



Discussion Points

**Presented by the Business and Industry Advisory Committee (BIAC) to the
OECD Competition Committee**

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Roundtable on Safe Harbours and Legal Presumptions in Competition Law

I. Introduction

1. The objective of antitrust law and enforcement is the prevention of anti-competitive conduct, i.e. conduct resulting in consumer harm. However, because the enforcement of antitrust law involves the application of relatively generally-drawn rules and standards, often framed in relatively simple terms, to a wide variety of complex economic phenomena, there is an inherent risk of misapplying the law and, as a consequence, mistakenly finding antitrust liability. The risk of misapplication of the law is in part dependent on the analytical shortcuts - in the form of presumptions of illegality - on which the application of the law relies.

2. In the past BIAC has stressed the need for transparency in competition law enforcement, predictable rules that are firmly based on economic insights, and the need to reduce companies' administrative and compliance costs.

3. BIAC has consistently voiced its concerns about potential over-enforcement of the competition rules. This is because incorrect findings of antitrust liability in relation to pro-competitive business transactions will prevent those transactions from materializing and from creating consumer benefits.¹ Such incorrect findings also risk being reproduced in other jurisdictions, something that is increasingly likely in today's global and interconnected competition universe. The risk of over-enforcement may in the future also increase as a result of deficient enforcement of competition law in relation to novel business transactions. Accordingly, BIAC's concerns regarding Type I errors, i.e. false positive findings of competition law violations, as well as Type II errors, remain valid.

4. While BIAC appreciates the fact that there may be a need for newer agencies to build up resources and experiences, it respectfully disagrees with the position that the early phase of competition law enforcement in a particular jurisdiction, the agency's resources, or the specific economic situation, justifies an increased use presumptions of illegality. Instead, BIAC suggests

¹ See for instance Lugard, Chilling Effects if Antitrust Law - Better Safe Than Sorry? International Competition Law & Policy, Fordham Competition Law (2008).

adequate resources, training, independency of the agency and other (institutional) factors are the main key variables for the proper enforcement of the competition rules. BIAC suggests that OECD and non-OECD members are best advised to invest in the quality of agencies' decision making, without resorting to debatable analytical shortcuts in an (implicit) attempt to enhance the agencies' output in terms of findings of violations.

5. For example, BIAC objects to the practice that existed until recently in a number of jurisdictions of applying non-rebuttable presumptions of dominance based on market share in the context of competition rules relating to unilateral conduct.² Similarly, perceived "quick wins" of agencies in the form of infringement decisions, perhaps in an attempt to establish the agency as a credible enforcer, or for other reasons, may in the long run backfire and negatively affect the agency's authority if they are based on improper presumptions - and thus a flawed analytical framework.

6. This does of course not imply that younger agencies should not be permitted to apply broadly accepted presumptions of illegality. However, BIAC submits that they should do so with restraint, withstand the temptation to apply too readily jurisdiction-specific presumptions and, while building up resources and experience, should tailor their priority setting and enforcement agenda to their resources. In fact, BIAC believes that it would be best to start with broader presumptions of legality and safe harbors to target initial enforcement efforts and focus development of a compliance culture on combatting clearly-recognizable problematic behavior, to keep the agency's performance under active review and engage in best-practice discussions with other agencies stakeholders and academics with a view to (re)calibrating the applicable rules and presumptions.

7. In any event, BIAC notes that there is a genuine need for more consistency in the application of competition law among different regions of the world. This includes the use of presumptions in the analysis of potentially anti-competitive business conduct. Accordingly, BIAC very much welcomes a discussion on this topic of the OECD Competition Committee and encourages the OECD, as well as the ICN, to intensify their work in this area. However, it also believes that individual agencies, including the European Commission, should more pro-actively advocate best practices for the proper enforcement of competition law. This applies in particular where bilateral (trade) agreements are in place that provide for minimum quality requirements regarding competition law enforcement in the other party's jurisdiction.³

8. Below, BIAC will submit a number of observations and suggestions in relation to specific types of presumptions and safe harbors that are frequently utilized in competition law. Before doing so, it will make a number of brief preliminary comments regarding four topics: (i) the connection between the objectives of competition law and the use of presumptions, (ii) rule

² See for instance ICN, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies (2007).

