[37] The first application of positive injunctions (mandatory injunctions, in the common law terminology), is the case *Lane v. Newdigate* [Court of Chancery (1804), 10 Ves. Jr. 192, 32, Eng. Rep. 818], where the plaintiff asked for a preliminary injunction that obligated the defendant to do something. Judges enacted an injunction prohibiting to the defendant "*further impeding, obstructing, or hindering, the plaintiff* […] *by continuing to keep the said canals, or the banks, gates, locks or works, of the same respectively, out of good repair*" (193 judgement). Reported in A. FRIGNANI, *L'injunction nella common law e l'inibitoria nel diritto italiano*, Milano, Giuffre', 1974, p. 180 ss.

the infringed rule. Consequently, since imperative rules may impose either duties to do or duties not to do, injunctions will present negative contents for original prohibitions, positive contents for positive duties[38].

In any event, Regulation 1/2003 recognizes to the Commission the power to impose both behavioural and structural remedies, with positive and negative contents. The Commission itself tends to enact positive orders more in article 82 than in article 81 cases.

Positive injunctions may be very useful against abuses of oligopolistic dominance: by departing from the scheme of mere cease and desist orders, the Commission may better articulate remedies, taking account of market features and of the role of each firm in collusion.

3.6 Competition policy and injunctive relief for abuses of oligopolistic dominance

All scholars concur that interdependency is a typical feature of oligopoly. However, not all scholars concur that, when interdependency results in anticompetitive effects, antitrust authorities should intervene to restore competition. Tacit alignment is still perceived as unavoidable consequence of the oligopoly itself: the ontological interdependency among the few firms active in the same market is often supposed to generate, by itself, collusive outcomes.

Despite the objections, evidence of cartel-like effects has pushed both US and EU competition policy to enforce the antitrust rules against tacit collusion. However, the greater impalpability characterizing such a category makes it extremely difficult to intervene. First, the anticompetitive alignment comes from tacit, mutual understanding, therefore there is proof neither of fault, nor of intentionality. It follows that fines cannot be imposed, and injunctions are the sole applicable remedy. Moreover, antitrust enforcement

[38] A. FRIGNANI, *L'injunction nella common law…cit.*, pp. 432-433, 459 ss. The A spells out that, in any event, positive and negative injunctions are two faces of the same coin, since every positive injunction may be changed in a negative one, and their difference simply reflects the contents of original duties.

always faces the objection that every corrective intervention on the oligopolistic interdependence, even when aimed to correct anticompetitive effects, is a regulatory action[39].

In my view, no caveat against the antitrust control on tacit collusion, however founded it may be, is strong enough to offset the need to intervene.

Generally speaking, every remedy, included monetary sanctions, incorporates the danger of detrimental effects upon the market functioning, but this limit is not strong enough to exclude the antitrust enforcement and to attribute corrective and preventive functions solely to the market. On the contrary, to protect the market functioning, the EU antitrust laws empower the Commission with a range of corrective measures, which reflect an implicit duty to intervene against violations[40], in order to stop unlawful conducts and to remove anticompetitive effects. In other words, whenever there is

---

[39] With regard to this point, the *OECD Study* reminds that, according to many scholars, there exist some workable means to correct the anticompetitive effects of tacit alignment, but antitrust is not one of these: "*there is not so much that an agency can do without placing itself in the role of a regulator, which is not a role that the US agencies want to assume*" (p. 214). This reasoning, which is equally applicable to the EU system, rests on the belief that remedies have a crucial importance, to the point that unlawfulness of conducts depends on the availability of workable and practicable remedies. In the case of tacit collusion, this approach seems to suggest that, since traditional antitrust remedies are inappropriate to deal with this matter, competition authorities should not care about this category at all.

[40] Since the *MIRECO* case, intervening against infringements of competition law is perceived as a duty, rather than as a mere power, for the Commission [Court of Justice, case 826/79, 10 July 1980, *Amministrazione delle Finanze dello Stato* v. *Mediterranea Importazione Rappresentanze Esportazione Commercio (MIRECO)*, in *ECR*, 1980, I-2559, para 13].

J. TEMPLE LANG, in commenting this judgement, draws the conclusion that "*national courts have a duty to provide effective remedies* […] *Since the whole range of remedies must be available to a plaintiff suing for beach of Community law, actions for declaration must be permitted where national law provides for them. However, the two principal remedies in practice will be damages and injunctions*" (J. TEMPLE LANG *EEC Competition Actions in Member States' Courts – Claims for Damages, Declarations and Injunctions for Beach of Community Antitrust Law*, in *Fordham Int'l L.J.*, 1984, pp. 389-466, here p. 392).

Despite Regulation 1/2003 states that the Commission 'may' intervene to end infringements, antitrust enforcement should properly constitute a duty, rather than a mere discretional power, for competition authorities. In a teleological perspective, in fact, eventual inertia would be inconsistent with the scope of protecting the market functioning against anticompetitive conducts and, therefore, would lead to unreasonable results. It follows that, in my view, once an infringement has been found, the Commission must intervene by the available and practicable remedies.

an infringement, the Commission faces an alternative: on the one hand, it may choose not to intervene, with the consequence that anticompetitive effects would remain, and that the deterrent power of antitrust rules would be weakened. On the other hand, it may choose to intervene and to remove anticompetitive effects, by adopting the available remedies.

Presence of available remedies and institutional purpose of antitrust authorities influence the competition policy against tacit collusion: in this perspective, the Commission should be allowed to exploit the chance of restoring market competition and deterring from future infringements[41]. This interventionist policy also preserves the primary scope of competition law (protecting the market functioning), which would be merely declaratory without an effective system of enforcement.

In this scenario, where significant arguments support the antitrust intervention against tacit collusion, where a wide range of remedies–with both negative and positive contents–is available, the potential benefits of injunctive relief remarkably increase, to the point that injunctions may reasonably expected to become the best means to deal with abuses of oligopolistic dominance. The comparative approach strengthens this prevision: Section 13(b) FTCA enables the FTC to intervene by preliminary and permanent injunctions against infringements of any provisions it enforces. More generally, the US antitrust system often recurs to injunctions, such as orders barring the prohibited conducts, and even orders imposing monetary relief to remedy past violations[42].

---

[41] See on this point, *OECD Study*, p. 24: "*having made the determination that the defendant's conduct was an unlawful abuse of dominance, despite any inextricable efficiencies or pro-competitive effects it also have had, an agency will ordinarily want to design remedy that puts a stop to the conduct and restores the level of competition that would have existed but for the violation – no more, and no less*".

[42] Administrative injunctions in US rest on the same requirements provided in Europe: it is enough to demonstrate the implementation of conducts with anti-competitive effects, even in absence of fault or intentionality. See, on this point, R. PITOFSKY, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, in *University of Chicago Law Review*, 2005, pp. 209-227.

Obviously, injunctive relief, as every other kind of relief, presents both positive and negative aspects, but, in the case of tacit collusion, injunctions may be so powerful and so significant that their benefits surely prevail over the eventual failures.

3.6.1 The pros of injunctions

In the antitrust policy against tacit collusion, where monetary fines cannot be imposed, injunctions ensure the essential functions of resting competition and deterring form future violations.

3.6.1.1 Restoring competition

Injunctive measures, as described in Regulation 1/2003, focus directly on the market injury, in order to correct unlawful conducts, to remove their effects, and to restore competition. Whenever firms infringe antitrust rules, remedies act as the first, immediate, and direct response to the market injury.

In the case of oligopolistic dominance, when there is cogent and consisting evidence of abuses, injunctions may restore competition and may ensure an effective market protection. Competition authorities have a range of practicable means, and may impose ultimate orders perfectly fitting the kind of infringement, the characteristics of firms, and the current and foreseeable market conditions.

Even the specific procedure to enact remedies potentially ensures workable enforcement: injunctions are the final step of a process whereby the Commission scrutinizes suspects of infringements, examines the concerned conducts, and identifies every critical point. All stages before enacting remedies, and the defences of parties too, ensure whole knowledge about the unlawful conduct and about its effects on market functioning. As a result, injunctions, designed on the anticompetitive effects, simply translate in remedies the original, infringed rule. Moreover, since remedies perfectly fit the market injury, the risk itself of over- or under-deterrence is escaped. In this framework, injunctive remedies represent as an opportunity to correct

anti-competitive effects coming from abuses of collective dominance, and to restore competition.

However, it is evident that remedies, taken alone, ensure only a partial reaction to antitrust infringements, and that imposing fines, together with injunctions, would realize a stronger deterrence. Nevertheless, remedies do not constitute a second best, since no other means is applicable to attack abuses of oligopolistic dominance.

3.6.1.2 Deterring from future infringements

Protection of market functioning also requires preventive actions that deter companies from violating the antitrust rules.

The deterrent power of injunction in the case of tacit collusion is remarkable. These remedies, in fact, result from an antitrust procedure whereby the Commission demonstrates, under the current standard of proof, abuses of oligopolistic dominance. The final decision imposing injunctions raises the conclusive presumption that the concerned firms are perfectly aware of the fact that their conduct violated article 82.

In this way, if firms involved in the first procedure persevere in that behaviour, there would be complete and cogent evidence of intentionality, which allows the Commission to impose fines too.

Therefore, injunctive remedies in the case of abuses of oligopolistic dominance have a strong deterrent power, because the consequence of reiterated infringements would be not merely to strengthen the original reaction, but to shift to a stronger punishment. This result of joint application of injunctive and punitive relief even in the case of abuses of oligopolistic dominance may be extremely frequent, given that anticompetitive parallelism tends to be a recidivist conduct.

3.6.2 The cons of injunctions: competition authorities with regulatory functions

The most frequent objection against injunctions in antitrust law is that they may imply the exercise of regulatory powers. Doubts

involve, in particular, behavioural remedies and especially when they impose positive duties. This kind of injunctions ranges from mere orders to do, which replace the contents of infringed rules and leave their implementations to the concerned firms, to more articulated and prescriptive measures[43]. In any event, behavioural remedies, by directly conditioning strategies of firms, also influence, to a certain extent, market dynamics: in other words, by imposing detailed injunctions, competition authorities may substantially interfere with the market functioning. Moreover, the more intrusive the contents of remedies are, the greater the danger for antitrust authorities of applying regulatory methods[44].

The apparent shift from antitrust enforcement to *de facto* regulation generates various critics, involving both theoretical and practical side of the antitrust enforcement.

As for the first, almost all scholars draw the difference between regulation and antitrust on the grounds that antitrust seek to correct eventual injuries occurred in already competitive markets, while regulation aims at driving market toward competition. In this way, intrusive and conditioning measures in the case of regulation are perfectly justified because of its scopes, while they make a little, if any, sense in the antitrust enforcement. By overturning the perspective, whenever antitrust enforcement imposes prescriptive and articulated measures, it is deemed to exert regulatory functions.

As for the concrete implementation of injunctions, scholars usually remark that defining effective criteria to correct anti-competitive behaviours is extremely difficult. Even when this is possible, it would always remain a remarkable risk that the imposed measures will make the market more rigid, will become the general standard or, in case of price, the minimum level. The main danger, in

---

[43] Duty to deal, for example, may result in a pure order to supply, without any further specification, or in detailed orders, also defining the contractual conditions.
Sometimes orders may be extremely detailed. W.E. KOVACIC, *Designing Antitrust Remedies…cit.*, notes that "*If a court decides to mandate access to a key asset, it must be prepared to specify the price and quality terms on which the defendant must provide access. In setting appropriate access charges, courts may find themselves enmeshed in ratemaking exercises for which they are institutionally ill-suited*" (p. 1294)

[44] P. LOWE, F. MAIER-RIGAUD, *Quo Vadis Antitrust Remedies…cit.*, say on this point, that behavioural remedies "*cannot modify the incentives of the firms but try to suppress the incentives by constraining firm behaviour in an essentially regulatory way*" (p. 7).

other words, is that positive inunctions may become, in the medium term, an excuse for firms not to compete on the concerned market variable[45].

