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Unilateral Effects: The Enforcement Act under the Old EC Merger Regulation

Claus-Dieter Ehlermann*

Axel Gutermuth†

*WilmerHale, amanda.nastari@wilmerhale.com

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Abstract

The reform of the EC Merger Regulation was preceded by an animated debate about whether the traditional “dominance” test allowed the Commission to challenge mergers that did not lead to single firm or collective dominance in the traditional sense, but nevertheless may have reduced competition to the detriment of consumers. The authors submit that the dominance test failed to reach such situations of “unilateral” or “non-coordinated” effects. The old Merger Regulation therefore suffered from a potential “enforcement gap” that was closed only by the legislative change to the “significant impediment of effective competition” test. National jurisdictions still using variants of the dominance test may want to consider this aspect in their legislative reform plans.

Unilateral Effects: The Enforcement Gap under the Old EC Merger Regulation

Claus-Dieter EHLERMANN, Sven B. VÖLCKER, G. Axel GUTERMUTH*

The reform of the EC Merger Regulation was preceded by an animated debate about whether the traditional “dominance” test allowed the Commission to challenge mergers that did not lead to single firm or collective dominance in the traditional sense, but nevertheless may have reduced competition to the detriment of consumers. The authors submit that the dominance test failed to reach such situations of “unilateral” or “non-coordinated” effects. The old Merger Regulation therefore suffered from a potential “enforcement gap” that was closed only by the legislative change to the “significant impediment of effective competition” test. National jurisdictions still using variants of the dominance test may want to consider this aspect in their legislative reform plans.

INTRODUCTION

Article 2(3) of the old Merger Regulation¹ allowed the Commission to challenge a concentration that “creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it”.

This “dominance test” clearly applied to mergers creating or strengthening the leading market player, which typically also had a significant lead over its closest rival (commonly referred to as “single firm dominance”). In the mid 90s, it also became widely accepted that Article 2(3) of the old Merger Regulation allowed intervention under the notion of collective dominance against mergers in oligopolistic markets, even if unlike Article 82 EC, the old Merger Regulation was not explicit on this point.

Perhaps encouraged by the Commission’s gradual embrace of a more economics-based approach in the area of Article 81 EC, the new millennium saw an increased debate as to whether the notions of single and collective dominance adequately addressed all forms of competitive harm that horizontal mergers could create. In particular, it was pointed out that in highly concentrated markets, a merger between the number two and three players could produce anti-competitive effects even if it did not create the market leader, and even if the conditions for collective dominance were not

* Claus-Dieter Ehlermann is senior counsel, Sven B. Völcker partner, and G. Axel Gutermuth counsel in the Brussels office of Wilmer Cutler Pickering Hale and Dorr LLP. This article is based on a legal opinion submitted to the European Commission on behalf of Oracle Corporation in its merger proceedings with PeopleSoft (*Oracle/PeopleSoft*, Case No. COMP/M.3216, Commission Decision of 26 October 2004). This article reflects the personal views of the authors. The authors wish to thank Christian Duvernoy and Eric Mahr for their contributions.

¹ Council Regulation (EEC) No. 4064/89, OJ 1989 No. L 395/1, as amended (in the following, referred to as the “old Merger Regulation”).

met, for example because products are highly differentiated. The so-called “Baby Foods” merger case² is an often-cited example for this type of situation.³

In the recent discussion about the reform of the old Merger Regulation, there were different views as to whether, as a practical matter, the potential enforcement gap was significant, and whether, as a legal matter, any “gap cases” could be addressed through an extensive interpretation of the existing dominance test or only by amending the old Merger Regulation. After initially denying the practical relevance of non-coordinated effects situations falling short of single firm dominance,⁴ the Commission maintained that the dominance test was sufficiently broad and flexible to extend to all manner of non-coordinated effects.⁵ The Commission nevertheless proposed to amend the dominance test in the Merger Regulation to “clarify” this.⁶ The Council was not persuaded by the wisdom of the proposed re-definition, and instead changed Article 2 to the “significant impediment of effective competition” (or “SIEC”) test, which covers situations of non-coordinated effects.⁷

While the Commission has occasionally invoked non-coordinated effects theories in its past decisions, it never actually applied them in cases that could not also have been based on traditional dominance analysis.⁸ In *Airtours*, the Commission suggested in a dictum that it was entitled to rely on non-coordinated effects, but did not develop a comprehensive assessment of such effects.⁹ In its recent *Oracle/PeopleSoft* decision, the

² *FTC v. H.J. Heinz*, 116 F. Supp. 2d 190 (2000 U.S. Dist.), revised 246 F.3d 708 (2001 U.S. App.). This case involved the merger of Heinz and Beech-Nut, which after the merger would face competition only from Gerber, which remained the market leader.

