BUSINESS at OECD

Comments by the
***Business at OECD* (BIAC) Competition Committee**
to the OECD Competition Committee
Working Party No. 3 (WP3)

Use of Structural Presumptions in Antitrust Cases

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I. Introduction

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

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

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

II. The Utility of Presumptions

4. Legal presumptions can be very useful in competition enforcement, distilling decades of jurisprudence and economic experience into practical application. According to the *Oxford Dictionary*, a presumption is "an idea that is taken to be true, and often used as the basis for other ideas [actions], although it is not known for certain." U.S. courts have described presumptions as "a legal inference" or "a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of

facts."[1] Presumptions can expedite decision-making by enforcers while providing clarity and predictability to companies. For example, the presumption of illegality for price-fixing agreements between horizontal competitors offers businesses a straightforward guideline, while a presumption of harm from a certain combined horizontal market share offers a rule of thumb for potential merging parties.

5. They can also be, however, stultifying and blunt tools that displace factual, legal, and economic reasoning in favor of rote obeisance. The use of presumptions, therefore, requires careful consideration of when, and under what circumstances, they should be used.

6. These considerations have become prominent in the last few years, which have seen a rash of proposals for the use of presumptions, particularly in evolving market sectors. These "new" presumptions, both rebuttable and irrebuttable, have emerged in enforcement guidelines and *ex ante* regulations in numerous parts of the world. In many instances, they are incorporated in laws, regulations, or enforcement initiatives directed at the technology sector, with authorities citing rapid development as requiring "new tools" to keep up.

7. This paper explores the intricacies surrounding the development and use of presumptions, placing a significant emphasis on the conditions that have been required under the law to justify their establishment and use. As we explore, irrebuttable presumptions find their footing in those situations where the anticompetitive consequences of specific market structures or behaviors are certain or nearly certain. In essence, irrebuttable presumptions provide a legal shortcut by precluding legal wrangling on key issues that are highly unlikely to alter the outcome. By contrast, rebuttable presumptions come into play when circumstances dictate that the likelihood of competitive harm is probable or highly probable. But, as we explore below, in the absence of at least a probability of anticompetitive result, presumptions lack a rational basis.

8. In short, where experience is lacking, presumptions are unjustified. And the risk stemming from applying presumptions to unprecedented market structures is compounded by the fact that presumptions—which effectively shortcut enforcement procedures—often necessarily involve the compromise of certain fundamental rights of the involved parties.

9. This risk highlights the nuanced and delicate balance required to navigate the realm of presumptions in competition law. While they can offer a powerful means of expediting enforcement processes and offer some predictability to market participants, their careful and selective application—grounded in empirical evidence—is crucial to preserve the integrity of competition laws.

III. Historical Context for the Use of Presumptions

10. Early on, the U.S. Supreme Court laid out the framework for the analysis of potential antitrust violations—what would later become known as the rule of reason—in the early 20th century, holding that a court:

> [M]ust 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

[1] *In Int. of* Keiss, 40 Ill. App. 3d. 1071, 1074 (1976); and Virginia v. Black, 538 U.S. 343, 395 (2003) (Thomas J., dissenting). In *Sandstorm v. Montana*, the U.S. Supreme Court made reference to an evidentiary rule defining a presumption as "an assumption of fact *that the law requires to be made* from another fact or group of facts found or otherwise established in the action or proceeding." 442 U.S. 510, 515 n.4 (1979) (emphasis in original).

> believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained. . . .[2]

11. This analytical framework described by the Court was "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."[3] In effect, this established a rule on presumptions under antitrust law: *i.e.*, that there should be no presumptions. This broad scope meant that courts had to delve deeply into the intricacies of market dynamics, analyzing market structure, consumer behavior, and other nuances for each new case.

12. Practically speaking, this approach also required substantial resources. As a result, there was a perception that requiring this level of analysis for every case was unmanageable, prompting calls for a more streamlined and practical approach to evaluating anticompetitive practices. This became especially true as agencies and courts gained more and more experience with certain business practices and strategies, allowing some differentiation between those that proved consistently harmful to competition and those that did not.[4]

13. The response, over time, was the identification of certain practices, including group boycott and price-fixing, that should be presumed to cause harm to competition.[5] The *per se* rule had its roots in early cases like *Addyston Pipe & Steel Co. v. United States*.[6] The trend towards *per se* categories of anticompetitive behavior peaked with the Supreme Court's decision in 1972's *United States v. Topco Associates, Inc.*, which saw the Court go so far as to discuss the judiciary's "limited utility in examining difficult economic problems."[7] But the *Topco* discouragement of economic engagement would quickly be rejected.

