

# Competition Economics and Antitrust in Europe

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# Introduction

- Influence of economics on antitrust policy in the EU
- Competition seems to matter for efficiency and antitrust enforcement may help fostering competition
- Antitrust and EU institutions
  - Art 81/82, ECMR
  - Centralized implementation (reg. 17)
  - Development of national regimes
  - Decentralization (reg. 1/2003)
- Is economics used efficiently in EU antitrust ?

# Outline

## — Economic advice

- A sharp increase
- And a strong imbalance between parties and DG Comp

## — Influence of economics on case law and policy

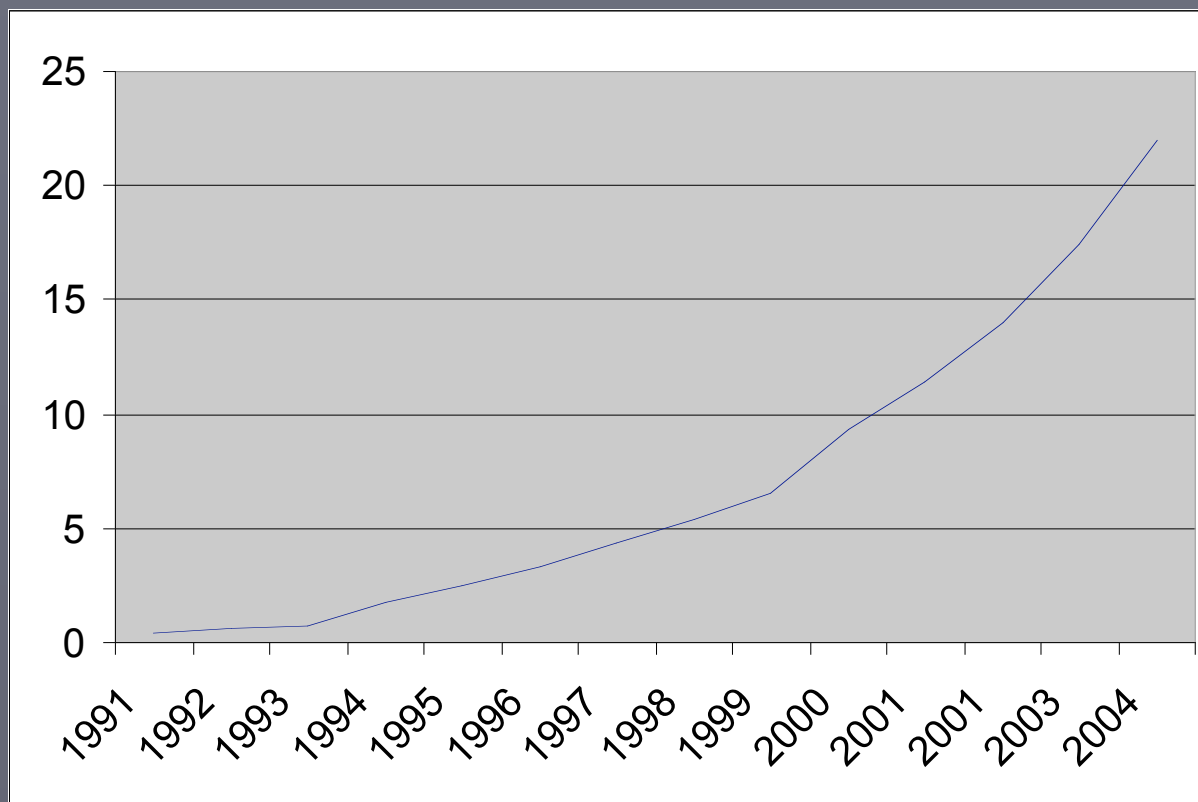
- Strong influence in some areas,
- But also abuse and neglect in other

## — What can explain this mixed result ?

- Standards of proof and review
- System of proof taking

## — Further reform

# Economic advice



Antitrust turnover of economic consultancy firms (£ million)

