



COUNTRY STUDIES

United States – Updated Report 2004

Introduction

This Report examines the state of competition policy in the United States in 2004. It focuses particular attention on developments since the 1998 “Report on the Role of Competition Policy in Regulatory Reform”, prepared as part of a larger OECD study of regulatory reform in the United States.

Overview

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UNITED STATES - REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

The attached report updates information on the current state of competition policy in United States. It was edited after the Competition Committee discussion (Item VII) in October 2004, which compared experiences in ten countries. It is circulated FOR INFORMATION.

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UPDATED REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

UNITED STATES

1. This Report summarizes the current state of competition policy in the United States. It focuses particular attention on developments since the OECD's 1999 "Report on the Role of Competition Policy in Regulatory Reform" ("1999 Report"), prepared as part of a larger OECD study of regulatory reform in the United States.¹ This report follows the same outline as the 1999 Report, dealing with substantive law, institutions, enforcement process, the law's coverage, and competition advocacy. The recommendations of the 1999 Report and subsequent developments related to their implementation are highlighted in boxes.

2. Competition law in the United States has been restated firmly over the last 35 years in terms of price theory. The prohibitions in the basic antitrust statutes, the Sherman Act, Clayton Act, and Federal Trade Commission Act, are couched in general terms and have remained essentially unchanged for 50 years – the Sherman Act for over a century. Policy evolves through court decisions interpreting the statutes, influenced significantly but not conclusively by the enforcement agencies' priorities and guidelines. Since the late 1970s, the enforcement agencies (the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC)) have emphasised strong action against horizontal price fixing, coupled with close economic analysis of other restraints, monopolisation, and mergers. While government enforcement policies are sometimes perceived as swinging pendulum-like over time between more aggressive and less aggressive postures, a thoughtful alternate interpretation is that the oscillations in approach are more apparent than real and represent incremental adjustments to reflect new learning.² There is no doubt that antitrust policy sophistication has increased, as the enforcement agencies now routinely apply econometric tools and game theory concepts to measuring market reactions and explaining oligopoly and strategic behaviour.

3. A notable recent development in the antitrust landscape is the establishment of the Antitrust Modernization Commission. Authorized by legislation enacted in 2002,³ Congress provided a budget appropriation in late 2003 and the Commission is now formally in operation. The Commission has twelve members, four appointed by the President, two by the majority leader of the Senate, two by the minority leader of the Senate, two by the Speaker of the House of Representatives, and two by the minority leader of the House of Representatives. The chairperson is appointed by the President from among the members. The stated mission of the Commission is (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues; (2) to solicit views of all parties concerned with the operation

¹ The Role of Competition Policy in Regulatory Reform (1998), available at www.oecd.org/competition. Also published as Michael Wise (1999), "Review of United States Competition Law and Policy," *OECD Journal of Competition Law & Policy*, vol. 1, no. 1, p. 9. A special chapter on product market competition appears in the 2004 OECD *Annual Survey* of the United States. The EDR Committee reviewed the United States in March 2004.

² William Kovacic (2003), "The Modern Evolution of U.S. Competition Policy Enforcement Norms," *Antitrust Law Journal*, vol. 71, p. 377.

³ Antitrust Modernization Commission Act of 2002, Pub. L. 107-273, Sec. 11053, 116 Stat. 1856.

of the antitrust laws; (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and (4) to prepare and submit within three years a report to Congress and the President.

Substantive law

4. United States law treats agreements among competitors that do no more than set price, establish output levels, or divide markets as crimes, conclusively presuming that such agreements lead to deadweight loss, higher prices, or reduced innovation. By contrast to this “per se” approach to naked collusion, determining whether other horizontal agreements are illegal depends on applying a “rule of reason,” which entails assessing net competitive effects in particular cases. Because “rule of reason” cases are complex and time consuming, the agencies and courts have sought to establish intermediate standards for assessing the economic effects of horizontal agreements –more nuanced than per se condemnation, but less costly than full rule of reason analysis. The courts have not rejected the concept, but they have been sceptical of most of the tests suggested. Thus, in the *California Dental Association* case, the Supreme Court in 1999 rejected an FTC decision, based on an abbreviated rule of reason analysis, that a dental association was unlawfully restricting price and quality of care advertising by its members. The Court remanded the case, holding that the association’s rules should not have been invalidated on an abbreviated analysis because the anticompetitive effects of the restraints were not sufficiently obvious. The FTC’s 2003 *Polygram Holdings* case entails a new attempt to articulate a truncated approach to agreements between competitors that, although not constituting an agreement to fix prices, are “inherently suspect.” The case involved an effort by several music distribution companies to promote a new recording featuring the “Three Tenors.” The Commission’s decision, holding unlawful the companies’ agreement not to advertise or discount the Tenors’ earlier albums, is pending on appeal. In April 2000, the FTC and the Antitrust Division issued Antitrust Guidelines for Collaborations Among Competitors, providing an analytical framework for addressing a broad range of horizontal agreements, including joint ventures, strategic alliances, and other competitor collaborations.

5. Vertical agreements along the supply chain are nearly all subject to rule of reason analysis, because of the stronger likelihood that they serve some efficient purpose. In theory, purely vertical agreements about minimum resale prices are illegal *per se*, but there is very little public enforcement at the federal level in the absence of a clear horizontal effect, and the law permits a significant degree of upstream control over resellers’ sales tactics. In general, for all conduct except horizontal price fixing, United States enforcers do not intervene absent some showing of economic power or market impact.

6. Organizational combinations of all kinds, including joint ventures and open market acquisitions, are covered by the general merger statute, the Clayton Act. The legal test is whether the transaction is likely to “substantially lessen” competition or tend to create a monopoly. Because the law is prospective, mergers can be enjoined on a showing of likely future effects, although the law is also available to challenge consummated mergers that have adverse competitive effects. Merger enforcement policy, systematically elaborated in the agencies’ 1992 Guidelines, is designed to prevent increased market power while supporting entry and capital mobility. Thus, mergers will not be attacked if there are no significant barriers to entering the market. The Guidelines were revised in April 1997 to clarify the agencies’ position on efficiencies, and now provide that a transaction will not be challenged if there are cognizable, merger-specific efficiencies “of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.”⁴ Acquisitions of “failing firms” are permitted, which facilitates exit (and hence entry). Pre-merger notification requirements, established in the 1970s, have frequently been refined over the years. The threshold levels at which notice is required have recently been increased substantially and are now indexed to increases in the GNP. This change has had the intended effect of greatly reducing the

⁴ Horizontal Merger Guidelines, section 4 (as revised, April 8, 1997).

number of filings, but has also obliged the antitrust agencies to be more vigilant in detecting anticompetitive transactions that need not be reported, and in some cases has necessitated taking action against consummated or non-reported mergers. In 2000, the FTC and the DOJ announced parallel improvements to merger review procedures relating to “second requests” for information or documents in the merger review process. This was followed in 2001 by announcement of the DOJ’s “Merger Review Process Initiative,” a project to improve the efficiency of investigative processes relating to the initial waiting period, the issuance of second requests, and post-second request activities.

