



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

**DAF/COMP/WD(2008)14
For Official Use**

ROUNDTABLE ON MARKET STUDIES

-- Note by the United States --

This note is submitted by the Delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 11-12 June 2008.

JT03246706

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

Introduction

1. The U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice (the “Antitrust Agencies”) are primarily responsible for enforcing the U.S. antitrust laws. The Antitrust Agencies complement their enforcement work with a wide variety of additional activities designed to promote competition, such as research and reports, workshops, advocacy filings, *amicus curiae* briefs, and testimony before Congress. This policy work helps inform the Antitrust Agencies and others about emerging legal and economic issues affecting competition enforcement. Through this “competition research and development,” the Antitrust Agencies maintain their expertise and share important information with other policymakers, the antitrust bar, businesses, and the general public.

2. Market studies are one of the Antitrust Agencies’ most important policy tools.¹ As Federal Trade Commission Chairman Kovacic has observed, “[e]mpirical research facilitates the creation of what might be called ‘economic precedents’ – economic studies that demonstrate the validity of a hypothesis and, like legal precedents, can be invoked over time to support specific policy interventions.”² While market studies provide valuable information to the Antitrust Agencies and to the public, they also require significant resources and must be conducted rigorously in order to produce useful results.

3. The Antitrust Agencies have conducted some studies jointly to take advantage of the Agencies’ collective experience and to coordinate their policy positions.³ For example, the Antitrust Agencies’ 2004 health care report analysed new forms of health care financing and delivery, including new forms of joint ventures and consolidation by physicians and hospitals.⁴ Another example is the Antitrust Agencies’ report examining the nature of competition in the real estate brokerage industry, which included discussion of the structural characteristics of the industry, the recent growth of non-traditional brokerage models, the impact of the Internet on consumers of brokerage services, and obstacles to a more competitive environment.⁵

4. Based on its statutory authority, the Federal Trade Commission (“FTC” or “Commission”) has also conducted a significant number of studies independently. The Federal Trade Commission Act (“FTC Act”) explicitly authorises the Commission to “gather and compile information concerning . . . the organisation, business, conduct, practices and management” of persons and of corporations. 15 U.S.C. § 46(a). President Woodrow Wilson, in his recommendation for the creation of the FTC in 1914, saw the new commission as “an indispensable instrument of information and publicity . . . as a clearing house for

¹ Information about Federal Trade Commission reports, as well as the reports themselves, are available to the public at <http://www.ftc.gov/opp/reports.shtm>.

² William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861, 865 (2005).

³ See, e.g., <http://www.usdoj.gov/atr/public/reports/index.htm> for the text of such reports.

⁴ FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), available at <http://www.ftc.gov/bc/healthcare/research/healthcarehearingreports.htm>. In this report, the Antitrust Agencies analysed the role of competition in the health care industry and made a number of joint recommendations for industry participants and government regulators.

⁵ FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (Apr. 2007), available at <http://www.ftc.gov/opa/2007/05/realestate.shtm>. The report included a recommendation that the Agencies and industry regulators consider the feasibility of conducting an empirical study of the brokerage industry.

the facts by which both the public mind and the managers of great business undertakings should be guided.”⁶ It has been observed that “the gathering of information and its dissemination has long been one of the chief justifications for the existence of the Federal Trade Commission.”⁷

5. The Antitrust Division lacks the statutory authority held by the FTC to issue compulsory process solely to conduct industry studies. As a result, the Antitrust Division has independently conducted very few industry studies in recent years. However, the Division can and does on occasion examine particular industries without using compulsory process. Two recent examples are the Telecommunications Symposium it held in November 2007 and the Workshop on Airline Competition that it will hold in October 2008.⁸

6. This paper focuses on how the Antitrust Agencies select industries to study and how they make use of market studies, the relationship between enforcement actions and market studies, and mechanisms for collecting data. The paper also describes the legal requirements for conducting studies. Given the FTC’s special history and role in developing such studies, most of the examples provided are FTC projects.

2. Selection of Industries to Study and Use of Market Studies

7. The Commission often initiates studies at the request of the U.S. Congress, the President, and Congressional oversight committees. Many of the FTC’s early studies were responses to Congressional requests. In 1916, the FTC published a Congressionally-mandated “Report on Cooperation in American Export Trade,” which explained problems that U.S. firms encountered in competing with foreign businesses.⁹ The report led in large part to the passage of the Webb-Pomerene Export Trade Act of 1918, which allows associations of U.S. producers to engage in cooperative activities solely for the purpose of export trade.¹⁰ Another example is the FTC’s “blue sky” work and its disclosure of securities issues abuses, which “played a role in heightening Congress’ perception of the need for securities industry regulation, leading to the Securities Act of 1933.”¹¹

8. Although these requests determine to some extent the scope of an inquiry, the FTC refines further the focus of the study in light of the substantial cost of undertaking a study and other considerations. Agency personnel must spend time carefully designing a study so that it yields useful results. Gathering data often involves a significant commitment of agency resources, and data can be costly to obtain from outside sources. There is also a burden on industry and the public when they receive a request to supply

⁶ H.R. Doc. No. 625, 63d Cong., 2d Sess. 6 (1914).

