COUNTRY STUDIES

United States - The Role of Competition Policy in Regulatory Reform

1998

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in the United States. This report was principally prepared by Mr. Michael Wise for the OECD.

Overview

Related Topics

BACKGROUND REPORT ON

THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM*

*This report was principally prepared by **Michael Wise** in the Directorate for Financial and Fiscal Affairs of the OECD. It has benefited from extensive comments provided by colleagues throughout the OECD Secretariat, by the Government of the United States, and by Member countries as part of the peer review process. This report was peer reviewed in June 1998 in the OECD's Competition Law and Policy Committee.

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Is competition policy sufficiently integrated into the general policy framework for regulation? Competition policy is central to regulatory reform, because (as the background report on Government Capacity to Produce High Quality Regulations shows) its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition. Moreover, as regulatory reform stimulates structural change, vigorous enforcement of competition policy is needed to prevent private market abuses from reversing the benefits of reform. A complement to competition law enforcement is competition advocacy, the promotion of competitive, market principles in other policy and regulatory processes. This report addresses two basic questions: First, is the US conception of competition policy, rooted in its history and culture, adequate to support pro-competitive reform? Second, do national institutions have the right tools to effectively promote competition policy? That is, are the competition laws and enforcement structures sufficient to prevent or correct collusion, monopoly, and unfair practices, now and after reform? And can its competition law and policy institutions encourage reform?

US competition policy is grounded in principles of economics and has been a powerful tool in regulatory reform. Competition law enforcement and policy advice have played central roles in successful efforts over the last 20 years to reform and often eliminate anti-competitive economic regulation of transport, energy, telecommunications, and services. The belief that market competition should underlie the US economy is broadly supported, so national sectoral regulators also operate under mandates to promote competition. To be sure, the ostensible commitment to competition has faltered in particular settings, and it has led to anomalies where regulators' mandates for competition have been vague, ambiguous, or arguably inconsistent with others. But connecting regulation to competition has made it easier to reform in many cases where sectoral regulation has led to anti-competitive results. Advocacy by the competition authorities was often important in pushing other regulators to focus on competition issues and to apply competition policy concepts consistently, and in clarifying the positive role competition policy could play in achieving regulatory objectives.

The basic legal enforcement tools are quite strong, so competition enforcement is a credible assurance that public interests remain protected in the absence of economic regulation. Paradoxically, the breadth of commitment to competition policy, and the strength of the US competition law and sanctions for violating it, may impede the direct application of competition law in some potential reform settings. Responsibility for competition policy is diffused widely and subject to myriad potentially competing interests. The number of special industry rules, jurisdictional oddities, and sectoral regulators and exemptions, which together constrain the application of the basic competition laws, is surprisingly large. Some of the sectoral regulatory programmes harmonise reasonably well with the general competition laws, but some have fallen short. One major source of exemption, the "state action" doctrine that permits individual states to impose non-competitive local regulatory programmes, can undermine larger-scale pro-competitive reform. Responding in part to these jurisdictional limitations and exemptions, the enforcement agencies have been vigorous public advocates of pro-competitive reform, to introduce competition by changes in regulation where they cannot do so by enforcement of competition law.

1. THE CONCEPTS OF COMPETITION POLICY IN THE UNITED STATES: FOUNDATIONS AND CONTEXT

The US's conception of competition policy as a principal component of its economic "constitution," and the central role competition policy plays in the design of economic legislation and regulation, constitute a powerful basis for fundamental reform. Basing regulation on a presumption of competition is not a radical idea in the United States, as it is in some OECD countries. Instead, reforms that emphasise competition can be represented, accurately, as a return to political and policy roots. That basic political support probably explains why the United States has done so much to remove price and entry controls over industries that are structurally competitive.

In the last 20 years, the two US competition policy agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, as well as the courts, which are the ultimate authorities, have embraced a basically economic conception of competition policy. In truth, US competition policy has been based on economic principles for at least the last 50 years. A principal reason for establishing the Federal Trade Commission in 1914 was to bring economic and commercial expertise to the application of general competition law. As different economic principles have gained ascendancy, antitrust law has generally followed.

Competition law prevents private constraints on the achievement of economic goals, principally the more efficient use of resources. This basically economic purpose for the law about competition is consistent with the directions and foundations of regulatory policy generally. The annual economic report of the President in 1996 introduced its discussion of regulatory policy by highlighting the importance of market competition to drive down costs and prices, induce firms to produce the goods consumers want, and spur innovation and the expansion of new markets from abroad.[1] Policies pursued by other federal regulatory agencies are typically conceived as intended to promote competition, rather than substitute for it, as much as possible. For example, the mission statement for the federal agency that regulates energy requires it "to foster and assure competition among parties engaged in the supply of energy and fuels."[2]

Box 1. **Competition policy's roles in regulatory reform**

In addition to the threshold, general issue, whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations

- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

- Regulation can **reproduce** competition policy. Rules and regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different practical outcomes.

- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

Despite the strong support for the idea of competition in US political culture, there is no single, generally accepted, authoritative statement of purpose for national competition policy. The first national competition laws, the 1887 Interstate Commerce Act and the 1890 Sherman Act, made federal powers and institutions available to apply substantive principles that were derived largely from common law. Just exactly what purpose those laws were to accomplish by challenging cartels and abusive monopolistic practices was debated then and has been debated since. Later laws, such as the 1936 Robinson-Patman Act about price discrimination and the 1950 Celler-Kefauver Act about mergers, seem to respond to different purposes at the time they were enacted, namely to protect firms against unfair practices by their competitors and suppliers and to control industrial concentration. No doubt the lack of a single authoritative statement in the basic legislation reflects how purposes can be multiple, changing, and sometimes conflicting. The most often-quoted description of the motivation for US competition law does not come from the legislature, but from the Supreme Court, which has called the Sherman Act "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," resting on the premise that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[3]

In such statements about purpose, different elements of competition policy often appear together, as policy makers are reluctant to admit priorities. The recent US statement about competition policy to the WTO exemplifies this eloquent indecision. It concludes that the three "principal touchstones" of US competition policy are "promoting consumer welfare, protecting the competitive process and enhancing economic efficiency." Here "consumer welfare" is understood quite broadly. It means that the ultimate question is always the effect on consumers; effects on other producers are considered only to the extent they ultimately affect consumers. It holds that consumers' welfare is improved by greater variety, higher quality, and lower prices. This state is "efficient" in the sense that consumers "pay no more and no less than it costs society as a whole—in real terms—to produce those goods and services." This formulation echoes conventional static equilibrium analysis, which values competition to the extent it leads to a price-output combination that maximises output at a given cost. The focus on consumers receiving the benefit of that low cost is notable. But the consumer's welfare is not determined just by an area on an economic diagram. Rather, "the test" for identifying what the competition law considers undesirable is whether the restraint "reduc[es] the importance of consumer preference in setting price and output." The second element, the competitive process, is protected by preserving static and dynamic conditions that discourage collusion and permit efficient entry and innovation. And the third, efficiency, is promoted as competition forces firms to lower costs and respond to the market's signals.

The benchmark for US competition law is effect on competitive outcomes, more than process alone. To some extent, process issues underlie the increasing attention to strategic, exclusionary behaviour. Sensitivity to dynamic efficiency may revive some old competition law rules, adapted to new settings. But US competition law rarely intervenes simply to preserve the possibility of greater rivalry, except to redress an unfair practice by a firm with market power or to prevent a merger that threatens such a result. Nor is the law or policy particularly concerned about structure, at least not at the present time.

Some years ago, when economic theory considered concentration to be significant or even determinative regardless of entry conditions or other factors, so did US competition policy.

The use of fairness as a competition policy value is controversial. The entire corpus of US competition law is included in the FTC Act, which prohibits "unfair method of competition." But the statute's sense of "unfair" has been transformed since the law was passed in 1914. Now, it is taken to mean "unfair to consumers." That is, it is unfair to deprive consumers of the benefits of an open, competitive marketplace. Some other, sector-specific competition laws are still concerned about preserving fair competition among business rivals, and it is not always clear that the other enforcers have adopted the same understanding as the competition agencies themselves.[4] And one US antitrust law, the Robinson-Patman Act, is based on traditional principles of unfair competition among competitors. US competition policy does not admit any special purpose for growth, although its policy presumes that competition promotes growth, and experience seems to bear this out. And it does not include any specific solicitude for small or medium sized businesses, although at one time it did, and the protection of small business was one of its political foundations.

Assigning a primary role to competition policy is consistent with the long-standing US cultural emphasis on individualism and entrepreneurial initiative. When national-scale regulatory institutions, such as the Interstate Commerce Commission and the Federal Trade Commission, were first created, they were conceived as necessary to protect and promote market competition, not as means of directly controlling business behaviour and investment. In those early years, farmers and local businesses complaining about abuses by railroads and national-scale firms called for these laws to stop discriminations and other abuses that, they said, unfairly prevented them from competing themselves. During the period from the Depression to the 1970's, when most of the other national regulatory institutions were created, there appeared to be a presumption in favour of federal economic regulation in many sectors. But even then, laws such as the Federal Power Act and Federal Radio Act (later the Federal Communications Act) often explained or justified regulation as a means of perfecting or correcting competitive markets.

One reason the notion of "competition" enjoys wide support, of course, is that the term can mean different things to different observers or in different contexts. In the first half-century of US competition policy, promoting competition was often understood to mean protecting opportunities for smaller competitors against putative monopolists. Sector regulators, who also claim to be promoting, rather than displacing, competition, have sometimes interpreted and applied the terms differently than the enforcement agencies would have. To some extent, those conflicts persist and have delayed achieving all the benefits of reform. But the basic cultural acceptance of a competition norm may explain why it has been politically feasible for the US to reform so many of its non-competitive regulatory policies. When dissatisfaction with the cartel-like results of economic regulation led to formal deregulation projects under the Ford and Carter administrations in the 1970's, those efforts drew support from the competition policy tradition. And competition law enforcement was applied directly as a reform tool, to break up the national telecommunications monopoly and to eliminate price-fixing through "private" regulation of professional services.

The multitude of institutions responsible for "competition" underscores that in the US, as elsewhere, competition policy must be understood as broader than just the basic laws about restrictive business practices and corporate combinations. Competition policy results from the combined effects of all the laws, policies, and institutions that protect, prevent, promote, or employ market competition. The basic competition laws are federal statutes, but their content and meaning is determined principally by a common-law process in which the courts are the highest authorities. Most other regulatory programmes are specified by detailed laws and statutes, but for those too the courts play important roles in interpretation and application. The power and role of the independent judiciary in the US legal system helps keep US competition policy coherent, despite the multiplicity of participants. Judges deciding particular cases may often be required to acknowledge and try to accommodate the many objectives and effects of these different legal commands. The result is a constant process of defining and balancing the roles of competition policy institutions and those responsible for economic and social regulation.

The strength and pervasiveness of competition policy concepts may explain some other features of US regulation. US competition law enforcement does not balance other policy goals against the goal of protecting competition. Thus a reduction in competition cannot usually be justified on the grounds that some other purpose is being served. And efforts to achieve other goals by means that appear to reduce competition run a serious risk of antitrust liability. Because the goals cannot be achieved by restricting competition, the US relies mostly on other methods, including direct regulation, to achieve them. It is a separate, and important, question whether the benefits of the direct regulation or other methods are justified by the costs they incur, including perhaps indirect effects on competition too.

2. THE SUBSTANTIVE TOOLKIT: CONTENT OF THE COMPETITION LAW

US competition law appears vigorous and strong. Its substantive provisions can reach all the kinds of possible competition problems that might arise after regulations are changed to permit greater market competition. The law has already been used, directly, to accomplish reform objectives. But one aspect of its strength disguises a potential handicap when applied to regulatory settings. Sanctions for violation are unusually harsh. High fines, trebled damages, and imprisonment can appear disproportionate, as punishment for conduct that had only recently been permitted, or even required, by other government regulation. The high penalties for violation encourage claims for exemption, special treatment, or even regulation as a substitute for competition enforcement.

Box 2. **The competition policy toolkit**

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: “horizontal” agreements among firms that do the same things, and “vertical” agreements among firms at different stages of production or distribution. The second category is termed “**monopolisation**” in some laws, and “**abuse of dominant position**” in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called “**mergers**” or “**concentrations**,” usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

2.1. Horizontal agreements: rules to prevent anti-competition co-ordination, including that fostered by regulation

Under US antitrust law, agreements among competitors about the critical competitive dimensions of price and output can be treated as crimes, subject to felony penalties of high fines and imprisonment. The actual effect or the reasonableness of the prices or market divisions agreed on is not relevant. Such agreements are illegal *per se*. Less severe penalties can also be applied, such as cease and desist orders. Other kinds of horizontal agreement may also be illegal, but their legality depends on the outcome of the "rule of reason" test, that is, on a review of the net competitive effects in the particular factual setting.

The law prohibiting horizontal agreements has often been used to ensure that deregulated industries do not continue their previous habits. After airline deregulation, executives attempting to fix prices were indicted.[5] Another suit stopped concerted practices by which airlines tried to establish or maintain price agreements by signalling through computer networks.[6] Tariff bureau agreements about trucking rates were challenged as horizontal price fixing.[7] A non-compete agreement between cable TV firms was challenged as market division.[8]

Self-regulation has been a particular target. Competition law has been used to break down "ethical" constraints that professionals and other service providers have imposed on themselves, typically via their trade associations. The seminal action was the Federal Trade Commission's successful complaint against the American Medical Association for banning price advertising and contracting practices.[9] Scores of other actions followed, most of them resolved by consent orders. In 1996, the FTC prohibited the California Dental Association from restricting truthful, non-deceptive advertising and solicitation practices. The Commission found that broad, categorical bans on advertising of low prices and discounts are as anti-competitive as outright price fixing.[10] And in 1997, the Commission ordered a voluntary professional association, the International Association of Conference Interpreters and its US affiliate members, to stop using rules that effectively fixed prices for interpreter services. Similar cases have been brought in industries outside the learned professions, such as automobile dealer associations and associations of insurers. Firms in industries subject to regulatory change can obtain some assurance against antitrust action, by asking for the agencies' advice in advance. Thus, in 1995, the Antitrust Division approved a proposal by the Intermodal Council of the American Trucking Associations, Inc. to begin a series of discussions about improved efficiencies in intermodal operations. This approval took the form of a "business review letter," an informal but binding assurance that the proposed actions would not be challenged.[11]

The strength of the law about price fixing follows naturally from the economic basis of US competition policy. There is a moral element as well: some have justified the harsh treatment by analogising the law against price fixing to the law against theft, reasoning that both take money out of the consumers' pockets without their knowledge and against their will. But harshness is less appropriate in regulatory contexts, and thus most actions against horizontal constraints in regulatory settings have been civil cases. (The exceptions are naked attempts to fix prices long after the regulatory price-setting methods have been formally repealed.)

