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CONCEPTS OF COLLECTIVE DOMINANCE IN EU COMPETITION LAW

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INTRODUCTION

Free competition is a crucial element of an open market economy. It forces producers to lower prices, improve their product to attract consumers. However, an operator enjoying a dominant position could act independently from its competitors, customers and consumers. The notion of dominance is considered by both economics and law. Economics' theories deals with dominance through leadership of oligopolistic market structures as well as co-opetition. In European Union (hereinafter - EU) Law, the concept of dominance is concerned in the Title VII, chapter 1 of the Treaty on the Functioning of the European Union (hereinafter - TFEU)[1] as this chapter lays down the basis for the rules of competition applicable in EU. The concept of dominance can be found in Merger regulation[2] (hereinafter - EUMR) as well.

Article 102 [3] TFEU is guarding competition by forbiding an undertaking or several undertakings, as a collective entity on the market, holding a dominant position, to abuse their market power. For Article 102 TFEU to be applicable the abuse should affect trade between Member States, and the relevant market, on which entity holds a dominant position, should be within the internal market or a significant part thereof. The most problematic aspects of implementing this article is the abuse and the collective dominance fact itself. Moreover, concepts of collective dominance in EU competition law mainly can be split by time limit, that is there are two main concepts of joint dominance: regulated by Article 102 of TFEU – collective dominance that already exist in the market, and collective dominance supervised under EUMR, as collective dominance that could occur or be strenthened in the future, if a merger occur. Through case law analysis it will be shown that mainly the concept of dominance is treated similarly under both – Article 102 TFEU and EUMR. Thus the main focus will be fixed on the application of Article 102 TFEU and EUMR will be analysed to the extent which is necessary to reveal the concept of dominance.

Over the past 10 years the application of the EU competition rules has seen a very significant shift towards an effects based approach. Under this approach practices are only prohibited when they are likely to harm competition and consumers. This shift in approach was first introduced in the field of Article 101 TFEU but is making its way into the field of abuse of dominance. After a long public consultation, the Guidence on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (hereinafter -

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[1] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU). // Official Journal of the European Union, 2008.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Official Journal L 24, 29.01.2004.

[3]All references to Articles 81 and 82 EC should be respectfully understood as references to the current Articles 101 and 102 of the Consolidated version of the Treaty on the Functioning of the European Union and vice versa // OJ 2008/C 115/01.

Guidance) was adopted in 2009.[4] Guidance shows the outcome of several years of work by DG Competition, which was launched in 2004 with the Commision's announcement that it had started reviewing its enforcement policy under Article 102 TFEU. This was subsequently followed by the publication in December 2005 of the Commission's Article 82 Staff Discussion Paper (hereinafter – Discussion Paper of Article 82).[5] Unfortunetly, Guidance brings much less clarity then expected – it only sets out the Commission's 'enforcement priorities'[6] and is explicitly 'not intended to constitute a statement of the law', as well as do not redefine the term 'dominant position', but only confirms the definition of dominance set out in *United Brands* case.[7] According to Guidance paragraph 10 - "*a dominant position derives from a combination of several factors which, taken separetly, are not necessarily determinative*". Although, the abuse of collective dominance is forbidden by TFEU and by national laws of Member States for quite some time, it is still problematic to establish the existance of a collective dominant position on the relevant market. Tests for determining such a situation were developed through European judicial practice and influenced by legal doctrine, however, there are still unclear issues relating to conditions, which the market must comply with, as well as, it can be challenging to prove the needed economic links in order to show that legaly separate and independat undertakings hold a collective dominant position. Furthermore, as protection of consumer welfare is one of the main objectives of EU competition law, there are still some ineffectiveness considering the implementation of Article 102 TFEU: if Commission fails to prove structural links of supposedly collectivelly dominant entity or if the firm inducing significant harm to consumer welfare could not be held dominant independently.

Novelty of the topic. Though abusive conducts of dominant undertakings and legal tests in finding collective dominance have been analized by few sholars, such as A. Jones and B. Sufrin, J. Faull and A. Nikpay, R. O'Donoghue and J.A. Padilla, N. Petit, Mezzanotte, I.Kokkoris, I. van Bael, the concepts of collective dominance still raises debates concerning several key issues. This paper will focus mainly on the concepts of collective dominance itself. As several articles and publications in relation to abuse of dominance in European Community competition law have been analyzed by several Lithuanian scholars, to name a few - Moisejevas R., Norkus I., Novosad A., Švirinas D., as well as there is also a doctoral thesis on the problematic issue of abuse[8] - by R.Moisejevas "Predatory pricing as a form of the abuse of the dominant position in the European Communities"[9], therefore, other aspects necessary to prove abuse of collective dominance under the

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[4] The Guidance on the commission's Enforcement priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by dominant Undertakings//OJ 2009/ C 45/7
[5] DG Competition , "Staff Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses", 19 December 2005, avialable on Commission's website at: http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf
[6] Guidance on Abusive Exclusionary Conduct, para. 2
[7] United Brands v. Commission, [1978] ECR 207, para. 65.
[8] concerning one of the forms of abuse of dominant position – predatory pricing.
[9] R. Moisejevas, Predatory pricing as a form of the abuse of the dominant position in the European Communities; Law, (01S), Mykolas Romeris University, 2009

Article 102 TFEU will be excluded from comprehensive analysis. However, in Lithuania only A. Volochova has analyzed the peciullarities of establishing collective dominance. Thus, the concepts of collective dominance as such lacks exchaustive analysis.

Problem. The lack of legal certainty what crucial criteria must be prooved and to which limit in order to establish or escape acusation of collective dominance.

Hypothesis. As European Union legal acts and established case law does not provide clear limit to which connecting links must be prooved to determinate whether a collective dominance exits, therefor, certain information exchange may be sufficient enough to proof the occurance of collective will.

The object of this paper is the concepts of collective dominance together with conditions under which an undertaking is found enjoying collective dominance.

The goal of this paper is to consistently evaluate the concepts of collective dominance as concepts formed in European Commission's and European courts' practice and how they changed since practice shifted to more economic aproach. In order to reach aformentioned goal it is needed:

1. To reveal the concept of collective dominance and how it evolved through case law as well as how this practice changed within implementation of more effect-based policy;
2. To analize the main criterias set in *Airtours*[10] case and how this decision influenced further devolopment in this spehre.
3. To analize the main elements used in practice to establish economic links and other factors with the aim to find collective dominance;
4. While analyzing European courts' practice, compare main issues to Lithuanian judicial practice.

In collecting and processing the necessary information for this paper, these methods were employed:

1. Qualitative analysis of documents – to critically analyze legal acts, cases and doctrine related to definitions of collective dominance;
2. Comparative method – to compare the most important European judicial practice related to concept of joint dominance. This method was also used in comparing various publications of different scholars that analyzed the most problematic issues related to the topic;
3. Logic methods such as systematic and analytical methods were used to reveal the content and correlation of legal documents, cases and doctrine related to the concepts of collective dominance.

All methods mentioned above were also employed in making conclusions and generalization of the whole paper.

[10] Case T-342/99, *Airtours* plc v Commission, ECR 2002 Page II-02585.

1. DEFINITION OF A DOMINANT POSITION

In order to establish a violation of Article 102 TFEU, it must be assessed that one or more undertakings, holding a dominant position that confers power on a relevant product and geographic market within the common market or a part thereof, abuse this position, in a way that is liable to affect trade between Member States. Since Lithuania became a Member State of European Union in 2004, many legal acts have been amended and secondary legislation have been drafted closely following the principles set out in TFEU. Thus, the Law on Competition[11] states a very similar notion prohibiting abuse of dominant position is stated in the Article 9. It prohibits abuse of a dominant position by performing actions in the relevant market that have as their object or effect the restriction of competition, limiting the opportunity for other undertakings to participate in the market or violating consumer interests and lists cases of conduct likely to constitute an abuse, similar to article 102 TFEU.

A "dominant position" was defined by the Court of Justice of the European Union (previously called – the European Court of Justice) (hereinafter - CJEU) cases in 1970' and early 1980's in terms of the ability of the undertaking to act 'independently' rather than in terms of ability to profitably raise prices. In *Hoffmann-La Roche*[12], CJEU defined a dominant position,[13]which consists of three main elements, two of which are closely related: an undertaking must have (a) a position of economic strength on the market which (b) enables it to effectively prevent competition on that market and (c) affords the power to behave independently, to an appreciable extent. The first element suggests that dominance exists in relation to a market. In other words, dominance cannot exist in the abstract sense.[14] Furthermore, an entity, alone or in cooperation with others, must be in a leading position. The other two elements concern the way in which the undertaking and other players act and interact on the market, what is the link between the position of economic strength held by the undertaking in question and the competitive process.[15]

According to the EU competition law, it is not illegal *per se* to hold a dominant position and the dominant undertakings are entitled to compete on the merits.[16]The essence of this principle is that an undertaking(s) enjoying a dominant position has a special duty not to eliminate or contort competition. It should be kept in mind that, under EUMR, mergers may be declared incompatible

[11] Law on Competition of the Republic of Lithuania// Official Gazette, 1999, No. 30-856.
[12]Case 85/76, *Hoffmann-La Roche v. Commission* [1979] ECR 461.
[13]CJEU stated that "[...] *a position of economic strength enjoyed by 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 of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or a quasi monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in this disregard of it so long as such conduct does not operate to its detriment.*", Case 85/76, *Hoffmann-La Roche v. Commission* [1979] ECR 461.
[14]Case T-62/98, *Volkswagen AG v. Commission*, [2000] ECR II-2707
[15] DG Competition , "Staff Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses", paras 21-26.
[16] Communication from the Commision, OJ C 045, 24/02/2009 P. 0007 – 0020, para 1

with the Single Market where they significantly impede effective competition in it or a substantial part of it, in particular as a result of the creation or strengthening a dominant position.[17] An appropriate form of competition on the merits is as an example from *Intel* case, competing on price or quality.[18]As a comparison part 11 of the Article 2 of the Law on Competition defines a ‘dominant position’ as the position of one or more undertakings that face no direct competition in a relevant market or the position that enables them to exert unilaterally a decisive influence in that market by effectively restricting competition therein. There are also statutory presumptions of dominance relating to undertakings holding market shares.

The Competition Council, in its Resolution No. 52 dated 17 May 2000,[19] has set out the criteria for defining dominance based on the EU case law and also to bring national regulations in line with EU law (particularly, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings).[20]Under the provisions of the above-mentioned resolution, the main criteria for defining dominance are the market share of an undertaking, the division of the market among competitors, credible changes in the market structure, barriers to the entry to the market and other factors that enable the evaluation of whether or not an undertaking holds a dominant position in the market.

1.1.Relevant market

Defining the market is a crucial step in evaluating undertakings actions as well as assessing if the firm hold a dominant position under Article 102 TFEU on the particular market. Moreover, under EUMR, ‘a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on the competition.’[21]Market definition provides a framework for competition analysis as it is usually the first step in assessment of market power, i.e. one of the first indicators for existence of dominance is market shares, which can only be identified and calculated after the market has been defined. Not to mention, the market must be defined while considering the potential for new entry.

One of the main legal sources of how relevant market is defined is the Commission notice on the definition of relevant market for the purposes of Community competition law(hereinafter -

[17]Joelson, Mark R., An international antitrust primer : a guide to the operation of United States, European Union, and other key competition laws in the global economy / by Mark R. Joelson. 3rd ed. Alphen aan den Rijn : Kluwer Law International, 2006, p. 370.
[18] Case COMP/C-3/37.990 – Intel, OJ 227, 22/09/2009 P. 0013- 0017, paras 39-42
[19]17 May 2000 Resolution No. 52 on the Explanations of the Competition Council concerning the Establishment of a Dominant Position (2000) 52-1516 *Official Gazette*, and amended by Decision No. 1S-15, dated 12 February 2005.
[20] 2004/C 31/03
[21] Kali und Salz/ MdK (I), M.308, OJ 1994 L186/38, para. 143

Notice on Market Definition)[22], as it provides useful information how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of European Union competition law. According to it, determining the relevant market basically consists of two main stages: defining the relevant product market and outlining the relevant geographical market.

According to the part 5 of the article 3 of the Law on Competition, the relevant market is understood very similarly to the definition provided by the Notice on Market Definition and regarding this, Lithuanian Competition Council on 24 February 2000 has adopted Decision No. 17 (hereinafter – Competition Council Decision No.17). The main purpose of defining the relevant market is stated in the 5th point as conforming the 2nd point of Notice on Market Definition. That is to determine the rivals of the undertaking under consideration that are capable of constraining the freedom of those undertakings to behave independently of other market participants.[23] Competition Council in it's 16 December 2010 decision No. 2S-31 concerning "Mažeikių nafta" (hereinafter – *"MN"* case) also drew attention that defining the relevant market must be in the light of the aim of the investigation pursued, meaning that determining the relevant market and the players in it is not as a state of the market as such, but concentrating on the factors that create competitive pressure to the undertaking in question, as well as the ability of other relevant market players to import the needed product from other countries.

Relevant product market

As it is stated in Notice on Market Definition point 7 "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use". Undertakings are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition.[24]

Demand substitutability deals with customers behaviour - if a person assume that two goods are substitutes for one another, and he/she would easily switch between them, then such goods are likely to form part of the same relevant product market.[25]In assessing the substitutability of goods from this perspective, the Commission will essentially examine two factors. First one is product characteristics/intended use.[26] For instance as Competition Council, bear in mind Commission's

[22]Commission notice on the definition of relevant market for the purposes of Community competition law [Official Journal C 372 of 9.12.1997], para. 1, access time: 4 January 2012
[23] Lithuanian Competition Council 24 February 2000 Decision No. 17regarding definition of the relevant market, point 5.
[24]Commission notice on the definition of relevant market for the purposes of Community competition law, point 13, access time: 4 January 2012
[25]Commission notice on the definition of relevant market for the purposes of Community competition law, points 15 -19.
[26]Goods which have similar features or can satisfy the same client's need are likely to form the same relevant products market. Although a mare similarity of characteristics or functional substitution between two goods may not be sufficient enough to define the limits of the relevant product market. Ibid, point 36.

practice, *"MN"* case decision- the investigated undertaking was trading in gasoline and dieseline fuel, although both are used as fuel for vehicles, the fact that to switch from using one to another, a person needs to install a special equipment. This fact was enough to determine two different relevant product markets. Secondly, focus is fixed on the price for operational and practical purposes.[27] While evaluating this Commission uses SSNIP[28] (Small but Significant Non-transitory Increase in Price) test.[29] The Competition Council adopt the same test in their practice as well.[30]

The extent of demand substitutability is determined by SSNIP evaluation. However, there are some factors to be weighted –the likely level of switching costs, or that the time of switching from one good to another may be influenced by the nature of that good or even the nature of the customer – consumer may be free to switch instantly, but an undertaking may need some adjustments to production process or machinery. If a monopolist charges the maximum price and any further increase would be unprofitable, applying SSNIP could cause false evaluation of monopolist's market power as resulting to an overly wide market definition. Consequently, Notice on Market Definition expressly provides that for the investigation of abuses of dominant positions, especially, the fact that the prevailing price might already have been substantially increased are taken into account.[31]

Competition Council in its 16 December 2010 "MN" decision also adressthe problematic issueofapplying SSNIP test in cases of possibly already existing dominance, thus to escape the *cellofane fallacy* while determining the relevant market uses other indicators to make a conclusion. This was due to the fact, that the undertaking in question was found dominant in 2000 and 2001, which leads to high probability that the prices are already above the competitive level. [32]

In these circumstance Discussion Paper of Article 82 sugest various methodologies that may be applied, for example applying SSNIP test on the basis of a reconstructed competitive price.[33]Competition Council in the above mentioned decision as well suggest that it would be possible to evaluate the prices of the investigated undertaking if there would be a possibility to draw the competitive prices. However, due to the lack of information andmethodologies to determine competitive prices, Competition authorities must rely on evaluating other factors and criteria to establish the existance of dominant position.

On the other hand, it should be noted that Guidance, contrary to Discussion Paper of Article 82, does not make any refferences at all to the application of the SSNIP test.

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[27] ibid, point 15.
[28] test involves a hypothetical situation, where a small (5 to 10 %), non-transitory change in prices is stipulated and reactions of customers switching between products are evaluated.
[29] Ibid, 17.
[30] Lithuanian Competition Council 24 February 2000 Decision No. 17, point 8
[31]Commission notice on the definition of relevant market for the purposes of Community competition law, point 19
[32] Competition Council in this decision cites United Kingdom's ofice of fair trading realesed discusion paper as well as opinions of several scholars on the issue of *cellofane falacy*.
[33] Discussion Paper of Article 82, para. 11-19.

The 'supply substitutability' shows the degree of substitutability from the supplier's point of view, which means that if the supplier would be able to quickly and without substantial costs switch between producing two different products, those two products may form part of the same relevant product market. It is intended to measure the extent to which business that do not presently produce demand –substitutable products would switch to produce such products in response to a small but permanent increase in price on the market for those products. For supply-side substitutability to be effective, producers must be able to switch production to the relevant products and market them sufficient time without incurring substantial additional costs or risks.

