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WHY THE EU MERGER REGULATION SHOULD NOT ENJOY A MONOPOLY OVER TACIT COLLUSION

1. INTRODUCTION

In a situation of tacit collusion firms rationally coordinate their commercial policies in such manner that their conduct closely resembles a cartel.[261] Yet, their decision to mimic the others' commercial policy is not the result of any agreement whatsoever. It stems from a range of market-specific features which the market players must accept as a given (oligopolistic market concentration, transparency, barriers to entry, etc.).[262] In European Union ("EU") law parlance, firms involved in a situation of tacit collusion are said to enjoy a "*collective dominant position*".

Over the past two decades, the European Commission ("the Commission") has adopted a stance whereby the implementation of *ex ante*, structural merger rules is deemed more appropriate when seeking to challenge collective dominant positions than *ex post*, behavioural instruments (e.g. on the basis of Article 102 of the Treaty on the Functioning of the EU ("TFEU"). As a result, the EU merger regulation[263] ("EUMR") is the preferred, if not sole, legal tool deployed by the Commission in order to address risks of tacit collusion.[264] Since the entry into force of the EUMR, the number of Commission decisions in which the future emergence of risks of collective dominance was examined lies in the region of 130.[265] In stark

261 The classic model of tacit collusion draws on the idea that in a transparent market where oligopolists compete for market share, each operator contemplating a price cut anticipates that its rivals will immediately follow suit, as a result of which there is no point in decreasing prices in the first place. Rather, operators can follow each other's pricing strategies and, through so-called "*tit for tat*" interactions, progressively increase prices. Any deviation from the common price strategy triggers immediate punishment from the other oligopolists. As a result each and every operator cooperates. This theory can be traced back to the early works of the famous economist CHAMBERLIN in the late 1920s. See E. H. Chamberlin, "Duopoly: Value Where Sellers Are Few", (1929) 44 *Quarterly Journal of Economics*, 63.

262 Yet, a number of authors are challenging the view that tacit collusion may originate simply from the market's structural features. Those authors tend to consider that at a minimum, oligopolists must have recourse to so-called "facilitating practices" to ensure the stability of the tacitly collusive equilibrium. See, for instance, T. Penard, "Collusion et comportements dynamiques en oligopole: une synthèse", mimeo.

263 See Council Regulation (EC) No. 139/2004 of 20 January on the Control of Concentrations Between Undertakings, (2004) OJ L24/1.

264 See in this regard N. Petit, *Oligopoles, collusion tacite et droit communautaire de la concurrence*, Bruylant-LGDJ, Brussels, 2007 and B. Hawk and G. Motta, "Oligopolies and Collective Dominance: A Solution in Search of a Problem", in E. Raffaelli ed., *Antitrust between EC Law and National Law*, Bruylant, 2008, at p. 65.

265 For an exhaustive list of the 127 decisions adopted under the EUMR between 21 September 1990 and 6 June 2006, see N. Petit, id. For recent decisions adopted since June 2006, see, in particular, Case No COMP/M.4601 – *Karstadtquelle/Mytravel*, 04/05/2007; Case No COMP/M.4381 – *JCI/Fiamm*, 10/05/2007; Case No COMP/M.4600 – *TUI/First Choice*, 04/06/2007;

contrast, and despite pronouncements of the General Court ("GC", or the Court) that Article 102 TFEU may apply to tacit collusion, the Commission has not yet taken a single decision enforcing this particular provision against tacitly collusive oligopolies.[266] Similarly, the silence of the 2009 Guidance Communication on Enforcement Priorities[267] on this issue implicitly confirms the Commission's reluctance to rely on abuse of dominance rules to address tacit collusion.[268]

Overall, within the realm of EU competition law, the EUMR can thus be said to enjoy a *de facto* jurisdictional monopoly over collective dominance issues. The present article challenges the conventional view that tacit collusion should be exclusively addressed through the use of the EUMR.[269] To this end, it examines and seeks to set straight five possible misconceptions on which such view seems to be based.

Case No COMP/M.4523 – *Travelport/Worldspan*, 21/08/2007; Case No COMP/M.4781 – *Norddeutsche Affinerie/Cumerio*, 23/01/2008; Case No COMP/M.4854 – *TomTom/Tele Atlas*, 14/05/2008; Case No COMP/M.4513 – *Arjowiggins/ M-real Zanders Reflex*, 04/06/2008; Case No COMP/M.4942 – *Nokia/Navteq*, 02/07/2008; Case No COMP/M.5020 – *Lesaffre / GBI UK*, 11/07/2008; Case No COMP/M.4980 – *ABF/GBI Business*, 23/09/2008; Case No COMP/M.5141 – *KLM/ Martinair*, 17/12/2008; Case No COMP/M.5406 – *IPIC/MAN Ferrostaal AG*, 13/03/2009.

266 See judgment of the GC (formerly CFI), Case T-193/02, 6/01/2005, *Piau v. Commission*, [2005] ECR II-209. There is, however, a "commitments" decision which identified concerns of abuse of collective dominance. See Commission Decision of 26/11/2008 COMP/39.388 *German Electricity Wholesale Market* and COMP/39.389 *German Electricity Balancing Market*. It ought to be noted here that since the judgments of the ECJ in *Dyestuffs* (ECJ, joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission*, [1988] ECR-5193) and *Woodpulp* (ECJ, Case 48/69, *Imperial Chemical Industries Limited v. Commission* [1972] ECR 619) the possibility of applying Article 101 TFEU to oligopolistic tacit collusion has been removed.

