


# Spamming the regulator: exploring a new lobbying strategy in EU competition procedures

Marlene Jugl <sup>1,\*</sup>, William A. M. Pagel<sup>2</sup>, Maria Camilla Garcia Jimenez<sup>3</sup>, Jean Pierre Salendres<sup>3</sup>, Will Lowe<sup>3</sup>, Helena Malikova<sup>4</sup>, Joanna J. Bryson<sup>3</sup>

<sup>1</sup>Department of Social and Political Sciences, Bocconi University, Milano, Italy

<sup>2</sup>Department of Economics, Oxford University, Oxford, UK

<sup>3</sup>Hertie School, Berlin, Germany

<sup>4</sup>European Commission, Directorate General for Competition, Brussels, Belgium

\*Corresponding author. E-mail: [marlene.jugl@unibocconi.it](mailto:marlene.jugl@unibocconi.it)

## ABSTRACT

Regulation plays a central role in modern governance; yet, we have limited knowledge of how subjects of regulation—particularly, private actors—act in the face of potentially adverse regulatory decisions. Here, we document and examine a novel lobbying strategy in the context of competition regulation, a strategy that exploits the regulator’s finite administrative capacities. Companies with merger cases under scrutiny by the European Commission’s Directorate General for Competition appear to be employing a strategy of ‘spamming the regulator,’ through the strategic and cumulative submission of economic expert assessments. Procedural pressures may result in an undeservedly favourable assessment of the merger. Based on quantitative and qualitative analyses of an original dataset of all complex merger cases in the European Union 2005–2020, we present evidence of this new strategy and a possible learning process among private actors. We suggest remedies to ensure regulatory effectiveness in the face of this novel strategy.

**KEYWORDS:** Competition regulation, Merger cases, Lobbying, Administrative capacity, Mixed methods

**JEL CLASSIFICATIONS:** L4, D21

## I. INTRODUCTION

Regulations and regulators are important mechanisms for societies to protect the collective interests of their citizens and residents, including their businesses.<sup>1</sup> But such collective interests do not always align with the private interests of all those subject to the regulation. While the first wave of regulatory studies examined how businesses and organized groups attempted to influence regulation in their interest,<sup>2</sup> recent studies of regulation focus more on the behaviour of governments, politicians, and bureaucrats.<sup>3</sup> The strategic behaviour of firms remains largely understudied.<sup>4</sup> Competition or antitrust regulation<sup>5</sup> is one such case where the interests of society can clash directly with the immediate goals of private actors. Merging or acquiring companies have strong incentives to sway the regulator's assessment, which constitutes a potential obstacle to their business plans.<sup>6</sup> Yet, there is little systematic knowledge about private actors' behaviour in the context of merger decisions.

In this article, we shed light on what appears to be a novel lobbying strategy, one exploiting the regulator's limited administrative capacity.<sup>7</sup> Based on qualitative and quantitative evidence, we argue that private companies with mergers under investigation by the European Commission's Directorate General for Competition (DG COMP) now often use a strategy akin to 'spamming' to interrupt or inhibit the enforcement of competition rules. This strategy consists of submitting numerous, highly specialized economic reports to increase the burden on the regulator, which has considerable, but nevertheless finite, administrative capacity. This puts DG COMP at risk of not being able to process all submissions adequately, potentially limiting its effectiveness and capacity to defend its decisions. In such a challenging situation, a regulator might decide not to rule against the firms and their merger, to avoid being challenged in court on procedural grounds. Although a spamming strategy does not violate the letter of the law, it goes against its intent. Spamming allows corporations to avoid full application of rules through procedural tactics, rather than through merit and the informed collaboration for which the report-submission system was designed.

In particular, we study the role of specialized economic consultancies, such as Compass Lexecon, Charles River Associates, RBB Economics, and NERA,<sup>8</sup> and their economic expert assessments.<sup>9</sup> We expect submissions by these hired consultancies to be an effective way of lobbying in the context of the highly technical and confidential merger proceedings, where more conventional types of lobbying (cf. Section II) could fail to be as impactful on any individual case. DG COMP is required to consider all submitted evidence regardless of its own

<sup>1</sup> Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' [1997] *Journal of Public Policy* 139; Mattia Guidi, Igor Guardiancich and David Levi-Faur, 'Modes of Regulatory Governance: A Political Economy Perspective' (2020) 33(1) *Governance* 5; Michael Moran, 'Understanding the Regulatory State' (2002) 32(2) *British Journal of Political Science* 391.

<sup>2</sup> Sam Peltzman, 'Toward a More General Theory of Regulation' (1976) 19(2) *The Journal of Law and Economics* 211; George Stigler, 'The Theory of Economic Regulation' (1971) 2(1) *Bell Journal of Economics* 3; Stephen G Breyer, *Regulation and Its Reform* (Harvard University Press 1982).

<sup>3</sup> Guidi, Guardiancich and Levi-Faur (n 1); Umut Aydin and Kenneth P Thomas, 'The Challenges and Trajectories of EU Competition Policy in the Twenty-first Century' (2012) 34(6) *Journal of European Integration* 531; Sebastian Billows, Sebastian Kohl and Fabien Tarissan, 'Bureaucrats or Ideologues? EU Merger Control as Market-centred Integration' (2021) 59(4) *Journal of Common Market Studies* 762.

<sup>4</sup> But see David Coen, 'Business-Regulatory Relations: Learning to Play Regulatory Games in European Utility Markets' (2005) 18(3) *Governance* 375; Neil Rollings and Laurent Warloutet, 'Business History and European Integration: How EEC Competition Policy Affected Companies' strategies' (2018) 62 *Business History* 717.

<sup>5</sup> Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004); Yannis Karagiannis, 'Political Analyses of European Competition Policy' (2010) 17(4) *Journal of European Public Policy* 599; Aydin and Thomas (n 3).

<sup>6</sup> Gail Orton, 'When Lobbying DG COMP Makes Sense: European Competition Officials are Policy-Makers as well as Regulators' (2011) 7(2) *Competition Law International* 50.

<sup>7</sup> Aydin and Thomas (n 3); David Coen, Alexander Katsaitis and Matia Vannoni, *Business Lobbying in the European Union* (OUP 2021); Eleanor Morgan and Steven McGuire, 'Transatlantic Divergence: GE-Honeywell and the EU's Merger Policy' (2004) 11(1) *Journal of European Public Policy* 39.

<sup>8</sup> These are among the consultancies identified in the public versions of the decisions reviewed in our study.

<sup>9</sup> Damien Neven, 'Competition Economics and Antitrust in Europe' (2006) 21(48) *Economic Policy* 742.

capacities. Such an evidence-producing strategy could therefore become disruptive in more areas of regulation in the context of increasing focus on evidence-based policy making.<sup>10</sup> Our theoretical contribution is to combine debates on lobbying, administrative capacities, and evidence-based policy making, to reveal a trade-off between increasingly evidence-based decisions and administrative and regulatory capacity. While institutionalizing the consideration of different perspectives, evidence-based decision making can strain limited administrative capacities and, counter-intuitively, undermine regulatory effectiveness. Specifically, in merger cases, firms' extended right to be heard opens channels for their interest articulation which, while warranted to ensure fairness of the administrative procedure,<sup>11</sup> also creates opportunities for potentially adversarial strategic behaviour.