According to the Notice of the Market Definition, supply-side substitutability is taken into account where its impact is so effective and immediate that it can be treated as equivalent to the effect of the demand-side substitutability, hence the primary test is demand-side substitutability.[34]One of the recent cases where the Commission thoroughly applied economic analysis to find dominance on the relevant market was the case of AstraZeneca[35]In this case it was determined that AstraZeneca was dominant in the market for proton pump inhibitors ("PPIs") a product used to treat a range of gastrointestinal disorders by blocking the production of stomach acid.[36]AstraZeneca claimed that the Commission's market definition was flawed because it failed to take account of competition from antihistamines that are also used to treat the same conditions. However, the Court of First Instance's (now called the General Court)[37] (hereinafter - GC) found no obvious mistake of assessment in the determination that PPI's, which are substantially superior in efficacy to antihistamines and therefore command a price premium, were a separate market. AstraZeneca's argued that the role of national authorities in the sale of prescription drugs in the EU caused that a pharmaceutical company did not have meaningful power over price, hence it could not be dominant for purposes of Article 102 TFEU. The GC rejected this argument and observed that AstraZeneca's ability to exclude rivals and therefore keep prices for PPI's from going down while its IP rights remained in force, was indicative of dominance.[38]

While asserting relevant product market, the Commission also recognizes a third form of substitutability known as 'chain substitutability'.[39] According to I. van Bael, in essence this substitutability occurs where it could be shown that although products A and C are not directly substitutable, product B is a substitute for both product A and C and therefore products A and C may be in the same product market since their pricing may be constrained by the substitutability of

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[34] Notice on Market Definition, points 20-23.

[35]Commission Decision of June 15, 2005 (COMP/A.37.507/F3--AstraZeneca) [2005] OJ L332/24. The Company appealed the Commission decision to the GC and later to the CJEU.

[36]*AstraZeneca AB v European Commission* (T-321/05) [2010] 5 C.M.L.R. 28. The judgment has been appealed by AstraZeneca to the CJEU.

[37]All references to Court of First Instance decisions should be respectfully understood as references to the current name of the court – General Court and vice versa.

[38]John Kallaugher, A. Weitbrecht, "Developments under articles 101 and **102** TFEU in 2010", E.C.L.R. 2011, 32(7), 333-342.

[39] Notice on Market Definition, points 56-58.

product B. [40]However, the risk of improperly broadening the scope of the relevant market should be mitigated by requiring substantial evidence showing clear price interdependence at the extremes of the chain and the degree of substitutability.

Geographic market

Besides defining the market by goods, delimitation of a geographical market is also needed to define the relevant market. definition of relevant geographic market is similarly drawn in Notice on Market Definition point 8[41]and in the Law on Competition article 3 part 7, where it is basically stated that the geographic market is a territory, where all undertakings face similar conditions of competition in the relevant product market and that due to these conditions can be distinguished from neighboring areas. Therefore, determining the relevant geographic market means excluding the area where the businesses trading the product in question enjoy similar conditions of competition,[42] though not necessarily perfectly homogenous.[43] The process of defining boundaries of the relevant geographic market is, in principle, concluded along the same lines as the delineation of the relevant product market, i.e. taking account of the demand-side and supply-side substitutability in response to a relative price increase in accordance with the SSNIP test.[44]The demand side substitutability centers on whether, in response to a small, but permanent relative increase in the price of a product, customers would switch to purchasing that product from elsewhere to such an extent as to render the price increase unprofitable. The assessment of supply-side substitutability in the context of geographical market definition focuses on whether, in response to a small, but permanent relative increase in the price of a product in area A, suppliers based in Area B will 'switch' and supply customers in Area A to such an extent to render the price increase unprofitable. The Commission assess the existence of supply-side substitutability, where its impact is so effective and immediate that it can be treated as equivalent to the impact of demand – side substitutability.

Correspondingly, the Competition Council takes many of the above mentioned criteria into account while asserting the relevant geographic market in Lithuania. A vivid example could be already mentioned "MN" case. "MN" was the sole producer of petroleum products in all three

[40] Ivo Van Bael, Competition law of the European Community /Van Bael&Bellis, Wolters Kluwer Law & Business ; Alphen aan den Rijn : Kluwer Law International, 2010, p. 123.
[41] "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those area"
[42] United Brands v. Commission, paras 44 and 53.
[43] Ibid; Deuthce Bahn v. Commission,[1997] ECR I-2387, para 92, Schneider Electric v. Commission (I), [2002] ECR II-4071, paras 153, 154.
[44] Ivo Van Bael, Competition law of the European Community /Van Bael&Bellis, Wolters Kluwer Law & Business ; Alphen aan den Rijn : Kluwer Law International, 2010, p.125.

Baltic states, there for while asserting relevant geographic market Competition Council evaluated the possible import of the products to Lithuania by the nearest competitors[45] of "MN", aiming to evaluate the competitive pressures that could apply to "MN" or influence it's actions. To establish the relevant geographic market the main two criteria were analyzed: the conditions and competitors/customers ability to import/buy product from outside Lithuania, and secondly – the state's regulation related to the quality of the products.

The Competition Council reviewed past evidence of diversion of orders to other areas as well as the current geographic pattern of purchases and selling agreements. One should bear in mind, that even if the export amounts of "MN" to over countries were significant, this fact does not significantly influence the need to establish possible import to Lithuania's market of the needed products for assessing the geographic market. To stress their point, the Competition Council cited the Commission decision in *Michelin II* case, points 1-53, and 123, stating that the fact in itself, that the major international producers compete in many European Union countries and in the countries beyond the Union, does not necessary mean that the relevant geographic market would be world wide. The Competition Council held that such a situation is compatible with different conditions of competition in different countries, but stressed the importance of evaluating the customers abilities to import the needed production to the national territory. In this particular case, it was held that the inability to store appropriate amount of production due to the lack of suitable oil reservoirs[46], the customers ability to buy production form outside Lithuania was restricted.

There were three main criteria due to which the relevant geographic market was drawn. Firstly, there were special requirements set out for the quality of relevant products, thus the import from the East was limited[47]. Even though, the quality was not the issue with the North European countries producers, the already mentioned problem concerning the lack of reservoirs and terminals, restricted imports from these countries as well. Moreover, Lithuania's protectionism policy played its role as well.[48]

All in all, to establish the relevant geographic market, one should distinct the area, where all undertakings face very similar conditions of competition and trade in the relevant product market, comparing the conditions of trade and competition in neighboring territory. It should also be observed that to achieve homogeneity in practice, the national competition authorities must follow European courts as well as Commission's practice of asserting the geographic market.

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[45] The closest other refinery companies, producing similar products are situated in Finland, Norway, Sweden, Poland, as well as in Belarus and Rusia, concluding that, that nearest possible importers are situated in the North Europe or East.

[46] Importing from the North Europe states was very difficult due to the lack of tank containers and the fact that the majority of containers in Klaipeda's port were leased to no other than "MN". There were difficulties to import through railroads were as well.

[47] Especially for the production of petrol in the refineries in Belarus and Russia.

[48]the need for importers to store additional 6 to 8 percent of production for the State's reserve was another drawback of buying from potential importer than from national producer "MN" as well as the different systems of customs during the time of the investigation – as in 2002 -2004 in Latvia and Estonia there were no custom's fee for importing oil products from Belarus or Russia as in comparison there were 15 percent custom fee applied by Lithuania.

Temporal market

Even if not essential in every case, time dimension may play a significant role in appraising dominance under EU competition law. Temporal developments due to varying offer/demand (e.g. seasonal distribution of goods, emergencies) are capable of influencing the relevant market and positions in it. Hence the Commission usually considers time factors indirectly when it includes them within its definition of the product market.[49]

In our opinion, asserting the relevant market objectively is reasonably difficult as there are space for contrary viewpoints, if a fact is substantial enough to influence the market situation of one or several undertakings. Moreover, even if Notice on Market Definition contains a list of factors and pieces of evidence that should be considered, it does not specify ranking between them and even states that their weight might differ from case to case. Thus, the lack of certainty may lead to diverging outcomes in similar cases. On the other hand, it seems that there is a new tendency for a more detailed economical analysis as the Commission has taken steps to change its practice in competition cases. Competition Council follow European courts' and the Commission' practice even in cases concerning purely national competition laws, thus change of Commission's practice should influence practice by Competition Council.

1.2.Market shares and other factors indicating dominance

The Guidance on Abuse Exclusionary Conduct states that an assessment of dominance will take into account the competitive structure of the market, including in particular the market position of the dominant undertaking and its competitors; the threat of future expansion by actual competitors or entry by potential competitors; and the bargaining strength of the undertaking's customers.[50]The lower a company's market share, the more additional factors have been relied on by the Commission and the European courts to support a finding of dominance. According to I. Van Bael,[51] such additional factors have included a number of structural elements, amounting to barrier of entry, as well as certain behavioral factors. It should be noted that extremely large market shares are *per se*, save exceptional circumstances, deemed evidence of a dominant position.[52]

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[49] Tetra Pak II, Commission Decission 62/163/EEC, [1992] OJL72/1, para. 18
[50] Guidance on Abuse Exclusionary Conduct, para. 12
[51] Ivo Van Bael, Competition law of the European Community /Van Bael&Bellis, Wolters Kluwer Law & Business ; Alphen aan den Rijn : Kluwer Law International, 2010, p. 108
[52]Case T-228/97, *Irish Sugar*, [1999] ECR II-2969

One of the most debated questions regarded market share is what is the turning point at which an undertaking would be considered holding a dominant position. A. Jones and B. Sufrin argue, that it follows from the case law that a firm with a market share of less than 20% is unlikely to be considered dominant while a company with market share of more than 40% runs a risk (depending on the circumstances) of being considered dominant and a company with a 50% or greater market share is likely *prima facie* to be dominant.[53] Moreover, Commission also clarified that a dominant company is generally considered to have a market position approaching that of a monopoly if its market share exceeds 75%.[54] While considering a situation of undertaking holding market shares below 40%, Commission stated in its Discussion Paper of application of Article 102 TFEU that such a firm 'could be considered to be in a dominant position', while in its Guidance of Abusive Exclusionary Conduct stated, that 'dominance is not likely if the undertaking's market share is below 40% in the relevant market'.

I. Van Bael claims that it is quite often, that the preponderant market share of the dominant undertaking is contrasted with the market shares held by its competitors. When there is a significant gap between the market shares of the potentially dominant undertaking and the market shares of its competitors, this element may be considered as confirmation of the existence of a dominant position. For instance, Commission in its Coca-Cola commitments decision[55] noted that the market shares of Coca – Cola branded carbonated soft drinks were 'more than twice the size of the market shares of the next competitor in a number of EU Member States'. One should also bear in mind, that when rivals have significant market shares, a relatively large market share is not necessarily indicative of a single-firm dominance, however one could not rule out the possibility of a collective dominance. The Commission has indicated that changes in the market shares may provide useful information about the competitive process and has confirmed that market shares are interpreted in the light of 'likely market conditions' including, for example, whether the market is highly dynamic in character and whether the market structure is unstable due to innovation or growth.

According to I. Van Bael, one could question if the Commission and the European Courts put too much emphasis on the market shares, often taking factors into account only in order to confirm the existence of a dominant position and not as a means of testing whether an initial finding of dominance based essentially on the market shares is sufficiently robust. Indeed, notwithstanding large market shares, the position of a leading undertaking may be significantly weakened by other factors such as low barriers to entry or countervailing buying power of customers.

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[53] A. Jones, B. Sufrin, EC competition law : text, cases, and materials, 3rd ed. Oxford : Oxford University Press, 2008, p. 397 -399, p. 404-405.
[54] DG Competition , "Staff Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses", para. 92, although not in its latest Guidance.
[55] Coca-Cola, case COMP/A.39.116/B2, recital 24(decision available on the Commission's website)

According to J. Gumbys, M. Juonys, L. Šlepaitė and K. Kačerauskas[56], it should be kept in mind that even if the notion of dominance generally corresponds to the notion of dominant position established in the EU competition law, it is distinct for Lithuanian concept to put special emphasis on the market shares held by the undertakings.

The Law on competition defines presumptions of dominance and collective dominance[57]. Thus, an undertaking with a market share of not less than 40 per cent shall be considered to have a dominant position in the market, unless it is proved otherwise. Moreover, after recent amendments of the Law on Competition the threshold of market shares was lowered - an undertaking engaged in retail trade, person responsible for the maintenance of the heating and hot water system of the building, engaged in activities of the administrator of the facilities of common use, with the market share of at least 30 per cent is considered to enjoy a dominant position within the relevant market. The September 2011 amendment aimed at ensuring utilities consumer protection interests and fair competition in utilities sector.

Nevertheless, in annual report issued by the Competition Council it is stated, that while concerning the concept of a dominant position, even in case market shares exceeds the threshold established in the Law on Competition, market share by itself does not mean the dominance of the undertaking where other circumstances are established that the undertaking is still facing competition in the market and is in no position to exercise a unilateral decisive influence on it.[58] It should also be noted that even if the presumption of finding collective dominance is established by the Law on Competition, due to the fact that the practice of the Competition Council in application of collective dominance is generally underdeveloped, it was never invoked in practice.[59]

According to I. van Bael, a finding of dominance may be made independent of market share, due to special circumstances, the normal competitive process comes to a halt. For instance, in both *Michelin* cases, the Commission and the CJEU considered that, in view of the heavy demand for Michelin tires, no dealer with concern for its credibility could reasonably eliminate Michelin tires from its sales outlet. Hence, dealers were placed involuntarily in a situation of economic dependence that made Michelin an unavoidable trading partner.[60] The EC institutions have frequently relied upon such situations of economic dependence when considering dominant positions in various economic sectors, such as commercial solvents[61], rail transport services[62], air transport services[63] and the issuance of conformity certificates for cars.[64]

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[56] Competition law in Lithuania. / J. Gumbis, M. Juonys, L. Šlepaitė, K. Kačerauskas, this book was originally published as a monograph in International encyclopedia of laws/ Competition law. Alphen aan den Rijn : Wolters Kluwer, 2011, p. 48
[57] Quantitative criterion of market shares in case of collective dominance will be analysed in 3.3 paragraph.
[58] Annual report on competition policy developments in Lithuania, DAF/COMP (2010) 18// http://www.konkuren.lt/en/international/docs/ar_2010.pdf , access time: 9 March 2012
[59] Competition law in Lithuania. / J. Gumbis, M. Juonys, L. Šlepaitė, K. Kačerauskas, this book was originally published as a monograph in International encyclopedia of laws/ Competition law. Alphen aan den Rijn : Wolters Kluwer, 2011, p. 49.
[60] Nederlandsche Banden Industrie Michelin v. Commission, para. 56, Michellin (II), OJ 2002 L143/1, recitals 200-208.
[61] ICI and CSC v. Commission (II), para 15-18.

Furthermore, if supposedly dominant firm does not hold a significant market share to confirm a dominant position in itself, Commission and European Courts consider some other factors to indicate a dominant position. Such factors could be divided in respect to (i) the structure and resources of the undertaking[65] and (ii) the structure of the market and the behavior of the other actors on it[66].[67]According to I. van Bael, these criteria are commonly described as competitive advantages enjoyed by a dominant firm that differentiate it from its competitors. Although it could be argued that sometimes it is difficult to find economical background for these factors or in any way to explain why and how the combination of these indicators gives a sufficient enough competitive edge for a firm to be held dominant.

To our opinion, having in mind Article 102 TFEU case law, the assessment of dominance was mostly based on large market shares, which highly depended on the relevant market. If market is defined too broadly or narrowly, undertakings market power could be estimated incorrectly and for that matter lacking further thorough economical analysis of the whole market performance and other structural factors could conclude to false conclusions of the existence of dominance. On the other hand, Commission's as well as Competition Council's shift in the priorities and aiming to conclude a more economically based investigations are main steps to more accurately applied laws and better protection of consumer welfare as well as the benefits of the single market.

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[62] Deutsche Bahn v. Commission, [1997] ECR II-1689;on appeal: Deutsche Bahn v. Commission, [1999] ECR I-2387, para 57.
[63] Virgin/British Airways, recital 92
[64] British Leyland v. Commission, [1986] ECR 3263, para.9.
[65]Indicators could be: strong vertical integration, security of supply of raw materials, surplus production capacity, technological lead over competitors, access to capital, strong brand name due to large-scale advertising campaigns, highly developed sales network, strong presence on adjacent markets, extensive range of products, technological and financial resources, ability to influence prices, etc.
[66]For example the absence of potential competition, market maturity, rivals' perception that a company is dominant, thus making them reluctant to compete for its traditional customers, bias of consumers in favor of a company from their Member State, spontaneous demand for the products of the company, countervailing buyer power.
[67] Ivo Van Bael, Competition law of the European Community /Van Bael&Bellis, Wolters Kluwer Law & Business ; Alphen aan den Rijn : Kluwer Law International, 2010, p.113-116; A. Jones, B. Sufrin, EC competition law : text, cases, and materials, 3rd ed. Oxford : Oxford University Press, 2008, p. 415 – 425.