267 See Guidance Communication on the Commission's enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, C(2009) 864 final.

268 See L. Vitzilaiou and C. Lambadarios, "The Slippery Slope of Addressing Collective Dominance under Article 82 EC", *GCP: The Antitrust Chronicle*, October 2009(1), p.10.

269 Many Commission officials, practitioners and scholars support this view: See, for instance, G. Drauz, "Collective Dominance/ Oligopoly Behaviour under Articles 81/82 and the EC Merger Regulation" in B. Hawk (Ed.), (2002) *Fordham Corporate Law Institute*, 380; J. F. Briones Alonso, "Economic Assessment of Oligopolies under the Community EC Merger Regulation", (1996) 3 *European Competition Law Review*, 118, p.119; P. Christensen and V. Rabassa, "The Airtours Decision: Is there a New Commission Approach to Collective Dominance?", (2001) 6 *European Competition Law Review*, 227. Many legal scholars are also supportive of this view. See, for instance, S. Stroux, *US and EC Oligopoly Control*, Kluwer Law International, The Hague, 2004, pp. 3 and 248; V. Korah, "Gencor v. Commission: Collective Dominance", (1999) 6 *European Competition Law Review*, 337, p. 341; R. Whish and B. Sufrin, "Oligopolistic Markets and EC Competition Law", (1992) 12 *Yearbook of European Law*, 59, p. 82.

2. THE EUMR IS MORE APPROPRIATE THAN OTHER LEGAL INSTRUMENTS WHICH ADDRESS COLLECTIVE DOMINANCE CONCERNS THROUGH A PUNITIVE APPROACH

A crucial explanatory factor underlying the exclusive jurisdiction of the EUMR over tacitly collusive oligopolies resides in the premise that the ex post, corrective instruments enshrined in Articles 101 and 102 of the TFEU cannot adequately regulate this area of concern. This is allegedly due to the perceived fact that addressing tacit collusion through the enforcement of Articles 101 and 102 TFEU would entail punishing in an unwarranted manner what constitutes a purely rational course of conduct.[270] Espousing this conventional belief, the Commission has refrained from applying Articles 101 and 102 TFEU on oligopolistic markets and has focused its enforcement resources on preventing the emergence of pro-collusive oligopolies through the careful monitoring of industry consolidation under the EUMR.[271]

On close examination, the view that Articles 101 and 102 TFEU should not be applied to purely rational conduct is, however, puzzling. To the best of our knowledge, the very rationale of Articles 101 and 102 TFEU is to eliminate market failures arising from the rational behaviour of market players. Firms engage in anticompetitive conduct, abusive tying or refusals to deal, for example, because they view such courses of action as rational, profit-maximizing strategies. Moreover, oligopolists that tacitly collude deliberately choose to follow the others' commercial conduct.[272]

Of course, one may legitimately question whether oligopolists should be sanctioned, pursuant to Articles 101 and 102 TFEU, for what constitutes mere rational adaptation to the others' conduct.[273] Whilst, from a common sense

270 See for expressions of this concern B. Carsberg and M. Howe, "Dealing with Abuse of Market Power", in B. Hawk (Ed.), (1993) *Fordham Corporate Law Institute*, 177; R. Whish and B. Sufrin, "Oligopolistic Markets and EC Competition Law", id, p. 75; B. J. Rodger, "Oligopolistic Market Failure: Collective Dominance versus Complex Monopoly", (1995) 16 *European Competition Law Review*, 21, pp. 26 and 29; V. Korah, "Gencor v. Commission: Collective Dominance", id; P. Muñiz, "Increasing Powers and Increasing Uncertainty: Collective Dominance and Pricing Abuses", (2000) 25 *European Law Review*, 645, p. 650; G. Monti, "The Scope of Collective Dominance Under Article 82 EC", (2001) 38(1) *Common Market Law Review*, 131, p. 145 (alluding to a "*tax on market structure*"); B. Hawk and G. Motta, supra note 264, p. 65.

271 In this respect a former DG COMP official coined the maxim that it is "*always better to put care before cure*"- see G. Drauz, "Collective Dominance/Oligopoly Behaviour under Articles 81/82 and the EC Merger Regulation", id. See also, S. Stroux, *US and EC Oligopoly Control*, supra note 269, pp. 3 and 248.

272 See R. Posner, "Oligopoly and the Antitrust Laws: A Suggested Approach", (1969) 21 *Stanford Law Review*, 1562, p. 1575.

273 Some commentators argue that in an oligopoly situation, the very structure of the market itself "requires" undertakings to behave as though they were part of a cartel.

perspective, such question is probably to be answered in the negative, this argument does not eschew the overall applicability of these provisions. In this context, one may for instance think of applying Articles 101 and 102 TFEU on a *no fault* basis, through the recognition that absent a wilful intention to restrict competition, oligopolists should enjoy immunity from fines.[274] In order to correct the market failure, the Commission would nonetheless remain entitled to impose remedies (behavioural or structural), pursuant to Article 7 of Regulation 1/2003, or negotiate commitments pursuant to Article 9 of Regulation 1/2003.[275] The Commission could, for example, draw inspiration from the well-known "*State compulsion doctrine*" (known in the US under the expression "*Act of State defence*") and devise a similar, yet distinct, "*oligopolistic compulsion doctrine*".[276] Since the oligopolists' conduct is dictated by the market's intrinsic structure (and other endogenous features, e.g. transparency) it is submitted that they should not be subject to penalties.[277]

3. THE EUMR ADEQUATELY PREVENTS THE EMERGENCE OF COLLECTIVE DOMINANCE

A second, possible reason in support of the EUMR's jurisdictional monopoly over situations of collective dominance lies in the belief that the Regulation's scope of application is sufficiently extensive as to prevent markets from blossoming into tacitly collusive outcomes.

