Tacit Collusion: An Analysis of the EU Legislative Framework

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

By George O’Malley

Introduction

One of the cornerstones of antitrust and competition law is the prohibition of collusion or agreements between competitors that adversely affects competition in the market. However, there is a grey area in relation to the notion of tacit collusion. Whether this practice is encompassed by European Union legislation has been a major impediment to the construction of a coherent and effective system of EU competition law.

This essay will examine how Articles 101 and 102 of the TFEU (“Article 101” and “Article 102”), and the EU Merger Regulations (“EMUR”) have been used as regulatory tools to deal with both tacit collusion and mergers likely to create conditions conducive to tacit collusion. Part one will consist of an overview of tacit collusion, why firms would engage in such behaviour, and in what types of markets. Part two will identify the legislative framework, both EU legislation and the relevant case law that has developed tacit collision jurisprudence. Part three will consider the current state of the law, and critically analyse this position. Finally, part four will contain concluding remarks and recommendations.

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1 Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations (Thrifty Books, 2009), Book 1, at 82.
2 See, eg., Article 101 TFEU; 15 US Code § 1.
4 Article 101 & 102 TFEU.
Tacit Collusion

Tacit collusion can be defined as a phenomenon that arises in markets in which there are only a few operators who are able, by virtue of the characteristics of the market, to behave in a parallel manner and to derive benefits from their collective market power, without entering into an agreement or concerted practice to do so. Put more succinctly, it is competitors acting collectively, for their own benefit, without an express agreement to do so. Tacit collusion occurs in oligopolistic markets, which are markets that exist between the two extremes of perfect competition and monopolies. Oligopolies exist throughout the value chain from service based markets, such as credit rating agencies, to retail goods such as alcoholic drinks and consumer electronics, in short, they are ubiquitous. While an oligopoly does not mean that tacit collusion will certainly occur, it is the natural breeding ground for such an activity. This is due to the oligopoly problem. This problem can be demonstrated using a version of the Prisoners’ Dilemma proposed by Simon Bishop and Mike Walker. To summarise, there are two firms, A & B, who much each decide whether to charge a high price or a low price. There are four possibilities: they could both charge high prices, both charge low prices, or one or the other could charge high and low prices respectively. The first number in each box represents firm A’s profits, while the second number represents firm B’s profits. This is outlined in Figure 1 below:

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7 Ibid, at 560.
10 Ibid.
Both firms would prefer an outcome in which both charged a high price to that in which they both charged a low price. This is because the incentive to charge a low price, to garner a higher proportion of the profits will result in the competing firm also lowering prices, resulting in less overall profit for the individual firm, indicated by the shaded area.  

The above example demonstrates the oligopoly problem; that firms operating in a market realise that the profitability of what they do is dependent on the behaviour of other firms operating in the market. Firms are better off if they coordinate their behaviour and charge higher prices. This presents a strong incentive to collude, however, such an action is robustly prohibited by EU competition law. Instead, firms will be acutely aware of their competitors in an oligopolistic market, their prices, methods, and suppliers to name but a few factors. This may lead some oligopolies to coordinate their prices, or other activities, without any express agreement, with the above realisation that coordinated actions will benefit all the players in the market. It is submitted that there is no economic difference between tacit collusion and all out cartel agreements and that the effect on competition is the same, albeit to a less obvious extent. However, the tacit nature of the coordination is enough to cause a myriad of legal difficulties which will be examined in detail in part two.

Certain other factors present in oligopolies facilitate tacit collusion. Lower numbers of competitors, symmetric market shares, high entry barriers, frequent interaction between firms

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Figure 1.

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and market transparency are some of the facilitating factors. On the other hand, innovative and technical markets, as well as cost asymmetries and product differentiation hinder tacit collusion. It is evident firms have an incentive to collude, and that oligopolies are conducive to this. The ubiquitous nature of oligopolies coupled with the economic problems of collusion, such as supra-competitive profits and an inefficient market, demonstrate a clear risk to a functioning, competitive market.

