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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

**Executive Summary 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 Executive Summary by the OECD Secretariat contains the key findings from the discussion of the Roundtable on the Use of Structural Presumptions in Antitrust held during the 140th meeting of Working Party 3 on 4 December 2024.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

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

By the Secretariat¹

On 4 December 2024, Working Party No. 3 on Co-operation and Enforcement held a roundtable on The Use of Structural Presumptions in Antitrust.

Taking into account the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by the expert panellists, the following key points emerged:

1. Structural presumptions may be identified as a specific form of legal presumptions, which rely on structural market features to infer likely competitive outcomes.

Structural presumptions in antitrust law refer to the general concept that certain market structures, including high market shares and concentration, are considered presumptively to point to the existence of market power and/or harm to competition and consumers. Structural presumptions are part of a burden-shifting framework, acting as a rebuttable and evidentiary tool and not necessarily intended to determine final outcomes. Once established by competition authorities or courts that a market displays the presumptively harmful structure, the evidentiary burden of proof typically shifts to the firms which need to rebut these presumptions.

They are particularly relevant in merger control and may also apply in unilateral conduct cases for the assessment of market power.

2. Relying on structural presumptions may have advantages and disadvantages involving a complex trade-off between predictability, administrability and effectiveness on the one hand and accuracy of decisions on the other.

Structural presumptions may be used by competition authorities or courts to establish potential anticompetitive practices by simplifying and streamlining the decision-making process. Their use may be thought as an evidentiary tool for easier decision-making, limiting the need for a detailed economic assessment. While offering clarity, speed and efficiency in decision-making, the use of structural presumptions may also be exposed to increasing the risk of erroneous decisions.

While generally supporting the use of structural presumptions, delegates discussed the pros and cons of using structural presumptions in the context of their antitrust enforcement experience. While structural factors may provide useful initial indicators for identifying cases warranting further review, high market shares and market concentration do not necessarily lead to anticompetitive harm. Conversely, even where conditions for applying a structural presumption are not met, competition concerns may still arise.

Important considerations related to whether the adoption of structural presumptions may be justified, despite potential error-costs, and to what extent competition authorities should rely on them to predict competitive outcomes. Another question related on whether moving towards an effects-based analysis may instead increase the accuracy and predictability of antitrust enforcement.

¹ This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion.

3. Adopting a balanced approach combining structural presumptions with detailed economic analysis may play a critical role in reducing the potential weaknesses of both strategies, while maximising their strengths for better outcomes.

The discussion highlighted the importance of adopting a balanced and flexible approach, where structural presumptions may serve as a preliminary screening tool for cases warranting scrutiny, followed by a detailed effects-based analysis on competition - including both quantitative and qualitative evidence - to assess whether the presumed harm to competition actually materialises.

This approach may leverage structural indicators, such as market share and market concentration, as preliminary filters to flag mergers or unilateral conduct that may pose competitive risks. Rather than relying exclusively on these structural presumptions, competition authorities may carry out further in-depth examinations to verify whether negative effects, such as price increases, reduced competition, or stifled innovation, are indeed likely in this specific context. This approach may offer flexibility by combining the efficiency of structural presumptions with more rigorous analysis, which are particularly beneficial for complex or rapidly evolving markets.

A case-by-case analysis may also be essential to maintaining a flexible and effective enforcement framework, especially in certain markets.

4. Competition authorities and practitioners may need to reflect on these issues, particularly those related to the potential trade-off and the shift from one type of error to the other (false positive vs false negative), to ultimately ensure that competition remains effective and fair for the benefit of consumers.

Further reflection on these issues among competition authorities and practitioners may be required, contributing to the ongoing debates, particularly those related to this potential trade-off (efficiency in decision-making vs accuracy in predicting outcomes) and the shift from one type of error to the other (false positive vs false negative) to ultimately ensure that competition remains effective and fair for the benefit of consumers.

The discussion reiterated the benefit of having jurisdictions providing periodic updates on newly implemented measures related to these issues, emphasising how regular check-ins by competition authorities may facilitate broader knowledge sharing and enable them to benefit from real-life experiences and outcomes.