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Oligopolies and Antitrust Law

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Abstract

This Essay aims to examine the application of antitrust law to the conscious parallelism characteristic of oligopolistic markets, with special emphasis on European Community and Italian laws.

OLIGOPOLIES AND ANTITRUST LAW

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INTRODUCTION

Antitrust systems have always encountered problems in markets with oligopolistic structures.[1] The greatest difficulty lies in defining the oligopolistic market itself. It is commonly understood as a market characterized by the presence of only a few undertakings. An oligopolistic market thus figures halfway between a monopoly, where only one party provides the supply, and an atomistic or perfect competition system, in which innumerable undertakings of all sizes operate.

In reality, oligopolistic markets behave in different manners. Consequently, an oligopolistic market is more appropriately defined as one that includes companies that are aware that the decisions each of them makes are interdependent with those made by other undertakings on the market.[2] This characteristic interdependence of undertakings seems typical of the market examined in this essay, in which the product is homogenous and significant entry barriers make it particularly risky for other competitors to enter.

The petroleum market is commonly considered a typical oligopolistic market. Indeed, the product in that market is substitutable, and demand is somewhat inflexible. Another significant example is the mineral waters market, which was analyzed in depth by the European Commission in the *Nestlè/Perrier* case and will be discussed below.[3] In the mineral waters market the product is also homogenous, and variations in price do not greatly affect the level of demand.

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1. *See* George A. Hay, *Oligopoly, Shared Monopoly and Antitrust Law*, 67 CORNELL L. REV. 439 (1982); Robert F. Allen, *Oligopoly, Tacit Collusion and the Problem of Proof Under the Antitrust Law*, ANTITRUST BULL., Fall 1981, at 487; Howard N. Ross, *Oligopoly Theory and Price Rigidity*, ANTITRUST BULL., Summer 1987, at 451. The experience of the United States is significant, as the first antitrust legislation was passed there. It greatly inspired all other such legislation, including that of the European Community.

2. *See* MICHELE GRILLO & FRANCESCO SILVA, IMPRESA, CONCORRENZA E ORGANIZZAZIONE 165 (1989).

3. *See* Commission Decision No. 92/553/EEC, O.J. L 356/1 (1992) [hereinafter Nestlé/Perrier].

In a market of this structure no single undertaking occupies a dominant position that would enable it to act without regard to the reactions of other operators on the market.[4] Furthermore, undertakings do not act freely in search of the greatest possible profit, as they would in an atomistic market with perfect competition. Rather, an oligopolistic market is composed of relatively few undertakings, whose primary concern is to study and predict the conduct of their competitors, rather then the conduct of the consumers. This is because undertakings in an oligopoly, unlike those in a monopoly or an atomistic market, do not know how the market will react to their decisions.[5] In fact, much depends on their competitors' reactions. For example, if an undertaking decides to raise its prices, it may see its market share decrease as a result. Accordingly, its competitors will acquire larger shares of the market, unless they also increase their prices. Alternatively, if its competitors do raise their prices as well, demand may hold constant and profits may increase.

Economists have studied this type of market at great length. It has been noted,[6] however, that theory plays a lesser role in oligopolies than in monopolistic or atomistic markets, as an oligopoly has several nuances in practice that make it nearly impossible to establish universally applicable laws. Among the many models that were developed to explain the function of oligopolistic markets, the Bertrand model is the most elementary and the most significant for the purposes of this Essay.[7] The Bertrand model focuses on an oligopolistic market formed by only two undertakings of equal size and efficiency, that offer a nearly identical product. These two undertakings engage in a price competition, with the purpose of shifting customer demand from one to the other. The model demonstrates that in such a

4. United Brands Company and United Brands Continental B.V. v. Commission of the European Communities, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429. According to the Court of Justice, an undertaking is in a dominant position when its economic strength "enables it to prevent effective competition on the relevant market, giving it the power to behave, to an appreciable extent, independently of its competitors, its customers and ultimately, its consumers." *United Brands*, [1978] E.C.R. at 281, [1978] 1 C.M.L.R. at 430.

5. *See* STEFANO ZAMAGNI, ECONOMIA POLITICA 496 (1985).

6. *See id.* at 496. *See also* Anne Perrot & Louis Vogel, *Entente tacite, oligopole et parallelisme de comportement, in* JURIS-CLASSEUR PERIODIQUE — LA SEMAINE JURIDIQUE, 48 Section I, 229, 539 (1993) (discussing joint, economic, and legal analysis of oligopolistic market).

7. *See* MICHELE POLO, TEORIA DELL'OLIGOPOLIO 17 (1993).

situation, the price ultimately settles at the average variable cost level, allowing for practically no profits.

The Bertrand model confirms that in a true oligopolistic market each undertaking must focus primarily on the conduct of its competitors and their reactions to each other's behavior. Furthermore, price competition, which is encouraged by antitrust law as the principal competitive instrument in atomistic markets, is difficult to put into practice in an oligopolistic market.

The typical problem that undertakings must resolve in an oligopolistic market is finding an equilibrium that permits them to cohabitate on the market, in the absence of economic laws. Once undertakings accept their interdependence, they conclude that non-competition presents the most suitable environment. Namely, it affords them a constant presence on the market, and spares them from having to pay continuous attention to the conduct of other undertakings, or from worrying about technological updating.[8] It is at this juncture that problems arise under antitrust law, which aims to protect the game of competition in the public interest. In this context, oligopolistic undertakings can establish non-competitive positions in one of two ways: (1) by engaging in true collusive behavior; or (2) by practicing so-called intelligent or conscious parallelism, which translates into adapting their conduct to that of their competitors.[9] The first case falls within the scope of antitrust law, which expressly forbids collusive practices. The second case, however, raises the problem of applying antitrust law to conscious parallelism. It should be emphasized that the effect on the market is identical:

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8. *See* ZAMAGNI, *supra* note 5, at 516. In order to study the conduct of undertakings in the oligopolistic market and explain the reasons for which oligopolistic markets inevitably lead to a non-competition position, economists have applied the so-called game theory developed in the field of mathematics. This theory, which concerns moves and countermoves, as particularly adapted to cases of interdependent conduct, such as that of oligopolistic undertakings. *Id.* The Commission refers to game theory in its most recent decision of November 30, 1994, in the Concrete case. Commission Decision No. 94/815/EEC, O.J. L 343/13 (1994) (Cement).

