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Use of Economic Evidence in Cartel Cases – Breakout sessions

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The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

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Please contact Ms. Tal Arnon [Tal.Arnon@oecd.org] or Ms Lynn Robertson [Lynn.Robertson@oecd.org] if you have questions about this document.

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How can competition agencies use economic evidence in their enforcement work?

1 Introduction

1. The [OECD 2019 Recommendation of the Council concerning Effective Action against Hard Core Cartels](#), defines “cartels” as anticompetitive agreements, concerted practices, or arrangements among actual or potential competitors. These agreements aim to control prices, manipulate bids, impose output restrictions, or allocate markets. By doing so, they pose a significant anticompetitive threat, undermining the principles of effective competition in the marketplace.
2. Proving the existence of a cartel poses unique challenges for competition law enforcers. Operating in secret and usually aware of the illegality of their actions, cartelists actively conceal their activities, making investigations difficult. When investigations are initiated, participants rarely co-operate. Enforcers often find themselves in the daunting position of proving a cartel's existence without the luxury of direct evidence. Obtaining direct evidence, which involves identifying meetings or communications describing the substance of the agreement, and requires specialised investigative tools and techniques, such as leniency/amnesty programmes, may not be possible. This topic was covered and discussed in the OECD Competition Committee roundtables on [“Prosecuting cartels without direct evidence”](#) and [“Ex officio cartel investigations and the use of screens to detect cartels”](#) and [“The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels”](#).
3. The evidence used to establish cartel agreements can be broadly classified into two categories: direct evidence, such as documents embodying the agreement or statements by co-operative cartel participants, and indirect (or circumstantial) evidence, that are evidence that relies on an inference to connect it to a conclusion of fact. Indirect evidence include communication evidence and economic evidence and analysis.
4. The economic harm resulting from cartel behaviour and the adverse impact on consumers is a foundational concept in competition policy. It has long been held that there is no pro-competitive justification for competitors getting together to fix prices, allocate markets among themselves, or restrict output. Given the per-se illegality of price fixing in most jurisdictions worldwide, cartel enforcement has traditionally relied on a direct evidence approach. In many jurisdictions, there is rarely need for economic analysis as the evidentiary question of factual evidence to prove cartel coordination.
5. While economic evidence and analysis play a crucial role in various competition areas, such as mergers and abuse of dominance matters, cartel cases have traditionally leaned towards direct evidence. Prior roundtables have explored economic analysis and evidence in Abuse Cases and [merger investigations](#). This session aims to extend these discussions, examining the use of economic evidence in cartel cases. While cartel cases primarily rely on direct evidence, including indirect evidence, such as economic evidence can significantly enhance enforcement efforts.
6. There are two types of economic evidence – Economic evidence can be categorised as either conduct or structural evidence.
 1. [Economic Conduct Evidence](#): This constitutes the primary form 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.

2. Economic Structural Evidence: Structural evidence helps demonstrate the plausibility of a cartel based on market conditions. Factors such as high barriers to entry, homogenous products, transparency and a significant degree of vertical integration can contribute to building a compelling case.

Use of Economic Evidence in Cartel Cases

3. Using economic evidence in cartel cases could presents numerous challenges and issues. Firstly, establishing the existence of a cartel based solely on the economic evidence is a difficult task, because economic analysis may not always clearly distinguish between competitive and explicitly collusive behaviours.
4. Secondly, different legal systems worldwide set varying standards of proof, influencing the use of economic evidence. For instance, in countries treating cartels as crimes, the high standard of proof in criminal cases imposes stringent requirements on the use of circumstantial evidence, though it may still be valuable in such cases. The evolution of laws regarding the use of circumstantial evidence in cartel cases aligns with legal frameworks. The classification of cartels as administrative, civil, or criminal violations further shapes the approach to these cases.
5. Additionally, another challenge and a crucial factor influencing how courts evaluate circumstantial evidence such as economic evidence is whether the court is willing to consider all evidence as a whole, giving it cumulative effect, or whether it requires that each item unequivocally support the hypothesis of agreement. Nevertheless, economic evidence can be a valuable tool in cartel cases.

