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**1 December 2017****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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This document reproduces summaries of contributions submitted for Item 4 of the 128th meeting of the Competition Committee on 5-6 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](http://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm)

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## *Safe Harbours and Legal Presumptions in Competition Law* *-- Summaries of Contributions --*

This document contains summaries of the various written contributions received for the discussion on Safe Harbours and Legal Presumptions in Competition Law (128th meeting of the Competition Committee meeting, 5-6 December 2017). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an \*.

### *Table of contents*

|   |           |
|---|-----------|
| <b>Safe Harbours and Legal Presumptions in Competition Law -- Summaries of Contributions --..</b> | <b>2</b>  |
| <b>Argentina.....</b>   | <b>3</b>  |
| <b>Belgium*.....</b>  | <b>4</b>  |
| <b>BIAC.....</b>  | <b>5</b>  |
| <b>Brazil.....</b>  | <b>6</b>  |
| <b>Chile*.....</b>  | <b>7</b>  |
| <b>Chinese Taipei.....</b>  | <b>8</b>  |
| <b>Colombia.....</b>  | <b>9</b>  |
| <b>Croatia*.....</b>  | <b>10</b> |
| <b>European Union.....</b>  | <b>11</b> |
| <b>Germany.....</b>   | <b>12</b> |
| <b>India.....</b>   | <b>13</b> |
| <b>Israel.....</b>  | <b>15</b> |
| <b>Japan.....</b>   | <b>16</b> |
| <b>Korea.....</b>   | <b>17</b> |
| <b>Latvia.....</b>  | <b>18</b> |
| <b>Lithuania.....</b>   | <b>19</b> |
| <b>Mexico.....</b>  | <b>20</b> |
| <b>Portugal.....</b>  | <b>21</b> |
| <b>Romania.....</b>   | <b>22</b> |
| <b>Russian Federation.....</b>  | <b>23</b> |
| <b>Sweden.....</b>  | <b>24</b> |
| <b>Turkey.....</b>  | <b>25</b> |
| <b>Ukraine.....</b>   | <b>27</b> |
| <b>United Kingdom.....</b>  | <b>29</b> |
| <b>United States*.....</b>  | <b>31</b> |

## *Argentina*

Safe harbours and legal presumptions are useful tools that competition agencies use to make a more efficient use of its scarce resources. In particular, in the analysis of mergers and acquisitions, safe harbours are used as a first screening device to decide whether an operation is worth analysing by the competition agency. The types of safe harbours used by Argentina's competition authority in merger control are the subject of this contribution.

Notification thresholds work as absolute safe harbours, in the sense that they are not rebuttable. Argentina's Competition Act (LDC) also includes other safe harbours for certain economic concentrations that, even when the operation meets the thresholds, would not be notifiable.

First, when the operation involving companies with economic activities outside Argentina, which do not have effects in the Argentine market. In order to determine whether such operation has effects on the domestic market, CNDC's case law established that substantiality, frequency and predictability of exports to Argentina shall be taken into account. Thus, whenever local sales are not relevant, they shall not generate "substantial effects" in the domestic market, and any agreement between companies outside Argentina in such terms shall not be subject to the obligation

Second, operations that are exempted from the obligation to notify, because they are presumed to be legal. These include: the case of a purchaser that already holds more than 50% of the shares of the acquired company; the acquisition of bonds, debentures, certificates of indebtedness or shares without voting rights; the acquisition of a domestic company by a foreign company that does not own any shares or assets of another domestic company; the acquisition of a business has not conducted business during at least the latest year; and cases in which the amount of the transaction or the assets acquired is sufficiently low.

Finally, the National Commission for the Defense of Competition (CNDC) has established internal safe harbours for merger control through a fast track procedure for operations with low probability to be restrictive of competition. This procedure includes a number of quantitative indicators aiming at identifying operations with a low probability to restrict competition. In particular, for this type of operations, the CNDC will use a simplified evaluation procedure, by which the analysis will be limited to classifying operations according to whether they are horizontal, vertical or conglomerate, and eventually to measuring the market shares of the companies involved.

## *Belgium\**

The Belgian Competition Authority (BCA) applies the EU block exemptions also in case the trade between Member states is not affected.

To the extent the EU block exemptions apply in application of EU law (i.e. when trade between Member states is affected), the benefit of the exemption can be withdrawn by the European Commission (we refer to the Commission's contribution). The Commission cannot withdraw the benefit of a block exemption when it is in any case not applicable. And Belgian law does not provide for a withdrawal of the benefit of EU block exemptions. The BCA concludes that the safe harbours offered by block exemptions are more absolute in case trade between Member states is not affected.

Concerning the justifications for including certain conduct within a presumption or a safe harbour, the 25% market share rule that applies to mergers in Belgium, according to which a concentration must be declared admissible when the undertakings concerned control not more than 25% on any relevant market (horizontal or vertical), the BCA states that it is the result of a compromise between the Government and the Federation of Belgian Enterprises when in 1999 the market share based notification threshold was replaced by a turnover defined threshold in accordance with OECD and ICN best practices. The BCA follows actively the discussions in the ECN on appropriate thresholds for the control of significant transactions between parties with no or no significant turnover.

## *BIAC*

The objective of antitrust law and enforcement is the prevention of anti-competitive conduct, i.e. conduct resulting in consumer harm. However, because the enforcement of antitrust law involves the application of relatively generally-drawn rules and standards, often framed in relatively simple terms, to a wide variety of complex economic phenomena, there is an inherent risk of misapplying the law and, as a consequence, mistakenly finding antitrust liability. The risk of misapplication of the law is in part dependent on the analytical shortcuts - in the form of presumptions of illegality - on which the application of the law relies.

