EXPELLING THE ECONOMISTS FROM EU MERGER CONTROL

BY JORGE PADILLA[1]

1 Jorge Padilla is Senior Managing Director at Compass Lexecon. I have benefited from the excellent research assistance and comments of Wiktor Owczarz, Joe Perkins, Ethan Soo and Andrew Tuffin. The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of Compass Lexecon, its economists and clients.

CPI ANTITRUST CHRONICLE December 2023

Visit www.competitionpolicyinternational.com for access to these articles and more!

EXPELLING THE ECONOMISTS FROM EU MERGER CONTROL

By Jorge Padilla

In this essay I discuss the claims and evidence in a recent paper, which has received significant attention in the media and the policy debate. The paper finds that "hired economic consultancies" play a key role in a new lobbying strategy – spamming DG Comp with submissions of low quality in order to exploit the regulator's limited resources and the informal requirement to respond to all submissions. I review the empirical analyses allegedly supporting the conclusion. I then discuss the likely implications of the policy measures that are being advocated in light of such findings. I conclude with a few constructive ideas about how to improve the way in which economics and economists contribute to the enforcement of competition law.

I. INTRODUCTION

This paper reflects on recent statements by prominent members of the competition policy community protesting against the allegedly negative influence of mainstream, neoclassical economics[2] and, in particular, of consulting economists on antitrust enforcement and merger control.

For example, Barry Lynn, Executive Director of the Open Markets Institute,[3] which lists the current chair of the U.S. Federal Trade Commission ("FTC") as a former employee and whose employees are regularly invited to events organized, among others, by the European Commission ("EC"),[4] or attended by the heads of the most important competition agencies around the world,[5] has stated,

> the [economics] profession is fundamentally corrupt, not in terms of money – there is some money corruption in the profession, but I'm not talking about that – it's intellectually corrupt. And until the fundamental intellectual corruption of economics is eliminated, the profession as a profession cannot help our society to address any of the fundamental problems.
>
> For the last 40 years, as we've seen power concentrated in these corporations, as the economists in our midst have been the priests for the corporations, hiding their power, hiding their predation, we, as people have been locked into tighter and tighter intellectual structures, into a black box created by the monopolists.[6]

Another prominent antitrust opinion leader, Cristina Caffarra,[7] similarly expresses her frustration with the use of mainstream economics in competition policy,

> We have, in some way, come full circle. I supported the "more economic approach" in the mid-1990s, thinking this was a much-needed way of bringing antitrust in Europe into the modern age. Yet, the concept of consumer welfare that we implicitly came to adopt has embodied a vision of enforcement that has protected incumbents from antitrust intervention. … Ironically, for Europeans, there is more than a little ordoliberal flavor in this posture. But then, this is not so dissimilar from the U.S. calls for a return to the original animating values of antitrust: freedom of choice and curbing of corporate power. It is just a pity we do not have quite the same poetic flourish in the European narrative right now around protecting democracy and freedom from all masters…[8]

A frustration that focuses in particular on economic consultants,

> Couldn't agree more. Too much money involved. Economic consultants (we) have become advocates making up narratives with pseudo-maths to support bad deals & bad conduct, fed to lawyers & clients in a festival of collective hubris. Some academics too. Incentives are just too strong.

These views have practical implications. They are used to justify a movement that advocates for the abandonment of effects-based antitrust and in favor of formalism, for the adoption of *per se* illegality rules and/or structural presumptions and, more recently, for the marginalization of mainstream or neoclassical economics.

---

2 The principles of neoclassical economics specify that the production, consumption and pricing of goods and services are driven by the interaction of supply and demand, which in turn reflect the utility maximization of rational consumers and the profit maximization of firms. See e.g. E. Roy Weintraub. (2007). "Neoclassical Economics," *The Concise Encyclopedia of Economics*, available from http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html.

3 See https://www.openmarketsinstitute.org/staff/barry-c-lynn.

4 See e.g. *Shaping competition policy in the era of digitization*, Brussels, January 17, 2019. https://ec.europa.eu/competition/information/digitisation_2018/files/programme.pdf.

