Organisation for Economic Co-operation and Development

DAF/COMP(2017)9

Unclassified **English - Or. English**

9 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Safe Harbours and Legal Presumptions in Competition Law

Background Note by the Secretariat

5-6 December 2017

This document was prepared by the OECD Secretariat to serve as a background note for Item 5 at the 128th Meeting of the Competition Committee on 5-6 December 2017.

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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JT03422616

Safe Harbours and Legal Presumptions in Competition Law[*]

Abstract

Courts, policy-makers and academics have long debated questions regarding the appropriate scope of rules and presumptions in competition law. On the one hand, competition laws include rules that prohibit certain conducts regardless of their effects, as is the case of naked price fixing; on the other hand, where the effects of a conduct are ambiguous that conduct may be prohibited only if it is shown to have anticompetitive effects. Following developments in economic theory in the latter half of the 20th century, competition law has increasingly moved away from form-based prohibitions towards requiring that detailed economic analyses be pursued before certain conducts are sanctioned as anticompetitive. This trend arose from the realisation that many conducts, —such as vertical relationships, tying and bundling, or exclusive dealing— that were previously thought to amount to hard-core infringements of competition law are, in the main, pro-competitive.

The surge of economic analysis in competition enforcement has provided greater credibility and more precision to the actions of competition agencies. However, it has also increased the cost of enforcing competition rules and introduced a higher degree of legal uncertainty regarding which behaviours are potentially challengeable under competition law. As a consequence, the same period that saw an increased reliance on detailed economic analyses also saw the rise of safe harbours and legal presumptions. These safe harbours and presumptions facilitate compliance with the law and make enforcement more predictable and efficient.

This background paper provides an overview of discussions on how to ensure the effectiveness and administrability of competition law in practice. It beings by describing the evolution of competition law over the last century; it then seeks to explain the reasons for this evolution by reference to decision theory, also known as "error-cost analysis". Building on this theory and on practical insights, this paper then identifies the main reasons for adopting legal rules and presumptions, and the circumstances in which detailed economic analyses are to be preferred.

[*] This paper was prepared by Pedro Caro de Sousa and Federica Maiorano of the OECD Competition Division. This note benefitted from comments from Antonio Capobianco and Iratxe Gurpegui.

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1. Introduction

1. Courts, policy-makers and academics have long debated questions regarding the appropriate scope of rules and presumptions in competition law. On the one hand, competition laws include rules that prohibit certain conducts regardless of their effects, as is the case of naked price fixing. On the other hand, where the effects are ambiguous, a conduct may be prohibited only if it is shown to have anticompetitive effects. The costs of an inquiry into economic effects brings up further questions, such as which entity is best placed to pursue the competitive analysis; how the costs of enforcement compare to the costs of allowing a potentially anticompetitive conduct to stand; and what the appropriate scope of rules and presumptions is.

2. Underpinning these questions is the fact that, while competition law seeks to prevent business practices that reduce economic welfare, the enforcement of competition law has costs. First, as a result of developments in economic theory, the way competition law treats certain practices has changed.[1] For example, for many years competition law prohibited practices that economic theory has rehabilitated as being mainly pro-competitive –such as vertical territorial allocations[2] or prohibitions of maximum resale prices[3]. Furthermore, enforcement bodies face obstacles arising both from imperfect information and limited resources when processing that information. In other words, decision makers are not infallible and mistakes will be made. Second, enforcement actions are costly. In order to determine whether enforcement is worthwhile, enforcement costs must be weighed against the costs of allowing a potentially anticompetitive conduct to stand. While prohibitions based on types of conduct are easier to apply, they are likelier to lead to mistakes than detailed market analyses. Pursuing detailed market analyses is more costly than identifying whether a certain type of conduct took place. Third, enforcement bodies have limited resources, and have to prioritise enforcement against some types of business practices. In practice, the effectiveness of competition law depends on its addressees –i.e. businesses– complying with it. Compliance and legal certainty are likely to be greater when there are clear rules regarding which business practices are lawful than if every business practice is potentially subject to a detailed market analysis to determine whether it has anticompetitive effects.

3. The trade-off implicit in choosing between prohibitions of certain business practices regardless of their effects and only prohibiting a conduct when it has anti-competitive effects is identical to the trade-off between bright-line rules and standards. Bright-line rules set out clearly whether certain behaviours are prohibited or allowed; e.g. a rule that prohibits price fixing or market sharing between competitors, regardless of the effects of these business practices in each individual case. Standards are vaguer than rules, and usually set out a benchmark which is harder to measure, e.g. a prohibition of business conduct that harms consumer welfare.

4. Standards are less likely to lead to enforcement errors, because they focus directly on the question of whether a conduct is anticompetitive, i.e. whether it harms consumer welfare; but they are also much harder to enforce, often requiring complex economic assessments. Rules, on the other hand, are much easier to enforce, but they may lead to errors in enforcement; e.g. a strict prohibition on price fixing may prevent socially beneficial co-operation efforts between competitors in R&D.[4] In between these extremes –bright-line rules and standards– one can find a variety of norms and presumptions that seek to ensure that competition law is administrable. Examples of this are the use of market shares to determine whether a business has sufficient market power to be liable for unilateral conduct, or the presumption that a firm was part to a cartel if it participated

in meetings at which anti-competitive agreements were concluded without opposing such agreements.

5. Ultimately, the challenge is how to balance the pursuit of the goals of competition law –i.e. welfare maximisation– with the need to create administrable rules. This is a balance that competition enforcers struggle with constantly, as new business practices emerge and economic theory evolves. Recent examples of efforts to arrive at a right balance can be found in work being pursued around the world regarding the appropriate treatment of vertical agreements –particularly in the context of the updating of guidelines by competition agencies– and in debates about how to treat loyalty rebates or about the relevance of the as-effective-competitor test for the assessment of pricing practices.

6. This background paper aims to provide an overview of discussions on how to ensure the effectiveness and administrability of competition law in practice, by reference to academic debates and practical experience. It will provide examples throughout, which will be taken mainly from the US and Europe, because these are the jurisdictions to which the literature on the topic mainly refers.

7. The paper will begin, in the next section, with a description of the evolution of competition law over the last century and of how it has oscillated between prohibiting business practices based on the form they take and requiring detailed economic analyses to determine whether those same practices should be prohibited. In Section 3, it will summarise the contributions of a branch of law and economics devoted to the study of how rules can have an optimal social impact –decision theory, also known as "error-cost analysis"– and describe how this approach contributes to our understanding of the structure of competition law and its evolution over the years. One of the main conclusions arising from this literature is that mistakenly condemning business practices as anticompetitive can have serious costs. While bright-line rules and presumptions make competition enforcement simpler, one must have a significant amount of confidence that such rules and presumptions are correct before adopting them. Thus, Section 4 is devoted to the reasons for adopting rules and presumptions, instead of engaging in detailed market analyses. This Section also includes a discussion of why competition enforcers may be more relaxed concerning rules and presumptions that amount to safe harbours. Safe harbours may lead to mistaken acquittals, which are not likely to prove as costly as mistaken condemnations of business practices, and may in any event be overruled by detailed market analyses in the context of individual cases. Section 5 concludes.

2. Competition law and competition rules – A historical perspective

8. The open language of competition law provisions does not provide detailed guidance on what conducts it prohibits. Instead, legal provisions prohibit conduct that amounts to a "restraint of trade", "monopolisation", a "practice that has as its object or effect the prevention, restriction or distortion of competition", or an "abuse of a dominant position".[5] In short, competition law provisions are vague.

9. While its fundamental objective is clear –to prohibit business conducts that reduce economic welfare– historically competition law has found it difficult to reduce this objective to simple rules. Competition law governs a vast and complex set of business practices, which have extremely diverse effects on welfare. As a result, competition law cannot be easily reduced to a handful of categorical rules setting out that some behaviour is allowed while some other is prohibited.[6] Instead, these conducts' effects on welfare can

often only be established with the aid of economic analyses, which are both expensive and time consuming.

10. Like other areas of the law, competition law must balance the advantages and drawbacks of simple rules, which are easy to apply but will often be wrong, against those of more accurate rules that are vaguer and more onerous to enforce.[7]

11. This challenge has underpinned debates throughout the years on the appropriate scope of competition law and on how certain business behaviours should be treated. Most literature traces the origin of this debate to a 1918 US Supreme Court decision that held that:

> *"The court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."*[8]

12. This test –known as the "rule of reason"– is quite broad, to the point where it can be argued that it is effectively open-ended and requires courts to engage in full-scale market investigations before determining whether a business practice is anticompetitive. Given the consensus that competition law is focused on maximising economic welfare, and that this is a matter of economic theory, the rule of reason can be said to be aligned with competition law's normative goals, in that it allows decision-makers to take into account all relevant facts in the context of the relevant economic theories.

13. However, even at their simpler level, economic theories are still technical and complex –and have become even more so with the incorporation of game theory in recent decades. Furthermore, markets are complex; more complex than the models that are used to study them and predict their behaviour. As a result, it is broadly accepted that decision-makers face significant difficulties when applying economic theory and, more broadly, when they try to determine whether certain types of behaviour are anticompetitive. Even if it were possible to correctly determine what the outcome of a case should be in every occasion, the cost of in-depth economic analyses means that they can only be pursued in a small number of cases.[9]

14. The perception of the rule of reason as unmanageable was taken by some as creating a major obstacle to effective antitrust enforcement.[10] This perception seems to have been prevalent in the U.S. from the early 1940s through the early 1970s. During this period, the courts expanded the category of practices deemed to be illegal regardless of their effects (known as *per se* prohibitions), reflecting the US Supreme Court's view that courts were "*of limited utility in examining difficult economic problems*"[11] and weighing competing economic effects.[12]

15. From the 1970s onward, however, competition law has moved towards a less formalistic approach, changing its focus from the type and form of business practices to the determination of whether such practices have demonstrable anticompetitive effects. This trend took form as courts and enforcement agencies –both in the US[13] and in Europe[14]– followed developments in economic theory, which rehabilitated practices once condemned as *per se* illegal as having potentially, or even mainly, pro-competitive effects. This was the case with practices such as vertical territorial allocations, vertical price restraints, and loyalty rebates.[15]

16. This trend was initially accompanied by a push to make a number of practices – and particularly unilateral behaviour– legal *per se*. For example, it was argued by the Chicago School that all vertical agreements should be legal *per se*,[16] and that exploitative unilateral behaviour should not be the subject of antitrust enforcement. Two main reasons were advanced for this: first, these practices usually create efficiencies; second, one can often derive "impossibility theorems" showing that firms lacked incentives to engage in practices that reduce welfare.[17]

