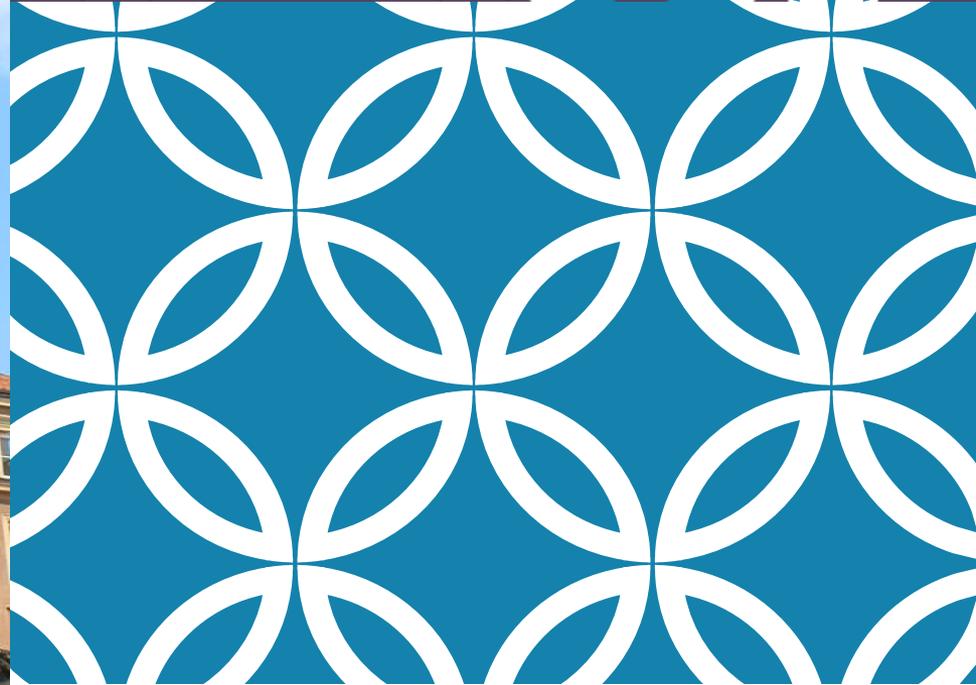




UCL



JUDICIAL DEFERENCE IN EU COMPETITION LAW AND ECONOMICS

Prof. Ioannis Lianos
Faculty of laws
University College London

MERGERS

Market Definition

Anticompetitive harm

- Unilateral effects
- Coordinated effects

ANTITRUST

Abuse of a dominant position

- Market Definition/Dominant position
- Abuse (pricing abuses, non pricing abuses)
- Efficiency gains/Objective justifications