In our opinion, any such view clearly accords the EUMR too much credit as far as its ability to prevent the appearance of tacitly collusive oligopolies is concerned. The jurisdictional scope of the Regulation, as defined in Articles 1 and 3, only encompasses *external growth* strategies in the form of mergers, acquisitions of control

274 The legal instrument used in the context of setting fines would be the Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006) OJ C 210/2. At para. 29, the Guidelines mention negligence as a possible mitigating circumstance for the purpose of setting fines. In addition, the Commission occasionally reduces the amount of the fine when it is faced with companies that have not intentionally infringed the competition rules. See Van Bael & Bellis, *Competition Law of the European Community*, 4th Ed., Kluwer Law International, The Hague, 2005. p. 1116.

275 See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) L1/1.

276 See ECJ, Cases C-350/95 P and C-379/95 P, *Commission and French Republic v. Tiercé Ladbroke Racing Ltd.*, [1997] ECR I-6265, para. 33.

277 Yet, unlike in the State compulsion doctrine, only the penalty should be rendered inapplicable. The applicability of the competition rules should, however, be maintained. It ought to be noted here that the applicability of the State compulsion doctrine does not preclude, in practice, the risk that the tacitly colluding oligopolists could be found liable for damages in the context of follow-on actions before ordinary courts. However, they may be able to benefit from the recognition of a form of "force majeure" under tort rules.

and joint ventures. In so doing, the EUMR inevitably fails to apprehend a number of market developments which significantly contribute to market concentration and, in turn, may create or strengthen tacitly collusive equilibriums. This is firstly the case with regard to firms' internal (or organic) growth strategies, which may lead to the creation, or the strengthening of anticompetitive oligopolies.[278] Put simply, the economic theory behind this is as follows: in the competitive process less efficient operators yield business to more efficient undertakings. In order to serve those customers which they manage to wrest from the former, the latter expand their scale of production through internal investments (internal growth). In the mid term, less efficient operators are forced from the market. The market eventually reaches a state of maturity with the appearance of a small number of large, entrenched firms. Those oligopolists subsequently find themselves in a position where they can cease competing, and adopt profitable, passive commercial strategies. In practice, many sectors, such as retail distribution, tyres, or professional software have experienced a significant level of oligopolistic concentration through internal growth. In *MCI/WorldCom/Sprint*, the Commission acknowledged this issue by noting that a collective dominant position may have been created prior to the notified merger following the exit of a number of players from the market.[279]

This is secondly the case with regard to a myriad of additional – often overlooked – market practices which may turn a competitive oligopoly into a tacitly collusive one.[280] For example, contractual "*meet and release*" clauses (also known as "*English*" clauses),[281] "*Most Favoured Customer*" clauses,[282] minority shareholdings and interlocking directorates,[283] basic point pricing systems,[284] etc. may also significantly contribute to the emergence of collective dominant positions on the market. The same holds true with regard to a number of other "facilitating" measures adopted

278 See J. Steindl, *Maturity and Stagnation in American Capitalism*, Monthly Review Press, New York, 1976.

279 See Case No COMP/M.1741 – *MCI/Worldcom/Sprint*, 28/06/2000.

280 See, for a discussion of those practices, Canadian Competition Bureau, The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector, *Enforcement Guidelines*, November 2002, para 5.2.3.

281 See S. C. Salop, "Practices that (Credibly) Facilitate Oligopoly Coordination" in J. E. Stiglitz and G. F. Mathewson (Eds), *New Development in the Analysis of Market Structure*, MIT Press, Cambridge, 1986, p. 265.

282 See T. E. Cooper, "Most Favored Customer Pricing and Tacit Collusion", (1986) 17 *RAND Journal of Economics*, 377.

283 See D. Gilo, Y. Moshe and Y. Spiegel, "Partial Cross Ownership and Tacit Collusion", (2006) 37, *RAND Journal of Economics*, 81.

284 See D. W. Carlton, "A Reexamination of Delivered Pricing Systems", (1983) 26-1 *Journal of Law and Economics*, 51; D. D. Haddock, "Basic Point Pricing: Competitive vs. Collusive Theories", (1982) 72 *American Economic Review*, 289.

by public institutions, including competition authorities and regulators.[285] This is, for instance, the case with measures adopted by sector specific regulators, which compel market players to observe price caps or to disclose information on their pricing policy. In increasing price transparency, such measures facilitate the surveillance activities within the oligopoly, thereby supporting the emergence of tacitly collusive market outcomes.

From the foregoing it is clear that collective dominant positions do not only result from external growth strategies, but may equally arise as a corollary of other business practices, which the EUMR does not, and indeed cannot, regulate. Whilst this article does not submit that the scope of the Regulation should be extended to cover such strategies, it nonetheless stresses that, contrary to a widely held belief, the EUMR does not, and cannot to the exclusion of other legal instruments, fully prevent the emergence of tacitly collusive oligopolies.[286] Furthermore, in oligopolistic markets which are not subject to a significant level of merger activity, situations of tacit collusion may well appear, develop and become consolidated for a significant period of time without the applicability of the EUMR being triggered until a structural change has occurred on the market. In such circumstances, the Regulation fails entirely to prevent a situation of tacit collusion and, absent any *ex post* enforcement policy, such market failure indefinitely benefits from a state of provisional immunity.[287]

4. THE COMMISSION CAN PREDICT THE EMERGENCE OF COLLECTIVE DOMINANT POSITIONS ON THE BASIS OF ECONOMIC THEORY

A third possible misconception is that competition authorities, the Commission in particular, can safely predict the emergence of collective dominance. This idea draws on the intuition that modern industrial organization theory provides robust and practical economic tools for anticipating situations of tacit collusion.

