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Working Party No. 3 on Co-operation and Enforcement

Summary of discussion of the Roundtable on the Use of Structural Presumptions in Antitrust

Annex to the Summary Record of the 140th Meeting of Working Party 3

4 December 2024

This document prepared by the OECD Secretariat is a detailed summary of discussion of the Roundtable on the Use of Structural Presumptions in Antitrust, held by Working Party 3 on 4 December 2024.

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Summary of discussion of the Roundtable on the Use of Structural Presumptions in Antitrust

1. On 4 December 2024, Working Party Nr 3 of the OECD Competition Committee held a roundtable to discuss the use of structural presumptions in antitrust. The session was chaired by Jonathan Kanter (US).

2. **The Chair** began by highlighting the importance of this topic for administrability in many work areas but especially for mergers.

3. The Chair emphasised that this is a closed session designed to encourage candid dialogue among government agencies. Delegates were encouraged everyone to engage actively, ask questions, and share insights, reminding participants that one of the OECD's key strengths is the opportunity to learn directly from one another. The Chair then invited the OECD Secretariat to introduce the topic.

4. **The Secretariat** noted the receipt of 17 written contributions and the participation of four authorities—Canada, the European Commission, Mexico, and the United States—in the panel discussion, as well as inviting any other countries to participate during the discussion.

5. The note covers three main areas:

- structural presumption
- antitrust analysis related to structural tools and their legal application
- identifying potential challenges in policy

6. Drawing on the background note, the OECD Secretariat began by defining each of these areas.

7. Structural **presumptions** refer to the assumption that certain market structures—such as high market shares or concentration levels—are presumed to point to the existence of market power and/or harm to competition and consumers. This presumption typically shifts the evidentiary burden of proof to firms to rebut these presumptions. Structural presumptions, can be for example, classified as rebuttable, substantive or evidentiary, which impacts how they are analysed by competition authorities and courts. Furthermore, when presumptions are embedded in legislation, guidelines, or case law they play a substantial role in the enforcement of antitrust law, noting that their use is strongly supported by economic theory and empirical evidence. They are particularly relevant in merger control and may also apply to cartels and new network contact cases.

8. Structural tools are closely related to structural presumptions and their objective is to assess the intensity of competition, in this case through evaluating market characteristics. Traditional metrics include using market shares, concentration ratios, the Herfindahl-Hirschman Index (HHI), as well as barriers to entry. The Secretariat also mentioned the importance of market definition, as they help determine the key elements such as market shares and concentrations. However, an over-reliance on market definition, can also hinder the application of structural presumptions.

9. Structural presumptions have both **benefits and drawbacks**. Benefits include improved antitrust enforcement efficiency, enhanced transparency, increased legal predictability, and reduced Type II errors (false negatives). However, potential drawbacks include challenges in predicting competitive outcomes and an increased risk of Type I

errors (false positives). The Secretariat emphasised the need for up-to-date economic analyses, as outdated methodologies or limited data availability could compromise the effectiveness of structural presumptions.

10. **The Secretariat** then discussed how structural presumptions are applied in practice and their associated policy implications. They noted that they have been primarily used in horizontal mergers—focusing on how market share and concentration levels might increase—but also has played a role in demonstrating market power in unilateral conduct cases. Recent legislative measures, such as the EU Digital Market Act, was cited as further examples of structural approaches in competition policy.

11. There are different arguments on the use of structural assumptions. Some advocate strengthening structural presumptions due to challenges in enforcement, including resource constraints and information asymmetries. Others criticise reliance on structural presumptions, arguing instead for an effects-based analysis that avoids heavy dependence on market definition and hence generates legal ambiguity. According to the Secretariat, this debate raises the question of how best to balance structural presumptions with comprehensive economic scrutiny. The Secretariat then suggested that a middle-ground strategy and flexible case-by-case assessment may offer an effective way forward.

