Presumptions in EU competition law

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Abstract

A presumption is usually defined as using a known fact to infer another fact. However, presumptions could be defined more broadly, as including several types of logical leaps, shortcuts, automatisms, burden-shifting mechanisms and predispositions. Using more than 30 such "presumptions" as examples, this paper tries to (a) provide a description and a classification of presumptions in EU competition law; (b) explore to what extent these presumptions are compatible with fundamental rights and general principles of EU law; and (c) explain the rationales for presumptions in EU competition law.

1. Types of presumptions

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

The straightforward meaning of a "presumption" is to use a known fact (or several) to infer another fact. Sometimes this is called a "factual presumption" or an "evidential presumption". Sometimes this is called "indirect" or "circumstantial" evidence. Such presumptions are usually rebuttable.[2]

In a case outside the sphere of EU competition law, the European Commission ("the Commission") argued that a presumption is a

> "legal mechanism whereby an uncertain fact is inferred from a certain fact. That mechanism is employed when the uncertain fact is by its nature very difficult to establish and follows from a fact that is easier to establish".[3]

In EU competition law, a classic example of such presumptions is the parental liability presumption: "it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary".[4] The fact that the subsidiary is wholly owned by the parent company is easily verifiable. This allows to presume that the parent company exercises decisive influence over the subsidiary. Drawing from that presumed fact, the legal conclusion is parental liability.

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2 C-204/00 P *Aalborg Portland*, ECLI:EU:C:2004:6, para. 79: "the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged". See also C-407/08 P *Knauf Gips*, ECLI:EU:C:2010:389, para. 80.

3 Opinion of AG Bot in C-605/13 P *Anbouba*, ECLI:EU:C:2015:2, para. 50, concerning sanctions against a Syrian businessman and whether his extensive business holdings were sufficient to presume that he was closely associated with the Syrian regime.

4 C-97/08 P *Akzo Nobel*, ECLI:EU:C:2009:536, para. 61. The presumption also applies to indirect shareholdings and to shareholdings of "almost" 100%. See e.g. C-289/11 P *Legris Industries*, ECLI:EU:C:2012:270, para 48 (99.99% shareholding); C-508/11 P *Eni*, ECLI:EU:C:2013:289, para. 49 (99.97%); T-45/10 *GEA Group*, ECLI:EU:T:2015:507, paras. 141-142 (99.5% indirect shareholding); T-203/01 *Michelin*, ECLI:EU:T:2003:250, para. 290 (more than 99%); C-521/09 P *Elf Aquitaine*, ECLI:EU:C:2011:620, para. 63 (98% shareholding, annulled on other grounds); T-299/08 *Elf Aquitaine*, ECLI:EU:T:2011:217, para.

Another example is the "only plausible explanation" case-law, which originated in the area of concerted practices: "parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation".[5] In other words, while there is no direct evidence of concertation, concertation is presumed if it is the "only plausible explanation" for observed parallel behaviour. This is often referred to as the *Wood Pulp* test, although it appeared earlier in the case-law.[6] The firm can rebut the presumption by showing some "other plausible explanation".

The Court of Justice then held that, where appropriate, an infringement of the competition rules can be presumed not only in situations of observed parallel behaviour, but also more generally, in situations where the evidence is "fragmentary and sparse":

> "[I]t is often necessary to reconstitute certain details by *deduction*. In most cases, the existence of an anti-competitive practice or agreement must be *inferred* from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules".[7] (Italics added.)

Such "deductions" and "inferences" are synonymous with presumptions.

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

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

By definition, a legal test entails an element of presumption. First, once the decision-maker concludes that the legal test is met or not met, the legal conclusion follows automatically: it is presumed that nothing else is relevant. When the legal test does not allow for defences (a rule of "per se" illegality), we could even call this an irrebuttable presumption.[8]

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57 (97%); T-206/06 *Total and Elf Aquitaine*, ECLI:EU:T:2011:250, para. 56 (96.48%); T-190/06 *Total and Elf Aquitaine*, ECLI:EU:T:2011:378, para. 52 (same).

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

6 40/73 *Suiker Unie*, ECLI:EU:C:1975:174, para. 301; 29/83 *CRAM and Rheinzink*, ECLI:EU:C:1984:130, para. 16; 395/87 *Tournier*, ECLI:EU:C:1989:319, para. 24; C-110/88 *Lucazeau*, ECLI:EU:C:1989:326, para. 18. See also, since *Wood Pulp*, T-442/08 *CISAC*, ECLI:EU:T:2013:188, para. 99.

7 C-204/00 P *Aalborg Portland*, ECLI:EU:C:2004:6, paras. 56-57. Later on, the General Court clarified that an applicant may rely on the "other plausible explanation" rebuttal "only where the evidence submitted by the Commission does not enable the infringement to be established unequivocally and without the need for interpretation". See T-36/05 *Coats*, ECLI:EU:T:2007:268, para. 74, T-380/10 *Wabco*, ECLI:EU:T:2013:449, para. 51, and T-141/08 *E.ON*, ECLI:EU:T:2010:516, paras. 55-56.

8 There are also rules of per se legality – or "safe harbours" – like the de minimis rule. See C-226/11 *Expedia*, ECLI:EU:C:2012:795, para. 16.

Likewise, a legal test based on few factors is often presented as a presumption. Such a test sorts different behaviours into a few broad categories. It is presumed that behaviours falling in the same category should be treated in the same way, without inquiring about other factors that may further differentiate between those behaviours. This kind of legal test rests on broad "categorisation", "generalisation", and "abstract" analysis, as opposed to a case-by-case, in concreto, specific and individual assessment.

