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Use of Economic Evidence in Cartel Cases – Summaries of contribution

- Session III -

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This document reproduces summaries of contributions submitted under Session III of the Global Forum on Competition to be held to be held on 7-8 December 2023.

More documentation related to this discussion can be found at: oe.cd/egci.

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Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on the Use of Economic Evidence in Cartel Cases (Global Forum on Competition to be held on 7-8 December 2023, Session III). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Armenia

See contribution: [https://one.oecd.org/document/DAF/COMP/GF/WD\(2023\)18/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2023)18/en/pdf)

Albania

ACA performs preliminary and in-depth investigations in cartel cases. Besides the prohibited agreements can be in the form of bid-rigging cases, and the ACA have the power to punish bid rigging. The undertaking engaging in bid-rigging's schemes are forbidden to participate in future bids for maximum of 3 years, by the Agency of Public Procurement.

Literature review and best cases from OECD especially in prosecution of cartels without direct evidence, the ACA assesses elements based on the OECD methodology "Prosecuting cartels without direct evidence" such as market structure in terms of stability of market shares over the years in the relevant market, high market concentration, high barriers to entry, high level of vertical integration and homogeneous products; and evidences of the undertakings' conduct in terms of high profits, equal selling prices and repeated conduct of competition infringement.

The data analysis includes gathering, administering, organizing, compiling statistics and indices, and reporting the results. When it is suspected that undertakings have some identical or approximated prices, we perform the analysis of the "parallel prices" where we compare prices for the same homogenies product and count the times undertaking1 and undertaking2 have determined the same price, and calculate the amount of turnover they gained with these prices. Then we compare the other competitor's price and quantity and conclude if the economic logic leads to price fixing, quantity fixing, market sharing, parallel pricing or bid rigging. Other calculations are performed in case of bid rigging especially when bids are very close to the highest level of limit fund.

During the hearing sessions exposing the data analysis and the use of economic data is very difficult to be understood by the parties under investigations in each case. Furthermore, during the court proceedings economist case handlers needs to be appointed to the team of defendant in order to clarify any questions from the judge. The Court itself has the power to appoint an outsourced economist expert in order to check the findings of the Competition Commission Decision and provide insights for the case. Absorbing the economic logistic during the court proceedings its an essential and curtail topic for ACA's lawyers to win the case.

Finding cartels with indirect evidences cases is very time consuming and difficult. It requires in-depth insights from all market operators as well as long-term data from the competitors. Special algorithmic models and IT software should be compiled to identify same pricing in price fixing cartels, and in bid rigging cases as well.

Georgia

The Georgian National Competition Agency actively uses economic analysis in cases of concerted practices (cartels). While economic analysis can be helpful in detecting a cartel agreement, it may not always be sufficient on its own. It is often necessary to supplement the decision with additional direct or indirect evidence. I would like to bring to your attention two significant cartel cases in 2023.

The case of five major motor fuel companies - The Georgian National Competition Agency launched investigation on the motor fuel market in 2022. After performing an economic analysis, we assessed the behavior of five major fuel-selling companies in the market and their concerted practices to keep high prices for consumers in the retail market.

During the investigation period, it was revealed that several companies failed to utilize their cost advantage in the face of cheaper imports, thereby avoiding competition with each other and other rival firms. As a result, instead of lowering the retail prices of their products, these companies maintained high-profit margins. Furthermore, some companies were selling fuel in wholesale from their own storage facilities at a significantly lower price than competitors, compared to what they charged in their own network. In order to provide more reliable evidence to the judges, additional research was conducted. During this period, telephone conversations between five companies were recorded, and it was found that the connections between them were very active. The case was completed in August 2023 and is currently awaiting trial.

The case of five major pharmaceutical companies - The Georgian National Competition Agency launched an investigation in April 2023 into five major pharmaceutical companies for offering identical prices in public procurement of oncology drugs. We have used economic analysis to gather evidence of cartel activity, based on probability theory and exclusion, it would be impossible for such a coincidence to occur naturally. Except for cases where companies did not know the acceptable and pre-offer price in advance, to make extra profit in the process of public procurement.

We have utilized the method of indirect evidence in addition to the economic analysis. This method involves examining the level of communication between the companies during the time the fact occurred. The case is anticipated to be completed by the end of 2023.

Kazakhstan

The Antimonopoly Authority of the Republic of Kazakhstan focuses on combating significant antimonopoly violations, including anti-competitive agreements and abuse of dominant positions. Recent changes in the administrative justice system require a more comprehensive set of circumstances for proving anticompetitive agreements. Economic evidence, such as the "but for" pricing methodology, is now crucial in establishing cartel cases. This evidence involves analyzing price and volume data, comparing prices of suspicious products, and considering expert opinions from economists to understand market dynamics and the extent of competition restrictions.

