Organisation, Operations, and the Value of Economics in Antitrust and Consumer Protection at the US FTC

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The Bureau of Economics at the Federal Trade Commission (FTC) works alongside the FTC's two legal bureaus – the Bureau of Competition (BC) and the Bureau of Consumer Protection (BCP) – to support the agency's twin missions of antitrust and consumer protection. The FTC is an independent agency with five voting commissioners, each of whom is nominated by the president and confirmed by Congress. No more than three commissioners can be from the same political party.

The FTC has approximately 1,000 employees, about half of whom are attorneys. The BC consists of approximately 200 attorneys with expertise in antitrust, while the BCP is comprised of about 250 attorneys whose legal proficiencies relate to the agency's consumer protection mission. The Bureau of Economics (BE) supports both missions with a staff of approximately 70 PhD economists with specialisations in microeconomics or econometrics, 20 research analysts (typically with a bachelor's degree), five accountants and financial analysts, and several administrative and support personnel. The BE's budget currently accounts for about 7 per cent of the FTC's overall budget. Over the past 40 years this figure has ranged from 7 to 11 per cent.

The organisational structure of the FTC is designed to ensure that its decisions are rooted both in sound economic and legal analysis. The fact that economists are housed in a distinct bureau not only reflects the importance of the discipline to the agency's missions, but improves efficiency, facilitates the maintenance and enhancement of essential economic skills, and ensures that the FTC has the best possible economic analysis before it when it makes its decisions.

On the antitrust side of the agency, the presence of a separate economics bureau helps ensure that antitrust enforcement protects consumers, not competitors – a guiding principle in the evolution of antitrust doctrine in the United States over the past quarter century. On the consumer protection side, the presence of a separate economics bureau helps ensure that the FTC's decisions are rooted in cost-benefit analysis. While the distinction between an independent agency (such as the FTC) and an executive branch department (such as the Antitrust Division of the US Department of Justice) necessarily leads to some organisational differences, the Economic Analysis Group in the Antitrust Division of the Department of Justice is also an organisationally distinct group for similar reasons. More generally, economists provide information that mitigates the potential for adverse unintended consequences from actions taken by the FTC.

As a result of this structure – and differences in the comparative advantages of the different legal and economic bureaux – whenever the five members of the FTC vote on a major matter, they typically receive a recommendation from the relevant legal bureau, as well as a separate recommendation from the Bureau of Economics. Thus, economists serve a dual role within the agency: providing attorneys in the legal bureaux with the economic support they need to make legal recommendations, and providing the commissioners with a separate assessment of the strengths and weaknesses of a proposed action from an economic point of view.

With this overview of the FTC, we now provide a more detailed look at how the Bureau of Economics is organised, how it operates, and also discuss a few of its recent contributions to the agency's twin missions.

Organisational structure and operations of BE

The Bureau of Economics is headed up by its director, who is appointed and serves at the pleasure of the chairman. In recent years, BE directors have been academic economists who have been granted leave from their university professorships to serve for up to two years as the agency's chief economist. The BE front office also includes the deputy director for antitrust, the deputy director for consumer protection, and the deputy director for research and development and operations. They not only provide valuable counsel to the director and the FTC, but also oversee other economists in the bureau who manage and assign staff economists to a variety of matters, some of which are discussed below. Additionally, they assist the director in monitoring the staff's economic analysis on cases or projects. The remainder of the BE front office team consists of the senior adviser to the director and the associate director for antitrust, who provide advice as well as assistance with front office responsibilities.

While BE is organised along three functional areas – antitrust, consumer protection, and research and development and operations – there is interaction among economists in the different groups. This is natural, given the considerable overlap in the theoretical and empirical tools each group uses, and the fact that our various competition advocacy and international functions each make use of substantial economic inputs. Indeed, such overlap is not unique to economists at the FTC; there is significant overlap in the tools used and issues addressed by academic researchers as well as consultants who work in subfields of microeconomics, such as industrial organisation, occupational regulation, industry regulation, information economics, labour economics, behavioural economics, and law and economics. Economists formally attached to a particular functional area often contribute to functional areas that serve other aspects of the agency's missions.

