



September 28, 2023

California Law Revision Commission
Attn: Brian Hebert, Executive Director
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: California Law Revision Commission - Study B-750 (Antitrust Law)

Dear Executive Director Hebert and Members of the California Law Revision Commission:

On behalf of the Computer & Communications Industry Association (CCIA)¹, I write in response to the California Law Revision Commission's ongoing work pursuant to Study B-750 (Antitrust Law). CCIA has long advocated for sound competition policy and antitrust enforcement. We appreciate the opportunity to provide input to the Commission's ongoing study of antitrust law.

Competition is a fundamental driver of innovation, particularly in the technology sectors where the industry is characterized by rapid advances driven by dynamic competition. As a result of the competitive process, companies that offer better products and services often benefit from increased returns. This cycle incentivizes firms to continue investing in innovation that allows them to develop higher quality goods and services at a lower price to the benefit of consumers.

Thank you in advance for considering our detailed comments and resources included below.

Businesses depend on regulatory certainty and predictability. Efforts that may undermine such certainty could have severe economic consequences.

Study B-750 authorizes the Commission to, among other items, study "...whether [state antitrust law] should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's 'Twenty-First Century Anti-Trust Act...". CCIA previously expressed concerns to the sponsor of the aforementioned proposed New York legislation.² CCIA cautions against pursuing an approach similar to New York's proposed legislation, particularly by creating uncertainty surrounding a new state-specific "abuse of dominance" standard, for which there is no existing federal U.S. precedent. Failure to define key terminology upfront creates a moving target for enforcement and poses greater legal uncertainty for companies operating in the state, which would have important implications for California's business environment.

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more information, visit www.ccianet.org.

² CCIA comments in opposition to S 933A, The Twenty-First Century Antitrust Act, <https://www.ccianet.org/wp-content/uploads/2021/05/2021-27-05-CCIA-Comments-on-New-York-Antitrust-Gianaris.pdf>.

Many entrepreneurs launch a business with the intention of eventually being acquired by another company. Pursuing any amendments to current antitrust laws, particularly at the state level, could undermine these efforts by creating an environment of uncertainty for both sellers and acquirers. Studies³ have shown how IPOs are done by bigger and richer companies but are too costly for smaller startups. These entrepreneurs usually have a simple acquisition or several rounds of venture capital investment as the only ways to obtain the resources needed to continue developing their idea into a marketable product.⁴

Acquirers and investors rely on clear, established laws and standards to help determine whether a proposed transaction or practice constitutes a violation; new, ambiguous rules will leave them hesitant to acquire startups. Conversely, firms encountering potentially objectionable behavior in the marketplace will not have certainty as to what practices are, in fact, permissible.

Pursuing this type of approach would also impose increased penalties that would inevitably have a chilling effect on business investment. Any increase in penalties, particularly drastic ones such as under New York’s proposed change, sends a threatening message to companies of all sizes seeking to engage in merger transactions. Uncertainty and lack of legal and regulatory predictability for business transactions and new, more severe penalties, would strongly disincentivize companies from conducting business in California. This is especially concerning during a time when many companies are exploring opportunities to relocate from California to states perceived to have more business-friendly policies.⁵

The “consumer welfare standard” provides an objective approach to antitrust policy.

In February 2023, the Commission’s meeting included a discussion of the consumer welfare standard, including proposed reforms to the standard, and received a presentation from Professor Thomas Greene. CCIA appreciates the opportunity to build on this discussion. For over 40 years, since the 1970s,⁶ the consumer welfare standard has helped to structure a framework in antitrust law that provides for objectivity over subjectivity, prioritizing

³ See, e.g., “Exits, Investment, and the Startup Experience: the role of acquisitions in the startup ecosystem, Engine and Startup Genome” (Oct. 24, 2022), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6356f5ccf33a6d5962bc7fd8/1666643406527/Exits_Investment_Startup_Experience_role_of_acquisitions_Report_Engine_Startup_Genome.pdf; Susan Woodward, “Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital” (Nov. 8, 2021), http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf.

⁴ *Id.*

⁵ Forbes, “Wall Street banks and tech companies are fleeing New York and California”, <https://www.forbes.com/sites/jackkelly/2020/12/14/wall-street-banks-and-tech-companies-are-fleeing-new-york-and-california/?sh=31da7de3661a> (last visited August 21, 2023).

