



Organisation for Economic Co-operation and Development

DAF/COMP/M(2017)2/ANN1/FINAL

Unclassified

English - Or. English

27 September 2018

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

Executive Summary of the Roundtable on Safe Harbours and Legal Presumptions in Competition Law

**Annex to the Summary Record of the 128th Meeting of the Competition Committee held on
5-6 December 2017**

5 December 2017

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held under Item 4 of the 128th Meeting of the Competition Committee on 5 December 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

Please contact Mr. Pedro Caro de Sousa if you have any questions regarding this document
[phone number: +(33-1) 85 55 64 49 -- E-mail address: pedro.carodesousa@oecd.org]

JT03436234

Executive Summary

By the Secretariat¹

Considering the discussion at the roundtable held by the Competition Committee on 5 December 2017, the delegates' submissions, the panellists' presentations and the Secretariat's background paper, several points emerged:

1. Competition regimes face challenges with ensuring at the same time that enforcement decisions are correct and that the mechanisms to arrive at such correct decisions are not too costly. Presumptions and safe harbours play a valuable role in balancing these two goals.

Competition regimes must find a balance between the accuracy derived from detailed economic analysis and the legal and business certainty that clear rules can provide. There is a theory that provides a framework for striking such a balance – decision theory. This theory identifies a number of costs that a legal system should seek to minimise: namely, error costs and enforcement costs. This theory also identifies two types of rules that minimise each type of costs. Bright line rules - which set out clearly whether certain behaviours are prohibited or allowed – minimise enforcement costs but can incur significant error costs; standards – which are vaguer than rules, and usually set out a normative benchmark which is harder to measure, such as consumer welfare - require detailed analysis that minimises error costs but increases enforcement costs.

Competition systems have moved from formalistic, bright-line rules towards standards of proof requiring a detailed economic analysis. This has led to a reduction of error costs, and particularly of false positives. However, a question raised by increased reliance on complex economic analysis is whether there is a point of diminishing returns – a point at which incurring additional enforcement costs no longer outweighs the benefit inherent to reducing error costs. There may be a point at which the adoption of structured approaches, and reliance on presumptions and burdens of proof, may be necessary to the effective enforcement of competition law.

2. Competition regimes deploy a number of presumptions and safe harbours that seek to ensure that competition law is administrable. Presumptions and safe harbours facilitate compliance with the law and make enforcement more predictable and efficient.

Presumptions may have a number of sources (legislation, guidelines or case law), types (procedural, factual or legal) and weight (conclusive and rebuttable). Presumptions – and their strength - reflect inferences made by legal systems concerning the likely effect, and adequate treatment, of specific facts in the context of competition proceedings. In doing this, they make it unnecessary to pursue detailed economic analyses in certain circumstances, leading to a reduction in enforcement costs while also minimising the risk of error.

¹ This executive summary does not necessarily represent the consensus view of the Competition Committee. It encapsulates key points from the discussion at the roundtable, the delegates' written submissions, the panellists' presentations and the Secretariat's background paper.

For this same reason, competition law also relies on safe harbours. Safe harbours are mechanisms that make it harder to establish liability for certain business practices. While safe harbours may lead to mistaken acquittals of anticompetitive practices, it is generally assumed that such acquittals are less costly than mistaken condemnations of pro-competitive business practices. To minimise the possibility of error, in many cases safe harbours may be overruled by detailed market analyses in the context of individual cases.

3. While there are different types of legal presumptions around the world, but they are underpinned by the same justifications – past experience, economic theory, proof proximity, and ensuring the administrability of competition law. In recent years, presumptions have changed to reflect economic insights and the increase in experience by competition enforcers.

Presumptions are underpinned by a number of justifications: past experience; economic theory; proof proximity; and ease of enforcement. However, it is consensual that ease of enforcement by itself does not suffice to justify the adoption of a presumption.