⁷ See William Breit and Kenneth G. Elzinga, “Information for antitrust and business activity: line of business reporting,” in *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 98 (Kenneth W. Clarkson & Timothy J. Muris eds. 1981).

⁸ See generally <http://www.usdoj.gov/atr/events/htm>.

⁹ See John F. McDermid, “*The Antitrust Commission and the Webb-Pomerene Act: A Critical Assessment*,” 37 WASH. & LEE L. REV. 105, 108 (1980).

¹⁰ FEDERAL TRADE COMMISSION, OFFICE OF POLICY PLANNING, HISTORY OF SECTION 6 REPORT-WRITING AT THE FEDERAL TRADE COMMISSION 10-12 (Apr. 1981), available at <http://www.ftc.gov/be/econrpt.shtm>.

¹¹ F.M. Scherer, “*Sunlight and Sunset at the Federal Trade Commission*,” 42 ADMINISTRATIVE LAW REVIEW 461, 467-68 n.32 (1990) (citing Stevens, *The Federal Trade Commission’s Contribution to Industrial and Economic Analysis: The Work of the Economic Division*, 8 GEO. WASH. L. REV. 545, 564 (1940); Oppenheim, *Foreword*, 8 GEO. WASH. L. REV. 249, 272-73 (1940); M. GREEN, B. MOORE, JR., & B. WASSERSTEIN, *THE CLOSED ENTERPRISE SYSTEM* 369 (1972)).

information to the agency. Analysing the data, preparing the report, and having it reviewed internally frequently require a full-time effort by many agency employees. These costs need to be considered as part of an agency's calculus in deciding when and whether to conduct particular market studies and in determining what industries to study.

9. For example, in May 2006, the Commission completed an extensive, Congressionally-mandated investigation to determine whether gasoline prices were being affected by "manipulation" and to determine whether "price gouging" occurred following Hurricane Katrina.¹² The investigation included the full-time commitment of a significant number of attorneys, economists, financial analysts, and other personnel with specialised expertise in the petroleum industry. As described in the following section, the FTC obtained substantial information from industry. Even with this commitment of resources, it was not possible to study every pricing and output decision in this very complex industry. Thus, the FTC used its knowledge and expertise from previous investigations and studies, as well as the concerns raised by knowledgeable observers and market participants about competition in the industry to focus on levels of the industry and parts of the country where problematic behaviour was most likely to have occurred and to have had an effect on consumers.¹³

10. The Antitrust Agencies also conduct studies on their own initiative, which frequently build on experience the Agencies have gained in enforcement matters. The Antitrust Agencies target their resources by focusing on aspects of industries that are of particular importance to consumers, such as petroleum, health care, and real estate. For example, the FTC's Bureau of Economics prepared a staff report that analysed structural changes in the petroleum industry such as the large mergers in the late 1990s.¹⁴ As that report explained, technological, economic, and regulatory factors spurred the transformation of the industry. The report concluded that most sectors of the petroleum industry remain unconcentrated or moderately concentrated, and that an increase in concentration due to a merger is not sufficient to find that a merger was anticompetitive. As detailed in the report, the FTC has challenged mergers or required divestitures when it has concluded that a merger is likely to reduce competition.

11. The Antitrust Agencies may also focus on dynamic industries that are rapidly changing. In this regard, the FTC's report on the relationship between the antitrust and the patent laws gave special attention to pharmaceuticals, biotech, computer hardware, software, and the Internet.¹⁵ Similarly, FTC staff issued a report on broadband connectivity that responded to the recent "net neutrality" debate relating to Internet

¹² FEDERAL TRADE COMMISSION, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES (Spring 2006), *available at* http://www.ftc.gov/ftc/oilgas/competn_reports.htm.

¹³ Other Congressionally mandated reports include FEDERAL TRADE COMMISSION STAFF REPORT, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES (Mar. 2004), *available at* <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>, and FEDERAL TRADE COMMISSION, ACCOUNTING FOR LAWS THAT APPLY DIFFERENTLY TO THE UNITED STATES POSTAL SERVICE AND ITS PRIVATE COMPETITORS (Dec. 2007), *available at* <http://www.ftc.gov/os/2008/01/080116postal.pdf>.