7. The antitrust laws speak only of competitive effects. Other values, including industrial development, employment, and the values and purposes promoted by other regulatory programs, are not to be considered. Antitrust prosecutions in market-based health care have been instructive about how the courts view the balance with other policies. Health care reform led to a great deal of restructuring, such as mergers and acquisitions of hospitals and drug firms. After initial enforcement successes, the agencies lost every hospital merger case litigated in federal court after 1994. While some courts disagreed with the agencies’ geographic market definitions (finding instead a much broader geographic market), and others relied on asserted merger efficiencies, some included “community commitments” by the hospitals as a cognizable factor in permitting the merger. In such commitments, the hospitals agree to pass on cost savings to consumers or to freeze prices at certain levels for a specified period. In some cases, also, the courts cited to the non-profit nature of the merging entities in concluding that the transaction would not be anticompetitive. The courts’ approach has revealed some judicial hesitation about applying antitrust principles with full force to health care markets. Despite these defeats, however, the agencies have neither retreated from their view that hospital mergers can be anti-competitive nor abandoned the field of hospital merger enforcement. In 1999, following the last of the litigated cases, two hospitals in Cape Girardeau, Missouri abandoned their consolidation in the face of an expected DOJ challenge. More recently, in early 2004, the FTC issued an administrative complaint challenging a previously consummated merger involving hospitals in the Chicago suburbs. The Department has also acknowledged it is actively investigating current hospital mergers. In July 2004, the agencies released a report on competition policy in health care markets that addressed hospital mergers, among other matters. The report reiterated that the agencies would continue to scrutinize hospital mergers, and stated the agencies’ view that “community commitments” are an ineffective regulatory approach to competitive issues and that non-profit status should not be considered in hospital merger analysis.⁵

8. United States law about monopolies threatens sanctions, including divestiture, against exclusionary conduct. Unlike the law of most Member countries, however, it otherwise tolerates the exploitation of market power. The Sherman Act does not prohibit a dominant firm from charging high prices or reducing output, provided that the acquisition or maintenance of its market position is not due to improper conduct. The law strongly presumes the value of low prices, and hence it is sceptical about claims of price predation. “Predatory” prices violate the law only if the alleged predator could recoup its losses in conditions of post-predation monopoly unthreatened by entry.

9. With respect to “unfair competition,” United States law is concerned fundamentally about harm to consumers, not competitors. The Federal Trade Commission Act prohibits both “unfair” methods of competition and “unfair” or deceptive acts or practices. On the competition side, however, the FTC Act

⁵ A recent example of Congressional interest in the interaction of the antitrust laws and health care policy appears in section 207 of the Pension Funding Equity Act of 2004, P.L. 108-218. This provision deals with “graduate medical education residency matching programs,” which are systems that employ a computerized mathematical algorithm to match medical students and hospital residency programs. The legislation provides that evidence of participation in such matching programs “shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws,” adding, however, that any agreement to fix the stipends of residency students is still subject to antitrust prohibitions.

prohibition is taken simply to cover acts akin to those barred by the other antitrust laws. Little remains of the traditional doctrine about unfair competition, now sometimes called “business torts” in the United States, and such torts are pursued primarily through private actions. One antitrust law remnant of traditional unfair competition doctrine appears in the Robinson-Patman Act, which regulates discriminations in price and marketing services. Even though the law’s basic prohibition includes a competitive-effects requirement, other parts of the law do not, and it is a technically complex statute that can sometimes be applied to protect competitors. The federal agencies do little to enforce this law themselves, but it is still important in private lawsuits.

10. On the consumer protection side, the portion of the FTC Act prohibiting “unfair or deceptive acts or practices” complements the antitrust provision in further ensuring the benefits of market competition. In the United States, the general competition laws are intended to ensure that markets provide consumers with an appropriate range of options. Consumer protection laws address market failures that inhibit consumers from being able to take advantage of the choices created by competitive markets.

Institutions

11. The United States has strong, well-established enforcement institutions. In fact, so many institutions have a role that maintaining co-ordination and consistency among them is a continuing challenge. To a large extent, the potential for appeal to the court system encourages a degree of consistency. But the proportion of cases decided by actual contests in the courts remains small.

12. With two national-level competition agencies, the United States presents two different models of institutional design. One agency, the Antitrust Division of the Department of Justice, is part of the executive branch of the government. Its location in the Department of Justice, rather than in a department more specifically charged with economic policy, follows from the Sherman Act’s origins as a criminal statute. It suggests a tradition of prosecution, as much as of policy analysis. The other agency, the Federal Trade Commission, is an independent body, lodged between the legislature and the executive. One reason for its creation was to bring greater technical expertise to competition policy. Historically, the redundancy of two institutions has not led to conflict, as the two agencies have divided their responsibilities to avoid duplicating effort or forum shopping. But, some costs are imposed on each agency to co-ordinate policies and actions with the other one. In March 2002, the agencies adopted a revised clearance system for allocating merger reviews and other antitrust matters. The technological convergence of various industries over the past decade had led to an increasing volume of disputes between the agencies as to which was better qualified to examine a particular matter. The new agreement for the first time explicitly assigned to DOJ or the FTC principal responsibility for specified economic sectors, although the legal jurisdiction of each agency was expressly preserved. The agreement met with resistance in some quarters of Congress. The agencies withdrew the agreement in May 2002 and the clearance process reverted to a system based on agency experience and expertise but without express sector allocations.

13. Independence and transparency at the two agencies are ensured by roughly comparable methods. The Antitrust Division has a tradition of independent decision-making, without influence by or consultation with higher political authorities in the executive branch. In any event, it cannot issue binding orders on its own authority, but must make its cases to independent, tenured federal judges. It is also required by law to publish and solicit public comment about proposed consent decrees. Recent statutory amendments controlling the consent decree process require the reviewing court to consider various specific factors (previously treated as discretionary) before approving a proposed decree.

14. At the FTC, independence arises from the Commissioners’ tenure for fixed terms, not subject to removal by the President over disagreements about policy. The political check on each agency is the fact that the top officials (the Commissioners and the head of the Antitrust Division) are appointed by the

President, subject to Senate confirmation. In addition, the President designates which FTC Commissioner will be the Chairman and, by statute, no more than a bare majority (three out of five) of the Commissioners can be from the same political party.

15. Both agencies publicise their decisions initiating action, and, in 2003, both agencies committed themselves to issuing more frequent explanations of decisions not to undertake enforcement action. Final decisions in contested cases, whether issued by the courts or the Commission, are almost always accompanied by detailed opinions and explanations and are subject to further review by higher courts. There have been some concerns that the consent order process sometimes obscures the agencies' reasoning, because public explanations are often phrased in conclusory terms that give little guidance about how doctrines are developing. It is now Commission policy to issue detailed statements at the close of important cases that result in consent orders, such as in its recent cases involving the state action doctrine.

