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Collective Dominance Under Scrutiny: Closing the Enforcement Gap or Complicating EU Competition Policy?

Miroslava Marinova

The GW Competition & Innovation Lab
805 21th Street NW
Suite 621. 6th Floor
Washington, DC 20052
gwucil@gwu.edu

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Miroslava Marinova[1]

Abstract

This paper examines the European Commission's Draft Guidelines on Article 102 TFEU, focusing on their treatment of collective dominance in oligopolistic markets. While the Guidelines adopt a structured framework derived from merger control, they fail to address a key challenge specific to Article 102: the need for clear evidentiary standards in retrospective enforcement. The paper argues that parallel conduct by independent firms can, in certain cases, serve as evidence of collective dominance where such behaviour is not rational absent joint market power. However, the Draft Guidelines offer little guidance on how to integrate such conduct into the dominance analysis. This gap risks leaving the collective dominance conceptually recognised but practically underenforced, thereby limiting the EU's ability to tackle anticompetitive outcomes in concentrated markets.

I. Introduction

Recently, the European Commission published Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings. Among the most notable developments is the introduction of the collective dominance concept that, although long recognized in EU competition law, has seen limited enforcement over the past two decades. Collective dominance is a term used in EU competition law to describe a situation in which two or more undertakings, though legally and economically independent, are able to present themselves or act together on the market as a collective entity, usually in highly concentrated oligopolistic markets.[2]

1 Senior Lecturer in Law, University of East London and Senior Fellow at The GW Competition and Innovation Lab, George Washington University, Washington, D.C.
2 The first case in which the term collective dominance was used is the *Italian Flat Glass* case: Commission Decision of 7 December 1988, IV/31.906*, Flat glass* (Italy), OJ L 33, 4/02/1989, 44.

In oligopolistic markets, firms may often engage in collusion in the economic sense, either through explicit agreements or through tacit coordination achieved via parallel behaviour. In such cases, firms adjust their pricing or output decisions not merely by independently reacting to competitors' actions, but by anticipating mutual restraint in order to sustain prices above competitive levels.[3] This conduct can arise without explicit communication, as each firm simply acts in its own best interest based on expectations about others' behaviour. As a result, prices may rise towards monopoly levels even in the absence of a deliberate intention to collude. Economically, firms' motivation is irrelevant: what matters is whether their conduct leads to higher prices or reduced competition, outcomes equivalent to those resulting from explicit collusion.[4] Tacit collusion is facilitated by structural factors such as transparency, mutual interdependence, and stable market conditions that allow firms to monitor and anticipate each other's actions. [5]

The legal framework for assessing such coordinated conduct was developed most significantly in the *Airtours* judgment, where the General Court (at the time 'Court of First Instance') articulated a structured test for identifying coordinated effects in merger cases. The Court specified four necessary conditions: (1) the ability to reach terms of coordination, (2) the ability to monitor adherence to those terms, (3) the existence of credible deterrence mechanisms, and (4) the absence of competitive disruption from outside the coordinating firms. This framework was later codified in the Horizontal Merger Guidelines and remains in the analytical basis for assessing coordinated effects likely to arise from a transaction under EU merger control.[6]

Building on this legal and economic foundation, it became clear that merger control provided a tool for preventing the emergence of coordinated behaviour through forward-looking assessments. However, a persistent problem remained: harmful parallel conduct can emerge in oligopolistic markets outside the scope of

[3] The 2023 U.S. Merger Guidelines recognise that coordinated effects can arise without explicit agreements among firms where mergers facilitate "parallel accommodating conduct," where firms independently but predictably respond to each other's competitive actions, leading to reduced competition: US Department of Justice and Federal Trade Commission, 2023 Merger Guidelines (2023) https://www.justice.gov/atr/2023-merger-guidelines

[4] Kai-Uwe Kuhn, 'An Economists' Guide Through the Joint Dominance Jungle' (2001) An Economists' Guide Through the Joint Dominance Jungle by Kai-Uwe Kuhn :: SSRN accessed 21 April 2025.

[5] For a complete overview of the economic literature of tacit collusion see Nicolas Petit, 'The oligopoly problem in EU competition law' In *Handbook on European Competition Law* (Edward Elgar Publishing, 2013) pp. 259-349.

[6] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 031, 05/02/2004 P. 0005 – 0018, paras 39-47.

merger control. Because this type of coordination occurs without explicit communication, it typically escapes enforcement under Article 101 TFEU.[7] Yet, its economic effects, such as supra-competitive pricing, reduced product variety, and potentially diminished innovation can mirror those resulting from explicit collusion, resembling the outcomes typically associated with monopoly power.[8] Indeed, a growing body of literature highlights the broader negative consequences of increasing market concentration across sectors, such as consumer harm, stifled innovation, and economic growth.[9]

This exposes a critical enforcement gap, where harmful parallel behaviour in oligopolistic markets remains beyond the reach of Article 101 TFEU, particularly because no explicit agreement can be established. This leads to the question of whether Article 102 can be used to tackle anticompetitive parallel behavior in oligopolistic markets. Academic literature has long recognised this enforcement gap as a key challenge in modern competition policy.[10] Some scholars argue that the relevance of collective dominance under Article 102 TFEU lies precisely in its capacity to capture harmful conduct that cannot be reached under Artic101 TFEU.[11] Others, however, expressed the opposite view, namely that, oligopolists' parallel behaviour is a rational and predictable response to market interdependence rather than an unlawful practice. As a result, attempting to address the so-called 'oligopoly problem' through Article 102 TFEU, which targets abuse of dominance, has been viewed as inappropriate, as the

[7] Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities* (*Wood Pulp*), [1993] ECR I-1307.

[8] Horizontal Mergers Guidelines, para 22 b), specifically mentioned that tacit collusion can lead to supra competitive prices. paras 39 – 57

[9] Denise Hearn, 'Harms from Concentrated Industries: A Primer' (February 1, 2024). Available at SSRN: https://ssrn.com/abstract=4724974 accessed 1 April 2025.

[10] OECD (1999), "Oligopoly: Key findings, summary and notes", OECD Roundtables on Competition Policy Papers, No. 25, OECD Publishing, Paris, https://doi.org/10.1787/4f85ebf0-en .

[11] See Giorgio Monti, 'The scope of collective dominance under Articles 82 EC' 38(1) (2001) Common Market Law Review; Albertina Albors-Llorens, 'Collective Dominance: A Mechanism for the Control of Oligopolistic Markets?' (2002) 27(1) European Law Review 17; Nicolas Petit, 'The "Oligopoly Problem" in EU Competition Law' (2012) http://ssrn.com/abstract=1999829 accessed 17 April 2025; Nicolas Petit, 'Re-pricing through Disruption in Oligopolies with Tacit Collusion: A Framework for Abuse of Collective Dominance' (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622083 accessed 17 April 2025; Ronny Jendemsjo, Erling J Hjelmeng and Lars Sørgard, 'Abuse of Collective Dominance: The Need for a New Approach' (2013) 36(3) World Competition 355; Felix Mezzanotte, 'Using Abuse of Collective Dominance in Article 102 TFEU to Fight Tacit Collusion: The Problem of Proof and Inferential Error' (2010) 33(1) World Competition 93.

absence of explicit agreement is not illegal and therefore cannot be effectively tackled under Article 102.[12]

The Commission's Draft Art. 102 Guidelines attempt to bridge this gap by clarifying how collective dominance can be established under Article 102 TFEU. They propose three possible ways to prove collective dominance: structural links (e.g., cross-shareholdings, joint ventures, board interlocks), aligned economic incentives (involves assessing whether firms have aligned economic interests that promote coordinated behavior without direct agreements), or a combination of both. The Draft Guidelines sets out a framework for assessing collective dominance based on tacit coordination. These criteria resemble those used for the assessment of coordinated effects under the EU merger control, suggesting that the same analytical framework may apply in abuse of dominance and merger control contexts.[13]

However, the Draft Guidelines overlook a critical distinction: merger control assessments are forward-looking, focused on whether a transaction will lead to coordinated effects. In contrast, Article 102 enforcement is retrospective, which means that there may already be a manifestation of abuse such as excessive pricing or other anticompetitive effects; yet, to trigger the application of Article 102, dominance must still be established as a necessary precondition for intervention. This makes the assessment under Article 102 fundamentally different from that under merger control, where authorities assess whether a proposed concentration is likely to create conditions conducive to future collusion. In abuse cases, however, authorities examine actual market behaviour and potentially harmful outcomes, requiring proof not only of dominance but also of a clear link between the dominance and the conduct.

