

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

Global Forum on Competition

JUDICIAL PERSPECTIVES ON COMPETITION LAW

- Executive Summary -

7-8 December 2017

This executive summary by the OECD Secretariat contains the key findings from the discussion held under Session II at the 16th Global Forum on Competition on 7-8 December 2017.

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

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Executive Summary

*By the Secretariat**

Considering the discussion at the roundtable held during the Global Forum on Competition on 7 December 2017, the panellists' presentations and the delegates' submissions, several points are noted:

(1) Economic evidence presents significant challenges for judges

Judges often lack the expertise and resources available to competition agencies, and as a result have difficulties when assessing complex economic evidence. Courts in a significant number of jurisdictions face serious difficulties when faced with economic matters, and often seek to resolve cases on procedural grounds. Another significant challenge for courts is the amount of evidence that parties are likely to submit in competition cases.

Competition authorities should present economic evidence in a simple way that courts can follow. Courts are open to review both quantitative and qualitative evidence, but quantitative evidence is likely to have higher evidential value. To manage the amounts of evidence that may be submitted, it is important that courts develop tools to manage evidence at both the pre-trial and trial stage. Legal rules that assist in this exercise, like burdens of proof and presumptions, are important.

(2) Judges should have a certain level of expertise in competition law and economics, regardless of whether competition matters are dealt with by specialised or generalist courts

Judicial specialisation is widely perceived to be a good idea. Specialised courts will usually have more extensive knowledge of the substantive issues of competition law necessary to decide a case, and greater experience as a result of a steady stream of cases. Nonetheless, specialised courts may face some problems, such as insulation from the wider body of national law, an insufficient stream of cases to justify the creation of specialised bodies, or the absence of a sufficient number of specialists in the relevant jurisdictions. These challenges can be particularly pressing for small jurisdictions that may lack both the resources and the case load necessary to justify incurring the costs of implementing a specialist court.

When a specialised court is created, it is important to consider its links with generalist courts. The nature of this link – usually in the form of judicial review by generalist courts of the specialist court's decisions – can give rise to problems. In particular, issues arising from a lack of judicial expertise may end up merely being deferred to a later appeal stage. While appeal courts may grant some deference to specialised courts, generalist appeal bodies may still overrule decisions on procedural points with which they are more comfortable.

* This executive summary does not necessarily represent the consensus view of the Global Forum on Competition. It encapsulates key points from the discussion at the roundtable, the delegates' written submissions, the panellists' presentations and the Secretariat's background paper.

Ultimately, the challenge is to ensure that judges dealing with competition law matters, either in specialised or generalist courts, have an adequate level of expertise on the topic. Specialist courts are merely a way of ensuring that cases related to the subject matter of competition are dealt with by judges who understand competition law and economics. There are many mechanisms – some formal, some informal – to ensure that judges acquire the requisite level of expertise. While competition agencies can play a role in this, they are often constrained by concerns about the separation of powers. This is an area where judicial bodies and international organisations can play a useful role.

(3) *Judicial control and requests for additional economic evidence often lead to greater refinement in competition enforcement*

When courts engage with the substance of competition authorities' decision, they perform a useful quality-control role. While this may lead to a number of decisions being quashed, a number of delegates described how judicial control forced them to improve and refine the analysis underpinning their decision-making practice.

Judicial control is valuable not only as a means to ensure that competition agencies comply with the required procedural rules, but also concerning the quantity and quality of economic evidence that must be adduced in order to establish competition infringements. At the same time, the quality of control will often depend on the expertise of the judges reviewing decisions adopted by competition agencies.

(4) *Established competition systems have influence around the world. A common challenge to emerging economies and new competition regimes is to adapt the rules of more established systems to their specific socio-economic context*

Competition law is a relatively homogeneous area of law around the world. A reason for this is that new competition regimes are strongly influenced by the more established competition regimes, which have decades of experience. However, the competition rules of established competition regimes may not be perfectly suited to the local conditions of new competition regimes.

The role of judges in competition law is an issue regarding which local circumstances can be very important. Even in the best established competition regimes, the role of judges varies significantly depending on the legal tradition – e.g. civil or common law – of each jurisdiction.

Courts must follow national laws even when they depart from international common practice. While courts in jurisdictions where competition regimes are more recent would do well to look at the experience of more established jurisdictions, international experience must be implemented by reference to national law – which reflects contexts and concerns that are specific to each jurisdiction.