Legal presumptions in abuse regulation: (where) do EU and U.S. antitrust approaches meet?

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1. Introduction

Although abuse regulation is at the heart of both legal orders, U.S. antitrust law and EU competition law address abusive anticompetitive behaviour in seemingly very different ways. Whilst Article 102 of the Treaty on the Functioning of the European Union prohibits *abusive behaviour* by a *dominant* economic operator[2], Section 2 of the 1890 Sherman Act considers every person *monopolizing* or *attempting to monopolize* part of trade or commerce to be *guilty of a felony* for which criminal sanctions can be imposed.[3] Differently formulated provisions – applied by differently structured enforcement authorities[4] and judges[5]– resulted in two distinct legal regimes that show some family resemblances, but simultaneously also attest to rather fundamental differences.[6]

Beyond the surface of differentiation however, antitrust authorities and courts in both legal orders have structured the identification and assessment of abuses in a very comparable fashion. More specifically, it would seem that similarly structured *legal presumptions* accompanying the application and enforcement of the abovementioned rules have been developed on both sides of the Atlantic. Those legal presumptions serve to determine – both in general and in relation to specific types of behaviour – the playing field for enforcement authorities and for market operators. As such, dominance or monopolisation will be presumed when specific market share thresholds in a predefined market have been reached or when certain elements pointing at abusive or monopolising behaviour can be proven. At the same

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[2] Article 102 TFEU reads as follows: 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'.

[3] Section 2 of the Sherman Act (15 U.S. Code §2) reads as follows: 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court'.

[4] On the institutional structure of U.S. antitrust enforcement, see D. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford, Oxford University Press 2011), from 27-48. For a general overview in the European Union, see P. Van Cleynenbreugel, *Market supervision in the European Union. Integrated administration in constitutional context* (Leiden/Boston, Brill, 2014), 13-34.

[5] On the different roles of courts in antitrust enforcement on both sides of the Atlantic, R. D. Kelemen, *Eurolegalism. The transformation of law and regulation in the European Union* (Cambridge, Harvard University Press, 2011), 143-194.

[6] On those differences in general, D. Gifford and R. Kudrle, *The Atlantic Divide in Antitrust. US and EU Competition Policy*, (Chicago, University of Chicago Press, 2014), 304 pp.

time, persons suspected of abusive behaviour or of monopolisation can refute those presumptions by offering objective or reasonable justifications for their behaviour.

Despite the consistent use of legal presumptions to facilitate the detection and enforcement of abusive market behaviour, the scope, use and role of such presumptions have most recently come under increasingly contested scrutiny. As a result, both EU and U.S. enforcement authorities and courts have been invited to reinvestigate and reconfigure the role and scope presumptions play in their enforcement schemes.

This paper seeks to make sense of the existence of such presumptions and their potential with a view to contributing to debates on a more coordinated or structured enforcement of abuse regulation provisions on a global scale. With that purpose, it compares the setup and role of legal presumptions of dominance/monopolisation and of abusive behaviour as benchmarks for antitrust enforcement in both EU and U.S. law. Section two of the paper identifies and distinguishes two different categories of legal presumptions (*substantive law* and *evidentiary* presumptions). General policy and case law evolutions allow to infer that both legal systems seemingly attest to a move away from substantive law presumptions in favour of evidentiary presumptions. In the U.S., the latter kind of presumptions are also even more limited in scope and scale. Section three will summarily address those evolutions in relation to both legal orders. Section four questions to what extent a reliance on different types of legal presumptions in both legal orders could provide fertile ground for convergence amongst EU and U.S. abuse practices and whether the development of effectively converging legal presumptions actually offers a way forward for emerging and more established competition law jurisdictions across the globe.

2. Legal presumptions as tools for the enforcement of abusive behaviour

Legal presumptions play a facilitating role in any enforcement system relying heavily on findings of fact supporting the classification of behaviour as prohibited by law (2.1.). From the point of view of relevance for abuse regulation, two different types of legal presumptions can be distinguished. On the one hand, substantive law presumptions allow enforcement authorities to *assume* – as a matter of law – the presence of *constituent elements pointing towards* an infringement of a legal norm (2.1.1.). On the other hand, evidentiary presumptions facilitate the *inference of evidentiary conclusions* from otherwise less conclusive behaviour. Those presumptions allow to *presume* – as a matter of fact – the meeting of a certain standard of proof and its resulting legal consequences (2.1.2.). It goes without saying that both types of presumptions favour a different enforcement scheme for the assessment of potentially abusive behaviour and therefore *prima facie* offer insight into how abuse regulation has been structured in those legal orders (2.2.).

2.1. Legal presumptions: where do they fit in the frameworks of evidence?

Within the framework of the law on evidence, presumptions have been listed consistently as tools to facilitate the conduct of a process of classifying facts into legal categories and as a

means swiftly to resolve pending disputes between parties.[7] Colloquially, a presumption is a an *act of accepting that something is true until it is proved not true*[8]; a *legal* presumption refers to the inscription of such act of accepting in a legal instrument (statute, regulatory practice or precedent case). As a result, as a matter of law, it will be accepted that certain facts are true, unless one proves up to a certain legal standard that those facts are not correct in the specific case at hand.[9]

Legal presumptions directly affect the *standard of proof* and the legal tests that need to be fulfilled in order for a certain kind of behaviour to be deemed present. Whereas, in general, the party claiming something has to prove its claim to a sufficient legal standard – *actori incumbit probatio* – presumptions have the effect of allowing such party to infer the proof of its claim from the presence of 'shortcut' elements. Those shortcut elements are then to be considered as sufficient indications of the presence of illegal or potentially illegal behaviour. In competition law, such shortcuts would point towards a presumption of harmful or anticompetitive intent on the part of businesses or to the presumptive existence of anticompetitive effects. In both instances, adducing proof that could trigger the presumption thus suffices to infer anticompetitive intent or *prima facie* anticompetitive effects. From an enforcement perspective, this obviously means that authorities or private claimants can easily focus on triggering the application of the presumptions rather to meet the standard of proof required to find an infringement of competition rules. As such, those presumptions facilitate the task of detecting, addressing and ending infringements in specific case situations[10], without full evidence of illegal behaviour having to be adduced.

The adoption or recognition of legal presumptions may additionally also alter the *burden of proof* for either enforcement authorities or defendant parties. To the extent that constituent elements triggering the legal presumption have been proven, enforcement authorites will be deemed to have adduced, to a sufficient legal standard, proof that specific behaviour was engaged in. The defendant party then has the burden of proving that the presumption cannot apply to the specific factual situation, by virtue of being rebutted or inapplicable. As such, reliance on presumptions generally has the effect of shifting the legal burden of proof from the claimant/enforcement authority to the defendant party. Such effects may be inscribed in law itself, as a legal consequence of the presumption at hand, or may factually follow from the application of the presumption in itself.[11] In the latter case, the burden of proof is not formally shifted, but the type of evidence to be adduced by either party will be centred around the scope and extent of the presumption at play in the specific case.

