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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

ROUNDTABLE DISCUSSION ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

-- Aide-memoire --

Held on 8 February 2006

This aide-memoire is circulated to participants FOR APPROVAL UNDER WRITTEN PROCEDURE. Participants are requested to respond with any written corrections before 15 May, after which the proceedings including this aide-mémoire will be distributed as a free publication.

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SUMMARY OF DISCUSSION

1. The **Chairman**, Daniel Goldberg of Brazil, invited the **Secretariat** to summarise the background paper that it prepared for the roundtable.

2. The subject is more complex than it might first appear to be. Competition laws apply both to explicit agreements and to agreements of a less formal kind, such as “concerted actions,” “understandings” and so forth. Moreover, proving cartel agreements can pose special challenges, as cartel participants usually do not willingly co-operate with investigators. The competition agency will seek to acquire all types of relevant evidence, including “direct” and “indirect,” or “circumstantial” evidence.

3. Direct evidence includes “smoking gun” documents or emails, and statements by cartel participants describing the agreement. Circumstantial evidence can be classified into two types: 1) “communication” evidence, or evidence that the suspected cartel participants did communicate about the subject of their agreement, and 2) “economic” evidence. Economic evidence can be further classified as a) “conduct” evidence and b) “structural” evidence. Conduct evidence includes such things as parallel pricing or other parallel behaviour and practices that facilitate a cartel agreement (e.g., price signaling). Structural evidence includes such factors as high market concentration and homogeneous products. Of the two types of economic evidence, conduct evidence is the more important.

4. The discipline of economics can provide valuable insights into how to evaluate economic evidence. In general, the conduct must be inconsistent with that which would occur if the enterprises were acting unilaterally. The paper describes various economic models in which competitors make decisions based upon their judgments on what their rivals are doing. Only one of these is considered to be a cartel and unlawful, and economics provides guidelines on how to make that judgment.

5. The paper discusses how different treatment of cartels across countries – prosecuted as crimes or as administrative violations, for example – can affect how circumstantial evidence is employed. The paper also notes two general points: 1) all types of evidence – direct and circumstantial – can be used together; and 2) circumstantial evidence should be considered holistically – that is, cumulatively, and not item by item.

6. The paper relies heavily on case descriptions as an effective way to illustrate the use of circumstantial evidence in cartel cases.

1. Definition of agreement and the applicable legal standard

7. The **Chairman** indicated that the discussion would be divided into blocks, or subtopics. The first would deal with the type of agreement that can arise in a cartel case – for example, explicit or tacit agreements – and standards that apply to proving these different types of agreements. He noted that the EU Treaty specifically identified two concepts: agreement and concerted action, and he asked the delegate from the **European Commission** whether there were different standards of proof that applied to these concepts, and specifically whether circumstantial evidence was more important in proving one than the other.

8. The EC delegate stated that the two concepts are indeed different. An agreement embodies a communion of will – an agreement that the parties will adopt a certain practice or behaviour. A concerted practice is less formal, and may simply be the observed result of a set of communications. In either case, however, the standard of proof is the same, and circumstantial evidence can be equally relevant in both. Admittedly, the exclusive use of circumstantial evidence is more risky, as it is necessary to exclude other plausible explanations for the conduct that is observed.

9. The **Chairman** noted that Chinese Taipei's competition law also employed the term "concerted action," and also that the competition agency sometimes, but not always, applies a per se rule to cartels. Did the application of the per se rule depend on whether direct or circumstantial evidence was predominant?

10. The **Chinese Taipei** delegate noted that its agency employed a kind of minimum standard when evaluating cartel cases, and it would decline to prosecute conduct that had a truly *de minimus* effect. The applicable standard of proof, however, is not dependant on the type of evidence that is available.

2. The difficult distinction between direct and circumstantial evidence

11. The **Chairman** moved to the second sub-topic, the sometimes difficult distinction between direct and circumstantial evidence. He noted that BIAC's written submission urged that cartel cases should not be based solely on indirect evidence. The paper also criticised the EC's policy of using corporate statements, which technically are direct evidence. He asked for an elaboration of BIAC's position on these points, and particularly how BIAC would differentiate between direct and indirect evidence.

