



**International Competition Network**

**MERGER WORKING GROUP**

**INVESTIGATIVE TECHNIQUES SUBGROUP**

**Developing Reliable Evidence in Merger Cases**

## **Introduction**

As discussed in the Report on Investigative Techniques employed by member agencies in the area of merger control, **competition agencies have a range of different tools to gather evidence from the merging parties.** The laws in many jurisdictions require companies to provide premerger filing notification and give the agency authority to issue broad requests for documents, data, and answers to questions. In some jurisdictions, the agency also can compel sworn testimony from company executives. In many jurisdictions, parties cannot close their transaction until they have substantially complied with the requests for information.

**Some ICN members also have broad powers to gather information from third parties.** In such jurisdictions, agencies may compel production of documents, data, and sworn testimony from third parties, such as competitors, customers, and others in the industry, in connection with a merger.

Developing reliable evidence is an exercise that spans all stages of merger review, although **the amount of evidence that agencies require to evaluate a transaction depends on the apparent competitive risk of the matter.** Some cases clearly will have no or little impact on competition and the reviewing agency will be able to reach its conclusions with a small amount of information (e.g., with relevant and probative evidence that there is no competitive overlap). In contrast, agencies will require substantially more evidence to assess a merger that appears to have a more significant impact on competition.

**The level of evidence required to convince a decision-maker to block a proposed transaction is substantial.** In administrative systems, where the agency is both investigator and decision-maker, staffs must convince the head of the agency, the deciding body or others to block a transaction. In judicial systems, the agency must prove to an independent judge that the transaction is anticompetitive and therefore should not be permitted. In some countries, the agency must defend its decision to clear or approve a merger (as well as to oppose one). Satisfying the agency's burden is especially hard in merger cases because of the difficulty of establishing what amounts to a prediction about the future.

Regardless of the system in which an agency operates, **the evidence should be subjected to exacting scrutiny.**

## Executive Summary

**Agencies evaluate many types of evidence from a variety of sources in merger investigations, including:** (1) pre-existing documentary evidence, such as corporate strategy documents, planning documents, and sales reports; (2) materials, such as surveys, reports, and compilations of information, that are created in anticipation of the merger or as part of the merger investigation and analysis; (3) descriptive oral evidence from market participants (i.e., customers, suppliers, competitors, and employees of the merging parties); (4) written responses to inquiries and compulsory requests for information; and (5) expert evidence, including industry and economic expert analysis and testimony.

The probative value and relevance of evidence may differ depending on the purpose for which the evidence is introduced and the particular stage of the merger review process (i.e., the nature of the decision and the identity of the decision-maker). For example, while descriptive evidence from customers often is an important factor at preliminary stages of review, it can take a secondary role as more extensive documentary, economic and/or testimonial evidence is created or produced during a more substantial review.

As described more fully below, evidence can be adduced from a variety of sources with varying degrees of reliability at the different stages of the merger review process. Standing alone, however, none of the categories of evidence is conclusive; rather the overall corroborative effect and support the evidence lends to the theory of the case will determine its reliability.

Documentary evidence varies in type and reliability. Pre-existing documents containing data are the most compelling. The data contained in ordinary course of business documents reflect the observations of the company or the author irrespective of whether the agency is able to test the data for reliability. Documentary submissions containing data to be used for reports, analyses and surveys must be tested for reliability, must be compared to other evidence in the industry and must have been collected properly – in the absence of which, its use and any reports or analysis based thereon will be of virtually no assistance and may harm the credibility of the case. Absent corroboration, documents created contemporaneously with the merger review that contain self-serving statements or unverified data may be given less weight.

Descriptive evidence from customers, suppliers, competitors and the merging parties, can provide early indications of concerns and identify relevant sources of additional detailed information. Descriptive evidence can provide powerful corroboration of expert and documentary evidence. Further, descriptive evidence can add a qualitative perspective to the merger review process.