To document and assess this emerging lobbying strategy, we follow the approach of inductive iteration between theory, qualitative, and quantitative data.<sup>12</sup> Because of the iterative design and the co-evolution of our theory and empirical analyses, we explain the underlying data and methods throughout the article and not in one dedicated section. We begin with a discussion of merger cases as a unique setting for interest articulation, and of DG COMP's practice in merger cases. This part is based on analyses of documents and insights provided by practitioners.<sup>13</sup> Next, we develop our model of the 'spamming' strategy and derive testable hypotheses. These are then tested in two steps that rely on an original dataset of all complex merger cases brought before DG COMP since 2005, which we publish together with this article. We test our hypotheses on these data and find strong indications for a learning process on the side of the merging firms and their consultancies regarding the strategic use of economic submissions. In particular, we report significant increases in the number of submissions by economic consultancies and in the number of economic consultancies hired by merging parties, per merger case over the study period. We also hypothesized that firms may engage in strategic timing of submissions in the course of the individual merger investigation; however, we found no significant evidence for this third strategy. The quantitative findings from the first two hypotheses nevertheless confirm our main expectations, but also lead us to partly revise our model of the spamming strategy. Following a nested analysis approach,<sup>14</sup> we next complement this quantitative strategy with a qualitative analysis of two specific merger cases from our dataset. These cases are *prima facie* comparable in terms of complexity and industry; they illustrate the learning process and increased spamming over time. The qualitative analysis finds that increases in submission numbers are accompanied by a drop in submission quality, another indication of spamming—of seeking to overwhelm rather than to inform.

A strategic oversupply of submissions and economic arguments would be a worrying trend, one we believe our research indicates. Such a strategy would be similar to the efforts of spamming in email and other Internet domains as a form of resource mobilization. Producing large volumes of email, postings, or overwhelming quantities of page requests is a strategy known not only for marketing but also for attempting to disrupt communication of

<sup>10</sup> Ian Sanderson, 'Evaluation, Policy Learning and Evidence-Based Policy Making' (2002) 80(1) *Public Administration* 1.

<sup>11</sup> Elsbeth Beumer and others, 'The Interaction between EU Competition Law Procedures and Fundamental Rights Protection: The Case of the Right to be Heard' (2014) 7(10) *Yearbook of Antitrust and Regulatory Studies (YARS)* 9; Itai Rabinovici, 'The Right to be Heard in the Charter of Fundamental Rights of the European Union' (2012) 18(1) *European Public Law* 149.

<sup>12</sup> Sean Yom, 'From Methodology to Practice: Inductive Iteration in Comparative Research' (2015) 48(5) *Comparative Political Studies* 616.

<sup>13</sup> Some of the qualitative information is based on repeated exchanges and discussions with informed practitioners employed by law firms and economic consultancies, who spoke on condition of confidentiality.

<sup>14</sup> Evan S Lieberman, 'Nested Analysis as a Mixed-method Strategy for Comparative Research' [2005] *American Political Science Review* 435; Valentina Mele and Paolo Belardinelli, 'Mixed Methods in Public Administration Research: Selecting, Sequencing, and Connecting' (2019) 29(2) *Journal of Public Administration Research and Theory* 334.

information via the Internet.<sup>15</sup> Such strategies motivated the innovations of spam filters and related search technologies, which serve to reduce noise and enhance signal for those using digital communications. We might also compare ‘spamming’ strategies to distributed denial of services attacks, which attempt to overwhelm the technical capacity of a Web service provider, leading to the development and deployment of cyberdefenses.<sup>16</sup> In line with these examples, our findings indicate the need for new regulatory rules to ‘filter’ the companies’ and consultancies’ new strategy, ensuring regulatory effectiveness by returning emphasis to quality and utility of submissions, not quantity. We conclude with theoretical implications beyond European Union (EU) merger regulation and with practical suggestions for strengthening the role of the regulator to improve outcomes for society at large.

## II. COMPETITION CASES AS CONTEXT FOR INTEREST ARTICULATION

Private actors often play an important role in public decision making. In the EU they will often do this at the highest level. In general terms, private companies seek to exchange technical expertise with EU institutions in return for access to policy makers in an attempt to influence outcomes to their benefit.<sup>17</sup> They employ a variety of lobbying strategies.<sup>18</sup> For example, private actors and interest groups build lobbying coalitions to promote their interests, and they are often successful in the agenda-setting phase.<sup>19</sup> Private actors also submit comments in public consultations in order to influence decisions by the union’s executive authority, the European Commission (EC),<sup>20</sup> and its regulatory agencies.<sup>21</sup> Unlike these well-documented arenas and practices of interest articulation, regulatory merger decisions are a unique and understudied setting.<sup>22</sup> To illuminate this particular context, this section describes its most important characteristics.

In the EU, competition regulation empowers the EC to impose constraints on private corporations ranging from the prohibition of mergers deemed to impede effective competition in the internal market, to imposing fines for anti-competitive behaviour, such as forming or partaking in a cartel.<sup>23</sup> Unlike public consultations on prospective legislation, competition cases are not open for public discussion to interest groups and representatives of civil society. As such, they are non-majoritarian processes mostly shielded from standard lobbying strategies. The EC’s DG COMP is regarded as independent from political pressures and enjoys strong reputation based on its legal and economic expertise.<sup>24</sup> The cases handled by DG COMP are largely decided on the basis of information that is undisclosed because it contains

<sup>15</sup> Michael Peckham, “New Dimensions of Social Movement/Counter-movement Interaction: The Case of Scientology and Its Internet Critics” (1998) 23(4) *The Canadian Journal of Sociology / Cahiers Canadiens de Sociologie* 317; Robert C Perkins and others, ‘Malicious Spam Distribution: A Routine Activities Approach’ (2022) 43(2) *Deviant Behavior* 1.

<sup>16</sup> Felix Lau and others, ‘Distributed Denial of Service Attacks’ (2000) vol 3; Saman Taghavi Zargar, James Joshi and David Tipper, “A Survey of Defense Mechanisms Against Distributed Denial of Service (DDoS) Flooding Attacks” (2013) 15(4) *IEEE Communications Surveys Tutorials* 2046.

<sup>17</sup> Pieter Bouwer, “Exchanging Access Goods for Access: A Comparative Study of Business Lobbying in the European Union Institutions” (2004) 43(3) *European Journal of Political Research* 337.

<sup>18</sup> Coen, Katsaitis and Vannoni (n 7) ch 6.

<sup>19</sup> Heike Klüber, *Lobbying in the European Union: Interest Groups, Lobbying Coalitions, and Policy Change* (OUP 2013).

<sup>20</sup> Anne Rasmussen and Brendan J Carroll, ‘Determinants of Upper-class Dominance in the Heavenly Chorus: Lessons from European Union Online Consultations’ (2014) 44(2) *British Journal of Political Science* 445; Andreas Dür, Patrick Bernhagen and David Marshall, “Interest Group Success in the European Union: When (and Why) Does Business Lose?” (2015) 48(8) *Comparative Political Studies* 951.

<sup>21</sup> Rik Joosen, ‘The Tip of the Iceberg: Interest Group Behaviour in Rule Drafting and Consultations during EU Agency Rulemaking’ (2020) 27(11) *Journal of European Public Policy* 1677.

<sup>22</sup> but see Coen (n 4).

<sup>23</sup> European Parliament, ‘Competition Policy’ [2020] Fact Sheets on the European Union <[https://www.europa.eu/ftu/pdf/en/FTU\\_2.6.12.pdf](https://www.europa.eu/ftu/pdf/en/FTU_2.6.12.pdf)> accessed 10 April 2023; Aydın and Thomas (n 3).

<sup>24</sup> Orton (n 6); Billows, Kohl and Tarissan (n 3); Morgan and McGuire (n 7).

business secrets of the merging parties. This characteristic of the merger process means that industry associations are not well placed to present policy views.