5 See e.g. Keystone, *The Brussels Conference*, Brussels, March 2, 2023, https://www.brusselsconference.com/speakers.

6 See Age of Economics, October 9, 2021, available at https://www.ageofeconomics.org/interviews/barry-c.lynn/.

7 See Cristina Caffarra's website, available at https://cristinacaffarra.com/about/.

8 See Cristina Caffarra, "Consumer Welfare Is Dead": What Do We Do Instead?—A Perspective from Europe," *Promarket*, April 27, 2023, available at https://www.promarket.org/2023/04/27/consumer-welfare-is-dead-what-do-we-do-instead-a-perspective-from-europe/.

For the most outspoken critics of neoclassical competition policy – the Neo Brandeisians[9] – the effects-based approach[10] and its reliance on consumer welfare has turned antitrust and merger control into an ineffective policy tools: lengthening investigations, making them highly complex endeavors, exposing them to challenge in court, and transferring authority from the people to (almost always biased) economic experts.

FTC Chair Lina Khan states,

> In today's formulation, the rule of reason serves as a supposed balancing test of harms and benefits. In practice, gauging the effects of particular conduct ends up turning on the 'conflicting testimony of the parties' retained expert economists. Indeed, … , the evolution and increasing centrality of the rule of reason approach has meant a 'delegation of authority from judges and juries to economists,' who now determine 'the application, and sometimes even content, of antitrust rules.'[11]

Neo Brandesians regard size to be bad per se, since unchecked economic power may translate into unfettered political power and distort the very foundations of our liberal democracies.[12] They criticize the consumer welfare goal, alleging that it fails to weigh appropriately the importance of preserving rivalry in the long run even when that implies tolerating higher prices in the short run.[13] They favor the adoption of a formalistic approach whereby intervention is automatically triggered when certain formal conditions (such as the market share of the company under scrutiny or the form of the conduct at issue) are met.[14] Thus, for example, they advocate for the reinvigoration of the "structural presumption" in horizontal merger control (i.e. mergers should be blocked if they increase concentration in the relevant market without further enquiry into their likely price effects).[15]

The idea is to expel mainstream economics (and economists) from the administrative process, so that the "heirs of neoliberalism" do not contaminate competition officers – lawyers, economists, etc. – leading them away from the true faith – that big is bad and that markets only work for the people when they are highly fragmented.

Former Chief Economist Tommaso Valletti has been especially critical of consulting economists,

> I saw the consultants hijack a certain way of doing economic work. They do this on a massive scale, to create doubt. They bombard you. They say 'well, this merger could bring all these fantastic efficiencies: here is a possibility you should consider.' You know that in practice this will not play a role, but then you have the burden of proof as an authority to dismiss those claims. It is a very dirty game.[16]

The need to get rid of the technocratic, neoliberal economic elite is regarded as existential for our political communities. Quoting Cristina Caffarra again,

> Europe cannot remain stuck in the outdated paradigm that views antitrust as a technocratic island and a bulwark against the emergence of "national champions." European regulatory elites need to grasp that the antitrust they are practicing today is far from "pure" or "neutral." Instead, it is the product of the neoliberal shift of the 1980s. Nowadays, US officials are insisting that antitrust also has a major role to play in achieving a different goal: not efficiency but opportunities.[17]

---

9 Not all critics of the neoclassical paradigm are Neo Brandesians. See e.g. Jonathan B. Baker, (2022), "Finding Common Ground Among Antitrust Reformers," *Antitrust Law Journal,* 84.3, pp. 705-751.

10 According to this approach, intervention is only justified when there is evidence that market outcomes are undesirable, in the sense of causing a reduction in consumer welfare, and that there is a causal link between the alleged market failure and those undesirable outcomes.

11 See Lina M. Khan (2018), "The Ideological Roots of America's Market Power Problem," *The Yale Law Journal Forum*, available from https://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem.

12 See e.g. Jamie Susskind. (2022). *The Digital Republic*. Pegasus Books. See also Tim Wu. (2018). *The Bigness Curse*. Columbia Global Reports.

13 See e.g. Maurice E. Stucke, (2012), "Reconsidering Antitrust's Goals," *Boston College Law Review*, 53, p. 551. See also Lina M. Khan (2017), "Amazon's Antitrust Paradox," *Yale Law Journa*l, 126, pp. 710-805.

14 See e.g. Wu, (2018), *supra* note 12.

15 See e.g. John Kwoka, (2017), "The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?," *Antitrust Law Journal*, 81.3, pp. 837-872.

