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Presume at Your Peril: Do New Antitrust Proposals Introduce New Risks?

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Legal presumptions play an important role in competition enforcement. They can translate decades of judicial experience and economic learning into workable, practical tools for efficient enforcement of the competition laws and provide predictability and clarity to companies seeking to comply with those laws. In the past few years, presumptions have been increasingly introduced to streamline enforcement efforts. But we are now seeing new presumptions, particularly with respect to the digital economy or to platform companies, that are not based on well-established legal and economic precedent but are designed as an enforcement expediency. As we explore, these can easily become an enemy to both competition on the merits and competition law enforcement.

The introduction of legal presumptions in competition law has been justified in two main ways. The main justification is the "*experience rationale*," which uses a presumption as a type of shorthand for significant past experience. In this manner, the presumption is shaped by past legal precedent or past economic and empirical evidence focused on the known effects of certain well-defined conduct. The simplest example is the irrebuttable presumption that price fixing equates to competitive harm. A second, lesser justification relies on the principle of judicial economy, which offers presumptions as necessary to conserve and spread sparse enforcement resources. This justification rarely applies to irrebuttable presumptions, as those exist due to the legal logic that the mere existence of the act is proscribed. For this reason, the judicial economy justification is more often related to rebuttable presumptions. These justifications are not mutually exclusive; a presumption may rely on more than one justification.

Some recent proposals, however, discard these established justifications in favor of creating legal presumptions from whole cloth. Supporters of these proposals argue that these "*new*" presumptions are necessary to contend with rapidly changing digital markets (the "*fast-moving market*" justification) or to properly combat the potential influence of large, dominant companies (the "*platform*" or "*ecosystem*" justification).

While these at best could be seen as offshoots of the judicial economy rationale, they lack the critical foundation of factual and economic experience upon which well-functioning presumptions are built. As a result, they often expose enforcers and companies to significant risks. These risks include unpredictable and arbitrary enforcement, chilling investment and risk-taking in new innovation and extrajudicial interpretation of the law. As examples, we review certain recent proposals in Europe, the United States, Canada, and India.

In **Italy**, the Annual Law for the Market and Competition (Law No. 118/2022) introduces a significant new presumption related to economic dependence for companies that rely on digital platforms to reach their customers. The law presumes economic dependence exists when a company uses, shifting the burden of proof to the platform to disprove the company's dependence. Notably, the application of the presumption of economic dependence under the Annual Law was recently challenged in court, with the result that an interim measure order imposed by the Italian competition authority was overruled. The court's decision emphasized that the presumption is "expressly rebuttable."

By reversing the burden of proof, the Italian law introduces a significant, likely overwhelming, evidentiary hurdle. Platforms must now prove a negative – a lack of dependence – by identifying and suggesting alternative options for companies deemed dependent. This creates a "*proof proximity*" issue, as platforms are required to blindly evaluate alternatives available to the customer and explain why they are sufficient, even though they are not the entities that would actually use or rely upon them. Critically, this law may also discourage platforms from innovating to attract new users. Since unique features might make it more difficult for a platform to show that a customer is not "*reliant*" on the platform, companies may be reluctant to invest in innovation for fear of increasing the risk of findings of economic dependence.

Issues of evidentiary burden are also present in the 2023 U.S. *Merger Guidelines* and the United Kingdom's Digital Markets, Competition, and Consumers Bill (DMCC), which both utilize presumptions as relate to mergers. In the **U.S.**, the revised *Merger Guidelines* state that a merger that creates a firm with a share over 30% and an HHI increase of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly. While the *Guidelines* lack the binding authority of a judicially created presumption, they carry significant influence over judicial decision-making.

While the initial public draft of the *Guidelines* was ambiguous about rebuttal evidence, the final version—perhaps in response to hundreds of public comments on the topic—explicitly states that presumptions of illegality can be rebutted or disproved. However, those seeking specifics are in for a lengthy search: the *Guidelines* state that "[the] *higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it*." But it provides no detail about what types of evidence may suffice (U.S. Merger Guidelines, at 6).