Again, however, this intuition fails to reflect the complexity and nuances of

285 See S. Albæk, H. P. Møllgaard and P. B. Overgaard, "Law-Assisted Collusion? The Transparency Principle in the Danish Competition Act", (1996) 17 *European Competition Law Review*, 339.

286 A related concern is that the view that the EUMR prevents most, if not all, risks of future collective dominance seems to have been so deeply inculcated into competition agencies' staff that only meagre, if any, enforcement resources are dedicated to such practices.

287 This being said, it ought to be noted here that Article 101 TFEU covers a number of facilitating practices that take the form of inter-firm agreements. See, on this, N. Petit, supra note 264 at Chapter IV.

modern industrial organization theory. Of course, a consensus would appear to exist amongst economists (and lawyers) on the very core analytical framework to be used in order to establish collective dominance.[288] In particular, most economists agree that four cumulative elements, in accordance with the GC's case law and the Commission's Guidelines, must be identified for tacit collusion to occur, *i.e.* mutual understanding of the terms of coordination; ability of oligopolists to detect cheating behaviour; availability of retaliatory instruments; and absence of countervailing power of rivals, and other economic partners. However, economists tend to consider that the theory of tacit collusion provides a very fragile basis upon which decision makers may predict the future. As noted previously by Nobel Prize winner G. Stigler, "*with oligopoly, virtually everything is possible*".[289] This is because a gulf subsists between opposing sets of economists as regards the effect that relevant market conditions produce on the abovementioned four conditions. To take but a few examples, the existence of *capacity constraints* certainly prevents an oligopolist from cheating in the first place, and thereby facilitates tacit collusion.[290] Simultaneously, however, the existence of capacity constraints is often deemed to neutralize the threat of retaliation.[291]

A similar ambiguous, complex effect can be ascribed to so-called "*multi-market contact*". When oligopolists are active on several distinct markets, they are able to punish deviations on a wider range of sectors, a consequence of which is that the deterrent effect of any punishment increases. As a result, multi-market contacts are deemed to facilitate tacit collusion.[292] Yet, other economists stress the fact that when oligopolists are active on several markets, retaliating on several markets is extremely costly.[293] In addition, in such a situation, an oligopolist may have increased incentives to cheat, in the hope of reaping profits not only on one market, but also on the other markets on which it is active.

288 See D. K. Osborne, "Cartel Problems", (1976) 66(5) *American Economic Review*, 835; D. Orr and P. W. McAvoy, "Price Strategies to Promote Cartel Stability", (1965) 32 *Economica*, 186; I. Ayres, "How Cartel Punish: A Structural Theory of Self Enforcing Collusion", (1987) 87(2) *Columbia Law Review*, 295, p. 296; T. Penard, "Collusion et comportements dynamiques en oligopole: une synthèse", supra note 262, p. 3.

289 See G. J. Stigler, "Theory of Oligopoly", (1964) 72 *Journal of Political Economy*, 44.

290 See Study on Assessment Criteria for Distinguishing between Competitive and Dominant Oligopolies in Merger Control, Report for the European Commission, DG Enterprise, May 2001, Europe Economics.

291 See F. Jenny, "Economic Analysis, Anti-trust law and the Oligopoly Problem", (2000) 1 *European Business Law Review*, 41; See K.U. Kühn, "An Economists' Guide through the Joint Dominance Jungle", Paper #02-014, John M. Olin Center for Law & Economics – University of Michigan.

292 See B. D. Bernheim and M. D. Whinston, "Multimarket Contact and Collusive Behavior", (1990) 21 *RAND Journal of Economics*, 1.

293 See S. Bishop and M. Walker, *The Economics of EC Competition Law*, 2nd Ed., Sweet&Maxwell, London, 2002, para. 7.60, p. 288.

Finally, *demand growth* is also a notoriously ambiguous market characteristic.[294] Some economists contend that it prevents tacit collusion because oligopolists have strong incentives to engage in cut-throat competition in order to capture new customers.[295] In addition, demand growth could trigger market entry which, in turn, undermines the potential for tacit collusion.[296] This being said, other economists argue that faced with demand growth, oligopolists are increasingly likely to collude.[297] This is because oligopolists have no incentives to engage in price competition strategies in the short run for fear of undermining their joint ability to coordinate prices in the future.

Because many market characteristics may either facilitate (pro-collusive effect) or undermine (anti-collusive effect) tacit collusion, it is almost impossible for competition authorities to prospectively determine (absent *ex post* evidence) which of those effects will prevail. In other words, the decision that a given market characteristic will lead to one type of effect rather than another invariably involves a certain degree of over-generalization and arbitrariness.[298]

This problem is further compounded by the fact that the risks of tacit collusion may be influenced by other unobservable variables. Regardless of economic profit-maximization considerations, the psychological, social and historical background of the oligopolists may influence their decision to adhere to a tacitly collusive equilibrium.[299] For instance, these firms may be particularly prone to acting in parallel because their CEOs have been educated together and thus share strong cultural bonds. In the same vein, an irrational competitor may decide to cheat regardless of the risk of costly punishment, simply because it wishes to maintain its reputation as a hard discount player on the market.