On many occasions BIAC has stressed the need for transparency in competition law enforcement, predictable rules that are firmly based on economic insights, and the need to reduce companies' administrative and compliance costs. BIAC has also consistently voiced its concerns about potential over-enforcement of the competition rules.

In its contribution to the Roundtable on Safe Harbours and Legal Presumptions in Competition Law, BIAC discusses a number of suggestions for the use of presumptions of illegality and safe harbors, in particular by newer agencies. In addition, it discusses and submits the following points for discussion:

1. Lack of Consensus Regarding the Objectives of Competition Law Enforcement May Complicate Definition of Generally Accepted Presumptions
2. Rule Design and Cost Error Analysis: Should Enforcement Costs Be Guiding?
3. Due Process Requirements Support Effect Analyses and Narrowly Defined Illegality Presumptions
4. As Judicial Review is Critical For the Design of Presumptions, Effective Access to Courts Should Be Guaranteed
5. Economic Insights Should Inform the Design of Appropriate Safe Harbors and Presumptions

Finally, BIAC's contribution includes 11 specific suggestions for the design and use of presumptions of illegality in competition law, as well as a number of suggestions for the use of safe harbors.

## *Brazil*

Competition authorities around the world adopt safe harbours for merger analysis, be it at the case submission phase or for deepening the analysis of notified matters. Safe harbours are commonly adopted to create objective and easy to understand criteria that permit separating the operations that raise major competition concerns from those with a minor potential to harm competition.

The use of safe harbours is common and increasing in Brazil. The New Brazilian Competition Law N° 12.529/2011 adopts the 20% market share criteria as an assumption of dominance in investigations regarding abuse of market power. However, the bill also mentions the possibility of adopting higher thresholds of market share to indicate dominance in certain economic sectors. In recent years, the latter has been increasingly used in opinions and votes.

The trend is the more intense use of these criteria in order to make the analysis faster and more efficient. This is because of the increase in the number complex operations, which require a cost-benefit analysis to comply with the mandated timelines stated by Law, and, above all, to deliver better results to Brazilian society through CADE's analysis.

## *Chile\**

The new law on merger analysis relies on safe harbours and presumptions, both substantive and procedural. Most of these are rebuttable and allow the competition authority to analyse the transaction or gather more information when needed.

The law sets thresholds on both the combined turnover of the merging entities and the individual turnover of at least two of the parties. Transactions falling below the thresholds are not subject to a notification requirement. However, the Fiscalía Nacional Económica (FNE) has the power to open an investigation, even if the transaction is not captured by the thresholds. The FNE has published a soft law guide (“Practical Guide Towards the Application of Thresholds to Merger Notifications”) to help agents to assess if they have to notify or not.

For transactions subject to notification, firms have two procedural options, i.e. general or simplified form. When certain conditions identified in the law are met, it is considered that a merger has less potential to raise competition concerns, and the parties are allowed to follow the simplified procedure. The burden of proof lies with the parties, who have to submit sufficient information to convince the competition authority that the transaction meets the criteria for the simplified procedure to apply. The law sets a number of conditions which enable the FNE to trigger a full notification.

There are a number of other presumptions and safe harbours in Chile. For instance, a non-rebuttable presumption of illegality applies to agreements between competitors involving price fixing, limiting production, market share allocation and bid rigging; similarly, there is a non-rebuttable presumption of illegality in the case of interlocking directorates. The FNE has recognised, through soft law, a presumption of legality for vertical agreements. Based on the “Vertical Restriction Guideline”, the FNE acknowledges a vertical restriction as legal when the seller’s market share and the buyer’s market share are less than 35%.

## *Chinese Taipei*

Conduct regulated by the Fair Trade Act (FTA) of Chinese Taipei includes restrictive competition and unfair competition. Monopolies, mergers, concerted actions, and vertical restrictions are all categorized under restrictive competition. The Fair Trade Commission (FTC) applies the safe harbours and legal presumptions in relation to the above-mentioned actions that restrict competition, in order to determine whether or not the competitive practices of the enterprises involved have violated the FTA.

Recently the FTC has studied foreign legislation and practical law enforcement cases, specifically the application of the safe harbours and legal presumptions for determining whether a concerted action is sufficient to affect the market function. Unless the concerted action involves prices, quantity, trading counterparts, or trading territory, and if the total market share of enterprises participating in the concerted action doesn't reach 10%, then it is presumed that the concerted action is insufficient to affect the market function. The safe harbours and legal presumptions are already recognized by the administrative court, and they will benefit the FTC in determining if the enterprises are in violation of the FTA and when utilizing its law enforcement resources.

## Colombia

As the national competition authority in Colombia, the Superintendence of Industry and Commerce (SIC) must investigate antitrust cases in which the criterion of "significance" is met. This condition is directly associated with: (i) free access to markets; (ii) consumer welfare; and (iii) economic efficiency. In consequence, the SIC should not investigate conducts that are not substantially affecting one of these three issues.

Nevertheless "significance" criterion is not objectively defined in the Colombian competition regime. On the contrary, it is the competition authority who reasonably evaluates in each case whether this criterion is met or not.

In this sense, for example, an agreement between competitors that seek to fix a minimum sale price of a product may not be considered illegal if from the preliminary analysis carried out by the SIC, it is inferred that it is not "significant", in the above terms.

With significance as a necessary condition, in Colombia there is presumption of illegality on certain behaviours that are considered competition restrictions per se, fundamentally based on economic theory. Thus, if the investigated facts can reasonably be framed in any of those behaviours, it will not be necessary for the SIC to evaluate whether the investigated conduct represents a potential harm to market competition, or if it has indeed restricted it.

