MEMORANDUM 2025–11

Antitrust Law: Initial Recommendations for ACR 95 Questions

This Memorandum[1] presents initial recommendations for the questions presented in ACR 95,[2] as framed by Memorandum 2024-46. Memorandum 2024-46 summarized the expert reports, presentations, and stakeholder feedback the Commission received in its examination of California's antitrust laws and practices. This memorandum presents the recommendations of the staff based on those sources and the Commissioners' public comments, and thus should be read in conjunction with Memorandum 2024-46.

This Memorandum was compiled with the invaluable assistance of the Commission's Antitrust Study consultant, Cheryl Johnson, and the staff would also like to recognize the expert report working group members[3] for their important and foundational work.

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

[2] 2022 Cal. Stat. res. ch. 147 (ACR 95).

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SHOULD CALIFORNIA REVISE ITS ANTITRUST LAWS?

The nation's primary federal antitrust law, the Sherman Act,[4] was adopted in 1890. California's primary antitrust statute, the Cartwright Act,[5] was adopted in 1907 and has seen few substantive updates over the intervening 117 years. While portions of the Cartwright Act are broader than the Sherman Act, the Cartwright Act lacks provisions that outlaw monopolization and attempts to monopolize, and allow the review and challenge of mergers and acquisitions. The Cartwright Act also does not generally reach single firm conduct. As a result, California must rely on federal law and jurisprudence to manage single large companies' market conduct within its borders.

These gaps in California's antitrust laws align with some of the deepest concerns in today's economy and create momentum for antitrust reexamination. Indeed, the federal government and numerous states including New York,[6] New Jersey,[7] Minnesota,[8] and Pennsylvania[9] have recently attempted to augment their antitrust laws to address similar circumstances.

The vertical integration[10] of some of California's largest industries,[11] as well as the

[4] 15 U.S.C. § 1. The Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[5] Bus. & Prof. Code §§ 16700 - 16770.

[6] See, e.g. S6748B (Gianaris, 2023).

[7] See, e.g. S3778 (Singleton, 2023).

[8] See, e.g. HF 1563 (Greenman, 2023).

[9] See, e.g. HB 2012 (Pisciottano, 2023).

[10] See Memorandum 2024–25, p. 7. "The traditional vertical merger is one between a downstream firm which produces some final good and an upstream firm which supplies some input necessary to the production of the downstream good. A PC manufacturer might merge with a chip manufacturer."

[11] See, e.g., Memorandum 2024-14.

sheer scale of digital platforms such as Google, Apple, Amazon, Microsoft, and Meta present unique competitive challenges not foreseen by the original antitrust law drafters. While successful challenges by the government against market malfeasants do occur under the current legal framework,[12] these successes are rare and require considerable resources to surmount the hurdles favoring the status quo.

There is a convincing body of literature supporting the update of antitrust laws to counter the decades of federal jurisprudence informed by certain Chicago School[13] precepts which time and scholarship have revealed to be unfounded.[14] While the Department of Justice and the Federal Trade Commission have reinvigorated federal antitrust laws in their 2023 Merger Guidelines,[15] these Guidelines are not binding law and could be repealed by new leadership or disregarded by the federal judges who hear most antitrust cases. California state judges hearing and applying new California law could better protect competition in the state and would likely bring different experiences and perspectives in resolving antitrust suits.

Recommendation

The staff recommends drafting recommendations revising California's antitrust laws. Strengthening California's antitrust laws is essential to protecting competitive freedoms within its borders, particularly because the state's interests may not always align with the priorities of federal enforcers. However, the Commission should heed the caution of critics so as not to disrupt California's enviable economy and its innovative environment.

Does the Commission agree with the staff recommendation?

If the Commission does not agree to drafting recommendations to revise California's antitrust laws, no further decisions on this study are necessary and staff will prepare a draft recommendation consistent with that decision.

If the Commission decides to direct the staff to work on recommendations to amend California's antitrust laws, the remainder of this memo presents additional decision points.

