

THE USE OF PRESUMPTIONS IN THE  
APPLICATION OF ARTICLE 102 TFEU  
COMMENTS ON THE PRESENTATION  
OF MS FERNANDEZ

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KONKURRENSVERKET SEMINAR “PROS AND CONS OF PRESUMPTIONS”

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# BROAD AGREEMENT

- PRESUMPTIONS ARE:
  - USEFUL
  - EFFICIENT
  - BUT NEED SAFEGUARDS

# COMMENTS ON:

- BURDEN & STANDARD OF PROOF
- ESTABLISHING PRESUMPTIONS
- REBUTTING PRESUMPTIONS
- EFFICIENCIES

# BURDEN & STANDARD OF PROOF

- STANDARD DOES NOT VARY, BUT EVIDENCE REQUIRED DOES
- "IT WOULD NEED MORE COGENT EVIDENCE TO SATISFY [A JUDGE] THAT THE CREATURE SEEN WALKING IN REGENT'S PARK WAS MORE LIKELY THAN NOT TO HAVE BEEN A LIONESS THAN TO BE SATISFIED TO THE SAME STANDARD OF PROBABILITY THAT IT WAS AN ALSATIAN [DOG]." LORD HOFFMAN, SECRETARY OF STATE FOR THE HOME DEPARTMENT V REHMAN [2001] UKHL 47)

# BURDEN & STANDARD OF PROOF

- IT'S ALL ABOUT THE HARM
- DIRECT EVIDENCE OF CONSUMER HARM HARD / IMPOSSIBLE TO GET
- SO... PROXIES, PREMISES AND PRESUMPTIONS

# ESTABLISHING PRESUMPTIONS

- CARTES BANCAIRES: OF MORE GENERAL APPLICATION?
- INTEL: TWO PRESUMPTIONS
  - FIDELITY REBATES ARE HARMFUL
  - BUT NOT IF THEY PASS THE AS EFFICIENT COMPETITOR TEST

# REBUTTING PRESUMPTIONS

- CARTES BANCAIRES: THE MORE NARROWLY TAILORED THE PRESUMPTIONS, THE MORE DIFFICULT THEY WILL BE TO REBUT.
- INTEL: TWO PRESUMPTIONS
  - FIDELITY REBATES ARE HARMFUL: WHAT LEVEL OF REBUTTAL IS NEEDED HERE? BARE ASSERTION OR ECONOMETRIC STUDIES?
  - BUT NOT IF THEY PASS THE AS EFFICIENT COMPETITOR TEST: CAN AN AUTHORITY REBUT THIS?

# EFFICIENCIES

- “UNICORNS”
- WHY AREN'T MORE PLEADED?
  - BECAUSE THE AUTHORITY IS UNRECEPTIVE
  - BECAUSE THE EFFICIENCIES DON'T EXIST
    - NO EFFICIENCIES IN “NAKED” RESTRICTIONS
    - 70% OF MERGERS “FAIL”



# CONCLUSIONS

- PRESUMPTIONS ARE ESSENTIAL
- THE BETTER THE PRESUMPTION, THE HARDER IT IS TO REBUT
- MAYBE REBUTTALS SHOULD GO BOTH WAYS