Many jurisdictions have stopped relying on presumptions of illegality and replaced them with detailed economic analysis. This reflects a view that presumptions are practical instruments that seek to arrive at correct outcomes. In many situations such an outcome requires an analysis of the specific effects of corporate conduct. However, some presumptions are very hard to rebut in practice, which may lead to unnecessary errors. To achieve an adequate balance between enforcement and error costs, it may be appropriate to adopt presumptions while ensuring that they can be rebutted by evidence that a conduct is not anticompetitive.

4. Despite being supported by similar justifications, the design of legal presumptions and safe harbours reflects differences between enforcement systems

The deployment of presumptions may be affected by the review mechanism to which competition investigations are subject. For example, an administrative decision will typically be subject to judicial review – which means that the authority is likely to be under much greater constraints regarding false positives (which will be subject to judicial control) than as regards false negatives (which will only be subject to social or political control). This means that the focus of enforcement efforts is not on minimising cost error, but on minimising the costs of false positives. In such circumstances, the standard of proof is linked to the standard of review – and the optimal rule for adopting presumptions and safe harbours is one in which marginal cost of additional information is the same as the increased likelihood of a decision being overturned in court.

As a result, the intensity of judicial review affects the design of presumptions and safe harbours. Furthermore, the optimal rule may be different in systems where the infringement decision is adopted by courts. Consequently, even if the likelihood of errors and the costs of investigations were similar across jurisdictions, the design of legal rules – including presumptions and safe harbours – will vary with the intensity of judicial review and the outline of the enforcement regime. In practice, legal presumptions of liability and safe harbours must also reflect differences in enforcement ability across jurisdictions, and the amount of likely enforcement and error costs. This leads to different jurisdictions adopting different legal presumptions and safe harbours, even as they build on the same set of justifications.

5. Presumptions and safe harbours can have practical implications beyond facilitating or making it more difficult to prove that a practice is anticompetitive. They may also be relevant to the identification of enforcement priorities, to the

structuring of investigations, and to ensure that judicial proceedings remain manageable.

A decision to investigate certain business conducts reflects certain priors about the likelihood of a conduct being pro- or anti-competitive. A number of jurisdictions explained that legal presumptions were important to how they identified which cases to investigate, and are thus relevant to the setting of enforcement priorities.

Furthermore, information is gathered sequentially during an investigation. What and how much information is gathered is connected to the legal presumptions and safe harbours that the investigating body will have to deal with to prove that an infringement took place. A number of jurisdictions emphasised that they try to sequence their investigation so as to obtain relevant and decisive information upfront, and that presumptions and safe harbours can be used to ensure that parties provide competition agencies with all relevant information at an early stage.

Lastly, presumptions and safe harbours may be necessary to ensure that judicial proceedings concerning competition law remain manageable.

6. Jurisdictions around the world have extensive experience in the application of presumptions and safe harbours. A typical distinction in practice is between presumptions and safe harbours deployed for the purposes of antitrust enforcement and in the context of merger control.

Presumptions are often deployed in the context of antitrust enforcement – both to prioritise enforcement and in the context of enforcement actions. Examples of presumptions discussed during the session include the presumption of innocence; presumptions of anticompetitive effect of hard-core cartels and some types of exchange of information; presumptions arising from market shares thresholds, which are used both to help identify dominance and to identify situations falling within safe harbours; and presumptions of parental liability. Safe harbours discussed during the session included the single economic entity doctrine in the context of collusive practices; *per se* rules of legality; and block exemptions from antitrust scrutiny that apply to certain practices or economic sectors.

Merger control also relies on presumptions and safe harbours when assessing the impact of a transaction on the structure of the market, or when deciding whether to subject a merger to simplified review. Such presumptions and safe harbours are usually outlined in guidelines issued by the competition authority. The strength of these presumptions and safe harbours vary. Further investigation is often not ruled out for mergers that fall within the safe harbours provided in the relevant guidelines. Instead, it is commonly held that firm size and market concentration provide only the starting point for a broad-based competition inquiry regarding whether a merger should be prohibited