Experts may be key interpreters and communicators of the meaning of the evidence. It is often useful to include both industry experts and economic experts at an early phase of the merger review process. Where expert analysis is properly founded on relevant factual and behavioral information, expert evidence is generally given substantial weight and may even be determinative of the issues.

Agency staff, counsel and experts must ensure that the evidence, whether documentary, descriptive or expert in nature, is tested for reliability throughout the process to ensure that the explanations provided to the decision maker are consistent with the evidence and not subject to other interpretations that are equally or more persuasive.

## **1. Pre-existing documentary evidence**

Pre-existing documentary evidence, for the purposes of this discussion, means ordinary, course-of-business documents that pre-date the merger agreement. In some jurisdictions, at an early stage in the merger review process, the agency relies upon pre-existing documentary evidence provided by the parties, along with customer and supplier interviews to verify the parties' assertions. Reviewing agencies usually value pre-existing documents for two key things that they contain: facts and analysis.

Primarily factual documents can provide basic factual information on ordinary, course-of-business operations. Examples include customer lists, competitor information, sales and marketing reports, geographic sales information, contractual terms and conditions of supply or sale, shipping/transport information, invoices and other sales information, plant and warehouse location information, and facility capacity utilization information (where applicable). These ordinary-course business documents reflect the perception of the parties' actual behavior and their responses to competitive forces in the industry. For example, shipping cost information can help define a geographic market, or sales reports can reveal to which competitors sales have been lost. These documents are also useful in that they provide corroborating (or conflicting) information to descriptive evidence and, as indicated above, enable the reviewing agency to make initial assessments about the facts concerning the proposed merger.

Primarily analytical documents can provide pre-merger description and analysis of market conditions. Examples include strategy documents, pricing documents, business plans, marketing plans, sales and marketing reports, short- and long-term projections, and other competitive assessments. Such documents can reveal how the merging parties assessed the competitive landscape. Because they were created before the merger was contemplated, such ordinary-course business documents tend to be viewed as reliable sources of evidence upon which analysis can be conducted and appropriate conclusions drawn. These documents can provide valuable and reliable information regarding competitive behavior in the market generally and the authors' perceptions of the market. Analytical documents may contain important information regarding market structure and competition within the

market, including information relating to market maturity, potential competitive threats and responses, competitive products, alternative product uses, and logistical information relevant to geographic market definition. For example, strategic plans may reveal which firms were regarded as significant competitors. Some documents, such as periodic reports, may contain elements both of factual reporting and competitive analysis.

Both factual documents and analytical documents provide information to test assertions made by the parties during the investigation. This is particularly true if the documents pre-date merger discussions. Further, documents of this nature are useful to shape and support conclusions regarding the competitive effects of a merger and to determine whether to recommend continuation of the merger review. Statements against interest or ‘smoking gun’ documents tend to be most persuasive in corroborating the anticompetitive nature of a proposed merger, but must be used with caution because they could be the product of overstatement or hyperbole.

Parties may produce pre-existing documents (as well as documents created contemporaneously with merger negotiations or with the merger investigation, discussed below), pursuant to statutory filing requirements, voluntary productions, and mandatory orders for production of documents. Compelled document production is a powerful tool in a reviewing agency’s arsenal of evidence-gathering techniques. Compelled production helps ensure that the reviewing agency gets a complete picture of the subjects at issue, particularly if the parties are required to produce all relevant documents and to certify the thoroughness of the search, and/or if they face substantial penalties for withholding relevant information. Voluntary productions of pre-existing documents carry the risk that the parties have provided only carefully selected and vetted documents, rather than a comprehensive production.

