

Federal Statutory Exemptions from Antitrust Law

This monograph, prepared on behalf the Antitrust Section of the American Bar Association, and the 24th volume in the Section's Monograph Series, surveys the wide array of statutes that modify or limit federal antitrust law. It analyses them critically, weighing their costs and benefits. Perhaps owing to the ad hoc nature of these laws, there appears never to have been a single, comprehensive evaluation of their effects. Understanding them is critical to appreciating the impact of U.S. competition policy. More than twenty such laws currently exist, touching upon widely differing aspects of commerce. Some completely exempt whole industries from antitrust, and even now several major aspects of U.S. commerce are subject to limited antitrust scrutiny or none at all.

The monograph first maps out the complex and disaggregated web of statutory antitrust modifications and then analyzes them through the use of selected case studies. Several themes emerge. First, the evidence casts doubt on the theoretical arguments by which most exemptions were initially justified. Next, in many respects comparative institutional strengths and weaknesses as between Congress and the courts suggest that the evolution of competition policy has been less problematic through caselaw than through legislation. Finally, exemption laws have been revisited only rarely, and over time many have diverged significantly from evolving public needs. Statutory exemptions geared to the circumstances of an earlier time may become irrelevant or even counterproductive, because the concerns that Congress initially addressed no longer exist. Likewise, as economic theory evolves, antitrust doctrine often evolves with it, but statutory exemptions are less likely to do so, because modification requires a legislative initiative that is difficult to muster.

The book urges an aggressive, blanket reconsideration of the entire project of statutory exemption, and in the event Congress desires to continue the practice, suggests several institutional corrections to make it work better.

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