In 2004, the EC adopted a new Merger Regulation and significantly adapted existing frameworks to a more effects-based approach to regulation.<sup>25</sup> DG COMP's primary tool for conducting merger investigations is to request information from the companies under investigation, and other market participants.<sup>26</sup> In addition to solicited submissions, companies have the right to submit further economic information and often do so in the form of purpose-built technical studies or reports ('unsolicited submissions'). A core value of the EU, strongly affirmed by the EC, is the 'right to be heard' of every person. The Court of Justice (CoJ) of the EU, which reviews the EC's enforcement of competition rules, pays particular attention to whether this right has been respected in the merger review process.<sup>27</sup>

Merger procedures are subject to strict administrative deadlines set out in European law.<sup>28</sup> The procedure of enhanced scrutiny lasts about 6 months, beginning from the moment the Commission is notified by the merging parties ('notification'), and ordinarily ending with a formal decision and publication of a detailed justification.<sup>29</sup> Even before the formal notification, there is often a period of informal information exchange between the merging parties and the Commission, that can also take 6 months or even longer. This exchange terminates when the information for a formal notification is broadly considered to be complete. Before adopting a final decision in a complex merger case (Phase II, see below), the Commission must also consult an Advisory Committee composed of representatives of the EU Member States and provide this committee with a draft of the final decision 10 working days in advance of the meeting of the Advisory Committee.<sup>30</sup> This required procedure effectively creates an internal administrative deadline. As a result, the point in the process when DG COMP is under greatest pressure is when finalizing their draft decisions, which typically include hundreds of pages of legal and economic analysis.

The 2004 Merger Regulation emphasizes an effects-based approach and economic analyses over form-based enforcement, which dominated previously.<sup>31</sup> This new approach responds to DG COMP's losses of three merger cases in the CoJ, which were annulled for the lack of economic reasoning.<sup>32</sup> The emphasis on economic analysis is also reflected in the creation of the function of Chief Economist within the European antitrust administration.<sup>33</sup> Merger investigations now are expected to rely more strongly on economic theory and competition economics.<sup>34</sup>

The increased importance of economic analyses in antitrust law enforcement since 2004 has also created a market for private economic consultancies.<sup>35</sup> On behalf of the merging companies, these consultancies produce specialized and sophisticated economic arguments and present them in the form of research papers, typically framed as 'technical expertise'.<sup>36</sup>

<sup>25</sup> Aydin and Thomas (n 3); Billows, Kohl and Tarissan (n 3); Lars-Hendrik Röller and Oliver Stehmann, 'The Year 2005 at DG Competition: The Trend Towards a More Effects-based Approach' (2006) 29(4) *Review of Industrial Organization* 281.

<sup>26</sup> 'solicited submissions', Morgan and McGuire (n 7) 43.

<sup>27</sup> Serge Durande and Karen Williams, 'The Practical Impact of the Exercise of the Right to be Heard: A Special Focus on the Effect of Oral Hearings and the Role of the Hearing Officers' (2005) 2005(2) *Competition Policy Newsletter* 22.

<sup>28</sup> LexisNexis, 'The EU Merger Investigation Process' [2020] LexisNexis Practice Notes <<https://www.lexisnexis.co.uk/leguidance/the-eu-merger-investigation-process>> accessed 10 April 2023.

<sup>29</sup> The exception to this outcome occurs only when companies withdraw their notification, because they no longer wish to proceed with the merger or acquisition.

<sup>30</sup> European Commission, 'Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation)' [2004] (L 24) *Official Journal (OJ)* of the European Union 1.

<sup>31</sup> Röller and Stehmann (n 25) p.282.

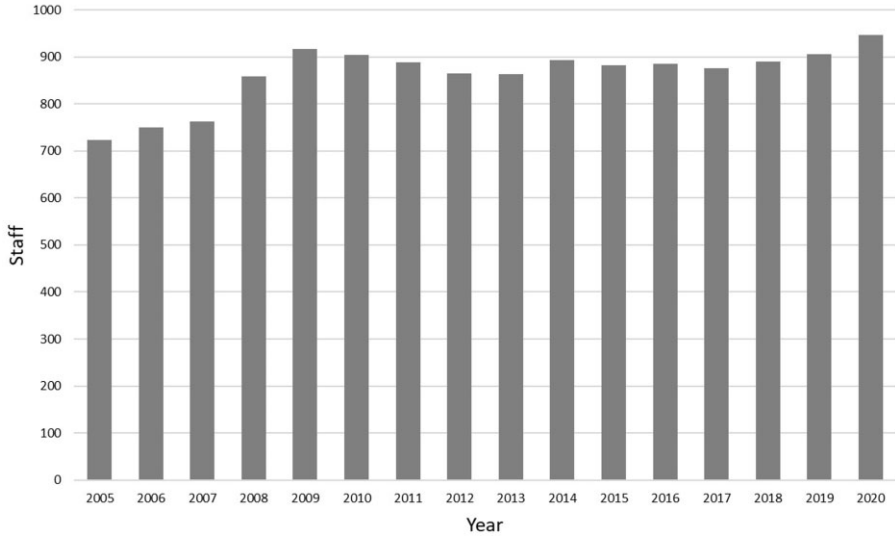
<sup>32</sup> Eleanor M Fox, 'GE/Honeywell: The US Merger that Europe Stopped-A Story of the Politics of Convergence' [2007] Available at SSRN 1002647, 352.

<sup>33</sup> Aydin and Thomas (n 3); Billows, Kohl and Tarissan (n 3).

<sup>34</sup> Also known as industrial organizations, Karagiannis (n 5) 605.

<sup>35</sup> Neven (n 9).

<sup>36</sup> Bouwer (n 17).



**Figure 1.** DG COMP Staff numbers. Sources: 2005–09 from Annual Management Plans of DG COMP; 2010–20 from DG COMP Business Correspondent. Figures include national experts seconded to DG COMP from national administrations, and exclude trainees. Numbers are also available in tabular form in the [Supplementary Appendix Table 4](#).

In the words of a lobbying expert, EU competition cases now require ‘more senior advisors than traditional legislative lobbying’ who ‘speak DG COMP’s language’.<sup>37</sup>

### III. CONCEPTUALIZING THE SPAMMING STRATEGY

In the particular context of merger procedures, described above, we observe a novel lobbying strategy employed by private actors in order to influence DG COMP’s decisions in their own interest. In this section, we present the logic of this ‘spamming’ strategy and qualitative indications for it. We also derive hypotheses, which we then test in subsequent sections.

We begin with DG COMP’s necessarily finite capacities,<sup>38</sup> which make the regulator vulnerable to ‘spamming’ or being overloaded by information provided by private actors. A key indicator of capacity is personnel. [Figure 1](#) shows that staff numbers increasing 27 per cent from 2005 to 2009, then remaining largely stable or declining until 2020. Because DG COMP must work to strict deadlines with these limited—arguably ‘severely stretched’<sup>39</sup>—resources while guaranteeing the right to be heard, it is vulnerable to being overloaded by a large number of submissions. This is especially likely if these submissions are made with close proximity to a process deadline when the administration has to form a view and produce draft decisions.