Where regulation has been in place, there may often be at least a colourable argument that the restraint accomplishes a proper purpose or even promotes competition. The agencies and the courts have tried several approaches to acknowledging and weighing the potential efficiencies of horizontal restraints, while minimising costly, time-consuming evidentiary analysis, if possible. The FTC adopted a protocol of shifting burdens and escalating standards of proof in its *Massachusetts Board of Optometry* decision in the 1980s and then used the test extensively in striking down private regulation among professional and trade associations. While the FTC has now evidently abandoned the *Massachusetts Board* method,[12] the Antitrust Division has announced that it is applying a three-step process that looks very much like it. The first step is determining whether an agreement among competing firms restrains competition that would otherwise have occurred. If the answer is yes, but the agreement does not fall into a usual *per* se category, the next step is to challenge the parties to the agreement to explain why, despite the evident risk to competition, their agreement nonetheless produced pro-competitive effects. If they fail to do so, the Antitrust Division claims it should then win the case, even though it has not demonstrated actual net anti-competitive effects in the particular factual setting. If the parties do come forward with evidence of significant efficiencies or pro-competitive effects, though, then it is necessary to undertake the third step, the balancing test of the rule of reason, applied to the particular setting.[13] There is Supreme Court precedent for some such middle-range decision method.[14] An approach limited to only the traditional full rule of reason and the traditional *per se* rule could affect enforcement costs and priorities, and make challenges to horizontal restraints less effective.[15]

Regardless of the particular test, other social policies and effects cannot be weighed in the balance in a competition law enforcement matter. The Supreme Court itself has held[16] that any argument to the effect that some other public interest, even safety, outweighs the law's interest in free competition must be addressed to the legislature, not to the courts or the enforcement agencies. This doctrine, that constraints on economic competition cannot be legally justified on the grounds of protecting other interests, has not necessarily undermined the protection of those interests. But it may explain, in part, why there is so much direct regulation in the US to promote or protect social values. Examples include rules applied by the Environmental Protection Agency, the Food and Drug Administration, the Department of Agriculture, and the Consumer Product Safety Commission. Some of this is regulation to correct market failures, especially those due to consumers' lack of accurate information. Direct regulation avoids the inefficiency that would result from preventing competition; however, it remains to be determined in particular cases, whether the benefits of direct regulation justify the costs. The refusal of competition law to admit defences based on protecting other values does not prevent competitors from acting together to improve safety or to correct information failures. Rather, it prevents them from agreeing to eliminate economic competition. Where another regulatory programme also applies to the conduct at issue, a balance between policies may be achieved by limiting or channelling the application of competition law. Balancing with other policy interests is accomplished through doctrines of exemption or assignments of jurisdiction, rather than through decisions about the application of the competition law.

US law about horizontal agreements could be less useful in regulatory situations because of long-standing difficulties in dealing with "tacit" conspiracy and co-ordinated action, even under the more flexible Federal Trade Commission Act. But careful economic analysis and presentation of evidence have supported successful application of the Sherman Act to tacit conspiracy in the post-deregulation airline industry, showing that this weakness can probably be overcome in appropriate cases.

A more important concern is the perception that penalties are disproportionate. Allegations about draconian penalties (including risks of treble damages in litigation outside the government's control) may lend credence to claims that previously regulated conduct ought not to be subject to the entire range of antitrust law. Many of the dozens of statutory special provisions, discussed in Section 4 below, appear designed to prevent the application of criminal penalties and treble damages for just this reason.

2.2. Vertical agreements: rules to prevent anti-competitive arrangements in supply and distribution, including those fostered by regulation

The text of US law, like the texts of most other competition laws, does not distinguish between horizontal and vertical agreements. But the doctrine developed by US courts and enforcement agencies draws a sharp distinction. Only one kind of vertical agreement, to fix minimum resale prices, is clearly illegal *per se*. Despite the *per se* label, resale price maintenance is not treated like horizontal price fixing, in terms of remedy and enforcement. The agencies bring very few cases, and virtually never bring criminal charges against this violation. Certain tying agreements are sometimes described as illegal *per se*, but the accuracy of that classification is doubtful, for the courts have also required that the party imposing the agreement have economic power over the tying good or service. Thus, illegality depends on more than just the form of the agreement. Most vertical relationships are thus assessed under the rule of reason and are considered illegal only if net anti-competitive effects are demonstrated. The usual remedy is an injunction or cease and desist order, or damages in private cases.

Competition law principles have been applied to vertical relationships imposed by regulation or adopted in order to thwart the goals of regulatory reform. State-level regulations mandating exclusive sales territories or protecting dealers and franchisees against contract partners or competitors have been criticised and challenged. In health care markets, some parties have responded to greater competition by adopted "most favoured customer" pricing clauses, assuring their customers or suppliers that their competitors will not get better treatment. These have been the target of several enforcement actions, because in some circumstances the clauses' net effect may actually be to discourage entry and price reductions. And some providers have sought regulations imposing "any willing provider" guarantees, to force medical coverage plans to admit them as contract parties. Agency advocacy has criticised these regulations as likely to dampen competition for lower prices.

The “rule of reason” approach to nearly all vertical relationships exemplifies how US law follows economic principles. The agencies and courts are sensitive to the difficulty of determining the net competitive effect of most vertical restraints and to the likelihood that they serve some useful, efficient purpose. And the approach is consistent with the US libertarian streak. Presuming that parties to business contracts entered them freely, competition law does not usually intervene to redress a perceived imbalance in negotiating power.

Nevertheless, there are some curiosities in US vertical restraint law, mostly related to the effort to maintain *per se* treatment for resale price maintenance. US law appears less regulatory than, for example, the elaborate structure of prescribed and prohibited contract terms under EC block exemptions. But in US law, there is a complex and obscure interplay of case law doctrines about how a vertical agreement can be inferred or avoided.

2.3. Monopolisation (abuse of dominance): rules to prevent or remedy market power, especially arising from reform-related restructuring

The Sherman Act does not prohibit being a monopolist, or even acting like one by charging high prices or reducing output. Rather, what is forbidden is conduct that, by unfair means, achieves or maintains a monopoly, principally by excluding other efficient competitors. The available sanctions are substantial, reaching all the way to mandated divestiture and restructuring, to undo the monopoly structure and create competing firms in its place. But monopolisation cases can be enormously complex, so few are brought.

The monopolisation law has been used to restructure regulated network monopolies. The principal illustration is the use of a Sherman Act monopolisation case, filed in the 1970s, to restructure the national telephone system. The consent decree issued in 1982 separated manufacturing, long distance, and local service operations. The basis for the action was the incumbent monopolist’s efforts to exclude competitors in equipment and long distance services. The consent decree led to prolonged, continued controversy, though, about the relative competences of the federal judge overseeing it, the Antitrust Division, and the sectoral regulator, the Federal Communications Commission, to implement further reforms in telecommunications. These are discussed further in the background report on Regulatory Reform in the Electricity Industry.

In determining liability for monopolisation, only competition policies are taken into account. But in designing a remedy, courts may consider other public policies, because the remedy must be in the public interest and thus must not unnecessarily impair other important policies. Thus, in the *AT&T* divestiture, the judge who entered the consent decree considered public comments about how the proposed divestiture would affect other regulatory requirements, including the responsibilities of state-level regulators.[17]

Monopolisation law is not used as a direct remedy for the exercise of market power through high prices. Because the policy is implemented through judicial law enforcement, this would require that judges or prosecutors become price regulators. Those roles are not suitable in the US administrative system, because those officials lack the technical support or political accountability necessary to those tasks. Monopolisation law enforcement may, however, be employed to counter actions that deny access to “essential facilities,” and it has been employed in many regulatory settings, such as telecommunications and electric power, for that purpose. The inability of competition law to address the pricing aspects of market power, but only underlying conditions that make market power possible, may encourage retaining regulatory programmes that control prices directly.

2.4. Mergers: rules to prevent competition problems arising from corporate restructuring, including responses to regulatory change

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 harm competition or tend to create a monopoly. The law is prospective; mergers can be prevented on a showing of likely future effects, and showing of actual, historic effect or non-competitive conditions is not necessary. The law can also be applied to undo a merger that has already happened, but because of pre-merger notification that is rarely necessary any more. The premerger filing obligation depends only on the size of the parties and the transaction. The process thus sweeps in many deals that have no competitive effect. The process of filing will impose some delay, even if the agencies exercise their power to terminate an investigation early, and the filing can cost over $100 000 even if there is no likely problem. The filing fee alone is nearly $50 000 per party per transaction. This figure may be significant for firms or transactions that just barely meet the reporting requirement, of sales or assets of about $15 million. The enforcement process is disciplined by deadlines and the fact that the agencies cannot act solely on their own, but must obtain an order from a federal judge to block a transaction.

In part because the statutory test is phrased explicitly in terms of competitive effect, merger law is perhaps the purest expression of the economics-based approach to competition policy. The agencies' guidelines outline a market definition protocol (based on demand substitution incentives and behaviour as proxies for cross-elasticity of demand), specify how to identify and characterise market participants (as "in" the market or committed entrants), state presumptions about structural measures, and set standards for evaluating likely competitive effects of entry. The guidelines and applicable law contain market share tests. These tests appear highly precise, seeming to declare that a combination of two firms with market shares of about seven per cent in a five-firm industry is illegal, and that one among such firms in a ten firm industry is suspect. But the precision is only apparent, and transactions of that low magnitude are rarely challenged. Decisions to challenge are based on detailed assessment of likely effect in the particular circumstances. Markets are defined based on data about actual and likely cross-elasticities and substitution responses. Assessment of likely effect depends critically on the long-term significance of entry. Possible entry by a firm that could exit quickly, at no cost, is treated differently than possible entry by a firm that would have to commit sunk resources. This difference in treatment of entry could be quite significant in regulatory settings. The hurdle faced by a "facilities-based" competitor could be much higher than that faced by a reseller of the incumbent's basic service.

The law speaks only of competitive effects. Other values, including industrial development, employment, and the values and purposes promoted by other regulatory programmes are not considered, at least explicitly. In practical fact, the agencies may be aware of the possible impact of other policy considerations when deciding whether to act. And applications in market-based health care are instructive about how the courts view the balance with other policies. Health care reform has led to a great deal of restructuring, such as mergers and acquisitions of hospitals and drug firms. The enforcement agencies have lost several hospital merger cases, as courts resisted the precept that competition cannot be balanced against other social goals.

The merger law has often been used to maintain and protect gains from reform and restructuring. The natural gas industry was essentially deregulated a decade ago; recently, the FTC stopped an acquisition that would have protected a local market gas pipeline against the threat of competition.[18] Other examples come from television and radio, where special sectoral rules about competition have been relaxed or discarded. In September, 1996 the FTC challenged Time-Warner's acquisition of Turner Broadcasting because it would restrict distributors' access to video programming and programme producers' access to distribution outlets, increase concentration by combining two leading producers, and increase vertical integration.[19] After sector-specific ownership constraints were relaxed, the Antitrust Division has challenged mergers of radio stations.[20] In telecommunications, an Antitrust Division challenge led to restructuring of the Nextel-Motorola acquisition to preserve competitive opportunities among entrants into wireless communication that might challenge the regulated landline telecommunications monopolies. In 1995, the Division insisted on modifications to the proposed alliance among Sprint, France Telecom, and Deutsche Telekom to preserve competitive opportunities for US firms in newly developing world telecommunications markets.

Jurisdiction over mergers in regulated industries has been scattered, though. Some sectoral regulators have shared or even exclusive jurisdiction over mergers in their industries. Most sectoral regulation is being dismantled, but separate merger control authority has proven difficult to uproot. As a consequence, application in regulation settings has sometimes been problematic. Because of their limited experience, and in some cases their responsibility to promote industry well-being, sector regulators may have systematic bias in favour of seeing the world the same way the regulated industry has, and may fail to appreciate the scope of possible competitive effects from novel industry combinations. The particular jurisdictional exemption are discussed below, under the relevant sectoral exemptions. Eliminating this bureaucratic balkanisation of analysis and enforcement could make the merger law a more effective reform tool, by ensuring that general competition law methods and principles are applied consistently.

2.5. Competitor protection: relationship to rules of "unfair competition"

The US federal law about unfair competition has developed from a law to remedy harm to competitors into the basis for a competition policy that is concerned fundamentally about harm to consumers. The basic law is the Federal Trade Commission Act, whose substantive section includes "unfairness" in two senses, both of which depart in some respects from usual doctrines of unfair competition. On the competition side, it prohibits "unfair methods of competition," and it is taken to mean the acts prohibited by the other antitrust laws. On the consumer protection side, it prohibits "unfair or deceptive" acts or practices. The implied distinction between "unfair" acts and "deceptive" ones seems to treat one of the basic, traditional kinds of unfair competition, namely deceptive advertising, as something different from "unfairness." These oddities are explained by how the purpose of US law has evolved. The traditional law of unfair competition is about unfairness among competitors. The US law now treats these terms as referring to unfairness to consumers, including harms to the competitive process on which consumers have a right to rely. In fact, federal competition law is increasingly interpreted to ignore claims of unfairness among competitors, except as the actions complained of might harm consumers. The US antitrust laws no longer include much of the traditional doctrine about unfair competition. That doctrine is now sometimes called "business torts" in the US. Since the interests being protected are usually private, business torts are pursued primarily through private actions. An exception to this trend, though, is the Robinson-Patman Act, a part of the federal antitrust laws which regulates discriminations in price and marketing services. This law has long been considered as an act to promote fairness, although that word does not appear in its text. Even though the law's basic prohibition includes a competitive-effects requirement, it is a technically complex statute that can sometimes be applied to protect competitors. The federal agencies do little to enforce this law themselves, and 20 years ago the Antitrust Division even called for its repeal. Despite the lack of public enforcement, it is still important in private lawsuits.

Often, competition law and policy have been invoked to undermine or remove rules ostensibly preventing unfair competition. A chief example is rules or even state laws prohibiting sales "below cost." The FTC has expressed concern about these laws, because the sales they prohibit often benefit consumers through low prices. Yet it is unlikely that competition is impaired, either in the short run or the long run, because it is rarely possible to recoup losses from "predation" in the settings where these claims are often made, such as retail trade. Another example is professional codes of ethics that try to prevent price competition or advertising, which have been frequent targets of competition law enforcement.

