European Antitrust Policy
An Analysis of Court of Appeal Rulings in the EU, 1957-2000

Andrea Günster
Universiteit Maastricht

Martin Carree
Universiteit Maastricht

Maarten Pieter Schinkel
Universiteit van Amsterdam[1]

Submission to the 6th Annual INTERNATIONAL INDUSTRIAL ORGANIZATION CONFERENCE, Washington, DC, 2008

In Europe, the most influental competition policy enforcing agency is the European Commission. The Commission applies antitrust, state aid and merger law as well as initiates new legislation thereby shaping the competitive process on the old continent. However, how well the institution is working in terms of legal certainty and economic justice is an open issue. This paper surveys critically the history of European antitrust policy from the perspective of the European Court of Justice since the grounds for its implementation were set in 1962. The data cover all antitrust decisions by the European Commission decided under Articles 81 and 82 resulting into an appeal proceeding. First, we present a number of descriptive statistics on the European Court of Justice antitrust sentences in form of a historical overview including landmark case discussion. Issues such as the grounds for appeal, revisions of the original decision, the duration and length of the appeals proceedings and probabilities of success depending on characteristics such as the type of infringement originally found are considered. Thereafter, we estimate a model evaluating the quality of the Commission's work with respect to Court sentences using a multinomial logit on the sentence and regressions on fine reduction and cost sharing by the parties.

Keywords: Antitrust, European Commission, Appeal Proceeding, European Court of Justice.
JEL Classification: L40, K21, D40

[1] Andrea Günster and Martin Carree are at the Department of Organization and Strategy, Universiteit Maastricht. Maarten Pieter Schinkel is at the Department of Economics and the Amsterdam Center for Law & Economics (ACLE), Universiteit van Amsterdam. Günster is corresponding author at: PO Box 616, 6200 MD Maastricht, The Netherlands, a.guenster@os.unimaas.nl.

Introduction

Founded in 1962, today the Commission actively shapes the European competition policy process. The Commission signs responsible for arbitrating in some of the controversial cases of antitrust enforcement. It passes laws and regulations aiming at an increased administrative efficiency. Ever more so, the officials increasingly shift their attention and resources to the utilization and augmentation of the underlying economic theories. Not only the size of the case increased but also their number of decisions per year (Guenster, Carree and Schinkel, 2007). Most recent example of the magnitude and relevance of the Commission's decisions is the 2004 record-breaking single firm fine of €497 million given to Microsoft Corporation (antitrust) upheld in 2007, by the Court of First Instance. Other fitting examples are the 2007 record-breaking cartel fine of €992 million to five elevator makers (antitrust), the Commission's diverging and critically acclaimed views on the US approved GE/Honeywell merger, and its adverse findings in the relationship between Ryan Air and Charleroi (state aid).

Over the period 2000-2004, the Commission has deliberated and reached a decision in no less than an average 370 cases per year. In addition, on average 274 merger inquiries and 880 State aid cases were decided upon in that same period.[2] Since the Commission has incorporated the national antitrust authorities (NCA) in May, 2004, they jointly deal with more cases per year than ever before (Annual Report, 2005). The Commission operates with a budget of almost €60 million (excluding state aid) the Directorate General Competition (DG Competition or DGComp) currently employs more than 300 core staff – including some 30 seconded temporarily from national agencies and excluding staff dealing with state aid and support staff. Moreover, the Commission, the Commissioner and the DG Competition together issue some thousand press releases yearly. Not only is the increasing amount of cases and especially infringement decisions over time an indicator for the establishment of the Commission, but also the growing number of press releases, Regulations, Notices and Guidelines indicate the soaring importance of the Commission.

The democratic system of Europe in which the Commission is evidently embedded in, crucially hinges on the separation and the verifiability of its powers. Who, however, is assessing the quality of the European Commission's work, and eventually keeps its power in check? The highest European institution being also the watch dog of European competition law is the European Court of Justice (ECJ). It was established eleven years before the

[2] XXXV Annual Report on Competition, 2005.

Commission in the first European Coal and Steal Community Treaty in Paris in 1951. It is the supervising body of interpretation and application of the entire European Community Treaty dating back to 1957. In 1962, the Commission was empowered as the executive enforcer of EU competition law amongst others. Since then the Court is the main legal supervisor over all administrative law applied by the Commission. The main task of the ECJ changed over time. Whereas in earlier stages its main task was interpreting the Treaty in appeal proceedings establishing a common law landmark reference system, nowadays its first instance delves more into disputed ideas about economic theory and deals more often with procedural mistakes. In this paper, we describe the establishment procedure of the Court and explain how landmark cases ended up in law. In addition, trends and statistics show the evolution of appeal proceedings under Articles 81 and 82. The main aim however is to evaluate the Commission's work critically by empirically estimating what determines the success of a sentence, the amount of fine reduction and the cost sharing for the appellant.

In the United States, studies on the history of competition policy enforcement have been a very rich source of empirical analysis and learning. With the publication of Richard Posner's seminal paper on federal antitrust enforcement in 1970 started a research branch from which a richness of papers resulted. such as more recently Gallo, Craycraft, and Bush (1985), Gallo, Craycraft and Dutta (1986), Corwin (1992), Gallo, Dau-Schmidt, Craycraft and Parker (1994, 2000), Lin, Baldev, Sandfort and Slottje (2000), and Ghosal and Gallo (2001), and contributions to Ghosal and Stennek (2007). As a result, more than one hundred years of federal US antitrust policy introduced by the Sherman Act of 1890 are well documented also from the Court's perspective. The procedures in Europe and the U.S. differ. Whereas in Europe we have one institution raising and deciding upon cases which will be potentially appealed, in the U.S. the judiciary and execution are assumed by two different authorities.

There is an increasing amount of literature which is concerned with the empirics of European competition law enforcement. The *Global Competition Review* publishes a *Handbook on Competition Enforcement Agencies*. Neven (2006) globally estimates the size of European competition policy practice and its effects on consumer welfare, similar to Kovacic and Shapiro (2000) and Baker (2003) on US antitrust. The majority of empirical studies focuses on European merger control, including Nillsen (1997), Duso, Neven and Röller (2006), Lyons (2006), Barros, Brito and de Lucena (2006) and Duso, Gugler and Yurtoglu (2006). Other papers consider particular aspects of enforcement. Stephan (2005) critically considers the yield of the 1996 leniency notice. Geradin and Henry (2005) and Bos

and Schinkel (2006) analyze the Commission's fining guidelines for breach of Articles 81 and 82. Finally, Harding and Gibbs (2005) discuss cartel appeals in the time period 1995-2004. Contray to our study, they focus on the legal argument and summarize main results as a case study. They conclude with a low rate of success for cartel cases.

Moreover, Davies, Driffield and Clarke (1999) determine the probability of an adverse finding against firms investigated by then UK Monopolies and Mergers Commission (MMC, now the Competition Commission, CC), on the basis of data from 1973 to 1995 collected from MMC reports. They find divergent probabilities for different types of alleged anti-competitive behavior. Utton (2000) reviews fifty years of U.K. competition policy, albeit largely qualitatively. Lauk (2002) did a study similar to Davies et al. (1999). She analyzes the decisions of the German Bundeskartellamt (BKartA) on abusive practices and cartels. Ultimately Lauk assesses the explanatory value of a number of characteristics on the probability of an adverse finding on data collected on BkartA decisions taken between 1985 and 2000.

Furthermore, there is a number of publications on summary surveys of landmark EU competition policy cases, such as Ritter et al. (2004) and Vogelaar (2004), that offer an occasional partial analysis of data 3 Cf. Posner (2002), Shapiro (2001), and Baker (2003) such as fines totals. But a consistent complete survey of EU competition law enforcement is lacking to date apart from the working paper by Guenster et al (2007) which traces back the history of the European Commission decisions in antitrust. This paper builds upon the one covering the Commission by Guenster et al (2007) and extends the analysis to the ECJ.

