Study B-750 November 14, 2022

Second Supplement to Memorandum 2022-50

Antitrust Law: Introduction of Study

The Commission[1] has received two letters commenting on the issues raised in Memorandum 2022-50. They are attached as an Exhibit.

The first is from Assembly Member Jordan Cunningham, one of the principal authors of the resolution that assigned the Commission the study of antitrust law (ACR 95 (Cunningham & Wicks)).

The second is from Amber Bauer, Executive Director of the United Food and Commercial Workers, Western States Council. That organization supported ACR 95 in the legislative process.

The letters make similar arguments. They both argue that the Commission should not segment its work on this topic, at least with respect to final recommendations and implementing legislation.

The argument is based in part on legislative history. Both letters assert that the text of the resolution and committee analyses of the resolution show the Legislature's intent that the Commission prepare a comprehensive legislative proposal that would remove obstacles to enforcement of antitrust in the tech sector. Doing so would require removing two "current jurisprudential barriers"[2] to such enforcement: (1) the lack of a California law prohibition on monopolies and (2) an existing standard of injury that precludes enforcement based on concerns other than an effect on consumer prices. "Both must be addressed to reform California's law in such a way that Big Tech market dominance can be addressed."[3]

The argument is also based on a political and practical concern that the introduction of two sequential bills would likely result in enactment of neither.

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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. See Exhibit p. 6.

3. *Id*.

The details of those arguments are explained in the attached letters. The staff appreciates this additional input.

Respectfully submitted,

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Executive Director

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SMALL BUSINESS AND ENTREPRENEURSHIP
STREAMLINING SERVICES FOR VICTIMS OF INTERPERSONAL VIOLENCE

November 10, 2022

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Re: Support For And Opposition To Proposals Regarding Implementation of ACR-95 Made in Commission Staff Memorandum 2022-50, dated November 3rd

Mr. Hebert:

As the lead author of ACR-95, I write respectfully and briefly to offer three comments about the proposed plan for implementing ACR-95 as detailed in Memorandum 2022-50, dated November 3rd.

THANK YOU

My first comment is one of gratitude for the thoughtful, timely, and thorough research and approach reflected in the Memo. It is an auspicious beginning to a project of great significance to whether California will remain the place where the next generation of technology innovators will arise, to the enduring benefit of commercial, labor, and consumer interests in the state.

OPPOSITION TO THE PROPOSED SEQUENCING OF LEGISLATION

With deep respect but with urgency I ask the Commission not to commit at this very early stage to proposing one bill addressing whether California law should permit antitrust scrutiny of a single market dominant company and another separate bill addressing whether such a company can be liable for market dominance on grounds beyond simply whether such dominance has caused consumers to be charged higher prices. I respectfully oppose this legislative proposal for three reasons:

1. Legislatively dividing these topics frustrates legislative intent.

The originating and motivating reason for the ACR is to review whether revision of California's antitrust laws are required to meet the relatively recent market dominating challenges posed

by so-called “Big Tech.” This intent can be seen from at least three parts of the plain text of the ACR.

First, the initial and resolution-framing “Whereas” for the ACR states that the inspiration for Congress weighing antitrust reform was “a bipartisan investigation into competition in digital markets”. (Emphasis added) Second, the ACR has a “Whereas” solely devoted to how current law regarding the kind of harm required to spark market dominance scrutiny has allowed “technology companies” to escape market dominance scrutiny applicable to all other businesses. Indeed, search the text of the ACR and you will find no specific reference to any other business sector other than “Big Tech.” And, third, the Commission is explicitly charged with weighing “[w]hether 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.”

Former DOJ antitrust attorney Cheryl Johnson gets this exactly right when, as quoted in your First Supplemental Memorandum dated November 9, she observes about the text of the ACR: “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.”

Every legislative Committee also read the text of ACR as seeking the Commission’s input on “Big Tech”-related market dominance issues and explained the ACR to legislators through such a lens. As the Assembly Judiciary Committee staff observed in its analysis of the ACR: “The power of the few big technology companies – in particular Apple, Amazon, Facebook, and Google – to control much of internet commerce, social media, and consumer data has been a growing concern in California and across the nation.” Likewise, my joint author Assemblymember Wicks is quoted in the same analysis as having introduced the ACR because “the accumulation of power among California’s tech giants is snowballing, and 20th Century antitrust laws are ill equipped to take on these monopolies.” Observe, please, Assemblymember Wicks’ use of “these” monopolies, meaning Big Tech.