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[7] A.E. Bernardo, E. Talley and I. Welch, 'A Theory of Legal Presumptions', 16 *Journal of Law, Economics and Organization* (2000), 2.

[8] A presumption is defined as 'a legal inference that must be made in light of certain facts. Most presumptions are rebuttable, meaning that they are rejected if proven to be false or at least thrown into sufficient doubt by the evidence. Other presumptions are conclusive, meaning that they must be accepted to be true without any opportunity for rebuttal', https://www.law.cornell.edu/wex/presumption.

[9] P. Ibáñez Colomo, '*Intel* and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy', *LSE Law, Society and Economy Working Paper 29/2014*, 15.

[10] D. Bailey, 'Presumptions in EU Competition Law', 31 *European Competition Law Review* (2010), 362.

[11] F. Castillo de la Torre, 'Evidence, Proof and Judicial Review in Cartel Cases', 32 *World Competition* (2009), 516.

In rules and principles on evidence, a familiar distinction is made between conclusive and rebuttable presumptions. A conclusive presumption means that the opposing or defendant party cannot rebut – through factual evidence – the claim made by the enforcement authority in a specific situation. The probability of evidence in a particular case suffices in that situation to *assume* – without any further proof needed and opportunity to rebut such proof – that prohibited behaviour may be at stake.[12] Assumptions refer to instances in which something is deemed to be the case without proof of this actually being so.[13] In that situation, it can be inferred that certain behaviour is in order, without claims as to the probable nature of that claim having to be adduced. A rebuttable presumption operates in a slightly different fashion. In that situation, the offering of probable evidence triggers the presumption that either illicit behaviour can be assumed or that sufficient evidence to hint at illicit practices is present. Rebutting such assumptions is cumbersome. In case of rebutting a presumed assumption, the defendant party can subsequently rebut such evidence, by proving – to a sufficient standard – that the assumption cannot come into play by virtue of countervailing factors that actually offer proof to the contrary, resulting in the assumption's application being rendered impossible. To the extent that the law allows to assume certain elements to be in place, defendant parties will most likely have to prove that in no circumstances whatsoever, the assumption could hold in this case. This is a complete reversal of the burden of proof, which, if allowed, will hardly be successful since the defendant party has to exclude all potential of the assumption to come into play. A presumption not incorporating any assumption as to certain behaviour operates in a completely different fashion. Such presumptions point towards situations where conclusions can be inferred on the basis of probabilities reflected in certain evidence.[14] Proof to the contrary could be adduced, most likely by the opposing party, following the application of the presumption. In case evidentiary materials are to be rebutted, the defendant or opposing party can suffice in claiming that evidence to the contrary can convincingly be offered, rebutting the presumption of evidence *à charge* with evidence *à décharge*.

The conclusive-rebuttable and assumption-presumption dichotomies grow even more complicated when comparing the use of presumptions with either legal tests developed by enforcement authorities and courts or evidentiary rules and principles accompanying those tests.[15] In the latter situation, enforcement authorities or courts have developed or sanctioned legal tests which, upon compliance, result in proof that certain behaviour is anticompetitive. As *Volpin* recently correctly pointed out, compliance with those tests differs from the operations of legal presumptions. According to the author, '[i]n such a situation, no presumption is applied: it is only the nature of the evidence available (circumstantial, instead of direct) which compels the court to adopt a contextual approach to evidence, evaluating at the same time the elements offered by the competition authority and those produced by the

[12] See on such 'assumptions', A. L. Sibony, *Le juge et le raisonnement économique en droit de la concurrence*, (Paris, LGDJ, 2008), 535.
[13] For an interesting focus on the assumption – presumption distinction as a distinction between rules and standards, P. Ibáñez Colomo, note 9, 14.
[14] D. Bailey, note 10, 363.
[15] C. Volpin, '*The ball is in your Court*: evidential burden of proof and the proof-proximity principle in EU competition law', 51 *Common Market Law Review* (2014), 1163.

undertaking in order to dismantle the evidentiary framework built by the former'.[16] When acting on the basis of presumptions, the Court will on the other hand have to look only at the evidence adduced by the defending party, or may even choose to neglect such evidence if it opts to act on the basis of an assumption that anticompetitive behaviour is in place in a conclusive way. In such a situation, the Court's attention as to the evidence offered or adduced will focus more naturally on the party seeking to rebut the presumption or exclude the assumption underlying that presumption. Presumptions are legal instruments that help to tilt the balance in this regard. They can thus be part of the evidentiary process, although the evidentiary process and the balance between claimant-defendant can also operate in the absence of legal presumptions.

In light of the abovementioned dichotomies and discussions, the concept of legal presumptions deserves to be qualified further for the purposes of the analysis undertaken in the following parts of this paper. I would therefore propose the following working definition. Presumptions are *instruments enshrined in or sanctioned by law with the aim of abridging or shortcutting the legal classification, fact-finding or evidentiary processes*, aimed at either triggering the operation of legal assumptions or of facilitating the evidentiary case file to be built up by one of the parties concerned. In order to explore the prevalence and use of legal presumptions in abuse regulation – predominantly tailored to the EU and the U.S. – I would like to make a distinction between two major categories of such presumptions: substantive law presumptions and evidentiary presumptions. The following sections will develop this distinction and the key features of both categories as an inroad into exploring the prevalence of legal presumptions in EU and U.S. abuse regulation.

2.1.1. Substantive law presumptions: behavioural assumptions and *(quasi-) per se rules*

The first category of legal presumptions comprise so-called *substantive law* presumptions. This category encapsulates all presumptions allowing enforcement authorities to classify certain sets of behaviour almost automatically as anticompetitive. The mere presence of a specific business practice engaged in by a dominant market operator could be sufficient to trigger a prohibition and appropriate enforcement actions. Substantive law itself incorporates those presumptions as abridged elements of proof allowing the prohibitions to come into play rather easily. Applying those presumptions, enforcement authorities and courts can *assume* a specific kind of behaviour to be in place and act as if it was in place. The operation of the presumption thus results in the application, as a matter of law, of the assumption that certain behaviour is anticompetitive or that businesses had an anticompetitive intent when engaging in specific practices. Clear examples in this regard are the classical U.S. cases accepting that an excessively large market share (90%) in a relevant market presupposes anticompetitive intent and therefore results in monopolisation.[17] Likewise, the presumption that pricing below average variable costs reflects anticompetitive intent of a dominant undertaking in EU law relies on the assumption that selling at a loss below a specific threshold is conclusively

[16] C. Volpin, note 15, 1163.
[17] *United States v. Alcoa*, 148 F.2d 416 (2nd Circuit Court of Appeals, 1945), at 424.

anticompetitive.[18] In *Intel*, the General Court of the European Union equally presumed specific rebates or discounts to reflect an assumption of anticompetitive intent.[19]

Substantive law presumptions allow enforcement authorities and courts to infer – as a matter of law – the anticompetitive nature of certain forms and formats of market behaviour. As such, those presumptions are essentially form-based: behaviour manifested in specific formats or constellations will be deemed anticompetitive, whereas behaviour falling outside those formats will not. I call this form-based category 'substantive law' presumptions since the law – either in the format of statutory provisions, judicial proclamations or regulatory guidance – itself reflects a presumption that specific forms of behaviour reflect anticompetitive intent or effects, without enforcement authorities having to demonstrate such intent or effects.