9. *See* Mario Franzosi, *L'oligopolio e il dilemma del prigioniero*, RIVISTA DI DIRITTO INDUSTRIALE, 1988, Pt. I at 58. Conscious or intelligent parallelism refers to conduct of oligopolistic undertakings by means of which, based on experience gained through the market, they conform their decisions even in the absence of any collusion. *Id.* In order to explain this phenomenon through game theory, economists use the so-called prisoner's dilemma. *Id.* By means of this game one can understand why undertakings, having understood their interdependence and the advantages offered by engaging in certain uniform conduct, behave in the same manner. *Id.*

whether an oligopoly is created through collusive practices or through parallel conduct, competition is eliminated and thus plays no regulatory role on the affected market.[10] Antitrust legislators and interpreters have difficulty in dealing with this situation because the structure of an oligopolistic market *inevitably* leads to the elimination of competition, even in the absence of collusive practices.[11]

This Essay aims to examine the application of antitrust law to the conscious parallelism characteristic of oligopolistic markets, with special emphasis on European Community and Italian laws. Although the goals of Italian law are different from those of the European Community,[12] Italian law substantially reiterates the provisions of the EEC Treaty[13]. In addition, the last section

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10. *See* Roberto Pardolesi, *Parallelismo e collusione oligopolistica: il lato oscuro dell'antitrust*, FORO ITALIANO, 1995, Pt. IV at 65 *et seq.* (1994). "An oligopoly is capable of defects which are quite similar to those for which monopolies are usually rebuked." *Id.* at 71.

11. *See* Franzosi, *supra* note 9, at 60. The "inanity and impotence" of antitrust law when faced with an oligopoly has already been demonstrated, while other authors have recently defined parallelism as "the dark side" of antitrust. *Id. See* Pardolesi, *supra* note 10; Cristoforo Osti, *Il lato oscuro dell'antitrust: qualche dubbio in più*, *in* FORO ITALIANO, 1994, Pt. IV at 76-79 (1994).

12. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). Community law, Article 3(f) of the EEC Treaty gives antitrust regulations an instrumental function aimed at pursuing the aims of the European Community, most importantly that of the effective development of the single market. *Id.*

> One of the essential aims of the EEC Treaty is the creation of a single market in which producers may freely exercise and develop their businesses, and where consumers can in their turn utilize products and services preselected by virtue of their price and quality. In order to guarantee this freedom, Community authorities aim primarily at creating a system which guarantees that competition is not distorted in the common market.

Opinion of Advocate General Henri Mayras, Imperial Chemical Industries v. Commission of the European Communities, Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557 [hereinafter *ICI Case*]. In Italian law, on the other hand, antitrust regulations have the precise goal of protecting competition, in implementation of Article 41 of the Constitution, which sanctions the right of economic initiative. *See* RAFFAELLA NIRO, PROFILI COSTITUZIONALI DELLA DISCIPLINA ANTITRUST (1994). The need to redefine the purposes of Community antitrust law now that the single market has been substantially realized has been emphasized. David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L L.J. 97 (1994).

13. *See* EEC Treaty, *supra* note 12, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1.

of Article 1 of Law 287/90[14] expressly provides that national antitrust laws must be interpreted based on principles of European Community competition law. Thus, any examination of EC legislation also lends itself to a discussion of Italian laws at a national level.

I. OLIGOPOLISTIC PARALLELISM AND PROHIBITION OF AGREEMENTS

This section will examine whether parallel conduct motivated by the inherent nature of an oligopolistic market is subject to EC laws that aim to eliminate anti-competitive agreements. Both Article 85 of the EC Treaty[15] and Article 2 of Law 287/90[16] prohibit undertakings from entering into agreements or engaging in practices that are intended to restrict or consistently distort competition or that produce that result. As parallelism occurs even in the absence of agreements among undertakings, the issue focuses on whether practices of conscious parallelism are comparable to "concerted practices."

EC case law has defined "concerted practice" as "a form of coordinating undertaking activity that, without actually concluding a true agreement, in practice becomes a conscious collaboration among said undertakings aimed at preventing competition, which collaboration leads to abnormal competition on the market . . ."[17] In particular, EC case law[18] has stated that the criterion for coordination must be interpreted according to the concept of the antitrust provisions set forth in the EC Treaty, so that "each economic operator must determine independently the policy he intends to adopt on the common market."[19]

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14. Legge 10 Ottobre 1990, n.287 (in Gazzetta Ufficiale, 13 Ottobre 1990, n.240) — Norme Per La Tutela Della Concorrenza E Del Mercato.

15. Treaty Establishing the European Community, art. 85, Feb. 7, 1992, [1992] 1 C.M.L.R. 573, 626 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-(1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

16. *See* Legge 10 Ottobre 1990, *supra* note 14.

17. Cooperatieve bereniging "Suiker Unie" UA and Others v. Commission of the European Communities, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 & 114/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295 [hereinafter *Suicker Decision*].

18. *Suicker Decision*, [1975] E.C.R. at 1943, [1976] 1 C.M.L.R. at 297.

19. *Id.*

Based on this case law, a concerted practice exists[20] when the following conditions are met: (1) there must be a form of coordination or practical cooperation between undertakings that replaces their independent action; (2) this coordination needs to be achieved through direct or indirect contact; and (3) the aim must be to remove, in advance, any uncertainty as to the future conduct of their competitors. On the other hand, conscious parallelism results from undertakings' experience in an oligopolistic market, which by its very nature restricts competition, especially with respect to price. The comparison of concerted practices to conscious parallelism is problematic[21] because it may lead to the repression of individual conduct by oligopolistic undertakings, such as the decision to make one's prices uniform with the others. Furthermore, this repression may occur even in the absence of the abuses that trigger the application of antitrust provisions against a monopolistic or dominant undertaking.