This distinction is particularly important in the context of collective dominance. In such cases, the very nature of the abuse is reflected in firms' ability to coordinate behaviour and diminish competition, typically by sustaining supercompetitive prices or restricting market dynamics. Thus, collective dominance cannot be assessed independently of firms' actual conduct. Because the

[12] Richard Whish and Brenda Sufrin, 'Oligopolistic Markets and EC Competition Law' 12 (1) (1992) Yearbook of European Law 59-83; John T. Lang, 'Oligopolies and joint dominance in community antitrust law' nn ANNUAL PROCEEDINGS-FORDHAM CORPORATE LAW INSTITUTE (Kluwer Academic Publishers, 2001) 269-360; Barry E Hawk and Massimo Motta, 'Oligopolies and Collective Dominance: A Solution in Search of a Problem' (2008) Fordham Competition Law Institute; Chris Withers and Mark Jephcott, 'Where to Go Now for E.C. Oligopoly Control?' (2001) European Competition Law Review 105; Paolo Siciliani, 'Should We Act ex Post Against Tacit Collusion – and How?' (2014) 5(5) Journal of European Competition Law and Practice 294.

[13] Horizontal Mergers Guidelines, Paras 38-41.

evidentiary burden for proving collective dominance is high, there is a risk that harmful parallel behaviour may escape enforcement if authorities fail to recognise the causal link between the conduct and the existence of collective dominance. Strengthening this link is crucial to make the collective dominance framework operational.

The Commission briefly acknowledges this principle in the Draft Guidelines, citing *Irish Sugar* acknowledging that: '*the action amounting to an abuse can be identified as one of the manifestations of such a joint dominant position*.'[14] However, the Guidelines do not elaborate on how such conduct should be operationalised as evidence of collective dominance. This leaves a significant gap between theory and enforcement and creates legal uncertainty for authorities applying the framework. Without clearer guidance, the enforcement of Article 102 against collective dominance risks remaining conceptually valid but practically ineffective.

Addressing this enforcement gap is essential not only from a legal standpoint, but also for safeguarding the EU's broader economic priorities. Many of the markets susceptible to tacit coordination, such as telecommunications, energy, and digital services are critical to the Union's long-term competitiveness.[15] Ensuring that these sectors remain open, innovative, and responsive to consumer needs requires a clear and operational framework for detecting and addressing collective market power. In this context, the development of legal tools to assess and intervene in cases of coordinated behaviour is closely linked to the EU's strategic aim of fostering a competitive, resilient internal market.[16]

Building on this background, this paper explores the implications of the renewed focus on collective dominance, assessing the Draft Article 102 Guidelines' clarity, coherence with legal and economic theory, and their practical utility for future enforcement.

This article consists of five sections. Following this introduction, Section two lays examinins the economics of tacit collusion, explaining why firms in oligopolistic markets may align their behaviour without explicit agreements and how such parallel

[14] The Draft Article 102 Guidelines, para 34.

[15] Although industries with more homogeneous products and limited opportunities for differentiation are typically even more susceptible to coordination, these strategic sectors remain vulnerable due to their structural features and the repeated interactions between a small number of major players.

[16] European Council, A Strategic Agenda 2024–2029: Building a Stronger Union (30 June 2023) https://www.consilium.europa.eu/media/67256/20240629-strategic-agenda-2024-2029-en.pdf accessed 22 April 2025.

conduct, although rational, can nonetheless lead to anticompetitive outcomes. The third section turns to the legal framework, tracing the evolution of the concept of collective dominance in the case law of the Court of Justice of the European Union (CJEU) and outlining how the courts have interpreted and applied this concept as the basis for the Commission's current approach. The fourth section critically assesses the European Commission's Draft Article 102 Guidelines, evaluating whether the proposed framework aligns with the legal and economic principles. The final section concludes with reflections on whether the Commission's reassertion of collective dominance is sufficient to address the enforcement gap in oligopolistic markets.

II. The economics of tacit collusion – The Oligopoly Problem

Economic theory defines an oligopolistic market structure as one in which a small number of firms operate, each recognising that its pricing and output decisions are interdependent with those of its rivals. In such markets, each firm takes into account the likely reactions of its competitors when formulating its own strategy.[17] Many economic sectors in Europe, such as telecommunications, media, and banking, display oligopolistic characteristics, where firms' mutual awareness of competitive interactions is particularly pronounced. This structure is especially evident in the EU telecommunications industry, where licensing constraints typically limit the number of mobile network operators in each Member State to between three and six.[18]

In markets with a limited number of participants, firms recognise that their pricing and output decisions affect, and are affected by, the behaviour of their competitors. This creates a situation of strategic interdependence, where each firm's demand depends not only on its own pricing decisions but also on the pricing decisions of others. Although firms independently choose their strategies, the mutual anticipation of competitive responses can lead to parallel adjustments in commercial behaviour. Under certain market conditions, such as transparency, stability, and repeated interaction, this interdependence may facilitate the alignment of pricing strategies and reduce competitive intensity. Such outcomes may, in some cases, resemble those of explicit

[17] No specific number of market participants has been identified that could be considered to be an oligopoly. This depends on the circumstances of each particular case. In this respect see: R. Selten, 'A Simple Model of Imperfect Competition, Where Four Are Few and Six Are Many' (1973) 2 International Journal of Game Theory, 141.
[18] J. Briones, 'From Collective Dominance to Coordinated Effects in EU Competition Policy' 1 (2009) Antitrust Chronicle.

collusion, even in the absence of any formal agreement or direct communication.