Public statements by one U.S. agency suggest any rebuttal evidence is likely to be met with skepticism in some corners. For example, former Federal Trade Commission Chair Lina Khan has noted that efficiency "*doesn't appear anywhere in the antitrust statutes*," downplaying the potential persuasiveness of efficiency evidence despite its judicial recognition and history of relevance in U.S. antitrust enforcement (*see, e.g.*, Federal Trade Comm'n v. University Health, 938 F.2d 1206 (11th Cir. 1991)). This raises serious questions about whether companies seeking to rebut a merger presumption will find a receptive and objective decisionmaker, which in turn suggests that this "*rebuttable*" presumption may be anything but. Similar skepticism can be found in the 2021 joint statement from the UK Competition & Markets Authority, Australian Competition & Consumer Commission, and the *Bundeskartellamt*. This is particularly hazardous in administrative jurisdictions, *i.e.*, where the competition authority itself takes the initial decision. It also suggests that even a merger with minimal prospects of competitive harm, but overwhelming demonstrable efficiencies might be shot down.

The Canadian Competition Act similarly introduced a structural presumption for mergers. The presumption, which took effect in 2024, establishes a combined market share threshold of 30%, above which a merger is presumed to substantially lessen competition. The new presumption marked a significant reversal: the original Act, passed in 1986, provided that a merger could not be found to substantially lessen competition solely on the basis of market share. As evidenced by its (unsurprising) similarity to the U.S. *Merger Guidelines* and the UK's DMCC, discussed immediately below, this shift towards a more structural approach to merger analysis as adopted by a few other jurisdictions. Unlike the U.S. *Guidelines*, the amended Canadian Competition Act identifies bases for rebuttal, such as the presence of acceptable substitutes, low barriers to entry, and the level of remaining competition (*see* § 93). But this law, unlike the U.S. *Guidelines*, does not just reflect agency enforcement intention, it has immediate force of law.

The **UK**'s DMCC combines elements from both the Italian law and the U.S. *Merger Guidelines*, introducing a presumption of market power for firms with a 30% share while imposing a reverse burden of proof on companies designated as having "*strategic market status*" (SMS). Under the law, SMS firms are presumed to be dominant and must prove that their actions, such as self-preferencing, are not harmful to competition. This reverse burden compels SMS firms to justify their practices without clear guidance on what evidence will be deemed sufficient. Moreover, the triple burden imposed by the DMCC—overcoming the presumption of dominance, overcoming the presumption of harm from certain equivocal actions, and the proof proximity problem—effectively converts this into a strict legal prohibition.

The DMCC also imposes an obligation for companies to ensure interoperability. This further increases the regulatory burden on SMS firms and disrupts market dynamics—likely to the advantage of certain competitors. Interoperability requirements can also pose other risks, such as access to sensitive user data. The law's presumption that self-preferencing by an SMS firm is inherently harmful discourages SMS firms from developing innovative features that might advance their own products or services, whether at the expense of competitors *or not*.

As with the Italian law discussed above, this could have a dampening effect on long-term innovation, as companies may avoid introducing new offerings that benefit consumers due to the risk of violating the presumption. In other words, why would a company invest in developing something better when they cannot promote or position it any better than the *worst* product in the market? Rather, this could lead to an economic incentive to mimic other products and free ride off others' investments, *i.e.*, uniformity and stagnation. Which then, of course, incentivizes less investment across the market and a tendency toward tacit collusion.

Deterring anticompetitive conduct without discouraging investment or encroaching on legitimate business conduct is a challenging line to walk. The **European Commission**'s 2024 Draft Guidelines on Article 102 TFEU mark a significant shift in its approach to dominant firm conduct. While the Commission's prior Guidance (issued in 2008) was focused on assessing the economic effects of potentially abusive behavior, the Draft Guidelines heavily utilize presumptions. Five specific types of conduct – exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeezes with negative spreads, and certain tying arrangements – all are presumed to be exclusionary, without an extensive experiential development in the law to justify such a shift (Draft Guidelines, at 60).