The Court of Justice rendered its first opinion in this regard in the *ICI v. Commission* case,[22] where it reviewed a Commission decision[23] that had considered it implausible that the undertakings in question would have been able to raise the prices of their substantially interchangeable products numerous times, simultaneously and uniformly without previous agreement. Although it denied the undertakings' appeal, the Court declared that conscious parallelism in itself is not a concerted practice. It may, nevertheless, constitute a "serious index" of concerted action, if it leads to competitive practices that are inconsistent with normal market conditions, taking into consideration the nature of the products, the size and number of the undertakings, and the volume of the market itself. According to the Court, this occurs when parallel conduct permits undertakings to establish a price equilibrium at a different level than that which would be warranted by a competitive system "as well as to crystallize the positions they attain, to the detriment of the effective free circula-

20. *See* IVO VAN BAEL & JEAN-FRANÇOI BELLIS, COMPETITION LAW OF THE EEC 21 (1990); CHRISTOPHER BELLAMY & GRAHAM CHILD, COMMON MARKET LAW OF COMPETITION 93 (1993); RICHARD WHISH, COMPETITION LAW 194 (1993); ALDO FRIGNANI, ET. AL., DIRITTO ANTITRUST ITALIANO 168 (1993).

21. *See* Pardolesi, *supra* note 10, at 72.

22. *ICI Case*, [1972] E.C.R. 619, [1972] C.M.L.R. 557.

23. Commission Decision No. 69/243/EEC, O.J. L 195/11 (1969) (Dyestuffs).

tion of goods in the common market and the consumers' free choice of suppliers."[24] Although the Court distinguished between conscious parallelism and concerted practices, it did not completely eliminate the possibility of extending the scope of Article 85(1) prohibitions to conscious parallelism as well.

Both the Court of Justice and the Court of First Instance[25] have recently revisited this issue, and confirmed the *ICI* decision. The Court of Justice partially overruled the Commission's decision in the *Woodpulp* case,[26] which had found that price parallelism, facilitated by the quarterly notice of prices published in the specialized press, constituted concerted practice. The Court appointed experts to prepare an economic report to determine whether price parallelism had actually occurred. More importantly, the report was also intended to indicate whether this would lead to a differentiated or uniform price structure, by means of an analysis that considered the natural functioning of the market in question. The Court-appointed experts thus reported that: (a) the system of price notices met the needs of the specific market; and (b) the price notices were simultaneous due to the great transparency of the market, achieved through multifirm agents, dynamism in the specialized press, etc. According to the experts, price parallelism therefore did not arise from concerted practices, but rather, was the result of normal market functions. Based on this expert report, the Court held that price parallelism could be explained as something other than concerted action.[27] In particular, it was deemed a result of the oligopolistic tendencies of the market in question. Consequently, the Court partially reversed the Commission's decision.

Thus, the principle seems to be that whenever parallelism may have an economic explanation related to the oligopolistic structure of the market, the presumption that it results from concerted action can be clearly overcome. The Court uses a

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24. *ICI Case*, [1972] E.C.R. at 656, [1972] C.M.L.R. at 597.

25. Re Wood Pulp Cartel: A Ahlstrom Oy and Others v. EC Commission, Joined Cases C-89/85, C-104/85, C-114/85, C116-117/85 & C125-129/85, [1993] 4 C.M.L.R. 407 (United Kingdom intervening in cases C-114/85 & C125-129/85). Re Italian Flat Glass: Societa Italiano Vetro SpA and Others (United Kingdom intervening on Article 86 Grounds) v. EC Commission (United Kingdom intervening on Article 85 grounds), Joined Cases T-68/69 & T77-78/89, [1992] 5 C.M.L.R. 302, FORO ITALIANO, 1992, Pt. IV at 433 (providing note by Roberto Pardolesi).

26. Commission Decision No. 85/202/EEC, O.J. L 85/1 (1984) (Wood Pulp).

27. *Id.*

rather efficient compromise solution that preserves the possibility of proving concerted practice by demonstrating parallelism,[28] while at the same time, recognizing that oligopolistic markets may inherently engender parallelism. Therefore, mere proof of simple parallelism, when it may have an economic justification, will not automatically constitute concerted action.[29]

The burden of proof regarding the existence of market factors that could justify parallelism, however, is rather ambiguous. The *Woodpulp* ruling seems to affirm the principle that the Commission must show that concerted action is the only possible ex-

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28. As Roberto Pardolesi states in his note to the decision of the Court of First Instance on October 24, 1991, in the Polipropilene case, the Court's decision is remarkable given the scarce visibility of cartels, as it makes it possible to strike at cartels without necessarily having to provide full proof written proof of the agreement. FORO ITALIANO, 1992, Pt. V at 121.