12. Lastly, they underscored the importance of innovation, pointing out that both supporters and opponents of structural presumptions view innovation as critical. In fast-paced sectors, elements such as R&D capabilities, intellectual property rights, and overall market dynamism must be evaluated alongside structural considerations.

13. **The Chair** thanked the Secretariat for the presentation and reminded participants that, despite discussions about benefits and drawbacks, there is broad support for structural presumptions across OECD jurisdictions. The Chair emphasised that structural presumptions remain an essential and universally accepted tool in administrable competition policy, and noted that the only significant opposition had come from the BIAC. The Chair then invited Canada to share its experiences.

14. **Canada** expressed admiration for structural presumptions used in other jurisdictions and which served as inspiration for their recent reforms. As of June 2024, Canada's merger law now includes a rebuttable structural presumption. This change aims to strengthen enforcement and reduce the investigative burden, while also improving the predictability and certainty through objective standards. Their hope is that it may deter some uncompetitive mergers going ahead in the first place. Canada highlighted that over the past three years, Parliament—despite being a minority government—passed major Competition Act reforms addressing **cartels,** abuse of dominance, and mergers. The new law doesn't alter the substantive "substantial lessening or prevention of competition" (SLC) test, but replaces lengthy proof requirements (previously involving extensive data and complex economic analyses) with a clearer presumption. Key reforms include:

- Removal of the efficiencies defence (which had permitted certain harmful mergers).
- A new restored standard for remedies.
- Presumptive thresholds: if concentration rises by 100+ HHI points above 1800, or if combined share exceeds 30%, the merger is presumed harmful. Firms retain the chance to rebut by presenting contrary evidence. They also note that their legislation allows for this threshold to be adjusted via regulation.

15. **The Chair** asked Canada to address how structural presumptions help overcome the challenge of producing forward-looking proof in merger enforcement. The Chair noted

that requiring quantitative evidence for something that has not yet happened effectively imposes a difficult burden of proof and suggested the importance of starting with factual market realities, then supplementing with predictive analysis.

16. **Canada** explained that administrability is a key reason for embracing structural presumptions. Historically, even in mergers with high barriers to entry, extensive investigation and data collection were required to prove likely anti-competitive effects. This delayed enforcement efforts and potentially resulted in false negatives. Canada underlined that the new structural presumption streamlines both the investigative process and legal assessment by shifting the burden to merging parties once thresholds are exceeded.

17. **The Chair** reiterated the benefit of having jurisdictions, such as Canada, provide periodic updates on newly implemented measures, explaining that frequent check-ins could help everyone learn from real-life experiences and outcomes—almost functioning like a natural experiment. The Chair then invited the European Commission to present.

18. **The European Union** began by underscoring three core questions:

- What economic theory and evidence say about structural presumptions?
- How accurately those presumptions reflect actual market structure?
- How much weight should they carry in enforcement?

19. According to the European Union's view, economic theory generally indicates that increased concentration correlates with greater market power. However, in practice, various contextual factors mean that "all else is often not equal," resulting in only moderate correlations between high market shares and anti-competitive effects. Nonetheless, they noted that sharp increases in concentration, particularly in horizontal mergers, are empirically linked to price hikes and thus remain a legitimate focal point in merger reviews.

20. The European Union further explained that limited correlation between concentration and pricing power can stem from the unique characteristics of different industries. For instance, in markets with low barriers to entry and easily substitutable products, there may be fewer participants, but competition can still be intense due to the threat of new entrants. Conversely, in industries with significant product differentiation, new entrants may be very profitable even with relatively small market shares. This complexity means that purely structural indicators can at times produce "false positives," and so a holistic approach is necessary. In EU merger control, the European Commission looks beyond market share to factors like profit margins, the closeness of competition among firms, and switching barriers. High market shares can sometimes signal dominance, but in recent cases—such as Arcelik/Whirlpool—the European Commission cleared a merger unconditionally even where certain markets showed shares above 50%, because further scrutiny revealed no substantial threat to competition.