Cartels

- Evidence of concertation
- Fines

Horizontal/vertical cooperation agreements

- Market Definition
- Restriction of competition
- Efficiency gains

**USE OF ECONOMIC
AND ECONOMETRIC
EVIDENCE IN EU
COMPETITION LAW**

**Economic
theory/models**

Econometrics

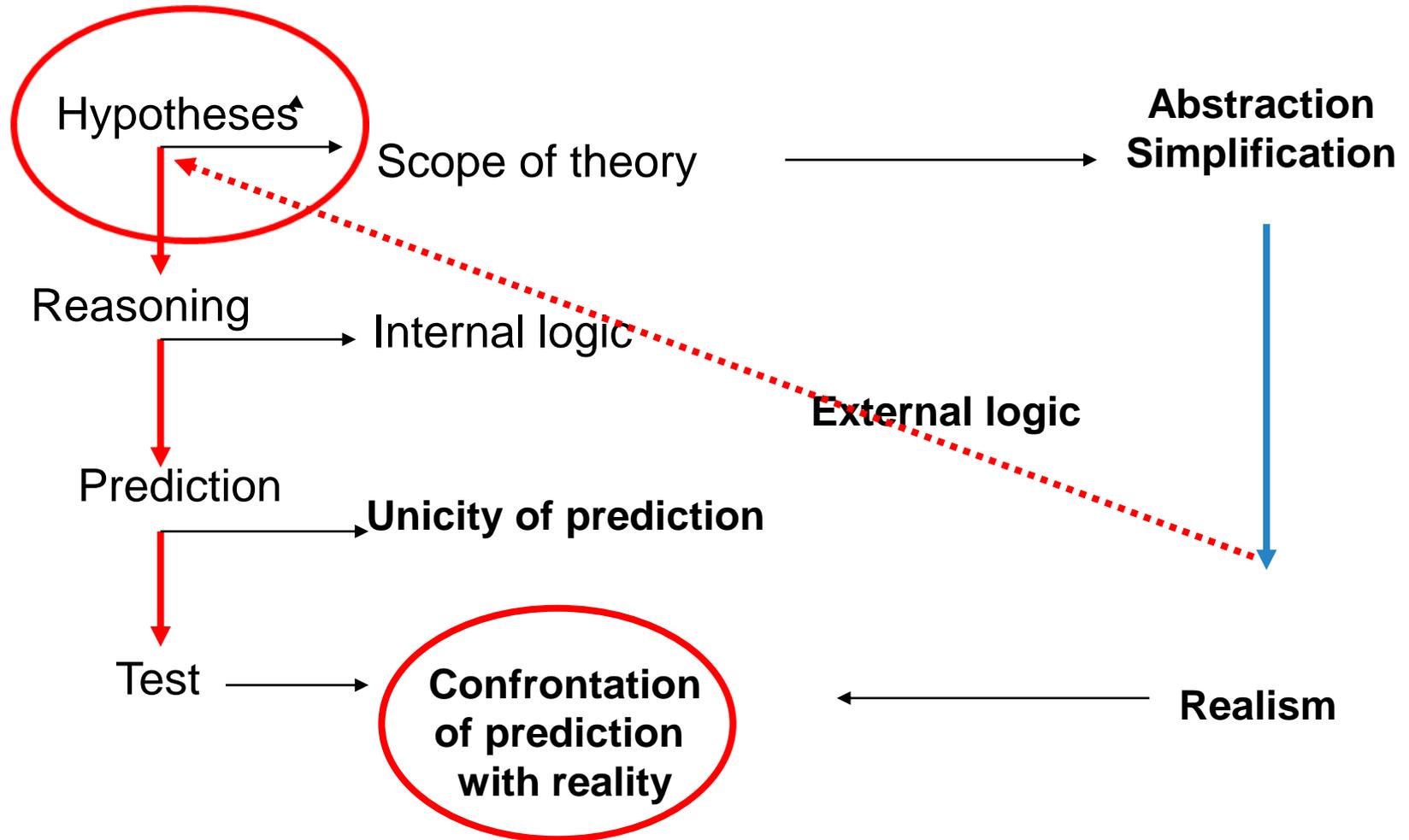
**Experimental
economics**

Economic data



**Economic
Phenomena**

CORE ELEMENTS OF ECONOMIC THEORY

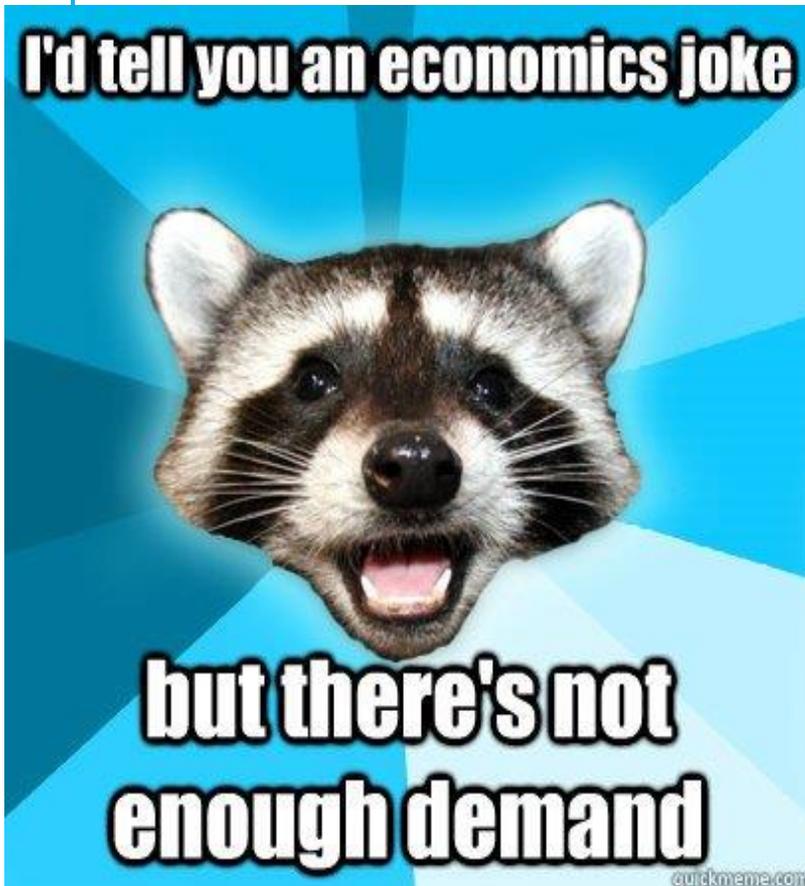


ECONOMICS AS A GUIDE OF INTERPRETATION OF THE LAW

“From the outset, EU competition rules have aimed to put in place a system of undistorted competition, as part of the internal market established by the EU. In that regard, it cannot be overemphasised that protection under EU competition rules is afforded to the competitive process as such, and not, for example, to competitors. In the same vein, competitors that are forced to exit the market due to fierce competition, rather than anticompetitive behaviour, are not protected. Therefore, not every exit from the market is necessarily a sign of abusive conduct, but rather a sign of aggressive, yet healthy and permissible, competition. This is because, given its economic character, competition law aims, in the final analysis, to enhance **efficiency**. The importance placed on **efficiency** is also in my view clearly reflected in the case-law of the EU Courts.”