Enforcement process

16. Both agencies have broad powers to initiate investigations and demand documents and testimony. The enforcement processes differ slightly, although both contemplate adversarial evidentiary hearings. The Antitrust Division appears in federal court as a party plaintiff or prosecutor, filing a conventional complaint or indictment. The process may lead to a trial before a judge or a jury, followed by an opinion by the independent federal judge. The FTC may proceed directly to court to obtain injunctive relief and may also issue an administrative complaint as part of its own statutory process. An administrative complaint leads to a hearing that is similar to a judicial trial, but is held before an Administrative Law Judge, a Commission employee with partially protected tenure and status. The Commission's decision and opinion is usually taken on appeal from the initial decision by the Administrative Law Judge. Commission decisions are subject to review in the federal courts of appeal.

17. The sanction in most non-criminal matters is an injunction or cease-and-desist order, to prevent future violations. Auxiliary measures to ensure compliance are also often included. Although fines are available only in criminal cases, settlements of civil cases may include pecuniary elements, and the government can sue to recover its own damages in cases where it has been a victim. In 2003, the FTC issued a policy statement on the use in antitrust cases of monetary equitable remedies such as disgorgement and restitution. The statement explained that, in determining whether to seek such remedies, the agency would consider: (1) whether the underlying violation was clear, (2) whether there is a reasonable basis for calculating the amount of the remedial payment, and (3) the value of equitable monetary relief in light of other likely remedies, including remedies in private actions and criminal proceedings. The agency stated that it would be sensitive to potential duplicative recoveries by injured persons or excessive multiple payments by defendants for the same injury.

18. Criminal fines and imprisonment are now standard practice against hard-core cartels. Under the Antitrust Division's leniency program, qualifying companies that assist the government to uncover and prosecute conspiracies will receive full immunity from criminal prosecution, along with their cooperating officers, directors, and employees. There was previously some concern that the threat of treble damages in civil litigation undermined the motivation to confess, but the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 now specifies that corporate amnesty applicants may have their civil damages reduced from treble to single damages if a court determines that they have cooperated with civil plaintiffs. The 2004 Act also raised the maximum corporate fine for Sherman Act section 1 violations from USD 10 million to USD 100 million, while penalties for section 1 violations by individuals increased from USD 350 000 to USD 1 million. Under general federal sentencing guidelines, these fines may be increased to twice the gain from the illegal conduct or twice the loss to the victims. The United States is virtually unique in its practice of prosecuting and imprisoning the individuals responsible for corporate violations.

In 2002, sentences imposed on individuals totalled nearly 30 years, a record. The 2004 Act increases the maximum jail sentence from 3 to 10 years.

Other Enforcement Methods

19. The competition agencies are not the only entities with the power to apply national competition law. Private litigation is unusually important in the United States. About 800 antitrust cases are filed under federal statutes each year (805 in 2003, 830 in 2002, and 723 in 2001), of which only about 10 per cent are United States government enforcement actions. In these private suits, the courts often deal with issues such as price discrimination and vertical restraints that are not high priorities in the agencies' enforcement programmes. A 2002 private suit involving the moist snuff market is notable, both because of the nature of the claim and the amount of damages awarded. The plaintiff, holding a 13% market share, asserted an unusual theory of monopolization through tortious conduct. Specifically, the plaintiff alleged that the defendant (holding a 77% market share) had instructed its employees to remove or damage the plaintiff's retail display racks. The jury returned a verdict for USD 350 million, which was trebled to USD 1.05 billion and ultimately upheld on appeal.

20. Private actions also frequently take the form of class actions filed as follow-on suits to government prosecutions, often but not exclusively in cartel cases. The FTC has become active in filing amicus briefs to oppose abusive settlement terms in such class action cases. In the *First Databank* litigation, the FTC challenged an anticompetitive merger and negotiated \$16 million in consumer redress. Private class action attorneys subsequently filed a "piggyback" action that increased this amount to USD 24 million. The class attorneys then requested a fee calculated as 30% of the entire settlement. The FTC objected to this fee request as excessive, and the court ultimately awarded class counsel 30% of the USD 8 million that they had actually contributed to the settlement fund. Since January 2002, the FTC has intervened or appeared as amicus curiae in five other cases in which the agency concluded that the proposed class action settlement was flawed, and also co-hosted a conference in September 2004 to examine whether various aspects of the class action mechanism – including settlement notices, non-pecuniary remedies, and attorney fee awards – could be reformed to protect the interests of consumer class members.

21. State and local law officials may undertake two forms of competition law enforcement actions. First, they can appear in a role similar to that of a private party, in suits under the general federal competition law. In addition, state-level officials can enforce their own competition laws. Virtually all of the 50 states have antitrust statutes of general application. These statutes generally mirror the federal antitrust laws, and the majority of the states refer to and generally follow federal case law in construing comparable provisions under their state antitrust laws. In addition, many states have specific antitrust statutes aimed at particular industries, such as insurance, petroleum, or dairy, or at specific practices, such as below-cost pricing, bid rigging, or price discrimination between areas within the state. Statutory exemptions from state antitrust laws are numerous and vary widely from state to state.

22. There is a chequered history of divergence between federal and state enforcers about how the federal laws should be applied. State officials tended to be more aggressive in the 1980s, and developed their own shared guidelines about mergers and vertical restraints that differed in significant details from those of the federal agencies. More recently, direct conflicts about enforcement actions have declined, as the agencies and state enforcers developed better means of co-operation in the 1990s. Meanwhile, active cooperation between federal agencies and the states has increased. DOJ was joined by 25 states in challenging the Echostar/DirecTV merger. Similarly, numerous states joined with the Division in challenging the First Data/Concord EFS and the Oracle/PeopleSoft mergers, and the states have been involved in other Division and FTC antitrust enforcement actions, including significant cases in the dairy, waste, and pharmaceutical industries. In recent years, the states have also frequently litigated antitrust

matters as a group effort, sometimes involving just the state governments, although often in cooperation with one of the federal agencies. These cases have resulted in significant negotiated settlements, including, a 50-state, USD 80 million settlement with Aventis for an alleged conspiracy to keep generic cardizem off the market; a 40-state settlement with five music distributors for resale price maintenance of CDs (settlement of USD 62 million cash and USD 71 million in kind); and a 3-state settlement with Williams Energy over claims of manipulation of west coast prices for wholesale energy (settlement of USD 417 million plus renegotiated contracts).

23. Nonetheless, some disagreement persists. State enforcers have tried to block mergers that the federal government did not challenge, and they have brought actions against vertical restraints that the federal enforcers probably would not have pursued. Most notable recently is the action of some states in rejecting the government's settlement of the *Microsoft* case and seeking stronger relief. Massachusetts, the final hold-out, appealed the district court order accepting DOJ's consent decree with Microsoft, but that appeal was rejected in June 2004. Massachusetts is now conducting discussions about joining a group of states formed to cooperate with DOJ in jointly enforcing the Microsoft decree.

Box 1. Clarify Enforcement Responsibilities

1998 Recommendation: Develop clearer assignments of responsibility among different enforcement officials, particularly between the federal and state levels, to avoid overlap and duplication.

Status: No publicly reported action has been undertaken.