This paper traces back the appeals' histories of those cases to which an appeal was lodged, either with the Court of First Instance (CFI) – since 1989 – or the European Court of Justice (ECJ) – after 1989. The survey is based on a substantive data set, put together from the decisions of the DG Competition as published over the years in the Official Journal, the Commission's official organ. All decisions under the Treaty Articles 81 and 82 are incorporated as long as they resulted into an appeal with the CFI and the ECJ. The rulings are available on their respective official websites excluding confidential information. In total, this data set contains 188 joint appeal proceedings opened as cases by the Court of Appeal. The appeals data include details on the original Commission decision, but emphasis more on indicators concerning the revision of the fine – if any – the break-down of litigation costs over the various parties, including the Commission, the duration of the Court sentence etc..

The paper is organized as follows. The next section surveys the existing appeal rulings, their histories and consequences. Some revisions on appeal have been based mainly

on legal grounds. Others have been the result of applied economic insights that led the Court to a different assessment of the alleged anticompetitive effects of the defendants' behavior. Some of these cases have become landmark cases, in that they had ramifications for the Commission's enforcement policy. Several revisions on appeal of merger decisions by the Commission, most obviously in GE/Honeywell, have been visible in this respect. Yet, a gradual overall process of 'economizing' EU competition policy by implementation of increasingly more sophisticated economic argument into the handling of antitrust cases can be observed. In part, this development is based on feedback from the appeals courts. In the last part, a multinomial logit on the sentence, a regression on fine reduction and one on cost sharing indicate a number of possible causes for reversals of Commission decisions on appeal. Section 5 compiles the main conclusions. For details on the sources and ways of collecting our unique data set, please refer to the Appendix.

The European Court of Justice

The main goal of the European Court of Justice is to "[…] ensure that the interpretation and application of the Treaty is observed" (Article 164 EC Treaty). Hence, the main task of the Court is the supervision and respective management of the treaty. In this sense, the ECJ is not only formalizing judgments but also giving orders and opinions on the interpretation of the EC Treaty to institutions outside the European "triangle" consisting of the European Parliament, Council and Commission. For example, national courts can pose questions to the ECJ whenever European law is applied by national competition authorities but also in other areas such as human right, civil servants law etc.

The European Court of Justice was established in the first European Community Treaty called Treaty of Paris laying down the foundation for the European Coal and Steel Community (ECSC) in 1951. In 1957, the Treaty of Rome followed, which laid the grounds for European Economic Community Treaty including competition policy law under Articles 81, 82 and 86.[3] It took another five years to install the executive power in Council Regulation 17/62/EEC establishing the Commission as the central enforcement authority of competition policy in the EC. In 2002, the ECSC Treaty expired but the Court is still empowered today as it generally is not based on a constitution contrary to its U.S. counterpart. It engages in constitutional review and handles with many different matters (de Burca and Weilers, 2001). Consequently, the ECJ is a court of general jurisdiction which is uncommon in civil law

[3] The current numeration of the articles was adopted by the Treaty of Amsterdam in 1997 and entered into force in 1999. Previously, Articles 81 and 82 were numbered 85 and 86 in the Treaty of Rome, respectively.

countries like the ones in Continental Europe. The Court represents the highest court in Europe on Community law and the jurisdiction to adjudicate the European Council, Commission, Parliament and Member States as laid down in the Articles 230 and 234 in the European Community Treaty. Each Member State of the 27 EC Member States appoints one judge assisted by eight Advocates Generals. However, at most 13 judges compose one chamber. In general, the more complex and important a case is, the higher the number of judges present in the decision process.

The process of the European Union legal system bases on Civil law which involves landmark cases. Landmark cases are used as reference and establish terminology and procedures for cases thereafter. For example, the economic unit was for the first time established in the ruling Centrafarm v. Sterling Drug case in 1974[4] and was modified in the Article 81 case Viho v. Commission in 1992[5]. Other examples are the two landmark cases defining the relevant market. In 1976, the Court decided in the United Brands Company and the Hoffmann-La Roche (Vitamins) cases on the notion of the relevant geographical and product market, respectively.[6][7] The most influential sentences result into Notices or Regulations which are the two most important legally binding communication instruments of the Commission. In the 1990s, the Commission started to give guidance in the form of the so-called Guidelines further interpreting Regulations. In contrast to Regulations, these Guidelines are not legally binding but serve as reference. In this sense, a certain learning behavior by the Commission might be established since the most important rulings have direct and indirect consequences for all thereafter.

The first EC competition decision is *Grosfillex & Fillistorfin* in March 1964, after investigations based on a notification had started in September 1959.[8] The first appealed decision dates back to that same year. This case was also the first finding of an infringement called the *Grundig-Consten* case.[9] After twenty months of investigation, the agreement between the two firms was decided a breach of Article 81 (1) EC Treaty, and ordered to be discontinued. After almost two years, the ECJ quashed the decision on economic grounds in June 1966. *Central Parts/JCB* is the last case we include in our analysis.[10] JCB entered into

[4] Case 15/74 Centrafarm v. Sterling Drug [1974] ECR II47
[5] Case T-102/92 Viho v. Comission [1995] ECR II-17. Whereas sentences by the ECJ do not require a specification before their respective number, the numbers given to CFI rulings start with a T indicating its origin. Nowadays, ECJ rulings are occasionally indicated with a C.
[6] Case 27/76 UBC (United Brands Company, Chiquita) [1978] ECR 207
[7] Case 85/76 Hoffmann/La Roche (Vitamins) [1979] ECR 461
[8] *Grosfillex & Fillistorf* Commission decision 64/233/EEC [1964] OJ L 64/915, Case IV/61
[9] *Grundig-Consten* Commission decision 64/566/EEC [1964] OJ L 64/2545, Case IV/3344
[10] *Central Parts/JCB* Commission decision 2002/190/EC [2002] OJ L 69/1, Case COMP.F.1/35.918

vertical price-fixing agreements as well restricting parallel import. The company was fined €39,614,000 which was reduced on appeal by 24 per cent as the Court did not agree with the Commission's decision on aggravating circumstances. Furthermore, the Commission had to pay its own breed cost and one fourth of the appellant's cost. The last appeal we consider dates back to 2000. As we gave coherent data set priority to the benefit of time span, we exclude the last couple of years containing cases which are still pending in our descriptive and inferential analysis.

History of the European Court of Justice

The observations of appeals proceedings range from 1964 until 2000 and are arranged according to their opening date, which corresponds to arranging it to the decision date of the Commission as there is a limited period of three months to file an appeal with the Court. In total, there have been 473 Commission decisions and 129 of them resulted in an appeal.

