

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

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session I: Digital Evidence Gathering in Cartel Investigations - Call for contributions

22-23 September 2020

This document is circulated in preparation of the discussion under Session I of the Latin American and Caribbean Forum that will take place on 22-23 September 2020 virtually (zoom meeting). Delegates are requested to submit their written contributions to the Secretariat by 31 August 2020 at the latest. Advance notice of your intention to submit contributions before or by 27 July 2020 would be appreciated.

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Session I: Digital Evidence Gathering in Cartel Investigations - Call for contributions

Introduction

1. This year's LACCF will feature a roundtable discussion on "Digital Evidence Gathering in Cartel Investigations". I am writing to you in order to provide you with some background information on the topic, and invite you to make a written submission to the Roundtable.

2. The discovery, investigation and prosecution of cartel conduct is a policy enforcement priority of many competition authorities, not only in OECD countries. According to the OECD CompStats Database and the [OECD Competition Trends 2020](#), authorities in 49 analysed countries took an average of around 10 cartel decisions each in 2018. According to [Connor](#) (2016), between 1990 and 2016, the sales affected by international cartels exceeded in nominal terms 50 trillion USD and over 100.000 companies were involved in cross-border price-fixing. This shows how relevant cartel enforcement is for competition authorities across the world.

3. The advent of digitalisation has radically changed the way governments operate in a number of areas, including the detection of crime and illicit conduct and the enforcement of the law. Competition law enforcement is no exception and digital tools can be used for detection, collection of evidence and to make the enforcement of competition law more effective. Whilst companies create, store and use digital information more and more in their daily activities, competition agencies around the world use digital tools more and more in their daily enforcement activities.

4. One of the areas where these developments are particularly noticeable is that of cartel enforcement, where digital intelligence and data screening tools, as well as tools for forensic imaging or for copying large amounts of data clearly proved their usefulness.

5. A great amount of attention has been devoted by academia and competition authorities to the digitalisation of business models and its implications for competition enforcement in terms of anticompetitive conduct and transactions and their analysis. Less attention has been devoted so far to the analysis of the opportunities and the challenges created by an increased use of digital tools in the enforcement activity.

6. This subject has been recently touched upon by the OECD in a [Global Forum on Competition](#) session on "[Investigative Powers in Practice: Unannounced Inspections in the Digital Age](#)" and in a Workshop on "[Cartel Screening in the Digital Era](#)" in 2018. It was also discussed in a roundtable on "[Ex-officio Cartel Investigation and the Use of Screens to Detect Cartels](#)" in 2014.

7. These sessions, however, did not have as their objective to analyse thoroughly the challenges faced by competition authorities in collecting evidence with digital instruments in cartel investigations. This roundtable will focus on this aspect as well as on the more practical considerations on evidence gathering in the digital era.

8. Many competition authorities have now for several years been taking steps to modernise their toolbox and ensure they can both keep pace with the changing ways to operate adopted by companies and exploit fully the opportunity arising from the adoption of digital tools in cartel enforcement. Further, in the context of the current Covid-19 pandemic, which limits the possibility to conduct unannounced inspections and on-site

interviews, tools that do not require physical presence and allow collection and analysis of evidence remotely, such as electronic submission of leniency/immunity applications, anonymous online whistleblowing systems or the conduct of interviews via video-conference tools may be more and more central to a successful investigation.

9. These adaptations may consist in the adoption of specific tools (e.g. forensic evidence gathering tools; incentives systems for reporting and whistleblowing; organisation of remote meetings) or in reorganisation of human resources, such as by hiring specialists, creating dedicated internal unit, setting up of collaboration with external experts (e.g. computer and data scientists) or delivering dedicated digital staff training. The roundtable will be an opportunity to discuss advantages and disadvantages of these solutions, and the experience of competition authorities in putting them into practice.

10. In addition, a number of challenges may arise in relation to the lawful collection of the evidence, the protection of the authenticity of the seized evidence, the availability of searchable data, the procedure to guarantee that confidential information is not unduly seized, the coordination within teams and with other competition authorities, and the allocation of resources. The roundtable will also explore these issues, identifying best practices that competition authorities can adopt when dealing with this delicate phase of the cartel procedure.