These vulnerabilities are exacerbated by an asymmetry of resources between DG COMP and the companies they investigate. Because the costs of antitrust enforcement are entirely concentrated on the private actors, we can expect the latter to have a strong incentive to articulate their position in an attempt to influence the decision.<sup>40</sup> Private actors can hire third

<sup>37</sup> Orton (n 6) 51.  
<sup>38</sup> Aydin and Thomas (n 3); Coen, Katsaitis and Vannoni (n 7).  
<sup>39</sup> Aydin and Thomas (n 3) 535.  
<sup>40</sup> Rasmussen and Carroll (n 20).

parties, like law firms<sup>41</sup> and economic consultancies, to support their arguments, and are not limited by the capacity of their own staff. If they have sufficient access to liquidity financed by own resources or debt, then they can commit large budgets commensurate with the anticipated commercial benefits of achieving a less constraining regulatory outcome in order to finance numerous outsourced economic studies, though this strategy is potentially also limited by the number and availability of economic consultancies.

Formally, companies are represented in the merger proceedings by their lawyer, as codified by the legal profession's own self-regulating rules, as well as EU and national legislation.<sup>42</sup> By contrast, economic consultants are not directly subject to such regulation or self-governing rules. Hiring economic consultancies, and individual consultants from private firms or academia in particular, allow companies and their lawyers 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. Since there is presently no requirement to disclose information on consultancies or other external resources deployed, it can be complicated to identify all relevant actors on the private side of the merger procedure, either for DG COMP or for other interested parties, including academic observers.

DG COMP is in a very different situation when it comes to expanding its resources in order to produce time-sensitive economic assessment. Officials principally responsible for economic assessment in complex merger cases are limited to the Chief Economist Team within DG COMP. DG COMP could in principle also contract external consultancies to respond to an increase of submissions. However, as for all parts of the EC, the disbursement of resources requires the administration to award a contract through a tender process which is time and resource consuming. It cannot be deployed in a matter of days, unlike the resourcing of a private company. Only contracts below a total value of 60,000 euros can benefit from a lighter procedure,<sup>43</sup> a limit well below private company expenditure on economic consultancies' advice in individual merger proceedings. Witt<sup>44</sup> describes this asymmetric deployment of resources:

The Commission tends to engage with these studies in detail in final decisions. The parties appear to commission and use econometric analysis in support of their arguments more often than the Commission itself.

Economic consultancies refer indirectly to timing and to the advocacy role of their submissions in their commercial material. For example, the presentation of the antitrust practice of the economic consultancy Oxera states:

Insight and action when you need it most. . . With antitrust issues, the key is to secure your objectives while satisfying competition authorities. We help clients in multiple sectors prepare the compelling evidence and expert support that they need to convince the authorities.<sup>45</sup>

<sup>41</sup> Rollings and Warloutzet (n 4).

<sup>42</sup> At the start of a merger procedure, companies are invited to provide power of attorney documents that allow the EC to communicate with the lawyers of the companies in the name of the company, to allow them to fully exercise their right to be heard (European Union, 'Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013' [2013] [L 336] Official Journal (OJ) of the European Union L [Annex 1, 2.1.3.2.].

<sup>43</sup> European Union, 'Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012' [2018] [L 193] Official Journal (OJ) of the European Union L.

<sup>44</sup> Anne C Witt, *The More Economic Approach to EU Antitrust Law* (vol 14, Bloomsbury Publishing 2016).

<sup>45</sup> Oxera, 'Oxera Antitrust' (Oxera 2022) <<https://www.oxera.com/expertise/antitrust/>> accessed 10 April 2023.





The aim of this strategy, we hypothesize, is to make DG COMP pursue a less forceful and more defensive decision *vis-à-vis* the merging companies, as this could protect DG COMP from the danger of being challenged in court on procedural grounds—that is, challenged that DG COMP failed to take proper account of the evidence provided on behalf of the merging companies. Based on the learning effect and resulting potential strategy among economic consultancies we hypothesize the following:

**Hypothesis 2:** Economic consultancies will make a greater number of economic submissions in more recent cases.

Pronounced increases in the number of consultancies and submissions per case would at the very least indicate that an increasing amount of resources are being deployed on the side of the private companies, contributing to an increase in resource asymmetry between private actors and the competition regulator, assuming the regulator cannot compensate. A stronger interpretation would be that these increases may be indicative of conscious choices of merging parties and economic consultancies to exploit the capacity constraints faced by the regulator, by increasing the administrative burden of their case, in the hope of disrupting the full application of the rules. Under this interpretation, we would expect to see other indications that merging parties' behaviour has changed over time to exploit DG COMP's specific vulnerability to being administratively overwhelmed by submissions made later in the merger investigation process. It is plausible that the consultants of the merging parties are aware of these deadlines, particularly given many consultancies actively recruit from DG COMP. We therefore expect that the merging parties and their consultancies know that the closer to the administrative deadline they make economic submissions, the greater the strain placed on DG COMP's administrative capacity. This leads us to the third observable implication of the spamming strategy:

**Hypothesis 3:** Economic submissions will be made later in the merger investigation process in more recent cases.

We also investigated a variation of this hypothesis that expects an amplification of that learning effect linked to a judgment by the European court in Luxembourg (ECLI: EU: T: 2017: 144). Because of space limitations, we discuss this variant of hypothesis 3 and related findings primarily in the appendix.

#### IV. DATA ON COMPLEX MERGER CASES

Our study is based on an original dataset comprising 108 procedures in complex merger cases.<sup>51</sup> 'Complex' in this case is defined as follows. The EU merger procedure allows for different intensities of review depending on competition concerns. Under Article 8 of Council Regulation 139/2004, more complex cases, where an impediment to competition cannot be ruled out *prima facie*, warrant a 'Phase II' procedure.<sup>52</sup> Our study is based on all 108 final decisions following such a Phase II investigation of which a public version was available in the electronic registry of DG COMP in September 2020, when our dataset was finalized.<sup>53</sup> The decisions' adoption dates range from 2005, when the Council Regulation 139/2004

<sup>51</sup> The data underlying this article are available from <https://doi.org/10.5281/zenodo.7763551>.

<sup>52</sup> Billows, Kohl and Tarissan (n 3) 6.

<sup>53</sup> The total number of decisions adopted at that point in time under Article 8 was 111; however, three decisions did not have a public version available at that date: decisions M.8870, M.8713, and M.9076.

**Table 1.** Summary of data.

	<b>Total</b>
Total Phase II cases	108
Cases with economic consultancies	76
Cases with no economic consultancies	32
Number of economic submissions	327
Number of economic submissions with known dates	247
Total cases featuring economic submissions with known dates	69

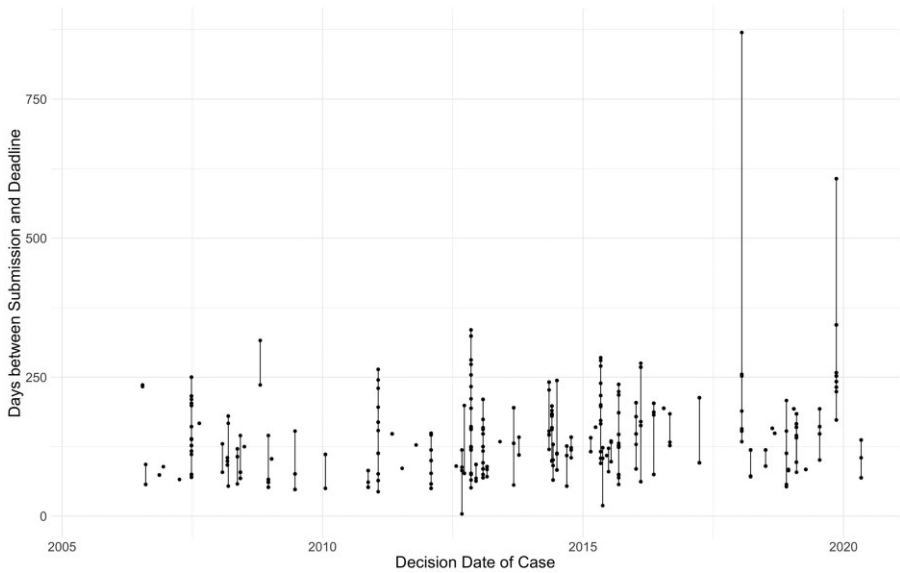
took effect, to 2020. In terms of the outcomes of the merger reviews, 10 of the decisions in our dataset resulted in a prohibition under Article 8(3), 62 decisions correspond to clearance decisions conditional on concessions by the merging businesses under Article 8(2), and 36 decisions correspond to unconditional clearances under Article 8(1).

We collected data in two steps: First, for each case, we ran a cursory search on the public decision text for terms relating to economic submissions, economic consultancies, economic research, and quantitative analysis. Where these searches returned no results, we assumed that these cases did not include any economic submissions or economic consultancies. Secondly, for those cases where the search indicated economic argumentation, we manually recorded each reference to economic submissions or references to economic consultancies, along with, where possible, their dates of submission, authors (or firms), title, and subject matter. This information is not provided for all mentioned submissions; sometimes the submission date, title, or author are not recorded in the public version of the decision. Based on the information available in the public decisions we identified and excluded submissions made by third parties that were not subject to the merger investigation, such as complainants. We also excluded submissions of economic or financial data that were not commissioned for the purposes of the merger under review but were, for example, commissioned in the context of a restructuring plan.<sup>54</sup> Finally, we record the date of the Advisory Committee meeting, and compute the date which corresponds to 10 working days prior to the Advisory Committee, indicating the administrative deadline.

The published decisions in merger proceedings do not contain exhaustive lists of submissions by economic consultancies. Rather, such submissions are referred to as required by the argumentation in the decision. Consultancies can be referred to anonymously or nominally and submissions by economic consultancies can be either attributed to them directly, to the companies that hired the consultancies or need not be referred to in the decision at all. In the absence of any evidence to the contrary, we assume the EC's approach to referencing the work of private consultancies did not change over the time of our study.<sup>55</sup> We also consider that there is no bias in referencing submissions based on whether they were received early or late in the review process. Even in the cases where submissions were received too late to be assessed by the Commission, such submissions would be likely recorded in the decision text for procedural considerations. To be clear, we do not assess the economic merits of the

<sup>54</sup> We identified references to business consultancies, which were not specialized in industrial economics but rather hired by firms in their normal course of business. In particular business and strategic consultancies such as Boston Consulting Group or McKinsey have been referred to in the decisions with respect to estimating the financial value of synergies. Typically, these studies are not directly addressed to DG COMP but rather to the management of the companies and are submitted to DG COMP at the request of DG COMP. Therefore, we excluded in the results reported here submissions by law firms and pre-existing studies by strategic business consultancies. However, if such references are included, the findings of our analysis remain unchanged.

<sup>55</sup> See Neven (n 9) for a similar analysis conducted for the period.

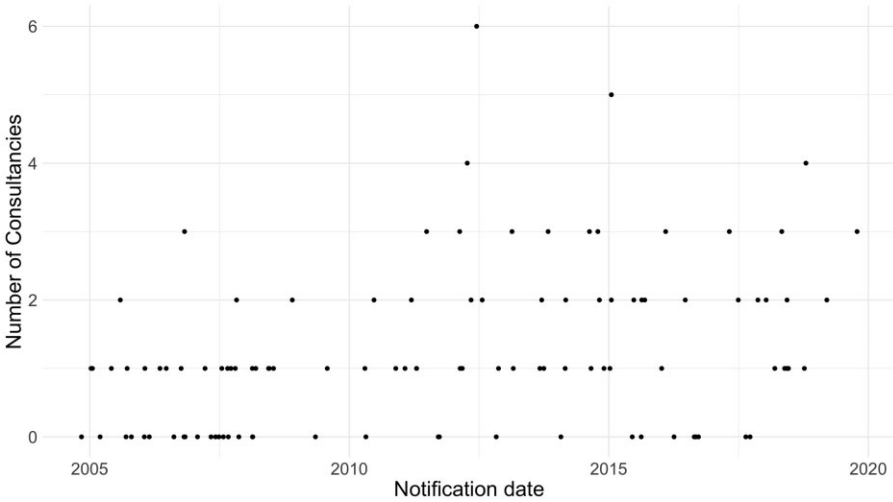


**Figure 2.** Number and timing of submissions in merger cases, where timings are in working days before the administrative deadline, ten working days before the meeting of the EU member states' oversight Advisory Committee. The vertical, Y-axis represents the number of working days before this deadline; points represent submissions made. Some cases span more than 6 months due to 'stop-the-clock' and deadline prolongations, see [Supplementary Appendix](#), especially [Table 5](#). Submissions are aligned over the year of the administrative deadline; submissions from the same case are connected by a vertical line. See further the main text.

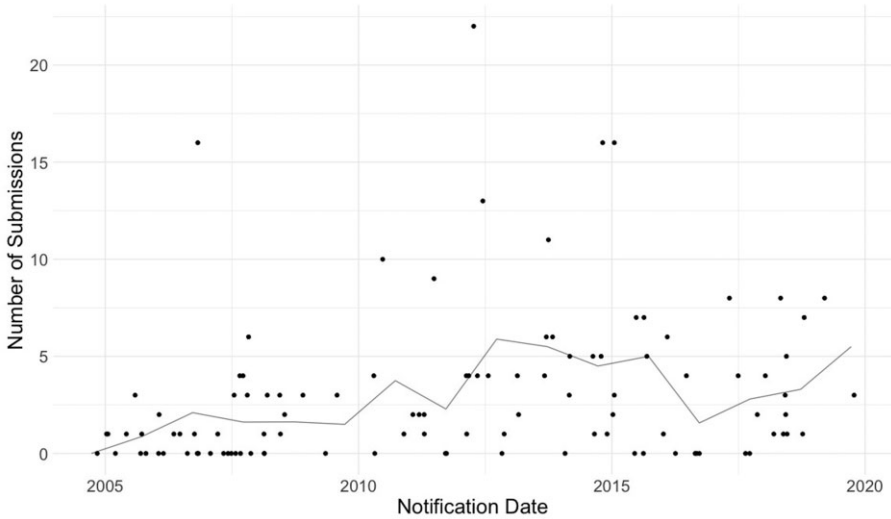
arguments produced by economic consultancies nor the outcome of the administrative decision. Rather, we offer a quantitative analysis of the *extent* of economic consultancies based on data from published merger decisions. We therefore consider our data to be an unbiased sample of all economic submissions and references to economic consultancies across the period of our dataset.

[Table 1](#) provides an overview of our dataset. The data allow us to assess the number of submissions made during each case, the timeline of these submissions (for which the dates are available), and the frequency with which the Commission references these submissions in their written decision. [Figures 2–4](#) present the data. We include further visualizations of the data for two illustrative cases in [Section VI](#).

[Figure 2](#) illustrates the richness of the data, in particular the number of submissions per case and their timing through the period of study. Cases are arranged on the X-axis in order of the dates of the final decisions in each case. Each point is a submission and each vertical line spans from the time of the first submission in that case, to the last one, measured in days to the submission deadline. Earlier submissions within a case therefore appear higher on the Y-axis. [Figure 3](#) shows the number of economic consultancies per case and [Figure 4](#) plots the number of submissions per case. In these figures, each point represents one merger case. There is a visible pattern of increases over time in both [Figures 3](#) and [4](#), which is in line with our expectations. To investigate these patterns further and formally test our hypotheses, we move to statistical analysis.



**Figure 3.** Number of consultancies per case, where identified (see main text). Points represent the absolute number of consultancies identified (Y-axis) plotted at the point of their notification date (X-axis).



**Figure 4.** Number of economic submissions per case (complete data). Points represent the absolute number of submissions (Y-axis), plotted over the year of notification (X-axis). The line shows the yearly averages of submissions per case.

## V. STATISTICAL ANALYSIS

### Methods

We test hypotheses 1 and 2 at the case level. To test hypothesis 1, we define the outcome variable as the number of unique submissions received by the Commission in case  $i$  as  $SubmissionCount_i$ . To test Hypothesis 2, we define the outcome variable as the number of

economic consultancies who make submissions on behalf of the notifying parties in case  $i$ , as  $FirmCount_i$ . For both hypothesis tests, the dependent variable is a count, bounded at zero and asymmetrically distributed for smaller counts. We suspect both of these variables are likely to be overdispersed due to unmeasured factors and for this reason, we use a generalized linear count data model that allows overdispersion. Since both hypotheses expect changes over time, we regress each outcome variable on  $NotificationDate_i$ , the date the commission was notified about merger  $i$ :

$$\begin{aligned} \text{Outcome}_i &\sim \text{Poisson}(\mu_i) \\ \log \mu_i &= \beta_0 + \beta_1 \text{NotificationDate}_i + \beta_2 \text{SO}_i + \beta_3 (\text{SO}_i \times \text{NotificationDate}_i) \end{aligned}$$

We include the binary variable  $\text{SO}_i$  to control for whether or not the Commission issued a Statement of Objections (SO) in case  $i$ . During the merger investigation procedure, the European Commission may or may not issue an SO, which is a detailed list of concerns about how the merger would impede effective competition. This procedural step is required in case of a prohibition; however, it does not prejudice the outcome of the investigation and could as well result in a clearance decision. Because an SO calls for a detailed response to the Commission's economic arguments, we expect it to increase the number of submissions. Therefore, we control for the issuance of the SO with a dummy variable and we interact this dummy with the notification date.

To test hypothesis 3, we move from the case level to the more granular level of the individual submission. We define our dependent variable for each submission as the number of working days between the date the Commission received submission  $j$  and the critical internal administrative deadline in each case  $i$ .

Finally, we take a tentative look at the success of the strategy. In order to assess the effectiveness of this strategy directly, we could analyse the outcome of the merger review (clearance or prohibition) against the intensity of the possible spamming strategy in each case. However, this seems an overly speculative approach when based only on information on the process in each merger review case. While we selected only complex cases in terms of process based on the Phase II investigation criterion, it is still not straightforward to appreciate the probability of the outcome of the complex review without taking a view on the merits of each case against the substantive requirements of the merger control rules. The omitted variables would not allow us to infer any causal link. Therefore, in the last step of the quantitative analysis, we present only descriptive evidence on the average number of submissions over time for each type of decision.

## Results

Table 2 reports results regarding hypothesis 1. The coefficient on  $NotificationDate$ , the date that each case began, is positive and significant, which shows that firms hire an increasing number of consultancies to interact with the European Commission in merger cases. Likewise, the results in Table 3 show a significant increase in the number of economic submissions per case received by the European Commission over time, which supports hypothesis 2. These results imply material increases in both the submissions and consultancies over time. For a one standard deviation increase in the notification date of a case—that is, over roughly 4.5 years—model 2 predicts a 38 per cent (95% interval: [28, 148]) increase in the number of consultancies per case advising merging companies and a 35 per cent (95% interval: [16, 206]) increase in submissions. These results entail that the mean number of

**Table 2.** Increases in economic consultancies per case

	Model 1	Model 2	Model 3
(Intercept)	0.15 (0.09) <sup>***</sup>	-0.17 (0.14) <sup>***</sup>	-0.22 (0.15) <sup>**</sup>
Notification date (Z-score)	0.34 (0.09)	0.32 (0.08) <sup>***</sup>	0.46 (0.14) <sup>***</sup>
Statement of Objections (SO)		0.57 <sup>***</sup> (0.17)	0.65 <sup>***</sup> (0.18)
SO × Notification date			-0.23 (0.17)
Deviance	117.79	107.45	105.99
Number of observations	108	108	108

Overdispersed Poisson models, dependent variable: number of economic consultancies per case.

\*\*\*  $p < 0.001$ ;

\*\*  $p < 0.01$ ;

\*  $p < 0.05$ .

consultancies and submissions per case more than double in the time period covered by our dataset.

In line with our expectations, the issuance of an SO is also significantly associated with more consultancies (Table 2) and submissions (Table 3). Nevertheless, the coefficients on *NotificationDate* are robust to the inclusion of this control variable. Model 3 in Table 2 suggests we have no evidence that the effect of notification date is different for SO and non-SO cases. Note that besides SO, cases are largely comparable in terms of complexity because the study includes only complex cases that warranted a Phase II investigation by DG COMP. Taken together, these findings confirm that merger cases pose an increasing administrative burden on the European Commission, which is likely to make the effective application of competition regulation more difficult. The findings are 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.

Our third hypothesis, that submissions will be made later in the merger investigation process, was *not* supported. Depending on the exact operationalization of lateness and which controls are added, we find a small association in the opposite direction to our hypothesis. Specifically, when lateness is coded as time in days of a submission to the final decision or to the administrative deadline, we find that cases notified one standard deviation (about 4 years) later in the dataset are associated with submissions on average 9.6 per cent (95% interval: [9.6, 18]) further from their administrative deadlines and 7.7 per cent (95% interval: [2, 14]) further from their final decisions.<sup>56</sup>

The above tests operationalize hypothesis 3 in real time, but this hypothesis could also be understood relative to the complexity of the case, which we can roughly measure using the total proceedings length. Using case length as a control, we find that cases notified one standard deviation (about 4 years) later in the dataset are associated with submissions on average 8.8 per cent (95% interval: [1.3, 17.2]) further from their administrative deadlines and 6.3 per cent (95% interval: [0.6, 12.3]) further from their final decisions. We conclude from this

<sup>56</sup> Our model testing hypothesis 3 did not factor in the days over which the procedural deadlines are suspended under the so-called 'stop-the-clock' procedure. This is because the administrative deadlines as included in the model (10 working days before the date of the Advisory Committee) are automatically prolonged by any deadline prolongation and stop-the-clock procedure. The stop-the-clock procedure is further described in the annex for completeness. As documented in the annex, we do not observe a sustained increase in the use of this procedure over the period of the study and therefore the omission should not introduce any bias to the findings concerning hypothesis 3.

**Table 3.** Increases in economic submissions per case

	Model 1	Model 2	Model 3
(Intercept)	1.06*** (0.13)	0.70*** (0.20)	0.61** (0.22)
Notification date (Z-score)	0.31 (0.13)	0.30 (0.12)	0.55** (0.21)
Statement of Objections (SO)		0.62 (0.25)	0.75** (0.26)
SO × Notification date			-0.39 (0.25)
Deviance	430.59	400.73	389.92
Number of observations	108	108	108

Overdispersed Poisson models, dependent variable: number of economic submissions per case.

- \*\*\*  $p < 0.001$ ;  
\*\*  $p < 0.01$ ;  
\*  $p < 0.05$ .

that there is no evidence for (and some against) the idea that consultancies have learnt to add workload closer to administrative deadlines. Our evidence indicates that spamming if it occurs, occurs only in terms of overall administrative load through increased investment in the generation of submissions.

