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ABSTRACT

This paper considers the use of rebuttable and irrebuttable presumptions in competition law, focusing on the conditions for their use. We conclude that: (i) presumptions based on predictable effects are key in various antitrust proceedings; (ii) it is crucial to distinguish between rebuttable and irrebuttable presumptions, which have distinct bases and applications; (iii) irrebuttable presumptions are reserved for cases where anticompetitive effects are certain or near certain; (iv) rebuttable presumptions apply where competitive harm is probable or highly probable; and (v) presumptions are inappropriate where anticompetitive harm is uncertain. Both presumptions facilitate enforcement but limit defense rights and may restrict pro-competitive behavior. Courts dictate their use in situations where anticompetitive harm is predictable and pro-competitive benefits are proportionately small or absent. The outcome of a structure/conduct combination must be highly predictable for presumptions to be proportionate. Predictability arises from significant legal, economic, and practical experience rather than speculative objectives. Where effects are less predictable, the use of presumptions is more questionable.

Cet article examine l'utilisation des présomptions réfutables et irréfutables dans le droit de la concurrence, en se concentrant sur les conditions préalables à leur utilisation. Nous concluons que : (i) les présomptions basées sur des effets prévisibles sont essentielles dans diverses procédures de concurrence ; (ii) il est crucial de distinguer entre présomptions réfutables et irréfutables, qui ont des bases et applications distinctes ; (iii) les présomptions irréfutables sont réservées aux affaires où les effets anticoncurrentiels sont certains ou quasi certains ; (iv) les présomptions réfutables sont adaptées lorsque le préjudice concurrentiel est probable ou hautement probable ; et (v) sans certitude de préjudice anticoncurrentiel, les présomptions sont inappropriées. Ces présomptions facilitent l'application de la loi mais restreignent les droits de défense et peuvent limiter les comportements proconcurrentiels. Les tribunaux estiment qu'elles doivent être utilisées lorsque le préjudice anticoncurrentiel est prévisible et que les avantages proconcurrentiels sont proportionnellement faibles ou inexistants. La prévisibilité découle principalement d'une expérience juridique, économique et pratique significative, et lorsque les effets ne peuvent être prédits de manière fiable, l'utilisation de présomptions est plus discutable.

I. The utility of presumptions

1. 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.

2. 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.

3. 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.

4. 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

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1 *In re 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*, 442 U.S. 510, 515 n.4 (1979), 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*" (emphasis in original).

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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.

5. 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.

6. 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 preserving the integrity of competition laws.

7. Based on this analysis, we conclude that:

- Presumptions based on predictable effects are an important part of antitrust across a range of administrative and contentious proceedings;
- It is essential to differentiate between the use of rebuttable and irrebuttable presumptions, which have different tenets and applications;
- 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;
- Rebuttable presumptions are appropriate where the competitive harm flowing from certain structure/conduct combinations is probable or highly probable; and
- In the absence of a high probability or certainty of anticompetitive harm, the use of presumptions is not appropriate.

II. Historical context for the use of presumptions

8. Consideration of the use of presumptions in modern competition law first requires a brief visit to the past. While this paper considers the use of presumptions in both judicial and administrative settings in various jurisdictions, looking at the origin of presumptions necessarily requires a look at the evolution of the concept in U.S. courts, where it all began. 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 "*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,* [and] *the purpose or end sought to be attained*."[2]

9. 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.

10. 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]

11. 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*, in which future Chief Justice William Howard Taft imagined judges setting sail on "*a sea of doubt*" when assuming the power to opine on contracts that "*have no other purpose and no other consideration on either side than the mutual restraint of the parties*."[6] The trend towards per se categories of anticompetitive behavior peaked with the Supreme Court's 1972 decision in *United States*

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

3 OECD, Safe Harbours and Legal Presumptions in Competition Law – Background Note by the Secretariat, DAF/COMP(2017)9 (Nov. 9, 2017), ¶ 12 https://one.oecd.org/document/DAF/COMP(2017)9/en/pdf [hereinafter OECD, Safe Harbors Secretariat Note]; *see also* S. Salop, An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards (2017), at 20, 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 W. H. Rooney, T. G. Fleming, and M. A. Polizzano, Tracing the Evolving Scope of the Rule of Reason and the Per Se Rule, *Colum. Bus. L. Rev.*, Vol. 2021, No. 1, 2021, pp. 1–32, at 7.