29. *Id.* ¶¶ 175, 191, at 116, 132. In the conclusions of Attorney General of the EC Court of Justice, Marco Darmon, he stated that for concerted action to exist, the undertakings' knowledge of each other's conduct must stem from communications between the undertakings, and not simply from the fact that they have monitored the market. *Id.* It follows that in oligopolistic markets all conduct which, by facilitating communication among undertakings (facilitating practices), makes it easier and more possible to respond to another's conduct, should be examined very closely. *See* VAN BAEL & BELLIS, *supra* note 20 at 29. It is also asserted that the solution to the "age-old problem of oligopolistic parallelism" may be found in "a clear prohibition on engaging in facilitating practices" because "without the adoption of facilitating practices it is quite difficult for undertakings to coordinate a restriction of competition." Cristoforo Osti, *Il controllo giuridico dell'oligopolio*, I GIURISPRUDENZA COMMERCIALE 580 (1993) [hereinafter *Il controllo giuridico*]. In effect, the position of Community authorities seems favorable to a similar interpretation, as it has proved to be stricter in evaluating the exchange of information in cases of oligopolistic structures or structures that tend to oligopoly. *See* Commission Decision No. 87/1/EEC, O.J. L 3/17 (1986) (Fatty Acids); Commission Decision No. 92/157/EEC, O.J. L 68/19 (1992) (UK Agricultural Tractor Registration Exchange); BELLAMY & CHILD, *supra* note 20, at 198. Exchanges of information involving prices have been found to be in potential conflict with competition laws. Commission Decision No. 74/292/EEC, O.J. L 160/1 (1974) (IFTRA Glass Containers). Agreements on information involving costs have also been found to be in potential conflict with competition laws. Commission Decision No. 75/497/EEC, O.J. L 228/3 (1975) (IFTRA Rules for Producers of Virgin Aluminum). Agreements on investments have also been found to be in potential conflict with competition laws. Commission Decision No. 84/405/EEC, O.J. L 220/27 (1984) (Zinc Producer Group). Other confidential information such as commercial strategies, production forecasts, etc, may also violate competition laws. At present one may thus state that when confidential information is exchanged, conscious parallelism will certainly be considered the result of concerted action, although there may eventually be another plausible explanation for it. In particular, in *Enichem Anic Spa v. EC Commission*, Case 7/89, [1991] E.C.R. 1623, [1992] 4 C.M.L.R 84, the Court of First Instance held that when there is evidence that the undertakings have held meetings regarding prices, there is no need to provide evidence of parallel conduct or implementation of price initiatives.

planation for parallelism.[30] The subjectivity entailed in the evaluation of potential economic justifications for parallelism, however, makes this analysis somewhat uncertain.[31]

Consequently, prohibitions on agreements play a limited role in preventing the natural conduct of undertakings in an oligopolistic market. Namely, competitors may still engage in parallel practices and avoid the scope of agreement prohibitions by unilaterally determining their conduct without exchanging confidential information. In this regard, it has been found[32] that antitrust laws on agreements prohibit the distortion of competition engendered by non-competition agreements, but do not require undertakings to compete. Considering the present state of antitrust legislation, this compromise seems correct. We shall later see if it suits the public interest.

Difficulties arise when undertakings in an oligopolistic market not only align their prices without entering into collusive agreements, but also fix non-competitive prices. In the absence of price-fixing agreements, an undertaking is normally free to establish its prices at the desired level, even if those prices clearly exceed its costs. Thus, the legitimacy of conscious parallelism could shield anti-competitive practices, such as uniform price fixing, from antitrust laws that consider them contrary to consumer welfare and against public interest.

II. *ABUSE OF COLLECTIVE DOMINANT POSITION*

Antitrust regulations such as Article 86 of the EC Treaty[33] and Article 3 Law 287/90,[34] expressly prohibit a dominant undertaking from abusing its position by charging excessively high

30. *See Woodpulp*, O.J. L 85/1, at 126 (1984). In *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission of the European Communities*, Joined Cases 29 & 30/83, [1984] E.C.R. 1679, [1985] 1 C.M.L.R. 688, the Court seems to lay the burden of proof on the Commission. In any case, if the undertaking demonstrates that the parallelism may be justified by something other than concerted action, the presumption is overcome.

31. In the *ICI Case*, [1972] E.C.R. 619, [1972] C.M.L.R. 557, the experts appointed by the Commission and the various undertakings analyzed the characteristics of the coloring materials market and came to diametrically opposite positions.

32. *See* Pietro Trimarchi, *Il problema giuridico delle pratiche concordate fra oligopolisti*, RIVISTA DELLE SOCIETÀ 3 (1969).

33. EC Treaty, *supra* note 15, art. 86, [1992] 1 C.M.L.R. at 627.

34. *See* Legge 10 Ottobre 1990, *supra* note 14.

prices compared to its costs.[35] An investigation of the possibility of applying the aforesaid regulations should begin by examining whether a dominant position can be discerned within a classic oligopolistic market.[36] In this regard, it is certainly impossible to identify a single undertaking in a dominant position. Such an entity would have to be able to act alone in the market, in such an independent manner that it need pay no attention to reactions of customers, competitors, or consumers. This situation is incompatible with the nature of a classic oligopoly and its characteristic interdependence among undertakings, which prevents even the market price leader from assuming a dominant position by itself.

An indifference to reactions of consumers and minor competitors may, however, be characteristic of an oligopolistic market with respect to the group of undertakings engaged in conscious parallelism. These entities enjoy a dominant position compared to the other undertakings remaining on the market. The oligopolistic dominators set their prices, therefore, by taking into consideration only other oligopolistic undertakings, without regard to the minor undertakings on the market.

Nevertheless, the definition of collective dominant position, which is the particular position of power jointly held on the market by a number of undertakings, has had a hard time gaining acceptance. This difficulty persists despite the literal reference in Article 86 of the EC Treaty, which prohibits "any abuse by one or more undertakings" of a dominant position on the market. In fact, some scholars have asserted that "more undertakings" who lack individual autonomy could create a collective dominant position only when they jointly establish a single economic unit.[37] This theory, however, did not take into account the fact

35. EC Treaty, *supra* note 15, art. 86(a), [1992] 1 C.M.L.R. at 627. Article 86(a) of the EC Treaty expressly provides that an abuse may consist of charging unfair prices. *Id.* In addition, the difficulty of setting criteria based upon which the "fairness" of a price may be determined has been noted, given that it is practically impossible for the Authority in charge of controlling and protecting competition to transform into a sort of "price observatory" for purposes of establishing what price each undertaking should properly charge. *Il controllo giuridico*, *supra* note 29, at 592. *See* Commission of the European Communities, Fifth Report on Competition Policy 13 (1976).

