Interview with Alison Oldale, Deputy Director for Antitrust, Bureau of Economics, Federal Trade Commission

Editor’s Note: In July 2011, Alison Oldale was appointed Deputy Director for Antitrust in the Bureau of Economics at the Federal Trade Commission for a one-year term. In this interview with The Antitrust Source, Dr. Oldale discusses competition enforcement in the United States compared to the United Kingdom, the economic analyses that the FTC undertook in several recent investigations and litigations, and the FTC’s priorities in health care markets.

Prior to this position, Dr. Oldale served as the Chief Economist for the UK’s Competition Commission. In addition, Dr. Oldale worked for over ten years as a consultant on antitrust and regulatory matters in Europe and the United Kingdom. Dr. Oldale holds an undergraduate degree from Cambridge University and a Ph.D. in economics from the London School of Economics.

This interview was conducted on April 24, 2012, by Elizabeth M. Bailey for The Antitrust Source.

ANTITRUST SOURCE: You joined the Federal Trade Commission as the Deputy Director for Antitrust in the Bureau of Economics in July 2011. What are your responsibilities in this role?

ALISON OLDALE: Let me start by talking about the role of the Bureau of Economics. I’ll focus on antitrust enforcement. Our input into cases can take a variety of forms. We work with attorneys to develop the theory and evidence during the investigation. The Bureau of Economics (BE) staff makes a recommendation to the Commission about whether to take enforcement action in a case. If the Commission litigates a case, BE will provide economic input and support. In addition, increasingly often the economic expert during trial will be a BE economist. Economists on the investigation team do not serve as trial experts in the same matters and there are procedures to prevent contamination if another staff economist is serving as a litigation expert.

My role is to oversee all this activity. This means I spend a lot of my time working with the staff economists—which I should say is a real privilege. I am sure this is the best group of antitrust economists anywhere. I may also make my own recommendation to the Commission about what action to take in a case. But in any case investigations also involve a lot of coordination with the Bureau of Competition, and with the Commissioners and their offices, so I spend a lot of time working with them as well, on specific cases and on policy and the Commission’s antitrust work more generally.

As a Deputy Director within BE, I am lucky to be part of a great management team of staff managers, Deputies for Consumer Protection and for Research, and of course the Bureau Director (Joe Farrell, when I started, and Howard Shelanski, who is expected to start in July).

ANTITRUST SOURCE: You mentioned there are several other Deputy Directors. How are responsibilities related to economics divided among the different deputy directors?

OLDALE: In addition to antitrust enforcement, BE is involved in consumer protection enforcement. It also conducts background research to learn more about the markets and issues we deal with.
For example, there is ongoing research in the petroleum and in the hospital industries where the Commission has repeated involvement, as well as research on estimating the cost to consumers of pay-for-delay settlements, an issue the Commission has a continued interest in.

The Bureau Director has three deputies to help manage this broad portfolio. I focus on antitrust enforcement. There is a Deputy Director for Consumer Protection who is responsible for enforcement on the consumer protection side. There is also a Deputy Director for Research who coordinates the Bureau's research work.

**Antitrust Source:** Prior to this position at the FTC, you were the Chief Economist for the UK’s Competition Commission. How are your current responsibilities similar or different to the responsibilities in your previous position?

**Oldale:** My responsibilities at the Competition Commission (CC) and the FTC are very similar in many ways. In both places I was and am the line manager for the economists engaged in antitrust case work and am responsible for generally making sure the decision makers have access to useful and reliable economic advice.

The institutions are slightly different in the way that decisions are made and, I think that one of the consequences is that economists at the Competition Commission play more of a role in driving the theory of the case and the framework used to evaluate it.

**Antitrust Source:** What are some other similarities and differences between the FTC and the Competition Commission?

**Oldale:** As background for any comparison between the FTC and CC, I should say that the Competition Commission in the UK is the second phase body. It reviews mergers and markets only if they are referred to it by the Office of Fair Trading (OFT). And the Office of Fair Trading will make a reference only after it has conducted its own investigation and has uncovered issues that require an in depth investigation.

