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Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by the European Union

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1. Under a presumption, if certain facts are established, it is taken as a starting point that other facts can be presumed, usually because experience or accumulated knowledge supports the view that the presumed facts are typically a logical consequence of the established facts. EU competition law presumptions are usually rebuttable, i.e. parties can bring forward evidence and arguments showing why the presumption should not apply in the concrete circumstances of a case.

2. In any legal system where gathering information is costly and litigants' resources are limited, it makes sense to use presumptions to structure the process and analysis in stages and to allocate the burden of bringing arguments and evidence. This enables authorities and courts to expedite the proceedings and make complex issues more administrable, while ensuring the required degree of accuracy of decision-making.

3. This contribution is divided in three parts: (1) the compatibility of EU competition law presumptions with the presumption of innocence; (2) the different types of presumptions under EU competition law; and (3) the rationales for using such presumptions.

1. Presumptions under EU competition law are compatible with the presumption of innocence

4. Perhaps the best-known presumption is the presumption of innocence. In EU competition law proceedings, according to Article 2 of Regulation No. 1/2003, the presumption of innocence means that the burden of proving an infringement of Article 101(1) or 102 is on the party alleging it. Conversely, the burden of relying on the efficiency defence is on the party alleging it.[1]

5. At the same time, in several cases, the Court of Justice has ruled that the burden of proving a particular point does not rule out the possibility of burden-shifting: "the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged".[2]

6. Presumptions are an instrument to allocate the burden of bringing arguments and evidence, to structure the process and analysis, to make complex issues more administrable and competition enforcement effective, while ensuring the required degree of accuracy of decision-making.

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1. The presumption of innocence constitutes a general principle of EU law now enshrined in Article 48(1) of the Charter of Fundamental Rights (OJ C 202, 7.6.2016, p. 389) and applicable in EU competition law proceedings: see C-89/11 P *E.on*, ECLI:EU:C:2012:738, para. 72.

[2] See C-204/00 P *Aalborg Portland*, ECLI:EU:C:2004:6, para. 79; C-407/08 P *Knauf Gips*, ECLI:EU:C:2010:389, para. 80; and C-501/06 P *Glaxo*, ECLI:EU:C:2009:610, para. 83.

7. Indeed, the EU courts have confirmed the use of presumptions in EU competition cases. In *Elevators*, the General Court held that "the presumption of innocence is not disregarded if in competition proceedings certain conclusions are drawn on the basis of common experience provided that the undertakings concerned are at liberty to refute those conclusions".[3] For this reason, EU competition law presumptions are usually rebuttable, rather than "irrebuttable" or "conclusive".

8. Furthermore, in *MCAA*, the Court of Justice held that "a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded". One could add that if a presumption is rarely rebutted, it is working precisely as intended, and therefore it was correct to presume.[4]

2. Types of presumptions

2.1. Using a known fact (or several) to infer another fact

9. The straightforward meaning of a "presumption" is to use a known fact (or several) to infer another fact. Sometimes this is called a "factual presumption" or an "evidential presumption". Such presumptions are usually rebuttable.

10. In EU competition law, a classic example of such presumptions is the parental liability presumption: "it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary".[5] The fact that the subsidiary is wholly owned by the parent company is easily verifiable. This allows to presume that the parent company exercises decisive influence over the subsidiary. Drawing from that presumed fact, the legal conclusion is parental liability.

11. Another example is the "only plausible explanation" case-law, which originated in the area of concerted practices: "parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation".[6] In other words, while there is no direct evidence of concertation, concertation is presumed if it is the "only plausible explanation" for observed parallel behaviour. This is often referred to as the *Wood Pulp* test, although it appeared earlier in the case-law.[7] The firm can rebut the presumption by showing some "other plausible explanation".

[3] T-144/07 *ThyssenKrupp Liften*, ECLI:EU:T:2011:364, para. 114, and T-141/07 *General Technic-Otis*, ECLI:EU:T:2011:363, para. 73.

[4] C-521/09 P *Elf Aquitaine*, ECLI:EU:C:2011:620, para. 62. See also C-501/11 P *Schindler*, ECLI:EU:C:2013:522, para. 107.

[5] C-97/08 P *Akzo Nobel*, ECLI:EU:C:2009:536, para. 61. The presumption also applies to indirect shareholdings and to shareholdings of "almost" 100%.

[6] C-89/85 *Ahlström Osakeyhtiö*, ECLI:EU:C:1993:120 ("*Wood Pulp*"), para. 71.

[7] 40/73 *Suiker Unie*, ECLI:EU:C:1975:174, para. 301; 29/83 *CRAM and Rheinzink*, ECLI:EU:C:1984:130, para. 16; 395/87 *Tournier*, ECLI:EU:C:1989:319, para. 24; C-110/88 *Lucazeau*, ECLI:EU:C:1989:326, para. 18. See also, since *Wood Pulp*, T-442/08 *CISAC*, ECLI:EU:T:2013:188, para. 99.

