

The use of presumptions in the application of Article 102 TFUE

Cani Fernández Vicién, President of the CNMC

*Konkurrensverket Seminar “Pros and Cons of Presumptions”
Friday, 6 November 2020 – Online*

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1. The burden of proof in EU Competition Law (I)

- ✓ **Case-law** (Case-law (Judgment of the Court of 17 December 1998, Case C-185/95 P, *Baustahlgewebe GmbH v Commission*):

“it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.”

- ✓ **Art. 2 Regulation 1/2003:**

“In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.”

1. The burden of proof in EU Competition Law (II)

**Optimal solution
to minimize type
I and type II
errors**

**Over-reliance
on
presumptions**

Presumptions Limits

- ✓ **Rebuttable under proportionate conditions**
- ✓ **Full respect of the rights of defence**

2. The Burden of Proof and Standard of Proof

- a. **Basic relation between burden of proof and standard of proof:**
 - ✓ **Authority** proves the participation of the undertaking in the anticompetitive practice;
 - ✓ **Undertaking** argues that the evidence used by Authority is not sufficient.

- b. In Competition Law, the **allocation of the burden of proof relates to the matter of the discharge**, which relates to the level of the proof required
 - ✓ The **stricter the standard of proof**, the **stricter the objective burden** of proof.

3. Presumptions in EU Competition Law: an Expansive Trend

- a. **Definition:** A presumption is the **inference that a fact exists** based on the existence of other known facts.

- b. **Use of presumptions** in EU competition law has become **common**:
 - ✓ Parent liability of the wholly owned subsidiary;
 - ✓ The “only plausible explanation” (concerted practices);
 - ✓ Participation of a firm in an anticompetitive conduct if it attended an anti-competitive meeting;
 - ✓ Continuous infringement...

- c. **Restrictions by object** are (almost) seen as **illegal *per se***, shifting court discussions from proof of infringement to determination of liability and the duration of the infringement.

- c. ECJ **Judgement in *Cartes Bancaires*** ends this trend: restrictions by object are a **presumption** that must be **applied in a restrictive way**.

4. Presumptions involving conducts prohibited by article 102 TFUE: the case for exclusivity rebates (I)

a. Conducts prohibited by Art. 102 TFUE based on presumptions: **From *Hoffman-La Roche***

- ✓ *an undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request (...) abuses its dominant position (...).*
- ✓ *obligations of this kind (...) are incompatible (...) because - unless there are exceptional circumstances which may make an agreement between undertakings in the context (...) permissible - they are not based on an economic transaction which justifies this burden or benefit*



4. Presumptions involving conducts prohibited by article 102 TFUE: the case for exclusivity rebates (II)

b. Conducts prohibited by Art. 102 TFUE based on presumptions: ... To Intel

*“the judgment under appeal seems to adopt the **starting point** that an ‘exclusivity rebate’, when offered by a dominant undertaking, **can under no circumstances have beneficial effects on competition**. That is because, according to the General Court, competition is restricted by the mere existence of a dominant position itself. AG Wahl Opinion C-413/15P, para. 87*

- ✓ The **formalistic approach** on exclusivity rebates led to a **“per se” abuse**, but, following Cartes Bancaires and GlaxoSmithKline, **legal and economic context and circumstances need to be examined**



Rebuttable Presumption of Illegality, but



HOW TO REBUT THIS PRESUMPTION?

5. How to rebut presumptions in EU Competition Law: The Intel Case (I)

a. Objective Justification (rare animal)

- ✓ Case by case analysis and may apply only in exceptional circumstances. *United Brands, AstraZeneca*

b. Efficiency defence (unicorn)

- ✓ Almost never accepted when “by object” restriction (Article 102 Guidance Paper, para. 30 and *Post Danmark* – probably merely hypothetical)

5. How to rebut presumptions in EU Competition Law: The Intel Case (II)

c. No exclusionary effect on competitors “as efficient” as dominant Company (para. 140 Intel)

- ✓ *The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates (...), may be **objectively justified**. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer (...). That balancing (...) can be carried out in the Commission’s decision only after an analysis of **the intrinsic capacity** of that practice to **foreclose competitors which are at least as efficient as the dominant undertaking**.*

5. How to rebut presumptions in EU Competition Law: The Intel Case (III)

Intermediate defence: if there are no exclusionary effects on AEC conduct can be justified without the need of an efficiency defence and without an objective justification → **“AEC” Test.**

Burden of proof shifts,



competition authority
must substantiate that
the **company conducted**
a strategy destined to
exclude “equally efficient
competitors”.

6. Article 102 TFUE Presumptions after Intel (I)

- a. **Advocate General Wahl** suggested a high probability threshold: conduct should “**in all likelihood**” produce anti-competitive effects.
- b. **ECJ followed a more conservative approach**: it must only be shown that **foreclosure is sufficiently likely**.
- c. **In my view**, Intel envisaged a **new approach to the fourth limb** of the efficiencies defence:
 - ✓ High standard verification of efficiencies;
 - ✓ Specificity and indispensability criterion;
 - ✓ Pass on to consumers;
 - ✓ **And fourth limb: “elimination of all actual and potential competition by competitors as efficient as the dominant company”**

6. Article 102 TFUE Presumptions after Intel (II)

Some new interesting judgements after Intel:

- ✓ **C-525/16 MEO (April 2018):** not every disadvantage resulting from the behaviour of a dominant firm amounts to an **anticompetitive effect** (...) – competition authority **must consider all the circumstances of the case, including the possible existence of a strategy aiming to exclude** from the market a **competitor as efficient** as the dominant company (para. 31);
- ✓ **T-691/14, Servier and others (December 2018):** the EU judicature is **required to examine all the arguments** (...) concerning that test and “it is clearly legitimate for the Commission to refer to **subjective factors**” (para. 194);
- ✓ **C-307/18, Generics (January 2020):** **pro-competitive effects** of an agreement ‘**must (...) be duly taken into account** for the purpose of its characterisation as a “restriction by object”’ (para. 103); **taking into consideration of, inter alia, the efficiency gains** of the practices concerned **cannot depend on the objectives that may have been pursued** by the party engaged in those practices (para. 168)

7. Conclusions

Presumptions **HAVE** to be rebuttable in a proportionate fashion

- ✓ **Rights of defence** would be devoid of substance;
- ✓ Principle of **presumption of innocence** would be ignored; and,
- ✓ Competition enforcement would be costly in terms of welfare: **increase of type 1 errors.**