SHOULD CALIFORNIA HAVE ITS OWN LAW ON SINGLE FIRM CONDUCT?

California's main antitrust law, the Cartwright Act,[16] generally does not apply to conduct by a single firm to monopolize, exclude its competitors, or cause other

[12] See e.g., U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).
[13] See First Supplement to Memorandum 2023-11, p. 20.
[14] See, e.g., Memoranda 2024-25, p. 20 and 2024-26, pp. 5-6.
[15] Department of Justice and Federal Trade Commission 2023 Merger Guidelines.
[16] Bus. & Prof. Code §§ 16720 - 16770.

anticompetitive harms. Rather, it focuses on the actions of "two or more persons."[17] Accordingly, any effort to challenge the conduct of a single company must generally be brought in federal court under Section 2 of the Sherman Act, which makes it unlawful for anyone "to monopolize or attempt to monopolize." [18]

California also has the Unfair Practices Act,[19] (UPA) which was designed to "safeguard the public against the creation or perpetuation of monopolies,"[20] and the Unfair Competition Law (UCL),[21] which protects the fairness of business practices. However, neither are written to effectively address the behavior targeted by the Sherman Act's Section 2.

Although the UPA explicitly prohibits below cost pricing,[22] locality discrimination,[23] secret rebates and allowances,[24] and loss leaders,[25] each prohibition has its own specific limitations and defenses. This complex statutory scheme, together with its lack of singular focus on overall competition, hinders its usefulness as an enforcement vehicle.[26]

Similarly, while expansive, the UCL is not an effective tool against single firm conduct because, among other reasons, it does not allow for compensatory damages or automatic attorney's fees. This significantly limits the feasibility of pursuing most antitrust cases under the UCL.[27]

There is a broad consensus of the academic and enforcement communities that California should adopt legislation reaching single firm conduct.[28] California is one of only a few states with antitrust laws that do not address single firm conduct, and thus the state can only pursue anticompetitive single firm conduct under the Sherman Act in federal court. Adopting a single firm conduct provision would allow California state courts to adjudicate California antitrust claims and reduce its reliance on federal enforcers who have their own resource constraints and enforcement priorities.[29]

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[17] Bus. & Prof. Code § 16720.

[18] 15 U.S.C. § 2.

[19] Bus. & Prof. Code §§ 17000- 17101.

[20] Bus. & Prof. Code § 17001. However, this retroactive declaration of purpose was made after the individual provisions of the UPA were enacted that targeted various economic circumstances between 1913 and 1939; all were codified as the UPA in 1941. California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis)

[21] Bus. & Prof. Code §§ 17200 - 17210.

[22] Bus. & Prof. Code §§ 17043, 17048.5.

[23] Bus. & Prof. Code § 17040.

[24] Bus. & Prof. Code § 17045.

[25] Bus. & Prof. Code § 17044.

[26] See generally California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis); Second Supplement to Memorandum 2024-13, EX 1-5.

[27] Memorandum 2024-25, pp. 11-12.

[28] See e.g., Memorandum 2024-15 and Seventh Supplement to Memorandum 2024-24, EX 7.

[29] Memorandum 2024-25, p. 15.

Recommendation

The staff recommends adding a provision to address single firm conduct to California's existing antitrust laws.

Does the Commission agree with the recommendation?

If the Commission directs staff to develop a California law addressing single firm conduct, the Commission needs to further decide its general form. The options are:

1. Mirror federal law.
2. Adopt a California Single Firm Conduct Standard.

Mirror Federal Law

Mirroring federal law in its entirety would allow California to build upon federal jurisprudence and afford a familiar base of established case law. California courts would still be able to interpret the law to meet California's unique needs and state enforcers could operate independently, but everyone would be starting with familiar terms, principles, and frameworks. Adopting federal law by simply importing Sherman Act Section 2 into the Cartwright Act would likely be the least disruptive option for including a single firm conduct provision in California law. As one law review article argued,

