WINSTON & STRAWN LLP

SPEAKING ENGAGEMENT

Eva Cole Speaks on Tacit Collusion at GCR Live: Cartels 2022

APRIL 5, 2022

Partner Eva Cole, co-chair of Winston's Antitrust/Competition Practice, was a panelist at the sixth edition of GCR Live: Cartels 2022 on April 5. Eva's panel, "Tacit Collusion—What Does It Mean To 'Agree'?" examined how courts, legal commentators, and economists have viewed tacit collusion in the past, and how those views have evolved over time both in the U.S. and abroad, with predictions on where enforcement is likely to go next.

Background

Allegations of concerted action by competitors are frequently based on a pattern of uniform business conduct, which is often referred to as tacit collusion, or conscious parallelism. "[C]onscious parallelism [] describes 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." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Whether tacit collusion should give rise to an antitrust claim has long been a contested issue, with legal opinions varying and evolving over time both in the U.S. and abroad. From a U.S. perspective, the evolution of Richard Posner's views is illustrative. As a Stanford Law School professor, he wrote an article in 1969 advocating for tacit collusion to be actionable under the Sherman Act. In his majority opinion in *In re Text Messaging Antitrust Litigation* nearly 50 years later, Judge Posner explicitly held that tacit collusion was not actionable under the Sherman Act and "probably shouldn't be." 782 F.3d 867, 874, 879 (7th Cir. 2015) ("Tacit collusion, also known as conscious parallelism, does not violate section 1 of the Sherman Act. Collusion is only illegal when based on agreement.")

Takeaways from the Panel Discussion

The GCR Live panelists discussed economic approaches to analyzing tacit collusion, existing caselaw on tacit collusion, and how regulators across the globe have approached enforcement challenges involving tacit collusion. Panelists also considered current legislative reforms aimed at increasing antitrust enforcement in the U.S., and how those reforms might (or might not) impact current standards related to tacit collusion.

An important theme that emerged was the recognition that government enforcers are becoming more aggressive and more willing to pursue borderline cases they would not have pursued in the past. Companies thus should be particularly vigilant with respect to the grey area between conscious parallelism (which tends to be legal, provided it

does not consist of coordination between competitors) and behavior that goes beyond conscious parallelism but may still fall short of an express agreement between competitors.

Other key takeaways from the discussion include:

- Economics continues to provide tools for helping to distinguish between benign cases of conscious parallelism and more problematic cases where conscious parallelism may be accompanied by some plus factor demonstrating an illegal agreement. Regulators are relying on economics at the outset of cases more and more.
- The rise of pricing algorithms may facilitate tacit collusion and with additional plus factors may create more significant risk areas for companies.
- In the U.S., Section 5 of the FTC Act is considered to be broader in scope than the Sherman Act, as Congress intended. Indeed, the FTC considers "invitations to collude" enforceable under Section 5. The FTC began challenging tacit collusion under Section 5 in the late 1970s and early 1980s, but it abandoned that strategy after several highly publicized and unsuccessful cases. The new progressive leadership of the FTC may look to revisit its efforts in this space.
- Proposed legislative reforms are intended to revamp the Sherman and Clayton Acts. Many of these proposals are focused on the technology sector, and specifically intended to address Big Tech's so-called "monopoly problem." Despite their broad scope, so far, these proposed laws are not explicit on the issue of tacit collusion. Nonetheless, it remains to be seen how they might specifically impact challenges to tacit collusion. Even for non-tech companies, general language about the purpose of these new laws may have an impact on how regulators and courts view tacit collusion.

Best Practices to Mitigate Risk

In light of the potential for increased enforcement, here are some best practices for companies that may face claims based on tacit collusion because of the industry and market in which they operate and a follow-the-leader pricing dynamic:

- Always document decision-making that explains how and why conduct is independently rational for the company.
- Set forth as much detail as possible regarding business justifications for any parallel conduct such as price increases. For example:
  - Input costs
  - Demand
  - Other economic rationales
  - Desire to increase profits
  - Desire to increase margins
  - Desire to be more competitive
  - Desire to retain more customers
  - Desire to grow customer base
- If a follow-the-leader price dynamic exists, a company should consider the timing of its own pricing announcements so as not to be simultaneous with those of competitors.
- An approach identical to that of others should be avoided unless the company carefully documents why such an identical move makes sense independently for the company.
- Avoid any direct communications or meetings with competitors around the time of price increases or other parallel movements.
- Ensure that there is no appearance of a conduit for conspiracy (third parties providing information).

- Avoid asking questions about competitors' movements or inviting, even tacitly, similar movements.
- Carefully document all competitive intelligence gathering exercises to make clear that sources are legitimate (publicly available information, information appropriately obtained from third parties, etc.).

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