12. **BIAC** expressed its support for vigorous prosecution of cartel conduct. It noted, however, that such prosecutions result in significant pecuniary and reputational harm to businesses that are found liable, and it urges, therefore, that cartel cases not be based solely on circumstantial evidence. Direct evidence can take the form either of documents or of testimony by individuals who were involved in the cartel activity. The latter is becoming increasingly available by means of leniency programmes. Other types of communication evidence are relevant, but sometimes they are ambiguous. Economic evidence, such as parallel pricing, is even more ambiguous, and it should not be sufficient by itself in a cartel case.

13. Regarding the Chair's question about the use of corporate statements in Europe, these are technically direct evidence, but they cannot be adequately tested because the European Commission procedure is administrative not judicial and there is no mechanism for either the Commission or the parties to cross examine witnesses on statements given in furtherance of a leniency application.

3. Communication evidence

14. The **Chairman** then turned to the subject of communication evidence – evidence that the parties communicated about the subject of their alleged agreement, but not containing the substance of an agreement itself. The Chair noted that the *Toshiba* case in Japan set forth an apparently precise standard for the use of circumstantial communication evidence. Must the evidence always meet this standard in Japan?

15. The delegate from **Japan** replied that if the evidence satisfies the test set out in the *Toshiba* decision it is sufficient to prove a cartel agreement, but it is not required that this test always be met. The *Toshiba* court understood that direct evidence of a cartel case can be difficult to obtain and that circumstantial evidence could be sufficient in appropriate circumstances. The court took a holistic approach toward circumstantial evidence, and using the three elements described in its decision it found that the evidence was sufficient. While these elements need not be satisfied in every case, it is important that there be some form of communication evidence presented.

16. The **Chairman** noted that Korea's competition law creates a "presumption of agreement" in the absence of direct evidence when there is "conformity of outward conduct" and "competition restrictiveness." The KFTC has also created a set of internal guidelines that provide standards for proving agreements in the absence of direct evidence. Is it necessary that the evidence always include some form of communication evidence?

17. The **Korean** competition law is somewhat unique in that it specifically provides for a presumption of agreement when the two elements noted by the Chairman are present. Strictly speaking, an agreement could be proved in the absence of communication evidence, but in practice this would be difficult. The KFTC always strives to acquire communication evidence, but if it is not present, it would be possible to prove agreement using a sufficient amount of economic evidence.

18. The **Chairman** referred to the submission of the **Czech Republic**, which described a case in which some interesting and unusual circumstantial evidence was generated. He asked the Czech delegation to describe this evidence for the delegates.

19. There were three important pieces of evidence in this case, which involved a cartel among bread producers in the Czech Republic. First, there was very suspicious parallel conduct, in which the producers announced identical price increases in parallel fashion. Second, the Antimonopoly Office obtained email messages between several of the cartel operators discussing customer allocations. One of these messages ended with "I am deleting this message now because the Antimonopoly Office and the Devil never sleep." Third, the investigators obtained some unusual photographic evidence: they photographed the automobiles of the cartel operators parked outside a pub, where they were meeting to discuss the operation of the cartel.

4. **Quasi-Communication: facilitating practices**

20. The **Chairman** moved to the subject of "quasi-communication" evidence, which includes facilitating practices. He referred to a successful case from Argentina, involving a cement cartel and which resulted in the imposition of record fines. The circumstantial evidence in the case was quite strong, and included regular exchanges of sensitive information, regular audits to confirm the operation of the cartel and one instance of predatory conduct serving as punishment of one member for cheating. Did the evidence also include evidence of parallel conduct and other economic evidence?

21. The delegate from **Argentina** explained that there was not much evidence of parallel conduct because cement markets in Argentina are local. The terms of the conspiracy mostly involved customer/market allocation. The circumstantial evidence of that agreement was strong, however.

5. **Economic evidence**

22. A second type of circumstantial evidence is economic evidence. The **Chairman** noted that economic evidence should be evaluated as to whether or not the conduct would be rational but for the existence of an agreement. The Chair noted that Turkey's competition law creates a rebuttable presumption of agreement when the observed conduct is inconsistent with competition. The Turkish submission described a cement case in which the price increases apparently were not justified by cost factors. The evidence also included, however, two documents that were considered as "plus factors." Would the economic evidence in this case have been sufficient without these two documents?