2.6. Consumer protection: consistency with competition law and policy

US policy treats antitrust and consumer protection law enforcement as complementary tools for achieving the benefits of market competition. The general competition law is intended to ensure that markets provide consumers with an appropriate range of options. These laws therefore prohibit conduct that would substantially and artificially limit choices in the marketplace. The general consumer protection law (principally Section 5 of the FTC Act, but also including other special-purpose consumer protection laws) is intended to ensure that consumers can select freely and effectively from the options offered in the market.[21] These laws prohibit conduct that can impair consumer choice even if carried out only by a single firm. Because these two bodies of law advance the public purpose of supporting a market economy, they are appropriately enforced by public agencies and boards. The FTC, responsible for both bodies of law, is a valuable integrator. Having both responsibilities in the same organisation can provide opportunities to test the two sets of policies' relationship to each other. These possibilities for cross-fertilisation often appear in regulatory contexts. US consumer groups generally favour strong competition law enforcement, sometimes even criticising the enforcement agencies for not being active enough. In general, though, anxiety about some aspects of reform and deregulation has been met, and to some extent overcome, by the knowledge that backup of competition law enforcement is credible.

3. INSTITUTIONAL TOOLS: ENFORCEMENT IN SUPPORT OF REGULATORY REFORM

Reform of economic regulation can be less beneficial or even harmful if the competition authority does not act vigorously to prevent abuses in developing markets. The US has strong, well-established basic enforcement institutions. In fact, it has so many different enforcement methods that maintaining co-ordination and consistency among them is a continuing challenge. To a large extent, the constant 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. Application of US competition law has come to look more like regulation over the last decade, as the agencies have turned to issuing guidelines about important policy issues, such as health care and intellectual property, and to negotiating detailed behaviour requirements in consent decrees in complex merger cases. Thus it becomes a matter of interest whether the processes meet desirable standards of regulatory quality.

3.1. Competition policy institutions

With two national-level competition agencies, the US 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, located politically and geographically between the legislature and the executive. One reason for its creation was to bring greater technical expertise to competition policy; however, the FTC's basic law was built on the common law of unfair competition, and the FTC was also charged with a law enforcement role and process. Proposals to create a competition agency with the powers of direct economic regulation were rejected at the outset in 1914. Thus, the US has two law-enforcement agencies, both staffed by a combination of lawyers and economists, both combining policy expertise and prosecutorial skill with political accountability (achieved in different ways), and both implementing policy about competition mostly by applying general principles case by case to particular situations. The redundancy has not historically led to conflict, as the two agencies have strictly divided their responsibilities to avoid duplicating effort or inviting forum shopping. But it does impose some costs on each agency, to co-ordinate policies and actions with the other one.

Independence and transparency are ensured by roughly comparable methods at the two agencies. The Antitrust Division has a tradition of separate decision, without influence from or consultation with higher political authorities. It is required by law to publish and solicit public comment about proposed consent decrees. And it cannot issue binding orders on its own authority, but must make its cases to independent, tenured federal judges. At the FTC, independence is established by the Commissioners' tenure for fixed terms, not subject to removal 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 chair. At the Commission, no more than a bare majority (three out of five) can be from the same political party. At both agencies, there is a strong tradition of professionalism, and enforcement decisions do not appear to depend on political influence. Both agencies publicise their decisions to initiate actions. Final decisions, from the courts or the Commission, are almost always accompanied by detailed opinions and explanations. But neither agency routinely explains its reasons for not taking action, although they may do so where there is unusual interest in a matter. (Decisions not to take action are not appealable; the disappointed complainant's recourse is to bring suit itself.) And there have been concerns that the consent order process sometimes obscures the agencies' reasoning, because public explanations are often phrased in conclusory terms that give little guidance to how doctrines are developing.

The competition agencies' relationships with regulatory bodies and policy makers differ some, as might expected from the difference in their institutional design. Because the heads of other agencies and regulators are also Presidential appointees, in principle all should be responsive to the same broad political themes. The Antitrust Division, as part of the executive branch, deals as one ministry to another, and thus has a stronger connection to the setting of economic policy within the executive branch of government. The FTC, as an independent agency, is more of an outsider with respect to other departments. Both competition agencies are outsiders with respect to the other independent agencies that have been responsible for major infrastructure industries such as telecommunications, energy, and transportation. Especially in their relations with these other independent agencies, the competition policy interactions with other policies can become formalistic. The competition agencies' efforts to promote competitive approaches at these other agencies have tended to be more successful when they have been built on long-standing staff-level contacts and consultations. For example, telecommunications reform has involved many years of interaction between the Antitrust Division and FCC staffs, and many of the competition agencies' statements about FCC regulatory proposals have been developed co-operatively, to support the direction of FCC efforts. This co-operative direction was crucial to the design of the antitrust divestiture which built on the FCC's separation rules between competitive and monopoly parts of AT&T's network, but was less effective in its implementation. To date, co-operation in regard to provisions in the new Telecommunications Act relevant to this issue has been effective, though it remains a source of possible future friction.

3.2. Competition law enforcement

Both competition agencies have adequate powers to take action independently, to gather the information they need to reach reasoned decisions, and to ensure that their decisions are effective. And despite the law-enforcement culture in which each operates, and the fact that policies other than competition are not formally taken into account in determining liability, both agencies have proven sensitive to regulatory contexts. They have tried to ensure that their enforcement programmes are consistent with regulatory reform initiatives. In some respects, notably concerning the time and expense of their procedures, the agencies' own regulatory process might be improved; for the most part, though, the agencies are taking steps to meet appropriate standards.

Both agencies implement their enforcement programmes independently and can take initiatives without necessarily obtaining formal authorisation from other parts of the government. The two agencies may consult informally, though, with other parts of the government that are known to have regulatory or law enforcement interests in particular companies or industries. Both agencies have broad powers to 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 and an opinion by the independent federal judge. The FTC issues complaints in its own internal process, which may lead to a hearing that is similar to a judicial trial, but is held before an Administrative Law Judge, a Commission employee with somewhat protected tenure and status. The decision and opinion by the Commission itself is usually on appeal from the initial decision by the Administrative Law Judge. It was originally hoped that the FTC's administrative process would be a more efficient way to find facts and apply expert analysis to them, but that hope has been disappointed. The Commission's internal processes have proven to be no speedier or less expensive than federal court litigation.

Some kinds of matters, especially mergers and criminal prosecutions, are subject to strict statutory deadlines. Others are not, though, and in the absence of that discipline, matters can languish. Taking a long time for some matters may not imply inattention. Rather, because easy cases settle fast, while hard ones take much longer, the long ones may show that the agency is taking on difficult issues. But unnecessary delay has long been a concern about competition litigation. The FTC adopted new rules in 1997 intended to set new, shorter deadlines for administrative litigation.[22] An initial decision must be filed within 12 months after the Commission issues its administrative complaint, barring extraordinary circumstances. In some circumstances, "fast track" procedures can require a final Commission decision (if the initial decision is appealed) within 13 months after issuance of a complaint. Experience so far has been promising, as the Commission has met this deadline when it has set it for itself.

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 often included also. Fines are available only in criminal cases, but settlements of civil cases may include pecuniary elements, and the government can sue to recover its own damages. An individual convicted of violating the Sherman Act may be imprisoned for up to three years and fined up to $350 000 for each count. For corporations, basic fines can be up to $10 million for each count, but in addition the fine may be increased to twice the gain from the illegal conduct or twice the loss to the victims. More recent violations are governed by general sentencing regulations, which tend to increase the potential incarceration for individual antitrust convictions, while reducing their fines; the net result of the new formulae for calculating fines against corporate violators leads to generally greater penalties.

The ultimate check on the agencies' enforcement policies and processes is the availability of judicial review. An initial substantive decision finding liability, either by a trial judge or jury or by the FTC in adjudicative matters, can always be appealed to a federal Court of Appeals. These independent appellate judges, who also hear appeals from private cases and decisions about other regulatory programmes, can control for consistency in the interpretation and application of the competition law, and have a great influence on how competition principles relate to other regulatory programmes. Judicial review also tends to ensure continuity of policy. The increasing influence of judges with an economic perspective has reinforced the economics-oriented antitrust policy of the last 20 years.

Box 3. **Enforcement powers**

Does the agency have the power to take action on its own initiative? The FTC, like most Member country agencies (19), has power to issue prohibitory orders on its own initiative. The Antitrust Division does not, though; it must make its cases in court. Neither is required to wait for a complaint. Unlike the agencies in about half of Member countries, neither agency can usually assess financial penalties directly, but instead must obtain a court order.

Does the agency publish its decisions and the reasons for them? Like virtually all Member country enforcement agencies, the FTC publishes its decisions, and courts publish opinions in many of the Antitrust Division's cases. (Trial-level opinions do not appear in criminal cases decided by juries).

Are the agency's decisions subject to substantive review and correction by a court? All Member country competition agencies must defend their actions in court if necessary.

Can private parties also bring their own suits about competition issues? Some kind of privately initiated suit about competition issues is possible in nearly all Member countries, but provisions for private relief in US law are probably the most substantial, and the greatest use is made of the option, too. Unlike most Member countries, the US agencies do not typically explain the reasons why they do not take action in a particular case, though. But this does not seem to inhibit plaintiffs from going to court.

3.3. Other enforcement methods

The competition agencies are not the only entities with the power to apply national competition law. Private enforcement, through suits for treble damages or injunctions, was provided in the original Sherman Act and continues to be important. Private suits can supplement government enforcement, but the litigants' priorities and motivations may not always be consistent with the government agencies' views on competition policy. A common type of private antitrust case is an auxiliary claim in a contract dispute, added because the threat of treble damages can be a powerful negotiating tool. But some private cases have been important on their own merits. Moreover, having the outlet available can be valuable check on government policies. If the government agency refuses to investigate a complaint, the complainant has the legal right to bring the case itself. Thus, the courts still hear cases about price discrimination and types of vertical restraints that are not high priorities in the agencies' enforcement programmes. Treble damages and attorneys' fees awards were included in the law to encourage private enforcement, by compensating for the high cost and risk of taking on a firm that is often the plaintiff's supplier or major competitor. But now that class actions are available to aggregate many small claims, and criminal fines have greatly increased, it may be worth reconsidering whether awarding exemplary damages in antitrust cases is still a sound policy.

Private litigation has played a significant role in regulatory reform, particularly in the professional services sector. The landmark case of *Goldfarb v. Virginia State Bar*, 421 US 773 (1975), applied the antitrust laws for the first time to the professions. In *Goldfarb* the Supreme Court held that minimum fee schedules for lawyers, adopted by a county bar association and enforced through disciplinary action by the state bar, constituted essentially private, anti-competitive activity. This decision opened the way to considerable private litigation and government enforcement challenging restrictions on professionals' business practices.

In addition to actions by purely private parties, there are two possible kinds of competition law enforcement actions by state and local officials. 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. Forty-eight of the 50 American states have antitrust statutes of general application. These statutes generally mirror the federal antitrust laws. By statute or judicial interpretation, the majority of the states refer to and generally follow federal case law in construing comparable provisions under their state antitrust laws. However, 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 provided for in state antitrust laws are numerous and vary widely from state to state.

State-level action is another supplement to federal enforcement and provides yet another check on the federal agencies' policies and priorities. There is some history of conflict between federal and state enforcers about how the federal laws should be applied. Local officials tended to be more aggressive in the 1980s. This additional tier of potential enforcement power can complicate business planning. The state enforcers have developed their own shared guidelines about mergers and vertical restraints, which differ in significant details from those of the federal agencies. The process by which these rule-like pronouncements have issued is irregular, and the scope of their authority is unclear. Direct conflicts about enforcement actions have declined, as the agencies and state enforcers have developed better means of co-operation in the 1990s. But state enforcers have tried to block some mergers that the federal government did not challenge, and they have brought actions against vertical restraints that the federal enforcers probably would not have challenged.

3.4. International trade issues in competition policy and enforcement

Foreign firms have the same rights as US 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 US antitrust law; however, a foreign government can only recover single damages. Foreign firms can, and do, bring complaints about exclusionary conduct of US firms to the attention of the two competition agencies. Indeed, they have sometimes brought complaints about actions by other agencies of US government, such as anti-dumping orders, that they claimed impaired access to the US market. The competition agencies do not have the power to bring enforcement actions against other parts of the government. But where there was cause for concern that US consumers could be harmed by an unnecessary reduction in competition, those situations sometimes prompted advocacy efforts at other agencies.

In general, the content and application of US competition policy does not depend on the nationality of the parties or even the location of the conduct. Anti-competitive conduct that affects US domestic or foreign commerce may violate the US antitrust laws regardless of where the conduct occurs or the nationality of the parties involved. An important set of recent price-fixing cases resulted in large fines against Japanese paper firms. Firms from Germany and Brazil paid a record fine for violating the premerger reporting requirement. In general, the proportion of agency matters involving foreign firms or individuals has greatly increased in the last decade.[23] In defining markets and assessing the likelihood of market entry, the methods used make no presumptions about national boundaries or origins, but instead treat the issue simply as one of fact.[24] In the US premerger notification programme, there are no special procedures for obtaining information, or 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 US commerce but otherwise meet the statutory thresholds.[25]

Dealing with foreign firms and products can raise some specific practical problems. To obtain evidence, the US agencies are increasingly turning to co-operation agreements with other countries. The US has entered four, with Germany, Australia, Canada, and the EC. In 1997, the US agencies made over 70 notifications to other countries' competition agencies under the OECD Recommendation about antitrust co-operation. The agreements with Canada and the EC have adopted the OECD Recommendation's principle of "positive comity," calling on each party to weigh the impact of anti-competitive conduct on the other party as an additional reason to challenge conduct that also violates the country's own laws. The genesis of the US-Canada agreement was in avoiding conflict over sensitive cases, but it now emphasises law enforcement co-operation. The two countries' enforcers have brought several joint price-fixing investigations, leading to convictions on both sides of the border. The positive comity provision in the EC agreement was recently invoked in an investigation concerning computer reservation systems. Co-ordination under the agreement led to US agencies deferring to European enforcement in several other matters, too. It is difficult to generalise about the degree of agreement among the various national enforcement policies, when they have been concerned about the same conduct or transaction. In some well-known cases, such as Boeing-McDonnell Douglas, it appeared that the European enforcers took a harder line than the US enforcers did. But in others, US enforcers insisted on divestitures after the European agencies had cleared the mergers.

Box 4. **International co-operation agreements**

Eight Member countries have entered one or more formal agreements to co-operate in competition enforcement matters: Australia, Canada, Czech Republic, Hungary, Korea, New Zealand, Poland, and the US. And the EC has done so as well.