Figure 1 Commission Decisions and Appeal Proceedings

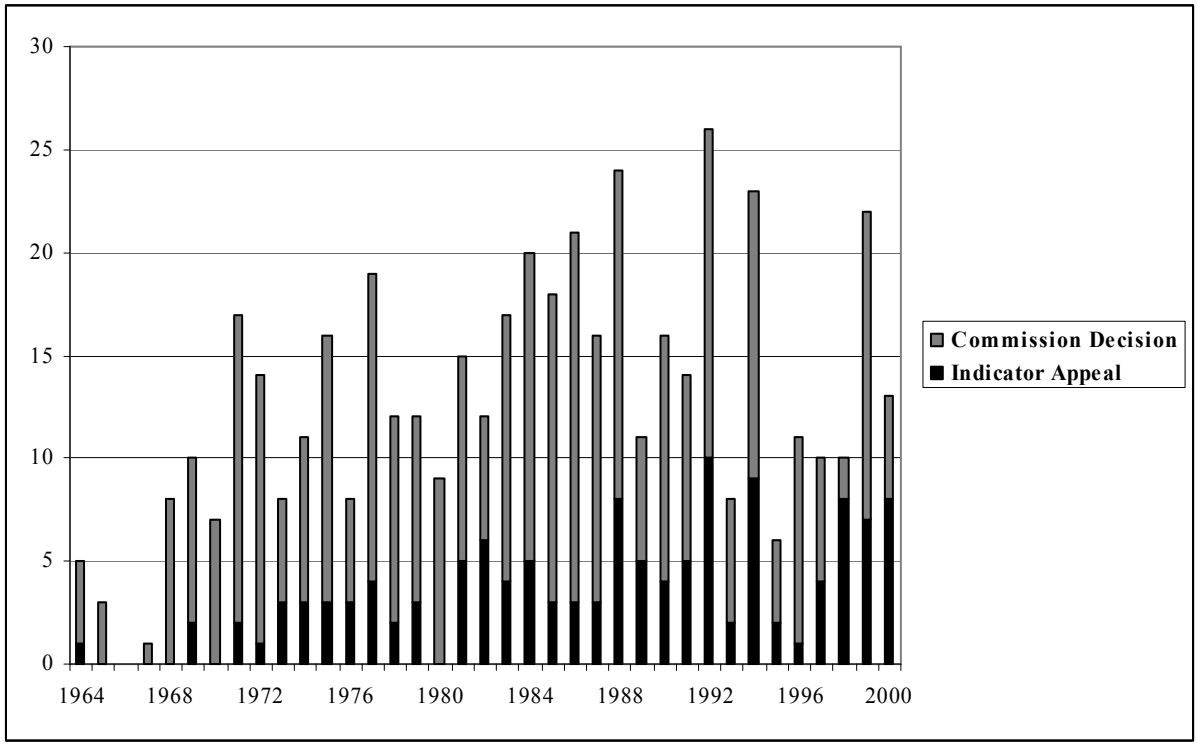


Figure 1 shows the trends of Commission decisions taken and appealed proceedings filed. Both series experience a positive trend over time. The early upward trend of Commission decisions reflects DG Competition's growing legitimacy and jurisdiction. The increase in appeal proceedings is most likely due to the steady increase in infringement decisions over time. About half of all infringement decisions are appealed and out of all appeal proceedings filed only 16 stem from exemption granted by the Commission between 1964 and 2000.

Parties convicted for a certain behavior strive more often for appeal proceedings than competitors complain about an exemption indirectly affecting them. Infringed firms aim for reducing the burden of the negative decision and/or the fine imposed. Due to administrative changes in form of granting block exemption regulations, less exemption and negative clearance cases became official decisions under Article 81. Certain agreements among companies were exempted per se and did not lead to an official decision.

The peaks in Commission's decisions most often refer to a change in power. Usually, at the end of a year whenever a Commissioner or Director General leaves the Directorate General of Competition, he tries to finalize a sizeable number of cases initiated during his term. These peaks also coincide with peaks in the number of appeal proceedings. Especially the years 1988, 1992 and the last four years when Commissioner van Miert was in charge exhibit a proportional higher number of appeal proceedings. In 1988, Sutherland went out of office followed by Brittan who resigned after his four year term in 1992 (Guenster et al., 2007). Fines increased on average during the van Miert era consequently were often reduced by an appeal. Guenster et al. (2007) show that one of the determinants of the probability of filing an appeal is determined by the height of the fine.

As illustrated in the second graph of this section (Figure 2), there is a difference between all appeals filed and cases opened by the Court. The Court is the decisive instance grouping cases together in one whenever the applicants appeal against the same decision on the same legal grounds. Consequently, the outliers represent appeal applications grouped by the authority into one procedure or case. One example of these outliners is the BMW case where the Bavarian car producer together with its distributors filed 47 appeals against a Commission decision based on vertical market separation which became joined cases.[11] In 1988, several cases led to numerous complaints which were treated as joined cases by the Court. Here to mention the two cartels stemming from the chemical industry: PVC I and Polyethylene II (LdPE).[12] The last outlier is in 1994 mainly representing two other large cartel cases: the Carton Board Cartel and PVC II, the detected repetition of the 1988 case.[13]

A counterexample is the first cartel found in 1967, the Quinine Cartel which became a landmark case with respect to the Commission and the ECJ.[14] Although only cartel

[11] *BMW Belgium NV and Belgian BMW dealers* Commission decision 78/155/EEC [1978] OJ L 46/33, Case IV/29.146

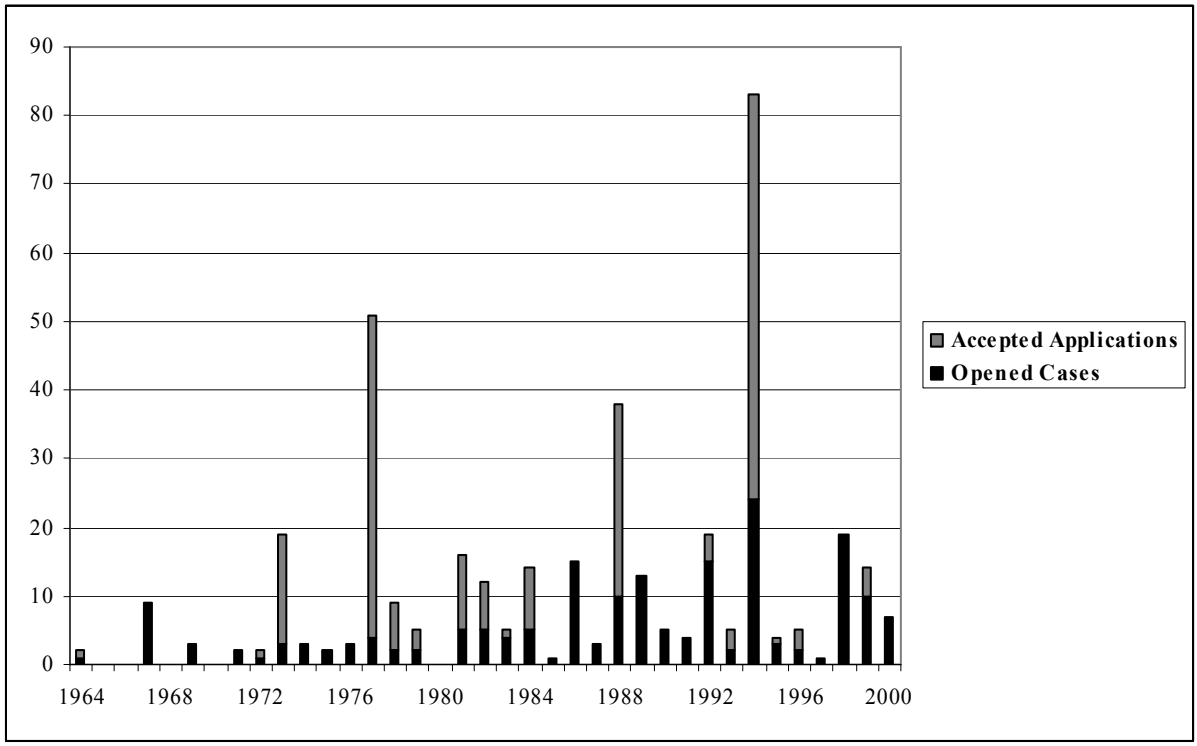
[12] *PVC* Commission decision 89/190/EEC [1989] OJ L 74/1, Case IV/31.865
LdPE Commission decision 89/191/EEC [1989] OJ L 74/21, Case IV/31.866

