May 1, 2024

California Law Revision Commission
Attn: Sharon Reilly, Executive Director
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: California Law Revision Commission - Study B-750 (Antitrust Law), Single Firm Conduct Report

Dear Executive Director Reilly 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, and acknowledge the Commission's continued effort during this study to analyze the state's best approach towards antitrust regulation.

As the Commission begins its series of meetings focused on specific areas of antitrust law, we write to offer comments in response to the published Single Firm Conduct report authored by Aaron Edlin, Doug Melamed, Sam Miller, Fiona Scott Morton and Carl Shapiro. CCIA is grateful for the opportunity to expand on our feedback and looks forward to the Commission's upcoming meeting on May 2.

CCIA supports the report's recommendation that California avoid pursuing an approach similar to New York State's 'Twenty-First Century Anti-Trust Act". As previously shared[2] with the Commission, we agree with the report's authors that this would not serve as a good model for California. It risks creating uncertainty surrounding a new state-specific "abuse of dominance" standard, for which there is no existing federal U.S. precedent. In addition, New York's proposal could harm competition while providing little to no benefit to workers and consumers.

CCIA aligns with the authors in advising against approaches to antitrust law that seem to abandon evidence-based enforcement that has protected competition and consumers for decades. The report acknowledges that evaluating anticompetitive conduct involves a balancing of benefits and harms, which can be challenging. It is important to identify and stop anticompetitive conduct without impairing or preventing normal competitive practices that ultimately result in lower prices, greater choice, or better quality for consumers. However, as noted in the report, these considerations are inherently complex because courts have

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[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] *California Law Revision Commission,* "FIRST SUPPLEMENT TO MEMORANDUM 2024-13 Antitrust Law: Status Update (Public Comment)" Apr 10, 2024 at page 46, http://www.clrc.ca.gov/pub/2024/MM24-13s1.pdf.

identified conduct that may weaken competition amongst rivals yet also provide benefits to trading partners. Traditionally, federal and California state law have tackled this conundrum by relying on rigorous, evidence-based analysis using "*ex-post*" enforcement of antitrust rules. Under this framework, judges decide on the legality of conduct based on the evidence of the positive and negative effects of a business' practice. This approach is critical in ensuring that only relevant issues are taken into consideration, thereby avoiding social and political goals that are subject to volatility, and avoiding inappropriate antitrust actions that could harm competition and consumers.

The report acknowledges that newer, far less rigorous antitrust "*ex-ante*" frameworks, as used in Europe, would replace this "*ex-post*" tradition. Because the "*ex-ante*" approach does not rely as heavily on evidence to guide a thorough assessment, it risks applying broad and sweeping bans that could prohibit pro-competitive conduct when applied in the wrong context[3] with negative consequences for both consumers and workers. For example, *ex-ante* rules could focus merely on company size, which is not an assured predicate for anticompetitive conduct, and they may not consider other beneficial effects such as lower prices or streamlined provision of goods and services to the consumer.

However, CCIA is concerned that certain report recommendations could unintentionally harm competition and consumers. While the report's authors caution against *ex-ante* rules, the report nevertheless goes on to suggest that the Commission consider recommending changes that would instruct judges to "err on the side of enforcement when the effect of the conduct at issue on competition is uncertain." This suggestion appears to abandon the evidence-based approach that the authors themselves tout as being preferred. As previously noted, the *ex-post* framework that currently governs antitrust enforcement helps to ensure that judges carefully consider the evidence and follow the facts. Mandating that judges consider certain factors over others would likely complicate the ability to reach correct antitrust judgments, particularly if other political dynamics are considered in lieu of evidence.

CCIA encourages the Commission to review these suggestions in the report with skepticism. 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.

As CCIA has previously noted,[4] courts have continued to use the *ex-post* antitrust framework even in the midst of the rapidly evolving technology space. As also evidenced in the D.C. Circuit's landmark 2001 ruling holding Microsoft liable for unlawful monopolization, courts have persisted in applying the test for illegal monopolization, determining a methodological way to identify anticompetitive conduct, employing the "rule of reason" balancing analysis, and deciding whether illegal monopolization has harmed competitors with "no procompetitive

[3] *See* Kay Jebelli, "The DMA's Missing Presumption of Innocence", *Truth on the Market* (Mar 5, 2024), https://truthonthemarket.com/2024/03/05/the-dmas-missing-presumption-of-innocence/.
[4] *The Enduring Potency of the Microsoft Decision,* CCIA (Apr. 2020), https://ccianet.org/wp-content/uploads/2020/04/CCIA_Paper_MSFT_Decision_8.5x11-1.pdf.

justification."[5] Courts have relied on this framework and precedent to judge anticompetitive enforcement actions in other dynamic markets. Thus, this analytical framework has proven repeatedly that it is well-suited to protect consumers as well as the ability of firms to innovate to improve their products.

Senior FTC officials have themselves endorsed the framework established by the 2001 *Microsoft* decision. For example, in 2006, then-FTC Chair Deborah Platt Majoras noted that the framework "incorporates principles for which there is wide consensus" to create a "sensible 'weighted' balancing approach." Majoras also observed that the court "did not attempt to substitute ex post facto its judgment for that of business judgments that were made *ex-ante*." This ensured that consumers would be protected from anticompetitive conduct while avoiding chilling incentives to innovate that would arise from the prospect of an *ex-post* analysis with the benefit of hindsight. Majoras praised the Microsoft court's painstaking analysis of the facts, "taking care to ensure not to chill procompetitive behavior."[6]

For these reasons, we urge the Commission not to advance any recommendations that would dilute the current *ex-post* framework that has consistently guided sound decisions and allowed competition to flourish while addressing anticompetitive behavior. This helps ensure that antitrust enforcement remains based on evidence and facts.

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We appreciate your consideration of these comments. We look forward to continuing to participate in the Commission's ongoing study process including reviewing and providing feedback on the series of expert reports. We hope the Commission will consider CCIA as a resource as these discussions progress.

Sincerely,

Khara Boender
State Policy Director
Computer & Communications Industry Association

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[5] U.S. v. Microsoft Corp., 253 F. 3d 34, 72 (D.C. Cir. 2001).

[6] Deborah Platt Majoras, Chairman, Federal Trade Commission, *The Consumer Reigns: Using Section 2 to Ensure a "Competitive Kingdom"* (June 20, 2006), https://www.justice.gov/atr/deborah-platt-majoras-remarks.