So in that sense the CC is very different from the FTC. Unlike the CC, the FTC has the difficult task of setting priorities and deciding what cases warrant a detailed review. But to me the most interesting difference between the two bodies is that the FTC mostly makes decisions about litigation, whereas the Competition Commission decides cases. And the Competition Commission has to publish written decisions setting out its reasons.

Quite a lot of things seem to flow from this difference. One is the role of economists. At the FTC there are a lot more lawyers than economists. Whereas at the Competition Commission it’s the other way around: there are a lot more economists than lawyers. I am sure that difference has a lot to do with the fact that the CC focuses on the substantive questions of whether a merger harms competition, for example. These questions involve understanding markets and the likely effects on competition of, for example a change in ownership. And economists have a great deal to say about these things. Now the FTC is obviously concerned with getting the right answer to these substantive questions as well. But it has other concerns. Much of the FTC’s work involves deciding whether cases should be litigated, and preparing and conducting litigation. Needless to say these are much more the preserve of attorneys.

Another effect of this difference is on the evidence base. At the FTC there is more emphasis on the documents and what people said. The Competition Commission focuses more on facts that can be established using market evidence about what actually happened. I suspect this differ-
ence is related to the mechanics of trying cases, the role of witnesses in putting evidence before a court, and the relative level of comfort with economic evidence of a court judge here, compared with the decision makers at the Competition Commission.

And there is also an effect on the way that teams interact and the way that initial decisions about whether to challenge are made. When it gets to the end of its statutory deadlines, the Competition Commission needs to have a written decision setting out the reasons for whatever decision it has made. This reasoned decision can be very long, and the parties and others need an opportunity to comment on drafts of it. This all means that the staff team at the Competition Commission essentially starts drafting on day 1 of an investigation. And they all work on the same document. Debate and challenge about how the case is developing is continuous and differences in view get resolved very quickly. At the FTC the decisions about whether to bring an enforcement action are much shorter with just a sketch of the reasons. Debate happens throughout an investigation, but it’s fair to say that it is more concentrated at the end of the process. And a variety of views can be represented right up to the end. At the end of the day, everyone who wants it gets to put their point of view to the Commission.

**Antitrust Source:** Do the economists at the Competition Commission engage in similar economic analyses as those at the FTC?

**Oldale:** Yes, in many ways it’s the same economic analysis. The issues that we deal with in competition policy are about how markets work, how firms interact, what the incentives of the firms are, and how incentives are changed by the activities of the firms. The economic analysis of these issues is pretty similar no matter where you are.

But there are some differences. Economists at the Competition Commission tend to play the leading role in framing the theory of the case and it is often the economists rather than lawyers who take the lead in conducting interviews and reviewing documents at the Competition Commission.

Also, I think that the level of technical economic expertise at the FTC is greater than you would find on average at the Competition Commission. And economists at the FTC more routinely use a broader range of more technical economics to analyze cases.

**Antitrust Source:** Do you think the proposed changes in the UK that would combine the competition agencies provide any lessons for the U.S.?

**Oldale:** I doubt it. Although there are two agencies responsible for competition in both the UK and the U.S., the similarity stops there. In the UK, it’s more of a vertical relationship. The Office of Fair Trading conducts preliminary investigations of mergers and markets, and if it finds issues will refer them to the Competition Commission for an in depth review. And the OFT does some things the Competition Commission doesn’t do: it investigates conduct cases, and plays a role in consumer protection. The efficiencies we would hope for from a merger in the UK would be mostly vertical efficiencies: better coordination of related activities.

In the U.S., the split between the DOJ and the FTC seems to be more horizontal—the two do very similar things and both see a case through from start to finish. Any efficiencies from a merger here would probably depend more on whether there were benefits from being bigger.