³ Another situation of non-coordinated effect outside the traditional dominance concept could be where the merged firm is the largest post-merger, facing few but relatively strong competitors. See Enrique Gonzalez-Diaz, *The Reform of European Merger Control: Quid Novi Sub Sole?*, 27 *W.Comp.* 2, pp. 177-186 (2004).

⁴ See the Commission’s Green Paper on the Review of Council Regulation (EEC) No. 4064/89, COM(2001)745/6 final, 11 December 2001 (“Green Paper”), at para. 166.

⁵ Commissioner Mario Monti, *Merger Control in the European Union: A Radical Reform*, speech delivered at the European Commission/IBA Conference on EU Merger Control, 7 November 2002, p. 4, SPEECH/02/545.

⁶ The Commission proposal for a Council Regulation on the control of concentrations between undertakings, OJ 2003 No. C 20/4, proposed to uphold the dominance test but to insert the following new Art. 2(2): “For the purpose of this Regulation, one or more undertakings shall be deemed to be in a dominant position if, with or without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition, in particular, prices, production, quality of output, distribution or innovation, or appreciably to foreclose competition.”

⁷ Article 2(3) of the revised Merger Regulation (Council Regulation (EC) No. 139/2004, OJ 2004 No. L 24/1) now reads: “A concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”

⁸ Sven Voelcker, *Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control*, ECLR, 2004, no. 7, pp. 395-409, analyses various Commission decisions that used aspects of non-coordinated effects analysis in addition to traditional dominance assessment.

⁹ *Airtours/First Choice*, Case No. COMP/M.1524, OJ 2000 No. L 93/1, para. 54 states: “[...] it is not a necessary condition of collective dominance for the oligopolists always to behave as if there were one or more explicit agreements (e.g. to fix prices or capacity, or share the market) between them. It is sufficient that the merger makes it rational for the oligopolists, in adapting themselves to market conditions, to act—individually—in ways which will substantially reduce competition between them, and as a result of which they may act, to an appreciable extent, independently of competitors, customers and consumers.” The exact meaning of this language is, however, not entirely clear. In later statements, Commission officials insisted that the Commission’s *Airtours* decision did not rest on unilateral effects, but on coordinated effects, see the explanations of Ali Nikpay and Fred Houwen, *Tour de force or a little turbulence? A heretical view of the Airtours judgment*, ECLR 2003, no. 5, pp. 193-202 (at 200 et seq.). This could imply that, in the Commission’s view, the language in para. 54 of the *Airtours* decision did not refer to unilateral effects at all. In any event, it appears uncontested that the Commission’s case was ultimately decided on a theory of coordinated effects.

Commission makes reference to the fact that the Statement of Objection was based in part on a non-coordinated effects theory, and that Oracle had challenged the Commission's competence to rely on this theory under the traditional dominance test.¹⁰ However, as the Commission in the end concluded that the merger would not lead to the kind of non-coordinated effects envisioned in the Statement of Objections, it was able to avoid further discussion of the more fundamental legal question of its competence.

In these two cases, the Commission appears to have viewed non-coordinated effects as a category of collective dominance. This is somewhat puzzling given that the Commission pleaded before the *Airtours* court that the concept of collective dominance is limited to coordinated effects.¹¹ Post-*Airtours* Commission decisions also applied collective dominance in the sense of coordinated effects only.¹² The Commission's Horizontal Merger Guidelines¹³ use the term "collective dominance" exclusively for situations of coordinated effects.¹⁴

It is submitted here that the dominance test under the old Merger Regulation did not allow challenging a merger for non-coordinated effects absent the creation or strengthening of a market leader. The alternative interpretation of the dominance test runs counter to the very notion of dominance, cannot be justified by the Merger Regulation's scope and purpose, and is at odds with the intentions of the legislator and the Community courts' case law. In particular, it should be pointed out that the extension of the old Merger Regulation to situations of collective dominance does not lend itself as a model for a "progressive" interpretation of the dominance test to encompass any form of non-coordinated effects.