¹⁴ FEDERAL TRADE COMMISSION, BUREAU OF ECONOMICS STAFF STUDY, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT (Aug. 2004), *available at* http://www.ftc.gov/ftc/oilgas/competn_reports.htm.

¹⁵ FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 2003). The Antitrust Agencies recently issued a joint report regarding competition issues raised by activities involving intellectual property rights, DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (Apr. 2007). Both reports are *available at* <http://www.ftc.gov/bc/tech/property/reports.htm>.

access.¹⁶ Likewise, the Antitrust Division intends to produce a report based upon what was learned in its 2007 Telecommunications Symposium.¹⁷

12. The FTC's attempt in the 1970s to study a broad swath of the economy was less successful. The agency initiated in 1973 a "Line of Business" program that was intended to address a long-perceived need for systematic financial data. The data were collected from accounting categories that would typically appear on a firm's income statement or balance sheet. The program required special accounting for about 260 industry categories by 460 large U.S. manufacturing and distribution firms that collected and reported data on over 4,000 lines of business. The data were much more disaggregated than those collected at the standard firm or business unit levels. A staff of FTC accountants, research analysts, and economists devised the rules for collecting the data and provided various quality controls.

13. The requirements for special accounting systems, confidentiality needs, and the likely fear that the data would later be used against them in legal proceedings made this program very controversial among the firms. Firms strongly resisted efforts to initiate the program, with more than 100 surveyed companies suing to enjoin the collection of the 1973 data. Litigation over the collection of data continued from 1975 to 1978, and data were ultimately collected for 1974 through 1977. The project was also criticised by academic commentators, who focused on data collection and accounting problems that might make the data of relatively little use.¹⁸

14. In 1981, the Commission suspended the data collection program and, in 1984, voted to terminate the program without issuing a report. FTC economists analysed the data through the mid-1980s, and consultants were given access to the data for academic research. Since then, however, the FTC has not conducted any economy-wide studies, instead targeting its resources by focusing on aspects of particular industries.

15. The Antitrust Agencies do not systematically examine prices in particular industries. One exception is the FTC's monitoring of retail and wholesale prices of gasoline and diesel fuel.¹⁹ FTC staff monitors gasoline and diesel prices to identify "unusual" price movements and then examines whether any such movements might result from anticompetitive conduct that violates the antitrust laws. FTC economists developed a statistical model for identifying such movements. The agency's economists regularly scrutinise price movements in 20 wholesale regions and approximately 360 retail areas across the country. The staff reviews daily data from a private data collection agency, and receives information weekly from the public gasoline price hotline maintained by the U.S. Department of Energy ("DOE"). The staff monitoring team uses an econometric model to determine whether current retail and wholesale prices are anomalous in comparison to the historical price relationships among cities.

¹⁶ FEDERAL TRADE COMMISSION STAFF REPORT, BROADBAND CONNECTIVITY COMPETITION POLICY (June 2007), available at <http://www.ftc.gov/bc/tech/cable/broadband.htm>.

¹⁷ See <http://usdoj.gov/atr/public/workshops/telecom2007/index.htm#report>.

¹⁸ See Breit and Elzinga, *supra* n. 7. After the program was terminated, a former FTC Bureau of Economics director defended the program, see Scherer, *supra* n. 11, at 477-79 (1990). For a discussion of the program more generally by its key proponents in the 1970s and early 1980s, see *FTC History: Bureau of Economics Contributions to Law Enforcement, Research, and Economic History and Policy, Roundtable with Former Directors of the Bureau of Economics*, Transcript at 205 – 213 (Sept. 4, 2003), available at <http://www.ftc.gov/be/workshops/directorsconference/index.shtm>.

¹⁹ See Federal Trade Commission, *Gasoline and Diesel Price Monitoring*, available at http://www.ftc.gov/ftc/oilgas/gas_price.htm.