16 See Corporate Europe Observatory, "Spamming the regulator. How Big Tech's 'economic consultants' undermine EU competition policy," January 30, 2023, available at https://corporateeurope.org/en/2023/01/spamming-regulator.

17 See Cristina Caffarra, "Europe's Tech Regulation Is Not an Economic Policy," *Project Syndicate*, October 11, 2023, available at https://www.project-syndicate.org/commentary/european-union-digital-markets-act-will-not-tame-big-tech-by-cristina-caffarra-2023-10.

Because of limitations in space, I cannot deal with all arguments raised against mainstream, neoclassical economics in this brief essay.[18] Instead, and by way of example, I will discuss the claims and evidence reported in a recent paper, which has received a lot of media attention.[19] The paper, titled "Spamming the regulator: exploring a new lobbying strategy in EU competition procedures" was published in the *Journal of Antitrust Enforcement* early in 2023.[20] The paper claims to study "the role of specialized consultancies, such as Compass Lexecon, Charles River Associates, RBB Economics, and NERA, and their economic expert assessments."[21] It concludes that these "hired consultancies" play a key role in a new lobbying strategy – spamming the regulator (in particular DG Comp) with submissions of low quality in order to exploit the regulator's limited resources and the informal requirement to respond to all submissions.[22]

The authors aver that,

> Hiring economic consultancies, and individual consultants from private firms or academia in particular, allow companies to *de facto* extend their rights of defence and right to be heard to actors the extent of whose involvement in the procedure might not have been initially foreseen by the legislator.[23]

Because of this, they consider that

> evidence-based decision making can strain limited administrative capacities and, counter-intuitively, undermine regulatory effectiveness … [creating] opportunities for potentially adversarial strategic behaviour.[24]

And that

> an increasing professionalization of regulatory practices, including extensive rights for private parties to submit information and evidence, can ultimately undermine regulatory effectiveness.[25]

So, in their opinion,

> it seems justified, for reasons of fairness between corporate practices and also benefit to taxpayers, to limit the resources that corporations demand a regulator use in order to examine their case.[26]

For example, by limiting "the number of consultancies allowed to intervene on behalf of the merging parties in a merger case," or requiring in cases "where multiple consultancies – and similarly academic experts – intervene on behalf of private companies by producing paid-for research, that these documents and mandates avoid overlap in order to avoid duplication."[27]

In this essay, I will first review the empirical analyses allegedly supporting the above claims and conclusions. I will then discuss the likely implications of the policy measures that are being advocated. I will conclude with a few ideas about how realistically and constructively improve the way in which economics and economists contribute to the enforcement of competition law.

---

18 See Jorge Padilla (2023), "Neoclassical Competition Policy Without Apology," in Adina Claici, Assimakis Komninos & Denis Waelbroeck (eds.), *The Transformation of EU Competition Law: Next Generation Issues,* Chapter 5, Kluwer Law International.

19 See Corporate Europe Observatory, 2023, *supra* note 16.

20 See Marlene Jugl, *et al.* (2023) "Spamming the regulator: exploring a new lobbying strategy in EU competition procedures," *Journal of Antitrust Enforcement*, 1-22.

21 *Id.* at 2.

22 *Id.*

23 *Id.* at 7.

24 *Id.* at 3.

25 *Id.* at 21.

26 *Id.*

27 *Id.*

II. EMPIRICAL ANALYSIS BEHIND *SPAMMING* THE REGULATOR

Jugl *et al.* analyze a dataset comprising 108 final decisions in Phase II merger cases for the period ranging 2005 to 2020. They searched the decision text for terms relating to economic submissions, economic consultancies, economic research, and quantitative analysis. They also recorded when possible the dates of submission, the authors or firms, title and subject matter of the submissions. They excluded submissions made by the third parties, including complainants. The authors assume that the EC approach to referencing the work of private consultancies did not change over time and consider, though it is difficult to prove, that they have an unbiased sample of all submissions and references to economic consultancies across the period of their dataset.