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, 284 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

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v. Topco Associates, Inc., which saw the Court go so far as to discuss the judiciary's "*limited utility in examining difficult economic problems*," and challenges in weighing "*destruction of competition in one sector of the economy against promotion of competition in another sector*" as "*one important reason we have formulated* per se *rules*."[7] But the *Topco* discouragement of economic engagement would not stand for long.

12. This era of expansion began to reverse in the 1970s. 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] The following decade also introduced the beginnings of the "quick look" review, falling somewhere between per se and a full rule of reason analysis. The quick look was borne of the Supreme Court's observation that "*the rule of reason can sometimes be applied in the twinkling of an eye*," albeit with little specificity on how and when to apply that "*twinkling*."[10]

13. 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.[11] By 2017, the OECD noted an "*opposite trend*," observing that even conduct that was not previously deemed to pose any competitive risk had become "*subject to detailed market assessment*."[12]

14. Per se and rule of reason represent two primary frameworks for the categorization of business conduct. They embody the concept of the evidentiary burden required to make out a case. However, they tell us little about the procedural application of the concepts within the context of an agency action. Likewise, the shifting of the burden of proof from one party (usually the agency) to the other (usually the defendant company) tells us that some prima facie case has been established but does not tell us whether the shifting of the burden has happened automatically or by virtue of in-depth analysis.

15. Categorization of conduct and distinctions in evidentiary burden significantly influence the role of presumptions. 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.

16. Concerns 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.[13] 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*."[14] Administrability is undoubtedly a concern frequently echoed by enforcers, given the rapid pace at which digital markets develop. But, as discussed below, administrative difficulty alone has never justified the use of presumptions.

Judicial vs. agency-created presumptions

17. 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[15] and predatory pricing.[16] 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.[17]

18. 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

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

8 United States v. General Dynamics Corp., 415 U.S. 486 (1974).

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

10 NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 n.39 (1984).

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

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

13 For example, the Competition and Antitrust 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 USD 5 billion.

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

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

16 Ibid. at 18.

17 Ibid. 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 (CJEC, Sept. 10, 2009, *Akzo Nobel v. Comm'n*, case C-97/08 P, EU:C:2009:536, ¶ 61). This presumption was later expanded by courts to apply even in situations of less than 100% ownership. *See* Ritter, *supra*, note 15, at 2 n.4.

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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 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.

19. And, of course, presumptions can also 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.[18] 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).

20. In some instances, agency presumptions are eventually given weight by the courts.[19] 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.[20] 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%.[21]

21. 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* [Department of Justice] *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 moves the law towards it, and the strength of the 'gravitational force' that the guidelines exert changes over time.*"[22]

22. An agency's expertise can create a perception of legitimacy that exceeds the presumption's actual legal status or utility, leading to potential overuse. In *Allis-Chalmers Manufacturing Co. v. White Consolidated Industries, Inc.*, the Third Circuit recognized that it was not bound by the DOJ's merger guidelines but that "*because the Justice Department is obviously one of the principal government agencies charged with the duty of enforcing the antitrust laws*," its position was "*entitled to some consideration*."[23]

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.

III. 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*."[24] 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*."[25]

18 Gesetz gegen Wettbewerbsbeschränkungen—GWB [Competition Act], Oct. 25, 2023 BGBl. I at 294, § 34(4), https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf.

19 *See* H. Greene, Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse, *Wm. & Mary L. Rev.*, Vol. 48, No. 3, 2006, pp. 771–857.

20 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 B. Kobayashi and T. 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").

21 Greene, *supra* note 19, at 802.

22 Ibid. at 811–812 (citations omitted).

23 Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 524 (3d Cir. 1969).

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

25 P.-C. Collins Hoffman and G. Pinsonnault, The Purpose, Nature and Constitutionality of the Presumptions of Section 69 of the Competition Act, *Can. Competition L. Rev.*, Vol. 28, No. 1, 2015, pp. 1–48, at 35.