In practice, substantive law presumptions rely on implicit convictions or assumptions as to whether such behaviour – absent any evidence – is indeed anticompetitive, which are translated into legal presumptions. Those presumptions are either conclusive – as is the predatory pricing presumption for prices charged below average variable cost – or indirectly rebuttable, by demonstrating that one's behaviour was objectively justified in the light of the circumstances of the case. In U.S. law, *per se* prohibitions fit this category: certain forms of behaviour are deemed anticompetitive, and no justification can be adduced in this respect. Falling in the scope of such prohibition results in the application of a conclusive presumption that anticompetitive intent or effects are to be assumed.[20] In EU law, certain formats of behaviour engaged in by a dominant undertaking are assumed to be abusive. At the same time however, objective justifications could still be relied on theoretically in order to escape from the prohibition. The fact, however, that it will be assumed that anticompetitive intent or effects are in place, makes it difficult to rebut a finding of abusive behaviour which is deemed to be proven in the absence of proof. No judicial precedents exist in that regard. As such, the presumptions give shape to 'quasi'-per se abuses enshrined in EU competition law.[21]

2.1.2. Evidentiary presumptions: effects-focused shortcuts and standardised enforcement tests

The second category of legal presumptions underlying abuse regulation comprises evidentiary presumptions. Those presumptions do not directly allow to infer specific behaviour as a matter of law. They rather support and structure factual claims made and reflect the standard with which those facts have to be proven. To the extent that a set facts can be adduced hinting at the presence of potentially anticompetitive behaviour, enforcement authorities or courts can then rely on a presumption that such behaviour possesses indeed anticompetitive threats. In other words, those presumptions facilitate – as a matter of fact – the finding that specific behaviour may be deemed illicit from the point of view of competition law. The presumption

[18] Case C-62/86, *Akzo Chemie BV v European Commission*, [1991] ECR I-3359, para 71.

[19] Case T-286/09, *Intel Corp v European Commission,* [2014] ECR I-0000, para 72.

[20] See B. Jones and J. Turner, 'The Fall of the Per Se Vertical Price Fixing Rule', 13 *Journal of Legal, Ethical and Regulatory Issues* (2010), 84.

[21] By quasi-per se, I refer to situations that are almost impossible to refute in practice, as assumptions relating to anticompetitive effects or intent impede the successful development of any refutation attempts. See on objective justification in this regard, T. van der Vijver, 'Objective justification and Article 102 TFEU', 35 *World Competition* (2012), 55-76.

helps the enforcement authorities in making a convincing factual claim falling within the scope of the legal prohibition, but does not trigger an assumption of anticompetitive or illicit action to be in place.

The best known example in this category relating to abuse regulation is the finding of dominance or of monopoly power, which generally relies on market share presumptions. Additional examples refer to predatory pricing below average total cost but above average variable cost. In both EU and U.S. law, the general consensus seems to be that such cases are only anticompetitive if it can be inferred from the facts that losses incurred now will be recouped once other competitors have exited the market.[22] In accordance with EU law, the mere fact of selling at a loss triggers an evidentiary presumption that such foreclosure effects may be in place, but enforcement authorities are to build up their case file with more specific indications of such behaviour. The actual practice only triggers the presumption that this may hint at potentially anticompetitive effects.[23]

In practice, evidentiary presumptions offer factual shortcuts to enforcement authorities or claimants when compiling their case file against businesses engaged in abusive behaviour. Those presumptions do not reflect legal assumptions regarding the intent or effect of specific behaviour but offer minimum thresholds required to make a convincing case that abusive behaviour is effectively in order in the situation at hand. They thus allow to presume the presence of certain effects, in the absence of more conclusive evidence to the contrary that such effects did not or could not materialise.[24] As a result, such presumptions can be 'rebutted' by the opposing or defendant party, which may adduce evidence that undercuts the claimant's reliance on the presumption. In this setting, evidentiary presumptions are engrained in more general enforcement testing frameworks that already in themselves reflect a certain balance between the burden of proof imposed on either side in a legal dispute. As such, evidentiary presumptions are a part of the standard of proof one party has to respect when claiming the existence of anticompetitive behaviour and when seeking to fall within the ambit of the legal provisions prohibiting such behaviour. Evidentiary presumptions do not allow to determine conclusively that behaviour is illicit or illegal, but enable parties more easily to fulfil the requirements of proof necessary to invoke successfully the legal provisions.

The presence of evidentiary presumptions best fits a so-called 'effects-focused' or 'effects-based' competition law enforcement system, where enforcement authorities have to provide evidence of actual (or potential) anticompetitive effects prior to prohibitions being issued. In order to enable authorities more easily to prove such effects, legal presumptions effectively constitute help lines to facilitate enforcement actions. In doing so, enforcement authorities can

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[22] Compare Case C-62/86, *Akzo Chemie BV v European Commission*, [1991] ECR I-3359, para 72 and U.S. Supreme Court, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) See on this issue, and against the use of substantive law presumptions, E. Elhauge, 'Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory--and the Implications for Defining Costs and Market Power', 112 *Yale Law Journal* (2003), 681.

[23] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, [2012] ECR I-0000, para 42; see also J. M. Strader, '*Post Danmark*'s Recoupment Test', 10 *Competition Law Review* (2014), 205-239.

[24] For examples in other branches of EU competition law, see D. Bailey, note 10, 363-364.

also proceed more easily in the absence of convincing claims brought about by defendants that no anticompetitive effects are in place.

2.2.Presumptions as indicators of a specific kind of enforcement system?

The distinction between substantive law and evidentiary presumptions appears neatly to overlap with the better known distinction underlying between form-focused and effects-focused competition law enforcement schemes. On the one hand, substantive law presumptions are reminiscent of a form-focused system and therefore support authorities seeking to find abusive behaviour even without conducting a detailed analysis of the effects of such behaviour on the market.[25] In such a system, enforcement authorities pay attention to the protection of the correct behaviour of competitors vis-à-vis other competitors and consumers, rather than focusing on the effects their behaviour has on consumer choice or welfare.[26] Evidentiary presumptions would on the other hand better fit an effects-focused system where prohibitions would only apply as an aid to proving anticompetitive effects. In such a system, behaviour would be prohibited only if it produces effects that are detrimental to the structure of the market or to the position of consumers on that market.[27]

Whilst there is most certainly some seemingly evident truth in the claim that each kind of presumption fits a certain system of competition law enforcement, such a general claim should not be taken for granted as such and in all circumstances. Indeed, both types of presumptions can be found in most mature and emerging competition law systems, including in U.S. and EU law, despite many systems' commitment to an effects-focused approach. Attention therefore needs to be paid as to where and how each type of presumption appears. The actual scope, prevalence and formats of either type of presumption could serve as an indicator of the extent to which effects- or form-focused elements are relied on, how those elements intertwine and what this means from the point of view of a more global approach to enforcing abuse regulation by competition authorities. The following two sections precisely set out to explore whether and to what extent both types of presumptions surface and whether both types could be used as legal policy tools in an on-going debate about converging antitrust approaches in the global business sphere.