36. *See* United Brands Company and United Brands Continental B.V. v. Commission of the European Communities, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429 (defining dominant position).

37. *See* Enrico Adriano Raffaelli, *Il concetto di 'unica entità economica' nella giurisprudenza comunitaria*, RIVISTA DI DIRITTO INDUSTRIALE, 1977, Pt. II at 396 (1977).

that EC law considers any entity which is in all respects autonomous to be an "undertaking"[38] and that undertakings which together constitute a single economic unit are no longer autonomous in this sense. The conditions under which a number of undertakings could be considered to be in a collective dominant position, that is, the particular relationships or links required between one another, were not clear.

By the late 1980's, however, the definition of collective dominant position began to make headway in the administrative case law of the Commission.[39] This progress was consistent with the development of oligopolies resulting from the globalization of markets, and the increasing need of undertakings to become large enough to exploit economies of scale.[40]

In the *Flat Glass* decision,[41] the Commission held that the three principal undertakings operating in the Italian flat glass market were in a "collective dominant position," based on the following: (i) the particular concentration of the market at issue (the three undertakings jointly held a market share between 79% and 95%, depending on the type of glass); (ii) the long-term stability of the market shares; (iii) the high degree of interdependence among the undertakings; (iv) the indifference to competition from other undertakings present on the market and the high barriers to entry due to "significant investments required in order to exercise this industrial activity and the pros-

38. *See* Poucet v. Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon, Joined Cases C-159 & 160/91 (Eur. Ct. J. Feb. 17, 1993) (not yet reported) (providing definition of undertaking in case law of Court of Justice); Pistre v. Caisse Autonome Nationale de Compensation de l'Assurance Vieilleuse des Artisans, *in* FORO ITALIANO, 1994, Pt. IV at 113 (with a note by Luigi Scudiero: *La nozione di impresa nella giurisprudenza della Corte di Giustizia*); SAT Fluggesellschaft mbH v. Organisation Européene pour la Sécurité de la Navigation Aérienne, Case C 364/92 (Eur. Ct. J. Jan. 19, 1994), *in* FORO ITALIANO, 1994, Pt. IV at 297 et seq. (with note by Luciano Di Via, *Brevi note sul criterio di economicità e l'impresa rilevante per il diritto della concorrenza nella recente giurisprudenza della Corte di Giustizia*).

39. *See* Commission of the European Communities, Fifth Report on Competition Policy 13 (1976). Nevertheless, even in the 5th Report on competition policy, in its investigation of the conduct of oil companies in the Community from October 1973 to March 1974, the Commission comments on ". . . the collective dominant position . . . ." held by refinery companies. *Id.* at 15 ss.

40. *See* SALVATORE VICARI, NUOVE DIMENSIONI DELLA CONCORRENZA — STRATEGIE NEI MERCATI SENZA CONFINI (1989) (examining effects of evolving market trends on competition).

41. Commission Decision No. 89/93/EEC, O.J. L 33/44 (1988) (Flat Glass).

pect of a weak increase in demand for the next ten years";[42] and (v) the structural links among the undertakings, established through systematic exchanges of products, which constitute a tool for preserving their respective market positions and the relationships of strength existing among the undertakings themselves.

In the ruling that followed the challenge to the Commission's decision, the Court of First Instance partially overturned the decision due to lack of evidence.[43] The Court, nevertheless, confirmed the possibility of the existence of a collective dominant position, which the Court seemed to feel was established more through economic ties among the undertakings than through the structure of the market itself.

Thus, the *Flat Glass* ruling finally overcame the theory that a collective dominant position could not exist among independent undertakings. The decision, however, seemed to require particular economic links, which were supplied in this case by making "a technological advantage" mutually available through "means of an agreement or license."[44] Point 359 of the decision also refers to the maritime cartels "which permit such economic links so that they jointly hold a dominant position with the other operators in the same market."[45]

Although the *Flat Glass* ruling was more progressive, it was not sufficient to bring oligopolistic undertakings that engage in parallel conduct within the definition of collective dominant position. This was because it was not clear whether simple parallel-

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42. *Id.* O.J. L 33/44, at 49, ¶ 5 (1988).

43. *Id.*

44. The Court of First Instance in fact states at point 358:

> There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by some 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 could be the case, for example, where two or more independent undertakings jointly have, through agreements or licenses, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers.

FORO ITALIANO, 1992, Pt. IV at 433 (with note by Roberto Pardolesi), GIURISPRUDENZA COMMERCIALE, Vol. II at 615 (1993) (with note by Giorgia Masina, *Osservazioni a Trib. di Primo Grado CE, 10 marzo 1992, in tema di posizione dominante collettiva*).

45. *See* Pardolesi, *supra* note 10 at 435. Pardolesi emphasizes that the Court of First Instance rejects the idea that a finding of collective dominant position must first run the "gauntlet of lack of economic independence." *Id.*

ism should in itself be considered an "economic link" that would justify finding a collective dominant position. In this regard, it should be noted that during the proceedings the Commission repeatedly declared that it had not based its finding of a collective dominant position on simple parallelism, but rather on particular economic links among undertakings in the sector.[46]

The Commission's position became clearer with the *Nestlé/Perrier* decision on the French oligopolistic mineral waters market.[47] There, the Commission focused exclusively on the parallelism exhibited by a group of undertakings that held a joint market share of 82%, to find that they enjoyed a collective dominant position.[48]

The *Nestlé/Perrier* decision showed that the Commission can derive the existence of a collective dominant position solely from the fact that a few undertakings, protected by strong entry barriers, coexist on the market without actually competing. For purposes of our examination, this decision represents a decisive step towards applying antitrust law to oligopolistic market situations. This makes it possible to prohibit abuses of dominant positions in oligopolistic markets and also facilitates the enforcement of regulations on concentrations, which will be discussed below. Based on the Commission's interpretation of Article 86 of the EC Treaty, particularly in light of the theory of collective dominant position, it seems possible to exercise control over tight oli-

