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The Use of Structural Presumptions in Antitrust – Summaries of contributions

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This document reproduces summaries of contributions submitted for Item 2 of the 140th meeting of Working Party 3 on 4 December 2024.

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Argentina

Structural presumptions in competition law are analytical tools that use market structure and conditions to assess competitive risks, such as increased concentration following a merger or dominance indicators based on market shares. The National Commission for the Defence of Competition (CNDC, for its acronym in Spanish) uses these presumptions to support decisions on mergers and investigations of abuse of dominant position, inferring competitive harm or dominance potential. Structural criteria such as concentration levels and market share thresholds serve as markers for determining competitive impacts, offering a clearer framework for companies and market agents.

The CNDC's guidelines embed structural presumptions in order to improve predictability and transparency for stakeholders in competition policy enforcement. These presumptions balance quantitative thresholds with flexibility, applying general criteria while allowing for case-by-case adjustments and complementary methods. They provide consistent guidance on economic concentration and exclusionary conduct, enhancing decision-making predictability without compromising adaptability to unique market conditions.

This document discusses the theoretical and empirical foundations of CNDC's structural presumptions and their specific applications in cases. The conclusion emphasizes the importance of balancing precise regulatory criteria with adaptability, as competition policy must evolve with market dynamics. Structural presumptions, therefore, play a critical role in promoting a stable yet responsive competition defence framework, aligning regulatory clarity with flexibility to address the complexity of modern markets.

BIAC

Business at OECD (BIAC) appreciated the opportunity to submit these comments to the roundtable on the use of structural presumptions in antitrust cases.

The use of presumptions in competition law has a long and deep history, which offers many teachings that are relevant for the present environment. This paper considers the use of rebuttable and irrebuttable presumptions in competition law, focused in particular on the conditions precedent for the use of each type of presumption. The analysis reveals that: (1) presumptions based on predictable effects are an important part of antitrust across a range of administrative and contentions proceedings; (2) it is essential to differentiate between the use of rebuttable and irrebuttable presumptions, which have different bases and applications; (3) irrebuttable presumptions are appropriately reserved for a segment of cases where the anticompetitive effects (*i.e.*, competitive harm) of certain structure/conduct combinations are certain or near certain; (4) rebuttable presumptions are appropriate where the competitive harm flowing from certain structure/conduct combinations are probable or highly probable; and (5) in the absence of a probability or certainty of anticompetitive harm, the use of presumptions is not justified.

Both rebuttable and irrebuttable presumptions are designed to facilitate enforcement efforts and short-cut enforcement procedures. But they also curtail parties' rights of defense and can restrict pro-competitive or competitively neutral behavior. Thus, courts dictate that they should be used where anticompetitive harm is predictable, *i.e.*, situations where anticompetitive harms are known to result and pro-competitive benefits are known to be proportionately small or non-existent. This means that the outcome of a given structure/conduct combination must be highly predictable for the presumption to be a proportionate enforcement tool. Predictability flows principally from significant legal, economic, and practical experience rather than postulation, expedience, or the introduction of non-competition objectives. Where the competitive effects cannot reliably be predicted based on such experience, the use of presumptions becomes more questionable.

Brazil

The document explores the concept and application of structural presumptions within Brazilian antitrust enforcement, particularly regarding mergers. Structural presumptions serve as tools to simplify and organize merger evaluations, primarily by focusing on market structure—such as concentration levels and firm dominance—to assess the likelihood of anti-competitive behavior. These presumptions are integral to Brazilian competition law and Cade's merger guidelines, drawing on established precedents that enable a more efficient review process. Cade employs this concept to prioritize cases based on predefined thresholds, ensuring that regulatory resources target transactions posing the highest competitive risks.