3. Mixing and matching? Legal presumptions in antitrust/competition law enforcement practice

The theoretical excursion into the conceptualisation and categorisation of types of legal presumptions in abuse regulation offers an inroad to an inquiry into how substantive law and evidentiary presumptions are being relied on in both EU and U.S. abuse regulation systems. A shrinking set of exceptions notwithstanding, substantive law presumptions present in the earliest Supreme Court judgments seem to have been downplayed almost completely in

[25] For that critique as to a form-based system, see P. Rey and J. Venit, 'An Effects-Based Approach to Article 102:A Response to Wouter Wils', 38 *World Competition* (2015), 6.

[26] P. Akman, 'Consumer Welfare and Article 82 EC: Practice and Rhetoric', 32 *World Competition* (2009) 71-90.

[27] See for a clear preference for this approach, Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] O.J. C45/7 (hereafter referred to as 2009 Commission Guidance Paper).

favour of evidentiary presumptions, which themselves occupy a very limited place in the overall antitrust analysis scheme (3.1.). In the European Union, the picture is slightly more complicated, as the nature of presumptions relied on in the application and enforcement of Article 102 TFEU has not conclusively been determined in the Court's case law (3.2.). On the basis of a cursory overview of those developments, some general thoughts will be devoted to the role of presumptions in both legal orders (3.3.).

3.1.U.S. antitrust rules and the rule of reason: purely evidentiary presumptions in decline?

In U.S. antitrust law, judicial analysis focuses in essence on presumptions accompanying the general analytical scheme assessing whether particular restraints to competition should be prohibited or can remain in place. *Per se* prohibitions are distinguished from *rule of reason* analyses. *Per se* prohibitions present an automatic rule of illegality. Activities that trigger a *per se* prohibition are immediately and without conducting a detailed (economic) analysis considered to be illegal and prohibited. They are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality'[28]. Well-known classical examples are direct price fixing and direct output limitations through cartels.[29] In principle, *per se* prohibitions establish conclusive presumptions of illegality; they cannot be rebutted by procompetitive justifications adduced by parties to an agreement.[30] *Per se* analysis could also exempt particular situations from antitrust scrutiny.[31] In those instances, a particular situation triggers the non-application of antitrust provisions. *Per se* prohibitions and exemptions thus avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable'.[32]

The U.S. Supreme Court limits the establishment of *per se* prohibitions and exemptions to exceptional situations. In most instances, the courts prefer a balance among procompetitive and anticompetitive arguments in a *rule of reason* analysis. The *rule of reason* allows the parties to present a balanced argument in which reasonable limitations on competition can be justified.[33] Attention is paid to the analysis of the 'facts peculiar to the business, the history of

[28] U.S. Supreme Court, *National Society of Professional Engineers v. United States* (1978), 98 S. Ct. 1366 (hereafter referred to as Engineers).

[29] Bid rigging could also be included in that list. For a very succinct overview of issues, see S. Adkins, 'Too Much Competition: The Supreme Court Sacks the NFL's Single Entity Defense 9-0 in American Needle, Inc. v. National Football League', 8 *Willamette Sports Law Journal* (2011), 25. For a case law overview, see H. Hovenkamp, *Federal Antitrust Policy. The Law of Competition and its Practice* (St. Paul, Thomson, 2005), 253-265, arguing that per se rules are the result of experience, rather than logic. Courts find practices so commonly anticompetitive that they do not need to conduct an elaborate analysis to verify anticompetitiveness.

[30] D. Bailey, note 10, 364.

[31] P. Nealis, 'Per Se Legality: A New Standard in Antitrust Adjudication under the Rule of Reason', 61 *Ohio State Law Journal* (2000), 347 – 398.

[32] U.S. Supreme Court, *Northern Pacific Railway Co. v. United States* (1958), 78 S. Ct. 518.

[33] According to Justice Brandeis famous exposition of rule of reason, *the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the*

the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint'.[34] As long as pro-competitive justifications outweigh anticompetitive consequences, the potentially anticompetitive agreement will not be condemned, unless the opposite party argues that a less restrictive alternative is available.[35] *Rule of reason* analysis imposes particular obligations on the parties to the antitrust proceedings to provide courts with economic and substantive analyses that allow judges to make a reasonable determination of the considered practices' scope.[36] As a part of such rule of reason analysis, evidentiary presumptions can facilitate the claims made by either claimant or defendant.

'The courts have always realized that the line between the per se rule and the rule of reason is not as hard or as easy to locate as we might wish'.[37] In a specific number of cases, the U.S. Supreme Court allowed a superficial analysis of seemingly anticompetitive agreements through the application of a 'quick look' or truncated *rule of reason* test.[38] 'Quick look' presents an analytical compromise between the *per se* and *rule of reason* approaches and allows for an efficient method of managing antitrust litigation that can otherwise become overly complex.[39] In cases where the anticompetitive effects on consumers and markets can be determined by someone with a basic knowledge of economics, competitive harm is presumed.[40] The defendant will have to prove that procompetitive justifications nevertheless exist in such a case.[41] Whereas a quick look does not amount to a non-rebuttable *per se* prohibition or exemption, the factual *rule of reason* analysis remains rather limited. The courts basically apply a *rule of reason* analysis, but truncate its scope because of particular properties inherent in anticompetitive behaviour.[42] A legal presumption of anticompetitive intent or effects is thus being inserted into what would otherwise require a more developed case file, to be compiled by a claimant or enforcement authority. The extent of truncated or quick look *rule of reason* nevertheless remains open and contested, and has so far predominantly been used in relation to infringements of Section 1 of the Sherman Act (collusive behaviour).[43]

It should not be surprising that the intensified focus on *rule of reason* assessments impacts on the use and scope of legal presumptions. In the realm of Section 2 Sherman Act analysis, the

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reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. U.S. Supreme Court, *Chicago Board of Trade of City of Chicago v. United States* (1914), 34 S. Ct. 244.

[34] Engineers, note 28 above, 1365.

[35] H. Hovenkamp, note 29, 260; G. Feldman, 'The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis', 58 *American University Law Review* (2009), 561 – 630.

[36] S. Adkins, note 29, 24-25.

[37] H. Hovenkamp, note 29, 265.

[38] *See* U.S. Supreme Court, *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*(1984), 104 S.Ct. 2948, stating that the Rule of Reason can sometimes be applied in the twinkling of an eye; U.S. Supreme Court, *Federal Trade Commission v. Indiana Federation of Dentists* (1986), 106 S. Ct. 2018.

