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Summary of Discussion 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 document prepared by the OECD Secretariat is a detailed summary of the discussion held during 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

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Summary of Discussion

By the Secretariat

1. Introduction

The **Chair** opened the session and identified the objective of the roundtable: to discuss the role of rules and presumptions in competition law enforcement. The challenge is to find a balance between the accuracy derived from detailed economic analysis, and the legal and business certainty that clear rules can provide. The Chair then identified two paradigmatic types of rules that reflect this tension: bright line rules and standards. The Chair further pointed to a theory that provides a framework for choosing between different types of rules – decision theory. This theory identifies a number of costs that a legal system should seek to minimise: namely, error costs and enforcement costs. Bright line rules minimise enforcement costs but can incur significant error costs; standards require detailed analysis that minimises error costs but increase enforcement costs. In practice, jurisdictions adopt a number of legal mechanisms between these extremes in order to minimise overall costs.

Before starting the discussion, the Chair explained that the discussion would be organised around four themes: (1) decision theory and rule design; (2) types of presumptions and safe harbours; (3) their sources and rationale; and (4) their practical applications.

2. Decision Theory and Rule Design

The Chair introduced the speakers: Andrew Gavil, Professor of Law at Howard University (United States), David Bailey, Visiting Professor at King's College London (United Kingdom) and Damien Neven, Professor of International Economics at the Graduate Institute in Geneva (Switzerland).

He then called on the Secretariat to set the stage. The **Secretariat** made a brief presentation outlining the background paper and identifying the main challenges faced by jurisdictions around the world when setting up effective competition enforcement rules.

The Chair thanked the Secretariat and asked **Andrew Gavil** to make his presentation. Prof. Gavil explained how competition systems have increasingly engaged in economic analysis, and departed from previous systems based on formal rules which were found to be over-deterrent. Increased economic analysis reduces error costs, particularly false positives. But he then asked whether there is a point of diminishing returns – a point at which the costs arising from asking for additional information outweigh the benefits from reductions in error costs. He then described how structured analyses may reflect this, by reducing the impact and costs of economic analysis. In light of this, and given the costs of enforcement (information, analysis, and reasonable disagreements), a better approach than seeking to minimise error costs as much as possible may be to adopt probabilistic decision-making regarding the potential impact of certain business conducts. In this, the use of presumptions and burdens of proof are crucial – as are the relative force of these presumptions. Prof. Gavil also distinguished between presumptions of innocence and of

anticompetitive conduct, and explained how this difference may justify adopting different rules on evidence and on the burden of proof and persuasion.

3. Types of Legal Presumptions and Safe Harbours

At this point the **Chair** moved to a discussion of the various types of legal rules and presumptions in competition law, and asked David Bailey to present on the topic.

David Bailey explained that presumptions are inferences that may have a number of different sources (legislation, guidelines or case law), types (procedural, factual or legal) and weight (conclusive or rebuttable). The adoption of presumptions is traditionally underpinned by three main justifications: past experience; economic theory; and ease of enforcement. As regards this last justification, David Bailey emphasised that ease of administration does not suffice to justify the adoption of a presumption. Presumptions evolve over time. They will likely extend to new scenarios; they will have to be updated – as has been the case with market shares and the strength of the presumptions they give rise to; and there will be new presumptions. Finally, David Bailey emphasised that it is important that presumptions be rebuttable in both theory and in practice.

At this point the **Chair** called on **Lithuania**, whose contribution listed many types of presumptions. Lithuania explained how it has stopped relying on presumptions concerning monopolistic practices, because it believes that presumptions are practical instruments to assist the authority in identifying anticompetitive conduct, and not to make the punishment of large companies easier. The **Chair** asked whether an unused presumption is actually detrimental; **Lithuania** answered that unused presumptions may complicate public communication of an agency's activities and the types of pressure the agency may find itself subject to.

Korea then described a number of its presumptions. In particular, according to the country's competition act, dominance is presumed in the following cases: 1) the market share of one undertaking is 50% or greater; or 2) the total market share of two or three undertakings is 75% or more (excluding those undertakings whose market share is less than 10% of the total market). These presumptions do not apply to undertakings with a turnover less than 4 billion won. Korea also discussed a case where three different companies were perceived to be a single economic entity by the agency. However, the courts found that this perception was incorrect, and hence that the finding of dominance was incorrect. Korea then explained that presumptions of dominance may be theoretically rebutted if the right economic evidence is in place – but that this has never occurred in practice.