23. The delegate from **Turkey** explained that while transportation costs are a significant factor in the price of cement, the cartel operators seemed to be willing to supply some customers more distant from their plants and unwilling to supply others located more close by. This evidence would have been enough to invoke the statutory presumption, but a successful case based on economic evidence usually requires more than just the presumption itself.

24. The **Chairman** turned to **France**, which had described a case involving public transportation in its submission. The case seemed to involve both direct and indirect evidence, and the Chair asked how the French authorities used both types of evidence and how they reinforced each other.

25. The French case involved urban public passenger transport. There were three providers of this service, and the evidence disclosed that they had allocated various local contracts among themselves. Thus, while the effects of the agreement were local, the cartel was national in scope. The Conseil de la Concurrence applied the “classic” technique, establishing the existence of the cartel from indirect evidence that was serious, specific and corroborative.

26. The circumstantial evidence indicated that the customer allocation was both stable and persistent. The technique of evaluating circumstantial evidence is not unlike that of an impressionist painting, in which many small points make up a complete picture. The technique in this case permitted a finding of an agreement.

27. The **Chairman** asked **Brazil** to describe how it uses economic evidence as a screening device in the many complaints that it receives regarding retail prices of petrol.

28. The Brazilian agencies must consider all complaints that they receive. In order to avoid spending too many resources on the many complaints of price fixing in petrol that it receives, it evaluates them preliminarily using economic evidence. Profit margins in the market in question are analysed according to several criteria as to whether they are increasing, and if so whether the increases are consistent with a hypothesis of collusion. If not, the complaint is dismissed. If further inquiry is indicated, the prices in the market in question are compared with prices at the state level, on the hypothesis that the local agreement, if any, might not exist in a broader geographic area. If after passing through these filters the possibility of collusion cannot be dismissed, a more detailed inquiry is begun.

29. The **Chairman** noted that in some cases the fact that competitors’ prices are the same even though their costs differ is evidence of collusion. But isn’t this situation also consistent with a competitive market? The taxi operators case from Lithuania appeared to have this situation of identical prices and differing costs.

30. The delegate from **Lithuania** stated that Article 5 of the Lithuanian competition law resembles and is intended to be interpreted similarly to Article 81 of the EC Treaty. In the taxi case there did exist this apparent disparity between costs and prices, but it was not a major factor in the case. There existed a substantial body of other evidence indicating that the abrupt, simultaneous and identical change in prices charged by the taxi operators was the result of an agreement.

31. The **Chairman** observed that in the **Russian Federation** many markets are highly concentrated and susceptible to collusion. Moreover, it is difficult for the Russian competition authority to acquire direct evidence of agreement in these circumstances. The Russian submission notes that it is important that the competition agency be able to prove the existence of cartel agreements by means of circumstantial evidence. In this regard, how do the Russian authorities use economic evidence to distinguish oligopolistic interdependence from collusion?

32. A new draft competition law is being prepared in Russia that will address these issues, among others. In general, the Russian authorities take a holistic approach when evaluating economic evidence. They consider market concentration, parallel conduct, facilitating practices, capacity reductions, information exchanges, and so forth. The authorities are also giving increased emphasis to the concept of collective dominance in dealing with this issue.

33. The **Chairman** turned to **Switzerland**, whose law seemingly requires that there be proved some harmful economic effect. Does this mean that in every case there is some economic analysis that must be provided?

34. The Swiss delegate explained that economic effects can come into play in two ways: first, in the proof of an anticompetitive act, and second, in the case of an attempt by the parties to show that the conduct, even if facially anticompetitive, is justified on the grounds of economic efficiency. In the case of cartels, however, the efficiency defence is not available, as it is considered that cartels are always harmful. Further, if a cartel agreement is proved, the harmful economic effects are presumed, unless the parties rebut this presumption through economic evidence, in which case a more complete economic analysis of the conduct is necessary.

6. **Criminal vs. administrative or civil prosecution and the treatment of circumstantial evidence**

35. The **Chairman** turned to the issue of different treatment of cartels across countries, notably the fact that in some countries they are prosecuted as crimes, while in others – the majority – they are considered as administrative or civil violations. The question is whether these differences have an effect on the way that circumstantial evidence is used. The Chair noted that the **United States** has long been known for its aggressive use of the criminal process to fight cartels. The U.S. states that it almost always bases its cases on direct evidence, often acquired through its leniency programme. But what advice would the U.S. have for countries that are just beginning to prosecute cartels as crimes, or considering doing so, and in particular, is there a place for circumstantial evidence in these cases?