The fewer factors in the test, the fewer categories there are, and the more it comes down to a generalisation or abstract assessment. By contrast, the more factors in the test, the more categories there are, and the more the assessment becomes case-specific. At the extreme, the test may even state that the list of factors is open-ended – and then we are reminded of Easterbrook's warning: "when everything is relevant, nothing is dispositive".[9]

There are several examples of legal tests functioning as such "presumptions". This is not to say that such tests are less accurate. Experience may show that when shaping the legal test for a particular practice, only one or two factors are sufficient to conclude with a high degree of reliability. For example, some behaviours that fall squarely within a category of established restrictions by object – such as cartels – are prohibited under Article 101(1), without much further analysis. They are presumed harmful, and they are presumed to constitute an appreciable restriction of competition (*Expedia*).[10]

At the other end of the spectrum, some cases require a detailed, case-by-case analysis on the basis of many factors (or even an open-ended number of factors): see for example, under Article 102, the judgments requiring an analysis of "all the circumstances".[11]

So both broader categorisations and finer categorisations use categories. Indeed it is not possible to have a workable interpretation of EU competition law without using categories.[12] What matters is whether the categorisation is correct. "Categorisation is not wrong as such, as a way of thinking. The problem is when it comes too early and at the expense of sufficient analysis".[13]

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9 Frank Easterbrook, "The Limits of Antitrust", 1984 Texas Law Review 1, at p. 12. Ironically, Easterbrook was making this point in support of presumptions of per se legality.

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

11 C-32/11 *Allianz Hungária*, ECLI:EU:C:2013:160, para. 48; C-280/08 P *Deutsche Telekom*, ECLI:EU:C:2010:603, para. 175.

12 Wouter Wils, "The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance", 2014 World Competition 405: "It is not possible to conceive a workable interpretation of Article 102 TFEU that would not make some use of categories. What matters is that the categories used are economically and legally sound, and that they are clear, foreseeable and administrable".

13 Former General Court Judge Martins de Nazaré Ribeiro, speech at the Baker Botts Global Antitrust Conference, Brussels, 11 September 2017.

There is also a more general point here. Any factor in any legal test carries some significance, and that significance must come from somewhere. It comes from either (a) knowledge which is assumed to be true (common sense or intuition); or (b) knowledge that has been empirically tested and confirmed (also known as "experience", although experience does not always yield complete certainty). By definition, giving any significance – indeed any relevance, any meaning – to a particular factor is based on a presumption.

When the General Court ruled that the coordinated effects theory under the Merger Regulation requires (a) market transparency, (b) credible retaliation, and (c) no possibility of countervailing measures by fringe competitors or customers, the Court was presuming that these were the three correct factors, presumably based on its own understanding of the economics of oligopolies.[14]

In the same vein, when the General Court held that a merger of two non-EEA undertakings is subject to the Merger Regulation when it produces an "immediate, substantial and foreseeable effect" in the EEA,[15] the Court was presuming that these were the right factors, presumably based on international law and policy considerations.

Indeed when any legislator, court, or administrative authority issues such a multi-factor legal test – a legal rule – it is presuming that these factors are not only *relevant* factors, but the *only* relevant factors, and that there are no exceptions. At the same time, the legislator, court, or administrative authority cannot reasonably account for the multiplicity and specificities of future situations in which the rule may apply. So the door is always open to – more or less wide or case-specific – exceptions, qualifications, caveats, rebuttals, "interpretations" or even modifications of the rule. In that sense, a legal rule is arguably no more than a presumption. This holds true even in legal systems that are not usually described as case-law-based systems.[16]

Even applying a precedent to a case includes some element of presumption: the presumption that the legal principle stated in that precedent applies with equal force in the new case, because the two cases are sufficiently similar.

Applying economic reasoning often entails an element of presumption as well. The typical example is extrapolation: can we infer that a fact which is proven for a particular subset of observations holds true for a larger set of observations? Can we infer future trends from past trends? Can we presume that an economic model is an accurate – or close enough – representation of reality?

In sum, a simpler legal test resting on categorisation and generalisation entails a stronger element of "presumption" than a more detailed, individual, case-by-case assessment. But actually, almost any legal test, legal rule, or reasoning entails an element of presumption.

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14 T-342/99 *Airtours*, ECLI:EU:T:2002:146, para. 62.

15 T-102/96 *Gencor*, ECLI:EU:T:1999:65, para. 90.

16 See also J. Harvie Wilkinson III, "Toward a Jurisprudence of Presumptions", 1992 New York University Law Review 907 (making the same point).

C. Procedural presumptions

The best-known procedural presumption is the presumption of innocence. In EU competition law proceedings, according to Article 2 of Regulation no. 1/2003, the presumption of innocence means that the burden of proving an infringement of Article 101(1) or Article 102 is on the party alleging it. Conversely, the burden of relying on the efficiency defence under Article 101(3) – or, presumably, Article 102 – is on the party alleging it.[17]

Other procedural presumptions pertain not to the burden of proof, but to the burden of responding. When a party misses the deadline for responding, it is presumed that silence means agreement.

- For example, if the complainant does not reply to the pre-rejection letter, the complaint is presumed ("deemed") withdrawn.[18]

- If the Commission asks an undertaking to identify the confidential information in its submissions but the undertaking does not reply within a certain time limit, "the Commission may assume that the documents or statements concerned do not contain confidential information".[19]

- Again for the purpose of protecting confidential information in competition proceedings before the Commission or the EU courts,

> "information which was secret or confidential, but which is over five years old must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties".[20]

- If the Commission does not adopt a merger decision by the deadline, the merger is presumed ("deemed") to be approved.[21]

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

18 Article 7 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18, as amended, hereafter "Regulation No. 773/2004".

19 Article 16(3) of Regulation No. 773/2004.

20 E.g. T-271/03, *Deutsche Telekom*, ECLI:EU:T:2006:163, para. 45, and C-162/15 P *Evonik Degussa*, ECLI:EU:C:2017:205, para. 64.