## **2. Surveys, reports, and compilations of information created in anticipation of the merger or as part of the merger investigation and analysis**

The relevance and probative value of documents created contemporaneously with merger negotiations or with the merger investigation vary widely. Often, merging parties retain experienced competition law counsel at an early stage in proposed merger negotiations. Competition law counsel play an active role in vetting merger documents to minimize the risk that statements against the interests of the parties will appear or that language tending to imply anticompetitive behavior or outcomes is used. For these reasons, agencies may give little weight to documents that are created contemporaneously with the merger negotiation or review and that are self-serving and promote the merging parties’ objectives without significant corroborating evidence.

Surveys, reports, and analyses that are developed during the merger negotiation process, and subsequently during the merger review process, can be particularly useful. Strategy documents that are based upon credible surveys, reports, and analysis have greater credibility, but it is the underlying survey, report, or analysis that provides the more probative evidence. Typically, both the agency and

the merging parties will attempt to rely upon surveys, reports, analyses, and economic studies to support their cases. The development of surveys, expert reports, and analyses must be based upon reliable underlying relevant factual and behavioral information – often obtained from the pre-existing documents described above.

### **3. Descriptive evidence from market participants**

Interviews of customers, suppliers, and/or competitors conducted informally in person or over the telephone may elicit descriptive oral evidence. In some cases, the reviewing agency may obtain an order requiring an individual with relevant information to testify under oath. In other cases, an individual voluntarily may give a written statement to the investigators. Descriptive evidence may also be obtained in writing.

Descriptive evidence from market participants can be valuable to learn facts about how an industry operates. It is less valuable if the individual reaches conclusions, e.g., whether the merger is procompetitive, competitively neutral, or anticompetitive, without establishing an adequate foundation and/or the conclusion is not sufficiently corroborated with business records or data. Particular attention should be paid to evidence of past behavior of market participants that illuminates how they likely would respond to future competitive changes.

In the early stages of a merger review investigation, descriptive evidence is useful to identify and frame legal, factual, and economic issues to pursue during the investigation. It also can factor significantly into decisions made to pursue or terminate a merger review inquiry. For example, customer interviews frequently are the quickest and most reliable way to learn of potential competitive problems. But, if none of the acquired firm's major customers express any concern about a merger, it could be that the transaction poses no significant competitive risk, that those customers pass on any price increase to their customers, or that the customers are sufficiently dependent on maintaining a favorable relationship with the merging parties that they are wary of making statements adverse to the merging parties. Irrespective of whether a customer predicts that prices may go up as a result of a merger, it is important to determine what the customer believes its options would be and what action the customer would take if, following the acquisition, the merged firm increased price unilaterally or increased price in combination with other firms in the market. In some cases, the reviewing agency may develop initial views of a proposed transaction at a relatively early stage in reliance on evidence obtained during customer, supplier, and competitor interviews.

Descriptive evidence is also useful to identify the views, strategies, and behavior of market participants or to identify what a particular market participant has done or intends to do in response to a change in competitive market conditions, such as a price increase. Descriptive evidence indicating perceptions of alternative sources of product supply and barriers to entry into the market (including reputation and loyalty considerations reflecting likelihood of switching to other sources of supply), can

be helpful in assessing, from a qualitative perspective, the significance of any potential lessening of competition. Descriptive evidence of actual or attempted entry into a market also would be relevant and probative to the assessment of the merger transaction.

Descriptive evidence, however, may not necessarily constitute a representative sampling of the evidence of market participants (for example, where there are a large number of consumers with different needs, but no ability to identify a representative witness/respondent or set of witnesses/respondents). In such circumstances the agency should exercise caution in relying on the evidence as being indicative of more widely held experiences, views and practices in the market. Where, however, the evidence relates to the witness's/respondent's own experiences and perceptions, it can provide useful corroboration of documentary and expert evidence.

When developing descriptive evidence, it is important to consider the ways in which the different types of witnesses/respondents are likely to be reliable.

