



**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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**ROUNDTABLE ON REGULATING MARKET ACTIVITIES BY PUBLIC SECTOR**

-- Note by the United States --

*This note is submitted by the United States Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting (8-9 June 2004).*

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1. The commercial activities in which various levels of government in the United States – federal, state, and local – are involved are quite limited. Moreover, the objectives of those activities are usually quite specialised and the extent of competition between the government and private sector is at most indirect, and often negligible or non-existent. Thus, there do not appear to be any “competitive neutrality” issues of consequence. There is no significant regulatory mechanism dealing with these



*Annex I. by the FTC*

1. Although situations in which governmental entities compete directly with private firms as market participants are rare,<sup>1</sup>

urge governmental action. The objective is to prevent antitrust enforcement for unduly chilling *bona fide* political conduct.

### **The State Action Doctrine – Origins and Problems**

6. The state action doctrine was first articulated by the U.S. Supreme Court in *Parker v. Brown*.<sup>2</sup> The doctrine emerged in response to efforts to apply antitrust rules designed to regulate business conduct to the activities of state governments. The Court based the doctrine on the notion that, in passing the Sherman Act, Congress intended to protect competition, not to limit the sovereign regulatory power of the states. Thus, pursuant to the doctrine, actions that could be attributed to “[t]he state itself” would be shielded from antitrust scrutiny.

7. The Supreme Court subsequently addressed delegations of state authority in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*<sup>3</sup> In that case, the court set forth a two-part test. The conduct of a party acting pursuant to a delegation of state authority is shielded from antitrust enforcement under the state action doctrine if: (1) the party is acting pursuant to a “clearly articulated” state policy, and (2) the conduct is being “actively supervised” by the state.

8. Since *Parker*, however, the scope of state action immunity from the antitrust laws has increased considerably. At times, courts have failed to consider carefully whether the anticompetitive conduct in question was truly necessary to accomplish the state’s objective. Other courts have granted broad immunity to quasi-official entities, including entities composed of market participants, with only a tangential connection to the state.

9. With respect to *Midcal’s* “clear articulation” prong, some courts have adopted an overly generous view of foreseeability. For example, some courts have inferred an intent to restrain competition from a grant of general corporate powers. In their view, anticompetitive contracts are a foreseeable result of the general power to contract, and anticompetitive mergers are a foreseeable result of the of the general power to make acquisitions. Other courts have refused to recognise sensible limitations on regulatory schemes. Instead, they have concluded that a state’s decision to authorise regulation in a particular industry reflects an intention to displace competition in a wholesale manner, thereby rendering almost any regulatory restraint foreseeable.

10. With respect to *Midcal’s* “active supervision” prong, the problem is somewhat different. To date, the courts have simply declined to elaborate clear standards for application of the requirement. As a result, unless there is a complete absence of supervision, courts have been reluctant to apply the “active supervision” requirement.

11. These problems with the doctrine are magnified by the potential for interstate “spillovers,” which force the citizens of one state to bear the burden of anticompetitive regulations imposed by a neighbouring state. *Parker*, for example, involved an agricultural marketing program regulating raisin production that extended to California growers only. Because the vast majority of the affected raisins were sold outside California, however, the burden of this program was borne almost exclusively by out-of-state consumers.

### **The Noerr Pennington Doctrine – Origins and Problems**

12. The *Noerr-Pennington* doctrine was first articulated in a pair of Supreme Court cases: *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*<sup>4</sup> and *United Mine Workers of America v. Pennington*.<sup>5</sup> Under the *Noerr* doctrine, a private party petitioning for government action – even anticompetitive government action – is exempted from antitrust enforcement.



### **Clarifying the State Action Doctrine**

19. In September 2003, the State Action Task Force issued a comprehensive report.<sup>13</sup> The Task Force Report surveys current state action case law, identifies problematic interpretations of the doctrine, and makes a number of recommendations regarding specific clarifications. The principal recommendations are:

1. Clarify proper interpretation of the “clear articulation” requirement.
2. Elaborate clear standard for the “active supervision” requirement.
3. Consider explicit recognition of a “market participant” exception to the state action doctrine.
4. Consider judicial recognition of the problems associated with overwhelming interstate spillovers.

20. The Commission has sought to implement the recommendations of the State Action Task Force through a variety of means. The first of these is competition advocacy. An important part of the Commission’s competition policy agenda involves cooperative, non-litigation advocacy efforts. Frequently, the Commission receives inquiries from state governments regarding the potential consumer impact of proposed legislative or regulatory initiatives. In these instances, the Commission is happy to lend its institutional expertise in the antitrust area to the state decision-making process.

21. The Commission has recently engaged in a number of competition advocacy efforts in the state action area. These include the following:

1. Physician Collective Bargaining Legislation – FTC staff opined that such legislation would

4. E-Commerce Issues – FTC staff examined a number of industries to determine whether legacy laws, enacted prior to the rise of the Internet, are disproportionately burdening e-commerce and preventing consumers from realising the benefits of advancements in information technology. In October 2002, the Commission held a public workshop on this subject, which examined potential regulatory barriers affecting Internet auctions and legal services, as well as online sales of such products as automobiles, caskets, wine, and prescription drugs.<sup>19</sup> Staff reports documenting regulatory barriers to Internet sales of wine<sup>20</sup> and contact lenses<sup>21</sup> have already been published. Other reports are expected to follow.

