Organisation for Economic Co-operation and Development

DAF/COMP/WD(2017)96

Unclassified

English - Or. English

23 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by Turkey

5 December 2017

This document reproduces a written contribution from Turkey submitted for Item 5 of the 128th OECD Competition committee meeting 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

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03423507

Turkey

1. Any legal/social arrangement is imperfect but it is perfectible. The emergence and/or evolution of many rules and norms show that human ingenuity can improve laws for the good of society.[1] Competition law is one such legal arrangement to increase welfare of societies. And as with all laws, it comes with assumptions and costs. Although the assumption that "competition is good" has been adopted almost globally given the existence of a competition regime in numerous countries, it is hard to deny the existence of question marks about the very assumption ("competition is good").[2] These question marks are sourced from the costs of the competition regime. The pertinent name of the article "The Limits of Antitrust" of Frank Easterbrook comes from the "costs of action and information."[3] The costs debate hitherto has concentrated on `rules vs. standards` binary. This debate cannot be resolved without taking account of the broader legal and economic context of the country in question. In this respect, `Varieties of Capitalism` (VoC) literature with its ideal types of Liberated Market Economies (LMEs), Coordinated Market Economies (CMEs) and Mixed Market Economies (MMEs) can serve as a guide to understand qualitative differences amongst countries.[4]

2. CMEs premise on negotiated wage moderation, centralized bargaining and moderate inter-firm competition. Likewise, LMEs rest on arm's length relationships in competitive labor markets, efficient and effective capital markets and high levels of inter-firm competition. In contrast to these models, MMEs are less coherent models with heterogeneous combinations of two VoC traits. This contribution paper will first give how Turkey sees the trade-off between rules and presumption in line with the existing literature. Then the evolution of legal presumptions and safe harbors will be narrated by pointing to the aberrations from EU *acquis communitaire* in terms of presumptions as our competition regime is mostly identical with that of the EU. Turkish case is exemplary to show that with a relatively brief history of markets and competition law, Turkey, as an MME, has a proper balance of rules and presumptions in place, allowing it to minimize total costs. This contribution will look at extant legal presumptions in Turkey adopting the following classification: i) rebuttable vs. conclusive presumptions ii) procedural presumptions iii) evidentiary presumptions iv) substantive presumptions. Safe harbors are conceptualized as presumptions of legality to provide certainty for the concerned undertakings/actors and therefore fall under substantive presumptions.

[1] The better the market history, the higher the potential for and the ease of perfectibility. Liquidity of London bond market enabled a victory in 1800-1815 against Napoleon who had to rely on taxation, confiscation and land sale. Hans-Bernd Schaefer, "Legal Rules and Standards" German Working Papers in Law and Economics, vol. 2002, paper 2.

[2] Maurice E. Stucke, "Is Competition Always Good?" *Journal of Antitrust Enforcement*, vol. 1, no. 1, 2013, p. 163-4.

[3] Frank H. Easterbrook, "The Limits of Antitrust" *Texas Law Review* vol. 63, no 1, August 1984, p. 4.

[4] Kathleen Thelen's response to the critiques of VoC is moot: "the question being asked was and remains not so much about the persistence of a variety of national clusters of institutional arrangements, but rather, *the qualitative outcomes being generated by those institutions.*" Travis William Fast, "Varieties of Capitalism: A Critique" *Industrial Relations*, 71-1, 2016, p. 133.

3. As the Background Paper notes, rules vs. presumptions/standards/safe harbors debate has its roots in the discipline of 'law and economics'. Minimization of total costs to society is the main tenet of this normative discipline. In our debate, there are two kinds of costs: i) the costs of legal drafting ii) the costs of administering the law. These costs in turn depend on: i) the probability of error ii) the cost of error iii) the likely benefits of an alternative procedure. As the institutional framework and human capital (competence) are the main drivers of less erroneous adjudication, the literature differentiates between advanced and developing economies. Schaefer argues that "it is more efficient for low-income countries than for high-income countries to have highly trained state officials and legal drafters, than to improve the overall level of the civil service and the judiciary throughout the country."[5] Applied to *per se* rules in competition law, little discretion and elimination of "void for vagueness"[6] by delineating the scope of arguments lead to better protection of competition. But be it courts or centralized agencies, implementers of the law *learn*. As Douglass North puts it, markets are always imperfect, so is law enforcement. He writes that "the measurement costs of constraining behavior are so high that in the absence of ideological convictions[7] to constrain individual maximizing, the viability of economic organization is threatened."[8] As competition law is one such law that constrains individual maximizing for the common good, navigating the institutional constraints to minimize costs is not exclusive to developing economies.

4. 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 (Articles 101, 102 of the TFEU and the Merger Regulation). 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.[9] Turkish competition regime thus endeavors to compensate its shorter experience and perfect its markets by devising foresighted rules.

5. In terms of rebuttable vs. conclusive presumptions, Turkish competition regime adopts a conclusive presumption in cartels with hard evidence and a rebuttable presumption in "concerted practice." As this binary of presumptions is concerned with inferences, shift of the burden of proof and the difficulty of rebutting, evidentiary presumptions become important. Evidentiary presumptions are mainly about inferences that lead the agency to establish a certain fact by reference to another fact. In markets that

[5] Hans-Bernd Schaefer, "Rules versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low Income Countries" *Sup. Ct. Econ. Rev*. 14, p. 122.

[6] Schaefer, 2002, p. 3.

[7] Legitimacy is implied.

[8] Douglass C. North, *Structure and Change in Economic History*, New York: W. W. Norton and Company, 1981, pp. 40-44.