2. A HISTORICAL OVERVIEW OF COLLECTIVE DOMINANCE THROUGH CASE LAW

2.1. Collective dominance under 102 TFEU

In words of M. Canoy, P. Rey and E. van Damme - the existence of dominance is a status, not an action; and this status is lawful.[68] By legal definition, a dominant firm has no more than the capacity or ability to commit an abuse, and Article 102 TFEU punishes this firm only if it engages effectively in abusive conduct.[69] In other words, dominant firms bear the special responsibility not to distort the process of competition, which restricts their business conduct.[70] It should be noted that non-dominant firms do not bear this responsibility. Nonetheless, Article 102 TFEU can still apply to the conduct of a group of non- dominant firms where the Commission finds that they hold together a position of collective dominance in the relevant market.[71]Although neither single nor collective dominance is as such objectionable, the members of an oligopoly have special responsibility and are therefore prevented from abusing their dominant position.[72]

The difference of accusing a single undertaking of abuse of a dominant position and to prove the dominance allegedly exercised by a group of undertakings due to holding a collective dominant position, is the need to evaluate not only relations between the group of undertakings' with other competitors on the relevant market (as the same must be done and in case of a single firm dominance), but also there is a need to evaluate certain links due to which a group of legally independent undertakings acts as one unit.[73]The overview of several cases where European courts have considered the issue of collective dominance and that firms had engaged in conduct contrary to Article 102 TFEU reveal how and in what direction the concept of collective dominance under the Article 102 TFEU evolved.

Application of the collective dominance doctrine under Article 102 TFEU and acceptance of the broader view of what is meant by 'more undertakings' can be traced back to the GC suggestion in *Flat Glass* case that: "*there is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of*

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[68]M. Canoy, P. Rey and E. van Damme, "Dominance and Monopolization" (TILEC Discussion Paper DP 2004-022, Tilburg University), p.21.
[69]*Hoffman La Roche* [1979] E.C.R. 461 at [91]; *Europemballage Corp v Commission of the European Communities* (6/72) [1973] E.C.R. 215 at [20]-[26]; and *Michelin v Commission of the European Communities* (322/81) [1983] E.C.R. 3461 at [70].
[70]*Michelin* [1983] E.C.R. 3461 at [57]; and Whish, *Competition Law,* 6th edn (2008), pp.183-184.
[71]*Compagnie Maritime Belge Transports NV v Commission of the European Communities* (C 395 & 396/96) [2000] E.C.R. I-1365; [2000] 4 C.M.L.R. 1076 ("*CEWAL II* ") at [37]-[38].
[72]Lennart Ritter and W. David Braun, *European Competition Law: A Practitioner's Guide*, Kluwer Law International, 3rd edition, 407
[73]A. Volochova, "Kolektyvinio dominavimo nustatymo praktikoje ypatumai", Vilnius: Jurisprudencija, Mokslo darbai 4(82), 2006, p.100

that fact, together they hold a dominant position vis-à-vis the operators on the same market."[74]

Examples of such an economic link include agreements or licenses which give undertakings a technological edge over others[75] and agreements between members of a liner conference. In *Flat Glass*, the GC did not state if such agreements were necessary to establish collective dominance. If agreements were necessary, then the concept of collective dominance under Article 102 TFEU would not appear to cover much more than the rules set forth in Article 101TFEU. Indeed, the GC appeared to hold in *Flat Glass* that collective dominance is created by agreements or concerted practices amongst a group of undertakings that collectively hold significant market power.[76] This reasoning has since been overturned by the CJEU, which defines collective dominance under Article 102 TFEU more broadly as '*two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity*.'[77]Thus, undertakings are deemed collectively dominant when they hold themselves out as or behave on the market as a collective entity, regardless of how they do so. Collective dominance can be proved by examining the economic links or factors that give rise to a connection between the undertakings concerned and whether these allow them to act together independently of competitors, customers and consumers.[78]According to F. Mezzanotte, it is the existence of these links that allows the Commission to conduct a collective assessment of the otherwise independent market positions of the undertakings.[79]The difference between the CJEU's approach and the GC's in *Flat Glass* is that the CJEU extended the concept of collective dominance to members of a tight oligopoly even if there are no contractual or structural links between them.[80]

The GC applied this approach in its *Gencor* judgment.[81] The GC explained 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 participate in one another's behaviour and are therefore strongly encouraged to align their conduct in the market.*"[82]

Furthermore, the harm for consumers in such oligopolistic markets usually occurs at a higher price level than under workable competition, since lowering prices is a vain initiative for oligopolist. Moreover, in the oligopolistic markets, the rivals are able to coordinate their actions

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[74]Joined cases T-68, 77 and 78/89, *Societa Italiana Vietro ('Flat Glass')* [1992] ECR II-1403, para. 358.
[75]*Ibid*., para. 339.
[76]Giorgio Monti, 'The Scope of Collective Dominance under Article 82 EC', *C.M.L.R*. 38, 2001, 132.
[77]Joined cases C-395 and C-396/96P, *Compagnie Maritime Belge Transports SA and others v. Commission* ('*Cewal*'), [2000] ECR I-1365.
[78]*Ibid*., paras. 41-42.
[79]Felix E. Mezzanotte "Tacit collusion as economic links in article 82 EC revisited", E.C.L.R. 2009, 30(3), 137-142
[80] In this way, the concept of collective dominance under Article 102 TFEU became more aligned with collective dominance as used in the EUMR.
[81]Case T-102/96, *Gencor v. Commission*, [1999] ECR II-753.
[82]*Ibid*., para. 276.

without entering in any agreements or resorting to a concerned practice, due to the specific anticompetitive features of the market itself, i.e. any other oligopolist can monitor the other's actions and react almost instantly by undercutting his product's price. However, the CJEU has stated 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*.'[83]

In *Almelo* case[84], IJM, the regional distributors of electricity, supported by the Trade Association of Electricity Operators in the Netherlands, required the local distributors, into an exclusive purchasing obligation. The exclusive purchasing clause had been included in the general conditions for the supply of electric power drawn up by the Trade Association of Electricity Operators. According to the judgment in *Almelo*, the application of an exclusive purchasing clause is precluded by both Article 101 and Article 102 TFEU, but may be permitted by the Article 106 (2) if the clause is absolutely necessary in order to enable the undertakings to perform a task of public interest. An exclusive purchasing clause amounts to abuse of joint dominance and to engagement to collusive conduct, if the task assigned by the public authorities can be performed even without enforcing such a clause. CJEU held that '*it is for the national court to consider whether there exist between* [......] *links which are sufficiently strong for them to be a collective dominant position in a substantial part of the common market*.'[85]In this way, the CJEU introduced the idea that the links should enable the jointly dominant firms to adopt the same conduct on the market.[86]Although an economic rationale for collective dominance was provided, what these links consisted of or what was required to prove their existence was still vague.

In *Irish Sugar*, the GC accepted the possibility of following the same approach to collective dominance under both Article 102 TFEU and the ECMR.[87]According to Monti, another lesson that can be learnt from *Irish Sugar* is that collective dominance may also be found where the anti-competitive act, without the existence of an agreement, is carried out by one undertaking which on its own is not dominant but which is linked to other undertakings that collectively hold a dominant position which the act in question is designed to safeguard.[88]Article 102 TFEU can apply under these circumstances, and all the undertakings in question need not have taken part in the abusive act. It must only be possible to identify the anti-competitive act as a manifestation of the collective dominant position.[89]As some scholars[90] have noticed, it is also possible to conclude from *Irish Sugar* that collective dominance can be held by undertakings in a vertical relationship. The GC did

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[83]*Ibid*., para. 277.
[84]Case C-393/92, *Almelo v. EnergiebedrijfI Jsselmij NV*, [1994] ECR I-1477.
[85]Ibid., paras. 42-43.
[86] Joost Fanoy & Somaya van Kraanen, The Approach to Abuse of Dominance Cases on Both Sides of the Atlantic and Insights into Other Jurisdictions, NautaDutilh 2009, the Netherlands.
[87]Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, paras. 44-45.
[88]Giorgio Monti, 'The Scope of Collective Dominance under Article 82 EC', *C.M.L.R*. 38, 2001, 141.
[89]*Irish Sugar*, paras. 44-45.
[90] For example A. Jones and B. Sufrin, J.Fanoy and S.van Kraanen.

not consider Irish Sugar and one of its distributors, Sugar Distributors Ltd, to be a single economic unit despite showing among other things a 51 per cent level of cross-shareholdings, and common directorships. Rather, the court found that all of these elements constituted no more than "economic links" between two independent undertakings, giving rise to the first case of vertical collective dominance in EU competition law.

In *Cewal*, one of the shipping conferences cases,[91] close links were shown between the ship-owners, who acted as a single entity. The abuse consisted in loyalty contracts outside the liner conference, involving the shippers. The contracts provided for substantial rebates where a shipper used only *Cewal* for their shipping requirements. Another abuse was the "fighting ships" strategy, by which the members of *Cewal* matched and under-cut the prices of the only competitor in the relevant market, by sharing of both earnings and loss between them. Although according to Regulation No. 4056/86 [92] certain agreements such as on a common rate structure and a regular schedule of service on specific routes, during long period of time, were exempted from prohibition in Article 101 TFEU, but in this regulation Commission was also allowed to withdraw the benefit of the block exemption and "take the appropriate measures for the purpose of bringing to an end the infringement of Article 102 TFEU" [93]. The CJEU stressed out that implementation of an agreement, decision or concerted practice, where the undertakings are linked in such a way that allows them to present themselves on a market as a collective entity constitutes a legal ground to establish the existence of joint dominance.[94]While defining a collective dominant position, the CJEU stated that: "*The expression one or more undertakings in Article 86* [now Article 102 TFEU] *of the Treaty implies that the dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity. This is how the expression collective dominant position, as used in the remainder of the judgment, should be understood.*"[95] This definition of collective dominance focuses on the concept of a collective entity rather than on the links between the undertakings in question. The CJEU cited as precedent in this regard its earlier judgments in *Almelo* (under Article 102 TFEU) and *France v. Commission*[96] (under the EUMR). It could also be mentioned, that due to points stressed in *Cewal*, the cooperation fostered by the liner

[91] CEWAL OJ L 34, 10.2.1993, p. 20-43;Compagnie maritime beige, C-395/96P & C-396/96P ECR 2000 Page I-01365, paras 41-42; Atlantic container Line, joined cases T-191/98, T-212/98 to T-214/98, ECR 2003 page II-03275

[92] Council Regulation No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 102 TFEU ans 102 TFEU to Maritime Transport O.J. 1986, L 378/4. The 28th of September 2009 has been issued the Commision Regulation No 096/2009 on the application of Article 101(3) TFEU to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia). Fixing prices and/or capacity is no longer alowed. However, the justifications for a block exemption for liner consortia are still valid. Regulation No 906/2009 entered into force the 26th of April 2010 and applies until 25th april 2015.

[93] Article 8 (2) of Regulation No 4056/86.

[94]*Cewal*, para 43-45.

[95]*Cewal*, para. 63.

[96]Joined cases C-68/94 and 30/95, *France v. Commission*, [1998] ECR I-1375 ('*Kali and Salz*').

conference might facilitate market coordination.[97]

Moreover, the CJEU did not seemed to consider collective dominance to have different meanings under Article 102 TFEU and the EUMR. In fact, the CJEU specifically stated in *Cewal* that the test of collective dominance is the same under Article 102 TFEU and the EUMR and that it is not necessary to have an agreement or other links to find collective dominance. In the same decision, the CJEU confirmed that the Commission can apply Articles 101 and 102 TFEU jointly: "[...] *As was stated in paragraph 33 of the present judgment, the applicability to an agreement of Article 85* [Article 101 TFEU] *of the Treaty does not prevent Article 86* [Article 102 TFEU] *of the Treaty being applied to the conduct of the parties to the same agreement, provided that the conditions for the application of each provision are fulfilled. More particularly, the grant of an exemption under Article 85(3)* [Article 101(3) TFEU] *does not prevent application of Article 86* [Article 102 TFEU] *of the Treaty*."[98]

In its *TACA* decision[99],the Commission again applied Article 102 TFEU in conjunction with Article 101 TFEU. The Commission found that the very high collective market share (approximately 70%) of members of a liner conference created a presumption of collective dominance.[100] Participation in liner conference agreements constituted the links that enabled the undertakings to act collectively. The GC 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*".[101] According to M. Filippelli, by this statement the GC clearly explained that eliminating the effective competition within the joint dominant group of firms does not require the absence of every competitive relationship.[102] However, significant competition within such a liner conference can be used to show that, regardless of the various links or correlation between the members, they are not in a position to adopt the same course of conduct on the market so as to give third parties the impression that they are acting as a single entity.

2.2. Collective dominance under EU merger control

[97] *Cewal*, para 48-49.
[98] *Cewal*, para. 130.
[99] *Transatlantic Conference Agreement* [1999] 4 C.M.L.R. 1415 (Commission); *Atlantic Container Line AB v Commission of the European Communities* [2003] E.C.R. II-3275; [2005] 4 C.M.L.R. 20 CFI.
[100] *TACA*, Commission decision of 16 September 1998, 1999 OJ L 95/1, para. 533. The presumption of dominance was also confirmed by other factors such as the undertakings' conduct on the market, the limited ability of customers to switch to alternative suppliers, the fact that the undertakings were price setters and other competitors followed their prices, and the existence of high entry barriers.
[101] *Atlantic Container Line* [2003] E.C.R. II- 3275.
[102] Marilena Filippelli, Collective dominance in the Italian mobile telecommunications market, E.C.L.R. 2010, 31(2), 81-89.

One of the first cornerstones of merger control case law is the CJEU decision in *Kali and Salz* case in 1998[103]. Before this judgment it was debatable if the EUMR covers only single or also collective dominance, due to wording of Article 2 of the old merger regulation[104], which unlike 102 TFEU did not expressly address the issue of collective dominance. The Court cleared up this matter, holding that collective dominance is within the scope of the EUMR. Even though the CJEU annulled the Commissions decision on the grounds that failed to prove that an oligopolistic dominant position would be created or strengthened, the Court confirmed the Commission's view that mergers creating an oligopolistic market structure (or duopolistic in the case in question) could be covered by Article 2(3) of the EUMR, which prohibits concentrations that create or strengthen a dominant position as a result of which effective competition is impeded. In *Kali and Salz*, the CJEU defined a collective dominant position under the EUMR as follows:"(...) *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 factors giving rise to a connection 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*."

The CJEU considered that such a situation could be found when several factors are present. Especially, the Court draw attention to those mentioned by the Commission in its decision: the homogeneity of the product, the maturity and transparency of the market, the high degree of concentration, and the similar market share of the members of the oligopoly. According to Faull and Nikpay, it also referred to structural links between the companies in question.[105] Unfortunately, it was not clarified whether in the absence of contractual or other, more formal, structural links between the collectively dominant undertakings operating on the market, the EUMR could apply to the creation of collective dominance.

This point was finally resolved in the GC's 1999 *Gencor*[106] judgment[107]. The Court in the notion of dominance included the relationship of interdependence existing between the members of a tight oligopoly.[108] The Commission issued in its decision[109], the frame definition of anti-competitive oligopolistic market:

1) on the demand side, there is moderate growth, inelastic demand and insignificant countervailing buyer power. Buyers are therefore highly vulnerable to a potential abuse;

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[103] *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entrepriseminière et chimique (EMC) v Commission of the European Communities ("Kali &Salz")* (C-68/94 and C-30/95) [1998] E.C.R. I-1375.
[104] Council Regulation (EEC) No 4064/89 of 21st December 1989 on control on concentrations between undertakings, OJ L395, 30.12.1989, p1.
[105] *See also* Faull &Nikpay, *The EC Law of Competition,* 342.
[106] Case No IV/M.619 – Gencor/Lonrho, OJ L 11, 14.1.1997
[107] Jones and Sufrin, *EC Competition Law, Text, Cases and Materials*, 3rd edition, 923.
[108] *Gencor,* para. 270.
[109] *Gencor*, para 14. The definition has been confirmed on appeal, Case T-102/96, ECR 1999 Page II-00753

2) the supply side is highly concentrated with high market transparency for a homogeneous product, mature production technology, high entry barriers (including high sunk costs) and suppliers with financial links and multi-market contracts. These supply side characteristics make it easy for the suppliers to engage in parallel behavior and provide them with incentives to do so, without any countervailing checks from the demand side.