14. In 1974's *United States v. General Dynamics Corp.*, the Court rejected a *per se* rule for mergers in favor of a flexible rule of reason analysis to assess competitive effects.[8] Three years later, the U.S. Supreme Court in *Continental TV, Inc. v. GTE Sylvania, Inc.*, described the *per se* rule as a "demanding standard" and made clear that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line-drawing."[9]

15. In both the U.S. and Europe, courts and antitrust agencies began "rehabilitating" formerly *per se* practices. For example, in 1997 the U.S. Supreme Court overruled its prior decision on price-fixing and held that vertical maximum price-fixing should be evaluated under the rule of reason.[10] By 2017, the OECD

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2 Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).

3 OECD, Safe Harbors and Legal Presumptions in Competition Law – Background Note by the Secretariat, DAF/COMP(2017)9, ¶ 12 (Nov. 9, 2017), https://one.oecd.org/document/DAF/COMP(2017)9/en/pdf [hereinafter OECD, Safe Harbors Secretariat Note]; *see also* Steven Salop, An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards 20 (2017), https://scholarship.law.georgetown.edu/facpub/2007/ (describing an "unstructured" rule of reason analysis that "could be based on a full reckoning of every potentially relevant fact that might be unearthed in a case").

4 William H. Rooney, Timothy G. Fleming, & Michelle A. Polizzano, *Tracing the Evolving Scope of the Rule of Reason and the Per Se Rule*, 1 COLUM. BUS. L. REV. 1, 7 (2021).

5 The U.S. Supreme Court declared group boycotts a *per se* violation in 1959's *Klor's, Inc. v. Broadway-Hale Store, Inc.*, 359 U.S. 207 (1959), while price-fixing was identified as a *per se* offense in 1968's *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

6 United States v. Addyston Pipe & Steel Co., 85 F. 271, 301 (6th Cir. 1898), *aff'd as modified,* 175 U.S. 211 (1899).

7 United States v. Topco Assocs., Inc., 405 U.S. 596, 609-610 (1972).

8 United States v. General Dynamics Corp., 416 U.S. 486 (1974).

9 Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 58-59 (1977).

10 State Oil Co. v. Khan, 522 U.S. 3 (1997).

noted an "opposite trend," observing that even conduct which was not previously deemed to pose any competitive risk had become "subject to detailed market examination."[11]

16. *Per se* and rule of reason represent two primary frameworks for categorizing business conduct, embodying the concept of the evidentiary burden required to make a case. However, they reveal little about how that concept is practically applied in an enforcement action. Presumptions are procedural devices that establish a baseline assumption about a particular fact or issue in an antitrust case. For example, a high market share may give rise to a presumption of market power. While presumptions do not directly categorize conduct as *per se* illegal or subject to the rule of reason, they can expedite the litigation process by allocating the burden of proof and creating a starting point for analysis. In essence, presumptions operate as a bridge between the substantive categorization of conduct and the procedural mechanics of antitrust enforcement.

17. Concern about the rapid growth of the digital economy and, more recently, generative artificial intelligence, have fueled calls for increased use of presumptions—in some cases based not on conduct but on size and other characteristics.[12] A 2017 OECD discussion on the use of legal presumptions in competition law attributes the development of presumptions to the need to identify "intermediate approaches that seek to ensure the administrability of competition law."[13] Administrability is undoubtedly a concern echoed frequently by enforcers given the rapid pace at which digital markets develop. But, as discussed below, administrative efficiency alone has never justified the use of presumptions.

A. Judicial vs. Agency-Created Presumptions

18. As in the development of the *per se* and rule of reason frameworks, courts have played the central role in developing and evolving competition presumptions. The phenomenon of judicial responsibility for establishing presumptions has resulted in the creation of presumptions on dominance[14] and predatory pricing.[15] In addition to creating competition presumptions, courts have also expanded and reduced the scope, shifted irrebuttable presumptions into rebuttable ones, and introduced new rationales for existing presumptions.[16]

19. By contrast, agency-created presumptions, such as a presumption of illegality based on a particular combined market share, do not have the same effect as judicial presumptions as they are always subject to review and adoption or rejection, or least application, by the courts. Lacking the same force of law as their judicially created counterparts, agency presumptions are properly viewed as "enforcement guides" discussing the intended enforcement approach of an agency, rather than a dispositive inquiry. This is particularly true in "prosecutorial" jurisdictions where the agencies must go to court to challenge any perceived competition violation and obtain a remedy. It is also true in "administrative" jurisdictions where the agency itself can determine a violation and impose a penalty, subject to later court review (if appealed). The distinction between the two lies principally in the interim effect of a remedy in an administrative agency

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11 OECD, Safe Harbors Secretariat Note, *supra* note 3, ¶ 17.

