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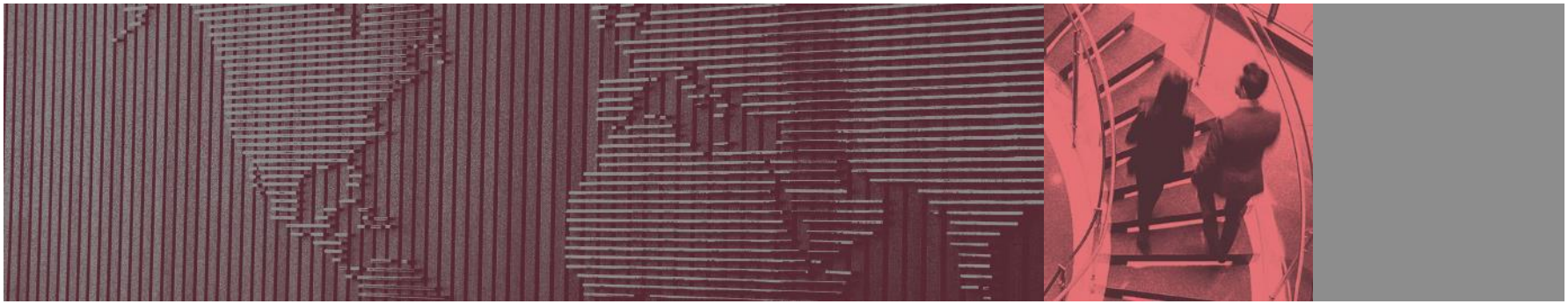
The use of presumptions and burdens of proof in Competition Law Cases



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1. Rules on the burden of proof in EU Competition Law (I)

- Regulation
  - 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. Rules on the burden of proof in EU Competition Law (II)

- Relation between burden of proof and standard of proof:
  - Competition Authority shall prove the participation of the undertaking in the anticompetitive practice.
  - The undertaking shall argue that the evidence used by the Competition Authority is not sufficient.
- Differences between burden of persuasion (objetive burden of proof) and evidential burden (subjective burden of proof):
  - The stricter the standard of proof, the stricter the objetive burden of proof.

2. Presumptions in Competition Law

- A presumption is the inference that a fact exists based on the existance of other known facts.
- General use of presumptions in Competition Law. For instance:
    - Parental liability.
    - Only plausible explanation (concerted practices).
    - A firm has participated in the agreement or concerted practice if it atended an anticompetitive meeting.
- Presumptions may work in favor of competition authorities/claimants or of defendants.
- Expansive trend of the use of presumptions in Competition Law.

3. Presumptions in Competition Law: Expansive trend

- Conducts prohibited by Art. 101 TFUE based on presumptions:
    - Restrictions by object such as cartels.
    - Single and continuous infringements.
- Trend: restrictions by object seen (almost) as ilegal *per se*.
- *Groupement des cartes bancaires* judgment (C-67/13) ends this trend. Restrictions by object are a presumption that must be applied in a restrictive way.

3. Presumptions in Competition Law: Expansive trend

- Conducts prohibited by Art. 102 TFUE based on presumptions:
    - Exclusivity rebates: From *Hoffmann-La Roche* 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. That viewpoint amounts to negating the possibility, already accepted in Hoffmann-La Roche, and reiterated in the judgment under appeal, of invoking an objective (pro-competitive) justification for the use of the rebates in question."

AG Wahl Opinion in Intel (Case C-413/14 P, Para. 87)

4. How to rebut presumptions? (I)

The General Court *"created a 'super category' of rebates for which consideration of all the circumstances is not required in order to conclude that the impugned conduct amounts to an abuse of dominance contrary to Article 102 TFEU. More importantly, the abusiveness of such rebates is assumed in the abstract, based purely on their form."*

AG Wahl Opinion in Intel (Case C-413/14 P, Para. 84)

- The GC in *Intel* had adopted a very formalistic approach to exclusivity rebates by a dominant firm, which in practice was closer to a *per se* abuse than a by object restriction.
- Always: context & circumstances (CJEU in *Cartes Bancaires,* C-67/13*; GlaxoSmithKline,* C-501/06 P) – It was an important part of Intel's appeal before the CJEU.
- AG Wahl and the CJEU: There is no *per se* rule under Art. 102, but a *rebuttable presumption of illegality*.
- Therefore the question remains: how to rebut this presumption?

4. How to rebut presumptions? (II)

- Different ways to rebut a presumption:

  A) Objective justification.

  - What could be an objective justification? There is no clear theoretical definition.
  - Only in exceptional circumstances.
  - Examples:
    - Protection of comercial interests (*United Brands v Commission, Case 27/76, Para. 189*).

      "an undertaking [..] in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be concerned the right to take such reasonable steps as it deems appropriate to protect its said interests".

    - Similar in *AstraZeneca v Commission, C-457/10 P, Para. 129*):

      "strategy whose object it is to minimise the erosion of its sales and to enable it to deal with competition from generic products is legitimate and is part of the normal competitive process".

4. How to rebut presumptions? (III)

B) Efficiency defense

- Very difficult to prove.
- Case *GlaxoSmithKline v Commission* (Case C-501/06 P): Same methodology for 102 with no 102.3?
- The Guidance Paper approach and the 4th limb

But, para. 140 Intel (C-413/14P):

> *In addition, it has to be determined whether 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*

And (para. 140…) the analysis on the favorable and unfavorable effects can be carried out…

…"*only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking*" **IS THIS A THIRD –IN-BETWEEN- WAY?**

5. Intel and the As Efficient Competitor (AEC) Test

- Even if there is not objective justification, if the company can show that the conduct had no exclusionary effects, it can be justified without an efficiency defense. Need to prove that the practice had:
    - *"intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking"* (Para. 140, *Intel*)
- This is done through an AEC Test (Price-Cost Test).
- The Commission must substantiate that the company conducted an strategy destined to push out at least equally efficient competitors (Para. 139, *Intel*) (i.e. conduct its own AEC test)…
    - …and the GC has the obligation to review it.
- Therefore, the AEC Test is placed between the objective justification and the efficiency defense.

6. Interplay between burden and standard of proof

High probability that a fact is true in all or almost all cases

Such fact is presumed by the Authority

Shift of the burden of adducing evidence

The company must rebut such presumption

- The standard of proof will determine if the undertaking has or has not been able to rebut the presumption.
- No clear guidance in Art. 102: Case by case analysis.
    - Likelihood of the conduct to produce anticompetitive effects (Post Danmark II)
    - A concrete effect on the markets concerned (*British Airways*)
    - Actual effect (*Michelin*)
- *Intel*: Debate on the notions of *capability* and *likelihood*
    - AG Wahl: Equivalent concepts.
    - CJEU Judgment: No clarification.

7. Final remarks

- Expanding trend on the use of presumptions and continuous resort to *by object* infringements (presumption of effects).
- Before: Very formalist analysis → Tendency: analysis based on context.
- No *per se* rule (even under Art. 102).
- *Intel* has reviewed the analysis established in *Hoffmann-La Roche*.
- Even though there are still doubts regarding the practical implications of *Intel,* this case has opened a door as to the rebuttability of the presumption.
    - What will happen next?