17. However, in recent years an opposite trend can be observed, as conducts which were previously deemed not to pose any competitive risk have become subject to detailed market assessment, such as business activities falling within the scope of IP rights (e.g. reverse settlement payments or the use of injunctions to prevent the use of standard essential patents), or some above cost pricing practices by dominant companies.[18] One reason for this may be the development since the early 1980s of "possibility theorems" based on game theory[19], which undermined the intellectual foundations of absolute safe harbours by showing that some practices thought not to pose competition issues –such as the leveraging of a monopoly position, and some above-cost pricing practices and vertical agreements– could instead enhance market power and lead to welfare losses under certain conditions.[20]

18. In short, over the past decades reliance on strict rules of legality and illegality has diminished as the use of detailed market assessments has increased. At the same time, business conduct not caught by a simple and straightforward rule is not necessarily subject to a detailed economic analysis concerning its effects. As the US Supreme Court has explained, in order to make the rule of reason workable: *"... courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones*."[21] As the box below makes clear, in practice one can identify various intermediate approaches that seek to ensure the administrability of competition law.[22]

Box 1. Bright-line rules and detailed market assessments in US and EU competition law

In the US the traditional distinction is between bright-line rules on the one hand (in the form of rules of per se illegality and legality), and a standard requiring a detailed market analysis on the other (in the form of the rule of reason). However, a closer look reveals a number of intermediate approaches, even if they are not clearly delineated in either the case law or academic writing.[23]

First, it is commonly accepted that US courts have developed a form of abbreviated or "quick look" rule of reason.[24] The quick look approach allows a court to decide whether a new form of conduct that appears on its face to be anticompetitive should be deemed illegal per se without a full-blown economic analysis by asking the defendant to provide pro-competitive justifications for the conduct. If the defendant can offer plausible economic reasons why a conduct may be pro-competitive, the court will assess the conduct under the rule of reason and compare those justifications to the competitive harms. If no efficiency justifications are forthcoming, the conduct is deemed illegal per se.[25]

Second, many argue that the rule of reason should be understood as a structured process for shifting the burden of proof.[26] Instead of balancing of pro- and anti-competitive effects, courts engaged in a rule of reason analysis merely shift the burden of proof between the parties by reference to the available evidence. Only in extreme cases will courts engage in the balancing of pro- and anti-competitive effects inherent in a pure rule of reason exercise. [27]

Last, it has been argued that even the distinction between per se prohibitions, quick look analysis and rule of reason is artificial. Instead, enforcement bodies engage in different levels of scrutiny along a continuum, or sliding scale, depending on what is necessary to determine whether a conduct is anticompetitive.[28]

Similar intermediate approaches can also be observed in the EU, which traditionally distinguishes between object restrictions and effect restrictions. These are similar, but not identical, to the US' per se prohibitions / rule of reason distinction. This comparison between the US and the EU is qualified by a number of important differences. By object restrictions, while presumed harmful to competition, can be rebutted by showing that the restriction is necessary to create efficiencies.[29] Furthermore, the EU system is said to rely more heavily on "categorisation" than the US. This is the case both when determining whether a business practice is anticompetitive, through the doctrine of object restraints, and when determining whether such conducts are nonetheless justified, through the application of block exemption regulations.[30] Lastly, given the administrative nature of the system, there is much fewer court cases in the EU than in the US and those that arise are often about judicial review. As such, how competition effects' analysis should be conducted, and of how to balance pro- and anti-competitive effects, are matters that arise relatively rarely before the EU courts and are comparatively unexplored.[31]

The European courts have nonetheless engaged in concise analyses as a means to determine whether a business practice is a restriction by object, in a manner

> reminiscent of the US quick look approach.[32] In addition, in certain cases the European courts seem to have developed a structured approach based on cumulative tests which is distinct from a pure effects' analysis – for example, the European essential facilities doctrine applies a structured test[33] that circumvents the need to assess whether a refusal to supply (or license an IP right) has anticompetitive effects in a specific case. [34]

3. Optimal competition rules

19. The developments in competition law identified above –and the fluctuation in legal tests between narrow rules regulating business conduct and more flexible standards that focus on the effects of that conduct– reflect the fact that competition law has found it difficult to find a balance between accuracy and administrability. They also indicate that competition law is not only about the identification and elimination of anticompetitive behaviour, but also about the design of the rules that govern competition enforcement.

20. In academic writings, there is widespread agreement that "*the design of antitrust rules should take into account the costs and benefits of the individual assessment of challenged practices".*[35] This refers to a framework for how to think about rule design developed by a number of academics from the 1970s onwards –decision theory, also known as error cost analysis– which can also help us understand the evolution of competition law over the years.[36]

3.1. Optimal rule design theory

21. Decision theory seeks to design socially optimal rules. It is also called error cost analysis because it pursues this objective by comparing the social costs and benefits of alternative legal arrangements. This approach starts from a number of propositions. First, any administrative rule will result in errors (e.g. a rule prohibiting market sharing may usually make sense, but in the context of distribution networks it could prohibit welfare-maximising practices). Errors can take two forms. Rules may lead to "false positives" (i.e. finding an infringement when a business practice does not harm competition), or to "false negatives" (i.e. not finding an infringement when a business conduct harms competition). Second, the error rate inherent to a certain rule can be reduced by some alternative procedure for examining individual cases, but such reduction can only be achieved by incurring additional regulatory costs (e.g. by reviewing whether the market sharing agreement is pro-competitive on a case-by-case basis, instead of applying an inflexible market sharing prohibition). [37]

22. The operation of decision theory can be illustrated by reference to the distinction between rules and standards, which finds expression in competition law in a distinction between bright-line prohibitions and safe harbours, on the one hand, and detailed market analyses on the other. The distinction between bright-line rules and standards is common across legal disciplines. While there is no set definition of these concepts,[38] they can be summarised as follows:

- bright-line rules condition liability on a limited set of readily observed factors, e.g. whether prices are fixed between competitors;

- standards condition liability on the fulfilment of some vague normative criterion that should guide the legal assessment, without defining beforehand what set of (or how many) factors or distinctions should be used in that assessment, e.g. whether a business practice reduces economic welfare.

23. The distinction between bright-line rules and standards brings to the forefront the type of costs that each type of norm entails. Bright-line rules tend to provide clear guidance to firms, and to limit the regulatory costs associated with enforcement. At the same time, bright-line rules are both over and under inclusive (e.g. a strict price-fixing rule would prohibit conduct which is not anticompetitive, such as ancillary price fixing necessary to pro-competitive co-operations on R&D[39]; and it would still allow obviously anticompetitive conduct such as market sharing, which prohibition would require a different rule).[40] Standards tend to reduce errors (whether false positives or false negatives) by permitting a more careful assessment of business practices' competitive effects, but they do this by incurring higher regulatory costs.[41]

3.2. Trade-offs in competition law

24. Competition law enforcement involves trade-offs between certainty, administrability, and effectiveness, on the one hand, and accuracy, on the other. What the optimal rule will be depends on the outcome of such trade-offs, as "*no sensible person supposes that rules are always superior to standards, or vice versa*."[42]

25. If neither costs nor uncertainty were a problem, standards would always be preferable to rules because they are more likely to arrive at the correct result and to correctly separate 'the beneficial sheep from the antitrust goats'.[43] However, an antitrust jurisprudence based on standards would also be more costly than a system of simple rules.[44] Furthermore, rules and presumptions that make it easier to identify anticompetitive conduct may also be favoured by businesses and enforcement bodies alike, despite the risk of false convictions they may carry. Apart from facilitating enforcement, such rules ensure that businesses can plan accordingly and are not acting under uncertainty on whether their conduct is legal or not. Legal certainty is a crucial element for the rule of law, and specific rules clearly delineating anticompetitive conduct may be of value for the legitimacy of competition law.

26. These trade-offs do not apply only to the design of substantive rules –between bright-line rules like prohibitions on price fixing, and standards like the prohibition of conduct that reduces economic welfare– but are also present for evidentiary rules and presumptions. Evidentiary rules set out the framework within which legal decisions can be adopted by regulating the type of evidence that can be brought to the process and how it should be assessed.[45] Restrictions on the type of evidence that can be adduced, regarding the circumstances in which evidence can be taken into account, or concerning the weight that can be put on particular elements of evidence will make it more difficult to successfully condemn a practice as anticompetitive. The more difficult it is to successfully bring a case for competition law infringement, the higher the regulatory costs of proving an infringement will be.

27. For a simple example that illustrates these trade-offs in practice, let us imagine that there is a rule that requires evidence of an agreement between competitors in order to find that those competitors are colluding, even if it can be shown that those competitors have been acting similarly, e.g. adopting the same prices consistently and simultaneously. One effect of such a rule –or of a rule that holds that only written evidence of collusion is

admissible– will be to decrease the percentage of erroneous convictions for collusion (i.e. a decrease in 'false positives' in which non-collusive instances of parallel behaviour are condemned as anticompetitive). This is socially beneficial. However, the effect of making it harder to prove that an infringement took place is to increase the percentage of mistaken acquittals (i.e. false negatives), which is socially detrimental because some collusive behaviours are allowed to continue merely because no evidence of an agreement has been found. Making it easier to prove that an infringement took place –for example, by allowing convictions for antitrust infringements whenever parallel behaviour is observed or by allowing hearsay evidence– would have the opposite effect of increasing the costs with mistaken convictions, while decreasing the costs with mistaken acquittals.

3.3. Rule design in competition law

28. The design of optimal rules that reflect the trade-offs described above needs to take into account a number of factors. First, the objective is to minimise the overall expected cost of all errors, and not of any individual case. Total error costs are a function of the likelihood of error and of the individual cost of each type of error – not on the basis of the expected consequences in any individual case, but based on probabilities over the run of the cases.

29. Second, the optimal rule cannot be identified merely by reference to error costs. Instead, the optimal rule is the rule which minimises both error and regulatory costs. For example, bright-line rules have very low enforcement costs, but they are also much more likely to condemn behaviour that is pro-competitive or absolve behaviour that is anticompetitive. Standards have very high enforcement costs, but they are less likely to lead to mistakes.[46] What the optimal rule may be in any particular case will depend on the total amount of error and regulatory costs that each possible rule will entail. Optimal rules do not lead to correct decisions in every single case, but rather minimise the total social costs of enforcement taking into account all cases.[47]

30. Third, optimal rules will ultimately be the best possible outcome of the combination of three factors: the probability of error, the cost of error, and the likely net benefits of an alternative procedure that engages in further information gathering and assessment (e.g. through a detailed investigation or trial).