This phenomenon is explained by the classic economic 'game theory'developed by John Nash.[19] Nash's theory is recognized as one of the outstanding intellectual achievements of the 20th century, for which he received the Nobel Prize in 1994. This is a fundamental concept in game theory that illustrates a situation where individuals acting in their own self-interest collectively arrive at a suboptimal outcome. It involves two suspects being interrogated separately for a crime, each faced with the decision to cooperate with the other (remain silent) or betray the other (confess). Possible outcomes depend on the choices made:

If both suspects cooperate (remain silent), they both receive a moderate sentence because there is not enough evidence to convict them of the more serious crime. If one suspect betrays (confesses) while the other remains silent, the betrayer goes free (or receives a reduced sentence) while the silent one receives the full sentence. If both suspects turn in (confess), they both receive a severe sentence, although it may be lighter than if only one confessed, due to the guilty pleas of both. Despite each suspect's individual incentive to betray (confess) for personal gain (to avoid harsher punishment) because he doesn't know what action the other suspect will take - and he might as well confess, leading to a heavy sentence for both , the optimal outcome for both collectively is to cooperate (keep silent). The dilemma is that the two would be in a better position if they could agree to cooperate rather than alternating between 'defection' and 'cooperation' for example. However, the 'Nash equilibrium' offers no explanation of how this cooperation can become established behavior. While Nash's insights explained why firms might struggle to maintain cooperation due to incentives to defect, subsequent research, notably Axelrod's simulations explored how repeated interaction under specific strategies, could support stable cooperation over time.[20] However, more recent developments in the theory of repeated games have shown that repeated interaction alone does not guarantee collusion.[21] Multiple equilibria exist in repeated games, and without some form of communication or focal mechanisms, firms are more likely to fail to coordinate on collusive outcomes. In the context of oligopolistic markets, this suggests that while tacit collusion is theoretically possible,

[19] Nash, Jr., John F. and Lloyd S. Shapley, 'A simple three-person poker game' in H. W. Kuhn and A. W. Tucker, editors, Contributions to the Theory of Games I [Annals of Mathematical Studies 24], Princeton U Press (1950); Nash, Jr., John F. 1951. "Noncooperative games." Annals of Mathematics 54:289-295.
[20] R. Axelrod, *The Evolution of Cooperation*, New York: Basic Books, 1984.
[21] Kai-Uwe Kühn, 'The coordinated effects of mergers' Paolo Buccirossi (ed) *Handbook of Antitrust Economics* (MIT Press 2008) 120.

sustaining it typically requires favourable conditions that go beyond mere repeated interaction.

While early economic theory, notably Stigler's seminal work in the 1960s, helped identify the structural conditions that make collusion viable, such as the ability to monitor rivals and retaliate against deviations, more recent research has shown that these conditions, although necessary, are not sufficient to predict collusive outcomes.[22] Stigler hypothesised that, once collusion was initiated, it could be sustained over time in oligopolistic markets if the incentives to deviate were low and credible punishment mechanisms existed, thereby allowing supracompetitive pricing to persist. However, subsequent theoretical and experimental research has demonstrated that these factors primarily serve as exclusionary criteria: their absence suggests collusion is unlikely, but their presence does not guarantee its emergence.[23] Modern collusion theory therefore recognises that the existence of conducive market conditions must be complemented by a deeper analysis of firms' strategic interactions and coordination problems.

Modern economic literature has built upon earlier theories to identify structural and behavioural factors that can affect the sustainability of tacit collusion, such as the level of concentration, the stability of market shares over time, cost symmetry, demand stability, product homogeneity, barriers to entry, and market transparency.[24] However, these factors are now generally understood as necessary, but not sufficient, conditions: while their absence can suggest that collusion is unlikely, their presence alone does not reliably predict collusion.[25] In particular, while transparency is often seen as facilitating collusion by making it easier for firms to monitor rivals and detect deviations, empirical evidence, including experimental studies, shows that transparency alone does not lead to collusion.[26] Perfectly competitive markets can be fully transparent, yet competitive outcomes prevail unless firms can communicate or otherwise coordinate explicitly. The overall effect of transparency therefore depends critically on broader

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[22] G. Stigler, 'A theory of oligopoly' 72(1) (1964) Journal of Political Economy 44.

[23] See in particular Kühn, 'The coordinated effects of mergers' (n 21).

[24] For general overview see Richard A Posner, 'Oligopoly and the antitrust laws: A suggested approach' In *Dominance and Monopolization*, pp. 197-242. (Routledge, 2017); KN Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge, Cambridge University Press, 2003); M. Ivaldi, B. Jullien, P. Rey, P. Seabright and J. Tirole, 'The Economics of Tacit Collusion' IDEI, Toulouse, Final Report to DG COMP, March 2003.

[25] Patrick Rey 'Collective dominance and the telecommunications industry' (2004) *The economics of antitrust and regulation in telecommunications*, 91, 104.

[26] Christian Schultz, 'Transparency and tacit collusion in a differentiated market' No. 730. CESifo Working Paper, 2002.

market conditions, including the frequency of interaction and the availability of mechanisms that can support coordination.

While modern economic theory of collusion identifies specific structural and behavioral factors that influence the sustainability of tacit collusion, Kühn emphasises that economics of collusion requires more than identifying market characteristics such as concentration or transparency. Instead, it demands a thorough analysis of whether coordination is sustainable under the specific conditions of the market, taking into account the economic incentives of firms to adhere to a collusive outcome and the credibility of punishment for deviation.[27] In a later paper analysing potential collusion in the context of differentiated product markets, Kühn claims that the ability to sustain coordination critically depends on the relative size of firms, arguing that greater asymmetry, where one firm controls significantly more product varieties than others, undermines both the incentives to adhere to collusion and the credibility of punishment, making collusion less stable and less profitable.[28] Thus, the sustainability of collusion depends on whether deviations can be credibly detected and punished, and whether the market structure makes such punishment economically rational. In this context, transparency plays a crucial but limited role: it is important only insofar as it enables firms to quickly observe deviations and react through credible retaliation.[29]

Building on earlier work identifying the conditions for sustaining collusion, more recent literature has rightly turned attention to an equally critical, yet often underappreciated, issue: the initiation of coordination. Green, Marshall, and Marx argue, in line with the mainstream of modern economic theory, that the spontaneous emergence of collusive outcomes without prior communication is rare and generally confined to highly simplified and transparent markets.[30] In more complex settings, such as those involving demand uncertainty, strategic buyers, or differentiated products, the absence of or focal mechanisms makes coordination substantially more difficult. Importantly, the authors distinguish between tacit coordination, passive mutual adjustment based on expectations, and tacit agreement, where active reinforcement through focal points or market signals is necessary. Without such reinforcing mechanisms, collusion is unlikely to arise, even when market conditions would otherwise

[27] Kuhn, 'An Economists' Guide Through the Joint Dominance Jungle' (n 4).
[28] Kai-Uwe Kühn, 'The coordinated effects of mergers in differentiated products market' (2004) < The Coordinated Effects of Mergers in Differentiated Products Market> accessed 19 April 2025.
[29] Kühn, 'The coordinated effects of mergers' (n 21).
[30] Edward J Green, Robert C Marshall and Leslie M Marx, 'Tacit Collusion in Oligopoly' in Roger D Blair and D Daniel Sokol (eds), The Oxford Handbook of International Antitrust Economics, Volume 2 (Oxford University Press 2014) 464–497.

seem favourable. Without such mechanisms, collusion may not arise at all, even if market conditions would support it.

Further empirical studies highlight that while the frequency of interaction between firms is an important factor for sustaining tacit collusion, it is not sufficient on its own.[31] According to Rey, collusion is difficult to maintain when firms interact only occasionally, as the opportunity to punish deviations is delayed, weakening the deterrent effect. Conversely, frequent interaction enables firms to observe and respond more quickly to rivals' actions, allowing quicker retaliation against undercutting. A similar logic applies to the frequency of price adjustments: the more often prices can be changed, the sooner a cheating firm can be punished, increasing the credibility of deterrence. However, frequent interaction only supports collusion if firms are already able to coordinate their strategies, a significant challenge, particularly in complex markets with many dimensions of competition and a wide range of potential strategies. Without an effective coordination mechanism, even frequent interaction may fail to produce collusive outcomes.