These critics are even stronger in case of abuses of oligopolistic dominance, because remedies seek to affect the behaviours of firms that substantially control the entire market. Consequently, the proscribed conducts really become the common standard, and a new parallelism may substitute the previous alignment. Although there is a shift from unlawful to lawful standard, risks of negative impact on the market dynamics cannot be excluded at all: there is always at least the danger of creating an artificial market equilibrium, which will not be able to react to unpredictable events and to progressively adapt itself to normal, economic changes.

Moreover, the adoption of regulatory methods in the antitrust enforcement seems to contrast with the institutional function of laws enforcers, rather than regulators, reserved to antitrust authorities. In addition, all those critics rest on the more general premise that the scope of market protection is better served by competition than by regulation[46].

However, the likelihood that remedies in general, and behavioural remedies in particular, will result in regulatory activity cannot be ruled out. Theoretically, the kind of orders that regulatory and antitrust authorities may impose, are substantially the same. Nevertheless, convergence on a point does not imply whole identity. On the contrary, there is an irreducible difference on purposes of remedies, and this difference generates an irreducible discrepancy between the two areas. Injunctive remedies enacted by antitrust authorities, in fact, seek to protect the correct market functioning, by

---

[45] All those critics also involve commitments about mergers. See F. MALONE, J.G. SIDAK, *Should antitrust consent decrees regulate post-merger pricing?*, in *J. Competition L. & Econ.*, 2007, pp. 471-490, about the dangers of post-merger price regulation.

[46] This approach also perceives protection of consumer welfare as the primary function of antitrust. "*Consumer welfare is better served by competition than by regulation. From the perspective of antitrust remedies, this suggests that structural remedies, which normally entail little or no regulation, are superior to conduct remedies, which are by their nature regulatory*" [E. CANAVAGH, *Antitrust Remedies Revisited…cit.*, p. 205]
With regard to this, we must take account that regulatory policies often embody the scope of protecting consumer welfare, because, especially in not completely developed markets, this goal may require a regulatory action.

removing anticompetitive effects. Regulatory measures pursue the further scope of promoting competition, goal not included in the antitrust, injunctive relief[47].

Pursued scopes influence the contents of remedies to an extent that, even for equal categories, final duties change, depending on the corrective or disciplining function that authorities seek to realize. For example, duties to deal imposed by the regulatory authorities would be necessarily different from duties to deal imposed by competition authorities, and equalling them because both impose positive obligations makes little, if any, sense. In other words, the matter of remedies with regulatory effects seems to involve formulation of injunctions and specific purposes behind every measure, rather than the kind of means.

This is not to say that there is no danger that remedies will result in market regulation, but that this possibility needs to be assessed case by case.

The mere risk of power misuse or arbitrariness in the remedial process, in my view, is not such a solid arguments to deny, in principle, any possibility to intervene and to correct the market failures, especially because competition authorities are not the last judges. In every case, in fact, parties may bring actions before Courts to control legality of remedies in the light of contested infringement.

3.7 Practicable remedies in the case of culpable abuse of collective dominance

Evidence of subjective elements, parallelism in conducts and anti-competitive effects allows competition authorities to impose both injunctions and monetary sanctions. Either this happens in the case of recidivist firms already addressed by injunctions for abusive conducts, or in the case of abuses of collective dominance that also embody article 81 infringement.

As for the first, evidence of recidivism aggravates the basic amount of fines, and the specific dynamics of the second infringement, which –I said- follows previous injunctions, raises the

[47] *Contra*, see E. CANAVAGH, *Antitrust Remedies Revisited…cit.*, pp. 202-203.

conclusive presumption of intentional behaviours and, therefore, impedes applying the mitigating circumstance of negligence[48].

As for the second, Courts have cumulatively applied articles 81 and 82, but have imposed only one fine, based either on one, or on the other rule.

In general terms, if the applicable rules provide different fines, authorities normally impose the greatest sanction, because it incorporates the social disvalue of the other too. In the case at issue, however, the regime of sanctions provided for articles 81 and 82 is the same: both rely on Regulation 1/2003 and on the subsequent *Guidelines*. Therefore, applying one or the other rule for defining the amount of sanctions does not make any difference. This is a further proof of the unitary nature of article 81 and article 82.

Finally, in defining the amount of sanctions, competition authorities have to also evaluate the individual contribution of each undertaking to the concerned infringement. In particular, this leads to the exclusion of the antitrust liability for firms that, although members of collective dominance, did not realize any abuse[49], and, conversely, to an increase of the basic amount of fines for leader, instigators, and coercers[50].

---

[48] See, *Guidelines on the method for setting fines imposed pursuant to Article 23(2) a of Regulation No. 1/2003*, in *OJ*, 2006, C-210/2. For a comment, see S.B. VOLCKER, *Rough Justice? An Analysis of the European Commission's New Fining Guidelines*, in *CMLR*, 2007, pp. 1285-1320.

[49] This scenario alludes to individual abuses of collective dominance. For a general analysis, see the *Irish Sugar* case, Part 1 – Chapter 3.

[50] See *2006 Guidelines*, § 28. This aggravating circumstance may be frequent in asymmetrical oligopolies, where the bigger-sized firm act as market leader and the smaller rivals follow that strategy. Moreover, cartel-like structures require significant efforts to be maintained: firms need to expressly or tacitly coordinate their actions, to monitor their activity to found out eventual defections, to develop mechanisms for discouraging and punishing cheating, and so on. Imposing higher fine for firms that plays a leading role in this equilibrium, and lower fines for the followers, may undermine the internal stability of collusion. See, on this point, W.P.J. WILS, *The European Commission's 2006 Guidelines on Antitrust fines: A Legal and Economic Analysis*, in *World Competition,* 2007, pp. 197-229. About the deterrent power of fines, see M.P. SCHINKEL, *Effective Cartel Enforcement in Europe*, in *World Competition*, 2007, pp. 539-572. In his view, the system of cartel enforcement is still insufficient to deter collusion, so deep detection is still required.

References

AA.VV. *Merger Control in the EU – A Survey of European Competition laws*, 3rd Edition, Kluwer International Law, The Hague, 1999.

AAVV, *Economics & Antitrust policy*, Greenwood Publishing, Oxford, 1989.

ABREU, P., *External Equilibria of Oligopolistic Supergames*, in *Journal of Economic Theory*, 1986, 191-225.

AIGNER, G., BUDZINSKI, O., CHRISTIANSEN, A., *The Analysis of Coordinated effects in EU Merger Control: Where Do We Stand after* Sony/BMG *and* Impala*?*, 2006, (available at www.ssrn.com)

ALBORS-LLORENS, A., *Horizontal agreements and concerted practices in EC competition law: Unlawful and legitimate contacts between competitors*, in *Antitrust Bulletin*, 2006, 837-875.

ALBORS-LLORENS, A., *The Role of Objective Justification and Efficiencies in the Application of Article 82 EC*, in *Common Market Law Review*, 2007, 1727-1761.

ALESE, F., *The economic theory of non-collusive oligopoly and the concept of concerted practices under article 81*, in *European Competition Law Review*, 1999, 379-383.

ALEXIADIS, P., *Abuse of Dominance Position*, in *International Company and Commercial Law Review*, 1991, 200-202.

ALLENDESALAZAR, R., *Remedies and Sanctions for Unlawful Unilateral Practices, with particular reference to exclusionary abuses*, Speech at Fordham, July 2007 (Forthcoming).

ANDERSON, A.V., *Collective Dominance in E.C. Merger Control: AN Analysis of Legal and Economic Arguments*, 2001 available at http://www.handels.gu.se/epc/archive/00003208/01/200155.pdf

ANDREWS, P., *Is Meeting Competition a Defence for Predatory Pricing? The Irish Sugar Decision Suggests a new Approach*, in *European Competition Law Review*, 1998, 49-57.

ANDREWS, P., *Regime Change in Ireland: But are the New Merger Rules Better*, in *European Competition Law Review* 2003, 288-294.

AREEDA, P.E., HOVENKAMP, H., *Antitrust Law – An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, Vol. VI, 2nd Edition, 2002.

ARQUIT, K,J., WOLFRAM, R., *Mergers and Acquisitions: United States Government Antitrust Analysis and Enforcement*, in *Practising Law Institute –Corporate Law and Practice Course Handbook Series*, 2001, 317-471.

ASSANT, G., *Anti-trust Intra-corporate Conspiracies: a Comparative Study of French, EEC and American Laws*, in *European Competition Law Review*, 1990, 65-79.

ATTENBOROUGH, N., JIMENEZ, F., LEONARD, G., *Are Three to Two Mergers in Markets with Entry Barriers Necessarily Problematic?*, in *European Competition Law Review*, 2007, 539-552.

AYRES, I., *How Cartels Punish: a Structural Theory of Self-enforcing Collusion*, in *Columbia Law Review*, 1987, 295-323.

AYRES, I., MADISON, K., *Threatening Inefficient Performance of Injunctions and Contracts*, in *University of Pennsylvania Law Review*, 1999, 45-108.

BACCARO, V., *Failing Firm Defence and Lack of Causality: Doctrine and Practice in Europe of two Closely Related Concept*, in *European Competition Law Review*, 2004, 11-24.

BAILEY, D., *Damages Actions Under the EC Merger Regulation*, in *Common Market Law Review*, 2007, 101-139.

BAILEY, D., *Scope of judicial review under article 81 EC*, in *Common Market Law Review*, 2004, 1327-1360.

BAILEY, D., *Standard of proof in EC merger proceedings: a Common Law perspective*, in *Common Market Law Review*, 2003, 845-888.

BAKER, B., *Identifying Horizontal Pricefixing in the Electronic Marketplace*, in *Antitrust Law Journal*, 1996, 41-56.

BAKER, D.I., BLUMENTHAL, W., *The 1982 Guidelines and Preexisting law*, in *California Law Review*, 1983, 311-347.

BAKER, J.B., *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects under the Antitrust Laws*, in *New York University Law Review*, 2002, 135- 203.

BALIGA, S., *Monitoring and Collusion with "Soft" Information*, in *Journal of Law, Economics, & Organization*, 1999, 434-440.

BARLETTA, A., *La competenza sull'inibitoria* antitrust, in *Rivista di Diritto Processuale*, 2006, 499-526.

BARTON, J.H., *Antitrust Treatment of oligopolies with Mutually Blocking Patent Portfolios*, in *Antitrust Law Journal*, 2001, 851-882.

BASTIANON, S., *I nuovi lati oscuri dell'antitrust: posizione dominante collettiva verticale e sconti selettivi*, in *Foro Italiano,* 2000, IV, 54.

BASTIANON, S., *L'abuso di posizione dominante,* Giuffrè, Milano, 2001.

BAUER, J.P., *Refusals to Deal with Competitors by Owners of Patents and Copyrights: Reflections in the Image Technical and Xerox Decisions*, in *DePaul Law Review*, 1211-1246.