31. The prevailing view in the literature is that competition law should be particularly concerned with the error cost of 'false positives' –i.e. the costs of mistakenly condemning pro-competitive behaviour. As Frank Easterbrook explained, the application of the error-cost framework must begin:

> *"with the presumption that the costs of false convictions in the antitrust context are likely to be significantly larger than the costs of false acquittals, since judicial errors that wrongly excuse an anticompetitive practice may eventually be undone by competitive forces attracted by the presence of monopoly rents. Conversely, judicial errors that wrongly condemn a procompetitive practice are likely to have more significant social costs because such beneficial practices are abandoned by firms and not offset by equilibrating market forces tending to mitigate their impact."*[48]

32. This perspective was adopted by the US Supreme Court, which held that:

> *"Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs (...) Mistaken inferences and the resulting false*

condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect".[49]

33. From this point of view, competition law should apply a strict standard for business practices whose effect is not certain, which should only be prohibited if there is extensive and convincing evidence that the relevant practice is anticompetitive.[50] For example, a prohibition of price fixing between competitors is justified because both economic theory and experience demonstrate that such a practice very rarely has positive effects, and almost always reduces competition.

34. This points towards a dimension of decision theory that we will be unable to explore in detail in this background paper, but which is closely connected to it: the evidentiary standards which are set in place regarding the imposition of liability for anticompetitive practices. From a decision theory standpoint, the question for these evidentiary rules is similar to the one applicable to the design of substantive rules: how much is the additional certainty derived from additional and better economic evidence worth, and whether it outweighs the costs of securing that additional evidence.[51]

3.4. Rule design and institutional framework

35. A different dimension of decision theory concerns the level of sophistication of decision-making bodies. It was described above how competition systems have evolved from a reliance on conduct-based rules towards the pursuit of detailed economic analysis. As knowledge and experience accrue and as enforcement bodies acquire the necessary resources to enforce competition law, the likelihood of errors in the enforcement of competition law diminish, which may well justify incurring additional regulatory costs with enforcement.

36. The rate of errors and the amount of regulatory costs incurred in the enforcement of competition law will in practice depend on the institutional framework under which competition law is enforced –which, in turn, may affect the optimal design of competition rules. For example, the US Supreme Court's frequent endorsement of *per se* prohibitions from the 1940s into the early 1970s rested in part on concerns that courts were ill equipped to assess the economic arguments and evidence that would have to be submitted as part of the detailed competition assessment of business practices.[52] On the other hand, the need for simple rules may be less pressing in the context of administrative enforcement, since competition agencies will have more resources and powers to engage in detailed market analyses than private parties or courts, or of established regimes, because they will have the knowledge and experience required to minimise errors and regulation costs.

37. Some law and economics studies, not devoted specifically to competition law, have argued that bright-line rules are well suited to countries with limited experience, resources and human capital.[53] The theory is that the optimal choice between rules and standard also depends on the level of human capital that adopts and enforces legal norms. While judges and enforcement agencies may have better case information, and hence be able to minimise error costs when compared to the application of bright-line rules, the error ratio will depend on the overall human capital available for enforcement. Less human capital is required for drafting rules, which means that total errors may be minimised if resources are devoted to *ex ante* rule design, which may lower enforcement error costs. When taken together with the reduction in regulatory costs brought about by the application of bright-line rules, such an approach can be optimal by minimising social

costs.[54] Ultimately, whether this is the case will depend on a balancing of the likely ratio of errors at the law-making and law-enforcement stages, and their enforcement costs.[55]

38. The difference in institutional capacity between jurisdictions may thus justify the adoption of different types of norms. Bright-line rules might be a better option in settings where a number of conditions commonly found in more established jurisdictions (e.g. broad business awareness of competition law, high quality courts, skilled enforcement agencies, a deep competition law and policy community) are lacking. In such settings, a case can be made for the adoption of simpler rules to educate businesses about their duties, to inform the enforcement decisions of competition agencies, and to guide courts in evaluating challenged conduct.[56] Well-drafted bright-line rules may be able to minimize the sum total of error and administration costs through rulemaking when there are limited enforcement resources –and in the competition sphere, this may be facilitated by recourse to the experience and rules adopted in more established jurisdictions.

4. Legal rules, presumptions and safe harbours in competition law

39. The distinction between bright-line rules and standards pursued above is useful mainly for analytical purposes. In practice, it may be more accurate to think of legal norms as belonging in a spectrum that has bright line rules and standards as its extremes, and a variety of intermediate forms in between.[5758]

40. As explained above, if regulatory costs were not an issue, competition enforcement would rely exclusively on detailed market analyses concerning the effects of individual business conduct, because this would minimise error costs. Since regulatory costs do exist, and are extremely important in practice, it is obvious that other types of rules are required to ensure the administrability of competition law.

41. This section is devoted to identifying the circumstances in which the adoption of rules and presumptions is appropriate in competition law. It is useful, in this regard, to begin by comparing rules and presumptions.

4.1. Rules and presumptions

42. The adoption of evidentiary and substantive rules can be justified from a decision theory perspective because they minimise the costs of law enforcement while maximising its effectiveness. They can be thought of as evidentiary shortcuts that pursue this objective by limiting the need to conduct detailed economic assessments. The same considerations apply to presumptions as well.

43. A party –either public or private– bringing a claim that a practice is anticompetitive will, unless there is a specific rule about it, have to prove the economic welfare effects of that practice. Proof must be made in accordance with the applicable rules of evidence. Evidentiary rules rest on two main pillars:

- The burden of proof, which is almost universally understood as the burden of producing the evidence necessary to persuade a decision-maker that certain facts have occurred;[59] and
- The standard of proof, also called the burden of persuasion, which refers to the amount and quality of evidence that the law requires a party to produce in order to prove an allegation. The standard of proof varies depending on the topic.[60]

44. Rules on the standard and burden of proof may also vary from jurisdiction to jurisdiction. The legal burden of proof on each separate issue is usually on the party who has by law to establish it in order to succeed.

45. Certain evidentiary rules –such as presumptions– may change the normal allocation of the burden of proof from one party to another, or may even preclude the production of evidence on certain topics if they are irrebuttable (or conclusive). Presumptions can also affect the type of inferences that may be drawn from the evidence. For example, since cartels are usually secretive and the evidence available is often fragmentary and sparse, the European courts have accepted that, in the absence of another plausible explanation, the existence of an anti-competitive conduct may be inferred from a number of coincidences and indicia of an infringement.[61] A similar type of presumption may be found in the "structural presumption" in place in US merger control. If a merger results in a significant increase in the market concentration and produces a firm controlling a certain market share, it is presumed that the merger is inherently likely to lessen competition substantially. On this basis, that merger should be prohibited, at least in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[62]

4.2. Types of presumptions

46. As this brief discussion makes clear, there are different types of legal presumptions. Below we attempt to elaborate a simple typology.

4.2.1. Rebuttable and conclusive presumptions

47. Presumptions can be divided between rebuttable presumptions, in which a party can demonstrate that the inference drawn by the presumption is incorrect, and conclusive presumptions, which cannot be rebutted. The relevance of the distinction between rebuttable and conclusive presumptions may, however, be blurred depending on the difficulty of rebutting a presumption in practice. This difficulty may depend on the type of evidence that may be used to rebut a presumption, or on the standard of persuasion that the rebutting evidence must meet.[63]

4.2.2. Procedural, evidentiary and substantive presumptions

48. In addition to the distinction between rebuttable and conclusive presumptions, three forms of presumptions are usually identified: procedural, evidentiary and substantive.[64] We shall now review each in turn.

(a) Procedural presumptions

49. Presumptions may sometimes be used for procedural reasons. As often as not, such presumptions are created for convenience. Arguably, the best known example of a procedural presumption is the presumption of innocence, which is a particular expression of the principle that the burden of proof must fall on the party accusing another in criminal activity. This presumption is also adopted in competition law in some jurisdictions given the severity of competition law infringements and sanctions.[65]

50. Other types of procedural presumptions may regulate how the parties interact with a competition agency or a court in the context of administrative or judicial procedures. For example, in administrative procedures in Europe, when a company fails to identify which information is confidential within a certain period it can be presumed that the

documents or statements concerned do not contain confidential information. A similar presumption applies to information that is more than five years old.[66] A procedural presumption with greater substantive implications arises when a merger is conclusively presumed to be approved if the relevant merger control agency does not adopt a decision within a certain time-frame.[67]

(b) Evidentiary presumptions

51. Evidentiary presumptions are also known as "inferences", and they set out that a certain fact can be established by reference to another fact. The effect of an evidentiary presumption is often to shift the evidentiary burden that would normally be on a party to the other party.[68]

52. A good example of an evidentiary presumption of illegal conduct is the presumption in Europe that a company will have taken into account information exchanged with its competitors as long as it remained active in the market. This is an inference drawn on the basis of experience, subject to proof to the contrary which it is for the firms concerned to present.[69] It may be extremely hard to overturn this presumption in practice, since it may be necessary for that party to bring sufficient evidence to prove that the exchange of information did not have any influence whatsoever on its own conduct on the market.[70]

53. In the context of cartels, a firm is also presumed to be part in a cartel if it participated in meetings at which anti-competitive agreements were concluded: "*Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs*."[71]

54. Evidentiary presumptions also exist as regards unilateral conduct. In order for unilateral practices to infringe competition law, two cumulative conditions must usually be met: that the relevant firm have sufficient market power, and that the conduct is illegal. For instance, in the EU there are presumptions concerning the identification of market power. Very large market shares sustained over time can be used to prove that a firm has a dominant position save in exceptional circumstances.[72] The European courts have set a rebuttable presumption that market shares above 50% amount to dominance.[73]

(c) Substantive presumptions

55. Competition laws often feature substantive presumptions. These are presumptions that do not derive factual inferences from another fact, but that instead infer that from certain facts arise certain (legal) effects, e.g. to conclude whether an infringement to competition law has occurred or not.