Antitrust

The deputy director for antitrust oversees about 50 economists and managers who work in two similarly sized groups, called Antitrust I and Antitrust II. These economists specialise in competition matters; the groups engage in similar activities, but generally work on matters related to different industries. This specialisation creates efficiencies that stem from the technical and industry-specific knowledge that each shop accumulates over time through different investigations related to their specific industries.

Any potential for monotony arising from such specialisation is greatly mitigated by the fact that BE staff take on many different roles throughout a given investigation. One such role is assisting BC staff attorneys identify and develop relevant economic facts. For example, BE economists use their knowledge of particular industries, along with their expertise in microeconomics, to identify potentially relevant theories of competitive harm, as well as to identify potential pro-competitive outcomes or efficiencies stemming from the conduct of firms or a proposed merger. BE staff also work hard to communicate relevant theories to attorneys, and to help identify the sorts of factual evidence required to test them. They also participate in customer and competitor interviews, review white papers produced by economists hired by attorneys for the potential respondents, and more generally assist BC attorneys in evaluating data and materials provided by their counterparts on the other side who increasingly rely on highly paid economic consultants to assist them. BE economists use econometric or other quantitative techniques to estimate potential competitive effects when appropriate data are available.

In horizontal merger cases where the proposed remedy is divestiture, BE staff evaluate whether it is likely to be an effective remedy. If divesture is not an acceptable remedy to either the FTC or the merging parties, BE staff play a critical role in preparing the economic evidence for the case. In short, one of the important roles of staff economists is to work with staff attorneys at each stage of an investigation to ensure that the BE – and the BC – has the information needed to make its recommendations based on economics and the law.

While economists work collaboratively with BC attorneys, they also play an important second role: providing an economic recommendation to the FTC. Once all of the relevant information is obtained and alternative legal and economic theories are tested, the investigating staff in BE and BC, as well as each front office, provides the FTC with separate recommendations regarding the merits of the matters on which it must vote.

After the FTC weighs these recommendations, the FTC may choose to enter the litigation stage in an antitrust matter. In that event, BE staff provide additional economic support for our attorneys. This includes interfacing with and verifying work done by any economic experts hired by the FTC, helping to prepare deposition and trial testimony, evaluating the work of the oppositions' experts, and so on.

Not all work done by economists in the antitrust group, however, relates to investigations triggered by mergers or, more generally, by the FTC's concerns regarding the conduct of one or more firms. As an example, the antitrust group continually monitors the prices of retail petrol and diesel fuel in 360 cities and monitors wholesale prices in 20 major urban areas. Using this data, economists work with attorneys in the BC to investigate any pricing anomalies that might be indicative of anti-competitive behaviour. Additionally, as discussed below, economists in the antitrust shop also assist in producing a variety of other outputs, including reports, studies and investigations requested by the president, Congress or the chairman, as well as analyses requested by state agencies.

Consumer protection

About 15 economists specialise in the economics of consumer protection. The basic economic tools for analysis in this area include the economics of information, law and economics, behavioural economics and marketing, and econometrics. Issues that have recently been examined by economists in the consumer protection area include: an analysis of mortgage loan shopping behaviour and an understanding of current mandated disclosures for mortgages, the economic analyses related to "fair lending laws", the effects of food advertising on nutrition and health, credit availability and the effects of credit scoring on consumers, online behavioural advertising, identity theft, and deceptive practices in the marketing of food, drugs and nutrition supplements.

On some of the larger and more complex consumer protection cases, BE staff economists work with staff attorneys in the BCP to design investigations, formulate candidate economic theories, and search for confirming or denying evidence in documents, from consumers or industry sources. BE tends to take the lead role in data gathering and in any econometric or quantitative analysis connected with a case or project. Data analysis in consumer protection cases might involve analysis of consumer survey data, examination of detailed information retained by various firms regarding their telemarketing activities or debt collection practices, or the collection and review of information on consumer loans.

As with competition matters, the bureau plays a dual role on the consumer policy side. It provides attorneys with economic support work and, on larger cases, may provide the chairman and the commissioners with a separate assessment of the strengths and weaknesses of a case.

In addition to investigations, economists working on the consumer protection side of the agency's mission frequently conduct economic analyses that address questions posed by Congress. For example, economists have recently invested much time in various studies stemming from a revision of US credit laws. Using a massive data set, they examined the effects of credit scoring in predicting automobile insurance risk and the differential effects of such scoring on various consumer groups. A similar type of analysis is beginning for homeowners' insurance. Economists also designed an examination of the accuracy of consumer credit reports using real consumers working with trained credit "coaches" to examine credit reports for potentially relevant errors.

Research and development and operations

The deputy director of research and development and operations not only ensures that the bureau operates smoothly and efficiently, but coordinates and evaluates research and development within BE to ensure that the economic knowledge base required for the FTC's antitrust, consumer protection, and advocacy missions continues to keep up with that of academic and consulting economists. Together with the deputy director for consumer protection, the deputy director of research and development and operations oversees BE's office of applied research and outreach (ARO). While only a few PhD economists are formally attached to this group, the office draws upon the talents of all BE economists to provide the economic support and analysis required by FTC attorneys in the Office of General Counsel (OGC), the Office of International Affairs (OIA), the Office of Policy and Planning (OPP), and the Office of Congressional Relations (OCR). These economists also engage in research that complements the agency's antitrust and consumer protection missions.

The flexibility afforded by an organisational structure that permits this unit to draw on the expertise of all economists within the BE ensures that economists with the right expertise – be it in antitrust or consumer protection – are appropriately matched with the needs of the other offices in the FTC. Once selected for a special project, these economists work with attorneys and other personnel in the OGC, OIA, OPP, and

OCR to provide economically sound answers to inquiries from Congress, state attorneys general, and international enforcement agencies. For instance, BE economists routinely consult with their counterparts at the European competition agencies, the OECD and other competition authorities. Economists from these entities periodically visit the US to exchange ideas on competition and consumer protection issues with their counterparts. Additionally, BE economists also contribute to submissions to the OECD and other international organisations on a wide range of competition, consumer protection, and regulatory issues. When the FTC receives requests by our international counterparts for training on how to incorporate economic analysis – especially empirical analysis – into antitrust investigations, the BE's ARO helps coordinate these and other efforts to share our experience on econometric methods of demand estimation and quantitative techniques – and to also learn from the experiences of other agencies.

In addition to international coordination and training activities, economists are involved in competition and consumer advocacy activities, in which the agency provides comments to other government agencies regarding the likely effects on consumers of laws and rules. The ARO coordinates these efforts for the BE. When other government agencies and self-regulatory bodies request information about the potential effects on consumers of proposed legislation, rules, or industry codes, BE staff economists work with attorneys in the BCP and the OPP to provide the requested analysis. In many cases, economic input provided by BE staff economists and FTC attorneys are incorporated in the decisions of other government entities, and consumers are the beneficiaries of these efforts. (Regulators are less likely to take actions that harm consumers when such public analyses of the costs imposed are available. See, for instance, Cooper, Pautler, and Zywicki, "The Theory and Practice of Competition Advocacy at the FTC," *Antitrust Law Journal*, 72(3), 2005, pages 1091-1112.)

The involvement of economists in these advocacy efforts is important for two reasons. First, consumers are not always well-represented in legislative and regulatory forums. This stems from the fact that, even in situations where regulation might lead to a high level of aggregate consumer harm, the harm to any one individual consumer is typically low. Since the benefits (relative to organisational costs) to any one individual of voicing concerns is low compared to other stakeholders who have a direct and substantial stake in the outcome, the process can lead to laws or regulations that unintentionally harm consumers. Second, laws and regulations that are designed to protect consumers can have adverse unintended economic consequences. BE economists working in the area of consumer protection help ensure that all of the costs and benefits are taken into account, and mitigates the potential for unintended consequences.

Recent advocacy filings that are coordinated through the ARO include issues from both the competition and consumer policy sides of the agency. On the competition side, economists participated in filings related to the use of certificate of need regulation for large-scale health care services, the provision of limited service medical clinics in consumer–friendly locations, and competition issues arising from various aspects of wholesale electricity regulation. In addition, we are working in tandem with economists and attorneys at the Justice Department to examine the effects of using an auction mechanism to allocate landing slots at congested airports. This idea, which has been around for a couple of decades, may be close to becoming a reality, at least on a small trial scale. In addition, economists recently worked on a Congressionally requested study of postal service regulatory reform, examining the types of advantages and disadvantages that the US Postal Service confronts compared to its rivals in package delivery services.

On the consumer protection side, ARO economists have been heavily involved in numerous comments regarding various restrictions on the terms and conditions for high-risk home loans and the information that should be provided to consumers regarding those terms and conditions to ensure that borrowers understand as fully as possible the complex components of the contracts before they finalise the agreement. In one instance, the consumer protection issues had competition implications, because a disclosure regarding the payments to mortgage brokers (who often bring together borrowers and lenders) might have provided a competitive advantage to vertically integrated lenders who provide their own brokerage services within the lending organisation, and thus would be immune from the disclosure.

This asymmetric disclosure between brokers and other lenders was one area that economists had previously investigated in an experiment using 500 recent mortgage customers to evaluate various loan disclosures (James M Lacko and Janis K Pappalardo, "Improving Consumer Mortgage Disclosures", Federal Trade Commission, June 2007). In addition, economists provided analytical input into various new disclosure rules for alcoholic beverage labels that are intended to allow consumers to more readily compare alcohol content across various beverages.

Perhaps the most important general role of the ARO is the continual improvement of our analytical capabilities. Economics is an evolving science for which research and development are essential to ensure that the BE is in a position to provide the FTC with the best possible economic analysis for its decision making. For this reason, the BE invests in the research and development necessary to provide scientifically sound, data-driven economic analysis that informs antitrust, consumer protection, and business regulation policy. This is a tradition that dates back to the FTC's predecessor organisation, the Bureau of Corporations, and has continued for the nearly 100 years of the FTC's existence.

This tradition stems from a recognition that there are strong complementarities between research and the FTC's competition, consumer protection, and advocacy missions – and a recognition that the use of obsolete science in the FTC's decision making is inconsistent with the agency's missions. For example, economists evaluated the published empirical literature on non-price vertical restraints in an effort to evaluate the extent and strength of the evidence on the effects of those restraints (J C Cooper, L M Froeb, D O'Brien, and M G Vita, "Vertical Antitrust Policy as a Problem of Inference", *International Journal of Industrial Organization*, 23 (7) (2005) pages 639-664). Interestingly, there was relatively little direct empirical evidence and that which did exist tended to show that restraints are likely used to obtain efficiencies in distribution. That review led to additional work in response by other commentators and, ultimately, to a clearer understanding of where the literature stands on certain vertical issues.

As with all policy areas, there is always more to learn, but knowing what we know and what we do not know is an essential element of good policy making. In addition, our ARO is currently heading up a long-term effort to absorb the learning in the area of dynamic oligopoly models and to assess whether the tools in that area can help provide additional insights for antitrust analysis.

Conclusion

Sound economic analysis is an essential ingredient in prudent antitrust and consumer protection policy. The organisational structures of the Bureau of Economics and the FTC ensure not only that complementarities between economists and attorneys are fully exploited, but mitigates the prospect for adverse unintended consequences. Only in this way can the FTC – and other stakeholders such as Congress – be assured of getting the best possible economic and legal advice on matters that are vital to the enhancement of competition and consumer welfare. The Bureau of Economics plays an essential role in virtually all aspects of the FTC's mission, and strives to maintain the human capital and research and development required to fulfil this mission not only today, but for many years to come.