These authorities illuminating the Legislature’s intent in passing the ACR also illuminate why I respectfully oppose the proposal to divide single company market dominance and actionable antitrust injury into two different bills as inconsistent with the intent of the ACR. “These monopolies” in my colleague’s words cannot currently be held liable in a state court of law for their market dominance unless (i) state law is revised so that an antitrust suit can be brought against one single company based on its market dominance and (ii) legally actionable antitrust injury is re-defined as proposed by scholars and legislators so that the fact that Big Tech does not charge prices to consumers is no longer an escape hatch from single company market dominance scrutiny.

Said slightly differently, If the law was revised to permit suits based on the market dominance of a single company but actionable antitrust injury remained limited only to when consumer prices rise, passing the solitary bill on single company market dominance would accomplish nothing to address the market power of "Big Tech;" the motivation behind and aim of the ACR as revealed in its text and as communicated to my legislative colleagues in bill analyses. Likewise, were antitrust injury addressed legislatively but not the law on single company dominance, the same would be true.

Former DOJ antitrust litigator Ms. Johnson also sees single company market dominance and injury-beyond-just-higher-prices as both needing to be addressed if the Commission's work is to address antitrust law and Big Tech, as the Legislature intended. She observes: "In other words… 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."

While I see nothing wrong with the Commission internally sequencing it research by first looking at single company market dominance and next antitrust injury (that is the sequence of my own and my staffs' research), when it comes to the very different question of proposing legislation based on that research, Ms. Johnson is right: the issues cannot be separated if the legislative proposal is to address the application of California antitrust law to Big Tech, as the ACR intended.

2. Legislatively dividing these topics likely means defeat in the Legislature for both.

Practically speaking and as a Legislator, dividing up these two reforms into two different bills will make it far harder to pass both. Both, in fact, both would likely die simply because of this division.

If the single company dominance bill is considered alone, so-called smokestack industries that will be exposed to lawsuits under the bill will (with some fairness) argue that they are being subject to a new liability when some of the wealthiest and most powerful companies ever known—Big Tech – will not be. In this way, cleaving a market dominance bill from an antitrust injury reform bill makes the market dominance bill far more difficult to pass over the opposition that can claim – rightly – they are not being treated equally.

But let's assume the single company market dominance bill does pass over the opposition of all those that killed the same effort way back in 2006 when these companies barely existed. If we ask otherwise pro-business legislators to take a subsequent and hard vote on the very same topic, many will likely demurrer either saying, in effect, wait didn't I vote last year on this issue? Or saying, "Sorry. I took that hard vote on this issue last year. I won't do that again."

For these reasons, while staff is correct that usually "narrow bills also have a greater chance of enactment," (Memorandum 2022-50 Nov. 3, 2022, at p. 3) I can testify from wide experience legislating technology-related issues, dividing reform addressing single company dominance

and reform of antitrust injury into two sequenced bills will make passing either far harder. In truth, such a separation would doom them both.

3. Legislatively dividing these topics is premature.

Such a decision is premature at this early stage; is not required for the research to begin. I believe it is best for staff and the Commission to get a more certain footing in the substance and politics of the topics it is studying before making a decision about the best way to propose legislation based on research not yet done.

CONCLUSION

For the excellent work staff has already done and for the excellent work staff and this Commission will do on this, the most important topic for securing the future of innovation in our state, I end where I began, with respect and with thanks.

Sincerely,

Jordan Cunningham
Assemblyman, 35th District

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November 10, 2022

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Re: Opposition Of UFCW To Proposal To Divide Intertwined Reforms Into Two Bills.

Dear Mr. Hebert:

The United Food and Commercial Workers Western States Council (UFCW) on behalf of its over 180,000 members was an active supporter of ACR-95. While we admire and appreciate the thoughtful and scholarly approach reflected in Memorandum 2022-50, we write to express our concern about and opposition to the proposal in the Memo to divide legislative reforms addressing the market power of single technology companies like Amazon and the reforms that would update what constitutes an injury caused by such a market dominant technology company into two distinct and sequenced bills.

I. Dividing These Reforms Into Two Different Bills Departs From The Legislature's Intent In Enacting ACR-95 Which Was To Elicit The Commission's Views On Antitrust Legislative Reforms As Applied To So-Called "Big Tech."

The Legislature's motive for tasking the Commission to study antitrust law was to address the market dominance challenges posed by so-called "Big Tech". This seen both in the ACR's text and in its legislative history.

We are pleased to see that former DOJ antitrust attorney Cheryl Johnson in her comments (see, Commission's November 9th Supplemental Memo) asserts that the text of the ACR shows the Legislature intended the Commission to propose legislation related to the market dominance of Big Tech. Looking at the text of the ACR, Ms. Johnson correctly states 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."

