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Data Screening Tools for Competition Investigations – Note by BIAC

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This document reproduces a written contribution from BIAC submitted for Item 3 of the 136th OECD Working Party 3 meeting on 28 November 2022.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/data-screening-tools-for-competition-investigations.htm

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BIAC

1. Introduction

1. *Business at OECD* (BIAC) welcomes the opportunity to provide its views to the OECD Competition Committee WP3 for the roundtable on data screening tools in competition investigations. Indeed, the use of empirical methods to analyze economic data, such as price developments, bidding patterns and market share fluctuations to detect suspicious instances of cartel behavior or other anticompetitive conduct has over the past few years gained significant practical importance.

2. Despite its reservations that are further set out in these comments, BIAC is of the opinion that the prudent use of screening mechanisms may not only bring direct benefits in the form of more effective cartel enforcement but may also lead to indirect benefits, such as enhanced compliance. At the same time, however, the price screens which reflect parallel behavior should not automatically be equated with anticompetitive conduct, even when those tools reflect direct interaction with competitor pricing activity, as “price follower” strategies, decisions not to bid, and intentionally high bids, absent express agreement among the parties, all may constitute legitimate forms of long-run competitive behavior.

3. BIAC notes that the methodology underlying a variety of the structural screening methods is subject to criticism. The thrust of this critique is that the methodologies applied may not reliably indicate the presence of cartel or otherwise anticompetitive behavior and may give rise to both false positives and negatives. In this respect, BIAC is particularly concerned that pro-active detection techniques may give rise to false positives, which in turn may inflict significant cost on enforcers and businesses without benefit. At the extreme end of the spectrum, there is also a risk that the use of screens may result in disproportionate and excessively wide-ranging ex officio investigations.

4. Proactive enforcement tools, including a careful and informed use of economic methodologies such as tailored detection screens, may in some specific cases be efficient and may even be desirable, provided adequate procedural safeguards for the companies under scrutiny are in place. Accordingly, in BIAC’s view, the proper question should not only be which techniques and approaches are best suited to detect anticompetitive conduct in specific settings, but also which procedural safeguards should be put in place to ensure that the voice of companies under investigation are taken into account in a timely and appropriate manner.

2. The Increased Use of Cartel Screens: General Observations

5. The Secretariat’s Background Paper notes that “[c]artel activity combined with the decline in the number of leniency applications means that more and better proactive enforcement through ex officio investigations is necessary, both to uncover new cases as well as to boost leniency programmes by creating a credible threat of discovery of cartels. Cartel screens are an important complement to leniency programmes.”¹ BIAC appreciates that there is a trend of declining leniency applications but notes that there is currently insufficient information to positively conclude that cartel screens can compensate for the

¹ OECD, *Data Screening Tools for Competition Investigations—Background Note*, at 10 (2022), www.oecd.org/daf/competition/data-screening-tools-in-competition-investigations-2022.pdf.

lower number of leniency applications. In BIAC's view, it seems more productive to treat the topics as separate and to (i) consider whether, and, if so, under which conditions, data screening tools may help uncover anticompetitive conduct, while (ii) also reflecting on the question why the number of leniency applications is declining, which (dis)incentives exists to apply for leniency, and how leniency regimes can be made more effective. The analysis should also consider the extent to which increased cartel penalties, civil damage regimes, and agency advocacy efforts to engender compliance have had the desired deterrent effect – i.e., it should not be discounted that the massive effort made thus far by competition agencies may actually have worked to some extent.

6. In fact, BIAC is concerned that competition authorities that decide to spend significant resources on the development of empirical screens may vest an excessive degree of trust in such instruments and divert valuable resources away from more cost-effective enforcement and deterrence tools, particularly, at this point, away from improving leniency regimes and efforts aimed at preventative measures such as the effective use of compliance programs by business.

7. BIAC notes the increased attention in academic literature on digital screening methods complements the review on the topic of screens that the OECD Competition Division has conducted.² BIAC welcomes advances that are likely to result in lower risks of false negative or false positive findings. In this respect, BIAC notes the Secretariat's observation that structural screens—as opposed to behavioral screens—more readily give rise to false positive findings of illegal conduct.³ Similarly, while analyzing actual market behavior seems in many cases more appropriate, behavioral screens may also result in false findings of illegal conduct as they do not capture the circumstances that explain the suspicious conduct.⁴ Accordingly, BIAC agrees with the observation that “[s]creening results must therefore be carefully analysed to avoid jumping to conclusions, and distinguish cases of, for example, tacit collusion or exogenous shocks that may explain price changes.”⁵

8. It appears that data screen tools are mainly applied to price or bidding data. By their nature, the resulting analyses concentrate on price-related conduct. However, given the increasingly complex nature of competitive parameters, BIAC notes that there is a theoretical risk that agencies focus on the small subset of competitive issues for which data may be available. Moreover, evaluating certain events in isolation may fail to consider long-run competitive conditions and strategies. Taken in isolation, an action that in the short run may be irrational might, in the long run, be eminently sensible given the dynamics and game theoretics of a particular market. Thus, the screens may identify a necessary, but insufficient, condition for the ultimate analysis of competitive behavior.