BAVASSO, A., *Gencor: a judicial review of the Commission's policy and practice: Many lights, some shadows*", in *World Competition*, 1999, 45-66.
BAVASSO, A., LINDSAY, A., *Causation in EC Merger Control*, in *European Competition Law Review*, 2007, 181-202.
BAVASSO, A., *The role of Intent Under Article 82 EC: from "Flushing the Turkey" to "Spotting the Lioness in Regent's Park"*, in *European Competition Law Review*, 2005, 616-623.
BAXTER, S., DETHMERS, F., *Collective Dominance under the EC Merger Control-After Airtours and the Introduction of Unilateral Effects is there still a Future for Collective Dominance?*, in *European Competition Law Review*, 2006, 148-160.
BAXTER, S., DETHMERS, F., *Unilateral Effects under the European Merger Regulation: How Big is the Gap?*, in *European Competition Law Review*, 2005, 380-389.
BAXTER, W.F., *Responding to the Reaction: the Draftsman's view*, in *California Law Review*, 1983, 618-631.
BAY, M.F., RUIZ CALZADO, J., *Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions*, in *World Competition*, 2005, 433-453.
BERG, W., OSTENDORF, P., *The Reform of EC Merger Control: Substance and Impact of the Proposed new Procedural Rules*, in *European Competition Law Review*, 2003, 594-603.
BERTOLINI, A., PARISI, F., *The Rise of Structuralism in the Merger Control*, in *Stanford Journal of International Law*, 1996, 13-36.
BISHOP, S., LOFARO, A., *A legal and economic consensus? The theory and practice of coordinated effects in EC merger control*, in *Antitrust Bulletin*, 2004, 195-242.
BISHOP, S., RIDYARD, D., *Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control*, in *European Competition Law Review*, 2003, 357-363.
BISHOP, S.B., *Power and Responsibility: The ECJ's Kali-Salz Judgment,* in *European Competition Law Review*, 1999, 37-39.
BLACK, O., *Collusion and Co-ordination in EC Merger Control*, in *European Competition Law Review*, 2003, 408-411.
BLACK, O., *Communication and Obligation in the Arrangements and Concerted Practices*, in *European Competition Law Review*, 1992, 200-205.
BLACK, O., *Concerted Practices, Joint Action and Reliance*, in *European Competition Law Review*, 2003, 219-228.
BLAIR, R.D., MAK, J., BONHAM, C., *Collusive Duopoly: the Economic Effects of the Aloha and Hawaiian Airlines' Agreement to Reduce Capacity*, in *Antitrust Law Journal*, 2007, 409-438.
BLUMSTEIN, A.S., *'Twombly" requires More for Notice Pleading*, in *Tennessee Bar Journal*, August 2007, 12-15.
BOGART, J.H., *The Supreme Court Decision in Twombly: a New Federal Pleading Standard?*, in *Utah Bar Journal*, 2007, 20-22.

BOK, D.C., *Section 7 of the Clayton Act and the merging of law and economics*, in *Harvard Law Review*, 1960, 226-354.
BORK, R.H., *The Antitrust Paradox – A Policy at War with Itself*, 2nd Edition, The Free Press, New York, 1993.
BOTTEMAN, Y., *Mergers, standard of proof and expert economic evidence*, in *Journal of Competition Law & Economics*, 2006, 71-100.
BOZANO GANDOLFI, M.F., *Brevi note sullo sfruttamento di posizione dominante collettiva*, in *Diritto Marittimo*, 2002, 506-514.
BRANBENBURGER, A.M., NALEBUFF, B.J., *Co-opetition*, Currency Dubleday, New York, 1996.
BRANDER, J.A., SPENCER, B.J., *Tacit Collusion, Free Entry and Welfare*, in *Journal of Industrial Economics*, 1985, 277-294.
BRENT, R., *The Certain Pursuit of Oligopoly: a Reply*, in *European Competition Law Review*, 1996, 163-165.
BRESNAHAN, T.F., *A Remedy that Falls Short of Restoring Competition*, in *Antitrust*, Fall, 2001, 67-70.
BRIONES, J., *Oligopolistic Dominance: Is there a Common Approach in Different Jurisdictions? A Review of Decisions Adopted By the Commission under the Merger Regulation*, in *European Competition Law Review*, 1995, 334-347.
BRIONES, J., PADILLA, A.J., *The Complex Landscape of Oligopolies under EU Competition Policy – Is Collective Dominance Ripe for Guidelines?*, in *World Competition*, 2001, 307-318.
BROBERG, M.P., *The European Commission's Jurisdiction to Scrutinize Mergers*, Kluwer Law International, The Hagues, 1998.
BROCK, J.W., *Antitrust Policy and the oligopoly problem*, in *Antitrust Bulletin*, 2006, 227-280.
BROD, A., SHIVAKUMAR, R., *Advantageous Semi-collusion*, in *International Journal of Industrial Organization*, 1999, 221-230.
BROWN, O., *The Philip Morris case: Part I*, in *Journal of Business Law*, 1988, 351-356.
BRUZZONE, G., SAJA, A., *Misure cutelari e decisioni con impegni nell'applicazione delle regole* antitrust*: i presupposti e le garanzie*, in *Contratto e Impresa / Europa*, 1-2007, 268-288.
BUNDA, M.M., *Monsanto, Matsushita and "Conscious Parallelism": Towards a Judicial Resolution of the "Oligopoly Problem"*, in *Washington University Law Review*, 2006, 179-210.
BURNSIDE, A., *Les incertitudes liées à la position dominante collective en matiére des controle des concentrations*, in *Review de la Concurrence et de la Consommation*, 2002, available at http://www.minefi.gouv.fr/fonds_documentaire/dgccrf/02_actualite/ateliers_concu/dominer6.htm
CABRAL, L.M.B., *Collusion Theory: Where to Go Next?*, in *Journal of Industry, Competition and Trade*, 2005, 199-206.

CAMILLI, E.A., *Optimal Fines in Cartel Cases and the Actual EC Fining Policy*, in *World Competition*, 2006, 575-605.
CANAVAGH, E., *Antitrust Remedies Revisited*, in *Or. L. Rev.*, 2005
CAPOBIANCO, A., *Information Exchange Under EC Competition Law*, in *Common Market Law Review*, 2004, 1247-1276.
CAVANAGH, E., *Antitrust Remedies Revisited*, in *Oregon Law Review*, 2005, 147-225.
CHAPMAN, B., *Rational Choice and Reasonable Interactions*, in *Chicago-Kent Law Review*, 2006, 75-94.
CINTIOLI, F., *The interpretation of competition law between the legal method and the economic approach*, in *Diritto Unione Europea*, 2007, pp. 873-884.
CITRON, P., *European Court of First Instance Annuls the Clearance of Sony/Merger*, in *International Trade Law & Regulation*, 2006, 131-133.
CLARK, D.S., *Price Fixing without Collusion: an Antitrust analysis of Facilitating Practices After Ethyl Corp*, in *Wisconsin Law Review,* 1983, 887-952.
COATE, M.B., *Efficiencies in Merger Analysis: an Institutionalist View*, in *Supreme Court Economic Review*, 2005, 189-205.
COLANGELO, G., *Comments on Airtours Judgment*, in *Diritto Industriale*, 2003, 259-276.
COLANGELO, G., *Oligopolio,* facilitating practices, *posizione dominante collettiva,* tie-in *e… un pizzico di Kodak*, in *Diritto Industriale*, 2001, 287-292.
COLOMBO, L., GRILLO, M., *Collusion when the Number of Firms is Large*, in *Quaderni dell'Istituto di Economia e Finanza - Università Cattolica del Sacro Cuore, Milano*, n. 66, March 2006, available at www.unicatt.it/Istituti/EconomiaFinanza/Quaderni/660306.pdf
COLOMBO, L., LABRECCIOSA, P., *The Suboptimality of Optimal Punishments in Cournot Supergames*, in *Economics Letters*, 2006, 116-121.
COLOMBO, L., *Product differentiation and cartel stability with Stochastic market demand*, Speech at SIEP (Societa' Italiana di Economia Pubblica) XIV Conference, 2002, Pavia, Italy, available at www.unipv.it
COMANOR, W., *The problem of remedy in monopolization cases: the Microsoft case as an example*, in *Antitrust Bulletin*, 2001, 115-134.
COMBE, E., *Èconomie et politique de la concurrence*, Dalloz, 2005.
COMPTE, O., JENNY, F., REY, P., *Capacity constraints, mergers and collusion*, in *European Economic Review*, 2002, 1-29.
CONNOR, J.M., LANDE, R.H., *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, in *Tulane Law Review*, 2005, 513-564.
COOK, C.J., *Commitment Decisions: the Law and Practice under Article 9*, in *World Competition*, 2006, 209-228.
COOK, C.J., KERSE, C., *E.C. Merger Control,* 2nd Edition, Sweet & Maxwell, London, 1996.
COOK, C.J., KERSE, C., *EEC Merger Control*, Sweet & Maxwell, London, 1991.

COPPI, L., WALKER, M., *Substantial convergence or parallel paths? Similarities and differences in the economic analysis of horizontal mergers in US and EU competition law*, in *Antitrust Bulletin*, 2004, 101-152.
COSCELLI, A., LOFARO, A., *Dominanza collettiva e fusioni alla prova di San Tommaso*, in *Mercato Concorrenza regole*, 2001, 193-209.
CRANDALL, R.W., ELZINGA, K.G., *Injunctive Relief in Sherman Act Monopolization Cases*, in *Journal of Research in Law and Economics*, 2002, 1-106.
CRANDALL, R.W., *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, in *Oregon Law Review*, 2001, 109-198.
CREW, E., *Matsushita v. Zenith: the Chicago School teaches the Supreme Court a Dubious Lesson*, in *Antitrust*, Fall 1986, 11-16.
DASKIN, A.J., *Observations on the Multiple Dimensions of Market Power*, in *Antitrust*, Summer, 2005, 53-57.
DAVIES, J., SCHLOSSBERG, R., *"Once more unto the breach, dear friends": judicial Review of antitrust agency merger clearance decisions*, in *Antirust*, Fall 2006, 17-22.
DAVIS, R., *FTC v. Heinz: Two Views on the Role of Efficiencies in Merger Analysis*, in *Antitrust,* Fall 2001, 73.
DAVIS, R.W., DRISCOLL, J.M., *The urge to converge – The new EU Discussion Paper on Abuse of a dominant position*, in *Antitrust*, Spring 2006, 82-88.
DENOZZA, F., TOFFOLETTO, A., *Contro l'utilizzazione dell'"approccio economico" nell'interpretazione del diritto antitrust*, in *Mercato concorrenza regole*, 2006, 562-579.
DEPOORTER, B., PARISI, F., *The Modernization of European Antitrust Enforcement: the Economics of Regulatory Competition*, 2005, available at http://ssrn.com/abstract_id=699802
DESANTI, S.S., NAGATA, E.A., *Competitor Communications: Facilitating Practices or Invitation to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, in *Antitrust Law Journal*., 1994, 93-131.
DETHMERS, F., *The Abuse of Hoffmann-La Roche: the Meaning of Dominance Under EC Competition Law*, in *European Competition Law Review,* 2006, 537-549.
DICK, A.R., *Coordinated Interaction: Pre-Merger Constraints and Post-Merger Effects,* in *George Mason Law Review*, 2003, 65-88.
DICK, A.R., *When Are Cartels Stable Contracts?*, in *Journal of Law and Economics*, 1996, 241-283.
DOERR, C., *The Problem of Collusion: How Best to Resolve it?*, in *Auckland University Law Review,* 2000-2003, 104-126.
DOLMANS, M., *Standards for Standards*, in *Fordham International Law Journal*, 2002, 163-208.
DOUGLAS MELAMED, A., *Antitrust: the new Regulation*, in *Antitrust*, Fall 1995, 13-15.

DRAETTA, U., *La giurisdizione internazionale della Commissione in material di controllo delle concentrazioni*, in *Diritto del Commercio Internazionale*, 1999, 785-799.

DREHER, D., ADAM, M., *Abuse of Dominance under Reform – Sounds Economic and Established Case law*, in *European Competition Law Review*, 2007,

DUBOW, B., ELLIOT, D., MORRISON, E., *Unilateral Effects and Merger Simulation Models*, in *European Competition Law Review*, 2004, 114-117.

DUNCAN, R.A., McCORMAC, B.S., *If It Takes Two Tango, Do They Con spire? Twombly and Standards of Pleading Conspiracy*, in *Sedona Conference Journal*, 2007, 39-55.

EASTERBROOK, F.H., *Workable Antitrust Policy*, in *Michigan Law Review*, 1986, 1696-1713.

EGGE, M.G., BAY. M.F., CALZADO, J.R., *The New EC Merger Regulation: a Move to Converge*, in *Antirust*, Fall, 2004, 37-41.

EGGE, M.G., BAY. M.F., CALZADO, J.R., *The New EC Merger Regulation: Recipe for Profound Change or more the Same?*, in *Diritto dell'Unione Europea*, 2004, 461-499.

EHLERMANN, C.D., VOLCKER, S.V., GUTERMUTH, G.A., *Unilateral Effects: The Enforcement Gap under the Old EC Merger Regulation*, in *World Competition*, 2005, 193-203.