[39] E. Grush and C. Korenblit, 'American Needle and a "positive" quick look approach in challenges to joint ventures', *Antitrust* 25 (2011), 55.

[40] S. Adkins, note 29, 25.

[41] U.S. Supreme Court, *California Dental Association v. FTC* (1999), 119 S. Ct. 1618. The Court refers to 'an intuitively obvious inference of anticompetitive effect'.

[42] H. Hovenkamp, note 29, 265.

[43] As apparent from E. Grush and C. Korenblit, note 39, 57.

presence of legal presumptions supporting claimants or enforcement authorities are as a result limited to evidentiary presumptions, rather than substantive law presumptions. In addition, those presumptions are also generally only relied on to determine the monopolizing power of a business, rather than to classify specific types of behaviour as prima facie anticompetitive.

The monopolisation offense in essence requires two elements to be proven. On the one hand, a business must have 'monopoly power', i.e. must have sufficient economic strength within a particular market to be considered sufficiently strong to exclude undistorted competition within that market.[44] In this realm, the U.S. courts have relied on presumptions to establish whether a business is indeed capable of having monopoly power. Market share presumptions have long played a role in establishing such monopoly power. Whereas Judge Learned Hand in *Alcoa* could still rely on a seemingly conclusive presumption that a business controlling 90% of a is to have monopoly power[45], the sole use of market shares has long been criticised, as has the market definition process accompanying it.[46] Current case law trends seem to suggest that market shares continue to be relevant, albeit only as an indication of monopoly power. As such, they can be used as evidentiary presumptions to facilitate the finding of monopoly power, but in doing so, they have to be embedded in a more elaborate set of indications allowing to infer the possession of monopoly power.[47] The case law of the circuit courts is rather inconclusive as to where exactly the presumption can come into play. Generally, the presence of market shares above 70% allows to conclude the presence of monopoly power; shares above 50% equally allow for this if and to the extent other factors contribute to justifying that conclusion.[48] It should be remembered, however, that the presumption as such does not allow to infer conclusively the existence of monopoly power.[49] No statutory provisions have been in place in which those thresholds have been outlined, as is the case in some other jurisdictions.[50]

In this context, the possession of intellectual property rights has for a long time also been construed as triggering a substantive presumption that the holder of such rights has monopoly power. In *Illinois Tool*, the U.S. Supreme Court held that the mere possession of IP rights no longer triggers such presumption.[51] That judgment does not allow clearly to infer whether the

[44] See for a succinct overview, E. Elhauge and D. Geradin, *Global Competition Law and Economics* (Oxford, Hart, second edition, 2011), 233-234.

[45] *United States v. Alcoa*, 148 F.2d 416 (2nd Circuit Court of Appeals, 1945), at 424. See also U.S. Supreme Court, *American Tobacco,* 328 U.S. 781, 81314 (1946).

[46] See W. M. Landes and R. A. Posner, 'Market Power in Antitrust Cases', 94 *Harvard Law Review* (1981), 937; L. Kaplow, 'The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative', 95 Harvard Law Review 1817 and L. Kaplow, 'Why (ever) define markets?', 124 *Harvard Law Review* (2010), 347.

[47] See for an overview of other factors, the report drafted by the Department of Justice provding an overview in this regard, available at http://www.justice.gov/atr/public/reports/236681_chapter2.htm#N_71_.

[48] For example, *Exxon Corp. v. Berwick Bay Real Estates Partners*, 748 F.2d 937, 940 (5th Circuit, 1984); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Circuit, 1989); for the 50% threshold, see *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Circuit, 1995) and *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Circuit, 2005).

[49] See for those dicta, *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Circuit, 2002); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Circuit, 1995).

[50] See for example, Article 19 of the Chinese Anti-Monopoly Law, available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.

[51] U.S. Supreme Court, *Illinois Tool Works, Inc. v. Independent Ink, Inc.,* 126 S.Ct. 1281 (2006).

possession of an intellectual property right could still trigger an evidentiary presumption of monopoly power, requiring the defendant to offer evidence to the contrary in this respect.

On the other hand, the holding of monopoly power is not in itself illegal under U.S. law. The business must engage in behaviour detrimental to competition.[52] When assessing the scope of particular behaviour – i.e. tying and bundling practices[53], predatory pricing claims[54], price discrimination[55], price squeezes[56] or refusal to supply or to grant access to essential facilities[57] –, the U.S. Supreme Court, as well as federal circuit or district courts, agree that a full-fledged rule of reason analysis should be engaged in. Claimants – or enforcement authorities prosecuting the case – have to adduce evidence that the monopolizing businesses engage in abusive practices which are detrimental to consumers on the market.[58] Defendants can then subsequently claim that such practices actually contribute to competition and benefit consumers.[59] Enforcement authorities or claimants cannot rely on presumptions to shortcut their reasoning here; they have to develop a full case file on the basis of available facts and economic studies. To the extent that those claimants or authorities cannot offer – to a sufficiently convincing degree – evidence that the practice engaged in does not make sense from a competition point of view, they cannot also rely on presumptions to shortcut their reasoning and to transfer the burden of disproving their claims to the defendant. Shortcutting presumptions – as to the desirability or focus of the behaviour at stake – no longer seem to have a place in the analysis of potentially anticompetitive behaviour itself.

3.2.EU competition law: some room for legal presumptions…

The finding of abusive behaviour, prohibited by Article 102 TFEU, engaged in by a dominant undertaking, proceeds in accordance with two distinct steps. Firstly, the existence of dominance on a relevant market has to be defined. Dominance on that market is not prohibited as such, but creates a special responsibility for the dominant operator vis-à-vis its competitors and consumers.[60] Practices engaged in by a dominant undertaking, which qualify

[52] The U.S. Supreme Court focused on the nature of such conduct as being exclusionary, see U.S. Supreme Court, *United States v. Grinnell Corp.,* 384 U.S. 563 (1966), at 570.

[53] For example, U.S. Supreme Court, *Illinois Tool Works, Inc. v. Independent Ink, Inc.,* 126 S.Ct. 1281 (2006), at 1292.

[54] For example, U.S. Supreme Court, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[55] For example, U.S. Supreme Court, *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). Price discrimination is formally assessed on the basis of the 1936 Robinson-Patman Act, which is nevertheless interpreted in the light of more general antitrust policies.

[56] For example, U.S. Supreme Court, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009).

[57] For example, U.S. Supreme Court, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

[58] See for a proposal to continue relying on at least evidentiary presumptions in this respect, J. Page, 'A suggested role for rebuttable presumptions in antitrust restraint of trade litigation', *Duke Law Journal* (1972), 595-625.

[59] For an overview and a critique regarding this system, see D. Fundakowski, 'The Rule of Reason: from balancing to burden shifting' in The Civil Practice & Procedure Committee's Young Lawyers Advisory Panel: Perspectives in Antitrust, available at http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf.

[60] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities,* [1983] ECR 3641, para 57.

as abusive, will be prohibited, absent any objective justification for such practices.[61] At both stages, legal presumptions play a more direct role compared to the present state of the law in the U.S. legal order.

