

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

JUDICIAL PERSPECTIVES ON COMPETITION LAW

- Summary of Discussion -

7-8 December 2017

The attached document is a summary of the discussion held during Session II of the 16th meeting of the Global Forum on Competition on 7-8 December 2017.

More documents related to this discussion can be found at:
<http://www.oecd.org/competition/globalforum/judicial-perspectives-competition-law.htm>.

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Summary of Discussion

By the Secretariat

1. The **Chair** opened the session and explained that while the GFC usually focuses on competition agencies, this session focuses on the challenges that judges face. He described the structure of the session, which is to include three parts: the challenges posed by the specific types of evidence which courts are required to evaluate in competition cases; a more institutional section, devote to specialised courts and their potential advantages and disadvantages; and lastly, we will talk about the relationship between courts and competition agencies, and the particular issues that arise in this regard. The Chair then presented the various panellists.
2. At this point, the Chair pointed out that the Secretariat had received a large number of contributions and that, as a result, he would not be able to call on every country to speak. He also asked everyone to stick to the time allotted to them.
3. At this point, the Chair introduced the part of the session on evidence, and asked **Paul Crampton** to speak. Paul described the Canadian system as being an accusatory system where the competition authority had to present its case to the court. The Court has often told the agency that it could present quantitative and qualitative evidence – but that quantitative evidence was likely to have higher evidential value. A large challenge is the amount of information that the parties like to present to the court – so an important stage is to control the discovery stage at the pre-trial stage; and the development of tools to manage evidence, like burdens and presumptions, to manage it at the trial stage. He also discussed the importance of providing information on economic evidence in a way that courts can follow.
4. Thanking Paul for his intervention, the **Chair** introduced Judge Shon from Korea. He would like to present a case where law required a market definition even though the practice is prohibited *per se* in most jurisdictions – and the Korean competition authority sanctioned a number of companies without defining the market. The Korean Supreme Court quashed the decision, requiring the competition authority to pursue a market definition. This reflected different functions of courts – to uphold the law – and competition agencies – which pursue effective enforcement. In practice, courts are able to pragmatically seek to balance these interests.
5. The **Chair** then emphasised that the prior presentation provided a good example of how economist may need to learn law as much as judges may need to learn economics.
6. He then asked **Nils Wahl** to speak. He described how in the EU the Commission adopts decisions that are presumptively valid, and which can only be challenged on a limited number of grounds. The standard of review for facts and legal classification is significantly stricter than the standard of review of complex economic analysis. At this stage, he described how the European courts sought to address criticisms that limited standards of review were unfair and acted to the detriment of infringing parties, even though it would seem that there is a practical assumption that the Commission's decision are valid. He further described how the preliminary reference procedure allowed the challenge of certain interpretations of competition law by national competition authorities. This regime does not look at the facts. As such, he says that the European

system makes it difficult to challenge the validity of decisions by competition authorities. Yet, he thinks this reflects an appropriate balance given the procedural obligations incumbent on competition authorities.

7. President **Diawara Mouhamadou** at this point described the African system, which includes a community system in West Africa. He notes that various different standards of proof may apply – civil law, administrative law, even criminal law – particularly given the potential application of different countries’ legal regime, and the influence of EU law in practice. He gave an example of two competition cases decided in Senegal, where a number of cases about who had the burden to prove the infringement or efficiencies arose. He emphasised that is important that evidence is clear, because judges must justify their decisions and this is difficult when evidence is not clear.

8. He then called on **Dennis Davis** to comment on the prior presentations. He explained that common systems see evidence differently from civil law jurisdictions of the EU courts. In common law systems, the management of evidence at first instance is crucial, since common law systems tend to require much more evidence. As such, he seriously supports the hot-tubbing system, where the judge conducts a seminar with experts to get to the bottom of the issue. He identifies two challenges with hot-tubbing: (i) it is quite onerous for the judge; (ii) parties do not like it, because it means they lose control over the process. This has an advantage of limiting the impact of biased evidence from experts. Importantly, rules and presumptions – both of legislative and judicial – also help in managing cases. He provided examples of US decisions on resale price cases, and of South African rules on market sharing. Judge Davis expressed his discomfort with presumptions that the competition authority is correct – there may be reasons for technical deference, but this should not amount to not reviewing a decision except for matters of manifest mistake.

9. At this point, the Chair asked **Judge Douglas Ginsburg** to comment on the presentations. Judge Ginsburg thinks it is important that evidence is presented clearly, even if it is beneficial for judges to have benefited from some economics training.

10. At this point the Chair asked **Chinese Taipei** to explain a case where the courts demanded additional economic evidence as regards the definition of the relevant market. Chinese Taipei described a case where this has happened, and how it led to a greater refinement of economic analysis by the authority in subsequent cases.