12 For example, the Competition and Law Enforcement Reform Act, introduced in the U.S. in 2021, featured a host of new presumptions, including a presumption of illegality for mergers valued at over $5 billion.

13 OECD, Safe Harbors Secretariat Note, *supra* note 3, ¶ 18.

14 Cyril Ritter, Presumptions in EU Competition Law, at 22 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999638.

15 *Id.* at 18.

16 *Id.* at 21-22. As an example of "expansion," the European competition law presumption of parental liability was initially applied by the Directorate General for Competition to "wholly owned" subsidiaries, *i.e.*, 100% ownership. Case C-97/08 P, Akzo Nobel v. Comm'n, 2009 E.C.R. I-08237, ¶ 61. This presumption was later expanded by courts to apply even in situations of less than 100% ownership. *See* Ritter, *supra*, note 14, at 2 n.4.

and the (typically) longer period of time required for judicial input on the agency's action, not in the force of the presumption applied by the agency. From that standpoint, the use of presumptions by agencies in administrative jurisdictions have more force and influence than in prosecutorial jurisdictions. This implies that administrative jurisdictions also have a heightened responsibility to ensure that presumptions are justified by legal foundation, and not merely administrative convenience or efficiency.

20. Of course, presumptions also can be built into legislation, with binding effect on courts. For example, the 11th Amendment to the German Competition Act, passed by the German Parliament in July 2023 and in effect as of November that year, added two legal presumptions to the existing German Act Against Restrictions of Competition: first, a presumption that an infringement of competition law results in economic benefits and secondly, that the benefits amount to at least 1% of the sales of the product or service concerned.[17] While agencies are bound by legislative presumptions—in that they cannot evade them if they prosecute—the agencies still have the ability to exercise prosecutorial discretion which provides some flexibility. Courts, in contrast, cannot choose the cases they review and are strictly bound by legislative presumptions, subject only to typical restraints on legislative authority (e.g., constitutionality).

21. In some instances, agency presumptions may eventually be given weight by the courts.[18] For example, following the introduction of the Herfindahl-Hirschman Index as a measure of concentration in the 1982 U.S. *Merger Guidelines*, many U.S. courts have recognized it as the preferred method of calculating market concentration.[19] But courts have stopped short of adopting a presumption based on the concentration index at the levels applied within those guidelines (which have themselves varied over time). In her examination of "guideline institutionalization," Hillary Greene found that between 1970 and 1975, the average rate of judicial reference to the guidelines was 12.5%. By the mid-1980s, the reference rate was typically above 50%.[20]

22. Even if not formally adopted by courts, agency-created presumptions can exert influence on judicial decision-making, business conduct, and legal policy and should be examined carefully as a result:

> When first introduced, the [merger] guidelines had limited authority outside the DOJ and even within the DOJ itself. Over time, the "legitimacy" of the guidelines increased, and even when that legitimacy had not been fully established, the statistics above revealed an increased tendency among decision makers to explain or reconcile rulings with the guidelines. . . . Increased judicial recognition moved the law closer to the guidelines, further enabling the courts to accord still greater weight to the guidelines. . . . In sum, each successive version of the guidelines

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17 Gesetz gegen Wettbewerbsbeschränkungen—GWB [Competition Act], Oct. 23, 2023 BGBl. I at 294, § 34(4), https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf.

18 *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006).

19 *See, e.g.*, Saint Alphonsus Med. Ctr.-Napa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 786 (9th Cir. 2015) (describing HHI as a "commonly used metric for determining market share"); Fed. Trade Comm'n v. Peabody Energy Corp., 492 F. Supp. 3d 865, 902 (E.D. Mo. 2020) (HHI is a "common tool used to measure changes in market concentration"). However, the U.S. Supreme Court has not endorsed this approach. *See* Bruce Kobayashi & Timothy Muris, *Turning Back the Clock: Structural Presumptions in Merger Analyses and Revised Merger Guidelines*, COMPETITIVE ENTER. INST. (Feb. 22, 2023), https://cei.org/studies/turning-back-the-clock-structural-presumptions-in-merger-analyses-and-revised-merger-guidelines/ ("Although the [Supreme] Court has not decided a contested case involving substantive merger analysis in nearly 50 years, there is every reason to believe that it would apply its consumer-centric approach used elsewhere to mergers.").

20 Greene, *supra*, note 18, at 802.

> moves the law towards it, and the strength of the "gravitational force" that the guidelines exert changes over time.[21]

23. Given these impacts, it is important to consider all aspects—both positive and negative—surrounding the use of presumptions before imposing them, even on an informal basis.