[13] *Cartonboard* Commission decision 94/601/EEC [1994] OJ L 243/1, Case IV/33.833
PVC Commission decision 94/599/EEC [1994] OJ L 239/14, Case IV/31.865

[14] *Quinine* Commission decision 69/240/EEC [1969} OJ L 192/5, Case IV/26.623

participants filed an appeal, the Court did not group them in a joint case as they appealed on

Figure 2 Filed Applications and Opened Proceedings

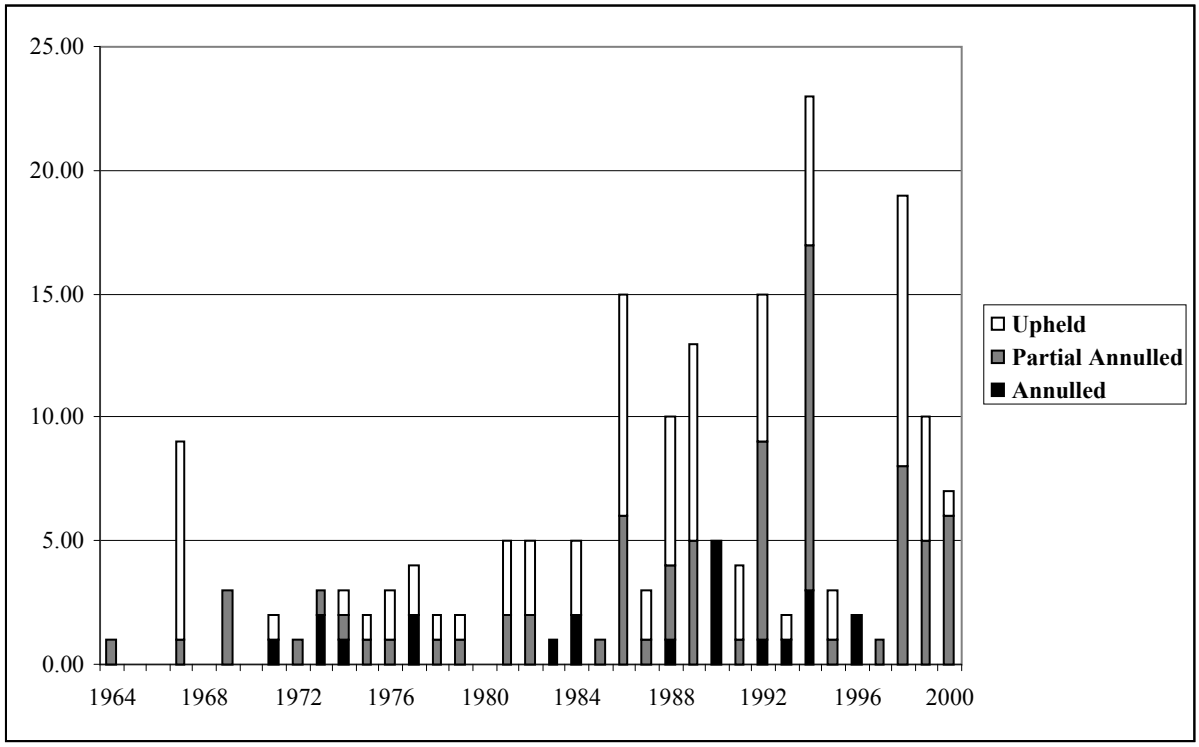


different grounds also receiving different sentences in the end. For the upcoming analysis we consider grouped or also called joint cases, reducing the number of cases significantly. The reason for choosing joint cases is that we follow the Court in its opinion about a case. If the decision and the ground for appeals are identical, then also the ECJ's sentence is the same for all parties with minor discrepancies in the amount of fine reduction or cost sharing. Moreover, joint cases reflect better the workload of the Court. In total, 393 applicants filed complaints after a Commission decision out of 129 appealed Commission decisions which gives an average of three applications per appealed Commission decision. The ECJ grouped these cases into 188 appeal proceedings translating to 1.5 sentences per Commission decision. One can not compare Figure 1 and 2 with respect to the case numbers. Figure 1 shows the amount of all Commission decisions and the number of cases against which one or more complaints were filed. Figure 2 indicates the number of applications which were potentially grouped in joint cases.

Figure 3 gives the distribution of final sentences of appeal proceedings. In general, there are three main outcomes – either the Court of Appeal approves the decision initially taken by the Commission or it partly or completely disapproves. In the case of disapproval, the court of appeal has two possibilities. It may rule partially in favor of the complaining parties, which translates usually into a fine or incurred cost reduction. However, it may also rule fully in

favor of the complaining agents and simply quash or annul the decision of the Commission. Our analysis aims to detect patterns of disapproval connected to different characteristics of these cases, which were brought to a court of appeal. The sentences might provide some insight into possible imperfections of the Commission's work over time.

Figure 3 Court of Appeal Ruling



The classification - Upheld - comprising dismissed applications experiences the fastest growth and is larger in number than partial annulments. A large proportion of upheld decisions indicates a favorable picture in the decision making process of the Commission, since both institutions are in accordance. A very sizeable proportion of Commission decisions is partially annulled. This may range from minor fine reductions and procedural details to very substantial fine reductions and important elements of the decision being quashed. The last category is annulled, which fluctuates most. One cannot observe a clear cut trend.

A clear conclusion is difficult to draw from Figure 3. In addition, fine reductions can be justified on legal as well as economic grounds. Most often, a fine revision is solely based on different sales, turnover or infringement duration estimations. For the first ten years from 1964 until 1973, the majority of decisions were partially or fully annulled which reveals inconsistency between the European Commission and the European Court of Justice during the early stages of European antitrust implementation. Hereafter, the proportion of quashed or annulled decisions tends to diminish. Summing up the insight from Figure 3 the decisions of

appeal proceedings do show both approval and disapproval of the judgments of the Commission.

Another potential indicator for the success of the Commission is the extent of reversed fine. The ratio of the revised fine to the originally imposed fine is given as an average per year.

