

The Role of Economic Analysis in EU Competition Policy

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The “more economic approach” in the EU

“... a major trend of this mandate has been to ensure that competition policy is fully compatible with economic learning....” Mario Monti, Brussels, 28th of October 2004

“We are overhauling all our rules in order to firmly ground them in rigorous economic analysis and to improve the speed, transparency and predictability of their application.” Neelie Kroes, with regard to State aid control, Berlin, 6th July 2006

why the trend?

- increased need to justify the benefits of competition policy (competitiveness debate)
- scrutiny by the courts
- working closely on a consistent basis with other jurisdictions, external pressure (US) – GE-HWL Merger
- support by top political levels (Monti, Kroes, Lowe)
- advances in economics – industrial organization

some merger examples

- M. 4439 RYANAIR/AER LINGUS Regression Analysis
- M.3942 ADIDAS / REEBOK Discrete choice
- M.3796 OMYA / J.M. HUBER PCC Discrete choice
- M.3625 BLACKSTONE / ACETEX Co-integration test
- M.3333 SONY / BMG Regression Analysis
- M.3216 ORACLE / PEOPLESOFT Merger Simulation
- M.3083 GE / INSTRUMENTARIUM Bidding data analysis
- M.2978 LAGARDERE/NATEXIS/VUP Merger simulation
- M.2220 GE / HONEYWELL Theory/Modelling
- M.1672 VOLVO / SCANIA Merger simulation

Economic analysis and economists at DG Comp: organization & mandate

- Economists in all directorates
- Chief Economist Office (2003)
 - the CE advises the Commissioner
 - the CET gets involved in selected analysis
 - link to the economics profession (formal internal training & evaluating analysis)
 - the EAGCP
- Mandate
 - checks-and-balances
 - do the economic analysis
- Organization of economists: functional vs. divisional

what kind of economic analysis is needed?

Policy areas

Merger Control

Article 82

Article 81

State Aid Control

Type of Economic analysis

■ Cases

- specific, identifying “equilibrium” theories of harm => counter strategies, counterfactual analysis

■ Guidelines

- general rules and frameworks, cumulative knowledge, legal certainty

■ R&D

- market monitoring, e.g. sector inquiries
- ex-post analysis – more needs to be done in the area of evaluations (Example: remedy studies)
- ex-ante priority setting (more general: policy screening)

The more (refined) economic approach

- reform a process, not a revolution
- recent developments are not about more or less economics, but rather about what kind and how economic analysis is used to arrive at better decisions.
- decisions in light of modern economic principles (reduce type I and II errors)
- provide an analytical framework, given objectives
- fact-based analysis: check assumptions, identify effects, quantify effects

Some issues

- ➔ requires know-how & capabilities; both by enforcers and affected parties
- ➔ often basic economic concepts (opportunity costs, counterfactual)
- ➔ level of sophistication limited by institutional environment
(administrative vs. judicial)

how far have we come?

➤ new merger regime

- new test (SIEC) – oligopoly approach
- more effects-based approach (even under the old test)
- efficiencies
- has it made any difference?
 - clarity
 - decisions: gap cases/efficiencies

➤ article 82

- Current EU approach => Art. 82 Review
 - form-based approach and per se rules (loyalty rebates in Michelin II)
 - effect-based analysis
- exclusionary and exploitative abuses
 - => Differences between US and Europe

➤ Article 81 Cartels

- Policy priority
- Leniency program has resulted in significant number of cartel cases
 - 1996-2002:13 applications per year;
 - 2002-2006:41 applications per year
 - Roughly 2/3 of all cases are based on leniency
- Guidelines of fines
 - economic principles only marginally reflected