**A Legislative Framework**

The two seminal articles in EU law dealing with competition are Article 101 and 102 of the TFEU. Article 101 prohibits collusion, whereas Article 102 prohibits abuse of a dominant position by one or more undertakings. While this is all very elegant and seems to be a robust defence of obvious competition related market abuses, it is difficult to see where tacit collusion fits into the legislative framework, or indeed, if it does at all. Does Article 101 necessitate actual collusion? If so, any tacit agreements would not be encompassed in this. Similarly, does Article 102 require a dominant position, and does it apply to scenarios outside that of monopoly situations? These questions illustrate the complicated nature of the law in this area. EUMR provides a limited in scope third option prohibiting mergers that would

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14 Ibid.
15 “All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.” Article 101 TFEU.
16 “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.” Article 102 TFEU.
significantly impede competition. However, again, it is questionable whether this regulation actually captures the notion of tacit collusion within its wording.

It is evident from the above that tacit collusion is a notion that does not sit well with the current legal framework surrounding EU competition law. The courts have attempted to drag tacit collusion into the sphere of the legislation; however this has provided a host of problems and this struggle will be outlined below. The essay will not detail the history of the law in great detail, as to do so would require a lengthy examination beyond the scope of this essay. It will present an overview of the developments, culminating with the current legal position. This is to allow for critical analysis of the law as it stands today, in the latter parts of the essay.

**Article 101**

The European Commission (the “**Commission**”) and the European Court of Justice (the “**ECJ**”) have identified tacit collusion, referred to as concerted practices in the case law, as being prohibited under Article 101, distinct from agreements to collude. However, concerted practices which arise out of parallel behaviour do not necessarily mean that all parallel behaviour results in a concerted practice. While parallel behaviour can be a strong indicator, especially if it leads to conditions of competition which do not respond to the normal market conditions, the ECJ recognised that price competition in oligopolies may be muted and oligopolists react to one and others conduct. This was confirmed by the ECJ in *Zuchner v Bayerische Vereinsbank AG*, which stated that intelligent responses to a competitor’s behaviour would not bring a firm within the scope of Article 101. It is submitted

17 "A concentration which would significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market." EC Merger Regulation, article 2(3).
19 *Dyestuffs*, para 65-66.
that this definitive approach by the ECJ, to distinguish parallel behaviour or intelligent responses from being anticompetitive, is necessary for the function of the free market. The Commission should not have an overly paternalistic role, and should only constrain undertakings when there is a real danger to competition.

*Wood Pulp*\(^{21}\) provided an ideal opportunity for the Commission to test the boundaries of the notion of parallel behaviour. The Commission concluded there was concerted practice arising from the parallel behaviour due to 1) direct and indirect exchanges of price information; and 2) that the market, on their analysis, was not a narrow oligopoly, in which parallel pricing would be expected.\(^{22}\) However, the ECJ annulled the Commission’s findings. It stated that making pricing available to third parties wasn’t an infringement of Article 101, that there were other explanations for the pricing system and similarities, for example the fact that buyers of wood pulp discussed prices openly and the market in general knew of the prices.\(^{23}\)

Regarding the structure of the market, the ECJ again rejected the Commission’s argument. It stated that on the basis of its own expert’s analysis, there was evidence to say the market was more oligopolistic than the Commission had supposed, as well as other mitigating factors, like the fact that market shares fluctuated (this is less likely to occur in a tacit collusion scenario).\(^{24}\) More recently, the General Court (together with the ECJ “the Courts”) followed this jurisprudence in striking down the Commission’s ruling in *CISAC*.\(^{25}\) The General Court held that the Commission did not prove a concerted practice as it neither demonstrated that

\(^{21}\) *Joined cases 89/85; 104/85; 114/85; 116/85; 117/8; and 125/85 to 129/85 A. Ahlström Osakeyhtiö and others v Commission of the European Communities* [1993] ECR I-1307 (Hereinafter *Wood Pulp*).

\(^{22}\) *Wood Pulp*, para 65-125.

\(^{23}\) *Wood Pulp*, para 65-99.

\(^{24}\) *Wood Pulp*, para 100-125.

the collecting societies acted in concert in that respect, nor provided evidence rendering implausible explanations for parallel conduct.  