In contrast, Colombian competition regime includes a general prohibition, for cases that cannot be easily related to per se antitrust conducts. When these kind of behaviours are being investigated by the SIC, the agency has the burden of proving that they represent a potential or effective harm to competition, applying the rule of reason.

However, Colombian competition regime also contemplates exceptions for conducts that, despite of leading to cooperation between agents that are presumed independent, are not considered competition restrictions.

Regardless the "per se" illegal condition of the conducts, the SIC has concluded in some cases that under specific conditions, such behaviours may not be harmful for market competition. In this case, for instance, there must be an analysis under the rule of reason criteria.

The aforementioned has been controverted by some practitioners, as they believe that, according to the Civil Law Tradition, there is no margin of interpretation for the competition authority in conducts that are expressly prohibited by law.

Nevertheless, the SIC doctrine has ratified that there can be some room to reasonably determine if behaviours that fit in the listed antitrust conducts can be considered illegal, and thus sanctioned, or not.

In the paper, we will explore some of this jurisdictional safe harbours and legal presumptions of the Colombian competition regime and, specifically, in cases of mergers control.

## *Croatia\**

Safe harbours and/or presumption of illegality or legality are not as such defined by any legal act, but they can be derived from the provisions of the Competition Act, from block exemption regulations and from case law.

The Croatian Competition Authority also relies on presumptions drawn from the EU *acquis*. For instance, in an opinion about the exchange of information between competitors, the authority stated that the exchange of aggregate information, dating back from more than a year before, is “generally not considered to raise competition concerns”.

The Regulation on Block Exemption Granted to Certain Categories of Vertical Agreements stipulates the conditions that vertical agreements between undertakings must contain and the restrictions or conditions that such agreements may not contain in order to benefit from a block exemption. For example, minimum retail price maintenance is a restriction that vertical agreements must not contain. In relation to abuse of a dominant position, the Competition Act sets a presumption that a company holding “more than 40% of market share in the relevant market may hold a dominant position”. Finally, the Competition Act provides for notification thresholds for concentrations. These thresholds are defined for (i) the total turnover of all the parties and (ii) the turnover of two of the parties in the transaction.

## *European Union*

Under a presumption, if certain facts are established, it is taken as a starting point that other facts can be presumed, usually because experience or accumulated knowledge supports the view that the presumed facts are typically a logical consequence of the established facts. EU competition law presumptions are usually rebuttable, i.e. parties can bring forward evidence and arguments showing why the presumption should not apply in the concrete circumstances of a case.

In any legal system where gathering information is costly and litigants' resources are limited, it makes sense to use presumptions to structure the process and analysis in stages and to allocate the burden of bringing arguments and evidence. This enables authorities and courts to expedite the proceedings and make complex issues more administrable, while ensuring the required degree of accuracy of decision-making.

The EU contribution explores: (1) the compatibility of EU competition law presumptions with the presumption of innocence; (2) the different types of presumptions under EU competition law; and (3) the rationales for using such presumptions. The EU contribution outlines in particular some of the many presumptions currently used in EU competition law, such as the parental liability presumption; the presumption that parallel conduct evidences explicit collusion in the absence of another plausible explanation; the presumption that a firm participating in a concerted practice adjusts its behaviour accordingly; the "restriction by object" presumption; the "pricing below average variable cost" presumption; and, for the purpose of the Antitrust Damages Directive, the indirect purchaser presumption and the presumption that cartels cause harm.

It concludes that presumptions are a widespread and useful device to save resources – to make the competition enforcement system more administrable – in circumstances where a particular fact can be inferred from prior experience; or where a particular fact should be proven or disproven by the party which has better access to the relevant evidence (the "proof proximity" principle); or where a particular fact should be presumed in order to increase enforcement effectiveness and clarity – usually to remedy the claimant's difficulties in gathering evidence.

## *Germany*

The German competition law regime contains general exemptions from the prohibition of anticompetitive agreements under certain conditions, which are consistent with Art. 101 (3) TFEU. In merger and unilateral conduct proceedings the German competition law regime provides for rebuttable legal presumptions of market dominance, which have the aim of facilitating the decision-making practice to promote effective competition law enforcement. In the enforcement practice of the Bundeskartellamt legal presumptions are mainly used as an auxiliary consideration since the Bundeskartellamt is legally obliged to investigate all the facts relevant to a case on its own motion (Amtsermittlungsgrundsatz). The main function of the presumptions of market dominance 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 contribution concludes by illustrating the complexity of balancing different risks of error using examples from developments in the digital economy.

## *India*

Indian Competition Act, 2002 (the Act) prohibits anti-competitive agreements under Section 3, abuse of dominant position under section 4 and regulates combinations under section 5 and 6 of the Act.

Section 3(3) of the Act that deals with horizontal agreements including cartels, presume certain acts and conducts to be anti-competitive. Since horizontal anti-competitive agreements including cartels, rarely, if ever, record their existence in contractual form, direct evidence regarding their operation is challenging to adduce. Law therefore recognises that an agreement (under Section 2(b)) need not be “formal or in writing” and it may be any arrangement, understanding or action in concert. Competition Commission of India (Commission) has held that the test for proof to be employed in case of horizontal agreement including cartels should be the “balance of probabilities”, which can be established with the support of indirect and circumstantial evidence.

With regard to the vertical agreements that are envisaged under Section 3(4) of the Act, the Commission has looked at it based on rule of reason approach. If the Commission does wish to proceed to examine whether an agreement under Section 3(4) of the Act causes AAEC, recourse would necessarily have to be to the factors enumerated under Section 19(3) of the Act.