16. The Antitrust Agencies rely on market studies as an effective tool for advocating regulatory and legislative reform. In the pharmaceutical industry, a number of recommendations from the FTC's report on generic drugs have been implemented.²⁰ As a result of those recommendations, the Food and Drug Administration revised its regulations for approving generic drugs and which patents can be listed with that agency. In addition, the Medicare Act passed by Congress in 2003 incorporates key FTC recommendations to facilitate entry of generic drugs and requires that the FTC be notified of certain agreements between branded and generic drug firms. The 2003 Medicare Act also instructed the FTC to perform another market study, this time of vertical integration between pharmacy benefit managers and mail-order pharmacies, based on the Commission's experience with the industry obtained while reviewing numerous mergers.²¹ The FTC's study of competition in the contact lens industry, as well as the joint FTC/DOJ study of competition in the real estate brokerage industry, also have served as the foundation for advocacy filings with state legislators and testimony before the U.S. Congress. The Antitrust Division has also authored a number of in-depth studies of the competitive performance of various regulated industries, including airlines, insurance, milk marketing, ocean shipping, and numerous energy industries.²² The purpose of these reports was to create greater public awareness of the costs of regulation and thereby to encourage greater consideration of the benefits of competition and of market-based solutions when crafting or revising regulations and/or legislation.

3. Relationship between Enforcement and Market Studies

17. The Antitrust Agencies do not use market studies as a substitute for conducting investigations and initiating enforcement, but there are some important complementarities between the Antitrust Agencies' enforcement actions and their market studies. The Agencies frequently decide to study markets in which they have long-standing expertise based on past enforcement actions. This expertise gives the Agencies a significant advantage in targeting their resources to the most fruitful avenues of inquiry.

18. The Antitrust Agencies build a substantial base of knowledge relating to specific industries in the normal course of enforcing the competition laws. That knowledge is naturally focused most directly on the firms, geographic markets, product segments, and business practices that create the competitive concern leading to a potential enforcement action. Market studies can be useful for expanding that knowledge to allow for a better understanding of proposed laws or regulations. They also help to foster an understanding of the market that can allow future antitrust investigations in the market to focus more quickly on potential problem areas.

19. On some occasions, the FTC's studies of particular industries have also instigated important enforcement matters. In 1949, the FTC began an intensive investigation of cartels in the international petroleum industry. Its report concluded that concentration in that industry was "probably more

²⁰ FEDERAL TRADE COMMISSION, *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY* (July 2002), available at <http://www.ftc.gov/bc/healthcare/research/healthcarehearingreports.htm>.

²¹ FEDERAL TRADE COMMISSION, *PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES* (Aug. 2005), available at <http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf>.

²² See, e.g., *Competition in the Oil Pipeline Industry: A Preliminary Report* (1984); *Competition in the Coal Industry* (1983); *Antitrust Advice on the License Application of the Texas Deepwater Port Authority* (1979) (pursuant to Section 7 of the Deepwater Port Act of 1974); *Outer Continental Shelf Federal/State Beaufort Sea Oil and Gas Lease Sale No. BF* (1980); *1985 Report of the Department of Justice to Congress on the Airline Computer Reservation System Industry* (1985).

widespread. . . . than in any other field of enterprise.”²³ The report led the DOJ in 1952 to initiate a criminal investigation of the oil industry.²⁴ More recently, initiatives such as the gasoline and diesel price monitoring project have unveiled information that has led to investigations and enforcement actions. FTC staff have followed up on observations of anomalous pricing patterns to examine bulk supply and demand conditions and practices for gasoline and diesel fuel in the Pacific Northwest. In the pharmaceutical sector, information collected for the FTC’s generic drug study was later used for several enforcement matters.²⁵

20. Typically, however, the Antitrust Agencies do not use studies as the basis for enforcement actions. In connection with the FTC’s current study of authorised generic pharmaceutical drugs, the agency has stated that it “would not exercise its enforcement authority solely on the basis of information collected in response to the [compulsory process] Orders. Rather, it would do so only after gathering additional information from a company and/or other sources through an investigation separate from the proposed study.”²⁶ For the Antitrust Agencies’ study of the real estate industry, there was a strict separation between staff conducting the study and staff conducting formal investigations of anticompetitive practices of groups of real estate brokers. Information obtained from the formal investigations was not used for the Antitrust Agencies’ report. This division between the Antitrust Agencies’ enforcement and policy functions has likely increased the willingness of firms to supply information to the Agencies.

4. Sources of Data

21. As suggested by the examples above, the Antitrust Agencies use data from a variety of sources. The FTC Act provides the agency with formal powers to collect information for studies, as discussed below. The DOJ Antitrust Division does not have formal powers that are specifically intended for studies, and thus uses other methods of gathering data. The choice of data collection methods depends on, among other things, the type of study being conducted, particular characteristics of the industry being studied, the level of agency resources devoted to the study, and time constraints for completion of the study. The choice of data is also influenced by legal requirements that apply to all federal agencies which involve how agencies collect data, the purposes for which data can be collected, and mechanisms for ensuring that information disseminated by agencies meets certain quality standards. Those legal requirements are discussed in the next section.