The **Chair** at this point asked **David Bailey** about the role that competition authorities should play as regards presumptions. David Bailey explained that authorities may play a role in the development of presumptions, but that courts also have an extremely important role to play. Because of this, it is important that judges take care to familiarise themselves with the origin and rationale of a presumption in order to assess whether and how it should be deployed.

Mexico explained how it uses market shares and concentration indexes to set up safe harbours. For instance, there are specific rules applicable to the mergers in the telecommunications and broadcasting sectors. A merger is not considered likely to lessen competition when the Herfindahl-Hirschman Index (HHI) or changes in the HHI following the merger (ΔHH) satisfy a set of conditions: (1) HHI $\leq$ 2,000 points; (2) 2,000

< HHI ≤ 3,000 and ΔHH ≤ 150 points; or (3) HI > 3,000 and ΔHH≤ 100 points. Even when one of these conditions is met, the ITF can still conduct an in-depth investigation into a merger, e.g. when the acquired company is a maverick. Mexico then described how safe harbours are used across all sectors, e.g. to exempt parties from a duty to notify a merger. It also explained how a safe harbour for mergers in the telecommunications sector has proved unsuitable to prevent undesirable concentration in the market.

At this point **Argentina** asked to intervene to share its experience with politicians, particularly as regards a recent debate about the inclusion of a legal presumption for dominance in the competition law. Some congressmen proposed to include a 40% presumption for dominance when the draft competition law was being discussed in Parliament. This presumption ultimately did not find its way into the law, partially as a result of pressure from the competition agency. Argentina commented that it is difficult to explain the risks of false positives to politicians.

Latvia then spoke on the presumptions of liability contained in its law. These are mainly judicial presumptions, and also extend to follow on claims for damages. They have the objective of increasing the deterrence effect of competition law, and have been broadly successful. A good example of this is how the presumption of parental liability has proved useful in limiting manoeuvres by infringing companies to avoid paying a fine.

David Bailey emphasised that the parental liability presumptions are rebuttable in Europe, but hard to defeat in practice. Clear guidance on how to rebut this presumption should be given – as was the case of the presumption that participants in a meeting where cartel matters were discussed are parties to the cartel.

Turkey then described how its law distinguishes between conclusive substantive presumptions (regarding cartels), and evidentiary presumptions which go to the burden of proof.

Belgium focused on its merger safe harbours. It explained how they have forced the Belgian authority to rely on provisions on the abuse of dominance to try to control mergers falling outside its control. In particular, according to merger control rules in the Belgian Competition Act, concentrations cannot be blocked by the competition authority when the undertakings concerned control no more than 25% on any relevant market (horizontal or vertical). However, the Belgian competition authority may pursue a non-notifiable transaction under abuse of dominance rules, if it can establish an abuse separate from the mere concentration.

BIAC then emphasised the importance of presumptions and rules for competition enforcement. However, there is a dimension of due process that must also be taken into account. There is a serious risk of false positives arising from presumptions of illegality; safe harbours may also have error risks, but these are likely to be smaller. As such, it is crucial that effective judicial review not be prevented by reliance on legal presumptions.

4. The Sources of Legal Presumptions and Safe Harbours

Next, the **Chair** moved the discussion on to the sources of presumptions and safe harbours.

Damien Neven presented on the economics of legal presumptions in competition law. He described presumption in Bayesian terms, as propositions that something is likely to be true, if another fact arises. He then argued that presumptions should be different

depending on the enforcement system; and that beyond optimal enforcement one should consider deterrence effects as well.

At this point, he developed a framework based on the idea that an agency is an entity which is adopting information sequentially and that has certain priors about the likelihood of a conduct being pro- or anti-competitive – this is quite useful for thinking about how investigations should be pursued, or merger control reviews should proceed. The reason for a competition agency to pursue a detailed investigation is because its decision will be subject to judicial review – which means that the authority is likely to under much greater constraints regarding false positives (which will be subject to judicial review) than as regards false negatives (which will only be subject to social or political control). This means that the focus of competition agencies is not on minimising cost errors *tout court*, but on minimising the costs of false positives. This means that the standard of proof is linked to the standard of review – and that the optimal rule is that the marginal cost of additional information is the same as the increased likelihood of a decision being overturned in court. Legal presumptions must reflect this in practice.

The **Chair** then turned to the delegations to ask how countries faced challenges to come up with rules and legal presumptions that assist in the enforcement of their competition law.