I. NON-COORDINATED EFFECTS AND THE NOTION OF DOMINANCE

Article 2(3) of the old Merger Regulation requires the creation or strengthening of a dominant position on the relevant market. The plain meaning of "dominant position" expresses the concept of holding the leading position on the market. Only the company in this leading position can be viewed as dominant. This had been the understanding for

¹⁰ *Oracle/PeopleSoft*, Case No. COMP/M.3216, Commission decision of 26 October 2004, para. 187, not yet published in the OJ

¹¹ Case T-342/99, *Airtours v. Commission (Airtours)*, [2002] ECR II-2585, para. 62.

¹² See cases *UPM-Kymmene/Haindl*, Case No. COMP/M.2498; and *Norske Skog/Pareco/Walsum*, Case No. COMP/M.2499, OJ 2002 No. L 233/83, para 74; *Solvay/Montedison/Ausimont*, Case No. COMP/M.2690, Commission decision of 9 April 2002, para 59; *P&O Stena Line*, Case No. COMP/M.2838, Commission decision of 7 August 2002, para, 23; *Ernst&Young France/Anderson France*, Case No. COMP/M.2816, Commission decision of 5 September 2002, para 73; *Deloitte&Touche/Andersen (UK)*, Case No. COMP/M.2810, Commission decision of 1 July 2002, para, 41.

¹³ OJ 2004 No. C 31/5.

¹⁴ The Guidelines distinguish two separate situations of competitive harm in oligopolistic markets under the SIEC test: a merger leading to non-coordinated effects may "result in a significant impediment to competition" (note that the Commission does not use the notion of dominance to describe these non-coordinated effects) (para. 25 of the Guidelines), while a merger that increases the likelihood of coordination may "significantly impede effective competition, through the creation or the strengthening of a collective dominant position." (para. 39 of the Guidelines)

40 years of application of the dominance concept under Article 82 EC (formerly Article 86) and 15 years of application of the old Merger Regulation. In addition, under the concept of collective dominance (coordinated effects), companies that act together on the market by coordinating their behaviour can also together hold the leading position.¹⁵

The close link between the concept of dominance and a leading market position is also demonstrated by the fact that the dominance concept is, at heart, derived from a monopoly market structure model that presumes that the undertaking in question is the strongest, and indeed the only player on the market. The concept of dominance does not require the finding of a monopoly situation, but instead also covers situations where some competition remains on the market. However, the proposition that an undertaking could be dominant on a market where another player is stronger and therefore closer to a monopoly position than the undertaking at issue runs counter to the roots of the dominance concept.

In addition, common sense suggests that “a dominant position” can mean only *one* dominant position. Clearly, an undertaking can alone hold such a position (single firm dominance). Furthermore, the idea that several undertakings collectively can hold “a dominant position” because they tacitly coordinate and adopt a single, common policy on the market is still in line with this wording. It fits within this understanding that the Court of First Instance set forth in *TACA* that under Article 82 EC the oligopolists undergo a “collective assessment” as if they were a “single entity” and act as such on the market.¹⁶ However, it would be a major linguistic contortion to say that oligopoly members hold “a”, i.e. *one*, dominant position by *individually* and without coordination acting anti-competitively.

II. “EFFET UTILE” VS. OBJECT AND PURPOSE OF THE MERGER REGULATION

It has been suggested that non-coordinated effects below the dominance threshold could be brought within the reach of the old Merger Regulation by way of teleological or *effet utile* interpretation.¹⁷ According to this view, the purpose of the old Merger Regulation was the preservation of a system of undistorted, effective competition in the

¹⁵ The application of the dominance test to situations of collective dominance is further explained in Section IV below.

¹⁶ Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB et al v. Commission (TACA)*, judgment of 30 September 2003, para. 602, not yet officially reported.

