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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Summary Record: ANNEX TO THE SUMMARY RECORD OF THE 123rd MEETING OF THE COMPETITION COMMITTEE HELD ON 15-19 JUNE 2015

Executive Summary of the Hearing on Competition Enforcement in Oligopolistic Markets

16-18 June 2015
Paris, France

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held under Item V of the 123rd meeting of the Competition Committee on 15-19 June 2015. More documents related to this discussion can be found at www.oecd.org/daf/competition/oligopoly-markets.htm.

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Executive Summary of the Hearing on Competition Enforcement in Oligopolistic Markets

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By the Secretariat[1]

Considering the discussion at the session, the delegations' written submissions, the expert panellists' presentations, as well as the Secretariat's issues paper, several points emerge:

1. Explicit collusive agreements are considered unlawful under competition law. Tacit collusion, typically not directly addressed by enforcement tools, may be equally harmful. The distinction between explicit and tacit collusion under the law, and whether competition enforcement should target tacit collusion, are subject to debate.

Oligopolies are pervasive across many sectors of the economy. In such markets there are relatively small numbers of firms who are interdependent and can each, to some degree, influence the market price. In recognition of these perceived interdependencies, profit-maximising firms in oligopoly markets will rationally take into account their rivals' behaviour and anticipated reactions when setting prices and other competitive variables. When there is repeated interaction over time, oligopolists may sustain supra-competitive prices to the detriment of consumer welfare and economic efficiency.

Cartel laws prohibit firms from explicitly agreeing to restrict competition. However, such an agreement may not be necessary, in principle, for firms to successfully co-ordinate their behaviour. Collusion may be sustained by a variety of arrangements, from a well-organised structure to minimal or no communication between the parties.

While there are legal instruments to tackle explicit collusion, delegates debated on whether specific tools would be needed to handle oligopolistic markets where evidence is missing and where firms may be tacitly colluding and engaging in parallel price increases. From an enforcement point of view, there is a risk that anti-competitive behaviour goes undetected and, conversely, that overreaching enforcement action has a chilling effect on competitive behaviour.

2. Cartel laws address explicit collusion when firms have entered an agreement. Some jurisdictions also have specific tools to address tacit collusion. However, these tools reflect different economic and legal environments and do not allow drawing general conclusions on their usefulness.

The legal notion of agreement or concerted practice is rather broad, at least in principle, and could potentially cover parallel conduct. In practice, proving co-ordination will require, among other factors, evidence of communication among the firms allegedly colluding. Some scholars have argued that the approach to agreements may be too formalistic and over-reliant on communication. One possible solution would be to broaden the definition of agreement, but the discussion at the session revealed the difficulties of making such an approach operational and doubts that it would be effective in telling apart anti-competitive practices from competitive behaviour.

A variety of other tools has been tested by competition authorities. Some jurisdictions recognise the concept of an abuse of 'collective' or 'joint' dominance. In principle, these provisions could be used to prohibit abusive conduct by a group of firms that helps them sustain a tacitly collusive outcome. There is a lack of consensus on whether, and in what circumstances, abuses of collective dominance should be pursued and enforcement action appears sparse.

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1 This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the session, the delegates' written submissions, the panellists' presentations and the Secretariat's issues paper.

In some jurisdictions, competition authorities can infer co-ordination among firms in the event of parallel price increases, under some conditions. This presumption of an agreement is meant to lower the burden of proof on the competition authority. Some of these experiences were discussed during the session. For instance, one competition authority can infer an agreement when there is reasonable probability that the firms have collaboratively engaged in prohibited concerted practices. This assessment takes account of matters such as the characteristics of goods or services, the effect of the relevant practices, and the frequency and form of contact among firms.

Alternative approaches include legislation targeting a specific facilitating practice, such as the disclosure of price information to competitors, or targeting a concentrated market structure. The discussion revealed that competition advocacy also plays a role in oligopolistic markets, where regulation may, for instance, restrict the number of competitors or affect their incentives.