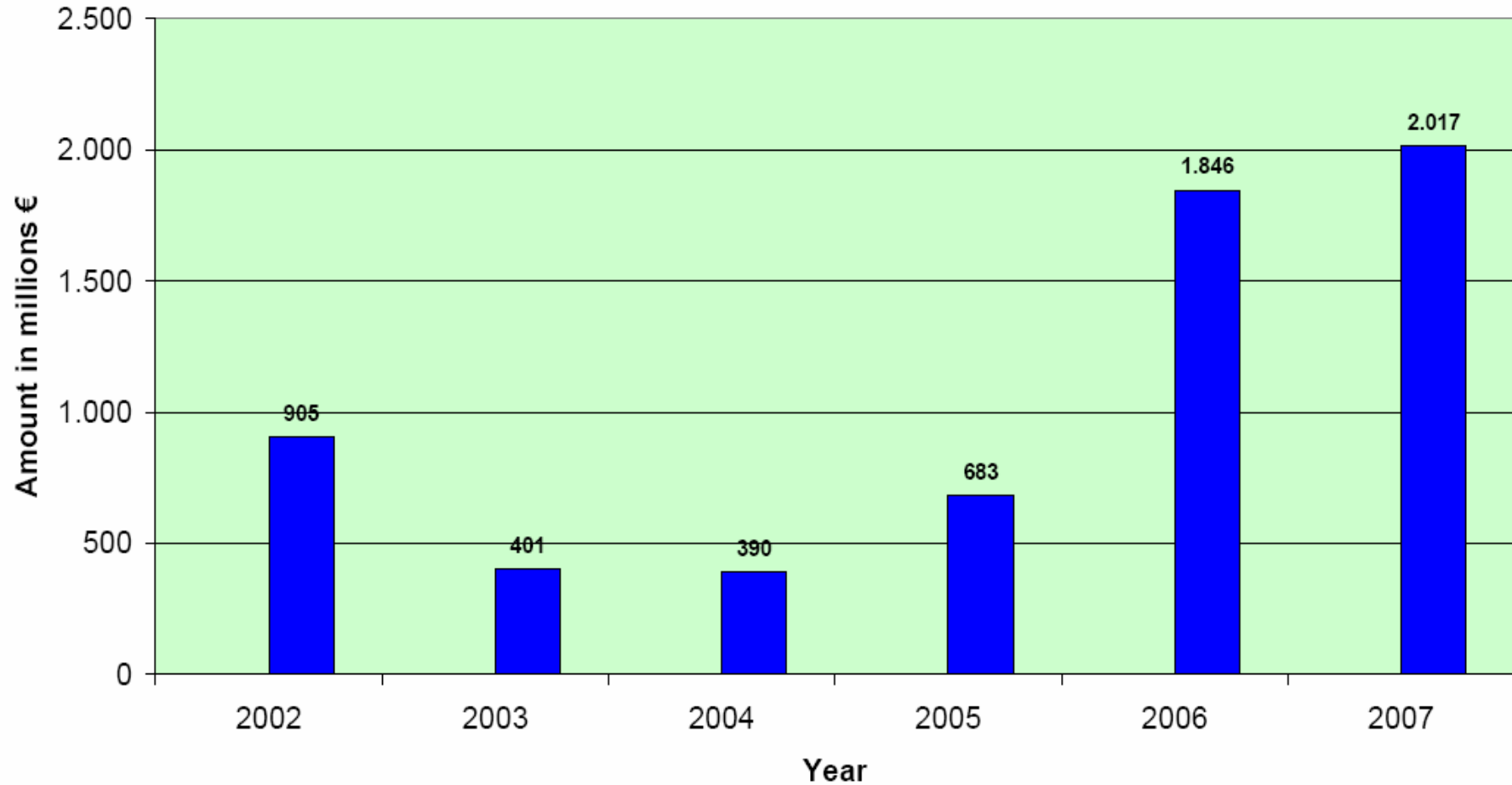
...and private enforcement action supported by the Commission!!

"Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages, submitting elements of the published decision as evidence that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine."

Standard quote from DG COMP press release

- ➔ Green Paper by the Commission
- ➔ Overcharge analysis will become more important in Europe (like in the US)

Cartel fines imposed (corrected for Court judgments)



Source: DG Comp statistics

Cartels – significant (and increasing) fines imposed by the Commission

10 largest fines imposed by the Commission by sector

Sector	Year	Total (euros)
Elevators and escalators	2007	992 312 200
Vitamins	2001	790 505 000
Gas insulated switchgear	2007	750 512 500
Synthetic rubber (BR/ESBR)	2006	519 050 000
Plasterboards	2002	478 320 000
Hydrogen peroxide	2006	388 128 000
Acrylic glass	2006	344 562 500
Copper fittings	2006	314 760 000
Carbonless paper	2001	313 690 000
Industrial bags	2005	290 710 000