According to the judgment in *Gencor*[110] a collective dominant position might arise whenever the market fits the frame description and competitors are aware that adopting a joint strategy is more constructive than developing a different strategy and conform from the coordinated course of action, which later was confirmed by *Airtours*.[111]

Airtours case is considered to be a milestone in the development of the doctrine of collective dominance since GC provided a set of three conditions to be fulfilled in order to find a joint dominant position. In 1999, Airtours plc (UK) proposed acquiring First Choice plc (UK). Only four undertakings had a significant share of the relevant market: Thomson (30.7%), Thomas Cook (20.4%), Airtours (19.4%) and First Choice (15%). The Commission found that this '4-to-3 merger' was incompatible with the common market on the ground that it would create a collective dominant position in the UK market for foreign package holidays, as a result of which competition would be significantly impeded in the common market. The Commission based its decision on three main bases. First of all, the merger facilitated the coordination between the oligopolists. Secondly, the retaliation mechanism was not absolutely necessary for the finding of joint dominance. Thirdly, the merger caused enhancement of market transparency, weakened the position of the actual and potential competitors and facilitated the elimination or the reduction of the competition between the merged parties. The court held that the transparency was not as high as the Commission argued and the rational coordination between the oligopolists was perfectly justified and therefore lawful. The market shares has been changing over the years before the merger and that’s why the market was dynamic and the new entries were likely to occur.[112]

The Commission concluded that: “*it is sufficient that the merger makes it rational for 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.*”[113]

However, the GC concluded that the Commission decision was: “*far from basing prospective analysis [regarding the creation of a collective dominant position] on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a*

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[110]*Gencor*, para. 276.
[111] Airtours plc v Commission, T-342/99, ECR2002 Page II-02585, paras 60-61 GC decided to integrally annul IV/M.1524 Airtours/First Choice.
[112] Lidgard, Judgement of the Court of First Instance: Case T-342/99 “Airtours”, ECPL 2009
[113]*Airtours/First Choice,* EC Commission Decision No IV/M.1524, para. 54.

collective dominant position might be created (...)”[114]and,“(...) *prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind significantly to impede effective competition in the relevant market*.”[115]

The GC stated that a collective dominant position, significantly impeding effective competition in the common market or a substantial part thereof, may arise as the result of a concentration where: “*the concentration would make each member of the dominant oligopoly, as it becomes aware of common interest, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article [101 TFEU] of the Treaty and without any actual or potential competitors, let alone customers or consumers, being able to react effectively*.”[116]

The GC, in striking down the Commission’s decision prohibiting the merger on the grounds that it would create a tight oligopoly, went further and named three elements necessary to find collective dominance under the EUMR:

(1) The market must be sufficiently transparent for the undertakings which co-ordinate their conduct to be able to monitor sufficiently whether the rules of co-ordination are being observed;

(2) There must be a form of deterrent mechanism in the event of deviant conduct;

(3) The reactions of current/future competitors and also the reactions of customers should not be able to jeopardise the results expected from the co-ordination.

Author of this thesis must agree with the views of F. Bektashi, that in *Airtours* decision, the GC clarified many crucial issues with regard to oligopolies and collective dominance, starting with the question of whether the EUMR applies to oligopolies as well as the role and the importance of economic links in this respect.[117]

In the context of the EUMR, therefore, it is clear that a collective dominant position will be created where the market structure causes the undertakings to align their conduct on the market and where the links between the undertakings are such that tacit coordination on the market can be expected. In addition, the GC also granted the Commission a significant freedom to act in assessing the market conditions under which collective dominance may be found.

The *Airtours* judgment’s immediate consequence was that it affected the 2004 reform of the EUMR. In this regard, the most important amendment was the change in the prohibition criteria from 'market dominance' to ‘significant impediment to effective competition’ (SIEC test).[118]

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[114]*Ibid.,* para. 294.
[115]*Ibid*.
[116]*Ibid*., para. 61.
[117]Farid Bektashi, *Structural Links for the Detection of Collective Dominance: Analysis of Case Law Under the ECMR*, 2007, p. 43
[118]Regulation No 139/2004, OJ 2004, L 24/1.

The GC's approach has been endorsed by the CJEU in *Impala I*[119], a case concerning the clearance of the Sony/BMG joint venture. The GC had annulled the Commissions decision to clear the joint venture, but the CJEU overturned this judgment and confirmed once again the *Airtours* criteria and sent the case back to the GC. The CJEU emphasized that '*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*.'[120]The key issue in this case was whether or not the five major record companies had held a joint dominant position before the merger between BMG and Sony. According to Mezzanotte, treating the tacit collusion in the context of pre-existent collective dominance, gives the legal basis to enforce tacit collusion in Article 102 TFEU.[121]

The basis for the litigation began in 2004, when the Commission approved the Sony/BMG joint venture (*Sony/BMG I* Decision),[122]despite opposition from other market players, including the Independent Music Companies Association (hereinafter - Impala). Impala appealed the Commission's Decision in *Sony/BMG I* in December 2004, in an application consisting of five pleas,[123]and in July 2006, the GC upheld that appeal[124]on the grounds of the first two pleas. These related to the Commission's assessment of: (1)whether a collective dominant position would be strengthened ("plea 1 of the GC application"); and (2) whether such a collective dominant position would be created in the recorded music market ("plea 2 of the GC application"). The GC found, amongst other things, that the *Sony/ BMG I* Decision contained insufficient reasoning and manifest errors of assessment in relation to whether a collective dominant position would be strengthened, and that the Commission had failed to carry out a proper prospective analysis of whether a collective dominant position would be likely to occur in the future as a result of further concentration among the major music recording companies. Consequently, the case was sent back to the Commission, which carried out a second investigation and approved the Sony/BMG joint venture for the second time in October 2007 (*Sony/BMG II* Decision).[125] In June 2008, Impala brought an action to challenge the *Sony/BMG II* Decision (Case T- 229/08). Meanwhile, Sony, Bertelsmann and Sony BMG appealed the GC judgment in *Impala v Commission* (T-464/04) on the grounds of seven pleas (*Bertelsmann v Impala* (C-413/06 P).In July 2008, the CJEU set aside the GC judgment, and sent it back to the GC (since only two of the original pleas had been addressed

[119] Bertelsmann AG and Sony Corporation of America v Commission, Impala, C-413/06, ECR2008 Page I-04951
[120]Case C-413/06P, *Bertelsmann AG, Sony Corporation of America/Independent Publishers and Labels Association (Impala)*, not published.
[121] Mezzanotte, Tacit collusion as economic links in article 82 EC revisited, E.C.L.R. 2009, p. 137-142
[122]Decision of July 19, 2004 (COMP/M.3333- *Sony/BMG*) [2005] OJ L62/30.
[123]*Impala v Commission* (T-464/04).
[124]*Impala v Commission* [2006] E.C.R. II-2289.
[125]Decision of October 3, 2007 (COMP/M.3333- *Sony/BMG*) [2008] OJ C94/19.

by the GC) (the "CJEU judgment").[126]

There was a further Commission investigation, when the Commission received a notification from the original merging parties concerning of the buyout by Sony of Bertelsmann's 50 per cent share in the original Sony/BMG joint venture. Following the Commission's approval of the buyout (*Sony/Sony BMG* Decision),[127]and receipt of observations from all of the parties to the two *Impala v Commission* cases (T-464/04) and (T-229/08), the GC declared both cases devoid of purpose in June and September 2009 respectively.[128]

As Jane Golding states, although both cases were declared devoid of purpose, they are of significant legal importance.[129] The outcome of Impala case is that: 1) confirmation occurred that the merger process is more than a private exchange between the merging parties and the Commission, and that the Commission must properly investigate the arguments made both by the merging parties and third parties. It must, in particular, test the claims of the merging parties, including late submissions; and it cannot leave the task of conducting fundamental aspects of the investigation to the merging parties but must verify submissions itself, even if it is not always possible to carry out market-testing at a late stage of the procedure; 2) the CJEU judgment has clarified the standard of proof applicable to merger decisions: there is no presumption in favor of approving mergers and thus the standard of proof is the same whether the Commission approves or blocks a merger.[130]

2.3. Collective dominance after *Airtours* and *Impala*

We may draw the main conclusion from the two cases analyzed above - it seems obvious that the EUMR cases involving the issue of collective dominance are relevant to Article 102 TFEU cases, as well as that the concept of collective dominance is interpreted by CJEU and GC in the same way under both Article 102 TFEU and the EUMR. As it was already seen, in *Gencor*, the CJEU based its ruling on the interpretation of collective dominance set out in the GC's *Italian Flat Glass* judgment (an Article 102 TFEU case). The GC relied on the CJEU's ruling in *Kali and Salz* in *Irish Sugar* (an Article 102 TFEU case) for its finding that: "*a joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent*

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[126]*Bertelsmann AG and Sony Corporation of America v Independent Music Publishers & Labels Association (IMPALA)* (C-413/06 P) [2008] E.C.R. I-4951; [2008] 5 C.M.L.R. 17.
[127]Decision of September 15, 2008 (COMP/M.5272-*Sony/Sony BMG*).
[128]Order of June 30, 2009 in *Impala v Commission* [2006] E.C.R. II-2289 and Order of September 30, 2009 (T-229/08).
[129] Jane Golding, The Impala case: a quiet conclusion but a lasting legacy, E.C.L.R. 2010, 31(7), 261-267
[130]*Bertelsmann AG and Sony Corporation of America v Independent Music Publishers & Labels Association (IMPALA)* (C-413/06 P) [2008] E.C.R. I-4951; [2008] 5 C.M.L.R., para 175.

independently of their competitors, their customers, and ultimately consumers."[131]

The GC stated in *Piau*,[132] relying on *Airtours*, that '*three cumulative conditions must be met for a finding of collective dominance (...)*.', meaning that the notion of collective dominance is for all intents and purposes identical under 102 TFEU and EUMR.[133]

In *Piau* case it was considered if the members of the International Football Federation (FIFA), held a collective dominant position by virtue of the fact that they agreed to be bound by the FIFA regulations. Contrary to the Commissions opinion, GC held that: *"Because the regulations are binding on national associations which are members of FIFA and the clubs forming them, these bodies appear to be linked in the long term as to their conduct by rules that they accept and that other actors (players and players' agents) cannot break on pain of sanctions that may lead to their exclusion from the market, in particular in the case of players' agents. Within the meaning of the case law [...] such a situation therefore characterizes a collective dominant position for clubs on the market for the provision of players' agents services, since, through the rules to which they adhere, the clubs lay down the conditions under which the services in question are provided."*[134]

Furthermore, the GC concluded that FIFA was not an economic operator on the market, but rather an emanation of the national associations and clubs, which were the actual buyers of the services, and therefore operated on the market through its members.[135]Joost Fanoy and Somaya van Kraanen argues[136], that the decision with respect to the establishment of a collective dominant position in *Piau* is contrary to the conclusion reached in the *Wouters* case.[137] In that case, the CJEU concluded that the members of the Dutch Bar Association were not sufficiently connected in their conduct on the market to hold a collectively dominant position due to their heterogeneous character and the fact that they engaged in a high degree of competition with each other.[138]

According D. Geradin, J. Padilla and N. Petit,[139] as the notion of single firm dominance receives a single interpretation under both – 102 TFEU and EUMR – by parity of reasoning similarly should be the interpretation of the concept of collective dominance. While agreeing with N. Petit, we would like to note, that the analysis of European court's case law shows that the concepts of collective dominance is the same for the purposes of both Article 102 TFEU and the EUMR. However, it should be taken into consideration, that an important distinction between the

[131]*Irish Sugar*, para. 46.
[132]Case T-193/02, *Piau v. Commission*, [2005] ECR II-209.
[133] Faull & Nikpay, 2007, p. 341.
[134]*Piau*, para 114.
[135]*Piau,* para. 107. Nevertheless, the GC concluded that no abuse had been established and upheld the rejection of the complaint.
[136] Joost Fanoy & Somaya van Kraanen, The Approach to Abuse of Dominance Cases on Both Sides of the Atlantic and Insights into Other Jurisdictions, NautaDutilh 2009, the Netherlands, p. 13.
[137]Case C-309/99, *Wouters*, [2002] ECR I-1577; *see also* Whish, 546.
[138]*Wouters*, paras. 64, 113-114.
[139] D. Geradin, J. Padilla and N. Petit "EU competition law and economics", Oxford ; New York (N.Y.) : Oxford University Press, 2012, p.198.

two exist: in Article 102 TFEU cases actual existence of a collective dominant position is a necessity, while in merger cases the Commission may act to prevent mergers which would lead either to the creation of a collective dominant position or to the strengthening of a pre-existing collective dominant position in the future. Thus in merger cases only the possibility of collective dominant position as well as no actual suffered abuse should be proved. GC in *Impala* made it clear that this distinction is a material one, not to mention that the evidence needed to establish, whether the requirements of the EUMR are met, will be affected by the question of whether the merger will lead to the creation of a collective dominant positioning or the strengthening of a pre-existing one. Where a collective dominant position exists, the *Airtours* criteria may be established with reference to market factors that typically indicate the presence of a collective dominant position.[140]

As there have been very few cases in which undertakings accused of engaging in abusive conduct under Article 102 have been found to be collectively dominant on the basis of tacit collusion/coordination and that European court's decisions have been limited to firms that had some sort of economic or contractual links.[141]On the other hand, considering the *Impala* judgment, in which it is stated that where the *creation* of a collective dominant position is alleged, proof thereof will inevitably be based on speculative evidence of how the market will most likely develop, i.e. evidence that the merger is likely to create a market situation which is conducive to tacit collusion. However, where the *existence* of a collective dominant position is alleged, it may be necessary to produce actual proof of factors consistent with tacit collusion to demonstrate that conditions that render the market conducive to collective dominance exist.

All in all, it may be very difficult to establish collective dominance in Article 102 TFEU cases, where there are no contractual or other structural links between the parties. According to N. Petit,[142] only recently in *EFIM v. Commission* case[143], the GC stated that a collective dominant position under Article 102 TFEU covered situations of "*tacit coordination*". Interestingly, the GC made no reference to the notions of "*collective entity*", "*correlation factors*" or "*economic links*" used in previous cases.

From our point of view, although technically exist two concepts of collective dominance and they differ slightly from one another, legally they should be treated equally under Article 102 TFEU and the EU Merger Regulation, as the European Courts already do.

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[140]*See also* Jones and Sufrin, p. 929.
[141]Sophia 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), at 5 ("Stephanou") available online at: https://www.competitionpolicyinternational.com/collective-dominance-through-tacit-coordinationthe-case- for-non-coordination-between-article-82-and-merger-control-collective-dominance-concept/., access time: 10 February 2012
[142] Nikolas Petit, The "Oligopoly problem" in EU Competition Law, p. 42, available at http://ssrn.com/abstract=1999829, access time: 10 February 2012
[143]GC, T-296/09, *EFIM v. Commission*, 24 November 2011, not yet reported, §§73 and 75. It also recalled that establishing a collective dominant position hinged on proof of (i) detection opportunities; (ii) retaliation mechanisms; and (iii) absence of countervailing power of actual and potential rivals.

3. DIFFICULTIES WITHIN THE FINDING OF A COLLECTIVE DOMINANCE

As already been discussed above, the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative. The concept of dominance has been analyzed by leading economists in the Report by the Economic Advisory Group on Competition Policy "An economic approach to Article 82" (hereinafter – EAGCP Report).[144]According to EAGCP Report traditional means of establishing dominance through information about market structure are proxies for the determination of dominance, they assess the ability to exert power and impose abusive behavior on other market participants.[145] The factors that need to be present for dominance *inter alia* include: large market shares; no close competitors; customers have limited possibilities of switching supplier; competitors are capacity constrained; firm is able to hinder expansion by competitors.

According to Craig Callery, it remains perfectly axiomatic that the "oligopoly problem" is one of the chief concerns of EU competition policy. Furthermore, the author of "Considering the oligopoly problem"[146]argues, that even if the word oligopolies is not explicitly said, the aim of exact wording in the Article 102 TFEU "one or more undertakings" enables to engage in the regulation of oligopolies, as market structure whereby a small number of undertakings utilize that structure to act analogously to each other. There is no need for explicit interaction or arrangement due to the market structure's transparency. This is often dubbed "tacit collusion",[147]and has been encompassed by Article 102 TFEU.[148]Undertakings are uniquely aware of their rivals' behavior on the market because, plainly speaking, there are so few of them. Craig Callery argues that oligopolies are naturally unpredictable and may act as they please, while merger's situation is a bit different and more predictable event. Going further, the scholar claims that *Compagnie Maritime Belge* judgment[149] makes explicit reference to assessment of "the *specific circumstances* of each case" thus rendering any hypothetical EU legislation rather futile. Not to mention, the Council of Europe have taken the view, that explicitly condemning oligopolistic structures would bring a proper measure of certainty, but on the other hand, such a legislative approach perhaps would be too restraining.[150]

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[144]The Report was written by JordiGual (IESE Business School and "la Caixa", Barcelona), Martin Hellwig (Max Planck Institute for Research on Collective Goods, Bonn), Anne Perrot (University Paris I and Conseil de la Concurrence, Paris), Michele Polo (Bocconi University, Milan), Patrick Rey (Coordinator, University of Toulouse), Klaus Schmidt (University of Munich) and Rune Stenbacka (Swedish School of Economics, Helsinki and RUESG, University of Helsinki).
[145]EAGCP Report page 14.
[146]Craig Callery, "Considering the oligopoly problem", E.C.L.R. 2011, 32(3), 142 - 152
[147]Whish, *Competition Law,* 2009, p.544. On the complications of this term, see pp.547-548.
[148] DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, Public Consultation (Brussels: European Commission, December 2005), e.g. p.23.
[149]*Compagnie Maritime Belge Transports SA v Commission of the European Communities* [2000] E.C.R. I- 1365; [2000] 4 C.M.L.R. 1076 at para. 114;
[150]Craig Callery, "Considering the oligopoly problem", E.C.L.R. 2011, 32(3), 142.