21 Article 10 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1, hereafter "Merger Regulation" or "EUMR". See also C-413/06 P *Bertelsmann*, ECLI:EU:C:2008:392, paras. 48-49: "Contrary to what the appellants submit, it cannot therefore be inferred from the

- If a Member State does not object to a proposed referral to the Member States requested by a notifying party under the EUMR, it is deemed to agree.[22]

- If the Commission does not object to a proposed referral to the Member States requested by a notifying party under the EUMR, it is deemed to agree.[23]

- If a Member State does not object to a proposed referral to the Commission requested by a notifying party under the EUMR, it is deemed to agree.[24]

- If the Commission does not object to a proposed referral to the Commission requested by a Member State under the EUMR, it is deemed to agree.[25]

There can be several reasons for the presumption that silence means agreement: (a) silence is more likely to mean agreement than not; (b) as a matter of efficiency and legal certainty, other parties cannot be required to wait forever; (c) there is a policy interest in pursuing the proposed or default course of action; and (d) if silence were to be interpreted as a refusal, such refusal without reasoning could violate the duty to provide reasons for negative decisions.[26]

D. Presumptions that express a general approach to a particular issue

These are presumptions that signal scepticism or openness towards particular points. This is, in effect, interpretive guidance. It is often framed as stating that a factor is useful or not useful, or that a factor is an indication (or a strong indication) of a legal conclusion, or that a particular point is likely or unlikely, or that a legal interpretation is to be applied restrictively or expansively. These "presumptions" "tip the scales", or "nudge" the analysis in a particular direction.[27]

Regulation that there is a general presumption that a notified concentration is compatible with, or incompatible with, the common market. That interpretation of the Regulation is not invalidated by Article 10(6), which provides that a notified concentration is to be deemed compatible with the common market where the Commission has not taken a decision on the compatibility of that concentration within the prescribed period. That provision is a specific expression of the need for speed, which characterises the general scheme of the Regulation and which requires the Commission to comply with strict time-limits for the adoption of the final decision…"

22 Article 4(4)(2) EUMR.

23 Article 4(4)(4) EUMR.

24 Article 4(5)(5) EUMR.

25 Article 22(3) EUMR.

26 Charter of Fundamental Rights, Article 41(2). Although there can be exceptions.

27 See also Lord Hoffmann's famous example about lionesses: "Some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian" (*Secretary of State for the Home Department v. Rehman* [2001] UKHL 74, [2003] 1 AC 153, para. 55).

For example, when the Commission's guidelines say that restrictions by object or hardcore restrictions are unlikely to produce countervailing efficiencies, this signals some general scepticism about the efficiencies from such restrictions.[28]

Another example concerns the "potential competitor" test: when two firms conclude a market-sharing agreement but then argue that they were not competitors in the first place, the general approach to this argument is one of scepticism. Indeed the General Court responds that the market-sharing agreement itself is a "strong indication" that the parties are potential competitors.[29] To go to the trouble of concluding a market-sharing agreement, the parties must have viewed each other as potential competitors. Presumably, the intuition is that companies typically do not enter into market-sharing agreements for no reason.

There are other examples.

- According to some judgments, the notion of "restriction by object" is to be applied restrictively.[30]

- Since the interruption of the limitation period constitutes an exception, it must be interpreted narrowly.[31]

- "The notion of public distancing as a means of excluding liability must be interpreted narrowly".[32]

- "Any exception to the right of access to the file must be interpreted narrowly".[33]

- Block exemption regulations and individual exemption decisions must be interpreted narrowly.[34]

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28 Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97, para. 46 ("Article 101(3) Guidelines"); Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, document SWD(2014) 198 final, as amended, page 4 ("practice shows that…"); Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1, para. 47.

29 E.g. C-373/14 P *Toshiba*, ECLI:EU:C:2016:26, paras. 33-34; T-216/13, *Telefónica*, ECLI:EU:T:2016:369, para. 227; T-472/13 *Lundbeck*, ECLI:EU:T:2016:449, para. 103.

30 C-67/13 P *Cartes Bancaires*, ECLI:EU:C:2014:2204, para. 58, and C-345/14 *Maxima Latvija*, ECLI:EU:C:2015:784, para. 18. However, the discussion on this point is arguably a misunderstanding. The General Court's *Cartes Bancaires* judgment (T-491/07 *Cartes Bancaires*, ECLI:EU:T:2012:633, para. 124), was merely and correctly referring to EU case-law (C-209/07 *BIDS*, ECLI:EU:C:2008:643, paras. 22-23). See also the speech by Johannes Laitenberger, "The many dividends of keeping markets open, fair and contestable", at the 2017 Sankt Gallen International Competition Law Forum, p. 11: "Let me further recall the recent judgement of the Court of Justice in the *Cartes Bancaires* case where the Court told us that the concept of restriction 'by object' must be interpreted restrictively. But that only means that it must be interpreted correctly, namely, when the practice presents 'by its very nature […] a sufficient degree of harm'."

31 T-213/00 *CMA CGM*, ECLI:EU:T:2003:76, para. 484.

32 T-303/02 *Westfalen Gassen*, ECLI:EU:T:2006:374, para. 103.

33 T-5/02 *Tetra Laval*, ECLI:EU:T:2002:264, para. 102.

- Since the conditions for abusive litigation "constitute an exception to the general principle of access to the courts, which ensures the rule of law, they must be construed and applied strictly, in a manner which does not defeat the application of the general rule".[35]

- According to the Article 102 Guidance Paper, "The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market".[36]

- According to the Merger Regulation, competition concerns are unlikely below a 25% market share.[37]

- According to the Guidelines on Vertical Restraints,

    - "In cases where the market share of the largest supplier is below 30% and the market share of the five largest suppliers is below 50%, there is unlikely to be a single or a cumulative anti-competitive effect situation";[38]

    - "A cumulative anticompetitive effect is unlikely to arise as long as less than 50% of the market is tied";[39]

    - "At the retail level, a cumulative foreclosure effect may also arise. Where all suppliers have market shares below 30%, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is less than 40% and withdrawal of the block exemption is therefore unlikely".[40]

E. Other classifications of presumptions

First, presumptions may appear in statutes, or in guidelines, or in case-law ("judge-made" presumptions).