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25. Presumptions can also provide predictability and foster better 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. Having considered how presumptions emerged in the antitrust world, we turn now to why. Achieving good economic outcomes through antitrust law requires a balanced approach. Presumptions can be useful and efficient; overly broad presumptions can introduce unintended consequences. For example, one could very efficiently establish a presumption that any merger among companies in the same "market" is anticompetitive. This would undoubtedly stop many anticompetitive mergers, but it would also discourage many mergers that create efficiencies and ultimately benefit consumers. Experience tells us that mergers in non-concentrated industries rarely cause competitive harm and can often generate such efficiencies and make the combined company more efficient and more competitive, not less. If such a wholesale presumption were applied, companies may not engage in beneficial mergers due to the high cost of rebutting the presumption, or due to the chilling effect of the presumption. The same is true of vertical mergers, which economic analysis tells us can often eliminate double marginalization and enhance competitiveness. Thus, 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. To that end, several justifications for the use of presumptions have been identified.

27. One main justification is the "experience rationale." Under this rationale, 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*."[26] 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*."[27]

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

29. Later in the same opinion, the CJEU describes the necessary criteria as "*sufficiently general and consistent experience*."[29]

30. Presumptions may also be justified by established economic practice. Economic and empirical evidence help shape these presumptions, which are often 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*."[30] 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*."[31]

31. A third, less established rationale relies on the principle of judicial economy, or the efficient use of judicial resources. Under a judicial economy rationale, 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*,"[32] 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.[33] 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.[34] In such cases, the use of a presumption would be unacceptably arbitrary. 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

26 OECD, Roundtable on Safe Harbours and Legal Presumptions in Competition Law – Note by the European Union, DAF/COMP/WD(2017)64 (Nov. 30, 2017), ¶ 18, https://one.oecd.org/document/DAF/COMP/WD(2017)64/en/pdf (citing Opinion AG Kokott, Feb. 19, 2009, *T-Mobile*, case C-8/08, EU:C:2009:110) [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).

27 Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, O.J. C 101, Apr. 27, 2004, p. 97, ¶ 21.

28 CJEU, Apr. 2, 2020, *Gazdasági Versenyhivatal v. Budapest Bank*, case C-228/18, EU:C:2020:265, ¶ 76.

29 Ibid. ¶ 79.

30 Opinion AG Wahl, Mar. 27, 2014, *Groupement des cartes bancaires (CB) v. Eur. Comm'n*, case C-67/13 P, EU:C:2014:1958, ¶ 55.

31 Ibid. ¶ 56.

32 *Chicago Bd. of Trade*, 246 U.S. at 238.

33 Opinion AG Kokott, T-Mobile, ¶ 43 ("The prohibition of a practice simply by reason of its anti-competitive object (. . .) sensibly conserves resources of competition authorities and the justice system.").

34 For example, as described by Xiaowen Tan in his examination of presumptions in EU competition law, "the pursuit of efficiency must not jeopardise the effectiveness of EU competition law, nor breach the general principles of EU law." X. Tan, Presumptions in EU Competition Law: Blurring the Substantive-Procedural Dichotomy, Int'l J. L. & Soc'y, Vol. 4, Issue 1, 2021, pp. 1–9, at 1.

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or at what threshold the justification should be applied. That assessment has to come from other experience.

32. Antitrust enforcement faces a continuous challenge: balancing the pursuit of robust competition with the need for a fair and efficient legal system.[35] Presumptions offer a partial solution to this tension. But just as presumptions offer significant benefits in certain instances, they also impose significant costs.

IV. Primary costs and risks of presumptions

1. Impact on rights of defense

33. Another side of the "efficiency and streamlined enforcement" coin is that presumptions have the potential to impact a party's rights of defense. By shortcutting enforcement proceedings or creating assumptions that shift the burden of proof to the defendant, they can distort the adversarial process and curtail a party's ability to present a robust defense.

34. Presumptions can restrict the scope of a defense. 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 is correspondingly limited. This is particularly true in "administrative" jurisdictions, where the totality of 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 (ECHR) 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*."[36]

35. 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.[37] 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*."[38]

2. False positives

36. In recent years, advocates for change in the competition laws (i.e., antitrust progressives) have shouted down concerns about false positives in antitrust law, arguing that too much deference has been paid to this risk, leading to under-enforcement. Whether this is true or not in terms of the agencies' use of prosecutorial discretion, any discussion of presumptions cannot ignore the risk of false positives. That distinction is an important one: it is one thing to decide against enforcement on the basis that false positives might result, but it is quite another to establish a regime based on presumptions where false positives become an inevitability. As discussed above, judicial presumptions heretofore were applied 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 information required to rebut the presumption due to procedural and discovery limitations, even when a practice is pro-competitive.[39] And at other times, they will choose to abandon a practice or a transaction, or accept an undertaking that limits their ability to act in the market, rather than incur the high cost of undertaking a defense.

