Candidate 12 – HIGHLY COMMENDED PRIZE – JONAS LEVERMANN - FRESHFIELDS BRUCKHAUS DERINGER LLP

Word count: 2,471

- **'Earlier this year, experts from the European Commission (EC) and a UK Digital Competition Expert Panel both made recommendations to adapt competition law and policy to the challenges of the digital era. Do you think the EC was right to propose a presumption of anti-competitive conduct, effectively shifting the burden of proof for pro-competitive benefits onto platform operators?'**

I. Introduction

The expert report[1] (***Report***) prepared for the European Commission (***Commission***) is part of a larger debate involving the Commission, national competition authorities (***NCAs***), lawyers, academics and policy makers. The question being discussed is whether the existing European Union (***EU***) competition law has the appropriate tools to ensure a level playing field in the digital economy.[2]

The Commission's proposal of a presumption of anti-competitive conduct has well-known proponents. For example, Tommaso Valletti, former Chief Economist of DG COMP, argued that shifting the burden of proof for certain online platforms would be more in line with economic theory and Jean Tirole, a Nobel Prize-winning economist, called for the burden of proof to be shifted onto dominant companies in the context of so-called "killer acquisitions".[3]

Competition authorities in Europe appear to be concerned that they might under-enforce by relying on the contestability of digital markets or over-enforce by inferring abusive conduct from mere market power. The Report's proposal of a presumption of anti-competitive conduct clearly goes into the direction of over-enforcement. This essay argues that the proposal is a divergence from economics- and evidence-based enforcement of competition law and the rule of law.

Part II sets the scene and discusses the allocation of the burden of proof in competition law enforcement. Part III discusses the burden of proof in the context of the digital economy and what role presumptions play in that regard. Part IV explains why the Commission's presumption of anti-competitive conduct would be contrary to the rule of law. Part V concludes that shifting the burden of proof is not required as

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1 European Commission, Competition Policy for the Digital Era, 2019.

2 For example, in the UK HM Treasury asked a "Digital Competition Expert Panel", chaired by Jason Furman, to make recommendations on changes to competition law policy to help unlock the opportunities of the digital economy. In Germany, a similar expert panel was set up by the government and tasked with drawing up recommendations for action for the further development of EU competition law in the light of the digital economy.

3 For both comments see Global Competition Review, Killer acquisitions are a recurring issue says Vestager, available via https://globalcompetitionreview.com/article/1179343/killer-acquisitions-are-a-recurring-issue-says-vestager.

the existing tools of competition enforcement are adequate to ensure a level playing field in the digital economy.

II. Who has the burden of proof in competition law cases?

In the EU, the starting point for all competition infringement investigations is that the Commission has the burden of proof. Article 2 of Regulation 1/2003[4] states that "*the burden of proving an infringement of Article [101(1)] or of Article [102] of the Treaty shall rest on the party or the authority alleging the infringement*".

Consequently, the Commission has to first determine the restrictive nature and impact of a specific practice. Only afterwards can it require the operator of an online platform to present pro-competitive benefits of that practice.[5] Without a prior determination of anti-competitiveness, the platform operator does not have a burden of proof for showing pro-competitiveness.

This raises the question what the Commission has to do when determining whether certain conduct is anti-competitive. The Court of Justice (***ECJ***) has held that "*where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it* ***and to adduce evidence*** *capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement*".[6]

Accordingly, the burden of proof does not shift to an undertaking if the Commission is not able to identify anti-competitive conduct (i.e. it does not have sufficient evidence) but merely assumes it because of a platform operator's market power and existing market conditions. When it comes to competition enforcement in the digital economy, however, this principle is now being challenged.

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4 Council of the European Union, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

5 European Commission, Guidelines on the application of Article 81(3) of the Treaty, 27 April 2004, paras 11-12.

6 Court of Justice, Case C-185/95 P, *Baustahlgewebe GmbH v Commission* [1998], para. 58 (emphasis added).

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III. The burden of proof and the digital economy

The Report assumes that some operators of online platforms hold dominant positions on highly concentrated markets characterised by strong network effects and high barriers to entry.[7] These characteristics, coupled with the digital economy's high degree of innovation and new economics, can lead to uncertainty about the consequences of any competition policy intervention or non-intervention because it is difficult to assess how the market will develop in the future. The Report therefore proposes a presumption of anti-competitive conduct, effectively shifting the burden of proof for pro-competitive benefits onto platform operators.