Second, presumptions may work in favour of competition authorities/claimants or in favour of defendants. Since many presumptions increase the effectiveness of competition enforcement, defendants often argue against the use of presumptions, on the grounds that each case deserves a full and individual assessment. At the same time, the same undertakings are only too happy to rely

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34 C-234/89 *Delimitis*, ECLI:EU:C:1991:91, paras. 36, 37 and 46; T-9/92 *Peugeot*, ECLI:EU:T:1993:38, para. 37; T-24/93 *Compagnie Maritime Belge*, ECLI:EU:T:1996:139, para. 48; T-395/94 *Atlantic Container Line*, ECLI:EU:T:2002:49, para. 146; T-67/01 *JCB*, ECLI:EU:T:2004:3, para. 164; C-70/93 *BMW*, ECLI:EU:C:1995:344, para. 28; and C-306/96 *Javico*, ECLI:EU:C:1998:173, para. 32.

35 T-119/09 *Protégé*, ECLI:EU:T:2012:421, paras. 49 and 63; T-111/96 *ITT Promedia*, ECLI:EU:T:1998:183, ECLI:EU:T:1998:183, para. 61.

36 Para. 14.

37 Recital 32 EUMR.

38 Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1, para. 135.

39 Para. 138.

40 Para. 141.

on presumptions when it suits them (e.g. block exemptions, the de minimis rule, or per se legality rules).

In *Lundbeck*, for example, Lundbeck argued that its market-sharing agreements with generic drug manufacturers were harmless, as the latter would not have been able to enter the market anyway during the validity period of Lundbeck's patent. Lundbeck argued that would-be generic entrants are not potential competitors when such entry would require challenging a patent, since patents should be "presumed valid". The Court rejected Lundbeck's argument, on the basis that

> "[w]hilst patents are indeed presumed valid until they are expressly revoked or invalidated by a competent authority or court, that presumption of validity cannot be equated with a presumption of illegality of generic products validly placed on the market which the patent holder deems to be infringing the patent."[41]

Third, presumptions may be mandatory or not. A mandatory presumption means that when the conditions of the presumption are met, the decision-maker is bound to use the presumption. If the presumption is not mandatory, the decision-maker may inquire further or even not use the presumption at all. For example, the parental liability presumption is not mandatory. When the Commission relies on the presumption, it does not have to produce additional evidence,[42] but it may do so if it wants to.[43]

Fourth, a presumption may be rebuttable or irrebuttable. Sometimes a rebuttable presumption is also known as a "prima facie" case or a "burden-shifting" presumption. Sometimes an irrebuttable presumption is also called "conclusive".

It could be argued that an irrebuttable presumption limits "the principle of the unfettered evaluation of evidence".[44] However, this is not an absolute principle. For example, there can be rules about the admissibility and credibility of particular types of evidence. The principle is, rather, that such rules limiting the judge's unfettered assessment of the evidence should be kept to a minimum.[45]

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41 T-472/13 *Lundbeck*, ECLI:EU:T:2016:449, para. 121.

42 In other words, "the Commission is not required, in order to apply the presumption of actual exercise of decisive influence in a given case, to provide indicia over and above those demonstrating the applicability and operation of that presumption": see C-521/09 P *Elf Aquitaine*, ECLI:EU:C:2011:620, para. 80.

43 C-628/10 P *Alliance One*, ECLI:EU:C:2012:479, paras. 49-50. This is known as the "dual basis" approach to parental liability.

44 Opinion of AG Vesterdorf in T-1/89 *Rhône-Poulenc*, ECLI:EU:T:1991:38, page 954; T-50/00 *Dalmine*, ECLI:EU:T:2004:220, para. 72; C-407/04 P *Dalmine*, ECLI:EU:C:2007:53, para. 63; and, most recently, C-469/15 P *FSL*, ECLI:EU:C:2017:308, para. 38.

45 Helmholz and Sellar also contrast presumptions and the "free evaluation of evidence": "More accustomed to the free evaluation of evidence by judges and juries, Anglo-American commentators have been bemused and even repelled by the apparently mechanical treatment inherent in the civil law of presumptions". Richard Helmholz & David Sellar, "Presumptions in Comparative Legal History", in THE LAW OF PRESUMPTIONS: ESSAYS IN COMPARATIVE LEGAL HISTORY, Duncker & Humblot, Berlin, 2009, at p. 9.

In any event, an irrebuttable presumption – or, more simply, a "rule" – is rarely inflexible. Any party is free to argue that the court or competition agency should carve out an exception to the rule or turn an irrebuttable presumption into a rebuttable one. Or perhaps a presumption can be rebutted on the basis of some types of evidence but not other types. That is perhaps a more useful distinction than the traditional rebuttable/irrebuttable distinction.

The notion of "restriction by object" illustrates this point well. On one side, it is often stated that the notion of restriction by object is a "presumption".[46] On the other side, AG Kokott has argued that the notion of restriction by object should not be viewed as a presumption, as that would imply that it is rebuttable by showing the absence of anti-competitive effects.[47] Actually both views are correct. A restriction by object is a presumption (the language of *Cartes Bancaires* seems clear in this regard)[48] but it is rebuttable *on the basis of some types of evidence but not others*.

For example, the defendant cannot argue that there are no effects, and it cannot argue that it has a low market share.[49] But the defendant can still argue that it is not actually an "undertaking", that there is no "agreement", no "effect on trade", or no sales into the EU, or that there is an ancillary restraint, a State action defence, a *Wouters* public-interest exception, or an Article 101(3) efficiency defence.

How much evidence is needed to rebut a presumption? This is important but rarely discussed. Is it enough to present *some* evidence? Or does it have to be evidence of equal weight as the evidence triggering the presumption? Or does it have to be conclusive evidence ("proof")? In practice, the level of evidence needed for a successful rebuttal depends on the presumption. Some are easier to rebut than others.

