

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

Global Forum on Competition

Use of Economic Evidence in Cartel Cases

Session III – Call for country contributions

7-8 December 2023

This document is a call for country contributions for the breakout sessions in Session III of the Global Forum on Competition to be held on 7-8 December 2023. GFC participants are invited to submit their contributions by **27 October 2023** at the latest.

JT03524091

TO ALL GLOBAL FORUM PARTICIPANTS

RE: Breakout Sessions on “Use of Economic Evidence in Cartel Cases”

22nd Global Forum on Competition (7 and 8 December 2023)

Dear GFC participant,

On 8 December 2023, the OECD [Global Forum on Competition](#) will hold breakout sessions on the *Use of Economic Evidence in Cartel Cases*. We are writing to you in order to provide you with some information on the theme and organisation of the session, and to invite you to submit a contribution of case studies.

Cartels are recognised as “*the most egregious violations of competition law*”,¹ because a) they are anti-competitive conduct with no efficiencies or pro-competitive benefits; and b) they are secret practices, with cartelists engaging in “acts of concealment”.² Across the world, cartel conduct is prohibited *per se* or *by object*, without the need to prove their anti-competitive effects or their actual implementation. Prohibitions on cartel conduct apply not only to explicit agreements but encompass a range of conduct where parties have reached a *meeting of the minds*.

The Breakout Sessions will discuss the two types of economic analysis – conduct evidence and structural evidence – that can be used as an indirect form of evidence to prove the existence of, and harms caused by a cartel. Economic conduct evidence refers identifying conduct incompatible with a firm’s unilateral self-interest and supports an inference of a prohibited agreement (e.g. parallel pricing or abnormally high profits). Economic structural evidence cannot prove the existence of a cartel arrangement, but could have value to demonstrate a cartel is plausible based on the market structure (e.g. barriers to entry or homogenous products).

The GFC will include two parallel breakout sessions which will provide a forum for participants to discuss the *Use of Economic Evidence in Cartel Cases*. The first session will cover how economic evidence can be used to prove cartel conduct and the evidentiary value of economic evidence about the structure of a market. The second session will discuss how economic evidence can be persuasively presented to decision makers (and courts).

We strongly encourage you to provide case studies in your contributions which are particularly illustrative of the challenges, success stories in tackling the challenges or lessons learned about the Use of Economic Evidence in Cartel Cases. In Annex I, we provide a list of indicative topics and questions that you may want to address when preparing your case study.

These topics and the issues mentioned above and in Annex I are non-exhaustive. Participants are encouraged to raise any other relevant points in their submissions or during the discussions regarding economic evidence in cartel enforcement.

To ensure a lively discussion, case studies will be presented in each breakout session. Please note that not every case study will be presented in the sessions, therefore we kindly ask you to indicate by **Friday 29 September 2023** if you are interested in making a presentation in one of these two sessions.

The dedicated OECD webpage on this topic, see GFC home page: [oe.cd/gfc](#) and also [www.oecd.org/daf/competition/roundtables.htm](#), will be the primary vehicle for conveying documentation and related links on this subject. Unless explicitly requested not to do so, we will reproduce all written contributions on the site.

¹ OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)]

² Werden, G. (2009), “Sanctioning Cartel Activity: Let the Punishment Fit the Crime”, *European Competition Journal*, Vol. 5/1, pp. 19-36, [http://dx.doi.org/10.5235/ecj.v5n1.19](#), pp 6, 9.

We would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. We invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively, the Secretariat will produce a summary, but given the time constraints you might not be in a position to check it before distribution on O.N.E.

We would encourage you to submit a written contribution that describes your experience or views on using economic evidence in cartel cases. Should you wish to provide a contribution, please inform the Secretariat by **Friday 29 September 2023**. Written replies to this call for contributions are due by **Friday 27 October 2023** accompanied by a short summary of the content to enable the Secretariat to prepare the session in a timely manner. Please note that not meeting this deadline may result in your contribution not being distributed to delegates in a timely fashion in advance of the meeting.

All communications regarding the documentation for this roundtable should be sent to Ms Angélique SERVIN (Email: angelique.servin@oecd.org). Please address all substantive queries relating to this discussion to Mr Connor HOGG (Email: connor.hogg@oecd.org) and Ms Tal ARNON (Email: tal.arnon@oecd.org).

ANNEX I – QUESTIONS FOR CONSIDERATION

Breakout Session 1: Use of Economic Evidence in Cartel Cases

- Economic conduct evidence is the most important type of economic evidence. It refers to analysis that can identify conduct incompatible with a firm's unilateral self-interest and supports an inference of a prohibited agreement. This could include evidence such as parallel pricing, abnormally high profits, or stable market shares.³ Do you have experience of enforcement action where this economic conduct evidence was a key pillar of your case? Were there any particular challenges related to how you gathered and utilised this evidence?
- Economic structural evidence cannot prove the existence of a cartel arrangement, but it can be used to demonstrate a cartel is plausible based on the market structure. Economic structural evidence could include high barriers to entry, homogenous products, market transparency and significant vertical integration. Do you have a methodology or approach on how you utilise relevant economic structural evidence in cartel enforcement? Have you faced any challenges in previous cases?

Breakout Session 2: Communicating Economic Evidence in Cartel Cases

- Many stakeholders at the OECD and in other fora have observed an increase in the complexity of the economic analysis used in competition cases, particularly in the merger context, but also in behavioural matters, including cartel cases. Economic analysis is often time consuming, requires specialised expertise, and can be burdensome – especially for newer or smaller competition authorities. Have you faced resourcing challenges to use and/or respond to economic evidence in cartel enforcement?
- Presenting economic evidence before external bodies like courts or tribunals presents an additional challenge, persuasively communicating complex economic evidence to non-expert audiences. Have decision making bodies in your jurisdiction accepted arguments based on economic evidence in cartel cases? Have you developed strategies or approaches to effectively communicate economic evidence in previous cartel enforcement cases?

³ *Market shares, of course, are also an element of market structure. Stable market shares are classified as conduct for purposes of this discussion because they could be the result of a conscious agreement among competitors not to compete". OECD, Prosecuting Cartels without Direct Evidence [DAF/COMP/GF(2006)7].*