Korea

When detecting a cartel, priority should be given to detecting it through securing direct evidence, such as meetings or communication of companies suspected of the cartel. However, as companies' collusive activities are becoming covert, it is increasingly difficult to obtain direct evidence of cartel. For such reason, economic evidence is often used as circumstantial evidence for identifying collusion and the collusion effect on the market.

The basic idea of estimating the effects of collusion in cases is to compare a hypothetical competitive price (but-for price) that would have been formed were it not for collusion and a collusive price to determine (1) whether the collusive agreement is implemented or (2) the degree of anti-competitiveness. The most common method is a dummy variable approach that compares data from allegedly collusive periods, firms or markets and their non-collusive counterparts.

In the cartel analysis using time series data, including year dummy variables in calculating the cartel effect has a risk of failing to capture the cartel effects. In the KFTC's case of cartel among seven poultry companies (2021), the defendants estimated the collusion effects using time series data, including both collusion and year dummies. They argued that the coefficient of collusion dummy variable was not statistically significant. However, after careful examination, the KFTC proved that this analysis may underestimate the effects of collusion due to the multicollinearity problem between two dummy variables.

The economic analysis is mainly conducted to identify cartels' impact on prices, but it is also used in various contexts, such as defining a relevant market definition and determining whether the market outcome could be observed with the presence of competition. In particular, with the recent total amendment to the MRFTA (effective as of December 30, 2021), information exchange was included as a condition for presuming an explicit agreement. Accordingly, economic analysis on the anti-competitiveness of information exchange is expected to increase.

Kenya

In Kenya, the competition law is enforced by the Competition Authority of Kenya ('the Authority') which is mandated to promote and safeguard competition in the national economy and protect consumers from unfair and misleading market conduct.

The Authority uses a combination of software and statistical methods to detect and remedy cartel conduct. There has been a continuous digitalization of private businesses and public services resulting in increased availability of data in digital form which has contributed to making it harder to detect anticompetitive practices. Digital tools therefore support the gathering of digital evidence in cartel enforcement. Digital forensics, in particular, is now being used by the Authority for the copying and analysis of evidence found during inspections and to deal with very large amounts of data in an efficient manner. Additionally, the Authority uses both proactive and reactive methods to detect possible competition law infringements and subsequently launch investigations. In conducting its investigations, the Authority is guided by section 31 of the Act which provides for the process of investigation. It may upon receiving a complaint or on its own motion (*suo moto*), decide to conduct an investigation by issuing a Notice of Investigation to the accused party informing it that it is the subject of an investigation and the contents of the complaint or violation.

Evidence gathered can be classified as direct or circumstantial evidence. Evidence gathering by the Competition Authority of Kenya is guided by sections 31, 32, 33, and 89 of the Act. Section 31 provides powers to the Authority to investigate allegations of an anticompetitive nature on its own motion or upon receipt of a complaint. In order to increase its ability to detect the cartels that may be covertly existing in the market, the Authority has adopted the use of screenings, market inquiries, monitoring the markets, and inter-agency collaboration as useful tools to detect cartels and gather initial evidence on the existence of cartels. Additionally, section 9(m) of the Act provides that the Authority may liaise with regulatory bodies and other public bodies in all matters relating to competition and consumer welfare. Additionally, pursuant to section 13(2) of the Competition Act which provides that the Authority may engage consultants and experts to assist it in performing its functions and exercising its powers. The Authority also contracts forensic laboratory experts who assist in the extraction of information from mobile phones and laptops when a need arises. In its previous engagements of investigating cartel conducts in the cement, paints, and steel sectors, the Authority used digital tools and techniques to gather evidence.

This paper has explained the evidence-gathering process by the Authority as well as the challenges it encountered in the process of collecting evidence.

Mexico

Federal Economic Competition Commission (Cofece)

The Federal Economic Competition Commission (Cofece) has resorted to structural economic analysis to detect markets prone to collusion and to support existing direct evidence when launching ex officio cartel investigations. This contribution draws from past experiences in this regard and presents the work carried out by the Cartels and Markets Intelligence units, as well as the strategies Cofece has put in place to strengthen its capabilities to manage economic evidence and to successfully present it before competition courts. To conclude, it references standards that the case law has established for considering the admissibility of economic evidence to prove that a collusion has taken place.

Chinese Taipei

This report describes how the Chinese Taipei Fair Trade Commission (hereinafter referred to as the CTFTC) uses economic evidence in cases to infer the mutual understanding of concerted actions when handling cases of concerted actions and explains the implications of market competition through general economic viewpoints.