3.5. Agency resources, actions, and implied priorities

The US backs its commitment to competition policy with substantial resources. Staffing at the two competition agencies has increased about 15 per cent over the last five years and now stands at about 1 300 (plus about 500 at the FTC who concentrate on the "consumer protection" part of that agency's jurisdiction). In addition, hundreds of staff at other agencies enforce other laws and regulations with significant competition policy aspects, and hundreds more in state governments are involved in applying national and state-level competition law. This commitment evidences more than just ceremonial seriousness. US firms can expect that competition laws will actually be applied to them and tend to behave accordingly.

Both agencies assign the highest enforcement priority to horizontal restraints and horizontal mergers. The FTC has recently begun paying more attention than in the past to vertical issues. Half of its new non-merger matters in 1997 involved vertical relationships. This is about double the proportion of five years ago. A large share of resources goes to merger investigations. The agencies have received about 2 200 filings per year. The rate has increased recently; in 1997, there were over 3 700. In 1997, about 15 per cent of the transactions notified to the government received some further investigation, although only about two per cent of the total ended up the subject of enforcement action.

Both agencies have been active in sectors affected by reform. In 1997, the Commission took four law enforcement actions against efforts to fix prices or otherwise prevent competition in professional services, including health care services provided under government-regulated programmes. And two other enforcement actions were aimed to preserve competition in the now-deregulated natural gas industry. These two sets of issues, "private" regulation of professional services and preserving competition in deregulating markets such as energy and broadcast, have been subject to continuing enforcement attention.

It is difficult, though, to estimate what proportion of enforcement resources the agencies have applied to cases where regulation has a significant competitive effect. Both competition agencies have been active advocates for competition policy solutions; those efforts are described in more detail below, in Section 5. The resources devoted to advocacy efforts have declined significantly in the 1990s.

4. THE LIMITS OF COMPETITION POLICY FOR REGULATORY REFORM

Whether competition policy can provide a suitable framework for broad-based regulatory reform is partly determined by the extent and justification for exemptions, exclusions, or special treatment for sectors, types of enterprises or actions. In the US legal system, competition policy enjoys some priority over regulatory policies; however, a host of exemptions and special jurisdictional provisions have developed over the past century, and the actual relationships between competition policy and regulation are highly complex.

4.1. Economy-wide exemptions or special treatments

Government authorisation

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."[26] This doctrine evidences the primacy of competition principles, and it means that, if Congress wants to exclude conduct from competition law or apply special rules to it, it must say so clearly. Courts have found implied exclusions only in a few circumstances, the chief examples being securities regulation supervised by the *Securities and Exchange Commission*[27] and common carrier tariffs filed with regulatory agencies.[28] 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. Conflicts are sometimes avoided by postponing them. If both the competition law and a regulatory programme might cover a situation, courts may assign "primary jurisdiction" to the regulator to deal with the situation first. But competition law enforcement remains as a backstop in the event that the competition problem remains after the regulator has acted. In general, federal officials have no independent authority to exempt conduct from the antitrust laws. Thus, at the federal level, the issue of regulatory authorisation or compulsion arises principally under the plethora of (mostly) statutory special provisions, discussed below.[29]

For regulations imposed by one of the fifty states, the relationship with national competition policy is different, and the result of the difference may be significant. The "state action doctrine" immunises private anti-competitive conduct from antitrust liability if the conduct is undertaken pursuant to a state policy to replace competition. The state may not simply announce that private, anti-competitive conduct is permitted. Rather, the regulatory policy to displace competition must be both clearly articulated and affirmatively expressed, and the policy's implementation must be subject to active supervision by the state.[30] The state must have exercised sufficient independent judgement and control that the conduct is the product of deliberate state intervention, and not merely acquiescence in the anti-competitive conduct of the private parties.[31] It is not necessary, though, that the text of the state law explicitly declare that the conduct is to be covered and thus excluded by the doctrine. 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, enacted when the Supreme Court was still developing some of its details, is a statutory immunity from liability for damages in private actions, for conduct engaged in or directed by a local government official or employee acting in an official capacity.)[32]

The state action doctrine embodies the US commitment to federalism. Its source is a late Depression-era Supreme Court case that permitted a state to sponsor a cartel, despite claims of harm to consumers both in the state and nationally.[33] Decisions applying this doctrine 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. Federal competition agencies have tried to keep the doctrine under control, by bringing enforcement actions to define its elements and boundaries. But the doctrine looks well entrenched.

The state action doctrine risks holding US national competition policy hostage to local legislative relief. The doctrine is based on the courts' interpretation of the competition statutes and of Congress's intent in passing them. The exclusion resulting from the doctrine could, in principle, be revised or even eliminated by Congressional action. Congress has in effect done so in particular cases. An example is Congress's termination of state regulation of local trucking, which courts had excluded under the state action doctrine. But it does not appear likely that the general doctrine will be modified soon, either by the courts or the legislature. The doctrine demonstrates that national competition policy, though privileged in relationship to US national regulatory policy, is treated as less important than some other political values, in this case federalism.

Another privileged value, the Constitutional protection of the right to petition the government, has led to another kind of general antitrust exemption. 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 by the antitrust laws. This exemption, like the state action doctrine, was created by court decisions. 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 basic exemption (labelled the *Noerr-Pennington* doctrine, after the two decisions that first announced it[34]) is commonly invoked in regulatory settings, as the government action sought is often the imposition or revision of a regulation or a regulatory action. The exemption is supposed to cover only joint action to influence the government, and not other anti-competitive agreements that might be reached at the same time or under the same circumstances. But it may be difficult to detect and isolate side agreements or understandings reached in the course of joint lobbying or petitioning efforts. Even if there is no anti-competitive side agreement, the anti-competitive effect of a successful petition undermines competition policy goals. An arena where both concerns often arise is anti-dumping proceedings, in which the preparation of a petition asking to discourage or exclude foreign competition may provide occasions for reaching other kinds of agreements too.

Government entities

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 US government are immune from antitrust liability. Those that are 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

There is no general exemption from the federal antitrust laws for small and medium sized enterprises. And there is no *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. The one statutory immunity for small business is not really an exemption, for the conduct it covers would probably not violate the law. Certain narrowly defined agreements (joint research and development and those 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.[35] (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,[36] but there are some provisions that were intended to benefit them as plaintiffs. 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

Special legislation ensures that joint ventures for research, development, and production (even between horizontal competitors) will not be judged by the harsh *per* se standard, but instead by the multi-factor rule of reason.[37] This protection was first enacted in 1984, applicable only to research and development, and was 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. It is an example of a response to concern that stringency of the basic competition law was inappropriate for these activities, and indeed was likely to have discouraged them unnecessarily. In addition to ensuring rule of reason treatment, the law also provides for a reduction in potential liability in private lawsuits, to single damages, if parties file their joint venture plans with the enforcement agencies. The concerns about chilling may have been overstated, for filings are infrequent, averaging about 60 per year. There may be some differential impact on foreign firms, for the limit to single-damages exposure for production activities only applies if there are production facilities in the US.

Box 5. **Scope of competition policy**

Is there an exemption from liability under the general competition law for conduct that is required or authorised by other government authority? Like most Member countries (15 out of the 27 reporting), the US provides exemptions from the general competition law for conduct required by other regulation or government authority. The US's federal structure has led to different levels of exemption doctrine for national regulatory action and for state law or regulation.

Does the general competition law apply to public enterprises? The US is one of only two Member countries that do not apply general competition laws to the commercial actions of public enterprises (the other one is Portugal).

Is there an exemption, in law or enforcement policy, for small and medium sized enterprises? Like the majority of Member countries, US law contains no special exemption based on the size of the enterprise.

4.2. Sector-specific exclusions, exemptions and special rules or enforcers

There are few sectors in the US economy from which competition policy and law are completely excluded. But in many sectors, the policy is implemented through special rules or enforcement structures. Many of the differences in law and structure are practically insignificant, because the exception or special treatment applies to conduct that probably would not have been considered in violation of law in any event, or that may have been undertaken pursuant to an order or instruction of a government regulatory programme. These exemptions may have been thought necessary to avoid any risk that private antitrust litigation would interfere with accomplishing other regulatory objectives. And they seem plausible in some cases, where they may moderate the strictness and severity of competition law standards and penalties. Most of the national regulation that fixed prices, limited output, reduced quality, divided markets or constrained entry has been eliminated. Many of the remaining sector-specific agencies apply competition policies reasonably consistently with those of the competition agencies themselves. But for some, remaining differences in treatment may not be clearly justified by compelling public interests that cannot be served in other ways. The following discussion focuses on the remaining exemptions and on cases where there have been apparent inconsistencies between the sectoral agency's conception of competition policy and that of the competition agencies. Some of these have arisen in what were intended to be transition settings, as old agencies retained powers over mergers or other conduct and applied them in ways that probably increased, rather than reduced, long-term competitive risks. The experience counsels in favour of clear, firm deadlines for changing regulatory standards, and for reducing to a minimum any period of overlap between regulatory and competition regimes.

Transportation: air

Removal of economic regulation from air transportation must be counted as a principal success of competition-directed reform. The government-enforced cartel controlling entry, service, and rates was dismantled in the late 1970's and the enforcement agency, the Civil Aeronautics Board, was abolished in 1985. But a sectoral regulator, the Department of Transportation (DOT), retained some jurisdiction to handle competition policy in the industry.

Mergers and acquisitions among domestic airlines were the exclusive responsibility of DOT, rather than the antitrust agencies, until 1989. The legislature's choice to keep this function with a sectoral agency, even though economic regulation of entry and rates was eliminated, probably represented a political bargain as part of deregulation. Making decision-making more efficient would not have been a compelling factor, because the historic regulator, which would have been familiar with the industry's structures, disappeared. DOT had authority to invoke other policy goals in order to approve an otherwise anti-competitive transaction, but never did so; rather, it claimed to have based its merger decisions on its interpretation and application of competition policy. DOT approved essentially all of the transactions it reviewed. DOT evidently believed that city-pair markets were highly contestable and so tended to assume that new entry would prevent any exercise of market power. The Antitrust Division noted its objections to some of the transactions that DOT nevertheless approved. Economic studies have shown that, where these combinations led to eliminating rivals and higher concentration at several hub airports, prices were significantly higher because passengers going to or from those locations had fewer choices. DOT's special jurisdiction over domestic mergers was terminated in 1989 and the Antitrust Division took over responsibility. The Division announced that its analysis would not assume contestability, but instead would be concerned about national market positions. The Division also took action against other kinds of transactions that threatened to limit competition, such as acquisitions of rights to use airport gates.

Although the special merger jurisdiction did not formally lead to a gap in coverage, it did leave a gap as a practical matter. The agency responsible for applying competition policy restraints did not find any occasions to do so. It is doubtful that the *de facto* repeal of merger law in this sector for a decade was supported by a compelling public interest. On the contrary, as fundamental changes in the industry's basic competitive dynamics attracted new entrants, stimulated reorganisations, forced bankruptcies, and invited new combinations, concern over the long-term implications of these restructurings should have been heightened. Especially because the sectoral regulator had no experience with market conditions other than those it had regulated, it would have been particularly important for this function to be performed by an agency with a broader background and perspective.

"Unfair competition" among airlines remains a DOT responsibility, under a statute whose operative language is identical to the Federal Trade Commission Act. There was some debate about giving these competition and consumer protection responsibilities to the general purpose agencies, but here too it appears that a bargain was reached in the legislature to maintain a sectoral agency. The scope of DOT's "unfair competition" authority overlaps substantially with the antitrust laws. DOT has applied it to claims about monopolisation through control of computer reservation systems and to claims about predation. In both cases, DOT is asserting jurisdiction over conduct that has also been the subject of active investigation by the Antitrust Division. On these issues, DOT has worked with the competition agencies to develop enforcement tools that complement and extend competition policy.

DOT's 1998 rulemaking concerning predation is an interesting case study. The perceived problem is hub airlines' strategic, targeted responses to threatened entry. As DOT describes the problem,

> *Following Congress' deregulation of the air transportation industry in 1978, all of the major air carriers restructured their route systems into "hub-and-spoke" networks. Major carriers have long charged considerably higher fares in most of their "spoke" city-pairs, or the "local hub markets," than in other city-pairs of comparable distance and density. In recent years, when small, new-entrant carriers have instituted new low-fare service in major carriers' local hub markets, the major carriers have increasingly responded with strategies of price reductions and capacity increases designed not to maximise their own profits but rather to deprive the new entrants of vital traffic and revenues. Once a new entrant has ceased its service, the major carrier will typically retrench its capacity in the market or raise its fares to at least their pre-entry levels, or both. The major carrier thus accepts lower profits in the short run in order to secure higher profits in the long run. This strategy can benefit the major carrier prospectively as well, in that it dissuades other carriers from attempting low-fare entry. It can hurt consumers in the long run by depriving them of the benefits of competition*.[38]

DOT's proposed rules to deal with this behaviour differ in two important respects from the rules that courts have imposed in competition law cases. First, it would not be necessary to show that the predator had priced below variable cost (or some other cost measure). Rather, predation would be found from a combination of fare cuts and capacity increases that result in the predator making less profit than it would have if it had accommodated the entrant's impact on its operations. And there would be no formal requirement to show likelihood of recoupment after the entrant was driven out. However, DOT believes that the conduct it is targeting is economically rational only if, after the new entrant is forced to exit, the major carrier can readily recoup the revenues it has sacrificed. DOT consulted with the competition agencies in developing this rule, but DOT maintains that the rule, under its "unfair competition" standard, is not to be considered an antitrust rule.

The predation rule demonstrates how a sector-specific regulatory regime might be used as an experimental test-bed for competition policy. The "opportunity cost" concept at the heart of DOT's proposed rule has been endorsed by two economists who have held top positions at the Antitrust Division. But it could be difficult to implement in court proceedings. Standard US antitrust law rules about predatory pricing are wary of discouraging vigorous price competition, and thus they impose a stringent cost-based test, as well as require showing the likelihood of recoupment, in order to avoid “false positives.” It remains to be seen whether a sectoral regulator, familiar with its industry’s strategic methods, might be able to apply the economically more sensitive, but more difficult, test based on opportunity costs, without discouraging more competition than it protects. If the test succeeds, the demonstration might be a basis for extending it to other areas, and potentially for changing the rules that apply under the competition law generally.

On the other hand, a special airline-industry rule might not have been necessary to counter this conduct, had the industry not been permitted to consolidate into “fortress” hubs in the decade after deregulation. Preventing any single airline from dominating a significant potential hub would have made predation less likely, for a predatory strategy is more difficult to execute if it must be co-ordinated with other firms.