The 1999 Report noted that, at the federal level, the two competition agencies co-ordinate well, but that the quality of co-ordination with other federal regulators that share competition policy authority varies. In general, that relationship is worked out through consultation, advocacy, and the intervention of the courts. The Report observes in this respect that the relative success of deregulation in energy and communications might be traced to a long tradition of staff-level consultations and exchanges between the antitrust agencies, FERC, and the FCC, as well as shared ideas among political-level appointees. At the FCC, staff-level contacts have been facilitated by changes to the FCC's rules that allow off-the-record, ex parte communications between its staff and other agencies. By contrast, at the Surface Transportation Board, informal staff consultation is not permitted in contested matters. Thus, the Antitrust Division's participation in railroad merger matters, for example, must be formal and public. Competition policies could be integrated into other regulatory programs more effectively by adopting rules to permit greater informal staff-level consultations.

The 1999 Report concluded that co-ordination problems are more difficult between the federal and state levels. State-level enforcement capacity adds resources, but the risk of multiple and inconsistent enforcement priorities is a significant cost. Some state-level officials have shown a greater interest than have the federal agencies in pursuing cases about vertical relationships. It has been said that, at one time, state initiatives filled a gap left by lax federal-level enforcement. But that interest is also consistent with the state laws protecting competitors against aggressive competition. A logical division of responsibility would have local officials deal with local problems, while national officials dealt with national ones. But United States law does not now require that division of labour. At best, clarity and predictability are undermined when a major federal-level enforcement effort, such as the monopolisation case against Microsoft, is second-guessed by a group of local enforcement officials bringing a separate, similar, and simultaneous lawsuit. Co-ordination with the states is being managed more amicably now than ten years ago, but the duplication of effort remains problematic. And differences in enforcement priorities can undermine policy coherence.

No identifiable action has been taken to implement the 1999 Report recommendations. At the federal level, the two competition agencies have continued their efforts to co-ordinate efficiently, and have sought to resolve sources of friction in their relationship. The 2002 effort of the agencies to improve their clearance agreement by allocating economic sectors was thwarted by unnecessary congressional intervention. The existence of two agencies is itself an institutional arrangement that provides a check on agency enforcement discretion. If the agency to which a matter has been "cleared" concludes that enforcement is not appropriate, the other agency could still pursue the matter if it had jurisdiction. This is very rare but not unknown. The only recent instance was the *Microsoft* monopolisation litigation, which was undertaken by the Antitrust Division after FTC proceedings concluded with a 2-2 tie vote.

As to co-ordination between the antitrust agencies and other federal regulators that share competition policy authority, the earlier recommendation to adopt rules permitting greater informal staff-level consultation in enforcement matters remains valid

and should be pursued.

Co-ordination issues between federal and state authorities remain problematic. The *Microsoft* case cannot be a demonstration of a sensible institutional model. Where a federal antitrust agency takes enforcement action, federal law should provide that no state or private plaintiff may commence a separate action under either federal or state antitrust laws except to recover damages. State and private enforcement would still be permitted where the federal agencies cannot allocate resources to enforcement action or where a federal agency decision has been made that enforcement is inappropriate. Such federal decisions should not bind other plaintiffs. But second-guessing is not appropriate in an ongoing enforcement action where the case outcome is subject to review by a court.⁶

International Matters

24. Foreign firms have the same rights as United States firms and individuals to make complaints to the enforcement agencies and to bring their own suits for treble damages or other relief. Even foreign governments may also sue, if they have standing to complain of injury covered by United States antitrust law; although a foreign government can only recover single damages. Foreign firms can, and do, bring complaints about exclusionary conduct by United States firms to the attention of the two competition agencies. The Supreme Court's June 2004 decision in the *Empagran* case addressed a lingering issue about damage recovery by foreign parties. The case involved a treble damage action filed in the United States by foreign claimants seeking relief for injury suffered in foreign countries. The defendants were participants in an international vitamin price-fixing conspiracy that damaged both American and foreign purchasers. The Court concluded that an antitrust damage suit could not be pursued where the plaintiff's claim rested solely on foreign harm, independent of the conspiracy's domestic effect. In general, however, the content and application of United States competition policy does not depend on the nationality of the parties or even the location of the conduct. Anti-competitive conduct that affects United States domestic or foreign commerce may violate the United States antitrust laws regardless of where the conduct occurs or the nationality of the parties involved. In the United States premerger notification program, there are no special procedures for notification or reporting with respect to foreign firms and products. There are, however, exemptions from the premerger notification requirements for certain international transactions that typically have little nexus to United States commerce but otherwise meet the statutory thresholds. In October, 2002, the FTC, DOJ and the European Commission released a set of "best practices" designed to enhance cooperation among the three agencies in merger reviews, minimize the risk of divergent outcomes, and reduce burdens on parties subject to merger investigations. The best practices treat such topics as joint interviews of parties and third-parties, and coordination with respect to remedies.

25. Dealing with foreign firms and products can raise some specific practical problems.⁷ To obtain evidence, the United States agencies are increasingly turning to co-operation agreements with other countries. In 1999 and 2000, the United States added agreements with Japan, Brazil, Israel, and Mexico to those already established with Germany, Australia, Canada, and the EC. Enhanced positive comity provisions were arranged with Canada in 2004, echoing the similar arrangements with the EC. In addition, an agreement under the International Antitrust Enforcement Assistance Act was signed with Australia, and

⁶ If this approach were adopted, some provision should be made for judicial review of FTC consent orders, analogous to the Tunney Act provisions that apply to Antitrust Division consent orders.

⁷ The International Competition Policy Advisory Committee (ICPAC), created in November 1997 to advise DOJ on emerging antitrust issues in the global economy, delivered its report and recommendations in February 2000. The report made recommendations to improve multi-jurisdictional merger review, enhance cooperation between governments and private industry in addressing restraints that impede open access to markets, and establish a global initiative to improve transparency and understanding regarding antitrust enforcement.

an arrangement was entered with the EC under which United States representatives may be permitted to observe certain investigative hearings conducted by the European Commission, and EC observers may be similarly able to observe certain meetings with the parties in DOJ and FTC investigations. In October 2001, DOJ and FTC were among antitrust agencies from 14 countries to launch the International Competition Network (ICN). The ICN is intended to provide a venue where senior antitrust officials from developed and developing countries can work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement. Eighty-eight antitrust agencies from 76 jurisdictions are now members. On-going projects include merger review, antitrust enforcement in regulated sectors, and capacity building and competition policy implementation. The merger review working group developed eight guiding principles for merger notification and review that were adopted in September 2002 and eleven recommended practices for merger review procedures that were adopted in June 2003. The Advocacy Working Group established an online information and resources centre, conducted sectoral studies of advocacy, and assembled a “tool kit” of competition advocacy mechanisms. The Capacity Building Group prepared a report on the challenges developing countries face in implementing competition policies, and is now conducting a study on the types of technical assistance that work best. In April 2004, the ICN created a new working group to deal with anti-cartel enforcement.