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35 *See* T. Takigawa, Balancing Fairness and Efficiency in the Globalized Competition Law Enforcement: Insights from JFTC Experiences, *CPI Antitrust Chron.* (June 2014), https://competitionpolicyinternational.com/assets/Uploads/TakigawaJUN-141.pdf (discussing the Japanese Fair Trade Commission's transformation of its administrative-hearing model in pursuit of a balance between efficiency and fairness).

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

37 Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, O.J. C 11, Jan. 14, 2011, p. 1, ¶ 74.

38 M. Bronckers and A. Vallery, No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law, *World Competition*, Vol. 34, Issue 4, 2011, pp. 535–570, at 563 (citations omitted).

39 *See* discussion *infra* "Rebuttable in name only?"

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3. Other risks

37. Overuse of presumptions can also have unintended consequences on markets. These include 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.

38. 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 proposes 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.[40] The immediate and obvious impact of such a structural presumption would be to deter procompetitive mergers and their potential benefits.

39. 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 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 shortcut is only warranted where the economic effects are highly predictable and well-known.

40. 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 difficult for them to penetrate markets and challenge established players. This directly undermines the efforts of many antitrust laws to protect and encourage nascent competitors.

41. 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 Business at OECD notes: "[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 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.*"[41]

42. Overbroad merger- or acquisition-related presumptions can be particularly harmful for smaller companies, as many entrepreneurs develop new technologies purposely targeted at acquisition by established firms with more experience bringing products to market.

43. 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 Treaty on the Functioning of the European Union (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.*"[42]

44. 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 become unnecessary and irrelevant: there is no need to research what is already predetermined. 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 of this learning process. This could impede the overall evolution of antitrust law and economics to address emerging challenges in rapidly changing industries.

40 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 (Comm. Print 2022), at 333, 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.*").

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

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

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45. 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.[43]

V. Newer justifications for use of presumptions

46. 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.[44] 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. In essence, this approach offers efficiency and predictability as core justifications for the use of presumptions.[45]

47. 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.[46] The core of this justification is that these companies are extremely large, dominant companies with vast influence over markets and (potentially) political outcomes.[47] 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 is often advanced based on a lack of experience and predictability with the conduct, which finds no foundation in the literature supporting the use of presumptions.[48]

48. 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 they do not justify the risks and costs that accompany their use.

VI. Types and structure of presumptions

1. Irrebuttable presumptions

49. Irrebuttable presumptions—also called conclusive presumptions—are legal presumptions that cannot be contradicted or disproven by evidence, which in the competition law context normally refers to evidence of procompetitive effects. Irrebuttable presumptions are typically reserved for situations in which repeated experience with certain conduct, committed within a certain market structure, to be so irredeemably harmful to competition that allowing evidence to the contrary would be pointless or contrary to public policy.

43 *See* OECD, Summary of Discussion of the Roundtable on Safe Harbours and Legal Presumptions in Competition Law, DAF/COMP/M(2017)2/ANN2/FINAL (Sept. 27, 2018), at 4, 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*.").

44 T. Wheeler, P. Verveer and G. 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/.

45 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 "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*." R. Metcalfe, From the Ether: Predicting the Internet's Catastrophic Collapse and Ghost Sites Galore in 1996, *InfoWorld* (Dec. 4, 1995), at 61.

46 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 D. Nieborg, T. Poell, R. Caplan and J. van Dijck, Locating and Theorising Platform Power, Internet Pol'y Rev., Vol. 13, Issue 2, 2024, https://policyreview.info/articles/analysis/introduction-special-issue-locating-and-theorising-platform-power.

47 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." M. 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.

48 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.