36. The delegate from the United States reviewed his country's procedures in investigating and prosecuting cartels, and acknowledged that the U.S.' leniency programme has a critical function in developing the necessary direct evidence to permit the criminal prosecution of this conduct. He noted that it is important to avoid errors in this process, particularly those that would result in the prosecution of conduct that is not a cartel. Heavy use of circumstantial evidence could result in such errors, and while one could not completely rule out using circumstantial evidence in cartel cases, it is preferable to use direct evidence, and this means developing an effective leniency programme.

37. The **Chairman** noted that cartels can be prosecuted in **Romania** either administratively or criminally, and he asked whether the decision to use either process was based on the nature of the evidence.

38. In Romania, administrative fines cannot be imposed upon individuals. Individuals can be prosecuted criminally for cartel conduct if it can be shown that they participated in a cartel with fraudulent intent and in a decisive way. In this way the administrative and criminal processes in Romania are complementary. It is possible to use evidence developed in the administrative process in a criminal prosecution.

7. **Sanctions**

39. The **Chairman** observed that it is accepted everywhere that cartels should be sanctioned heavily, most often with high fines, so as to deter future conduct of that kind. The issue presented here is whether in order to justify such high fines it becomes more necessary to develop direct evidence of the unlawful agreement. The Chair noted that the **European Commission** is now imposing very large fines in its cartel cases, and he noted also the standard of proof that the Commission must meet is also high – not much different than that which exists in criminal cases. Is this standard related to the fact that large fines are now

common, and in particular, does it mean that the Commission must rely more heavily on direct evidence in its cases?

40. The delegate from the Commission responded that the high standard of proof confronting it results from the close scrutiny that the European courts give to Commission decisions. Regarding circumstantial evidence it means that the evidence must be credible, and that the only plausible explanation for the conduct is that of an agreement. On the other hand, there is no direct link between the type of evidence in a case and the level of fines. All cartels are considered as very serious infringements and all must be sanctioned accordingly.

41. The submission by Chile described a case involving a cartel of milk processors, in which the evidence was apparently entirely circumstantial. It took a period of nine years to complete the case, after which the sanctions applied were minimal. The **Chairman** inquired of **Chile** whether the mild sanctions were a result of there being no direct evidence of agreement in the case.

42. The Chilean delegate stated that the case was the first under a new system in which a Competition Court would decide appeals from decisions of the competition agency. The court decided in fact that the evidence, which was entirely circumstantial, was not sufficient to prove a cartel agreement. Therefore the court did not impose any significant sanctions. The result has highlighted for the competition agency the importance of acquiring direct evidence when possible. In this regard the agency is considering adopting a leniency programme.

8. Countries beginning anti-cartel enforcement

43. The **Chairman** noted that a few countries that provided submissions for the discussion had not previously been actively prosecuting cartels. It would be useful to hear from these countries as to issues facing them at this first stage, including their use of both direct and indirect evidence in their investigations.

44. **Croatia** has not yet completed a cartel case, though it currently has one investigation underway. It is difficult to acquire direct evidence in these cases, especially after the competition law has been in effect for a period of time, because businesses learn to conceal evidence of their wrongdoing. In an economy as small as Croatia's even circumstantial evidence may not exist, as it is easy for enterprises to monitor one another's conduct and to act in parallel fashion. In the current investigation the competition agency is studying various contract clauses employed by the parties for a pattern that may suggest collusion.

45. In **Zambia** cartels are prosecuted as crimes, and the higher burden of proof associated with criminal cases is proving difficult to satisfy for the Zambian competition agency. Zambia does not have a leniency programme in place, for example, and circumstantial evidence is usually not sufficient by itself. There is growing momentum in the country for changing the classification of this conduct to an administrative violation. Another constraint facing the agency is a lack of effective investigative skills. Zambia urges that there be more effective international co-operation in cartel matters. It is having some success in informal co-operation with its neighbouring developing countries. Zambia also finds useful the seminars on developing investigational skills sponsored by UNCTAD in its region twice each year.

