

**Best Practices for Interacting with the Federal Trade Commission
Re: Data and Empirical Analyses in Antitrust Investigations**

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In November 2002, the Bureau of Economics (BE) of the Federal Trade Commission (FTC) released “Best Practices for Data, and Economic and Financial Analyses in Antitrust Investigations” (<http://www.ftc.gov/be/ftcbebp.pdf>). Since this release, we have seen only limited use of these practices by parties to antitrust investigations. David Scheffman and I strongly encourage parties to use these best practices so that empirical analyses conducted by FTC staff and by the experts hired by the parties can be incorporated more effectively into the decision-making process at the FTC. In this paper, I briefly outline the best practices suggested by BE and then discuss why it is in the interests of the parties to FTC investigations to follow these practices.

Summary of Best Practices

The goal of the Best Practices paper is to encourage practices that facilitate effective incorporation of empirical analyses into antitrust investigations while reducing the burden on parties in complying with data requests. Frequently, parties do not submit data until near the end of FTC investigations, particularly merger investigations, and even then the data are often not in a form that is easily used for empirical analyses. By then, other sources of information, such as documents and interviews with industry participants, have frequently been gathered, reviewed and incorporated into staff and management views concerning whether a case should be pursued. Once data are received, the economists and financial analysts in BE work as quickly as possible to conduct as many of the key economic analyses as possible. The impact of such analyses, not only on the recommendations of BE, but also on the recommendations by the Bureau of Competition (BC) and the ultimate decision by the Commission may be limited if BE has had little time to conduct the analyses, discuss the results within BE and with BC and test the

¹ The opinions expressed herein are those of the author and do not necessarily reflect the opinion of the Commission or any individual Commissioner.

robustness of the results. This is particularly true if the results of the empirical analyses contradict the findings from other sources of information. In such cases, the staff needs time to assess possible reasons for the different outcomes and to determine which set of evidence should be given more weight.

Compounding the problem of late submission of data, often analyses conducted by economic or financial experts hired by the parties are submitted very late in the process, sometimes with little supporting materials (or significant delay in submission of those materials) and with little interaction with FTC economists regarding the types of analyses that would prove most useful. Thus, not only is it difficult to assess the validity of the analyses submitted but also, at times, the analyses are not on point to the key issues of the case. In such situations, the analyses submitted by the economic consultants will have only a limited role in the decision process.

The Best Practices paper suggests methods of solving these problems. The main feature of the best practices is communication – that is, we recommend early and frequent communication between the parties and their experts (as well as the business people knowledgeable about the data maintained by the company) and FTC staff. This communication serves several purposes:

1. Transparency as to the possible theories of the case: With early and on-going communication, the staff can describe the potential theories of competitive harm that they are considering so the parties can understand what issues they will need to address. In addition, the staff will let the parties know if there is a change to the theories as new information becomes available. Consultants hired by the parties can play an important role in this process by having a dialogue with the staff economists to help clarify and develop the theories.
2. Identification of types of evidence to assess the theories: Discussions between the parties and their consultants and the staff can help to identify types of evidence that would be relevant to assessing the theories, including what types of empirical analyses could be used to test them. By participating in this process, the parties' consultants can know better what analyses will be most useful and work with the

staff to identify possible issues that would arise in such analyses and how best to address them.

3. Identification of data available to conduct empirical analyses: With an understanding of the types of empirical tests that would be most useful, the parties can then address the data that they have available that might be used in these tests and the form in which they can provide the data to the FTC so that is most useful. Particularly important to these discussions is direct participation by those individuals (usually employees of the firms involved) who are most knowledgeable about the types of data that the parties have available. With this information, the FTC can write or modify requests so they are tailored to the information the parties have on hand and that would be most useful in assessing the competitive theories at issue. Such tailored requests will reduce the burden on the parties and allow the parties to gather the data more quickly, making it possible for the FTC staff (as well as their own consultants) to analyze the data in a timely fashion.

4. Discussion of the findings from the analyses:

- Analyses submitted by the parties: Subject to confidentiality and litigation issues, FTC staff will provide their assessment of the analyses submitted by the parties and their consultants. Such a dialogue will be feasible only if the parties provide sufficient supporting materials, including data that will enable the FTC staff to check the analyses submitted in a timely fashion. The later the analyses and supporting materials are provided, the less likely it will be that staff will be able to provide meaningful assessments of the submissions and the less weight such submissions will be given.

It is also important that the consultants hired by the parties have an understanding of the range of evidence bearing on relevant issues (*e.g.*, documents or customer views to the extent known by the parties) so that they are able to discuss their empirical findings within the context of this evidence. While the technical details of the analyses should be provided and discussed

with the economic and financial staff, the general description of the empirical analyses and their results should be in non-technical terms so that both the economic and legal staffs can understand the intuition behind the analyses.

- Where possible, consistent with confidentiality and litigation issues, FTC staff will discuss, at least in general but useful terms, the findings from their own empirical analyses and, where possible, will share data and analyses with the parties and their consultants. The earlier the communication between BE and the parties' consultants and the more productive this dialogue is, the more information that BE is likely to provide on its own analyses.

Why Employing Best Practices Is In the Parties' Interest

There are several reasons why employing these best practices is not only good for the FTC but also in the parties' interest. As noted, following these best practices will make it more likely that empirical analyses will be incorporated effectively into the FTC's decision-making process. Like other types of evidence, empirical analyses may or may not support bringing a case – one cannot determine which way the analyses are likely to go before they are conducted.

From an ex ante perspective, if other evidence (from customers and documents, for instance) supports bringing a case, the empirical analyses may provide evidence to the contrary. In such circumstances, it should be in the parties interest to work with FTC staff to discuss what data analyses would be useful and allow the FTC to determine what the empirical evidence shows. These are the cases where the FTC is most interested in conducting empirical analyses.² If the empirical analyses only bolster other evidence that suggests the FTC should bring a case, then the FTC would likely bring an enforcement action even without the empirical data and thus provision of the data will not likely change the outcome at the Commission for the parties. If the analyses do not support bringing a case, the FTC might choose not to bring a case if the reasons for the differences reveal that the empirical analyses should be given more weight than the other evidence. For instance, in the Cruises investigation, the documents and other information

² FTC staff, including BE staff, is generally less interested in pursuing time consuming and costly empirical analyses if other evidence does not support a case unless there is a direct, relatively easy-to-conduct test that can be performed to assess the potential competitive effects of the behavior at issue.

suggested possible theories of competitive harm from the merger but the results of data analyses were not consistent with these theories. As a result (and because we had time to consider a wide range of possible data analyses to test these theories), three Commissioners as well as BE and BC staff and management, concluded that the investigation should be closed.

Another benefit from following these practices is that they can help reduce the burden on the parties in submitting data, an issue that was of on-going concern in the recent Best Practices workshops conducted by BC. With these practices, the parties and staff will have a better view early on regarding what analyses will be most useful and what data are available (and in what form) to conduct these analyses. As a result, the FTC can limit requests to the data that are relevant and can attempt to write (or modify) the requests to reflect the information that the parties maintain.

Summary

In many cases, empirical analyses can and should be an important component of an antitrust investigation. The methods outlined in the Best Practices paper facilitate effective incorporation of empirical analyses into antitrust investigations while reducing the burden on parties for complying with data requests.