AG N. Wahl, in Case C-413/14P Intel [2017]

ECONOMICS AS A CONTESTED SOURCE OF WISDOM



- It is usually argued that much of economic theory is not based on empirical research but on a fairly abstract, sometimes unverifiable, and largely mathematically derived conclusions about human behaviour
- There has been a considerable evolution over the acceptable methods of observation in economics
- “Economic science for litigation”
- Economic “schools of thought”
- Epistemic asymmetry and expert bias

DIFFERENT TYPES OF ECONOMIC EXPERTISE IN COMPETITION LITIGATION

- **Economic facts** (broad consensus in economic discourse and the judge has no choice but to adopt or reject the consensus view)
- **Economic authority** (economic theory, econometrics, experimental economics)
- **Economic transplants** (economic concepts are integrated in law but their meaning is not exactly the same as it is in economics)
- **Economic laws** [“General truths derived from specialised expertise”]
 - Learned Hand, Historical and Practical Considerations Regarding Expert testimony, 15 Harvard L. Rev. 40 (1901)
- The role of economic expertise will be different for each type of economic concept

DEMAND THEORY

RATIONALITY ASSUMPTION

Preferences axioms

- **Assumption of completeness:** you can build a rank order of the choice (consumption) options you encounter (e.g. prefer apple, then oranges, then bananas...)
Ordinal Utility – higher-ranking options provide more utility to the individual than lower-ranking options. People with limited budget can maximize their utility by choosing the highest-ranking option
- **Assumption of transitivity:** the rank order of options is internally consistent (e.g. if I prefer more apple than oranges and then more oranges than bananas, one can correctly conclude that you prefer more apple than bananas...) If $A > B$, and $B > C$, then $A > C$

- **Assumption of continuity:** small changes in options do not lead to huge changes in the rank order – preferences can be represented by a continuous utility function
- **Assumption of (context) independence:** your choices express your preferences. These do not depend on the preferences of other individuals or the broader choice context
- **Axiom of choice determination:** preferences determine choice
- **No inter-personal comparison of utility**
- **Ceteris Paribus assumption:** all things being equal
- **Maximisation assumption:** more is better



**Everything
depends on
assumptions?**

Measuring and Understanding Behavior, Welfare, and Poverty

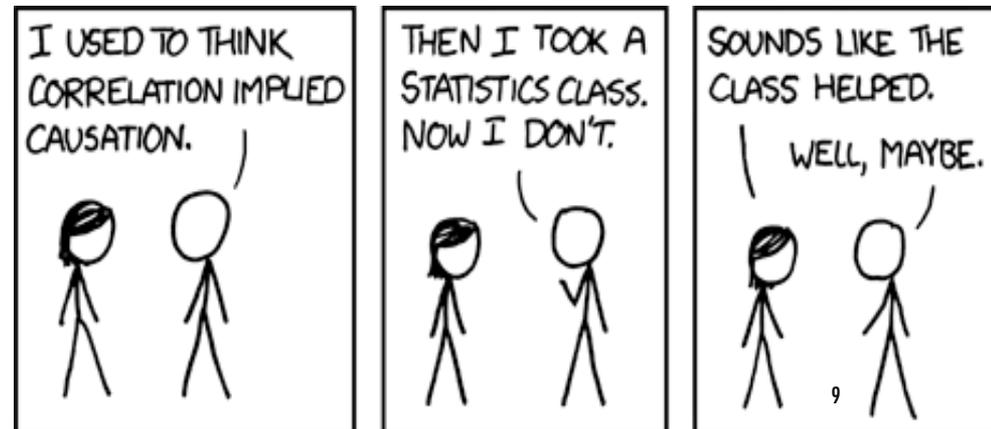
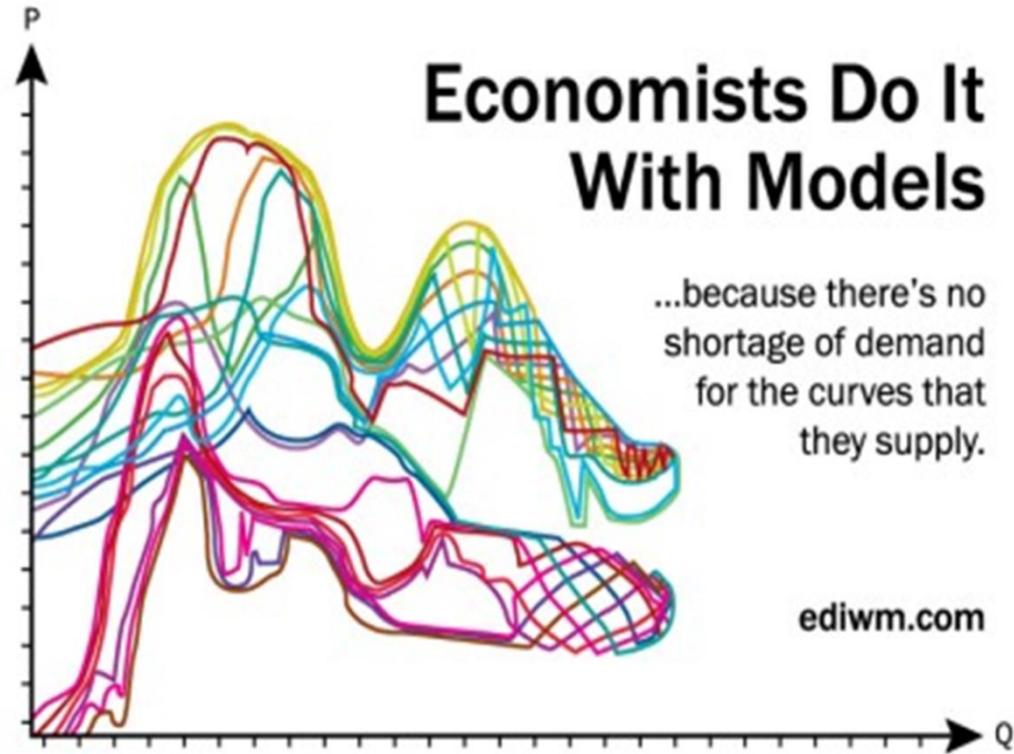
Prize Lecture, December 8, 2015