46. **Jamaica's** written submission contained a candid assessment of the JFTC's current inactivity in cartel prosecution. The problems include inadequate investigative tools and inadequate sanctions, insufficient resources for the Commission and a lack of competition culture in the country. The submission noted that competition advocacy was an important tool in remedying these shortcomings. The Jamaican delegate agreed that specific cases can be useful in competition advocacy, and that it was

currently engaged in an investigation in the banking sector that might be appropriate for this purpose. The Commission may also focus on government procurement in another effort toward raising public consciousness about cartels.

47. The **Chairman** observed that several of the written submissions described cases involving collusion in the wholesale and retail petrol sector. It seems that cases in this sector are especially common across countries, and many of them are constructed with mostly circumstantial evidence. **Japan** described such a case in its submission, and the Chairman asked their delegation to discuss its use of circumstantial evidence in the case.

48. The Japanese case included the usual episodes of parallel pricing, but there were also two items of communication evidence that proved to be important. One was evidence of an “emergency” meeting of petrol retailers called by their trade association. It was clear that this was not a routine meeting of the association. Second, while records of the meeting did not describe the terms of an agreement, they did disclose that the members were instructed not to keep notes of the meeting in order to keep knowledge of it from the JFTC. This evidence, taken together with the economic evidence produced in the case, was sufficient for the JFTC to find that an agreement had been reached.

49. The **Chairman** invited the **European Commission** to comment further on point raised by BIAC regarding the Commission’s use of corporate statements submitted under its leniency programme.

50. The corporate statements themselves are not necessarily direct evidence, as that term is commonly used. They may be of two types: 1) a general story, which must be corroborated by evidence developed in traditional ways, and 2) a more detailed specific disclosure accompanied by strong evidence.

9. Open discussion

51. The **Chairman** declared that the floor was open for discussion.

52. Committee Chairman **Frederic Jenny** described two cases recently decided by the French Conseil de la Concurrence that involved issues of circumstantial evidence and agreement. The first was a petrol case, involving petrol stations on the French autoroutes. Each morning the several concessionaires along a route would exchange by telephone their current prices. This information was analysed by the individual networks, forming the basis for their prices the following day. The Conseil found that the conduct was an anticompetitive facilitating practice. The appeals court ruled, however, that while there had been an exchange of information, the evidence did not prove that the parties had reached an agreement. A second case was in fertilizer, in which the parties had adopted most favoured nation and meeting competition clauses, the result of which was a tendency not to reduce prices. Again, the decision was that an unlawful agreement had not been reached. These cases present the difficult question of what one means by an agreement under competition laws.

53. **Indonesia** described its experience in early cases prosecuted by the competition agency, in which it applied the rule of reason to cases in which there was circumstantial evidence. The agency had difficulty convincing the courts to accept its decisions in these cases. As time progressed the agency had more success in the courts, but the Indonesian delegate expressed interest in learning from other countries how they dealt with this issue of educating courts in competition analysis.

54. **Israel**, which prosecutes cartels criminally, finds it difficult to succeed in a case in which there is no direct evidence. The agency often finds, however, that circumstantial evidence, for example parallel pricing, provides a good basis for initiating an investigation, in the course of which direct evidence may later be developed. The Israeli delegate also responded to a comment that had been made earlier that countries new to anti-cartel enforcement may find it more necessary to build cases on circumstantial

evidence, because they have not yet developed effective tools for acquiring direct evidence. Israel's experience was the opposite, because there existed many "naïve cartels" – cartels in which the members are unaware that their conduct is unlawful and who do not conceal their activity – when these prosecutions first began. Later, cartel operators became more sophisticated, and acquiring direct evidence became more difficult.

55. **Australia** currently prosecutes cartels civilly, although a criminal regime is due to start soon. Even under the civil process, however, the competition agency's burden of proof is high – "quasi-criminal" – because the respondents are subject to very high fines. In this context the ACCC has encountered two problems in proving cases on the basis of circumstantial evidence. The first is the courts' receptivity to the "passive recipient defence," in which a party claims merely to have received in some way an invitation to raise price and then, without any affirmative response, merely does so. A second is the reluctance of courts to accept "inferential evidence." Such evidence might consist of, for example, a series of phone calls, perhaps hundreds, which correspond in time to parallel changes in price. Australian courts have required something more – that a particular communication be specifically linked to subsequent action by one or more parties. Both of these issues are under appeal in the Australian courts system, but a final resolution may be some time in the future.