### *Customers*

An acquired firm's customers tend to have the most to lose from an anticompetitive merger because they may lose their preferred supplier and may lose their preferred product after the merger. Often they are the strongest complainants, are most likely to oppose the merger, and are most likely to cooperate with the agency. Frequently, they are able to provide important testimony about how they benefitted by playing the acquiring and acquired firms off against one another and whether they expect to be harmed by the loss of rivalry between two important suppliers.

Acquiring firm's customers may be less likely than the acquired firm's customers to be concerned or complain about a merger because they are not losing their preferred supplier or product. They may be satisfied by the acquiring company's representations concerning prices and service levels. On the other hand, if they have benefitted from the rivalry between their supplier and the acquired firm, their experience may provide insight or possible harm from a loss of competition. In any event, they should be able to provide significant evidence about the marketplace.

In many markets, there are too many customers to get statements from all customers. Often there are good reasons, however, to believe that the largest customers are the customers least likely to be harmed by an acquisition because they are the most sophisticated and may have some monopsony power. Under these circumstances, testimony that even the largest customers expect to be hurt by the merger may be very informative about the threat facing all customers.

Where the customers of the merging parties are not the final sellers, it may be useful to examine the general markup practices of these intermediate sellers. Where traditional markups are used, the customers (who are retailers or other middlemen) may be much more concerned about horizontal equitable treatment by manufacturers and may have much less concern about wholesale price levels per

se as long as all retailers face these prices. In such situations, lack of "customer" complaints by, for example, supermarkets or distributors, may not be a good indicator of whether a merger threatens anticompetitive harm. Indeed, distributors may even welcome a price increase if their markup is a percent of the price.

### *Competitors*

Competitors may provide important information about the market and how competition works in the market. Competitors usually are uniquely situated to provide important evidence on most significant issues in a merger case, such as the identity of competitive alternatives, entry conditions, market shares, former market participants, and contacts at large customers. Complaints from competitors must be analyzed critically, however, because the competitor, is likely focused on perceived potential risks of the merger to its interests rather than its likely effect on customers. Indeed, competitors' incentives generally are to favor an anticompetitive merger and oppose a pro-competitive merger. Complaining competitors often are motivated by a concern that the merged company will be a more formidable competitor, rather than a concern that the transaction will harm competition. On the other hand, a complaint by a competitor standing alone, is not a reliable indicator that a merger is procompetitive.

### *Merging Parties*

Parties obviously want to consummate their merger, so they are advocates for the position that the merger poses little or no competitive risks. Their statements, therefore, must be considered in this light. To the extent they are providing industry facts, executives for the parties and their counsel often provide reliable, straightforward, objective information—e.g., descriptions of product lines and major customers. On critical issues and at an advanced stage of the investigation, staffs usually need to question party executives on the record and under oath to determine if their positions are reliable and to develop evidence in areas where the parties may not be voluntarily forthcoming. Pre-existing party documents, particularly those authored by key executives, can be useful mechanisms to test the assertions of its executives during the merger review. Assertions by parties offering alternative interpretations of documents or otherwise attempting to explain away the documents should be evaluated for credibility.

### *Descriptive evidence – written or oral form?*

In the process of merger review, the agency is constantly confronted with the question of whether to obtain descriptive evidence in written or oral form. The answer is informed by the stage of the review process, the agency's available investigative tools and resources, and the apparent competitive risk of the transaction. At early stages of review, and often for the initial contact with third parties, some jurisdictions rely on oral descriptive evidence through phone interviews memorialized in notes. Other jurisdictions only make written requests of the merging parties and other third parties.

An advantage of evidence produced in written form is that the information received is automatically documented and ready for the file without having to prepare minutes and to verify with the sender. Depending on the assertions of the responding company, a written reply may be taken as the official position of the company to whom it is addressed. Written replies to requests for information allow the addressee time to consider the questions posed, to consult with other, perhaps more competent, parts of the company and thus often provide a comprehensive reaction to the issues raised. A disadvantage of evidence produced in written form may be that it has been so carefully screened by lawyers that it provides less useful information than an oral interview.