In this context, the Report refers to the so-called "error cost framework" and names the risk of false positives versus false negatives[8] as the reason for why a presumption of illegality may be appropriate.[9] By erring on the side of disallowing types of conduct that are potentially anti-competitive, competition authorities would eliminate the risk of wrongly allowing an anti-competitive conduct, i.e. they would avoid false negatives.

In general, applying presumptions of illegality is a useful and efficient tool for competition authorities.[10] Presumptions like restrictions by object, however, have to be applied restrictively and require certainty that the conduct at issue, by its very nature, harms competition.[11] This should especially be kept in mind when considering conduct that is only *potentially* anti-competitive. Before a presumption is introduced competition policy makers should be certain that sufficient evidence proves that it is necessary and that its introduction is compatible with the legal framework and the rule of law.

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7 The Report, p. 71.

8 A false positive would be to prohibit a pro-competitive conduct. A false negative would be to allow an anti-competitive conduct.

9 The Report, pp. 50-52. For a general discussion of presumptions in EU competition law see e.g. Volpin, The Ball is in Your Court: Evidential Burden of Proof and the Proof-Proximity Principle in EU Antitrust Law, Common Market Law Review, 2014, 51 (4), pp. 1159-1185. Presumptions may be applied where the existence of an anti-competitive practice may be inferred from indicia which, in the absence of another plausible explanation, constitute evidence of an infringement (see, for example, Court of Justice, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission* [2006], para 55-57).

10 For example, it has long been recognised that certain infringements, such as price fixing, market sharing or bid-rigging, are rightly considered to constitute restrictions of competition by object in European competition law. For a detailed assessment of presumptions see Ritter, Presumptions in EU competition law, Journal of Antitrust Enforcement, 2018, 6, pp. 189-212.

11 Court of Justice, Case C-67/13 P, *Cartes Bancaires* [2014], para 58.

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IV. The shift would be contrary to the rule of law

As set out above, the starting point in competition law proceedings is that it is for the Commission to prove a competition law infringement. In addition, there are certain safeguards that ensure undertakings accused of competition law infringements a due process.

The European Court of Human Rights has held that competition law proceedings are of a criminal law nature and that the procedural guarantees of Article 6 of the European Convention on Human Rights (***ECHR***) are binding on the Commission.[12] The ECJ has also held that the presumption of innocence constitutes a general principle of EU law, currently laid down in Article 48 of the Charter of Fundamental Rights of the European Union (the ***Charter***).[13]

Because potential fines for a competition law infringement are high and subsequent private damages claims can be significant, the ECJ has recognised the applicability of the presumption of innocence in EU competition law procedures.[14] Due to the nature of the infringement and the severity of the consequences, the applicability of Article 6 of the ECHR and Article 48 of the Charter is considered necessary for competition proceedings (and presumptions there applied) to be in keeping with the standard of fundamental rights.[15]

The Report does not elaborate how its proposal would be aligned with the fundamental right that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. A presumption of illegality for certain behaviour of online platforms would require concrete evidence that such behaviour amounts to a by object infringement. Otherwise a shift of the burden of proof would infringe the platform operator's fundamental rights as well as Article 2 of Regulation 1/2003.

A presumption of anti-competitive conduct for online platform operators can therefore not be aligned with the existing legal framework and the rule of law, in particular if its introduction is not the result of an evidence-based approach to policy which follows an empirical analysis of a wide body of cases concerning the digital economy. The consequence of such an ill-considered reform of competition law enforcement would be years of legal challenges before the EU courts which would neither lead to more efficiency nor to more legal certainty.

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12 European Court of Human Rights, *A. Menarini Diagnostics S.r.l. v Italy*, no. 43509/08, para 44. While the ECJ has so far not ruled that EU competition proceedings constitute criminal proceedings for ECHR purposes, the General Court has done so in Case T-9/11, *Air Canada* [2015], para 33.

13 Court of Justice, Case C89/11 P, *E.ON Energie AG v Commission* [2012], para 72; Case C-74/14, *Eturas UAB and others v Lietuvos Respublikos konkurencijos taryba* [2016], para 38.

14 Court of Justice, Case C-199/92 P, *Hüls AG v Commission* [1999], paras 149-150; Case C-265/92 P, *Montecatini v Commission* [1999], paras 175-176.