³ For instance, the European Commission has concluded such agreements with a large number of countries, see <http://ec.europa.eu/competition/international/bilateral/>

design and cost-error analysis (iii) due process requirements, (iv) the role of courts and (v) the trend towards more rigorous economic analyses and impact thereof on the use of presumptions.

9. While BIAC is well aware of the distinction between procedural, evidentiary and substantive presumptions, this note is confined to the use of substantive presumptions, either to establish the legality or illegality of a particular practice. Presumptions of illegality generally relate to the necessary conditions of a particular antitrust violation. For example, in the area of exclusionary conduct, an agency may apply particular presumptions to establish the existence of dominance or significant market power, or may infer from certain facts - such as the length of exclusivity agreements and the part of the relevant that is tied up by the dominant company - that a particular practice is anti-competitive. Similarly, agencies may utilize a substantive presumption that an agreement of a particular nature - such as resale price maintenance - is *per se* unlawful, or quasi *per se* unlawful.⁴

10. While limiting itself to a number of comments on the use of substantive presumptions, BIAC notes that - as shown by US practice - the qualification of a business practice as either subject to an effect analysis (as is the case under the US Rule of reason standard of analysis), or as *per se* illegal, has profound procedural consequences, particularly on the allocation of the burden of proof.

11. While the *per se* - rule of reason dichotomy is helpful for conceptual purposes, it is important to appreciate that, especially in administrative competition law regimes, presumptions may take different forms, ranging from (practically) unqualified presumptions of legality⁵, to strictly conditioned safe harbors included in European-style block exemptions,⁶ to “soft” safe harbors,⁷ to rebuttable presumptions of illegality⁸ and, finally, quasi⁹ and absolute, non-rebuttable presumptions of illegality.¹⁰ The choice for a particular presumption should reflect the

⁴ Resale price maintenance (“RPM”) has been *per se* unlawful under federal US antitrust law, until the Supreme Court ruled in its 2007 judgement in *Leegin* held that this practice must be analysed under the rule of reason standard. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). Under European competition law, RPM continues to be considered a hardcore restriction of competition and, as a result, subject to a quasi- illegality standard, with very limited chance of the presumption being proved incorrect.

⁵ Such presumptions apply for example to subcontracting agreements among non-competitors and intra-group agreements under European competition law.

⁶ See for example the safe harbour for vertical restraints not involving parties having market shares exceeding 30% and hardcore restraints under Commission Regulation 330/2010 on vertical restraints.

⁷ See for example the “soft safe harbour” for IP licenses involving patent pools included in the EU Technology Transfer Guidelines (2014).

⁸ For example the presumption under the European competition rules that prices above average variable costs but below average total costs ATC are abusive if part of a plan to eliminate competitors.

⁹ Examples of quasi non-rebuttable presumptions of illegality include the hardcore restraints, such as resale price maintenance and absolute territorial protection clauses included in Article 4 of Commission Regulation 330/2010.

¹⁰ Examples of absolute presumption of illegality are *per se* violations under Section 1 Sherman Act, or certain cheap exclusion cases under Article 102 TFEU and Section 2 Sherman Act. See for example also the (now abandoned) practice under the Israeli Restrictive Trade Practices Law in relation to vertical restraints.

economic insights into the effects and the agency's experience with that conduct. For example, it would be incorrect to subject a novel practice, the effects of which are still subject to genuine academic debate - for example specific restrictions agreed upon in the context of multi-sided market - to a per se illegality test, or even a less rigid presumption of illegality.

Lack of Consensus Regarding the Objectives of Competition Law Enforcement May Complicate Definition of Generally Accepted Presumptions

12. BIAC is of the opinion that there is a direct connection between the (continuing) discussion about the precise objectives of competition law enforcement on the one hand, and the design of proper safe harbors and presumptions of illegality. For example, if a competition enforcement agency would take the view that the protection of small and medium sized companies would merit explicit protection under competition law, it might be inclined to adopt rules and presumptions that would enable it to more easily conclude that specific business practices that are harmful to that category of market participants are unlawful. In contrast, an agency that supports a Total Welfare standard may not wish to apply such a presumption. In a similar vein, agencies that consider that "less efficient" firms play an important role in the competitive process, may not wish to apply a presumption that no antitrust violation occurs if "less efficient" competitors are excluded from the market.

