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BLOG

Antitrust 101: Tacit Collusion

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Whether tacit collusion—where firms effectively behave as though they are colluding without any direct communication expressing agreement—should give rise to an antitrust violation has long been a contested issue in the United States, with legal opinions varying and evolving over time. Under current U.S. law, tacit collusion does not give rise to an antitrust violation without additional conduct evidencing an agreement between competitors. Indeed, the Supreme Court has defined "tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism" as "the process, *not in itself unlawful*, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (emphasis added).

Today's treatment of tacit collusion follows decades of evolving debate in academia and courts. Particularly illustrative of this is famed antitrust jurist Richard Posner's opinion in 2015 holding that tacit collusion is not a violation of the Sherman Act and "probably shouldn't be." *In re Text Messaging Antitrust Litigation*, 782 F.3d 867, 874 (7th Cir. 2015). That *Text Messaging* opinion is now one of the most widely cited cases on tacit collusion in U.S. law.

And the debate continues. Technological advances, such as algorithmic pricing, have facilitated new forms of tacit collusion. And amid increased interest in aggressive antitrust enforcement and nontraditional theories of harm, there are open questions as to how legislators, enforcers, and courts will consider and treat claims of tacit collusion and conscious parallelism in the future.

Treatment of Tacit Collusion in U.S. Courts

In the 1954 Supreme Court case addressing conscious parallelism in relation to Sherman Act claims, *Theatre Enterprises v. Paramount Film Distribution Corp.*, a suburban theater owner brought an action against Paramount, alleging violations of Sections 4 and 16 of the Clayton Act based on claims that Paramount conspired with Twentieth Century-Fox, Warner Brothers, and other movie producers and distributors to restrict "first run" movie pictures to downtown Baltimore and leave suburban theaters with only "subsequent runs." 346 U.S. 537, 538 (1954). The Court determined the "crucial question" was whether the conduct "stemmed from independent decision" by Paramount or "from an agreement, tacit or express" among Paramount and the other movie producers and distributors. *Id* at 540. In dicta, the Supreme Court found that it "has never held that proof of parallel business behavior conclusively

establishes agreement, or, phrased differently, that such behavior itself constitutes a Sherman Act offense . . . but conscious parallelism has not yet read conspiracy out of the Sherman Act entirely." *Id*. at 541. The Court then held that the "crucial question" related to the factual issue of whether there was a conspiracy and that the question had been properly submitted to the jury by the trial court. *Id*. at 542.

Almost 40 years after the *Theatre Enterprises* decision, the Supreme Court returned to the topic of tacit collusion in *Brooke Group*. In that case, a cigarette manufacturer brought an antitrust action against a competitor, alleging violation of the Robinson-Patman Act because of its below-cost sales of generic cigarettes through discriminatory volume rebates. The plaintiff's theory of harm was that the cigarette manufacturer would be able to recoup its predatory losses from below-costs sales by later—after disciplining the market—engaging in tacit oligopolistic price coordination with its remaining competitors.

Analyzing tacit collusion more thoroughly than in *Theatre Enterprises*, the Court declared that tacit collusion is "not in itself unlawful." *Brooke Grp.*, 509 U.S. at 227. The Court found that "[h]owever unlikely predatory pricing by multiple firms may be when they conspire, it is even less likely when, as here, there is no express coordination." *Id*. The Court ultimately concluded that there was no evidence supporting a finding that the "alleged scheme was likely to result in oligopolistic price coordination and sustained supracompetitive pricing." *Id*. at 243. Overall, the *Brooke Group* ruling confirmed that tacit collusion is not actionable *joint* conduct and, on the facts of the case, rejected a *unilateral* conduct theory where the alleged harm would have arisen from tacit collusion.

In 2015, Judge Richard Posner held that tacit collusion is not a violation of the Sherman Act and "probably shouldn't be." *In re Text Messaging Antitrust Litig.*, 782 F.3d at 874. While Judge Posner was bound by precedent and the facts of the case, his opinion went further than necessary to illustrate that tacit collusion is not unlawful under the antitrust laws. Judge Posner wrote about the danger of treating tacit collusion as a violation of the Sherman Act because "[s]uch a requirement would convert antitrust law into a scheme resembling public utility price regulation, now largely abolished." *Id*. He continued his opinion by addressing the potential consequences of treating tacit collusion as illegal because of such treatment being contrary to the antitrust laws: "It is one thing to prohibit competitors from agreeing not to compete; it is another to order them to compete." *Id*. Judge Posner concluded his opinion by explicitly stating that tacit collusion, without an agreement, does not violate the antitrust laws: "We hope this opinion will help lawyers understand the risks of invoking 'collusion' without being precise about what they mean. Tacit collusion, also known as conscious parallelism, does not violate section 1 of the Sherman Act. Collusion is illegal only when based on agreement." *Id*. at 879.