9. Nonetheless, BIAC appreciates agencies' efforts to continuously evaluate and improve screening methods and believes that such a process should be a key condition for any use of screening method. Obviously, adequate safeguards should be put in place to

² In this respect, BIAC refers to one helpful paper that the Background Paper did not mention explicitly, i.e., Korbinian von Blanckenburg, Alexander Geist & Konstantin A. Kholodilin, *The Influence of Collusion on Price Changes: New Evidence from Major Cartel Cases*, 13 *Ger. Econ. Rev.* 245 (2012), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-0475.2011.00558.x>.

³ OECD, *supra* note 1, at 15.

⁴ *Id.*

⁵ *Id.*

ensure that the evaluation of the use of screening methods is objective and meets internationally accepted scientific norms.

10. To minimize screening error risks, BIAAC is of the view that the use of multiple screens—or a combination of screens—is advisable, whereby the outcomes of the individual screening tests should point in the same direction and should be carefully analyzed before the agency at issue decides on further enforcement steps.

11. While BIAAC is not as a matter of principle opposed to the results of data screens to function as a basis for opening a further investigation—as appears to have occurred in the See-Gaster road construction cartel in Switzerland and the procurement of fire protection in Brazil⁶—it emphasizes that the results of screening tests can never be decisive in and of themselves and should always be complemented by “actual and hard” evidence that meets the requisite standard of proof.⁷

12. BIAAC emphasizes that to the extent data screening results support an adverse final decision of an agency, the affected parties have a right to access the screen’s methodology and data treatment methods to properly defend themselves. The corollary of this principle is that, if parties do not have appropriate opportunities to present their own arguments on the process and interpretation of screening results before an adverse decision is taken, the resulting decision may violate the parties’ rights of defense and may result in the annulment of the decision.⁸

3. The Value of Screening and Conditions for Effective Screens: Data and Staff Requirements

13. Data screening should only be applied in settings where anti-competitive conduct is *prima facie* likely to occur. For example, the use of data screens that are aimed at identifying cartel-related conduct may be inappropriate in fast-moving markets where innovation is important or where market positions change rapidly.

14. BIAAC agrees that bid-rigging is the area where screens could potentially be most effective. Tenders are usually organized in controlled environments with clear rules, which facilitate understanding the nature of competition and of any possible collusive behavior. Moreover, the transparency of bidding processes often generate clean and usable data. Therefore, screens can be relatively easy to apply due to the data availability and to the relative simplicity of the underlying collusive theory. Screens can be based on improbable patterns generated by the collusive behavior and bids should be independent once public information is controlled for.

15. Adequate and effective data screening not only requires sufficiently complete and sufficiently detailed datasets, but also agency personnel with specialized knowledge, skills, and experience to gather, clean and analyze the data. BIAAC supports agencies that invest in these skills but also believes that agencies should consider internal safeguards and quality

⁶ *Id.*, Box 8.

⁷ *Id.*, § 4.2.

⁸ See, e.g., Case C-265/17P, *Comm’n v. United Parcel Service, Inc.* (Jan. 16, 2019), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62017CJ0265> (in the European merger context); and Case T-286/09 *RENV, Intel Corp. v Comm’* (Jan. 26, 2022), [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009TJ0286\(01\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009TJ0286(01)) (in the context of unilateral conduct).

mechanisms to ensure that their data screening initiatives are robust, in line with the latest scientific insights, and do not operate in a vacuum.

16. Finally, BIAC encourages agencies to conduct rigorous cost/benefit analyses to ensure that data requirements imposed on companies are not unreasonably high compared to the probabilistic nature of the exercise (taking into account machine learning and levels of digitization).

4. Digital Screening by Private Companies

17. BIAC notes the increasing interest in digital screening as part of compliance programs to identify potentially objectionable conduct in the private sector. In some instances, there may be potential gains to be had in the form of superior insights into market conduct and first-mover advantages, for example in the context of leniency applications.

18. However, private screening may not be possible or appropriate for all companies. For example, adequate screening requires sufficiently large datasets, which may only be available in certain industrial sectors, such as fast-moving consumer goods. Private companies may also take the position that data screening may not be opportune in light of already existing compliance programs.

19. BIAC believes that competition enforcement agencies would be ill-advised to impose private data screening as part of companies' compliance efforts without a proper legal basis.⁹

5. Conclusions

20. BIAC notes an increased interest in the use of data screens, possibly due to the digitization of many businesses. While data screening should not be considered as a means to compensate for the declining number of leniency applications, data screening may in specific circumstances be helpful to uncover suspicious behavior and even be a basis for agencies to take further investigative or enforcement action.

21. However, the use of data screening tools by agencies calls for rigorous quality standards and respect for due process. Companies under investigation should be given a timely and adequate opportunity to access the used screening methodology and data treatment methods to properly defend themselves.

22. Mandating the use of internal screening methods by companies, however, would not be appropriate.

⁹ In Europe, the Digital Markets Act (DMA) imposes significant obligations on “gatekeeper” firms to gather transaction data.