22. There are several types of formal compulsory process that the FTC can use to obtain data for a study. With each type, the recipient of compulsory process is entitled to object to the information request through a mechanism that can ultimately reach the full Commission and is appealable to the courts. If a party fails to comply with the compulsory process, the Commission may seek enforcement of the request in a federal district court. The FTC must balance the advantages of using formal information requests with the costs of formulating the requests, obtaining agency approval for issuing them, and litigating any challenges to the requests.

²³ BURTON I. KAUFMAN, *THE OIL CARTEL CASE: A DOCUMENTARY STUDY OF ANTITRUST ACTIVITY IN THE COLD WAR ERA* 29 (1978).

²⁴ *Id.* DOJ eventually brought civil suits against marketing and pricing agreements, which were settled by consent decree.

²⁵ “*More than Law Enforcement: The FTC’s Many Tools – A Conversation with Tim Muris and Bob Pitofsky*,” 72 *ANTITRUST L.J.* 773, 777 n.1 (2005) (citing as examples *Bristol-Myers Squibb Co.*, No. C-4076 (Apr. 14, 2003) (consent order); *FTC v. Perrigo Co. & Alpha Pharma Inc.*, No. 04-1397 (D.D.C. Aug. 25, 2004) (consent orders)).

²⁶ 72 Fed. Reg. 25304, 25312 (May 4, 2007). Authorised generics are generic drugs sold by, or on behalf of, the branded manufacturer.

23. Compulsory process obligates recipients to produce the data in the format required by the Commission. Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), empowers the Commission to require the filing of “reports” or “answers in writing to specific questions” for the purpose of obtaining information about “the organisation, business, conduct, practices, management and relation to other corporations, partnerships, and individuals” of the entities to whom the inquiry is addressed. In addition, the Commission is authorised to issue “civil investigative demands” – which are similar to subpoenas – to investigate possible antitrust and consumer protection violations. This form of compulsory process, like orders issued under Section 6(b), may require the recipient to “file written reports or answers to questions.” 15 U.S.C. § 57b-1(c)(1).

24. The Antitrust Agencies may also use information that is voluntarily supplied by firms, that they purchase from third parties, or they obtain from other government agencies. The information the FTC collected for the 2006 report on gasoline price manipulation and post-Katrina gasoline price increases illustrates the use of many different types of sources. Staff conducted more than 65 voluntary interviews with industry participants and representatives of state and federal agencies, and also conducted investigational hearings (similar to depositions) of industry officials. Staff gathered quantitative data from several sources. The Commission issued 139 civil investigative demands to a wide spectrum of petroleum industry firms. The Commission also issued 99 orders pursuant to Section 6(b) of the FTC Act. In addition, the Commission used firm-level data supplied by the Department of Energy and purchased a large volume of wholesale and retail pricing data from a private data collection company.

25. The FTC occasionally obtains quantitative data through the use of voluntary requests (voluntary access letters) to industry.²⁷ The Commission’s recent study of the effects of credit-based insurance scores on the availability and affordability of automobile insurance illustrates the advantages and disadvantages of relying solely on voluntarily provided data.²⁸ For that Congressionally mandated study, FTC staff obtained access to automobile insurance policy data provided voluntarily by five firms representing 27% of the United States automobile insurance market in 2000. Three Commissioners issued a joint statement accompanying the report that explained the data and methodology used for the report.²⁹ One Commissioner dissented from the report and criticised the agency’s decision to use information obtained voluntarily rather than through compulsory process. Commissioner Harbour concluded that there were several deficiencies in the data, such as that “the data cannot be independently verified to determine whether any bias was introduced during the selection process” and that the “data did not contain critical elements on individual policyholders.”³⁰ As a result, she “doubt[ed] the reliability of any conclusions the report might draw.”³¹ Several consumer groups criticised the report’s conclusions and also expressed concern that the FTC would use the same type of voluntarily-provided information for a similar study on the impact of credit-based insurance scores on the availability and affordability of homeowners

²⁷ Voluntary access letters were used for the FEDERAL TRADE COMMISSION STAFF REPORT, THE USE OF SLOTTING ALLOWANCES IN THE RETAIL GROCERY INDUSTRY (Nov. 2003), *available at* <http://www.ftc.gov/opa/2003/11/slottingallowance.shtm>.

²⁸ FEDERAL TRADE COMMISSION, CREDIT-BASED INSURANCE SCORES: IMPACTS ON CONSUMERS OF AUTOMOBILE INSURANCE (July 2007), *available at* <http://www.ftc.gov/opa/2007/07/facta.shtm>.