In sum, the economic theory of tacit collusion advanced through empirical research demonstrates that in oligopolistic markets, firms may be able to align conduct and sustain supra-competitive outcomes even in the absence of explicit agreements. This outcome depends not only on the specific structural characteristics of the market, including high concentration, market transparency, symmetry, and repeated interaction, to name a few, but also on whether firms are able to coordinate their strategies effectively. However, what makes coordination sustainable is whether firms are deterred from deviating by credible threats of retaliation, a mechanism that itself often requires some form of communication to coordinate expectations around punishment, as shown by recent experimental evidence.[32] This highlights the inherent difficulties in predicting collusion based solely on market structure or observed firm characteristics. This interplay between the temptation to deviate and the cost of being punished is central to assessing whether collusion is likely and stable over time. Based on that, it can be concluded that the likelihood of collusion presents significant analytical challenges. While economic theory and empirical research help identify conditions that facilitate coordination, and these factors alone cannot definitively establish whether collusion is actually occurring.[33]

[31] Rey (n 25) 113.
[32] David J. Cooper and Kai-Uwe Kühn, 'Communication, Renegotiation, and the Scope for Collusion' (2014) 6 AEJ: Microeconomics 247.
[33] Rey (n 25) 111.

As such, the framework for assessing collusion serves as a predictive model to anticipate and prevent potential harm to competition before it materialises - a function well suited to merger control. It explains why the EU courts, in developing the legal concept of collective dominance (which also served as a foundation for the reform of EU merger control), have increasingly aligned their analysis with the economic conditions that facilitate tacit collusion as it will be seen in the next section.[34]

III. Legal framework and analysis of case law

Article 102 TFEU states that any abuse by one **or more undertakings** of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. While the Treaty itself explicitly references the possibility of abuse by 'one or more undertakings,' the concept of collective dominance, the ability of several independent firms to hold and exercise market power jointly, emerged much later with the development of case law.

Over the past three decades, the notion of collective dominance has evolved significantly. This evolution has taken place in parallel under two distinct areas of EU competition law: the application of Article 102 TFEU to abusive conduct and the review of mergers under the EU Merger Regulation.[35] Although each area serves a different regulatory purpose - ex post enforcement for abuse and ex ante scrutiny in mergers - the analytical tools used to assess collective dominance have converged, particularly in evaluating whether firms can engage in coordinated behaviour absent explicit agreements. To understand how the concept has been interpreted and applied, this section analyses the case law chronologically, irrespective of whether the cases were decided under abuse of dominance or merger control rules.

3.1 Early case law introducing the concept of collective dominance

[34] See The Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and C-396/96 P, Compagnie Maritime Belge Transports SA and Others v Commission, delivered on 29 October 1998, para 15. This paper will adopt the term collective dominance as this is the terminology used by the EU Courts and the European Commission.

[35] Council Regulation (EC) No 139/2004.

The term collective dominance was first used in the *Nestle/Perrier merger control* decision in 1992.[36] The Commission found that the high market shares and concentration level, combined with significant barriers to entry and a high degree of market transparency, would likely facilitate tacit coordination between Nestlé and BSN. These conditions, it concluded, could enable the two firms to adopt a common commercial policy and behave, to a considerable extent, independently of competitors, customers, and consumers, resulting in collective dominance that would significantly impede effective competition and likely cause substantial consumer harm.[37] Although the merger was ultimately approved after Nestlé agreed to divest certain brands, the Commission's reasoning relied predominantly on market structure indicators and lacked the more refined, incentive-based economic analysis that underpins modern theories of tacit collusion.

In the same year, the *Italian Flat Glass* judgment, the first case on abusive collective dominance under Art. 102 was delivered. The Court of First Instance (now the General Court (GC)) considered that: '*In principle, there is nothing to prevent two or more independent economic actors in a particular market from being united by such economic ties that, together, they have a dominant position over the other operator in the same market*.'[38] The Court accepted the notion of collective dominance and the applicability of Article 102 to more than one undertaking. It considered that this might arise, for example, where two or more independent undertakings jointly possess, through agreements or licences, a technological advantage that enables them to behave to an appreciable extent independently of their competitors, customers, and ultimately consumers.[39]

However, while the Court disagreed with the Commission's conclusion that the three Italian producers of flat glass collectively held a dominant position, based on their agreements with major distributors and systematic product exchanges, it provided only limited clarification of the necessary criteria.[40] It emphasised that high joint market shares and structural links might be relevant, but were not sufficient in themselves to demonstrate the existence of collective dominance. Yet, the judgment failed to clearly define what constitutes the necessary

[36] *Nestlé/Perrier* (Case No IV/M.190) Commission Decision [2002] OJ L 356.
[37] Ibid, para 131.
[38] Joined cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities* [1992] ECR II-1403 (Hereinafter *Italian Flat Glass*), para 358.
[39] Ibid.
[40] Ibid, para 360.

'economic links' between undertakings.[41] Moreover, the Court did not sufficiently analyse whether the firms were able to adopt a common policy and act independently of competitive constraints, a key element for establishing dominance. [42] As a result, the judgment was seen as offering little practical guidance for future cases.

In 1994, in the *Almelo* judgment, the Court of Justice reaffirmed that a finding of collective dominance under Article 102 TFEU requires the undertakings in question to be linked in such a way that they can adopt the same conduct on the market.[43] As the case was referred for a preliminary ruling, the Court did not assess the facts itself as it was for the national court to determine whether such links were present in the case at hand.[44]

The next case in which the assessment of collective dominance was questioned was *Kali und Salz* - the first case under EU Merger Control in which the Commission's decision was annulled by the CJEU in 1998.[45] The Commission based its assessment on several factors, including the degree of concentration on the market which would follow from the concentration, the structural factors relating to the nature of the market and the characteristics of the product, and the structural links between the undertakings concerned.[46] The Court rejected the Commission's findings considering that the combined market share of 60% post-merger cannot of itself point conclusively to the existence of a collective dominant position.[47] Next, the Court considered the structural links, such as joint ventures and distribution agreements, not as significant as the Commission claimed.[48] It also criticised the Commission for failing to adequately assess the potential competitive pressure from other operators, such as Coposa,[49] and the fact that that demand for potash had declined by nearly 30% between 1988 and 1993, making coordination less likely, as falling markets typically intensify competition rather than facilitate collusion.[50] The Court clarified that establishing collective dominance requires a thorough and dynamic analysis of the market,

[41] Lia Vitzilaiou and Constantinos Lambadarios, 'The Slippery Slope of Addressing Collective Dominance Under Article 82 EC' GCP: The Antitrust Chronicle (2009): 1-10.
[42] Ibid, para 358.
[43] Case C-393/92, *Almelo (Gemeente) and Others vs. Energiebedrijf Ijsselmij NV* [1994] E.C.R. I-1508, para 42.
[44] Ibid, para 43.
[45] Case M308 *Kali und Salz/MdK/Treuhand* [1994] OJ L186/30; on appeal Cases C-68/94 and C-30/95, *France v. Commission, Societe Commerciale es Potasses et de l'Azore (SCPA) v. Commission* [1998] ECR I-1375 (*France v. Commission*).
[46] Ibid, para 180.
[47] Ibid, para 226.
[48] Ibid, para 228-232.
[49] Ibid, para 247.
[50] Ibid, para 238.

including demonstrating that the undertakings involved are able to adopt a common policy and act to a considerable extent independently of competitors, customers, and consumers.[51] However, the judgment did not provide clarity on whether the Commission's findings, absent the identified flaws, would have been sufficient to establish the existence of collective dominance.[52] This left open important questions about the evidentiary threshold and the appropriate methodology for assessing collective dominance under merger control.