EILMANSBERGER, T., *How to distinguish good from bad competition under Article 82 EC: in search of clearer and more coherent standards for anti-competitive abuses*, in *Common Market Law Review*, 2005, 129-177.

ELHAUGE, E., GERADIN, D., *Global Antitrust Law and Economics*, Foundation Press, New York, 2007.

ELLIOT, P., *More Than an Ocean Separates Us*, in *Business Law Today*, 2007, 55-59.

ENGEL, C., *Tacit Collusion – The Neglected Experimental Evidence*, 2007, available at www.coll.mpg.de

ERSBOLL, N.C., *Commitments Under the Merger Regulation*, in *European Competition Law Review*, 2001, 357-364.

ESWARAN, M., *Cross-licensing of Competing Patents as a Facilitating Devise*, in *Canadian Journal of Economics*, 1994, 689-708.

ETTER, B., *The Assessment of Merger under the EC Concept of Collective Dominance – An Analysis of the Recent Decisions and Judgements – by an Economic Approach*, in *World Competition*, 2000, 103-139.

EZRACHI, A., *Behavioural Remedies in EC Merger Control – Scope and Limitations*, in *World Competition*, 2006, 459-479.

FACEY, B.A., ASSAF, D.H., *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: a Survey*, in *Antitrust Law Journal*, 2002, 513-588.

FAGERLUND, E., *Collective Dominance under EC Merger Regulation No 139/2004*, Lund University, 2005, (available at www.jur.lu.se)

FATTORI, P., TODINO, M., *La disciplina della concorrenza in Italia*, Il Mulino, Bologna, 2004.
FEASTER, T., TREACY, P., *Compagnie Maritime Belge Transports SA v Commission of the European Communities (T24/93) [1997] 4 C.M.L.R. 273 (CFI)*, in *European Competition Law Review*, 1997, 467-472.
FEINSTEIN, D.L., *Recent Trends in US Merger Enforcement: Down but not Out*, in *Antitrust*, Summer 2007, 74-80.
FERNANDEZ, P.M., *Increasing powers and increasing uncertainty: collective dominance and pricing abuses*, in *European Competition Law Review*, 2000, 645-653.
FERRY, J.E., *Towards Completing the Charm: the Woodpulp Judgement*, in *European Competition Law Review*, 1989, 58-73.
FERSHTMAN, C., GANDAL, N., *Disadvantageous semicollusion*, in *International Journal of Industrial Organization*, 1994, 141-154.
FERSHTMAN, C., PAKES, A., *A Dynamic Oligopoly with Collusion and Price Wars*, in *RAND Journal of Economics*, 2000, 207-237.
FEUERSTEIN, S., *Collusion in Industrial Economics-A Rejoinder*, in *Journal of Industry, Competition and Trade*, 2005, 235-239.
FEUERSTEIN, S., *Collusion in Industrial Economics-A Survey*, in *Journal of Industry, Competition and Trade*, 2005, 163-198.
FIEBIG, A., *Crisis Cartels and the Triumph of Industrial Policy over Competition Law in Europe*, in *Brooklyn Journal of International Law*, 1999, 607-638.
FINE, F.L., *The Substantive Test of the EEC Merger Control Regulation: the First Two Years*, in *Antitrust Law Journal*, 1993, 699-735.
FINGLETON, *Does Collective Dominance provides suitable housing for all anti-competitive oligopolistic mergers?*, in *International Antitrust Law & Policy*, 2003, 181-199.
FLORIDIA, G., CATELLI, V., *Diritto Antitrust. Le Intese Restrittive della Concorrenza e gli Abusi di Posizione Dominante*, IPSOA, Milano, 2003.
FLOYD, C.D., *Vertical Antitrust Conspiracies after Monsanto and Russell Stover*, in *University of Kansas Law Review*, 1985, 269-304.
FLYNN, J., STRATFORD, J., *Competition: Understanding the 1998 Act*, Palladian Law Publishing, Isle of White, 1999.
FOROS, Ø., HANSEN, B., SAND, J.Y., *Demand-side Spillovers and Semi-collusion in the Mobile Communications Market*, in *Jour, Industry, Compet. Trade*, 2002, 259-278.
FORRESTER, I.S., *Article 82: Remedies in Search of Theories?*, in *Fordham International Law Journal*, 2005, 919-951.
FOUNTOUKAKOS, K., RYAN, S., *A New Substantive Test for EU Merger Control*, in *European Competition Law Review*, 2005, 277-296.
FOX, E.M, *Collective dominance and the message from Luxembourg*, in *Antitrust*, Fall, 2002, 57-58.

FOX, E.M., *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, in *University of Pennsylvania Journal of International Economic Law*, 2002, 457-468.
FOX, E.M., *Monopolization, Abuse of Dominance, and the indeterminacy of Economics: the US/EU Divide*, in *Utah Law Review*, 2006, 725-740.
FOX, E.M., *Remedies and the Courage of Convictions in a Globalized World: how Globalization Corrupts Relief*, in *Tulane Law Review*, 2005, 571-594.
FOX, E.M., SULLIVAN, L.A., PERITZ, R.J.R. *Cases and Materials on U.S. Antitrust in a Global Market*, 2nd Edition, West Thomson, St. Paul, 2004.
FOX, E.M., *The merger regulation and its territorial reach*, in *European Competition Law Review*, 1999, 334-336.
FOX, E.M., *What is harm to competition? Exclusionary practices and anticompetitive effects*, in *Antitrust Law Journal*, 2002, 371-411.
FREED, M., KOVACIC, W.E., MOLTENBREY, M.J., EIMER, N, *The Detection and Punishment of Tacit Collusion*, in *Loyola Consumer Law Review*, 1997, 151-168.
FRESHTMAN, C., PAKES, A., *A Dynamic Oligopoly with Collusion and Price Wars*, in *RAND Journal Economics*, 2000, 207-236.
FRIEDMAN, E.A., *Airline Antitrust: Getting Past the Oligopoly problem*, in *University of Miami Business Law Review*, 2001, 121-143.
FRIEDMAN, J.W., *A non-cooperative equilibrium for supergames*, in *Review of Economic Studies*, 1971, 1-12.
FRIGNANI, A., *Intese, Posizioni Dominanti e Imprese Pubbliche nelle Decisioni dell'Autorita' Garante della Concorrenza e del Mercato*, in *Diritto del Commercio Internazionale*, 1997, 549-588.
FRIGNANI, A., *L'injunction nella common law e l'inibitoria nel diritto italiano*, Milano, Giuffre', 1974.
FRIGNANI, A., PARDOLESI, R., PATRONI GRIFFI, A., UBERTAZZI, L.C., *Diritto antitrust italiano*, Zanichelli, Bologna, 1993.
FRIGNANI, A., *The Collective Dominant Position*, in AA.VV., *Antitrust between EC Law and National Law*, Giuffre', Milano, 2006.
GARCIA PEREZ, M., *Collective Dominance Under the Merger Regulation*, in *E.L.Review*, 1998, 475-480.
GARZANITI, L., LIBERATORE, F., *Recent Development in the European Commission's Practice in the Communications Sector: Part 3*, in *European Competition Law Review*, 2004, 286-298.
GAVIL, A.I., KOVACIC, W.E., BAKER, J.B., *Antitrust Law in Perspective: Cases, Concepts and Problem in Competition Policy*, Thomson West, St. Paul, 2002
GERADIN, D., HOFER, P., LOUIS, F., PETIT, N., WALKER, M., *The Concept of Dominance in EC Competition Law*, [Research Paper on the Modernization of Article 82 EC, available at www.coleurop.be], 2005.
GERADIN, D., PETIT, N., *Judicial Remedies under EC Competition Law: complex issues arising from the "modernization" process*, in *International Antitrust Law & Policy*, 2005, 393-439.

GERARD, D., *Merger control policy: how to give meaningful consideration to efficiency claims?*, in *World Competition*, 2003, 1367-1412.
GERBER, D.J., CASSINIS, P., *The "Modernization" of European Community Competition Law: Achieving Consistency in Enforcement: Part 2*, in *European Competition Law Review*, 2006, 51-57.
GIFFORD, D.J., KUDRLE, R.T., *Rhetoric and Reality in the Merger Standards of the United States, Canada and the European Union*, in *Antitrust Law Journal*, 2005, 423-469.
GILO, D., MOSHE, Y., SPIEGEL, Y., *Partial Cross Ownership and Tacit Collusion*, 2005, available at www.esi.ac.at
GINSBURG, D.H., *Comparing Antitrust Enforcement in the United States and Europe*, in *Journal Competition Law & Economics*, 2005, 427-439.
GIORDANO, M., *Abuso di posizione dominante collettiva e parallelismo oligopolistico: la Corte di Giustizia tenta la quadratura del cerchio?*, in *Foro Italiano*, 2001, IV, 327-333.
GIORDANO, M., *Comments on Gencor case*, in *Foro It.*, IV, 2000
GLATZ, A., UTZSCHNIEDER, Y., *France: Abuse of Dominant Position – Road Works*, in *European Competition Law Review*, 2006, 114-115.
GOEDDEKE, A.K., *Strategic profit sharing in a unionized oligopoly*, working paper 2006, available at www.ssrn.com.
GOETZ, C.J., MCCHESNEY, F.S., *Antitrust Law – Interpretation and Implementation*, 3rd Edition, 2006, Foundation Press, New York
GOLDFARB, C.B., *Telecommunications Act: Competition, Innovation, and Reform*, in *Practising Law Institute-PAT*, 2005
GOLDMAN, L., *Oligopoly Policy and the* Ethyl Corp. *case*, in *Oregon Law Review*, 1986, 73-121.
GONZALEZ DIAZ, F.E., *Recent Developments in EC Merger Control Law: the Gencor Judgment*, in *World Competition*, 1999, 3-28.
GONZALEZ DIAZ, F.E., *The Reform of European Merger Control:* Quid novi sub sole*?* in *World Competition*, 2004, 177-199.
GORRIE, A., *Competition between Branded and Private Label Goods. Do Competition Concerns Arise when a Customer is also a Competitors*, in *European Competition Law Review*, 2006, 217-227.
GOYDER, D.G., *EC Competition Law,* 3rd edition, Oxford University Press, Oxford, 2003.
GRANT, J., NEVEN, D.J., *The Attempted merger Between General Electric and Honeywell: a case Study of Transatlantic Conflict*, in *Journal of Competition Law & Economics*, 2005, 595-632.
GREANEY, T.L., *Not for Import: Why the EU Should not Adopt the American Efficiency Defence for Analysing Mergers and Joint Ventures*, in *Saint Louis University Law Journal*, Summer, 2000, 871-895.
GRILLO, M., *Collusion and Facilitating Practices: A New Perspective for Antitrust Analysis*, in *European Journal of Law and Economics*, 2002,151-169.

GRILLO, M., *The Economic Analysis of Collusion and the Detection of Collusive Behaviour: New Perspectives for Antitrust Policy and Law*, in AA.VV., in AA.VV., *Antitrust between EC LAw and National Law*, Giuffrè, Milano, 2000, pp. 27-42.

GRILLO, M., *The theory and Practice of Antitrust – A perspective in the history of economic ideas*, in *Quaderni dell'Istituto di Economia e Finanza - Università Cattolica del Sacro Cuore, Milano*, n. 66, March 2006, available at http://www.unicatt.it/Istituti/EconomiaFinanza/Quaderni/680906.pdf

GRIMMOND, J., *E.I. du Pont de Nemours v. FTC: Facilitating Practices under FTC Act Section 5*, in *Iowa L. Review*, 1985, 1045-1060.

GUAL, J., HELLWIG, M., PERROT, A., POLO, M., REY, P., SCHMIDT, K., STENBACKA, R., *An Economic Approach to Article 82*, in *Competition Policy International*, vol. 2, n. 2, 2006, 43-104.

GUERRERO, K., *New "convincing evidence" standard in European Merger Review,* in *University of Cincinnati Law Review*, 2003, 249-284.