The **European Union** identified a number of *rationales* for legal presumptions: experience, prior empirical evidence, effectiveness, and proof proximity. The EU emphasised that presumptions may be particularly important to competition law enforcement given the secrecy of some anticompetitive conducts and how fact-intensive competition law investigations can be. This is also related to the time-dimension of competition law, which requires quick intervention to alleviate the effects of anticompetitive conduct in the market and to provide legal certainty to companies. Presumptions also make it possible to pursue more cases than otherwise would be possible.

Romania described how it made use of a consumer survey in order to develop a presumption of market definition for retail trade. Based on the results of the survey, the Romanian Competition Authority will consider the following markets: (1) if the target is a proximity store (under 400 m^2), the market definition will include proximity stores within a 10-minute walk and larger stores (over 400 m^2) within a 10-minute drive around the target; (2) if the target is a large store, the market definition will include any type of store within 10-minutes' drive from the target store.

Japan described how it recently reviewed its guidelines on vertical restraints and merger control. For instance, the guidelines establish safe harbours for certain vertical restraints (such as restrictions on dealings with competitors) when a company's market share is "20% or less". Other practices, such as resale price maintenance, do not benefit from safe harbours at all. The revised guidelines increased the market share for establishing a safe harbour, from the initial "less than 10%" in the previous version. This was because it had been claimed that the scope of application of this safe harbour rule was too narrow for companies. Japan also noted that it analysed the anti-competitive effects of the respective types of conduct, its own decisions and guidelines adopted in other jurisdictions in the course of its reforms.

Portugal explained how the presumptions in its competition law have evolved from being formalistic to reflecting more recent economic learning, partially as a reflection of European processes to update competition law and to adopt a 'more economic approach'.

Portugal also presented an example of a merger case where it could have relied on market share presumptions, but instead decided to pursue a more detailed economic analysis.

The **European Union** emphasised that given the uncertainty of decision-making in competition law, we are very often in the realm of probabilistic decision-making and presumptions can be useful in this context. **David Bailey** then intervened to say that competition law is as fact-intensive as many other commercial cases. This leads to uncertainty as to the legality of certain conduct. This uncertainty does not *per se* justify adopting presumptions – it may actually justify pursuing an even more careful and detailed analysis.

5. The Practical Application of Legal Presumptions and Safe Harbours

At this point, a number of countries intervened to describe how legal presumptions and safe harbours impact enforcement efforts beyond the factual determination of individual cases.

The **United Kingdom** explained how it exercises its discretion not to refer a merger to detailed investigation when it believes that the market(s) to which the duty to refer applies is/are not of sufficient importance to justify a reference. The exception was introduced in order to avoid references where the costs involved with in the analysis would be disproportionate to the size of the markets concerned. The UK further explained how guidelines were adopted regarding *de minimis* mergers following a cost benefit-analysis.

Sweden made a presentation regarding their use of presumptions in the prioritisation of competition investigations of vertical agreements. While there are a number of presumptions, prioritisation is based on potential harm to consumers of a conduct. They then presented a 2013 case, 13:e Protein Import, on resale price maintenance – where there was a legal presumption that the conduct was illegal, but the Swedish authority nonetheless decided not to spend resources investigating the conduct because the conduct was found unlikely to lead to significant harm to consumers.

Chile explained how it relied on presumptions to prioritise its enforcement efforts. It explained why a number of presumptions in the area of merger control led to some transactions not been subject to a strict scrutiny, or even not requiring notification in the first place. This approach frees up resources from reviewing non-problematic transactions which can be put to better use dealing with more pressing concerns.

Israel described how its law contains a list of conducts which are absolutely presumed to amount to abuses of a dominant position. However, this list of provisions includes broad terms relating to fairness and the competitive effect of the action. As a result, the courts have come to the conclusion that an examination of the practice's potential impact on the market is required before an infringement is found.

Germany explained that the main function of legal presumptions is to provide a strong incentive for firms to submit to the *Bundeskartellamt* all the information that it needs for a complete assessment of the case at an early stage of the investigation. The incentive on companies which meet a presumption leading to liability to provide evidence that rebuts the presumption is noticeable. Another important function of presumptions is to provide the courts with an instrument to keep the issues raised in the proceedings manageable.

6. Conclusions

The **Chair** then proceeded to close the session. He invited final comments from the presenters.

Andrew Gavil emphasised that there is no need to rely on presumptions when there is direct evidence. He also explained that burden-shifting frameworks are important, and that decision-theory can be relevant for agency assessment. Lastly, he argued for the pursuit of small cases that set out a correct precedent, instead of a strict focus on the consumer welfare of the practice.

David Bailey wanted to emphasise that presumptions can have many different origins. Furthermore, it is important that they change over time.

The **Chair** thanked the experts and the delegations, and closed the session.