11. I would like to invite delegates to submit contributions on the subject of digital evidence gathering in cartel investigations. In order to assist you with the preparation of your contribution, I refer you to the Secretariat background paper which will be circulated in the next months, to the suggested bibliography included at the end of this letter, and to the more detailed list of questions included in the Annex. The list in the Annex is not exhaustive, and you are encouraged to raise and address other issues in your submissions and during the discussion.

12. The LACCF webpage (oe.cd/lacsf) will be the primary vehicle for conveying documentation and related links on this subject. Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on the site.

13. In order to ensure an effective preparation of the roundtable discussion, I would be grateful if you could advise the Secretariat by **Monday 27 July 2020** at the latest if you are planning to make a written contribution on the topic. Written submissions are due by **Monday 31 August 2020** and failure to meet this deadline may result in your contribution not being distributed in a timely fashion in advance of the meeting.

14. All communications regarding the documentation for this roundtable should be sent to Ms Angélique Servin (Angelique.SERVIN). Please address all substantive queries relating to this discussion should be sent to Ms Lynn Robertson (Lynn.ROBERTSON@oecd.org), Dr. Harry Hong (Harry.HONG@Oecd.Org) and Dr. Cristina Volpin (Cristina.VOLPIN@Oecd.Org).

Annex: Suggested Questions for Consideration in the Country Submissions

Roundtable on “Digital Evidence Gathering in Cartel Investigations”

1. Does your authority use any digital tools (based on big data, artificial intelligence or other tool) for evidence gathering in cartel investigations? If so, please provide details on:
 - a. the kind of tools used, including specifying whether they were developed in-house or acquired externally, its functioning and its specific function(s) (screen the market, identify the relevant data set, search the data, etc.);
 - b. why your authority decided to use that tool in that specific investigation;
 - c. the type of investigation in which the tools were applied;
 - d. the specific markets involved;
 - e. the outcome of the use of the tool, of the investigation and of the case;
 - f. the main challenges, if any, your authority has faced in the use of the tool, in the investigation and in the case and how these challenges may have eventually been overcome.
2. If your authority does not use any digital tools for evidence gathering in cartel investigations at the moment, does your authority intend or have any plans to start using any such tools in future cartel investigations? What parameters do you take into account in this choice (user-friendliness, effectiveness, costs, experience in other jurisdictions, deterrence effect, etc.)?
3. What kind of issues did your authority face in relation to the digital storage of information in cartel investigations? Did you face any difficulties (legal or IT related) in accessing servers or in relation with the volume of data to be analysed and copied?
4. Did your authority face any due process challenges, for example in relation to confidentiality and privacy of the data analysed or in connection with the private or business nature of the devices inspected when using digital evidence gathering tools?
5. How does your authority ensure that the rights of defence of the companies (e.g. protection of privileged information) are observed in digital evidence gathering in cartel investigations?
6. Does your authority have rules or guidelines on how to gather and process digital evidence? If so, what do the rules or guidelines provide?
7. Does your authority use specialised IT staff or other dedicated staff members during or after an announced inspection in cartel investigations?
8. Does your authority have a specialised unit or taskforce dealing with digital evidence gathering, or intend setting up one? What factors influenced the decision to create it? If your authority has such a specialised unit or taskforce:
 - a. What are its mandate, functions and internal composition?

- b. What are the profiles and backgrounds of the staff working in it?
 - c. What practical adjustments were required to set it up (acquisition of licenses, physical space, etc.)?
 - d. How do you ensure integration between the team leading the cartel investigation and the specialised unit team?
 - e. What challenges did you encounter in the setting up and running of the specialised unit?
 - f. Do you consider the budget investment worthwhile so far?
9. Has your authority ever co-operated with other national public agencies or with another competition authority for the retrieval, copying and analysis of digital evidence in a cartel investigation or for the creation of a specialised unit dealing with digital evidence gathering? If so, how did you organise the co-operation to ensure its effectiveness?
 10. What are the tools that you think are most effective to conduct cartel investigations during the Covid-19 pandemic?

Suggested Bibliography

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- ECN (2013), “ECN Recommendation on the Power to Collect Digital Evidence, including by Forensic Means”, https://ec.europa.eu/competition/ecn/ecn_recommendation_09122013_digital_evidence_en.pdf.
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- OECD (2020), “OECD Competition Trends”, <https://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf>.
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