IV. Primary Justifications for the Adoption and Use of Presumptions

24. Presumptions offer a number of real benefits. They can "minimise the costs of law enforcement while maximising its effectiveness."[22] This can free up resources for overall enforcement. In assessing the use of presumptions in Section 69 of the Canadian Competition Act, Pierre-Christian Collins Hoffman and Guy Pinsonnault consider this "macro" benefit: that the presumptions in the Act "ensure the expeditious and economical administration of the *Act* by reducing evidentiary issues which can hinder the enforcement of the Act and the prevention of anti-competitive behaviour in Canada."[23]

25. Presumptions can also provide predictability and foster better corporate compliance with the law. In contrast to case-specific determinations, which are criticized as overly challenging for decision-makers and unpredictable for businesses, presumptions can provide clear guidance for businesses seeking to comply with competition laws.

26. Achieving good economic outcomes through antitrust law requires a balanced approach. Presumptions can be useful and efficient; overly broad presumptions can introduce unintended consequences. If presumptions are to be used, the goal should be to strike the optimal balance and there should be a strong foundation for the introduction of a presumption. Several justifications for the use of presumptions have been identified.

27. First is the "experience rationale," where presumptions serve to abbreviate significant past experience: "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 always, or usually, or likely) follows."[24] The experience rationale is the explicit basis for the European Commission's restrictions *by object*, such as price-fixing and market allocation. The Commission's *Guidelines on the Application of Article 81(3) of the Treaty* describe the presumption as:

> [B]ased 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.[25]

28. In a 2018 proceeding, the Court of Justice of the European Union (CJEU) explained:

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21 *Id.* at 811-812 (citations omitted).

22 OECD, Safe Harbors Secretariat Note, *supra* note 3, ¶ 42.

23 Pierre-Christian Collins Hoffman & Guy Pinsonnault, *The Purpose, Nature and Constitutionality of the Presumptions of Section 69 of the Competition Act*, 28 CAN. COMPETITION L. REV. 1, 41 (2015).

24 OECD, Roundtable on Safe Harbors and Legal Presumptions in Competition Law – Note by the European Union, DAF/COMP/WD(2017)64, ¶ 18 (Nov. 30, 2017), https://one.oecd.org/document/DAF/COMP/WD(2017)64/en/pdf (citing Opinion of AG Kokott, Case C-8/08, T-Mobile, 2009 E.C.R. I-04529) [hereinafter OECD, EU Safe Harbors Note]. The U.S. Supreme Court has echoed this rationale, "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 344 (1982).

25 Guidelines on the application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, ¶ 21.

> [I]n order to justify an agreement being classified as a restriction of competition '*by object*', without an analysis of its effects being required, there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition.[26]

Later in the same opinion, the CJEU describes the necessary criteria as "sufficiently general and *consistent* experience."[27]

29. Second, presumptions may be justified by established economic practice, where presumptions are shaped by economic and empirical evidence derived from the recognition of common patterns observed in competitive markets. In a 2014 CJEU opinion, Advocate General Nils Wahl wrote, "In my view, it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy."[28] Wahl concluded, "Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition *by object*."[29]

30. Third is the judicial economy rationale, where presumptions are used to conserve and spread sparse agency resources. In situations where a particular practice has a well-established history of harming competition, presumptions place the onus on the company to prove their actions do not, in fact, stifle competition. Rather than force the agency to "consider the facts peculiar to the business to which the restraint is applied,"[30] this allows the case to proceed either to quick conclusion or to a phase where the parties must put forward compelling evidence showing that the act(s) did not harm competition. The idea is to free up investigative and prosecutorial resources to pursue other cases and other priorities, promoting overall enforcement efficiency.[31] Judicial economy standing alone, however, cannot justify the use of presumptions in the absence of sufficient experience to identify practices as certain, or very likely, to harm competition.[32] In such cases, the use of a presumption would very likely be arbitrary.[33] And while judicial economy provides a valid basis for the use of presumptions in some cases, it cannot answer the question of which justification is appropriate or at what threshold the justification should be applied. That assessment has to come from other experience.

V. Primary Costs and Risks of Presumptions

A. Impact on Rights of Defense

31. When a defendant is forced to disprove a presumed fact or legal outcome, their ability to present alternative theories, challenge the evidence presented, or demonstrate the benefits of the conduct at issue are correspondingly limited. This is particularly true in "administrative" jurisdictions, where the totality of

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26 Case C-228/18, Gazdasagi Versenyhivatal v. Budapest Bank, ECLI:EU:C:2020:265, ¶ 76 (Apr. 2, 2020).

27 *Id.* ¶ 79 (emphasis added).

28 Opinion of Advocate General Wahl, Case C-67/13 P, Groupement des cartes bancaires (CB) v. Eur. Comm'n, ECLI:EU:C:2014:1958, ¶ 55 (Mar. 27, 2014).