There is an important observation in this judgment that is highly relevant to the main objective of this paper. In their submissions, the French Government (along with EMC and SCPA) criticized the Commission for basing its assessment of collective dominance on criteria that were inconsistent with the case law developed under Article 86 (now Article 102 TFEU).[53] In response, the Commission defended its approach by maintaining that merger control and the enforcement of Article 102 differ in nature: while Article 102 enforcement requires retrospective proof of an existing abuse of dominance, merger control demands a forward-looking assessment aimed at predicting whether a concentration would likely create or strengthen a dominant position in the future. According to the Commission, this justification is based on its analysis on structural indicators and economic incentives without requiring evidence of actual collusive behaviour.[54] This statement clearly shows that the Commission recognised the conceptual difference between merger control and abuse cases, showing the different evidentiary burden. Unfortunately, the Court did not engage with this important distinction, and similarly, the Commission's Draft Article 102 Guidelines, as will be discussed later, fail to fully acknowledge or operationalise it.

Chronologically, the next key judgment was delivered in 1999 in *Gencor v Commission.*[55] In this case, the Commission had prohibited a proposed merger between two South African mining companies, Amplats and Implats/LPD, on the grounds that it would result in the creation of a duopolistic structure collectively dominant in the platinum market. On appeal, the GC upheld the Commission's decision but also took the opportunity to clarify and refine the standard for assessing collective dominance under merger control. The Court emphasised that the existence of formal structural or economic links was not a necessary condition for establishing collective dominance post-merger.[56]

[51] *France v. Commission,* Para 221.
[52] Ibid, para 249.
[53] Ibid, para 179.
[54] Ibid, para 180.
[55] Case T-102/*96 Gencor v Commission*, para 206 (hereinafter *Gencor*).
[56] *Gencor*, para…..

This position of the Court corrected the misconception that collective dominance necessarily required structural links following the *Italian Flat Glass* judgment.[57] Instead, the Court clarified that collective dominance may emerge solely from a market structure characterised by strong interdependence among a small number of firms.[58] The GC also added that the large market share in a duopoly situation can be considered as a '*strong indication of the existence of a collective dominance*.'[59] However, this early interpretation did not yet fully take into account later economic insights, which show that substantial asymmetries between firms, such as a significant gap in market shares, generally undermine the stability of collusion by increasing the incentives to deviate, which suggests that collusion is more sustainable among firms of relatively similar size and market strength.[60]

In addition, the GC implicitly linked oligopolistic market characteristics, such as market concentration, transparency, and product homogeneity, as facilitating factors that made market participants able to anticipate one another's behaviour and align their conduct in the market, in particular to maximise their joint profits by restricting production with a view to increasing prices.[61] This judgment marked an important development in EU competition law by confirming that oligopolistic interdependence could, in principle, suffice to support a finding of collective dominance if it enabled firms to adopt common market strategies without explicit coordination. However, it is important to note that at the time, the economic understanding of tacit coordination was still evolving, and subsequent literature has provided a more nuanced view of the challenges involved in sustaining collusion under conditions of mere interdependence.

The CJEU upheld this position in *Compagnie Maritime Belge Transports v Commission*.[62] The CJEU upheld the Commission's finding of collective dominance between shipping lines that were members of a liner conference. In its judgment, the CJEU adopted the following definition of collective dominance: '*Position held by two or more economic entities legally independent of each other, which from an economic point of view, present themselves or act together on a particular market as a collective entity.*'[63] The Court clarified that structural links are

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[57] Robert O'Donoghue and Jorge Padilla, *The law and economics of Article 102 TFEU* (2th edn, Hart Publishing 2013) 149.
[58] Stroux (n 6).
[59] *Gencor*, para 206
[60] See Kühn, 'The coordinated effects of mergers' (n 21).
[61] *Gencor*, para 276.
[62] Joined cases-395/96 P and 396/96 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge and Dafra-Lines A/S v Commission of the European Communities* [2000] ECR I-1365 (Hereinafter *Compagnie Maritime Belge Transports*).
[63] *Compagnie Maritime Belge Transports*, para 45.

not a precondition for establishing collective dominance. It stated that the economic links between undertakings must be examined to establish collective dominance. Still, other factors, such as the market structure, must also be considered.[64]

In the same year, the GC delivered it's judgment in *Irish Sugar* - a case often cited for its assessment of rebates, but which also contains a significant, albeit often overlooked, clarification of the standard for establishing collective dominance.[65] The Court built on earlier jurisprudence, particularly *Almelo* and *Compagnie Maritime Belge*, to clarify that collective dominance may exist where two or more undertakings are connected by factors that enable them to adopt a common policy and act to a significant extent independently of competitors, customers, and consumers.[66]

Crucially, in paragraph 66, the Court stated that it is sufficient for the conduct amounting to abuse to be '*a manifestation of such a joint dominant position*.' In other words, the abusive behaviour itself may serve as evidence of collective dominance, particularly where it reflects a coordinated strategy between legally independent entities. The Court rejected the argument that economic independence between Irish Sugar and its distributor SDL precluded a finding of collective dominance emphasising instead that the ability to act collectively in the market was decisive.[67] This reasoning is critical when reconsidering the *Kali und Salz* judgment, where the Commission had emphasised that merger control assessments are inherently forward-looking, requiring authorities to infer the likelihood of future coordination from structural and market features, without needing direct proof of existing collusion. By contrast, in Article 102 enforcement, the assessment is retrospective, requiring proof that dominance exists at the time of the conduct. The *Irish Sugar* judgment confirms and operationalises this distinction: in the context of collective dominance under Article 102, the manifestation of abusive conduct, can itself form the factual basis for establishing dominance. The importance of this principle is further illustrated in two Commission decisions: COMP/39388 – *German Electricity Wholesale Market* and COMP/39389 – *German Electricity Balancing Market*.[68] In both cases, the Commission directly relied on paragraph 66 of *Irish Sugar*, where. In, the

[64] Ibid, paras 41-45.
[65] Case T-228/97 *Irish Sugar v Commission*, EU:T:1999:246.
[66] Ibid, para 46.
[67] Ibid, para 49.
[68] Commission Decision of 26 November 2008 in Case COMP/39388 – *German Electricity Wholesale Market* [2009] OJ C63/7 and Commission Decision of 26 November 2008 in Case COMP/39389 – German Electricity Balancing Market [2009] OJ C63/14.

Commission explicitly states that '*It is enough for the abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market. The abuse only has to be capable of being identified as one of the manifestations of such a joint dominant position being held.*'[69] Here, the Commission adopted the view that authorities can infer collective dominance from the abusive behaviour itself, rather than relying solely on abstract structural indicators.

This reflects a crucial insight: Unlike merger control, where structural criteria are used prospectively to predict coordinated effects, in the context of Article 102 enforcement, there is no scope for applying a checklist of market features to establish collective dominance independently of behaviour. Instead, the key question becomes whether the observed conduct would constitute an abuse if carried out by a single dominant firm, and whether the resulting market outcomes, such as supra-competitive prices, reduced output, or diminished innovation are consistent with the exercise of market power. If so, this supports the inference that the firms are jointly dominant. This approach grounds the assessment directly in observed market effects and helps avoid reliance on abstract structural criteria alone. These decisions demonstrate how the Commission operationalised Irish Sugar's principle, which allows enforcement authorities to infer collective dominance directly from the observed conduct itself. It shows that in Article 102 collective dominance cases, the manifestation of abusive conduct is not merely circumstantial evidence, it is the core basis for establishing the existence of joint dominance.