Oral interviews with market participants can provide input from a large number of market participants in a short amount of time, with relatively little burden. Oral interviews can be useful as an initial contact with third parties to help identify issues for further investigation. Additionally, written questionnaires are less interactive than oral interviews and do not allow for immediate clarifications of questions or answers. Therefore, written questionnaires often require additional follow up, either orally or in writing.

#### **4. Written responses to inquiries and compulsory requests for information**

In some jurisdictions, after the initial stage of the merger review process, the agency crafts requests for written responses from market participants. These written requests for information are mainly addressed to the merging parties to complement and expand information provided in a filing or to third parties (competitors, customers, suppliers, public authorities, etc.) to obtain a better understanding of the markets involved in the transaction, to gather evidence or to check the information provided by the merging parties. Such requests often accompany requests for documents discussed in sections 1 and 2, or can be used in place of, or to complement, interviews described in section 3.

To obtain useful evidence through written requests, it is important, first, to identify what addressees are in the best position to provide the required information and, second, to tailor the requests to information the respondents can answer on a reliable basis. Identifying the appropriate third-party respondents will ensure meaningful and efficient responses. For instance, if verification of the capacity utilization rate in the market is needed, requests have to be addressed to a substantial sample of producers. If looking for data in a bidding market (number of bids, who bid, who won, who lost, the prices offered by each bidder and so on) with a few, large customers, it may be useful to address requests to these customers rather than to each competitor.

Special care should be applied to the exact wording of the requests. Written responses can suffer from the same limitations as documents created contemporaneously with the merger investigation, discussed in section 2, notably that they may be self-serving and used to promote the respondents' objectives. Questions should be as precise as possible to avoid any loopholes or misunderstandings that

could significantly reduce the evidentiary value of the information obtained. Although opinions of market players can be helpful in gaining an understanding of the relevant market mechanisms, hard data constitutes better evidence than mere opinions, and this fact must be reflected in the way the requests are drafted. Requests for written responses should therefore focus more on verifiable facts and figures and less on eliciting opinions and conclusions.

Sufficient response time should be granted to addressees to obtain a high rate of comprehensive answers. Replies that have to be prepared hurriedly may be superficial or may lack sufficient detail, and thus may be less reliable.

Responses to the requests must be checked carefully to determine the need for follow-up. In cases where written replies to requests are fragmented, inconsistent or lack explanations, a follow-up by phone or meetings, and perhaps ultimately in written form, may be necessary. In particular, when answers state pure opinions (e.g, market entry is “difficult”), it is important to follow up and request figures and examples to better explain these statements. It is also important to verify whether the replies represent a sufficient proportion of the market (in terms of demand/production etc.), and cover a representative sample of market participants (in terms of size, geographic location, etc.)

## **5. Expert Evidence**

Expert evidence is very useful during the course of a merger review. The role of experts is to interpret the actual behavior of the merging parties and the factual information collected during an investigation and to draw logical inferences from these sources. Whether they be industry experts (such as a consultant or accountant with experience in the relevant industry, an academic who has done considerable research, or a former company executive), or economic experts, experts should maintain this role during the investigation and/or at trial.

It is important that expert analyses and opinions developed from the evidence be based on reliable underlying factual and behavioral information. Where an expert’s evidence is based on erroneous information, that evidence will not be reliable and will not be useful to a decision maker.

When involved early, experts can help identify the key questions and ways to find reliable answers to them. Moreover, the involvement of economic experts at an early stage of the merger review can be important for the proper design of data questionnaires and information requests, either voluntarily or pursuant to production orders. Agencies seeking survey information or other data from market participants for subsequent agency analysis must devote care and attention to questionnaire design, data collection, and quality control procedures. Where the methodology for collecting and compiling the data is unsound, the conclusions based upon that evidence should be afforded little or no weight.