**Antitrust Source:** You are the first person coming internationally to hold this position at the FTC. How have you found this experience?
OLDALE: It’s been fabulous. As well as being Chief Economist at the Competition Commission in the UK, I have spent many years in private practice, working mainly in Brussels on cases with DG Comp. So I now have experience of three institutions. It’s really interesting to see how different institutions can do essentially the same job in very different ways. I have to say, as well, that I have really enjoyed living in Washington.

And I’d like to think it’s a useful experience for the FTC as well. Listening to different perspectives is a vital part of good decision making for any competition agency and is one of the strengths of the FTC. I think my different experiences and perspectives, coming from experience of the CC and DG Comp, have added to the mix in a positive way and I hope this has been an experiment that would be repeated not just by the FTC but by other institutions as well.

ANTITRUST SOURCE: You mentioned you worked as a consultant prior to joining the Competition Commission. How does your consulting work inform your work in government?

OLDALE: Seeing the world from the perspective of clients and law firms has definitely helped gain a better understanding of some business realities. I’ve spent a lot of time talking frankly to a lot of people about how their businesses work and what they were trying to achieve by various actions. This is valuable background for an enforcer trying to understand what is going on in settings where frank discussions can be hard and firms are very guarded, and where we are trying to piece things together from the evidence.

ANTITRUST SOURCE: Let’s talk about horizontal mergers. The FTC has had a number of high-profile wins recently, including OSF’s proposed acquisition of Rockford Health System and the ProMedica/St. Luke’s matter. How have the 2010 Horizontal Merger Guidelines informed those investigations?

OLDALE: Let me start by talking about the Horizontal Merger Guidelines in general. It’s broadly right to say there has been no radical change in how we analyze cases arising from Guidelines changes. However, I do feel that there has been some shift in emphasis in the analysis we do engendered by the debate leading up to, and following, the Guidelines revisions. This brought some issues and types of evidence into sharper relief, and some of the FTC’s recent cases have highlighted this.

We’ve just completed the investigation of the Express Scripts/Medco merger.¹ For me, this was a really interesting case. It was very high profile. It started after I came here so I saw the whole process from start to finish. The case itself was challenging and interesting. And it highlights areas of analysis that get greater billing in the revised Guidelines. An initial market share analysis indicated high concentration and suggested that this might be a very problematic transaction. But when we looked at the deal in more detail things weren’t so clear. We looked at what customers of one of the merging firms did if they became dissatisfied and switched to an alternative supplier, and found that they rarely went to the other merging firm. The parties were not particularly close competitors, and notwithstanding the large market shares, unilateral effects were not likely.

The Graco/ITW matter was also very interesting.² This was a merger of manufacturers of com-

ponents for industrial spray painting. There are lots of small components that go into industrial spray finishing lines and the components are highly differentiated. Market definition here was potentially messy. If you read the complaint you'll see that the Commission dealt with this by avoiding a detailed identification of the narrowest markets—as the revised Guidelines emphasized we might sometimes do. Instead of using market definition and shares as the starting point for our analysis we focused more directly on effects, which was much more straightforward in this case. We had data that allowed us to look fairly directly at the switching behavior of customers between the two merging parties, and this showed significant switching within some product categories. You can see this emphasis in the way the complaint is written, with the analysis of effects first and of market definition second.

But there is still work to do. One case where the revisions clearly hadn’t percolated through enough was *Lundbeck*, a case the FTC notoriously lost. The case was about a merger of suppliers of the only two drugs for a particular serious pediatric condition. A key piece of evidence in the judge's opinion revolved around asking a small sample of doctors what they would do if the price of one of the drugs rose. The judge noted that only 1 in 8 of the doctors said they would switch to the other drug, which showed the price elasticity was low, and concluded that drugs were not in the same market. But the real point was that no doctors at all said they would switch to surgery or stop treating the condition. In other words the only alternative to paying the higher price that doctors mentioned was switching to the other drug. So while the elasticity was low, the diversion ratio was really high. And the guidelines emphasize that it is diversion ratios that are most relevant for understanding merger effects.