29 *Id.* ¶ 56 (emphasis added).

30 Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).

31 Opinion of AG Kokott, Case C-8/08, T-Mobile, 2009 E.C.R. I-04529, ¶ 43 ("The prohibition of a practice simply by reason of its anti-competitive object . . . sensibly conserves resources of competition authorities and the justice system.").

32 For example, as described by Xiaowen Tan in his examination of presumptions in EU competition law, "[T]he pursuit of efficiency must not jeopardise the effectiveness of EU competition law, nor breach the general principles of EU law." Xiaowen Tan, *Presumptions in EU Competition Law: Blurring the Substantive-Procedural Dichotomy*, 4 INT'L J. L. & SOC'Y 1, 1 (2021).

33 *See* Administrative Procedure Act, 5 U.S.C. § 706.

the record is gathered and assembled by the enforcement authority, which may have little interest in gathering information to assist the charged party(ies) in rebutting the presumption (if the presumption is rebuttable). The European Court of Human Rights has opined on the potential for presumptions to conflict with rights of defense in the context of criminal proceedings:

> Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. . . . Article 6 para. 2 . . . does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[34]

32. The right of defense is particularly impacted in situations where a defendant must "prove a negative" to rebut a presumption of illegality. For example, the European Commission's 2011 *Horizontal Guidelines* categorized individualized exchanges of future prices as a restriction *by object*.[35] While theoretically rebuttable, the *Guidelines* did not articulate a possible rebuttal or indicate an applicable standard of proof. And, by establishing a "shortcut" for the enforcement agency, the *Guidelines* remove any requirement to create a causal link that could generate evidence useful to a defense:

> By affirming that sharing of strategic data among competitors *amounts to concertation, because it reduces the independence of competitors' conduct on the market,* the Commission also implies that it does not need to make a showing of parallel, let alone joint conduct following an information exchange. In other words, for the Commission, exchange of strategic data creates a presumption of both a causal link and joint market conduct. In our view, such a truncated analysis is taking too many liberties with the Commission's standard and ultimately its burden of proof. This creates a profound tension with the presumption of innocence.[36]

B. False Positives

33. Any discussion of presumptions cannot ignore the risk of false positives – i.e., the risk that a presumption will hold unlawful conduct that is competitively beneficial or benign. In recent years, advocates for change in the competition laws (i.e., antitrust progressives) have dismissed concerns about false positives, arguing that too much deference has been paid to this risk leading to under-enforcement. Whether this is true or not in some applications (e.g., the agencies' use of prosecutorial discretion), presumptions undoubtedly introduce the risk of false positives. As discussed above, judicial presumptions were justified only after sufficient experience was amassed to indicate that the risk of false positives would be negligible. Introducing presumptions in scenarios where experience in markets is lacking or limited, however, provides no assurance against false positives; to the contrary, they become likely. Even rebuttable presumptions create this risk because defendants, at least some of the time, will not be able to gather the

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34 Salabiaku v. France, App. No. 10519/83, ¶ 28 (Oct. 7, 1988), https://hudoc.echr.coe.int/eng?i=001-57570.

35 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 O.J. (C 11) 1, ¶ 74.

36 Marco Bronckers & Anne Vallery, *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, 4 34 WORLD COMPETITION 535, 563 (2011) (citations omitted).

information required to rebut the presumption due, e.g., to procedural and discovery limitations, even when a practice is pro-competitive.[37]

C. Other Risks

34. Overuse of presumptions can also have unintended consequences on markets, including the potential deterrence of beneficial conduct. This "chilling effect" arises when companies become hesitant to engage in certain competitive activities for fear of triggering a presumption. This apprehension can stifle procompetitive behavior that could ultimately benefit consumers through lower prices, improved products, or increased efficiency. A cautious approach driven by the potential for legal challenges, even if ultimately surmountable, can outweigh the perceived benefits of such actions, hindering overall market dynamism and potentially undermining the very goals of antitrust law.

35. A stark example of this impact can be found in a recommendation from the U.S. House Judiciary Committee's *Investigation of Competition in Digital Markets* report*,* which proposed that Congress codify a structural burden of proof upon merging parties to show that a merger would *not* reduce competition, with explicit disregard for efficiencies claims.[38] The immediate and obvious impact of such a structural presumption would be to deter procompetitive mergers and their potential benefits.