Agency Resources and Actions

26. The two federal agencies commit about 1 260 staff (FTE) and USD 195 million to the competition enforcement mission (plus about 560 FTE at the FTC who concentrate on the “consumer protection” part of that agency’s jurisdiction). DOJ assigns the highest enforcement priority to horizontal restraints, especially international cartels, and horizontal mergers. The FTC has specified four subjects for particular attention: the state action doctrine, the *Noerr-Pennington* doctrine, health care, and intellectual property. The state action and *Noerr-Pennington* initiatives are described below in connection with antitrust law coverage.

27. With respect to health care, the FTC has significantly increased its emphasis on stopping collusion and other anticompetitive practices that raise health care costs and decrease quality, focusing on pharmaceutical companies as well as health care providers. In addition to reviewing several significant pharmaceutical mergers, an important focus has been preventing pharmaceutical firms from thwarting competition from lower-cost generic drugs. Some manufacturers of branded drugs have exploited the regulatory system that was established to preserve incentives for continued innovation by research-based pharmaceutical companies while also encouraging market entry by generic drug manufacturers. A July 2002 report titled “Generic Drug Entry Prior to Patent Expiration: An FTC Study,” made recommendations designed to avoid delay in the market availability of new generic drugs. The FTC’s proposals were subsequently adopted in 2003 by congressional legislation and FDA rule. Recent FTC cases have challenged branded drug manufacturers for paying generic firms to delay bringing a competing generic drug to market, and for improperly asserting alleged patent rights to forestall generic entry. The FTC has also brought numerous cases involving horizontal agreements among health care providers to fix the prices negotiated with health insurers. In addition, the FTC and DOJ Antitrust Division held extensive hearings in 2003 covering a comprehensive range of topics relating to health care and antitrust. The hearings culminated in a July 2004 report entitled *Improving Health Care: A Dose of Competition*. The report covers a host of health care topics, and includes recommendations urging that (1) private payors, governments, and providers should continue experiments to improve incentives for providers to reduce costs and enhance quality, and for consumers to seek lower prices and better quality; (2) states should reconsider whether “Certificate of Need” programs best serve their citizens’ interests, consider broadening the membership of state licensing boards, and consider implementing uniform licensing standards to reduce barriers to telemedicine and competition from out-of-state providers; (3) governments should re-examine the role of health-care market subsidies, in light of their inefficiencies and the potential to distort competition; (4) governments should not enact legislation permitting independent physicians to bargain

collectively; (5) states should consider the potential costs and benefits of regulating pharmacy benefit manager (PBM) transparency, and (6) governments should reconsider whether mandating a particular set of health care benefits represents wise policy.⁸

28. In the intellectual property field, after public hearings on the relationship between the antitrust and intellectual property laws, the Commission issued a 2003 report entitled *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*. The underlying thesis of the Report is that both competition policy and the patent system can foster innovation, but that the two regimes must be harmonized to avoid adverse effects. The Report, while not directly affecting enforcement activities, is nevertheless intended to illuminate the interaction between antitrust and IP. The FTC has devoted increasing attention to enforcement actions involving IP, exemplified by such cases as *Rambus Incorporated* (alleged monopolization through misrepresentations to standards setting body), *Union Oil Co. of California* (alleged monopolization through fraudulent behaviour subverting state rulemaking proceedings), *Schering Plough Corp.* (agreement between branded and generic drug firms to delay entry of competing products), and *Bristol-Myers Squibb Co.* (misconduct designed to forestall generic competition with patented products).

Coverage of competition law

29. The heavy penalties for violating the antitrust laws have encouraged numerous claims for exemption, special treatment, or even regulation as a substitute for competition law enforcement. Although there are few sectors in the United States economy from which competition policy and law are completely excluded, in many sectors the policy is implemented through special rules or enforcement structures.

Economy-wide exemptions or special treatments

Government authorization

30. Exercise of authority by another regulatory body will not usually displace competition law, unless a statute makes the exclusion explicit. At the federal level, the general rule applied by the courts is that “repeal by implication” from another regulatory statute is disfavoured and will be found only “in cases of plain repugnancy between the antitrust and regulatory provisions.” Courts have found implied exclusions only in a few circumstances, the chief examples being securities regulation supervised by the Securities and Exchange Commission and common carrier tariffs filed with regulatory agencies. Where regulatory and antitrust requirements conflict, the courts’ usual practice is to exempt only to the minimum extent necessary to make the regulatory statute work. Thus, at the federal level, the issue of regulatory authorisation or compulsion arises principally under the plethora of (mostly) statutory special provisions, referenced below.

31. For regulations imposed by one of the fifty states, the relationship with national competition policy is significantly different. The “state action doctrine” immunizes private anti-competitive conduct from antitrust liability if the conduct is undertaken pursuant to a state policy to replace competition. Embodying the United States commitment to federalism, the doctrine stems from a Supreme Court decision that permitted a state to sponsor a Depression-era cartel. Later decisions have permitted anti-competitive state regulation of transportation, hospitals, health care and other professional services, retail distribution, utilities, residential and commercial rent, and other subjects. A state may not, however, simply announce that private, anti-competitive conduct is permitted. Rather, the regulatory policy to displace

⁸ Among the other subjects treated are hospital mergers, quality ratings of hospitals and physicians, payment mechanisms for health care services, licensure, allied health professionals, pharmaceutical pricing, single-specialty hospitals, buying power in health care markets, and group purchasing organizations.

competition must be both clearly articulated and affirmatively expressed, and the policy's implementation must be subject to active supervision by the state. The doctrine also shields actions taken by the states themselves and by cities, counties, and other political subdivisions to which the state has delegated authority to adopt competition-suppressing regulatory measures. (A corollary to the doctrine is statutory immunity from damages in private actions for conduct engaged in or directed by a local government official or employee acting in an official capacity.) The exclusion resulting from the doctrine could, in principle, be revised or eliminated by Congressional action. Congress has, in effect, accomplished elimination in particular cases, such as in the legislative termination of local trucking regulation by the states. Nonetheless, the persistence of the doctrine demonstrates that national competition policy, although privileged, is subordinate to certain other political values such as federalism.

Box 2. Address the State Action Doctrine

1998 Recommendation: Undertake a comprehensive study of the extent and effect of the state action doctrine, in preparation for legislation to reduce its scope or even eliminate it.

Status: Efforts have been made to constrain the reach of the doctrine, but no study to assess its economic impact has been undertaken.

The 1999 Report argued that state regulations and legislation that impair competition may delay regulatory reform, not only in professional services and distribution, but also in telecommunications and electric power. Such state programs are inconsistent with effective implementation of national competition policy. The Report recommended that a comprehensive study be done to assess the competitive effects of state laws and regulations and to identify sectors where reform is most needed. The Report suggested that prime targets for action should be state and local laws that permit business and professional associations to restrict price and other forms of competition among their members, and laws that protect dealers against new competition or prohibit aggressive pricing and other marketing methods.