56. The **United States** referred to the intervention by Frederic Jenny, in which he described cases involving facilitating practices but lacking evidence of a specific agreement among the parties. In the U.S. two lines of cases have developed, one involving traditional cartel agreements and a second involving only the facilitating practice itself. Perhaps the most famous facilitating practice case was the *Container* case in the 1960s, which involved an extensive pattern of price verification among manufacturers of cardboard containers. This conduct was held in a civil case to be unlawful in itself, without there having been an explicit agreement on prices. The beneficial effect of the decision was later revealed in a document obtained from an oil company, in which the *Container* case was cited as causing businesses in the oil industry to cease similar practices, the result of which, in the words of the document, was to make it easier for "disturbers in the marketplace to discount without a commitment to verify prices."

57. The delegate from **Italy** described a case from that country in which insurance companies had engaged in regular, detailed exchanges of pricing information. It was argued that transparency in prices can be procompetitive, which it can be, but it can also have anticompetitive effects. The Italian authorities considered the arguments on this issue and concluded in this case that the conduct was anticompetitive, and ordered that it be stopped. Contributing to their decision was the fact that prices in this sector in Italy were the highest in Europe. The Italian delegate provided another observation about evidence of this kind, which is that when it becomes necessary to fashion an effective remedial order against a cartel it is important to forbid these kinds of practices. One cannot merely forbid parallel pricing; one must prevent specific conduct which makes the parallel pricing possible.

58. The delegate from the **United Kingdom** expressed his agreement with the point made by the United States, that competition agencies should focus on cases in which there is direct evidence. Too much emphasis on circumstantial evidence could waste resources and could jeopardise long-run success in the fight against cartels. Having recently come from the private sector, the delegate noted that direct evidence of cartel conduct does exist; it is up to the investigators to find it. The delegate also expressed his disagreement with BIAC's position on corporate statements in European cases, saying that there is a place for such statements in these cases, especially when they are corroborated by other evidence.

59. The **United States** noted the importance of educating both the public and the courts about the nature of cartels and of the need to sanction them severely. In this regard, the quality of the cases initiated by the competition agency is important. A straightforward price fixing or market allocation case, proved by direct evidence, is the most effective for this purpose.

60. The delegate from **Finland** described that country's experience in its initial efforts against cartels. When its competition law was first enacted 50 years ago cartels were subject to criminal sanctions, but because such conduct was not generally thought of as a crime and because the standards of proof were high, there were few successful cases. In 1992 the law was changed to provide for an administrative process, and enforcement has become more vigorous. Criminalising the conduct might be more successful today. The lesson is that available sanctions and legal tool kits must be tailored to each country's situation, including whether there exists a strong competition culture. A second point regarding circumstantial evidence is that a case may resemble a jigsaw puzzle, in which the evidence must be considered as a whole. An important part of the puzzle can be evidence supplied by customers, or those affected by a cartel.

61. The **Chairman** asked **Chinese Taipei** about a case described in its presentation, in which it appeared to apply game theory in its evaluation of economic evidence.

62. The case was another in the petrol sector, in which there was a duopoly. The leading firm was a former state owned enterprise, with a 70% market share. The evidence was entirely circumstantial. It consisted of a pattern of simultaneous prices increases by the two sellers, many of them preceded by announcements in the newspapers. The parties also employed a facilitating practice – meeting competition clauses. The competition agency considered the evidence in a holistic fashion and concluded that it was sufficient to prove an agreement. It was acknowledged that the evidence was not particularly strong, however. The competition agency did not use game theory in the course of making its decision, but subsequently the case has been analysed using game theory in scholarly journals.

10. Conclusion

63. The **Chairman** thanked the delegates for their participation in this highly useful discussion. He noted that prosecuting cartels is becoming ever more difficult, as cartel operators react to the threat of increasing sanctions by being more secretive. In this environment, circumstantial evidence may become more important to the competition agency. It can help in differentiating between, on the one hand a mere facilitating practice, and on the other a full blown, hard core cartel agreement.