Agreements concerning foreign air transportation are also under DOT jurisdiction, subject again to a competition-based substantive test, and they are exempted from antitrust liability if DOT approves them.[39] This power has been used, in conjunction with bilateral diplomatic efforts, to authorise co-operative arrangements with national airlines of other countries. Some of these, such as the KLM-Northwest agreement, seem to have clearly opened up markets to new competition. The Antitrust Division has objected to some other grants, though, on the grounds that immunity is not needed for conduct that does not violate the law, and should not be granted to conduct that does. DOT and the Antitrust Division may find themselves concerned with different aspects of the same relationship. DOT may be responsible for approving international aspects of airline co-operation, while the Antitrust Division is concerned about domestic consequences. An example of this dual consideration is the two agencies’ concurrent review of proposed co-operation between American Airlines and British Airways. Coherent competition policy requires that, in such situations, the sectoral regulator and the competition agency strike a consistent balance between competition standards and other policies.

These are particular issues where the scheme of regulation in air transport has not coincided with generally applicable competition policy principles. These subjects are not necessarily excluded from the competition laws. Indeed, the Antitrust Division is looking at some of the same issues that DOT is concerned about, and will be examining other developments such as proposed code-sharing and other alliances among US domestic carriers. Thus, the issue is not so much exemption or exclusion from competition law, as of potential regulatory conflict over the content and application of similar, if not identical, substantive standards.

Transportation: rail

The rail freight system has been substantially deregulated since 1980, but in a different way than airlines. The historic economic regulatory body, the Interstate Commerce Commission, was eliminated, but many of its functions were transferred to a new entity, the Surface Transportation Board (STB). And much of the deregulation is accomplished by expanding STB’s powers to authorise exemptions from regulatory requirements. The major deregulatory steps were removing most of the constraints on rates and services and limiting how much railroads could discuss and agree about rates, although they can still do so to some degree, subject to STB approval.[40] But STB retains authority over mergers, which are exempt from antitrust liability if STB approves them,[41] and STB has power to hear and correct complaints about railroads’ exercise of market power over “captive” shippers. In these respects, STB’s authority displaces the competition laws, and in the latter, it may act much like a traditional rate regulator, although its authority is exercised only in conditions that in other legal systems would be called "abuse of dominant position."[42]

Creating the STB, rather than completely eliminating sectoral regulation for surface transport, was a legislative decision, again probably reflecting a bargain and expectation of sympathetic treatment, compared to the likely results if general purpose competition law were applied. And as in airlines, the STB's exercise of its merger powers has been problematic. In 1996, STB approved the largest merger in US rail history, between the Union Pacific and Southern Pacific railroads. These were two of only three major railroads in the western United States. The Antitrust Division made a formal appearance in the STB proceeding, contending that the merger would significantly reduce competition in many markets where the number of competing railroads would decline from two to one or from three to two. The parties proposed an agreement to make track rights available to competitors, but the Antitrust Division argued that these rights would be inadequate, in part because they would often apply in a non-competitive duopoly situation. The Antitrust Division ultimately urged the STB to reject the merger outright, because the extensive divestitures required to fix it would not be worth the effort. But in August 1996, STB approved the merger with only minor additional conditions. Within a year, severe and persistent operating problems and capacity limitations developed on the merged system, many of them where the Antitrust Division had pointed out the problems that would result if parallel operations were no longer available to shippers as competitive alternatives. The breakdown in rail service has persisted and has become a major controversy, with shippers' groups calling for regulatory intervention. One reason STB approved the merger was evidently its faith that its own regulatory interventions would be sufficient to remedy market power problems that might result. But STB's actions to date seem to hope that the problem will solve itself. It has called for railroads and shippers to develop a dialogue about service problems, to discuss possible standards for sharing track and facilities, and to nominate experts to recommend ways to identify market power problems that STB ought to correct. That is, STB does not appear capable of solving the problems it helped create by approving a merger that led to substantial market power.

Here too, there is not necessarily a gap in the coverage of some form of competition law or policy, so much as a significant difference in how a sectoral regulator conceives and applies it. The first explicit policy set out in the statute governing rail regulation is "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."[43] Other aspects of the explicit statutory policies are also consistent with generally applicable competition policy. Although creating a merged corporation with a larger asset base may have been consistent with another statutory policy, "to foster sound economic conditions in transportation," it is not clear that this purpose was so compelling that it justified creating market power, nor that there was not a less anti-competitive alternative. As in airlines, it appears that the sectoral regulator, unfamiliar with the dynamics of unregulated markets, was not sensitive enough to the problems that this combination might lead to, nor to the great difficulty of solving them after the merger was an accomplished fact.

Transportation: ocean shipping & terminal operators

Cartels in ocean shipping have been subject to a special regulatory system since 1916. The relationship between that system and the antitrust laws was a long-standing source of controversy, with a chief source of friction being foreign trading partners' concerns to protect their national firms against US antitrust liability. In 1984, Congress revised the Shipping Act in several ways, including making the antitrust immunity more explicit. The Act was revised again in 1998, to reduce the impact of some of its anti-competitive features. A separate body, the *Federal Maritime Commission* (FMC), regulates common carriers in this sector. The regulatory scheme is neither full economic regulation of rates and entry, nor government supervision and enforcement of the cartel, nor open competition, but a combination of all these elements. The mixture of elements probably reflects the mixture of contradictory reasons for oversight. On the one hand, US law has to recognise the fact that international liner shipping has long been dominated by cartels that have enjoyed some legal protection elsewhere. On the other hand, the US antitrust tradition is uncomfortable with such thorough-going price-fixing. The result is a regulatory system that permits considerable cartel conduct that would be *per se* illegal, indeed criminal, if attempted in other sectors. Conference agreements fixing rates, dividing markets, pooling revenues, limiting output, and otherwise preventing competition, as well as conduct pursuant to them, are immune from antitrust liability if they are filed with the FMC. But, at least, conferences in US trades must be open and they must not discriminate among shippers or ports. Moreover, they must permit members to take independent action, in effect to cheat on the cartel agreement. Until 1998, tariffs had to be filed with the FMC, although the FMC does not regulate rate levels. Enforcement oversight is limited to complaints of discrimination or failure to adhere to terms of tariffs. The FMC may go to court to seek an injunction to prevent the operation of an agreement that it determines is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. The FMC has not actually had to obtain any court orders on this basis. On the few occasions when the FMC has raised concerns about competitive effects, the matters were settled. The general competition law has some residual application, to anti-competitive conduct that is not covered by a filed agreement and to mergers and acquisitions in the industry.

Some of the original rationale for separate regulation was based on the international dimension. It appeared unfair and impracticable to apply US competition rules to US firms trying to compete against foreign firms that were colluding, or to attempt to apply US law to foreign firms that had minimal ties in the US. Other rationales sometimes offered are relatively weak. First, the industry's cost structure and the movable nature of its assets are said to make it unique in a way that makes application of general competition law inappropriate. But the liner shipping industry shares with the airline industry a high ratio of fixed to variable costs and highly movable assets. Yet in airlines, experience with deregulation shows that open competition does not lead to asset-wasting, output-reducing "destructive competition." Second, the industry is said to be highly competitive despite the constraints. But industry performance suggests that the current conference system does reduce competition. The cartels are not perfectly effective, but economic analysis shows that rates are lower where the conferences' competition-restraining rules are weaker.[44]

The FMC has taken only a few, tentative actions under its mandate to protect competition. Its practice seems to be to accept settlements in terms of temporary rate reductions, rather than require basic structural corrections. Congress's clear purpose in establishing this system was to prevent the application of standard competition policy principles and remedies. Thus, it is unsurprising that the sectoral regulator would rely on regulatory remedies for competition concerns. But the effect is to leave a substantial and unjustified gap in the coverage of consistent competition policy.

Congress has recently revised the system substantially. Eliminating the requirement of filing tariffs at the FMC has ended the FMC's residual role as cartel enforcer. The scope of independent action has been expanded to include individual service contracts. And Congress has tried to instruct the sectoral agency to enforce this law's competition rules more strictly, voicing a concern that the industry has moved toward greater concentration and less competition since the 1984 statute. But the new legislation stops well short of assigning competition enforcement responsibility to the competition agencies themselves. Instead, it calls for consolidating the FMC's enforcement function with that of STB.

The long history of special treatment for this sector offers little support for continuing the exemption from general antitrust jurisdiction. From a competition policy perspective, the best that can be said for the situation is that conditions could be worse. As other nations are reconsidering how much to tolerate cartels in this sector, it may be that difficulties of transnational application and fears of diplomatic friction are less important factors now. In the absence of competition law immunity, conflicts about the scope of competition policy in this sector could be dealt with as they are increasingly in other sectors, by consultations among national competition enforcement authorities to ensure consistent treatment.

Transportation: trucking

Nearly all economic regulation of trucking has been eliminated, now that Congress in 1995 pre-empted the remaining state economic regulations.[45] But Congress has left pockets of regulated immunity at the national level. Rate bureaux continue to enjoy antitrust immunity for agreements about some subjects: commodity classifications, documentation, packaging, tariff structures, mileage guides, through routes and joint rates, rules and divisions, non-price activities, and pooling agreements between carriers.[46] But there is no longer any antitrust immunity for agreements on single-line rates, with one glaring exception. Motor carriers of household goods are permitted to agree on rates, subject to regulation by the STB, and this joint rate-making is immune from antitrust liability.[47] The reason for retaining this exemption is unclear. There was some concern that eliminating the Interstate Commerce Commission would leave the industry's consumer protection rules unenforceable. But protecting consumers does not require permitting movers to agree not to compete. The exemption's net impact on competitive conditions is unknown. Many larger interstate movers, which deal repeatedly with corporate clients, probably have had to offer competitive rates and services to maintain those relationships. But industry collusion may mean that individual consumers, lacking the information or bargaining power of larger customers, may be receiving poorer service or paying too much for it. In the absence of any plausible justification, this last significant exemption for trucking should be removed. The residual exemption and immunity for agreements about joint and through rates probably should be removed, too, as it seems unnecessary in the current, competitive industry environment. It is unlikely that efficient collaborations along this vertical dimension would be found illegal under normal antitrust principles today.

Transportation: motor carrier, passenger

In 1982 the FTC argued forcefully for complete deregulation of intercity bus service, including pre-emption of any state regulations that inhibited competition. The FTC noted then that the weakest firms in the industry were the two major national lines and attributed their weakness to lack of competition between them. Subsequent reforms opened the industry to new entry, but left some economic regulation in place. STB has authority to review and approve, and thus immunise from antitrust liability, mergers, transfers of control, pooling agreements, and certain other transactions involving intercity bus companies.[48] Passenger bus tariffs must be filed at STB, and STB has authority to hear complaints about their reasonableness. STB also has authority to grant or deny applications to enter the industry, but the legal standard of "fitness" does not consider competitive or market effects and applications are rarely rejected. Entry is thus essentially unrestricted. Nearly all of the many new bus companies are charter operators, though, and the two national regular-route carriers were permitted to combine into one because the smaller one was evidently failing. The necessity and effect of the remaining regulatory oversight should be examined. Lower air fares have diverted many of the bus lines' traditional riders to the airlines. It may be that costs of alternatives are so low that the remaining demand for intercity bus service is too small to support more than one system. But the population that still uses the bus system is probably highly dependent on it, as it includes principally those who are too poor, too young, or too old to drive or fly. Perhaps regulation could be justified, to protect those consumers who may be considered particularly vulnerable. But if there are aspects of the regulatory structure that unnecessarily reinforce the *de facto* monopoly, more competitive alternative approaches should be explored.

Energy

Special sectoral regulation of the natural gas and electricity industries at the federal level has moved steadily toward increasing consistency with generally applicable competition policy. This contrast with the more uncertain course of transportation regulation is due to several factors. The regulatory structure did not displace the competition law completely, but coexisted with it. The courts have instructed the regulator to include competition policy in its understanding and application of broader "public interest" criteria, and the regulator has followed that instruction. Congress has clearly supported the move toward deregulation, taking actions in the late 1970s that began to eliminate price controls for gas and to introduce competitive alternatives for electric power generation. And the competition agencies have encouraged these moves at every stage, offering informal and formal advice and assistance.

The sectoral regulator, the *Federal Energy Regulatory Commission* (FERC), shares responsibility over mergers with the antitrust agencies. In natural gas, FERC has jurisdiction to approve acquisitions of physical assets, and the antitrust agencies have jurisdiction over combinations through merger or acquisition of securities. In electric power, FERC is responsible for combinations involving firms subject to its regulatory jurisdiction, applying a "public interest" standard; however, this power is shared with the competition agencies' application of the Clayton Act. FERC has imposed conditions on approval of mergers that have had the effect of extending its efforts to promote competition into areas where it probably lacks authority to order change directly. FERC's basic regulatory authority is over pricing and access issues for the network operations of natural gas transmission and electric power transmission. Here too, FERC authority overlaps with the coverage of the competition law. A government monopolisation suit first applied the Sherman Act to the problem of access to electric power transmission,[49] and private parties have continued to bring antitrust cases on this issue. FERC also has some authority over pricing of wholesale electric power (retail prices and service are regulated by the states), but this authority is being exercised less now, as FERC decisions have led to *de facto* market pricing in much of that part of the industry. FERC regulatory action does not generally confer absolute antitrust immunity. That lack of immunity may explain why FERC's policies and decisions have converged on the coverage of the competition laws. Convergence is increasingly explicit. FERC's recently-amended rules about mergers have embraced the methodology of the competition agencies' *Merger Guidelines*. Its rules about when gas pipeline rates will be set by the market rather than by regulation also track the analysis used in the *Merger Guidelines*. And its decisions about regulating oil pipelines apply somewhat similar antitrust-based principles. There, regulation typically amounts to a hands-off decision to allow market forces to work, as long as the market is not too concentrated.

The complex of special energy industry rules has several sources. The original regulatory legislation did not carve out a separate regulatory domain, immunised and isolated from antitrust coverage, but instead asserted that competition was one of the elements of regulation. Court decisions admonished the regulator to interpret the "public interest" as consistently as possible with general antitrust principles. Later legislation, by initiating deregulation of wellhead prices and electric power, signalled continued support for moves toward competition. The regulator generally followed that course, in decisions about prices, access, structural separation of monopoly and competitive parts of the businesses, and relations with state regulatory responsibilities over local service. And the competition agencies themselves have encouraged and advised the regulator, while backing the deregulation moves with merger enforcement. FERC adoption of antitrust agencies' merger analysis under its own "public interest" standard may be a fruitful compromise between sector regulation and generally applicable law. On the other hand, industry changes might have been accomplished more swiftly under a general authority. FERC has been tentative in its application of the *Merger Guidelines* so far, evidently because of the complex jurisdictional problem it faces. Because it has no regulatory authority over retail-level operations, it is unclear whether it can take action concerning a merger whose principal competitive effects appear at the retail level. FERC has deferred to state regulators on those issues, yet those regulators are likely to try to deal with those issues through direct control over rates and service, rather than structural, competition-based solutions. Application of the general merger law under generally applicable standards and analysis would be more straightforward.

