



**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**ROUNDTABLE ON THE USE OF ECONOMIC EVIDENCE IN MERGER CONTROL**

-- The United States --

*The attached document is submitted by the delegation of the United States to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item V at its forthcoming meeting on 10 June 2004.*

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1. This paper explains briefly the use of economists at the U.S. antitrust agencies, the Antitrust

**The Structure of the FTC's BE**

7. The Federal Trade Commission is organized into three functional bureaus. The Bureau of Consumer Protection and the Bureau of Competition are comprised of attorneys responsible for the FTC's

*Why not Instead Integrate the Economists Into the Legal Sections?*

14. The most important role of economists in the U.S. is as independent members of the investigatory team who approach matters using an economic framework for the analysis. Although the economists work closely with attorneys in the appropriate legal section on virtually all investigations, they have the specific role of identifying and developing the economic theory of the case and testing it with the evidence obtained in the course of the investigation.



collusion). Here we would look for evidence not merely on whether marketplace factors appear to make coordination feasible, but also, importantly, on whether the proposed merger appears likely to make coordination significantly *more* feasible. In the former category would fall factors such as the ability of competitors to reach agreement—perhaps by allocating customers along dimensions suggested naturally by their plant locations or historical sales patterns—their ability to monitor and react to one another’s prices before too many sales are “stolen” by a cartel defector, and whether available data are consistent with current or past coordinated pricing. Past criminal conspiracy by the incumbents, combined with a lack of significantly changed circumstances, would be of obvious relevance.

28. In the latter category would fall evidence on whether the merger would make significantly more symmetric the costs, market shares, or other characteristics of the key competitors in the market. Also highly relevant would be information on whether the merger might eliminate a firm whose characteristics and/or demonstrated past behavior make it unusually disruptive, or maverick-like. Where, for example, one of the merging parties has a relatively large share of the market’s unutilized capacity and only a modest share of current sales, merging it into a firm with substantially greater sales (and thus substantially more to lose from a price war) would, all else equal, increase our concerns.

29. Differentiated product unilateral effects and homogeneous product coordination are not, of course, a complete list of candidate competitive concerns. Certain oligopoly models, such as that developed by Cournot, predict (in the absence of efficiencies) unilateral anticompetitive effects from horizontal mergers even where products are not differentiated. Thus, one candidate project might be to examine the extent to which the predictions of a Cournot model seem consistent with how firms compete in the marketplace. Do they compete by setting quantities rather than prices? Are firm price-cost margins and market shares (currently, and historically in response to entry or exit) consistent with the predictions of a Cournot model?

30. In addition, even with homogeneous products, unilateral effects may be of concern if there are indications that nonmerging firms are capacity constrained or unable to expand at constant cost in response to a post-merger price increase. An extreme situation of this sort would be where most existing competition involves imports, but foreign sellers are constrained by binding quotas. To help test such theories

33. Many monopolization theories require that there be significant scale economies in the to-be-monopolized market; otherwise an at-risk customer or small group of customers might be able profitably to sponsor efficient entry (or enter themselves). In such cases it is useful to obtain data relating to the extent of scale economies relative to the size of at-risk customers. If scale economies are nontrivial and customers are relatively small, one might then inquire into the coordination costs to customers of protecting themselves by jointly sponsoring entry. Under any theory of harm from vertical practices, we try early on to answer the pointed question raised by the Chicago School: Why would customers agree to facilitate a practice that is ultimately harmful to their interests?

situations, however, we rely entirely on our professional career staff. We find our staff fully capable of providing the requisite analysis that goes into Front Office decisions as to whether a case ought to be brought and we view excessive use of outside experts as something that would lower the morale and performance of staff. It would ultimately impact adversely on our ability to recruit and retain the highest quality talent. Finally, hiring outside economists can be very expensive, frequently costing considerably upwards of \$300 per hour.

39. Where an economist is to be retained in a testifying capacity and the skill set of a member of our own staff seems to fit the particular demands of the case, there are a number of tradeoffs in deciding whether to employ an outside economist or to instead use the staff economist. Outside experts are far more expensive and tend also to immerse themselves less fully in the investigation and case preparation. In-house staff selected to prepare as testifying experts will typically not be assigned other matters and will devote themselves more or less full time to preparing for deposition and trial. Outside experts tend to work on multiple matters at the same time and to have outside support staff (which are, collectively, often far more costly than the expert him/herself) do much of the preparatory work—with considerable assistance from the prosecuting agency's staff.

40. On the other hand, outside economists are often more experienced at testifying and generally have greater prestige in the profession. The latter characteristic can, however, cut two ways, as a judge may expect more from a prominent economist and be particularly harsh towards those who appear not to have prepared fully and be largely “mailing it in,” i.e., essentially renting out their name and resume. Also, there can at times be concerns that, by using its own employee to testify, the government will have unduly influenced the expert's independence and objectivity. Of course, there are others who suspect that an expert being paid hundreds of dollars an hour to testify will be no more “independent and objective” than will a government employee.

41. The relevance to antitrust of economic analysis, and the importance of economists to antitrust enforcement, are growing dramatically worldwide. The U.S. antitrust agencies have had considerable experience in trying effectively to in2.4(j)-14e f(.t.5(e c)wU14e hnc)11.1f(2, c)wU14n(2ly)13wU14nng to is(t)7.8is