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Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by the United States

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This document reproduces a written contribution from the United States submitted for Item 4 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

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United States

1. Introduction

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

2. This paper will discuss presumptions, safe harbors, and the *per se* rule in U.S. antitrust law. In the United States, presumptions in competition law are based on common law as established by courts deciding multiple cases over time, and include both substantive and procedural presumptions. It is important to note that before applying any presumption, plaintiffs must establish certain factual predicates, according to evidentiary standards that are heightened at each step of the litigation process.[1]

3. Under U.S. competition law, some types of conduct are recognized as anticompetitive and thus unlawful, while for other types of conduct an inquiry into their effects is necessary.[2] As discussed below, the former approach is reflected in the *per se* rule of illegality that applies to naked price fixing, while cases under the second approach sometimes employ presumptions of competitive harm that are rebuttable with evidence that, on balance, the practice increases economic efficiency and renders markets more, rather than less, competitive.

4. U.S. courts rely on three methods of analysis to determine whether conduct is anticompetitive and thus illegal. In general, these methods fall along a spectrum based on

purpose other than their tendency to eliminate competition, such that extensive inquiry into the restraint's effect is unnecessary.[3]

6. Over time, new economic learning has led to the recognition that firms may have efficiency justifications for what may otherwise appear to be anticompetitive behavior. This evolution in economic learning has led to a narrowing of the set of restraints that courts treat as illegal *per se*.

7. Rule of reason analysis is used by U.S. courts for a broader range of conduct and is usually a detailed economic analysis. In rule of reason analysis, a court typically

1.1. *Per Se* Analysis

11. Section 1 of the Sherman Act proscribes "[e]very contract, combination . . . or conspiracy . . . in restraint of commerce."[6] The U.S. Supreme Court has held that Section 1 prohibits only *unreasonable* restraints.[7] The type of analysis a court uses to determine if a restraint violates Section 1 depends on the type of restraint.

12. Certain "types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit" that they do

reason treatment for all vertical restraints except minimum resale price maintenance,[14] to the current approach in which all vertical restraints other than pricing are evaluated under the rule of reason. In 2007, the Supreme Court overruled previous precedent in Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), to analyze minimum resale price maintenance under the rule of reason after reviewing economic evidence of the potential for benefits to consumers due to enhanced interbrand competition. The Supreme Court held that manufacturer-imposed minimum resale prices may lead retailers to compete efficiently for customer sales in ways other than cutting the retail price.[15]

2. Abbreviated Rule of Reason ± Rebuttable Presumption of Unreasonableness.

14. More recently, courts have applied a rebuttable presumption of unreasonableness to certain types of behavior that are sufficiently similar to agreements that have been condemned as *per se* unlawful. In such cases, the court will consider procompetitive justifications in deciding whether the initial presumption was rebutted.

15. For instance, an absolute ban on competitive bidding by a professional association does QRW UHTXLUH ³DQ HODERUDWH LQGXVWU\ DQDO\VLV´ V nature of horizontal agreements among competitors to refuse to discuss prices.[16] Nor does a horizontal agreement among competitors to withhold a valued service,[17] or a plan by an association of college athletic competitors to limit the number of games that could be televised.[18] In each of these cases, courts have applied what has come to be called DEEUHYLDWHG RU ³TXLFN ORRN´[19] DQDO\VLV XQGHU WKH UXO

16. As with any rule of reason analysis, once the plaintiff has established a prima facie case the defendant bears the burden of establishing that the suspect conduct has a SURFRPSHWLWLYH MXVWLILFDWLRQ E\ SUHVHQWLQJ ³IDFW\ the restraint,

3. Presumptions under U.S. Merger Law

17. In the United States, mergers are generally challenged under Section 7 of the Clayton Act, which prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[21] U.S. federal courts generally follow a burden-shifting approach.[22] First, the plaintiff must establish its prima facie case, including the definition of a relevant product and geographic market.[23] At this stage, defendants can demonstrate that plaintiff's product market, geographic market, or both, are inaccurate and thus that the plaintiff has failed to establish a prima facie case. If the plaintiff can show that the merger would produce a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, that creates "a presumption that the merger will substantially lessen competition."[24] Once the plaintiff has made such a showing, it "establish[es] a prima facie case of anticompetitive effect."[25]

18. To rebut the presumption, defendants must produce evidence that shows that the market-share statistics t ac

20. The Agencies also rely on the analysis set out in the Horizontal Merger Guidelines.[32] The Guidelines "outline the principal analytical techniques, practices, and the enforcement policy" of the Agencies. Using the analysis contained in the Guidelines, the Agencies make decisions about which mergers to challenge; whether to order a remedy to resolve the competitive concerns and restore competition that would otherwise be lost in the merger; or whether to seek a court injunction to block a merger. The Horizontal Merger Guidelines are not binding on courts, but courts have relied on the framework contained in the Guidelines to assist in determining whether a horizontal merger violates Section 7 under the burden-shifting framework described above.

21. The Guidelines set out market concentration thresholds to identify mergers that may require more in-depth agency review to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration.[33] The Agencies calculate the Herfindahl-Hirschman Index (HHI) as a measure of market concentration, as one way to identify some mergers that are unlikely to raise competitive concerns.[34] While these thresholds do not create a presumption of liability, they reflect the collective experience of the agencies in enforcing merger

of conduct that is permissible. Conduct falling outside of safety zones will not necessarily be challenged.

24. Competition law analysis is inherently fact-intensive. Safety zones require the consideration of only a few factors that are relatively easy to apply. These factors provide the agencies with a high degree of confidence that the conduct falling within the safety zone is unlikely to raise substantial competitive concerns. Safety zones and the guidelines that describe them also provide transparency to firms about how the competition laws may be applied to their conduct and how the Agencies perform their analysis of such conduct. This helps firms to engage in agreements and transactions that are not likely to run afoul of the competition laws.

25. The appendix to this paper contains a list of the guidelines that have been issued by the Agencies. These guidelines contain safety zones for specific types of conduct and industries. For example, as discussed previously, the Horizontal Merger Guidelines set out threshold HHI levels below which the Agencies rarely conduct an in-depth investigation or challenge a transaction. Similarly, the Antitrust Guidelines for Collaborations Among Competitors lay out antitrust safety zones for collaborations among competitors, including research and development joint ventures. For example, absent extraordinary circumstances the Agencies do not challenge a competitor collaboration "when the market shares of the collaboration and its participa

27. Outside of these thresholds, Section 8 prohibits a person from serving as a director or an officer, elected or chosen by the board, of two or more corporations if the corporations are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws."[41] Competitor corporations are covered by Section 8 if the combined capital, surplus, and undivided profits of each of the corporations exceeds an inflation-adjusted multiple of $10 million.

[41] 15 U.S.C. § 19(a)(1)(B).