> The current antitrust jurisprudence has evolved through decades of case law, and will continue to evolve on a case-by-case basis as more digital markets cases are bought and as economic theories continue to develop. This common law approach takes time and can be criticized for being too slow for the fast pace of the digital economy. But this approach has significant benefits. It is adaptable to new experiences and improved economic thinking. It is malleable, enabling courts to tailor rulings to a wide variety of facts. And it leaves room for case-by-case development and evolution of the law as circumstances change.[30]

Adopt a California Single Firm Conduct Standard

Multiple expert reports cautioned against California adopting Section 2 in its entirety.[31] By so doing, California would effectively import the decades of federal jurisprudence that has diluted Section 2's original scope and strength. Accordingly, many have recommended that California adopt single firm conduct provisions that selectively distinguish themselves from federal law and the many federal jurisprudential limitations that can undermine effective enforcement.[32]

[30] Third Supplement to Memorandum 2024-32, EX 84, Lin W. Kahn, David C. Kiernan, Alyxandra Vernon, Maya Baumer, *The Adaptable Antitrust Laws,* 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc., 75 (2023); The staff notes, however, this article argues against *any* revisions to current antitrust law, but this quotation explains the benefit of an approach beginning from a familiar foundation.

[31] See e.g., Memoranda 2024–35, pp. 16, 21; 24-15, pp. 1-2.

[32] Memoranda 2024-15, pp. 6-7, 13; 2024-33, p. 8; 2024-26, pp. 7-8.

There are numerous ways to distinguish California single firm conduct law from federal law while using Sherman Act Section 2 as a foundation. The Sherman Act's Section 2 makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ."[33] Other state and federal legislative proposals have added language to clarify the breadth of this section. For example, New York's proposed Twenty-First Century Antitrust Act adds a ban on monopsony in addition to that on monopoly, and includes an abuse of dominance (AOD) provision, among other changes.[34] "Monopsony" which simply refers to seller-side monopoly, is commonly believed to be encompassed within the broader term "monopoly".[35] However, some believe the express inclusion of monopsony may help address the historical underenforcement of buyer-side monopolies.[36] Because the monopsonist or buyer side monopolist can depress the prices paid for important inputs like labor, use of the monopsony term also reinforces antitrust's commitment to protect labor.[37] Pennsylvania's antitrust proposal inserts language banning *maintenance* of monopolies to the ban on acquisitions or attempts to monopolize.[38] Reasonable minds might differ on the need for this additional language but it could help distinguish a state provision from federal law.

In addition, language implicitly rejecting the effects of Supreme Court cases that have weakened antitrust enforcement could also be added, similar to the proposed federal antitrust law, Competition and Antitrust Law Enforcement Reform Act (CALERA),[39] and the Single Firm Working Group Report's recommendations.[40] Both include language that rejects federal principles on predatory pricing, unilateral refusal to deal, market definitions, multi-sided platforms, and the certainty of damage evidence.

However, because there are many federal cases and principles that diminish the strength of Section 2 enforcement, merely selectively disclaiming certain aspects of federal law could invite arguments that California is embracing all other federal jurisprudence. This problem could be addressed by expressly untethering a California Section 2-type provision from existing federal jurisprudence.[41] To this end, the Commission could include

[33] 15 U.S.C. § 2.
[34] S6748B (Gianaris, 2023).
[35] Memorandum 2024-24, p.16
[36] See First Supplement to Memorandum 2024-13, EX 31.
[37] Memoranda 2024-14, pp. 4-6; 2024-25, p. 17.
[38] HB 2012 (Pisciottano, 2023).
[39] S. 225 (Klobuchar, 117th Congress 2021). Sen. Klobuchar reintroduced this measure in the 2023-2024 Congress as S. 4308.
[40] Memorandum 2024-15, pp. 15-18.
[41] Memoranda 2024–25, p. 15; 2024-26, pp. 7-8.

statements expressly directing California state courts to freshly interpret the single firm conduct language in light of California's interests and a rejection of the federal policy favoring under-deterrence.

