Authority for
Consumers & Markets

Discussion
Presumptions in Competition Enforcement: Some Comments from a Law and Economics Perspective – Damien Neven

Pros & Cons of Presumptions – 6 November 2020
Swedish Competition Authority (online)

Theon van Dijk
Chief Economist ACM

Markets that work well for people and businesses

Two models of competition enforcement

- Based on **Bayesian updating:**
  1. Start with a prior on the expected effects of practice on consumer surplus (the "presumption")
  2. Collect information through an in-depth investigation
  3. Update the prior using collected information

- First model based on **optimal statistical decision theory**
  - <u>Objective</u>: make go/no-go in-depth investigation decision that minimizes error costs (error costs: effects of wrong decisions on consumer surplus)

- Second model based on **probability thresholds**
  - <u>Objective</u>: go/no-go decision that minimizes type I and II errors

Findings

- **Research question**: when should a competition authority carry out an in-depth investigation into potentially anticompetitive behaviour?

1. Optimal stopping model

   - **Answer**: if, based on an initial investigation, the behaviour is expected to be anticompetitive, and an in-depth investigation is believed likely to show otherwise, is not too costly and is sufficiently precise

2. Probability thresholds model

   - **Answer**: set thresholds for priors such that there are sufficient prospects that the default case will be overturned after the in-depth investigation

Modelling remarks

- **Optimal stopping model**

  1. Priors concern consumer welfare effects and direction of evidence – <u>not</u> precision (quality) of evidence.

  2. If a potentially anticompetitive practice is believed likely harmless after an in-depth investigation, why not use a <u>different prior</u> for consumer welfare effect to start with? Correlation between prior for consumer welfare and prior for direction of signal?

- **Probability thresholds model**

  3. Assumed balance of probability ($\gamma = \frac{1}{2}$) after in-depth investigation seems unrealistic – in practice prohibition often requires more proof than clearance. Should that not be reflected in a different <u>value for γ</u>?

Implications for presumptions discussion?

Optimal stopping model

- More about the relationship between "presumption" (= prior about consumer welfare effect) and the optimal decision to carry out an in-depth investigation …

- … than about the <u>variance</u> in the prior (which seems more related to the discussion on the use of presumptions)

- Optimal decision not to carry out in-depth investigation ≈ or ≠ presumption?

- <u>Counterintuitive advice</u> on how to run a competition authority: start an in-depth investigation to rebut rather than to confirm the initial assessment

    - "Bias" due to model set-up? Objective to minimize error costs implies smaller "returns" from confirmation of prior beliefs?

Burden of proof

- Presumption shifts burden of proof to defendant: is an in-depth investigation by the competition authority then still necessary?

Fact B is *mandatorily* inferred and the burden of proof shifts on the defendant.

If fact A is established to the standard of proof,

then fact B is accepted as established to the standard of proof, too.

The defendant can *always* try to rebut the presumption by challenging its foundation (i.e. fact A) or the mandatorily drawn inference (i.e. fact B).
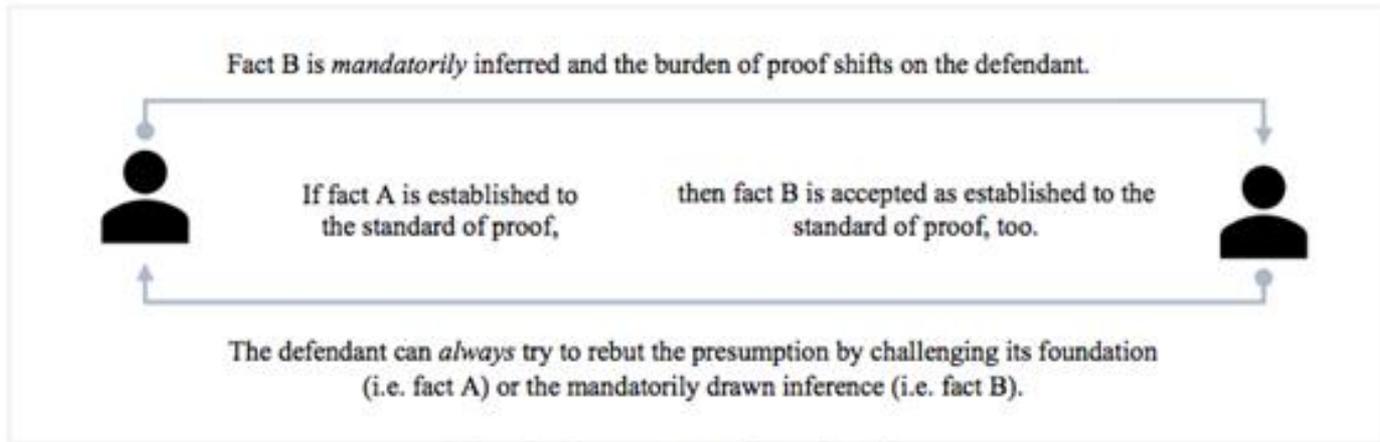
Figure 1: Presumptions in the technical sense

Source: Kalintiri, JCLE (forthcoming)