## Economic advice (ii)

- The proportion of fees spent on economists increases from about 5% to 15 % in the last ten years
- Economic evidence is increasingly cited in Phase II merger cases
- The market becomes fragmented and economic consultancy firms become “global”
- DG comp has about 10 economists with a Phd in IO. Economic consultancy firms have about 150 professionals

# Influence on case law and policy

Absorbed	Abused	Neglected
<ul style="list-style-type: none"><li>- Static oligopoly theory (market definition, market power)</li><li>- Collusion (repeated game)</li><li>- White list of vertical restraints</li><li>- Dynamic theories of tying and bundling</li><li>- Quantitative methods</li><li>- R&amp;D and efficiencies</li></ul>	<ul style="list-style-type: none"><li>- Conglomerate effects</li><li>- Factors affecting coordination</li><li>- Efficiencies under 81(3)</li><li>- Efficiencies turned into offences ECMR</li><li>- Quantitative evidence</li></ul>	<ul style="list-style-type: none"><li>- Efficiencies in VR</li><li>- Predation</li><li>- Pricing abuses</li><li>- Exclusion</li></ul>

# A characterization of procedures

- Scope : positive decisions, negative decisions, or both
- Proof taking
  - Inquisitorial : the party which decides gathers the evidence from the parties
  - Adversarial : proof taking is delegated to the parties
- Standard of proof : “balance of probabilities”, “beyond reasonable doubt”
- Structure of the evidence required to meet the burden of proof (*per se* vs rule of reason)
- Standard of review by the Courts : “manifest error”

# EU procedures

	Art 81	Art 82	ECMR
Scope	<ul style="list-style-type: none"> <li>- Finding that an agreement restricts competition</li> <li>- Finding that an agreement does or does not entail efficiency benefit</li> </ul>	Finding that a firm has a dominant position and abuses it	Finding that a concentration does or does not restrict effective competition
Proof taking	Inquisitorial for 81 (1) – with different procedures for the two sides Mixed for 81(3)	Inquisitorial with different procedures for the two sides	Inquisitorial with different procedures for the two sides
Standard of proof	No less than ECMR	No less than ECMR	More than balance of probabilities
Set of sufficient facts (per se)	Horizontal price fixing, market sharing cartel	Dominant position with MS > 60 (?) % Pricing below avoidable cost	No
Standard of review	Id ?	Id ?	Manifest error Facts, reasoning and inferences



# EU procedures

- The standard of proof has recently been clarified and probably increased (relative to the Commission's prior perception)
- The standard of review has also been enhanced
- Proof taking is inquisitorial
- But one side of the argument is weakly represented
- The procedure for 81(3) is a mix (the burden of proof is shifted). Like an adversarial procedure without adversaries

## EU procedures (ii)

- The burden of proof is not shifted under the ECMR
- An explanation behind abuse under 81(3) ?
- The scope of decisions and the standards of proof for the ECMR may not be compatible. In some circumstances, no decision can be taken with the required amount of confidence

# Adversarial vs inquisitorial

- An inquisitor may not look for information
- He may also suppress information to avoid the status quo, leading to “extremism”
- Parties in an adversarial system may also suppress conflicting evidence. This may lead to either inertia or extremism
- Adversarial procedures also allow for asymmetric burdens of proof
- Extremism in the EU may be encouraged by the interaction between the scope of decisions and the standard of proof

## EU procedures (iii)

- Abuse of evidence sanctioned by Courts look like a symptom of extremism
- So does conservatism
- And the systematic reduction of fines by Courts
- Economic evidence can be misinterpreted
- Validation of evidence is best undertaken by an adversarial procedure
- Inquisitorial procedure may be particularly poor given the imbalance in resources

# Further reform

- Resources, codification of the role of experts
- Make the case team the “judge” and delegate proof taking to the parties. Unlikely to work because of the asymmetry in the parties resources and incentives (?)
- Make the case team a “prosecutor” and organize the office of a judge, possibly within DG Comp
- Or follow the mixed model of the FTC, in the which the agency is an inquisitor that becomes a prosecutor in front of an administrative law judge – if it has serious doubts
- From the capture by corporate interests and member states to bureaucratic capture