²⁹ Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch, *available at* <http://www.ftc.gov/opa/2007/07/facta.shtm>.

³⁰ Dissenting Statement of Commissioner Harbour at 4, *available at* <http://www.ftc.gov/opa/2007/07/facta.shtm>.

³¹ *Id.* at 1.

insurance.³² In response, the Commission has approved a resolution authorising the use of compulsory process to obtain homeowners' policy information from insurance companies.³³ The Commission has placed on its website a draft model order and is seeking comment from the public.³⁴ The Commission has noted, however, that it expects the use of compulsory process to delay its completion of the report.³⁵

26. Some studies draw upon hearings and workshops that gather knowledge from informed outsiders.³⁶ The Antitrust Agencies use hearings "to obtain the current thinking of business operators within the profession about developments that bear upon the formulation of competition policy."³⁷ In addition, the Agencies can "invite academics to present the results of empirical or theoretical work and to help guide the formulation of the agency's own research agenda and to encourage academics to consider research programs that might be of interest to the competition policy community."³⁸ Policy-makers from other federal and state agencies also frequently share their views in these proceedings.

27. For example, in 2003 the Antitrust Agencies conducted 27 days of joint hearings on the health care industry.³⁹ The hearings gathered testimony from approximately 250 panellists, including representatives of various provider groups, insurers, employers, lawyers, patient advocates, and leading scholars. The Antitrust Agencies also sponsored a workshop and received 62 written submissions from interested parties. The resulting report made a number of joint recommendations to improve competition in health care markets and provided the Agencies' perspective on several antitrust enforcement issues. The FTC recently held a workshop on innovation in health care delivery to update its knowledge on developments since the 2003 workshop.⁴⁰

28. Shorter workshops are typically used to provide the agency and others with a preliminary assessment of an industry. The FTC's report on broadband connectivity was based on a 2-day workshop and voluntary interviews with and submissions by industry, consumer groups, and other interested parties. Staff supplemented this information with its own research, which relied on scientific and legal journal articles, as well as government reports and studies. The report looked at national trends in the provision of Internet access but was not intended to analyse local markets, which would have required a far more sweeping inquiry. The Antitrust Division held a Telecommunications Symposium in 2007 to address the

³² Prepared Statement of the Federal Trade Commission, "*Credit-Based Insurance Scores: Are They Fair?*," before the Subcommittee on Oversight and Investigations, House Committee on Financial Services (Oct. 2, 2007), available at http://www.ftc.gov/os/testimony/P044804_Credit-based_Insurance_Scores.pdf.

³³ *FTC Seeks Public Comments on a Model Order to Obtain Data for Study of the Effect of Credit-Based Insurance Scores on Consumers of Homeowners Insurance*, available at <http://www.ftc.gov/opa/2008/05/comprofyi.shtml>. See also Prepared Statement of the Federal Trade Commission, "*The Impact of Credit-Based Insurance Scoring on the Availability and Affordability of Insurance*," before the Subcommittee on Oversight and Investigations, House Committee on Financial Services (May 21, 2008), available at <http://www.ftc.gov/os/2008/05/080521creditbasedtest.pdf>.

³⁴ *FTC Seeks Public Comments on Model Order*, *supra* n. 33.

³⁵ "*Credit-Based Insurance Scores: Are They Fair?*," *supra* n. 32, at 9.

³⁶ A list of workshops and conferences, along with relevant materials, is available at <http://www.ftc.gov/ftc/workshops.shtml>.

³⁷ Kovacic, *supra* n. 2, at 866.

³⁸ *Id.*

³⁹ Materials from the hearings are available at <http://www.ftc.gov/bc/healthcare/research/healthcarehearing.htm>.

⁴⁰ See <http://www.ftc.gov/bc/healthcare/hcd/index.shtml>.

current state of competition and likely future developments in providing voice, video, and broadband services to consumers, and will hold a workshop on airline competition later this year.

29. Gathering information through workshop testimony can provide a useful overview of a particular industry and help discern important competition and consumer protection issues related to its operation. Also, interviews with industry participants can help to identify other sources of information that could be used to address questions of interest. Objective data, whether obtained through compulsory process or voluntary means in some cases, collected by the Antitrust Agencies themselves, such as the price survey in the study of the strength of competition in the contact lens industry, or purchased from outside sources, provide a more reliable basis for policy-making than do purely anecdotal data. On the other hand, these data are usually more costly to obtain. Moreover, as noted above, even quantitative data can be open to criticism, so the strongest studies incorporate a variety of types of information.