Examples of how and when to use economic evidence:¹

7. **Detecting cartels and initial stages of a cartel investigation** - economic evidence can play an important role in the initial stages of a cartel investigation. Analysis helps authorities identify fruitful cases and may lead to the discovery of better evidence. Tools such as **cartel screens** play a vital role in detecting cartels. Structural and behavioural screening approaches analyse observable economic data to flag markets susceptible to collusion, guiding authorities in conducting further inquiries and investigations. For more info see OECD roundtables on "[Ex officio cartel investigations and the use of screens to detect cartels](#)" and "[Data screening tools for competition investigations](#)" and OECD workshop on "[Cartel screening in the digital era](#)".

8. **Market Structure Analysis** could show economic evidence related to market structure strengthens the plausibility of a cartel agreement. While not proving the existence of an agreement, factors such as parallel pricing (and other forms of parallel conduct, such as capacity reductions, adoption of standardised terms of sale, and suspicious bidding patterns), industry performance, concentration, abnormally high profits, stable market shares barriers to entry, and product homogeneity enhance the overall case.

9. Economic evidence also plays a crucial role in **damages claims** where those harmed seek restitution from cartel members. While some competition authorities do not directly intervene in damage calculations and others take a more active role, their decisions on aspects such as infringement periods and affected products significantly influence the damages amount. For more info on the topic see OECD roundtables on "[Public and Private Antitrust Enforcement in Competition](#)" and "[Quantification of Harm to Competition by National Courts and Competition Agencies](#)".

¹ While these are examples, it's important to note that there are numerous other ways to use economic evidence in cartel cases.

2 Presenting Economic Evidence in Cartel Cases to Decision Makers and Judges

Introduction

10. Effectively presenting economic evidence in a clear, and understandable manner, to both decision makers and courts is a critical and challenging skill. The growing complexity of economic analysis has had a substantial impact, not only on general competition cases but also on cartel cases. Despite the primary reliance of cartel cases on direct evidence, the increasing need for economic analysis has become a crucial component on these cases as well. This demands a clear and coherent presentation before the court and other relevant bodies.

11. The OECD Competition Committee discussed this matter in the past on a roundtable on "[Presenting Complex Economic Theories to Judges](#)" that covered the challenges presenting Economic Evidence and the reasoning for these challenges and various techniques that are used to help decision makers and judges understand complex economic evidence. And in a later roundtable on "[Judicial Perspectives on Competition Law](#)" that addressed various dimensions of the judicial adjudication of competition law including economic evidence in cartel cases (such as evidentiary Matters and the Interactions between Courts and Competition Authorities). Additionally, other roundtables discussed economic analysis and evidence in abuse cases and [merger investigations](#).

Challenges in Presenting Economic Evidence

12. One of the primary hurdles in presenting economic evidence lies in the effective communication of sophisticated economic concepts to individuals who may not possess specialised training in economics or prior experience with competition law. The challenge is to translate those complex economic concepts into understandable terms.

13. To address this challenge, some jurisdictions have opted to include non-judicial members, often individuals with a background in economics and relevant experience in competition law, in the decision-making bodies or tribunals. Their inclusion is intended to enable a more informed evaluation of economic evidence.

14. In addition and irrespective of whether the decision-making bodies have experience in competition law, problems may arise from the, ineffective presentation methods used by competition authorities.

Key aspects in presenting economic evidence

15. For the effective presentation of economic evidence, competition authorities must be able to use the most efficient and successful methods to ensure comprehension by others.

16. In recent years, several competition authorities have issued guidelines for submitting economic evidence,² While these standards may not be exclusive to cartel cases, some of their principles could prove applicable to the complexities involved. Also a lot can be learned from previous OECD roundtables on “[Presenting Complex Economic Theories to Judges](#)” and on “[Judicial Perspectives on Competition Law](#)”.