The next significant development in the jurisprudence on collective dominance came with the GC's judgment in *Airtours* in 2002. This case provided crucial clarification on the evidentiary standards required for establishing collective dominance under EU Merger Control. The Commission had prohibited the proposed merger between Airtours and First Choice, arguing that it would lead to the creation of a collective dominant position among the major tour operators in the UK market for short-haul foreign package holidays, thereby reducing capacity and increasing prices. However, the GC annulled the Commission's decision, finding that it had failed to provide sufficient evidence demonstrating that the merger would create or strengthen a collective dominant position that would significantly impede effective competition.

Importantly, the Court made clear that collective dominance does not require formal structural links between firms but rather

[69] Para 27 of the German Electricity Balancing Market decision. The same position expressed in COMP/39388 – *German Electricity Wholesale Market*.

depends on whether the market structure enables tacit coordination. The GC introduced a three-limbed test focusing on: (1) transparency to monitor deviations, (2) the sustainability of the coordination, and (3) the absence of effective competitive pressure, *i.e.* the reaction of actual or potential competitors (countervailing competitive pressure) and consumers (countervailing buyer power).

This framework reflected a deeper integration of economic theory, particularly the understanding of how oligopolistic interdependence can lead to coordinated outcomes even without explicit collusion. According to the Court, these conditions, allow the oligopolists not only to coordinate their behaviour but also to detect and punish any deviations effectively, which ultimately make the coordination successful without the need for any explicit agreements.

The Court also clarified that the meaning of the term 'economics links' used in the earlier decisional practice is not necessary for finding collective dominance: a merely describing interdependent market characteristics without showing the existence of a credible deterrent mechanism was insufficient to establish collective dominance. Finally, the Court emphasised that the assessment of countervailing factors, such as consumer ability to switch to alternative suppliers was crucial. Ultimately, the GC's three-limbed test provides a structured, forward-looking framework: it identifies market conditions under which tacit coordination is likely to emerge post-merger, without requiring proof of existing collusive outcomes. It sets a structured approach that competition authorities must follow to demonstrate a risk to competition, helping to rebut any presumption that the merger would be harmless. This standard was confirmed in the *Impala II* case by the CJEU.[70]

The *Airtours* judgment was the basis, shaping the Commission's subsequent merger control reform.[71] In the annulment decisions, the Courts criticised the Commission's assessments for, among other things, failing to establish that the mergers would likely give rise to a negative effect on competition. The interpretation of the Courts was that the likelihood of harm to the structure of the market was not sufficient to establish that a merger is not

[70] Case C-413/06 *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-04951.

[71] The Commission's reform of Merger Control was triggered when the European Courts overturned three prohibition decisions by the Commission, namely Case T-342/99 *Airtours v Commission* [2002] ECR II-2585; *Airtours/First Choice* (Case IV/M.1524) Commission Decision [1999] OJ L 93/1; Case T-310/01 *Schneider v Commission* [2001] ECR II- 4071; Schneider (COMP/M.2283) Commission Decision [2002] OJ L 101/134; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4519; *Tetra Laval* (Case COMP/M. 2416) Commission Decision [2001] OJ 2004 L 38/1.

compatible with the common market.[72] The assessment requires instead an evaluation of the impact of a merger on competition rather than their effect on the market structure.[73] This position of the Court illustrates that the assessment under merger control is inherently forward-looking. The objective is not to prove that collusion already exists, but to evaluate whether the merger would increase the likelihood of coordinated behaviour among firms in the future. In this predictive context, the *Airtours* framework serves primarily as a screening tool: it identifies conditions under which coordination might become more likely, helping competition authorities anticipate and prevent harm to competition before it materialises.

This predictive function explains why the EU courts, when developing the legal concept of collective dominance (which later influenced EU merger control practice), increasingly aligned their analysis with the economic conditions facilitating tacit collusion. However, while the *Airtours* framework is well-suited for merger assessments, it is not sufficient for the purposes of Article 102 TFEU. Following this development, in 2004, Regulation EC 139/2004 on the control of concentrations between undertakings was adopted, together with the Commission's Guidance on the assessment on horizontal mergers.[74] The new package required the assessment of the impact of horizontal mergers on competition and consumers, rather than on market structure i.e. will the merger substantially restrict competition.[75] Consequently, one of the key aspects of the reform of merger control was to move the assessment from a test based on the structure of the market and to adopt a 'significant impediment to effective competition' test – i.e. will the merger restrict competition substantially. The new test asks whether the merger will create a significant impediment to the effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening

[72] Anne Witt, 'The Commission's Guidance Paper on Abusive Exclusionary Conduct– More Radical than it Appears?' (2010) 35 E.L. REV. 214, 215.

[73] This section is based on Miroslava Marinova, Fidelity Rebates in Competition Law – Application of the 'As Efficient Competitor' test (Wolters Kluwer 2018) Chapter IV.

[74] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings [2004] OJ L 24/1 (ECMR); Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings [2004] OJ C 31/5; Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2008] OJ C 265/6.

[75] J. Vickers, 'How Does the Prohibition of Abuse Of Dominance Fit with The Rest of Competition Policy?' in Claus-Dieter Ehlermann and Isabella Atanasiu (eds) *European Competition Law Annual* 2003: What is Abuse of Dominant Position (Bloomsbury Publishing 2006) 147, 150. He also observes that the assessment of mergers *ex ante* is very different from the *ex post* intervention in abuse of dominance cases and as such, the threshold for the latter should be considerably higher than for the former.

of a dominant position.[76] The new test implies that dominance is no longer an essential condition for the prohibition of a merger, which suggests that the scope of Merger Control is extended to mergers that lead to oligopolies that might create significant impediment to the effective competition.[77]

At the same time the new Merger regulation came into force, the Horizontal Mergers Guidelines were published. The Guidelines elaborate the content of the new legal standard, and notice in particular that competitive harm may arise from mergers in two ways: unilateral and coordinated effects.[78] The the Commission based the assessment of coordinated effects on the economic theory of tacit collusion, which reflects exactly the legal test for collective dominance adopted by the GC in the *Airtours* judgment.[79] The Guidelines discuss the following factors that facilitate coordination: market concentration, homogeneity of the product, stability of the price levels and demand, low innovation, market transparency, symmetric cost structure, barrier to entry.[80] The assessment of coordinated effects as a possible theory of harm under the EU Merger Regulation is focused on 'preventing the structure of the market from becoming conducive to tacit coordination.'[81]

However, while the *Airtours* standard became well-established in merger assessments, it was not immediately clear whether the same principles applied under Article 102 TFEU. However, this issue was clarified in the *Laurent Piau* judgement in 2005,[82] where the GC confirmed that the analytical framework for assessing collective dominance under Article 102 TFEU is aligned with the approach applied under the EU Merger Regulation.[83]

While this principle suggests a uniform standard, this article argues that the enforcement context, *ex ante* in merger control and *ex post* in abuse cases, necessitates important distinctions, particularly with regard to the evidentiary burden. In merger control, the analysis is forward-looking: competition authorities must assess whether a proposed transaction is likely to result in

[76] Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (OUP Catalogue 2014) 26.
[77] Anne Witt, *The More Economic Approach to EU Antitrust Law* (Bloomsbury Publishing 2016) 134.
[78] Horizontal Mergers Guidelines, para 22.
[79] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings [2004] OJ C 31/5, paras 41-60.
[80] Paras 39-48.
[81] R. Whish and D. Bailey, *Competition law* (OUP, USA 2015) p. 564.
[82] Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209.
[83] Robert O'Donoghue and Jorge Padilla, *The law and economics of Article 102 TFEU* (2th edn, Hart Publishing 2013) 157.

a situation where firms can engage in tacit coordination that significantly impedes effective competition. The focus is on risk prediction and the avoidance of future harm. Consequently, authorities can intervene based on the plausible likelihood of anticompetitive effects.