56. In practice, it is often hard to distinguish substantive presumptions from legal rules.[74] If a substantive presumption is rebuttable, that presumption could usually also be framed as a legal rule, to which an exception could apply. If a substantive presumption is not rebuttable, however, its structure and effects will often be identical to a legal test set out in a substantive legal rule.[75]

57. For example, the US *per se* prohibition rule is sometimes presented as an irrebuttable substantive presumption: proof that a prohibited practice such as price fixing occurred suffices to establish liability, and justifications concerning the effects of the practice based on the absence of market power and pro-competitive are irrelevant.[76]

58. Less conclusive rules can also create strong substantive presumptions that a conduct infringes competition law. For example, object restrictions in Europe are often described as rebuttable substantive presumptions[77] –conduct that amounts to an object restriction may still be allowed if it fulfils the conditions set out in Article 101(3) TFEU.[78] However, these presumptions can be extremely hard to overturn, which has led some to argue that they amount to *per se* prohibitions in practice.[79]

59. There are also examples in the literature of substantive presumptions of legality, which set out that under certain circumstances business conduct cannot infringe competition law. First, on both sides of the Atlantic there is a safe harbour for co-ordination within business groups: this is called the "single entity" doctrine in the US[80], and the "single economic entity" doctrine in the EU.[81] According to transaction economics, a change in the legal rules that affects arm's length transactions differently from transactions within an integrated firm should merely prompt integration or disintegration, not a change in the actual behaviour of the economic actors.[82] However, from a competition law perspective the difference between a business practice being illegal or not may hinge on whether the companies engaged in the relevant business practice are part of the same business group.

60. A second example of a safe harbour is the predatory pricing rule that above-cost pricing cannot amount to predatory pricing, which can be said to amount to a substantive presumption because it presumes that such pricing practices do not have anticompetitive effects; and because the presumption only applies if the conduct in question does not fall within the scope of above-cost pricing practices that can be condemned as anticompetitive, such as margin squeeze.[83]

4.3. When should rules and presumptions be adopted?

61. In the literature, a number of reasons can be found for the adoption of rules and presumptions. These are described below.

4.3.1. Justified confidence that certain consequences follow from certain facts

62. The main reason for creating a presumption that fact A corresponds to fact B is the high probability that if A occurs, B will follow in almost all cases. In such a context, to require a party to prove what is overwhelmingly expected to occur would impose unnecessary social costs.[84] In these circumstances, presumptions should be adopted because they reduce regulatory costs without significantly increasing error-costs.[85] Confidence on the accurateness of presumptions can be based on a number of reasons:

1. Previous, consistent experience: Once experience with a particular kind of fact allows one to conclude that one fact typically follows another one, it may be safely presumed that such those facts are connected. For example, as regards the prohibition of certain types of collusive behaviour, these are condemned because such practices "*may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers*".[86]
2. Economic theory: Competition law often develops presumptions and safe harbours by relying on insights from mainstream economic theory regarding the

economic impact of certain types of behaviour. A good example of this can be found in the discussions regarding how to treat resale price maintenance provisions in vertical agreements, which is described in the box below.

3. Common sense: Common sense comes into play when a particular fact is so likely to follow from another fact that the decision-maker can safely conclude that the original fact is proven.[87]

Box 2. Presumption of illegality regarding Resale Price Maintenance (RPM)[88]

An agreement setting a distributor's minimum or fixed retail prices is presumed harmful for competition in the European Union and other jurisdictions, such as Japan,[89] Korea[90] and Switzerland.[91] For instance, according to the European Commission's Block Exemption Regulation on vertical agreements (BER),[92] a resale price maintenance provision is a hard-core restriction to competition.[93] This means that such a provision is presumed harmful, but the parties could rebut the presumption by proving that the practice generates efficiencies.[94] Setting maximum prices or defining recommended prices is instead presumed to be legal. In other jurisdictions, such as the US, RPM is assessed under a rule of reason. RPM used to be per se illegal in the US in line with the decision on Dr Miles,[95] even though it was somewhat limited subsequently, when the Supreme Court allowed non-monopolists to impose an RPM restriction, under the condition that it was not a monopolist. In the Leegin case, the Supreme Court acknowledged that RPM could be pro-competitive and should not be per se illegal.[96] Moreover, the Court set out three factors that would be important to assess in an RPM case: (i) the number of firms using RPM restraints; (ii) the motivation of the restraints, on the grounds that the agreement would be more likely to be anti-competitive if the retailers themselves pushed for it; and (iii) whether the upstream supplier or the retailer had market power.[97]

The choice of presumption may be informed by past enforcement experience and/or economic insights. As to the former, the experience gained in past cases has been taken into account in defining the presumption of illegality, at least at EU level. Based on mostly national enforcement cases between 2000 and 2009, the revised BER issued in 2009 maintained the treatment of RPM as a hard-core restriction, hence presumed illegal.[98]

Many economists have highlighted the difficulty of establishing presumptions in this area, given that RPM can have both pro-competitive and anti-competitive effects and that the empirical evidence is scarce. Bennett et al. conclude that there is not sufficient evidence for RPM to be treated under an effects-based approach, instead of being presumed illegal, because of: (i) the role of RPM in facilitating co-ordination, which seems to be confirmed by enforcement cases; and (ii) the fact that many of the benefits from RPM may be obtained through other vertical restraints since, at least under some assumptions, alternative restraints can be used to achieve the same objective.[99]

There have also been some suggestions of how the presumption may be modified. For instance, taking into account that effects are unlikely to be significant in the absence of market power, Motta et al. have argued that hard-core restrictions, specifically RPM and territorial restrictions, should not lead to a presumption of illegality when the parties do not have market power.[100]

4.3.2. Providing operational criteria for law enforcement

63. As is made clear by the discussion in the previous sections, bright-line rules and presumptions provide operational criteria for law enforcement. In a context of increased emphasis on economics in the substantive assessment of business practices, rules and presumptions help create an economically sound system with a maximum of predictability.[101] Bright-line rules and presumptions form part of an analytical framework

that is both economically realistic and administrable:[102] they conserve the resources of competition authorities and the justice system, and ensure the effectiveness of competition enforcement.[103]

64. As such, bright-line rules and presumptions should be adopted when they are less costly than pursuing detailed analyses and other available alternatives. Some of these alternatives may consist of procedural mechanisms to overcome information asymmetries and other evidentiary issues. In most legal systems, judges are granted procedural powers regarding disclosure, adverse inferences, and “lower” standards of proof, among others.[104] Furthermore, in many occasions bright-line rules and presumptions are not suitable given the lack of certainty regarding the effects of a practice or behaviour. Nonetheless, as a noted throughout this paper, bright-line rules and presumptions remain an important tool in ensuring the effectiveness and administrability of competition enforcement in practice.

4.3.3. Proof proximity

65. Evidentiary presumptions are sometimes based on the idea that evidence should be adduced by the party that has the better access to it. This is known as the "proof proximity principle", which can be said to underpin not only evidentiary presumptions but also the generic rules on burden of proof.[105]

66. For example, the burden of proof may shift to a party that attended a cartel meeting, which will then have to demonstrate that it was not part of that cartel despite its presence at the meeting.[106] In such cases, the adoption of an evidentiary presumption leading to a partial shift in the burden of proof could be said to be justified, because the evidence relevant to certain facts is likely to be in the possession of, or be much more accessible to the party against which the presumption operates.

4.3.4. Other underlying policy considerations

67. Sometimes the law also uses bright-line rules and legal presumptions to advance policy interests. For example, the law may deem it necessary to strengthen a claimant’s position where it would otherwise be very difficult to gather the necessary evidence; or it may judge it preferable to adopt a simple rule of liability when the application of a standard requiring a detailed market analysis is beyond the capacity of decision-makers and is likely to lead to significant under-enforcement.[107]

68. Rules that make it easier to identify anticompetitive conduct may also be favoured by businesses and enforcement bodies alike, despite the risk of false positives, i.e. the erroneous prohibition of pro-competitive conduct that they entail. Apart from facilitating enforcement, such rules ensure that businesses can plan accordingly and avoid competition liability.

69. As described in Section 2, rules and presumptions themselves may evolve over time. In addition, some practices may become more frequent in light of market developments and may not be fully reflected in current guidance by competition agencies and courts. An example is provided in the box below.

Box 3. Selective distribution in online sales

In the European Union, where most enforcement activity on online sales bans and limitations seems to be concentrated,[108] national cases and ECJ decisions have often revolved on the boundaries of the safe harbour provided by the Block Exemption Regulation regarding vertical agreements (BER).[109]

Two main questions have been debated:

- Whether preventing a distributor from selling online constitutes a hard-core restriction –and, therefore, whether the safe harbour granted by the BER is not applicable to the agreement. The Commission Guidelines on Vertical Restraints clarify that an online sale ban would be treated as a hard-core restriction.[110] This was confirmed in the much-cited Pierre Fabre case,[111] where a cosmetics manufacturer, which traditionally distributed its products only through pharmacies, was not allowed to prevent the sale of its products online. The European courts ruled that the agreement fell under Article 101(1) of the TFEU and was a hard-core restriction to competition.
- Whether preventing a distributor from selling on third-party platforms, in the context of a selective distribution system, should be allowed. According to the Commission Guidelines on Vertical Restraints, "a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet".[112]

70. Clear rules may operate to limit the possibility of a 'chilling effect' developing as a result of competition enforcement – which is also a justification for the adoption of safe harbours.

4.4. The importance of safe harbours

71. "Safe harbour" is an expression that is commonly used to refer to different types of rules; some with substantive consequences, and some relating to mere evidentiary assessments. For example, safe harbour can stand for rules setting out that, if certain conditions are met, liability will not be attached to a business conduct regardless of whether an individual practice has negative effects on economic welfare in practice (e.g. rules of *per se* legality).[113] Safe harbour can also be used to refer to legal concepts that place certain situations outside the scope of competition law altogether, such as the single entity defence[114], which creates a safe harbour for co-ordination within a single firm.[115] Lastly, safe harbours can refer to mere (rebuttable) presumptions of legality. A good example of this is the use of market shares as presumptions of dominance or lack thereof, which is a pre-condition for unilateral conduct being subject to competition law.

72. What all the meanings of safe harbour have in common is that they refer to mechanisms that make it harder to establish liability for certain business practices. The reasons just discussed in section 4.3 that underpin other bright-line rules and presumptions also justify the adoption of safe harbours. In particular, and like other rules, it is expected that safe harbours correspond to business practices that experience,

economic theory and common sense lead to believe are without anticompetitive effects. Safe harbours are also tools that ensure the administrability of competition law, and reflect policy considerations: given competition law preference for ‘false negatives’ –i.e. for, when in doubt, not prohibiting conducts that may be anticompetitive– the adoption of safe harbours is usually easier to justify as adequate than the adoption of rules and presumptions that make it easier to establish antitrust liability.