The Commission, as well as the Courts, identify certain factors, or facilitating practices, which will demonstrate how parallel behaviour becomes a concerted practice. These factors include the level of shared information between the undertakings, and the structure of the market, such as how competitive it is as well as other market characteristics. It does appear to be theoretically possible for tacit collusion to be captured under Article 101. However, it is evident that the Courts require a high threshold to do so, beyond mere parallel behaviour. The nature of the market and conduct of the parties must be examined thoroughly, to reach this notion of concerted practice. It remains to be seen whether Article 101 will be an effective instrument in combating tacit collusion. There is an interesting, and recent opinion by Advocate General Paolo Mengozzi to the ECJ confirming the Commission and General Court’s decision to ban MasterCard’s cross-border interchange fees. Mengozzi reasoned that concerted practices and decisions by associations of undertakings are catch all provisions designed to catch all collusion, irrespective of the form it takes. The ECJ are expected to rule on the matter in the coming months, and this could potentially pave the way for Article 101 being used in scenarios where undertakings coordinate conduct through a joint structure or an independent body, as was seen in this instance.

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26 CISAC, para 182.
27 See, eg., Commission Decision 92/157/EEC UK Agricultural Tractor Registration Exchange OJ [1992] L 68/19 (whether the market was a narrow oligopoly as opposed to a more competitive market impacted the decision); Case 194/99 P Thyssen Stahl v Commission [2003] ECR I-10885 (exchange of recent data on market shares); and Wood Pulp (sharing of pricing information was a factor examined).
29 Ibid.
30 Ibid.
31 Ibid.
Article 102

The controversial elucidation of Article 102’s wording, “abuse by one or more undertakings”, has led to the need for creative interpretation to allow for the prohibition of tacit collusion to be captured by it.  

Case law was split over a narrow interpretation of this provision, in that it could only apply to undertakings within the same corporate group. The broader interpretation, that legally and economically independent firms might be considered to hold a collective dominant position, seemed to be initially rejected by the ECJ in *Hoffman-La Roche v Commission*[^34], with the court suggesting problems of tacit collusion did not fall under Article 102. However, this notion was rejected in *Italian Flat Glass*[^35], where the General Court stated:

“There is nothing in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of the fact, together they hold a dominant position vis-à-vis the other operators on the same market.”[^36]

This position was upheld by the ECJ in *Compagnie Maritime Belge Transports v Commission*[^37]. The ECJ upheld a finding by the Commission of collective dominance between shipping lines that were members of a linear conference. It stated that collective dominance implies that a dominant position may be held by two or more entities legally independent from one and other if, from an economic point of view, they present themselves

[^34]: Case 85/76 Hoffmann-La Roche & Co AG v Commission of the European Communities [1979] ECR 461 (Hereinafter *Hoffman-La Roche*).
[^36]: *Italian Flat Glass*.
or act together on a particular market as a collective entity. The ECJ continued, saying that to establish a collective dominance you must look to the economic links between the undertakings, however, other factors, such as the structure of the market in question, can also be relevant. The ECJ cites *France v Commission*\(^{40}\), which is examined below, as authority which seems to support the argument that the test of collective dominance is the same under Article 102 as it is under the EUMR.\(^{41}\) The General Court has fleshed out the conditions for findings of collective dominance, 1) each member of the dominant oligopoly must be able to monitor how others are adopting the common policy; 2) the tacit collusion must be over a sustained period of time, there must be an incentive not to depart from the common policy; and 3) foreseeable reactions of undertakings must not be able to jeopardise the common policy and its results.\(^{42}\) It is submitted that the notion of collective dominance resulting from a number of undertakings acting as a collective economic entity is applicable in EU competition law. However, this is not all that is required to find a tacit collusion under Article 102.

Once collective dominance is established, the analysis turns to whether or not this dominance was abused. Callery points out that parallel behaviour or oligopolistic interdependence is to be distinguished from tacit collusion; however this is considered a very fine line.\(^{43}\) To help distinguish this, Whish and Bailey identify three main categories of abuse that the Commission will condemn, namely exploitive abuse of a collective dominant position, anti-competitive abuse of a collective dominant position, and individual abuse of a collective dominant position, 1) each member of the dominant oligopoly must be able to monitor how others are adopting the common policy; 2) the tacit collusion must be over a sustained period of time, there must be an incentive not to depart from the common policy; and 3) foreseeable reactions of undertakings must not be able to jeopardise the common policy and its results.

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\(^{38}\) *Compagine Maritime Belge Transports*, para 36.

\(^{39}\) *Compagine Maritime Belge Transport*, para 41-45.

\(^{40}\) *Case 30/95 France and Others v Commission (Kali & Salz)* [1998] ECR I-1375 (Hereinafter *France v Commission*).

\(^{41}\) Whish & Bailey, note 6, at 578.