GUERRIN, M., KYRIAZIS, G., *Cartels: proofs and procedural issues*, in *Fordham International Law Journal*, 1992/1993, 266-341.

GURREA, S.D., OWEN, B.M., *Coordinated Interaction and Clayton § 7 Enforcement*, in *George Mason Law Review*, 2003, 89-118.

HAN, J., *Antitrust and Sharing Information about Product Quality*, in *University of Chicago Law Review*, 2006, 995-1017.

HARRIS, B.C., VELJANOVSKI, C.G., *Critical Loss Analysis: Its Growing Use in Competition Law*, in *European Competition Law Review,* 2003, 213-218.

HAUPT, H., *Collective Dominance under Article 82 E.C. and the E.C. Merger control in the light of the Airtours Judgment*, in *European Competition Law Review,* 2002, 434-444.

HAY, G.A., *Horizontal agreements: concept and proofs*, in *Antitrust Bulletin,* 2006, 877-914.

HAY, G.A., *Oligopoly, Shared Monopoly and Antitrust Law*, in *Cornell L. Review*, 1982, 439-481.

HEYER, K., *Predicting the Competitive Effects of Mergers by Listening to Customers*, in *Antitrust Law Journal*, 2007, 87-125.

HOVENKAMP, H., *Federal Antitrust Policy – The Law of Competition and its Practice*, 3rd Edition, Thomson West, St. Paul, 2005

HUSER, H., DEPOORTERE, F., *Substantive enforcement standards in horizontal merger under the EC merger Regulation*, in *Antitrust,* Fall, 2002, 44-49.

IRVINE, H., *Does the South African Competition Act Accommodate the Concept of Collective Dominance?*, in *South African Mercantile Law Journal*, 2004, 448-457.

IVALDI, M., JULLIEN, B., REY, P., SEABRIGHT, P., TIROLE, J., *The Economics of Tacit Collusion*, Final Report for DG Competition, European Commission, 2003 (available at www.europa.eu)

JACOBS, M.S., *An Essay on the Normative Foundations of Antitrust Economics*, in *North Carolina Law Review*, 1995, 219-266.
JEBSEN, P., STEVENS, R., *Assumptions, Goals and Dominant Undertakings: the Regulation of Competition Under Article 86 of the European Union*, in *Antitrust Law Journal*, 1996, 443-516.
JENNY, F., *Collective dominance and the EC merger regulation*, in *International Antitrust Law & Policy*, 2001, 361-373.
JEPHCOTT, M., WITHERS, C., *Where to go for EC oligopoly control*, in *European Competition Law Review*, 2001, 295-303.
JOILET, R., *Monopolization and abuse of dominant position*, Martinus Hijhoff Publishers, The Hague, 1970
JONES, A., *Woodpulp: Concerted Practice and/or Conscious Parallelism*, in *European Competition Law Review*, 1993, 273-279.
JORGE PADILLA, A., *From* Fairness *to* Welfare*: Implications for the Assessment of Unilateral Conduct under EC Competition Law*, [Speech at the 12th Annual Competition Law and Policy Workshop – Robert Schuman centre, 8-9 June 2007, EUI, Florence, available at www.iue.it. In EHLERMANN and MARQUIS, eds, *European Competition Law Annual 2007: A reformed Approach to Article 82 EC*, forthcoming 2008]
JOSHUA, J.M., JORDAN, S., *Combinations, concerted practices and cartels: adopting the concept of conspiracy in European Community competition law*, in *Northwestern Journal of International Law & Business*, 2004, 647-681.
JOSHUA, J.M., *Proof in Contested EEC Competition Cases: a Comparison with the Rules of Evidence in Common Law*, in *European Law Review*, 1987, 315-353.
KARLSSON, J., *Clearance of Near-Duopoly*, in *European Competition Law Review*, 2006, 514-518.
KASEBERG, T., *Are Merger Control and Article 82 EC in the Same Market? The Assessment of Mergers Which Facilitate Exclusionary Conduct under EC Merger Control*, in *European Competition Law Review*, 2006, 409-423.
KATTAN, J., *Antitrust Analysis of technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, in *Antitrust Law Journal*, 1993
KATTAN, J., *Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment*, in *Antitrust Law Journal*, Fall 1994, 133-151.
KATZ, M.L., SHELANSKI, H.A., *Merger and Innovation*, in *Antitrust Law Journal*, 2007, 1-85.
KAUPER, T.E., *Merger Control in the United States and the European Union: some Observations*, in *Saint John's Law Review*, 2000, 305-359.
KAUPER, T.E., *Section Two of the Sherman Act: the Search for Standards*, in *Georgetown Law Journal*, 2005, 1623-1644.
KAUPER, T.E., *The 1982 Horizontal Merger guidelines: of Collusion, Efficiency and Failure*, in *Cal. L. Review*, 1983, 497-534.
KAYSEN, C., TURNER, D.F., *Antitrust policy: an economic and legal analysis*, Harvard University Press, Cambridge, 1959.

KILJANSKI, K., "*Pass-on" in Merger Efficiency Defence*, in *World Competition*, 2003, 651-684.
KINTNER, E.W., KRATZKE, W.P., *Federal Antitrust Law*, vol. VII, Anderson Publishing Co., Cincinnati, 1988.
KLOOSTERHUIS, E., *Joint Dominance and the Interaction between Firms*, in *European Competition Law Review*, 2001, 79-92.
KOCMUT, M., *Efficiency Considerations and Merger Control –Quo Vadis, Commission?*, in *European Competition Law Review*, 2006, 19-27.
KOKKORIS, I., *Do Merger Simulation and Critical Loss Analysis Differ under the SLC and Dominance Test?*, in *European Competition Law Review,* 2006, 249-260.
KOKKORIS, I., *Failing Firm Defence in the European Union. A Panacea for Mergers*, in *European Competition Law Review*, 2006, 494-509.
KOKKORIS, I., *The Development of the Concept of Collective Dominance in the ECMR. From its Inception to its Current Status*, in *World Competition*, 2007, 419-448.
KOKKORIS, I., *The reform of the European Control Merger Regulation in the Aftermath of the Airtours case – The Eagerly Expected debate: SLC* v. *Dominance test*, in *European Competition Law Review*, 2005,
KOLASKY, W., *Coordinated effects in merger review: from dead Frenchmen to beautiful minds and mavericks*, 2002 (available at www.usdoj.gov).
KOLASKY, W., DICK, A.R., *Celebrating Twenty Years of the Merger Guidelines: the Merger Guidelines and the Integration of Efficiencies into antitrust review of Horizontal Mergers*, in *Antitrust law Journal*, 2003, 207-237.
KOLASKY, W.J., *The Role of Efficiencies in Merger Review*, in *Antitrust*, Fall 2001, 82-87.
KOMNINOS, A.P., *Public and Private Antitrust Enforcement in Europe: Complement? Overlap?*, in *Competition Law Review*, 2006, 5-26.
KOPIT, W., *Inferring antitrust conspiracies from circumstantial evidence: How much is enough?*, in *Antitrust Bulletin*, 2007, 417-434.
KORAH, V., *Collaborative Joint Ventures fro Research and Development where Markets are Concentrated: the Competition Rules of the Common Market and the Invalidity of Contracts*, in *Fordham International Law Journal*, 1991/1992, 248-302.
KORAH, V., *Competition Law of Britain and the Common market*, 3rd Revisited Edition, Martinus Hijhoff Publishers, The Hague, 1982.
KORAH, V., *Gencor v. Commission: collective dominance*, in *European Competition Law Review*, 1999, 337-341.
KOVACIC, W.E., *Antitrust Policy and Horizontal Collusion in the 21st Century*, in *Loyola Consumer Law Reports*, 1997, 97-108.
KOVACIC, W.E., *Designing Antitrust Remedies for Dominant Firm Misconduct*, in *Connecticut Law Review*, 1999, 1285-1319.

KOVACIC, W.E., MARSHALL, R.C., MARX, L.M., SCHULENBERG, S.P., *Coordinated effects in Merger Review: quantifying the payoffs from collusion*, in *International Antitrust Law & Policy*, 2006, Chapter 13.
KUHN, K.U., *An economist's guide through the joint dominance jungle*, 2001, University of Michigan – John M. Olin Center for Law & Economics, working paper #02-014 (available at www.ssrn.com)
KUHN, K.U., CAFFARRA, C., *Joint Dominance: the CFI Judgement on Gencor/Lonrho*, in *European Competition Law Review*, 1999, 355-359.
KUHN, K.U., *Closing Pandora's box? Joint Dominance after the "Airtours" judgement*, 2002, (available at http://ssrn.com/abstract_id=349521)
KUHN, K.U., *Fighting collusion – Regulation of communication between firms*, in *Economic Policy*, 2001, 169-204.
KWOKA, J.B., WHITE, L.J., *The Antitrust Revolution- Economics, Competition and Policy*, Oxford University Press, New York, Oxford, 4th Edition, 2004
LA NOCE, M., FERRERO, M., *Controllo delle concentrazioni tra imprese e criteri di valutazione*, in *L'Industria*, 1996, 99-164.
LACROIX, S., MIKLIUS, W., MAK, J., *The New Standard of Unfair Competition: an Economic Analysis of the* du Pont v. FTC *Litigation*, in *University of Hawaii Law Review*, 1987, 457-486.
LAMBO, L., *Parallelismo consapevle e collusione nei mercati oligopolistici*, in *Foro Italiano*, 2001, IV, 386-394.
LANGENFELD, J., MORSH, J., *Refining the Matsushita Standard and the Role Economics Can Play*, in *Loyola University Chicago Law Journal*, 2007, 507-512.
LANGER, J., *The Airtours judgement: a welcome lecture on oligopolies, economics and joint dominance*, in *Columbia Journal of European Law*, 2003, 105-117.
LEARY, T.B., *An Inside Look at the Heinz case*, in *Antitrust*, Spring, 2002, 32-34.
LEDDY, M., *The 1992 US Horizontal Merger Guidelines and Some Comparisons with EC Enforcement Policy*, in *European Competition Law Review*, 1992, 15-20.
LEE, S.C. S., NIEBERDING, J., WEISKOPF, D.A., *Game Theory*, in *Antitrust*, Spring 2006, 98-100.
LEGAL, H., *Standards of proof and standards of judicial review in Competition law*, in *International Antitrust Law & Policy*, 2005, 107-116.
LEIGH, M., *Antitrust – High Standard of proof required to Show the Existence of Conspiracy*, in *American Journal of International Law*, 1986, 955-958.
LEVEQUE, F., SHELANSKI, H., (edited by), *Merger Remedies in American and European Union Competition Law*, Edward Elgar, Cheltenham, UK, 2003.
LEVEQUE, F., *UK Tractors, Paris Luxury Hotels and French Mobile Telephony Operators: Are All Oligopoly Information Exchanges Bad for Competition?*, in *World Competition*, 2007, 231-241.
LEVIN, N.G., *The Nomos and Narrative of Matsushita*, in *Fordham L. Review*, 2005, 1627-1710.

LEVINE, B.S., *Predatory Pricing Conspiracies after Matsushita Industrial Co. v. Zenith Radio Corp.: Can an Antitrust Plaintiff Survive the Supreme Court's Skepticism?*, in *International Lawyer*, 1988, 529-542.

LEVY, N., *European Merger Control Law: a guide to the Merger Regulation*, Matthew Bender, London, 2004.

LIBERTINI, M., *Il Mercato e la Concorrenza*, (Chapters LIII-LIV, LVI-LXI), in C. CASTRONOVO, S. MAZZAMUTO, *Manulae di Diritto Privato Europeo*, Vol. III – Impresa e Lavoro, Giuffrè, Milano, 2007.

LIBERTINI, M., *Nuove riflessioni in tema di tutela civile inibitoria e risarcimento del danno*, in *Rivista critica di Diritto Privato*, 1995, 385-416.

LIBERTINI, M., *Posizione Dominante Individuale e Posizione Dominante Collettiva*, in *Rivista del Diritto Commeciale*, I- 2003, 543-584.

LOEWENTHAL, P.J., *The Defence of "Objective Justification" in the Application of Article 82 EC*, in *World Competition*, 2005, 455-477.

