Regulated Industries Discussion Outline

Note: Italicized text are excerpts from questions on which the Commission requested comment from the public.

I. *What role should antitrust enforcement play in regulated industries, particularly industries in transition to deregulation?*

[1] The role of antitrust versus regulation will depend on the industry. Until there is a workably competitive context, for example, regulation may be superior to traditional antitrust rules in reshaping the structure of a regulated industry and limiting the incentives for incumbents to engage in strategic conduct that may frustrate the development of competition.

[1a] In general, competition is the fundamental economic policy of the United States, and statutes that create regulatory regimes (including any savings clauses) should be construed consistently with that policy to the maximum extent possible.

[2] Antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

[3] The federal antitrust enforcement and other regulatory agencies should consult on the effect of regulation on competition.

[4] Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.

[5] Antitrust enforcement agencies and courts should take account of the special circumstances of regulated industries, including the effect of regulation.

[6] Courts should adopt a rule of joinder in antitrust cases that would make any relevant regulatory entity a compulsory party.

II. *When a merger or acquisition involves one or more firms in a regulated industry, how should authority for merger review be allocated between the antitrust agencies and the relevant regulatory agency?*

[7] The federal antitrust enforcement agencies should have the exclusive authority to review and challenge mergers or acquisitions of regulated firms under the antitrust laws.

[8] The federal antitrust enforcement agencies should have exclusive authority to review the competitive effects of mergers or acquisitions of regulated firms. The antitrust agency's findings or conclusions on competitive issues would be "binding" on the industry regulator as a part of its public interest determination.

[9] In making their public interest determinations, regulatory agencies should be required to give presumptive weight to the competitive analysis conducted by the federal antitrust enforcement agencies.

[10] The federal antitrust enforcement agencies should be required to provide a competitive analysis of a proposed merger to the industry regulator, but the regulator would not be required to give that analysis any particular weight in its public interest determination.

[11] The federal antitrust enforcement agencies and regulatory agencies should pursue "soft convergence" of merger review in order to harmonize substantive approaches to competition analysis and procedural requirements to reduce compliance costs.

III. *In what circumstances should antitrust immunity be implied as a result of a regulatory structure?*

[12] Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied.

[13] Recommend that courts should not imply an immunity unless active regulatory supervision makes it unlikely that anticompetitive conduct (or effects) will occur, and that courts should construe any implied immunity narrowly.

[14] Recommend that Congress evaluate whether the filed-rate doctrine should continue to apply in regulated industries and legislatively overrule it where the regulatory agency no longer specifically reviews proposed rates.

IV. *How should courts treat antitrust claims where the relevant conduct is subject to regulation, but the regulatory legislation contains a "savings clause" providing that the antitrust laws continue to apply to the conduct?*

[15] Recommend that Congress craft savings clauses carefully to delineate clearly and specifically what antitrust claims remain in light of the regulatory regime.

[15a] Recommend that Congress pass a statute stating that, in statutes dealing with regulatory regimes, absent a provision expressly providing otherwise, the antitrust laws continue to apply.

[16] Recommend that courts interpret savings clauses to give deference to the antitrust laws.

[17] Confirm that *Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act under the facts of the case, and that it does not displace the role of the antitrust laws in regulated industries.

[17a] *Trinko* was wrongly decided insofar as it can be read as holding that, as a matter of law, violations of Section 251(c) of the 1996 Telecommunications Act cannot be the basis for a violation of Section 2 of the Sherman Act. Such a holding is inconsistent with Congress' intent in enacting the antitrust savings clause in the 1996 Telecommunications Act and unduly limits the role of the antitrust laws in ensuring all the benefits of a competitive marketplace.

V. *Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?*

[18] Recommend that Congress and regulatory agencies decline to set industry-specific standards for particular antitrust violations.

[19] Recommend that Congress establish industry-specific antitrust standards only after it has specifically considered the particulars of an industry and determined the most appropriate way to regulate it.