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

**Global Forum on Competition**

**USE OF ECONOMIC EVIDENCE IN CARTEL CASES**

**- Executive Summary -**

8 December 2023

This Executive Summary by the OECD Secretariat contains the key findings from the Roundtable on Use of Economic Evidence in Cartels, held by the Global Forum on Competition on 8th December 2023.

More documents related to this discussion can be found at  
<https://www.oecd.org/en/events/2023/12/global-forum-on-competition-2023.html>

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## *Executive Summary*

By the Secretariat<sup>1</sup>

The OECD Global Forum on Competition held a Roundtable on the Use of Economic Evidence in Cartel Cases in December 2023. Based on the background paper prepared by the Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged.

### **1. Economic evidence is used in a variety of ways to assist with cartel enforcement.**

The diverse application of economic evidence to cartel enforcement spans across all stages of the process including:

- assisting with cartel detection and screening
- providing initial evidence demonstrating the need for additional investigation
- providing supporting evidence for cases at the edges of cartel conduct
- dealing with efficiency arguments
- calculating cartel penalties
- demonstrating the impact of cartel intervention.

The roundtable discussion provided real world instances from a wide range of jurisdictions of how economic evidence can play a key role in navigating complex scenarios. The discussions underscored that while proving economic effects may not be obligatory, economics is increasingly important in providing essential support to cartel enforcement efforts. For example, in making use of increasingly data intensive cartel screening.

### **2. Economic evidence can be used to detect cartels and provide initial evidence to demonstrate the need for further investigation.**

Competition authorities increasingly use economic input for cartel screening. This involves checking data indicators for signs of cartel behaviour within a market or industry. It can include scrutinising pricing data, market concentration and frequency of communications between competitors.

Before a case is taken, pricing data can be analysed looking for abrupt changes in price patterns (structural breaks). The changes could signal the sign of the start of a cartel, disruption to the cartel or it's end. The findings are not proof of illegality but can provide evidence for further investigation, for example trigger dawn raids seeking direct evidence.

Market share data is also an important metric to consider. Cartels often use market shares as a mechanism to coordinate their behaviour and therefore assessing the stability of market shares over time can be an important part of cartel screening. Economists can add value to cartel detection by analysing the incentives of cartelists in creating a stable cartel and the ways in which they may look to coordinate. For example, considering if there are other forms of market data or announcements which could be easy ways to coordinate with rivals.

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<sup>1</sup> This executive summary does not necessarily represent the consensus view of the Global Forum on Competition. It does however identify key points from the discussion at the Roundtable, including the views of the expert panellists and the participants' oral and written contributions.

The discussion highlighted that to conduct effective screening having access to high quality data is critical and obtaining this data can be a major challenge. Data screening may require some evolution in ways of working for example acquiring new tools such as machine learning and working with data scientists. When conducting cartel screening focusing narrowly within one jurisdiction may miss cartel activity that is operating across borders. Therefore, efforts should be made to promote international co-operation between authorities and conduct regional as well as national analysis.

**3. Economic evidence can be used to supplement other forms of evidence in less straightforward collusion cases and where direct evidence is lacking.**

Taking cases against cartels with indirect evidence can be very time consuming and difficult. It often requires in-depth insights from market operators as well as long-term data from competitors. Special algorithmic models and IT software can be used to identify same pricing in price fixing cartels, and in bid rigging cases as well.

There are different forms of economic evidence being used. This economic evidence can relate to the firms' conduct, where the analysis is seeking to identify behaviour which is incompatible with a firm's unilateral self-interest but could rather be explained as compatible with a collusive scheme. It can also be economic structural evidence which helps demonstrate the plausibility of a cartel based on structural conditions of the market, like high barriers to entry and homogeneity of products.

These forms of economic evidence can be particularly useful in regimes acting against concerted practices where there may not necessarily be an explicit agreement and therefore direct evidence can be harder to come across.

**4. In some jurisdictions judges are requiring economic evidence to prove harm from cartels**

There are jurisdictions where judges are increasingly requiring economic evidence to prove the harm from cartels. Even in jurisdictions where this is not a requirement economic evidence is often being discussed in court to refute efficiency claims being put forwards by defendants.

Delegations stressed that this desire to provide economic evidence of harm should not mean that it is required to find an infringement. If it becomes a requirement, it creates a big hurdle which many competition authorities might struggle to meet because it can be very complicated time intensive exercise.

**5. Economic evidence is often used to assess the impact of cartels for fine calculation and advocacy purposes.**

Calculating the impact from enforcement against cartels can be an important tool for advocacy purposes. Calculating the impact of a cartel does not necessarily mean calculating the specific harm for each cartel but instead a benchmark can be used to estimate the potential markups and applied to the relevant sales volumes.

The reason for using benchmarks rather than trying to calculate specific markups is both due to the resource intensive nature of the calculations but also the potential lag in the cartel impact and the competitive price sometimes taking years to emerge even after then end of the cartel.

The impact or harm calculation is also used by some jurisdictions in calculating penalties. It is possible to use benchmarks of very substantial cartel price markups, which combined with the deterrence impact can justify some very large penalties for cartel activity.

**6. Presenting economic evidence to judges and decision makers in a clear, impartial and easy to comprehend manner is challenging but of crucial importance.**

The discussion highlighted the importance of clearly stating the objectives of economic evidence and presenting it in a way which is easy to understand. Making clear the limitations of the evidence and assumptions used can help create credibility with the decision maker. In some cases, judges have dismissed evidence because they were unable to understand it. While judges can be better trained in economics, ultimately the responsibility for ensuring the content is understood rests with the presenting economists.

Exposing case handlers and economists to court hearings can help staff understand the types of questions asked, the challenges and limitations of what can be said in court and the potential gap that can exist between economic and legal jargon.

There are a range of potential issues with presenting statistics. Evidence and discussion with decision makers should not focus on statistical significance in isolation. The evidence should be presented together with other evidence to demonstrate a consistent narrative.

In some jurisdictions, competition courts have economist members sitting on a panel as judges to assist them in making decisions. While that might not be possible for all jurisdictions, courts could consider employing an economist directly to assist them in interrogating the evidence. The legal process can also be assisted by economic evidence being discussed to begin before it arrives in court so that the court can focus on the true points of difference.