The origins of structural presumptions trace back to the 1950s within the U.S. antitrust framework, particularly through legislative reforms and influential case law. Cases like Brown Shoe Co., Inc. v. United States (1962) and United States v. Philadelphia Nat'l Bank (1963) highlighted the role of market share and concentration thresholds in determining anti-competitive risks. Under these cases, structural indicators, such as market share above 20%, began to represent a "relative indication" of competitive concerns. This established a foundation for the use of pre-set thresholds in antitrust analysis, where certain levels of market concentration trigger regulatory scrutiny based on probable—not definitive—harm, aligning with the Clayton Act's focus on mergers that "may substantially lessen competition."

In Brazil, structural presumptions are integrated through guidelines that set specific thresholds for market share and concentration, often involving the Herfindahl-Hirschman Index (HHI). Cade's Horizontal Merger Guidelines apply HHI metrics for highly concentrated markets (HHI above 2,500 points) and significant increases ($\Delta HHI > 200$). Cases like Kroton/Estácio in higher education and Localiza/Locamerica in car rentals illustrate how these metrics streamline the regulatory process, focusing on horizontal and vertical integrations where overlaps and concentration are substantial. Furthermore, Cade's guidelines for retail mergers—such as the Carrefour/Big case—reflect tailored thresholds for market dominance (20-30% in various markets), as seen in sectors like healthcare and construction, where thresholds guide procedural review based on the potential for anti-competitive impact.

By relying on structural presumptions, Cade achieves both efficiency and predictability in merger analysis. These presumptions allow regulators to focus on mergers with a higher likelihood of competitive harm while enabling firms to anticipate criteria for review. However, the approach faces challenges in dynamically evolving markets, where standardized thresholds may inadequately address sector-specific characteristics or new business models. Recent cases underscore Cade's willingness to adapt presumptive guidelines, marking an important step in balancing procedural economy with thorough, context-sensitive antitrust enforcement.

Egypt

Structural presumptions are useful tools that can be used by competition agencies in simplifying the assessment they may undertake for the purpose of promoting competitive markets. In Egypt, structural presumptions are mainly used in the context of assessing market dominance and ex-ante merger control, such as in the assessment of control and material influence, simplified procedures, killer acquisitions and HHI thresholds.

Structural presumptions play a crucial role in the enforcement of competition law in developing countries, by simplifying the burden on competition authorities, especially, structural presumptions enable more consistent and proactive regulation, reduce the risks of anticompetitive practices , and help safeguard consumer welfare. Over time, they contribute to building more capable and independent institutions that can enforce competition laws effectively, setting the stage for sustainable economic development and fairer markets.

However, caution is crucial when adopting structural presumptions as market characteristics differ from jurisdiction to other, thus several risks may inherent such as government intervention in the markets, externalities and data deficiency. Moreover, in dynamic markets characterized by rapid technological changes and shifting competitive landscapes, structural presumptions may not always hold true. In such contexts, relying solely on static criteria could lead to false conclusions regarding market behavior and anticompetitive risks.

While structural presumptions can significantly streamline competition law enforcement, it is essential to adapt these frameworks to the unique characteristics of each jurisdiction. Competition agencies must conduct thorough market analyses to ensure that the presumptions applied are relevant to the local context. This involves not only understanding the economic landscape but also considering cultural, political, and social factors that may influence market behavior. By tailoring presumptions to fit specific market dynamics, authorities can enhance their effectiveness and reduce the likelihood of unintended consequences.

EU

Presumptions, including structural presumptions, may be helpful to streamline the assessment of public authorities and courts, including in the field of competition policy.

The European Commission uses structural presumptions relating to both market share and concentration levels (via the Herfindahl-Hirschman Index or HHI) in antitrust and merger proceedings. These presumptions in turn help the Commission to assess the overall levels of market power or changes in such market powers brought about by a concentration. The European courts also validated the reliance on (at least some) structural presumptions. In the Akzo case for instance, the European Court of Justice held that a 50% market share could be considered very high and was therefore, in itself, save in exceptional circumstances, evidence of the existence of a dominant position.