11. **Latvia** explained how there were many cases where the courts require detailed economic analysis. This included a case where the courts found that an intra-brand cartel created economic benefits; another where economic analysis was important as regards suitable methods to identify excessive pricing cases; and a third set of cases where the courts doubt whether economic analysis is appropriate. This all provides examples

12. **Lithuania** explained how most of the cases courts have seen do not really involve economic analysis. In the cases that did require extensive economic analysis, the courts have benefitted from the experience of external consultants. While not impartial, they are able to present the two sides of a case. There would nonetheless be an issue if smaller companies, which are unable to afford foreign consultants.

13. **Australia** then asked to explain what hot-tubbing is. It is a mechanism for confronting experts, used by both the competition authority and the courts. It may prove to be less useless when it involves detailed econometrics, but it is otherwise quite useful. The **Chair** also explained how economists advance different arguments if another economist is going to question them

14. At this point, the Chair turned to **Peru**. In Peru, courts take a long time and face serious difficulties in assessing economic evidence – in one case, a decision took 13 years. Furthermore, the court of first instance often upholds decisions of Indecopi without assessing economic evidence, which led to court of appeals overturning due to lack of reasoning. He further emphasized that judges have benefitted from training by international experts, which the *Indecopi* has sought to promote.

15. **Turkey** was then asked to present a number of cases where courts were not convinced with the authorities' conclusions that there was no infringement. The court of first instance found that there was an insufficient analysis of the market, and that additional investigation was required – and that specific types of analysis were required. Having conducted this additional investigation, the agency still found no infringement.

16. **El Salvador** described how the competition agency faced constitutional complaints on requests to provide economic evidence as infringing the right against self-incrimination. The Constitution Tribunal held that market investigation procedures were in line with constitutional protections – and that a refusal to provide economic information when requested amounted to an obstruction of justice.

17. In **Serbia** has an administrative court which is reluctant to engage in full review of competition cases. This seems to be due to how recent competition law is, and to the judges' lack of comfort to engage in full economic analysis.

18. In **Ukraine** the judicial review system is undergoing a transformation towards more detailed analysis. In the last two years there were a number of significant cases where economic evidence has played an important role.

19. At this stage, the **Chair** asked two experienced jurisdictions to talk on their experiences about how to present complex economic evidence to judges.

20. The **US** began by advocating the adoption of a consumer-welfare, evidence based system in allowing for the development of an administrable system of rule. As regards how to present economic evidence before judges, the US explained that bringing a competition case before a court requires effectively communicating economic analysis in a manner understandable to a judge who has not necessarily had special training in economics, and who may have no prior experience with competition law. This requires integrating economics with the main evidence of the case; evidence should be explained clearly and simply; and economic evidence should be based on the evidence and empirically verified.

21. The **EU** spoke on how the Commission takes great care to arrive at correct results and works hard to take into account available economic evidence. They also described they compiled the best practices in a document on how to submit economic evidence to courts, and on how to submit economic evidence to the European Commission. These best practices also apply to the European Commission, and not only to the parties.

22. **South Africa** raised an issue for consideration: most emerging economies copied older rules from other countries, and this gives rise to a challenge on how to interpret these rules. As judges look at them for the first time, it is a challenge to convince them that they do not need to interpret *ex novo* and pay attention to international experiences.

23. **Mongolia** explained how their agency is quite new, which is why they do not have extensive experience. As such, they follow international experiences, such as Japan. They suggest they could benefit from support from international countries' support and increased cooperation.