73. Furthermore, rules of legality can be extremely valuable. Such rules provide immunity to commercial behaviour with ambiguous but usually positive social welfare consequences that could otherwise be challenged under competition law.[116] By identifying safe harbours in which businesses can operate with certainty, these rules avoid the expenditure of resources in assessing the impact of practices that usually improve competition or, at a minimum, do not endanger it.

74. For competition agencies, safe harbours have the advantage of allowing them to prioritise their enforcement activities and save resources for the prosecution of the most grievous competition harms. Safe harbours may be particularly valuable in jurisdictions where businesses face high risks of seeing business conduct challenged as anticompetitive by other private parties, and of being thereby forced to incur significant costs to demonstrate that a conduct is not anticompetitive.[117]

Box 4. Safe harbours in exclusive dealing

In the US, single branding/exclusive dealing is subject to a rule of reason approach, as are all vertical restraints. Within the broader rule of reason approach, the courts have developed a few safe harbours for single branding/exclusive dealing:[118]

- Agreements that are “short in duration or terminable at will”. A contract lasting for less than a year has been considered presumptively lawful.[119] As for ease of termination, a contract with 30 days’ notice has been considered terminable at will.[120]
- Agreements that “foreclose a sufficiently small fraction of the distribution market”. In Jefferson Parish,[121] the Supreme Court ruled that an exclusive dealing agreement foreclosing 30% of the market was not forbidden by the Sherman Act. Other decisions have confirmed that a presumption of legality may exist where foreclosure is less than 40% of the relevant market.[122]

However, these safe harbours have been challenged in other court cases, in particular in respect to the duration. It has been held that exclusive supply contracts between a dominant manufacturer and its dealers are anti-competitive, even when those contracts are terminable at will.[123] Factors beyond the legally observable ability to terminate a contract at will – such as high switching costs – have been taken into account and deemed to effectively limit the possibility to terminate contracts in practice. As for the safe harbour created by low foreclosure rates, it has been argued that, while still holding in theory, it has been bypassed by courts in practice.[124]

75. Safe harbours can be found both in primary competition rules, and in secondary instruments or in guidelines. These secondary instruments and guidelines usually provide a greater amount of details and regulation regarding safe harbours.

76. A good example of safe harbours that can be found in secondary instruments are block exemptions, which in the EU shield from competition scrutiny a number of conducts that would otherwise draw the attention of courts and enforcement agencies. Block Exemptions in Europe cover both vertical agreements and a number of horizontal agreements: on exclusive distribution and purchasing, research and development, on technology transfer, and on specialisation agreements.[125] Block exemptions provide safe harbours for some types of business conduct, but such protection is not absolute. Instead, block exemptions only apply if specific conditions are met. These conditions require in particular that market share thresholds (used as rough proxies for market power) are not exceeded, and that a number of “hard-core” restraints are not incorporated into the exempted agreements.[126] Furthermore, the European Commission will usually have the power to “withdraw the benefit” of an otherwise applicable block exemption when a particular arrangement nevertheless appears to threaten competition.[127]

77. Safe harbours may also be found in guidelines issued by competition agencies. Guidelines not only inform the activities of competition agencies, but also provide non-binding guidance for other decision-makers (such as courts).

78. A good example are the merger control guidelines issued by a number of competition agencies around the world, which commonly create safe harbours by specifying thresholds relating to post-merger market share levels below which it is presumed that the merger is not problematic.[128] The strength of this presumption varies; for example, further investigation is often not ruled out for mergers that fall within the safe harbours provided in the relevant guidelines. In particular, it is commonly held that firm size and market concentration provide only the starting point for a broad-based competition inquiry regarding whether a merger should be prohibited.[129] Nonetheless, these guidelines make it easier for businesses and authorities to assess whether a merger is likely to be problematic, and to plan their activities accordingly by creating an area which is *prima facie* exempt from antitrust scrutiny.

79. Another example of guidelines commonly providing safe harbours relate to vertical agreements. Such safe harbours are often granted on the basis of the lack of concern with vertical agreements between companies that lack market power. As is described in the box below, guidelines usually rely on market shares as proxies for market power and for the creation of safe harbours in this area.

Box 5. Guidelines on vertical restraints and market shares

With some differences across jurisdictions and practices, low market shares have been considered to provide safe harbours for certain vertical restraints. For instance, the Guidelines issued by the Japan Fair Trade Commission (JFTC) provide for a safe harbour for firms with a market share of 20% or less. The European Commission's Block Exemption Regulation (BER) sets the corresponding share at 30%.[130] When firms hold market shares above the threshold, the agreement will have to be assessed on a case-by-case basis.

Setting a market share threshold is seen as providing "certainty and predictability".[131] Additional considerations about thresholds include the following:

- Safe harbours on vertical restraints may be structured so that a market share threshold applies both at upstream and at downstream levels. One of the arguments put forward against this approach is that "as long as there is sufficient inter-brand competition, then the fact that one brand is sold exclusively by one retailer should not matter".[132.] Conversely, it has been argued that expanding the market share criterion to both upstream and downstream markets provides a more comprehensive view of the impact of the restriction and of whether competition is foreclosed.[133] Indeed, distributors may have such degree of market power that they could persuade a supplier to use vertical restraints to further soften competition at retail level, e.g. fictitious RPM to facilitate retail price co-ordination.
- In addition to market share thresholds, there are guidelines (such as the European Commission's and the JFTC's), which explicitly cover the situation of "networks" of agreements. The European Commission has the power to exclude from its block exemptions "parallel networks of similar vertical restraints where these cover more than 50% of a relevant market".[134] This provision is based on the literature's finding that industry-wide vertical restraints may have the effect to soften competition.[135]

While setting a specific market share threshold provides clarity to businesses, it does not lead to an automatic assessment. For instance, if there is no established precedent on the definition of the relevant market, the companies entering the agreement may not be certain of their market shares, as these will depend on the scope of the market.

5. Conclusion

80. The modernisation of competition law has led to an increase in detailed market assessments. However, while greater attention to the analysis of effects in individual cases can reduce errors when compared with simpler rules, it also has the potential of increasing the costs of administering the enforcement system.

81. Error cost analysis, also known as decision theory, is the analytical framework underpinning the identification of optimal rules, including presumptions and safe harbours in competition law. This framework attempts to balance the social costs and benefits of alternative legal arrangements. At one extreme, bright-line rules (such as *per se* prohibitions and by object restrictions) favour clarity and the administrability of

competition law; at the opposite end, detailed market analyses minimise errors, possibly at the expense of higher regulatory costs. In practice, there are a number of intermediate approaches between *per se* prohibitions /by object restrictions, on the one hand, and full-blown market assessments on the other.

82. Competition agencies and courts attempt to identify rules that balance this trade-off. These are typically based on the economic understanding of the different practices and on enforcement experience. For example, Peeperkorn explains that classifying a restriction as a by object restriction should be based "*on sufficient experience or other empirical evidence that the restriction in question will normally have an overall negative effect on competition and consumers*".[136]

83. Presumptions and safe harbours create shortcuts by limiting the need to conduct detailed economic assessments. While the advantages of this for the administrability of competition law are evident, safe harbours and presumptions come at a risk of increased errors. As discussed in the paper, while competition law tries to minimise all errors, it is particularly concerned with "false negatives", i.e. mistaken condemnations of pro-competitive activities. For this reason, it may be easier to justify the adoption of safe harbours or presumptions that may lead to "false positives", i.e. a failure to condemn practices that are anti-competitive.

84. For competition agencies, presumptions and safe harbours allow them to prioritise enforcement activities and save resources for the prosecution of the most harmful practices to competition. By identifying safe harbours in which businesses can operate with certainty, these rules also reduce the expenditure of resources by businesses and enforcement bodies in assessing the impact of practices that usually improve competition or, at a minimum, pose limited dangers to it.

Endnotes

[1] Daniel Crane 'Rules Versus Standards in Antitrust Adjudication' (2007) Washington and Lee Law Review 64(1) 50, p. 51-52.

[2] *Continental T.V., Inc. v. GTE Sylvania, Inc*., 433 U.S. 36, 59 (1977).

[3] *Bus. Elecs. Corp. v. Sharp Elecs. Corp*., 485 U.S. 717, 735-36 (1988)

[4] See, for example, Art. 5(5) of the European Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements (OJ L 335, 18.12.2010, p. 36), which allows '*the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies'* in the context of R&D agreements.

[5] These are the basic concepts contained in the US Sherman Act, sections 1 and 2, and the Treaty on the Functioning of the European Union, Articles 101 and 102 TFEU. Many other similarly vague formulations can be found in competition statutes across the world.

[6] Daniel Crane 'Rules Versus Standards in Antitrust Adjudication', p. 54, 82.

[7] Jonathan B. Baker 'Taking the Error Out of 'Error Cost' Analysis' (2015) Antitrust Law Journal 80 1, p. 31.

[8] *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), at 238.

[9] Herbert Hovenkamp *The Antitrust Enterprise – Principle and Execution* (Harvard, 2008), p. 45-47.

[10] Arndt Christiansen and Wolfgang Kerber 'Competition Policy with Optimally Differentiated Rules Instead of 'Per Se Rules vs. Rule of Reason' (2006) Journal of Competition Law and Economics 2(2) 215, p. 217.

[11] *Topco Assocs., Inc. v United States*, 405 U.S. 596, 609-610 (1972)

[12] William E. Kovacic & Alison Jones 'Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework' (2017) Antitrust Bull. 62 254, p. 262.

[13] Daniel Crane 'Rules Versus Standards in Antitrust Adjudication', p. 51-52.

[14] The Commission's modernisation programme promised a move away from its previous formalistic approach to Articles 101 and 102 TFEU to an effects-based approach built on a consumer welfare foundation. See, for example, Commission Regulation (EU) No 330/2010 on vertical agreements and concerted practices OJ L 102, 23.4.2010 and Guidelines on Vertical Restraints 2010/C 130/01; the *Commission Guidance on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* OJ C 45, 24.2.2009. See also William E. Kovacic & Alison Jones 'Identifying Anticompetitive Agreements in the United States and the European Union', p. 279.

[15] See, in the US, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (territorial allocations in vertical agreements); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985) (expulsions of members from industry associations), *State Oil v. Khan* 522 U.S. 3 (1997) (maximum resale price), or *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (minimum resale price).