294 See J. Haltiwanger and J. E. Harrington, "The Impact of Cyclical Demand Movements on Collusive Behavior", (1991) 22 *RAND Journal of Economics*, 89.

295 See M. Ivaldi, B. Jullien, P. Rey, P. Seabright and J. Tirole, *The Economics of Tacit Collusion*, Final Report for DG Competition, European Commission, March 2003, p. 28.

296 Id.

297 See M. Motta, *Competition Policy – Theory and Practice*, Cambridge University Press, Cambridge, Massachusetts, 2004, p. 146.

298 See on this T. Kauper, "Oligopoly: Facilitating Practices and Plus Factors", in B. Hawk (ed.) 2007, *Fordham Competition Law Institute*, 751 at pp. 754-755.

299 See F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, 3rd Ed., Houghton Mifflin Company, Boston, 1990, pp. 235-236, who provide the example of the dinners organized by Judge Elbert H. Gary, the President of US Steel's Board of Directors between 1907 and 1911. Judge Gary explained once that: "*these dinners generated such mutual respect and affectionate regard among steel industry leaders that all considered the obligation to cooperate and avoid destructive competition more binding than any written or verbal contract*".

Finally, in merger control proceedings involving tacit collusion there is an additional hurdle. Because a situation of collective dominance entails the cooperation of most, if not all, players on the market, the Commission must not confine itself to investigating the merging parties, but also extend its inquiries to their rivals. In particular, it must collect information on their costs, investment, pricing strategies, etc. This implies that in collective dominance cases the Commission must in reality conduct an investigation which is tantamount to a broad and burdensome "*sector inquiry*". However, unlike under Article 17 of Regulation 1/2003,[300] such sector inquiry must be carried out within the tight time limits provided for in the EUMR. Though perhaps a trite observation, any such investigation is likely to prove extremely difficult for the Commission.

Despite recent papers suggesting the contrary, the Commission's recent decisional practice bears testimony to the difficulties of proving tacit collusion in merger cases.[301] In recent years, the Commission has erred on the side of caution and promoted a "*low-profile*" enforcement policy. Since the *Airtours* judgment,[302] the Commission has only scrutinized the risks of tacit collusion/collective dominance/coordinated effects in 11 cases.[303] The staggering number (95 in total) of collective dominance-related decisions adopted by the Commission between 1989 and the *Airtours* judgment, a period during which the evidentiary burden on the Commission was considerably lower, puts the Commission's enforcement activity since *Airtours* into perspective. In addition, in a not insignificant number of those cases, the Commission has seemed incapable of proving the initial collective dominance concerns identified in its Statement of Objections. The Commission

300 See Article 17 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) L1/1, in particular para. 1 which provides: "*Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose. The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices. The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties*".

301 See A. Amelio, P. Asbo, M. de la Mano, R. Maximiano and V. Porubsky, "ABF/GBI Business: coordinated effects baked again", Competition Policy Newsletter, 2009-1.

302 See CFI, Case T-342/99, *Airtours plc. v. Commission*, [2002] ECR II-2585. In April 1999, Airtours notified its proposed acquisition of First Choice to the Commission. The latter was a direct competitor of Airtours on the British market for short-haul foreign package holidays. The operation reduced the number of tour operators to three (the merged entity, Thomson and Thomas Cook). They together held an 83 percent share of the market. At the end of its assessment, the Commission concluded that the operation would lead to a collective dominant position and thus prohibited it.

303 See the decisions quoted at footnote 265.

ultimately chose to leave the issue open.[304] This problem is particularly apparent in the *JCI/Fiamm*,[305] *Lesaffre/GBI UK*,[306] *IPIC/MAN Ferrostaal AG*,[307] *T-Mobile/Tele.ring*,[308] and *Arjowiggins/M-real Zanders Reflex* cases.[309]

5. THE SUBSTANTIVE LEGAL PRINCIPLES GOVERNING COLLECTIVE DOMINANCE ARE SOUND AND WELL-SETTLED

A fourth possible misconception consists in believing that the EUMR's jurisdictional monopoly over tacit collusion is legitimate because the merger control regime is grounded upon a high degree of *legal soundness, maturity* and *certainty* (as opposed to the perceived obscurity and novelty of the concept of abuse of a collective dominant position under Article 102 TFEU).

In the authors' opinion, there is a distinct want of merit in the contention that the dust has settled as far as the legal standards underpinning collective dominance are concerned.[310] *Airtours v. Commission* and the Guidelines on Horizontal Mergers ("the Guidelines")[311] indeed ushered in an increased degree of legal clarity, with the laying down of four cumulative conditions for a finding of collective dominance. The recent rulings handed down by the GC and the Court of Justice of the EU ("CJ", formerly the "ECJ") in *Impala v. Commission* have, however, muddied the waters regarding the application of those standards.[312] In *Impala*, which concerned a proposed joint venture between Sony and BMG in recorded music markets, the GC explicitly, albeit in an *obiter dictum*, undermined the relevance of the four cumulative conditions set out in *Airtours v. Commission* and in the Guidelines on horizontal mergers. At paragraph 251 of its judgment,

304 The Commission decided to rely on other theories of harm and/or declared that the proposed remedies, in restoring the *status quo*, allayed all competition concerns.