36. The overuse of presumptions can also become a form of market regulation itself. By relying heavily on presumptions, authorities potentially bypass an evidence-based analysis of the specific market dynamics at play. This can stifle competition in two ways. First, rigid presumptions might impose inflexible rules on business conduct, hindering companies' ability to adopt creative business strategies or adapt their strategies to the unique circumstances of a particular market. In these cases, the presumption becomes akin to an *ex ante* regulation. Second, an overreliance on presumptions can overshadow the crucial economic analysis of a situation's actual impact on competition. Subtleties and potential benefits of certain procompetitive actions could be overlooked, ultimately hindering the adaptability and efficiency on which markets rely. As noted above, this short-cut is only warranted where the economic effects are highly predictable and well-known.

37. An increased reliance on legal presumptions also has the potential to raise barriers to entry for new market participants. If the overuse of presumptions leads to a more conservative approach to evaluating competitive conduct, potential entrants may face heightened scrutiny. This, in turn, will make it more costly and complex for them to penetrate markets and challenge established players. This directly undermines the intent of many antitrust laws to protect and encourage nascent competitors.

38. The overuse of presumptions can also increase costs for companies. The burden of disproving a presumption often falls on the accused firms, requiring the investment of significant resources in legal defense and the presentation of rebuttal evidence. These costs, both financial and temporal, can be particularly burdensome for smaller businesses and potentially deter engagement in competitive activities, compounding the chilling effect. As BIAC has noted:

> [T]he discussions [around presumptions] tend to over-emphasize enforcement costs associated with the investigation of potentially anti-competitive practices, and undervalues the costs inflicted on business, both in terms of (legal and

[37] Note that the use of presumptions in violations for which intent is relevant or state of mind is a factor may entail different considerations.

[38] STAFF OF THE SUBCOMM. ON ANTITRUST OF THE H. COMM. ON THE JUDICIARY, 117TH CONG., MAJORITY STAFF REPORT AND RECOMMENDATIONS ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 333 (Comm. Print 2022), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf ("a showing that the merger would result in efficiencies should not be sufficient to overcome the presumption that it is anticompetitive").

> economic consultancy) costs required to establish that a particular business practice that is presumed illegal, is in fact not anti-competitive, and the cost of foregone procompetitive transactions.[39]

39. Excessive reliance on legal presumptions can also lead to the underdevelopment of necessary analytical structures. A 2017 study by Miguel de la Mano and Alison Jones on the analysis of vertical agreements under Article 101 of the TFEU observed that the current legal framework failed to adequately reflect the economic logic of vertical restraints due in part to a dearth of decided cases, which meant that "despite significant advances in the economic and legal assessment of vertical mergers and abuse of dominance . . . a transparent structure for analysing and balancing the competitive harms and benefits of vertical arrangements has not developed."[40]

40. Ironically, an overreliance on presumptions could also thwart the development of competition law and economics. If antitrust enforcement relies too heavily on presumptions, then nuanced market and economic analysis becomes unnecessary and irrelevant: there is no need to research and analyze what is already pre-determined. Particularly in new and evolving markets, this could slow the learning process that might help us better understand which types of market conduct are harmful and which are beneficial or neutral. It may hinder the development of sophisticated frameworks for understanding complex market dynamics. And there is no doubt that competition agencies are an essential component to this learning curve. In this fashion, overreliance on presumptions could impede the overall evolution of antitrust law and economics to address emerging challenges in rapidly changing industries.

41. Finally, as discussed above, the overuse of legal presumptions presents a potential tension with due process and rights of defense. Due process requires fair and impartial proceedings, and an overreliance on presumptions may "shortcut" the traditional evidentiary process. This can lead to concerns about the fairness of antitrust proceedings and the protection of individual rights, particularly for presumptions that are difficult to rebut. Striking the right balance between the use of legal presumptions and the preservation of due process rights is crucial to maintaining the integrity of antitrust enforcement.[41]

VI. Newer Justifications for Use of Presumptions

42. Many of the "new" presumptions proposed by competition authorities are accompanied by new justifications. Some authorities contend that presumptions (sometimes referred to as "new tools") are necessary in light of fast-moving digital markets that may "tip" quickly to a dominant player.[42] Proponents of this "fast moving market" justification argue that presumptions both provide agencies with a means to protect against market tipping and provide businesses operating in these markets with better predictability.

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39 OECD, Roundtable on Safe Harbors and Legal Presumptions in Competition Law – Note by BIAC, DAF/COMP/WD(2017)90, ¶ 16 (Nov. 27, 2017), https://one.oecd.org/document/DAF/COMP/WD(2017)90/en/pdf.

40 Miguel de la Mano & Alison Jones, *Vertical Agreements Under EU Competition Law: Proposals for Pushing Article 101 Analysis, and the Modernization Process, to a Logical Conclusion* 3 (TLI Think! Paper 59/2017, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930943.

