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?**


   [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?**


   [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?**


   [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.