However, presumptions by themselves also involve the risks of generating false positives as well as false negatives. As a result, while the Commission may rely on presumptions, including structural presumptions, in its enforcement activities, such presumptions are typically rebuttable, and the Commission also generally supplements its assessment with other quantitative and qualitative data rather than strictly relying on applicable presumptions.

Germany

Antitrust law has always had to deal with very complex issues. However, the complexity of these issues, and in particular the speed in which they evolve, have increased considerably in the digital economy. In the recent past, various legal efforts have been undertaken worldwide to tackle special difficulties and challenges involved. As to Germany, the introduction of Section 19a[1] of the German Competition Act (GWB)[2] in 2021 and, with regard to Europe, the introduction of The Digital Services Act (DSA)[3] and the Digital Markets Act (DMA)[4] in 2022 should be mentioned in this context. However, this is not enough. In an increasingly complex and fast-moving world a more workable approach for antitrust law is indispensable. Structural presumptions can play a key role here. If they are well designed, balanced and, ideally, enshrined in law, they can significantly strengthen the enforcement of antitrust law and speed up proceedings in the interest of all parties involved, while both maintaining legal certainty and predictability and thereby striking an appropriate balance between Type I (false positive) and Type II (false negative) errors.

Fortunately, where the assessment of market dominance in the form of single firm or collective dominance is concerned, the German GWB provides for such rebuttable legal presumptions in merger and unilateral conduct proceedings. They are aimed at facilitating the decision-making practice in order to promote effective competition law enforcement (**Section II.**) These legal presumptions are helpful even if they are mainly used as an auxiliary consideration in the Bundeskartellamt's practice because the authority is legally obligated to investigate all the facts relevant to a case ex officio (*Amtsermittlungsgrundsatz*). Their main and still highly beneficial function is to provide a strong incentive for firms to submit to the Bundeskartellamt all the information required for a complete assessment of the case at an early stage of the investigation (**Section III.**). Another important function of the presumptions is to provide the courts with an instrument to keep the issues raised in the proceedings manageable (**Section IV.**). In addition, they

[1] In 2021 the 10th amendment to the German Competition Act (GWB) modernised and extended the control of abusive practices. The Bundeskartellamt can now intervene more quickly and effectively against anti-competitive practices by large digital companies. It can prohibit companies which are of "paramount significance for competition across markets" from engaging in certain practices that are damaging to competition. Interventions are also possible in markets in which the companies are not (yet) dominant. This is a significant change from previous abuse control and enables the Bundeskartellamt to also intervene at an early stage in order to keep markets open, promote innovation and protect consumer choice. For further information see: https://www.bundeskartellamt.de/EN/Digital_economy/RulesDigital_economy/rulesdigitaleconomy_node.html.

[2] English version available at: https://www.gesetze-im-internet.de/englisch_gwb/index.html. Please note, the English translation includes the amendments to the Act by Article 1 of the Act of 25. October 2023 (Federal Law Gazette I. p. 294). Translations may not be updated at the same time as the German legal provisions displayed on this website. To compare with the current status of the German version, see: http://www.gesetze-im-internet.de/gwb/BJNR252110998.html.

[3] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), OJ L 277, 27.10.2022, p. 1–102.

[4] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

enable and facilitate fact-finding in private enforcement in civil proceedings (**Section V.**). In view of these effects, the legal presumptions, while respecting the *Amtsermittlungsgrundsatz*, not only help to speed up and facilitate the Bundeskartellamt's proceedings as well as the ensuing appeal proceedings, but also, and even more so, private antitrust enforcement (**Section VI.**).

Hungary

This contribution presents the structural presumptions known and applied by the Hungarian courts and the Hungarian Competition Authority (GVH) in its antitrust and merger control proceedings. Their main purpose is to identify potentially distortive market practices and mergers. The contribution describes these presumptions, but in more detail the merger-specific presumptions will be discussed.