[16] Richard A. Posner ‘The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality’ (1981) 48 U.ChicL.Rev. 6, p. 23.

[17] David Evans and Jorge Padilla ‘Designing Antitrust Rules for ‘Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach’ (2005) University of Chicago Law Review 73, p. 74.

[18] Daniel Crane ‘Rules Versus Standards in Antitrust Adjudication’, p. 63; Lindsey M. Edwards and Joshua D. Wright ‘The Death of Safe Harbours: Causes and Consequences” (2016) George Washington Working Papers George Mason Law Review 23 (5) 1205, p. 1227-1236. Furthermore, vertical agreements are not exempt from competition law scrutiny even if they are deemed to be generally pro-competitive.

[19] However, these theorems have been criticised in turn as being of limited practical value. Given only a limited set of facts, this sort of model is likely to have multiple equilibria, or outcomes. While one of these outcomes may be anticompetitive, neither the model itself nor empirical testing can show the likelihood of such an outcome. If, on the other hand, the model incorporates more assumptions to make it more determinate, it becomes difficult to apply the model in practice. Given this, recourse to such theorems in competition law has been criticised: see Bruce H. Kobayashi ‘Game Theory and Antitrust: A Post-Mortem’ (1997) Geo. Mason L. Rev 5 411; Jeffrey Fisher ‘Can Post-Chicago Economics Survive Daubert’ (2001) Akron L. Rev. 34 795; Paul L. Joskow ‘Transaction Cost Economics, Antitrust Rules, and Remedies’ (2002) J L, Econ, & Org 18 95, p. 104; John Lopatka and William Page ‘Economic Authority and the Limits of Expertise in Antitrust Cases’ (2005) Cornell L. Rev. 90 617, p. 700; David Evans and Jorge Padilla ‘Designing Antitrust Rules for ‘Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach’, p. 79-80.

[20] Michael D. Winston ‘Tying, Foreclosure and Exclusion’ (1990) American Economic Review 80 837; David Evans and Jorge Padilla ‘Designing Antitrust Rules for ‘Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago, p. 74; Daniel P. O’Brien ‘The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems’ (2008) Konkurrensverket 40, p. 61-74.

[21] *Leegin Creative Leather Products Inc. v PSKS Inc*.551 U.S. (2007) 877, 898–899

[22] Mark Lemley and Christopher Leslie ‘Categorical analysis in antitrust jurisprudence’ (2008) Iowa Law Review 93 1207, p. 1211, note that competition law is rife with categorical distinctions and rules.

[23] To these should be added a number of screens developed to dispose of antitrust cases at an early stage in the judicial process, before a detailed market analysis is pursued. These screens have become more marked recently. While summary judgments were traditionally used sparingly in antitrust litigation, in *Matsushita Electric Industrial Co. v. Zenith Radio* 475 U.S. 574 (1986) the Supreme Court held that if “*the factual context renders respondents’ claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary*’ in order to avoid summary judgement against them. Another decision imposing stricter scrutiny at an early stage in the process was *Bell Atlantic Corp. v. William Twombly*, 127 S.Ct 1955 (2007), which imposed increased scrutiny of the economic plausibility of theories of anticompetitive effects by the notice pleading stage when assessing motions to dismiss. This is a point which is closely connected with the evidentiary standards for finding an antitrust infringement which, while undoubtedly relevant, fall outside the scope of this paper.

[24] *California Dental Association v FTC* 526 U.S 679, 688, 696 (1978).

[25] Mark Lemley and Christopher Leslie ‘Categorical analysis in antitrust jurisprudence’, p. 1215.

[26] A number of authors have sought to elucidate exactly what this structure is. See Herbert Hovenkamp *The Antitrust Enterprise – Principle and Execution*, p. 106-108, 149; Philip Areeda &

Herbert Hovenkamp *Antitrust Law (Vol. 7)* (3rd Ed., 2010), paras. 1504-1507; William E. Kovacic & Alison Jones 'Identifying Anticompetitive Agreements in the United States and the European Union, p. 273-275.

[27] Michael A. Carrier 'The Real Rule of Reason: Bridging the Disconnect' (1999) BYU L. REV. 1265, p. 1268, describes how between 1977 and 1999 there was no balancing of pro- and anti-competitive effects in 96% of rule of reason cases: in 98% of the cases involving vertical restraints, 99% of refusal-to-deal cases, 99% of exclusive dealing cases, 97% of tying cases, 94% of unfair competition cases, and 86% of cases involving association rules or practices. In a follow up study in 2009 – Michael A. Carrier 'The Rule of Reason: An Empirical Update for the 21st Century' (2009) George Mason Law Review' 16(4) 827 – it was found that between 1999 and 2009 only 2% of cases reached the balancing stage. Perhaps even more notable was the finding that in 221 of 222 cases the defendant won the case – the sole exception being *US v VISA* 344 F.3d.229 (2nd Cir 2003). A different, more recent study adds further support to this view – by finding that between 1998 and 2013 there were only 6 cases out of nearly 300 where balancing under the rule of reason actually took place – Daniel Fundakowski 'The Rule of Reason: From Balancing to Burden Shifting'(2013) Perspectives in Antitrust 1(2) 1, p. 5.

[28] ABA Antitrust Section, Monograph No. 23, 'The Rule of Reason' 10 (1999); William E. Kovacic & Alison Jones 'Identifying Anticompetitive Agreements in the United States and the European Union', p. 274. In *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 476 (1978), the Supreme Court held that: "*properly understood, rule-of-reason analysis is not distinct from "per se" analysis. On the contrary, agreements that are illegal per se are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of reason.*"

[29] The parties will have to show that the conditions of Article 101(3) TFEU are satisfied. In brief, the parties have to show that the agreement or concerted practice will have (or has had) positive effects and that the restriction was "indispensable" to achieve these effects.

[30] William E. Kovacic & Alison Jones 'Identifying Anticompetitive Agreements in the United States and the European Union', p. 280.

[31] Id., p. 287.

[32] Case T-168/01 *GlaxoSmithKline* ECLI:EU:T:2006:265, paras. 119–120; Case T-472/13 *Lundbeck*, ECLI:EU:T:2016:449, para. 438.

[33] The court compels licensing of intellectual property only if (1) it is indispensable for firms if they are to compete in a secondary market, (2) the failure to license the intellectual property would eliminate competition in that secondary market, (3) the intellectual property is needed to create a new product for which there is likely consumer demand, and (4) there is no objective justification for refusing to license it.

[34] It has been argued that this is because the conditions of the test limit compulsory licensing to cases in which the prospective social benefits are so large that they offset the chilling effect on incentives to innovate: Christian Ahlborn, David S. Evans, and A. Jorge Padilla 'The Logic and Limits of the "Exceptional Circumstances Test" in Magill and IMS Health' (2004) Fordham International Law Journal 28(4) 1109, p. 1111. However, a similar test seems to apply to other situations of refusal to supply an essential input or facility, in which the benefits of innovation would seem to be absent: see Richard Whish and David Bailey 'Competition Law' 8th Ed. (OUP, 2015), p. 740.

[35] Richard Posner *Antitrust Law* 2nd ed. (University of Chicago Press, 2001), at (ix).

[36] Richard A. Posner 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) J. Legal Stud. 2 399; Isaac Ehrlich & Richard A. Posner 'An Economic Analysis of Legal Rulemaking' (1974) J. Legal Stud. 3 257. These insights were introduced into mainstream antitrust

scholarship by Paul L. Joskow and Alvin K. Klevorick ‘A Framework for Analyzing Predatory Pricing Policy’ (1979) Yale L.J. 89 213, p. 222–25.

[37] Regulation costs go beyond the costs of litigation and include, among others: (i) costs incurred setting up rules; (ii) information gathering costs by potential litigants; (iii) costs incurred assessing individual cases; (iv) monitoring and compliance costs; (v) costs related to chilling behaviour caused by unclear rules. See Arndt Christiansen and Wolfgang Kerber ‘Competition Policy with Optimally Differentiated Rules Instead of ‘Per Se Rules vs. Rule of Reason’, p. 231-234; Louis Kaplow ‘Rules Versus Standards: An Economic Analysis’ (1992) Duke L.J. 42 557.

[38] See, e.g., George Paton, *A Textbook of Jurisprudence* § 48, at 236-38 (4th ed.) (Oxford, 1972) (a legal rule is a precept prescribing definite consequences when certain facts exist; a rule operates by incorporating either standards or concepts; standards are elastic, whereas concepts are rigid abstractions); Isaac Ehrlich & Richard A. Posner ‘An Economic Analysis of Legal Rulemaking’, p. 258 (the term “standard” refers to “a general criterion of social choice,” such as a mandate to promote “competition.” The term “rule” refers to a more precise statement that circumscribes the assessment of factors relevant to a decision according to the standard); Roscoe Pound, ‘Hierarchy of Sources and Forms in Different Systems of Law’ (1933) Tul. L. Rev. 7 475, p. 482-83, 485-86 (rules prescribe definite, detailed legal consequences to a definite set of detailed facts; standards, by contrast, specify a general limit of permissible conduct requiring application in view of the particular facts of the case); Hans-Bernd Schäfer ‘Rules versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low-Income Countries’ (2006) Supreme Court Economic Review 14 113, p. 115 (rules are legal commands that differentiate legal from illegal behaviour in a comprehensive and clear manner. Standards are criteria that are unclear and fuzzy and require complicated judicial interpretation).

[39] See the example of lawful price-fixing in fn. 4 above.

[40] Jules Coleman ‘Rules and Social Facts’ (1991) Harv. J.L. & Pub. Pol't 14 703, p. 710 (arguing that "rules are necessarily under- and over-inclusive with respect to the sets of reasons that support or ground them); Frederick Schauer ‘Playing by the Rules: A Philosophical Examination of Rule-Based Decision-making in Law and Life (OUP, 1993), p. 17-31 (describing rules as "crude probabilistic generalizations" that may lead to suboptimal or even plainly erroneous decisions) and at 31-34 (describing rules as entrenched generalizations likely to be under- and over-inclusive in particular cases).

[41] Jonathan B. Baker ‘Taking the Error Out of ‘Error Cost’ Analysis’, p. 31.

[42] Richard Posner in *MindGames, Inc. v. W. Pub. Co.,* 218 F.3d 652, 657 (7th Cir. 2000)

[43] David Evans and Jorge Padilla ‘Designing Antitrust Rules for Assessing Unilateral Practices’, p. 85-87.