- For example, in order to rebut the parental liability presumption, the undertaking must *prove* that it did not actually exercise decisive influence over its subsidiary.[50] As the Court of Justice said in *Elf Aquitaine*, "if, in order to

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46 Article 81(3) Guidelines, para. 21. See also para. 24: "In the case of restrictions of competition by effect there is no presumption of anti-competitive effects." See also Alexander Italianer, "The Object of Effects", speech at the CRA conference, Brussels, 10 December 2014 (defining the "restriction by object" characterisation as a presumption); and the opinion of AG Cruz Villalón in C-32/11 *Allianz Hungária*, ECLI:EU:C:2012:663, para. 64.

47 AG Kokott's opinion in C-8/08 *T-Mobile*, ECLI:EU:C:2009:110, para. 45: "the prohibition on 'infringement by object' may not be interpreted as meaning that an anti-competitive object gives rise merely to some kind of presumption of unlawfulness which may be rebutted, however, if in the specific case no negative consequences for the operation of the market can be demonstrated."

48 C-67/13 P *Cartes Bancaires*, ECLI:EU:C:2014:2204, para. 51: "certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects".

49 E.g. T-49/02 *Brasserie Nationale*, ECLI:EU:T:2005:298, para. 108.

50 C-521/09 P *Elf Aquitaine*, para. 57: "The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary,

rebut that presumption, it were sufficient for a party concerned to put forward mere unsubstantiated assertions, the presumption would be largely robbed of its usefulness".[51]

- Where a firm's participation in an anti-competitive meeting has been established but there is no evidence of what the firm's representative said at the meeting, the firm is anyway presumed to have participated in the agreement or concerted practice that took place in that meeting. This presumption is rebuttable, but

> "it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs."[52]

This is known as "distancing". To rebut the presumption of participation in the infringement, the firm must "*prove*" distancing on the basis of "concrete, objective evidence" (italics added).[53]

- With regard to concerted practices, according to the *Anic* presumption,

> "the concept of a concerted practice … implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. … Subject to *proof* to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market" (italics added).[54]

The *Solvay* judgment shows that the burden of rebutting the *Anic* presumption is very heavy:

> "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

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unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market".

51 C-521/09 P *Elf Aquitaine*, para. 61. See also Kenneth Broun, "The Unfulfillable Promise of One Rule for All Presumptions", 1984 North Carolina Law Review 697, at p. 702: "the policy considerations behind the presumption should not be disregarded simply because the opponent presented a prima facie case".

52 T-303/02 *Westfalen Gassen*, ECLI:EU:T:2006:374, para. 76.

53 Ibid., paras. 95 and 115.

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

> determination, by that undertaking, of its conduct on the market" (italics added).[55]

- According to the *Eturas* judgment, when an anti-competitive message is addressed to several undertakings through a special electronic mailbox within an online booking platform, one may presume "that the travel agencies concerned were aware of the content of that message as from the date of its dispatch", but only where "other objective and consistent indicia" are present. The presumption is rebuttable.[56] Importantly, the Court of Justice adds that "the referring court cannot require that those agencies take excessive or unrealistic steps in order to rebut that presumption". The Court then sets out several ways to rebut the presumption: (a) "for example by *proving* that they did not receive that message or that they did not look at the section in question or did not look at it until some time had passed since that dispatch"; or (b) by showing "distancing"; or (c) by rebutting the *Anic* presumption, for example by showing "evidence of a systematic application" of a lower price than the agreed price (italics added).[57]

- With regard to an agreement's effect on trade between Member States, in *Lombard Club*, the General Court held that when a cartel covers the entire territory of a Member State,

  > "there is, at least, a strong presumption that a practice restrictive of competition applied throughout the territory of a Member State is liable to contribute to compartmentalisation of the markets and to affect intra-Community trade. That presumption can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary".[58]

  It is for the undertaking to rebut or "overturn" the presumption.[59]

- Rebutting the five presumptions outlined above requires proof. But here is a presumption which is easier to rebut. The Commission may base an Article 101 case on the presumption that the facts established – typically, observed parallel behaviour – cannot be explained other than by concertation between firms. In such cases, rebutting the Commission's case merely requires a "plausible" alternative explanation. Not only does the Commission have the burden of showing that the presented alternative explanation is implausible, but "the Commission cannot criticise the applicant for failing to provide further

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55 C-455/11 P *Solvay*, ECLI:EU:C:2013:796, para 43; C-449/11 P *Solvay Solexis*, ECLI:EU:C:2013:802, para. 38.

56 C-74/14 *Eturas*, ECLI:EU:C:2016:42, para. 40.

57 Ibid., paras. 41-49.

58 T-259/02 *Raiffeisen*, ECLI:EU:T:2006:396, paras. 181-186, confirmed in C-125/07 P *Erste Group Bank*, ECLI:EU:C:2009:576, paras. 39-43.

59 Ibid.

specifics regarding its other explanation, inasmuch as it is the Commission which must prove an infringement".[60]

2. When can we use presumptions? The compatibility of presumptions with fundamental rights and general principles of EU law

A. Compatibility with the ECHR

According to a long line of ECHR case-law, starting with *Ireland v. United Kingdom* in 1978, "'proof' may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact".[61]

The Strasbourg court had an opportunity to refine its case-law in the 1988 *Salabiaku* case. In that case, French customs agents caught Mr Salabiaku crossing the border with 10 kilos of marijuana in his suitcase. Mr Salabiaku was charged with drug smuggling, defined as having "prohibited goods" in one's "possession" while "crossing the border". Mr Salabiaku argued that this rule was too automatic or simplistic, and that he should have been able to argue that he was unaware of the marijuana in his suitcase.

The Court noted that French case-law in general, as well as the French judgments at issue, did consider the possibility for the accused to argue that he didn't know about the goods in his suitcase. Accordingly, there was no violation of the right to a fair trial (Article 6 ECHR). However, the Court did set some limits on the use of presumptions in criminal proceedings:

> "Article 6 … 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."[62]

Later on, in *Västberga Taxi*, the Court held that presumptions "have to be reasonably proportionate to the legitimate aim pursued".[63] In *Janosevic*, the Court added that a presumption can be reasonable even if it is difficult to rebut.[64]

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60 T-442/08 *CISAC*, ECLI:EU:T:2013:188, paras. 133 and 161.