Considering what was mentioned above, in this part of the paper we believe it is necessary to address a few key issues concerning the application of the concept of collective dominance: the standard of proof sufficient to finding a collective dominance, the importance of relation between Articles 101 and 102 TFEU, as well as the need to establish connecting links, evaluate information transfers on the market and the gap in the enforcement of 102 TFEU, if the connecting links are not proved.

3.1. Tests and standard of proof applied to 102 TFEU and EUMR cases

3.1.1 The importance of *Airtours* criteria

The judgment in *Airtours* laid the foundation for the current SIEC-test that considers the impact of the unilateral anticompetitive effects even in the absence of dominance. For a finding of collective dominance, the GC clarified that it must be established that: (a) there is sufficient market transparency – in case to allow spotting deviations; (b) there are adequate deterrents to ensure that there is an incentive not to depart from the common policy; (c) and the benefits of co-ordination are not jeopardized by the action of current and future competitors or consumers.

One should be bear in mind that merger control has a number of features that make it different from Article 102 TFEU proceedings. In the context of EUMR, the *Airtours* criteria aim at foreseeing the future of tacit coordination, while in case of Article 102 TFEU, the Commission aims to show what has already occurred. Due to this it can be questioned whether the test should be enforced in a similar way[151].

The first element considers the structure of the market in which undertakings operate. The market must be sufficiently transparent for each member of the oligopoly to observe actions of others, in order to evaluate whether or not they are following the tacitly agreed joint policy, for example lowering output or raising prices. Transparent market allows players on it to easily compare prices as well as sales conditions. The oligopolistic markets are naturally transparent and due to this, rivals are able to coordinate their actions without entering in any contracts, both by conscious and unconscious parallel conduct. This type of transparency is due to the market structure. In order to avoid such structure, potentially harmful mergers must be controlled or prevented. On the other hand, transparency may be obtained through the flow of information between the competitors, as knowledge of planned actions or strategies obtained by others may influence undertaking to act in compliance. Further analysis on information sharing will be given in 2.4 part of this thesis.

[151] The standard of proof required in each situation will be analysed in 3.1.2. paragraph.

Secondly, one of the *Airtours* conditions concern sustainability of actions, thus there is a need of a punishment mechanism to exist, in order to ensure that group members would not stray off the applied strategy as there is a need to counter the incentive to 'cheat'. According to D. Geradin, N. Petit and J. Padilla, [152] GC specifically noted in Airtours that the Commission did not have to bring evidence of the existence of a specific retaliatory mechanism. It just had to show that a potential retaliatory mechanism might give incentives to firms not to deviate.[153] The assessment of situation investigated in the light of Article 102 TFEU might be easier in comparison to investigation under EUMR. As noted by above mentioned scholars, it seems to be easier to evaluate already existing retaliatory mechanism or the lack of it. Consequently, the Commission should be required, unlike under EUMR test, to show that a specific retaliatory mechanism existed and exercised a deterrent effect that resulted in undertakings surely following mutual course of action.

Third condition concerns the absence of competitive constraints. It suggests that, the reaction of rivals and consumers would not be sufficient enough to impede the anticipated results from the applied joint policy. The Commission has an obligation to prove that the foreseeable reaction of active and potential rivals as well as consumers would not endanger desired consequences of common policy. According to above mentioned scholars, the Commission should prove that the undertakings could effectively implement tacit coordination because of the absence of countervailing power from their customers as well as actual and potential competitors.

After the Guidelines[154] adoption, there could be a fourth requirement named – oligopolists should share a common understanding of the tacitly collusive policy.

Another related issue is the Commission's obligation to show that competition between the oligopolists is severely distorted.[155] Unfortunately, it seems unclear to which degree. In *Airtours* GC held that it should be shown that there is a lack of effective competition between the possibly collectively dominant undertakings[156]. In *TACA* GC went further and added: "*there can be no requirement, for the purpose of establishing the existence of such a dominant position, that the elimination of effective competition must result in the elimination of all competition between the undertakings concerned*"[157] . Thus, it is uncertain to which degree the competition should be impeded in order to find collective dominance. There may occur a situation, when undertakings

[152] D. Geradin, J. Padilla and N. Petit "EU competition law and economics", Oxford ; New York (N.Y.) : Oxford University Press, 2012, p.205.
[153] This notion was critized by A. Nikpay and F. Houwen in 'Tout de Force or Little Local Turbulence? A Heretical View on the Airtours Judgment', 2003 (24) ECLR 193,199. They also criticed exsesive reliance on the third Airtours criteria's application under EUMR.
[154] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004, at 5 – 18, para 41.
[155] D. Geradin, J. Padilla and N. Petit "EU competition law and economics", Oxford ; New York (N.Y.) : Oxford University Press, 2012, p.205.
[156] *Airtours,* para 63 :" The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators."
[157] *TACA,* para 653.

competing on certain parameters (for instance, marketing, innovation), are unable to compete on price due to obvious reasons, for example, price is constrained due to taxation, homogeneity of products or cost of raw materials(such markets could be in oil sector, alcohol or tobacco sectors).

Thus, we must agree with D. Geradin, N. Petit and J. Padilla suggesting that competition agencies should focus on markets where there is a lack o effective competition on large range of parameters. In our opinion, this only confirms the importance of thorough economic analysis of the market while assessing possible collective dominance.

While comparing situation of evaluating merger's effect on competition in Lithuania, J. Malinauskaitė argues that although the wording of the substantive tests in the Baltic countries has been modified after the new EUMR, their focus is still on a finding of dominance, which, according to the author of article "Development of merger control in the Baltic countries: over 10 years of experience: Part 2"[158], can be problematic especially for small market economies, such as the Baltic countries. It is argued, that the new EUMR substantive test is more economically based centering on to the significant impediment of competition instead of the focusing only on the assessment of dominance. Unfortunately, the Commission's practice have not yet significantly changed as dominance continues to play an important role in most cases, and once established, appears sufficient to challenge a merger. However, it should also be noted, that dominance is assessed concentrating not only on market shares, but on other relevant market characteristics that are consistent with an effect-based approach.[159] While considering the substantive test applied by Lithuania's Competition Council the scholar stresses that it was amended after the new EUMR, still the main focus seems to be locked on the finding of dominance.

The Law on Competition authorizes the Competition Council to approve, approve a conditional concentration (by imposing certain conditions and obligations on the parties involved aiming to prevent the creation or strengthening of a dominant position) or to refuse to grant a permission for concentration by enforcing a decision. Previously applicable Law on Competition[160]stated in article 14(3) that the Competition Council may refuse to grant permission, "where concentration will *establish or strengthen a dominant position* and *result in a substantial restriction of competition in a relevant market*"[emphasis added]. Malinauskaitė claims that these provisions were confusing, as article 14(1) referred only to a finding of dominance, while article 14(3) contained two possible outcomes - the finding of dominance and that dominance results in a substantial restriction of competition in a relevant market. From previously applicable legislation it was unclear, if two different substantive tests were used in the Lithuanian jurisdiction. Fortunately, the case law gave

[158] J. Malinauskaitė, Development of merger control in the Baltic countries: over 10 years of experience: Part 2, E.C.L.R. 2011, 32(3), 109-115
[159] ibid., p. 110.
[160]Law on Competition 23 March 1999, Nr. VIII-1099.

clarity -once dominance was found, no further investigation was held. While arguing this Malinauskaitė cites the *Rautarkirja Oy v UAB Lietuvos Spauda* case,[161] where permission for acquisition was granted, subject to certain conditions and obligations in order to avoid the creation or strengthening of a dominant position.[162]

While citing M. Gal,[163]Malinauskaitė argues, that as the former substantive test of the EUMR was focusing on static aspects, such as finding dominance, and once the creation or strengthening of a dominant position was determined, other pro-competitive aspects (i.e. efficiencies) were not taken into account. Blindly following and imitating the same test to small market economies such as Lithuania's can have detrimental effects, due to the fact that there are a limited number of market players in small market economies and quite often the market can support only a limited number of firms.[164]Therefore, the scholar suggests that, concentrated market structure may need to become further concentrated in order to achieve minimum efficient scales of production relative to demand in small market economies, for instance a merger, which is considered to strengthen a dominant position or lead to monopoly, can also lead to a reduction in prices, for example, through a realization of efficiencies.

Nowadays applicable substantive test is influence by the change of new SIEC-test. The legal text of Article 14(3) Law on Competition[165] has been modified and now provides the Competition Council the right to prevent concentration, "where concentration will establish or strengthen a dominant position or substantially restrict competition in a relevant market". The literal meaning suggests that transactions can be evaluated on the either ground: if it creates or strengthens a dominant position; or whether it substantially restricts competition in a relevant market. According to J. Malinauskaitė, the same substantive test applies for conditional merger approval, which has solved previous uncertainties.[166]While comparing the SIEC –test established in EUMR, it states: *"A concentration which would significantly impede effective competition, in particular by the creation or strengthening of a dominant position, in the common market or in a substantial part of it shall be declared incompatible with the common market",*[167] it should be noted, that both possible outcomes are also guarded by the Law on Competition. However, it seems to us, the Competition Council concentrated on the result relating with the dominance, but not centering on the "significantly impeding effective competition" part itself, as it is shown as an alternative to finding a possible

[161]27 October 2005 Resolution of the Competition Council No. 1S-121, *Rautarkirja Oy v UAB Lietuvos Spauda*.
[162] J. Malinauskaitė, Development of merger control in the Baltic countries: over 10 years of experience: Part 2, E.C.L.R. 2011, 32(3), p.111.
[163]M. Gal, *Competition policy for small market economies* (Harvard University Press, 2003)
[164] J. Malinauskaitė, Development of merger control in the Baltic countries: over 10 years of experience: Part 2, E.C.L.R. 2011, 32(3), p.113.
[165] Law on Competition, ammended by *No. IX-2126, 2004-04-15, Official Gazette, 2004, No. 63-2244* and *No. XI-216, 2009-04-09, Official Gazette, 2009, No. 46-1795.*
[166] J. Malinauskaitė, Development of merger control in the Baltic countries: over 10 years of experience: Part 2, E.C.L.R. 2011, 32(3), p.113.
[167] EUMR article 2(3).

creation or strengthening of dominant position, while according to SIEC –test wording in EUMR it seems that the objective is to guard the possible significant impeding effective competition as the result might be strengthening or creating a dominant position in the relevant market. Consequently, the starting point of merger evaluation in Lithuania is a finding of dominance. Lithuanian soft law provides that the assessment of concentration effects is based on the establishment of the dominant position. If dominance is created or strengthened through a concentration transaction, it presents, "sufficient grounds to believe that the concentration may substantially restrict competition in the market".[168]

All in all, in our opinion, due to the change in EU substantive tests for merger appraisal, Lithuania also have amended the test. However, it evolved not as significantly as SIEC test as the test applicable by the Law on Competition still firstly centers on finding dominance. Not to mention, the concept of dominance is defined in the same article of the Law on Competition as for purposes of establishing a dominant position. Lithuania's competent authorities as well as courts follow the practice of EU courts even in cases concerning purely national competition laws application. The lack of sufficient economic approach may result in harmful effects, due to the fact that in such a small market economies as Lithuania's there are a limited number of market players and consequently to efficiently satisfy the needs of consumers and customers a more constructive way to control mergers would be by concentrating on the evaluation of possible effects to the market.

3.1.2. **Differences of standard of proof applied to 102 TFEU and EUMR cases**

Furthermore, in *Impala* case the CJEU made it clear that there is a symmetrical standard of proof for clearance and prohibition of Commission's decisions. Ben Van Rompuy in article "Implications for the standard of proof in EC merger proceedings: Bertelsmann and Sony Corporation of America v. Impala (C-413/06 P), CJEU"[169]claims, that most significantly, the judgment of the CJEU brought an end to the discussion about whether there exists a bias against or in favor of the legality of mergers. It specifically held that it cannot be inferred from the EUMR that there is a general presumption that a notified concentration is compatible with, or incompatible with, the Internal Market. It would be wrong, though, if the Commission would opt by default for a clearance decision in any case of doubt. Furthermore, an unequal standard of proof in favor of clearance could in practice lead to the undue authorization of anticompetitive mergers. This was one

[168]17 May 2000 Resolution No. 52 on the Explanations of the Competition Council concerning the Establishment of a Dominant Position (2000) 52-1516 *Official Gazette*, point 32.
[169]Ben Van Rompuy, "Implications for the standard of proof in EC merger proceedings: Bertelsmann and Sony Corporation of America v. Impala (C-413/06 P), CJEU", E.C.L.R. 2008, 29(10), 608-612.

of the alarming issues that was raised in the aftermath of the three judicial defeats in 2002. Far from arguing why the merger would not lead to the creation or strengthening of a collective dominant position, the Commission mainly indicated why the evidence was "not sufficient" to underpin a prohibition decision. The CJEU therefore rightfully confirmed that the Commission cannot opt for a clearance Decision to be on the safe side, the Commission has an obligation to make a decision only based on sound evidence - a standard the first clearance decision did not satisfy. Hopefully, this will also reestablish the legal certainty that a clearance decision will be permanent, as the notifying parties have little control over ensuring that the Commission's analysis can withstand judicial scrutiny.[170]

Secondly, the CJEU accepted that there is a different standard of proof for finding an existing or potential collective dominant position. In *Impala,* the GC suggested that the *Airtours* conditions for a finding of collective dominance could be more easily satisfied in the investigation of a pre-existing collective dominant position in comparison to the investigation of a potential creation of such a position. The GC departed from this substantive test by declaring that: "*Although the three conditions <...> 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. Thus, in particular, close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of collective dominant position, might, in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such cases.* "[171](Emphasis added).The CJEU interestingly did not object to this *obiter dictum*. It highlighted in this regard that: "*It is necessary to avoid a mechanical approach involving the separate verification of each of those criteria in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination.*"[172]According to B. van Rompuy, this can be seen as an explicit acknowledgment of the difficulties the Commission may face when investigating complex collective dominance cases. Besides, B. van Rompuy argues that quite in contrast to the often-heard claim that *Impala* imposed a too high standard of proof on the Commission, the CG and the CJEU thus in fact lowered the evidentiary threshold for establishing an existing collective dominant position.

To our opinion, debates of whether the standard of proof is too high or is sufficient or even lowered in case of already existing dominance, only illustrates that the *Airtours* conditions are not

[170] Ibid.
[171] *Impala* [2006] E.C.R. II-2289 at para. 251 and 252.
[172] *Impala II* (C-413/06 P), [2008] ECR II-4951, at para.125.

yet clear-cut. Unfortunately, the same can be said about the GC's teachings on the market transparency criterion in *Impala* (e.g. the undefined "indicia and items of evidence" or the vague formulation of "appropriate circumstances").

In the context of Article 102 TFEU, the CJEU in *Continental Can* argued, "*there is no need for a causal link to be established between the dominant position and the abuse. It is necessary only that the conduct strengthens the undertaking's dominant position and fetters competition on the market*".[173] Consequently, a dominant undertaking can abuse its position without using the market power that the position confers, but by ordinary commercial practices also engaged in by non-dominant undertakings.[174] The market on which the abusive conduct takes place not necessarily must be the same as that on which the dominant position is held,[175] although, the alleged abusive conduct is normally found on the dominated market, it may also be found on a distinct, but closely associated market, likely to strengthen the position on the dominated market.[176]

On the contrary as the CJEU confirmed in *Kali und Salz*,[177] there must be a causal link between the creation or the strengthening of dominance under the original EUMR and the adverse impact on effective competition. This distinction on the necessity of the "causal link" illustrates the different application of the dominance test under Article 102 TFEU and EUMR.

Existence of a dominant position is a necessary condition for application of Article 102 TFEU, however, it is not necessary for there to be a link between the dominance and the abuse. As regards the definition of "abuse", although there is no definition of the concept in legislation[178]the CJEU has on numerous occasions dealt with this concept.