In engaging the services of an industry expert, an agency is best served by an expert who has relevant experience in the same industry, and, if possible, in the same market. An expert with relevant market experience is likely to be better situated to draw on experience applicable or relevant to the market and market conditions under consideration in the merger review. Industry experts can provide persuasive evidence about appropriate market share calculations (i.e., what measure to use, whether value of sales, unit sales, production capacity, or natural resource reserves), the significance of competitors, barriers to entry, change and innovation in the market, and the applicability of any rules relating to the regulation of the market. Further, industry expert evidence will assist in defining, and corroborating evidence relating to, relevant product and geographic markets.

Economic analysis, often including use of statistical information, is typically important in merger reviews. Experts typically provide economic analysis critical to the definition of relevant product and geographic markets through the application of economic principles, theories, and statistical estimates to help evaluate the substitutability of products in defining relevant markets and in projecting the likelihood of anticompetitive effects. Direct statistical evidence relating to price sensitivity and product substitutability, where available, particularly studies of prior significant competitive events, is valuable. Indirect, descriptive evidence may be persuasive if corroborated.

Both industry expert and economic expert evidence and analysis also is helpful to the evaluation of any claimed efficiencies. Industry experts can evaluate the plausibility of efficiency claims and whether a merger is needed to achieve them. Economic theories and measures relating to consumer welfare or total welfare may be used to identify, test, or quantify potential efficiencies.

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Below are some tips and techniques for developing reliable evidence.

### **Obtaining *Reliable* Documentary Evidence—A Few Suggestions**

1. **There are no shortcuts to finding the important, reliable evidence.** In countries with broad power to gather documents from the merging and third parties, major merger investigations may involve review of hundreds of boxes of documents. It is inescapable that review of such large quantities of material is time-consuming, tedious, and difficult. Of the vast number of documents often included in such productions, the case may turn on a relative handful of documents. The challenge is to find and recognize these documents. Prioritizing review can make best use of limited staff resources. For example, for extent of competition and substitutability issues, marketing and sales department documents are often most useful and should be reviewed immediately. Document screening criteria should be determined in consultation with an economic expert.

2. **Consider using database software to track documents.** A number of different database software products are available on the market today. Information about each potentially significant document—including objective information such as date, author, recipients, and document type (e.g., memorandum, invoice, e-mail, handwritten notes) and subjective information about the document’s significance may be input into a database. The databases are often invaluable in allowing the agencies to identify and analyze the key documentary evidence related to the critical issues in the investigation.
3. **Pay close attention to pre-existing documents.** The parties’ business records that were created before the merger was considered are likely to be a reliable source of how competition works in an industry. Records that are inconsistent with the parties’ position in the investigation may be particularly important.
4. **Exercise caution when relying on historical information to ensure that the information is representative.** Information that is not representative for some reason, e.g., because conditions have changed significantly, will not be reliable, and opinions and analysis conducted based on that information will not be of much utility in the merger review analysis.
5. **Documents that the parties create in anticipation of the merger and agency investigation must be carefully scrutinized.** Because the parties are motivated to persuade the agency that their transaction poses no competitive risks, anything that they write during or in contemplation of the investigation—e.g., white papers, answers to written questions, filings—should be reviewed with great caution. The agencies should try to corroborate the parties’ important assertions with independent evidence before relying on them.
6. **Inquire about the scope of voluntary productions of documents.** Voluntary productions may include only carefully selected and vetted documents. It is important, therefore, to ask the parties to describe the scope and nature of the search for documents (and possibly to certify that description) or specify documents that the parties shall produce.
7. **Pay particular attention to electronic documents, including e-mails.** It is possible that electronic records may never appear in paper form, and therefore could not be discovered by production of paper records alone. E-mails are often especially important because they may reveal important and candid information—never found in more formal memoranda—about the inner workings of companies.

8. **Do not assume you can understand any document standing alone.** A “hot” document may not be so hot when put into context. Often agencies cannot assess the significance of a document without reviewing large numbers of other documents to put the document in context. It may also be necessary to question the author or recipients of a document to understand its significance fully.

### **Developing *Reliable* Oral and Written Evidence from Witnesses/Respondents—A Few Suggestions**

1. **Consider the competence of any person serving as a witness/respondent.** Ask if this witness/respondent is qualified to address this topic. Be sure to learn the witness’s/respondent’s level of direct involvement in and responsibility for the relevant product. Was the witness/respondent a hands-on participant with detailed, day-to-day involvement with the product or was she just a supervisor of the real experts, the executives with direct responsibility for the product? Did she have final decision-making authority for the product or did she just rubber-stamp others’ decisions? No witness/respondent is likely to be qualified to address all of your issues. Focus on the issues that each witness/respondent is best situated to address.
2. **Remember that actions speak louder than words.** If the witness/respondent says she would switch from Product A to Product B in response to a 5% price increase, find out if she ever took any actions consistent with that view. Get the details. Similarly, if the witness/respondent is a potential competitor discussing entry, get details about any efforts made to assess possible entry. For example, did the witness’s/respondent’s company actually do a study of entry? If so, how extensive was the study? Did the firm actually try to enter? If so, elicit detailed information about the attempt to enter. If the firm has not tried to enter or studied the question, find out the witness’s/respondent’s basis for her view about possible entry.
3. **Do not accept conclusory statements.** It is impossible to know how much weight to give unsupported conclusions. Always push the witness/respondent to give, or draft requests for information to obtain, detailed support for her views. For example, before asking a witness/respondent if she would switch from Product A to Product B in response to a 5% price increase, determine how and why Product A is used instead of alternative products. What advantages does the customer realize in using Product A? If it is an intermediate product, what is its cost share in the products in which it is used and how would the quality or quantity of the end product be affected if Product A were not used? How would the price and demand for the end product be affected if a change in the price of Product A were passed through? After asking such questions, then test demand elasticity by asking how customer would respond to a 5% price decrease.
4. **Open-ended questions usually are best: who, what, why, when, where, how.** Non-leading

questions are most likely to elicit the witness's/respondent's positions in his or her own words, as well as to develop important information about the basis for the witness's/respondent's views. The exception to this rule is in cross-examinations of oral witnesses where leading questions can be necessary.

5. **Consider requiring a witness's/respondent's relevant documents and data.** In the interview/request, ask about business records or data that would support or undermine the witness's/respondent's testimony. If the witness/respondent is important, you should consider compelling production of documents relevant to the testimony, including documents (including e-mails) that the witness/respondent herself authored. A witness's/respondent's credibility may be undermined by previous writings that are inconsistent with her present testimony. Conversely, a witness's/respondent's credibility may be enhanced by previous writings that are consistent with the present testimony.
6. **Determine if the witness/respondent speaks for the company.** Different persons or groups within any large business may hold different views. It may be risky to assume that, because one employee said something in an interview, you have a reliable statement of that company's position.
7. **Consider bias.** Does the witness/respondent have an "agenda" that may be affecting his response? Of course, the parties to the transaction have an obvious bias—to convince the government that the transaction poses no competitive risk. Other witnesses/respondents may have other biases that may affect their credibility.
8. **When in doubt about oral evidence, get a sworn or signed statement or sworn testimony.** Often a witness's/respondent's blithe and confident position during the interview becomes tentative and qualified when delivered in a more formal way.
9. **Make sure that the witness/respondent is aware of the potential sanctions for supplying incorrect information.** Where possible, consider applying measures that would trigger/increase these sanctions (e.g., statements under oath, questions probing further) in case of doubts about the reliability of the information

provided.

### **Reliable and Unreliable Quantitative Analyses – A Few Suggestions**

9. **Use quantitative analysis when appropriate.** As computing power and the quantity and quality of available data has grown, quantitative analysis has become increasingly important in merger investigations.
  - For example, in cases involving differentiated consumer products, economists may attempt to estimate potential effects of the transaction on consumer prices by analyzing scanner data to estimate retail demand elasticities.
  - But useful quantitative evidence does not always involve complex statistical or economic analysis. It may involve something as simple as sorting customer databases by customer size, location of customer, or types of products sold, by customers, to reveal important customer characteristics.
  - Quantitative analysis is most useful when its conclusions are corroborated by documentary and oral evidence.
10. **Use an economist.** It is impossible for a layperson to do an adequate analysis of data or to assess the reliability of the parties' analysis in a merger investigation. On any matter in which quantitative analyses may be at issue—and that's most significant matters these days—use an economist with appropriate expertise and experience.
11. **Do not blindly accept the parties' or third parties' representations.** Do not accept without verification the parties' or third parties' representations about any analysis they have done. If the parties want you to accept and rely on their analysis, require them to produce their data, programs, and results in full. Your economist should be able to understand and replicate the parties' analysis before you rely on it.
12. **Maintain a healthy skepticism about the reliability of numerical analysis.** If statistical or econometric evidence is plainly inconsistent with basic economic theory, the great weight of other evidence, or common sense, that may mean there are serious problems in the data or the techniques applied to it or, especially, the assumptions involved.
13. **Carefully scrutinize the assumptions underlying any study and the reliability of the data.** No set of data is perfect, and no economic analysis is better than the assumptions from which it proceeds and the data on which it is based. Be careful if you do not know how the parties generated the data for their analysis. Make sure you are aware of any limitations in the

data. For example, price data may be based on only a few transactions or may not reflect rebates or discounts and thus may not reflect the true prices that customers pay.

14. **Remember that you cannot beat something with nothing.** If the parties are performing an econometric analysis, it is critical that you have your own economic staff look at the available data. Even if your economic staff is unable to produce a study that the agency can sponsor, it should be able to assist you in determining whether the parties' study is reliable. In litigation, if the parties produce a study, the agency must produce its own study or be positioned to attack and undermine the parties' analysis.
15. **Be wary of unsound data analysis.** Shortcomings may include:
  1. Failing to gather or use available and pertinent market data;
  2. **Undocumented or unjustified data transformations and arbitrary elimination of extreme observations**
  3. Ignoring or failing to account for alternative hypotheses and explanations for market conditions;
  4. Applying antitrust guidelines in an overly mechanical manner;
  5. Applying an accepted methodology in an unacceptable manner or in a way that has not been subjected to scholarly comment and peer review;
  6. Applying methodologies that are simply improper or unsound;
  7. Failing to adequately define important factors, such as the relevant market; and
  8. Making assumptions or conclusions that are inconsistent with the other evidence or with the demonstrable economic reality of a market.

### **Reliable Expert Economists – A Few Suggestions**

1. **External economic experts may be important or even crucial in merger cases.** Given the value of economic evidence in merger cases, it is important to have capable and persuasive economic experts.
2. **Be critical about what you consider to be reliable economic expert testimony.** Review aggressively all aspects of economic testimony to identify potential flaws. Do not hesitate to

exclude from evidence an economist's testimony found to be of insufficient reliability.

3. **Use care in selecting your expert.** Hire experts with the training and experience to handle the specific economic tasks you need them to do. For complex data analysis and modeling, you should look for an econometrician. If industry expertise is important to your case—for example, in a highly regulated industry such as telecommunications—hire an economist with experience in your industry. Consider using two specialized experts, each of whom could deliver a strong economic report or testimony on a portion of the case, rather than using one generalist who could address all issues, but none in sufficient depth.
4. **Make sure that your expert has substantial direct involvement in any economic analysis on which he relies for his opinions.** Your expert must personally do or supervise the analysis required to support the opinion about which she is to testify. Any expert that simply adopts the work of others risks having his evidence excluded altogether. A serious time commitment from the expert may be required as a result.