Figure 4 Fine Reduction imposed by the Court of Appeal

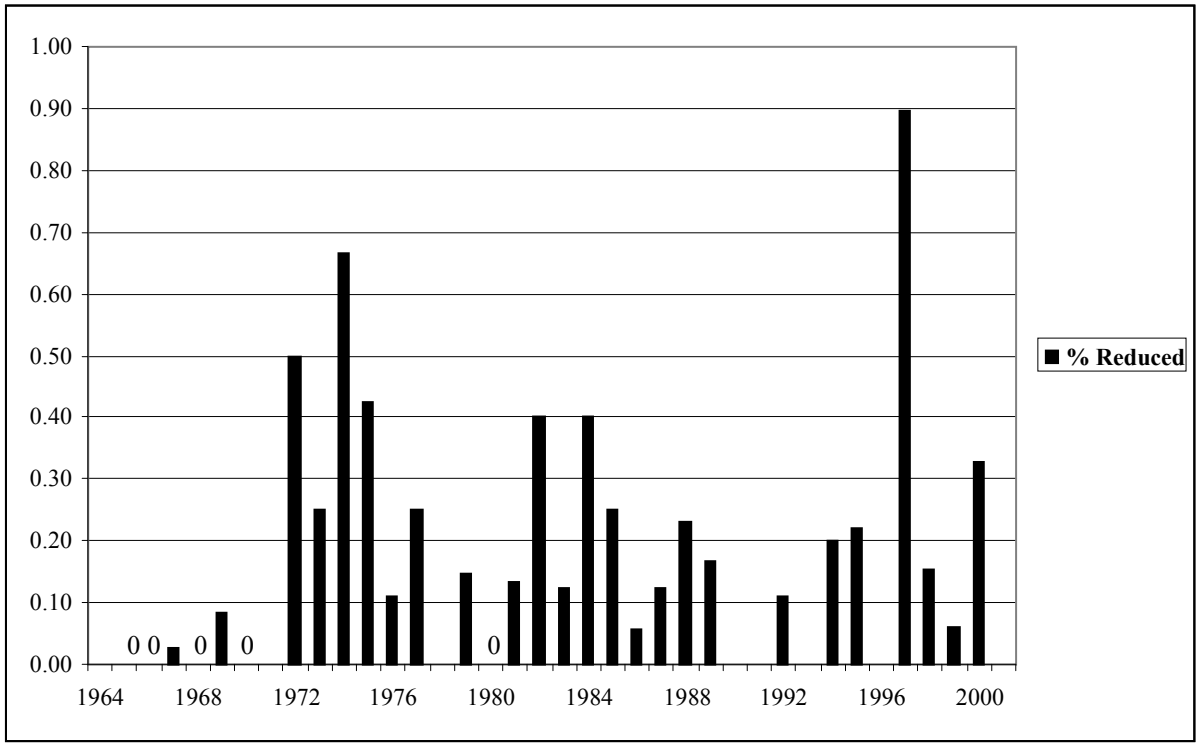


Figure 4 shows that the ratios of revised fines vary a lot over the years which is mainly due to small numbers of cases per year at the beginning of the time period. Hence, the volatility indicated by the standard deviation of average fine revision is large. In 1996, there was just one appeal proceeding decided upon involving Bayer AG.[15] Here, the fine has almost completely been withdrawn, explaining the ratio of 0.9 for this year. Note that there are no cases 1965, 1966, 1968, 1970 and 1980. Hence, there is also no fine reduction and the zero indicates the non-existent of a case.

Although there are only a limited number of cases, the data still provides some evidence that the European Commission and its respective authority of appeal seem to disagree in a significant portion of the total fines. Generally, a complete fine reduction only takes place if the court of appeal completely abolishes the EC economic argumentation or if the Commission makes severe mistakes in the legal procedure. On the contrary, partial fine

[15] Case T-41/96 Bayer v. Commission [2002] ECR II-3383

reductions happen, when for example the turnover estimation is perceived to be wrong. The latter case takes place most often, showing a positive outcome for the Commission over time.

Another measurement for success of party is the division of the incurred costs for litigation. Table 1 illustrates these results. As we do not know the exact costs, we take the Court estimate of division. It divides costs among the parties by proportion. In upheld cases, the applicant has to bear Commission's and its own entire cost indicated with a 1 for his cost incurred cell as well as the one of the Commission. Hence, 100% of both parties cost equals a total of 2 in Table 1. In analogy, if the ECJ quashes the decision, the Commission has to pay both. Hence, the numbers in the table represent the count of total cost percentages paid to each party. The total of all costs incurred equals double the number of appeal proceedings.

The Commission only had to bear the entire cost incurred in one fourth of all cases. The Commission has paid for entire costs incurred in 29 cases of which six (almost 30%) are due to one famous landmark case involving Soda Ash, Solvay and ICI, concerning a collective abuse of dominance in Belgium in 1990.[16] Hence, apart from the case described above, in less than 10% of all rulings the Commission had to bear all costs incurred by itself as well as one of the applicant(s). Most often, the court of appeal has divided the costs incurred equally. As the majority of rulings are partial annulments, this result is intuitive.

Table 1 Cost Sharing

Liable/Cost Incurred	Applicant	Commission	Total
Applicant	159.22	123.01	282.22
Commission	64.79	28.98	93.77
Total	224.01	151.99	376.00

Regularly, the court of appeal ordered the Commission to pay half of these costs, even when the decision of the Commission has been upheld. In this case, the cost payments by the Commission can be interpreted as a punishment for minor legal/procedural mistakes. Out of a total of 188 cases, only a small fraction of incurred cost was not devoted integer to a party involved, but instead split in percentages. Total costs – the sum of the expenses of the Commission and the plaintiff - burden the latter by about 75 per cent on average.

Apart from the rulings of the court of appeal, the analysis also focuses on the characteristics defined in the decisions of the Commission. In these decisions, six different rationales can be identified, which coincide with the Annual Reports on Competition

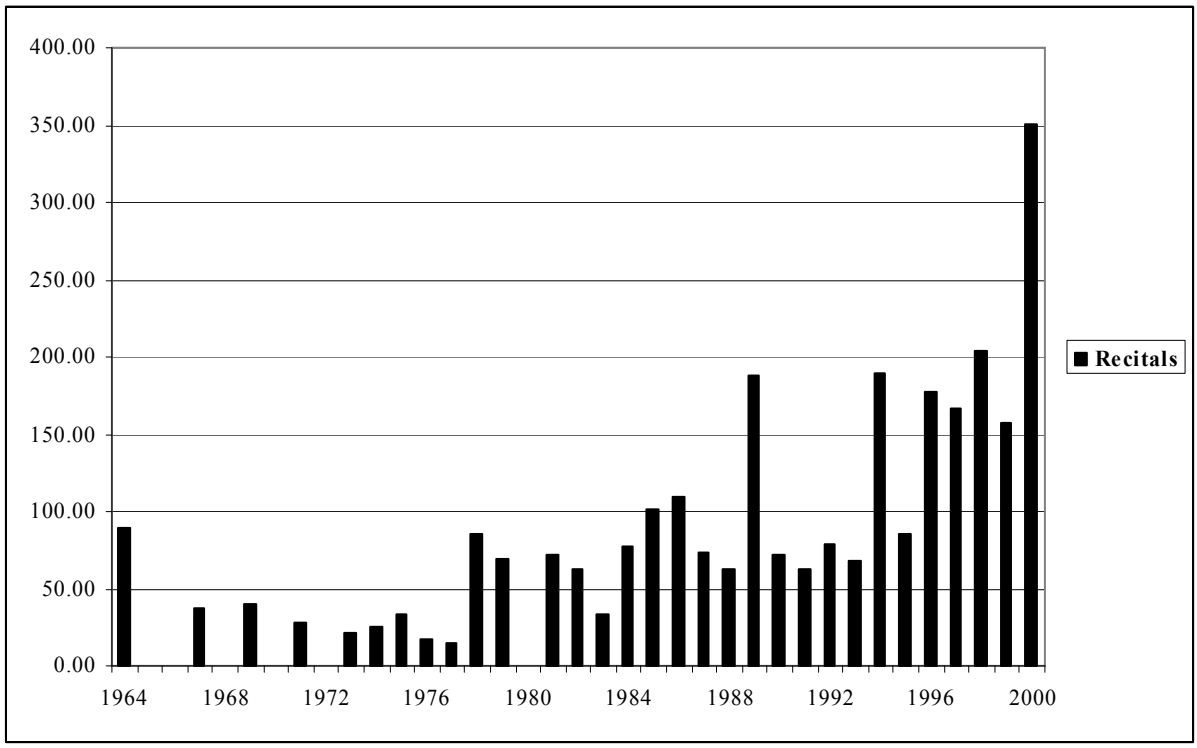
[16] *Soda-ash - Solvay/ICI* Commission decision 91/297/EEC [1991] OJ L 152/1, Case IV/33.133

classifications (1971-2006) (see also Guenster et al., 2007). They are horizontal constraints, abuse of dominance, vertical restraints, licensing, joint ventures and Article 86 representing the abuse of Member States' regulations. Article 86 cases are not covered in this analysis. All rationales, except for vertical joint venture, have an almost equal coin-toss chance of success with success defined as a partial annulment of the decision. Joint ventures only had three cases ending in appeal.