I do also want to talk about the recent success in the *Rockford* case because, obviously, it's important. This was a case where the FTC challenged a hospital acquisition in Rockford, Illinois, got a preliminary injunction, and the parties dropped the deal. It was an important win, particularly given the current rush to consolidation in health care—it shows the FTC is watching and will challenge anticompetitive mergers that are likely to lead to high prices to payers. But our success there was not really a reflection of the revised merger guidelines. The economists in BE have deep expertise at analyzing the effects of hospital mergers, and this was a critical factor in winning the case.

**ANTITRUST SOURCE:** Are there unique features of the health care industry that affect the types of economic analyses that the FTC performs compared to other industries?

**OLDALE:** There isn’t anything particularly unique about the analysis that we do in the health care industry. It’s true that we tend to do quite a lot of empirical analysis in hospital mergers, but that is due to a combination of things. First, it can be more important than in some other cases because location really matters for how closely different hospitals compete, and basing the analysis of effects on defining geographic markets can be very unreliable in those circumstances. Second, it’s possible to do a more direct analysis of how closely the merging hospitals compete because good data are available. And third, we know just what to do with the data. We have looked at quite a few hospital mergers now and can build on what we’ve done in previous research and in past investigations.

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3 FTC v. Lundbeck, Inc., 2010-2 Trade Cas. (CCH) ¶ 77,160 (D. Minn. 2010), aff'd, 650 F.3d 1236 (8th Cir. 2011).

4 FTC v. OSF Healthcare Sys., 2012-1 Trade Cas. (CCH) ¶ 77,850 (N.D. Ill. 2012).
That said, there really is nothing unique that we do in analyzing hospital mergers. We do merger simulation in those cases and we do merger simulation in other cases. We calculate a form of diversion ratios in hospital cases and we look at the diversion ratios in other cases. We look at efficiency issues in hospital mergers and we evaluate efficiencies in other cases.

**ANTITRUST SOURCE:** What are some of the health care-related antitrust issues that are at the top of the FTC’s agenda?

**OLDALE:** Pay for delay, or reverse payments, in pharmaceuticals remains a very active area of interest at the Federal Trade Commission. I’ve seen quite of a few of these cases now and I am amazed at the complex agreements that rivals enter into in relation to the supply of generics. We will carry on scrutinizing these to make sure they don’t frustrate the benefits of generic competition.

We will watch the effects of accountable care organizations with interest.

**ANTITRUST SOURCE:** How does the FTC think about the potential for accountable care organizations (ACOs) to raise competitive concerns?

**OLDALE:** The Federal Trade Commission along with the Department of Justice’s Antitrust Division published a policy statement talking about ACOs.\(^5\) And this makes it clear that the introduction of ACOs doesn’t herald a revolution in thinking on the basic principles of antitrust or merger control. We acknowledge the potential for ACOs to generate important efficiencies, but also the potential for agreements between competitors in the same market to harm competition and customers. As ACOs start to operate we will gather evidence so we can see how they are working out in practice.

**ANTITRUST SOURCE:** A number of the FTC’s horizontal merger challenges recently have been against consummated mergers. The transaction between ProMedica and St. Luke’s is one such example. What types of economic analyses are useful in evaluating a consummated merger?

**OLDALE:** The big advantage of consummated mergers is that you’ve got a natural experiment and, in some cases, you can actually look to see whether the merger led to a change in prices or resulted in some loss in competition in another dimension. But it’s important to keep in mind that this should not be transformed into requiring evidence of actual effects in order to challenge a consummated merger. We might lack evidence of actual effects, even if they were there, for any number of reasons, including that the data may not be available or the experiment is not sufficiently clean and our empirical techniques are not sufficiently strong to pick up effects. Also, importantly, the parties may be strategically holding the price down. For these reasons it would be wrong to rely only on an empirical analysis of the natural experiment. Rather, we need to bring to bear all the other evidence of the case that we would have collected and all the analysis that we would have done if the merger were being investigated ex ante and hadn’t been consummated. The abil-

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ntity to do the natural experiment as well is just an additional source of information that might help us refine our decisions.