305 See Case No COMP/M.4381 – *JCI/Fiamm*, supra note 265, para. 505 ("*Based on the results of the market investigation, it is therefore concluded that, while the merger […] may increase the likelihood of the emergence of coordinated effects on the OE markets for starter batteries for cars/LCV and trucks/HCV by removing an important competitor, the Commission has not found sufficiently convincing evidence to demonstrate that such coordinated effects are more likely than not to emerge*").

306 See Case No COMP/M.5020 – *Lesaffre/GBI UK*, supra note 265, para. 47.

307 See Case No COMP/M.5406 – *IPIC/MAN Ferrostaal AG*, supra note 265, para. 63.

308 See Case No COMP/M.3916 – *T-Mobile Austria/Tele.ring*, 26/04/2006, para. 129.

309 See Case No COMP/M.4513 – *Arjowiggins/ M-real Zanders Reflex*, supra note 265, para. 434.

310 See, for a similar opinion, J. Briones, "From Collective Dominance to Coordinated Effects in EU Competition Policy", *GCP: The Antitrust Chronicle*, October 2009(1), at p. 7 ("*we have little guidance as to how oligopolies will be handled*").

311 See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, pp. 5-18.

312 See CFI, Case T-464/04, *Independent Music Publishers and Labels Association (Impala) v. Commission*, 13 July 2006, [2006] ECR I-2 and ECJ, Case C-413/06 P. *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, [2008] ECR I-4951.

the GC declared that:

> *"[I]n the context of the assessment of the existence of a collective dominant position, although the three conditions defined by the Court of First Instance in Airtours v Commission, paragraph 45 above, which were inferred from a theoretical analysis of the concept of a collective dominant position, are indeed also necessary, they may, however, in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position."*

The CJ, on appeal,[313] seemed to confirm this analysis at paragraphs 125 and 128 of its judgment.[314] Such pronouncements – the interpretation of which remains keenly disputed by legal scholars –[315] are obviously unfortunate from the standpoint of legal certainty. Whilst, of course, the four demanding *Airtours* conditions had raised the evidentiary burden imposed on the Commission in merger proceedings – and allowed parties to discredit in their entirety tacit collusion theories of harm by simply proving the absence of one condition – those conditions provided a clear, comprehensive legal framework for the assessment of collective dominance.[316] Following the *Impala* rulings, the Commission may now "*indirectly*" reach findings of collective dominance. The abstract wording of the ruling, where the GC evokes "*a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent [in] a collective dominant position"* bears testimony to the fact that legal certainty has been somewhat watered down.

Second, the substantive principles established in those recent judgments are not based on sound economics. In particular, the standard according to which

313 On points of law.

314 See B. Van Rompuy, "Implications for the Standard of Proof in EC Merger Proceedings: Bertelsmann and Sony Corp. of America v. Impala (C-413/06 P) ECJ", (2008) 10, *European Competition Law Review*, 608, p. 611. See ECJ, id, at paras. 125 and 128. The Court noted that "*objection cannot be taken to paragraph 251 of itself*". It also observed: "*In applying those criteria, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination*". See, for a similar interpretation, S. Stephanou, "Collective Dominance Through Tacit Coordination: The Case for Non-Coordination Between Article 82 and Merger Control 'Collective Dominance Concepts', *GCP: The Antitrust Chronicle*, October 2009(1), at p. 6 note 15. For a discussion of the case see also J. Luebking and P. Ohrlander, The Joint Venture Sony BMG: final ruling by the European Court of Justice, Competition Policy Newsletter 2009-2.

315 See, for instance, T. Käseberg, "Case C-413/06 P. Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala), (2009) 46 *Common Market Law Review*, 255.

316 See S. Baxter and F. Dethmers, "Collective Dominance under EC Merger Control – After Airtours and the Introduction of Unilateral Effects is there Still a Future for Collective Dominance?", (2006) 27(3) *European Competition Law Review*, 148.

a collective dominant position can be inferred from mere observations of price uniformity, supra-competitive profits and other empirical data suffers from the very obvious flaw that correlation does not imply causation.[317] Situations of price uniformity may appear, for instance, in mature markets where technology and costs remain constant when operators price at marginal cost as a result of fierce competition in the market. Similarly, in a model of so-called COURNOT competition, which leads to price equilibriums situated between marginal costs-pricing and monopoly pricing, oligopolists may achieve supra-competitive profits absent tacit collusion.[318] Furthermore, in markets where scale matters, large incumbent oligopolists may enjoy generous margins simply because they are very efficient.

Rather, we believe that the aforementioned principle may lead to a risk of decisional abuse. The Commission may, by rigidly adhering to such standard, reserve to itself the ability to freely brush aside and disregard key tenets of economic theory in order to reach findings of collective dominance. For instance, it may rely on the fact that the parties' prices have followed a similar evolution, and pay no heed to the fact that the market is not sufficiently transparent to harbour a situation of tacit collusion.

A similar analysis applies to retaliation, which represented a core issue in the *Airtours* case. The level of vehemence of any retaliatory measure required to discourage cheating and, in turn, give rise to a situation of collective dominance remains unclear. The relevant guidelines in this respect are couched in rather loose terms, a consequence of which is that the Commission is accorded a significant margin of discretion in this context. In a footnote, the Guidelines consider that:

> "*The expectation that coordination may break down for a certain period of time, if a deviation is identified as such, may in itself constitute a sufficient deterrent mechanism.*"[319]

317 The GC seemed to recognize this at para. 252 of its judgment in stating that: "*loose alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position* (emphasis added)". However, the scope of this qualification is unclear. See, on this, N. Petit, supra note 264, pp. 253-260.

