

State Action Doctrine Discussion Outline

Note: Italicized text is based on questions on which the Commission requested comment from the public.

1. *Should courts change or clarify the application of the “clear articulation” prong of the state action doctrine?*

[1] Recommend no change to the “clear articulation” prong.

[2] Recommend that courts reaffirm a “clear articulation” standard as proposed in the FTC Report.

[3] Recommend that courts adopt a “sovereign compulsion” test, under which “clear articulation” would be found only where a state compelled the action giving rise to the antitrust claim.

[4] Recommend that courts apply a standard for “regulated by state law” analogous to that applied under the McCarran-Ferguson Act.

2. *Should courts change or clarify the application of the “active supervision” prong of the state action doctrine?*

[5] Recommend no change to the “active supervision” prong.

[6] Recommend that courts (a) consider whether the state “develop[ed] an adequate factual record, including notice and an opportunity to be heard;” (b) consider whether the state created a “written decision on the merits” of the activity being regulated; and (c) undertake “a specific assessment—both qualitative and quantitative—of how private action comports with the substantive standards established by the state legislature.” (FTC Report proposal)

[7] Recommend that courts adopt a “tiered” approach with different requirements based on the situation.

[a] Recommend no active supervision required as to agencies that are part of the state.

[b] Recommend that “active supervision” applies to any entity consisting in whole or in part of market participants.

[c] Recommend that, when there is a hybrid public-private entity, if the majority of the decision-making entities are private market participants, regular reauthorization of the state action immunity by the legislature be required.

[d] Recommend that “active supervision” be performed by a governmental official or entity outside the entity in question.

[e] Recommend a rigorous case-by-case analysis of whether there is an appreciable risk that the challenged conduct is the result of private actors pursuing their own private interests, rather than state policy.

[8] Recommend that private parties acting in “good faith” to comply with the terms of regulation should not be found liable for violating the antitrust laws.

3. *Should courts create a market participation exception to the state action doctrine?*

[9] Recommend no market participation exception.

[10] Recommend that courts create an exception to the state action doctrine for municipalities acting as market participants.

[11] Recommend that courts create an exception to the state action doctrine for state government entities acting as market participants.

4. *Should courts create an interstate spillover exception to the state action doctrine?*

[12] Make no recommendation.

[13] Recommend that courts consider the extent of spillovers when applying the clear articulation and active supervision requirements.

[14] Recommend a statutory exception to the state action doctrine when there are interstate spillovers.

[a] Applicable when the costs of a state regulatory regime are borne “primarily” by citizens of other states.

[b] Applicable when there are “overwhelming interstate spillovers.”

5. *Should the federal state action doctrine be codified?*

[15] Do not recommend codification of the federal state action doctrine.

[16] Recommend that the federal state action doctrine be codified.

If so:

[a] Model it after Connecticut’s statute, which provides that “[n]othing contained in this chapter shall apply to those activities of any person when said activity is specifically directed or required by a statute of this state or of the United States.”

6. *Should Congress change the Local Government Antitrust Act of 1984?*

[17] Do not recommend any change to the Local Government Antitrust Act of 1984 (“LGAA”).

[18] Recommend addition of an active supervision prong to the LGAA.

[19] Recommend revision of the LGAA to provide for single damages in addition to injunctive relief.