They find that

1. "firms hire an increasing number of consultancies to interact with the European Commission in merger cases,"[28]
2. "a significant increase in the number of economic submissions per case,"[29]
3. "there is no evidence for (and some against) the idea that consultancies have learnt to add workload closer to administrative deadlines,"[30] and
4. the average number of submissions per case has decreased in the case of prohibition decisions and increased in the case of clearance decisions subject to commitment decisions.[31]

These results are interpreted as broadly supporting the spamming hypothesis. In particular (1) and (2) are said to be "consistent with private actors practicing a strategy of *spamming* the regulator in order to hamper the proper functioning of regulation and minimize potential disadvantages for their businesses."[32] Result (4) is interpreted as evidence of increased spamming for clearance decisions subject to commitment decisions and of decreased spamming for prohibition decisions. Finally, result (3) is said to be "not inconsistent with the assumption that a strategy of a higher number of submissions can benefit merging companies,"[33] though the authors acknowledge that "if spamming occurs, occurs only in terms of overall administrative deadlines,"[34] and not in terms of strategic timing of submissions.[35]

III. ASSESSING THE EVIDENCE IN *SPAMMING* THE REGULATOR

The empirical project in Jugl *et al*. is valuable and its results interesting. Yet, the interpretation of those is, in our opinion, incorrect. The problem lies in that the authors center their quantitative analysis on three empirical (or testable) hypothesis – that merger parties hire a greater number of consultancies in more recent cases (*hypothesis #1*); that economic consultancies will make a greater number of economic submissions in more recent cases (*hypothesis #2*); and that economic submissions will be made later in the merger investigation process (*hypothesis #3*) – that do not serve to discriminate between the following two propositions of economic and policy relevance:

- **Proposition 1**. The merger parties are spamming the regulator in recent merger cases through the submission of economic submissions.
- **Proposition 2**. Merger cases are *exogenously*[36] becoming more complex and/or are analyzed more rigorously, and this is reflected *inter alia* in a greater number of economic submissions.

In technical terms, the quantitative analyses in Jugl *et al.* suffer from a severe *identification problem*.[37] Intuitively, the three testable hypothesis in Jugl *et al.* could be true under propositions 1 and 2. If mergers were more complex or were analyzed more in depth, i.e. under proposition 2,

28 *Id.* at 13.

29 *Id.* at 13.

30 *Id.* at 15.

31 *Id.* Figure 5.

32 *Id.* at 14. Emphasis in the original.

33 *Id.* at 15.

34 *Id.*

35 *Id.*

36 That is, for reasons other than the increase in the number of economic submissions. See the discussion regarding the interpretation of Figure 4 below.

37 See e.g. Cheng Hsiao, (1983), "Identification," *Handbook of Econometrics*, Vol. 1, Ch.4, North-Holland Publishing Company.

we would expect to see an increasing number of economic submissions and more hired consultancies in recent merger cases. We may also see an increasing number of submissions closer to the deadline, if the complexity of the merger or the depth of the analysis were such that concerns were only resolved towards the end of the administrative process. If anything, I would submit that hypothesis #3 is the only one that can serve to discriminate between propositions 1 and 2, since it is relatively more consistent with the complexity explanation in proposition 2 than with the Machiavellian theory in proposition 1. Given this, the interpretation given to results (1) and (2), and also (4) by Jugl *et al.* is unwarranted. All in all, given result (3), the evidence in Jugl *et al.* fails to support the spamming hypothesis.

Addressing this identification problem is not simple. Certain additional analyses can, however, help to discriminate between the two propositions, and their underlying narratives. Thus, I have investigated whether the number of economic submissions in recent merger cases have increased relative to various proxies of complexity or analytical rigor, such as (i) the number of pages in the decisions, (ii) the number of references to non-economic evidentiary sources (such as internal documents and market test results), and (iii) the number of Requests for Information (RFIs) issued by the DG Comp's case teams.