318 See A. Cournot, *Recherches sur les principes mathématiques de la théorie des richesses*, Dunod, Paris, 2001 (réédition de l'article paru au *Journal des Savants*, 1883). It is interesting to note that the OECD alluded in 2002 to the possibility of extending the concept of collective dominance to anticompetitive oligopolistic inter-dependence falling short of tacit collusion. See OECD, Policy Roundtables, *Substantive Criteria used for Merger Assessment*, 2002.

319 See Guidelines on the assessment of horizontal mergers under the Council Regulation, supra note 311, at note 70.

Yet, this contention is disputed in economic theory. Whilst it is conventionally accepted that retaliation must be such that it is able to cancel out the profits achieved through a cheating strategy,[320] economists are generally loath to hold that the mere risk of a return to the competitive equilibrium is sufficient to constitute a retaliatory mechanism. Depending on the circumstances, tacit collusion may only be sustainable if the oligopolists have the ability and incentives to retaliate through, for instance, below-costs pricing strategies (i.e. predatory pricing).

Finally, the Guidelines primarily focus on the factors that facilitate tacit collusion, and thus paint a grim picture of the effects that mergers may have on the likelihood of its occurrence.[321] In so doing, the Guidelines fail to reflect the current state of economic thinking in the literature, which equally insists on those factors which hinder tacit collusion. This is true in two particular respects. First, the Guidelines are silent on a number of market features which exert ambivalent effects on tacit collusion. For example, the document disregards a number of factors (e.g. overcapacities, capacity constraints, demand growth, demand inelasticity, network effects, etc.), which all produce contrasting effects on tacit collusion. Second, the document alludes to certain economic parameters in so far as they have a positive effect on the risks of collective dominance, but rather remarkably remain silent on the parallel, undermining effect which such parameters may produce. For instance, multi-market contacts are only referred to as facilitating retaliation, with no reference being made to the fact that they may increase profits pursuant to a cheating strategy (and increase the costs of retaliation).[322]

Third, and aside from the confused state of affairs resulting from the *Impala* rulings, the *Airtours* case and the Guidelines leave many technical and substantive issues unanswered. It remains for instance open to question whether, in order to establish a situation of tacit collusion, the Commission must prove that retaliation will be specifically targeted at the cheating firm (through, for instance, target rebates, price discrimination in favour of the cheating undertaking's customers, other exclusionary and boycott tactics), or whether it is sufficient to prove a risk of *general* retaliation through market-wide price reductions. Again, relying on the mere observation of untargeted retaliation to establish collective dominance has given rise to criticism. Indeed, in such situations a punishing firm may cause other oligopolists to incur costs, and may as a result expose itself to the risk of retaliatory

320 See N. Petit, supra note 264, p. 39.

321 Id, pp. 233-237.

322 See S. Bishop and M. Walker, supra note 293, paras. 7-60.

measures at a later stage.[323] In order to avoid this in the first place, the punishing firm may simply forgo the opportunity to enforce the retaliatory mechanism. In other words, the inability of oligopolists to specifically target retaliatory measures may jeopardize all future prospects of effective punishment and, as a corollary, impede the emergence of tacitly collusive strategies.

Similarly, a number of uncertainties arise as regards the issue of whether all oligopolists must be in a position to retaliate, and indeed be likely to do so, for collective dominance to occur. The Guidelines indicate rather laconically that "*The credibility of the deterrence mechanism depends on whether the other coordinating firms have an incentive to retaliate* (emphasis added)".[324] Unless the Commission can anticipate which firm is likely to cheat, and subsequently focus only on the other players' ability to retaliate, there are solid grounds for believing that the Commission should consider each and every market player's ability to punish a cheating strategy.

6. REMEDIES NEGOTIATED UNDER THE EUMR APTLY ALLAY COLLECTIVE DOMINANCE CONCERNS

A final mistaken belief is that, once a risk of collective dominance has been identified, the Commission could appropriately assuage any tacit collusion concerns by requiring the parties to offer structural remedies as a *quid pro quo* for a conditional clearance decision. A few years ago, one of the authors of this article conducted a survey which demonstrated that 54 percent of the remedies negotiated by the Commission with a relevant party in collective dominance cases consisted in creating a new, external competitive entity on the market (through structural divestitures, for instance), which could compete with the incumbent oligopolists. By contrast, 40 percent of the remedies consisted in the severance of internal links between oligopolists (joint ventures, etc.).

Contrary to this conventional view, we believe that the structural remedies negotiated by the Commission with the merging parties may generate perverse effects, and in particular, may further exacerbate the risks of tacit collusion. As far as the first type of remedy is concerned – *i.e.* the creation of a new competitive entity on the market – the Commission has often requested

323 See R. O'Donoghue and C. Feddersen, "Case T-342/99, Airtours plc v. Commission, Judgment of the Court of First Instance of 6 June 2002, nyr" (2002) 39 *Common Market Law Review*, 1171.