The majority of appeal proceedings is filed by companies exercising horizontal conduct making up 58 per cent of all appeals proceedings. The second largest category is vertical restraints encompassing 20 per cent followed by dominance cases with about 16 per cent. There are only 7.5 licensing cases which were appealed. Joint venture decisions and licensing cases are those appeal proceedings stemming mainly from an exemption or negative clearance. In these cases usually competitors complain about the exemption granted whereas in horizontal, vertical and dominance cases the company directly punished by the Commission usually complains.

Figure 6 shows the average length of the sentences. The document length is measured as the number of paragraphs which are referenced as points or recitals which in turn represent

Figure 6 Average Length of the Sentence



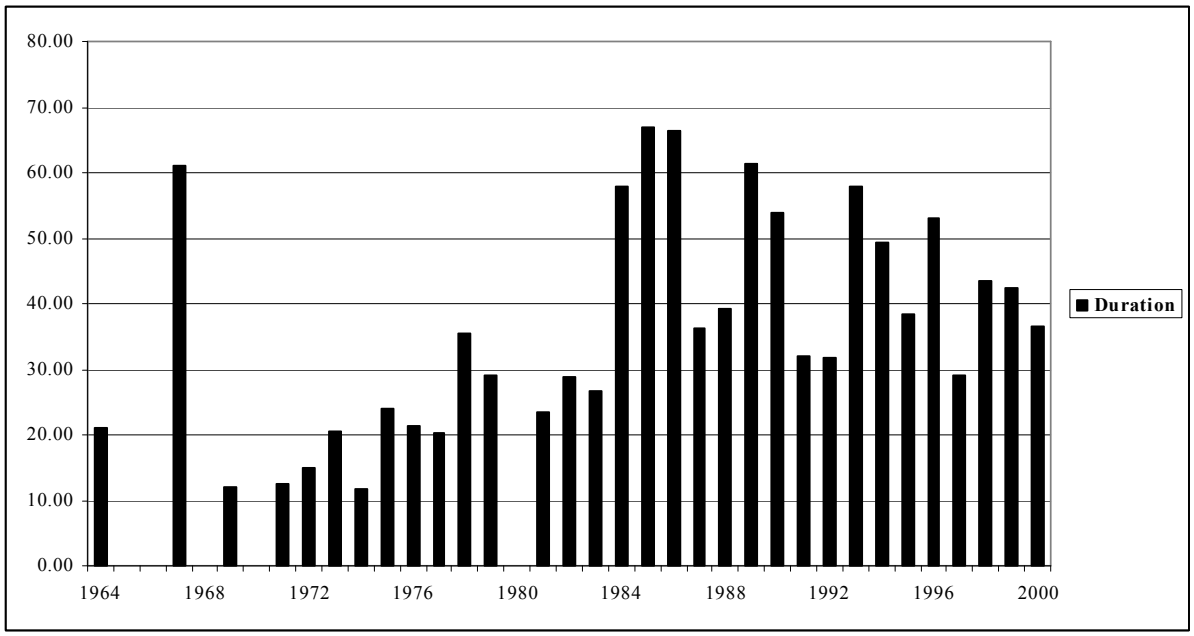
the number of paragraphs used to evaluate a case. In general, the length of the document represents the complexity of the case. The more parties, agreements or economic rationales are involved, the longer is the Commission's decision. Alternatively, if a case is hard to

establish or the economic theory is applied with utmost scrutiny, the longer will be the decision document. Hence, part of the exponential rise is explained by the average original decision document length which also increased strongly (Guenster et al., 2007).

The establishment of landmark cases contributed to the rise of the length of the document. They shaped regulations and procedures for the application of antitrust law. For example, there are two landmark cases defining the relevant market in 1976. The Court decided in the United Brands Company and the Hoffmann-La Roche (Vitamins) cases on the notion of the relevant geographical and product market, respectively.[17][18] After these two sentences, the Commission started to incorporate the Court's definition process of the relevant market in each decision thereafter. A second example is the notion on collective dominance established in 1989 and 1993. In the flat glass appeal decided by the ECJ in 1992, it explained its understanding of collective dominance introducing potential relevance of Article 82 for all cartel cases thereafter.[19] This idea matured in the CEWAL sentence where the Court identified joint predation by the members of CEWAL grouped in a shipping liner conference.[20]

Figure 7 highlights the average duration of the Court's decision making process representing simultaneously the complexity of cases. Apart from some outliers, the Court needs roughly

Figure 7 Duration of the Sentence



[17] Case 27/76 UBC (United Brands Company, Chiquita) [1978] ECR 207
[18] Case 85/76 Hoffmann/La Roche (Vitamins) [1979] ECR 461
[19] Italian Flat Glass Joined Cases T-68, 77 and 78/89 [1992] ECR II-1403
[20] CEWAL Joined Cases T-24-26 and 28/93 [1996] ECR II-1201

a constant amount of time for finding a sentence over the years. The outlier in 1967 is due to the Dyestuff cartel. The case had already been at the Bundeskartellamt previous to the Commission decision. The parties were found guilty of horizontal price fixing and information exchange. The ECJ upheld the entire decision and the companies had to pay each their Commission imposed fine of ECU 50,000 and all costs incurred.

The Sentences of the European Court of Justice

There are various issues concerning antitrust law that can be examined using statistical analysis. One may consider the probability of appeal (Guenster et al., 2007), the probability of a decision being annulled by ECJ/CFI, the fine revision by ECJ/CFI and the way in which ECJ/CFI decides the legal costs have to be shared. There are three main measures indicating the economic and legal validity of the Commission's decision. First, the sentence of the ECJ can be divided into three main categories: decision upheld, partially annulled and fully annulled. Whenever a Commission decision is annulled, either the antitrust authority can not prove that economic conduct took place or did indeed harm competition. Alternatively, the Commission made major mistakes in the procedure which happened in the case of the German Banks in 2001.[21] In this case, all German banks fixed foreign exchange operation charges especially with respect to the newly introduced Euro. Since a young lawyer faxed the legal documents upside down and therefore, the ECJ did not receive the document in time but only blank pages. The German banks escaped a fine worth €100.8 million. This is the only case where solely a procedural fault led to the annulment of an entire sentence. If case could not be made or the Court does not follow the Commission's reasoning on harm caused by a specific anti-competitive conduct, it annuls the decision. Out of the 188 rulings we consider, 21 decisions were annulled

Usually, procedural mistakes lead to the sentence of partial annulment which is always accompanied by a fine reduction whenever a fine was imposed by the Commission. Further reasons for partial annulment of a decision are wrong estimation of turnover, infringement duration, market shares etc. Since minor mistakes seem to happen more often, 77 rulings led to a partial annulment of the decision. The largest category is upheld compromising 89 cases. We estimate a multinomial logit on the three rulings the ECJ issues. Upheld is the base level given its high count. A multinomial estimates the determinants of the variance among the categories. Table 2 shows the results. It indicates a R^2 of 36% meaning

[21] *Bank charges for exchanging euro-zone currencies – Germany* Commission decision 2003/25/EC [2003] OJ L 15/1, Case COMP/E-1/37.919

Table 2 Multinomial Logit on the Sentence, (n=188)

Partially Annulled	Coefficient	Standard Error	Mean
Duration	-0.021	0.014	42.633
Parties	0.051	0.043	8.739
Horizontal	-0.084	0.590	0.593
Dominance	-0.160	0.840	0.117
Applicant	-0.196***	0.071	3.016
Number of Intervener for Applicant	0.418	0.456	0.165
Number of Intervener for Defendant	0.392*	0.233	0.489
Recitals	0.009***	0.002	123.404
Fine	0.131***	0.047	6.766
Judges	-0.219	0.351	2.890
Andriessen (01/81-01/85)	-0.422	0.788	0.101
Sutherland (01/85-01/89)	-1.446	1.265	0.144
Brittan (01/89-01/93)	0.551	1.293	0.186
van Miert (01/93-09/99)	-1.442*	0.861	0.293
Constant	-1.375	0.908	…

