Study B-750 November 9, 2022

First Supplement to Memorandum 2022-50

Antitrust Law: Introduction of Study

The key question raised in Memorandum 2022-50 is whether the Commission[1] should segment its study of antitrust law and proceed incrementally through each of the assigned subtopics, or instead study two or more of those subtopics simultaneously. One of the main considerations in making that decision is an assessment of whether any of the assigned subtopics are so interconnected that they can only be effectively studied together.

After the release of that memorandum, the staff had a conversation with Cheryl Johnson, a retired antitrust attorney who provided background materials that were attached to Memorandum 2022-50. She shared her perspective on the issues raised in the memorandum, for consideration by the Commission.

Ms. Johnson believes that the assigned subtopics are fundamentally interconnected and should be studied together. In particular, she points out that the resolution language on the first subtopic — adding a monopoly prohibition to California law — directs the Commission to look to sources other than Section 2 of the federal Sherman Act as models for such a prohibition:

> [T]he Legislature approves for study by the California Law Revision Commission the following new topics:
>
> (1) Whether the 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" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions*….[2]

She believes that this implies a legislative intention that the Commission do more than simply consider adding a provision that would parallel the federal

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

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.

2. 2022 Cal. Stat. res. ch. 147 (emphasis added).

prohibition. She believes that the Commission was meant to consider combining such a reform with changes that would modify the standard for enforcement. In other words, she believes that the Legislature intended the first two subtopics — adding a monopoly prohibition to California law and making changes to the standard for antitrust injury in the context of tech companies — to be studied in tandem.

Aside from that textual argument, Ms. Johnson also noted that the resolution as a whole seems aimed at addressing business concentration in the tech sector, an issue she believes can only be effectively addressed with a package of reforms, including both of the first two subtopics. The full text of the resolution is attached as an Exhibit.

Regarding the discussion in Memorandum 2022-50 of the prior monopoly bills that were authored by Senator Dunn, Ms. Johnson cautions against drawing too strong an inference from that experience. Those bills were introduced many years ago (in 2002 and 2006). The tech sector is fundamentally different than it was at that time. As one informal commenter recently noted to staff, Google went public in 2004. Much has changed since then.

Finally, Ms. Johnson expressed doubt about the staff's understanding of the third assigned subtopic:

> Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions…[3]

The staff read the word "approval" in that language to imply the creation of some form of premerger review process in California, which would parallel the existing federal review process conducted by the Federal Trade Commission ("FTC") (in coordination with the federal Department of Justice).

Ms. Johnson notes that the FTC process is not technically an "approval" process, because there is no legal requirement that the FTC formally approve mergers before they can occur. Instead, after completing its review of a proposed merger that is subject to review, the FTC will either decline to take further action, negotiate a consent decree to avoid anticompetitive effects, or initiate legal action to challenge the merger.[4] Further, Ms. Johnson points out that states can also challenge a merger or acquisition, even if the FTC declines to do so.

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3. *Id*.

4. See Fed. Trade Comm'n, Premerger Notification and the Merger Review Process, *available at* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process .

With that information in mind, it is less clear that the resolution language about California "approving" a merger or acquisition refers to an entirely new state-run premerger review process, or instead envisions some modification of California's existing ability to challenge a merger on its own authority. It probably makes sense to read the language broadly, as encompassing a range of reform possibilities.

The staff appreciates Ms. Johnson's input on these issues.

Respectfully submitted,

Brian Hebert
Executive Director

Assembly Concurrent Resolution No. 95

RESOLUTION CHAPTER 147

Assembly Concurrent Resolution No. 95—Relative to the California Law Revision Commission.

[Filed with Secretary of State August 23, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

ACR 95, Cunningham. California Law Revision Commission: studies: antitrust.

Existing law requires the California Law Revision Commission to study, and limits the commission to studying, topics approved by resolution of the Legislature or by statute.

This measure would grant approval to the commission to study new prescribed topics relating to antitrust law and its enforcement. The measure would require the commission, before commencing work on this project, to submit a detailed description of the scope of work to specified policy committees of the Legislature, and, if during the course of the project there is a major change to the scope of work, to submit a description of the change.

WHEREAS, On June 3, 2019, the House of Representatives' Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law, launched a bipartisan investigation into competition in digital markets which in part concluded: "...we firmly believe that the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform."; and

WHEREAS, The American Antitrust Institute published a policy brief in 2016 finding that "[t]here is a growing consensus that inadequate antitrust policy has contributed to the concentration problem and associated inequality effects."; and

WHEREAS, In February 2017, the director of the Open Markets program at the New America Foundation, stated: "The idea that America has a monopoly problem is now beyond dispute."; and

WHEREAS, Concern about market power concentration has reached even the so-called "Chicago School," leading The Economist magazine's April 15, 2017, headline, about an antitrust conference held there, to read "The University of Chicago worries about a lack of competition. Its economists used to champion big firms, but the mood has shifted"; and

WHEREAS, Federal legislative reforms are being considered. On February 4, Senator Amy Klobuchar introduced a comprehensive bill called the "Competition and Antitrust Law Enforcement Reform Act of 2021" that would make wholesale changes to federal antitrust jurisprudence; and

WHEREAS, While much of current federal antitrust law is premised upon market concentration leading to a rise in prices, the business models of some technology companies in part relies upon consumers paying with their data, rather than their dollars, such that price alone may no longer be a viable basis upon which to base antitrust analysis and enforcement; and

WHEREAS, New York State is considering legislation that would fundamentally rewrite its antitrust laws. The legislative findings in the proposed act in part state that "The legislature hereby finds and declares that there is great concern for the growing accumulation of power in the hands of large corporations … It is time to update, expand and clarify our laws …"; and

WHEREAS, California should be uniquely sensitive to the threat of market concentration because much of early state history was shaped by monopoly power wielded by the "Big Four" of Huntington, Crocker, Stanford, and Hopkins, who, through the Central Pacific Railroad, acted as monopolistic gatekeepers for businesses that needed to bring goods to market. California therefore should not depend on federal laws or federal enforcement to protect its citizens from monopolistic anticompetitive behavior; and

WHEREAS, No California statute deals expressly with monopolization or attempted monopolization by one giant company; and

WHEREAS, California's primary antitrust statute, the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), unlike Section 2 of the federal Sherman Antitrust Act of 1890 (Sections 1 to 7, inclusive, of Title 15 of the United States Code, hereafter the Sherman Act), does not apply to monopoly conduct of single powerful companies, and, for the same reason, does not address mergers and contains statutory exemptions that lessen its impact; and

WHEREAS, While arguably such claims may be brought under California's Unfair Competition Law (Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code) or California's Unfair Practices Act (Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code), neither expressly addresses monopolization and foundational issues such as what is needed for standing to bring such claims and the damages available are unsettled; and

WHEREAS, The California Law Revision Commission is authorized to study topics that have been referred to the commission for study by concurrent resolution of the Legislature or by statute; now, therefore be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Legislature approves for study by the California Law Revision Commission the following new topics:

(1) Whether the 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" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.

(2) 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.

(3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians; and be it further

Resolved, That before commencing work on this project the California Law Revision Commission shall submit a detailed description of the scope of work to the chairs and vice chairs of the Assembly Committee on Judiciary and the Senate Committee on Judiciary, and any other policy committee that has jurisdiction over the subject matter of the study, and if during the course of the project there is a major change to the scope of work, shall submit a description of the change; and be it further

Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the California Law Revision Commission and to the author for appropriate distribution.

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