5. Procedural Requirements

30. The Antitrust Agencies follow a number of best practices when conducting a study, some of which are based on legal requirements applicable to most federal agencies. The Agencies typically announce publicly that they are considering initiating a study and frequently provide an opportunity for the public to provide comments on how the study should be conducted. Information in the Antitrust Agencies' reports is normally subject to one or more levels of internal staff, supervisory, or formal agency review for quality before the information may be disseminated. Once a study is completed, the report is made available to the public.

31. There is no standard procedure for setting a timetable for a study. Often the request for a study will come with a corresponding deadline. The amount of available time will frequently determine the scope of the study. The principal authors of the study will work backwards from the deadline, estimating the amount of time needed for a number of tasks, potentially including: printing for public distribution; final review and approval; final editing; incorporating feedback from within the agency; drafting; document and data analysis; document and data acquisition; obtaining approval of data acquisition methods; initial feedback from the public; initial study design; interviews of industry participants and experts; and internal discussions and initial planning. The amount of time allotted to each task depends on many factors, and flexibility is often required due to unanticipated complications.

5.1 Confidentiality and Transparency

32. The Antitrust Agencies' authority to disseminate information is subject to legal restrictions or limitations applicable to the disclosure, use, or transfer of information that it collects or maintains.⁴¹

33. The Antitrust Agencies seek to publish the results of their studies in as broad and as prompt a manner as possible, consistent with applicable disclosure restrictions. The FTC aggregates and anonymises the data so that trade secrets and other confidential commercial or financial information will not be disclosed. The Freedom of Information Act, 5 U.S.C. § 552, also establishes an effective statutory right of public access to federal agency information, unless confidentiality protections or other exemptions apply.

⁴¹ See, e.g., 15 U.S.C. § 57b-2 (b) & (f); 16 C.F.R. § 4.10(d) (information obtained pursuant to compulsory process or in lieu thereof in a Commission law enforcement investigation); 15 U.S.C. § 46(f) (trade secrets and confidential commercial or financial information obtained by the Commission); 15 U.S.C. §§ 1313(c)(3), 1314(g) (information obtained by the Antitrust Division pursuant to compulsory civil process); 15 U.S.C. § 18a(h) (information obtained by the Antitrust Agencies pursuant to Hart-Scott-Rodino pre-merger notification requirements).

5.2 *Paperwork Reduction Act*

34. Studies conducted by the Antitrust Agencies are subject to the Paperwork Reduction Act, 44 U.S.C. §§ 3501-20, which requires federal agencies to inform the public about the nature of the study and requires agencies to “maximise the practical utility of and public benefit from information collected.” 44 U.S.C. § 3504(c)(3)-(4). The Act also requires federal agencies to consider methods of collecting data that reduce the burden on industry members or other suppliers of data. The Act is intended to reduce the burden on companies and individuals of (1) collecting information, including training employees if applicable, (2) preparing information in the format required by the agencies, and (3) if applicable, consulting with a company’s legal department regarding the collection requirements.

35. The Paperwork Reduction Act applies when a federal agency asks similar questions that are directed to ten or more persons or business entities, but does not apply if the agency uses data already prepared by outside entities. The Act does not apply when the agency invites comment from the general public provided that a commenter is not required to supply specific information to the agency. The Act does not apply to subpoenas and other investigatory requests for data or information once a case or file is opened that is directed against a particular party. When the U.S. Congress mandates that the Commission conduct a study, Congress may waive the Act’s requirements when a study must be completed in a short time frame. This was done for the FTC’s study on pharmacy benefit managers, which allowed the agency to quickly issue subpoenas to 20 industry participants.

36. If the Paperwork Reduction Act applies, the agency must submit its plans for collecting the information to the Office of Management and Budget (“OMB”), which is part of the Executive Office of the President and has a role in supervising executive branch agencies. OMB has issued guidelines that cover a wide range of issues such as the agency’s choice of methods for conducting the survey, sampling techniques, modes of data collection, questionnaire design and development, and statistical standards.⁴²

37. The OMB guidelines include criteria for determining when a study will “maximise public utility.” According to those criteria, the agency must “justify why the information is needed and how it furthers the agency’s goals.”⁴³ When appropriate, the agency should “highlight the knowledge gaps that the information collection is designed to address,” and must demonstrate a “direct connection between the information needs and specific research questions.”⁴⁴ The agency must also ensure that the information collected does not duplicate other information available to the agency.⁴⁵

38. The Paperwork Reduction Act imposes a number of procedural requirements on federal agencies. The agency must publish an initial public notice announcing that OMB clearance is being sought, and include a discussion of the general design of the study, the benefits to the public, and an estimate of the anticipated burden in terms of hours and cost. The public has an opportunity to submit comments to the agency on these topics. The agency then publishes a second notice responding to any comments submitted and seeks further comment from the public. At the same time, the agency submits to OMB the sample requests for information, notices, comments, and additional documentation. OMB has up to 60 days to render its decision on the agency’s proposed collection of information and often will provide input on the method of collecting data, the design of the survey, and other issues covered by its guidelines.