by Angus Deaton

Much of what follows is based on the traditional (in economics) premise that people know what is good for them and act in their own interest. People reveal (something about) their preferences in their behavior, which allows us to infer (something about) wellbeing from the choices that they make. The validity of revealed preference is currently being robustly challenged by behavioral economics, though no new general operating link between behavior and wellbeing yet exists; this is surely a key task for economics in the years ahead. Here I stick to the traditional position, if only because of the many successes that approach has brought.

MODELS

- “(m)odels are both economics’ strength and its Achille’s heel; they are also what make economics a science – not a science like quantum physics or molecular biology, but a science nonetheless [...] The discipline advances by expanding its library of models and by improving the mapping between these models and the real world” D. Rodrik
- “Models provide half-truths” J. Reiss
- Models as “credible worlds”
- The futile quest for “causal robustness”



JUDICIAL DEFERENCE

➤ Full jurisdiction v. unlimited jurisdiction: Case C-386/10 P Chalkor v Commission, para. 43 BUT

- "the Courts cannot use the Commission's margin of discretion - either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines (of the Commission) or as regards the assessment of those factors - as a basis for dispensing with the conduct of an in-depth review of the law and of the facts".

(Case C-368/10 P Chalkor AE Epexergasias Metallon v European Commission, para. 62)

➤ Epistemic deference

- The weight which courts should attribute to the decisions of non-judicial expert institutions (by according weight to their decisions)
- Expertise element

➤ Doctrinal deference

- Deference to “the allocation of authority”: rather than simply paying respect to the decisions of the authority because of its expertise, one might allocate authority to another to make binding decisions
- Political element

ASSESSMENT OF ECONOMIC EVIDENCE AND JUDICIAL REVIEW

■ Traditional judicial review standard

- Case T-177/04 Easyjet v. Commission [2006] ECR I-1931
 - 44. [...] review by the Community judicature of complex economic assessments made by the Commission in the exercise of the power of assessment conferred on it by Regulation No 4064/89 is limited to **ensuring compliance with the rules governing procedure and the statement of reasons, as well as the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers**
 - Errors invoked by the applicant must be **manifest**
 - It is not for the Court to substitute its own economic assessment for that of the Commission

■ Hybrid judicial review standard

- Case T-210/01 General Electric v. Commission [2005] ECR II-5575
 - 63. 'Although it must be recognised that the Commission has a margin of assessment when applying the substantive provisions of [Merger Regulation], that does not mean that the Community judicature must refrain from reviewing the Commission's legal classification of economic data. The Community judicature not only must establish, inter alia, 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**'.
 - 64. 'Although those principles apply to all appraisals of an economic nature, **effective judicial review is all the more necessary** when the Commission carries out a **prospective analysis** of developments which might occur on a market as a result of a proposed concentration'.

COMPLEX ECONOMIC AND TECHNICAL ASSESSMENTS I

- With regard to **‘complex economic and technical assessments’**, the Commission was recognized a **discretion**, over which the Courts only exercise a **limited review** for a **‘manifest error of appreciation’**

(Case 42/84 *Remia* [1985] ECR 2545, para 34; Joined Cases 142/84 & 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para 62)

- Note that, **‘[d]etermination of the effects of an agreement on competition constitutes a complex economic appraisal’**

(Case C-7/95 *John Deere v Commission* [1998] ECR I-3111, para 41)

- Reasons** for this limited, ‘manifest error’- type of review for complex economic and technical assessments made by the Commission as to the nature and impact of the alleged infringement?