Indeed, in this context, the regulatory framework applicable to the telecommunications sector illustrates the relevance of a forward-looking approach. Under the new European Electronic Communications Code, which builds on the 2002 Framework Directive, an undertaking is considered to hold significant market power (SMP) if, either individually or jointly with others, it enjoys a position equivalent to dominance, defined as the ability to act to an appreciable extent independently of competitors, customers, and consumers. This definition expressly adopts the language and legal understanding of dominance developed by the EU courts under Article 102 TFEU, thereby aligning the concept of collective SMP with that of collective dominance under competition law. Article 147 of the Code confirms that joint dominance may arise not only through structural or contractual links, but also where the market structure itself facilitates tacit coordination. Reflecting this, the new SMP Guidelines provide a comprehensive framework for assessing joint SMP, explicitly drawing on the *Airtours* criteria - coordination, monitoring, and deterrence and applying them to sector-specific factors such as price alignment, vertical integration, demand elasticity, and network symmetry. The Guidelines emphasise that a case-by-case analysis, sensitive to national circumstances, is required, and that even the mere existence of a deterrence mechanism may suffice to establish sustainable coordination. Thus, the regulatory approach in the telecommunications sector reinforces the principle that a forward-looking assessment of market structure and behaviour can justify intervention where coordinated effects are likely to emerge, even in the absence of explicit agreements. Given their sector-specific expertise and ongoing engagement with operators, regulators can play a complementary role by alerting competition authorities to emerging risks of collective dominance, thereby reinforcing the ex post enforcement role of antitrust bodies.[84]

By contrast, Article 102 enforcement is retrospective, requiring not only proof that collective dominance exists, but also that an abusive behaviour. This has important implications for the evidentiary threshold. Under Article 102, the conduct itself, can indicate that firms involved exercise collective dominance, particularly where firms are independent and yet behave in the same anticompetitive way and it is not competitively rational

[84] Rey (n 25) 117.

unless they possess dominance jointly. This recognition offers a practical enforcement tool to address coordinated effects that might otherwise escape detection. The next section examines whether the Commission's Draft Article 102 Guidelines adequately reflect this approach and provide clear standards for identifying collective dominance.

IV. Collective Dominance in the Commission's Draft Article 102 Guidelines

The European Commission first acknowledged the concept of collective dominance in its 2005 Discussion Paper on Article 82 EC (now Article 102 TFEU), but did not provide a detailed analytical framework or enforcement strategy for it.[85] The focus remained on exclusionary conduct by single dominant firms, and collective dominance was only briefly mentioned. This limited approach was further entrenched in the 2009 Enforcement Priorities Guidance, which excluded collective dominance entirely and concentrated solely on single-firm abuses.[86] As a result, despite recognition in case law, collective dominance was effectively sidelined, leaving a gap in enforcement against coordinated behaviour in oligopolistic markets where explicit agreements are absent and are not subject to merger control.

In its Draft Guidelines on the application of Article 102 TFEU, the European Commission has returned to the concept of collective dominance suggesting a shift in enforcement strategy for tackling anticompetitive coordination in oligopolistic markets. According to the Commission, collective dominance arises when two or more independent economic entities are so closely linked, economically or structurally, that they behave on the market as a single entity. The Commission states that, once a collectively dominant position is established, the same analytical approach used for assessing single-firm dominance becomes applicable. [87]

However, as already explained based on economic theory and case law, this position is conceptually flawed. In cases of collective dominance, the separation between the establishment of dominance and the assessment of abuse is artificial. Unlike in single-firm dominance, where dominance is typically

[85] DG Competition, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' COM [2005].
[86] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Art. 102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45/7.
[87] The Draft Article 102 Guidelines, para 34.

established structurally before assessing abusive conduct, in collective dominance cases the observed behaviour, such as parallel anticompetitive conduct, plays a central role in revealing the existence of joint market power. If the behaviour would not be rational under competitive conditions, it serves as strong evidence that collective dominance already exists. Thus, in collective dominance, parallel conduct is not merely a consequence of dominance but an integral element in establishing it. The Commission's own clarification supports this view: it acknowledges that what matters is that the abuse can be attributed to the joint market power they collectively exert. Yet, this important insight is underdeveloped. Although the Commission briefly cites *Irish Sugar*, noting that it is sufficient for the action amounting to an abuse to be 'one of the manifestations' of joint dominance, it does not provide concrete guidance on how behavioural evidence should be integrated into the dominance assessment.

Instead, the Draft Article 102 Guidelines mainly mirror the merger control framework, applying screening tools, such as transparency, credible deterrence, and external stability, to predict the sustainability of tacit coordination. While these factors are appropriate for merger control, which is forward-looking and seeks to prevent future harm, they are insufficient for abuse cases under Article 102. There, enforcement must be retrospective: authorities must establish that collective dominance existed and was exploited through conduct that harmed competition.

In this context, the only plausible manifestation of abusive collective dominance is coordinated behaviour leading to supracompetitive outcomes, in a manner similar to explicit collusion. Unlike in single-firm dominance, exclusionary practices are unlikely to be rational strategies for undertakings engaged in tacit coordination, as such practices would disrupt the common understanding underpinning their parallel conduct. Importantly, while the Commission describes various forms of abusive conduct for single-firm dominance, it does not articulate corresponding forms for collective dominance. This silence likely reflects the specific nature of collective dominance abuses, where the principal manifestation is coordinated behaviour leading to supracompetitive outcomes, rather than exclusionary strategies.

Next, the Commission acknowledges the conceptual overlap between the frameworks for collective dominance under Article 102 TFEU and merger control, citing *Laurent Piau* as support.[88]

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[88] Case T-193/02 *Laurent Piau v Commission*, paras 109–111 (Hereinafter *Laurent Piau*).

However, as previously discussed, this position again overlooks a fundamental distinction between the two regimes. As already explained, merger control is forward-looking: it assesses whether a transaction could plausibly increase the risk of coordinated effects that significantly impede competition. Intervention is justified based on the prediction of potential harm, without requiring proof that collusion has already occurred. By contrast, Article 102 enforcement is retrospective and requires a prior finding of dominance to trigger intervention. This difference significantly affects the evidentiary burden. In abuse of dominance cases, especially those involving collective dominance, authorities are often already presented with conduct that has allegedly harmed competition. That very conduct may provide valuable evidence of the existence of collective dominance, but the Draft Guidelines do not provide concrete guidance on how to treat behavioural evidence as part of establishing dominance.

This omission repeats the conceptual error previously identified: in collective dominance cases, the separation between market structure and behaviour is artificial. Parallel conduct that would not be rational under competitive conditions is not merely evidence of abuse but a central indicator of the existence of joint dominance. Without clearer standards for incorporating observed behaviour into the dominance analysis, the risk remains that enforcement will be theoretically sound but practically ineffective.