⁴² Office of Management and Budget, *Guidance on Agency Survey and Statistical Information Collection*, 9 (Jan. 2006), available at <http://www.whitehouse.gov/omb/inforeg/infocoll.html#PRA>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

39. For example, the FTC sought Paperwork Reduction Act clearance for its ongoing study of authorised generic pharmaceutical drugs.⁴⁶ The study will analyse the likely short- and long-run competitive effects of authorised generics in the prescription drug marketplace. The FTC sought OMB approval for the mandatory information requests it intended to send to brand name, generic, and authorised generic companies. The FTC received extensive comments from industry on ways to reduce the burden of the information requests. In response, the FTC revised its proposed information requests to reduce burden by targeting more narrowly the information required for the study.

40. As the authorised generics study illustrates, the Paperwork Reduction Act furthers the goal of transparency for agency studies. The Commission has a dedicated website specifically for the study, which includes the public notices seeking comment on the study, the comments received, and examples of the OMB-approved mandatory information requests as well as an example of the requested format for providing information. Even when the Paperwork Reduction Act does not apply to a study, the Antitrust Agencies use a transparent process that informs the public about a study and typically provides a forum for the public to comment.

5.3 Information Quality Act

41. The Information Quality Act and OMB guidelines implementing the Act require federal agencies to ensure and maximise the quality, objectivity, utility and integrity of information (including statistical information) that they disseminate. Pursuant to those mandates, the FTC and the DOJ have each issued guidelines that explain how the agency strives to achieve those goals.⁴⁷

42. The FTC's guidelines state that information or data may be subject to public comment or exposure before the agency uses the information. This public comment process provides an opportunity for interested parties, including persons who may be most affected by the dissemination, to corroborate or dispute the objectivity, utility, or integrity of the information. In these cases, the FTC may provide to the public the underlying data or methods the agency uses (e.g., statistical models, assumptions, etc.), to the extent consistent with any confidentiality restrictions.

43. The FTC and DOJ have each outlined an administrative mechanism by which affected persons may seek and obtain appropriate correction of information the agency maintains and disseminates that does not comply with the agency's or OMB's guidelines. Each agency submits to OMB an annual report on the number and nature of complaints regarding agency compliance with the OMB guidelines and how the agency resolved such complaints.

5.4 Federal Advisory Committee Act

44. Federal agencies must comply with the Federal Advisory Committee Act, 5 U.S.C. app. § 1 *et seq.*, which provides that certain advisory committees must be established pursuant to a published determination of need and under a charter filed with the agency's congressional oversight committees. Among other things, the membership of an advisory committee subject to the Act must be fairly balanced with respect to the relevant points of view; meetings must be open to the public; detailed minutes must be kept; and documents considered must be disclosed unless they are exempt from the Freedom of Information Act. The Act does not apply to meetings consisting entirely of employees from federal agencies. In rare circumstances, the FTC relies on a formal advisory committee to provide input into its report.

⁴⁶ Information about the study is available at <http://www.ftc.gov/os/comments/genericdrugstudy3/>.

⁴⁷ The FTC guidelines are available at <http://www.ftc.gov/ogc/sec515/index.shtm>. The DOJ guidelines are available at <http://www.usdoj.gov/iqpr/dojinformationqualityguidelines.htm>.

6. Conclusion

45. The Antitrust Agencies have found market studies to be a valuable component of their policy activities and an important complement to their enforcement work. Market studies provide an opportunity for in-depth analysis of industries that are particularly important to consumers. By using studies as a method of competition research and development, the Antitrust Agencies support their policy activities with well-documented findings.

46. While market studies have many benefits, they should be undertaken carefully and with a clear goal in mind. In the United States, before federal agencies can collect data from industry and others, they must comply with U.S. laws that, among other things, provide the public an opportunity to comment on the design of the study and the method of collecting data. When designing a study, competition agencies should consider the many sources of data available: some sources may be relatively easy to access, while others are more burdensome for the agency, the industry, and the public. The usefulness and reliability of the data should be balanced against the costs of acquiring it, in particular the burden on the industry involved. If a competition agency considers these factors, a study is likely to result in an efficient use of agency resources while also providing useful findings for the formulation of competition policy.