LOPATKA, J.E., PAGE, W.H., *Economic Authority and the Limits of Expertise in Antirust Case*, in *Cornell Law Review*, 2005, 617-703.

LOWE, P., MAIER-RIGAUD, F., *Quo Vadis Antitrust Remedies*, Speech at Fordham, July 2007 (Forthcoming).

LUESCHER, C., *Efficiency Considerations in European Merger Control – Just Another Battle Grounds for the European Commission, Economists and Competition Lawyers*, in *European Competition Law Review*, 72-86.

MAJUMDAR, A., *Whither Dominance?* In *European Competition Law Review*, 2006, 161-165.

MALONE, F., SIDAK, J.G., *Should antitrust consent decrees regulate post-merger pricing?*, in *Journal Competition Law & Economics*, 2007, 471-490.

MALTBY, N., *French-west African Shipowners' Committees: Implications for Maritime Transport*, in *International Company and Commercial Law Review*, 1992, 434-435.

MANTOVANI, F., *Concorso e conflitto di norme nel diritto penale*, Bologna, Zanichelli, 1966

MARKOVITS, R.S., *A response to professor Marvovits*, in *Stan. L. Review*, 1976, 919-956.

MARKOVITS, R.S., *Oligopolistic Pricing Suit, the Sherman Act and Economic welfare*: Part II, *Injurious Oligopolistic Pricing Sequences: their Description, Interpretation and Legality under the Sherman Act*, in *Stanford Law Review*, 1974, 717-771.

MARKOVITS, R.S., *Oligopolistic Pricing Suit, the Sherman Act and Economic welfare*: Part I, *Oligopolistic Price and Oligopolistic Pricing: their Conventional and Operational definition*, in *Stanford Law Review*, 1974, 493-548.

MARKOVITS, R.S., *Oligopolistic Pricing Suit, the Sherman Act and Economic welfare*: Part III, *Proving (Illegal) Oligopolistic Pricing: A Description of the Necessary Evidence and a Critique of the Received Wisdom about its Character and Cost*, in *Stanford Law Review*, 1975, 307-331.

MARKOVITS, R.S., *Oligopolistic Pricing Suit, the Sherman Act and Economic welfare*: Part IV, *The Allocative Efficiency and Overall Desirability if Oligopolistic Pricing Suits*, in *Stanford Law Review*, 1975, 45-60.

MARKS, R.D., *Can Conspiracy Theory Solve the 'Oligopoly Problem'?*, in *Maryland Law Review*, 1986, 387-431.

MAS-COLELL, A., WHINSTON, M.D., GREEN, J.R., *Microeconomic Theory*, Oxford University Press, Oxford, 1995.

MASINA, G., *Osservazioni a Trib. di primo grado CEE, 10 marzo 1992, in tema di posizione dominante collettiva*, in *Giurisprudenza Commerciale*, 1993, II, 615-620.

MAUDHIUT, S., SOAMES, T., *Changes in EU Merger Control: Part 2*, in *European Competition Law Review*, 2005, 75-82.

MAUDHIUT, S., SOAMES, T., *Changes in EU Merger Control: Part 3*, in *European Competition Law Review,* 2005, 2005, 144-150.

MAUL, A., *Are the Major Labels Sandbagging Online Music? An Antitrust Analysis of Strategic Licensing Practices*, in *New York University Journal of Legislation and Public Policy*, 2003-2004, 365-392.

Mc GREGOR, L., *The future for the control of oligopolies following Compagnie Maritime Belge*, in *European Competition Law Review*, 2001, 434-442.

McARTHUR, J.B., PATERSON, T.W., *The effects of Monsanto, Matsushita and Sharp on the Plaintiff's Incentive to Sue*, in *Connecticut L. Review*, 1991, 333-354.

McDAVID, J.L., *Proposed reform of the EU Merger Regulation: a US perspective*, in *Antitrust*, Fall 2002, 52-55.

MECKFESSEL JUDSON, L., *Kodak v. Image Technical Services: The Taming of Matsushita and the Chicago School*, in *Wisconsin Law Review*, 1993, 1633-1672.

MEHTA, J., HARRIS, R.J., ZAKAR, R., *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit – Antitrust Law*, in *George Washington Law Review*, 2002, 287-327.

MEYER, D.L., *The Seventh Circuit's High Fructose Corn Syrup Decision – Sweet for the Plaintiffs, Sticky for Defendants*, in *Antitrust*, Fall 2002, 67-73.

MOLIN, F.B., *Burden of Proof for Summary Judgement in Antitrust Conspiracy Cases: Arizona v. Standard Oil Co. of California*, in *George Mason University Law Review*, 1990, 473-498.

MONTAGNANI, M.L., *Remedies to Exclusionary Innovation in the High-Tech Sector: Is there a Lesson from the Microsoft Saga?*, in *World Competition*, 2007, 623-643.

MONTI, G., *EC Competition Law*, Cambridge University Press, Cambridge, 2007.

MONTI, G., *The scope of Collective Dominance under Article 82 EC*, in *Common Market Law Review*, 2001, 131-157.

MOORE WILLIS, W., *European Commission – Concentrations – Nestle' Bid to Takeover Perrier: A Landmark Merger Restructuring on Duopoly Grounds*, in *Georgia International & Competition Law*, 1993, 141-154.
MOTTA, M., *Competition Policy – Theory and Practice*, Cambridge University Press, Cambridge, 2004.
MOTTA, M., *EC Merger Policy and the Airtours case*, in *European Competition Law Review*, 2000, 199-207.
MOTTA, M., POLO, M., VASCONCELOS, H., *Merger Remedies in the European Union: An overview*, in *Antitrust Bulletin*, 2007, 603-631.
MULLER, E., BOGE, U., *From the Market Dominance Test to the SLC Test: Are there any Reasons for a Change*, in *European Competition Law Review*, 2002, 495-498.
MUNARI, F., *Il Diritto comunitario antitrust nel commercio internazionale: il caso dei trasporti marittimi*, CEDAM, Padova, 1993.
MURIS, T.J., *Improving the Economic Foundations of Competition Policy*, in *George Mason Law Review*, 2003, 1-30.
MURIS, T.J., *The FTC and the Law of Monopolization*, in *Antitrust Law Journal*, 2000, 693-722.
MURPHY, C.P., *Money as a "Specific" Remedy*, in *Alabama Law Review*, 2006, 119-158.
MURPHY, C.P., *Rethinking Injunctions in Tort Law*, in *Oxford Journal of Legal Studies* 2007, 509-535
NAZERALI, J., *A Merger of Minds Split Opinion – Does the European Commission Address Current E.U. Merger Control*, in *International Company and Commercial Law Review*, 2002, 480-484.
NAZZINI, R., *The Wood Began to Move: an Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 cases*, in *E.L. Review*, 2006, 518-539.
NEAL, P., *Report of the White House Task Force on Antitrust policy*, printed in *Antitrust Law & Economic Review*, 1968-1969, pp. 26-27 and in *Trade Regulation Reports*, n. 415, 1969.
NELSON, P., BAKER, S., BISHOP, S., RIDYARD, D., *The European Union's New Horizontal Merger Guidelines*, in *Antitrust*, Summer, 2003, 57-62.
NELSON, P.B., *Patent Pools: an Economic Assessment of Current Law and Policy*, in *Rutgers Law Journal*, 2007, 539-572.
NESTEROWICZ, M.A., *The Mid-Atlantic view of the Antitrust Regulation of Ocean Shipping*, in *University of San Francisco Maritime Law Journal*, 2004-2005, 45-88.
NEUMANN, M., *Competition Policy – History, Theory and Practice*, Edward Elgar, Cheltenham, UK, 2001.
NIELS, G., *Collective Dominance: More than just Oligopolistic Interdependence*, in *European Competition Law Review*, 2001, 168-172.
NIKPAY, A., HOUWEN, F., *Tour de force or little local turbulence? A heretical view on the Airtours judgment European Competition Law Review,* 2003, 193-202.

NOLLET, L., *France: anti-competitive Agreements*, in *European Competition Law Review*, 2003, 115-116.
O'DONOGHUE, R., PADILLA, A.J., *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford and Portland, Oregon, 2006
O'KEEFFE, S., *Court Scathing of Commission's merger analysis*, in *EU Focus,* 2002, 4-6.
O'LAERY, B., *The Nature of the Agreement*, in *Fordham International Law Journal*, 1999, 1628-1667.
ODUDU, O., *Collective Dominance Clarified?*, in *Cambridge Law Journal*, 2004, 44-47.
ODUDU, O., *The Boundaries of EC – The Scope of Article 81*, Oxford University Press, Oxford, 2005.
ODUDU, O., *The Role of Specific Intent in Section 1 of the Sherman Act: a Market Power Test?*, in *World Competition*, 2002, 463-491.
OECD – Directorate for Financial and Enterprise Affairs Competition Committee, *Remedies and Sanctions in Abuse of Dominance Cases*, 15 May 2007, DAF/Comp(2006)19, (available at www.oecd.org).
OECD, *Mini-Roundtable on Oligopoly*, 1999, available at www.oecd.org
ONG, B., *Building Brick Barricades and Other Barriers to Entry: Abusing a Dominant Position by Refusing to Licence Intellectual Property Rights*, in *European Competition Law Review*, 2005, 215-224.
ORDOVER, J.A., *Coordinated effects in merger analysis: an introduction*, in *Columbia Business Law Review*, 2007, 411-435.
OSTI, C., *Antitrust e oligopolio*, Il Mulino, Bologna, 1995.
OSTI, C., *Diritto della Concorrenza*, Il Mulino, Bologna, 2007.OSTI, C., *Il Controllo giuridico dell'Oligopolio*, in *Giurisprudenza Commerciale*, 1993, I, 580-606.
OSTI, C., *Information Exchanges in the Oscure Light of Woodpulp*, in *European Competition Law Review*, 176-182.
OVERD, A., *After the Airtours Appeal*, in *European Competition Law Review* 2002, 375-377.
PAGE, W.H., *Communication and Concerted Action*, in *Loyola University Chicago Law Journal*, 2007, 405-460.
PAGES, W.H., Communication and Concerted Action, in Loyola U. Chi. L.J., 2007, p. 62.
PARDOLESI, R., *Chi ha paura dell'interpretazione economica del diritto antitrust?*, in *Mercato concorrenza regole*, 2007, pp. 119-128.
PARDOLESI, R., *Nota a Tribunale di Primo Grado 10 marzo 1992, Società Italiana Vetro e altri v. Comm*, in *Foro It.*, 1992, IV, 433-435.
PARKER, D., *A Screening Device for Tacit Collusion concern*, in *European Competition Law Review*, 2006, 424-433.
PATTERSON, M.R., *The Role of Power in the Rule of Reason*, in *Antitrust Law Journal*, 2000, 429-460