21. Structural presumptions can offer a useful starting framework to build a *prima facie* case, but merging parties often rebut these presumptions with data and arguments, prompting a need for a more thorough investigation. Similarly in antitrust cases, structural indicators can simplify enforcement, but typically the Commission assesses whether firms can behave independently of the market in the light of the overall evidence. Similarly, they shared that presumptions may also be used for their antitrust rules to determine whether certain agreements fall outside of scope of Article 101 of the Treaty or to create safe harbours. Examples are the various block exemptions, and the "De Minimis" notices.

22. The European Union concluded by remarking that their use of structural presumptions remains relatively limited and are never applied on a standalone basis.

However, they feel that their methods achieve similar levels of enforcement and outcomes, particularly in merger reviews, as other jurisdictions.

23. **The Chair** reiterated that structural presumptions function as one instrument among many in assessing mergers and that failing to meet a presumption does not necessarily mean there are no competition concerns. He posed a broader question regarding why competition agencies care about market structure itself. Highlighting a hypothetical scenario in which every industry merged into a single monopoly without any evident anti-competitive effects, and suggested that most observers would still view that outcome as undesirable. This broader philosophical point underscored the idea that structure remains intrinsically important for preserving competition as a fundamental principle. Mexico was then invited to present its views.

24. **Mexico** noted that, unlike some jurisdictions that have introduced notable new merger guidelines, it does not employ a strict structural presumption based on market share or concentration thresholds. Nonetheless, they still must consider market concentration—primarily evaluated through variations of the Herfindahl-Hirschman Index—when reviewing proposed transactions. For an intervention to occur, the competition authority must establish that the merger would confer or enlarge market power, create entry barriers, or enable unlawful practices. Mexico noted that while their legislation, guidelines or technical criteria had not changed, they have begun looking more carefully at mergers.

25. Mexico then cited its recent experience blocking three mergers over the past year—after a five-year period in which no mergers had been blocked. One example involved ferry services in Quintana Roo, a region known for major tourist destinations. In that matter, a large hotel chain, already investing aggressively in the ferry market, proposed to acquire a significant rival. The authority viewed this deal as a form of reverse killer acquisition. It observed that, while the acquiring firm's entry had already produced competitive benefits, the proposed merger would have re-established a de facto monopoly in certain city routes and hindered ongoing competitive advances. Another recent block involved the ready-to-drink coffee beverage sector, where Nestlé proposed to acquire Café Olé from Sigma. Nestlé held over 50% of the relevant markets in which the combined entity would operate. The resulting Herfindahl-Hirschman Index would have soared to over 3,000, and the authority concluded that acquiring multiple prominent brands in the same category could allow Nestlé to act unilaterally, raise barriers to entry, and undermine competition.

26. Mexico concluded by noting that while their legal framework does not rest on strict presumptions, these examples demonstrate that structural factors can play a role in decisive enforcement action.

27. **The Chair** thanked Mexico then turned the floor over to the United States.

28. **The United States** explained that structural presumptions have formed part of American antitrust enforcement for decades and are rooted in both case law and economic theory. They traced the evolution of the structural-conduct-performance framework from the mid-twentieth century, noting how early literature supported the notion that mergers and market concentrations can reduce competition and have adverse effects. That thinking was reflected in foundational Supreme Court decisions, like Philadelphia National Bank (*1963*), which was important for establishing presumptions in the United States. Over time, empirical research has developed further, showing that mergers in already concentrated markets tend to be more likely to reduce competition. While cross-industry comparisons of HHI and pricing may not always yield a simple correlation—particularly if concentration increases for reasons that benefit consumers, such as quality improvements—economic models still affirm that when concentration arises through the merger of competing firms, competition can be adversely affected. Accordingly, U.S. authorities (the DOJ and FTC)

continue to rely on HHI and market shares in their investigations and litigation, with courts consistently endorsing the use of structural presumptions to guide merger enforcement.