Finally, Figure 5 presents the average number of submissions over time for each type of decision. A tentative reading of the descriptive results in Figure 5 would indicate that the intensity of spamming in the case of prohibition decisions (Article 8(3) represented by blue bars) has decreased and the intensity of spamming in the case of clearance decisions subject to commitments decisions (Article 8(2) represented by green bars) has increased over time. One possible interpretation of this change of relative intensity of spamming would be that the spamming strategy can indeed be effective in some cases and that some decisions that would have resulted in a prohibition at the start of the assessment period fell into the category of clearances with conditions by the end of the period. Faced with intense spamming, the authorities might have been more likely to clear the transaction than prohibit the same transaction by the end of the analysis period compared to the start of the analysis period. However, the number of prohibition cases in our dataset is too low to engage in this interpretation (10 prohibitions out of the 108 decisions analysed), and it is also evident that at least in early cases, a high level of submissions did not prevent all prohibitions. We limit ourselves to observe that the number of submissions per case for different types of outcomes and the variation over time of this number is not inconsistent with the assumption that a strategy of higher number of submissions can benefit merging companies. Future research would still be necessary to demonstrate this interpretation. Such research would need to undertake a substantive assessment of the cases under review in combination with the spamming intensity during the review process. Whether an increase in submissions is truly spamming depends also in part on the quality of the submissions, for which reasons we turn to qualitative analysis in the next section.

## VI. ILLUSTRATIVE CASES: FROM INFORMATION TO SPAM

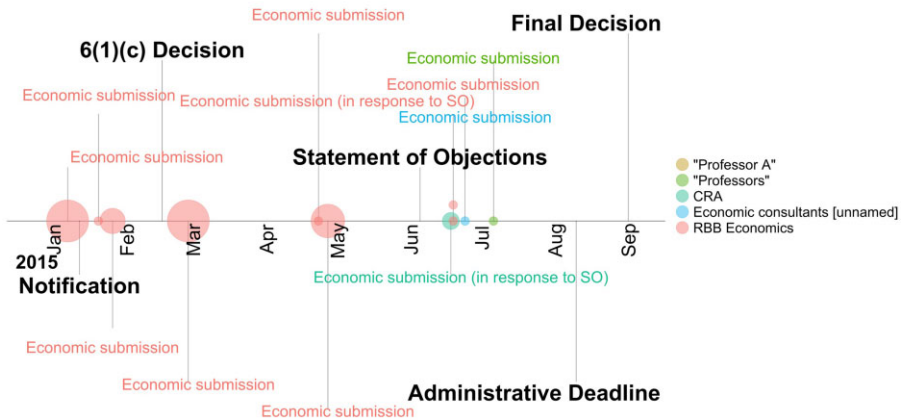
In order to better understand what is behind increasing quantities of submissions in merger cases, we now zoom in on two merger cases from our larger dataset. The first example, the acquisition by StatoilHydro of petrol stations from ConocoPhillips, occurred early in our







M.7278 GENERAL ELECTRIC / ALSTOM (THERMAL POWER - RENEWABLE POWER &amp; GRID BUSINESS)



**Figure 7.** Timeline of the economic submissions and deadlines in the GE/Alstom merger case notified in 2015. Visualization per the caption for [Figure 6](#). Figure for this case (M.7278) omits 12 submissions due to unknown submission dates.

technical nature of the procedure and decision process. They further demonstrate how DG COMP uses the submissions for information, but not without some healthy suspicion. In a comment on the case and procedure, DG COMP staff members highlight the productive collaboration with the private parties and draw lessons from this positive experience for future cases:

[...] it is thus important that the Commission and the notifying party engage in a dialogue as early as possible in the notification process (preferably at the pre-notification stage), to discuss data and timing issues as well as the analyses that can be undertaken.<sup>64</sup>

The staff members describe RBB's submissions as parts of a cooperative assessment process that led to an 'appropriate and carefully balanced outcome'<sup>65</sup> despite the analytical and technical difficulty of the case.

### The GE/Alstom merger in 2015

As a contrasting case, we present in [Figure 7](#) the timeline of the acquisition by General Electric (GE) of Alstom's power unit, notified to DG COMP in 2015 (M.7278). The final decision to approve the merger with remedies<sup>66</sup> contains references to 16 individual identified submissions. The submissions referenced were authored by two economic consultancies specialized in industrial economics, CRA and RBB, additional economic submissions were authored by an unidentified academic expert, referred to as 'Professor A', and yet another set of submissions was authored by a group referred to as 'Professors' in the public version of the final decision. Compared to the StatoilHydro/ConocoPhillips case, the second case

<sup>64</sup> Cloarec and others (n 60) 76.

<sup>65</sup> *ibid* 76.

<sup>66</sup> European Commission, Case M.7278: General Electric / Alstom (Thermal Power — Renewable Power & Grid Business). Public version (Strasbourg, 2015) <[https://ec.europa.eu/competition/mergers/cases/decisions/m7278\\_6808\\_3.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m7278_6808_3.pdf)> accessed 10 April 2023.

involved a significantly higher number of consultancies and paid-for specialized economic advisors (at least four compared to one), and submissions (twenty-three compared to five). This increases the workload for DG COMP which is expected to consider all submissions, which it does in several hundred pages in its decision. These differences illustrate outcomes typical of the learning and increasing use of the spamming strategies hypothesized here, and supported in the statistical analysis.

The submissions in the two cases differ also in qualitative terms. A qualitative analysis of the regulator's decision on the GE/Alstom case suggests that the economic submissions were one-sided and mere obstacles for DG COMP. These were not well-founded, reasonable arguments within the usual scientific margin for interpretation and disagreement as in the earlier case. The Commission spends a significant share of the hundreds of pages of the decision text arguing why the claims made in consultancies' economic submissions must be rejected. For example, one claim is rejected because, although some data and code are provided, they are not sufficient to replicate and substantiate the specific claim.<sup>67</sup> Another claim made by the consultancy CRA is rejected partly because it 'contradicts assumptions made in the model [by Professor A], which is the only economic model submitted by the Notifying Party [to justify the technical claim]'.<sup>68</sup> Here, the spamming strategy may have backfired in the sense that among the many submissions on behalf of the merging companies, some contradicted each other. Yet all required thorough analysis, and therefore resources, from DG COMP to detect these contradictions. Overall, the drop in the quality of submissions between the cases supports our argument that at least in some cases, increases in quantity should be interpreted as akin to spamming. The qualitative analysis of many of the cases suggests that these increases are merely strategic, they are not necessarily due to an increased demand for economic submissions, nor correlated with case complexity.

Figure 7 also illustrates a difference in the timing of submissions, which are presented later in the procedure, and concentrated in the period after the formal notification when 'the clock is already ticking' for DG COMP. This and similar cases led us to expect a strategic and significant change in the relative timing of submissions, yet the statistical analysis has not confirmed a significant pattern overall. Perhaps, the late submission is a coincidence, or perhaps this case was so egregious that the practice was stopped through informal communications (see Figure 2, where last-minute submissions appear concentrated between 2012 and 2015). Manipulation of timing would also be a rather transparent action that could be interpreted as hostile. So perhaps, we should not be surprised to see no persisting use of this available tool. It may also be that only certain consultancies or firms pursue this more extreme strategy. Future research could analyse whether merging firms' behaviour varies, for example, by economic sector or by country of origin, its national political culture, legal tradition,<sup>69</sup> and by whether interest articulation in the country of origin follows a more cooperative or competitive model.