Export cartels are exempt under section 3(5) (ii) of the Act.

While assessing dominance, the Commission considers factors mentioned in section 19(4) of the Act and therefore full blown analysis is required to assess the market power of a party. This is required in light of explanation to section 4 which defines dominance and section 19(4) of the Act which makes it obligatory for the Commission to look into the factors mentioned in section 19(4) of the Act to assess dominance. Market share or any other quantitative criteria is not envisaged in the Act to establish dominance of a party. The parties are free to adduce evidence to refute the assessment of the Commission on dominance. However, once the dominance is established, in case the dominant entity is found to be indulging in the actions mentioned in section 4 of the Act, the law holds them to be per se violative of the Act. Of course, the Commission performs analysis on all parameters before holding that a dominant player has indeed abused its position of dominance.

The Competition Act, 2002 provides for safe harbours in the form of thresholds required for notification of combinations by the parties.

As per Regulation 4 of the Competition Commission of India (Procedure in regard to the transaction of business relating to Combinations) Regulations, 2011, the categories of combinations mentioned in Schedule I are ordinarily not likely to cause an AAEC in India and therefore, notice under sub-section (2) of section 6 of the Act need not normally be filed in respect of these combinations.

The Central Government of India under section 54 of the Act has the right to exempt from the application of the Competition Act: (a) any class of enterprise if necessary in the interest of security of the state / public interest; (b) practices arising out of and in accordance with an obligation assumed by India under any treaty, agreement or convention with any other country or countries; and (c) enterprises that perform a sovereign function on behalf of the Central Government or a State Government.

Safe harbour per se is not available for IPR holders under the Competition Act, 2002. However, parties who are IPR holders and are parties to agreements can take intellectual property defence, provided the agreements impose reasonable conditions as may be necessary for protection of IP rights.

## *Israel*

In the past, the Israeli antitrust regime – particularly regarding restrictive arrangements – was based on very rigid rules, and often required parties to an arrangement to receive pre-approval from the antitrust supervisory system. This rigid interpretation of the law, based on per se rules, eliminated the need to establish in every case that the arrangement is liable to harm competition. That made criminal enforcement of the antitrust laws in Israel significantly easier, which has helped deter potential violations of the Law. Although a more rigid regime has benefits in terms of deterrence, it also raises concerns of classifying arrangements that do not harm competition as prohibited if did not receive approval from the Director General or from the Antitrust Tribunal. For that reason, the tendency today is to move towards a self-assessment regime and focus the enforcement efforts on practices that have a substantial impact on competition and on the public. Along with this desire to ease the regulatory burden and to focus enforcement efforts, it is important to preserve the deterrent effect of criminal enforcement of antitrust laws in Israel.

The paper reviews the absolute presumptions and safe harbors in the Israeli Antitrust Law today. Also, the paper describes trends in the case law and in the Antitrust Director General's papers relating to the desire to focus the antitrust enforcement and ease the regulatory burden. Furthermore, the paper describes changes that have occurred in the antitrust laws in Israel with respect to vertical arrangements, and discusses future developments with respect to horizontal arrangements, such as the publication of drafts for new block exemptions. The developments regarding horizontal arrangements aim to preserve the absolute presumptions regime regarding horizontal restraints while expanding the block exemptions in a way that allows parties to a horizontal arrangement t

## *Japan*

In Japan, some guidelines provide for safe harbour rules that describe conduct that is deemed not to violate the Antimonopoly Act. Japan Fair Trade Commission (hereinafter referred to as “JFTC”) sets out safe harbours in the “Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act (hereinafter referred to as the “DSBPG”)” and the “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination (hereinafter referred to as the “MRG”; Merger Review Guidelines).”

The DSBPG stipulates that in cases a company which has a market share of 20% or less or a new entrant commits certain vertical restraints, it does not usually tend to impede fair competition and therefore is presumably not illegal.

The MRG provides the scope of merger which would not substantially restrain competition, using the HHI and market share.

In developing the safe harbour criteria in both of these guidelines, JFTC has taken into consideration its past enforcement and precedents, as well as the anti-competitive effects of the respective types of conduct, and if necessary, the international consistency. Meanwhile, the guidelines have been formulated with the primary focus to secure the predictability for companies, and they have not been developed from the viewpoint of JFTC’s capacity.

## *Korea*

Recently, as detailed economic analysis is required in enforcing the competition law, legal presumptions and safe harbours are utilized to ease the burden of proof and enforcement costs for competition authorities and reduce legal uncertainty. They also allow law violators to increase predictability. However, there are concerns over under-enforcement for safe harbours and over-enforcement for legal presumptions. Therefore, it is necessary to carefully review in setting standards for legal presumptions and safe harbours.

The KFTC, in accordance with the Article 4 of the MRFTA, presumes a market-dominating enterprise when 1) the market share of one operator is more than 50% or more, or 2) the total market share of not more than three enterprises is 75% or more. Under the Article 7 of the MRFTA, a merger is presumed to be anti-competitive 1) in cases where the combined market share of merging companies satisfies the presumptive requirements for a market dominating enterprise; 2) in cases where the combined market share of merging companies is the largest in the business area concerned; and 3) in cases where the combined market share of merging companies exceeds the market share of a company with the second largest market share by not less than 25% of the aggregate of the market share. In addition to the Article 19 (5), which presumes cartel agreements, the MRFTA stipulates three legal presumptions.

In addition, in relation to M&A, cartel, unfair support and unfair trade practices, notifications and guidelines stipulate safe harbours to give an exemption of examination as long as certain conditions are not met.