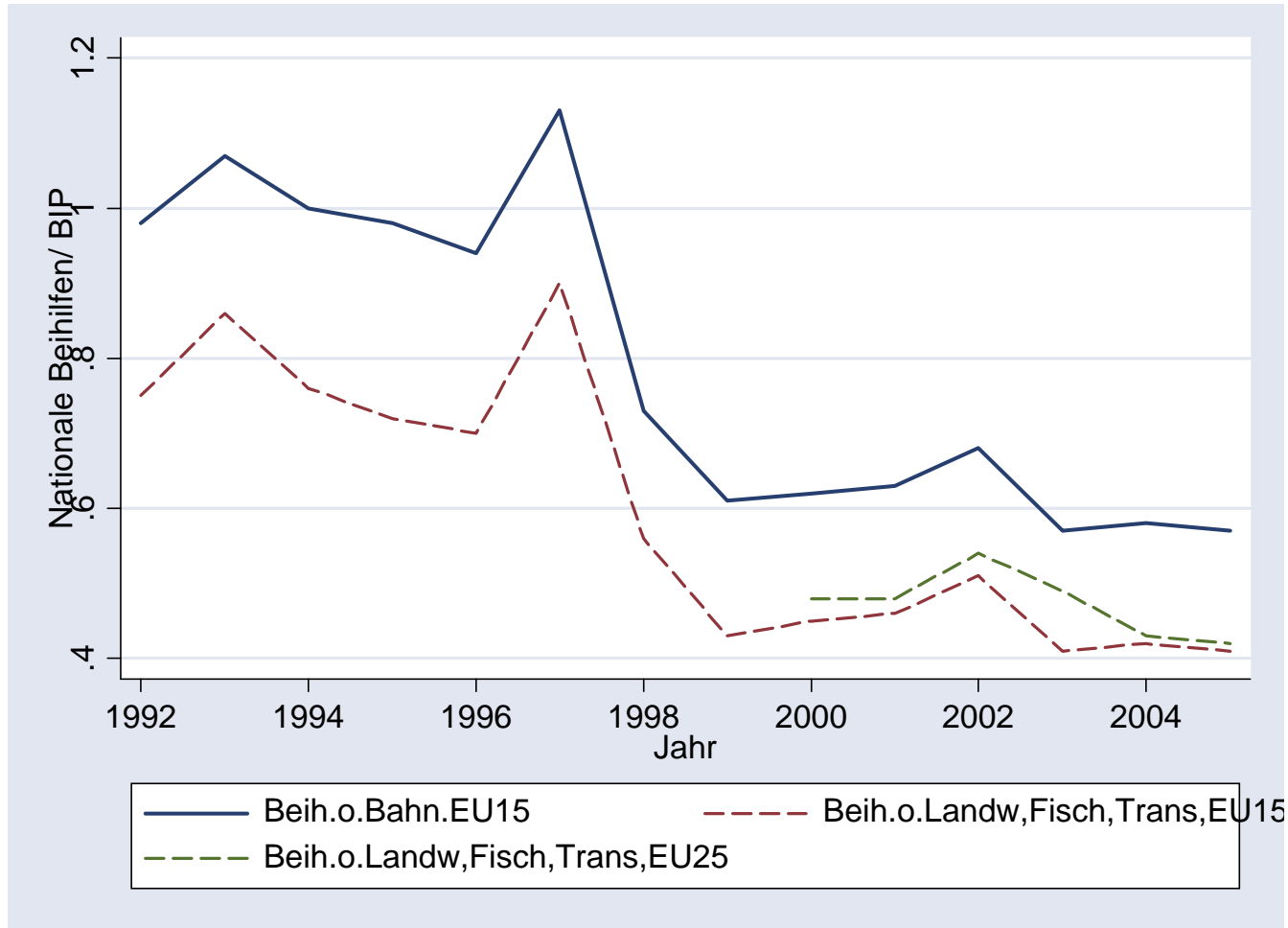
cartel investigations – the (limited) role of economics

- “affected markets” – for example market definition
- overcharge estimation - importance of counterfactual analysis (what would have been the market outcome without cartel)
 - => private enforcement
- ex-officio investigations (agency)

European state aid control

why the reform.....