Here are some key aspects that could help:

- Exercising caution and providing context: Economists should explain why the application of certain rules is appropriate in specific cases, avoiding the use of complex economics as a smokescreen to mask weak cases. This ensures alignment between economic and legal arguments to avoid inconsistencies.
- Explain the limits of your data: A common technique in challenging empirical analysis is to point to one or two of the underlying data points and show that they are shaky, or even wrong. In most cases, these one or two data points will not actually be determinative of the analytical conclusions reached, but this form of attack on the evidence can undermine the decision maker confidence in the analysis. It is therefore important to check the robustness of the data – and the likely effect of changing the data, in order to be in a position to show that any apparent data deficiencies do not affect the overall conclusions.
- Ensuring alignment between the economic and legal case: The economic and legal analyses should be fully integrated, avoiding inconsistencies that may confuse decision-makers. Properly embedding economic arguments within submissions enhances their effectiveness.
- Using plain, non-technical language: Economists should use the correct technical terms while explaining them in plain, non-technical language. Analogies can be helpful but should not compromise the accuracy and robustness of economic reasoning.
- Using real-life examples or analogies: Reinforce arguments with practical illustrations, aiding comprehension for non-economists.
- Utilizing visual aids: Visual tools can be valuable for those who learn better visually, enhancing understanding.
- Combination of oral and written economic testimony - to present complex economic concepts comprehensibly and maintain a respectful tone when addressing judges. Expert witnesses should be well-prepared, and these standards influence the submission of economic evidence, particularly in the nuances of cartel cases.

² Here are some examples of guidelines related to economic analysis submissions:

- FTC: 'Best Practices for Submitting Data and Economic Analysis during Antitrust Investigations' (<https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/best-practices>).
- CMA: Guidance on 'Economic Analysis Submissions Best Practice' (<https://www.gov.uk/government/publications/economic-analysis-submissions-best-practice>).
- DG Competition: 'Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases Staff Working Paper (European Commission) SEC/2011/1216 final' (https://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf).

3 Conclusion

17. Presenting economic evidence in cartel cases to decision makers and judges is laden with multifaceted challenges. There are some tools and principals that can significantly enhance the presentation of economic evidence. In the evolving landscape of competition law, drawing on insights from diverse discussions becomes pivotal in addressing the specific challenges posed by cartel cases in ensuring that economic evidence is presented comprehensively and persuasively.

References

- OECD (2006), Prosecuting Cartels without Direct Evidence, OECD Competition Policy Roundtable Background Note, <https://www.oecd.org/daf/competition/37391162.pdf>.
- OECD (2008), Competition Committee Roundtable on Presenting Complex Economic Theories to Judges, <https://www.oecd.org/daf/competition/abuse/41776770.pdf>.
- OECD (2011), Quantification of Harm to Competition by National Courts and Competition Agencies, OECD Competition Policy Roundtable Background Note, <https://www.oecd.org/daf/competition/QuantificationofHarmtoCompetition2011.pdf>.
- OECD (2013), Roundtable on ex officio cartel investigations and the use of screens to detect cartels- Background Note by the Secretariat, [https://one.oecd.org/document/DAF/COMP\(2013\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2013)14/en/pdf).
- OECD (2015), Relationship between public and private antitrust enforcement - Note by the Secretariat for WP3 on Co-operation and Enforcement, <https://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>.
- OECD (2017), Global Forum on Competition Roundtable on Judicial perspectives on competition law, <https://www.oecd.org/competition/judicial-perspectives-competition-law.htm>.
- OECD (2018), Workshop on cartel screening in the digital era, [Workshop on cartel screening in the digital era - OECD](https://www.oecd.org/competition/workshop-on-cartel-screening-in-the-digital-era).
- OECD (2019), Recommendation concerning Effective Action against Hard Core Cartels, [OECD Legal Instruments](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>.
- OECD (2020), Economic analysis in merger investigations, <http://www.oecd.org/daf/competition/economic-analysis-in-merger-investigations-2020.pdf>.
- OECD (2021), Economic Analysis and Evidence in Abuse Cases, OECD Competition Policy Roundtable Background Note, [https://one.oecd.org/document/DAF/COMP/GF\(2021\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2021)6/en/pdf).
- OECD (2022), Data screening tools for competition investigations - OECD Competition Policy Roundtable Background Note, <http://www.oecd.org/daf/competition/data-screening-tools-in-competition-investigations-2022.pdf>.
- OECD (2023), The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/the-future-of-effective-leniency-programmes-2023.pdf.