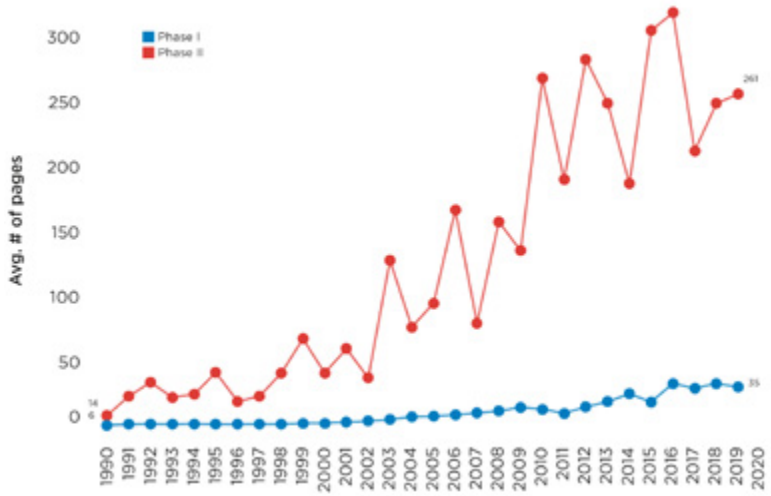
Of course, these analyses do not solve the identification problem fully, since an increase in the number of economic submissions may result in lengthier decisions, a greater number of references to other non-economic sources, and an increase in the number of RFIs. In other words, contrary to the premise in proposition 2, merger cases may have become more complex and/or are analyzed more rigorously *endogenously*. Yet, for the reasons stated after the data analysis is presented, I believe the evidence suggests that causality flows from greater complexity in the merger review process to an increased number of submissions and not *vice versa*.

This analysis has been carried out by Compass Lexecon's data science team based on two approaches:

- First, an assessment of all EC merger decisions between 1990 and 2020, covering 7,823 cases in all, using machine learning to read and interpret almost 100,000 pages of decisions. This assessment was originally carried out for Muhamedrahimov & Tuffin (2021), "Analyzing EC Merger Decisions."[38] It provides useful background information on how decision practice appears to have changed over time (particularly about the balance between economic and other forms of evidence), but was not designed specifically to test between the two propositions above.
- Second, an assessment of all English-language EC phase 2 merger decisions between 1990 and 2022, covering 212 cases. This assessment was carried out for this article. It analyses what published decisions can tell us about how the number of requests for information (RFIs) issued by the EC, and the number of citations to these RFIs, has changed over time.

These analyses find first that the complexity of decisions has increased over time. This is consistent with both propositions 1 and 2. The average number of pages of phase II decisions increased from around 50 in the early 2000s to around 250 now (Figure 1). While this does not necessarily imply more complexity (it could, for instance, reflect greater transparency of decision-making rather than more complex analysis), it is supportive evidence for Jugl et al.'s claim that there is *"a growing workload for the EU regulator in complex merger review procedures."*[39]

Figure 1: Decision length, excluding Simplified Procedure, EC decisions (1990-2020)

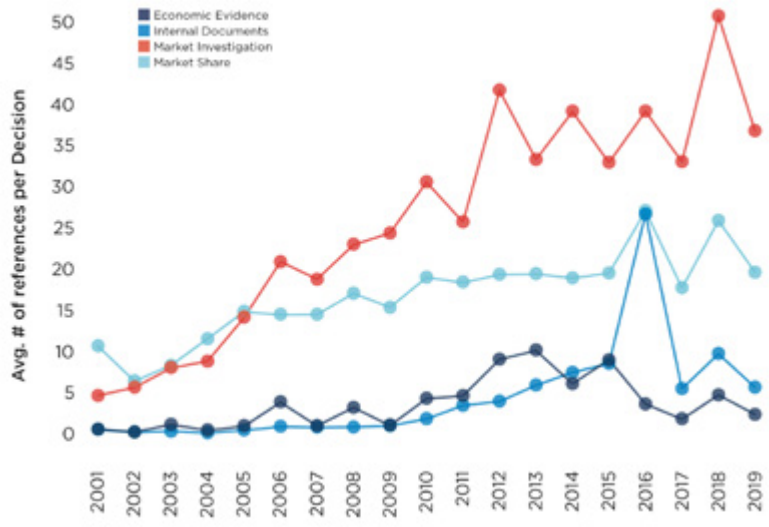


38 See Muhamedrahimov & Tuffin, (2021), "Analyzing EC Merger Decisions," available at https://www.compasslexecon.com/wp-content/uploads/2021/04/CL_Expert-Opinion_Analysing-EC-Merger-Decisions_April-2021.pdf.