**ANTITRUST SOURCE:** From an economic perspective, are there particular analyses that you tend to find informative as to likely competitive effects of a potential transaction?

**OLDALE:** This is a tricky question because the truth is that I don’t think that we can afford to be choosy. Evaluating a merger is a very difficult and tricky exercise. We try to use whatever we can to provide information about the likely effects, to forecast the but-for world of the future with the merger and without the merger. Cases differ dramatically in what sort of evidence is available, in the institutional features of the markets involved, and in whether price information is reliable. They differ in what the parties have said in their strategic documents and how persuasive that is. So really there are no rules about what evidence is persuasive and what is not in a particular case.

In some of the cases I talked about earlier we had good evidence about what customers did when they switched suppliers, and that evidence was very helpful in understanding the competitive dynamics of the market. There are other cases where internal documents have been really key. In another recent case an analysis of what happened when there was entry was very important. We take what we can get.

**ANTITRUST SOURCE:** How, if at all, have FTC economists incorporated behavioral economics into their approach to merger matters?

**OLDALE:** Behavioral economists are clearly correct in saying that people and firms are not the perfect decision makers using perfect information that they are portrayed to be in many economic models. But alternative models that incorporate better assumptions about behavior and which give us useful ways to understand the likely effects of mergers, or particular types of conduct, aren’t there yet. And in the meantime our existing models give us workable approximations. So we haven’t done much yet, but we’ll keep watching developments.

For myself, I wonder whether the first place behavioral economic analysis might be brought to bear on antitrust enforcement will be in areas like coordinated effects or exchange of information. These are areas where our existing theories are not very helpful. For example when looking at coordinated effects in merger control the standard approach focuses a lot on incentives to coordinate. But there are lots and lots of markets where firms have an incentive to coordinate but they don’t seem to be doing so. So it seems there is a big piece of the puzzle that we are missing, and perhaps behavioral economics will be able to tell us something about what to look at in order to get a better handle when coordination is likely in practice.

**ANTITRUST SOURCE:** Tell us about the research conducted by the Bureau of Economics.

**OLDALE:** BE economists conduct research in many different areas—as you can see from a quick look at the FTC website where you can find our working papers. But if I were to comment on areas of focus, I’d want to mention retrospectives. We have published some really important studies of the effects of mergers, especially amongst hospitals. Our research here was directly responsible for reinvigorating enforcement.

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6 FTC Bureau of Economics working papers are available at [http://www.ftc.gov/be/econwork.shtm](http://www.ftc.gov/be/econwork.shtm).
Which brings me to health care generally—a real area of focus for our research. We have investigated the effects of pay for delay agreements for example, and I mentioned our analysis of hospital mergers. We continue to develop our research agenda here.

Another area of particular interest is IP. The FTC has published reports on standard setting, and we are always on the lookout for ways to learn more.

Thinking more about antitrust policy, I have been particularly interested in my time at the FTC in exclusive dealing, where the Commission has been quite active in investigating cases recently. Analysis of exclusive dealing is a tough area because the economic analysis is very complicated and doesn’t lend itself to easy generalizations and rules. But we still need to give advice on matters. Economists here in the Bureau have been working hard to improve our understanding of the issues.

I have also been interested in how antitrust agencies should view supply contracts. These seem to be coming up as complicating issues in a number of pharmaceutical cases. How should we view these? As a remedy for competition problems? As a way firms can use to suppress competition?

**ANTITRUST SOURCE:** Is there a bright line for thinking about when exclusive dealing arrangements are likely to be anticompetitive?

**OLDALE:** Very tricky. Not yet, but we are working on it.

**ANTITRUST SOURCE:** Thank you. We really appreciate your taking the time to talk with us today.