13. BIAC believes that a rigorous application of the Consumer Welfare standard is a prerequisite of a welfare-enhancing system of competition law enforcement. Therefore, it supports a continuing discussion, within and outside the OECD, on the proper objectives of competition law and the practical implications thereof on rule - making in this area.

Rule Design and Cost Error Analysis: Should Enforcement Costs Be Guiding?

14. BIAC appreciates that the enforcement of competition law, including the use of presumptions and safe harbors involves a complex trade-off between (i) predictability and legal certainty, administrability and effectiveness on the one hand and (ii) accuracy of agencies' investigations outcomes. One notable example are the European block exemptions on specific types of vertical restraints, which were in force until the mid1990s and which provided for exemptions from the 101(1) TFEU prohibitions regardless of the market shares held by the parties to the agreement. While those rules and (legality) presumptions were predictable and reasonably easy to administer and to comply with, current economic insights suggests that those safe harbors were drawn too wide and that, as a result, potentially anti-competitive conduct has gone uninvestigated. Thus, while those regulations may have reduced enforcement costs, they are likely to also have led to costs associated with Type II errors.

15. BIAC supports analyses aimed at identifying the benefits and costs involved in rule-design decisions in relation to competition law, including decisions to provide for presumptions of (non-)legality and safe harbors. It also supports more (academic) research and OECD involvement in this area, specifically tailored to competition law.

16. However, BIAC submits that - to the extent rule design and costs error analysis does play a role in competition law enforcement - the discussions tend to over-emphasize enforcement costs associated with the investigation of potentially anti-competitive practices, and undervalues the costs inflicted on business, both in terms of (legal and economic consultancy) costs required to establish that a particular business practice that is presumed illegal, is in fact not anti-competitive, and the cost of foregone pro-competitive transactions. As the latter losses are difficult to qualify, especially on a forward looking basis, it is reasonable to assume that they tend to be under-estimated. This means that there may be a risk that any cost-error cost analysis might be skewed towards administrability and enforcement costs, thereby potentially resulting in overbroad presumptions of illegality, thus creating a disincentive for pro-competitive business transactions.

17. BIAC takes the position that, as a matter of principle, agencies' costs associated with the investigation of a particular business should only play a subordinate role in the decision whether or not to subject a particular business practice to a presumption of illegality.

Due Process Requirements Support Effect Analyses and Narrowly Defined Illegality Presumptions

18. Substantive law presumptions, especially when they are non-rebuttable, favor competition enforcement agencies and claimants. For instance, a presumption that the mere possession of an intellectual property right confers monopoly power,¹¹ makes it difficult for the holder of such right to establish that, in fact, it does not have monopoly power. Due process principles are generally geared towards defendants' right to defend their case and bring forward alternative explanations or analysis of the conduct at hand. BIAC submits that an analysis of the actual effects of the conduct generally provides for more opportunities for the defendant to defend itself and is, as a result, preferable from the viewpoint of due process. As a consequence, the decision to apply a presumption of illegality is likely to have a negative impact on the due process rights of defendants which agencies and governments should take into account.

As Judicial Review is Critical For the Design of Presumptions, Effective Access to Courts Should Be Guaranteed

19. As further discussed below, BIAC submits that presumptions of illegality in competition law should be supported by solid economic insights that the practice at issue almost invariably produces anti-competitive effects and, perhaps more importantly, be tested in court. Indeed, before competition agencies can confidently take the view that a particular practice is very likely to give rise to anti-competitive effects and thus merits to be subjected to a (rebuttable) presumption of illegality, there needs to be sufficient certainty that the practice is indeed most

¹¹ See for instance Katz, Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power, Arizona Law Review, Vol. 49, No. 4, pp. 837-909, 2007, University of Toronto, Public Law Research Paper No. 02-05

likely anti-competitive. Courts reviewing competition agencies' decisions play an important role in this respect. Ultimately, it is up to the courts reviewing agencies' decisions, to rule on the appropriateness and legality of the presumptions applied by the agency.¹²

20. In particular, courts reviewing agencies' decisions, may conclude that the agencies' use of presumptions of illegality are not or no longer justified in light of economic research, or for other reasons. Indeed, both in the US and EU courts have played a decisive role in shaping the standard of analysis and legal presumptions in important fields of competition law.¹³

21. The above leads to two observations. First, access to judicial review of competition enforcement agencies should be widely available, as stipulated in various pronouncements of international organizations.¹⁴ And second, the use of alternative enforcement mechanisms, such as commitment decisions in EU competition law, does not contribute to the development of the law and court-sanctioned standards of analysis.