46. Flat Glass, O.J. L 33/44 at pt. 350.

47. Nestlé/Perrier, O.J. L 356/1 (1992).

48. *See* Guido Iannuzzi, *Una svolta nell'antitrust: la posizione dominante oligopolistica*, GIURISPRUDENZA COMMERCIALE, Vol. I at 778 (1994). In addition to the *Nestlé/Perrier* case, O.J. L 356/1 (1992), the Commission found a collective dominant position in other cases. *See, e.g.*, Commission Decision No. 93/82/EEC, O.J. L 34/20 (1992) (Cewal). In the *Cewal* case, for example, the Commission found the following to be indicative of a collective dominant position: (a) a market share of over 70%; (b) availability of a market share considerably superior to that of its leading competitor; (c) services decidedly more developed than those of its leading competitor; and (d) experience acquired over the years. *Id.* Based on all these elements, the Commission held that the members of the Cewal maritime cartel jointly held a dominant position "as a result of the cartel agreement which unites them and which creates extremely close economic links among them." *Id.* The "Autorità Garante," the Italian Antitrust Authority, found the existence of a collective dominant position in the APCA/COMPAG. Decision 558/92, *Bollettino dell' Autoritá Garante della Concorrenza e del Mercato* 13/92. The Authority also found a collective dominant position in the Centro Italiano Gpl. Decision 1087/93, in *Bollettino dell' Autoritá Garante della Concorrenza e del Mercato* 8/93. Giovanni Cavani comments on these decisions in "Abusi di posizione dominante," in *Concorrenza e Mercato*, 1993, no. 1 at 77.

gopoly markets. Such supervision aims to prevent undertakings in oligopolistic markets from manipulating their non-competitive dominant positions so as to abuse the balance achieved on the market. As it has also been noted,[49] the definition of a collective dominant position has the additional advantage of permitting a more expansive application of merger regulations.

III. *CONTROL OVER CONCENTRATIONS IN OLIGOPOLISTIC MARKETS*

In implementing Article 3(f) of the EC Treaty, and in accordance with the purposes set forth in Article 2,[50] the Council of the European Communities has adopted a Regulation[51] that gives the Commission control over concentrations with EC dimensions. This Regulation aims to facilitate the institution of "a system ensuring that competition on the common market is not distorted."[52] It establishes that only those concentrations "which do not create or strengthen a dominant position as a result of an actual and significant obstruction of competition in the common market" may be declared compatible with the common market.[53] The Regulation is thus intended to "maintain and develop effective competition within the common market."[54]

Prior to this legislation, the European Community had prohibited abuses of a dominant position through Article 86, but not the dominant position itself. By means of this Regulation, legislators who were conscious of the difficulties engendered by a major economic power on the market, prepared the tools for preventing such market positions from developing. The idea

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49. *See* Pardolesi, *supra* note 10 at 70; Iannuzzi, *supra* note 48 at 781.

50. EEC Treaty, *supra* note 12, art. 2, 298 U.N.T.S. at 11, 1973 Gr. Brit. T.S. No. 1. Article 2 of the EEC Treaty states that:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Id.

51. *See* Council Regulation No. 4064/89, O.J. L 395/1 (1989) (dealing with control of concentrations).

52. *Id.* O.J.L. 900/1, at 1 (1989).

53. *Id.* art. 2, O.J. L 900/1, at 3 (1989).

54. *Id.* art. 2(1)(a), O.J. L 900/1, at 2 (1989).

was to allow the dominant positions that form naturally on the market due to contingent situations or particular entrepreneurial skill, while discouraging their formation through concentrations.

The definition of collective dominant position is important in this area as well. It enables the authorities responsible for controlling concentrations to prevent their creation in markets that are already highly concentrated. The market share to be considered in deciding whether a planned market concentration creates or strengthens a dominant position consists of the aggregate shares held by the undertakings directly involved, not of the individual undertaking.[55] Thus, the aggregate market share clearly indicates when a planned concentration runs afoul of antitrust law by intending to strengthen a dominant position.[56]

The Commission has already had occasion to use the definition of collective dominant position in applying regulations governing mergers. In the *Thorn Emi/Virgin* case, the problem was simply stated.[57] The Commission was faced with the planned acquisition of a small undertaking by one of the largest record companies in the world. Despite the fact that "the structural features of the market for recorded music could indicate a situation of collective dominance," the Commission held that the concentration was compatible with the common market.[58] According to the Commission, "the proposed acquisition would not create or strengthen a dominant position among the five major record companies as a result of which effective competition would be significantly impeded in the common market or a substantial part of it."[59] The Commission arrived at its ruling in light of the investigations it performed on the market and in spite of the undoubted increase in concentration caused by the elimination of Virgin from the market. Therefore, there is no doubt that the Commission used the idea of collective dominant position in this case in order to determine the lawfulness or unlawfulness of the planned concentration.

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55. *See* Council Regulation No. 4064/89, *supra* note 51, O.J. L 395/1 (1989).

56. *Id.*

57. Commission Decision of April 27, 1992, Case No. IV/M202 (Thorn Emi/Virgin Music) (unpublished).

58. *Id.* at pt. 21.

59. *Id.* at pt. 68.