61 *Ireland v. United Kingdom*, 18 January 1978, application no. 5310/71, Series A no 25, p 65, [1978] ECHR 1, (1978) 2 EHRR 25, para. 161.

62 *Salabiaku v. France*, 7 October 1988, application no. 10519/83, [1988] ECHR 19, (1988) 13 EHRR 379, para. 28.

63 *Västberga Taxi and Vulic v. Sweden*, 23 July 2002, application no. 36985/97, para. 113.

64 *Janosevic v. Sweden*, 23 July 2002, application no. 34619/97, para. 102.

B. Compatibility with EU law

The language from those ECHR cases is largely repeated in the Court of Justice's *Spector Photo Group* judgment of 2009, a case concerning insider trading.[65] The 2016 EU Directive on the presumption of innocence in criminal proceedings does the same.[66] [67]

In the area of EU competition law specifically, the topic of presumptions is usually discussed in light of the presumption of innocence and the correct allocation of the burden of proof.[68] For example, AG Kokott in *T-Mobile* and AG Szpunar in *Eturas* stated that the presumption of innocence does not preclude the use of presumptions in competition cases, although such presumptions must be rebuttable.[69]

Similarly, in *Elevators*, the General Court held that

> "the presumption of innocence is not disregarded if in competition proceedings certain conclusions are drawn on the basis of common experience provided that the undertakings concerned are at liberty to refute those conclusions".[70]

Moreover, in *MCAA*, the Court of Justice held that

> "a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded".[71]

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65 C-45/08 *Spector Photo Group*, ECLI:EU:C:2009:806, para. 43.

66 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1, recital 22: "Such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and in any event, should be used only where the rights of the defence are respected."

67 But see also C-621/15 *Sanofi Pasteur*, ECLI:EU:C:2017:484, para. 54, which takes a dim view of even rebuttable presumptions.

68 It is sometimes claimed that applying a presumption would violate the presumption of innocence and "reverse" or "shift" the burden of proof. Indeed the presumption of innocence and the burden of proof are two sides of the same coin. See European Court of Human Rights, *John Murray v. United Kingdom*, 8 February 1996, application no. 18731/91, (1996) 22 EHRR 29, 22 EHRR 29, [1996] ECHR 3, para. 54, and *Telfner v. Austria*, 20 March 2001, application no. 33501/96, [2001] ECHR 228, (2002) 34 EHRR 7, para. 15.

69 AG Kokott's opinion in C-8/08 *T-Mobile*, ECLI:EU:C:2009:110, para. 93, and AG Szpunar's opinion in C-74/14 *Eturas*, ECLI:EU:C:2015:493, para. 97.

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

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

The Court of Justice could have added that if a presumption is rarely rebutted, it means that the presumption works precisely as intended. Since evidence contrary to the presumption rarely comes up, it was correct to presume.[72]

3. Why use presumptions? Sound rationales for presumptions

Clearly, as a matter of common sense, justice, and the case-law, there must be a sound rationale for a presumption, in the sense that a presumption must be based on valid sources and valid purposes. What are these rationales?

There have been useful attempts to concisely capture the rationales for presumptions. Helmholz and Sellar, for example, argue that "the creation of legal presumptions depended upon the efforts of jurists dealing with recurring situations, where for one reason or another reliance on direct proof of the facts at issue was impossible, inexpedient, or unnecessary."[73]

In Bailey's view, "legal reasoning creates presumptions in order to assist a decision-maker. A fact or conclusion may (provisionally) be presumed because experience shows it is self-evident, or for reasons of public policy or procedural convenience".[74]

This section discusses the four main rationales for presumptions: common sense, applying the lessons of experience, "proof proximity", and effectiveness.

A. Common sense

Common sense comes into play when a particular point is so likely that the decision-maker can safely conclude that it is proven (or so unlikely/implausible that it is considered not proven).

In *Cement*, for example, Aalborg argued that it could not be considered to be a party to the agreement, since "the discussions were in French, which its representative … could not understand". The General Court rejected the argument: "it is not credible that the Danish Head Delegate travelled on two occasions to be present at meetings held solely in a language which he did not understand."[75] It was *presumed* that the firm would send a participant who can understand the language of the cartel meetings, especially since, having sent the delegate once, it sent the same delegate again to the next meeting.

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[72] For example, the *Anic* presumption has never been rebutted so far. The parental liability presumption has been rebutted four times so far (T-185/06 *Air Liquide*, ECLI:EU:T:2011:275, T-196/06 *Edison*, ECLI:EU:T:2011:281, C-521/09 P *Elf Aquitaine*, ECLI:EU:C:2011:620, and T-517/09 *Alstom*, ECLI:EU:T:2014:999).

[73] Helmholz and Sellar, cited in footnote 45 above, at p. 11.

[74] David Bailey, "Presumptions in EU Competition Law", 2010 European Competition Law Review 362, at p. 363.

[75] T-25/95 *Cimenteries CBR*, ECLI:EU:T:2000:77, para. 1385.

Another common-sense presumption concerns situations where an undertaking committed an infringement "intentionally or negligently" – a requirement for the Commission to be able to impose fines. The EU courts routinely reject undertakings' defences, on the basis that (a) a large undertaking "with legal and economic knowledge" must be expected to correctly assess the legality of its behaviour[76] and (b) for some serious restrictions, the firm "could not have been unaware that its conduct had as its object the restriction of competition".[77]

B. Applying the lessons of experience

By far the most common basis for an irrebuttable presumption 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.[78] Therefore it is not necessary to spend resources on establishing fact B. Using the lessons of experience saves costs.

Courts and authorities have limited resources, so they cannot afford to seek absolute truth: they only seek to solve legal disputes with their limited resources. For this reason, courts and authorities look at the likelihood of events, not "certainty". When fact B is reasonably likely or certain, the benefit of ascertaining whether it is, in fact, true, is not necessarily worth the cost – not just the costs to the court, the competition authority, and the firms involved, but, mostly, the cost to the public in terms of competition cases that are not pursued because resources are tied down on other cases. The largest part of "false negative" cases are not those cases wrongly deciding that a firm's behaviour is legal, but those cases of illegal behaviour that are never even investigated for lack of resources.[79]

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

- *Restrictions by object*. According to the Article 101(3) Guidelines, restrictions by object

> "are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This *presumption* is based on the serious

[76] E.g. T-202/98 *Tate & Lyle*, ECLI:EU:T:2001:185, para. 128.

[77] E.g. T-352/09 *Novácke chemické závody*, ECLI:EU:T:2012:673, para. 85.

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

[79] See also, on the tension between efficient and accurate adjudication, Antonio Bernardo, Eric Talley, and Ivo Welch, "A Theory of Legal Presumptions", 2000 Journal of Law, Economics, & Organization 1, at pages 39-40; and, on the error cost/decision theory framework in antitrust, Alan Devlin and Michael Jacobs, "Antitrust Error", 2010 William & Mary Law Review 75, and Jonathan Baker, "Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right", 2015 Antitrust Law Journal 1.

> 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" (italics added).[80]

The ECJ used similar language in *Cartes Bancaires*:

> "Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered *so likely* to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered *redundant*, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market. *Experience* shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers" (italics added).[81]

- *No "other plausible explanation"*. The Commission may infer the existence of illegal collusion from the parties' parallel behaviour, when there is no other plausible explanation for such behaviour.[82] The presumption is based on prior experience of the economics of oligopolistic markets.

- *Predatory pricing*. In the *Akzo* judgment, the Court of Justice ruled that "prices below average variable costs … must be regarded as abusive … since each sale generates a loss".[83] This is interpreted as a presumption. In *Compagnie Maritime Belge*, AG Fennelly explained that "it is not *usually* rational to sell below average variable costs".[84] In *France Télécom*, the Court of Justice held that selling below average variable cost "is *presumed* to pursue no other economic objective save that of eliminating its competitors" (italics added).[85]

- *Block exemptions*. According to the Guidelines on Vertical Restraints,

> "[f]or most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Provided that they do not

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80 Article 81(3) Guidelines, para. 21. See also para. 24: "In the case of restrictions of competition by effect there is no presumption of anti-competitive effects."

81 C-67/13 P *Cartes Bancaires*, ECLI:EU:C:2014:2204, para. 51. That does not mean that experience of a restriction is necessary before we can classify it as a restriction by object. Experience is one possible basis for the "restriction by object" presumption. Another possible basis for the presumption is that in the case at hand, "following an individual and detailed examination", the Commission can cut short the analysis and conclude that the restriction "reveals a sufficient degree of harm" without having to examine effects. See T-472/13 *Lundbeck*, ECLI:EU:T:2016:449, para. 438.

82 See footnote 6 above.

83 62/86 *Akzo*, ECLI:EU:C:1991:286, para. 71.

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

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

> contain hardcore restrictions of competition, which are restrictions of competition by object, the Block Exemption Regulation creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer."[86]

C. "Proof proximity"

It also makes sense to use a rebuttable presumption to cut the costs of adjudication by shifting the burden to the party which is more likely to have access to the evidence.[87] This is known as the "proof proximity principle". When someone is caught speeding, for example, usually the police can presume that the vehicle was driven by its owner, unless the owner can show that someone else was driving.

In the sphere of competition law, this applies to the efficiency defence, for example: the undertaking is much more likely than the authority to be able to access the relevant evidence.[88] To take another example, the *Anic* presumption (that a firm participating in a concerted practice adjusts its behaviour accordingly) may be rebutted, probably because the firm is better able to produce evidence on this point. The parental liability presumption also rests partly on the proof proximity principle.[89]

D. Effectiveness

Sometimes the law also uses presumptions because there is a policy interest in increasing the effectiveness of enforcement, or strengthening the claimant's position. It may be necessary to strengthen a claimant's position, for example, where it otherwise would have excessive difficulties in gathering the necessary evidence (the information asymmetry problem). In this regard, it is important to recall that the principle of effectiveness of EU competition law is not just a policy objective – it is a legal principle recognised in case-law.[90]

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86 Para. 23. This is only a "presumption" of legality because there is always the possibility that the block exemption might be withdrawn or disapplied for certain parties or markets.

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

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

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

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

- *Aalborg Portland* is probably the best-known case-law on presumptions operating to the Commission's advantage in order to remedy information asymmetry and increase enforcement effectiveness.

> "Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.
>
> Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.
>
> In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."[91]

- The case-law on establishing the duration of infringements provides another example. "If there is no evidence directly establishing the duration of an infringement, the Commission is required to adduce evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates".[92] That is also a presumption based on the effectiveness rationale.

- The Commission's guidelines on fines state that in order to assess the economic weight in the EU of a participant to a market-sharing agreement who agreed to stay out of the European market, the Commission will presume that absent the agreement, this participant would have had, in the EU, the same share of sales as its worldwide share of sales.[93] Clearly, it would be impossible to reconstruct this participant's share of sales in the EU absent the agreement, but this impossibility should not stand in the way of effective enforcement and deterrent fines. The solution was to create this presumption.[94]

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

92 T-208/08 *Gosselin*, ECLI:EU:T:2011:287, para. 154, with further references.

93 Guidelines on the method of setting fines, OJEU C 210, 1.9.2006, p. 2, para. 18.

94 This approach was confirmed by the Court of Justice in e.g. C-373/14 P *Toshiba*, ECLI:EU:C:2016:26, para. 90.

- In the Antitrust Damages Directive, it is presumed that the direct purchaser passed on the overcharge to the indirect purchaser merely from the fact that the indirect purchaser bought the products/services from the direct purchaser, unless the defendant "can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser".[95] That is because "it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm".[96]

- Again according to the Antitrust Damages Directive, it "shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption".[97] This presumption is explained in the recitals of the directive:

> "To remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm."[98]

Moreover, using presumptions to increase the effectiveness of the competition rules often contributes to the clarity of the rules, and, therefore, predictability and legal certainty – in other words, incentivising and shaping firms' behaviour. In *Janosevic*, the European Court of Human Rights held that effectiveness and the clarity of the rules were valid rationales for presumptions.[99] In the EU competition law context, this point is well made by AG Kokott in *Akzo Nobel* and AG Mazák in *General Química*:

- "The effective enforcement of competition law requires clear rules. A presumption rule such as that recognised by the Court in *AEG* and *Stora*, which allows the Commission as the competition authority to attribute to a parent company the responsibility for the cartel offences of its wholly-owned

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

96 Recital 41.

97 Article 17(2).

98 Recital 47.

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

subsidiaries, creates legal certainty and is straightforward to implement in practice."[100]

- "I consider that the function of the presumption in question, as explained by Advocate General Kokott in her Opinion in Case C-97/08 P *Akzo Nobel and Others v Commission*, is to facilitate the effective enforcement of competition law while promoting legal certainty due to the straightforward manner in which the presumption arises."[101]

4. Can presumptions evolve over time?

A. Reducing the scope of a presumption

The case-law on dominance illustrates how the evolution of views can modify a presumption. In *Hoffmann-La Roche*, the Court of Justice held that "very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position".[102] In *Akzo*, the Court of Justice ruled that a 50% market share demonstrated dominance.[103] Around the same time, in *Hilti*, the General Court held that "a share of between 70% and 80% … is, in itself, a clear indication of the existence of a dominant position".[104]

But less than 10 years later, the General Court added that it would be relevant to consider whether "the other operators on the market hold only much smaller shares".[105] Another 10 years later, in the Article 102 Guidance Paper, market shares were said to merely provide "a useful first indication" for the purpose of assessing dominance, and the presumption became a presumption of no dominance: "dominance is not likely if the undertaking's market share is below 40% in the relevant market".[106]

B. Broadening the scope of a presumption

The parental liability presumption illustrates the opposite phenomenon – a presumption whose scope has broadened over the years. It initially concerned only situations of 100% shareholdings. Now it also covers indirect shareholdings and shareholdings of "almost" 100%.[107]

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

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

102 85/76 *Hoffmann-La Roche*, ECLI:EU:C:1979:36, para. 41.

103 62/86 *AKZO*, ECLI:EU:C:1991:286, para. 60.

104 T-30/89 *Hilti*, ECLI:EU:T:1991:70, para. 92.

105 T-221/95 *Endemol*, ECLI:EU:T:1999:85, para. 134.

106 Article 102 Guidance Paper, paras. 13-14.

107 See footnote 4 above.

C. Changing an irrebuttable presumption into a rebuttable presumption

According to the *Akzo* judgment, pricing below average variable cost means predation. This test has been seen as a presumption since then.[108] But the Article 102 Guidance Paper introduced two possible rebuttals. First, if the firm can show that it is pricing below an appropriate measure of cost on one side of the market but making revenue on the other side of the market, this revenue may have to be taken into account and may rule out predation.[109] Second, there is no predation if, ex ante, the firm "could reasonably expect that the activity would be profitable".[110] Moreover, the efficiency/objective justification defence remains available as another possible rebuttal.

Another example concerns concerted practices. In *Enichem Anic*, the General Court held that when a firm exchanges sensitive information with competitors in a meeting, this constitutes a concerted practice, as the firm "could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings".[111] On appeal – the appellant now renamed Anic – the Court of Justice turned this irrebuttable presumption into a rebuttable presumption: "there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged", but "subject to proof to the contrary, which it is for the economic operators concerned to adduce".[112]

D. Changing the rationales for a presumption

Can the rationale for a presumption change over time? Yes. For example, the original rationale for the parental liability presumption – in the 1983 *AEG Telefunken* judgment – was only based on prior experience.[113] But in *Elf Aquitaine* in 2011, the Court of Justice used three rationales for the parental liability presumption: (a) effectiveness, (b) experience, and (c) proof proximity.[114] This triple rationale shows that the parental liability presumption has strong foundations.

5. Conclusion

It is difficult to define the legal notion of "presumption". On one level, a presumption is an inference – using a known fact to infer another fact. On another level, various types of logical leaps, shortcuts, automatisms, burden-shifting mechanisms and predispositions could also be described as "presumptions". At the extreme, assigning any relevance to any factor – drawing any conclusion,

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

109 Article 102 Guidance Paper, at footnote 19.

110 Article 102 Guidance Paper, at footnote 43.

111 T-6/89 *Enichem Anic*, ECLI:EU:T:1991:74, para. 201.

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

113 107/82 *AEG-Telefunken*, ECLI:EU:C:1983:293, para. 50.

114 C-521/09 P *Elf Aquitaine*, ECLI:EU:C:2011:620, paras. 59-60. See similarly C-501/11 P *Schindler*, ECLI:EU:C:2013:522, from para. 107.

making any logical connection – is also a presumption. In that understanding, any factor in any legal test entails an element of presumption.

Whatever their exact definition, presumptions are legal as a matter of ECHR law and EU law – even presumptions that are difficult to rebut. They do not unduly reverse the burden of proof or run counter to the presumption of innocence. Importantly, presumptions can work both ways: to the benefit of competition authorities/claimants or to the benefit of defendants.

Finally, presumptions are a widespread and useful device to save resources in circumstances where a particular fact can be inferred from common sense or from prior experience; or where a particular fact should be proven or disproven by the party which has better access to the relevant evidence ("proof proximity"); or where a particular fact should be presumed in order to increase enforcement effectiveness – usually to remedy the claimant's difficulties in gathering evidence.

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