Adopting a new California single firm standard would not only reinforce California's independence from federal law but would allow California to tailor guidelines, definitions, and presumptions to California's specific concerns. While a new California standard need not be based on Sherman Section 2 language, generating a unique set of standards that totally rejects federal law presents a formidable drafting challenge, as evidenced by the lack of consensus in the Commission's expert working groups. A new, untested antitrust framework could be risky and invite uncertainty, which could chill innovation and business growth. Further, antitrust provisions without precedents might also pose a significant challenge to courts, particularly when they are instructed to not follow federal law or draw on federal experience.[42] As a result, a hybrid approach that selectively draws on federal law would offer some essential grounding for a new California standard.

Recommendation

The staff recommends that California adopt its own single firm conduct provision. This provision could be selectively based on federal law and include statements clarifying its scope, emphasizing California's interests, and directing that its interpretation not be bound by certain federal precedents.

Does the Commission agree with the staff recommendation?

SHOULD CALIFORNIA ADOPT AN ABUSE OF DOMINANCE STANDARD?

The Commission should additionally decide whether to integrate principles of the abuse of dominance (AOD) standard.

Both proposed reforms noted in ACR 95,[43] the New York State Twenty-First Century Antitrust Act[44] and CALERA,[45] contain an AOD provision that makes it unlawful for a dominant entity to abuse that position to its competitive advantage. This concept is based upon a European Union (EU) law that prohibits "any abuse by one or more undertakings of a dominant position within the internal market or on a substantial part of it…."[46] The EU Court of Justice defines a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being

[42] See Memorandum 2024-46.
[43] 2022 Cal. Stat. res. ch. 147 (ACR 95).
[44] S933 (Gianaris, 2021).
[45] S. 225 (Klobuchar, 117th Congress 2021).
[46] Treaty on the Functioning of the European Union, Document 12008E102.

maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[47] Such a provision has long been a fixture of European and Canadian antitrust laws, which draw on their own respective definitions, regulations, and methods of enforcement. However, AOD as practiced in some foreign countries may have definitions and procedures not suitable for California's economy or legal structure.[48]

However, AOD is considered essential by some to challenge dominant companies' conduct that defy a ready application of the broad Sherman Act Section 2 language.[49] While Section 2's broad proscription of "attempts to monopolize" could be read to meet the competitive challenges of dominant companies, in practice it has proven relatively ineffective for that purpose.[50] Hence, the California adoption of an AOD-like or a "misuse of market power" approach could find support as a "much-needed change to take on the emergence of 'Big Tech'[51] and to balance out weak federal laws that have handicapped litigation against large technology companies over the past three decades."[52] That said, the Commission should be wary of an overly vague and undefined standard that might impact procompetitive conduct or reach unintended targets.

There is no specific formulation for this approach. The Commission can choose from an array of options to identify dominant actors, from using specific percentages of market shares based on detailed consideration of direct and indirect market evidence, to vesting an agency with the task. The Commission may also choose to deem specific conduct presumptively unlawful or establish principles against which actions can be measured.

Recommendation

The staff recommends integrating elements of an AOD standard that guard against the misuse of market power to any new single firm conduct provision.

Does the Commission agree with the staff recommendation?

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[47] European Parliament, Fact Sheets on the European Union, Competition Policy.

[48] See e.g., First Supplement to Memorandum 2024-46, EX 1; Second Supplement to Memorandum 2024-13, EX 33.

[49] See e.g., Second Supplement to Memorandum 2024-13, EX 4.

[50] See e.g., Memorandum 2024-15, p. 13; Third Supplement to Memorandum 2024-32, EX 84, Jordan Elias, *Antitrust Restoration From California Anchored by a New Monopolization Synthesis*. 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc., 34 (2023).

[51] See Sixth Supplement to Memorandum 2024-24, EX 14. "Big Tech" in this memorandum refers generally to Google, Meta, Apple, Amazon, and to some degree, Microsoft.

[52] Third Supplement to Memorandum 2024-32, EX 84, Susannah Torpey, Brandon Annette and Quinlan Cummings, *Should California Adopt Revisions Proposed By Congress And The New York State Legislature To Address Single-Firm Conduct?* 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc., 14 (2023).

SHOULD CALIFORNIA HAVE SPECIFIC ANTITRUST LAWS FOR BIG TECH?

ACR 95 asks the Commission "Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices."[53] This question, while phrased in terms of "antitrust injury," requires an analysis of the current law's ability to rein in the negative competitive effects of Big Tech's conduct while preserving its benefits. Also implicated is whether any revisions to antitrust law should treat Big Tech differently than it treats dominant firms in other sectors.

Section 2 of the Sherman Act has been the chief statutory framework by which the exclusionary conduct of Big Tech conduct has been challenged. However, critics validly question whether, even when successful, Section 2 is agile enough to effectively police misconduct and deter future abuses by dominant firms.[54]

The Technology Platform Working Group report[55] and many public comments[56] detail the unprecedented footprint of several digital platform companies, many of which are headquartered or have a substantial presence in California. These stakeholders share concerns that certain practices by dominant companies such as self-preferencing, discriminatory access, exclusionary contracting, restraints on data portability, tying, and killer acquisitions may escape condemnation under Section 2's broad brush. But exclusionary practices by dominant companies in every industry have the capacity of harming competition, so arguably any new law should not single out individual industries but apply to all. However, because otherwise pro-competitive conduct may result in harm when practiced by a dominant company, it is important to provide clear guidance in identifying those companies subject to additional scrutiny.[57]

The Federal Trade Commission and U.S. Department of Justice's (FTC/DOJ) 2023 Merger Guidelines[58] reset some aspects of merger law without singling out Big Tech. While these merger guidelines lack the force of law, they provide useful guidance for reimagining presumptions and shifting burdens of proof to make it easier to challenge Big Tech and non-Big Tech mergers. For example, the guidelines presume certain mergers with

[53] 2022 Cal. Stat. res. ch. 147 (ACR 95).

[54] See generally Memorandum 2024-26.

[55] Memorandum 2024-26, p. 2; Technology Platforms Working Group Presentation transcript, June 20, 2024, p. 3.

[56] See, e.g., First Supplement to Memorandum 2024-32, EX 13; Seventh Supplement to Memorandum 2024-24, EX 7.

[57] See Memorandum 2024-15, pp. 1, 4.

[58] Department of Justice and Federal Trade Commission 2023 Merger Guidelines.

a dominant company could significantly increase consolidation and therefore shift the burden to the merging parties to establish the lack of anticompetitive effects.[59] Likewise, CALERA avoids Big-Tech specific provisions and shifts the burden from the government to the merging parties to prove the merger will not decrease competition if the proposed merger covers 50% or more of a market or has a value in excess of $5 billion.[60]

Recommendation

The staff recommends against Big Tech-specific antitrust laws and instead recommends ensuring any proposed antitrust language is drafted sufficiently broad and flexible enough to encompass Big Tech as well other industries.

Does the Commission agree with the staff recommendation?

SHOULD CALIFORNIA HAVE ITS OWN MERGER LAWS?

While mergers and acquisitions can be powerful engines for innovation and have real consumer benefits, some can negatively impact the economy by reducing competition, raising prices, or thwarting the development of new businesses. The California Attorney General (AG), like other state attorneys general, may act alone or partner with federal agencies to challenge a merger affecting California, but the AG must generally[61] do so in federal court under Section 7 of the Clayton Act.[62] Although partnering with federal agencies to sue under federal law is not required, states going alone in a merger challenge often face defendants who raise evidence of federal inaction to suggest federal approval of the merger, thereby casting doubt on the state's case.