There are two minor exemptions to remove the threat of antitrust litigation inhibiting industry co-operation with certain energy security efforts. Voluntary international agreements and plans of action about energy industry responses to supply crises are exempted from antitrust liability, if approved by the Attorney General after consultation with the FTC.[50] This "exemption" appears much like a business review or advisory opinion, but it goes further, by conferring immunity from private lawsuits as well as an assurance against prosecution. And certain meetings and related actions by natural gas producers enjoy a limited exemption from antitrust liability, where undertaken pursuant to a presidential order and monitored by the Department of Justice and the FTC.[51]

Banks and financial institutions

Financial institutions are not exempt from the antitrust laws.[52] But there are some special competition rules, particularly about mergers, and enforcement responsibility is shared between the Antitrust Division and banking regulators, of which there are four, each with jurisdiction over a particular type of financial institution, each applying the same basic laws. The bank merger laws[53] include competition standards like those of the Sherman Act and Clayton Act. They also permit a "public interest" defence that would be inadmissible in pure competition cases. A banking agency may approve a transaction, even if it is anti-competitive, if it finds that the anti-competitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. The bank regulators must consult with the Department of Justice (except for transactions involving bank holding companies), and the Attorney General may seek an injunction against a merger that the bank regulator has approved. In such a challenge, though, the "public interest" defence is still available before the court. The banking agencies and the Antitrust Division apply different substantive standards, even concerning the competition analysis. Both are based on the competition agencies' *Merger Guidelines*, but the bank regulators and the antitrust enforcers make different presumptions about the likely contours of product and geographic markets. Special anti-tying laws also apply to banks, preventing them from conditioning their services on acceptance of any other service except four traditional banking functions: loans, discounts, deposits, and trust services.[54] This special provision is not an exemption, but rather an intensification, of otherwise applicable competition law. Finally, the recent federal law that enabled greater inter-state expansion also set statutory limits on resulting concentration (measured in terms of deposits): no more than 10 per cent on a national basis, or 30 per cent in a single state.[55]

These various forms of special treatment represent conscious legislative decisions, motivated in part by concerns over the special role of financial institutions in the economy. Assigning specialised regulators institutionalises some balancing of concerns about competition against concerns about liquidity, solvency, and safety. Consistency in the application of competition principles is accomplished, somewhat inefficiently, by the threat that the competition agency will act independently, and by the fact that decisions are subject to review and correction by general jurisdiction courts.

Securities and futures

The courts have fashioned a limited immunity for the securities industry, inferred from the extensive system of regulation and oversight by the SEC. The statute providing for securities industry regulation calls on the SEC to consider the competitive impact of its actions. The course of deregulation in this sector demonstrates the potential value of private antitrust litigation for that purpose. A court decision in a private lawsuit extended antitrust immunity to agreements to fix commissions.[56] Congress responded by revising the basic securities law to forbid such price-fixing. Similar rules and results apply to commodity futures, which are subject to a different regulatory body. For commodity futures, there is also a limited, implied immunity and a "competitive effects test" in the basic law, and there too antitrust litigation led to the abandonment of fixed commissions. As legislative and regulatory actions have moved these industries strongly toward competitive market methods, the judicially created implied immunities may no longer be very important.

Insurance

The business of insurance is not subject to the Sherman or Clayton Acts, nor to the Federal Trade Commission Act, to the extent it is regulated by state law. This statutory exemption, the McCarran-Ferguson Act,[57] was a direct Congressional response to a government prosecution for price-fixing. The law was said to protect the states' traditional powers to tax insurance companies and regulate the content of insurance contracts, after the Supreme Court's finding that insurance was interstate commerce subject to oversight by Congress.[58] The exemption does not apply to actions that amount to boycott, coercion, or intimidation. And mergers in the insurance industry are still covered by the general merger law. But Congress has generally kept the antitrust enforcers away from the insurance industry where possible. In the late 1970s, the FTC staff studied and reported on consumer protection and competition problems in the insurance industry. Even though these were only studies, and did not call for law enforcement action, Congress responded by preventing the FTC from using any of its funds to study or report on any aspect of the business of insurance, unless specifically requested by Congress. Promoting competition in this sector is the responsibility of state law and state insurance regulators. The funding limitation prevents the FTC from advocacy action here, and the Antitrust Division has historically done little advocacy at the state level. The institutional basis for applying national competition policies consistently in this industry is therefore weak.

Communications

In general, the competition laws are fully applicable to telecommunications, broadcasting, and cable. There are no general exemptions; indeed, the basic laws underlying broadcast and telecommunications regulation state explicitly that the antitrust laws also apply.[59] There are two, limited exemptions. The television industry enjoys a limited exemption for joint actions to develop and disseminate voluntary guidelines to reduce the negative impact of TV violence.[60] And local officials involved in granting cable franchises are immunised from treble damage liability in lawsuits over their decisions.[61] The sectoral regulator, the *Federal Communications Commission* (FCC), has promoted competitive methods where regulatory authority remains, although promotion of pro-competitive methods has been tempered by pursuit of the goal of diversity. For example, the FCC has been changing rules about broadcast licensing and operation that have had significant competition policy dimensions. These rules included limits on the number of broadcast licenses that could be held in common and constraints on vertical relationships between networks and programme sources. When they were adopted, these rules were probably reasonably consistent with standard competition law doctrine; indeed, they were supplemented by Antitrust Division law enforcement actions on the same issues, notably network control over programming. But as antitrust doctrine has changed, so have the FCC's rules, albeit with some delay.

The competition agencies have played an effective role in promoting competition in telecommunications. The most visible role, of course, was the Sherman Act monopolisation case that led to the break-up of the national telephone monopoly and court-ordered line-of-business restrictions. Co-operation between the FCC and Antitrust Division was central in establishing an effective divestiture framework, although questions have been raised in regard to its implementation. In particular, while the administration of the consent decree strayed into questions better suited to an industry-specific regulator, the FCC abandoned its role in separating competitive and monopoly elements soon after the divestiture. The recent Telecommunications Act supersedes the antitrust restrictions of the monopolisation case and provides for a role for the competition agency to advise the FCC in the FCC's application of Section 271 of that Act (the "competitive checklist" for RBOC entry into inter-LATA services). These restrictions are becoming increasingly burdensome to the economy (for example, through the loss of scope economies). These issues are discussed further in the background report on Regulatory Reform in the Electricity Industry.

Agriculture

Several statutes accord special treatment to agriculture and related activities. The existence and normal operations of producer co-operatives do not violate the antitrust laws.[62] A special competition regime, the Capper-Volstead Act, applies to them.[63] This regime is administered by the Department of Agriculture, not the competition agencies. (Protections like those of the Capper-Volstead Act also apply to fisheries; that exemption is administered by the Secretary of Commerce.)[64] The Secretary of Agriculture may take action against co-operative associations that have monopolized or restrained trade to the extent "that the price of any agricultural product is unduly enhanced." Depending on how much price increase is "undue," this standard may leave room for these entities to exert market power. These special statutes were enacted in response to early enforcement efforts by the Federal Trade Commission against monopolisation by these organisations. Other exemptions permit these groups to exchange price, production, and marketing information[65] and to make internal payments without liability under the Robinson-Patman Act.[66] Most of these provisions according special treatment to co-operatives do not apply to agreements between a co-operative and others, nor do they immunise monopolising conduct aimed at other businesses. Depression-era legislation permits the Secretary of Agriculture to issue marketing orders, with the practical effect of enforcing cartels for some agricultural products. The agreements among the producers and the Secretary leading to these orders are exempt from antitrust liability.[67] (After the FTC staff had undertaken studies of the anti-competitive effects of some of these orders in the 1970s, Congress cut off FTC funding for that purpose. The Antitrust Division has continued its advocacy efforts here, though.) Some other agreements or actions approved by the Secretary are exempt from antitrust liability; these include arbitration meetings and awards concerning dairy co-operatives,[68] and marketing agreements for serum against hog cholera.[69]

In meat-packing, competition issues are subject to a special law, the Packers and Stockyards Act,[70] and to the joint supervision of the Secretary of Agriculture and the Department of Justice. This law was enacted in 1922 after a vigorous FTC investigation of competitive abuses in the industry. Congress responded by removing the FTC's jurisdiction and assigning enforcement oversight to a sympathetic sectoral regulator. The law deals with deceptive practices and monopolisation, but not mergers, which are subject to the Clayton and Sherman Acts. The Packers and Stockyards Act does not create an exemption, but rather a parallel competition regime, with some priority over the general law.

Newspaper combinations

The Newspaper Preservation Act of 1970 permits joint operating arrangements among otherwise competing newspapers.[71] The asserted goal is to protect editorial diversity. The joint operation must maintain separate editorial functions for the two papers, but may merge business functions such as sale of papers and of advertising. The agreement is not subject to Section 1 of the Sherman Act; however, the joint operation may not engage in conduct that would be considered monopolising in violation of Section 2 of the Sherman Act. Proposed agreements are subject to review and approval by the Attorney General. For the joint operation to receive the exemption, all but one of the papers must be in probable danger of financial failure. The exemption represents a legislative expansion of a general principle of merger law, the "failing firm" doctrine. The statutory standard is more forgiving than the failing firm doctrine, however. The wide diversity of other sources of information and opinion that are now available suggests that this relaxation of the law is not the least anti-competitive way to serve a compelling public interest.

Sports

Some sports leagues are permitted to pool the rights to broadcast their games, in order to sell them as a package to broadcast networks without antitrust liability.[72] The Sports Broadcasting Act effectively reversed a court finding that pooling violated the Sherman Act. The exemption is fine-tuned to protect a home team's interest in full attendance and to discourage broadcasts of professional games in competition with school and college contests. In addition, a one-time special-interest exemption in the 1960's permitted the merger of two professional football leagues, on the condition that the total number of teams would not decline. No similar protection has been afforded to later sports league mergers. And the Supreme Court is responsible for a long-standing anomaly, the complete exemption of major league baseball. In 1922, the Court decided that baseball was not interstate commerce and hence not covered by the antitrust laws. It has stuck to that decision ever since, acknowledging that it is inconsistent with the modern treatment of all other sports and similar activities.

Soft drinks

In response to government and private actions against the soft drink industry's vertical manufacturing and distribution structures, Congress enacted a special rule that substantially immunises them from liability.[73] The justification offered for this extraordinary special interest exemption, and the applicable legal test, is the existence of sufficient competition among products with different brands. The exemption applies only to vertical agreements about distribution of trademarked products, and is intended principally to permit a system of tight exclusive distribution territories. The exemption does not extend to horizontal agreements. Congress evidently believed that the competition law enforcement agency and the judges who decided these cases did not adequately understand the practices and their actual competitive effects. But the apparent statutory immunity has hampered efforts to investigate whether these vertical arrangements could prevent entry of new brands or permit the industry to monitor and police tacit, horizontal collusion. The exemption serves no necessary purpose that would not also be served by judicious application of the general competition law.

Health care peer review

Private antitrust lawsuits against joint actions in "peer review" processes, by which health care professional evaluate the quality of their colleagues' work, can only recover single damages.[74] Competition law violations could still be subject to government enforcement action. This is an example of a concern that the antitrust law's *per se* rule and treble damage threat inappropriately inhibit legitimate co-operation.

Copyright royalties

The copyright law contains several provisions requiring compulsory licensing, to facilitate media transmission of recordings and similar material. Several provisions grant limited antitrust immunity to parties negotiating agreements about dividing the resulting fees and royalties.[75] Similar immunities apply to certain royalties in connection with public broadcasting,[76] and to royalties collected in connection with digital audio recording technology.[77] The statutory programme requires some intra-industry joint action, and the exemption ensures against opportunistic antitrust litigation disrupting that process.

Charities and non-profit institutions

Several statutes accord some degree of special treatment to non-profit institutions. Non-profit, charitable enterprises enjoy a statutory exemption from Section 5 of the FTC Act.[78] Competition (and consumer protection) violations by those entities must be handled by the Department of Justice or private plaintiffs, under the Sherman and Clayton Acts. The Robinson-Patman Act's prohibition of various kinds of price discrimination and related practices does not apply to purchases by non-profit schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions of supplies for their own use.[79] The Robinson-Patman exemption is particularly significant in health care, where there have been disputes over how non-profit hospitals or managed care organizations use pharmaceuticals purchased at discount prices. And in response to a government lawsuit that successfully challenged an agreement among major universities about the calculation of financial aid awards,[80] Congress enacted an exemption from the Sherman Act for the use of common standards and agreements on this subject.[81] That temporary exemption expired in 1997.[82]

The exemption from FTC Act jurisdiction is a historical oddity and an unjustifiable and costly obstacle to Commission action against violations by non-profit firms. The exemption dates from the agency's creation as the successor to the *Bureau of Corporations*, with a mission to rein in the excesses of business corporations. It serves no valid purpose (as illustrated, perhaps, by the fact that there is no such exemption applicable to competition enforcement by the Department of Justice), it complicates the FTC's enforcement efforts against non-profit professional and trade associations, and it prevents FTC action against non-profit firms even when they compete directly against for-profit firms. At a minimum, the exemption concerning competition matters should be narrowed to cover only charitable organisations that do not compete with for-profit firms.

Labour

To the consternation of those who saw the Sherman Act as a tool to control business, it was used first to stop efforts to prevent competition in labour. Congress responded with a statutory exemption from the antitrust laws for the existence and usual operations of organised labour groups.[83] The exemption does not apply to agreements or concerted actions between labour groups and business or other non-labour parties. However, courts have devised a "non-statutory" exemption that shields some, but not all, concerted conduct that involves non-labour parties. Generally, this applies to activities and agreements arising in a collective bargaining setting that do not have "a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."[84]

Export trade

The antitrust laws do not apply to associations whose joint actions restrict competition in export trade, under certain conditions.[85] There must be no effect on US prices of the commodities being exported, nor any other substantial lessening of US competition. The association must be for the sole purpose of export trade and not in restraint of the export trade of the association's competitors. These associations must register and file annual reports with the FTC. The FTC recommended the exemption, very shortly after the Commission was established, in order to permit US companies to compete more effectively against foreign cartels. Association activities outside the boundary of the exemption, such as agreements that involve foreign firms or non-members, are subject to public or private antitrust action.

A somewhat similar, but more limited, immunity is available through a procedure at the Department of Commerce.[86] On application, that Department may issue a "certificate of review" of export trade activities, with substantive standards parallel to the Webb-Pomerene Act. This certification requires the concurrence of the Attorney General. Certification does not provide total immunity, but only immunity from criminal prosecution, and a limitation of possible recoveries in private lawsuits to single damages. Its scope may be slightly broader than Webb-Pomerene, in that it can cover exports of services as well as goods.