(Case T-112/99 *Metropole Television and others v Commission* [2001] ECR II-2459, para 114)

- the limited nature of this scrutiny is justified by **the need to preserve the ‘inter-institutional balance’** within the Union and especially to prevent the Courts from encroaching upon the discretionary powers of the Commission in the area of competition policy
- the **‘policymaking discretion’** recognized to the Commission for the characterization of a specific type of conduct as restrictive of competition by object, on the basis of an **economic assessment** of the restrictive nature of the conduct performed by the Commission in view of its **enforcement priorities**
- limited ability of the courts to engage in a critical analysis of complex economic and technical evidence and the recognition of the **comparative advantage of a specialised competition authority** to perform this type of appraisal

COMPLEX ECONOMIC AND TECHNICAL ASSESSMENTS II

- Distinction between the standard of judicial review for **economic** versus **technical** assessments
 (Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601)
- Economic appraisals: ‘review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant **rules on procedure** and on **stating reasons** have been complied with, whether the **facts have been accurately stated** and whether there has been any **manifest error of assessment** or a **misuse of powers**’ (Case T-201/04, para. 87)
- Technical appraisals: ‘insofar as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only **limited review** by the Court, which means that the Community Courts **cannot substitute their own assessment of matters of fact for the Commission's**’ (Case T-201/04, para. 88)
- With regard to *both* economic or technical matters, the Courts ‘must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. (Case T-201/04, para. 89)
- Certainly, the Court uses the expression ‘limited review’ for complex economic assessments as well, but explains that this ‘**does not prevent the Community judicature from examining the Commission's assessment of economic data**’. (Case T-201/04, para. 482): Should we distinguish between **economic data** and **economic theory**?

COMPLEX ECONOMIC AND TECHNICAL ASSESSMENTS III

- Move to **a more economics approach** and depth of judicial review
- ❖ Annulment of the three merger decisions *Schneider*, *Tetra Laval* and *Airtours*
 - Case T-342/99 *Airtours plc v Commission*) [2002] ECR II-2585; Case T-77/02 *Schneider Electric SA v Commission* [2002] ECR II-4201; Case T-80/02 *Tetra Laval BV v Commission* [2002] ECR II-4519; Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987

“the Courts cannot use the Commission's margin of discretion - either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines (of the Commission) [...] or as regards the assessment of those factors - as a basis for dispensing with the conduct of an in-depth review of the law and of the facts”:

(Case C-368/10 P *Chalkor AE Epexergasias Metallon v European Commission* ECLI:EU:C:2012:284, para 62. See also, Case C-389/10 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECR I-13125 ; Case C-272/09 P, *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECR I-12789)

- Since these cases the CJEU has largely abstained from the use of the ‘manifest error of appraisal’ terminology and seems to exercise a more intensive scrutiny of the assessment of facts by the Commission
 - Case C-382/12 P *MasterCard Inc. and Others v. Commission*: the CJEU found that in reality the judicial scrutiny performed by the General Court in reality was “a full review“
 - Case C-295/12 P *Telefónica SA, Telefónica de España SAU v Commission*: , the CJEU described the standard of review as being ‘in depth’ review with regard to the review of legality provided for by Article 263 TFEU
 - **But, commitment decisions:** Case C-441/07 *Commission v Alrosa* [2010] ECR I-5949; Case T-76/14 *Morningstar v Commission* ECLI:EU:T:2016:481

ECONOMETRICS

- Technical or economic? Discussion of Case T-342/07 *Ryanair Holdings plc v European Commission* [2010] ECR II-3457
- Deference to the Commission: most recent cases
 - ‘[...] [w]hilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion, that does not mean that the Court must refrain from reviewing the Commission’s **interpretation of information of an economic nature**. The Court must not only establish **whether the evidence put forward is factually accurate, reliable and consistent** but must also determine whether that evidence contains **all the relevant data that must be taken into consideration** in appraising a complex situation and whether it is **capable of substantiating the conclusions** drawn from it (see, to that effect, judgment of 10 July 2014 in *Telefónica and Telefónica de España v Commission*, C-295/12 P, ECR, EU:C:2014:2062, paragraphs 53 and 54 [...])’

(Case T-472/13, *H. Lundbeck A/S v Commission*, ECLI:EU:T:2016:449, para 113)
 - Case T342/07, *Ryanair Holdings plc v. European Commission* [2010]
 - often repeated statement by the Court that Ryanair did not show that the Commission had exceeded its margin of discretion in economic matters
 - Case T-194/13 *UPS v. Commission* [March 7, 2017]: procedural/substantive?
 - not really a thorough substantive assessment of the econometric evidence. The Court constructs this as a merely procedural issue concerning the rights of defence.