Annulled	Coefficient	Standard Error	Mean
Duration	-0.038	0.027	42.633
Parties	-0.089	0.070	8.739
Horizontal	0.422	0.909	0.593
Dominance	1.107	0.963	0.117
Applicant	0.083	0.072	3.016
Number of Intervener for Applicant	0.957	0.645	0.165
Number of Intervener for Defendant	-0.049	0.343	0.489
Recitals	0.001	0.004	123.404
Fine	-0.023	0.060	6.766
Judges	1.150***	0.350	2.890
Andriessen (01/81-01/85)	-4.044**	1.964	0.101
Sutherland (01/85-01/89)	-4.578***	1.675	0.144
Brittan (01/89-01/93)	-6.201***	2.211	0.186
van Mie t (01/93-09/99)	-2.694**	1.224	0.293
Constant	-1.062	0.923	…

Upheld is the base level. The R^2 is 36%. Note: *, **, and *** indicate significance at 10%, 5% and 1% significance levels, respectively.

that one third of the difference between the categories is explained by our model. There are five variables significantly explaining the difference between a partial annulment and an upheld decision: the Commissioner van Miert, the number of applicants, the number of interveners in favor of the defendant (Commission) of the decision, the length of the document (in recitals) and the amount of the fine.

For all inferential statistics, the impact of Commissioners dummies might be understood as representing a personal influence. We rather perceive the Commissioners rather presenting an enforcement period in form of a trend. Base level of the Commissioners is Commissioner Vouel who was the first official Commissioner of the Commission in the period 1976-81, and previously, the Presidents of the Commission signing the decision on behalf of the Commission. Van Miert's time period seems to have led to less partial

annulments compared to all years previous and after. In his time period, although the number of appeal proceedings was higher (see Figure 1), they did not result as often in partial annulments.

The number of applicants has a negative effect on the difference between partial annulment and upheld; the more applicants there are, the less likely that the decision is fully upheld. The more parties supporting the defendant (Commission), the higher the likelihood that the sentence is a partial annulment. Moreover, the length of the document of the ECJ and the original fine imposed have a positive effect. Intuitively, the higher the fine, the more potential causes for a revision exist.

Finally, the last part of Figure 2 summarizes the results of the determinants of a full annulment. The significant coefficients of the Commissioners indicate that in the later stages fewer cases have been completely annulled. Next to the Commissioners representing a time trend, the number of judges is of importance. The higher the number of judges, the more likely it is that the Commission decision is annulled. The number of judges indicates the importance of a sentence. If the case is highly debated, the Court decides to use a combination of chambers dealing with the case.

The second indicator for the appropriateness of the Commission decision is the amount of fine reduction on appeal. Fine reduction is defined as a percentage of the original fine. If the case involves more than one party, the percentage of fine reduction is averaged over the parties. The R^2 of the simple OLS regression is 20%.

Table 3 Regression on Fine Reduction (n=188)

	Coefficient	Standard Error	Mean
Duration	0.004**	0.002	42.633
Parties	0.008*	0.005	8.739
Horizontal	-0.097	0.083	0.593
Dominance	-0.165	0.105	0.117
Applicant	-0.004	0.005	3.016
Number of Intervener for Applicant	0.004	0.060	0.165
Number of Intervener for Defendant	0.016	0.028	0.489
Recitals	-0.001***	0.000	123.404
Fine	-0.001	0.009	6.766
Judges	-0.121***	0.034	2.890
Andriessen (01/81-01/85)	-0.046	0.116	0.101
Sutherland (01/85-01/89)	0.529***	0.140	0.144
Brittan (01/89-01/93)	0.434***	0.146	0.186
van Miert(01/93-09/99)	0.332***	0.100	0.293
Constant	-0.207	0.127	…

The R^2 is 20%. Note: *, **, and *** indicate significance at 10%, 5% and 1% significance levels, respectively.

The duration of the investigation by the ECJ has a significant positive impact on the amount of fine reduction. Also the number of parties has a significant positive impact. As

with the determinants of the height of the fine shown in Guenster et al., 2007, the length of the document is also a determinant of the fine reduction. Whereas in the previous paper points had a positive effect on the height of the fine, in this paper we find a negative effect of it on the amount of reduction. The longer the document, the smaller the fine reduction. If the Commission elaborates on any detail in a case and well establishes the amount of the fine without making procedural mistakes, then the fine reduction will be significantly smaller.

The number of judges has a negative effect on the reduction of fine. The effect is strongly significant. Finally, the Commissioners have an impact on the amount of fine reduction. Andriessen does not show any difference to his predecessors. Sutherland, Brittan and van Miert encounter higher fine reductions than there have been before 1985. Out of all statistically significant Commissioners dummies, Karel van Miert shows the smallest impact.

The last variable considered as a benchmark for the quality of the Commission's work is the distribution of costs. The variable cost sharing ranges from -2 to 2, where the latter means that cost are solely paid by the applicant. Whenever, the Commission has to pay all costs incurred the variable takes -2 (see also Table 1). The regression analysis shows an R^2 of 18 per. Significant determinants of cost sharing are duration, number of interveners for applicant, the number of judges and the Commissioners who were in charge from 1985 onwards.

Table 4 Regression on Cost Sharing (n=188)

Cost Sharing	Coefficient	Standard Error	Mean
Duration	-0.003**	0.002	42.633
Parties	-0.006	0.005	8.739
Horizontal	0.013	0.074	0.593
Dominance	0.071	0.093	0.117
Applicant	0.006	0.005	3.016
Number of Intervener for Applicant	0.082*	0.044	0.165
Number of Intervener for Defendant	-0.035	0.023	0.489
Recitals	0.000*	0.000	123.404
Fine	0.004	0.005	6.766
Judges	0.074**	0.032	2.890
Andriessen (01/81-01/85)	-0.149	0.102	0.101
Sutherland (01/85-01/89)	-0.241*	0.136	0.144
Brittan (01/89-01/93)	-0.270**	0.139	0.186
van Miert(01/93-09/99)	-0.229**	0.099	0.293
Constant	0.274***	0.093	…

The R^2 is 18%. Note: *, **, and *** indicate significance at 10%, 5% and 1% significance levels, respectively. The cost sharing ranges between -2 (all costs paid by the Commission and +2 (all costs paid by the applicants)

The duration of the decision making process has a negative impact on the height of the cost paid by applicants. In complex cases in which the Court requires more time, the Commission has to pay on average more than in less time consuming cases. Contrary the

number of judges has a positive impact. High profile cases ruled by a high number of judges leads to more cost being paid by the applicant. If the intervener has a high number of supporters, it also has to pay a higher share of total costs. The length of the document has a very small positive effect statistically significant at the 10 per cent level. Finally, the Commissioners all have a significant negative effect when compared to its predecessors including Andriessen. Since 1985 the Commission has to pay more often a significant share of total cost incurred.

Conclusion

In Europe, the most important competition policy enforcing agency is the European Commission. It applies antitrust, state aid and merger law as well as initiates new legislation thereby shaping the competitive process on the old continent. This paper surveys critically the history of European antitrust policy from the perspective of the European Court of Justice since the grounds for its implementation were set in 1962. The data cover all antitrust decisions by the European Commission decided under Articles 81 and 82 resulting into an appeal proceeding.

The paper shows a number of interesting statistics concerning ECJ rulings. First, appeals have become more popular over time. This maybe connected to the substantial fine reduction that sometimes takes place. However, the share of cases completely annulled is decreasing in the last decade of our period under investigation. Second, there is a tendency for the document length of the ECJ decisions to become larger, but not leading to a higher average duration of the decision process. Third, increased fine and EC document length lead to more partial annulment but not to more complete annulment (when compared to upheld decisions). This indicates that in important complex cases, it is unlikely that either of the two parties (Commission and applicants) receives a full legal victory. Fourth, while increased EC document length leads to less fine reduction, there is a tendency for more fine reduction for the more recent Commissioners. Hence, the ECJ looks increasingly critical at the fines imposed but appears to appreciate well defended argumentation related to that. Fifth, applicants tend to have to bear most of the legal costs made, on average. However, the share of the costs borne by the Commission is increasing over time. Cases with many judges and interveners for the applicant tend to result in more costs borne by the applicants.

The use of statistics on ECJ decisions has the advantage of revealing some trends. It should be emphasized that each and every case is unique, so there is little use in taking the outcomes and wanting to predict the likelihood of fine reduction, cost sharing or probability

of annulment for a specific case. The heterogeneity among cases is large, the time period and the number of firms and the economic misconduct may differ substantially from one case to another. Nevertheless, statistical outcomes suggest how the Commission and the ECJ are evolving over time in their decisions taken.

References

Baker, J.B., (2003). "The Case for Antitrust Enforcement," Journal of Economic Perspectives, 17:27-50.

Barros P.P., Brito D., and de Lucena D., (2006). "Mergers in the Food Retailing Sector: An Empirical Investigation". European Economic Review, 50:447-468.

Bos, A.M. and M.P. Schinkel, "On the Scope for the European Commission's 2006 Fining Guidelines under the Legal Maximum Fine," Journal of Competition Law and Economics, 2(4), 2007, 673-682.

Corwin, E.D. (1992), "Trends in Enforcement of the Antimonopoly Laws", *in Antitrust and Regulation*, Elgar, London, 110-118.

Davies S.W., Nigel L.D. and Clarke R., (1999). "Monopoly in the UK: What determines whether the MMC finds against the investigated firms?", Journal of Industrial Economics, 47:263-83.

Duso T., Gugler K.P. and Yurtoglu B., (July 2006), "How Effective is European Merger Control?", WZB, Markets and Politics Working Paper No. SP II 2006-12.

Duso, Tomaso, Neven, Damien J. and Röller, Lars-Hendrik, (April 2006), "The Political Economy of European Merger Control: Evidence using Stock Market Data," WZB Discussion Paper No. FS IV 02-34 (forthcoming in The Journal of Law & Economics).

European Commission, Directorate-General for Competition (2003), European Union, Competition Policy, XXXIInd Report on competition policy 2002, Office for Official Publications of the European Communities, Luxembourg.

Gallo, Joseph C., Joseph L. Craycraft, and Steven C. Bush (1985), "Guess Who Came to Dinner: A Statistical Study of Federal Antitrust Enforcement for the Period 1963-1984", Review of Industrial Organization, 2:106-130.

Gallo, Joseph C., Joseph L. Craycraft, and Shantanu Dutta (1986), "Incarceration and Fines: An Empirical Study of Antitrust Sanctions", Review of Industrial Organization, 3:38-66.

Gallo, Joseph C., Kenneth G. Dau-Schmidt, Joseph L. Craycraft, and Charles J. Parker (1994), "Criminal Penalties under The Sherman Act: A Study of Law and Economics", Research in Law and Economics, 16:1-73.

Gallo, J.C., K. Dau-Schmidt, J.L. Craycraft and C.J. Parker (2000), "Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study", Review of Industrial Organization, 17:75-133.

Geradin D. and Henry D., (2005), "The EC Fining Policy for Violations of Competition Law: An Empirical Review of The Commission Decisional Practice and the Community Courts Judgments," *European Competition Journal*, Vol 1, No 2, 401-473.

Ghosal, V. and Gallo, J. (2001), "The Cyclical Behavior of the Department of Justice Antitrust Enforcement Activity", International Journal of Industrial Organization, 19:27-54.

Global Competition Review, Special Report (2004), The 2004 Handbook of Competition Enforcement Agencies, 6th edition.

Harding C. and Gibbs A., (2005). "Why go to Court in Europe? An anlysis of cartel appeals 1995-2004", European Law Review, 30:349-62.

Jones C. and Van der Woude M., (2006), EC Competition Law Handbook, 17th edition, Thomson Sweet & Maxwell, London

Kovacic W.E. and Shapiro (2000). "Competition Policy: A Century of Economic and Legal Thinking", Journal of Economic Perspectives, 14(1):43-60.

Lauk, M. (2002), "Econometric Analysis of the Decisions of the German Cartel Office", working paper, Technische Universitaet Darmstadt.

Lin, P., R. Baldev, M. Sandfort, D. Slottje (2000), "The US Antitrust System and Recent Trends in Antitrust Enforcement", Journal of Economic Surveys 14, 255-306.

Lyons B. R., (2004), “Reform of European Merger Policy”, Review of International Economics, 12, 246-261.
Neven, D.J. (2006), “Competition Economics and Antitrust in Europe,” *Economic Policy*.
Nillsen T., (1997). “On the Consistency of Merger Policy”. The Journal of Industrial Economics, 45:89-100.
Posner, Richard A. (1970), "A Statistical Study of Antitrust Enforcement," Journal of Law and Economics, 13: 365-419.
Posner, Richard A. (2001), Antitrust Law, second edition, The University of Chicago Press, Chicago.
Ritter L. and Braun W.D., (2005), *European Competition Law. A Practitioner’s Guide*, 3rd edition, Kluwer Law International, London.
Roeller L.H., Stehmann O., (spring 2006), “The Year 2005 at DG Competition: The Trend towards a More Effects-Based Approach”, Review of Industrial Organization, 29:281-304.
Schinkel, M.P., “Effective Cartel Enforcement in Europe,” *World Competition*, forthcoming December 2007
Vogelaar F.O.W., (2007), The European Competition Rules; Landmark Cases of the European Courts and the Commission, second edition, Europa Law Publishing, Groningen.

Appendix Description of the Data: Appeals with ECJ and CFI

The analyses of appeals histories to the Commission decisions reported on in this paper are based on a data set that includes information on rulings on appeals to decisions taken on behalf of the European Commission (EC) by Directorate-General for Competition (DGCOMP) in antitrust cases brought to the authorities of appeal, the Court of First Instance (CFI) and the European Court of Justice (ECJ), respectively. The information was taken from the official ECJ and CFI records. These stretch from 1964 to 2000 and are ordered chronologically after the date of the original decision by the DGCOMP. The case documents were accessed through the official web page of the C

ourt of First Instance and the European Court of Justice:

-Court of First Instance:

http://curia.eu.int/en/content/juris/index.htm

-European Court of Justice:

http://curia.eu.int/en/content/juris/index.htm

Both websites were lasted consulted on the 20th of December 2007. All decisions published on these websites are included in the sheet. Some of the information contained in those documents was censored for reasons of confidentiality.

Duration	Number of months the Court needs to formulate its sentence
Parties	Number of parties involved in the decision
Horizontal	Indicating a horizontal constraint (vertical restraints is base level)
Dominance	Indicating an abuse of dominance (vertical restraints is base level)
Applicant	Number of parties applying against the decision
Number of Interveners for Applicant	
	Number of Interveners supporting the Application
Number of Interveners for Defendant	
	Number of Interveners supporting the Defendant (here Commission)
Recitals	Length of the document measured in paragraphs (recitals, points)
Fine	Natural logarithm of the original Commission fine imposed
Judges	Number of judges deciding about the case
Andriessen	Commissioner
Sutherland	Commissioner
Brittan	Commissioner
Van Miert	Commissioner