In addition to submissions by economic consultancies and experts, the merging parties in this case employed one further tool. As usual in merger case investigations, DG COMP sent questionnaires to customers and competitors to ask for their assessment of the merger's potential impact. Based on an assessment of customers' comments and responses, the regulator concluded in the decision 'that GE implemented a wide ranging and carefully planned campaign to influence customer replies to the Commission questionnaires and their overall reactions to the Transaction'.<sup>70</sup> Upon further investigation, the regulator discovered that GE had

<sup>67</sup> Case M.7278: General Electric / Alstom (Thermal Power — Renewable Power & Grid Business). Public version (n 66) Annex I, 40.

<sup>68</sup> *ibid* Annex I, 44.

<sup>69</sup> Guidi, Guardiancich and Levi-Faur (n 1).

<sup>70</sup> Case M.7278: General Electric / Alstom (Thermal Power — Renewable Power & Grid Business). Public version (n 66) 6.

instructed its commercial representatives to contact customers and request an 'active and positive reply'<sup>71</sup> to the questionnaire. When DG COMP did not consider the resulting customer responses as reliable, 'GE argued that the Commission failed in its legal obligation to consider and weigh up all available evidence'.<sup>72</sup> The company's conduct provides suggestive evidence for private parties actively exploiting the right to be heard, a tactic beyond the focus of this study, but recorded here for completeness.

## VII. DISCUSSION AND RECOMMENDATIONS

Based on an original dataset and quantitative as well as qualitative evidence, we have identified a growing workload for the EU regulator in complex merger review procedures. We confirmed our two first hypotheses by documenting increases over time in the number of economic submissions and economic consultancies per case used by private merging parties. This is particularly noticeable in cases that were not prohibited. We, however, failed to find evidence of hostile timing of submissions, except possibly in isolated cases. We similarly identified at least some qualitative changes in these expert submissions that further suggest that the increased submissions numbers can reflect a strategy of spamming rather than purely constructively informing.

Our findings are consistent with the hypothesis that private specialized economic consultancies have adapted their behaviour to the EU's new Merger Regulation from 2004. Such a change could occur either through conscious decision or simply the emerging habits of successful agencies. Either way, merger and acquisition cases put before the EU's regulatory enforcer, DG COMP, engage increasingly in strategies akin to spamming that regulator and its finite capacities. We have suggested that the patterns we uncovered result from actions taken in order to achieve favourable outcomes for their clients by minimizing regulatory intervention, but there are also alternative hypotheses. It is possible that consultancies have grown increasingly efficient and therefore less expensive, though the drop in quality indicated in our qualitative case studies would counterindicate this. We did not here examine the efficacy of the hypothesized strategies from the perspective of the merging firms. Our focus is on examining evidence for the existence of the hypothesized strategies.

What we have documented can be seen as a new strategy of interest articulation that has so far been overlooked in the literature on (EU) lobbying. In so doing, we have not only contributed to the understanding of private actors' strategic behaviour<sup>73</sup> and to the notion of business–regulator relations evolving over time based on private actors' learning,<sup>74</sup> but we have also highlighted the substantive effects that administrative capacity, or limits thereof, can have for market regulation and, in turn, on outcomes for society.

Besides the limits posed by the number of staff and other resources, the study indicates that a regulator's capacity to effectively apply competition law is also shaped by the formal regulation and investigation procedure. This speaks to earlier arguments on the interaction between organizational factors and policy instruments<sup>75</sup> and the procedural sources of state capacity.<sup>76</sup> Changes in procedural requirements, such as the new Merger Regulation, can thus have substantive and also unintended effects on regulatory capacity, and on the balance of capacities between regulators and regulatees. A theoretical and counter-intuitive

<sup>71</sup> *ibid* 7.

<sup>72</sup> *ibid* 12.

<sup>73</sup> Stigler (n 2); Breyer (n 2); Rollings and Warloutzet (n 4).

<sup>74</sup> Coen (n 4).

<sup>75</sup> Guidi, Guardiancich and Levi-Faur (n 1).

<sup>76</sup> Jonas Meckling and Jonas Nahm, 'The Power of Process: State Capacity and Climate Policy' (2018) 31(4) *Governance* 741; Morgan and McGuire (n 7).

implication is that an increasing professionalization of regulatory practices, including extensive rights for private parties to submit information and evidence, can ultimately undermine regulatory effectiveness. With an intended shift towards evidence-based decisions in the public sector, we may see similar strategies in other areas of regulation. Still, merger procedures constitute a particular context with high financial stakes for the private side and, on the other hand, extensive requirements for the regulator's decision in terms of administrative procedures and economic evidence. These contextual factors could render a spamming strategy particularly effective in this context.

Taking a more comparative perspective reveals the particularities of the merger regulation process in the EU. Whereas EU cases are decided by an executive body based on scientific, economic evidence, comparable complex cases in the USA are litigated in front of a judge. While these differences have been noted elsewhere,<sup>77</sup> they may imply some behavioural spillover. Private companies often hire the same economic consultancies to argue their merger cases in a court setting in the USA and in a more administrative setting in the EU, and an adversarial tone, as we observed in the GE/Alstom case, may have spread from the former to the latter context. A comparative perspective for future research to explore the effects of variation in legal, political, and administrative contexts and potential spillovers on the behaviour of regulators and private actors would be promising.

Besides adding to the scholarly literature, this study has important practical, policy implications, particularly on how to address such strategies. For example, one regulatory concern that emerged from our study is the anonymization of academic experts (or any authors), as seen in the GE/Alstom case, which increases the likelihood of undisclosed conflicts of interest.<sup>78</sup> More general to spamming, regulators could explore issuing guidelines and best practice notices addressing the conduct of consultancies<sup>79</sup> in order to alleviate potential strain on the administrative capacity being exercised opportunistically by private actors. As economic consultancies are intervening directly in merger-case review, it could be warranted to subject this sector to a professional code and monitoring system, analogous to the rules that govern the legal profession.

Another possibility would be to formally limit the number of consultancies allowed to intervene on behalf of the merging parties in a merger case, in order to limit overlap in mandates and streamline the process. Yet, this recommendation is difficult to reconcile with the legal principle of the right to be heard. Today, the burden of streamlining and consolidation of the arguments in different economic submissions lies effectively to a large extent with the regulator. Nevertheless, it might be useful to require that 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 return to our metaphor of spamming and filtering, it could seem unjustified to limit the resources that corporations expend on making their cases. In contrast, 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. For this reason, the costs of the 'spam filtering'—that is, the clarification process—should be pushed back towards the regulated parties. One of the simplest remedies might be a page limit. Corporations and consultancies could then focus on creating the highest quality, clearest,

<sup>77</sup> Douglas H Ginsburg and Taylor Owings, "Due Process in Competition Proceedings" (2015) 11(1) *Competition Law International* 39; Morgan and McGuire (n 7).

<sup>78</sup> Informed practitioners have raised the issue that the same scholars or other third-party experts may be involved in advising regulators on the design of regulatory rules, and then advising private clients on how to minimize the regulatory burden under the rules that they designed.

<sup>79</sup> The existing best practice notice on economic evidence in merger proceedings consists principally of constraints on the Commission's requests.

and most convincing case possible within that limit. By hypothesizing and examining the regulator-spamming strategy, we hope we have raised awareness and indeed vigilance among scholars and practitioners in other regulatory contexts, within and outside the EU, for this and similar subverting practices.

### SUPPLEMENTARY DATA

[Supplementary data](#) are available at *Journal of Antitrust Enforcement* online.

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### CONFLICT OF INTEREST

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