In the *Nestlé/Perrier* case,[60] the Commission concretely applied the definition of collective dominant position and held that the French mineral water market was an oligopolistic market characterized by the presence of three undertakings. The Commission based its ruling on the fact that: Nestlé, Perrier and BSN alone controlled about 80% of the market; entry barriers such as high transport costs and high advertising investment costs offered strong protection; and, the almost total absence of price competition, as well as the high degree of transparency exhibited by the mineral water market.[61] The *Nestlé/Perrier* case presented a situation of high market concentration in which competition by other small undertakings operating on the market did not influence price policies, allowing the three major undertakings to constantly increase their prices. Thus, the Commission held that a *sic et simpliciter* authorization of the concentration planned by Nestlé and Perrier would have permitted Nestlé and BSN to further reduce the already limited degree of competition on the market. Moreover, it would have further reduced retailers' potential choices, as well as constituted a further impediment to the entry of new operators on the market.[62]

In conclusion, according to the Commission, the planned concentration would have permitted the creation of a symmetrical duopolistic dominant position, given the similar size of the two undertakings. Therefore, the Commission observed that since "the safeguarding of effective competition is one of the principal objectives of the Treaty (Article 3(f)). . . limitations placed on effective competition which are prohibited if they re-

60. Nestlé/Perrier, O.J. L 356/1 (1992).

61. *Id.* at pts. 61-62 (1992). According to the Commission (see points 61-62), prices were fixed above the competitive level, and with respect to transparency, the Commission notes that the three undertakings in question a) publish their price lists, with discounts for basic quantities, b) supply the same customers, and c) inform the Chambre Syndacale des Eaux Minerales of their monthly sales volumes, and each of them receives information on quantities sold monthly by the other suppliers, broken down by brands. *Id.*

62. *Id.* at pts. 90 & 96 (1992). With respect to potential competition, the Commission analyzed the significant obstacles and risks for eventual new operators, noting the discount policies that the three national suppliers used to tie purchasers to the entire range of their products, as well as the good reputation of Nestlé, Perrier and BSN brands and the fairly static demand. In this regard, the Commission notes the mutually violent reaction of Nestlé and BSN to IFINT's (Agnelli group) public offer for EXOR (Perrier) as a demonstration of their intent to prevent the entry of new operators who might disturb the structure of the existing market. *Id.* at pt. 98.

sult in a dominant position held by a single undertaking do not become lawful when they are due to more than one undertaking."[63] The Commission then authorized the concentration under certain conditions, based primarily on Nestlé's obligation to sell certain trademarks to a third party competitor. The sales would ensure that the collective dominant position already present on the market would not be further reinforced and a duopolistic dominant position would not be created.[64]

The *Nestlé/Perrier* decision evidences the Commission's intent to exert its control over oligopolistic markets and markets with oligopolistic tendencies. The Commission was concerned about the creation of a dominant duopolistic position in which undertakings of similar sizes would not have been able to compete with each other. Those undertakings would then be motivated to maximize profits by engaging in anti-competitive parallel behavior, despite the inflexible nature of demand with respect to prices and substantially equivalent costs. According to the Commission, this situation could only result in tacit parallel conduct, which would cause price increases to the detriment of consumers.

In light of the Commission's position in *Nestlé/Perrier*, Regulation 4064/89[65] on concentrations, like Article 3 of Law 287/90,[66] can be effectually used not only to prevent a single under-

63. *Id.* at pt. 113. By means of this statement the Commission intended to fully reject those theories according to Council Regulation No. 4064/89, art. 2, ¶ 3, O.J. L 395/1 on concentrations would not affect collective dominant positions. *See* Council Regulation No. 4064/89, *supra* note 51, O.J. L 395/1 (1989) (dealing with control of concentrations). And in this regard the Commission justly observes that various national antitrust systems (French, British and German law) have a system for controlling concentrations which is applicable to both an oligopolistic dominion and to domination by individual undertakings. And the Commission held that this consideration bore witness that Article 2, paragraph 3 of Regulation 4064/89 was applicable to a collective dominant position, as it would appear odd that the mere fact that the transaction was of Community relevance would cause it to escape the control to which it would certainly otherwise be subject by domestic law. The main foreign antitrust laws are published in the book by GIUSEPPE SENA & MARIO FRANZOSI, ANTITRUST (PROGETTI ITALIANI, REGOLAMENTO C.E.E., LEGISLAZIONI STRANIERE) (1990).

64. *See* Commission Decision No. 92/385/EEC, O.J. L 204/1 (1992) (Accor/Wagon-lits). The Commission authorized a concentration on the restaurant market subject to the obligation of the acquiring company to sell one of the businesses of the company acquired. *Id.*

65. Council Regulation No. 4064/89, *supra* note 51, O.J. L 395/1 (1989) (dealing with control of concentrations).

66. Legge 10 Ottobre 1990, *supra* note 14.

taking from acquiring or reinforcing an individual dominant position, but also to avoid the creation of collective dominant positions in an oligopolistic market or the strengthening of already existing collective dominant positions. Regulation 4064/89 thus avoids the creation of market positions where parallelism is the only rational conduct for undertakings present on the market.

Authorities in charge of controlling concentrations must examine the various elements of the specific market on a case by case basis, in order to establish whether the particular concentration may lead to unlawful results. This is a complex examination, necessarily based on an economic analysis of the market; the decision in the *Nestlé/Perrier* case is significant in this regard.[67]

IV. *FINAL CONSIDERATIONS*

The preceding discussion illustrates how EC antitrust regulations and their nearly identical Italian counterparts may serve to control excesses and concentrations in oligopolistic markets, but seem inadequate in dealing with the normal consequences of an oligopolistic market. In fact, under current legislation the only possible actions by antitrust authorities are those which result from the application of provisions involving the control of concentrations.[68] These actions center on the concept of collective dominant position and the prohibition against abuse of a dominant position.

Authorities in charge of safeguarding competition may intervene in order to prevent an oligopolistic market from further increasing its degree of concentration. Similarly, they may act to prevent oligopolistic undertakings in a collective dominant position from abusing their position. In cases of excessive prices, intervention appears extremely difficult given the demonstrated practical impossibility of showing the "unfairness" of the prices.

At first sight, this power to intervene may seem sufficient, but upon closer examination it proves inadequate. This is due

67. *See* CHRISTOPHER JONES & ENRIQUE GONZÁLES-DÍAZ, THE E.E.C. MERGER REGULATION 174 (1992) (giving exhaustive list of factors which may be taken into account in order to establish existence of dominant oligopolistic position).