⁶ See OECD (2023), The Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternativestandard-s-2023.pdf.

competition over competitors.⁷ This approach helps to ensure economic efficiency, delivering lower prices, higher quality, more innovation, and other benefits for consumers.⁸ Notably, during this same time period, technology companies in California specifically have blossomed.

Digital platforms provide consumers and businesses with tremendous benefits. CCIA recommends that any new legislation or regulation focused on competition policy take into account wider potential implications for consumer protection and consumer welfare, impact on innovation, and the interplay with other policy areas such as data privacy, national security, cybersecurity, and intellectual property.⁹

Conversely, adopting an EU-style model to antitrust law risks impeding competition and innovation.

As commentators have highlighted, the European Union’s abuse of dominance standard has led to the EU’s overenforcement of competition rules for several decades.¹⁰ In the EU, a company is considered to hold a dominant position with just 39% of the market. In this position, they are required to abide by unique guidelines that restrict their ability to grow and thrive. In contrast, U.S. federal antitrust law requires a more meaningful and significant market share to find a “monopoly”.¹¹ As a result, the U.S. has seen rapid innovation and a thriving business environment. Under the EU’s abuse of dominance provisions, the ultimate goal of competition law and policy is to maintain a competitive playing field with multiple players. In effect, this can create a *disincentive* for businesses to compete more aggressively; this, by extension, may result in fewer benefits realized by consumers. Therefore, CCIA discourages California from applying an EU-style model, as it will likely lead to decreased competition and innovation in the tech sector, to the detriment of both consumers and California’s economy.

CCIA advocates for a uniform, evidence-based national approach to antitrust law.

Businesses, particularly those in the technology sector, are increasingly operating across state lines, and in doing so, are tasked with navigating complex compliance regulations. Proposing new, state-specific rules would only add to the difficult considerations companies face when

⁷ See Hovenkamp, H. (2020), “Antitrust: What Counts as Consumer Welfare?”, https://scholarship.law.upenn.edu/faculty_scholarship/2194 (accessed on August 21, 2023);

⁸ See “Who is Meant to be Protected by Antitrust Law and Policy?”, <https://www.project-disco.org/competition/112322-who-is-meant-to-be-protected-by-antitrust-law-and-policy/#.Y4VAwezMI3Q> (November 23, 2022).

⁹ See “Abandoning the Consumer Welfare Standard to Target Tech Would Harm Users,” <https://www.project-disco.org/competition/abandoning-the-consumer-welfare-standard-to-target-tech-would-harm-users/> (March 7, 2023).

¹⁰ See OECD (2020), Abuse of dominance in digital markets,, www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf; see further “Comparison of Competition Law and Policy in the US, EU, UK, China and Canada” (December 16, 2021), <https://bipartisanpolicy.org/blog/comparison-of-competition-law-and-policy-in-the-us-eu-uk-china-and-canada/>

¹¹ United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945); Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989).



seeking to expand or move across state lines, with those rules providing no apparent benefits, but with additional and costly regulatory burdens instead. For example, regulations, laws, and enforcement actions targeting only technology companies, with no evidence-based reason behind them, would increase operating costs for U.S. companies. Reducing their market value and thus harming shareholders would potentially result in billions of dollars of long-term losses to state and local government employee pension plans.¹²

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While CCIA primarily focuses on promoting competition in the technology sector, our experience tells us that sweeping regulations may impact the business community writ large. We strongly advise against adopting broad new policy changes that will likely lead to unintended consequences for all business sectors, including the tech sector that has grown to be a huge economic driver in California. We encourage the Commission to pursue recommendations that reflect data-driven solutions to help attract innovative, productive businesses and spur economic growth that benefits all Californians. We appreciate your consideration of these comments and stand ready to provide additional information as the Commission continues its study of antitrust law.

Sincerely,

Khara Boender
State Policy Director
Computer & Communications Industry Association

¹² CCIA Research Center, “Regulatory Overreach Targeting Tech Would Cost California State and Local Government Employee Pension Plans Billions”, <https://research.ccianet.org/stats/regulatory-overreach-targeting-tech-would-cost-california-state-and-local-government-employee-pension-plans-billions/> (last accessed August 21, 2023).