The GVH considers the SSNIP test as the theoretical basis for the definition of the relevant market. The SSNIP test cannot be considered as a structural presumption per se, but market definition is indispensable for the determination of market shares and market power, given that the assessment of market power is strongly connected to the relevant market definition. In several decisions, the GVH has made clear that it relies on the European Commission's practice on the question of the existence of a dominant position. The market share is the basis for the assessment of dominance, but the assessment of dominance also requires an examination of other aspects.

The rules of the Hungarian merger control system are set out in Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (HCA). The HCA sets out thresholds which in themselves constitute a structural presumption. The legislator has assumed that concentrations below the thresholds have little impact on competition and therefore do not require any action by the GVH. In Hungary, uniform turnover-based thresholds have been set for all sectors. The traditional thresholds consider two components when determining whether there is a notification obligation. On the one hand, the overall economic significance of the transaction and, on the other hand, the incremental value.

The HCA also allows for the examination of concentrations below the traditional thresholds. Voluntary notification under the HCA is essentially based on the likelihood of a significant lessening of competition, but in the interests of legal certainty the Hungarian legislator has limited the possibility of bringing concentrations under control by setting a combined turnover threshold.

Undertakings that reach the turnover thresholds set out in the HCA are subject to a notification obligation. However, the GVH does not always initiate proceedings for a detailed examination of the concentration. The conditions for initiating proceedings are set out in a Notice issued by the GVH. The Notice contains structural presumptions both for mergers of undertakings with an established market presence and for cases where only one of the parties is an actual market player and the other is only a potential entrant.

Where both undertakings are active on a market, the Notice sets a combined market share threshold of 20% for horizontal mergers and 30% for non-horizontal mergers, as well as a merger-specific increment of 5%. HHI increments are also considered.

When examining potential entry, the Notice sets a higher threshold for an actual entrant's share, whereas for a potential entrant there is no quantitative threshold, the Notice only requires that there be verifiable arguments in favour of the future growth potential (e.g. size of the customer base).

However, these thresholds, as in dominance cases, are only a pre-screening test and, if they are met, additional circumstances need to be taken into account to establish the likelihood of an SLC.

As far as the significance of structural presumptions in judicial practice is concerned, no judgments of the courts have explicitly addressed the issue of structural presumptions, i.e.

no judgments have so far been handed down challenging structural presumptions and their application.

Indonesia

The use of structural presumptions in antitrust law is a pivotal aspect of ensuring fair competition and safeguarding consumer interests in Indonesia. Preasumstion of market power or dominance is needed in the efficiency of the enforcement of Law Number 5/1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition and Law (Indonesian Competition Law), which in its application is then often also equipped with other analyses. Structural presumptions serve as a regulatory framework that allows Indonesian Competition Commission (ICC or KPPU) to identify dominance or market power and potential anti-competitive effects of mergers and acquisitions (M&A) efficiently. This article discusses the challenge that face by Competition Authority, particularly The KPPU in use of structural presumptions and their application in upholding the Competition Law. Given Indonesia's unique economic landscape, characterized by diverse sectors ranging from manufacturing to services and agriculture, the application of these presumptions varies significantly across industries.

Italy

The Italian competition law framework does not provide for structural presumptions as per se rules, neither positive nor negative. Nevertheless, the Italian Competition Authority (the "Authority" or the "AGCM") uses structural indicators such as market shares as preliminary screens, in both merger and abuse of dominance cases. In merger review, structural presumptions are used in Phase I as important indicators to identify potentially harmful cases. However, the assessment of the actual effects of the transactions is based on a thorough economical and factual analysis in the course of the investigation. Similarly, market structure tools constitute key indices to infer market power in abuse of dominance cases, but are usually supported by additional case-specific elements that should be consistent with such structural presumptions.

The Authority's practice of using structural indices as rebuttable presumptions derives from EU competition policy and has been endorsed by the Italian Courts. The combined use of static market structure tools and alternative metrics seems appropriate to take account of market dynamics and to properly understand the competitive behaviour of the firms and its effects.

This contribution focuses on three recent developments in the Italian competition law system that relate to structural presumptions.