## *Latvia*

Such kind of presumptions as liability presumptions are not explicitly stated in Competition law but are developed by case law and practice. For example, parental liability presumption, liability of the undertaking for the actions of employee, liability of undertaking for the misconduct of outsourced service provider (third party) and specific liability presumptions for an anticompetitive behaviour in civil damages cases.

According to actual case practice there are 2 cases (Preiss agro, KIA) in which court upheld CC approach to apply parental liability. Legal reasoning and evaluation of facts carried out by the CC in these cases was developed taking in to account interpretation and criteria given by the European Court of Justice (ECJ) in its judgments assessing such concept.

The concept of market participant in CL who performs or is preparing to perform economic activity in the territory of Latvia or whose activity shall influence competition in the territory of Latvia may be applied also to the group companies also in the case if the parent company has control over subsidiary or subsidiaries. CC came to conclusion in Preis Agro case that 100 per cent shareholding allowed the parent company to appoint board members and control decision-making process and thus conduct of subsidiary on market was not regarded as independent.

Also, liability to successors if company's assets or part of them are transferred to new owner may be applied according to actual case law. In accordance with the decision of the Supreme Court in ECN Latvia case the changes of the form of a legal entity (including even liquidation) does not end the liability of an economic operator.

In case law in Latvia and according to ECJ recent judgment in VR Remonts case liability to the company may be also applied for the actions of outsourced service providers. Company may be held liable for the acts of a service provider if the company could reasonably have foreseen that the service provider would share its commercial information with its competitors and if it was prepared to accept the risk which that entailed.

In in 2016 CL was amended adding legal presumption for civil damages that amount of damages caused from cartel is equivalent to 10 per cent price increase, unless proved otherwise by any party. There is no case law yet but this legal presumption should ease the proceedings in the future for the persons that suffered damages from cartels found out by CC to prove the amount of damages.

## *Lithuania*

There are several legal presumptions and safe harbours in competition law in Lithuania. Most of the legal presumptions/safe harbours are substantive. They can be both absolute and rebuttable. Some evidentiary legal presumptions are also used. As regards the prohibition of anti-competitive agreements, the Law on Competition of the Republic of Lithuania enshrines an absolute legal presumption of the illegality of the agreements stipulated in Article 5(1) points 1-4 of the Law on Competition (this provision covers hard-core restrictions). The aforementioned legal presumption was applied by the Competition Council and the courts in a judicial review procedure in a number of cases. Further, an important interpretation of both substantial and evidentiary legal presumptions with regard to a concerted practice was provided in the E-Turas case, which was scrutinized not only by the national competition authority and the courts, but also by the ECJ, which issued a preliminary ruling upon the request of the Supreme Administrative Court of Lithuania in this case. A safe harbour rule as regards anti-competitive agreements, which do not have an appreciable effect on competition, is enshrined in the Law on Competition and is further specified by the Competition Council. With regard to an abuse of a dominant position, the Law on Competition provides a legal presumption of single and collective dominance. Yet, a different legal presumption (based on lower market shares) is provided for undertakings in the retail sector. When it comes to the analysis of an abuse of a dominant position, the Competition Council has dealt in several cases with the question of predatory pricing (thus, also a legal presumption enshrined in the AKZO case) as well as with the thereto related cross-subsidization. Furthermore, the Law on the Prohibition of the Unfair Practices of the Retail Companies includes an evidentiary legal presumption on particular types of conduct that are considered illegal under the aforementioned law. Moreover, the aforementioned law applies only in case of the retail company with significant market power thereby providing a safe harbour for companies, which do not fall under this definition. As regards merger control, the Law on Competition enshrines a safe harbour rule for mergers related to banks and other credit institutions. Also, a safe harbour is provided in the Law on Competition in terms of the turnover thresholds for merger control. Yet, the amendment of the law as regards the latter is currently considered. The Project on the Amendment of the Law on Competition suggest increasing the turnover thresholds. Also, an introduction of a new legal presumption as regards mergers is suggested by the aforementioned proposal on the amendment of the Law on Competition. According to the proposal, it is suggested that two or more transactions, concluded in a period of two years by the same undertakings, should be considered to be one concentration. Finally, legal presumptions are provided with regard to private enforcement of competition law as well as unfair commercial practices.

## Mexico

Since the Constitutional Reform, the Federal Telecommunications Institute (IFT), as the competition authority and the regulatory agency of those sectors, pursues regulatory convergence adopting competition criteria in matters subject to sectorial regulations, including the application of safe harbours and legal presumptions contained in the Federal Economic Competition Law (LFCE).

The legal framework of the Mexican telecommunications and broadcasting sectors contains presumptions and safe harbours in economic competition matters. They are useful and have been used in procedures carried out by the IFT in mergers and acquisitions under the LFCE, and in tenders and auctions, transfers of concessions rights, among other regulatory procedures in the telecommunications and broadcasting sectors under the Federal Telecommunications and Broadcasting Law (LFTR).

Relevant examples in the application of safe harbours and legal presumptions are presented:

1. The LFCE sets safe harbours in which the authority shall issue a resolution in a shorter time than that stipulated in the general merger control framework. It also sets legal presumptions in which economic agents are not required to notify the transactions to the authority (article 93 of the LFCE).
2. Another presumption established in the LFCE refers to cartels. They are considered anticompetitive and illegal *per se* without the need to perform an analysis by its object or its effects.
3. On April 2016, the IFT issued the criteria for calculating and applying a market concentration index in the telecommunications and broadcasting sectors (Concentration Criteria). The IFT has considered in several cases that if a transaction generates a market share below 35%, it is unlikely that it has the object or the effect of hindering, diminishing, damaging or impeding competition and free concurrence. This threshold has been used in the assessment of transactions in the spectrum secondary market in which the IFT has decided to allow spectrum holdings for the provision of mobile telecommunications to up to 35% when there is enough spectrum available for new and existent competitors. In some public auctions the IFT has imposed spectrum caps in order to protect and promote competition and free concurrence, and avoid accumulations contrary to the public interest.