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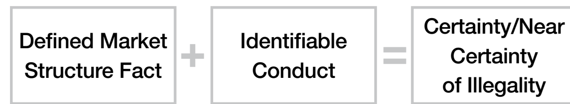
50. Essentially, irrebuttable presumptions can be justified where the following formulation prevails:

Figure 1



51. In these cases, a restraint is conclusively presumed to be unlawful "*without elaborate inquiry as to the precise harm* [it has] *caused or the business excuse for* [its] *use*."[49] For example, under this construct, if the market structure involves direct horizontal competitors, and the conduct involves price-fixing agreements, then the outcome is irrebuttably presumed to be illegal. The same applies to horizontal competitors rigging bids or allocating markets. Thus, because irrebuttable presumptions conclusively decide certain issues, the analysis often revolves around whether the defined market structure and identifiable conduct exist.[50]

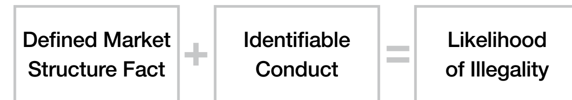
52. Irrebuttable presumptions are rare. Given their inherent limitation on a party's ability to present evidence and mount defenses, they are typically limited to a small set of antitrust offenses, invoked only after judicial experience demonstrates that particular conduct is a "*naked restraint of trade with no purpose except stifling of competition*."[51]

53. Per se prohibitions are sometimes described as irrebuttable presumptions, as proof of a prohibited practice within the market structure is sufficient to establish liability, and potential justifications are irrelevant.[52] As discussed above, the U.S. Supreme Court has observed that per se classifications only come after "*considerable experience with certain business relationships*."[53] The Supreme Court has also cautioned against categorizing a restraint as per se illegal without a preliminary assessment of its likely competitive effects and the plausible justifications for its use, warning that "*easy labels do not always supply ready answers*."[54]

2. Rebuttable presumptions

54. Far more common are rebuttable presumptions, which allow the parties to introduce evidence that can tip the results towards or away from illegality. Although their use is, in concept, not as damning, these too require significant experience in order to categorize conduct as presumptively unlawful. Rebuttable presumptions can be justified where the following formulation exists:

Figure 2



55. Rebuttable presumptions are a common tool in merger analysis, specifically when existing competitors with large market shares are combining. Based on long experience backed by economic teaching, antitrust authorities presume that if two larger players in a concentrated market attempt to merge, this will likely reduce competition through increased price, reduced innovation, or other forms of harm. However, companies can rebut this presumption by demonstrating various factors that mitigate the anticompetitive effects. These can include market dynamics that influence expected behavior, the presence of potential new entrants, strong bargaining power by buyers, the presence of government regulation, or the efficiencies created by the merger itself. By providing evidence of these mitigating factors, the companies can convince authorities (or courts) that the merger is unlikely to harm competition despite the market structure and the conduct.

56. The use of rebuttable presumptions, rather than irrebuttable presumptions, is sometimes tied to rights of defense such as due process considerations and the presumption of innocence: "*In* Elevators [the EC cases against ThyssenKrupp/Liften and General Technic/Otis], *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.' For this reason, EU competition law presumptions are usually rebuttable, rather than 'irrebuttable' or 'conclusive*.'"[55]

57. The application of both rebuttable and irrebuttable presumptions requires the establishment of the defined market structure facts and the identifiable conduct, which means that the burden is not entirely eliminated for the prosecuting authority. But it is often much easier to prove the baseline facts (e.g., that the companies are competitors and that they reached an agreement on price) than it is to demonstrate the effect of those baseline facts. In any event, one key in establishing presumptions is a clear iteration of the facts and conduct necessary to trigger the presumption.

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49 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

50 Note that "defined market structure" in this context does not imply the need to prove a relevant product or geographic market. Rather, it often goes, for example, to whether the parties are competitors, sufficiently economically integrated to constitute a single entity or similar factors.

51 White Motor Co. v. United States, 372 U.S. 253, 263 (1963); see also Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. at 349–351.

52 A. I. Gavil, Burden of Proof in U.S. Antitrust Law, in *Issues in Competition Law & Policy*, Am. Bar Ass'n, 2008, pp. 125–157, at 128, https://masonlec.org/site/files/2011/09/Gavil-Issues-in-Competition-Burden-of-Proof-Chapter-2008.pdf.

53 United States v. Topco Assocs., Inc., 405 U.S. at 607.

54 Broad. Music, Inc. v. Colum. Broad. Sys., 441 U.S. 1, 8 (1979).

55 OECD, EU Safe Harbors Note, *supra* note 26, ¶ 7 (citing GCEU, July 13, 2011, *ThyssenKrupp Liften v. Comm'n*, cases T-144/07, T-147/07 to T-150/07 and T-154/07, EU:T:2011:364, ¶ 114; and GCEU, July 13, 2011, *General Technic-Otis v. Comm'n*, cases T-141/07, T-142/07, T-145/07 and T-146/07, EU:T:2011:363, ¶ 73).