The assessment of whether an undertaking is dominant, relies on a set of factors and practices such as the nature of the products concerned, the structure of the market, the specificities of demand and supply, yet above all, market shares.[62] Whilst being controversial, market shares remain one of the key elements to determine an undertaking's dominance in a relevant market. It should not be surprising therefore that EU law relies on a set of legal presumptions as to whether market shares express the holding of a dominant position on a market. In its 1991 *Akzo* judgment, the Court confirmed its position that very large market shares can in themselves be evidence of a dominant position. That is the case especially when the undertaking concerned holds 50% or more of those shares.[63] As such, having a market share of 50% or more creates a presumption of dominance, which can be rebutted by the defendant party on the basis of the structure of the market and the economic context in which it operates.[64] In its guidance paper, the European Commission built on this line of case law stating that dominance below 40% market share is less likely to emerge.[65] From this, it follows that a market share between 40% and 50% is already suspicious, but does not in itself trigger the evidentiary presumption, absent any further proof as to how the market is structured.[66] This once again demonstrates that the presumption at hand is not substantive, but rather evidentiary; it helps enforcement authorities and claimants to shortcut the analysis as to whether the undertaking is dominant, allowing them more swiftly to proceed to the actual assessment of the abusive nature of the behaviour at stake.[67]

In determining the scope of abusive behaviour, EU law makes a distinction between exploitative abuses and exclusionary abuses, focusing enforcement actions mostly on the latter category.[68] Within the framework of those abuses, refusal to supply[69], refusal of access to essential facilities[70], margin squeeze[71], predatory pricing[72], exclusive dealing obligations[73],

[61] For the concept of objective justification at this stage, see Case C-95/04, *British Airways v. European Commission* [2007] ECR I-2331, para 69, offers an example of the difficulties in justifying specific types of presumably abusive behaviour.
[62] 2009 Commission Guidance Paper, para 13.
[63] Case 62/86, *AKZO Chemie* v *European Commission,* para 60; see also already Case 85/76, *Hoffman-La Roche* v *Commission,* [1979] ECR 461, para 41.
[64] 2009 Commission Guidance Paper, para 14.
[65] 2009 Commission Guidance Paper, para 14.
[66] Compare Case 27/76, *United Brands Company v Commission,* [1978] ECR 207, para 38 and Case C-250/92, *Gottrup Klim v KLG,* [1994] ECR I-5641, para 48.
[67] 2009 Commission Guidance Paper, para 15.
[68] 2009 Commission Guidance Paper, para 6.
[69] For example, Case T-201/04, *Microsoft* v *European Commission,* [2007] ECR II-3601, para 319, 330, 331, 332 and 336.
[70] For example, Joined Cases C-241/91 P and C-242/91, *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP)* v *Commission (Magill),* [1995] ECR I-743, para 50; Case 7/97, *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft,* [1998] ECR I-7791, para 46 and Case C-418/01, *IMS Health* v *NDC Health,* [2004] ECR I-5039, para 35.
[71] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527.
[72] Case 62/86, *AKZO Chemie* v *European Commission,* para 71.
[73] Case T-65/98, *Van den Bergh Foods* v *Commission,* [2003] ECR II-4653.

foreclosing rebates or discounts[74] and abusive tying or bundling of products[75] constitute the best-known examples of abusive behaviour. In this context, the European Commission overall favours an effects-focused approach, requiring an actual analysis of the facts and effects of a particular case, so as to determine whether and to what extent abusive behaviour is in place. In doing so, the Commission appears to propose a framework where the enforcement authorities have to prove the presence of abusive behaviour, which could then still be rebutted by the defendants on the basis of sound economic analysis.[76] Just like in the U.S. legal order, substantive law presumptions would play a negligible part in this understanding.

In practice however, the Court of Justice continues to rely somewhat more on such presumptions to ensure the effective enforcement of the Article 102 TFEU prohibition. Two cases are most obvious in this respect. Firstly, in relation to predatory pricing, selling at a loss below average variable costs are presumed to have as their sole purpose the elimination of a competitor from the market.[77] To the extent that such pricing scheme is in place, the presence of anticompetitive effects is presumed conclusively.[78] It will only be in situations where pricing is not below average variable cost that additional elements of proof will have to be adduced and balanced.[79] Secondly, exclusive dealing situations are equally deemed suspicious. In the notorious *Intel* judgment, the General Court claimed that 'an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position […], whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate'.[80] The Court here seemed to rely on the substantive presumption that exclusivity arrangements engaged in by a dominant undertaking are producing anticompetitive effects.[81] That does not however mean that undertakings concerned could not justify their practices. The question nevertheless remains what type of justification is to be brought forward in this specific case.[82] The way in which the Court framed its approach at the very least creates the impression that a substantive presumption of anticompetitive effects still holds in this particular situation.

Overall, the Court of Justice has not unequivocally decided that substantive law presumptions should be abandoned. Whereas in the determination of dominance, market shares provide for evidentiary presumptions, the presumptions of below cost pricing and of exclusive dealing

[74] For example, see Case T-219/99, *British Airways* v *European Commission,* [2003] ECR II-5917, para 277 and 278 and Case T-203/01, *Michelin* v *Commission (Michelin II)*, [2003] ECR II-4071, para 162 and 163.
[75] Case T-30/89, *Hilti* v *European Commission,* [1991] ECR II-1439, para 67.
[76] 2009 Commission Guidance Paper, para 20 seems to hint at this dynamic evidentiary or legal testing approach.
[77] Case 62/86, *AKZO Chemie* v *European Commission,* para 71.
[78] Case 62/86, *AKZO Chemie* v *European Commission,* para 72.
[79] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, [2012] ECR I-0000, para 42.
[80] Case T-286/09, *Intel Corp v European Commission,* [2014] ECR I-0000, para 72. The judgment has been appealed and is now awaiting final determination in front of the Court of Justice as Case C-413/14 P.
[81] See W. Wils, 'The judgment of the General Court in Intel and the so-called more economic approach to abuse of dominance', 37 *World Competition* (2014), 407 and R. Whish, '*Intel v Commission*: Keep Calm and Carry On', 6 *Journal of European Competition Law & Practice* (2015), 1-2.
[82] See on that W. Wils, note 81, 427-428; compare to P. Rey and J. Venit, note 25, 26 and to B. Sher, 'Keep Calm – Yes; Carry On – No! A Response to Whish on Intel', 6 *Journal of European Competition Law & Practice* (2015), 219.

still seem to amount to substantive law presumptions, which could in principle be justified. It remains unclear, so far, as to what type of justification could be offered in that regard, contributing to the view that substantive law presumptions remain in vogue in Article 102 TFEU enforcement.[83] It should be clarified, however, that the European Commission, in focusing on an effects-based approach implicitly expresses a preference that any presumption still in place should be construed as evidentiary[84], i.e. as an instrument shortcutting the reasoning and proof-production process and inviting defendant undertakings to argue that the effects of their measure are beneficial to competition or consumers.[85] The lack of clarity as to the aims of Article 102 TFEU make it difficult however to predict what kind of justifications are to be offered in that respect. As a result, the presumptions in place still reflect more of a substantive law outlook rather than offering a mere evidentiary tool.