The explosion of merger and acquisition activity over the last decades has facilitated significant market consolidation and unusually high profit margins.[63] Though federal merger provisions have been largely unchanged since 1950, federal courts have made it more difficult to successfully challenge a merger by requiring greater and more certain proof of possible competitive harm; narrowly defining nascent, potential and maverick competitors; failing to recognize labor losses as a harm; and entertaining dubious claims of efficiencies.[64] The federal 2023 Merger Guidelines attempted to counter many of these

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[59] Department of Justice and Federal Trade Commission 2023 Merger Guidelines, Guideline 1.

[60] S. 225, § 4(b), (Klobuchar, 117th Congress 2021).

[61] California has narrow laws providing it authority to review mergers and acquisitions under narrow circumstances in certain industries, but it lacks a general state–specific merger law.

[62] 15 U.S.C. §§ 12–27.

[63] Memoranda 2024-25, p. 3; 2024-14, p. 1.

[64] Memorandum 2024-15, p. 13. See generally, Third Supplement to Memorandum 2024-32, EX 84, Ausra O. Deluard, Competition Beyond Rivalry: Adapting Antitrust Merger Review to Address Market Realities, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 108, 108-109 (2023).

developments, but the guidelines lack the force of law and can be rejected by the courts and new leadership.

These are just a few reasons scholars and practitioners argue California should not be reliant on the federal merger regime and should have the legal power to police competition and mergers within California's own borders.[65] Even if California's state merger law simply copied federal merger law, the benefits could be significant.[66] It could also allow state court judges to adjudicate challenges, who may be more familiar with state law and interests, and bring a state-centric perspective to antitrust.

An effective state merger regime would require prompt notification of any merger affecting the state and provide for additional resources to review and challenge mergers. The federal Hart–Scott–Rodino Act (HSR)[67] requires companies to file premerger notifications with the FTC and the DOJ for transactions over a certain threshold size. The FTC and DOJ determine which mergers to challenge under standards established by Section 7 of the Clayton Act, which prohibits mergers whose effect "may be substantially to lessen competition or tend to create a monopoly."[68] In 2021, less than 2% of the 3,520 HSR reportable mergers were investigated by the federal agencies; this fractional amount stems from a variety of reasons, not the least of which is the resource intensive nature of a merger challenge.[69] State attorneys general have a right to challenge mergers, but do not currently have automatic access to HSR filings, nor can they share in the filing fees paid to federal agencies.[70]

Recommendation

The staff recommends California adopt its own merger approval and premerger notification laws.

Does the Commission agree with the staff recommendation?

SHOULD CALIFORNIA ADOPT THE LOWER "APPRECIABLE RISK" STANDARD FOR PROOF OF HARM IN ANY MERGER REVIEW?

The federal Clayton Act prohibits mergers whose effect "may be substantially to lessen

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[65] See e.g., Technology Platforms Working Group Presentation, June 20, 2024 transcript, p. 12.
[66] Seventh Supplement to Memorandum 2024-24, EX 7.
[67] 15 U.S.C. § 18(a). The 2024 minimum threshold for reporting is $119.5 million. Federal Trade Commission, New HSR thresholds and filing fees for 2024.
[68] 15 U.S.C. § 13.
[69] Third Supplement to Memorandum 2024-32, EX 84, A. Garcia, Why Has California Waited So Long to Enact Its Own Merger Review Law? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 99 (2023).
[70] SB 25 (Umberg, 2025) proposes to enact the Uniform Law Commission's (ULC) Antitrust Pre–Merger Notification Act, which the ULC presented to the Commission at its June 20 and August 15, 2024 meetings.

competition or tend to create a monopoly….”[71] Though, as noted above, this language has remained unchanged since 1950, courts over the decades have required ever stricter proof of prospective harm from a merger – a standard that is closer to “likely,” or “probably” or “almost certainly” to cause harm.[72] This high evidentiary burden, coupled with the huge difference in resources between the merging parties and the government, is a significant deterrent to governments even filing challenges to proposed mergers.[73]

CALERA proposes to replace this standard in the federal merger law with one that prohibits mergers whose effect may be “to create an appreciable risk of materially lessening competition.”[74] This language signals a departure from recent federal judicial decisions. By recalibrating the standard for proof of harm required to challenge mergers, it is anticipated that the government will be better able to arrest those mergers that may harm consumers, workers and competitors.