3. Market studies help to analyse competition in oligopolistic markets. They can provide useful insights or evidence for follow-on investigations. In a limited number of jurisdictions, authorities have the power to carry out market investigations and to impose remedies, if they identify adverse effects on competition. Market studies are useful complementary instruments and they do not substitute competition law enforcement.

Competition authorities conduct market studies when there are concerns that a market or a sector may not work well, for a variety of reasons including market structure, firm behaviour or information failure. Market studies can be useful to examine oligopolistic markets, including concerns of tacit collusion. One of the theories of harm that competition authorities can pursue is that of co-ordinated conduct by firms.

By analysing data and other information such as the applicable regulation, competition authorities can look holistically at a market or a sector. Market studies in oligopolistic markets often identify competition problems. The discussion revealed some examples in which this was the case and the understanding gained during the market study was used in follow-on investigations. Market studies can also deliver arguments which can be used in a broader policy discussion, for example within the legislative process. However, a study may also dismiss competition concerns and may therefore ‘clear the air’.

In a small number of jurisdictions competition authorities can perform market investigations. These are more detailed examinations into whether there is an adverse effect on competition in a sector or a market. Following a market investigation, the authority can impose structural or behavioural remedies. There are some arguments that the use of studies and investigations should be limited to situations where there is evidence of anti-competitive conduct, and not as a tool to generically analyse markets.

4. Merger control provides a potential ex-ante solution to the risk of tacit collusion. Competition authorities can remedy or prohibit mergers that would make markets more conducive to co-ordination. However, few mergers are challenged on the basis of co-ordinated effects theories of harm, at least in some jurisdictions.

Mergers can increase the incentives for co-ordinated behaviour and have a significant impact on prices and consumer welfare. Merger control provides a pre-emptive instrument to tackle tacit co-ordination in oligopolistic markets. There are a number of reasons why agencies may prefer to rely on merger control as the main tool for targeting tacit collusion. For instance, it may be easier, less disruptive and more effective to intervene on a proposed merger than to remedy tacit collusion through structural remedies ex post. In addition, addressing tacit collusion under merger control is less likely to lead to harmful chilling effects on business conduct.

However, merger control will not solve all competition problems in oligopolies. For instance, firms may tacitly collude even in the absence of a merger and not all mergers may be reviewable under a jurisdiction’s law. Moreover, co-ordinated effects can be difficult to prove to the necessary standard.

The analysis of co-ordinated effects in mergers generally involves two steps: (i) an assessment of whether the relevant markets affected by the merger are conducive to co-ordination; and (ii) an assessment of whether the merger would make such co-ordination more likely. The factors used to evaluate if a market is conducive to co-ordination include market concentration, product homogeneity, market transparency and a history of co-ordination. These factors can sometimes give mixed results and are difficult to weigh. Assessing the effect of the merger on co-ordination builds on the same factors. For instance, co-ordination may be easier in a market with fewer firms. When a merger involves a 'maverick' firm disrupting co-ordination, for example because it faces different economic incentives, the result may be to increase the likelihood of co-ordination.

Quantitative tools are less frequently used in these merger cases than in unilateral effects mergers. Merger simulation techniques can be used to compare the payoffs from co-operation and defection, before and after the merger. They measure the scale of potential incentive to co-operate, but do not prove that firms would indeed co-operate. It has been argued that models and quantitative evidence used to predict co-ordinated effects in mergers are not more complex than those used in the analysis of unilateral effects, nor are they more demanding in terms of data requirements. However, in co-ordinated effects cases, merger simulations can only quantify incentives for collusion in the market and do not give clear indications on the extent of price increases expected after the merger.

The discussion highlighted that quantitative modelling should be used as a complement to other analysis, as is the case in unilateral effects cases. For instance, competition authorities could rely on documents that are created in the ordinary course of business, indicating that firms are trying to co-ordinate. Competition authorities should develop a coherent theory of harm supported by evidence, and not necessarily complex models.