First, in the area of merger control, the AGCM updated its Notice on the notification of mergers in May 2024 to align with the EU guidelines. The Notice provides clarification as regards the identification of those relevant markets are likely to be affected by the merger, the so-called "affected markets" in terms of market shares, as well as competitors and other parameters. The revised Notice requires additional information beyond market shares and Herfindahl-Hirschman Index (HHI) changes, such as evidence from internal company documents on competitive constraints, entry barriers and efficiencies. These structural screening criteria assist the AGCM in the preliminary identification of problematic mergers, without constraining the Authority's capacity to challenge reportable mergers under the SIEC Test (introduced in Italy in 2022). In reviewing mergers involving oligopolies, the Authority has complemented the structural analysis with alternative screening tests, such as diversion ratios and price pressure tests, in order to gauge problematic mergers at an early stage.

Second, following an amendment to the Competition Act in 2022, the AGCM now has the power to request notifications of potentially problematic below-threshold transactions. These may include acquisitions of potential competitors or innovators if there is a "concrete risk for competition". In these cases, the strategic nature of the target company may be an equally or even more relevant factor than market shares or concentration screens, particularly when turnover figures are unavailable or insufficient to gauge the target's potential competitive impact in the future. Furthermore, the Guidance Notice published by the Authority introduced a detailed list of safeguards, specifying circumstances in which below-threshold concentrations are unlikely to be called in for review. Despite not being binding, these screening tools can be regarded as relative negative structural presumptions.

Third, in the area of unilateral conduct, the AGCM has occasionally recognised the concept of super dominance, particularly in the digital sector. In addition to high market shares, other parameters – such as a substantial disparity in market shares in comparison to the nearest competitor or the fact that the undertaking was a key player in platform

intermediation – were regarded as clear indications of the degree of the company's dominance and market power.

Notably, the Authority can also enforce the abuse of economic dependence legislation if there is a competitive impact. A legislative amendment in 2022 introduced a rebuttable presumption of economic dependence on digital platforms that play a "key role" in providing access to end users or suppliers. Early applications of this provision have offered insights into the practical utility of this presumption.

This contribution is organised as follows: Section 2 examines structural presumptive rules in merger control, with a particular focus on the Authority's new powers for below-threshold mergers, where negative presumptive rules may apply. Section 3 discusses the AGCM's application of structural presumptions in addressing abuses of dominance. Section 4 explores the interplay between structural presumptions and other competition policy tools, with a specific emphasis on economic dependency. Finally, Section 5 draws some conclusions.

Japan

The Japan Fair Trade Commission (JFTC) has strictly enforced the Antimonopoly Act (AMA) against anticompetitive conducts in order to encourage fair and free competition. However, the AMA itself does not provide clear and precise criteria of its violations. Therefore, the JFTC has formulated various guidelines that illustrate what kind of conduct might arise problems under the AMA, for better understanding of and promoting transparency in the application of the AMA to anticompetitive conducts. While those guidelines do not have any numerical criteria for presuming illegality based on specific market structure or market share, one of them shows a policy to prioritize a case where a market share of a product supplied by an enterprise exceeds approximately 50% when deciding whether to investigate a case, and some of them establish “safe harbours” that define the scope of conducts normally considered not problematic under the AMA.

The main purpose of this contribution paper is to introduce the overview of the JFTC's enforcement policy considering market share and the safe harbours set out in these guidelines.

Korea

The "structural presumption" refers to a methodology in which market concentration serves as a key indicator of anticompetitive effects, and the Korea Fair Trade Commission (herein after the "KFTC") applies the methodology to antitrust cases. While structural presumptions provide valuable insight, the KFTC adopts a balanced approach that comprehensively considers a wide range of factors, including internal documents of entities concerned and various statistics.