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3. Rebuttable in name only?

58. While rebuttable presumptions are, in theory, easy to distinguish from their irrebuttable counterparts, in practice there sometimes may be little distinction. Rebuttable presumptions require a pragmatic assessment of whether credible and compelling evidence to effectively overcome the presumption can be procured.

59. This can present defendants with significant hurdles. First, gathering the evidence necessary for a rebuttal can be immensely challenging, particularly in jurisdictions with an administrative approach. Antitrust investigations frequently involve information held by third parties, and few jurisdictions allow the full scope of third-party discovery that may often be required to develop contrary evidence. Even with the right to review the file, the defendant is at the mercy of the evidence collected by the agency, which is sometimes collected for the purpose of establishing an offense rather than disproving one.[56] Even in jurisdictions with robust discovery rights, the focus often leans towards evidence supporting the prosecution's case. Companies, therefore, may struggle to access crucial exculpatory evidence that could effectively rebut a presumption.

60. Second, the inherent nature of a presumption can make it difficult to overcome. In certain instances, companies may be required to prove a negative proposition—essentially demonstrating the absence of something, like competitive harm.[57] This may not be possible, let alone feasible.

61. Finally, the process of rebuttal can be particularly onerous in administrative systems where the decision rests with the antitrust authority itself (rather than by a court as in a "prosecutorial" jurisdiction). Here, persuading the authority to abandon a presumption it itself established based on a desire for enforcement efficiency and based on case-specific facts that it identified, collected, and assembled can be akin to Sisyphus reaching the summit with his boulder. But even agencies acting objectively can make mistakes, and the application of a presumption—especially when combined with deference to the agency—can make the appeal of such mistakes untenable.

62. For example, one theoretically rebuttable presumption that has proven difficult to overturn in practice is the European presumption that "*subject to proof to the contrary*," companies "*participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market*."[58]

63. A number of cases show that defendants have struggled with what, exactly, constitutes "*proof to the contrary*." In a 2013 decision considering an appeal (based in part on the defendant's claims that the General Court failed to take account of submissions rebutting this presumption), the CJEU elaborated that "[i]*n order to rebut that presumption, it is for the undertaking concerned to prove that the concerted action did not have any influence whatsoever on its own conduct on the market. The proof to the contrary must therefore be such as to rule out any link between the concerted action and the determination, by that undertaking, of its conduct on the market*."[59]

64. This is a classic example of a requirement to prove a negative. The CJEU further noted that "*probative data illustrating the competitive nature of the market and, in particular, the decrease of prices during the period concerned cannot suffice, of itself, to rebut that presumption*."[60] Ultimately, the Court found that "*even if it were established that the exchange of information in question had no influence on prices during the period concerned, that would not call into question the legality of the Commission's* [prior] *findings*."[61] The Court did not provide additional details on what, if any, evidence would have allowed the defendant's appeal to succeed.

65. Similarly, in a 1992 appeal of a Commission decision fining 15 producers of polypropylene, the appellant asserted that it "*took no account of the outcome of* [its meetings with other polypropylene producers] *when determining its pricing conduct on the market, as is shown by its aggressive pricing policy on the market*," which was supported by both an audit and an economic study.[62] The Commission concluded that these arguments "*cannot be accepted as evidence to support the applicant's assertion that it did not subscribe to the agreed price initiatives*," and would "*at the most demonstrate that the applicant did not implement the decisions reached at the meetings*."[63]

66. Rebuttable presumptions should also adhere to the "proof proximity" principle—the idea that the burden of proof should be on the party that has the better access to evidence. In tracing the development of the principle, Cristina Volpin finds expressions of the principle in practice across competition regimes, such as Article 101(3) TFEU and the concept of a "dynamic" burden of proof in certain Latin American countries.[64] As Volpin concludes, the proof proximity principle is critical to maintaining the legitimacy of presumptions

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56 GCEU, June 15, 2022, *Qualcomm Inc. v. Comm'n*, case T-235/18, EU:T:2022:358. This also raises the issue of adherence to the "proof proximity" principle, which states that the burden of proof falls properly on the party with better access to evidence and is discussed in more detail below.