FTC Enforcement of Tacit Collusion

The U.S. Federal Trade Commission (FTC) has also been active in the evolving interpretation of tacit collusion under U.S. law. In the late 1970s and early 1980s, the FTC attempted to challenge tacit collusion under Section 5; however, after some unsuccessful cases against the oil, fuel additives, and cereal industries, the FTC largely abandoned that strategy, despite stressing its belief—both publicly and privately—that Section 5 was broad enough to encompass such conduct.

In 1972, the FTC issued a complaint charging three cereal manufacturers with violating Section 5 of the FTC Act in relation to their alleged anticompetitive conduct in the ready-to-eat cereal market. *In re Kellogg Co.*, 1982 WL 608291, 99 F.T.C. 8 (Jan. 15, 1982). After nearly 10 years of litigation, the complaint was ultimately dismissed. The FTC had alleged that the three cereal manufacturers "tacitly colluded and cooperated to maintain and exercise monopoly price" that "suppressed competition in the [ready-to-eat] cereal market and . . . caused consumer prices to be substantially higher than [in] a more competitive market." *Id*. at *17. After finding that tacit collusion "can be inferred from circumstantial evidence" and the "use of circumstantial evidence to infer a conspiracy presents problems of proof," the administrative law judge concluded his opinion by finding: "Consciously parallel conduct is circumstantial evidence that competitors have acted pursuant to a tacit agreement. Standing alone, however, parallel business behavior does not constitute a violation of the antitrust laws." *Id*. at *195.

In 1983, the FTC entered a final order finding that the two largest manufacturers of lead antiknock gasoline additives violated Section 5 of the FTC Act due to conduct resembling conscious parallelism, but the Second Circuit reversed that decision in *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984). The Second Circuit specifically addressed the conscious parallelism the FTC challenged in the present case, finding that the "mere existence of an

oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws." *Id*. at 138–39. The court explained that enforcing Section 5 as the FTC argued would lead to "patent uncertainty" as to what conduct would be encompassed by the broad scope of the Act, and lead to similar cases where "the FTC's rulings and order appear to represent uncertain guesswork rather than workable rules of law." *Id*. at 139.

Nearly 30 years after these setbacks, the FTC issued a policy statement regarding Section 5, explicitly stating that it "reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions." As discussed in a prior Competition Corner post, this development likely signals that the FTC intends to expand its antitrust enforcement authority under Section 5.

Algorithmic Tacit Collusion

While antitrust enforcement agencies have been largely unsuccessful in combating tacit collusion, they may face even greater challenges as tacit collusion evolves into conduct that is both more sophisticated and harder to detect. Recently, there has been growing interest in pricing algorithms. While pricing algorithms allow companies to price more efficiently and maximize long-term profitability, "there is growing experimental evidence that an algorithm can be designed to tacitly collude." Ai Deng, *What Do We Know About Algorithmic Tacit Collusion?*, 33 Antitrust 88, 88 (2018).

Algorithmic tacit collusion describes a scenario where "humans program their pricing algorithms to monitor and respond to rivals' pricing and other key terms of sale," allowing them to "know that the likely outcome will be conscious parallelism and higher prices" without the need for an express agreement or even any communication. Ariel Ezrachi & Maurice E. Stucke, *Sustainable and Unchallenged Algorithmic Tacit Collusion*, 17 Nw. J. Tech. & Intell. Prop. 217, 220 (2020). While antitrust enforcement agencies will be forced to adapt to this new form of tacit collusion, which is difficult to detect, "the current law limits their ability to challenge it." *Id.* at 256. However, recent legislative efforts to revamp the antitrust laws could give enforcement agencies the proper vehicle to challenge algorithmic tacit collusion in the future.

Conclusion

For over half a century, courts and legal scholars have debated the enforceability of tacit collusion under the antitrust laws. Over time, the Supreme Court has made clear that tacit collusion is not itself illegal under the Sherman Act or the Clayton Act, and the Federal Trade Commission has been largely unsuccessful in challenging tacit collusion and invitations to collude under Section 5 of the FTC Act. However, recent efforts to revamp antitrust enforcement in the United States could lead to new scrutiny of tacit collusion, especially as newer methods emerge with advances in technology. Indeed, there are numerous initiatives underway in the United States to strengthen and expand antitrust enforcement, and to reduce consolidation in U.S. industry. In addition to aggressive policies from the Biden administration and new leaders of the FTC and U.S. Department of Justice Antitrust Division, there are also a multitude of legislative proposals working through the U.S. Congress and state legislatures, with sponsors from both Democratic and Republican political parties. Many current legislative proposals are focused on Big Tech, as well as issues with data privacy and the interpretation of the consumer welfare standard. While tacit collusion has not been an explicit focus of these initiatives, highly consolidated monopolistic and oligopolistic industries have very much been a focus—and it is in precisely such industries where tacit collusion is most likely to occur. It remains to be seen whether any new policies, rules, or legislation to increase competition in such industries—and how courts interpret them—may change the legal landscape to bring increased scrutiny to tacit collusion.

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