In the KFTC's merger review process, the Monopoly Regulation and Fair Trade Act (hereinafter the "MRFTA") presumes that a merger may limit competition when: ▲the aggregate of the merging parties' market shares amount to 50% or higher; and ▲the gap between the aggregate and the second-largest company's market share is a quarter of the aggregate or more. Based on the established thresholds, the KFTC blocked a horizontal merger in March 2024, proposed by Megastudy and STUnitas, both private learning institutes for the Korean civil service exams. Given the aggregate market share of up to 75% with the considerable gap of up to 66%p with the second-largest company, which exceeds a quarter of the 75%, the KFTC concluded that the merger may lead to anticompetitive effects—an increase in tuition fees.

The KFTC's Merger Guidelines (hereinafter the "Guidelines"), on the other hand, sets out the types of mergers that are presumed not to raise competitive concerns. In non-horizontal mergers, for example, the Guidelines presume that a proposed deal is not anticompetitive if both merging parties hold less than 10% market share. In the Microsoft-Activision Blizzard merger assessed in May 2023, the KFTC concluded that the merger did not cause competition concerns, as neither party held a market share of 10% or higher in the game distribution and console markets.

The structural presumption is also frequently employed in cases involving abuse of dominance or cartel conduct. The MRFTA presumes that a business entity has market dominance if its market share is at least 50%. In June 2023, the KFTC imposed a fine of KRW 24.7 billion on Kakao Mobility, a taxi-hailing service provider in Korea, for prioritizing its affiliated drivers in the passenger-driver matching process over non-affiliated drivers, as the firm is presumed to hold dominance in the taxi-hailing service market with a market share of at least 90%. In a softcore cartel where hardcore cartel activity (e.g., price fixing) is not involved, it is presumed not to limit competition if the combined market share of cartel participants is 20% or less.

Mexico

Structural presumptions, based on indicators such as market concentration or high market share, allow competition authorities to anticipate possible anticompetitive effects without requiring a thorough investigation in each case. By establishing structural thresholds, through Herfindahl-Hirschman Index (HHI) calculation or market share analysis, authorities could identify situations likely to result in reduced competition. This allows for the more efficient implementation of preventive or corrective measures.

At the same time, structural presumptions help standardize competition law enforcement, making the process more predictable and reducing the burden of proof for authorities in certain cases. It also allows to allocate resources to cases requiring more staff members involvement.

According to the Federal Economic Competition Law (LFCE for its initials in Spanish), structural indicators, such as market shares and the use of concentration indicators, are used by the Mexican Federal Economic Competition Commission (Cofece) when assessing **mergers, market power and effective competition**.

While the LFCE establishes the use of indicators such as market shares and market concentration, it does not set explicitly specific thresholds to be considered as presumptions for concluding competition issues. In general, **plain structural presumptions are not established in the Mexican legal system.** Structural market indicators are analyzed in a complementary way with other competition conditions indicators, such as barriers to entry, strategic behavior of competitors, access to inputs, among others. However, in merger analysis there are HHI measures that allow Cofece to identify simple and complex cases.

In this regard, while structural presumptions are useful for detecting potential risks, they need these are complemented with more dynamic analyses that consider the changing nature of markets, especially in sectors where innovation plays a key role. This allows for a more nuanced application of competition laws in modern markets.

Peru[5]

This contribution is aimed at providing a general overview on the approximation on structural presumptions in the Peruvian competition legislation and jurisprudence, both for the merger control regime and the prohibitions against anticompetitive practices. Regarding the mergers review, we present the applicable rules for evaluating the effects of merger transactions, alongside the treatment of market shares and concentration indices, as outlined in the Guidelines on the Definition and Analysis of Merger Transactions. In the context of anticompetitive practices, we explore how the assessment of market shares is integrated with additional factors to draw conclusions regarding the existence of a dominant position in cases of abuse of that position and vertical collusive practices. The criteria employed for both merger control and anticompetitive conducts investigations are illustrated through references to specific cases from Indecopi's jurisprudence in recent years.