PAULIS, E., *The burden of proof in article 82 cases*, in *International Antitrust Law and Policy*, 2006, 469-476.
PERITZ, R.J.R., *Competition Policy in America: History, Rhetoric, Law*, Revised Edition, Oxford University Press, New York, 2000
PERITZ, R.J.R., *Doctrinal cross-dressing in derivative aftermarkets: Kodak, Xerox and the copycat game*, in *Antirust Bull*, 2006,
PERITZ, R.J.R., *Towards a Dynamic Antitrust Analysis of Strategic Market Behaviour*, in *New York Law School Review*, 2003, 101-118.
PETRICCIONE, R.M., LEONE, V.M., *Recent Developments Concerning Exchange of Information*, in *European Law Review*, 1988, 196-201.
PIRAINO, T.A., *A Proposed Antitrust Analysis of Telecommunications Joint Ventures*, in *Wisconsin L. Review*, 1997, 639-704.
PIRAINO, T.A., *Identifying Monopolists' Illegal Conducts Under the Sherman Act,* in *New York University Law Review*, 2000, 809-892.
PIRAINO, T.A., *Regulating Oligopoly Conduct under the Antitrust Laws,* in *Minnesota L. Review*, 2004, 9-70.
PITOFSKY, P., *Antitrust at the Turn of the Twenty-First Century: the Matter of Remedies*, in *Georgetown Law Review*, 2002, 169-181.
PITOFSKY, R., *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, in *University of Chicago law Review*, 2005, 209-228.
POLO, M., *A favore di un approccio economico nell'applicazione del diritto antitrust,* in *Mercato concorrenza regole*, 2007, pp. 129-136.
POLVERINO, F., *Assessment of Coordinated Effects in Merger Control: between Presumption and Analysis*, 2006, available at www.ssrn.com.
POPE, D., *Some Reflections on Italian Flat Glass case*, in *European Competition Law Review*, 1993, 172-175.
PORTER ELLIOT, G., *The* Gencor *judgment: collective dominance, remedied and extraterritoriality under the Merger Regulation*, in *European Law Review*, 1999, 638-652.
POSNER, R, *The Chicago School of Antitrust Analysis*, in *University of Pennsylvania Law Review*, 1979, 925-948.
POSNER, R., *Antitrust Law*, University of Chicago Press, 2nd Edition, 2001.
POSNER, R.A., *A Reply to Professor Markovits*, in *Stan. L. Review*, 1976, 903-914.
POSNER, R.A., *Antitrust Law,* 2nd Edition, University of Chicago Press, Chicago and London, 2001.
POSNER, R.A., *Oligopoly and the Antitrust Laws: a Suggested Approach*, in *Stanford Law Review*, 1969, 1562-1606.
POTER, R.H., *Collusion in Industrial Economics: a Comment*, in *Journal of Industry, Competition and Trade*, 2005, 231-234.
PREECE, S., *Compagnie Maritime Belge: missing the boat*, in *European Competition Law Review*, 2001, 388-393.
PRETE, L., NUCARA, A., *Standard of proof and scope of judicial review in EC Merger cases: everything clear after Tetra Laval*, in *European Competition Law Review*, 2005, 692-704.

RABASSA, V., CHRISTENSEN, P., *The Airtours Decision: Is there a New Commission Approach to Collective Dominance?* in *European Competition Law Review*, 2001, 227-237.

RABASSA, V., *Joint Venture as a Mechanism that may Favour Co-ordination: an Analysis of the Aluminium and Music Mergers*, in *European Competition Law Review*, 2004, 771-779.

RAFFAELLI, E.A., *European Union Competition Policy subsequent to the Airtours case*, in *International Antitrust Law & Policy*, 2002, 129-143.

RAFFAELLI, E.A., *Oligopolies and Antitrust Law*, in *Fordham, International Law Journal*, 1996, 915-935.

RAFFAELLI, E.A., OTTOLENGHI, D., *La Posizione Dominante Collettiva: Quali Prospettive dopo Airtours?*, in *Concorrenza e Mercato*, 2004-2005, 441-451

RAHL, J.A., *Conspiracy and the Anti-Trust Law*, in *Illinois Law Review*, 1950, 743-768.

REEVES, T., DODOO, N., *Standards of proof and standards of judicial review in European Commission Merger Law*, in *Fordham International Law Journal*, 2006, 1034-1067.

REICH, R., *Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in case of Breaches of EC Rights*, in *Common Market Law Review*, 2007, 705-742.

RENCKENS, A., *Welfare Standards, Substantive tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defence*, June, 2007, 149-179.

RENZI, L.M., *The GE/Honeywell Merger: Catalyst in the Transnational Conglomerate Merger Debate*, in *New England Law Review*, 2002, 109-145.

REYNOLDS, M.J., *Merger Control in the European Union: Draft Reforms to the EC Merger Regulation*, in *Antirust*, Spring 2003, 77-83.

RICAZAUX, P.P., DIENY, E., *Position dominant collective: vers une notion unifiée? (1er partie)*, in *Revue Lamy de la Concurrence*, n. 3, Mai/Juillet 2005, 125-131.

RICAZAUX, P.P., DIENY, E., *Position dominant collective: vers une notion unifiée? (2e partie)*, in *Revue Lamy de la Concurrence*, n. 4, Aout/October 2005, 117-122.

RICHARDSON, R., GORDON, C., *Collective Dominance: the Third Way?* in *European Competition Law Review*, 2001, 416-423.

RIDYARD, D., *Economic Analysis of Single Firms and oligopolistic Dominance under the European Merger Regulation*, 1994, 255-262.

RIDYARD, D., *Joint Dominance and the Oligopoly Blind Spot under the EC Merger Regulation*, in *European Competition Law Review*, 1992, 161-164.

RIESENKAMPFF, A., *The New EC Merger control test under Article 2 of the Merger Control Regulation*, in *Northwestern Journal of International Law and Business*, 2004, 715-727.

RILL, J.F., ROSENBLATT, H., *Coordinates Interaction and Collective Dominance: A Remarkable Journey Towards* Convergence, in *Liber Amicorum Peter Plompen*, Intersentia, 2005.

RIZZA, C., *La posizione dominante collettiva nella giurisprudenza comunitaria*, in *Concorrenza e Mercato*, 2000, 509-563.

ROBERT, G., HUDSON, C., *Past Co-ordination and Commission Notice on the Appraisal of Horizontal Mergers*, in *European Competition Law Review,* 2004, 163-168.

RODGER, B., MAC CULLOCH, A., *Competition Law and Policy in the European Community and United Kingdom*, 2nd Edition, Cavendish Publishing, London- Sydney, 2001.

RODGER, B.J., *Oligopolistic Market Failure: Collective Dominance versus Complex Monopolies*, in *European Competition Law Review,* 1995, 21-29.

RODGER, B.J., *The oligopoly problem and the concept of collective dominance: EC developments in the light of the U.S. trends in antitrust law and policy*, in *Columbia Journal of European Law*, 1996, 25-47.

ROSCH, J.T., *Has the Pendulum Swung too Far? Some Reflections on US and EC Jurisprudence*, 2007, available at www.ftc.gov.

ROSS, T.W., WINTER, R.A., *The Efficiency Defence in Merger Law: Economic Foundations and Recent Canadian Developments*, in *Antirust Law Journal*, 2005, 471-502.

ROUND, D., SMITH, R., *Competition Assessment and Strategic Behaviour*, in *European Competition Law Review*, 1998, 225-236.

RUBIN, J.L., *Patents, Antitrust, and Rivalry in Standard-Setting*, in *Rutgers Law Journal*, 2007, 509-538.

RUTTLEY, P., *International Shipping and EEC Competition Law*, in *European Competition Law Review,* 1991, 5-18.

RYAN, P.S., *European Competition Law, Joint Dominance, and the Wireless Oligopoly Problem*, in *Columbia Journal European Law*, 2005, 355-373.

SABBATINI, P., *Concentrazioni. Le tra sconfitte della Commissione in Tribunale*, in *Mercato concorrenza regole*, 2003

SABBATINI, P., *How to simulate the coordinated effect of a merger*, in *Temi e Problemi*, vol. 12, June 2006, available at www.agcm.it

SALOP, S.C., *Anticompetitive Overbuying by Power Buyers*, in *Antitrust Law Journal*, 2005, 670-705.

SARGENT, M.T.L., *Economics Upside-Down: Low Price Guarantee as Mechanisms for Facilitating collusion*, in *University of Pennsylvania Law Review,* 1993, 2055-2118.

SCARCIA, G., *Le concentrazioni nei mercati oligopolistici nell'ottica del nuovo Regolamento: un epitaffio per la posizione dominante collettiva?*, in *Rivista del Diritto commerciale,* 2004, 1079-1108.

SCHINKEL, M.P., *Effective Cartel Enforcement in Europe*, in *World Competition*, 2007, 539-572.

SCHMIDT, J., *The new ECMR: "Significant Impediment" or "Significant Improvement"? Common Market Law Review*, 2004, 1555-1582.
SCHMIDT, J.M., *Spotting the Elephant in Parallel Mergers: First past the Post, or Combined Assessment?*, in *European Competition Law Review*, 2003, 183-192.
SCHODERMEIER, M., *Collective Dominance Revisited: an Analysis of the EC Commission's New Concepts of Oligopoly Control*, in *European Competition Law Review*, 1990, 28-34.
SCHWARTZ, L.B., *New Approaches to the Control of Oligopoly*, in *University Pennsylvania Law Review*, 1960, 31-50.
SCHWARTZ, L.B., *The New Merger Guidelines: Guide to Governmental Discretion and private Counseling or Propaganda for revision of the Antitrust Laws*, in *California Law Review*, 1983
SCHWARZE, J., *Judicial Review of European Administrative Procedure*, in *Public Law*, 2004, 146-166.
SCOTT, A., *"Winter talk by the Fireside?" Tacit Collusion and the Airtours Case*, in *European Competition Law Review*, 2003, 298-314.
SHAW, J., *Collective Dominance or Concerted Practices*, in *European Law Review*, 1989, 96-99.
SHER, B., *Abuse of Dominance – Effects and Inherent Effects under article 82: Michelin 2 and van Den Bergh Foods*, in *Competition Law Insight*, 2004, 12(7).
SHERER, F.M., ROSS, D., *Industrial Market Structure and Economic Performance*, 3rd Edition, Houghton Mifflin Company, Boston, 1990.
SHERMAN, R., *The Matsushita case: Tightened Concepts of Conspiracy and Predation?*, in *Cardozo Law Review*, 1987, 1121-1138.
SHIBIK, M., *A Game Theorist Looks at the Antitrust Laws and the Automibile Industry*, in *Stanford law Review*, 1956, 594-630.
SHORES, D.F., *Narrowing the Sherman Act through an Extension of Colgate: the Matsushita case*, in *Tennessee Law Review*, 1988, 261-315.
SHULMAN, D.R., *Proof of Conspiracy in Antitrust Cases & the Oligopoly Problem*, in *Sedona Conference Journal*, 2003, 1-19.
SHULMAN, D.R., *Williamson Oil v. Philip Morris: Whatever Happened to Jury Trials?*, in *Sedona Conference Journal*, Fall 2004, 81-91.
SIMONS, J.J., *Fixing Prices with your Victim: Efficiency and Collusion with Competitor-Based Formula Pricing Clauses*, in *Hofstra Law Review*, 1989, 599-639.
SINCLAIR, D., *Abuse of Dominance at a Crossroads – Potential Effects, Object and Appreciability Under Article 82 EC*, in *European Competition Law Review*, 2004, 491-501.
SKOCILICH, J., *Narrower is better- The Third Circuit's latest word on Conscious Parallelism and the problem of Plus Factors: In Re Flat Glass*, in *Villanova Law Review*, 2005, 1309-1330.
SOAMES, T., *An Analysis of the Principles of Concerted Practices and Collective Dominance: a Distinction without a Difference*, in *European Competition Law Review*, 1996, 24-39.