39 See Jugl *et al.*, at 20.

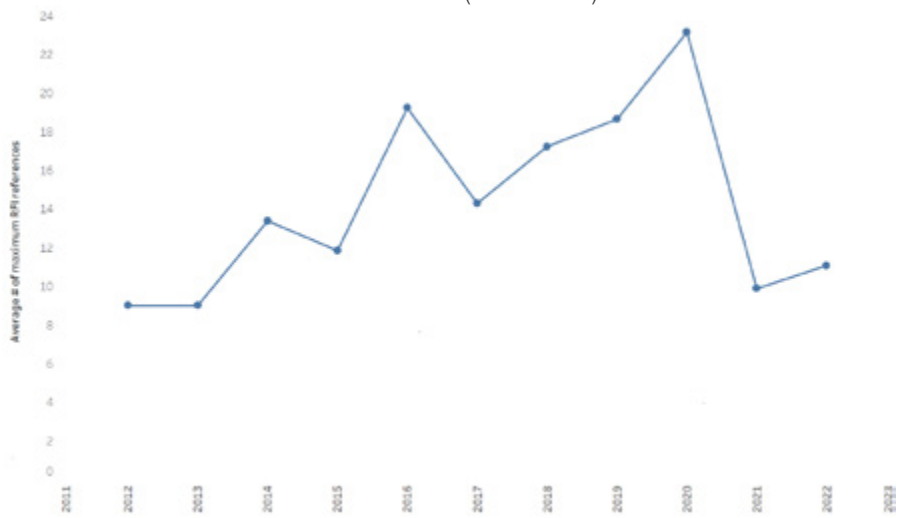
Second, the data show that forms of evidence other than economic evidence have been cited relatively more frequently in decisions over time. The average number of references to in-depth economic evidence (such as Upward Pricing Pressure or econometric analyses) declined between the early 2010s and 2020. Internal documents, market investigations and market shares are much more frequently cited (Figure 2). This appears more consistent with Proposition 2 than Proposition 1, as it suggests that the EC is relying more heavily on non-economic evidence (presumably generated by its own analysis, or submitted by parties other than economic consultancies) than on economic evidence. There are though other explanations – for instance, the EC could be receiving more economic submissions, but placing less weight upon them.

Figure 2: Average number of references to different types of evidence used in EC decisions (2001-2019)[40]



Third, there is evidence that the number of RFIs issued by the EC increased substantially between 2012 and 2020, before falling back in 2021 and 2022. Figure 3 shows the average maximum number of RFIs referred to in EC decisions over time (that is, we look at the highest-numbered RFIs that each decision refers to, and then average across all decisions published in each year).[41] This increased steadily from around 9 in 2012 to over 22 in 2020, but fell back to around 10 in 2021 and 2022 (Figure 3). The case with the highest-numbered RFI was the 2020 merger between PKN Orlen and Grupa Lotos, in which at least 355 RFIs were issued. The reasons for these changes are not clear, but prima facie they appear consistent with Proposition 2, in that they suggest that the EC has chosen to issue more RFIs for reasons unconnected with the economic submissions made by parties.

Figure 3: Average maximum number of RFIs referenced in EC decisions (2012-2022)

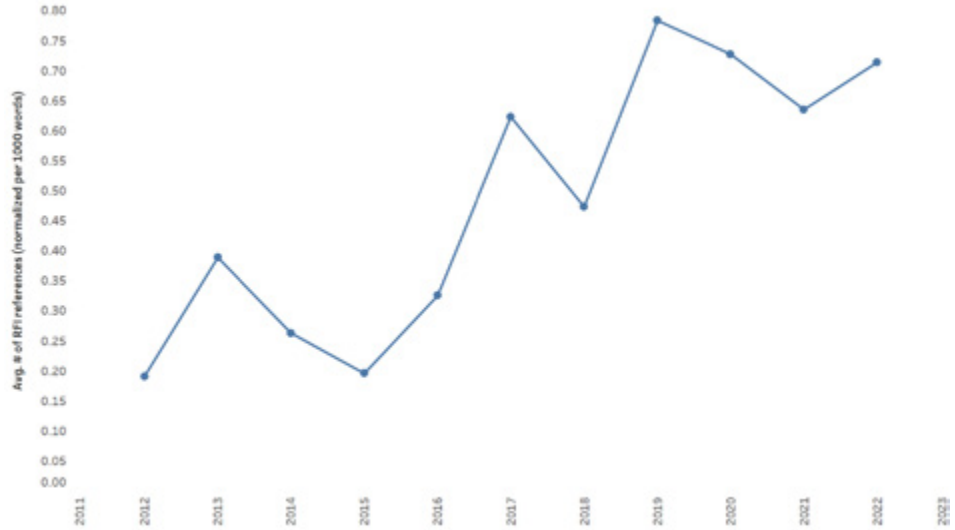


40 Only English-language cases included (83% of database). High average 2016 internal document count is driven by two large cases: *Dow/DuPont* and Hutchinson *3G Italy/Wind/JV.*

41 This means that it is a lower bound on the number of RFIs issued; the EC could have issued more RFIs that are not referred to in the decision.