41 *See* OECD, Summary of Discussion of the Roundtable on Safe Harbors and Legal Presumptions in Competition Law, DAF/COMP/M(2017)2/ANN2/FINAL, at 4 (Sept. 27, 2018), https://one.oecd.org/document/DAF/COMP/M(2017)2/ANN2/FINAL/en/pdf (BIAC noted, "[T]here is a dimension of due process that must also be taken into account. There is a serious risk of false positives arising from presumptions of illegality; safe harbours may also have error risks, but these are likely to be smaller. As such, it is crucial that effective judicial review not be prevented by reliance on legal presumptions.").

42 Tom Wheeler, Phil Verveer & Gene Kimmelman, *The Need for Regulation of Big Tech Beyond Antitrust*, BROOKINGS (Sept. 23, 2020), https://www.brookings.edu/articles/the-need-for-regulation-of-big-tech-beyond-antitrust/.

In essence, this approach offers efficiency and predictability as core justifications for the use of presumptions.[43]

43. Likewise, some commentators argue for presumptions to apply based on the size or market strength of a (digital) company, perhaps described as a "platform" justification.[44] The core of this justification is that these companies are extremely large, dominant companies with vast influence over markets and (potentially) political outcomes.[45] Also, agencies say they are challenged to predict in which areas these platforms might "strike next" and need to nip them in the bud. Therefore, a presumption should lie that categories of conduct by these companies should be presumed to be unlawful. In making these arguments, however, these authorities deviate from a core attribute of the historical use of presumptions: predictability of anticompetitive effect. While it is well established in competition law that certain conduct by dominant firms (e.g., exclusive dealing arrangements) can be anticompetitive, that same conduct—even by a dominant firm—can often be pro-competitive. Indeed, this justification often is advanced based on a *lack* of experience and predictability with the conduct, which finds no foundation in the literature supporting the use of presumptions.[46]

44. Moreover, in both of these cases, these justifications strongly resemble the traditional "judicial efficiency" defense which, as we have seen, does not stand up as an independent basis for the use of presumptions. These "new" presumptions are not borne of the historical foundations and longstanding precedent that support traditional presumptions and raise significant concern that the risks and costs that accompany their use are unwarranted.

VII. Assessing Recent Presumptions

45. Some recent competition law proposals discard the traditional justifications for presumptions, claiming that the need to contend with rapidly changing digital markets and large, dominant companies overrides the need to develop a foundational body of experience and evidence. This approach exposes enforcers and companies to significant risk.

46. In **Italy**, the Annual Law for the Market and Competition (Law No. 118/2022) introduces a significant new presumption related to economic dependence for companies that rely on digital platforms to reach their customers.[47] The law presumes economic dependence exists when a company relies on a

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[43] Note, however, that the "fast moving market" justification also assumes the ability to identify *which* markets are going to tip—no easy feat in an industry that often seems characterized by its *lack* of predictability. Even the market players, investors, and "experts" are likely to get it wrong sometimes, as famously demonstrated by technology pioneer Robert Metcalfe's 1995 prediction that the Internet would "soon go spectacularly supernova and in 1996 catastrophically collapse." Robert Metcalfe, *Predicting Internet's catastrophic collapse & ghost sites galore in 1996*, INFOWORLD, Dec. 4, 1995, at 61.

[44] Large platform companies "exert substantial structural and instrumental power: by governing their platform markets and infrastructures, and by influencing policy making and political decision making." *See* David Nieborg, Thomas Poell, et al., *Locating and Theorizing Platform Power*, INTERNET POL'Y REV. 13(2) (2024), https://policyreview.info/articles/analysis/introduction-special-issue-locating-and-theorising-platform-power.

[45] For example, in justifying the creation of the Digital Services Act and Digital Markets Act, Margrethe Vestager argued, "For decades, tech platforms were left mostly free to do as they wished, and there was very little legislation to limit them as they seized ever-greater control of the world's information channels." Margrethe Vestager, *Tearing Down Big Tech's Walls*, PROJECT SYNDICATE (Mar. 9, 2023), https://www.project-syndicate.org/commentary/eu-big-tech-legislation-digital-services-markets-by-margrethe-vestager-2023-03.

[46] Indeed, as discussed above, antitrust jurisprudence would suggest that innovative markets and those characterized by new and novel practices would be the least appropriate for the use of presumptions.

[47] *The Annual Law for the Market and Competition*, ITALIADOMANI, https://www.italiadomani.gov.it/en/Interventi/riforme/riforme-abilitanti/la-legge-annuale-per-il-mercato-e-la-concorrenza.html.

"dominant" platform's services, shifting the burden of proof to the platform to disprove the company's dependence.