2.2. Using a fact (or several), known or presumed, to draw a legal conclusion

12. The legal assessment of a particular situation often rests on a "legal test" – a combination of factors leading to a legal conclusion. The factors may be cumulative or to be assessed "on the whole" or "on balance".

13. A legal test based on few factors is often presented as a presumption. Such a test sorts different behaviours into a few broad categories. It is presumed that behaviours falling in the same category should be treated in the same way, without inquiring about other factors that may further differentiate between those behaviours. The fewer factors in the test, the more it comes down to a broad categorisation, or generalisation, or abstract assessment.

14. This is not to say that such a test is less accurate. Experience may show that when shaping the legal test for a particular practice, only one or two factors are sufficient to conclude with a high degree of reliability. For example, some types of behaviour that fall squarely within a category of established restrictions by object – such as cartels – are prohibited under Article 101(1), without extensive further analysis. They are presumed harmful and they are presumed to constitute an appreciable restriction of competition (*Expedia*).[8]

15. Conversely, the more factors in the test, the more the assessment becomes a detailed, case-by-case, individual, *in concreto* assessment. Such a test is not necessarily more accurate. Courts and authorities have limited resources, so they cannot afford to seek absolute truth: they only seek to solve legal disputes with their limited resources. The benefit of ascertaining whether something is, in fact, true, is not necessarily worth the cost – not just the costs to the court, the competition authority, and the firms involved, but, mostly, the cost to the public in terms of competition cases that are not pursued because resources are tied down on other cases. The largest part of "false negative" cases are not those cases wrongly deciding that a firm's behaviour is legal, but those cases of illegal behaviour that are never even investigated for lack of resources.

16. Finally, presumptions may work in favour of competition authorities/claimants or in favour of defendants. Since many presumptions increase the effectiveness of competition enforcement, defendants often argue against the use of presumptions, on the grounds that each case deserves a full and individual assessment. At the same time, firms do benefit from presumptions, such as block exemptions, the *de minimis* rule, or per se legality rules ("safe harbours").

3. Main rationales for presumptions

17. This section discusses some of the main rationales for presumptions: experience, "proof proximity", and effectiveness.

3.1. Applying the lessons of experience

18. By far the most common basis for presumptions is that according to past experience, when fact A occurs, fact B always (or automatically, or invariably, or almost

[8] C-226/11 *Expedia*, ECLI:EU:C:2012:795, para. 37.

always, or usually, or likely) follows.[9] Therefore it is not necessary to spend resources upfront on establishing fact B. Using the lessons of experience saves costs.

19. There are several examples of presumptions based on the experience rationale.

- *Restrictions by object*. According to the Article 101(3) Guidelines, restrictions by object "are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101(1)] to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules".[10]
- *No "other plausible explanation"*. The Commission may infer the existence of illegal collusion from the parties' parallel behaviour, when there is no other plausible explanation for such behaviour. The presumption is based on prior experience of the economics of oligopolistic markets.
- *Predatory pricing*. In the *Akzo* judgment, the Court of Justice ruled that "prices below average variable costs … must be regarded as abusive … since each sale generates a loss".[11] This is interpreted as a presumption. In *Compagnie Maritime Belge*, AG Fennelly explained that "it is not *usually* rational to sell below average variable costs".[12] In *France Télécom*, the Court of Justice held that selling below average variable cost "is *presumed* to pursue no other economic objective save that of eliminating its competitors" (italics added).[13]

3.2. "Proof proximity"

20. It also makes sense to use a rebuttable presumption to cut the costs of adjudication by shifting the burden to the party which is more likely to have access to the evidence.[14] This applies to the efficiency defence, for example: the undertaking is much more likely than the authority to be able to access the relevant evidence.[15] To take

[9] Opinion of AG Kokott in C-8/08 *T-Mobile*, ECLI:EU:C:2009:110, from para. 89, referring to presumptions based on "common experience". AG Szpunar makes the same point in his opinion in C-74/14 *Eturas*, ECLI:EU:C:2015:493, para. 99. See also T-141/07 *General Technic-Otis*, ECLI:EU:T:2011:363, para. 73 (referring to "common experience" as a basis for presumptions).

[10] Article 81(3) Guidelines, para. 21. See also para. 24: "In the case of restrictions of competition by effect there is no presumption of anti-competitive effects." See also C-67/13 P *Cartes Bancaires*, ECLI:EU:C:2014:2204, para. 51.

[11] 62/86 *Akzo*, ECLI:EU:C:1991:286, para. 71.

[12] C-395/96 P *Compagnie Maritime Belge*, ECLI:EU:C:1998:518, para. 127.

[13] C-202/07 P *France Télécom*, ECLI:EU:C:2009:214, para. 109.

[14] T-321/05 *AstraZeneca*, ECLI:EU:T:2010:266, para. 686; C-521/09 P *Elf Aquitaine*, ECLI:EU:C:2011:620, para. 60; opinion of AG Wahl in C-177/16 *Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība*, ECLI:EU:C:2017:286, paras. 135-136; and Cristina Volpin, "The ball is in your court: Evidential burden of proof and the proof-proximity principle in EU competition law", 2014 Common Market Law Review 1159.