This is supported by our analysis of citations to RFIs, which show a significant and sustained increase in references over time (Figure 4), both in absolute terms and relative to the length of published decisions.

Figure 4: Average number of RFIs referenced in EC decisions (2012-2022)



Taken in the round, the evidence I have reviewed appears more consistent with Proposition 2 than Proposition 1. The large increase in RFIs issued by the EC (and references to them) is suggestive of an increase in complexity that is outside the influence of economic consultancies, and the relative reduction in the importance of economic evidence in published decisions is suggestive of a reduction in the extent to which economists affect merger decision-making.

I would note, however, that this is indicative rather than definitive. In particular, I do not know the extent to which RFIs were issued in response to claims made in merging parties' economic submissions. A full analysis, which would likely only be possible using data held by the EC, could look at the interaction between the timing of RFIs and economic submissions across a substantial number of cases – for instance, do RFIs precede or follow economic submissions?

IV. ASSESSING THE POLICY RECOMMENDATIONS IN *SPAMMING THE REGULATOR*

As stated in the Introduction, Jugl *et al.* conclude that conferring "extensive rights for private parties to submit information and evidence, can ultimately undermine regulatory effectiveness," and so it may be optimal "for reasons of fairness between corporate practices and also benefit to taxpayers, to limit the resources that corporations demand a regulator use in order to examine their case," for instance, by limiting "the number of consultancies allowed to intervene on behalf of the merging parties in a merger case," or requiring in cases "where multiple consultancies – and similarly academic experts – intervene on behalf of private companies by producing paid-for research, that these documents and mandates avoid overlap in order to avoid duplication."

To understand the likely implications of these policy measures, it is useful to review the analysis conducted by Dewatripont & Tirole in their paper titled "Advocates."[42] Consider a society that needs to choose how to run its merger control policy. It can delegate to a non-partisan inquisitor, who collects information and then makes a decision, or to a non-partisan decision maker, who makes a decision based on information collected and reported by two advocates – one representing the interests of the merging parties and the other those of consumers.

Dewatripont & Tirole demonstrate that when society rewards the non-partisan inquisitor based only on the final decision, rather than on the amount and quality of the information collected, society is better off with a non-partisan decision maker relying on competing advocates. This is because the latter arrangement produces either more information, and hence better decisions, or the same information more cheaply. This result is relevant in practice because decision-based rewards are pervasive.

42 See Mathias Dewatripont & Jean Tirole, (1999), "Advocates," *Journal of Political Economy,* Vol. 107.1, pp. 1-39.

The benefit of the system with open advocates is that "it generates precious information on the pros and cons of alternative policies. One cost is that advocates have an incentive to retain information that is detrimental to their cause or even forge information."[43] The authors demonstrate that the cost of the adversarial system is less with "representative" advocates – i.e. when the advocate does not benefit directly from the decision-maker's choice. They conclude that "a representative advocate, who has less powerful incentives [than a self-advocate] may only omit to reveal information detrimental to the client," but will not risk its future credibility by forging or manipulating the information it collects and reports.

The implications of the work of Dewatripont & Tirole for the assessment of the proposals made by Jugl *et al.* are non-trivial; the reason being that merger control in the EU cannot be easily categorized as either a "pure inquisitorial" system or a "pure adversarial" system – the two polar cases investigated by Dewatripont & Tirole.