Most businesses will not leave direct evidence of concerted actions in order to avoid legal sanctions that might arise from their engaging in concerted actions. For this reason and in most countries, many competition authorities or courts accept “economic evidence” and prove the existence of a mutual understanding of concerted actions indirectly through reasoning. The CTFTC complies with the provision prescribed in Paragraph 3, Article 14 of the Fair Trade Act, “The mutual understanding of the concerted action may be inferred by considering factors, such as market condition, characteristics of the good or service, cost and profit, and economic rationality of business conducts.” The CTFTC will infer the mutual understanding of concerted actions by using economic evidence in the handling of concerted actions in related cases.

The CTFTC has already handled similar cases, such as the case of premixed concrete suppliers engaging in price fixing in 2019 and that where importing companies engaged in jointly raising dried scallop prices in 2022. The above-mentioned cases feature high product homogeneity and highly concentrated oligopolies in terms of market structure. The CTFTC noted the price-raising actions without economic reasoning and inferred that the engaging companies had reached a mutual understanding of concerted actions, based on the date of the price increase, quantity, equivalent magnitude, and the significant price increase against the cost structure, or relevant economic evidence indicating that the price increase was higher than past price increases.

In addition, the CTFTC ruled on 9 independent power plants (IPP) in 2013, where the plants had reached a mutual understanding and refused to adjust the rates for the power they sold to TaiPower Co., Ltd. At the core of the controversy was whether the 9 IPPs had signed a Power Purchase Agreement (PPA) in horizontal competition with Taipower. From an economic perspective, the experts and scholars commissioned by the CTFTC in this case believed that, if the IPPs signed a PPA with Taipower through bidding, they would convert the market competition from the ex post “competition in the market” to the ex ante “competition for the market,” which would mean that they were in horizontal competition with one another.

The CTFTC has accumulated data from a considerable number of cases in regard to law enforcement and court rulings and has used the economic evidence to infer the mutual understandings reached by businesses involving concerted actions. In the future, when handling related cases, the CTFTC will focus on the recognition of consistent behavioral patterns, market conditions and industry characteristics, the acquisition of evidence for information exchange, and indirect evidence other than the cost structure, in addition to intensely consolidating the economic analysis and legal applicability, and thereby reinforcing the discourse over concerted actions. The competition authority will increasingly rely on economic evidence in law enforcement.

Türkiye

Economic Analysis and Research Department (EARD) renders opinion, upon request, in inquiries/investigations conducted under the scope of article 4 of the Act no 4054 on the Protection of Competition, which regulates agreements and concerted practices between undertakings, for the purpose of supporting case teams in cartel cases as a complement to other types of evidence.

Economic evidence has become an important instrument in investigations since this sort of analysis used as a complement for legal assessment for cartels and similar agreements and concerted practices restricting competition. Economic methods that used to identify any collusive relationship between undertakings seek to answer the questions of whether undertakings' conducts comply with competitive behavior, whether there was a structural break in the undertakings' data generating processes within the investigated period, whether the conduct of the undertakings suspected of anti-competitive collusion is different from those of the competing undertakings in the market, and whether the outcomes observed in the market are more in line with a collusive model rather than a competitive one.

A typical opinion consists of economic and/or econometric analysis of the collusive behavior that is the subject of the cartel cases. Moreover, in some cases, depending on the findings obtained from the analysis of the case and the relevant data set, the Department also submits opinion using more than one assessment method. Economic evidence can be used to assess the existence of conduct which is indicated by legal evidence, and to show effects of collusion on consumer welfare. However, proving the existence of a cartel based solely on economic evidence can be a challenging task, as economic evidence is more prone to alternative interpretations than concrete evidence.

The results of the analysis are fundamentally based on statistical and econometrical tests that rely on the data set obtained specifically for the matter in hand from the parties of the investigation and the competitors in the sector. Analyses conducted with that goal in mind focus on price movements primarily. In addition to price movements, other variables including market shares, capacities, markups, costs and demand as well as their relationship with prices are taken into account in order to distinguish prices formed as a result of anti-competitive agreements between undertakings from competitive prices.

The TCA has used these tools in a number of investigations. In a case involving 32 insurance companies, statistical tests and variance analysis were employed to assess whether there was collusion in raising insurance premiums, ultimately finding no evidence of anti-competitive behavior. Similarly, an investigation in the wheat flour market utilized regression and moment analysis to detect potential price agreement periods. For the welding sector, graphical, statistical, and econometric analyses revealed that while prices moved closely together, the impact of collusion could not be observed since cost and exchange rate factors could explain those co-movements. In the fertilizer industry, the TCA examined price data for structural breaks and regression analyses but found no evidence of price agreements among the investigated undertakings. These cases demonstrate the importance of economic evidence and statistical analysis in cartel detection, helping competition authorities make informed decisions regarding anti-competitive behavior and potential penalties.