[5] This contribution has been prepared by Andrés Valdivia Montes and Hugo Figari Kahn, officials of the National Directorate for Investigation and Promotion of Free Competition (DLC) of Indecopi, the Peruvian Competition Agency (an administrative body within the Executive Branch). Unless otherwise stated, this report does not necessarily reflect the opinion of the Commission for the Defense of Free Competition (CLC) or other authorities within Indecopi.

Spain

The Spanish competition framework is designed to be flexible and adaptable, capable of addressing a wide range of market situations and the risks they may pose to competition. In certain cases, and at an initial stage, the assessment may preliminarily rely on structural presumptions.

One common application of these structural presumptions in both merger control and antitrust analysis is the use of concentration levels and market shares as indicators of potential competition risks. In merger control, high market shares and overlaps may signal harm to competition. In antitrust, high market shares can indicate dominance or market power, to be factored in when assessing potentially anticompetitive conducts.

However, these structural presumptions serve only as starting points. In order to ensure a comprehensive assessment in both merger control and antitrust, the CNMC use structural presumptions in combination with a thorough analysis of factors such as market dynamics, barriers to entry and competitive constraints.

Chinese Taipei

The relevant regulations and practical experiences concerning the use by the TFTC of structural presumptions in competition law cases can be explained in terms of (1) the statutory provisions on market share standards for monopolies and merger notification thresholds, (2) the de minimis standards of market share for cartels and vertical transaction restrictions, and (3) the standards for market structure in the analysis of practical cases.

The statutory provisions on market share standards for monopolies and merger notification thresholds can mainly be divided into (1) the market share standards for monopolies, (2) the market share standards for merger notification thresholds, and (3) the market share standards for applying the simplified procedure in merger cases. To align with international trends in competition law, the TFTC has promoted amendment schemes to delete the current provisions of market share thresholds regarding merger notifications and has adopted "sales revenue" as the standard instead.

Regarding the de minimis standards of market share for cartels and vertical transaction restrictions, there are different threshold standards for different types of conduct: (1) the de minimis standard for cartels is a 10% market share; (2) regarding the de minimis standard for resale price maintenance, case experience is still being accumulated with no standards adopted presently; furthermore, (3) the de minimis standard for vertical non-price transaction restrictions is a 15% market share.

As regards standards for market structure in the analysis of practical cases, in past cases, the TFTC usually made comprehensive assessments based on market shares and market concentration (the HHI index) and referred to threshold standards for market structure, such as the 2010 U.S. Horizontal Merger Guidelines or the 1995 U.S. Bank Merger Competitive Review, to screen cases for possible anti-competitive concerns. However, the U.S. has abolished the aforementioned guidelines and introduced the Merger Guidelines in 2023, with amendments to the threshold standards for market shares and market concentration therein.

As for related analytical standards for market structures, the TFTC has compiled past cases and used data from the Industry and Service Census of our country to analyze changes in the market concentration of different domestic industries. The TFTC will continue to accumulate data in practical cases and conduct related research to serve as reference in future enforcement.

Ukraine

The Antimonopoly Committee of Ukraine (hereinafter - the AMCU, the Committee) uses structural presumptions in its enforcement both in the framework of merger control and in determining the dominant position of an undertaking in the relevant markets.

At the same time, **it is important to ensure that the parties have the opportunity to rebut the presumption of illegality.**

In 2020, due to complaints and applications from citizens regarding unreasonable and unjustified increases in tariffs for mobile communication services by Ukrainian mobile operators, the AMCU studied the field of telecommunications (mobile telephone services).

In the course of this Study, the AMCU identified signs of violation in the form of abuse of monopoly (dominant) position in the market of mobile communication services by company "Kyivstar" (one of the biggest Ukrainian mobile operator), and the case was initiated.

The following structural presumptions, in particular, served as grounds for initiating the study, which was later transferred to the case:

- high market share.
- Consistency (stability) of market share over time.
- the degree of market concentration.
- barriers to entry.

Having established the structural presumptions regarding Kyivstar's dominant position on the Services market, the burden of proof then shifted dynamically from the Committee to Kyivstar and vice versa.