22. The Commission's state action efforts also involve the filing of *amicus* briefs. In November 2003, the Commission filed a brief before the Sixth Circuit in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.<sup>22</sup> This case involved a rule promulgated by a high school athletic association that prohibited schools participating in the state's most prestigious and desirable sports leagues from offering financial aid, thereby allegedly raising the cost of private education throughout the state. The FTC brief focused on a narrow issue of state action. Specifically, the Commission argued that the test used to determine whether an entity is a "state actor" for purposes of constitutional analysis is *not* the same as the test to determine whether a party is exempted from Sherman Act enforcement under the antitrust state action doctrine.

23. Finally, when other alternatives fail, the Commission has resorted to administrative litigation to protect competition. In the state action context, these litigation efforts have targeted both governmental entities and private parties engaged in anticompetitive conduct that is purportedly authorised by "the state itself." Our most recent efforts have addressed both the "clear articulation" and "active supervision" prongs of the *Midcal* test.



**Clarifying the Noerr-Pennington Doctrine**

26. Although the *Noerr* Task Force has not yet published its final report, it has nevertheless



NOTES

1. See related DOJ/FTC submission to this round table.
2. 317 U.S. 341 (1943).
3. 2445 U.S. 97 (1980).
4. 365 U.S. 127 (1961).
5. 381 U.S. 657 (1965).
6. 404 U.S. 508 (1972).  
6*Noerr*, 365 U.S. at 136.
7. *Id.* at 138.
8. *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983).
9. *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993).
10. *Id.* at 60.
11. *Id.* at 61 (quoting *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991)) (emphasis in original).
12. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080-81 (8th Cir. 1999).
13. Report of the State Action Task Force (Sept. 2003) available at <<http://www.ftc.gov/os/2003/09/stateactionreport.pdf>>. See also Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective* (Oct. 24, 2003) available at <<http://www.ftc.gov/speeches/muris/fordham031024.pdf>>; Susan A. Creighton, *A Federal-State Partnership on Competition Policy: State Attorneys General as Advocates* (Oct. 1, 2003) available at <<http://www.ftc.gov/speeches/other/031001naag.htm>>.
14. See FTC Staff Letter on Alaska Senate Bill 37 (Jan. 18, 2002) available at <<http://www.ftc.gov/be/v020003.htm>>; FTC Staff Letter on Washington House Bill 2360 (Feb. 8, 2002) available at <<http://www.ftc.gov/be/v020009.pdf>>; FTC Staff Letter on Ohio House Bill 325 (Oct. 16, 2002) available at <<http://www.ftc.gov/os/2002/10/ohb325.htm>>.
15. See FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <<http://www.ftc.gov/be/v020006.htm>>; FTC/DOJ Letter to the President of the North Carolina State Bar re: Proposed North Carolina State Bar Opinions Concerning Non-Attorneys' Involvement in Real Estate Transactions (July 11, 2002) available at <<http://www.ftc.gov/os/2002/07/non-attorneyinvolvement.pdf>>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <<http://www.ftc.gov/be/v020013.pdf>>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Proposed Restrictions on Competition From Non-Attorneys in Real Estate Closing Activities (Mar. 28,

- 2003) available at <<http://www.ftc.gov/be/v020013.htm>>; FTC/DOJ Letter to the Indiana State Bar Ass'n Unauthorised Practice of Law Comm. re: *Proposed Amendment to Indiana Supreme Court Admissions & Discipline Rule 24* (Oct. 1, 2003) available at <<http://www.ftc.gov/os/2003/10/uplindiana.htm>>; FTC/DOJ Letter to the ABA re: Proposed Model Definition of the Practice of Law (Dec. 20, 2002) available at <<http://www.ftc.gov/opa/2002/12/lettertoaba.htm>>.
16. See Brief *Amici Curiae* of the United States of America and the Federal Trade Commission (July 28, 2003) available at <<http://www.ftc.gov/os/2003/07/georgiabrief.pdf>>.
  17. See Brief *Amici Curiae* of the Federal Trade Commission and the United States of America (May 25, 2004) available at <<http://www.ftc.gov/be/V040017.pdf>>.
  18. See FTC Staff Comment before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <<http://www.ftc.gov/be/v020007.htm>>.
  19. See Federal Trade Commission, Public Workshop, *Possible Anticompetitive Efforts to Restrict Competition on the Internet* (Oct. 8-10, 2002) available at <<http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>>.
  20. See FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003) available at <<http://www.ftc.gov/os/2003/07/winereport2.pdf>>. See also FTC Staff Letter on New York Assembly Bill 9560-A/Senate Bills 6060-A and 1192 (Mar. 29, 2004) available at <See