In 2001, the FTC identified the state action doctrine as a topic for priority attention and established a task force to examine the relevant issues and suggest actions to clarify the doctrine's limits. The State Action Task Force issued a report in September 2003, concluding that the Commission should seek, through litigation, amicus briefs, and competition advocacy, (1) to re-affirm that the state action defence is available only when it is shown that the state deliberately adopted a policy to displace competition and authorized the conduct at issue, (2) to clarify what acts of the state constitute proof of active state supervision, (3) to rationalize the criteria for identifying which quasi-governmental entities should be subject to active supervision, and (4) to encourage judicial recognition of adverse economic spillovers that may affect out-of-state parties in state action cases. In a series of recent consent orders and litigated cases (several involving tariff filings by associations of household goods movers and another involving a state dentistry board), the FTC has articulated specific standards for how carefully the states must supervise boards and associations before their actions will be immune. Commission advocacy efforts involving state action issues include letters to state legislators regarding physician collective bargaining, licensing requirements for professional participants in real estate closings, and mandatory minimum mark-ups on gasoline. In June 2004, DOJ and the FTC filed a joint *amicus curiae* brief in a court of appeals case involving application of the state action doctrine. The appeal arose in a private antitrust suit against a local hospital district in Tennessee that had employed its contracting authority to establish exclusive contracts with area health care providers. The agencies argued that the district court improperly extended state action protection to the hospital district and that the hospital district's statute did not displace competition.

The agencies' efforts to restrict the scope of the state action doctrine and to prevent its inappropriate application are laudable, but do not address the fundamental anomaly represented by the doctrine's existence. A study to identify and assess the extent and effect of anti-competitive state regulation is desirable to construct a record supporting the doctrine's partial or complete legislative repeal. The doctrine's service to interests in federalism comes at an economic cost that has never been addressed. Even if permitting states to organise their internal markets as they wished was a sustainable policy in the 1930s, maintaining that policy in the globalised markets of today would have serious implications for national economic welfare if higher input costs make US products less competitive in world markets. The previous report's recommendation should be pursued without delay

32. Another privileged value, the Constitutional protection of the right to petition the government, has led to another kind of general antitrust exemption labelled the *Noerr-Pennington* doctrine. Joint or individual efforts to persuade a government body or official to take an action, even an action that excludes

a competitor or authorises the elimination of competition, are immune from attack under the antitrust laws. This exemption, like the state action doctrine, was created by court decision, and further decisions have refined the principle. For example, there is no protection for a purported petition that is actually a sham, intended not to influence the government but to intimidate a competitor. The *Noerr* exemption is commonly invoked in regulatory settings, because the government action sought is often the imposition or revision of a regulation or a regulatory action. The exemption is supposed to cover joint action only to the extent that it involves attempts to influence the government, and not ancillary anti-competitive agreements reached at the same time. But it may be difficult to detect and isolate side agreements or understandings reached in the course of joint lobbying or petitioning efforts. And even if there is no anti-competitive side agreement, the anti-competitive effect of a successful petition undermines competition policy goals. An arena in which these concerns often arise is anti-dumping proceedings, in which the preparation of a petition seeking to discourage or exclude foreign competition may provide an occasion for reaching other kinds of agreements as well.

33. The FTC established a task force in 2001 to identify situations that involve petitioning the government but where applying the exemption may be inconsistent with *Noerr*'s underlying rationale. The work of the task force has focused on efforts to (1) clarify the boundaries of conduct that rightfully constitutes immunized petitioning; (2) establish that *Noerr* immunity does not extend to advocacy of government action where the government decision-maker has no purpose to restrain trade; (3) establish that the *Walker Process* exception to *Noerr* immunity – a judicially-created doctrine permitting an antitrust suit against the assertion of rights under a patent that was obtained by fraud – applies to analogous non-patent proceedings; (4) confirm the existence of an independent material misrepresentation exception to *Noerr*, separate and distinct from the sham exception arising from objectively baseless litigation; (5) clarify that a “pattern” exception to *Noerr* immunity exists where there is a pattern of repetitive petitioning without regard to the merits of individual claims, even where some instances might not objectively be wholly baseless; and (6) establish that *Noerr* immunity is either fully or partially inapplicable to causes of action brought under the FTC Act.

34. Case activity associated with the *Noerr* task force effort includes the Commission's January 2002 amicus brief in the *Buspirone* case, successfully arguing that a patent drug listing in the Food and Drug Administration's “Orange Book” was not *Noerr* protected. An Orange Book listing is one of the statutory prerequisites for obtaining a 30-month stay of FDA approval for a generic equivalent of the patented drug. The Commission asserted (1) that obtaining an Orange Book listing is never protected by *Noerr* immunity because listing is in the nature of a ministerial act and thus does not constitute petitioning protected under the First Amendment, and (2) that, in any event, *Noerr* immunity should not apply in the instant case because the defendant had misrepresented to the FDA that the pertinent patent satisfied the statutory criteria for an Orange Book listing. Other cases include the Commission's 2003 consent order in *Bristol-Myers Squibb* (noting the Commission's position that conduct involving a clear and systematic pattern of anticompetitive misuse of governmental processes falls outside the scope of *Noerr* protection), and its 2004 interlocutory decision in *Unocal* (holding that *Noerr* does not protect deliberate misrepresentations that undermine the legitimacy of government proceedings).

Government entities

35. Government entities, even those that are involved in commercial operations, are beyond the reach of competition law enforcement or private litigation. Entities that are owned and operated by the United States government are immune from antitrust liability, and the Supreme Court recently held that this exemption includes the United States Postal Service. Entities owned and operated by state and local governments may be shielded from antitrust liability under the state action doctrine. The immunity may be particularly significant for government-owned electric power systems, hospitals, and port authorities, all of which are being affected by regulatory reforms. Private competitors in these fields have occasionally

complained that the government-related entities enjoy unfair competitive advantages, especially in access to financing.

Small and medium sized enterprises

36. There is no general exemption from the federal antitrust laws for small and medium sized enterprises, nor is there a *de minimis* rule for conduct covered by the *per se* standard of liability. Of course, a firm that is too small to affect competition is unlikely to be subject to any enforcement attention concerning conduct subject to the rule of reason. There is one statutory immunity provision for small business, but the conduct it covers would probably not violate the law in any event. The statute provides that certain narrowly defined agreements (joint research and development pacts, and agreements that the President determines contribute to the national defence) among small “independently owned and operated businesses” that are “not dominant” in their “field of operation” are immune from antitrust attack. The enforcement agencies are unaware of any instances in which this protection has been invoked. Small and medium sized enterprises enjoy no particular protection against liability as defendants, but there are some statutory provisions that were intended to benefit them as plaintiffs. For example, one of the justifications offered for awarding treble damages plus attorney’s fees, and of permitting parties to join together in class actions, is to encourage smaller firms, with fewer resources, to initiate private lawsuits.

Joint research and production

37. Special legislation ensures that joint ventures for research, development, and production (even between horizontal competitors) will not be judged by the strict *per se* standard, but instead by the multi-factor rule of reason. This protection, as first enacted in 1984, was applicable only to research and development, but was subsequently expanded in 1993 to cover production joint ventures as well. The protection does not extend to agreements about marketing and distribution; exchanges of information on costs, sales, profitability and prices; or allocating markets with a competitor. In addition to ensuring rule of reason treatment, the law also reduces potential liability in private lawsuits to single damages if the parties file their joint venture plans with the enforcement agencies. There may be some differential impact on foreign firms, because the single-damages limit for production activities applies only if there are production facilities in the United States. Legislation enacted in 2004 extends the same scheme of procedures and protections to standards development organizations.