Ms. Johnson is right. Whether it is (1) the framing "WHEREAS" that targets "digital markets," (2) the ACR provision describing how current law regarding the kind of harm required to spark market dominance scrutiny has allowed "technology companies" to escape antitrust law's reach, or (3) the related part of the ACR where the Commission is specifically asked to research and report on"[w]hether 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," the plain text of the ACR shows the Legislature's intent to seek the Commission's guidance on California's antitrust legislative reforms reaching "Big Tech" market dominance.

Moreover, each of the Committee and Floor analyses of the ACR emphasize to legislators that it is the market dominating technology companies being entirely immune from antitrust law scrutiny that spurred the introduction and the bi-partisan support for the ACR. So, too, do the letters submitted in support of the measure. In point of fact, in one of the Committee analyses, ACR 95 joint author of Assemblymember Buffy Wicks is quoted as saying she co-authored the ACR because "the accumulation of power among California's tech giants is snowballing, and 20th Century antitrust laws are ill equipped to take on these monopolies."

So, both the text of the ACR and what legislators were told about what it would do reflect an intent to address the market dominance of Big Tech.

Why is this intent relevant to whether it is wise for the Commission to propose to the Legislature one bill relating to single company market dominance and another, later bill related to whether only higher prices should be considered to be the harm caused by such dominance? As your Memo correctly explains, and paraphrasing Assemblymember Wicks, the relevance is that there are not one but two current jurisprudential barriers to being able to "take on" these technology giants in state court for their individual market dominance. As a result, both must be addressed to reform California's law in such a way that Big Tech market dominance can be addressed.

First, California law places us in a minority of states and does not currently permit state enforcers to challenge the market dominance of a single company.

Second, even if California law was reformed to permit California's enforcers to have the same power as those in 35 other states when challenging the market dominance of a single company, that change alone isn't enough to reach Big Tech. As the ACR states, the prevailing basis for determining whether single company's market dominance is actionably hurtful under current antitrust law is whether it has abused that dominance by raising prices paid by consumers. But, it is free for consumers to join Amazon, Facebook, and search on Google. *Consumers are not charged prices by these companies*.

For this reason, unless what constitutes an antitrust injury is modernized beyond prices charged to consumers so more kinds of harm are recognized as bases for antitrust injury, so-called "Big

Tech" companies would still entirely evade monopoly or monopsony review *even if the law was reformed to permit actions against one dominant company*. This is what Assemblymember Wicks was referring to when she said rightly that 20th Century antitrust laws are outdated to meet Big Tech business models. That is what the ACR is referring to when it observes that the Commission should review whether under California law there should be actionable injuries that are not limited to price increases. ("… and not solely whether such monopolies act to raise prices")

We are once more pleased to see that former California Department of Justice attorney agrees that these issues are two sides of the same Big Tech coin: "In other words… 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."[1]

For this reason, legislation that proposes to implement ACR-95 that does not address whether the technology companies referred to in every analysis and in every support letter can be held accountable for their market dominance respectfully falls short of the Legislature's intent for the ACR, as reflected in its text and legislative history. To implement the ACR's intent, legislation proposed by the Commission must at minimum address ***both*** whether California should join 35 other states in outlawing abuses by one market dominant company ***and*** whether higher prices should be the only measure of such abuse.

II. Dividing The Reforms Will Ensure Neither Are Enacted.

Not only would dividing these two intertwined topics into two separate bills consecutively introduced mean the Legislature would not be receiving what it asked to receive, dividing these reforms into two separate bills would ensure that neither would be enacted. There are two reasons why.

First, if the single company dominance issue is legislatively considered first, by itself, without reforms that would allow Big Tech companies to be subject to such liability, the non-Big Tech businesses that will be exposed to new liability under this first bill will vehemently and effectively argue that they are being subject to a new liability when some of the richest and most market dominating companies in the world remain immune. Our experience tells us such "fairness" arguments are very hard to overcome. Indeed, overcoming such an argument would be especially difficult here when the ACR's narrative was about technology companies that wouldn't even be covered by this first ACR-95 inspired bill.

And, **second**, even if such a solitary company market dominance bill was enacted, if a subsequent bill on antitrust reform was introduced the very next year, business-sympathetic legislators will be far less likely twice to vote against business interests on essentially the same topic two years in a row.

III. Conclusion.

[1] Note Ms. Johnson's comment is about the Commission's research. We have no objection to how the Memo proposes to order its research. Our objection is to how the Memo suggests uploading that completed research into proposed legislation.

The Memo thoughtfully approaches how the Commission should stage its research on the issues. As a passionate supporter of ACR-95, however, we respectfully urge the Commission not to decide to pursue a legislative strategy that departs from legislative intent and would likely doom the legislation proposed.

Sincerely,

Amber Baur, Executive Director
United Food and Commercial Workers, Western States Council