3.2. Relationship between Articles 101 and 102 TFEU

According to the protocol on the internal market and competition[179], which is an integral part of the TFEU, the internal market shall include a system ensuring that the competition is not distorted. Article 3(1) TFEU obliges national competition authorities and courts to apply Articles 101 and 102 TFEU to agreements or conduct capable of affecting trade between Member States. This rule is intended to ensure that the EU competition rules are applied to all cases within their scope and that the cooperation mechanisms foreseen in the Regulation 1/2003 are fully applicable. In *Continental*

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[173]Case 6/72 *Europemballage Corp and Continental Can Co. Inc. v. Commission* (Continental Can), [1973] ECR I-215, para 26 - 27.
[174]*Europemballage Corp and Continental Can Co. Inc v Commission (Continental Can)*, at para 27; Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR I-461, at para 91 and para 120.
[175]Case T-51/89, *Tetra Pak Rausing SA vs. Commission (Tetra Pak I)* [1990] E.C.R. II-309, [1991] 4 C.M.L.R. 334, para 25.
[176]Case T-83/91, *Tetra Pak Rausing SA v Commission (Tetra Pak II),* [1994] ECR II-755, at para 23-28.
[177]Case M308 *Kali und Salz/MdK/Treuhand*[1998] OJ C275/3; on appeal Cases 68/94 and C-30/95 *France v Commission, Societe Commercialees Potasses et de l'Azore (SCPA) v Commission* [1998] ECR I-1375.
[178]Kokkoris I. "*A Gap in the Enforcement of Article 82*", BIICL, 2009.
[179] Protocol (No. 27) on the internal market and competition, Official Journal 115, 09/05/2008 p.0309 - 0309

Can case, the Court highlighted that the Articles 101 and 102 TFEU have been included in the Treaty for the same reason. As it was already mentioned, both articles of the Treaty also contain the same jurisdictional requirement that trade between Member States must be affected. Undertakings may breach both Articles with the same conduct or practices.

The main distinguishing features between Articles 101 and 102 TFEU are that: 1) while Article 102 TFEU requires a dominant position to be enjoyed by one or more undertakings on the markets, Article 101 can potentially apply nonetheless of whether any party has a market power; 2) Article 102 TFEU can apply to both agreements and unilateral conduct adopted by a dominant undertaking (or a group of undertakings holding a position of collective dominance), however Article 101 can not be applied to unilateral conducts as it only apply to agreements between at least two independent undertakings and 3) there is no possibility of an exemption under Article 102, whereas agreements or practices caught by the ban in article 101(1) may be exempted pursuant to article 101(3). Moreover, a consideration of Article 102 TFEU requires an undertaking of the 'special responsibility' that the Commission and European Courts have held is incumbent on undertakings found to hold a dominant position.[180]This 'special responsibility' is essentially the idea that dominant undertakings may be prevented from engaging in conduct which is otherwise permissible when engaged in by non-dominant undertakings.[181]

Assuming that the anticompetitive behaviour can be explained as the consequence of economically rational reactions of oligopolists, then Article 101 TFEU is not applicable according to *Wood Pulp*'s judgment. Therefore, according to Mario Monti[182], the CJEU can not approve that the same evidence which offers a defense under Article 101 TFEU also constitutes evidence of an abuse under Article 102, as it would conflict with the legitimate expectations of undertakings. In *Tetra Pak I*[183], the GC upheld that considering caused effects on the structure of competition, the acquisition of exclusive license by a dominant company constituted a breach of the Article 102 TFEU. Although, the applicant argued that the acquisition was allowed by then Patent Block Exemption[184], the court explained that the block exemption as secondary legislation had lower priority in comparison to the Article 102 TFEU.[185] The conflict between block exemption and primary legislation may occur because there is no positive assessment of the market situation and no case-by-case examination of the circumstances.

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[180] E.g. Microsoft v. Commission, [2007] ECR II-3601, para. 229

[181] Ivo Van Bael, Competition law of the European Community /Van Bael & Bellis, Wolters Kluwer Law & Business ; Alphen aan den Rijn : Kluwer Law International, 2010, p.100.

[182] Monti, The scope of Collective Dominance under Article 82 EC, Common Market Law Review 38: 131–157, 2001, p.145

[183] Tetra pak I, Case T-51/89, ECR 1990 Page II-00309

[184] Commision Regulation 2349/89 on the application of Article [101 TFEU0 (3) of the Treaty to certain categories of patent lisencing agreements, OJ L219, 16.8. 1984, p. 15-24

[185] Tetra Pak Rausing v. Commission, [1990] ECR II-309, para.25.

The Block Exemptions under Article 101 TFEU may strengthen or create dominant positions and consequently the Competition Authorities may withdraw the exemption or turn to Article 102 TFEU and search to establish abuse of collective dominance. Article 102 TFEU can be applied to undertakings benefiting from a block exemption when: the joint dominant position is the result of the exempted agreement, the existence of a dominant position is established by the court and the dominant position is abused. According to A. Jones and B. Sufrin citing *TACA* case paragraph 330, the application of article 101(3) TFEU does not prevent the application of the article 102 TFEU and makes it clear that Article 101(3) TFEU cannot be applied to permit an agreement that constitutes an abuse of a dominant position. According to already discussed *Almelo*[186] judgment, the application of an exclusive purchasing clause is precluded by both Article 101 and Article 102 TFEU, but may be permitted by Article 106(2) if the clause is absolutely necessary in order to enable the undertakings to perform a task of public interest. An exclusive purchasing clause amounts to abuse of collective dominance and to engagement in collusive behavior, if the task assigned by the public authorities can performed even without enforcing such a clause.

All in all, we believe, the relationship between Articles 101 and 102 TFEU is of crucial importance as both articles could be applied to the conduct of collectively dominant undertakings. The main differences between the two articles is that for 101 TFEU to be applied there are the need to establish an agreement between at least two independent undertakings, as well as there are laid conditions for such an agreement to be exempted individually, or by block exemptions. On the other hand, Article 102 TFEU does not need the existence of concurrence of wills as it could be applied to a single undertaking or to collective entity, as long as its conduct would constitute an abuse of a dominant position. It should also be noted, that there is no exemption in case where behaviour is caught under Article 102 TFEU as well as exemption granted under Article 101(3) TFEU does not prevent possible investigation under Article 102 TFEU. However, as the GC has stated, 'in applying [Article 102 TFEU], the Commission must take account, unless the factual and legal circumstances have altered, of the earlier findings made when exemption was granted under [Article 101(3) TFEU]'[187], consequently it seems to us, that there should be a different approach to applying Article 102 TFEU to agreements that have been individually evaluated and declared to satisfy the conditions of Article 101(3) TFEU, especially the requirement of 'indispensability' and 'elimination of competition', in comparison to agreements that merely fall within the safe harbor of a block exemption.

3.3. Quantitative criteria of collective dominance

[186] Gemeente Almelo and Others v. Energiebedriif NV, C-393-92, ECR I-1477, paras 42-43; See aslo the opinion of Advocate-General Darmon, para 117.
[187] Tetra Pak Rausing v. Commission, [1990] ECR II-309, para.28

One of the crucial factors in supporting a finding of joint dominance is high market share of the collective firm concerned, as it has been stated that undertaking can only be deemed to be in a dominant position on a market if it has succeeded in obtaining a large part of that market.[188]The competent authorities (either Commission or Competition Council, depending on the scope of affected market) consider the same criteria while assessing collective dominance as well as sole dominance. Thus, a quantitative criterion of entity's high market share is one of the main, although not exclusively decisive, criteria. According to CJEU practice, it seems that presumption of dominance is rebuttable, in case where a company has a market share of 50% or more.[189] GC held that a market share of 60% was considered as a strong indication of collective dominance in *TACA*.[190] On the other hand, in *United Brands* CJEU stated that there was a need to evaluate not only firm's market share, ranging from 40 to 45%, but also other factors to claim undertaking being dominant.[191]

Market shares provide useful first indications of the market structure and of the competitive importance of various undertakings active on the market. The Commission interprets market shares in the light of likely market conditions, for instance, whether the market is highly dynamic in character and whether the market structure is unstable due to innovation or growth. The benefits of using market shares as a first indication must be weighed against the risks, in particular the potential over-emphasis on market shares and thus potential enforcement errors.[192]

While assessing a collective dominance position, separately held entity's market shares would be aggregated with supposedly connected undertaking's market shares. Therefore, a possibility is created to see, what position in regards to market shares is held by supposedly collective entity and if such a collective undertaking acts independently from its competitors, customers and essentially consumers while enjoying a collective dominant position. Thus it is assumed that if a collective entity of two or more undertakings gets hold of certain amount of market share, such a collective entity enjoy a collective dominance unless it is proven otherwise. As an example of such a situation could be already discussed *TACA* case.

In comparison, we may draw attention to the Law on Competition in Lithuania, as each undertaking in a group of three or fewer undertakings that have the largest share of and hold jointly 70 per cent or more of the market shall be considered to enjoy a dominant position, unless it is

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[188]*United Brands v. Commission*, para. 107
[189] In AKZO Chemie v. Commission, case 62/86, [1991] ECR I-3359, para. 60, CJEU ruled that a market share of 50% was in itself, absent exceptional circumstances, adequate evidence of the existence of a dominant position.
[190] Atlantic Container Line and others v. Commmission (III), joined cases T-191/98, T-212/98 and T-214/98, [2003] ECR II-3275, para.908.
[191] United Brands, para.108-109.
[192] Ioannis Kokkoris, Are we Underenforcing Article 102? Competition Law and the Enforcement of Art. 102, Etro & Kokkoris Eds., *Oxford Univ. Press*, 2010

proved otherwise[193]. It should also be noted that due to already mentioned certain developments the threshold of market shares in certain markets[194] have been lowered - a collective entity will be considered enjoying dominant position, if jointly hold 55 per cent (compared with the previous 70 per cent) or more of the relevant market. On the other hand, due to recent shift in competition policy priorities[195] practical application of the above mentioned norm may be more economically based as seeking to apply the norms not mechanically, as well as the consumer welfare may be taken more into account than just rigid application of market shares criteria.

While taking into account all what was mentioned, it seems to us that as market shares provide useful first indications of the market structure as well as of competitive entities active on it, quantitative criteria of entity's high market share is crucial in assessing of collective dominance. However, it should be evaluated in the light of other criteria, such as barriers to entry, markets dynamics.

3.4. The need to establish connecting links

Unsurprisingly, oligopolistic markets engage a high level of transparency and therefore provide favorable conditions for tacit coordination. On the other hand, there are also non-oligopolistic markets where the information flow is very high and the market transparency is not a matter of structure, but rather a matter of commitment in constant information exchange, for example markets established on the Internet. Consequently, a situation may arise, where one may be looking for explicit or oligopolistic collusion in cases where the nature of the collusion is not explicit and not oligopolistic either. Although it seems natural, that continuous, non-binding and wide spread communication occurs on the specific market, a question needed to be answered is whether collusion is interpreted in the same way under Articles 101 and 102 TFEU, as the existence of economic link is one of the requirements to find joint dominance. Based on the economic links that competitors might share with each other, collective dominance can be defined as a relationship of mutual interdependence. The joint dominant competitors are interdependent to each other, though able to act independently of the other competitors and the rest of the market actors.

As it can be seen from the analysis of the case law in the first part of the thesis, definition of connecting links are not set in stone as the case law only provide the examples of what they could be or more importantly what their effect should be to establish a collective entity.

[193]Law on Competition of the Republic of Lithuania, part 11 of Article 3
[194]engaged in retail trade, person responsible for the maintenance of the heating and hot water system of the building, engaged in activities of the administrator of the facilities of common use.
[195] 8th Regional Competition Conference, Vilnius, 29 September 2011, http://www.konkuren.lt/en/index.php?show=conf_pr

Furthermore, economic links can be structural, contractual or oligopolistic. Examples of structural links could be cross-shareholdings and interlocking directorates[196]. Cooperation or license agreement[197] could constitute examples of structural links. Such structural links might be a matter of explicit collusion, not to mention, oligopolistic interdependence, as an outcome of the market structure, could be an issue of tacit collusion.[198] Both explicit and tacit collusion may result in reduction of consumer welfare, mainly through the raising of prices and restriction of output as well as these practices may limit possible variety and innovation on a market.[199] The difference of these types of collusions is that explicit or overt collusion occurs where undertakings collectively agree to exploit their economic power while in a case of tacit collusion, undertakings act independently and without communication, however due to the transparency of the market, damage inflicted could be equally severe. It should also be kept in mind, as CJEU noted in *Irish Sugar* case, that it is not necessary that the undertakings in question adopt identical conduct on the market in every respect, or as CJEU explained in the judgment of *Kali and Salz* case, the important thing is that undertakings adopt a common commercial strategy and act to a considerable extent independently of their competitors, their customers, and consequently independently of consumers.

According to Mezzanotte[200], case law offers only two cases where economic links were clearly defined and established, namely *CEWAL II* and *TACA*[201].The scholar noted, that economic links between undertakings such as contracts (i.e. tariff agreements) or structural links that interconnect undertakings (i.e. cross-shareholdings, shared management or common directorships) can be grouped together to denote undertakings that are connected by links in law. The economic links found in *CEWAL II* and *TACA* can be categorized as links in law.[202]Mezzanotte raises some key issues concerning assessment of structural links – such as how to evaluate threshold level of cross-shareholdings or would it be enough to established shared management in itself to find economic links needed to establish collectiveness. Further, Mezzanote argues that in *CEWAL II* judgment the CJEU delivered a first indication that tacit collusion might constitute 'economic links' within the scope of Article 102 TFEU. Mezzanote refers to the CJEU statement that: "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.*

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[196] Interlocking directorates should be understood as a situation where one person is a director or an active board member of two different legal entities.

[197]as the licensing agreements in *Italian Flat Glass,* joint management contract in *CEWAL*, collective concession rights in *Almelo.*

[198] Goyder & Albors-Llorens, Goyder's EC Competition law, Oxford University press, 2009, p 378 referring to *Italian Flat Glass*, para 45

[199] A. Jones, B. Sufrin EC competition law : text, cases, and materials / Oxford : Oxford University Press, 2008, p. 859.

[200]Felix E. Mezzanotte, Tacit collusion as economic links in article 82 EC revisited, E.C.L.R. 2009, 137-142.

[201]*CEWAL II* [2000] 4 C.M.L.R. 1076; and *Atlantic Container Line AB v Commission of the European Communities* (T-191/98) [2003] E.C.R. II-3275.

[202]*CEWAL II* [2000] 4 C.M.L.R. 1076 at para 41-48; and *TACA* [2003] E.C.R. II-3275, para 592-627.

"[203] . Mezzanotte in his conclusion is not alone, as the author cited other supporters of the idea that the CJEU referred to tacit collusion as economic links.[204] However, Preece, for example, claims that the notion of economic links (collective entity) laid down by the CJEU in *CEWAL II* does not imply parallel conduct among undertakings, yet without tacit collusion necessarily explaining this parallelism.[205] While analyzing *Piau* situation, Mezzanotte argues that as *Airtuors* criteria captures what is now settled in merger law – that collective dominance includes the notion of tacit collusion, consequently, following *Piau,* "economic links" can be categorized as links in law and tacit collusion. The author does not agree with argumentation laid down in *Piau* case, as argues that *Airtour* criteria was ill placed in the context of the case as well as GC exhibited no attempt to integrate it into the operative part of the judgment. Nevertheless, Mezzanote claims that tacit collusion could be found in pre-existing collective dominance, citing *Impala* judgment, where CJEU stated that a group of firms can be found collectively dominant prior a merger if the Commission proves that they are effectively engaged in tacitly collusive conduct.

Therefore, argumentation laid down in the mentioned judgment is of essential importance as involved analysis that hypothetically could be applied to Article 102 TFEU cases, not to mention that the CJEU cited *CEWAL II* at paragraph 45 as a legal basis for tacit collusion in pre-existing collective dominance.[206] Furthermore, the Commission could investigate an alleged Article 102 infringement in a setting of tacit collusion by relying on *Impala* 's principles. In this light, the CJEU stated that the *Airtours* criterion is compatible with those facts defining, on an actual basis, tacit collusion.[207]

In our opinion, to sum up it must be noted that to prove collectivity one must show economic links of separate undertakings, which allow subjects in question to act as a single unit on the market. The concept of these links are debatable subject as the case law only provide examples of what they could be or more importantly what their effect should be, as a given example of *Impala* case - group of firms can be found collectively dominant prior a merger if the Commission proves that they are effectively engaged in tacitly collusive conduct. Unfortunately, Guidelines[208] do not address collective dominance issue and further clearance could only be assessed through future case law practice.

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[203] *CEWAL II* [2000] 4 C.M.L.R. 1076 para 45 (emphasis added).
[204] Mezzanotte suggests to see, e.g. S. Stroux, "Joined Cases C-395/96 P and C-396/96 P, Compagnie Maritime Belge and Others v. Commission, Judgment of the Fifth Chamber of 16 March 2000" [2000] 37 C.M.L.R. 1249, 1260; Haupt, " Collective Dominanceunder Article 82 EC and EC Merger Control in the Light of the Airtours Judgment" [2002] E.C.L.R. 434, 437-438; O'Donoghue and Padilla, *The Law and Economics of Article 82 EC* (2006), p.148-149; and Jones and Sufrin, *EC Competition Law,* (2008), p.924-927.
[205] S. Preece, "Compagnie Maritime Belge: Missing the Boat?" [2000] E.C.L.R. 388 (also noting that the CJEU in *CEWAL II* did not cite the CFI decision in *Gencor*). In a similar fashion, Geradin*et al.,* "The Concept of Dominance" in *GCLC Research Paper on Article 82 EC* (2005), p.28-29 and Petit (2007), p.140-141.
[206] *Sony/BMG* [2008] 5 C.M.L.R. 17, para 119.
[207] *Sony/BMG* [2008] 5 C.M.L.R. 17, para123-124.
[208] The Guidance on the commission's Enforcement priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by dominant Undertakings//OJ 2009/ C 45/7, para. 2 and 4.