- positive and negative effects not investigated fully (distortions of competition and effect on trade really not assessed)
 - ➔ effect-based vs. form-based
- priority setting: are we investigating the right cases (notified cases, complaint-driven, what about non-notified new aid?)
- procedures often not effective (too long)



Source: DG COMP scoreboard

State Aid Action Plan

“less and better targeted” – political mandate

- reduce the overall level
 - increase effectiveness of state aid to achieve economic and social objectives
 - simplify the architecture, transparency & predictability
 - shared responsibility with MS
- ➔ the “refined economic approach”

the “balancing” test

- a) existence of a market failure or social problem (is there a problem)?
- b) targeting the market failure or social problem (does the aid solve the problem?)
 - a) appropriateness (better placed instrument)
 - b) incentive effect (windfall profits)
 - c) aid to the minimum/necessary
- c) distortion of competition, effect on trade + balancing (proportionality)
 - ⇒ remark on integrated approach
 - ⇒ remark on sequencing

how far should we go?

challenges to maximize “use of economics” (minimize abuse of economics)

“Natural” Limitations

- trade-off: predictability & legal certainty vs. precisions (Vickers argument)
- communicate economic evidence:
 - ability by economist to communicate with non-economists (inside and outside)
 - level of sophistication limited by institutional environment (administrative vs. judicial)
- demonstrate effective enforcement (reduce type I and II errors) in a timely manner
- limitation of economics as a science: ex – effects of rebates

challenges to maximize “use of economics” (2) (minimize abuse of economics)

“Systemic” Limitations

- process of generating economic evidence and analysis
 - best practice for empirical economic analysis
 - no “Gutachterschlachten”
 - transparency vis-a-vis parties, meetings amongst economists
 - critical mass, resource imbalances
- capacity building crucial to minimize abuse of economics
 - “The market share of economic arguments has been dramatically increasing, however, the market share of economists has not”

Bobby Willig at an OECD meeting in 2004

final thoughts.....

- reform a process (MEA), not a revolution
- not equally in all areas (and that is good!)
- it has made a substantial difference – through shifting of arguments
- the trend is likely to continue; in fact, the full benefits are likely yet to come.
- however, there are “natural” limitations, but also systemic risks of abusing economics
- capacity building crucial to minimize systemic abuse of economics and to reap the benefits of the MEA.

Publications on the use and abuse of economics

- “The more economic approach”
 - “Economic Analysis and Competition Policy Enforcement in Europe”, in Modeling European Mergers: Theory, Competition and Case Studies, Edward Elgar, 2005.
 - “Der ökonomische Ansatz in der europäischen Wettbewerbspolitik”, in Monopolkommission: Zukunftsperspektiven der Wettbewerbspolitik, Nomos Verlag (ed.), Colloquium anlässlich des 30-jährigen Bestehens der Monopolkommission, 2005.
 - “Ökonomische Analyse in der EU Wettbewerbspolitik. Ein erstes Résumé”, (with Hans W. Friederiszick), 13. Internationales Kartellrechtsforums, St. Gallen, Helbing & Lichtenhanh, Band 8, 2007.
- Cases and Review
 - “The Year 2005 at DG Competition: the trend towards a more effects based approach”, (with Oliver Stehmann), Review of Industrial Organization, forthcoming.
- Merger Control
 - “The Impact of the New Substantive Test in European Merger Control”, (with Miguel de la Mano), European Competition Journal, Vol. 2, No. 1, April 2006.
- State aid
 - “European State Aid Control: an economic framework”, (with Hans W. Friederiszick and Vincent Verouden), in Advances in the Economics of Competition Law, Cambridge, Mass.: MIT Press, forthcoming.

The EU Courts: judicial review

Judicial review and economic evidence

- DG Comp is an administrative authority that takes decisions and imposes fines. Effective judicial review is necessary.
- what does “margin of discretion on economic matters” mean?

*“Whilst the Court recognises that the Commission has a **margin of discretion** with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.” (emphasis added)*

(2005, Tetra Laval BV, ECR 2005 I-00987 ¶139)

Judicial review (cont'd)

- “separating facts from complex economic assessment”
 - is economic assessment always complex?
 - do facts require complicated economic assessments?
- “all the information that must be taken into account” & “substantiating the conclusions drawn from it” seems very much part of an economic assessment
- alternative 1: increase the margin, i.e. delegate economic assessment to the agency
- alternative 2: more scrutiny of economic assessment, but then need more economic expertise at the Courts:
 - in-house economic expertise (economists)
 - more Court appointed experts
 - other possibilities: specialized Judges