15 Compare Volpin, *supra* note 9, p. 1162.

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V. Shifting the burden of proof is not required

The authors of the Report stress that they do not set out the Commission's future policy framework.[16] This is to be welcomed as the Report's proposal should not be seriously considered as a solution. A shift of the burden of proof is simply not required.

The Report rightly acknowledges that the issues related to digital markets it describes are not yet fully understood and that "*it is extremely difficult to estimate consumer welfare effects of specific practices*".[17] It is therefore surprising that it nevertheless proposes a presumption of anti-competitive conduct.

There is no empirically backed evidence that traditional competition law concepts and the existing legal framework are not capable of addressing the challenges raised in the Report. This is concerning from both a rule of law and a general policy perspective as competition law enforcement should not move into a direction where far-reaching changes are no longer made based on empirically sound evidence and expert consensus.[18]

Enforcement should always follow mainstream economic principles and any reform should be based on robust evidence supporting the claims that online platforms actually pose challenges that cannot be addressed by existing tools.[19] However, many of the phenomena like two-sided markets and network externalities associated with digital platforms are not unique to them. The existing legal framework is familiar with these characteristics and has applied a variety of remedies to deal with them.[20]

The Commission and NCAs already enjoy far-reaching powers to order interim measures while an investigation is on-going to ensure that no irreparable damage is caused to competition.[21] If there is a suspicion that an online platform operator is abusing its market power this tool could be applied while the Commission investigates the conduct. The Commission has recently, and for the first time in 18 years, imposed interim measures on an undertaking in an ongoing abuse of

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16 The Report, p. 127.

17 *Ibid.*, p. 71.

18 With regard to expert consensus it is noteworthy that in the United Kingdom the Digital Competition Expert Panel concluded that in the context of merger control a presumption against all acquisitions by large digital companies is not a proportionate response to the challenges posed by the digital economy. See Digital Competition Expert Panel, Unlocking digital competition, March 2019, p. 101.

19 Ibanez Colomo, A contribution to 'Shaping competition policy in the era of digitisation', p. 3, available via https://ec.europa.eu/competition/information/digitisation_2018/contributions/pablo_ibanez_colomo.pdf.

20 For example, non-discrimination or transparency obligations. Compare Ibanez Colomo, *supra* note 19, p. 2.

21 Articles 5 and 8 of Regulation 1/2003.

dominance investigation.[22] It remains to be seen whether this tool will be used more frequently in the future when the Commission investigates digital players, but it may be a viable alternative to radical steps like shifting the burden of proof.

In addition, the Commission has more resources and much wider powers to investigate whether a certain practice may harm competition, e.g. by conducting market investigations. Further, the Commission and NCAs could act more efficiently by applying a narrower scope to their investigations. Most sector inquiries in the digital economy are protracted and have targeted very wide areas.[23] If regulators are concerned with potentially anti-competitive conduct by certain platform operators then they should investigate these more directly.

VI. Conclusion

While characteristics of the digital economy such as network and lock-in effects, access to data or economies of scale may pose challenges to competition law enforcement, shifting the burden of proof onto platform operators is not the right measure to address these challenges. There is too much uncertainty about the consequences of any competition policy intervention or non-intervention in the digital economy to justify such a radical proposal.

There is also no evidence that suggests that a presumption of anti-competitive conduct should be applied to certain online platform operators. Without such proof the introduction of the presumption would be contrary to the existing legal framework and the rule of law.

A generalised inversion of the burden of proof combined with the high standard of proof for pro-competitive efficiencies would merely result in over-enforcement with all its negative side effects. Because the characteristics of the digital economy are in themselves not new, the existing tools of competition law enforcement should be applied instead.

It should also be kept in mind that a change in law to shift the burden of proof would be challenged in the courts, all the way to the ECJ. It could take years before companies would have legal certainty on whether or not their practices are legal. It is arguable that this would not lead to a more efficient assessment of platforms' practices. It would instead leave many digital companies in a state of limbo, possibly resulting in less innovation and investment.

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22 See Commission, STATEMENT/19/6115, Statement by Commissioner Vestager on Commission decision to impose interim measures on Broadcom in TV and modem chipset markets, 16 October 2019.

23 See, for example, the EU's e-commerce sector inquiry, the German Federal Cartel Office's sector inquiries into price comparison websites, smart TVs and online advertising, the Competition and Market Authority's online platforms and digital advertising market study or the Dutch Authority for Consumers and Markets' market study into mobile apps.