3.5. Information sharing

According to OECD[209], increased transparency in the market as a result of information sharing may both benefit consumers directly as well as produce efficiencies for the companies involved, resulting in improved consumer welfare. Unfortunately, greater transparency can also ease the attainment of collusive equilibria among rivals or result in non-coordinated anticompetitive effects. As competition laws mostly do not specifically deal with exchanges of information, instead certain situations involving the flow of information on the market are dealt within the framework of traditional prohibitions against cartel agreements and/or concerted practices.

According to A. Jones and B. Sufrin[210] the CJEU and the Commission have consistently emphasized the importance of rivals acting independently. Sharing highly sensitive information, for instance, on capacity and price may be used as a mechanism for implementing or monitoring compliance with a cartel agreement. Furthermore, scholars claim, that the compatibility of such information exchanges with Article 101(1) TFEU can not therefore be determined abstractly, but must be determined taking into account the economic conditions on the relevant markets. By citing the CJEU decision in *Asnef-Equifax, Serviios de Informacion sobre Solvencia y Credito, SL v. Asociacion de Usuarios de Servicios Bancarios (Ausbanc)*[211], J. Alison and B. Sufrin argues that two key issues are crucial on the making of such a determination: the type of information exchanged and the market structure. Similar point of view is also shared by OECD[212]. While considering the type of information to be exchanged, through the case law practice[213], it seems that likely to infringe Article 101(1) TFEU is disseminating information concerning business secrets, information about capacity increases, investment plans, research projects, individual output and sales figures. On the other hand, statistical information concerning the level of demand and output in the market or the information which enables undertaking to assess the cost of its rivals may not be in itself objectionable as well as exchange of technical or other information that does not constrain other market players to decide independently on their actions in the market. Furthermore,

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[209]Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise affairs Competition Committee, Information exchanges between competitors under competition law, DAF/COMP(2010)37, http://www.oecd.org/dataoecd/12/52/48379006.pdf

[210]A. Jones, B. Sufrin, EC competition law : text, cases, and materials, 3rd ed. Oxford : Oxford University Press, 2008, p. 903.

[211] Case C-238/05, [2006] ECR I-11125, [2007] 4 CMLR 6, para. 54 : "*Accordingly ... the compatibility of an information exchange system...with the Community competition rules can not be assessed in the abstract. It depends on the economic conditions on the relevant markets and on the specific characteristics of the system concerned, such as, in particuar, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged – be that, for example, public or confidential, aggregated or detailed, historical or current – the periodicity of such information and its importance for the fixing prices, volumes or conditions of service.*"

[212] In DAF/COMP(2010)37 it is stated: "The potential for anticompetitive effects depends on a number of key factors, such as the type of information exchanged and the structural characteristics of the market involved."

[213] A. Jones and B. Sufrin cites *Re Cimbell* [1972] OJ L303/24; Zinc Producer Group [1984] OJ L220/27, [1985] 2 CMLR 311; UK Agriculture Tractor Registration Exchange [1977] OJ L242/10, [1977] 2 CMLR D28, as examples. EC competition law : text, cases, and materials, p.904 -905.

not only the object of exchanged information is crucial, while evaluating the importance to the market competition authority (whether Commission or national) should consider the way it is exchanged as well as novelty of information. The effect of shared information would be less influential if shared in a way that consumers may also assess it as well as if information is exchanged not on regular basis. Publishing recent information would allow other market players to presume future actions of the undertaking more accurately. Moreover, the structure of the relevant market also plays an important role, as the effect of information exchange may be very different in competitive and oligopolistic markets, where transparency is already high or it is difficult to enter it to potentially new market players.

According to OECD, information exchanges between rivals may be divided into three different situations: (i) as a part of a wider price fixing or market sharing agreement whereby the exchange of information functions as a facilitating factor; (ii) in the context of broader efficiency enhancing cooperation agreements such as joint venture, standardization or R&D agreements; or (iii) as a stand-alone practice, whereby the exchange of information is the only cooperation among competitors.[214]Competition agencies if conclude that information exchanges fall under the first two scenarios, according to OECD gathered information, would assess the possible restrictive effects of such practices in the broader context of the cartel or the agreement to which they are ancillary. However, the third theoretical situation raises difficulties as it is crucial to recognize, whether it resembles more a cartel-type infringement or an efficiency enhancing cooperation.

For instance, as a usual way to coordinate information might be through public exchange of strategic information in mass-media, stating publicly how much the demand is expected to increase from one year to the next can be a way to notify about how much extra capacity the rivals can put on the market, without reducing the price. The more complex the market situation is, the more transparency or communication is needed in order to act as a single entity on the market.[215]The communicating through various networks improves the social links between undertakings as helps to realize shared values, aims as well as fears and therefore encourages the exchange of both tacit and explicit information, which consequently leads to the occurrence of collective will. Therefore, it seems that, the anticompetitive information agreements under Article 101(2) TFEU support the finding of collusive oligopoly under Article 102 TFEU.

We may assume that information exchange which does not fall under the scope of Article 101 TFEU can still be illegal for the scope of Article 102 TFEU. Furthermore, in our opinion, due the fact Articles 101 and 102 TFEU aim both at securing effective competition, consistency requires that Article 101(3) be interpreted as preventing any application of exception rule to restrictive

[214]DAF/COMP(2010)37, p.9.
[215]Draft commission notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 331, 31/12/2002, para 52.

agreements that lead to the abuse of a dominant position.[216]

While considering information sharing issue in Lithuania's jurisdiction, it should be noted, that according to the Law on Competition as well as Article 102 TFEU, price discrimination is one of the forms of the abuse of dominant position and states an infringement of the competition rules. Thus the Competition Council holds the view that pricing policy (official price lists, transparent discount system, etc.) of a dominant undertaking should be transparent in order to prevent possible price discrimination and consequences related to it (e. g. restriction of competition in downstream markets, etc.).[217] The Lithuanian Law on Competition expressly prohibit any agreements, concerted practices and decisions of associations of undertakings concerning direct and indirect price fixing, market sharing, production limiting and other "black-listed" collusions, as it is presumed that they have detrimental effects on competition. As an example could be the decision in Decoupage case,[218] in which Competition Council (and later on the Lithuanian Supreme Administrative Court (hereinafter - LSAC)) held that even if there is no direct or explicit norm in the agreements between undertakings, but information exchange indicates or by itself constitutes (in this case, exchange of opinions on minimum product's prices via email correspondence) that kind of collusion, it is treated not as information exchange as such, but as price fixing (and in other cases could be considered as market sharing or other above mentioned agreement, concerted practices or decision of association). Competition Council also noted in the above mentioned decision that agreements on prices between competitors as well as suppliers or distributors are considered to be the most harmful to consumers and for this reason assessment of such agreements is one of the Competition Council's priorities, regardless of what kind of business sector they are formed and the size of the company consists of such agreements.

According to Lithuanian competition law other kind of information exchanges (for instance exchange of recent past data about volumes of sales) does not constitute *per se* infringements and different approach must be taken into account as their anti-competitive object or effect needs to be assessed. According to the LSAC practice[219], the artificial increase of market transparency, which is acquired by competitors exchanging information about market shares, demand and sales volume, can significantly reduce internal competition within market players who participates in such communication as well as distort the external competition between the group of undertaking sharing this information and potential competitors.

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[216] For example, such an agreement was the acquisition of the exclusive license to a new technology for filling packages in *Tetra Pak I*.

[217] DAF/COMP(2010)37, p. 348 – 352.

[218] Competition Council 22 of November, 2010 decision No.2S-29 concerning undertakings, engaged in decoupage, craft accessories and other products, actions compatability with article 5 of the Law on Competition, appealed to Lithuanian Supreme Administrative Court, court aggreed with Competition council's views in 26 of February 2012 decision, case No. A858-269/2012.

[219] The Lithuanian Supreme Administrative Court's administrative jurisprudence, No. 8 (18), 2009, p. 144.

The LSAC draws attention similarly to already expressed opinion by above mentioned scholars as well as Commission's point of view. To distort competition two main factors should be assessed: 1. the market should be not fragmented, but rather concentrated and (or) oligopolistic; and 2. shared information should be detailed, recent and not publicly available to others.[220]The participants of information sharing system would distort or reduce the competition in a way that having full and relevant information would eliminate active competition between them – any strategic move one undertaking would do, - others would contra react. To our opinion such a situation would meet the second criterion of *Airtours* - sustainability of actions, an entity cheating from commonly applied policy would be caught and for that punished.

Furthermore, other market players or potential market players, that are not included in the information sharing circle, would suffer from not acquiring this needed relevant data and may face more difficulties operating on the market. Even if later on, the new undertaking are accepted to the information sharing system, the older members of the group may react to the new information faster and to protect themselves from the new comer to not win their market share. Thus, the information exchange system may in some cases significantly reduce the autonomy of decision making of the market participants as replacing the normal risks of competition with practical cooperation.

All in all, in our opinion, market transparency could be effectively increased through information sharing. Due to this, market that is not oligopolistic may be sufficiently transparent for market operators to monitor and react accordingly to rivals actions in a way that would distort normal competition. Thus, it is crucial to economically evaluate in every case of information sharing not only the market structure, which should be highly concentrated and stable, but also the context of the information exchanged as well as the way it was assessed (for example periodicity, amounts etc.). If there is clear evidence that information exchange has as its object restriction of competition, the above mentioned factors like market structure are not important and detailed analysis is not needed in order to find an infringement of competition laws. However probably only in very rare cases anti-competitive object of the information exchange can be clearly demonstrated, thus assessment of its anti-competitive effects usually is necessary.

3.6. The gap of enforcement of 102 TFEU, if economic links are not proved

The Court of Justice in *Continental Can* concluded that Article 102 is aimed at practices which may cause damage to consumers directly, as well as to practices that are detrimental to consumers through their impact on an effective competitive structure. The consumer welfare is one of the main objectives of EU competition law and safeguarding it is one of the purposes of Article 102 TFEU.

[220] The Lithuanian Administrative Court's 16 of October 2009 decision in case No. A502-34/2009

There might arise a situation, where collective dominance can not be proved by the lack of clear economical or structural links between undertakings, the damage that may be or is inflicted by undertakings, which enjoy quit large market share, but can not be punished is yet another gap of enforcement of Article 102 TFEU. This gap arises if the structural or economic links are not proved in the market between undertakings and if the one, which is inflicting such damage, does not hold a dominant position separately from other undertakings in the market.

This problem have been addressed by I. Kokkoris in several articles[221]. The author addressed the inability of the Commission as well as of some Member States to capture conducts that relate to abuse of superior bargaining position/abuse of economic dependence. As it was previously stated, The Commission in the Discussion paper states what amount of market share might indicate undertakings positions on the relevant market.[222]In comparison in Lithuania Law on Competition part 11 of article 3[223]states the limit of market shares to primarily indicate the dominant position or collective dominance.

Monti in his article "*The Concept of Dominance in Article 82*" argues, that statement in the Commissions Discussion paper indicates the Commission's ability to apply Article 102 to conducts of firms having low market shares.[224] The lowest market share to date which substantiated a finding of dominance is 39.7% in BA/Virgin.[225] According to I. Kokkoris, the practice of the Commission and the courts illustrate dependence of the concept of dominance on the market shares of the allegedly dominant firms. The Commission "in theory" (i.e. discussion paper as it has no enforcement status), argues that market shares is a first indication and is not conclusive evidence of a firm's dominant position. On the other hand, the relative market shares of the undertakings in a market seem to constitute a safe harbor, i.e. if the second biggest firm has a market share close to the supposedly dominant firm's, there is very little possibility that the Commission and courts will ever argue that the highest market share firm is dominant. Ioannis Kokkoris claims that the gap in the application of Article 102 arises in all situations where the two biggest firms have very similar market shares, their products are differentiated and although the biggest firm's conduct would be considered abusive, the second biggest firm's conduct would escape accusation. It should be stated that not every non-dominant firm should be investigated due to it's anticompetitive conduct, just

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[221]Kokkoris I. "*A Gap in the Enforcement of Article 82*", BIICL, 2009, Are we Underenforcing Article 102? Competition Law and the Enforcement of Art. 102, Etro & Kokkoris Eds., *Oxford Univ. Press*, 2010.

[222]DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, para.31

[223] Unless proved otherwise, an undertaking (except for an undertaking engaged in retail trade) with the market share of not less than 40 per cent shall be considered to enjoy a dominant position within the relevant market. Unless proved otherwise, each of a group of three or a smaller number of undertakings (except for undertakings engaged in retail trade) with the largest shares of the relevant market, jointly holding 70 per cent or more of the relevant market shall be considered to enjoy a dominant position. Unless proved otherwise, an undertaking engaged in retail trade with the market share of not less than 30 per cent shall be considered to enjoy a dominant position within the relevant market. Unless proved otherwise, each of a group of three or a smaller number of undertakings engaged in retail trade with the largest shares of the relevant market, jointly holding 55 per cent or more of the relevant market shall be considered to enjoy a dominant position.

[224]Monti G. (2006), "*The Concept of Dominance in Article 82*", European Competition Journal, pp. 31-52, page 50.

[225]*BA/Virgin* [2000] OJ L30/1.

the conducts of these close non-dominant competitors which are likely to induce significant and similar harm to consumers, which if induced by the dominant firm, it would have been examined under Article 102 TFEU.

There must be some preconditions met regarding the market structure, for an undertaking to be considered to be dominant having a close market share to the second biggest firm. One very important element is product differentiation. Products may differ from customers point of view as for example due to brand image[226], product features, quality, a full line of goods or services, complete systems, level of service, or the location of the seller. When products are differentiated, those customers who like a particular brand's attributes are likely to continue to purchase that brand even after the producer increases its prices (although an increased product's price could be only one example of consumer harm induced by a firm which exploits its substantial market power).For example, in the medicinal products sector such as in Bayer (*Adalat*) case[227], doctors and patients are often very attached to a particular brand, particularly in the case of chronic diseases. In this case, the Commission argued that the market shares held by Bayer through its product Adalat had acquired special significance due to the attachment, although these market shares being in themselves comparatively substantial[228], particularly in the United Kingdom. Even if Bayer did not hold a dominant position in the examined markets, the Commission considered that the attachment of general practitioners and patients to particular drugs, gave Bayer the ability to act in a way which would be harmful to consumers. In such a situation, the products are not fully substitutable in the eyes of the customers but they still constitute one antitrust market. However, as Commission tried to prove that an infringement of Article 101 TFEU occurred, as Bayer imposed an export ban as part of its continuous commercial relations with the distributors and that this constituted an agreement[229], it failed in proving so. GC held that there were no evidence of such an agreement and that the supply thresholds were based merely on historical supplies, taking into account possible growth in the size of the national market as well as stated that the Commission was "*wrong in holding that the actual conduct of the wholesalers constitutes sufficient proof in law of their acquiescence in the [manufacturer's] policy designed to prevent parallel imports*". CJEU agreed

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[226]In the *United Brands (para. 91, 93 and 122-124)*, the CJEU argued that significant factors indicating dominance was United Brands' brand image. United Brand had spent significant resources establishing the brand. Furthermore, the CJEU considered that United Brands had made their product distinctive by large scale advertising and promotion which had induced the consumer to show a preference for it in spite of the difference between the price of labeled and unlabeled bananas and thus had made its brand name the premier banana brand name.

[227] Commission Decision 96/478 *Adalat*[1996] O.J. L201/1 (January 10, 1996); Case T-41/96 R *Bayer AG v Commission* [1996] E.C.R. II-3101 (Order of June 3, 1996), [2000] E.C.R. II-3383 (Judgment of October 26, 2000); Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-ImporteureeV and Commission v Bayer AG* (Advocate General Opinion of May 22, 2003, CJEU Judgment of January 6, 2004)

[228] Commission held that in France, Adalat represented a market share of 5.1% on the coronary heart disease market and 4.1% on the hypertension market. Adalat represented in Spain respectively 7.4% and 8.7%, and in the United Kingdom accordingly held 19.6% and 16.6% market shares. Finally, in the Community (of 12 Member States), Adalat represented 7.6% of the coronary heart disease market and 5.8% of the hypertension market.

[229] particularly given that Bayer had a system in place for detecting exporting wholesalers and that it reduced the mounts supplied to wholesalers who were exporting

with GC that the burden of proof to show the existence of an agreement were on the Commission's shoulders. CJEU rebutted Commission's view that an agreement arises merely from the distributors' continuous commercial relations with a manufacturer (after implementation of the undertaking's unilateral policy) and clarified the concept of an 'agreement' as it requires the existence of a true 'concurrence of wills', or meeting of minds, between firms to collaborate, the manner in which such wills are expressed being unimportant. The outcome of this case is that a firm may implement a supply policy which it considers essential even if it is to hinder parallel imports, provided that this undertaking does so without abusing a dominant position or that there is no concurrence of wills between it and its wholesalers. Thus, the harm to consumers may occur if either the firm does not hold a dominant position under Article 102 TFEU or there is a lack of proof of an agreement within the scope of Article 101 TFEU as competition authorities are unable to stop this action.