\(^{43}\) Callery, note 32, at 147-148.
dominant position. The first limb refers to firms exploiting the market by charging excessively higher prices than the market, through the tacit agreement. This leads to an interesting question of whether the notion that excessively high prices, explicitly prohibited in Article 102(2)(a), can cause the abuse to lie not in the parallel behaviour but in the quantifiable level of the prices themselves. The Commission has considered this finding of exploitive abuse of a dominant position, however no formal finding was made. The second limb deals with anti-competitive measures performed as a group. For example, collectively dominant members of a conference were found to have engaged in practices to eliminate competitors from the market, such as granting loyalty rebates and price cutting. The ECJ held this to be an anti-competitive abuse of a collective dominant position due to the elimination of competitors. Finally, the third limb refers to undertakings which are part of a collective dominant position, but act individually to abuse this position. Irish Sugar is the leading case in this regard. The General Court accepted that undertakings can perform individual abuse of a collective dominant position. However, it is prudent to note that this case does not speak on horizontal collective dominance, as it dealt with vertical integration.

One last thing to note with regards to Article 102 is the influence the EMUR had on the jurisprudence surrounding the notion of collective dominance. Whish & Bailey state that it was not until EMUR based decisions such as France v Commission and Glencor v Commission that a true picture began to emerge of what was meant by the concept of

44 Whish & Bailey, note 6, at 580-581.
45 Ibid.
46 Article 102(2)(a) TFEU.
47 Whish & Bailey, note 6, at 580.
49 Compaigne Maritime Belge Transport.
50 Compaigne Maritime Belge Transport.
51 Note that this also refers to some firms, as opposed to the whole group of firms in a collective dominant position, acting independently.
53 Irish Sugar.
54 Irish Sugar.
collective dominance.\textsuperscript{55} Furthermore, the three conditions necessary for a finding of collective dominance in \textit{Laurent Piau}, derive from \textit{Airtours}\textsuperscript{56}, discussed below, which dealt with EMUR.

\textit{EC Merger Regulation}

The Commission has used EMUR as a tool to combat mergers likely to create conditions conducive to tacit collusion. This is done by using the concept of collective dominance to control situations that could not be caught by the concept of single dominance, where there was no clear leader to be found on the relevant market.\textsuperscript{57} EMUR states that the Commission will declare a merger incompatible where it would significantly impede effective competition (“SIEC”), in particular as a result of creation or strengthening of a dominant position.\textsuperscript{58}

However, this wasn’t always the case and the change came about due to the non-collusive oligopoly gap resulting from the decision by the General Court in \textit{Airtours}.\textsuperscript{59} The Commission had been successful in utilising EMUR to prevent collective dominance arising from mergers\textsuperscript{60}. However, problems arose when the General Court held that collective dominance must be associated with coordinated effects, and a finding that individual firms would be able to unilaterally exercise market power without any need to act in a coordinated manner was annulled.\textsuperscript{61} The solution was to change the wording of the 1989 Merger Regulation\textsuperscript{62}, to allow an SIEC to consider other factors rather than just the creation or strengthening of dominant position. For example to consider whether the merger would

\textsuperscript{55} Whish & Bailey, note 6, at 574.
\textsuperscript{56} Case T-342/99 Airtours plc v Commission of the European Communities [2002] ECR II-2585 (Hereinafter \textit{Airtours}).
\textsuperscript{58} EC Merger Regulation 139/2004 art 2.
\textsuperscript{59} \textit{Airtours}.
\textsuperscript{61} Whish & Bailey, note 6, at 864; and \textit{Airtours}.
“significantly impede effective competition,” a popular test in common law jurisdictions.\(^{63}\)

What is important to note here is the General Court’s guidance on the cumulative nature of conditions required for finding collective dominance. This was the basis of the Article 102 jurisprudence, discussed above, referring to the three conditions to be fulfilled to show a transaction is anti-competitive. These are the ability to monitor others, over a sustained period of time and for the collusion to be stable.\(^ {64}\) Airtours, also reinforced the increased importance of economic analysis to show collective dominance that will result in tacit collusion that is required under EMUR.\(^ {65}\)

The EU Horizontal Merger Guidelines\(^ {66}\) (the “Guidelines”) outline the framework for the Courts and the Commission to take into account when deciding whether mergers will create conditions conducive to tacit collusion.\(^ {67}\) The three conditions for collective dominance are incorporated from the Airtours decision as well as a general requirement to reach a common understanding on the terms of coordination, and the Guidelines go on to discuss the specifics of these in detail.\(^ {68}\) In terms of reaching a common understanding the stability of the market, the number of firms present, how homogenous the products are, and how innovative the market is, among other things, are taken into account.\(^ {69}\) In terms of monitoring other coordinating firms, the Guidelines refer to how transparent the market is, and the level of public or shared information present.\(^ {70}\) The economic incentives of the alleged tacitly colluding firms are examined to determine deterrents in departing from the collusion.\(^ {71}\)

Finally the reaction of outsiders is examined with regard to things such as maverick firms and

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\(^ {63}\) Whish & Bailey, note 4, at 866-867.