324 See Guidelines on the assessment of horizontal mergers under the Council Regulation, supra note 311, para. 54.

incumbent oligopolists to transfer relevant assets. Such measures, which normally fall beyond the scope of the Commission's oversight capabilities (they are implemented by the parties and trustees) imply a potential risk of secret, arm's length collaboration between the incumbent oligopolists and the new entrant. As a result, one cannot exclude that a vendor will seek to induce the acquirer to join the tacitly collusive oligopoly. As explained by Professor Farrell: "*[a]gencies should beware of over-trusting the buyer of the divested assets. A strong argument can be made that the buyer is a team-mate not of the agency but of the merging parties*".[325] In practice, the US Federal Trade Commission has found empirical evidence of this problem in two merger cases.[326]

In the same vein, whilst a divestiture of assets to a new entrant will in theory undermine collective dominance by increasing the number of firms active on the market, it may simultaneously increase the degree of symmetry between the incumbent oligopolists and thus indirectly encourage tacit collusive dynamics. This risk is particularly acute when the proposed merger entails the creation of an asymmetric oligopoly where the collusive outcome takes the form of price leadership.[327] Whilst the divestiture of assets may well erode the price leader's market share, it may concomitantly increase the symmetry of market shares held by the relevant oligopolists. The remedy may thus fall into the trap of simply bringing about a change in the nature of collusion.

As far as the second type of remedy is concerned – i.e. the severance of internal links between oligopolists – they are likely to be ineffective because the Commission's powers under the EUMR can exclusively bear on the "*undertakings concerned*", i.e. those participating in the concentration.[328] In contrast to Article 101 TFEU, the Commission cannot request third parties (firms that are for instance linked to the merged oligopolist) to sever commercial, industrial, and other financial links. In practice, this means that the ability of the merging parties to enforce a proposed commitment will ultimately depend on the goodwill of third parties. Moreover, because the implementation of the merger might be conditional on the attendant implementation of the relevant remedy, third parties may

325 See J. Farrell, "Negotiation and Merger Remedies: Some Problems", (in:) F. Levêque and H. Shelanski (Eds), *Merger Remedies in American and European Competition Law*, Edward Elgar, Cheltentham, 2003, p. 95.

326 See F. Leveque, "Quelle efficacité des remèdes du contrôle européen des concentrations?", (2006) 1 *Concurrences*, 27.

327 In such a setting, one firm – the one with high market shares – would lead the market (*i.e.* it sets the prices), and the others would follow.

328 See Article 8(2) of Council Regulation (EC) No. 139/2004, supra note 263.

be in a position to hold the merging parties hostage in order to extract significant financial compensation, etc. Finally, it ought to be remarked that such remedies are, *ex hypothesi*, unavailable in cases of pure tacit collusion (*i.e.* collusion absent structural, or commercial links).[329]

7. CONCLUSION

The current "monopoly" position occupied by the EUMR vis-à-vis issues pertaining to tacit collusion issues is somewhat paradoxical. Whilst there remains a gulf between opposing sets of economists regarding the real existence of pure, oligopolistic tacit collusion on markets for everyday products/services,[330] the Commission's practice "*systematically*" scrutinizes the risk of collective dominance arising from oligopolistic mergers on the basis of the EUMR.[331] Whilst we believe that, from a resource-based perspective, the cost of testing all oligopolistic mergers on the grounds of potential collective dominance concerns is likely to be high, the Commission seems to believe that it is lower than the cost attributable to the allegedly complex and cumbersome system of *ex post* monitoring under Article 102 EC.[332] This cost-benefit perspective, however, is not based on any empirical evidence. In addition, it fails entirely to factor in the huge costs which may result from erroneous *ex ante* predictions under the EUMR.

In addition, such a systematic, preventive approach is problematic for a number of reasons. Exclusive reliance on the EUMR in order to abate tacit collusion concerns fails first to apprehend certain market constellations which arise from organic growth strategies.[333] Second, it imposes unwarranted informational

329 See J. Temple Lang, "Oligopolies and Joint Dominance in Community Antitrust Law" in B. Hawk (Ed.), (2000) *Fordham Corporate Law Institute*, 269, p. 347.

330 See T. Penard, "Collusion et comportements dynamiques en oligopole: une synthèse", supra note 262. See also T. Kauper, supra note 298, pp. 754-755. Experimental economics also casts doubt on the plausibility of the existence of tacit collusion absent any communication. See, for instance, A. Muren and R. Pyddoke, "Does Collusion without Communication Exist?", *Research Papers in Economics* 1999, 11, Stockholm University, Department of Economics and the various references cited in this study. See finally R. Posner, "Oligopoly and the Antitrust Laws: A Suggested Approach", supra note 272 who considers that core tacit collusion is in reality likely to be rare, absent additional facilitating practices and contacts between oligopolists.

331 See J. Briones, supra note 269, p.1. The Commission also scrutinizes collective dominance in vertical mergers. See for instance, the *TomTom/TeleAtlas* and *Nokia/Navteq* decisions, supra note 265.

332 See F. Mezzanotte, "Can the Commission use Article 82EC to Combat Tacit Collusion?" – CCP Working Paper 09-5, available at http://www.uea.ac.uk/polopoly_fs/1.111282!ccp09-5.pdf (stressing the costs and burdens of collective dominance investigations under Article 102 TFEU).

333 In addition, assuming the existence of textbook tacit collusion situations where symmetrical oligopolists charge supra-competitive prices and make abnormal profits, it is doubtful that such oligopolists will actually merge, on pain of (i) creating a structural imbalance in the market which will undermine their ability to achieve supra-competitive profits; and (ii) attracting the attention of competition authorities.

and procedural burdens on oligopolistic firms. Third, and more fundamentally, it increases the risk of decisional errors because of the flaws in the economic theory on which the Commission relies and the short deadlines within which it is required to predict future occurrences. Finally, it does not reflect the very economic idea that tacit collusion is, in so far as its effects are concerned, almost as damaging as a hardcore horizontal cartel. As a result, competition authorities should arguably use the full range of their legal weaponry to dissolve tacitly collusive equilibriums and not close the door to *ex post* enforcement actions.