Economic Insights Should Inform the Design of Appropriate Safe Harbors and Presumptions

22. BIAC acknowledges the trend away from form-based rules towards more rigorous economic analyses as a condition for competition agencies to be able to confidently condemn business practices as illegal. In particular, economic insights have played an important role in changes to the standard of analysis for resale price maintenance, exclusionary pricing conduct and pay-for-delay arrangements in the pharmaceutical sector. BIAC supports this trend - and the disciplinary function of economic research - as it may decrease the number of false positive findings of antitrust violations over time.

23. BIAC notes that - in contrast to suggestions made by the briefing note for this Roundtable - in some cases economic insights have not only resulted in broader safe harbors or less strict presumptions of illegality, but have also led competition enforcement agencies to eliminate or limit safe harbors or have introduced stricter presumptions of illegality.¹⁵ BIAC supports this. As mentioned below, it believes that safe harbors and presumptions should be firmly based on economic insights. This implies that, if economic research advances and identifies hitherto unknown theories of harm or new circumstances in which competitive harm is likely to materialize, modification of the standard of analysis may be warranted.¹⁶

¹² See for instance Case C-413/14 P, Intel Corporation Inc. v Commission

¹³ See for instance Leegin, note 4 above, for US law and Intel, note 12 above, for an example under European law.

¹⁴ See for instance ICC, Effective procedural safeguards in competition law enforcement proceedings (2017), available at <https://iccwbo.org/publication>

¹⁵ For example, stricter standards of analysis have over time been introduced for pay-for-delay agreements (under US antitrust law), and for vertical agreements (under European competition law), when Commission Regulation 330/2010 introduced an additional market share threshold.

¹⁶ For example, if economic research and practical and jurisprudential experience would establish that a particular type of narrow price parity clauses in agreements between hotels and hotel booking platforms invariably produces anti-competitive effects, those provisions may merit a presumption of illegality treatment. To date, this has not been established.

II. BIAC Suggestions for Devising Safe Harbours and Presumptions of Legality and Illegality

24. The section below puts forward a number of suggestions and principles that may guide a further discussion on the use of presumptions and safe harbors in competition law.

Presumptions of Illegality

25. BIAC acknowledges that, to a limited extent, presumptions can be valuable instruments for effectively enforcing the competition rules. They can make enforcement more predictable, may contribute to compliance, and lower agencies' costs of enforcement, in particular by permitting them to allocate capacity to cases that merit an analysis of their actual economic effects.

26. However, BIAC firmly believes that a full analysis of the actual effects of the conduct at hand is preferable over any presumption of illegality, even if it would be rebuttable. This is because the use of such presumptions has a profound impact on the allocation of the burden of proof and may result in false positive findings of antitrust liability.

27. As a deviation from the principle that competition enforcement agencies should assess the actual effects of potentially anti-competitive conduct, presumptions of illegality should be used with severe restraint. Their use should be subject to requirements of necessity and proportionality.

28. Any presumption of illegality should be firmly based on economic insights, preferably empirical research, common-sense and robust past experience justifying the presumption. A presumption of illegality should be supported by each of these three rationales.

29. In addition, the use of presumptions of illegality should be supported by consistent jurisprudence of the competent courts.

30. Presumptions of illegality are not appropriate for novel economic business conduct. Instead, competition enforcement agencies should invest in expanding their understanding of new economic phenomena, for instance by tailored market investigations, as the resulting insights may likely deepen their understanding of those phenomena and expedite investigations.

31. The motives for the use of a particular presumption should be made clear. Presumptions that are motivated by considerations of a non-economic nature, such as market integration considerations, or the wish to protect certain categories of economic actors are objectionable as they may lead to inefficient outcomes.