SOAMES, T., *Towards a "smart" article 82* – Qui audit adipiscitur, in *International Antitrust Law & Policy*, 2005, 457-493.
SPIEGEL, M.I., LIAO, W.M., *Avoiding Summary Judgement after Matsushita and Monasanto*, in *Antitrust*, Spring 1991, 12-16.
SPROUL, G., *Articles 85 and 86: First Application to Maritime Transport*, in *European Competition Law Review*, 1992, 215-221.
STADLER, C., *"Conflicting Mergers": Combined Assessment or Priority Rule?*, in *European Competition Law Review*, 2003, 321-330.
STAIGER, R.W., WOLAK, F.A., *Collusive Pricing with Capacity Constrains in the Presence of Demand Uncertainty*, in *Rand Journal of Economics*, 1992, pp. 203-219.
STEEN, F., SØRGARD, L., *Semicollusion in the Norwegian Cement Market*, in *European Economic Review*, 1999, 1775-1796.
STEINBERG, H., *Oligopolistic Interdependence: the FTC adopts a "No Agreement" Standard to Attack Parallel Non-Collusive Practices*, in *Brooklyn Law Review*, 1984, 255-299.
STELLA, F., *Posizione dominante collettiva e concentrazioni: il caso Rhône-Poulenc / Snia*, in *Diritto del Commercio Internazionale*, 1994, 165-169.
STENBORG, M., *Forest for the Trees: Economics of Joint Dominance*, in *European Journal of Law & Economics*, 2004, 365-385.
STEUER, R.M., *Standards of Proof and Judicial Review: a U.S. Perspective*, in *International Antitrust Law & Policy*, 2005, 143-156.
STEVENS, S., *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and its Impact on Transatlantic Cooperation in Antitrust*, in *Syracuse Journal of International Law and Commerce*, 2002, 263-302.
STIGLER, G.J., *A Theory of Oligopoly*, in *Journal of Political Economy*, 1964, 44-61.
STIGLER, G.J., *Law or Economics?*, in *Journal of Law and Economics*, 1992, 455-468.
STOCK, E.J., *Explaining the Differing U.S. and EU Positions in the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, in *University of Pennsylvania Journal of International Economic Law*, 1999, 825-909.
STOTYKA, Y., *Joint Dominance: Mobile Telecommunications in the Ukraine*, in *World Competition*, 2007, 365-391.
STROUX, S., *Collective Dominance under the Merger Regulation: a Serious Evidentiary Reprimand for the Commission*, in *European Law Review*, 2002, 736-746.
STROUX, S., *Is EC Oligopoly Control Outgrowing Its Infancy?* in *World Competition*, 2000, 3-50.
STROUX, S., *US and EC Oligopoly Control*, Kluwer Law International, The Hague, 2004.
STUCKE, M.E., *Behavioural Economists at the Gate: Antitrust in the twenty-first Century*, in *Loyola University Chicago Law Journal*, 2007, 513-591.

STUCKE, M.E., *Evaluating the Risks of Increased Price Transparency*, in *Antitrust*, Spring, 2005, 81-86.
SULLIVAN, E.T., *The Antitrust Division as a Regulatory Agency: an Enforcement Policy in Transition*, in *Washington University Law Quarterly*, 1986, 997-1055.
SULLIVAN, E.T., *The Jurisprudence if the Antitrust Divestiture: the Path less Travelled*, in *Minnesota Law Review*, 2002, 565-614.
SULLIVAN, L.A., GRIMES, W.A., *The Law of Antitrust: an Integrated Handbook*, 2nd Edition, 2006, Thomson West, St. Paul.
SULLIVAN, T., *Antitrust remedies in the US and EU: advancing a standard of proportionality*, in *Antitrust Bulletin*, 2003,
TAJANA, A., *EC Merger Control: Music Publishing*, in *European Competition Law Review*, *European Competition Law Review*, 194-195.
TEMPLE LANG, J., *Commitment Decisions under Regulation 1/2003: Legal Aspects of a New Kind of Competition Decision*, in *European Competition Law Review*, 2003, 347-356.
TEMPLE LANG, J., *EEC Competition Actions in Member States' Courts – Claims for Damages, Declarations and Injunctions for Beach of Community Antitrust Law*, in *Fordham International Law Journal*, 1984, 389-466.
TEMPLE LANG, J., *European Community Antitrust Law: Innovation Markets and High Technology Industries*, in *Fordham International Law Journal*, 1997, 717-818.
TEMPLE LANG, J., *National Measures Restricting Competition and National Authorities Under Article 10 EC*, in *European Law Review*, 2004, 397-406.
TEMPLE LANG, J., O'DONOGHUE, R., *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC*, in *Fordham International Law Journal*, 2002, 83-162.
TEMPLE LANG, J., *Oligopolies and Joint Dominance in Community Antitrust Law*, in *International Antitrust Law & Policy*, 2001, 269-359.
TEMPLE LANG, J., *Two Important Merger Regulation Judgements: the Implications of Schneider-Legrand and Tetra Laval-Sidel*, in *European Law Review*, 2003, 259-272.
TESAURO, C., *Crisi dell'impresa e posizione dominante collettiva nella disciplina delle concentrazioni*, in *Foro italiano,* IV, 1999, 184.
THOMAS, T.A., *The Prophylactic Remedy: Normative Principle and Definitional Parameters of Broad Injunctive Relief*, in *Buffalo law Review*, 2004, 301-385
THOUVENIN, J-M., *Concurrence (Concentrations): après l'arret Airtours trios nouveaux avertissements à la Commission*, in *Revue du Marchè Commun et de l'Union europèen*, 2003, 12-20.
TORINO, R., *Le intese restrittive della libertà di concorrenza: verso un superamento della distinzione tra accordi e pratiche concordate?*, in *Riv. Dir. Comm.*, II, 1997, 280-294.
TREXLER, J.T., *Conglomerating Antitrust Policy by Comparative Example: a Conceptual Analysis of Merger Regulation in the United States, Japan, and the*

European Union, in *International Law & Managements Review*, 2005, 111-153.

TRIMARCHI, P., *Il problema giuridico delle pratiche concordate tra oligopolisti*, in *Rivista delle Societa'*, 1969, 1-25.

TURNBULL, S., HOLMES, S., *Remedied in Merger Cases: Recent Developments*, in *European Competition Law Review*, 2001, 499-511.

TURNER, D.F., *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, in *Harvard Law Review*, 1962, 655-706.

TURNER, D.F., *The Scope of Antitrust and Other Economic Regulatory Policies*, in *Harvard Law Review,* 1969, 1207-1244.

TURNER, J.M., *Mega Merger, Mega Problems: a Critique of the European Community's Commission on Competition's review of the AOL/Time Warner Merger*, in *American University International Law Review*, 2001, 131-188.

TYAGI, R.K., *On the Relationship between Product Substitutability and Tacit Collusion*, 1999, 293-298.

VAN DE WALLE DE GHELCKE, B.; VAN GERVEN, G., *Competition Law of the European Community,* Matthew Bender & Company, Newark, 2006.

VAN DER ESCH, B., *The Principle of Interpretation applied by the Court of Justice of the European Communities and their relevance for the Scope of the EEC Competition*, in *Fordham International Law Journal*, 1991/1992, 366-397.

VAN KERCKHOVE, M., *The EU Remedies Study: Toward Further Transatlantic Convergence in Merger Remedies?,* in *Antitrust*, Fall 2006, 66-73.

VARIAN, H.R., *Microeconomic Analysis*, 3rd Edition, W.W. Norton & Company, New York, 1992.

VASQUES, L., *Nota a CG 27 aprile 1994 -Comune di Almelo-*, in *Foro Italiano*, 1995, IV, 185.

VELJANOVSKI, C., *EC Merger policy after* GE/Honeywell *and* Airtours, in *Antitrust Bulletin*, 2004

VENIT, J.S., *Article 82: the Last Frontier – Fighting with Fire*, Fordham *International Law Journal*, 2005, 1157-1178.

VENIT, J.S., *Two steps forward and no steps back: economic analysis and oligopolistic dominance after* Kali & Salz, in *Common Market Law Review,* 1998, 1101-1134.

VESTERDORF, B., *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, in *European Competition Journal*, Mar. 2005, 3-33.

VICKERS, J., *Competition Economics and Policy*, in *European Competition Law Review*, 2003, 95-102.

VICKERS, J., *Merger Policy in Europe: Retrospect and Prospect*, in *European Competition Law Review,* 2004, 455-463.

VITA, M.G., *Fifteen Years after Ethyl: the Past and Future of Facilitating Practices*, in *Antitrust Law Journal*, 2001, 991-1005.

VIVES, X., *Oligopoly Pricing: Old Ideas and New Tools*, Cambridge MA, MIT Press, 2000

VOIGT, S., SCHMIDT, A., *Making European Merger Policy More Predictable*, Springer, Dordrecht, The Netherlands, 2005.
VOLCKER, S.B., *Mind the Gap: Unilateral effects analysis arrives in EC Merger control,* in *European Competition Law Review*, 2004, 395-409.
VOLCKER, S.B., O'DALY, C., *The Court of First Instance's Impala Judgement: a Judicial Counter-Reformation in EU Merger Control*, in *European Competition Law Review*, 2006, 589-596.
VOLCKER, S.B., *Rough Justice? An Analysis of the European Commission's New Fining Guidelines*, in *Common Market Law Review*, 2007,1285-1320.
VON GRAEVENITZ, G., HARBORD, D., *Market definition in oligopolistic and vertically related markets: some anomalies*, in *European Competition Law Review*, 2000, 151-158.
VON HINTEN REED, N., CAMESASCA, P.D., *European Merger Control: Tougher, Softer, Clearer*, in *European Competition Law Review*, 2003, 458-462.
WAELBROECK, D., COLOMO, P.I., *Comments on the Piau case*, in *Common Market Law Review*, 2006, 1743-1756.
WALKER, M., AZEVEDO, J.P., *Dominance: Meaning and Measurement*, in *European Competition Law Review*, 2002, 363-367.
WEISS, L.W., *The Structure-Conduct-Performance Paradigm and Antitrust*, in *University of Pennsylvania Law Review*, 1979, 1104-1140.
WEITBRECHT, A., *EU Merger Control in 2001 – The Year of Controversy*, in *European Competition Law Review*, 2002, 407-412.
WEITBRECHT, A., *EU Merger Control in 2005 – An Overview*, in *European Competition Law Review*, 2006, 43-50.
WEITBRECHT, A., *EU Merger Control in 2006 – The Year in Review*, in *European Competition Law Review*, 2007, 125-133.
WENT, D., *The acceptability of remedies under the EC Merger Regulation: Structural versus Behavioural*, in *European Competition Law Review*, 2006, 455-475.
WERDEN, G.J., *Economic Evidence on the Existence of Collusion: Reconciling Antitrust law with Oligopoly Theory*, in *Antitrust Law Journal*, 2004, 719-800.
WERDEN, G.J., *Identifying Exclusionary Conduct under Section 2: the "no Economic Sense" Test*, in *Antitrust Law Journal*, 2006, 413-433.
WESSELY, T., *EU Merger control at a turning point – The Court of First Instance's Schneider and Tetra Judgments*, in *Zwer*, 2003, 317-350.
WHINSTON, M.D., *Lectures on Antitrust Economics – Horizontal Mergers*, 2003, available at www.csio.econ.northwestern.edu.
WHINSTON, M.*D., Lectures on Antitrust Economics*, Cambridge MA, MIT Press, 2006.
WHISH, R., *Competition Law*, 5th Edition, LexisNexis, London, 2003.
WHISH, R., *Recent developments in Community competition law 1998/99*, in *European Law Review*, 2000, 219-246.

WHISH, R., *Substantial Lessening of Competition/Creation or Strengthening of Competition*, speech at *International Competition Network – First Annual Conference*, Napoli, 2002, Analytical Framework of Merger Review (available at www.agcm.it)

WILLIAMSON, O.E., *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, in *Harvard Law Review*, 1972, 1512-1531.

WILS, W.P.J., *Optimal Antitrust Fines: Theory and Practice*, in *World Competition*, 2006, 183-208.

WILS, W.P.J., *The European Commission's 2006 Guidelines on Antitrust fines: A Legal and Economic Analysis*, in *World Competition,* 2007,197-229.

WINCKLER, A., HANSEN, M., *Collective dominance under the EC Merger Control Regulation*, in *Common Market Law Review,* 1993, 787-828.

WIND, E., *Remedies and Sanctions in Article 82 of the EC Treaty*, in *European Competition Law Review*, 2005, 659-668.

WOOD, D.P., *The U.S. Antitrust Laws in a Global Context*, in *Columbia Business Law Review*, 2003, 265-281.

WRIGHT, K., *Perfect Symmetry? Impala v. Commission and Standard of Proof in Mergers*, in *E.L. Review*, 2007, 408-418.

YSEWYN, J., CAFFARRA, C., *Two's Company, three's a Crowd: the Future of Collective Dominance after the Kali & Salz Judgements*, in *European Competition Law Review*, 1998, 468-472.

YSEWYN, J., *The New World of the Merger Task Force*, in *European Competition Law Review* 2002, 207-209.

ZHU, S., Converge? Diverge? *A Comparison of Horizontal Merger Laws in the United States and European Union*, in *World Competition*, 2006, 635-651.