29. **The Chair** thanked the United States for underscoring the continued relevance of structural presumptions and agreed that economic research backs the connection between high market concentration and anti-competitive risks. They stressed that share-based metrics, including the Herfindahl-Hirschman Index, function as useful screening tools that guide enforcers on where and how intensely to investigate potential harms. Nonetheless, they emphasised that factual evidence ultimately determines enforcement decisions. The Chair noted that the United States updated its merger guidelines in 2023 without making drastic changes to concentration thresholds and that courts have consistently endorsed structural presumptions, with around ten recent rulings citing these guidelines as both legally and analytically sound.

30. The Chair then opened the floor for further discussion.

31. **Germany** noted that it has long relied on structural presumptions, recalling that a decade and a half ago, its stance might have been viewed as insufficiently grounded in economics. Now, however, Germany's experience illustrates that structural presumptions can work well when combined with robust economic analysis. The Bundeskartellamt's thresholds—40%for unilateral dominance, 50% for three-firm oligopolies, and 66 percent for five-firm oligopolies—serve as valuable starting points for deeper evaluation. These presumptions, in Germany's view, primarily facilitate enforceability by shifting the burden of proof to companies, ensuring they provide crucial information in merger proceedings, particularly as they are incentivised to comply to gain merger approval. They provided a further example that companies are less forthcoming in abuse proceedings because they do not have a comparable incentive. Germany also noted that in abuse cases, structural presumptions are useful in civil litigation, where private parties otherwise struggle to gather sufficient evidence. Ultimately, the speaker underscored that no credible authority would base a final decision purely on structural thresholds, but that these presumptions do help improve the balance of proof and stimulate more thorough investigations.

32. **The Chair** thanked Germany for its perspective and called on Japan, with Ecuador, Brazil, and Italy to follow.

33. **Japan** noted that its competition authority, the Japan Fair Trade Commission (JFTC), does not rely on firm numerical criteria or formal structural presumptions to establish legality under the Anti-Monopoly Act. Instead, it conducts a holistic analysis of the competitive landscape, taking into account various factors such as potential competitive pressure and market structure. The JFTC has certain "safe harbour" provisions in its guidelines related to distribution systems and business practices—for example, exclusive dealing—where an enterprise's share of the market is below 20%. This threshold is grounded in the authority's enforcement experience and reflects an assessment that firms with below 20% shares typically lack the market influence needed to impede competition. Japan also briefly noted that the JFTC has set safe harbours for merger reviews, which rely on both the Herfindahl-Hirschman Index and market share criteria.

34. **Ecuador** shared that the competition authority uses the Herfindahl-Hirschman Index (HHI) as an initial indicator to identify possible increases in concentration, which they then complement with structural analysis to understand the concrete effects. This analysis is further supplemented by studies of potential barriers to entry and likely responses from existing competitors. On structural presumptions, collecting reliable and specific data remains a core challenge—particularly in digital markets with cross-border components—requires international cooperation. Notably, high concentration is not

inherently detrimental in some sectors, like in the digital sector, where scale can generate network effects or innovation that benefits customers.

35. Ecuador applies turnover and market-participation thresholds of around 30% to flag mergers requiring deeper scrutiny. Ecuador views structural presumptions as a critical starting point that must be contextualized with broader economic analyses.

36. **Brazil** reported that its competition law prescribes a 20% market-share threshold as the defining point for presuming a dominant position. If a firm (or combined firms in a transaction) remains below that threshold, it is typically not considered capable of unilaterally conducting anti-competitive practices. Mergers and acquisitions under this threshold also qualify for CADE's fast-track review procedure. Similarly, if the combined market share is up to 50% but the Herfindahl-Hirschman Index (HHI) change is under 200, the case can proceed via fast track, since the merger is deemed unlikely to alter market concentration significantly. For vertical mergers, a 30% threshold applies. Fast-track reviews generally conclude within 30 days, often faster. By contrast, if a transaction exceeds these thresholds, it undergoes an ordinary review, which can last up to 330 days. In those instances, CADE evaluates potential anti-competitive effects and efficiency gains, and reviews possible remedies if necessary. Brazil emphasized that these procedural distinctions help concentrate limited resources on cases with higher potential competitive harm.

37. **Italy** explained that its approach broadly mirrors the European Commission's practice, beginning with a structural examination of market shares before moving on to more nuanced methods such as upward pricing pressure, diversion ratios, critical loss analysis, and surveys that capture qualitative aspects. Recent changes to Italy's merger filing form reflect an increasing emphasis on target firms and whether they may represent a potential competitor or an innovator. Additionally, they are trying to better account for how large market shares can be problematic for labour markets by introducing a new section on buying power.

38. Given that around 95% of Italian firms are small or medium enterprises (SMEs), the national authority typically examines only about 100 mergers per year and proceeds to a second-phase investigation in roughly 5% of cases. An ex-post review of past inquiries found that although market share is a central indicator, many other contextual factors guide the authority's decision to extend scrutiny.

39. Further addressing concerns about rising concentration, they secured a power from Parliament that permits it to revisit transactions falling below notifiable turnover thresholds when there are indications of competitive harm, particularly for mergers involving startups or potential innovators. While no rigid structural presumption exists in such scenarios, guidelines advise that transactions remain unlikely to face notification requests if market share or the HHI delta remains beneath specified levels. Italy also introduced a rebuttable presumption of economic dependence, which allows them to tackle situations in supply chains where there is an imbalance of bargaining power. This is particularly important considering the growing reliance of businesses on digital platforms for intermediary services.

40. In conclusion, Italy noted that Parliament now receives annual competition proposals from the authority. Currently, Italy remains comfortable with the flexibility of a system that combines structural and non-structural analysis.

41. **The Chair** thanked Italy for illustrating how structural indicators and flexibility can coexist effectively, and remarked on the concept of economic dependence as an elegant way to frame supply chain issues. Argentina was then given the floor.

42. **Argentina** explained that its guidelines and regulations on both mergers and abuse of dominance cases integrate structural presumptions to provide clarity and predictability for market participants, while still allowing for case-by-case analysis. The authority combines quantitative and qualitative analyses, which include defining relevant markets, calculating concentration levels, and establishing market shares using sales, production, or capacity data. For merger reviews, Argentina's 2018 concentration control guidelines and its 2023 notification regulation set a general threshold of 20%—mergers below this combined share typically do not raise competition concerns. In abuse of dominance matters, a 2019 set of guidelines outlines how to assess potential market power through similar structural criteria, allowing the CNDC to quickly screen out instances where combined shares remain comparatively low. Argentina emphasized that each market has unique features, so while structural presumption aids enforcement efficiency, the authority maintains a flexible, adaptable approach. Over time, it expects these methodologies and criteria to evolve in response to changing market conditions.

43. **Australia** reported a major shift in its merger control framework after new legislative amendments were announced just days prior. The country is transitioning from a voluntary, informal system reliant on court enforcement to a mandatory, suspensory regime centred on administrative decision-making. Although no specific structural presumptions were included in the amendments, Australia anticipates that structural analysis will be pivotal in two key respects. First, many more transactions are now expected to undergo review, imposing heightened expectations for efficient and timely decision-making. Consequently, structural tools will help Australia's competition authority identify which transactions present the highest potential risk to competition and warrant deeper scrutiny. Second, the revised law clarifies that a "substantial lessening of competition" encompasses the creation, strengthening, or entrenchment of market power, indicating that structural factors—and any changes they induce—will play a critical role in future enforcement decisions. Australia thanked fellow participants for their contributions and noted that it will be actively adapting its processes and seeking international input over the coming year.