EU merger control is a "hybrid inquisitorial-adversarial" model, which can be characterized as follows:

- Society delegates the decision to approve or prohibit a proposed merger to an inquisitor – DG Comp – that is "quasi" partisan, since it is tasked with protecting consumers disregarding the potential efficiencies that the merging parties could generate and appropriate through the transaction, so that it is more concerned about Type II errors (i.e. clearing mergers that reduce consumer welfare) than Type I errors (i.e. prohibiting mergers involving no consumer harm but giving rise to efficiencies that may be mostly appropriated by the merging parties).
- The inquisitor is incentivized to handle cases efficiently as well as to make decisions that withstand judicial scrutiny. That is, the inquisitor receives both decision-based rewards and information-based rewards. Since in the EU both clearance and prohibition decisions can be appealed, it seems unlikely that the availability of information-based rewards is capable of reducing the inquisitor's bias in favor of minimizing Type II errors. However, following Dewatripont & Tirole, the inquisitor has a greater incentive to acquire information to improve the quality of its decisions than would be the case with decision rewards only.
- The inquisitor is not the only one collecting information, the merging parties and the complainants also collect information that is then communicated to the inquisitor, and the latter is required to consider all these data in its decision. Following Dewatripont & Tirole, this is bound to produce better quality decisions.

It is unclear whether the EC model results in better or worse decisions than the pure inquisitorial and pure adversarial models considered by Dewatripont & Tirole. On the one hand, the EC inquisitor will make decisions based on more and better information than the non-partisan inquisitor in their model, since it is incentivized to make better decisions and not only more decisions and, moreover, it benefits from the information collected by the merging parties and the complainants. On the other hand, the EC inquisitor is somewhat partisan, which may make it more error prone.

This hybrid inquisitorial-adversarial model can be used to work out the implications of the proposals made by Jugl *et al*. They advocate limiting the number of consultancies hired by the merging parties and, by avoiding overlaps between the work of said consultancies, reducing the overall number of submissions. This policy will have three adverse effects on the efficiency of EC merger control.

- *First*, unless the limit to the number of economic submissions of merging parties and complainants is symmetric, that limit will aggravate the existing bias in favor of the minimization of Type II errors that is inherent to EC merger control. The reason is fairly obvious: the inquisitor will necessarily receive biased information from the third-parties if the limitation in the number of submissions affects the merging parties only. This would be problematic in a hypothetical world with a non-partisan inquisitor, let alone in the real world where decisions are taken by the quasi-partisan EC inquisitor.
- *Second*, even if the limit to the number of economic submissions of merging parties and complainants is symmetric, with the limit in place the EC inquisitor will have to make its decisions with less information than it would if it had unrestricted access to all the information collected and processed by the parties, which may lead to lower quality decisions.
- *Third*, following the logic in Dewatripont & Tirole, if consultancies are removed from the information-collection process the EC inquisitor will only have access to the information provided by "self-advocates," merging parties and complainants, which have a greater incentive to forge or manipulate the information they collect and report.

V. CONCLUDING REMARKS

In this essay I find that, contrary to what is claimed in "Spamming the regulator: exploring a new lobbying strategy in EU competition procedures," there is no evidence that "hired economic consultancies" are being used to spam DG Comp. I also find that the policy proposals

43 *Id.* at 5.

advocated in that paper would reduce the efficiency of EC merger control and lead to more Type I and Type II errors, and especially more Type I errors.

Does this mean that everything is perfect with the *status quo?* Of course, there is room for improvement. Based on my experience, and consistently with the findings of Dewatripont & Tirole's seminal paper on advocacy, economic consultants and/or academics working for the merging parties and complainants do not risk their future credibility by forging or manipulating the information they collect and report and, at most, may only omit to reveal information detrimental to their clients. Yet, that is a problem and not something that we should condone. Improving the incentives of consultants and academics to fully disclose the information they collect constitutes optimal public policy.

How can this be done? A full discussion would require a separate paper, but one simple way of doing so would be for the regulator to state in its decisions, as UK judges do in their rulings, whether the information provided by this or that advisor was helpful to reach the decision or was irrelevant. Said information may be useful even if the regulator ends up disagreeing with the underlying analyses and their conclusions, provided it helped to reach a better grounded decision. That would allow consultancies/academics to build a reputation and to defend it by avoiding biased submissions. It would also facilitate the companies that hire them to discriminate between them according to their credibility.

Unfortunately my experience indicates that informative submissions are often heavily criticized in decisions, which gives readers of said decisions the impression that they were not worthwhile, because (a) they did not align with the regulator's conclusions and (b) they were sufficiently solid that they had to be dealt with in anticipation of a possible appeal. Meanwhile, submissions that are uninformative are left without criticism. This is something that can be changed easily.

CPI COMPETITION POLICY® INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.