3.3.Tendencies and developments

Although both legal orders rely on evidentiary presumptions grounded in market shares to establish monopoly power or dominance, the role of substantive law presumptions in determining abusive behaviour appears to be construed differently across both legal orders. The U.S. rule of reason approach seems to grant leeway to evidentiary presumptions at best; a cursory overview of the case law nevertheless highlights that even such presumptions play a consistently limited role in Section 2 Sherman Act antitrust enforcement. In the European Union, the Commission clearly promotes a more effects-focused enforcement approach tailored to the rule of reason-like analysis engaged upon in the United States; whereas the Court of Justice agrees in certain instances that such analysis is the way forward – and that even evidentiary presumptions may not be appropriate to reach those goals –, it also continues to rely on substantive law presumptions. The Commission's guidance paper seems to state implicitly that those presumptions should merely be construed as evidentiary presumptions, but the EU Courts have not immediately followed suit in this regard.

The increasing attention to effects-focused abuse regulation enforcement on both sides of the Atlantic at the very least signals a move away from extensive and all-encompassing substantive law presumptions, a favouring of evidentiary presumptions at best and perhaps a limited role for presumptions at all in antitrust enforcement. Presumptions, it would seem, even when considered evidentiary shortcuts, go against a more full-fledged effects-focused analysis.

4. Presumptions as analytical benchmarks for streamlined global competition law enforcement?

It goes without saying that the (non-)use of presumptions comprises an interesting vantage point to explore opportunities for convergence or divergence among legal systems and for the

[83] On that question, see also P. Nihoul, 'The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?', 5 *Journal of European Competition Law & Practice* (2014), 521-530;
[84] 2009 Commission Guidance Paper, para 2 (implicitly).
[85] 2009 Commission Guidance Paper, para 3 (without offering clear statements as to the law, which remains the province of the EU Courts).

design of better intertwined structures for the application of abuse regulation beyond the specific legal orders of the EU and the U.S. The move away from substantive law presumptions and the shifting analytical schemes resulting from it give rise to a debate favouring convergence among EU and U.S. law (4.1.). At the same time, it can be argued that the converging potential of legal presumptions should not be exaggerated and that calls for more convergence by means of streamlining legal presumptions would threaten the autonomy of different national legal orders. From that point of view, presumptions nevertheless offer an insprational window to explore what kind of convergence could or should be aimed for in relation to abuse regulation (4.2.).

4.1. An easy case for more convergence…?

The conclusions to be drawn from the survey conducted in the previous section appear to indicate the following, traditional, conclusion: U.S. antitrust law has clearly moved away from a form-focused approach, and legal presumptions have been either marginalised or instrumentalised at best as tools within a developed and sustained 'rule of reason' balancing framework. The EU, whilst not having abandonded its reliance on substantive law presumptions to the same degree, is following suit and thus continues in 'americanising' its approach to and outlook for Article 102 TFEU enforcement. The Commission's 2009 Guidance Paper clearly attests to this approach. The Court of Justice, trying to match its more classical effects-focused approach to form-based necessities, is not however completely willing to relinquish all reliance on substantive law presumptions. This classical conclusion, which neatly fits the tone adopted by multiple articles on the evolution of EU competition law in the previous five years, would seem to argue implicitly that convergence between both systems is gradually taking shape. If the EU is adapting to the U.S. system, presumptions would offer a clear and convincing indicator as to how far such adaptation is actually taking place, what changes can be predicted in the near future and what can be expected to happen in the near future on an even more global scale.[86]

Whereas it would be tempting indeed to infer those conclusions from the overview provided (evidentiary presumptions on the rise – Commission focus on effects-based approach – abandoning of most obvious form-based substantive law presumptions, resulting in convergence being made very easy), the mere conclusion that EU presumptions are moving towards a U.S. rule of reason styled enforcement approach would seem too far-fledged in my opinion. Indeed, some converging tendencies are to be noted; indeed, similar presumptions are in swung; indeed, both systems favour an effects-focused approach, albeit within the confines of their own legal systems; at the same time however, the fact that this is happening is not necessarily a sign or a willingness to actually converge one's legal systems and to adopt what could become the nucleus of a global competition law enforcement system. What appears to be convergence, could also merely point towards similar tendencies that are common to both legal orders, but also external to competition law enforcement in its narrowest understanding of applying competition law or abuse regultation provisions.

[86] As such, they could be fitted into a more broader debate on the desirability, scope and format of global competition law; for an analysis in that respect, see D. Gerber, *Global Competition. Law, Markets and Globalization*, (Oxford, Oxford University Press, 2010), 394 pp.

In the following section, I briefly explore two alternative hypotheses equally capable of explaining adequately the *prima facie* convergence uncovered in the previous section, before drawing lessons as to how similar evolutions in the use of legal presumptions can be used as a lesson for emerging jurisdictions seeking to update or reform their own abuse regulation systems.

4.2. Looking beyond convergence

The diminishing importance of substantive law presumptions in the enforcement setting of both U.S. and EU abuse regulation enforcement could also be explained by factors external to – and not immediately fueled by – the emergence of a converging enforcement scheme that could be replicated at the global level in a more streamlined or coordinated fashion. Firstly, the abolition or tailoring of such presumptions point at increased attention to 'due process', the 'rights of the defense' or 'procedural balancing' emerging in both legal systems. As both systems rely on their own legal and cultural tools to make the system work from that vantage point, differences in the role, scope and format of presumptions could be explained against that background, rather than against a background of seeking convergence among two legal systems. Secondly, the rise of presumptions – and the slightly divergent developments in that respect in the U.S. and the EU – also point at a different balance struck between political priorities, economics and legal instruments. Both alternative explanations highlight that studying legal presumptions and their prevalence across legal orders at best offers an illustration for other legal orders to adapt their own mechanisms, which may result in convergence, but which also may not.