¹⁷ See the Commission’s explanatory memorandum to the Commission proposal for a Council regulation on the control of concentrations between undertakings, OJ 2003 No. C 20/4, footnote 17 to para. 54: “In the past, the Court has shown a willingness to adopt a teleological interpretation of the notion of dominance in order not to deprive it of its *effet utile*.” See also Philip Lowe, *The Future Shape of European Merger Control*, opening speech delivered at a RBB/FIPRA seminar on 18 February 2003, p. 5: “It would be wrong, however, to infer that all this will result in a tightening of EC merger control. We only clarify what we think is already covered by our [dominance] test. After all, if confronted with a so-called “gap” case, if we could establish that such a case would likely lead to price increases [...], should we really not intervene? The economic community seems to agree that such cases should indeed be covered by a merger test. The general public would hold the same opinion, I reckon. And I dare to say that also the Court would interpret the test in the same way.”

common market as expressed in Recitals 13 and 14 of the old Merger Regulation and Article 3(g) EC treaty. This argument appears to imply that the wording of Article 2(3) of the old Merger Regulation is a legislative mishap, not fully capturing its intended purpose.

The legislative history of the old Merger Regulation, however, indicates that it was aimed at granting well-defined powers of intervention against mergers to the Commission, rather than a broad discretionary mandate to prohibit any transaction the Commission suspects of distorting effective competition. When enacting the old Merger Regulation, the Council had the option of granting the Commission such broad discretion, but it chose not to do so. Indeed, the Commission's final proposal for the old Merger Regulation contained a substantive test that was more broadly based on an impediment of effective competition.¹⁸ However, the Council rejected that test.

Instead, the Council opted for the dominance test in order to provide a high degree of legal certainty and predictability under the—at that time—new system of merger control. The dominance test provided legal certainty and predictability, as its application was familiar from Article 86 EC (now Article 82) and national merger control, notably in Germany. The Council consciously accepted—and intended—that this test would limit, compared to other substantive tests, the range of situations that could be prohibited by the Commission, as the dominance test requires the creation or strengthening of the leading, dominant player on the market.¹⁹

The Council's intention to grant the Commission only well-defined powers of intervention is illustrated by the fact that it had taken more than 15 years for the Commission to succeed in convincing the Council to adopt the old Merger Regulation at all.²⁰ Indeed, as the majority of Member States at that time did not have national systems of mandatory merger control, they were hesitant to establish any form of merger control at the Community level. The fact that the Council could not agree to expressly allow Commission intervention against mergers that lead to collective dominance (coordinated effects) demonstrates the Council's hesitation in granting broad powers to the Commission to control mergers.

The concern that any substantive test that does not require a finding of dominance but extends to all forms of distortions of effective competition, would be dangerously broad and lead to an undesirable degree of legal uncertainty was not only a concern when the Merger Regulation was initially enacted. During the recent debate on the reform of the substantive test of the Merger Regulation, many commentators suggested that the more open-ended “substantial lessening of competition test” (the test that was

¹⁸ Article 2(3) of the Commission's revised proposal for the Merger Regulation of December 1988 proposed a substantive merger control test asking whether the concentration would “create or strengthen a position as a result of which the maintenance or development of effective competition would be impeded in the common market” (Amended proposal for a Council regulation on the control of concentrations between undertakings (COM(88)734 final-revised version, 19 December 1988). This test did not refer to dominance.

¹⁹ See, also with further references on the legislative history, Levy, *European Merger Control Law*, para. 2.03.

²⁰ The first Commission draft of a Merger Regulation dated from July 1973 (OJ 1973 No. C 92/1). The Merger Regulation was finally adopted on 21 December 1989.

principally discussed as an alternative to the current dominance test) would lead to a greater degree of legal uncertainty than the dominance test and therefore supported maintaining the dominance test.²¹ When it adopted the old Merger Regulation in 1989, the Council wanted to avoid this greater degree of legal uncertainty.

Accordingly, it is submitted here that it would be wrong to argue that the Council, in adopting the old Merger Regulation, wanted to create a tool that provided the Commission with the discretion to intervene against any merger that the Commission might consider produced anti-competitive effects. Rather, the Council took a more balanced approach and enacted a substantive test that granted the Commission defined and limited powers in order to provide a higher degree of legal certainty and predictability.