[44] Daniel Crane ‘Rules Versus Standards in Antitrust Adjudication’, p. 54; Mark Lemley and Christopher Leslie ‘Categorical analysis in antitrust, p. 1256-1257.

[45] Robert Allen ‘Burdens of Proof, Uncertainty and Ambiguity in Modern Legal Discourse’ (1994) Harv. J.L. & Pub. Pol't 627, p. 633.

[46] Theoretically, if a rule is unable to distinguish between anti- and pro-competitive conducts, it will usually not be appropriate. On the other hand, this disregards the role of regulation costs: the adoption of a relatively inaccurate bright-line rule might still be warranted if a more detailed (and costly) standard requiring a detailed market analysis would not lead to significantly more accurate outcomes – see Steven Salop ‘The Evolution and Vitality of Merger Presumptions: A Decision Theoretic Approach’ (2015) Antitrust L. J. 80.

[47] Jonathan B. Baker ‘Taking the Error Out of ‘Error Cost’ Analysis’, p. 5; Lindsey M. Edwards and Joshua D. Wright ‘The Death of Safe Harbours: Causes and Consequences”, p. 1223.

[48] Frank H. Easterbrook 'The Limits of Antitrust' (1984) Tex. L. Rev. 63 1, p. 4.

[49] *Verizon Communications v. Law Offices of Curtis Trinko* 540 U.S. 398, 414 (2004).

[50] Frank H. Easterbrook 'Ignorance and Antitrust' in Jorde, T.M., Teece, D.J. (eds.), *Antitrust, Innovation, and Competitiveness* (OUP 1992) 119, p. 129; David Evans and Jorge Padilla 'Designing Antitrust Rules for Assessing Unilateral Practices, p. 85-87; *Leegin Creative Leather Products, Inc. v. PSKS*, 127 S. Ct. 2705 (2007) at 2729 (Breyer J, dissenting).

[51] Andrew Gavil 'The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience' (2007) Journal of Competition and Law Economics 4(1) 177, p. 182.

[52] See the discussion in *United States v. Topco Assocs. Inc*., 405 U.S. 569, 609-10 & n. 10 (1972).

[53] Kevin E. Davis 'Law-Making in Small Jurisdictions' (2006) The University of Toronto Law Journal 56(3) 151, p. 152.

[54] Hans-Bernd Schäfer 'Rules versus Standards in Rich and Poor Countries', p. 114, 119-133.

[55] Kevin E. Davis 'Law-Making in Small Jurisdictions', p. 177-178.

[56] William E. Kovacic & Alison Jones 'Identifying Anticompetitive Agreements in the United States and the European Union', p. 264.

[57] Mark Lemley and Christopher Leslie 'Categorical analysis in antitrust jurisprudence', p. 1211.

[58] Some authors have gone as far as to seek to put this insight on a firm theoretical basis. For example, Christiansen and Kerber attempted to develop a model for the adoption of optimally differentiated rules. According to this model, it is worthwhile increasing the degree of differentiation of competition rules by taking into account additional assessment criteria up to the point at which the additional regulation costs are higher than the additional reduction of error costs. As a result, the optimal complexity (or precision) of competition rules will vary between different types of business behaviour. Arndt Christiansen and Wolfgang Kerber 'Competition Policy with Optimally Differentiated Rules Instead of 'Per Se Rules vs. Rule of Reason', p. 217, 228

[59] David Bailey 'Presumptions in EU competition law' (2010) European Competition Law Review 9 20, p. 20.

[60] In practice the burden of proof often depends on the standard of proof required, and the perceived ability of the party bearing the burden to meet the standard of proof – see James McNaughton 'Burden of Production of Evidence: A Function of a Burden of Persuasion' (1955) Harv. L. Rev. 68 1382.

[61] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland*, ECLI:EU:C:2004:6, paras. 55-57. A similar presumption exists regarding the duration of an infringement, provided that the various activities of the undertaking fall within the framework of a single and continuous infringement: see Case C-105/04 P, *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission* ECLI:EU:C:2006:592, para 98.; Cristina Volpin, "The ball is in your court: Evidential burden of proof and the proof-proximity principle in EU competition law" (2014) CML Rev. 1159, p. 1170.

[62] See *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). This presumption was subsequently enshrined in the US Merger Guidelines in 1968, 1992 and, more recently, in 2010, which provide that this "structural presumption" may be rebutted by showing that some listed offsetting factors are met. According to Herbert Hovenkamp and Carl Shapiro, the structural presumption is underpinned by two important economic ideas. The first idea is that the loss of a significant competitor in a concentrated market is likely to lead to the creation of enhancement of market power. The second idea is that entry barriers in concentrated markets often are significant –

see Herbert Hovenkamp and Carl Shapiro ‘Horizontal Mergers, Market Structure, and Burdens of Proof’ (2017) University of Pennsylvania Law School Institute for Law and Economics Research Paper 17/42, p. 5 (viewed on 30 October 2017).

[63] Harvie Wilkinson III, "Toward a Jurisprudence of Presumptions" (1992) New York University Law Review 907 , p. 907; Cyril Ritter ‘Presumptions in EU Competition Law’ (viewed on July 10, 2017), available at SSRN: https://ssrn.com/abstract=2999638, p. 11.

[64] David Bailey ‘Presumptions in EU competition law’, p. 20-21.

[65] Case C-235/92 P, *Montecatini v. Commission* ECLI:EU:C:1999:362, para 176.

[66] See Article 16(3) of Regulation No. 773/2004; Case T-271/03 *Deutsche Telekom*, ECLI:EU:T:2006:163, para. 45, and C-162/15 P *Evonik Degussa* ECLI:EU:C:2017:205, para. 64; and Cyril Ritter ‘Presumptions in EU Competition Law’ (viewed on July 10, 2017), available at SSRN: https://ssrn.com/abstract=2999638, p. 6.

[67] Article 10(6) of the EU Merger Regulation; Hart–Scott–Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[68] David Bailey ‘Presumptions in EU competition law’, p. 21.

[69] Case C-49/92 P *Commission v Anic Partecipazioni SpA* ECLI:EU:C:1999:356, para. 121.

[70] Case C-199/92 *P Hüls v Commission* ECLI:EU:T:1992:31, para. 167; Case C-455/11 *P Solvay*, ECLI:EU:C:2013:796, para 42-43; C-449/11 P *Solvay Solexis*, ECLI:EU:C:2013:802, para. 38.

[71] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland* ECLI:EU:C:2004:6, para. 81; Case T-303/02 *Westfalen Gassen*, ECLI:EU:T:2006:374, paras. 95 and 115. See Cristina Volpin, ‘The ball is in your court’, p. 1168-1169.

[72] Case 85/76 *Hofman La Roche v Commission* ECLI:EU:C:1979:36, para. 41.

[73] Case C-62/86 *AKZO Chemie BV v Commission* ECLI:EU:C:1991:286, para 60.

[74] David Bailey ‘Presumptions in EU competition law’, p. 23-24.

[75] For example, EU courts have described its substantive rules on prohibitions by object as amounting to a (substantive) presumption – “*the classification of an agreement or practice as restrictive of competition by object acts as a kind of ‘presumption’, since, if that agreement or practice is found to be restrictive, it will not be necessary to establish what effects it has on competition*”: Opinion of AG Cruz Villalon in Case C-32/11 *Allianz Hungária*, ECLI:EU:C:2012:663; para. 64

[76] Robert Bork, “The Rule of Reason and the Per Se Concept: Price Fixing and Market Division” (1966) 75 Yale L.J. 373, p. 387; Mark Lemley and Christopher Leslie ‘Categorical analysis in antitrust jurisprudence’, p. 1213-1214. Explicitly describing per se prohibitions as irrebuttable presumptions, see Andrew Gavil ‘Burden of Proof in US Antitrust Laws’ (2008) Issues in Competition Law and Policy 125, p. 128.

[77] Describing object restrictions as substantive presumptions, see David Bailey ‘Presumptions in EU competition law’, p. 22-23; Advocate General Villalon’s Opinion in Case C-32/11*Allianz Hungária* ECLI:EU:C:2012:663, para. 64; Cristina Volpin, ‘The ball is in your court’, p. 1166; Cyril Ritter ‘Presumptions in EU Competition Law’, p. 11.

[78] These conditions are that the agreement or concerted practice leads to efficiency gains, a fair share of which will be passed to consumers; and that the agreement or concerted practice only impose restrictions of competition which are indispensable to the fulfilment of these goals and that do not eliminate competition.

[79] See William E. Kovacic & Alison Jones ‘Identifying Anticompetitive Agreements in the United States and the European Union’, p. 281.

[80] For a discussion, see Lindsey M. Edwards and Joshua D. Wright ‘The Death of Safe Harbours: Causes and Consequences, p. 1213. This doctrine places outside the scope of antitrust law coordination between corporations with wholly-owned subsidiaries – *Copperweld Corp. v. Independence Tube Corp*. 467 U.S. 752 (1984) – and with some partially owned subsidiaries - *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 706–07 (N.D. Cal. 1994); *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987); *Novatel Commc'ns, Inc. v. Cellular Tel. Supply, Inc.*, No. C85-2674A, 1986 WL 798475, at *9–10 (N.D. Ga. Dec. 23, 1986) –; coordination between companies controlled by the same parent – *Eichorn v. AT&T Corp*., 248 F.3d 131, 138 (3d Cir. 2001); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co*., 833 F.2d 606, 611 (6th Cir. 1987) – or under common ownership – *Guzowski v. Hartman*, 969 F.2d 211, 214 (6th Cir. 1992); *Century Oil Tool, Inc. v. Prod. Specialties, Inc*., 737 F.2d 1316, 1317 (5th Cir. 1984); *D'Last Corp. v. Ugent, 863 F. Supp*. 763, 768–69 (N.D. Ill. 1994), aff'd, 51 F.3d 275 (7th Cir. 1995); *Orson, Inc. v. Miramax Film Corp*., 862 F. Supp. 1378, 1385 (E.D. Pa. 1994), aff'd in part & vacated in part, 79 F.3d 1358 (3d Cir. 1996). But see the limitation recently imposed on the extent of this doctrine by *American Needle, Inc. v. NFL* 560 U.S. 183, 200–01 (2010).