44. **The Chair** praised Australia's changes, congratulating them on their expanded authority. They stressed the significance of preventing a merger from entrenching existing market power, describing this principle as fundamental in the 2023 U.S. merger guidelines. In a world characterized by moats, network effects, and feedback loops, they underlined that even if a firm already holds substantial power, further consolidating power poses competition risks. Consequently, authorities must be vigilant in safeguarding contestable markets. Peru, Korea, and Ukraine were then invited to contribute to the discussion.

45. **Peru** explained that, under its Law for the Repression of Anti-Competitive Conduct, having a "significant participation" in a relevant market is one potential indicator of dominance, though neither the law nor judicial precedent specifies a fixed share threshold. While market share typically serves as an initial step, it must be considered alongside factors like barriers to entry and competitor capacities before concluding dominance. Peruvian case law makes clear that dominance cannot rest solely on market share: a broader contextual analysis is mandatory. By way of example, in a 2022 sanction involving a cement producer, the authority found that the firm's more than 90% share combined with structural barriers—ranging from legal hurdles and high sunk costs to a strategically located production plant—supported the conclusion of a dominant position.

46. **South Korea** highlighted the growing importance of structural presumptions in overseeing online platforms, explaining that easing the burden of proof can help agencies respond swiftly in markets that can tip quickly into monopoly. As an example, Kakao Mobility, a dominant taxi-hailing platform, allegedly favoured its own taxis, which allowed

it to capture a far larger share in a short time and eliminate nearly all competitors before the Korea Fair Trade Commission (KFTC) could intervene. According to the delegation, slow enforcement of platform abuses can curb innovation more severely than any inhibitions caused by strict competition laws, as seen when a novel legal-services platform was effectively thwarted by entrenched industry interests before KFTC orders could secure its viability.

47. To address these issues, the KFTC is pursuing legislative reforms that would establish presumptions of dominance for platform operators with at least a 60% market share and a monthly user base exceeding 10 million. Under this proposal, self-preferencing, tying arrangements, restrictions on multi-homing, or any demands for preferential treatment by presumed dominant platforms would shift the burden of proof to those platforms to justify their actions. Nonetheless, South Korea clarified that structural presumptions will not become its sole enforcement tool; the authority will continue considering a broad range of factors when scrutinising platform conduct. The KFTC committed to sharing updates and outcomes of these reforms with the international community.

48. **The Chair** thanked Korea for its insights, underscoring the special relevance of structural presumptions in platform markets that tend to "tip" toward monopoly. He noted the convergence of Korea's approach with Australia's focus on preventing mergers or conduct that solidify existing market power, emphasizing that as more sectors—from healthcare to energy to pharmaceuticals—display platform-like traits, apt application of merger control standards becomes increasingly critical. The Chair then invited Ukraine to speak.

49. **Ukraine** described its reliance on structural presumptions both for merger control and in determining whether a firm holds a dominant position. Given the country's evolving market conditions—exacerbated by current economic and geopolitical challenges—the Antimonopoly Committee of Ukraine (AMCU) uses these presumptions to focus limited resources on cases presenting the greatest competition risks. The process, using measures like high market share or substantial barriers to entry to streamline resources, while also allowing the right of participants to rebut these presumptions through detailed evidence.

50. A recent example involved Kyivstar, a leading mobile operator whose large and stable market share initially suggested potential dominance. The AMCU also found indications of significant barriers to entry. Yet further inquiry, aided by the national telecommunications regulator, showed that the market was more competitive than initial data suggested and that Kyivstar's pricing and overall conduct did not, in fact, undermine competition. Furthermore, Kyivstar was able to rebut the structural presumption by showing its pricing strategies and behaviour did not harm competition. Ukraine noted that structural presumptions can provide a clear, predictable and efficient starting point that combined with options to rebut presumptions ensure that fairness and accuracy in the enforcement process can also be preserved.

51. **The Chair** thanked Ukraine for its contribution and then closed the session.