68. *See* Osti, *supra* note 29, at 603. According to Cristoforo Osti, concentration transactions which occur within an oligopolistic market should be prohibited; the author in fact considers concentrations in an oligopolistic market to be a "facilitating practice," and in fact the "facilitating practice" par excellence. *Id.*

in part to the difficulties inherent in the economic analysis of the markets, which must be turned over to experts who will have the final say in deciding on the merits. It is also a consequence of demonstrated impossibility of identifying abuses regarding the price factor, which is the major concern of consumers. The real problem, however, is that current laws seem effectively powerless against the normal structure of an oligopolistic market. This is because parallelism *per se* is not affected by current law.

Consequently, current laws do not deal with the typical problems of an oligopolistic market. Such a market allows no competition, causing its undertakings to stagnate for lack of motivation to engage in technological innovation.[69] Undertakings thus become primarily concerned with creating a common front to prevent new operators from entering the market and disturbing their comfortable situation. Competition, however, is considered a market regulator that serves the public interest. Nevertheless, it is hard to contest the fact that antitrust law, which is institutionally aimed at safeguarding the game of competition, seems to refuse to act against oligopolistic markets. At the same time, those are the very markets that are becoming increasingly important and widespread.

This is not an acceptable result. When a market becomes oligopolistic due to increasing concentration, it can result in situations of non-competition that are opposed in other markets. Still, while this is doubtless the situation with respect to current antitrust law in the European Union and in Italy, there is, nevertheless, no reason to believe that matters must inevitably end here. In this regard, the British experience is quite important, as the national antitrust law[70] is characterized by significant prag-

69. *Id.* at 603 n.42. Osti emphasizes the relevance of the problem of technological growth in dormant oligopolistic markets, especially when "one considers the fact that technological growth is capable of rapidly dissipating the negative static effects of market concentration." *Id.*

70. Restrictive Trade Practices Act 1976 (Eng.); Fair Trading Act 1973 (Eng.). Article 6 of the Fair Trading Act finds the following situation to be similar to a monopoly when:

> [A]t least one quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group consisting of two or more such persons . . . or are supplied by members of one and the same group consisting of two or more such persons . . . (not being a group of interconnected bodies corporate) who whether voluntarily or not and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the produc-

matism. The authority in charge of controlling competition, called the Monopolies and Mergers Commission ("MMC") has the power to perform investigations in any sector in which it feels that the practices engaged in by operators present on the market are contrary to the public interest. Once it finds that, as in the case of an oligopolistic market, operators have not entered into an agreement or engaged in a concerted practice, but nevertheless behaved in a manner that conflicts with the economic interest of consumers, the MMC may take one of two actions. It may order a halt to said conduct, or give recommendations aimed at encouraging the development of competition within oligopolistic markets, without inflicting sanctions. In this respect, the Fair Trading Act of 1973 even grants the Secretary of State power to order the sale of a business, giving him the ability to forcibly deconcentrate the market.[71]

In effect, many of the investigations carried out by the MMC have involved oligopolistic markets[72] and have led to recommendations for changes in conduct, and sometimes even structural changes. Some of the investigations of oligopolistic markets have involved price alignment, which the MMC considers prejudicial to consumer interests when it does not correspond to parallelism of costs. Other investigations have involved prices that are considered excessive. The solutions suggested by the MMC in individual cases have ranged from price control, to monitoring of the market, to requesting purchasers to better exercise their power during the purchase phase.[73] The lesson to be learned from the British experience is that antitrust legislation must not necessarily grind to a halt in the face of difficulties inherent in oligopolistic markets. Rather, tools can be created to restore a certain level of competition even in the tightest oligo-

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tion or supply of goods of that description, whether or not they themselves are affected by the competition and whether the competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers.

Id. art. 6.

71. *Id.* art. 56. For the combined provisions of Article 56 and part II of Schedule 8 of the Fair Trading Act of 1973, "An order may provide for the division of any business by the sale of any part of the undertaking or assets, or otherwise . . . or for the division of any group of interconnected bodies corporate . . ." *Id.*

72. *See* RICHARD WHISH, COMPETITION LAW 479 (1993).

73. *Id.* at 481. Whish explains in detail the interventions which the Secretary of State has made in oligopolistic markets upon suggestion of the MMC. *Id.*

polistic markets.[74]

Taking into consideration the demonstrated impossibility of fitting an oligopoly within a framework of general rules, as well as the practically inevitable situation of non-competitive stability that is always created in oligopolistic markets, especially when they are mature, the pragmatic approach suggested by the British experience seems almost obligatory. It ensures that the benefits of competition, that antitrust legislation aims to protect, will not be totally absent in oligopolistic markets, which are bound to increase in number. The risk is that without legislative changes, EC and Italian antitrust authorities will actively enforce antitrust rules in markets with perfect competition where many small to medium size undertakings operate, and accept the same situations in oligopolistic markets where operators are generally large in size. This would be a truly unacceptable situation.

It should be noted that the EC Commission already seems to have moved in the direction taken by British legislation, by authorizing the *Nestlé/Perrier* concentration upon condition that Nestlé make some divestments that would enable another party to enter the market. Thus, the Commission avoided the formation of a duopolistic dominant position, which would have eliminated all remaining competition in a market already characterized by strong parallelism. Community and Italian legislative reform must move in this direction in order to guarantee the future of antitrust law, which will be increasingly called upon to safeguard the game of competition in oligopolistic markets.

74. In this regard, it should be recalled that even Article 1, paragraph 2 of the French antitrust law (ordinance no. 86-1243 of December 1, 1986, *amended by* Law no. 87/499 of July 1, 1987), which makes it possible for the Council of State to regulate prices by decree after consultation with the Competition Council "dans les secteurs ou le zones où la concurrence par les prix est limitéè en raison soit de situations de monopole ou de difficultés durables d'approvisionnement, soit de dispositions législatives ou règlementaires." Ordinance no. 86-1243 (Dec. 1, 1986) (Fr.).