A first alternative explanation for the decline of substantive law presumptions lies in the importance paid to 'due process' in the realm of competition law enforcement. Widely believed to provide a tool that confines and regulates the powers of enforcement authorities or overzealous claimants, due process – or the increased attention to (fundamental) procedural rights in enforcement contexts and in the structuring and organisation of enforcement authorities[87] – has been on the rise in both U.S. and – even more so – EU enforcement contexts. Due process has thereby become a policy standard against which competition enforcement schemes are assessed and will be adapted to some extent. The rise of evidentiary presumptions could be said to fit that purpose. More specifically, evidentiary presumptions provide a playing field for enforcement authorities and claimants to develop a convincing case file rather easily, but equally allow defendants to contest those findings by offering alternative evidence and by rebutting the presumptions on which claimants rely. In doing so, defendants have an opportunity to defend themselves against allegations that they engage in anticompetitive behaviour. Substantive law presumptions do not always – or at the very least to the same extent – allow for such rebuttals or defenses and therefore rather unilaterally favour claimants or enforcement authorities. In paying more attention to a balanced enforcement environment where all parties benefit from fundamental procedural rights, the decline or modification of the scope of substantive law presumptions can be explained from

[87] See P. Van Cleynenbreugel, 'Effectiveness through fairness? Due process as institutional precondition for effective decentralised EU competition law enforcement' in P.Nihoul and T. Skozny (eds.), *ProceduralFairness in Competition Proceedings*, (Cheltenham, Edward Elgar, 2015), forthcoming.

this point of view. As such, prima facie convergence between EU and U.S. enforcement systems can also be related back to a similar attention to due process. Due process naturally carries different meanings in different legal systems, which in itself can already explain the differentiated developments in both legal orders. From that point of view, the seemingly natural convergence between presumptions could rather be considered a manifestation of similar due process considerations, rather than a clear commitment to streamline an effects-focused system in a similar fashion on both sides of the Atlantic.

More generally, a second alternative explanation refers to the different balance struck between politics, economics and law as to how abuse regulation should be enforced. In the U.S. system, the Chicago School of Economics received large political momentum, resulting in the judiciary gradually taking its insights into account in legal precedent.[88] The adversarial judicial culture – focus on private enforcement, judges as the primary enforcers of the Sherman Act – contributes to those changes.[89] In the European Union however, politics, economics and law are not as aligned as it is the case on the other side of the Atlantic. Whereas the European Commission expressed a clear political commitment to an effects-based approach grounded in (Chicago School)-economics, Member States do not generally agree that this is the only way forward.[90] Likewise, the Court of Justice of the European Union continues to rely on its own effects-focused approach, translated into proper legal tests, which rely, in some instances, also on substantive law presumptions.[91] The present set-up and the combination of substantive law and evidentiary presumptions demonstrate that the Court is seeking ways to reconcile its effects-focused approach (also grounded in economics) with the Commission's particular economics-grounded approach. The current shift in – but also continued reliance on – the use of both types of presumptions could be said to fit this narrative. From that point of view, the evolutions taking shape in the European Union are not moving naturally towards convergence with U.S. rule of reason practice. Rather than indicating such convergence, the use of legal presumptions rather allows – for each legal order – to clarify the links between (the type of) economics doctrines used, political choices and legal tools to bridge those doctrines and choices.

The abovementioned two alternative explanations highlight that the prima facie natural tendency to read a move towards more convergence in U.S. and EU approaches as as basis for convergence in the enforcement of abuse regulation should be treated with caution. Although some convergence may be spotted, it is always dangerous to argue that the EU is adapting to a U.S.-styled rule of reason system and that it therefore predicates what will happen more globally, i.e. the design of aligned antitrust enforcement structures. Comparing the existence, scope and structure of legal presumptions used in both legal orders should therefore not be conducted in order to promote a converging streamlining of antitrust enforcement practices, but rather as an *inspirational* starting point for other jurisdictions to make one's own informed

[88] M.E. Stucke, 'Reconsidering Antitrust's Goals', 53 *Boston College Law Review* (2012), 551-629.
[89] R.D. Kelemen, note 5, 146-147.
[90] K. Cseres, 'Comparing Laws in the Enforcement of EU and National Competition Laws', 7 *European Journal of Legal Studies* (2014), available at http://www.ejls.eu/7/89UK.htm.
[91] See for that picture, W. Wils, note 81, 421-426. For a critique, however, see P. Rey and J. Venit, note 25.

choice and to study the diversified role of legal presumptions across jurisdictions.[92] A study of legal presumptions therefore at best provides a useful means to understand how a competition law enforcement system operates, without however offering conclusive evidence as to where it is heading.

5. Conclusion

Legal presumptions have been relied on consistently as tools to ensure the adequate enforcement and application of abuse regulation across multiple jurisdictions, including the United States of America and the European Union. Whereas presumptions are a well-known phenomenon in those jurisdictions' rules on evidence, their prevalence, scope and applicability in competition law enforcement remain clouded in conceptual confusion and in misunderstandings, despite a recent increase in attention to what presumptions actually mean for competition law enforcement.

This paper sought to better understand the existence of such presumptions and their potential to contribute to debates on a more coordinated or structured enforcement of abuse regulation provisions on a global scale. To that extent, section two of the paper distinguished the concepts commonly relied on in debates relating to and related to presumptions in competition law enforcement. It distinguished between *substantive law* and *evidentiary* presumptions as two major categories relied on by competition law enforcement authorities. Section three sketched the prevalence of both types of presumptions in the United States' and the EU's legal orders and – unsurprisingly – uncovered a preference for evidentiary presumptions over substantive law presumptions, without both legal orders having completely discarded the latter category. This evolution seems to fit both orders' attention to a more effects-focused competition enforcement environment, whilst also maintaining attention to enforceability, predictability and legal certainty. Section four therefore argued that the apparent 'effects-focused' preference as reflected in both legal orders should not necessarily be taken as a sign that both legal orders are effectively converging into a streamlined global competition law enforcement system or that convergence can now be called for effectively. Rather, the fact that presumptions are used in both legal systems, can equally be seen as a commitment of both orders to due process for its defendant businesses or as a manifestation of particular

[92] A vivid illustration of this is offered by the recent *Tencent* case ruled on by the Supreme People's Court of the People's Republic of China; in that case, the Court relied on the market share presumptions incorporated in Article 19 of the Chinese Anti-Monopoly Law, but clearly chose to construct those presumptions as *evidentiary* in focus and nature, despite the fact that the Law could also have been understood as reflecting a substantive law presumption in this case. The Supreme People's Court indicated that a mere presence of an elevated market share is only an indication, following which other factors can be adduced by the prosecuting or the defendant party to substantiate or rebut it. The Court did not make clear what additional elements of incriminating or exculpating evidence would be required however. At the very least, the Supreme People's Court dealt, in its own way, with the presumption enshrined in the Chinese Anti-Monopoloy Law. For (a translated version of) the judgment see, D. Evans and V. Zhang, 'Qihoo 360 v Tencent: First Antitrust Decision by The Supreme Court', *Competition Policy International* (2014), available at https://www.competitionpolicyinternational.com/qihoo-360-v-tencent-first-antitrust-decision-by-the-supreme-court?utm_source=Copy+of+TencentWebinar&utm_campaign=April+30%2C+2013&utm_medium=email; for a comment, see Y. Lim and Y. Shen, '*A Tale of Two Courts:* Handling Market Definition in Abuse of Dominance Cases under Market Share-Based Statutory Power Presumptions in China and Korea', *CPI Antitrust Chronicle* (2015), available at http://ssrn.com/abstract=2564845.

(public or private) interests in the formatting and framing of competition law enforcement. In light of such alternative explanations, the emergence of similarly structured presumptions should above all be construed as an inspirational rather than the necessary way forward in competition law enforcement for other or emerging jurisdictions seeking to develop their own effective enforcement approach to abuse regulation.