24. **Mexico** described its situation, where the ITF has advanced recent theories, which surprisingly have often not been challenged in court. While these are now specialized courts, they are unlikely to engage in detailed economic analysis – and asked the panel for suggestions on how to ensure that there is greater economic analysis.
25. **Cameroon** raised the difficulty of finding direct evidence, in cases where often only indirect evidence is available.
26. **Dennis Davis** says that judgments in South Africa are dotted with international references, particularly to the EU. At the same time, a narrow conception of consumer welfare was of limited utility in South Africa, with the challenges of integrating society after the apartheid. As such, it is important to take local conditions into account.
27. **Paul Crampton** agreed with the need to avoid reinventing the wheel, while fitting international experiences into local contexts.
28. At this point, he called on **Brasil** because they had to leave. They spoke of ProCade, a semi-autonomous body which has responsibilities to defend the competition authority's decisions before the courts. They are very reputed, and recognised both internally and internationally – and decisions are held up at a 75% rate. Importantly, they work inside Cade as staff members, but they are specialised and semi-autonomous. He also wanted to inform that in May 2016 the Federal Justice Council recommended the creation of specialised courts. They believe that specialised courts may lead to faster and more consistent decision-making on competition matters. They also mentioned a number of advocacy initiatives before courts, which may become less pressing when specialised courts are implemented (which means the number of judges dealing with competition cases).
29. At this point, the **Chair** answered that courts should eventually between become more sensitised to evidentiary matters with more experience.
30. At this point, the Chair moved to the second part of the discussion, about specialisation. He asked **Dennis Davis**, Judge of the High Court and President of the Competition Appeal Court of South Africa, to present on the topic, who started by saying that specialisation is broadly speaking a good idea. He described the challenge of creating specialist courts in a country without specialists, as happened in South Africa. The way they dealt with this was to appoint a number of commercial experts for a long term, and invested significantly in training the judges. He then explained why it is important that competition judges have a minimal understanding of economics – even if the need may be smaller if judges merely review competition agency decisions on a narrow basis.
31. He then asked **Enrique Vergara** who emphasised the importance of the nature of the link between the specialised and generalist courts. The nature of this link – usually in the form of a review by generalist courts – can give rise to problems. In Chile, the Supreme Court pursues a detailed, full merits review of decisions adopted by the specialised court. While the Supreme Court originally granted some deference, but many decisions were overruled on procedural points – usually lack of sufficient evidence and, sometimes, because of absence of sufficient economic analysis.
32. **Paul Crampton** agreed with the previous presentations, and presented an intermediate approach: to have a specialised chamber within a generalist court. He also provided examples of having generalist courts review decisions by competition authority – including administrative specialists reading efficiency defences out of the law, or inability to allow the risk of a monopoly to be outweigh small efficiency benefits.

33. The **Chair** then intervened to explain that one common criticism of specialised courts is that it risks a lack of coherence in the application of the law across different legal areas.

34. **Diawara Mouhamadou** argued that while a judge need not be an economist, he needs to understand economics. When he joined the court, he understood that competition law was different from more traditional areas of the law. In Senegal, the parties rely on experts, which he would be unable to control if he did not know at least a bit of economics. The **Chair** said it did not really suffice for judges to rely on experts, because it is important that judges know what questions to ask, which requires a minimum knowledge of economics.

35. **Nils Wahl** pointed out that the limited number of cases may create obstacles to the creation of specialist courts. The **Chair** emphasised that this difficulty was particularly evident in small or resource strapped countries. Another obstacle are rules on career progression, which may prevent judges from wanting to remain in a court enough time to specialise, or event to want to specialise.

36. The Chair then called on **Portugal**, which implemented a specialist court. One reason for this was the tendency of generalist courts to avoid dealing with competition cases, and prioritising simpler cases which are easier to decide. The specialist court is seemingly operating well, and judges are trying to develop their expertise. Judges are also aware of their limitations, and may ask for external experts to not only participate but also provide reports (which are often incorporated into the decision). The main problems are turnover in the court, and the appellate court not being specialised and tend to decide cases on procedural grounds.

37. Regarding the relationship between courts and competition agencies, **Paul Crampton** identified a number of mechanisms whereby the court seeks to solve cases, which may provide a venue for appropriate interaction with the authority. **Enrique Vergara** described similar mechanisms in Chile, but also mentioned interactions regarding the approval of procedural / investigative tests, and joint-participation in international fora and in national advocacy and reform efforts.

38. **Dennis Davis** described a particular situation where the chief economist explained the reasons behind a number of cases on excessive pricing. He also described a number of conversations with the Bar about the lack of diversity of council arguing cases – because it was important to ensure that there will be sufficient diversity in competition judges in the future.

39. **Nils Wahl** describes how every system may have its own concept of what is normal.

40. **Korea** then explained how staff of the KFTC has been regularly dispatched to the Supreme Court, proposing opinions related to the competition cases. Also, there was a case where the Court had dispatched a judge to the KFTC as a legal advisor, providing legal advice in the past. There are also informal contacts between members of KFTC and judiciary.

41. **Mexico** described how judges used to avoid competition issues. The new specialist court are more open to economic evidence and analysis. In their cooperation, Mexican competition authorities seek to create a common (economic) language.

42. **Italy** then intervened on the matter of interaction between private and public enforcement, they found it important to reflect their experience in providing *amicus curiae* in judicial cases, and in their participation in two European projects for training judges.

43. The **Chair** then mentioned the many ways through which competition authorities can interact with judges, and the OECD's efforts in this regards.

44. The Chair then closed the session by thanking everyone, and concluding that there were fewer issues with the judicial treatment of complex economic evidence by courts. It was consensual that it was important to use economic evidence in ways that judges understand. On specialist courts, there was qualified enthusiasm for them when they engage in full merits review. A number of costs were also identified. As regards cooperation between courts and agencies, there was a discussion about the many ways through which this can occur.

45. President **Diawarra** then expressed his appreciation for the OECD for trying to interact with emerging jurisdictions, and to thank for his invitation.