57 We note that the basic presumption of innocence does not, in any circumstance, require the prosecuting authority to prove a negative.

58 CJEC, July 8, 1999, *Comm'n v. Anic Partecipazioni SpA*, case C-49/92 P, EU:C:1999:356, ¶ 121.

59 CJEU, Dec. 5, 2013, *Solvay v. Comm'n*, case C-455/11 P, EU:C:2013:796, ¶ 43 (citation omitted).

60 Ibid. ¶ 44.

61 Ibid. ¶ 45.

62 CFIEC, Mar. 10, 1992, *Huls AG v. Comm'n*, case T-9/89, EU:T:1992:31, ¶ 169.

63 Ibid. ¶ 170.

64 For example, the information needed to prove the conditions of Article 101(3) TFEU "*is usually apt to be found in the hands of the undertaking seeking to rely on the exemption*," including access to cost data and relevant information to show efficiencies and consumer benefits. C. Volpin, *The Ball Is in Your Court*: Evidential Burden of Proof and Proof-Proximity Principle in EU Competition Law, *Common Mkt. L. Rev.*, Vol. 51, Issue 4, 2014, pp. 1159–1185, at 1174.

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and the overall fairness of the legal system that employs them: "*The proof-proximity principle would act as a corrective device for the inequality caused by the use of presumptions, requiring the judge to make sure that the party bearing the risk of error is also the one who is better situated to prevent him or her from committing errors in the adjudication. While the application of presumptions is imposed by effectiveness objectives, the application of the proof-proximity principle is imposed by fairness*."[65]

67. The ability to access and produce rebuttal evidence was a key point of contention in the EU General Court's landmark decision to annul the European Commission's 2018 fine against Qualcomm.[66] Following the Commission's decision and its application for an appeal, Qualcomm submitted further evidence largely consisting of documents it received from a relevant third party (Apple). Notably, Qualcomm did not receive these documents until after submitting its appeal. The Commission argued that the evidence was inadmissible, in part because Qualcomm lacked adequate justification to provide additional evidence.

68. The General Court noted that lodging of evidence after the first exchange of pleadings was permissible if justified by "*exceptional circumstances*," that is, "*if the person offering the evidence was unable, before the end of the written procedure, to obtain possession of the evidence in question*."[67] The Court ultimately found that there were exceptional circumstances to justify the late submission based on Qualcomm's inability to access Apple's documents prior to submitting its appeal. The decision marked the first time in decades that the General Court had quashed an abuse of dominance decision, underscoring the importance of access to evidence to ensure procedurally correct outcomes.

69. Finally, existence of and access to evidence aside, the efficacy of a rebuttable presumption also hinges on the impartiality and lack of institutional bias of the adjudicating party. An agency that is biased or unwilling to consider or accept rebuttable evidence compromises the fundamental principle of a fair and meaningful opportunity to challenge the presumption.

65 Ibid. at 1181.

66 GCEU, June 15, 2022, *Qualcomm Inc. v. Comm'n*, case T-235/18, EU:T:2022:358

67 Ibid. ¶ 129.

70. A truly rebuttable presumption presupposes a neutral and unbiased forum where parties can present evidence in a transparent and objective manner. This is deemed to be the case where a court or independent tribunal is the trier of fact. However, recent statements from competition authorities call into question whether parties can reasonably expect an unbiased audience for rebuttal evidence. For example, a 2021 joint statement from the UK Competition & Markets Authority, Australian Competition & Consumer Commission, and the Bundeskartellamt expressed deep skepticism over merging parties' claims: "*Our experience suggests that merging firms often overstate the apparent efficiency benefits of mergers and how these will translate into more competitive outcomes for markets. Given the long-term structural change and clear loss of rivalry that can result from a merger, protecting competition may require the prevention of problematic mergers rather than the acceptance of submissions relating to purportedly procompetitive benefits that are difficult to verify and predict*."[68]

Conclusion

71. 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.

72. 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. ■

68 Competition & Mkts. Auth., Austl. Competition & Consumer Comm'n and Bundeskartellamt, Joint Statement on Merger Control Enforcement (Apr. 20, 2021), https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement. *See also* Int'l Competition Network, ICN Recommended Practices for Merger Analysis § VII, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf.

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