

# The Handbook of Competition Economics

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## Overview

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It has been a year since the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) issued updated Horizontal Merger Guidelines (HMGs), which explain how the US competition agencies analyse the competitive effects of mergers between firms that directly compete with similar products. Since then, the agencies have taken action against perceived threats to competition from a variety of mergers, as well as from cartels, and monopolistic acts. Merger enforcement has not been limited to horizontal mergers, but has involved a number of actions against ‘vertical’ mergers (merger of buyers and sellers) that are not addressed by the new HMGs. Very recently the DoJ issued potentially significant new guidelines for remedies to anti-competitive horizontal and vertical mergers, which appear to move away from structural remedies (such as divestiture) to behavioural remedies, particularly for vertical mergers.

In addition to merger enforcement, the FTC and DoJ have actively challenged agreements between competitors and cartels as they have in past years. The DoJ has recently challenged some monopolistic practices after relatively little action in the area for a number of years.

### Merger enforcement

The agencies have used the new HMGs in enforcement actions against a number of high-profile horizontal mergers. The DoJ filed a complaint against the proposed merger between NASDAQ and the New York Stock Exchange which ultimately led to the abandonment of those acquisition plans. The DoJ believed that a merged NASDAQ/NYSE would have monopolised securities exchanges in the US. The DoJ has also sought to prevent H&R Block’s proposed acquisition of TaxACT, a rival manufacturer of tax preparation software on the grounds that it would create a merger to duopoly. Additionally, The DoJ recently filed to block the proposed merger of AT&T and T-Mobile’s wireless networks.

Continuing a trend illustrated by the FTC’s imposed conditions on the *TicketMaster/LiveNation* merger in 2010, the agencies have pursued vertical

mergers. In January 2011, the DoJ approved Comcast’s acquisition of NBC Universal with modifications, notably compelling the inclusion of an arbitration process for resolving disputes between Comcast and other rival cable operators over access to NBC Universal content. In April 2011, the DoJ also approved with modifications Google’s acquisition of airline flight data provider ITA, requiring Google to license ITA’s key software package to current and new customers at ‘fair, reasonable, and non-discriminatory’ terms.

### Monopolisation cases

Some high-profile actions have come in non-merger, monopolisation cases. The DoJ reached a settlement with United Regional Health Care System, a Texas hospital chain, (in the first unilateral monopoly case the agency brought since 1999) to prevent the hospital from inappropriately hindering commercial health insurers from contracting with competing hospitals. An ongoing case against Blue Cross/Blue Shield of Michigan concerns the insurer’s use of most-favoured customer contracts. The DoJ alleges that these contract terms had the effect of preventing hospitals and other providers from offering steeper discounts to other competing insurers. The DoJ also filed a complaint against American Express (over the fees the credit card company charges merchants). In addition, Google has confirmed that it is being investigated by the FTC over its practices in its search engine and advertising business.

### New policy initiatives

In June 2011, the DoJ issued an updated Policy Guide to Merger Remedies to further promote transparency and fairness, and reduce uncertainty over antitrust enforcement. The new Policy Guide stresses remedies for potentially anticompetitive mergers beyond the traditional structural remedies. While DoJ says it still prefers to use divestitures to resolve problems in horizontal mergers, conduct remedies are now apparently favoured to resolve many vertical issues. Anti-competitive concerns in vertical mergers in particular may be resolved by using firewalls between parts of the new firm,

preventing discrimination against downstream competitors, and barring certain contracting practices (such as exclusive dealing) that may block competitors from accessing critical inputs or customers.

While the DoJ rightly advertise their policies and procedures for remedying vertical mergers in the new Policy Guide, there is still a gap in information available to the public about how the agencies will enforce vertical mergers. It is difficult to evaluate the appropriateness of behavioural remedies when there is no clear indication of what the DoJ or FTC considers to

be a competitive problem and how they determine whether a problem exists. Much has changed in economic thinking about vertical mergers since the last time vertical merger were discussed in the 1984 Guidelines, and those guidelines do not even discuss foreclosure issues that are the key basis for recent vertical merger remedies. Given their increased emphasis on enforcement of vertical mergers it would seem desirable to spell out clearly and concisely how they will review vertical mergers – particularly since the European Commission was able to issue vertical merger guidelines several years ago.

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Navigant Economics, a subsidiary of Navigant Consulting, provides economic and financial analysis of legal and business issues to law firms, corporations and government agencies. Our experts are leading academic and industry professionals with backgrounds in economics, accounting, finance and public policy. We serve clients engaged in litigation, regulatory proceedings, policy debates and strategic planning.