[81] This underpins the concept of “undertaking” in EU competition law, which “*encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed*” – see Case C-41/90 *Höfner and Elser v. Macrotron GmbH* [1991] ECLI:EU:C:1991:161, para. 21. As such an undertaking “*must be understood as covering an economic entity, even if, from a legal perspective, that unit is made up of a number of natural or legal persons”* – see Case C-597/13 *Total* [2015] ECLI:EU:C:2015:613, para. 33.

[82] Mark Lemley and Christopher Leslie ‘Categorical analysis in antitrust jurisprudence’. This follows from transaction cost economics, which in turn is an offshoot of Ronald Coase's theory of the firm – see Ronald H. Coase ‘The Nature of the Firm’ (1937) Economica 4 386.

[83] *Brooke Group v. Brown & Williamson Tobacco Corp* 509 U.S. 209 (1993); *Pacific Bell Telephone Co. v. linkLine Communications, Inc* 555 U.S. 438 (2009); Case C-62/86 *AKZO v Commission of the European Communities* [1991] ECLI:EU:C:1991:286. Above-cost pricing conducts may still be deemed anticompetitive under other theories of harm; and it is worth noting that in the US the Sixth Circuit held that, even in single product predation cases, a dominant firm does not have an absolute defence if it priced above its cost – see *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005).

[84] David Bailey ‘Presumptions in EU competition law’, p. 25.

[85] Cyril Ritter ‘Presumptions in EU Competition Law’, p. 17.

[86] See Case C-67/13 P *Cartes Bancaires* ECLI:EU:C:2014:2204, para. 51. For the USA, see *Arizona v. Maricopa County Medical Society* 457 U.S. 332 (1982). For the literature on the role of prior experience for the adoption of rules and presumptions in competition law, see also Mark Lemley and Christopher Leslie ‘Categorical analysis in antitrust jurisprudence’, p. 1257; David Bailey ‘Restrictions of Competition by Object under Article 101 TFEU’ (2012) CML Rev. 49 559, p. 565; and Cyril Ritter ‘Presumptions in EU Competition Law’, p. 17-18.

[87] Id., p. 16.

[88] RPM was the subject of a Committee Roundtable, see OECD (2008) ‘Roundtable on Resale Price Maintenance’ DAF/COMP(2008)37.

[89] Available at www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/170616.pdf (viewed on 25 August 2017).

[90] See OECD (2013) 'Roundtable on vertical restraints for on-line sales' DAF/COMP(2013)13, Submission from Korea; and Global Competition Review, The Asia-Pacific Antitrust Review 2017 – Korea: Overview, available at http://globalcompetitionreview.com/benchmarking/the-asia-pacific-antitrust-review-2017/1138986/korea-overview.

[91] Available at https://www.weko.admin.ch/weko/fr/home/documentation/communications---notes-explicatives.html in French, German and Italian (viewed on 25 August 2017).

[92] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1.

[93] Hardcore restrictions in block exemption regulations can be generally taken to mean by object restrictions. See European Commission, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, p. 5.

[94] These set out in Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) and listed here in footnote 79. The accompanying Guidelines, in section 1.3.2., explain how they are applied to vertical restraints.

[95] *Dr Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). This rule was somewhat limited subsequently, as non-monopolists were allowed impose RPM restrictions – see Lindsey M. Edwards and Joshua D. Wright 'The Death of Safe Harbours: Causes and Consequences', p. 1209.

[96] *Leegin Creative Leather Proods., Inc. v. PSKS, Inc*., 551 U.S. 877 (2007).

[97] *Leegin Creative Leather Proods., Inc. v. PSKS, Inc*., 551 U.S. 877 (2007), pp. 12-14.

[98] See OECD (2013) 'Roundtable on vertical restraints for on-line sales' DAF/COMP(2013)13, Submission from the European Union.

[99] Matthew Bennett, Amelia Fletcher, Emanuele Giovannetti and David Stallibrass 'Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy' (2011) Fordham International Law Journal 33 4 1295.

[100] Massimo Motta, Patrick Rey, Frank Verboven and Nikos Vettas 'Hardcore restrictions under the Block Exemption Regulation on vertical agreements: An economic view' (2009) (viewed on July 17, 2017), available at http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf. A similar argument is put forward by Andreas Reindl 'Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach' (2011) Fordham International Law Journal 33 4.

[101] Philip Lowe "Taking Sound Decisions on the Basis of Available Evidence" in C.D. Ehlermann & M. Marquis (eds.) *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart, 2009) 157.

[102] Mark Lemley and Christopher Leslie 'Categorical analysis in antitrust, p. 1257; David Bailey 'Presumptions in EU competition law', p. 26.

[103] This point of view has been clearly expressed on both sides of the Atlantic. In Europe, it can be found in A.G. Kokott's Opinion in Case C-8/08, *T-Mobile*, [2009] ECLI:EU:C:2009:110, para 43; in the US, see *Continental TV Inc v. GTE Sylvania Inc*, 433 US 50, footnote 16 (1977), and Breyer J in *Leegin Creative Products, Inc v. PSKS Inc*, 551 US 877 (2007).

[104] Cristina Volpin, "The ball is in your court', p. 1163.

[105] Id., p. 1173-1177. Other reasons that underpin the rules on the burden of proof include limiting the amount of litigation and disposing of cases effectively.

[106] David Bailey ‘Presumptions in EU competition law’, p. 26; Cyril Ritter ‘Presumptions in EU Competition Law’, p. 19.

[107] David Bailey ‘Restrictions of Competition by Object under Article 101 TFEU’, p. 565; Cyril Ritter ‘Presumptions in EU Competition Law’, p. 19; William E. Kovacic & Alison Jones ‘Identifying Anticompetitive Agreements in the United States and the European Union’, p. 262.

[108] ICN (2015), Online Vertical Restraints Special Project Report, http://www.internationalcompetitionnetwork.org/uploads/library/doc1130.pdf

[109] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1.

[110] Commission Notice – Guidelines on Vertical Restraints, OJ 2010/C 130/1, para. 56.

[111] Case C-439/09 *Pierre Fabre* ECLI:EU:C:2011:649.

[112] Commission Notice – Guidelines on Vertical Restraints, OJ 2010/C 130/1, para. 54.

[113] This is similar to the concept of substantive presumptions of legality, reviewed above.

[114] In the USA, see *Copperweld Corp. v. Indep. Tube Corp*. 467 U.S. 752, 767–68 (1984).

[115] Lindsey M. Edwards and Joshua D. Wright ‘The Death of Safe Harbours: Causes and Consequences’, p. 1205.

[116] Daniel Crane ‘Rules Versus Standards in Antitrust Adjudication’, p. 99.

[117] This may explain why US courts have created rule of *per se* legality for a number of practices. Such safe harbours cover certain agreements (e.g. activity within the scope of intellectual property rights; reasonableness of exclusive dealing contracts; short-term exclusivity agreements), unilateral practices (e.g. above-cost pricing; unilateral refusals to deal and monopoly pricing; product innovation and patent licensing), and even merger control (e.g. regarding mergers leading to post-merger market shares of less than 35 percent). See Lindsey M. Edwards and Joshua D. Wright ‘The Death of Safe Harbours: Causes and Consequences’, p. 1205-1206.

[118] Here we follow the examples provided by Lindsey M. Edwards and Joshua D. Wright ‘The Death of Safe Harbours: Causes and Consequences” quote a few decisions confirming this safe harbour. See in particular fn. 87, p. 1215; fn. 92, p. 1216; and fn. 177, p. 1231.

[119] *Roland Machinery Co. v. Dresser Industries, Inc.* 749 F.2d 380 (7th Cir. 1984);.

[120] *U.S. Healthcare, Inc. v. Healthsource, Inc*. 986 F.2d 589, 596 (1st Cir. 1993).

[121] *Jefferson Parish Hospital District No. 2 v. Hyde* 466 U.S. 2 (1984).

[122] Lindsey M. Edwards and Joshua D. Wright ‘The Death of Safe Harbours: Causes and Consequences’, p. 1216.

[123] *United States v. Dentsply, Int’l, Inc*., 399 F.3d 181, 193-94 (3rd Cir. 2005).

[124] Lindsey M. Edwards and Joshua D. Wright ‘The Death of Safe Harbours: Causes and Consequences’, p. 1231-1233.

[125] There are also a number of sector-specific rules – on agriculture, air transport, insurance, motor vehicle, postal services and transport.

[126] For example, vertical agreements will fall within the scope of a block exemption when both the seller and the buyer have a market share below 30% of the market where they respectively sell and purchase the relevant goods or services. This is usually coupled with an additional obligation that the businesses do not engage in a hard-core restraint. Gianni De Stefano ‘The new EU Vertical

Restraints Regulation: Navigating the vast seas beyond safe harbours and hardcore restrictions' (2010) European Competition Law Review Issue 12 487, p. 488.

[127] See, for example, Regulation 330/2010 recitals 13–15, and New Guidelines, paras 74–78.

[128] See, for example, the US 1982 Merger Guidelines at § III.A.1.a; the 1992 Merger Guidelines, at § 2.211, 2.22; and the 2010 Merger Guidelines, at § 1. In the EU, see Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings OJ L 24, Recital 32; Guidelines on the assessment of horizontal mergers (2004) OJ C 31, para. 18; Guidelines on the assessment of non-horizontal mergers (2008) OJ C 265, para. 25..

[129] Michael Pickford and Qing Gong Yang 'Safe Harbours in Merger Guidelines: What Should They Be?' (2011) Australian Competition Review 44(1) 13, p. 13.

[130] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1

[131] See Joint comments of the American Bar Association Section of Antitrust Law and Section of International Law on The Japan Fair Trade Commission's draft revisions to the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20170509.authcheckdam.pdf.

[132] RBB Economics 'Comments on proposed changes to EC Commission Guidelines on Vertical Restraints' (2009), p. 5, available at http://ec.europa.eu/competition/consultations/2009_vertical_agreements/rbbeconomics_en.pdf (viewed on 15 October 2017).

[133] This seems to be, for instance, the point of view in the Joint comments of the American Bar Association Section of Antitrust Law and Section of International Law on the proposal of the European Commission for a revised Block Exemption Regulation and Guidelines on supply and distribution agreements, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_proposal-ec.authcheckdam.pdf.

[134] This power is granted by Article 6 of the Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1. See also par. 79 of the accompanying Guidelines.

[135] Massimo Motta *et alia* 'Hardcore Restrictions under the Block Exemption Regulation on Vertical Agreements: An Economic View'.

[136] Luc Peeperkorn "Defining "by object" restrictions" (2015) Concurrences 3-2015 40, p. 44.

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