[15] T-321/05 *AstraZeneca*, ECLI:EU:T:2010:266, para. 686.

another example, the presumption that a firm participating in a concerted practice adjusts its behaviour accordingly may be rebutted, probably because the firm is better able to produce evidence on this point.[16] The parental liability presumption also rests partly on the proof proximity principle.[17]

3.3. Effectiveness

21. Sometimes the law also uses presumptions because there is a policy interest in increasing the effectiveness of enforcement, or strengthening the claimant's position. It may be necessary to strengthen a claimant's position, for example, where it otherwise would have excessive difficulties in gathering the necessary evidence (the information asymmetry problem). In this regard, it is important to recall that the principle of effectiveness of EU competition law is not just a policy objective – it is a legal principle recognised in case-law.[18]

22. *Aalborg Portland* is probably the best-known case-law on presumptions aiming to remedy information asymmetry and increase enforcement effectiveness: "Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."[19]

23. In the Antitrust Damages Directive, it is presumed that the direct purchaser passed on the overcharge to the indirect purchaser merely from the fact that the indirect purchaser bought the products/services from the direct purchaser, unless the defendant "can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser".[20] That is because "it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm".[21]

[16] C-49/92 P *Anic*, ECLI:EU:C:1999:356, para. 121.

[17] C-521/09 P *Elf Aquitaine*, ECLI:EU:C:2011:620, paras. 59-60.

[18] See e.g. C-382/12 P *Mastercard*, ECLI:EU:C:2014:2201, para. 91; C-196/99 P *Aristrain*, ECLI:EU:C:2003:529, para. 81; C-453/99 *Courage v. Crehan*, ECLI:EU:C:2001:465, para. 26; and C-194/14 P *AC Treuhand*, ECLI:EU:C:2015:717, para. 36. Sometimes the principle of effectiveness is expressed as the need to preserve the Commission's "task of supervising the proper application of the competition rules": see T-110/07 *Siemens*, ECLI:EU:T:2011:68, para. 50; T-67/00 *JFE*, ECLI:EU:T:2004:221, para. 192; T-410/09 *Almamet*, ECLI:EU:T:2012:676, para. 93; and C-469/15 P *FSL*, ECLI:EU:C:2017:308, para. 36. The principle of effectiveness of the EU competition rules is a manifestation of the EU law principle of "effet utile".

[19] C-204/00 P *Aalborg Portland*, ECLI:EU:C:2004:6, paras. 55-57.

[20] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1, Article 14.

[21] Recital 41.

24. Again according to the Antitrust Damages Directive, it "shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption".[22] This presumption is explained in the recitals of the directive:

> *"To remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. … This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm."*[23]

25. Moreover, using presumptions to increase the effectiveness of the competition rules often contributes to the clarity of the rules, and, therefore, predictability and legal certainty – in other words, incentivising and shaping firms' behaviour. In *Janosevic*, the European Court of Human Rights held that effectiveness and the clarity of the rules were valid rationales for presumptions.[24] In the EU competition law context, this point is well made by Advocate-General Kokott in *Akzo Nobel* and Advocate-General Mazák in *General Química*:

- "The effective enforcement of competition law requires clear rules. A presumption rule such as that recognised by the Court in *AEG* and *Stora*, which allows the Commission as the competition authority to attribute to a parent company the responsibility for the cartel offences of its wholly-owned subsidiaries, creates legal certainty and is straightforward to implement in practice."[25]
- "I consider that the function of the presumption in question, as explained by Advocate General Kokott in her Opinion in Case C-97/08 P *Akzo Nobel and Others v Commission*, is to facilitate the effective enforcement of competition law while promoting legal certainty due to the straightforward manner in which the presumption arises."[26]

4. Conclusion

26. This contribution has outlined some of the many presumptions currently used in EU competition law, such as the parental liability presumption; the presumption that parallel conduct evidences explicit collusion in the absence of another plausible explanation; the presumption that a firm participating in a concerted practice adjusts its behaviour accordingly; the "restriction by object" presumption; the "pricing below average variable cost" presumption; and, for the purpose of the Antitrust Damages

[22] Article 17(2).

[23] Recital 47.

[24] *Janosevic v. Sweden*, 23 July 2002, application no. 34619/97, paras. 102-104.

[25] C-97/08 P *Akzo Nobel*, ECLI:EU:C:2009:262, para. 71.

[26] C-90/09 P *General Química*, ECLI:EU:C:2010:517, para. 61.

Directive, the indirect purchaser presumption and the presumption that cartels cause harm.

27. Presumptions are a widespread and useful device to save resources – to make the competition enforcement system more administrable – in circumstances where a particular fact can be inferred from prior experience; or where a particular fact should be proven or disproven by the party which has better access to the relevant evidence (the "proof proximity" principle); or where a particular fact should be presumed in order to increase enforcement effectiveness and clarity – usually to remedy the claimant's difficulties in gathering evidence.