## *Portugal*

Portuguese competition law relies on a number of safe harbours and legal presumptions, most of which originate from EU competition law.

As regards antitrust, a large number of the safe harbours and legal presumptions drawn from EU competition law have been integrated into the Portuguese competition law system through an explicit reference in Article 10(3) of the 2012 Competition Act.

According to this provision, any agreements, concerted practices or decisions of associations which are prohibited by Article 9(1) of the 2012 Competition Act<sup>1</sup> may be justified, even in the absence of an effect on trade between Member States, if they comply with the remaining criteria established in EU Regulations adopted under Article 101(3) TFEU (e.g. the Vertical Restraints Block Exemption Regulation or the Technology Transfer Block Exemption Regulation).

This legal provision has been used a number of instances in antitrust proceedings and the Autoridade da Concorrência (“AdC”) has also referred directly to EU Regulations or the European Commission guidelines in order to apply safe harbours and legal presumptions.

As regards merger control, the major specificity regarding the legal system relates to the notification thresholds, since these include a market share threshold. In addition, there is a string of merger control decisions which have consistently applied EU safe harbours and legal presumptions relating to the substantive merger assessment.

Overall, the use of safe harbours and legal presumptions has ensured a consistent decisional practice by the AdC overtime, which is predictable both to business and the Courts, thus contributing to legal certainty.

Nevertheless, the use of safe harbours and legal presumptions has progressed towards a more economic-based approach. This is namely visible in the evolution of the Portuguese competition legal framework, where some legal presumptions have been replaced by a case-by-case analysis by the AdC (e.g. under the 1993 Competition Act, there was a rebuttable presumption of dominance if a company held a market share of 30% or above).

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<sup>1</sup> Article 9(1) of the 2012 Competition Act is the equivalent to Article 101(1) TFEU, whereas Article 10(3) of the 2012 Competition Act is the equivalent to Article 101(3) TFEU.

## *Romania*

The Romanian Competition Council (RCC) concentrates its efforts and resources on those cases that pose the greatest threat to consumer welfare, the purpose of its intervention being the protection of markets and maintaining them at the most competitive level. In order to make the most efficient use of its resources, a necessary balance can be achieved between the material and human resources available to the authority and the achievement of the objective.

The contribution of Romania describes the RCC approach to presumptions and safe harbour through the example of how the RCC intends also to change the way of analysing mergers and acquisitions on the food retail market due to changes emerged from both companies and consumers' behaviour.

## *Russian Federation*

Endemic to the jurisdiction of the Russian Federation is the application of both the respective presumptions, as well as the concept of “safe harbors,” which, in turn, are absolute. An illustrative example of “presumptions of unlawfulness” is provided by the “per se” prohibition, such as cartels. In this case, the competition authority should only prove the existence of the consequences described in the aforementioned clauses and not the restriction or potential restriction of competition. Such agreements are prohibited as such, irrespective of their impact on the state of competition.

Also considered as “per se” are the prohibitions envisaged by Part 3, Article 15 of the Competition Law, which ban the combination of functions between federal bodies of executive power, bodies of executive power at the RF constituent-entity level, other state agencies and local self-government authorities, on the one hand, and the functions of business entities, as well as vesting of economic entities with the functions and rights of the aforementioned bodies, including the functions and rights of state control and oversight agencies.

As “presumptions of lawfulness” within the scope of antimonopoly legislation may be considered particular conditions upon satisfaction of which certain actions (inaction), agreements, concerted actions and transactions may be deemed lawful from the standpoint of antimonopoly legislation.

Russian competition legislation also establishes “safe harbors” in the form of immunity from the establishment of dominant position for legal entities whose founders or participants consist of one or more natural persons and whose revenue from the sale of goods, works or services over the preceding calendar year does not exceed four hundred million rubles.

“Safe harbors” are also established on the level of the Eurasian Economic Union. Annex No. 19 to the Treaty on the Eurasian Economic Union (EAEU) (hereinafter referred to as the Treaty) provides only two grounds for the acceptability of “vertical” agreements: (1) if these are contracts of commercial concession and (2) the share of each economic entity (market participant) that is a party to such an agreement in the commodity market of the goods covered by the vertical agreement does not exceed 20 %

## *Sweden*

Safe harbours and legal presumptions provide important means for efficient supervision of the competition rules. The efficiency gains in enforcement from relying on safe harbours and legal presumptions have to be weighed against the possible risks of over-enforcement and under-enforcement. Therefore, safe harbours and legal presumptions must be based on robust theory and experience in order to reduce such risks. The risk of over-enforcement can further be reduced by combining an enforcement based on safe harbours and presumptions with initial prioritisation filters to sort out conduct unlikely to harm competition and consumers given the market conditions at hand, even though the conduct might fall under a presumption of illegality. This submission describes under what circumstances vertical agreements are prioritised for further investigation by the Swedish Competition Authority (hereafter the SCA).

Theory and experience show that, under certain conditions, vertical cooperation may cause harm to competition and consumers. However, theory and experience also show that there is generally a low likelihood of harm to competition and consumers from vertical cooperation under certain market conditions. Therefore, in its prioritisation of cases concerning different types of vertical agreements, the SCA gives particular consideration to the market conditions at hand, irrespective of what legal presumption might apply to the conduct.

The SCA's Prioritisation Policy for Enforcement describes the issues that are prioritised for enforcement. The main objective of the SCA is to promote effective competition for the benefit of consumers. As regards cooperation between non-competitors, i.e. vertical cooperation, the SCA prioritises vertical cooperation which is capable of harming effective competition in product or distribution markets. In its prioritisation, the SCA particularly considers what share of the market is affected by the cooperation, the market power held by the parties engaged in the cooperation, the concentration of the markets and whether other firms on the same market are engaged in similar forms of cooperation.

The initial investigations that the SCA conducts as part of its prioritisation of vertical cooperation cases, giving particular consideration to the market conditions at hand, are a tool for the SCA to focus its resources on conduct that is most likely to harm competition and consumers. These initial investigations also limit the risk for the SCA of spending investigative resources on over-enforcement by prohibiting conduct that is actually to the benefit of competition and consumers. In the SCA's experience, initial investigations of the market conditions at hand are therefore an efficient first screening tool in vertical cooperation cases in order to prioritise conduct that is able to harm competition and consumers.

## *Turkey*

Ideal types of Varieties of Capitalism (VoC): Turkey is mostly identified with Mixed Market Economies (MMEs); other varieties are Liberated Market Economies (LMEs) and Coordinated Market Economies (CMEs). MMEs' institutional framework and complementariness are more different than the other two types. Independent Regulatory Agencies (IRAs), including the competition agencies, struggle to minimize costs of administration and effective competition policy implementation. MMEs are expected to rely more on rules than standards. But institutions/agencies/individuals in them do learn and adapt in order to optimize.

Turkey is an MME and lacks a long history of markets and competition law. Still, by injecting competition as a principle into the Constitution and empowering an independent regulatory agency (IRA), the state rendered competition and markets the main pillars of economic and social structure. Competition Act (Law No 4054) has been adopted in 1994 and the agency (Turkish Competition Authority, TCA) became operational in 1997. The substantive rules are mostly identical with those of the EU. Still, some aberrations exist. No discrete clause exists on state-owned enterprises (SOEs) and state-aid. SOEs are treated as any other economic undertaking. Such treatment is sourced from the presumption that as Turkey is an MME with a history of state-led economic mind, the implementers of the law would be tendentious to be lenient towards SOEs and that a separate clause would be perceived as an 'exception.' Turkish competition regime thus endeavors to compensate its shorter experience and perfect its markets by devising foresighted rules.

**Table 1. A comparison of burden of proof, standard of proof and legal presumptions regime in Turkey and the EU**

| Jurisdiction | Burden of proof  | Standard of proof  | Conclusive presumptions   | Evidentiary presumptions   | Substantive presumptions   |
|--------------|--|--|---|--|--|
| The EU       | On the claimant; for 101(3) it falls on the potential beneficiary; shifts throughout the investigation period                                  | National laws; general principles are preventing probatio diabolica                          | Existent but refutability is not impossible; black list in vertical restrictions; parallel trade restriction in dominance cases | information exchange presumption is rebuttable; participation in cartel meetings; 2 cumulative conditions for abusive behavior; 40% market share for dominance | Safe harbor of single economic entity in coordination; 25% safe harbor in vertical concentrations; 30% safe harbor in vertical restraints; object restrictions highly difficult to rebut; safe harbor of above-cost pricing in predatory pricing; market share and temporal safe harbors in specific horizontal cooperation agreements |
| Turkey       | On the claimant except in cartels/concerted behavior; in exemptions it falls on the beneficiary; may shift throughout the investigation period | All kinds of information/data and evidence are accepted; beyond a reasonable doubt principle | Existent but refutability is not impossible; black list in vertical restrictions  | information exchange presumption is rebuttable; participation in cartel meetings; 2 cumulative conditions for abusive behavior; 50% market share for dominance | Safe harbor of single economic entity; 25% safe harbor in vertical concentrations, 30% safe harbor in vertical restraints; object restrictions but the agency always looks at effects; safe harbor of above-cost pricing in predatory pricing; market share and temporal safe harbors in specific horizontal cooperation agreements    |

## *Ukraine*

Ukrainian legislation and practice widely applies the concept of the "Safe Harbors" in controlling the concentrations. For example, while controlling concentrations, in cases where the volumes of sales or the value of the assets of participants in the relevant transactions do not exceed the statutory indicators.

The concept of "Safe Harbors" is also used in the system of control over concerted actions of business entities.

In the Law of Ukraine "The Protection of Economic Competition" there is a sufficiently developed system of material presumptions, in particular Articles 6, 13, 15. Article 6 provides general definitions of anticompetitive concerted actions and contains a list of presumptions according to which certain concerted actions of business entities are determined as anticompetitive. Article 13 (2) defines the presumption of abuse of a monopoly dominant position on the market. Article 15 (2) defines the presumptions of anticompetitive actions of the authorities, local governments, bodies of administrative and economic management and control.

The above mentioned forms of conduct of business entities or state bodies were chosen by AMCU as a presumption, based primarily on the practice of applying the Law of Ukraine "On the Protection of Economic Competition.

The legislation of Ukraine applies a legal presumption regarding the connection between the structure of the market and the presence of a dominant position.

Unlike other presumptions of Ukrainian competition law, these presumptions are controversial. They do not apply if the business proves that there is significant competition.

Article 56 contains procedural presumptions. It is assumed that in the event that a decision that can not be handed down is prompted to publicize the decision, it is deemed to have been deposited in the official printed matter within 10 days.