Nothing else can be concluded from Recitals 13 and 14 of the old Merger Regulation. Although the preservation of effective competition clearly is the underlying purpose of the old Merger Regulation, it is also clear that the Council decided in the operative part of the old Merger Regulation to pursue the objective of undistorted competition through a substantive test relying on the dominance standard. Allowing the Recitals of an act of Community legislation to override its operative part runs counter to basic principles of Community law.²²

Finally, the fact that Article 3(g) EC defines as one of the Treaty's goals the establishment of a system ensuring that competition in the common market is not distorted equally does not support a wide interpretation of the dominance test. Article 3(g) also states that the goal of undistorted competition is only to be pursued "as provided in this Treaty and in accordance with the timetable set out therein". The Treaty goals may only be pursued by means of the European Union's legal acts and policies. With regard to merger control, the Council has defined and limited in the old Merger Regulation the Commission's powers in pursuit of the goal established in Article 3(g) EC to situations of creation or strengthening of a dominant position.

III. THE COUNCIL'S VIEWS IN THE REFORM PROCESS

When adopting the revised Merger Regulation, the Council explained the introduction of the SIEC test in Recital 25. It states that the Community courts had not previously mandated the application of the dominance test to situations of non-coordinated effects absent traditional dominance. Recital 25 goes on:

"Therefore, in the interests of legal certainty, it should be made clear that *this* Regulation permits effective control of all such concentrations [i.e., which create non-coordinated effects] by providing that any concentration which would significantly impede effective competition [...] should be declared incompatible with the common market." (emphasis added)

²¹ See Green Paper, para. 165.

²² See to this effect also joined cases C-68/94 and C-30/95, *Kali+Salz*, [1998] ECR I-1375, paras 176-177.

It is submitted that this statement cannot be understood to indicate that the Council viewed the change to the SIEC test as a pure matter of clarification “in the interest of legal certainty” that the old Merger Regulation already applied to situations of non-coordinated effects. Rather, Recital 25 states that *this* Regulation (the revised one) does.

The immediately following statement in Recital 25 provides an even stronger indication that the Council viewed situations of non-coordinated effects to fall outside the concept of dominance:

“The notion of ‘significant impediment to effective competition’ in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the *non*-coordinated behaviour of undertakings which would *not* have a dominant position on the market concerned.” (emphasis added)

Hence, for the Council, scenarios of non-coordinated effects are “beyond the concept of dominance” and control thereof could only be brought under the Merger Regulation by changing its substantive test.

IV. THE COMMUNITY COURTS’ JURISPRUDENCE ON COLLECTIVE DOMINANCE

As noted above, in two instances where the Commission put forward a non-coordinated effects theory, it did so under the heading of “collective dominance”. However, the case law of the Community courts limits the concept of collective dominance to situations of coordinated effects.

In a consistent line of cases, starting with *Kali+Salz*,²³ the Community courts held that a dominant position held collectively by a group of companies constitutes “a dominant position” within the meaning of Article 2(3) Merger Regulation.²⁴ However, these cases also held that a finding of collective dominance is only possible if the members of the oligopoly (i) are connected by certain factors, which the Court in *Kali+Salz* calls “correlative factors”, which allow them to (ii) adopt a common policy (i.e., coordinate their behaviour), and (iii) act together on the market in implementing the common policy. These conditions are not present in the case of non-coordinated effects.

In *Kali+Salz*, the court stated:

“In the case of an alleged collective dominant position, the Commission is therefore obliged to assess, [...] whether the concentration [...] leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which *together*, in particular because of *correlative factors* which exist between them, are able to adopt a *common policy* on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.”²⁵

²³ Joined Cases C-68/94 and C-30/95, *France and others v. Commission (Kali+Salz)*, as note 22 above.

²⁴ That conclusion was not self-evident, as Article 2(3) of the Merger Regulation does not explicitly address the issue of collective dominance, but only refers to “a dominant position”. In contrast, Article 82 EC explicitly refers to an “abuse by *one or more undertakings* of a dominant position”.

²⁵ *Kali+Salz*, as note 22 above, at para. 221 (emphasis added).