Sector specific provisions

38. The 1999 Report discussed sector specific provisions in detail, and the treatment provided in that report remains accurate for rail transportation, ocean shipping and terminal operators, trucking, passenger motor carriers, energy, banks and financial institutions, insurance, agriculture, newspaper combinations, soft drinks, health care peer review, copyright royalties, charities and non-profit institutions, labour, export trade, import trade⁹, and national defence.

39. In air transportation, the predatory pricing rule considered by the Department of Transportation in 1998 was never adopted, as the Department withdrew it in favour of a case-by-case approach. In 1999, the Antitrust Division brought suit against American Airlines, charging it with predatory capacity increases on selected routes with the purpose of driving low fare airlines from markets served from its major hub. The district court dismissed the case in 2001, rejecting the incremental revenue/costs analysis advanced by the Antitrust Division, and imposing instead a strict standard requiring a demonstration that American’s

⁹ DOJ observes that, with respect to agreements on price and quantity negotiated to settle trade law disputes, implied antitrust immunity attaches only to agreements between the foreign competitor and the Department of Commerce. Any agreement directly between the foreign competitor and the US petitioner is not covered.

revenue for service on each of the routes in question fell below the variable cost of serving the route. The appellate court affirmed on a different ground, concluding that, while comparing incremental revenues from capacity expansion with incremental costs was a valid approach to demonstrating below-cost pricing, the government's incremental cost measure had included allocated costs that were not avoidable for the capacity increases at issue. In 2002, the Division reviewed two proposed codesharing alliances, one between Continental, Delta and Northwest, and the other between United and USAirways. In response to Division concerns, the carriers agreed to certain restrictions designed to protect competition, including an agreement not to codeshare on non-stop overlap routes and not to set joint frequent flyer terms. The Department of Transportation also reviews codesharing alliances under its authority respecting unfair competition, and airlines are required by statute to notify DOT prior to implementing codesharing and other joint marketing agreements. DOT reviewed and approved the two alliances, subject to conditions similar to those requested by the Antitrust Division.

40. For securities markets, although the SEC is required by its enabling statutes to consider the competitive impact of its actions, the Department of Justice has responsibility for ensuring market competitiveness. Department investigations have resulted in successful challenges to a quoting convention in over-the-counter securities trading, and a "gentlemen's agreement" not to list certain stock options on multiple exchanges. The courts have fashioned a limited antitrust immunity for the securities industry that applies where a federal agency actively regulates the particular conduct at issue or where the regulatory scheme is so pervasive that Congress must have intended the antitrust laws to be inapplicable. Recent court decisions such as that in the *Stock Exchanges Options Trading* litigation have found an implied repeal where the regulatory scheme empowers the agency to allow conduct that would violate the antitrust laws, without regard to whether the agency had actually adopted such a regulation.¹⁰

41. Although the statutes applicable to the broadcast and telecommunications sectors state explicitly that the antitrust laws also apply, the existence of substantial sector regulation can affect the way in which the antitrust laws are implemented. This was highlighted by the Supreme Court's recent decision in *Verizon v. Trinko*, which rejected a private claim of monopolization under Section 2 of the Sherman Act against one of the Regional Bell Operating Companies (RBOCs). The suit arose from a claimed refusal by the RBOC to provide access to unbundled service elements that the 1996 Telecommunications Act required the RBOC to offer. The Court, while acknowledging that the Telecommunications Act precluded implication of immunity, also ruled that a monopolistic refusal to deal could not be found where the services withheld were only made available because of the Telecommunications Act's requirements. The existence of regulatory oversight, including regulation of the rates at which the services were offered, was a significant factor in the Court's decision to preclude a separate antitrust claim.

42. The broadcast sector regulator, the Federal Communications Commission (FCC), has sought to change rules about broadcast licensing and operation that have significant competition policy dimensions, including rules on limits of numbers of broadcast licenses that can be held in common and constraints on vertical relationships between networks and program sources. Congress recently blocked a new FCC rule that would have allowed companies to own TV stations serving up to 45 per cent of United States viewers, compared to the existing 35 per cent ceiling. The FCC has also sought to modify rules about concentration in nationwide cable system ownership, although its efforts in this area have recently been reversed by an appellate court. The FCC has lifted the cap it formerly maintained on the amount of spectrum that could be owned by a single commercial mobile radio service provider, potentially allowing consolidations of mobile radio systems to the extent allowed under normal antitrust constraints. When the spectrum caps were

¹⁰ Indeed, in the *Stock Exchanges Options Trading* case, the Second Circuit found an implied repeal of the antitrust laws even though the conduct attacked was forbidden by SEC rule. The court concluded that the SEC's authority to permit, forbid or otherwise regulate such conduct demonstrated a Congressional intent to make the antitrust laws completely inapplicable.

originally adopted, they dealt with the risk that competition in mobile wireless services would fail to develop because a small number of firms would gain control of the majority of wireless spectrum during the FCC's auction process or shortly thereafter. As the mobile wireless markets have become more mature, with six nationwide carriers in competition, the FCC concluded that standard antitrust analysis should govern possible mergers, without the need for a special cap on spectrum ownership.

43. In telecommunications, the 1996 Telecommunications Act sought to open local markets to competition by requiring unbundling of the incumbents' networks, interconnection with competitors, and the preclusion of state regulation that maintained legal telecommunication monopolies. The Telecommunications Act also provided that the Antitrust Division would advise the FCC in resolving RBOC state-by-state applications for long distance entry. These applications entail a showing by the RBOCs that they have met the requirements of a "competitive checklist" designed to open their local markets to competition. The Antitrust Division has filed evaluations of all of the RBOC applications, and the FCC is required to give these evaluations substantial weight in its decisions. By 2003, the RBOCs had met the statutory requirements nationwide and were able to offer long distance services in every state. At the same time, competitors in local services were also operating in all states and, by the end of 2003, had collectively acquired a 16 percent share of local lines.

44. With respect to sports, legislation enacted in 1998 limits the judicially-created baseball exemption by providing that, with respect to employment matters, Major League Baseball players have the same rights under the antitrust laws as other professional athletes.

Box 3. Eliminate Exemptions and Special Treatment

1998 Recommendation: Eliminate the remaining exemptions and sector-specific jurisdictional provisions.

Status: DOJ has testified in favour of eliminating the antitrust exemption for ocean carrier agreements. Otherwise, no action has been taken except for legislation limiting the baseball exemption.

The 1999 Report observed that there were various areas in which competition policy is applied uncertainly, and urged that the risk of inconsistency and gaps in coverage be corrected by eliminating unnecessary exemptions and clearly assigning responsibility to the general competition law rather than a sectoral regulator. While some of the exemptions make no practical difference, others are special-interest protections, and many were obviously enacted to reverse specific law enforcement initiatives.¹¹ The Report invited particular attention to specific provisions, including (1) the transport sector's special merger authority for railroads, (2) immunity in trucking for collective ratemaking on joint and through rates and for household goods, (3) immunity for ocean shipping, (4) the sector-specific unfair competition provisions applicable to airlines, (5) the sector-specific authority concerning mergers and other competition issues in energy and in telecommunications, (6) the exemption from the FTC Act for non-profit firms, (7) the special protections for vertical agreements in the soft drink industry, (8) the exemption for joint newspaper operations and for pooling sports broadcasts, (9) the exemption for commercial operations of publicly owned enterprises, and (10) the special treatment of insurance under the McCarran-Ferguson Act.

DOJ testified several times in support of eliminating the antitrust exemption for ocean carrier agreements in the Shipping Act of 1984, and the FTC urged removal of the telecommunications common carrier exemption from the FTC Act, but no legislation was enacted in either case. No other action has been taken to eliminate statutory exemptions and sector specific provisions, except for the 1998 legislation limiting the baseball exemption with respect to employment matters. The agencies have testified against proposals to extend or create new sector exemptions. Recent court decisions interpreting the securities laws have tilted in the wrong direction by finding an implied repeal of the antitrust laws where the regulatory scheme merely empowered the agency to allow conduct that would violate the antitrust laws. The 1998 recommendations remain valid and should be pursued. The

¹¹ Separate enforcement systems for meat packing and agricultural co operatives date from the 1920s, prompted by early FTC monopolisation cases against these organisations. Other laws have reversed findings against pooling of sports broadcast rights, manufacturing and distribution agreements in the soft drink industry, price fixing in the insurance industry, and agreements among universities about financial aid awards.

arguments for considering constriction or elimination of the “state action” doctrine, that maintaining such systemic inefficiencies could not only harm US consumers but also make US products less viable in the global marketplace, apply here as well.

Competition Advocacy

45. Competition advocacy has been an important function of the United States competition agencies. Their efforts contributed significantly to the first major deregulation successes, in airlines and natural gas, and continued with trucking, communications, broadcasting, and electric power. After the successes of the 1980s, the volume of advocacy activity declined, and by 1997 the annual total of advocacy items for both agencies combined was less than 20. The Antitrust Division continues to direct its advocacy almost entirely at other federal agencies and departments, while the FTC addresses about half of its efforts to state and local issues. The FTC’s competition advocacy program has recently seen some re-invigoration. The Commission averaged only 13 advocacy comments per year from 1999-2001, including studies related to advocacy efforts. In contrast, for 2002 and 2003, the FTC filed 24 and 23 advocacies, respectively, and through the first half of 2004, the Commission has issued 15 advocacies. In the wake of reforms in the energy sector, that area was a major focus of FTC advocacy efforts in 1999-2000 at both the state and federal level. Subsequently, the Commission has emphasized urging states not to adopt (or to repeal existing) laws prohibiting the sale of gasoline below some measure of cost. Other areas receiving attention are state restrictions regarding the practice of law, especially in the area of real estate transactions, and restrictions affecting e-commerce. On this subject, FTC staff reports have addressed the potential competitive implications of state restrictions that impede competition from online sellers of wine and contact lenses, and the Commission has filed an amicus brief respecting a state rule that would restrain online sellers of caskets. Apart from competition issues, there has also been an increased emphasis on FTC advocacy before other federal agencies regarding restrictions on content labelling and advertising. Commission staff has filed a number of comments with the Food and Drug Administration advocating the free flow of truthful information in connection with advertising for prescription drugs and labelling and advertising for foods. The Antitrust Division has remained committed to its competition advocacy program, focusing primarily on other federal agencies and departments. It has, however, devoted some resources to state-level advocacy, participating jointly with the FTC in filing comments on state practice of law restrictions.

Conclusions and recommendations

- *Develop clearer assignments of responsibility among different enforcement officials, particularly between the federal and state levels, to avoid overlap and duplication.*

46. The recommendation in the 1999 Report, to adopt rules permitting greater informal staff-level consultation between the antitrust agencies and other federal regulators, remains valid and should be implemented. Likewise, and more importantly, the previous recommendation to rationalize coordination between federal and state antitrust authorities should be pursued. Where a federal antitrust agency takes enforcement action, federal law should provide that no state or private plaintiff may commence a separate action under either federal or state antitrust laws except to recover damages.¹²

¹²

Of course, the problem of coordination among multiple enforcement agencies has emerged as a critical issue in the international arena. Here, however, Congressional legislation cannot dictate a solution. The establishment of the ICN demonstrates recognition by the international antitrust enforcement community that the problem is pressing and must be addressed by focused deliberations and a commitment to maximize cooperative efforts.

- ***Undertake a comprehensive study of the extent and effect of the state action doctrine.***

47. The previous report's recommendation, urging a study to identify and assess all forms of existing anti-competitive state regulation, would provide a basis for considering partial or complete legislative repeal of the state action doctrine. Such a study should be pursued without delay.

- ***Eliminate the remaining exemptions and sector-specific jurisdictional provisions.***

48. The 1999 Report recommended that inconsistencies and gaps in competition law coverage be corrected by eliminating unnecessary antitrust exemptions and by replacing special regulatory regimes with provisions making the antitrust laws generally applicable to all economic sectors. This recommendation should likewise be pursued.

- ***Continue efforts to constrain inappropriate application of the Noerr-Pennington doctrine.***

49. As the FTC has observed, some courts have applied the *Noerr* doctrine too broadly. Parties have been granted immunity even though the anticompetitive conduct at issue lacked any "petitioning" component. Courts have also accorded protection to such tactics as repetitive lawsuits and misrepresentations that were plainly intended to delay a competitor's entry or raise its costs, rather than legitimately petition the government. Since the doctrine is a judicially created device to reconcile antitrust prohibitions with First Amendment protections, litigation and *amicus* briefs offer the best prospect for refining doctrinal formulations. Such efforts should continue as an enforcement priority, and should be expanded to address the problem of anti-competitive agreements reached in conjunction with settlement of litigation or other disputes. The 1999 Report observed that it is difficult to detect and isolate anti-competitive "side agreements" or understandings established in the course of joint lobbying or petitioning efforts, citing anti-dumping proceedings as a fertile environment. Settlements of patent litigation that entail anti-competitive provisions enshrined in a court order are another possible abuse of petitioning immunity. The petitioning activities that trouble the margin of the *Noerr-Pennington* doctrine constitute, in many respects, commercial speech of the kind that the Supreme Court has held does not deserve full First Amendment protection. There should be adequate space in First Amendment jurisprudence to fashion appropriate restrictions on anti-competitive petitioning that goes beyond mere solicitation of government regulation.

- ***Urge Antitrust Modernization Commission to recommend legislative improvements***

50. The Modernization Commission is tasked with examining "whether the need exists to modernize the antitrust laws," and thus is a potential vehicle for promoting the legislative changes recommended elsewhere in this report. The enforcement agencies should urge the Modernization Commission to propose legislation (1) providing that, where a federal antitrust agency takes enforcement action, no state or private plaintiff may commence a separate action under either federal or state antitrust laws except to recover damages, (2) reducing or eliminating the applicability of the state action doctrine, and (3) eliminating remaining statutory antitrust exemptions and sector-specific jurisdictional provisions.