\(^ {64}\) Airtours, para 65 & 195.

\(^ {65}\) Baxter & Dethmers, note 55, at 151.


\(^ {67}\) Merger Guidelines, para 39-55.

\(^ {68}\) Ibid, para 39.

\(^ {69}\) Ibid, para 45-48

\(^ {70}\) Ibid, para 49.

\(^ {71}\) Ibid, para 53-55.
barriers to entry. This framework provides comprehensive guidance that the Commission and the Courts can use to analyse the potential anticompetitive effects of a merger likely to facilitate tacit collusion. This practical, market analysing, case-by-case approach is effective. As shown in Travelport/Worldspan the Commission had regard for the, “complexity of the pricing structure and product offerings,” which, “limited the transparency of the market and therefore the possibility of successfully monitoring coordinated behaviour.” It is evident from the above that EMUR is a successful tool in controlling a risk of conditions which are conducive to tacit collusion. However, this idea of only a “risk of conditions” may be problematic in and of itself. This will be addressed below, when analysing EMUR with regard to Articles 101 and 102.

**Analysis of the Law**

The EU legislative framework surrounding the phenomenon of tacit collusion is a complex interplay of Article 101, Article 102 and EUMR, as well as a creative interpretation of each regulatory tool. This leads to the conclusion that, while the Courts may have done the best with what they had to work with, naturally there are some problems and critiques. This essay will examine three in particular. Firstly, whether there should be new legislation specific to tacit collusion. Secondly, the conflict between the linguistic interpretations of Article 102 and EMUR, and finally, the worrying notion of firms acting as a single entity but at the same time acting individually.

Callery argues that the lack of a coherent, specific provision dealing with tacit collusion is beneficial as it would not be able to deal with the vast range of factual circumstances which

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73 *Case M 4523 Travelsport/Worldspan* (21 August 2007).
74 *Case M 4523 Travelsport/Worldspan* (21 August 2007).
may arise.\textsuperscript{75} He submits that, a legislative approach would create a whole host of new problems of interpretation, and the courts should be left to consider future cases under the now-familiar mould of Article 102.\textsuperscript{76} While this approach does seem to have some merit, given the host of legal development surrounding the use of Article 102 to tackle tacit collusion, it is submitted that the legislation is being stretched by the courts in an effort to encompass tacit collusion. One of the Commission’s functions is to make laws for the EU as a whole, and it should utilise this function to address a problematic area of legal interpretation. The Courts and the Commission struggle to decide whether cases fall under Article 101 or Article 102, and utilise EMUR jurisprudence to help interpret this. However, EUMR expressly states that the Courts should utilise the criteria of certain key phrases, such as coordination of the competitive behaviour of undertakings, with regard to Article 102.\textsuperscript{77} This circular reasoning clearly highlights the woeful state of the case law in this area, and it is submitted that a specific provision dealing with tacit collusion needs to be adopted.

Callery’s argument that legislation specific to tacit collusion will not be able to address the “vast range of factual circumstances” is an erroneous statement. This could be said of competition law in general, and is not particular to tacit collusion. Legislation need not, and indeed should not, cater for every scenario. It is not argued that the law in this area should be codified taking into account all the past scenarios as this type of ex post action is ineffective. Rather, a workable framework should be drafted, akin to the way frameworks are drafted for a myriad of complex legal problems. It is submitted that there is already the bones of such a framework in place. The three criteria expressed by the Courts in Airtours and Laurent Piau, coupled with the in depth analysis of these criteria contained in the Guidelines\textsuperscript{78}, provide an ideal starting point. This will ensure the Courts and Commission have a defined path when

\textsuperscript{75} Callery, note 32, at 151.
\textsuperscript{76} Ibid.
\textsuperscript{77} EU Merger Regulation, art 4.
\textsuperscript{78} Merger Guidelines.
investigating potential market abuses. An effects-based, economic approach on a case by case basis can still, and arguably should, be utilised, however, high level legislation is necessary to ensure this approach does not stray off course.