Import trade

The *International Trade Commission* (ITC) enforces a law prohibiting "unfair methods of competition and unfair acts in the importation of articles into the United States," if the effect is to destroy or substantially injure a US industry, or if the acts relate to importation of articles infringing intellectual property rights granted under US law.[87] The principal remedies are an order excluding the offending goods from entry into the US and a cease and desist order against offending US firms and individuals. The law's substantive standard is essentially identical to the basic standard of Section 5 of the Federal Trade Commission Act. But the ITC has rejected suggestions that this "unfair competition" law be applied with the same consumer-oriented analysis and purpose as the FTC Act. The import "unfair practices" law is now applied almost entirely to patent disputes, though, so inconsistency with the interpretation and application of other competition principles is less important than it might have been. The ITC is required to give the competition enforcement agencies an opportunity to comment before making a final determination. In practice, this consultation opportunity is rarely significant, because the ITC's processes allow insufficient time for the competition agencies to respond. The Department of Justice has a later opportunity for input, because it participates in the interagency group that recommends whether the President should approve the import relief proposed by the ITC.

An implied immunity covers certain actions under other US trade laws. If specified procedures are followed in settling trade disputes through agreements with foreign competitors about price and quantity,[88] those agreements are immune from antitrust liability. The immunity fails if the agreements do not comply with these procedures or go beyond the measures authorised.[89]

National defence

Agreements initiated by the President, authorised and actively supervised by the president or designee, and subject to a presidential finding that "conditions exist which may pose a direct threat to the national defence or its preparedness programmes," are given a partial exemption.[90] The exemption does not apply if the actions are taken for the purpose of violating the antitrust laws. The competition agencies monitor these agreements.

5. COMPETITION ADVOCACY FOR REGULATORY REFORM

The US competition agencies have been unusually active in promoting competitive, market methods and outcomes in the policy-making and regulatory processes. Their advocacy contributed to the first major deregulation successes, in airlines and natural gas, and continued with trucking, communications, broadcasting, and electric power. The rate of their advocacy activity has declined substantially in the last few years, though. Since the 1970s, they have made over 2 000 comments or other formal public appearances in proceedings at other agencies or government bodies. In the late 1980s, these appearances came at a rate of over a hundred a year. By 1997, though, the annual total was less than 20. This decline probably reflects the fact that, at the federal level at least, the easier and more obvious battles have been fought and won. The Antitrust Division concentrates its advocacy almost entirely at other federal agencies and departments, while the FTC has addressed about half of its efforts to state and local issues.

The analytic principles motivating competition advocacy are summarised in the Antitrust Division's operating manual. The foundation assumption is that exceptions to the general rule of free market competition (subject to antitrust law oversight) can be justified only by compelling evidence that competition is unworkable or that it prevents achieving another, overriding social objective. Advocacy's goals are to eliminate existing regulation that is unnecessary or too costly, to discourage unnecessary new regulation, to minimise distortions where regulations are necessary by encouraging use of the least anti-competitive regulatory methods, and to ensure that regulation is properly designed to meet legitimate objectives. Some basic issues to address include: identifying the costs or disadvantages of competition in the setting at issue; determining whether regulation, if already in place, has actually fulfilled its purpose, and whether the conditions that were said to have justified it still obtain; and identifying the necessary elements of a transition from a regulated market to a competitive one. Ultimately, the question is the balance of costs and benefits. The agencies typically argue that the burden of proof is on those who would establish or maintain the regulatory system.

Competition issues in industries undergoing restructuring remain a focus of advocacy efforts. Several recent comments from both agencies have dealt with the electric power industry. They have pointed out the advantages of structural remedies over regulatory, behavioural solutions in safeguarding non-discriminatory access to the transmission grid and in dealing with market power in electricity generation. Comments have also discussed the appropriate framework of analysis for review of electric utility mergers, supporting the regulator's eventual decision to apply standard competition analysis in making its "public interest" determinations. In the last few years, comments have concentrated on the changes in the regulation of broadcasting and telecommunications. Many of these comments are related to the FCC's implementation of the Telecommunications Act of 1996. The competition agencies have successfully advocated, for example, cost-based pricing and forbearance where appropriate.

Some comments are in support of other agencies' efforts to apply competition principles under their own laws. Recent examples include the comments to FERC about electric power merger policy and comments to the Department of Transportation supporting proposed DOT rules under its unfair competition jurisdiction to address anti-competitive practices by airlines' computer reservation systems.

Some comments have assessed the likely effects of proposed exclusions and exemptions from competition law. A recent FTC staff report to Congress analysed a proposed settlement of litigation against cigarette manufacturers, which would include an antitrust exemption for certain joint practices to implement the settlement. The report concluded that the exemption could enable cigarette companies to co-ordinate price increases and raise profits. Another FTC staff comment objected to proposed state legislation to authorise "certificates of public advantage" conferring state-action antitrust immunity on co-operative agreements among healthcare providers. The comment pointed out that the exemption could lead to reduction of consumer choices and increase in consumer prices. If the state nonetheless proceeded with the programme, staff recommended that the anti-competitive risk be reduced by setting fixed, limited terms and terminating certificates that are found to harm consumers.

Privatisation issues arise infrequently. A recent FTC staff comment about introducing competition into the system for assigning Internet domain names assessed the likely consequences of using a not-for-profit corporation organised to include diverse stakeholders. The comment concluded that diversifying the board of directors would alleviate concerns about anti-competitive joint actions.

Many comments have addressed particular regulatory constraints on competition. Price and rate regulations subject to recent comments include those affecting long distance telephone service, liquor distribution, and marine pilotage. Entry has been addressed in such contexts as the allocation of airport landing and take-off privileges, certified public accounting, local multipoint telephone and video distribution services, and automobile sales. The two competition agencies filed a joint opposition to a rule preventing non-lawyers and title company attorneys from handling real estate closings, arguing that it would increase costs for consumers who would not otherwise hire an attorney and would increase prices by eliminating competition. Output regulation was the subject of comments on television's prime time access rules, must-carry rules for television retransmissions by satellite and open video system, allocation systems governing airport landing and take-off privileges, and restrictions on collision damage waivers for automobile rentals. Limitations on forms of practice are addressed in comments on optometrists' and veterinarians' commercial relationships with non-professionals and on linkages between cemeteries and funeral establishments.[91]

Fewer comments have addressed competition problems with social or environmental regulation. At one time, the FTC staff commented on such issues as economic impacts of auto fuel economy requirements and market-based methods for reducing CFC production. But since the 1980s, the only FTC comments on environmental issues have been about advertising claims. In comments on health care regulation, the agencies generally deal only with economic impacts and suggestions of market-based alternative methods. They typically decline to engage in debate about the priority and weight of other policy considerations.

Recent advocacy efforts represent the continuation, now on a somewhat smaller scale, of long-established themes. At the FTC, the programme is co-ordinated by one individual, now assigned to the Office of Policy Planning. At the Antitrust Division, the programme is generally monitored by a Deputy Assistant Attorney General. At both agencies, staff lawyers and economists with enforcement-based experience in the industries involved are more directly responsible for identifying problems and preparing responses. The exact resource commitment to advocacy is not clear, but is obviously very small. The FTC estimates that advocacy now consumes about one per cent of its staff and financial resources. That proportion has probably never been as high as five per cent, even in the late 1980s when the FTC staff alone was issuing about a hundred comments per year.

Advocacy should be backed by enforcement. The need for reform can be demonstrated by law enforcement actions. Because regulation is often accompanied by exemption or exclusion from the competition law, this effect is indirect, and appear in two ways. Sometimes, as in the Commission's actions against "ethical practice" agreements among professionals, enforcement succeeds and shows that conduct required by regulation has anti-competitive effects. And sometimes enforcement succeeds by failure. If an action brought against clearly anti-competitive behaviour must be dismissed because of a regulatory exclusion, the failure can support a call to eliminate the exclusion. Unsuccessful suits against tariff bureaux which were found to enjoy protection under the state action doctrine may have helped set the stage for trucking deregulation.

It can be difficult, perhaps impossible, to assess accurately whether advocacy is effective. There are too many other factors that may influence a regulator's or legislator's decision. A few generalisations about methods may be drawn from the two agencies' long experience, though. Advocacy is probably more effective when it is one part of a larger strategy that includes enforcement. And formal, public advocacy is more effective when it is combined with informal co-operation with other regulators. 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 which now allow off-the-record, *ex parte* communications between its staff and other agencies. By contrast, at the Department of Transportation informal staff consultation is not permitted in contested matters. Thus, the Antitrust Division's participation in the recent rail merger matter had to be formal, public, and adversarial, rather than consultative. Competition policies could be integrated into other regulatory programmes more effectively if remaining barriers to informal staff-level consultations could be lowered.

6. CONCLUSIONS AND POLICY OPTIONS FOR REFORM

6.1. General assessment of current strengths and weaknesses

Competition policy and institutions have been employed very effectively in the process of reforming economic regulations to stimulate competition. At the federal level, commitment to competition is a part of general regulatory policy, so regulatory programmes are generally subject to statutory instructions to promote and protect competition. Where regulation has instead impaired competition, the legal and policy foundation for reform was already present. US competition policy is also strongly linked to consumer interests. Maintaining that linkage, embodied in the broad jurisdiction of the Federal Trade Commission, may justify the otherwise peculiar redundancy of federal law enforcement structures.

Competition policy institutions have used their enforcement and advocacy powers widely, and sometimes quite systematically, to promote reform. Their efforts have helped eliminate economic regulations that restricted entry into airlines and other transport industries, that prevented exit from the rail industry, that controlled pricing for natural gas, electric power, and telecommunications, that limited output of airlines, and that prevented normal commercial practices and forms of business organisation in health care and other professional services.

Commitment to reform extends well beyond the national competition agencies. Since the 1970s, Congress and the federal courts have generally backed reform efforts, too. Major reforms in trucking, railroads, natural gas, and electric power were stimulated or enabled by legislation. Judicial oversight encouraged regulators to adopt policies that were consistent with antitrust principles.

But the breadth of support for competitive reform means responsibility for implementing it is diffused. Because so much of US economic policy is based on competition, many different regulators and other bodies profess to be implementing competition policy. Their conceptions have differed, sometimes significantly. For the general competition law, there are two essentially equivalent national enforcement agencies, fifty state officials with similar and overlapping responsibilities, and an unlimited number of private "enforcers," all subject to several hundred independent federal judges who are ultimately responsible for ensuring policy coherence, but who are not, for the most part, experts in competition policy. Special sectoral regulators are charged with following competition-like policies, but their relationship to general competition policy principles is not always well conceived. The Congress has created dozens of special requirements and exemptions, often simply reversing or forestalling particular law enforcement decisions, that do not all appear consistent with an integrated competition policy. This diffusion of power, both within the federal government and between the federal and state governments, which is a general characteristic of US government, may weaken the focus of competition policy. With so many entities claiming some competence over competition policy, the two national government enforcement agencies enjoy less authority and policies are necessarily more uncertain. Duplication and second-guessing are virtually inevitable. Resources expended on co-ordination could be better applied to analysis and enforcement.

Not all reform efforts have succeeded. Some of the legislated exemptions are obviously responses to organised special interests. Some assignments of regulatory responsibility appear designed to preserve non-competitive conditions or permit potentially non-competitive mergers. Efforts to introduce market methods in health care may be encountering a backlash of opposition, motivated both by concerns over the appearance of new forms of market power and by efforts to retain old ones. Competition agency participation in reform of non-economic regulations has been much less systematic. And any broad reform effort is complicated by the potential for "state action" immunity, permitting local regulatory programmes to contradict national competition policy.

6.2. The dynamic view: the pace and direction of change

The process of reforming economic regulation has slowed, largely because most of the work has been done. What remains are mostly isolated issues and subsectors. In two large sectors, electric power and telecommunications, reform is being delayed by firms' jockeying for advantageous positions, but these projects will proceed. Congress has recently passed legislation intended to make telecommunications more competitive, and it is considering national legislation to stimulate electric power reform. These actions evidence a political commitment to the principle of pro-competitive reform. Retrenchment is unlikely, for competition policy is an integral element of the national regulatory system.

Although some anomalies remain at the federal level, the principal opportunities for further reform of economic regulation probably lie at the state and local level, where the integration of competition policy is less well established. Some state laws protect retailers and distributors against competition in motor vehicles, liquor, and other products. Some states have general laws against sales "below cost" which do not adequately consider real competitive effects. Some states law grant protection against antitrust oversight to health care providers and facilities. Many states still support anti-competitive regulation of professional practices. Situations vary widely from state to state, so it is very difficult to generalise or even estimate the size of the potential problems. While some states have reformed or eliminated these laws, others have moved in the opposite direction.

The competition authorities' role in the reform process has become less visible. That trend may continue. The agencies are still involved in the major, national efforts about telecommunications and electric power. They will face significant political challenges dealing with state level issues, with international trade and ocean shipping, and with social regulation. On those subjects, promoting competition policy principles in reform may depend on other institutions.

6.3. Potential benefits and costs of further regulatory reform

At the national level, completing the task of eliminating regulatory constraints on economic competition will not generate nearly the benefits of the major reforms already accomplished. But the costs should not be as great, either. First, the difference between the current state and the fully competitive market is smaller. Second, experience with previous deregulation should suggest likely restructuring strategies that will minimise transition costs.

At the state level, the balance is less clear, because there is no complete, systematic estimate of the net effects of anti-competitive state-level regulations. But it is likely that potential gains from eliminating them are substantial.

6.4. Policy options for consideration[92]

Further reform in the United States should:

- ***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.***

The impact of the state action doctrine, and of anti-competitive state and local legislation, is a matter of concern. State regulation and special legislation impairs competition and may delay reform, not only in professional services and distribution, but also in telecommunications and electric power. The state action exemption, and anti-competitive state laws that impair competition affecting interstate commerce, are within the power of Congress to correct, either in particular applications or by general legislation. Congress has already done so in some sectors, such as trucking, where the anti-competitive effects of continued state regulation were patent. A comprehensive study should be undertaken to assess the competitive effects of state laws and regulations and to identify sectors where reform is most needed. A model for such a study in a federal context is the review of state-level constraints on competition that is underway now in Australia. Prime targets for action would be state and local laws that continue to 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.

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

At the federal level, the two competition agencies co-ordinate well, but the quality of co-ordination with other regulators that share competition policy authority varies. In general, that relationship is worked out through consultation, advocacy, and the intervention of the courts. Adoption of rules to permit greater informal staff-level consultation in enforcement matters among sectoral agencies with competition policy responsibilities would improve co-ordination even more.

The 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 the federal agencies have in cases about vertical relationships. It has been said that, at one time, that concern 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 US 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 now pending 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 the difference in likely priorities can undermine policy coherence.

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

Despite the general move toward deregulation, areas remain where competition policy is applied uncertainly. The risk of inconsistency and gaps in coverage should be corrected by eliminating unnecessary exemptions and clearly assigning responsibility to the general competition law rather than a sectoral regulator. Significant exceptions from normal antitrust jurisdiction that remain in transport include sector-specific merger authority for railroads, immunity in trucking for collective ratemaking on joint and through rates and for household goods, immunity and resulting cartelisation of ocean shipping, and sector-specific authority about unfair competition for airlines. The special enforcement body, the Surface Transportation Board, has illustrated the problems with sector-specific competition enforcement. Its powers should not be expanded, by assigning it responsibility for monitoring the cartels in ocean shipping too. Rather, it should be eliminated and competition enforcement authority consolidated in the general competition agencies.

Sector-specific authority concerning mergers and other competition issues in energy and telecommunications should also be eliminated in the course of deregulation. In those sectors, potential conflicts are being managed more successfully than they have been in transport, and it appears more likely that reform will end naturally in the termination of overlapping sectoral competition responsibilities.

Anomalous exemptions and special provisions should be eliminated. Some are simply clutter in the statutes, with little practical significance. But the exemption for non-profit firms from the FTC Act should be repealed, or at a minimum narrowed to apply only to organisations that do not compete with for-profit firms. The special protections for vertical agreements in the soft drink industry are not defensible. The exemption for newspaper joint operations does not seem necessary any more, in the modern media era, nor does the immunity for pooling sports broadcasts. Alone among OECD Member counties, the US does not apply its general competition law to the commercial operations of publicly owned enterprises. Although there are few such enterprises, the exemption probably has significant effects in some markets, and the special treatment should be reconsidered. The special treatment of insurance under the McCarran-Ferguson Act leaves a major national industry subject only to local-level competition oversight; that imbalance in jurisdiction should be re-examined and probably corrected.

6.5. Managing regulatory reform

Experience in the US suggests that the "transition" from economic regulation to a competitive market can rarely be managed or controlled, so it is more effective for it to happen quickly.[93] In airlines, a phased transition was planned, but once the airlines realised change was inevitable, they insisted on speeding it up. Deregulation was achieved *de facto* years before the end of the projected timetable. In natural gas, a somewhat longer-term transition seems to have worked reasonably well, but that may have been because competition law had coexisted with regulation and thus was already familiar. There too, once the industry realised the change was inevitable, it came rapidly. Litigation slowed the process some. A principal complication was sorting out liability for contract commitments entered when the rules and expectations were different. Eventually, deals were reached, mostly through private litigation. The threat of similar complications is delaying change in electric power, though similar deals will no doubt be reached eventually.

A lengthy, planned transition process may be an invitation to resist the final step, or at least to postpone it. Setting a date certain does announce that the issue is no longer debatable. But the farther that date is in the future, the less credible is the commitment to change. The regulated industry may continue to stall in the interim, lobbying for a change of political will. Or it may use the intervening time and the transition tools themselves to build up resources and develop strategies for fending off new entry after regulated protection ends. Thus, a firm date is necessary, and it must not be too far off. Once the industry understands that it cannot stop the process, the industry itself is likely to adapt quickly in anticipation.

The incumbent firms may well still have some monopoly advantages during and after this process of anticipated change. Abuse can be prevented by shifting to the application of general competition law as promptly as possible. The incumbents' use of unfair or abusive methods to perpetuate the monopoly or cartel could then be challenged under generally applicable standards. General competition law should of course be applied with due regard for an appropriate choice of sanctions, while the industry is becoming familiar with the new expectations. But in the US, antitrust law has already applied to most of the sectors where remaining economic regulation is being removed. The "grace period" could be quite short.

NOTES

1. Council of Economic Advisors (1996), *Economic Report of the President*, p. 155.

2. 42 U.S.C. § 7112(12) (Department of Energy).

3. Northern Pacific Railway Co. v. United States, 356 US 1, 4 (1958).

4. A little-known example is the Federal Alcohol Administration Act, 27 U.S.C. § 203, which sets rules about marketing practices in distribution of alcoholic beverages. Although Congress stated that its purpose was to ensure a competitive market, the rules that the Bureau of Alcohol, Tobacco, and Firearms has adopted to implement the law prohibit many practices that current competition policy would not object to.

5. United States v. American Airlines, 570 F. Supp. 654 (N.D. Tex. 1983), *rev'd*, 743 F.2d 1114, 1119 (5th Cir. 1984), *cert. dismissed*, 474 US 1001 (1985).

6. United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH) ¶ 70,687 (DDC 1994).

7. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 US 48 (1985); New England Motor Rate Bureau v. FTC, 908 F.2d 1064 (1st Cir. 1990).

8. In 1994, the FTC settled charges brought in l988 that Boulder Ridge Cable TV and Weststar Communications, Inc, entered into an agreement not to compete against each other as part of Boulder's acquisition of Three Palms, Ltd. The FTC alleged that the agreement was not limited to the area in which the acquisitions occurred.

9. American Medical Association, 94 FTC 701 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided Court*, 455 US 676 (1982).

10. California Dental Ass'n, Docket No. 9259, 5 Trade Reg. Rep. (CCH) ¶ 24,007. That order has since been affirmed on appeal, although the court used different reasoning.

11. Text at 6 Trade Reg. Rep. (CCH) ¶ 44,095 (letter 95-2).

12. In the recent *California Dentists* decision, the Commission tried to base its decision on a plain *per se* standard, arguing that there had been enough experience with the practices to justify placing them in that category. The court disagreed, though, and affirmed on the basis of a more standard rule of reason analysis.

13. See Klein, Joel, "A Stepwise Approach to Antitrust Review of Horizontal Agreements," Address to the ABA Antitrust Section (Nov. 7, 1996), discussed in *Antitrust*, spring 1998, p. 41.

14. FTC v. Indiana Federation of Dentists, 476 US 447 (1986).

15. Kattan, J. (1996), "The role of efficiency considerations in the Federal Trade Commission's Antitrust Analysis," *Antitrust L. J.*, Vol. 64, p. 613.

16. National Society of Professional Engineers v. United States, 435 US 679 (1978).

17. United States v. AT&T, 552 F. Supp. 131, 150, 153 (DDC 1982), *aff'd sub nom.* Maryland v. United States, 460 US 1001 (1983).

18. Questar Corp., File No. 961-0001, 5 Trade Reg. Rep. (CCH) ¶ 23,949.

19. Time Warner Inc., File No. 961-0004, 5 Trade Reg. Rep. (CCH) ¶24,104. For a more detailed discussion, *see* PITOFSKY, Robert (1997), remarks before the Fordham Corporate Law Institute on "Vertical Restraints and Vertical Aspects of Mergers—A US Perspective," October 16-17, 1997, at 8-10.

20. On August 5, 1996, the Division sued to block the proposed merger of two of the nation's largest radio station owners, alleging that they would control more than 50 per cent of sales of radio advertising time in Cincinnati, and could enable the companies to increase prices to advertisers and substantially lessen competition. The parties agreed to divest a leading Cincinnati contemporary music station to an independent buyer. *See* 7 Trade Rep. Reg. (CCH) ¶ 50,807, Case No. 4225.

21. See Averitt, N. & Lande, R. (1997), "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law", *Antitrust L. J.* Vol. 65, p. 713.

22. FTC Rule 3.51 and 61 Fed. Reg. 50,640 (1996).

23. See Swanson, Daniel G. and Diethelm, U. Markus (1998), "Ignore US Antitrust Rules at Your Own Peril", *Wall Street Journal Europe*, 9 February.

24. Sections 1.2, 1.3, and 3 of the *Horizontal Merger Guidelines*. The analysis in these sections about market definition, identification of market participants, and entry is similar to the analysis that is applied to foreign trade aspects of these issues in non-merger cases as well.

25. *See* section 4.22 of the *Antitrust Enforcement Guidelines for International Operations* and 16 C.F.R. §§ 801-803 (1994). In contrast to those exemptions that offer foreign firms some degree of relief from otherwise applicable requirements, a geographic requirement in the special program for joint research or production, discussed below in Section 4, might work to their disadvantage.

26. United States v. Philadelphia Nat'l Bank, 374 US 321, 350-51 (1963).

27. Gordon v. New York Stock Exchange, 422 US 659 (1975).

28. Keogh v. Chicago & North-western Railway, 260 US 156 (1922). The "filed rate" doctrine only protects against suits for damages based on the rate levels.

29. A relic in the statute book is an exemption for discussions held by subcouncils of the Council on Competitiveness, each of which included a representative of the government; that Council no longer exists.

30. California Retail Dealers Ass'n v. Midcal Aluminium, Inc., 445 US 97 (1980).

31. FTC v. Ticor Title Insurance Co., 504 US 621 (1992).

32. Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

33. Parker v. Brown, 317 US 341 (1943).

34. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 US 127 (1961); United Mine Workers v. Pennington, 381 US 657 (1965).

35. 15 U.S.C. §§ 638(d)(2), 640.

36. Although small businesses do enjoy the possibility of compensation for some of their legal bills, if they prevail in a government enforcement action against them. This applies to all kinds of government enforcement action, not just those under the antitrust laws.

37. National Co-operative Research and Production Act of 1993 (NCRPA) 15 U.S.C. § 4301-06 (1994).

38. Department of Transportation (1998), Statement of Enforcement Policy Regarding Unfair Exclusionary Conduct (April 6, 1998).

39. 49 U.S.C. § 41308(b), (c).

40. 49 U.S.C. §§ 10706(a)(2)(A), (a)(3)(B)(ii), (a)(4), (a)(5)(A), (d).

41. 49 U.S.C. § 11321(a).

42. There is also an exemption from antitrust liability for agreements between rail carriers about co-ordination and unification of operations, if the agreement is reached at a conference held by the Secretary of Transportation and it is approved by the Secretary. The statutes also contain a relic of earlier reforms, an exemption for actions taken to formulate or implement the final plan under the Regional Rail Reorganisation Act of 1973. 45 U.SC. § 791(a). And there is an exemption for certain agreements with the national rail passenger service, AMTRAK, about joint use or operation of facilities and equipment. 49 U.S.C. § 24301(j).

43. 49 U.S.C.A. § 10101.

44. Clyde, P. S. and Reitzes, J. D. (1995), *The Effectiveness of Collusion under Antitrust Immunity: the Case of Liner Shipping Conferences*.

45. *See* 49 U.S.C. § 11501(c), § 14501(c)(3).

46. 49 U.S.C. §§ 13703(a)(1), (a)(6), (c). The Surface Transportation Board also has some power to approve, and thus immunise, agreements about pooling or dividing traffic and services. 49 U.S.C. § 14302(f).

47. 49 U.S.C. § 13703(a)(1)(B). See also 49 U.S.C. § 13097(d), exempting discussions between a carrier and its agent or another carrier about shipping rates for household goods.

48. 49 U.S.C. § 14303(f).

49. Otter Tail Power Co. v. United States, 410 US 366 (1973).

50. 42 USC § 6272.

51. 15 U.S.C. § 3364(3).

52. They are, however, free from the jurisdiction of the Federal Trade Commission. 15 U.S.C. § 5(a)(2).

53. 12 U.S.C. §§ 1828(c), 1849.

54. 12 U.S.C. §§ 1971-1978.

55. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. §§ 1849.

56. Gordon v. New York Stock Exchange, 422 US 659 (1975).

57. 15 U.S.C. §§ 1011-15.

58. United States v. South-Eastern Underwriters Ass'n, 322 US 533 (1944).

59. 47 U.S.C. § 313(a), Telecommunications Act of 1996 § 601(b)(1). The 1996 Act also made telephone company mergers subject to generally applicable antitrust procedures and standards under the Clayton Act.

60. 47 U.S.C. § 303c(c).

61. 47 U.S.C. § 555a. This immunity essentially duplicates that which is also available to local officials generally, discussed above.

62. Clayton Act, § 6.

63. 7 U.S.C. § 291.

64. 15 U.S.C. § 521.

65. 7 U.S.C. § 455.

66. 15 U.S.C. § 13b (1994); 7 U.S.C. § 207(f).

67. 7 U.S.C. § 608(b).

68. 7 U.S.C. § 671(d).

69. 7 U.S.C. § 852.

70. 7 U.S.C. §§ 181, 192.

71. 15 U.S.C. §§ 1801-1804.

72. 15 U.S.C. §§ 1291-1295.

73. Soft Drink Interbrand Competition Act of 1980, 15 U.S.C. §§ 3501-03.

74. 42 U.S.C. §§ 11101, 11111-11115.

75. 17 U.S.C. §§ 111, 114, 115, 116.

76. 17 U.S.C. §§ 118(b), (e)(1).

77. 17 U.S.C. §§ 1007(a)(2).

78. 15 U.S.C. §§ 44, defining "corporation" subject to FTC jurisdiction to exclude those not for profit.

79. 15 U.S.C. §§ 13c.

80. United States v. Brown University, 5 F.3d 658 (3d Cir. 1993).

81. Pub.L. 103-382, Title V, §§ 568(a) – (d), Oct. 20, 1994, 108 Stat. 4060.

82. There is also a curious immunity against treble damages for certain charitable gift annuities and charitable remainder trusts. Charitable Gift Annuity Antitrust Relief Act of 1995, Pub. L. 104-63. 15 U.S.C. § 37. This appears to be a response to a particular threat of a private lawsuit.

83. Clayton Act, §§ 6, 20; Norris-La Guardia Act, 29 U.S.C. §§ 104, 105, 113(b).

84. Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 US 616, 635 (1975).

85. Webb-Pomerene Act, 15 U.S.C. §§ 61-66.

86. Export Trading Company Act of 1982, 15 U.S.C. §§ 4011-4021.

87. 19 U.S.C. § 1337, amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

88. These are set out in 19 U.S.C. § 1673c.

89. A limited exemption was also enacted to cover certain actions taken before 1 January, 1975 in connection with steel import quotas. 19 U.S.C. § 2485.

90. Defence Production Act of 1950, § 708(j).

91. Some of the FTC staff comments have addressed regulations to prevent or redress fraud and deception. Examples include comments concerning telemarketing fraud, 900-number rules, licensing fraud, pharmaceutical marketing, and environmental marketing claims.

92. These options correspond to the relevant recommendations of OECD (1997), *Report on Regulatory Reform.*

93. Kahn, A. E. (1986), “The Theory and Application of Regulation,” *Antitrust L. J.*, Vol. 55, p. 177.