In particular, the AMCU reviewed the mechanism of formation of the cost of the mobile phone tariffs (cost price) and found that Kyivstar PrJSC set tariffs for the this services independently, considering the current market prices, tariffs and demand.

Also it is worth noting that the majority of subscribers who exercised their right to transfer their number chose the operator of the Services with the smallest share in the market surveyed - Lifecell LLC.

Considering the information obtained from Kyivstar PrJSC and National Telecommunications Operator, the AMCU concluded that in the period from January 2020 to December 2020 (inclusive) was subject to significant competition in the market of mobile communication services, and therefore **the provisions on abuse of dominance can not be applied**.

Based on the AMCU's practice, structural presumptions are a fairly effective tool in terms of predictability of its application, saving limited resources of the competition authority and the opportunity for undertakings to rebut the presumptions expressed by the AMCU.

The AMCU support’s the middle-ground approach expressed in the Background Note[6] as the most rational and reasonable, in our opinion, given the main goal of the competition

[6] THE USE OF STRUCTURAL PRESUMPTIONS IN ANTITRUST

authority - to ensure effective protection of economic competition in the relevant markets. Since the speed of decision-making should not really reduce its effectiveness, the scope of structural presumptions (quantitative and qualitative composition of indicators) should be determined on a case-by-case basis to balance over- and under-enforcement.

https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/11/the-use-of-structural-presumptions-in-antitrust_27777e33/3b8c6885-en.pdf

United States

For decades, courts in the United States have relied on the so-called "structural presumption" that a merger that significantly increases concentration in a highly concentrated market can be presumed unlawful absent a rebuttal showing from the merging parties that other evidence establishes that there is no violation of law. In the experience of the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (collectively, the "Agencies" or the "government"), this rebuttable presumption offers a practical, efficient, and analytically sound method for the Agencies to identify harmful mergers and for courts to adjudicate illegality. Where concentration levels and market shares indicate a significant risk of harm, the structural presumption allows enforcers to focus resources on mergers that pose the greatest risk, while placing the burden on merging firms to show that their transaction would not substantially lessen competition in violation of U.S. law.

The Agencies recently had the opportunity to conduct a robust review of the legal and theoretical support for the structural presumption as part of the Agencies' 2023 update to the U.S. Merger Guidelines.[7] Starting in January 2022, the Agencies undertook a comprehensive review of the then-current guidelines to ensure that they accurately reflect the governing statutes and judicial precedent, current economic thinking, and modern market realities. This review included a fresh look at the structural presumption, which has been recognized in some form in U.S. merger guidelines since the guidelines were first created in 1968.[8]

As this paper explains, the Agencies' review affirmed that there is strong legal and economic support for continued reliance on a rebuttable structural presumption. In the following sections, we first provide an overview of the role that concentration and market shares play in judicial adjudication of mergers in the United States. We then describe the widespread recognition of the utility of the structural presumption among economists. We then explain the Agencies' approach to the structural presumption as an analytical framework in merger review, as reflected in the 2023 Merger Guidelines. Finally, we explore the interaction of structural presumptions with other tools and frameworks used for analyzing mergers.

[7] U.S. Dep't of Justice & Federal Trade Comm'n, *2023 Merger Guidelines* (2023), *available at* https://www.justice.gov/atr/2023-merger-guidelines. The Agencies issue merger guidelines to enhance transparency and promote awareness of how the Agencies undertake merger analysis when deciding whether to challenge an acquisition. The first merger guidelines were issued in 1968, and periodically over the years, the Agencies have worked collaboratively to update them, including in 1982, 1992, 1997, 2010, and 2020.

[8] The 1968 Merger Guidelines explained that the goal of merger enforcement was to "preserve and promote market structures conducive to competition," setting forth market-share based presumptions prohibiting mergers that raised concentration. U.S. Dep't of Justice, *1968 Merger Guidelines*, 1 (1968), *available at*

https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf.