

# TO PRESUME, OR NOT TO PRESUME: THAT IS THE QUESTION

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# THE ROLE OF PRESUMPTIONS

## OUTLINE OF PRESENTATION

- ◎ **ISSUE 1:** WHAT IS A PRESUMPTION?
- ◎ **ISSUE 2:** WHEN IS IT APPROPRIATE TO USE PRESUMPTIONS?
- ◎ **ISSUE 3:** WHEN IS IT INAPPROPRIATE TO USE PRESUMPTIONS?
- ◎ **ISSUE 4:** HOW CAN PRESUMPTIONS CHANGE OVER TIME?

# THE ROLE OF PRESUMPTIONS

## ISSUE 1: WHAT IS A PRESUMPTION?

- ◉ A PRESUMPTION DEEMS SOMETHING TO BE TRUE BECAUSE IT IS INHERENTLY LIKELY
- ◉ PRESUMPTIONS CAN BE CREATED BY LEGISLATION, GUIDELINES OR JUDGES
- ◉ PRESUMPTIONS CAN BE ADMINISTRATIVE, PROCEDURAL, FACTUAL OR LEGAL
- ◉ PRESUMPTIONS CAN BE CONCLUSIVE OR REBUTTABLE

# THE ROLE OF PRESUMPTIONS

## ISSUE 1: WHAT IS A PRESUMPTION?

- HOW DOES A PRESUMPTION DIFFER FROM:
  - AN ASSUMPTION?
  - AN ASSERTION?
  - A 'PER SE' RULE?
  - A BLOCK EXEMPTION?
  - COMMON SENSE?

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## ISSUE 2: WHEN IS IT APPROPRIATE TO USE PRESUMPTIONS?

- #1: WHEN THE PRESUMPTION REFLECTS AN INFERENCE THAT CAN NORMALLY BE DRAWN FROM THE EVIDENCE
  - DOMINANCE INFERRED FROM HIGH MARKET SHARES: *HOFFMANN-LA ROCHE*, 1979, PARA 41
  - SALES BELOW AVERAGE VARIABLE COSTS ARE PRESUMED TO BE ABUSIVE: *AKZO*, 1991, PARA 71
  - PARTICIPATE IN A CARTEL IF FIRM ATTENDS A MEETING WITH AN ANTI-COMPETITIVE AIM: *AALBORG PORTLAND*, 2000, PARA 81

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## ISSUE 2: WHEN IS IT APPROPRIATE TO USE PRESUMPTIONS?

- ◉ #2: WHEN THE PRESUMPTION REFLECTS THE LESSONS FROM EXPERIENCE AND MAINSTREAM ECONOMICS:
  - RESTRICTION OF COMPETITION BY OBJECT: EUROPEAN COMMISSION'S ARTICLE 101(3) GUIDELINES, PARA 21
  - PARENTAL LIABILITY: *GOLDMAN SACHS*, 2014, PARAS 44, 46

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## ISSUE 2: WHEN IS IT APPROPRIATE TO USE PRESUMPTIONS?

### ⦿ #3: WHEN THE PRESUMPTION IS BASED ON A “REVEALED PREFERENCE”; EG:

- “PAY FOR DELAY” AGREEMENTS BETWEEN COMPETITORS: *GENERICS*, 2020, PARA 87
- EXCHANGES OF COMMERCIALY SENSITIVE INFORMATION BETWEEN COMPETITORS: *DOLE*, 2015, PARA 134

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## ISSUE 3: WHEN IS IT INAPPROPRIATE TO USE PRESUMPTIONS?

- #1: WHEN IT IS NOT POSSIBLE TO MAKE A RELIABLE INFERENCE FROM A GIVEN SET OF FACTS
  - NO INFERENCE OF MARKET POWER BY EXCEEDING MARKET SHARE THRESHOLDS: PARA 21 OF HORIZONTAL MERGER GUIDELINES
  - MERE EFFECT OF REDUCING COMPETITIVE PRESSURE ON THE REMAINING COMPETITORS: *CK TELECOMS*, 2020, PARA 97

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## ISSUE 3: WHEN IS IT INAPPROPRIATE TO USE PRESUMPTIONS?

- #2: WHEN IT IS THOUGHT TO BE NECESSARY AND/OR DESIRABLE TO PROVE ACTUAL OR LIKELY HARM TO THE COMPETITIVE PROCESS
  - FORECLOSURE EFFECTS OF TYING WMP WITH WINDOWS: *MICROSOFT*, 2004, PARA 841

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## ISSUE 3: WHEN IS IT INAPPROPRIATE TO USE PRESUMPTIONS?

- #3: IRREBUTABLE PRESUMPTIONS SHOULD GENERALLY BE AVOIDED
  - THE STRICT APPROACH IN *HOFFMANN-LA ROCHE* TOWARDS EXCLUSIVITY REBATES FELT LIKE A PER SE RULE
  - THAT STRICT APPROACH WAS JETTISONED BY THE ‘CLARIFICATION’ IN *INTEL*, 2017, PARA 138
  - THE NEW APPROACH HAS SINCE BEEN APPLIED IN EG *QUALCOMM*, 2018

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## ISSUE 4: HOW CAN PRESUMPTIONS CHANGE?

- ◉ PRESUMPTIONS MAY BE EXTENDED TO NEW SCENARIOS: EG CONCEPT OF PUBLIC DISTANCING IN *ETURAS*, 2016
- ◉ PRESUMPTIONS MAY BE REFINED TO REFLECT NEW THINKING: EG MARKET SHARES AS A “USEFUL FIRST INDICATION” IN THE HORIZONTAL MERGER GUIDELINES, 2004, PARA 13

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## ISSUE 4: CAN NEW PRESUMPTIONS BE BORN?

### ◎ YES, THEY CAN:

- *EXPEDIA*, 2012, PARA 37: OBJECT RESTRICTIONS ARE PRESUMED TO BE APPRECIABLE
- *GENERICS*, 2020, PARA 93: TRANSFERS OF VALUE ARE SUFFICIENTLY LARGE TO ENCOURAGE A MANUFACTURER OF GENERIC MEDICINES NOT TO ENTER THE MARKET

# THE ROLE OF PRESUMPTIONS

## CONCLUSION

- ◎ THE **PROS OF PRESUMPTIONS** ARE ADMINISTRABILITY, A DEGREE OF LEGAL CERTAINTY, LOWER ENFORCEMENT COSTS, ALL GROUNDED IN FACTS OR EXPERIENCE
- ◎ THE **CONS OF PRESUMPTIONS** ARE REDUCED ACCURACY IN A PARTICULAR CASE AND A RISK OF FALSE POSITIVES IF THEY DO NOT HAVE EMPIRICAL SUPPORT

# ROLE OF PRESUMPTIONS

THANK YOU FOR YOUR ATTENTION!