Stothers in analyzing *Adalat* case argued that this failure to prohibit unilateral action by non-dominant private undertakings to prevent parallel trade appears to be a lacuna in the EC Treaty[230] as well as Geradin and Petit noted that a "*gap in the EC competition system exists where, as the CFI held in Bayer, a supplier restricts parallel trade without abusing a dominant position, and there is no concurrence of wills between him.*"[231] Sousa Ferro in article "Reassessing borders between agreements and unilateral practices after Case C-74/04, Volkswagen II"[232] argues that there is a clear trend in the GC's case law to put an end to unreasonably wide interpretations of the concept of agreement under Article 101[233]whereas, the CJEU has shown itself more reluctant to take this step, the reason being that it is more mindful of the gap which this reform will create in EU competition law. A finding of tacit concurrence in the context of unilaterally imposed policies has been made substantially harder by the *Adalat* case.

According to I. Kokkoris, the gap that Sousa Ferro refers to could be dealt in some jurisdictions with the concept of "abuse of economic dependency", though perhaps a more effective way to combat such a lacuna in the application of Article 102 TFEU in general to unilateral anticompetitive conducts of non-dominant firms is to focus the definition and the application of the concept of dominance on the ability of firms to act independently in their strategies rather than mainly on the market share of the allegedly dominant firms. Furthermore, it is suggested, that if there are a

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[230]Stothers C., "*Who needs intellectual property? Competition law and restrictions on parallel trade within the European Economic Area*," E.I.P.R. 2005, 27(12), pp. 458-466.

[231]Geradin D., Petit N., (2006), "*Price discrimination under EC competition law: another antitrust doctrine in search of limiting principles?*" JCLE, 2(3), 479-531.

[232]Sousa Ferro M. "*Reassessing borders between agreements and unilateral practices after Case C-74/04, Volkswagen II*", ECLR, 2007, 28(3), 205-209.

[233]Sousa Ferro identified several Commission's decisions which widened the concept of an agreement: *Wea-Filipacchi Music SA* (72/480/CEE), [1972] O.J. L303/52; *Miller International Schallplatten GmbH* (76/915/CEE), [1976] O.J. L357/40; *The Distillers Company Limited, Conditions of Sale and Price Terms* (78/163/CEE), [1978] O.J. L50/16; *Johnson & Johnson* (80/1283/CEE), [1980] O.J. L377/16; *Fisher-Price/Quaker Oats Ltd--Toyco*(88/86/CEE), [1988] O.J. L49/19; and *Konica* (88/172/CEE), [1988] O.J. L78/34.

number of alternative suppliers to whom a significant number of customers are willing to turn, the threat of losing these customers may be adequate to place a constraint on the non-dominant firm. Nonetheless, product differentiation as well as the inability of competitors to react by either increasing output (if spare capacity is limited), or repositioning in order to place a constraint on the non-dominant firm, is conducive to consumer harm arising from the non-dominant firm's anticompetitive conducts.[234]

As it was already stressed out, consumer harm induced by anticompetitive behavior of non-dominant firms can arise in markets where undertakings compete with differentiated goods and the products of the competitors are not obvious substitutes. Customers habitually prefer different suppliers when goods are differentiated based on brand image, technical specifications, quality, or level of service and perhaps it is one of the reasons why there are quite a few merger cases in which there are highly differentiated products but they belong to a wider antitrust market.[235]

In our opinion, to mitigate the damage caused by anticompetitive non-dominant undertakings conduct, the incumbents in the market could modify their product line in reach to develop close substitutes to the supposedly dominant firm's goods.

I.Kokkoris claims, that in order to address anticompetitive conducts of non-dominant firms some EU jurisdictions apply the concept of abuse of superior/dominant bargaining position/abuse of economic dependence,[236]and even though the scope of application differs among these countries (e.g. applied only on buyer side, grocery sector, etc.), it is omitted altogether by the Commission. Consequently there is risk of not scrutinizing anticompetitive conducts of non-dominant undertakings which inflict consumer harm and would be addressed by the national legislation of Member States. Although the ability of Member States to apply such stricter rules compared to Article 102 TFEU is acknowledged in Regulation 1/2003,[237] the Commission does not apply such rules. Lucey, referring to Regulation 1/2003, argues that Article 3 is not clearly defined in terms of scope. Especially, the implication of "national competition law" is not set. Member States' persistence on exceptions to allow the application of national laws created a text with uncertain boundaries. The scope of the national laws which principally seeks an objective different from that

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[234]Concerns of consumer harm induced by anticompetitive conducts of non-dominant firms can also arise if the suppliers' capacities are the main driver of competition, rather than product differentiation, and competitors would be unlikely to react to an increased demand arising from the adoption of an anticompetitive conduct by the non-dominant firm by increasing output due to capacity constraints they may be facing.

[235]See e.g. software products in *Oracle/Peoplesoft*(Case M3216 *Oracle/PeopleSoft* [2005] OJ L218/6), music recordings in *Sony/BMG* (Case M3333 *Sony/BMG* [2005] OJ L62/30). According to I. Kokkoris citing many economists, most retail markets are likely to involve differentiated products. With highly differentiated consumer products, the relevant market delineated by the hypothetical monopolist paradigm may be as narrow as two products.

[236]For further information on these countries see: *A Gap in the Enforcement of Article 102*, published by the British Institute of International and Comparative Law.

[237]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,OJ L 1 of 4.1.2003, later on amended by Regulation (EC) No 411/2004, OJ L 68 of 6.3.2004, and Regulation (EC) No 1419/2006, OJ L 269 of 28.9.2006.

of Articles 101 TFEU and 102 TFEU will be essential for litigants, pursuing to void an agreement permitted by Article 101.[238]

The Economic Advisory Group reasoned that it would be more appropriate that the implementation of TFEU itself focus on the abuses and to treat the assessment of dominance in this context.[239] Although a reduction in the role of separate assessments of dominance will depart from the tradition of case law concerning Article 102 TFEU, it will not depart from the legal norm itself.[240]Therefore, the Commission would be ableconstitute an infringement of Article 102 TFEU in future cases, evaluating whether the anticompetitive conduct of non-dominant undertaking in differentiated markets may harm consumer,without departing from the essence of Article 102 TFEU. By addressing such conducts the Commission will ensure that it captures all conducts that lead to harm to consumers and competition in general. The Commission should be capable of examining behavior of non-dominant business. Moreover, it needs to address the abuse of superior bargaining position/economic dependence, as is presently done by Member States and advocated by the International Competition Network[241].

To sum up, what was analyzed by other scholars, in our opinion, the lacuna in the application of the dominance test has resulted from the dependence of assessing dominant undertaking while relying mostly on market shares as well as the application of the dominance test itself. As the above analysis illustrated, applying the concept of dominance in that way leads to a situation where a non-dominant business in a differentiated market enjoy anticompetitive conducts and can not be frightened by the possible application of Article 102 TFEU. This gap of applying Article 102 TFEU must be corrected in order to ensure effective enforcement of competition legislation on abusive conducts of non-dominant undertakings to avoid possible harm to consumer welfare.

[238] M.C. Lucey, “Unforeseen consequences of Article 3 of EU Regulation 1/2003”, 2006, E.C.L.R., 27(10), 558-563, page 563.
[239]EAGCP Report, page 15.
[240]EAGCP Report, page 14.
[241] http://www.jftc.go.jp/en/international_relations/icn/kyoto-materials/pdf/ASBP_1.pdf

CONCLUSIONS

1. Establishing a collective dominant position on the relevant market is based on complex analysis – summarizing qualitative as well as quantitative features of the situation. To achieve this objective, there must be an overall examination of the relevant market, evaluating the structure of the market, considering market player's abilities to coordinate conducts as well as their ability to act independently from their rivals, customers and consumers. The main criteria used to assess a dominant position are (a) the structure of the market, (b) the structure of the undertaking, and (c) the undertaking's conduct.

2. Interdependence (structural, close economical or oligopolistic links) between undertakings are crucial in finding a collective dominance. The mare fact of the existence of such links are not sufficient enough to claim the existence of collective dominance, although it may be a solid evidence of coordination of conducts, strategies and goals.

3. *Airtours* judgment set three main conditions to find a collective dominant position: market must be transparent, sustainability of actions exist, and the absence of competitive constraints occurs. Transparent market is vital feature as rivals are able to coordinate their actions by conscious and unconscious parallel conduct. Sustainability of actions is concerned with evaluation of the rivals ability to contra react if any member of the collective entity dismisses the common policy. The absence of competitive constraints concerns the reaction of actual and potential competitors and consumers, if it could be strong enough to distort the pursued benefits from the applied common policy.

4. In the *Impala* judgment CJEU draw a distinction in standard of proof: (a) in case of possible creation of a collective dominance proof thereof will be based on speculative evidence of the market development; (b) where the existence of collective dominance is supposed, necessity to produce actual proof of factors consistent with tacit collusion is needed, in order to confirm that conditions that render the market beneficial to collective dominance exist. Debates of whether the standard of proof is too high or is sufficient in case of already existing dominance, only illustrates that the *Airtours* conditions are not yet clear-cut. Unfortunately, the same can be said about the GC's teachings on the market transparency criterion in *Impala* (e.g. the undefined "indicia and items of evidence" or the vague formulation of "appropriate circumstances").

5. Due to the change in EU substantive tests for merger appraisal, Lithuania have amended the test used to evaluate mergers, however it evolved not as significantly as SIEC test in EU competition law. The test applicable by the Law on Competition still centers on finding dominance. As well as concept of dominance is defined in the same article of the Law on Competition as for purposes of establishing a dominant position.

6. Articles 101 and 102 TFEU overlap and may apply simultaneous to the same practice. However, according to *Italian Flat Glass*, the Commission cannot recycle the facts constituting an infringement of Article 101 TFEU and conclude by virtue of these circumstances alone that the parties of the restrictive agreement also hold a joint dominant position. The GC in *Italian Flat Glass* refers to acquisitions of technology licenses and A-G Fennelly in *CEWAL* to cross-shareholdings and interlocking directorates as examples of economic links. These commercial practices and examples of economic links constitute structural abuses as established by the judgments in *Continental Can* and *Tetra Pak I.*

7. As market shares provide useful first indications of the market structure as well as of competitive entities active on it, quantitative criteria of entity's high market share is crucial in considering a collective dominance. However, it should be evaluated in the light of other criteria, such as possibilities to entry and expand, market's dynamics, countervailing buyer power. As pure reliance on evaluation of market shares may lead to the gap in enforcement of Article 102 TFEU. According to the Law on Competition, although it is rebuttable, presumption of collective dominance exist.

8. To prove collectivity one must show economic links of separate undertakings, which allow subjects in question to act as a single unit on the market. The concept of these links is debatable subject as the case law only provide the examples of what they could be or more importantly what their effect should be, as a given example of *Impala* case - a group of firms can be found collectively dominant prior a merger if the Commission proves that they are effectively engaged in tacitly collusive conduct.

9. The market transparency could be effectively increased through information exchange. Due to this, market that is not oligopolistic may be sufficiently transparent for market operators to monitor and react accordingly to rivals actions in a way that would distort normal competition. Thus, it is crucial to economically evaluate in every case of information exchange not only the market structure, which should be highly concentrated and stable, but also the context of the information exchanged as well as the way it was assessed (periodicity, amounts etc.). Extensive communication through exchange of sensitive data may also constitute an economic link between undertakings. According to Lithuania's judicial practice if there is clear evidence that information exchange has as its object restriction of competition, the above mentioned factors are not important and detailed analysis is not needed in order to find an infringement of competition laws. However probably only in very rare cases anti-competitive object of the information exchange can be clearly demonstrated, thus assessment of its anti-competitive effects usually is necessary.

10. The gap in the application of Article 102 TFEU must be corrected in order to ensure effective enforcement of competition legislation on abusive conducts of non-dominant undertakings

harming consumer welfare. If no contractual or structural links between certain market players could not be proved, consumer harm induced by anticompetitive behavior of non-dominant undertakings can arise in markets where firms compete with differentiated goods. This gap in the application of the dominance test has resulted from the application of the dominance test and from the dependence of a finding of a dominant undertaking on the market share of the company. Applying the concept of dominance in that way may lead to a situation where a non-dominant business in a differentiated market enjoy anticompetitive conducts and can not be frightened by the possible application of Article 102 TFEU.

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SUMMARY

CONCEPTS OF COLLECTIVE DOMINANCE IN EU COMPETITION LAW

Keywords: competition, collective dominance, economic links, tacit collusion, oligopoly.

Summary content

This paper analyses the concepts of collective dominance in EU competition law, focusing on Article 102 of the Treaty on the Functioning of the European Union. Paper is based on the analysis of development and perception of collective dominance in European Courts' jurisprudence, European Commission's decisions and also Lithuania's practice in this field. The aim of the thesis is to consistently evaluate the concepts of collective dominance and the main criteria needed to establish collective dominance on the relevant market.

Summary

This paper deals with concepts of collective dominance under European Union and Lithuanian competition law. The object of this paper is to analyze the concepts of collective dominance focusing on the conditions that are needed to establish collective dominance. Issues connected with the abuse of the collective dominant position is not included in the paper.

To reveal the concept of collective dominance and how it evolved through case law, fistly the notion of dominance is introduce and according to which criteria it is determined. Furthermore, concept of collective dominance is introduced and how this concept grew through case law of European and Lithuania's courts as well as competent authority's decisions.

Moreover, in third part - analysis of the difficulties within the finding of a collective dominance takes place. The *Airtour* criteria (transparent market, existence of sustainability of actions, and the absence of competitive constraints occurs) is analysed and what change as well as clearance was brought by *Impala* case, concerning the standard of proof. The importane of perception of economic links is reviewed, emphasisng that not the form, but the effect of ecconomic links is the most important. Moreover, information exchange as a possible ecconomic link is introduced. As well as the possible gap in the enforcement of collective dominance is discusssed.

In every case of assessing collective dominance detailed economic analysis is required - the structure of the market, the structure of the undertaking, and the undertaking's conduct evaluation must take place.

SANTRAUKA

KOLEKTYVINIO DOMINAVIMO SĄVOKOS EUROPOS SĄJUNGOS KONKURENCIJOS TEISĖJE

Pagrindinės sąvokos: konkurencija, kolektyvinis dominavimas, ekonominiai ryšiai, tylus suokalbis, oligopolija.

Santraukos turinys:

Darbe analizuojamos kolektyvinio dominavimo sąvokos Euopos Bendrijų ir Lietuvos konkurencijos teisės kontekste. Darbe analizuojama Europos Bendrijų bei Lietuvos jurisprudencija siekiant nustatyti kolektyvinš dominavimą atitinkamoje rinkoje.

Santrauka:

Šiame darbe analizuojama kolektyvinio dominavimo sąvokos, siekiant atskleisti kiekybinius bei kokybinius vertinimo kriterijus ir ES, ir Lietuvos konkurencijos teisės kontekste.

Siekiant išsamiai atskleisti kolektyvinio dominavimo sąvoką ir kaip ji formavosi teismų bei kompetentingų institucijų praktikoje, pirmiausia atskleidžiama pati dominavimo sąvoka, akcentuojant, kokiais kriterijai vadovaujantis bei kaip tai analizuojama.

Darbe aptariamos pagrindinės problemos taikant kolektyvinio dominavimo sąvoką. Tarp nagrinįjamų klausimų aptariami ir *Airtours* sprendime suformuluoti kriterijai rinkai, praktikos pokyčiai po *Impala* byloje priimto sprendimo.

Daugiausia dėmesio sutelkiama į kokybinių kriterijų aiškinimą ir tinkamą taikymą, ypač atkreipiant dėmesį į ūkio subjektų grupės koordinacinius, ekonominius ryšius. Jų dėka grupę galima įvardinti kaip kolektyviai veikiantį subjektą, pabrėžiant kolektyvinio dominavimo nustatymo specifiką. Atitinkama informacijos sklaida pateikiama kaip potencialiai galinti atitikti ekonominiam ryšiam tarp ūkio subjektų nustyti keliamus reikalavimus. Šiame darbe pabrėžiama, kad nustatant kolektyvinę dominuojančią padėtį pagal konkrečius kokybinio ir kiekybinio pobūdžio kriterijus, svarbiausia atlikti visapusišką atitinkamos rinkos, kurioje konstatuojamas kolektyvinio dominavimo faktas, analizę. Vadovaujantis paviršutiniškai ištirta rinkos analize tikėtina kolektyvinio dominavimo sąvokos teisės taikymo spraga.

Pastebėtina, jog neatsižvelgiant į tai, jog praktikoje jau yra susiklostę tam tikri kolektyvinio dominavimo nustatymo ir vertinimo kriterijai, vis dar nėra visiškai aiškiai suformuluotas šių kriterijų turinys ir jų tinkamo praktinio taikymo principai.