

# We must improve antitrust tools, says Wright

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On the opening day of the Federal Trade Commission's first hearing on competition and consumer protection, an ex-commissioner called for updating the agency's antitrust "toolbox" to take on new challenges in the economy, but a former top antitrust economist at the Department of Justice said to use the tools at hand.

Joshua Wright – a Republican commissioner at the FTC from 2013 to 2015 and a professor at George Mason University's Antonin Scalia Law School – spoke yesterday about the use of data in determining concentration in the US economy. The FTC should take a hard look at the presumptions that are driving enforcement and old systems of thought with new economic analysis, he said.

The US needs to make a "serious investment both in the academy and the agencies" to improve their tools and be "able to answer better some of the questions that we struggle with now," Wright said.

Specifically, the agencies must start using their hired economists to create the data and studies needed to make informed policy decisions about how much to regulate concentration and what effects it has on the economy, he said.

Only by investing in more knowledge can the agencies make informed decisions on such issues, he said, and warned them to avoid oversimplified fixes.

Wright added that he would like to see more resources reallocated within the agencies to hire more economists, and to study public constraints on competition such as occupational licensing.

However, Yale University professor Fiona Scott Morton, a former deputy assistant attorney general for economics at the Department of Justice's antitrust division, took a different stance.

"I would disagree," she said. "I don't think we need to spend 10 years developing the tools. I think we could start now."

Nothing is wrong with the existing standard or economic analysis, Scott Morton said; the problem comes when you try to apply them.

"If you are in court and the judge is taking the view of recent cases that we have seen, which is either ignoring the facts, ignoring the economic principles or not applying the horizontal merger guidelines... I think that's where the problem comes," she said.

Despite their differences, she and Wright agreed that enforcement needed to adjust to fit the current market structure.

Scott Morton said courts must follow the correct definition of consumer welfare and the horizontal merger guidelines – specifically that a company defending a deal based on efficiencies has to show them to be cognisable, merger specific and beneficial to consumers.

Secondly, she noted that companies increasingly use government processes to protect themselves from competition, then defend this conduct as being protected under the *Noerr-Pennington* doctrine. For example, the FTC recently [defeated](#) a *Noerr* defence proffered by pharmaceutical companies that the agency accused of using sham patent infringement claims to fend off competition from generic rivals.

"I think it would be helpful if someone could figure out a way to adjust *Noerr-Pennington* and similar kinds of laws to make it less possible for incumbents to keep out potential competitors," Scott Morton said.

Yale University professor Steven Berry and Jonathan Baker from the American University Washington College of Law also participated in the panel. The FTC hearings will continue next Friday.