Adopting a different state standard for proof of competitive harm from the federal standard could have several benefits. First, the volume and strength of evidence required to prove possible anticompetitive harms would be lower, which would make it easier for the state to address anticompetitive mergers. Second, the change would signal a departure from federal merger law and provide distance from the federal precedents that hinder successful merger enforcement. Such decisions have steadily chipped away at checks on power-concentrating mergers by, among other acts, assuming that vertical mergers are procompetitive, blocking findings of nascent or potential entrants, and heavily focusing on price effects while ignoring harms to labor, innovation and other nonprice elements.[75] Without those burdens, state court judges may feel freer to establish more protective caselaw. Third, the proposed change is relatively modest; it merely relies on the substitution of a few words and arguably reverts the standard to its origins.

Recommendation

The staff recommends adopting the “appreciable risk” standard of proof for harm in merger review for California merger law.

Does the Commission agree with the staff recommendation?

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[71] 15 U.S.C. § 13.

[72] Seventh Supplement to Memorandum 2024-24, EX 7; Third Supplement to Memorandum 2024-32, EX 84, Ausra O. Deluard, Competition Beyond Rivalry: Adapting Antitrust Merger Review to Address Market Realities, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 108-109 (2023).

[73] Seventh Supplement to Memorandum 2024-24, EX 7.

[74] S. 225, § 4(b), (Klobuchar, 117th Congress 2021).

[75] Memorandum 2024-25, pp. 3, 20.

OTHER SUGGESTED CHANGES TO CALIFORNIA ANTITRUST LAWS

In addition to considering the larger antitrust issues of mergers, single firm conduct, and Big Tech, ACR 95 directed the Commission to consider other changes that might be made "to promote and ensure the tangible and intangible benefits of free market competition for Californians."[76] The expert working groups provided a number of suggestions and recommendations, and a sizeable number of these could be addressed by adding a single firm conduct provision and adding a state-specific merger approval regime.

Other reform suggestions, however, would strengthen existing California antitrust law provisions about collusive conduct and include suggestions to:

- Require the "proximate cause" test be used to determine standing under Cartwright Act claims.[77]
- Revise Section 17024 of UPA to exempt a company from predatory pricing claims only where the California Public Utilities Commission actually regulates the company's rates.[78]
- Exclude consideration of self-serving statements of intent or purpose from the below-cost provision of the UPA.[79]
- Remove the distinction between commodities and services in Sections 16720 and 16727 of the Cartwright Act.[80]
- Clarify there is no business justification to tying allowed under Section 16727 of the Cartwright Act.[81]
- Codify that resale price maintenance in California remains per se illegal.[82]
- Declare contractual waivers of treble damages and attorney's fees as unenforceable as against public policy in antitrust cases.[83]
- Strengthen the law on information sharing by competitors.[84]

Recommendation

The staff recommends the Commission review the recommendations and suggestions remaining after the Commission considers the broader changes to single firm conduct and merger review and then calibrate the possible impact of further reforms.

Each of these recommendations could bolster the effectiveness of the Cartwright Act and UPA in addressing collusive, anticompetitive conduct. However, addressing piecemeal improvements to existing statutes might divert focus on the larger, more impactful reforms.

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[76] 2022 Cal. Stat. res. ch. 147 (ACR 95).
[77] Memorandum 2024-35, p. 21.
[78] Memorandum 2024-15, p. 17.
[79] Memorandum 2024-15, p. 18.
[80] Memorandum 2024-34, p. 62.
[81] Memorandum 2024-34, pp. 62-63.
[82] Memorandum 2024-35, p. 21.
[83] Memorandum 2024-35, p. 22.
[84] Memoranda 2024-34, pp. 43-48; 2024-14, pp. 14-15.

Does the Commission agree with the staff recommendation?

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Chief Deputy Director