The advantage of these accusations is that they allow you to save time and reserves of the competition authority, dismiss it from the need to in each case prove the presence or absence of negative consequences for competition.

The disadvantages of this approach are that there may be problems of identifying non-standard or new behaviors that may have negative effects on competition.

The presumption, in accordance with the Law of Ukraine "On the Protection of Economic Competition" and "Safe Harbors", as far as they are defined in normative legal acts, are absolute. The law does not provide for certain conditions and circumstances in which they may not be applicable. An exception is the above mentioned presumption regarding the structural features of domination.

At the same time, the correct application of the appropriate presumptions of competition protection can be verified by the courts.

As for Safe Harbors, they are defined by the Law of Ukraine "On the Protection of Economic Competition" in relation to control over the concentration of business entities.

Concerning the concerted actions of business entities, the possibility of identifying such "Safe Harbors" is also established by the Law of Ukraine "On the Protection of Economic Competition".

At the same time, the right to determine the specific detailed circumstances under which those or other concerted actions of economic entities are permitted and do not entail responsibility provided by the legislator of the Antimonopoly Committee.

Taking into account the recommendations of the OECD and UNCTAD in view of the best practices summarized by ICN, in 2016 Ukraine has been reforming the thresholds for concentration control. This reform envisaged a significant increase in the value of turnover indicators, as well as the refusal of the threshold figure in the form of a market share.

## United Kingdom

The UK Competition and Markets Authority (CMA) has a statutory duty to refer mergers which it believes may raise a realistic prospect of a substantial lessening of competition for further in-depth investigation. A discretion not to refer a merger is available where the CMA believes the market or markets in question are of insufficient importance to justify a reference (the '*de minimis*' exception).

The CMA has published guidance explaining how it interprets and will apply this discretion. The CMA's application of the exception is based on a 'cost-benefit' approach. In considering whether to apply the exception, the CMA assesses whether the benefits of referring the case for in-depth investigation (in terms of the consumer harm that might ultimately be avoided by referring the merger) materially outweigh the public costs of a reference.

In keeping with this approach, the CMA has, in order to provide additional clarity, identified certain market size thresholds at which a reference generally will not be – or will be – justified. At present (following recent changes to the CMA's guidance), the CMA considers that a reference will not generally be justified for mergers where the market(s) concerned have an annual value, in aggregate, of less than £5 million. By contrast, the CMA considers that a reference will be generally justified where the market(s) concerned have an annual value, in aggregate, of over £15 million.

Where the annual value of the market(s) concerned lies between these two thresholds, the CMA will conduct a case-by-case analysis of the extent of the potential consumer harm. The CMA will base its assessment of expected customer harm on: the size of the market concerned; its view of the likelihood that a substantial lessening of competition will occur; its assessment of the magnitude of any competition that would be lost; and its expectation of the duration of that substantial lessening of competition.

The CMA will also take account of the wider implications of its decisions in this area, and will be less likely to exercise its discretion, and therefore more likely to refer, where the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question.

The CMA's general policy is not to apply the '*de minimis*' exception (even where the markets concerned are below the market size thresholds at which a reference will generally not be justified) where clear-cut undertakings in lieu of reference could be offered by the parties to resolve the competition concerns identified.<sup>2</sup>

The CMA believes that its current approach to applying the '*de minimis*' exception is the right one in the context of its statutory duties and its previous detailed considerations of its guidance, which aim to balance the risk of underenforcement with the desire to reduce burden overall. Although the cost-benefit nature of the guidance reflects a generally cautious approach to limit the risk of underenforcement, application in practice has reflected a careful consideration of the facts at hand and does not appear to have been overly narrowly interpreted such as to limit the '*de minimis*' exception's general use. In

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<sup>2</sup> [Mergers: Exception to the duty to refer in markets of insufficient importance](#) (CMA64) 17 June 2017.

this context, the CMA notes that the '*de minimis*' exception has been applied regularly and has had a significant impact on the overall number of Phase 2 cases. Further to its most recent review, the CMA believes that the '*de minimis*' exception will deliver increased benefits, particularly due to earlier application of the exception. The CMA remains committed to reviewing the guidance on the '*de minimis*' exception, particularly in light of any changes to its functions.

## *United States\**

In the United States, business conduct may be deemed anticompetitive by courts interpreting the federal antitrust laws. Cases are brought by federal competition enforcement agencies – the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice – and by states and private parties.

The US contribution discusses presumptions, safe harbors, and the per se rule in U.S. antitrust law. In the United States, presumptions in competition law are based on common law as established by courts deciding multiple cases over time, and include both substantive and procedural presumptions. Before applying any presumption, plaintiffs must establish certain factual predicates, according to evidentiary standards that are heightened at each step of the litigation process.

Under U.S. competition law, some types of conduct are recognized as anticompetitive and thus unlawful, while for other types of conduct an inquiry into their effects is necessary. The former approach is reflected in the per se rule of illegality that applies to naked price fixing, while cases under the second approach sometimes employ presumptions of competitive harm that are rebuttable with evidence that, on balance, the practice increases economic efficiency and renders markets more, rather than less, competitive.

U.S. courts rely on three methods of analysis to determine whether conduct is anticompetitive and thus illegal. In general, these methods fall along a spectrum based on the level of proof that a plaintiff (either a government agency or a private party) must show to establish that conduct is anticompetitive, and therefore illegal. These methods of analysis are per se illegal; an abbreviated rule of reason; and the full rule of reason. The form of analysis used by a court depends largely on the type of conduct at issue. In addition, for mergers, courts have over time developed a set of procedural assumptions and a burden-shifting framework to determine whether a merger violates the Clayton Act.