47. The Italian law introduces several issues, the most prominent being the reversal of the burden of proof. Platforms are now tasked with proving a negative—a lack of dependence—which creates a "proof proximity" challenge. Critically, the law may also discourage platforms from innovating to attract new users. Since unique features might further entrench a company's reliance on the platform, companies may be reluctant to invest in innovation for fear of increasing the risk of findings of economic dependence.

48. In the **U.S.**, the recently introduced *Merger Guidelines* state that a merger that creates a firm with a share over 30% is presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.[48] While lacking the binding authority of a judicially created presumption, the *Guidelines* carry significant influence over decision-making.[49]

49. While the initial public draft of the *Guidelines*[50] was ambiguous about rebuttal evidence, the final version—perhaps in response to hundreds of public comments on the topic—explicitly states that presumptions of illegality can be rebutted or disproved. However, those seeking specifics are in for a lengthy search: the *Guidelines* state that "The higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it" but provides no detail about what types of evidence may suffice.[51]

50. The **UK's** *Digital Markets, Competition, and Consumers Bill* (DMCC) introduces a hybrid approach, combining features of both the Italian and U.S. models. The DMCC creates a rebuttable presumption of market power (based on a 30% combined share) while also introducing a "reverse burden of proof" for firms deemed to have "strategic market status" (SMS).[52] These companies are presumed to be market dominant and are tasked with proving that their conduct, such as self-preferencing, does not harm competition.

51. The DMCC also imposes a presumed obligation for companies to ensure interoperability, further increasing the regulatory burden on SMS firms and disrupting market dynamics, likely to the advantage of certain competitors. The law's presumption that self-preferencing is inherently harmful discourages firms from developing innovative features that might favor their own products or services. This could hinder competition in the long run, as companies may avoid introducing new offerings that benefit consumers due to the risk of violating the presumption.

52. The DMCC and other proposals that outline presumptions based on a very specific set of behaviors (*e.g.*, self-preferencing) also run headlong into the issue of "future proofing" regulations. The digital landscape is constantly evolving, to a degree unprecedented in any other market to date. Relying heavily on narrow, specific presumptions rather than "doing the work" and establishing the analytical tools and framework to critically assess new practices will leave authorities disadvantaged when new practices and business models inevitably arise.

53. In **Canada,** changes to the Competition Act brought into force as of June 2024 reversed one of the statutory principles enacted when the Act was originally passed in June 1986 which provided that a merger

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[48] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES 5-6 (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [hereinafter 2023 U.S. MERGER GUIDELINES].

[49] *See* Greene, *supra* note 18.

[50] The initial draft of the Guidelines included many other presumptions, which were later dropped.

[51] 2023 U.S. MERGER GUIDELINES, *supra* note 48, at 6.

[52] Digital Markets, Competition and Consumers Act 2024 (UK), https://www.legislation.gov.uk/ukpga/2024/13/enacted.

could not be found to substantially lessen competition solely on the basis of market share. Now, there is a structural presumption of a substantial lessening of competition if the combined market share of the parties to the merger is likely to be more than 30%.[53] At the same time, any such presumption may be rebutted based on various statutory criteria and applicable caselaw pertaining to other competitive factors such as acceptable substitutes, the scope of barriers to entry, effective competition remaining, and additional competitive factors.

54. In the **European Union**, the European Commission's recently published draft guidelines on abusive exclusionary conduct by dominant undertakings[54] are a significant update to the Commission's guidance on the application of Article 102. Where previous guidance (issued in 2008) focused on an examination of economic data and understanding the effects of potentially abusive conduct, the draft introduces a number of new presumptions, with five types of conduct presumed to lead to exclusionary effects (exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeeze in the presence of negative spreads, and certain forms of tying).[55] Concerningly, the types of conduct covered by the presumption are not clearly defined, which could result in unpredictable enforcement and reduced clarity for businesses.

VIII. Conclusion

55. Antitrust presumptions have long played a role in shaping regulatory frameworks. Their historical development highlights their enduring relevance as pragmatic tools for authorities to address complex market dynamics. When grounded in sound empirical evidence or economic theory, these presumptions offer valuable guidance for navigating intricate market landscapes.

56. However, it is crucial to acknowledge that the effectiveness of presumptions is not without limitations and risks. Chief among these is the impact that presumptions can have on the fundamental rights to defense. Other risks, such as the potential for underdevelopment of certain types of antitrust analysis or chilling effect on innovation, can unnecessarily interfere with markets and hinder the efficacy of competition law as a whole. And while these tools hold promise in addressing contemporary challenges, the severity of the risks means that a cautious approach is essential.

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[53] Competition Act, RSC 1985, c. C-34, § 92(3) (Can.).

[54] Guidelines on Exclusionary Abuses of Dominance, EUROPEAN COMM'N, *available at* https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

[55] *Id*. ¶ 60.