NEW ECONOMIC THEORIES AND THE POLITICAL ELEMENT OF DEFERENCE

- The Commission is not just an adjudicator: the political dimension of the Commission
 - Juncker (2015) “State of the Union”, here to “lead a political Commission”
 - Compare with the relation between CMA/Competition Appeal Tribunal: an appellate review process
- How often economics change? A funeral at a time! (paraphrasing Max Planck)
- Mainstream economics
- Delay with a big bang change or incremental changes?
- A new/better deal for antitrust?
 - The nightmare of *Ben Avon* for progressive antitrusters (problems for the “Better Deal” by reliance on mainstream economics)
 - A natural experiment: role of courts in the EU and austerity
 - CJEU: very cautious approach
 - National courts: more activist approach – protection of national welfare States

EXAMPLE I: RECEPTION OF NEW ECONOMIC THEORIES IN ANTITRUST

TWO-SIDED MARKETS

- The middle-man facilitate the interaction (often aimed at carrying out a transaction) between different sets of customers
- Members on each side decide to ‘get-on-board’ on the basis of an expectation that those on the other side will do the same – chicken-and-egg coordination failure
- The platform is a match-maker
- ❖ Platforms, Multi-sided markets and Market definition
- **Case C-67/13 P, Groupement des cartes bancaires (CB) v. Commission, ECLI:EU:C:2014:2204**
 - Not taken into account for market definition but when analysing economic context
 - Compare with Amex in the US Supreme Court [the platform is the market]
 - Compare with *Sainsbury’s vs Mastercard* [2016] CAT 1

