

Can the Commission use Article 82EC to Combat Tacit Collusion?

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CCP Policy Briefing

BACKGROUND

- Recent developments in EC competition law seem to indicate that Article 82 may prohibit the abusive conduct of tacitly colluding firms. However, a policy of tackling tacit collusion in Article 82 need not make sense and has already met with some scepticism.
- In order to find an Article 82 infringement in tacit collusion, the Commission has to establish that a group of firms:
 - (1) has exerted abusive conduct (the legal test of the abuse of a position of collective dominance),
 - (2) while colluding tacitly (the legal test of the existence of a position of collective dominance).
- At issue is a question of fact: after observing that a group of firms are committing an alleged abuse, can the Commission establish that the actions of these firms are linked by tacit collusion?

METHODOLOGY

- The focus of this paper is *law and economics*. It builds upon the pros and cons of principles of game theory, most notably the one-shot and repeated prisoner's dilemma, in order to understand what facts the Commission must establish to prove the conduct of tacit collusion, and discusses to what extent the Commission is able to achieve this in real world.

KEY FINDINGS

- The author shows that proof of tacit collusion requires the Commission to overcome a difficult problem of identification, that is, how to distinguish tacit collusion from other forms of firm interaction, in particular, unconscious parallelism and undetected overt collusion.
- The type 1 error, or false positive, is particularly worrisome as the Commission can wrongly find that innocent firms (such as firms involved in unconscious parallelism) are colluding tacitly in the relevant market. This can evolve into an error of law as a court may find that the Commission has misapplied Article 82 by wrongly punishing a group of neither single nor collectively dominant firms.
- If the Commission forms the wrong view that firms are colluding tacitly when in fact they have succeeded in colluding by means of hidden communications, the Commission may misdirect the investigation and take

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the wrong remedial actions because the conduct is ultimately an undetected Article 81 violation.

- It is argued that the Commission cannot resolve this problem of proof by establishing the typical conditions drawn from case law as this proof cannot sufficiently mitigate the chances of error.
- If the Commission is to succeed in making a case for tacit collusion, it has to produce more cogent evidence. However, to produce this evidence can be far too onerous a burden for the Commission, rendering the enforcement of Article 82 very unlikely.

POLICY ISSUES

- The author concludes that, owing to a problem of proof, Article 82 is unenforceable and can neither punish nor deter tacit collusion. This makes a policy of using Article 82 to combat tacit collusion *ex post* misconceived and it suggests that thus far tacit collusion admits only an *ex ante* treatment in EC competition law.

THE CCP

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FOR MORE INFORMATION

The full working paper (CCP Working Paper 09-5) and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

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