The *Kali+Salz* test not only requires that the members of the oligopoly must be able *together* to adopt a common policy, but they must also, as a result of this common policy, *together* be able to act independently of competitors, customers and consumers. Under no interpretation of this test can collective dominance be said to arise if oligopoly members *individually* act to a considerable extent independently of their competitors, customers and consumers. Accordingly, the Court used the expression that the merging parties plus the other oligopoly members must *together* hold a dominant position.²⁶

The judgments of the Court of First Instance in the cases *Gencor*²⁷ and *Airtours*²⁸ confirmed the *Kali+Salz* requirements for a finding of collective dominance. The *Airtours* judgment is of particular significance because, as noted above, the Commission had tried to introduce elements of a non-coordinated effects theory in a dictum in para. 54 of its prohibition decision. Although the Court did not explicitly refer to this dictum, it effectively rejected the Commission's proposition by holding that a Commission finding of collective dominance requires conclusive evidence that a common policy to the mutual benefit of the oligopolists can be (i) monitored; (ii) sustained in the face of possible cheating within the oligopoly; and (iii) implemented despite foreseeable reactions by the competitive fringe as well as customers. All three of these factors revolve around the central concept of common policy, focusing on the creation, enforcement, and sustained implementation of that common policy. The Court emphasises that these "three conditions *are necessary* for a finding of collective dominance as defined above".²⁹

Dominance under Article 82 EC (formerly Article 86) always extended to collective dominance, as its wording refers to situations where "one or more undertakings" abuse a dominant position. Just as the cases under the Merger Regulation, the Court cases decided under Article 82 EC have required coordination,

²⁶ *Kali+Salz*, as note 22 above, at para. 166: "[...] creation or strengthening of a dominant position, that is, a dominant position held by the parties to the concentration together with an entity not a party thereto".

²⁷ Case T-102/96, *Gencor Ltd. v. Commission (Gencor)*, [1999] ECR II-753; the court states at para. 163, referring to *Kali+Salz*: "In assessing whether there is a collective dominant position, the Commission is therefore obliged to establish, [...] whether the concentration in question would lead to a situation in which effective competition in the relevant market would be 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, ultimately, of consumers" (emphasis added).

²⁸ Case T-342/99, *Airtours v. Commission (Airtours)*, [2002] ECR II-2585. The court states at para. 59, referring to *Gencor* and *Kali+Salz*, that collective dominance arises if the oligopolists "*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." (emphasis added).

²⁹ *Airtours*, para. 62 (emphasis added). Scholarly commentary after the *Airtours* judgment also takes the view that collective dominance covers situations of coordinated effects only. See, for example, Levy, *European Merger Control Law*, para. 10.04[5]. Other commentary submitted that the *Airtours* judgment only clarified the requirements for a finding of coordinated effects and denied that the Court took a position on whether unilateral effects could also fall under the concept of collective dominance, see Ali Nikpay and Fred Houwen, as note 9 above, at p.202. The authors submit that this view is not in line with the explicit language in paras 59-62 of the *Airtours* judgment and the other judgments on collective dominance mentioned here. These judgments do not indicate that they view coordinated effects as only one form of collective dominance, but appear to squarely equate collective dominance with coordinated effects.

correlative links, and a common policy, and thus the requirements of coordinated effects, to establish collective dominance. Most recently, the Court of First Instance summarised this line of cases in its *TACA* decision as follows:

“It has consistently been held that Article 86 [now Article 82] of the Treaty is capable of applying to situations in which several undertakings together hold a dominant position on the relevant market [references omitted]. In order to conclude that such a dominant position exists, the undertakings concerned must, according to the case-law, be *sufficiently linked* between themselves to *adopt the same line of action* on the market [references omitted]. In that regard, it is necessary to examine the *links or factors of economic correlation* between the undertakings concerned and to ascertain whether those links or factors allow them to act *together* independently of their competitors, their customers and consumers [references omitted].³⁰

The *TACA* court also clearly confirms that the links or factors in question must be so dense that they allow a “collective assessment” of the oligopoly members that allegedly enjoy a collective dominant position. The links must be “such as to allow them to adopt *together*, as a *single entity* which represents itself as such on the market *vis-à-vis* users and competitors, the same line of conduct on that market”.³¹ Situations where non-coordinated effects can arise do not meet these requirements. Accordingly, also under Article 82 EC, collective dominance is limited to coordinated effects.

V. *KALI+SALZ* AS A MODEL FOR AN EXPANSIVE INTERPRETATION OF THE MERGER REGULATION?

The fact that the Court of Justice, in *Kali+Salz*, approved the application of the old Merger Regulation to situations of collective dominance (coordinated effects), although such application was not expressly mandated by the wording of Article 2(3), does not suggest that the Community courts would have been open to apply the old Merger Regulation also to situations of non-coordinated effects. Two decisive arguments that supported the application of the old Merger Regulation to situations of collective dominance (coordinated effects) in *Kali+Salz* were not present with regard to non-coordinated effects.