32. Presumptions of illegality should be subject to periodic review, preferably by courts and competition agencies alike, and should be abandoned or modified if appropriate. They should reflect advances in economic research. Courts should be encouraged to assess the continuing appropriateness of presumptions utilized by competition agencies and, indeed, critically review legal precedent.

33. Narrowly defined presumptions of illegality in relation to specific conduct are preferable over broadly-drawn presumptions that apply to several classes of conduct, unless there are persuasive economic reasons to apply the same presumption to different types of conduct.

34. If a presumption of illegality is deemed necessary, competition enforcement agencies and regulators should opt for the “lightest” presumption available. For instance, if the anticipated gains from the presumptions - in terms of lower enforcement costs or otherwise - can be achieved through an enumeration of factors that the agency will take into account when assessing certain conduct, as opposed to a more formal assumption that the conduct is anti-competitive if certain conditions are met, then the agency should elect the former approach.

35. Presumptions of illegality should be rebuttable and the standards for rebutting the presumption should be reasonable. Only in cases where there is no doubt that particular conduct is “by its very nature, injurious to the proper functioning of competition” and “on experience showing that [they] are likely to produce negative effects on the market” that competition agencies may apply non-rebuttable presumptions of illegality. There is no reason to extend the category of per-se illegal practices beyond hard-core price cartels, group boycotts and similar conduct.

36. Courts reviewing competition enforcement agencies’ attempts to broaden the category of well-established per se illegal conduct, should be critical and interpret the category of per se illegal conduct restrictively.

Safe Harbors

37. Rules that preclude a finding of a competition infringement and/or make it unnecessary to assess market circumstances in order to find a conduct lawful if certain pre-determined conditions are met (e.g. the company does not enjoy a certain degree of market power, or its market share is below a certain threshold) can be valuable instruments for effectively enforcing competition law. They can make enforcement more predictable, may contribute to compliance, and, like presumptions of illegality, lower agencies’ costs of enforcement, in particular by permitting them to allocate capacity to cases that merit an analysis of their actual economic effects.

38. Safe harbors are particularly relevant in merger control, where they serve as screens regarding transactions that are unlikely to prove problematic, and in vertical relationships, where they identify situations where vertical restrictions are unlikely to produce foreclosure or other anticompetitive effects.

39. As is the case with presumptions of illegality, economic research should inform the use of safe harbors. However, because the risk of false negative findings of antitrust liability weighs - in BIAC’s view - less heavy than the potential chilling effects of Type I errors, agencies and regulators should be less concerned about overbroad safe harbors. In addition, as practice demonstrates, the applicability of safe harbors is often subject to the possibility to withdraw the

benefit of the safe harbor if certain conditions are met.¹⁷ BIAAC does not take issue with such withdrawal mechanisms, as long as their use is predictable and clearly conditioned.

40. The business community values presumptions of legality and safe harbours, as essential to ensure legal certainty and predictability and protecting investment and innovation. They are especially important from SMEs, start-ups adopting innovative business methods and others who lack sufficient data and resources efficiently to conduct extensive self-evaluation exercises. To ensure legal certainty, business should be able to rely on such presumptions and safe harbours and so be immune to enforcement and sanctions in respect of decisions and conduct carried out in good faith in line with them. At the same time, to enable presumptions and safe harbours to be as broad and helpful as possible they also need to be flexible and should be reviewed and revised when necessary to adapt, for the future, to new learnings from economics and practice and to market developments.

41. In many cases, the use of safe harbors is justified if the parties involved in a particular type of business transaction do not have market power. BIAAC suggests that the lack of market power should strongly militate in favor of classifying that conduct as falling within a safe harbor.

42. BIAAC is in favor of a continued discussion and additional research - within and outside the OECD - to examine appropriate conditions for safe harbors, as well as research into the question why presumptions and safe harbors can be so different across otherwise rather similar jurisdictions. It would welcome further work towards convergence on specific topics where divergence is most stark and to examine potential broader adoption of positive changes made in some jurisdictions.

¹⁷ For example, the European safe harbour block exemption regulations generally provide the power to the European Commission to withdraw the benefit of the exemption if specific conditions are met. For instance, the exemption under Commission Regulation 330/2010 on vertical restraints can be withdrawn in the event of cumulative effects.