Our analyses are grounded in economic theory and guided by the latest scholarly research. We base expert advice and testimony on an in-depth understanding of the relevant facts combined with application of economic theory and supported by rigorous empirical analysis.

Many of the consulting professionals of Navigant Economics are affiliated with leading academic institutions, including The University of Chicago, Georgetown University, Northwestern University, George Mason University School of Law, Loyola University Chicago School of Law and University of Virginia. In addition to our full-time professional staff, we maintain relationships with a wide range of academic affiliates and expert consultants, including distinguished professors engaged in relevant economic and financial research and former top-level government officials. Our experts are closely involved in each engagement – a key to better service and better results – and they are supported by staff experienced in the theory and application of state-of-the-art models in economic and financial analysis.

# Department of Justice

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## Questions and answers

### **How many economists do you employ?**

The Antitrust Division of the US Department of Justice currently employs approximately 50 full-time economists.

### **Do you have a separate economics unit, or 'bureau'?**

We have a separate economics unit, which is named the Economic Analysis Group (EAG).

### **Do you have a chief economist?**

We have a deputy assistant attorney general for economic analysis, a position that is currently held by Fiona Scott Morton. Fiona is a noted expert in competition and industrial organisation economics on leave from the Yale School of Management.

### **To whom does the chief economist report?**

The economics deputy reports to the assistant attorney general for antitrust – the top official in the Antitrust Division of the Department of Justice.

### **Does the chief economist have the power to hire his or her own staff?**

The economics deputy participates in the recruiting and selection of staff economists within the government's competitive civil service process.

### **How many of your economists have a PhD in Industrial Economics?**

Nearly all of the Division's economists have a PhD in industrial organisation or related fields of economics.

### **Does the agency include a specialist economist on every case team? If not, why not?**

In virtually all antitrust investigations, one or more members of the EAG are assigned alongside Division attorneys.

### **Is the economics unit a 'second pair of eyes' during cases – is it one of the agency's checks and balances? If not, why not?**

The EAG works both collaboratively with and independently from Division attorneys in determining the welfare and competitive implications of business practices, including proposed mergers. The economist's role is to provide the economic analysis necessary to guide the Antitrust Division's decision makers. This typically involves developing and testing relevant hypotheses and, ultimately, making case recommendations to superiors. The EAG is definitely one of the agency's checks and balances.

### **How much economics work is outsourced? What type of work is outsourced?**

With the exception of expert witness testimony, all economics work is performed in-house by our professional career staff. Often where the Division litigates, it hires an outside expert rather than use a member of EAG. The EAG staff otherwise performs virtually all economic analysis required for investigations as well as an extensive amount of general research that is not case-specific.

## Federal Trade Commission

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### Questions and answers

**How many economists do you employ?**

Seventy-nine PhD economists; about 75 per cent of economists' time is spent on antitrust matters and 25 per cent on consumer protection matters.

**Do you have a separate economics unit?**

Yes.

**Do you have a chief economist (please give name and qualifications)?**

Yes, the Bureau director is Joseph Farrell, PhD, an industrial organisation economist who is on leave from the economics department at the University of California, Berkeley, where he also served as chair of the Competition Policy Center. The deputy director for antitrust is Alison Oldale, PhD, who joined the FTC in July 2011, after serving as the chief economist for the United Kingdom's Competition Commission.

**To whom does the chief economist report?**

The chairman of the FTC, Jon Leibowitz.

**Does the chief economist have the power to hire his or her own staff?**

Yes, subject to review by the chairman.

**How many of your economists have a PhD in Industrial Economics?**

All seventy-nine economists of the agency have a PhD. Most of the economists have a field of specialisation in industrial organisation, but some have specialisations in labour economics or other microeconomics subfields. Several have some specialisation in econometrics.

**Does the agency include a specialist economist on every case team? If not, why not?**

Yes, on all investigations.

**Is the economics unit a 'second pair of eyes' during cases – is it one of the agency's checks and balances? If not, why not?**

The Commission's investigations of competition matters integrate legal and economic analysis. The economists work with the lawyers as a team. The Bureau of Economics, however, is responsible for providing its own recommendation to the Commission on most matters.

**How much economics work is outsourced? What type of work is outsourced?**

Expert witness work for litigation is often, but not always, outsourced. The vast bulk of other economic and accounting work is done in-house.