This rampant recent reliance on presumptions raises several concerns. First, the lack of clear definition for these presumed exclusionary practices can lead to unpredictable enforcement, especially when the Guidelines will be further interpreted by the Commission and EU Member State competition authorities in their enforcement efforts. Businesses will be unsure whether their innovative conduct will be interpreted to fall under the presumption, creating uncertainty about their antitrust exposure and deterring investment. Second, the presumption itself may be overly rigid. Firms often engage in practices with similar characteristics, some of which are competitively beneficial and some of which are harmful. Presuming harm without any analysis of the specific market dynamics throws out the baby with the bathwater. Third, where is the lengthy course of experience required to justify such sweeping presumptions? Normally that history is established by court precedent which ordains such practices as reliably and nearly always anticompetitive. That record is lacking.

While the aim of the EC's Draft Guidelines may be to streamline enforcement and deter anticompetitive behavior, a more balanced approach is necessary (*see also* comments from Berkeley Research Group and the European Competition Lawyers Forum). Except for a few unequivocal practices, courts long ago dismissed the notion that competition lends itself to bright line rules. Retaining a focus on economic effects and market-specific evidence (and, in contrast to the U.S. and UK approaches, *specifying* the types of evidence that would be sufficient) would ensure that the Commission's interventions promote fair competition without hindering legitimate business practices. The OECD Secretariat proposed such a balance, concluding that a "*well-rounded enforcement strategy*" ideally integrates structural analysis (as an "*initial filter*") followed by in-depth economic analysis.

Recent amendments to **India**'s Competition (Amendment) Act have also introduced similarly hard-to-justify changes to prior practice. Specifically, the Act now provides for a presumption of an Appreciable Adverse Effect on Competition (AAEC) against participants in an agreement even if they are not engaged in identical or similar trades. This broadens the scope of the Competition Act, empowering the Competition Commission of India (CCI) to interfere with a wider range of agreements in digital markets.

But at least this new presumption acknowledges that digital markets can be complex and interconnected, aiming to introduce flexibility in examining agreements that may cross traditional market boundaries. By contrast, the UK's DMCC and other proposals that outline presumptions based on a very specific set of behaviors (e.g., self-preferencing) run headlong into the problem of future-proofing. Everyone acknowledges that the digital landscape evolves quickly, marked by rapid advancements and the constant emergence of new business models and there is good evidence that innovation produces far greater benefits than static efficiencies. Regulations anchored in rigid, behavior-specific presumptions may quickly become outdated, limiting their effectiveness in addressing unforeseen competitive dynamics. Moreover, laws and regulations designed to indiscriminately limit the behavior of large players do so broadly, to both their anticompetitive conduct and their innovative conduct. Without a flexible, robust analytical framework that enables authorities to critically evaluate novel practices, regulators risk stifling development and being ill-equipped to respond to future developments. A reliance on narrowly tailored presumptions, rather than on adaptable analytical tools, could impede authorities' ability to assess and respond to the complexities of an increasingly dynamic digital market – the very thing they purportedly are trying to do with many of these new laws.

However, the broad framework set out in the Amendment to the Indian Competition Act provides little clarity to companies trying to figure out whether their business arrangements could run afoul of CCI scrutiny. This problem could be softened, though not entirely fixed, by requiring that enforcement actions taken under this new presumption be publicly explained in writing. This would both provide guidance to companies and promote transparency and trust in enforcement.

Presumptions in competition enforcement are double-edged swords. While they offer practical tools for regulators to address complex market dynamics, they can also lead to overreach and unintended consequences when they are applied without the proper foundation of experience and evidence. Thus, presumptions should only be employed where there is a high probability or certainty of anticompetitive harm from specific conduct; otherwise, their use may result in more harm than good. As more jurisdictions consider the use of presumptions to regulate the technology sector, the focus should be on creating frameworks that allow for flexibility, anticipate the evolving nature of digital markets, and maintain appropriate review procedures. By striking this balance, regulators can sidestep the common perils of presumptions and ensure that their tools remain relevant, effective, and fair in an ever-changing market landscape.

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