The second point which this essay will look at also complements the idea of new legislation to deal with tacit collusion, and again illustrates the inconsistencies in the relationship between Article 102 and EMUR. It is well established that the necessary criteria for a finding of tacit collusion behaviour under Article 102 is two pronged, firstly there must be a collective dominant position, and secondly there must be abuse of this dominant position.\textsuperscript{79} EMUR states that a merger which “has as its object or effect the coordination of the competitive behaviour of undertakings”\textsuperscript{80}, and will allow the “possibility of eliminating competition”\textsuperscript{81}. It is obvious that Article 102 envisions an ex post examination, whereas EMUR requires a hypothetical ex ante analysis. How then, can cases applying EMUR’s definition of tacit collusion be used effectively to guide the Courts in applying Article 102’s definition of the same?\textsuperscript{82} There are two different standards present. One requires actual collective dominance and abuse of this dominance, whereas the other only requires the possibility that collective dominance will occur and abuse could then, hypothetically follow from this. It is not disputed that merger guidelines and legislation necessitate a forward looking, examination of multiple fact scenarios, however, these same principles should not be utilised when examining past events. Thus, it is again submitted that this area of tacit collusion as a whole needs real legislative review.

The final point, or critique, is the contradiction present in the judgments of \textit{Irish Sugar} and \textit{Compainge Maritime Belge Transport}. \textit{Irish Sugar} paved the way for the idea that

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\textsuperscript{80} EU Merger Regulation, art 4
\textsuperscript{81} \textit{Ibid}, art 5.
\textsuperscript{82} As is discussed in the analysis of Article 102, above.
\end{flushleft}
undertakings occupying a joint dominant position may engage in joint or individual abusive conduct.\(^{83}\) However, the ECJ then stated that the undertakings present themselves or act together on a particular market as a collective entity.\(^{84}\) It is inconsistent to find one undertaking to be abusive of a collectively dominant position if the other member undertakings do not “appear” to act alongside that individual undertaking.\(^{85}\) What about scenarios where an undertaking which is collectively, but not individually dominant, engages in abusive conduct?\(^{86}\) Whish & Bailey propose that the abuse by this individual firm is done to protect the oligopoly in general and not just the single firm, thus, the individual abuse augments the collective dominance.\(^{87}\) This is an acceptable notion; however, it again exposes the failings in the jurisprudence surrounding tacit collusion in general.

To further complicate things another idea is submitted that attempts to make sense of the conflicting rulings. The statement in question in *Irish Sugar* relates to abuse, after the position of collective dominance has been established, whereas in *Compaigne Maritime Belge Transport* the statement is used to establish the idea of a collective dominant position. If the two limbs are deemed discrete entities, then abuse can be examined irrespective of dominance. However, this only serves to complicate the law further and illustrates potential problems that may arise in future if the Courts and the Commission continue to bend and warp the limited regulatory tools at their disposal. Again it is stressed that there is a need for a proper examination and overhaul of the law surrounding tacit collusion.

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\(^{83}\) *Irish Sugar*, para 66.

\(^{84}\) *Compaigne Maritime Belge Transport*, para 36.

\(^{85}\) Callery, note 32, at 150.

\(^{86}\) *Ibid*.

\(^{87}\) Whish & Bailey, note 6, at 582.
Conclusion

This essay has considered whether Articles 101 and 102 and the EUMR have been used as effective regulatory tools to deal with both tacit collusion and mergers likely to create conditions conducive to tacit collusion.

While it can be conceded that the Courts and Commission have utilised the limited tools they had to attempt to deal with the problem of tacit collusion, this has not been effective. The position of the law is blurred and uncertain. It is comprised of piecemeal judgments that derive rulings from inconsistencies and contradictions. The interplay between Article 102 and EMUR clearly shows this. The fact that merger guidelines are being used to help bend fundamental articles of the TFEU in an attempt to provide a legal tool to deal with tacit collusion is shameful. The Commission must act to review this area and provide a coherent and effective regulatory framework to deal with this issue. The free market is the essential aspect of the European Union, and protection against abuses such as tacit collusion is part of the vital role the Commission and Courts play.
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