



An HSR investigation involves the evaluation of a very large amount of evidence derived from documents, depositions, quantitative data and analyses, and third parties under very substantial time pressures. The objective of the agencies is to attempt to develop all important pieces of evidence. However, agency staffs have to be ready to litigate against a proposed transaction, and have to prepare for litigation starting early in the investigation, since there is not sufficient time to adequately prepare for litigation if preparation begins late in the investigation. Necessarily, this puts a substantial burden on the parties to the proposed transaction to insure that all the important evidence that support their contentions is developed and transmitted and communicated effectively to staff, and eventually to management and agency heads.

Time is important. Data, quantitative analysis and other complex evidence requires time to be assessed. A White Paper submitted late in the process that requires considerable time to properly assess is unlikely, given time and resource constraints, to be given as thorough an assessment as it might deserve. This is *particularly* true of economists' White Papers. Any sort of empirical analysis is going to require time to assess the data and the analyses, and a meaningful dialogue between outside economists and the Bureau of Economics.

Over the past decade the FTC has become more transparent in revealing potential concerns and the bases for those concerns. Under Chairman Muris, we are trying to increase our transparency. You should expect to be told of our potential concerns and representative bases of those concerns. This includes Commission economists' assessment of the parties' economic analyses. Of course we cannot be totally transparent. We have access to information and data that cannot be shared with outside parties, and we have to be prepared to litigate should the Commission decide to challenge a transaction. Nonetheless, if you listen carefully and engage in productive

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<sup>2</sup> The views expressed in this paper are only those of the author, not necessarily those of the Federal Trade Commission, or any individual Commissioner.

<sup>3</sup> For a more extensive recent discussion of economics-related issues in FTC investigations see Interview with David Scheffman, the FTC's New Director of the Bureau of Economics, September 26, 2001, American Bar Association Section of Antitrust Law, "Brown Bag" Program, *The Antitrust*

discussion, you should be able to be reasonably clear about our potential concerns and their bases. Although there is obviously an important role for advocacy, merger investigations generally turn on facts rather than advocacy. By far the most effective response to our potential concerns is development and effective presentation of facts that might allay those concerns.

Customer views are generally very important in merger investigations. Customer views are solicited prior to the issuing of a 2<sup>nd</sup> Request (and sometimes have are a significant factor in the decision not to issue a 2<sup>nd</sup> Request), and when a decision is made to issue a 2<sup>nd</sup> Request, a significant component of the investigation focuses on customer opinions. Customer views are important not only to understanding the relevant market in which to assess the merger but also to understanding the potential effects of the mergers. Customers provide information on what alternatives they have to the products or services sold by the merging parties and the importance of price and other factors to their decision. Customers are also frequently well positioned to assess the potential impact of the merger on prices and other competitive factors. Merger investigations with significant customer *antitrust* concerns typically generate affidavits by customers stating the nature of their concerns.

prices) and thus are not well positioned to provide information about the potential effects of the transaction.

(vi) Customers may not have adequate information to assess the potential effects of the transaction. Thus, in some cases, customers complaints may have less weight if other factors not considered or known by customers suggest the merger would not substantial reduce competition. In other cases, customers may not be concerned about a deal because they are not aware of plans of the merging parties that might suggest additional competition between the parties in the future.

Perhaps the most important task for counsel in dealing with business executives who are still at the point of contemplating a transaction with a competitor in a concentrated industry is to impress on them the importance of assessing how customers who might be impacted by the transaction would view the transaction. In my experience, too frequently business executives enter into transactions agreements without a knowledgeable assessment of customer views. This is of importance not just for antitrust review. A considerable body of research on transaction *outcomes*

important element of discovery in all cases (*e.g.*, in obtaining sufficiently accurate estimates of market shares).

Documents also play an important role in merger analysis. Documents provide information about how the merging parties and other interested parties view the industry in their normal course of business. These documents can provide information about what competitors the parties and others focus on, possibilities for substitution, the importance of various competitors in the market (currently and potentially in the future), what changes may occur in the market going forward and how pricing is set. Documents are also important for understanding the merging parties plans for the acquisition - what efficiencies are anticipated and whether the merging parties anticipate more or less competition after the transaction is consummated.

The importance of documents to the decision to challenge a transaction varies by transaction. In some cases, there are “hot” documents that indicate that the authors of the documents see an anticompetitive potential in the proposed transaction. Of course, such documents can be extremely important in merger investigations and in litigation.<sup>5</sup> It is important for counsel to provide credible factual bases for benign interpretations of documents if they exist. As discussed at the outset, the time pressures of a merger investigation push the agencies to be prepared for litigation from a fairly early stage in the investigation. Although certainly the intention is to conduct thorough investigations developing all credible evidence, there necessarily is a substantial burden on the parties to develop and put forward credible evidence that supports their contentions.

The agencies are interested in whether transactions are likely to lead to substantial efficiencies.<sup>6</sup> Ordinary course of business documents providing discussion and analyses of potential efficiencies are generally quite important in the assessment of the credibility of efficiency claims. What you have actually achieved on past transactions that were reviewed by the agencies or in analogous transactions are also relevant to our inquiry.

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Investigational hearings and depositions are another important source of information to the agencies in analyzing mergers. Most frequently, such hearings involve witnesses from the merging parties as the agencies seek to get on the record the opinions of the parties and explanations for information found in documents or data. Some depositions are also geared towards better understanding what information is available from the company and how such information is maintained. Depositions and investigational hearings are used not only to inform the investigation but also in preparation for potential litigation. Because of the short time frames associated with merger review, the agencies must prepare for litigation as they are conducting the investigation. The documents us

of the work of accountants and economists at the FTC involves analyzing databases or other source data to get at important factual issues. These analyses can involve summarization of pricing, sales, capacity and other data as well as more sophisticated econometric analyses. Moreover, the former is generally an important pre-cursor to the latter as understanding the basic underlying data is important to understanding what types of econometric tests are useful and feasible. Often, fact-based analyses do not involve sophisticated statistical or economic analyses. They can be as simple as sorting a customer database by customer size, location of customer, types of products sold by customers, *etc.*, to reveal important characteristics of customers or other relevant facts.

One of my missions in my return to the FTC is to increase the input of the economists and accountants in developing quantitative evidence and other relevant “hard” facts. However, it is very important for the outside parties and their consultants to do their part in developing the relevant quantitative evidence and other “hard” facts.

Of course, when data is available and such analyses are appropriate to the relevant issues, economists do use statistical and economic modeling and estimation to try to shed light on key factual issues. In a recent paper, my co-author and I discuss various important issues that should be considered when conducting econometric analyses in the context of an antitrust matter.<sup>8</sup> We note that an econometric study useful for decision-making at the FTC has the following characteristics:

1. Poses an empirical economic issue that is relevant to the matter at hand;
2. Utilizes an economic model that is consistent with economic theory;
3. Utilizes an economic model that is consistent with the key institutional factors and the facts in the setting being modeled and generates results that can be evaluated in the context of other evidence;
4. Uses data that are appropriate to the task and provides relevant results and

8. If conducted by “outside economists, the data and details of the modeling are provided with sufficient time and explanation that FTC economists can replicate and sufficiently understand the analyses and conduct their own tests.

In my experience, the most common deficiencies in studies submitted to the FTC are in #3, 4 and 6-8. When done well, such quantitative analyses can provide important factual information (*e.g.*, evidence bearing on whether two products or companies are particularly close competitors), that can be used to understand the competitive dynamics in the industry and help test the theories of competitive harm that are being considered with regard to the merger.

For example, with the appropriate data, statistical estimates of own-price and cross-price elasticities of demand can provide important information with regard to the breadth of the relevant market and the extent to which the two merging parties are close competitors. This approach has been taken in many consumer products mergers, providing detailed information about the extent of substitution among various products.<sup>9</sup> Such estimates from structural demand models can then be incorporated into simulations models that attempt to estimate the impact on price from a merger. Simulation models provide a convenient way of putting together the estimates of own and cross price elasticities to assess their potential implications. In my view,

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transaction is filed. This gives them time to provide an economic assessment of the potential antitrust issues, and also provides time for experts to collect and analyze various data.

In some situations an economist's input on a particular issue can be useful even when there is limited opportunity for quantitative analyses related to the issue. Economists can be useful in providing an economics and perhaps a business framework for understanding a proposed transaction. For example, an economist can be useful in describing a firm's economic and financial incentives in various situations, even when a precise quantification of these incentives might not be calculable.

In my experience over 20+ years inside and outside the antitrust agencies, it is not very effective to have economists simply submit statistical or other quantitative analyses when they are not sufficiently knowledgeable about the industry and transaction, and when they are not familiar