Importantly, the Commission clarifies that undertakings found to be collectively dominant need not adopt identical conduct across all competitive parameters, nor is it necessary for all of them to participate in the abusive conduct.[89] This clarification is welcome. It correctly recognises that collective dominance does not require perfect alignment across all competitive dimensions, nor uniform participation in the abusive conduct. What matters is the joint exercise of market power, which can manifest even if the undertakings vary in their individual behaviour.

Next, in determining whether collective dominance exists, the Commission places emphasis on identifying the links whether structural, contractual, or purely economic that connect the undertakings and enable them to align their strategies.[90] The Commission considers that connections may arise from agreements, the implementation of agreements, structural ties such as cross-shareholdings, joint ventures, interlocking directorships, or even other informal links, provided these links lead the undertakings to behave or present themselves as a

[89] The Draft Article 102 Guidelines, para 34.
[90] The Draft Article 102 Guidelines, Para 35.

collective entity. Although the Commission's Draft Guidelines continue to place emphasis on identifying structural, contractual, or economic links between undertakings as indicators of collective dominance, this approach is outdated. Modern economic theory and recent jurisprudence, including *Airtours,* have demonstrated that such links are neither necessary nor sufficient to establish collective dominance. Therefore, in assessing collective dominance, the focus must shift from static structural features to dynamic evidence of coordinated behaviour and market outcomes. Failure to do so risks misaligning enforcement with the realities of oligopolistic competition.

The Commission proposes a structured framework that builds on established case law and the economic theory of tacit coordination. First, it examines whether the undertakings can arrive at a common understanding of coordination based on market conditions.[91] The Commission considers that tacit coordination is more likely to emerge when firms can easily develop a shared understanding of how coordination should operate, particularly around clear focal points. This is facilitated by a stable and less complex market environment, a small number of players, and a high degree of symmetry between undertakings in terms of market share, cost structures, product offerings, and strategic positioning. These features, make it easier for firms to align their behaviour without formal agreements.

Second, the Commission looks at whether undertakings can effectively monitor each other's conduct, a necessary condition for sustaining coordination.[92] The Commission considers that coordination is easier to sustain where market transparency enables each undertaking to monitor whether others are adhering to the common strategy. Firms must be able to observe, with sufficient precision and speed, any changes in competitors' conduct so that deviations can be promptly detected and met with a response.

Third, the existence of a credible deterrence mechanism is considered critical.[93] The Commission considers that, for coordination to be sustainable over time, each undertaking must have a clear incentive not to deviate from the common policy. This requires a credible threat of retaliation, such that any competitive move to gain market share would trigger equivalent responses from rivals, leaving the deviating firm no better off. The deterrent effect alone is sufficient and there is no need to demonstrate that retaliation was threatened or actually carried out.

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[91] The Draft Article 102 Guidelines, para 38.

[92] Ibid, para 30.

[93] Ibid, para 40.

Finally, the Commission evaluates the external stability of the coordination.[94] For tacit alignment to succeed, rivals and customers must lack the ability to disrupt the coordinated outcome. This requires assessing potential competitive pressure from outside the collective entity, including barriers to entry and the countervailing power of buyers. These considerations echo the approach in the Horizontal Merger Guidelines and prior merger decisions such as VEBA/VIAG.[95]

While the Commission's proposed framework builds on established case law and economic theory developed under merger control, its direct transposition into Article 102 enforcement is conceptually flawed as already explained. In merger control, the *Airtours* criteria serve as predictive tools: they identify market conditions that might make tacit coordination more likely in the future, justifying intervention based on anticipated risks. By contrast, Article 102 enforcement is retrospective and requires proof that dominance exists and that it has been exploited through anticompetitive conduct. Thus, relying solely on the *Airtours* framework risks overlooking the critical need to demonstrate that firms are already exercising joint market power through their conduct. Without integrating behavioural evidence into the dominance assessment, the proposed framework risks remaining insufficient for meeting the legal standards required under Article 102.

Taken together, the Commission's Draft Guidelines provide a welcome restatement of the concept of collective dominance. However, they do not address how behavioural alignment, particularly when leading to clear anticompetitive effects, can itself serve as evidence of collective market power. This omission is problematic given that in Article 102 cases, the conduct under investigation already reflects the exercise of dominance. The Guidelines' silence on how to integrate these observable effects into the dominance assessment weakens their utility in practice. In practice, this creates legal uncertainty, as authorities are left without concrete guidance on how to interpret the "manifestation" of abuse in this context. Strengthening this aspect would be essential to make the collective dominance framework more operational and to close the long-acknowledged enforcement gap in addressing anticompetitive parallel behaviour under Article 102 TFEU. Without further guidance, the application of Article 102 to collective dominance risks remaining conceptually sound but practically underutilised,

94 Ibid, para 41.

95 Commission Decision of 13 June 2000 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case No COMP/M.1673 — VEBA/VIAG) [2001] OJ L142/27.

undermining its potential to close the enforcement gap in oligopolistic markets.

V. Conclusion

The European Commission's Draft Article 102 Guidelines mark an important return to the concept of collective dominance and provide a welcome attempt to systematise the assessment of tacit coordination in oligopolistic markets under Article 102 TFEU. However, despite this renewed attention, the Draft Guidelines fall short in a crucial respect: they fail to provide sufficient clarity on the evidentiary requirements necessary to substantiate a finding of collective dominance. This lack of guidance is particularly problematic given the high legal threshold for establishing collective dominance in Article 102 cases. While the analytical structure largely reflects that used under the EU Merger Regulation for assessing coordinated effects, the Draft Guidelines overlook the fundamental difference of the two regimes. Whereas merger control operates ex ante and assesses whether a concentration is likely to result in a collective dominant position, Article 102 enforcement is inherently retrospective and presupposes that dominance already exists at the time of the alleged abuse. Thus, the conduct under scrutiny must reflect dominance and constitute an abuse that has already occurred. This creates a conceptual and practical challenge in collective dominance cases under Article 102.

This distinction has direct implications for the kind of evidence needed in abuse of dominance cases. In particular, where multiple independent undertakings engage in parallel behaviour that produces anticompetitive effects, the abusive conduct itself may serve as an indication of collective market power. Although the Commission acknowledges that what matters is whether the abuse can be attributed to the joint market power collectively exerted, it fails to develop this crucial insight into a workable evidentiary framework. Ultimately, this put into question what kind of evidence can support the abuse rather than predicting the likelihood of collusion. One suggestion for determining whether collusion has occurred could be comparing firms' profit margins against underlying cost and demand conditions, which can be used to assess excessive pricing under Art. 102 in particular, if the manifestation of abuse is one of excessive prices.[96] However, the abuse can be manifested in other ways, which put into question whether other evidence of the alleged abuse may also serve as evidence of it. This causal relationship is

[96] Pey, p.24 however, such an approach would come close on price regulation, which competition law is not intended to impose

underdeveloped in the Commission's Draft Guidelines. Rather than viewing the abuse merely as a consequence of dominance, it should be recognised as part of the factual basis that helps establish the existence of collective dominance in the first place. However, the Draft Art. 102 Guidelines fail to elaborate on how such conduct should be treated within the dominance analysis. This lack of guidance leaves a significant gap, as authorities are not clearly instructed on how to integrate evidence of abuse into the assessment of collective dominance. Ensuring that the legal framework for assessing collective dominance is both clear and enforceable is essential not only for effective competition enforcement, but also for supporting the EU's broader objective of maintaining open and competitive markets.