

Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations¹

To clarify processes and procedures in antitrust investigations and to enable the Commission and the Parties to reach the best decisions in the most efficient manner, this document provides suggestions of the Bureau of Economics (“BE”) for “Best Practices” for data, and economic and financial analyses in an investigation.²

Data Issues

- We understand that complying with data requests can be expensive and burdensome. Data are typically very important in our investigations, however. The burdens of compliance with data requests can often be significantly reduced if the parties engage staff at the earliest opportunity. One of the goals of early interaction with the parties’ counsel and economic consultants and relevant personnel from the parties (or from third parties) is to determine what data is available, its suitability, and in what form, in order to make it easier and faster for the parties to provide the data.
- Parties (with their consultants) should meet at the first opportunity with FTC staff (including economists) to discuss data issues and economic theories relevant to case.
 - We generally want to discuss data issues before we write the 2nd Request (or a CID) so we can ask for the right information. In merger cases, depending on clearance and time, this may not always be feasible so data requests may be an important component of 2nd Request negotiations.
 - It is generally very useful for us to have discussions with the personnel of the parties most knowledgeable about how the company maintains the relevant data and thus we strongly encourage the parties to make such personnel available as early as possible.
 - These discussions should involve descriptions of the type of electronic (or other) data that the parties maintain (both in the ordinary course of business and what is archived, and in what form). Providing samples of the data is generally very helpful as it helps FTC staff determine what data is available and would be useful and thus draft a more focused 2nd Request, limiting the eventual burden on the parties.

¹ These materials reflect the views of the staff, and not of the Commission or of any Commissioner.

² For a suggestions on best practices in empirical analyses see David Scheffman and Mary Coleman, “FTC Perspectives on Econometrics,” <http://www.ftc.gov/be/ftcperspectivesoneconometrics.pdf>
See, also, Dan Hosken, Dan O'Brien, David Scheffman, and Michael Vita, "Demand System Estimation and its Application To Horizontal Merger Analysis," <http://www.ftc.gov/be/workpapers/wp246.pdf>.

What the Bureau of Economics Will Do

- In the early stages of an investigation, including before the 2nd Request or CID issuance if possible, BE staff will discuss with the parties and their economic consultants, economics, financial, and data issues, including theories that are being considered (although at an early stage discussions of theories are likely to be relatively general).
- This conversation should begin a dialogue (generally conducted with the presence of attorneys) between the FTC economists and the parties that can continue throughout the investigation. In this dialogue, FTC economists will engage the parties' economic and/or financial consultant(s) in a discussion regarding possible empirical analyses and data or other information relevant to potential anticompetitive theories.
 - This discussion should include the types of empirical analyses that might prove useful in testing the anticompetitive and/or efficiencies theories – with input from both FTC staff and from outside consultants. In particular, outside consultants can suggest potential analyses that they believe would be useful which may be easier for FTC staff to conduct, given the FTC's access to information that the parties do not have. FTC staff may propose analyses they believe might be useful for the parties to conduct.
 - The timing of discussions will sometimes be governed by discovery issues. (For example, some specific issues may not be discussed until interviews and investigational hearings have concluded).
- It should be recognized that theories may change as the investigation proceeds and additional information is learned. By continuing a productive dialogue with FTC staff, the parties will be informed (subject to confidentiality issues) of new or augmented theories or factual issues as they arise.
- FTC staff will review any empirical analyses submitted by the parties. This will include a review of the data, programs, and results. Staff will provide their assessments of the parties' analyses (subject to confidentiality and potential litigation issues).
- FTC staff will also describe, at least in general but useful form (subject to confidentiality and potential litigation issues) results that are obtained from staff's empirical analyses. In addition, consistent with confidentiality constraints, FTC staff will share data and analyses with the parties and their consultants.
- These procedures also apply to efficiencies analyses. The initial burden is generally on the parties to put forward efficiencies analyses. FTC staff will engage the parties on these analyses and provide feedback (subject to confidentiality and potential litigation issues) as to our findings. In some cases we may conduct additional efficiency analyses.

What We Expect from the Parties and Their Consultants

- Parties should always inform FTC staff, *including the Bureau of Economics management*, in advance if they plan to bring economists to meetings with staff or management and identify those economists.
- Parties should deliver copies of “white papers” and other submissions directly to the BE and BC Directors, and to BE staff, as well as to BC staff. The parties should provide white papers or other analyses sufficiently prior to meetings with FTC staff or management to provide staff enough time to read and absorb the analyses and results. This will encourage a more productive dialogue at the meeting. Such analyses should be presented in a manner that provides enough detail so that FTC staff can understand the methodology that was used to conduct the analysis and can review the results of such analyses. For example, PowerPoint presentations that provide a summary of the analysis (without details on what was done or specifics of the results) are not generally very productive.
- When submitting any empirical analyses, the parties should provide Commission staff with data (both in its original raw form and compiled in the manner used by the parties for any analysis they perform) as early in the investigation as is practicable.
 - Discussion of empirical analyses will be much more productive if the data and supporting materials (e.g. programs and results) are provided with sufficient advance time for FTC staff to evaluate the analyses. This submission should be made either with the white paper or immediately after the meeting where the white paper is presented. However, we recognize this is not always feasible or desirable. We will have further discussions with the parties and their consultants once FTC staff has had the chance to review the supporting materials.
 - To the extent that the parties wish to present new analyses in meetings with Bureau management and Commissioners, they should provide the data and backup material to staff in sufficient time for staff to brief the Bureau management and Commissioners regarding the new analyses.
 - Time is of the essence. FTC economists need time to assess any analyses submitted. If there is insufficient time, generally the submitted analyses cannot be given much, if any, weight in staff recommendations or in management or Commission decisions.