[9] Turgut Tan, *Economic Public Law Lectures*, Ankara: Turhan Yayinlari, 2011.

are characterized by 'oligopolistic interdependency,' the agency abates evidentiary assumptions and recognizes that parallel conduct by itself is insufficient for conviction. The agency investigates whether there are 'conduct plus' or 'circumstantial evidence' such as signaling, behavior that is contrary to individual maximization and existence of opportunities for collusion.[10] Evidentiary presumption of illegal conduct exists in Turkey as well. In a recent case concerning vacuumed glass tubes, one of the alleged cartel participants' defense of non-responding to the proposal of its rival has been accepted. This defense was also supported by pricing behavior.[11] As noted before, parallel behavior by itself does not suffice for the denouement of collusion without additional evidence of communication and/or unity of wills of the undertakings. The finding of a similar trend of pricing of the concerned undertakings in another recent case regarding the gasoline stations in the city of Kayseri,[12] again, did not suffice for the conclusion of an infringement.

6. This is also related to 'object restrictions' which exists in Turkish competition regime as it does in the EU. Still, even this presumption does not equate with what Easterbrook names 'inhospitality tradition.'[13] Object restrictions are rebuttable substantive presumptions and allow the Agency to obviate effects analysis but in practice effects analyses are always conducted against the undertakings' non-implementation defense. As object restrictions show, substantive presumptions of illegality do not always minimize administrative costs because of their refutability. Safe harbors, substantive presumptions of legality, on the other hand, are efficacious in increasing legal certainty and reducing administrative costs. Safe harbors of 'single economic entity,' 'above-cost pricing' in predatory pricing,[14] market shares in block exemption regulations (BERs) in vertical agreements and some horizontal cooperation agreements have been important in allowing the agency to save resources and provide certainty for the economic actors. Block exemptions are not absolute and when the dynamics of the market change, the agency can always withdraw the benefit.[15]

7. Unilateral conduct does not shelter a *per se* approach and all presumptions are rebuttable. Evidentiary presumptions in unilateral conduct are two-fold as it is in the EU but with a subtle difference in terms of wording: i) the undertaking must be dominant in the relevant market ii) the conduct must be abusive (exploitative and/or exclusionary). Because these conditions are cumulative and because the former condition requires market definition and market power analysis, most preliminary investigations opt for analyzing the second condition by seeking evidence on whether the conduct has been intended for or resulted in exclusion/exploitation. The TCA has published a guidance paper on exclusionary conduct where the presumption of market share in market power (dominance) identification is 40% and the wording is as follows: "dominance probability with market shares lower than 40% is accepted to be low while market shares above % 40

[10] TCA decision on cement suppliers in three regions, Decision No: 02-06/51-24 (2002).

[11] TCA Decision No 17-08/100-43.

[12] Not published, File No 2017-1-41.

[13] The tradition of judges' viewing each business practice with suspicion that they are using it to harm consumers. Easterbrook, p. 4.

[14] The tested costs are mainly average avoidable costs and long run average incremental costs. The guidance paper explains the analytical approach in detail.

[15] TCA Decisions concerning food, alcoholic beverages and e-commerce industries.

necessitates a more detailed analysis." 40% threshold is thus a rebuttable presumption concerning the identification of market power.

8. In mergers and acquisitions, as well as privatizations, the TCA uses 50% market share threshold for findings of dominance in horizontal mergers and 25% market share threshold as a safe harbor for vertical mergers. In electricity distribution privatization cases, the TCA implemented 30% horizontal market share threshold for any one undertaking; above 30% market share, the agency disallowed privatizations. In line with the EU, the TCA recognizes the safe harbor of 3 years in ancillary restraints in mergers and acquisitions and assesses longer ones in detail. When employing any presumption, the agency refers to *stare decisis* and never fails to assess effects and market dynamics so that error costs (especially 'false positive') could be minimized. The TCA values bright-line rules for the predictability and they provide but always think more broadly to see whether the individual context of the case in question requires a different set of presumptions and standards. 'Proof proximity principle' is applied in Turkey to the utmost degree as procedural safeguards are in place to involve all interested parties throughout the investigation period.

9. One important challenge for the agency (any agency, including the TCA) in approaching presumptions and safe harbors is not taking competition assumptions too literally. As Stucke writes in his article, "Is Competition Always Good?" market participants, firms and consumers, as well as the agencies, have 'imperfect willpower' and especially in terms of the consumers, could make biased decisions. Also, when there are conflicts of interests due to distorted incentives as in media and credit rating markets, competition takes the form of 'race to the bottom.'[16] A fierce competition in some industries, without complementary regulations for consumer protection/empowerment in place would result in sub-optimal results. This is why presumptions, safe harbors and more importantly assumptions, always need to be revisited. As some industries' sophistication increases and characteristics of market participants change, more sector-specific probity of presumptions and safe harbors could be useful. Measures conducive to consumer-debiasing, awareness and active participation in the market may require different presumptions and assumptions in the choice of legal paraphernalia.

10. In conclusion, Turkey, similar to other MMEs, combines presumptions and standards as well as advocacy in its assessment and reform toolkit. Assumptions of competition, like of other institutions, are in question more than ever. While competition is good, the costs of the competitive regime may render it undesirable in the eyes of the society. The point is maximizing the results given the institutional constraints. At the same time, institutional change and innovation in competition regime are always valued and pursued. Although the legal presumptions and safe harbors may themselves be in flux, legitimacy of competition law may not.

[16] Stucke, pp. 173-6, 192-3.

Table 1. A comparison of burden of proof, standard of proof and legal presumptions regime in Turkey and the EU[17]

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

[17] OECD Background Note; Relevant regulations; David Bailey, "Presumptions in EU Competition Law" 2010. This table is preliminary and not exhaustive.