First, one of the main arguments supporting the application of the old Merger Regulation to situations of collective dominance (coordinated effects) was the resulting coherence with Article 82 EC (formerly Article 86 EC), which covers situations of collective dominance (in the sense of coordinated effects). An argument of coherence, however, could not be made with regard to non-coordinated effects, as Article 82 EC

³⁰ Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB et al. v. Commission (TACA)*, as note 16 above, at paras 594, 595 (emphasis added); see also joined cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro Spa et al. v. Commission (Flat Glass)*, [1992] ECR II-1403, para. 358 (“There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position *vis-à-vis* the other operators on the same market.”). This was the first case under Article 82 EC where the court decided on collective dominance. See also joined cases T-24/93, T-25/93, T-26/93 and T-28/93, *Compagnie Maritime Belge Transports SA et al. v. Commission (CEWAL I)*, [1996] ECR II-1201, paras. 60, 62; see further the other references in *TACA*, paras 594 and 595.

³¹ *TACA*, as note 16 above, at para. 602 (emphasis added).

does not extend to non-coordinated effects absent single firm dominance. Applying the old Merger Regulation to such scenarios would therefore have been incompatible with the aim of ensuring coherence between the dominance standard of the old Merger Regulation and Article 82 EC.

Indeed, one of the main reasons why, during the recent reform discussion, many commentators favoured changing the substantive merger control test was because they feared that lowering the boundaries of intervention under the old Merger Regulation solely through an interpretation of the dominance test would have had undesirable spill-over effects into the area of control of abusive conduct. This phenomenon was referred to as the “cross-contamination” effect.³² The Commission motivated its initial proposal of adding “clarification” language to the dominance test of the old Merger Regulation with “the additional advantage” that such an amendment would have de-linked the test under the Merger Regulation from the test used in Article 82 EC.³³

Second, an important argument that led to the application of the old Merger Regulation to situations of collective dominance (coordinated effects) was that major antitrust systems at the time applied their merger control rules to oligopolistic dominance.³⁴ Accordingly, and although the old Merger Regulation was silent on the issue, it appeared reasonable also to apply the Merger Regulation to such situations. The Commission, at the time, justified the application of the old Merger Regulation to collective dominance (coordinated effects) with this argument.³⁵

A similar argument cannot be made with regard to non-coordinated effects. Rather to the contrary, the merger control systems in those Member States that rely on the dominance test, notably Germany and Italy, appear to exclude the application of a non-coordinated effects theory. Absent an express provision in the Merger Regulation, it cannot be assumed that those Member States, and hence the Council, in 1989 wanted to grant the Commission the power to review transactions that those Member States could not and cannot review under their national systems.

VI. CONCLUSION

As submitted here, the dominance test of Article 2(3) of the old Merger Regulation did not provide a sufficient basis for the Commission to intervene against mergers that may have had led to non-coordinated effects but did not create or involve

³² See the Commission's summary of those concerns in the Green Paper, as note 4 above, at para. 96.

³³ Commission's explanatory memorandum to Commission proposal for a Council regulation on the control of concentrations between undertakings, OJ 2003 No. C20/4, para. 57.

³⁴ See Commission decision *Nestlé/Perrier*, Case No. IV/M.190, OJ 1992 No. L 356/1, para. 115 (this was the first case where the Commission applied the theory of collective dominance under the Merger Regulation); the Commission cites as examples the United States, the United Kingdom, France, and Germany.

³⁵ In *Nestlé/Perrier*, as note 34 above, at para. 115, the Commission stated: “The Merger Regulation would not only have transferred the national merger control powers to the Community but those Member States which had a system with oligopolistic dominance control would at the same time have abandoned such control altogether without any substitute for it at Community level. In the absence of any express provision to that effect, such a cession of control cannot be assumed.”

the market leader. The Commission has thus been well-advised to not test its contrary legal position before the Community courts, but instead to propose a modification of the substantive test by the Community legislator. The new SIEC test now closes whatever enforcement gap may have existed, alleviating any perceived need for an interpretation that would have stretched the dominance test beyond its proper limits. Countries inside and outside the European Union that still have the dominance test on the books and are currently re-thinking their substantive merger tests in the spirit of substantive convergence may want to carefully consider whether legislative change is not in order.