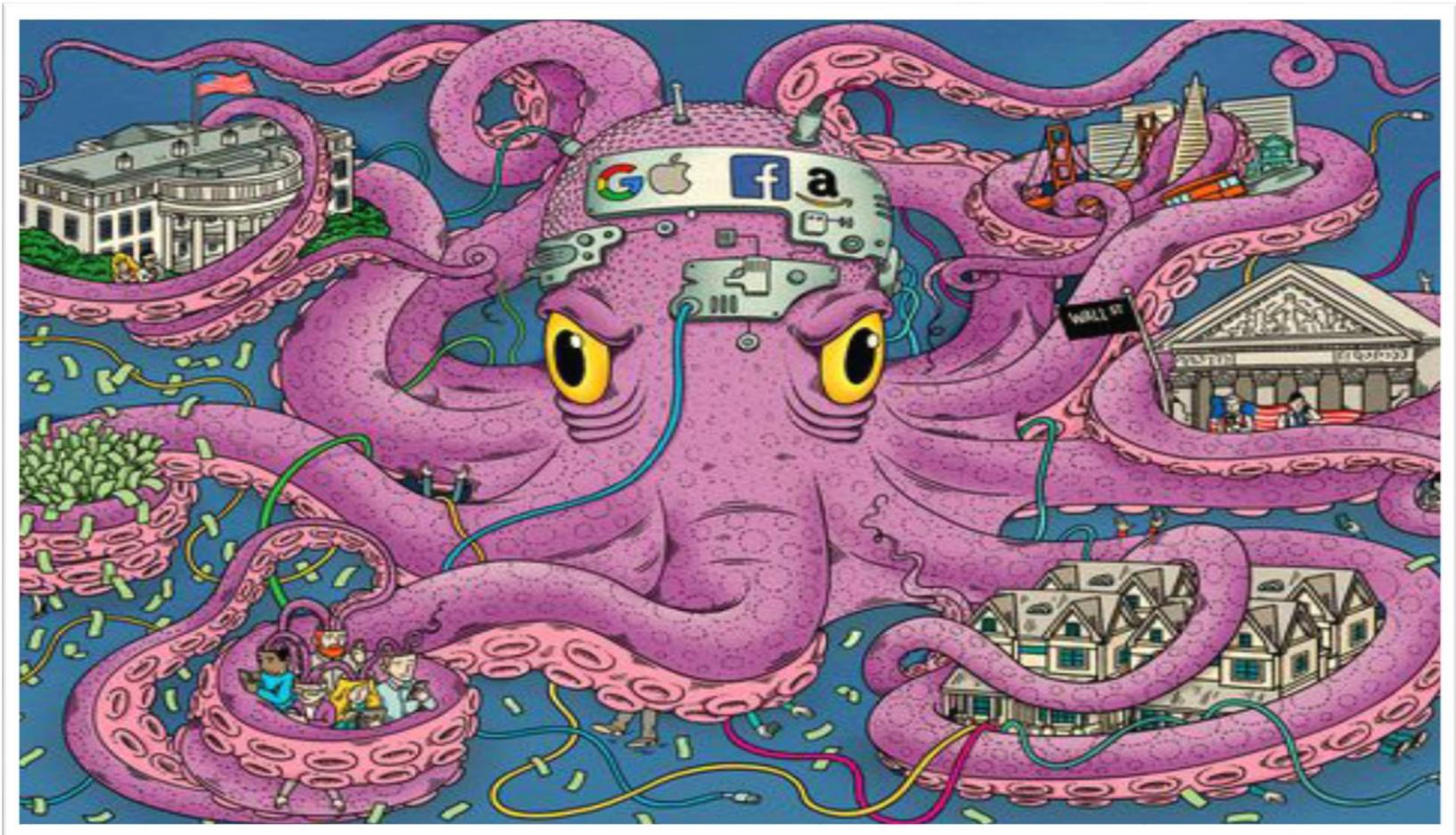
PLATFORMS: TOP 5 CAPITALIZATION COMPANIES OVER TIME: IN 2016, ALL TECH



EXAMPLES OF PLATFORMS

<u>Platform</u>	<u>Side 1</u>		<u>Side 2</u>		<u>Services</u>
Uber	Driver		Rider		Transport
Airbnb	Apartment		User	Accommodation	
MSFT OS	MS-Word		User		Writing
Apple iOS	Phone apps	User		Various	
Google	Advertiser		User		Ads/Search
M-Pesa	Money sender	Money receiver	Tr. Savings		
Sony PS3	Game		User		Games
Internet	Google Search	User		Search	
Internet	Netflix		Video user		Video
Internet	Kindle books	Kindle app		eBook	
YouTube	Video creators	Video users	Video		
Facebook	User		User		Social network

THE RISE OF PLATFORMS: A COMPLEX ECONOMY PERSPECTIVE



EXAMPLE II: IMPORTANT AND CLOSE INNOVATION COMPETITORS

- G. Federico, G. Langus, T. Valletti, 'A simple model of mergers and innovation', (2017) 157 Economic Letters 136: 'actual potential entrant theory'
- Dow/Dupont merger transaction & Bayer/Monsanto
- Dow and in particular DuPont are **more important innovators** than their market share or their R&D expenditure share suggest
 - Ambitious strategic targets for efforts and output (number of new Ais and innovative impact)
 - Track record and AI shares show commercial success of innovation
 - Patent quality analysis based on citations shows high relative and combined strength
 - Strong pipeline
- Dow and DuPont **close innovation competitors**
 - Past head to head innovation competition in herbi/insecticides
 - Ongoing and future head to head innovation competition
 - Few other innovators in same innovation spaces
- **How will this theory of assessing competition innovation fare at the EU Courts? Is it a new theory, an old theory and why should this matter?**

ASSESSING EFFECT ON INNOVATION: A NEW THEORY?

□ Commission Dow/Dupont (2017)

- ❖ First, the assessment of innovation competition requires the identification of those companies which, at an **industry level**, do have the assets and capabilities to discover and develop new products which, as a result of the R&D effort, can be brought to the market.
- ❖ Second, the **innovation space**: The R&D players do not innovate for all the product markets composing the entire crop protection industry at the same time. They also do not innovate randomly without targeting specific spaces within that industry. When setting up their innovation capabilities and conducting their research R&D players have specific discovery targets.
 - The spaces where innovation competition takes place are thus broader than an individual downstream crop protection market, but are nonetheless small.
- ❖ The Commission will both consider metrics of innovation taking place at industry level, as well as innovation taking place in spaces consisting of groupings of crop/pest combinations, areas where the parties' activities overlapped

THE ROLE OF ECONOMIC “DOCTRINE” IN JUDICIAL REVIEW BLURRING THE LINES: MATERIAL BIAS IN “ACADEMIC ECONOMICS”?

- Courts in the EU rarely engage with published economic studies, wonder why?
- Corporate academics Inc.

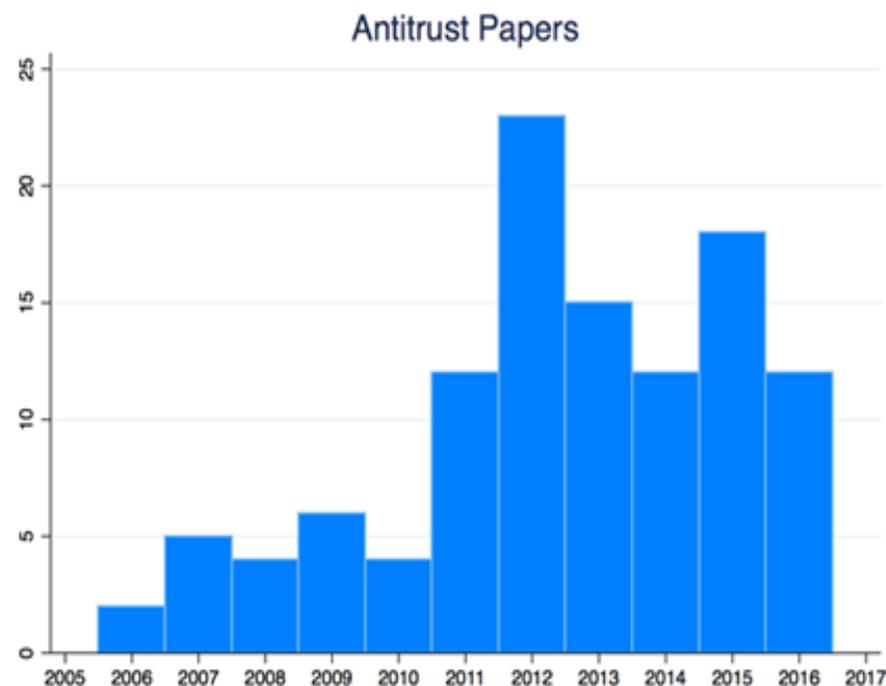
New

<https://googletransparencyproject.org/articles/google-academics-inc>

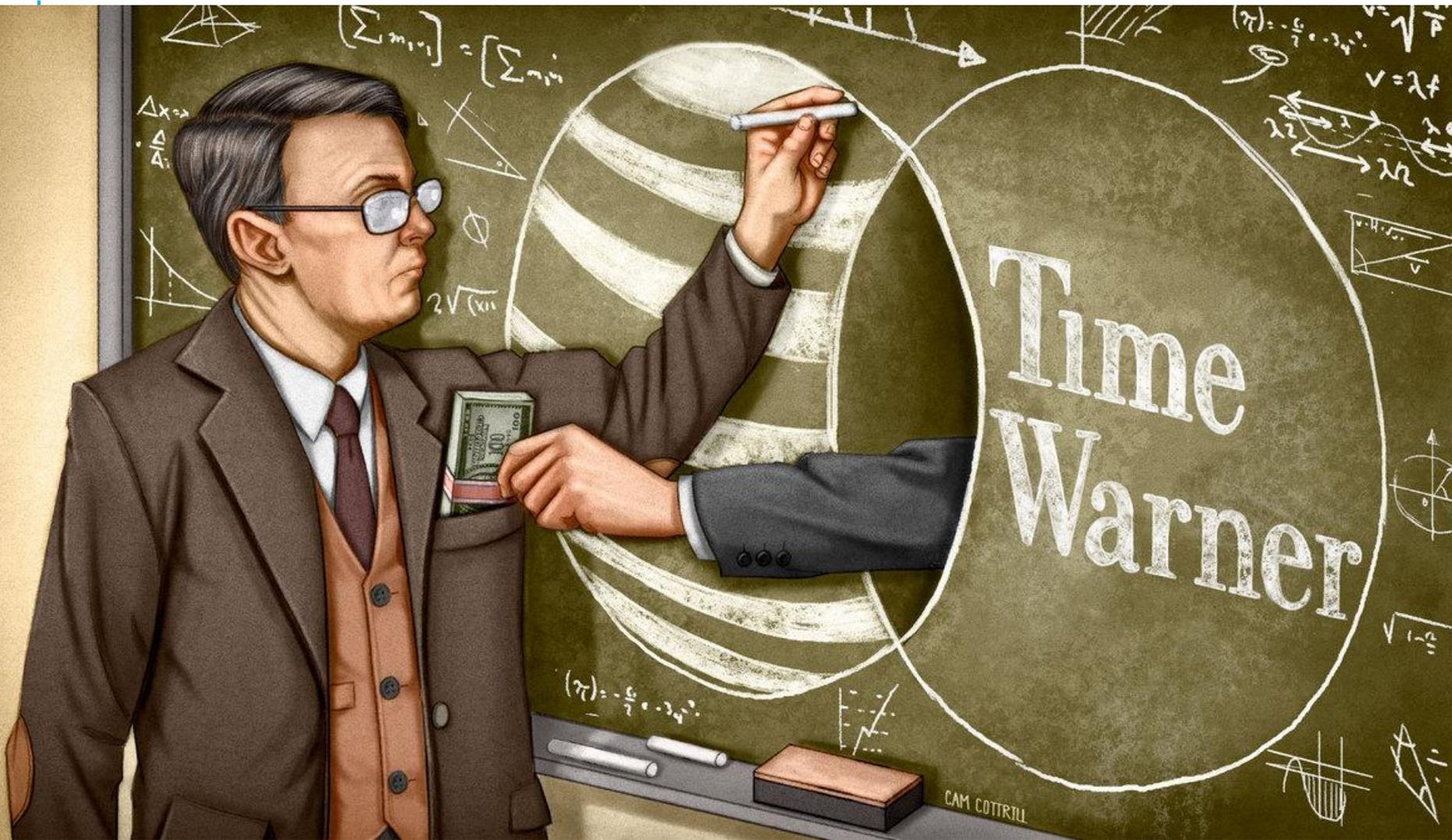
<https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers>

And old

<https://www.prweek.com/article/1258356/esapience-suit-exposes-suspect-tactics-academics-pr-roles>



Google funded competition studies spiked in 2012 at the time of the FTC investigation



Source: <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers>