

MEMORANDUM 2023-37

Antitrust Law: Status Report

This memorandum provides an update on the status of the Commission's study of antitrust law.¹ The latest developments are described below.

AUGUST MEETING

There will not be a remote presenter on antitrust at the August meeting.

OCTOBER MEETING

Commissioners have expressed interest in hearing from representatives of the United States Senate and the New York State Senate, to discuss the antitrust reform bills that were introduced in those bodies and that are referenced in the resolution that assigned the Commission this study. The Commission was expressly directed to consider the content of those bills as part of this study.²

The staff has scheduled the following speakers to discuss the pros and cons of each bill, at the Commission's October 19, 2023, meeting:

New York State Senate Bill (scheduled for 10:00 a.m. Pacific)

- *Senator Michael Gianaris*, Deputy Senate Leader, New York State Senate
- *Eric Stock*, Gibson, Dunn & Crutcher LLP

United States Senate Bill (scheduled for 11:00 a.m. Pacific)

- *Avery Gardiner*, Chief Counsel, Competition & Technology Policy, Senator Klobuchar, Senate Judiciary Committee
- *Sean Heather*, Senior Vice President, International Regulatory Affairs & Antitrust, U.S. Chamber of Commerce

The staff is grateful to Dan Robbins, President of the Uniform Law Commission, for his assistance in arranging the participation of those speakers.

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 2022 Cal. Stat. res. ch. 147.

DECEMBER MEETING

The Uniform Law Commission is currently working on a draft of a uniform act on Antitrust Pre-Merger Notification. The Reporter (drafter) for that project is Professor Daniel Crane of the University of Michigan Law School. Professor Crain has agreed to make a presentation on the ULC's proposal at the Commission's December 21, 2023, meeting. Details will be worked out as December draws closer.

ANTITRUST CONSULTANT

The Commission recently expressed interest in hiring an expert consultant to assist with the antitrust study.

The staff recommends that Cheryl Lee Johnson be hired to serve in that capacity.

Summary of Ms. Johnson's Qualifications

Ms. Johnson has deep knowledge of federal and California antitrust law and the community of practitioners and scholars who specialize in that topic. She graduated from Columbia Law School, where she was an editor of the Columbia Law Review and a Harlan Fiske Stone scholar.

She has handled complex antitrust and business litigation throughout her legal career. After some thirty years as a partner in two major national law firms, she joined the Antitrust Section of the Attorney General's office in 2006, where she led and managed major antitrust litigation cases involving the healthcare, pharmaceutical, grocery, sports, electronics, and software industries. She has led or been on the Executive Committee of numerous multistate antitrust suits involving claims of monopolization, product hopping, pay-for-delay agreements, price-fixing and other forms of anticompetitive conduct. She has secured numerous major settlements and consent decrees and challenged several multi-billion dollar mergers. She co-chaired the National Association of Attorneys General Antitrust Pharmaceutical Industry Working Group for some six years. She was the Chair of the State Bar Antitrust Section and the California Antitrust Lawyer of the Year for the California State Bar in 2017. She recently retired from her position at the California Attorney General's office.

In addition to her practice as an antitrust attorney, Ms. Johnson served as the Editor-in-Chief of the *California State Antitrust and Unfair Competition* treatise for over 23 years. That work demonstrates her ability to lead a team of experts and oversee the production of a complex, comprehensive, neutral, and authoritative legal publication. That experience is directly relevant to important parts of the work she would be asked to do with the

Commission.

The staff has also been impressed by Ms. Johnson's useful input into the study to date. Shortly after the commencement of this study, Ms. Johnson began an informal correspondence with staff, offering her insights into how the study might be structured. Her ideas and connections have been extremely helpful.

Terms of Consultant Agreement

The staff envisions that the consultancy would be structured as follows:

- *It would begin on January 1, 2024.* This is the point at which the Commission's work on antitrust will move past its initial information gathering phase and into active deliberations. It will also be the point at which the working groups' background reports will be ready for compilation.
- *The initial contract would be for six months, until the end of the 2023-24 fiscal year.* The Commission could then decide whether to extend the agreement into the 2024-25 fiscal year. An initial six-month commitment will not overtax the Commission's current budget, which will already be bearing a significant burden associated with the retirement of the Executive Director.
- *The position will be compensated.* In the past, nearly all Commission consultant contracts included modest compensation and the reimbursement of travel expenses.³ The staff proposes that this consultant contract also include compensation. Ms. Johnson is already acting as a volunteer contributor to one of the working groups. The work as consultant would be in addition to her volunteer contributions. The staff believes that compensation of \$10,000, plus reimbursement of expenses, would be fair for the first six months.
- *The work performed by the consultant would include the following:*
 - Assist the staff with compiling the working group reports.
 - Assist the staff with preparing memoranda for consideration at Commission meetings.
 - Assist with coordinating the input of antitrust stakeholders.
 - Attend all Commission meetings at which the antitrust study is considered, to respond to Commissioner questions and to volunteer information and opinion when helpful.

The description of tasks above is intentionally somewhat general. By the time that the consultancy is expected to begin, the current Executive Director will have retired. The staff believes it would be best to allow the new Executive Director to work out the specific

³ See *Commission Handbook of Practices and Procedures* § 855.

details of the consultant's work.

Decision

The Commission's approval is required before the Executive Director can execute a contract (other than routine operational contracts).⁴ In the past, the Executive Director has always sought the Commission's approval before entering into a contract for expert consulting services.

The Commission needs to decide whether to approve a contract with Ms. Johnson, along the lines described above. If approved, the staff will take care of the formalities.

PUBLIC COMMENT

The Commission received a letter from Kaitlyn Harger, PhD, Senior Economist at the Chamber of Progress. It is attached. Her letter references three papers that she believes the Commission would benefit from reading. In the interest of keeping this memorandum to a manageable size, the papers cited by Dr. Harger were not attached. However, footnotes in the letter include working links to all three.

Respectfully submitted,

Brian Hebert
Executive Director

⁴ See *Commission Handbook of Practices and Procedures* § 900.



August 2, 2023

Dr. David Carrillo, Chairperson
California Law Revision Commission
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 Chairperson Carrillo and Members of the Commission:

I write on behalf of Chamber of Progress, a center-left tech industry association that supports federal and state policies that seek to build a fairer, more inclusive country in which all Americans benefit from technological leaps. Thank you for your ongoing examination of possible reforms to California's antitrust laws, which are essential to protecting consumers from harm.

As you know, the Legislature directed the commission to study in part the question of "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."¹

During the past two years, Congress considered two such potential reforms changing the antitrust law as applied to large technology companies: the American Innovation and Choice Online Act ([AICOA](#)) and the Open App Markets Act ([OAMA](#)). Both bills were met with a number of concerns from both Democrats and Republicans in Congress, and ultimately failed to pass Congress.

To support your ongoing examination of antitrust regulation in California, I have attached three studies to this letter. These studies provide valuable insights into the concerns surrounding tech industry-focused antitrust legislation. Overall, the included research highlights several critical concerns related to targeting online markets via legislation like AICOA and OAMA.

¹ <http://www.clrc.ca.gov/B750.html>

First, the legislation targeted online markets specifically, without sufficient justification.

In a comprehensive [report](#) authored by [Professor Herbert Hovenkamp](#), the James G. Dinan University Professor at University of Pennsylvania's Carey Law School, Professor Hovenkamp argues that the differentiation of online markets from traditional markets is unfounded and lacks empirical justification. He states, **“there is little empirical justification for thinking that the exercise of market power is more common or more harmful on online markets than on traditional markets.”**²

Moreover, the report emphasizes the importance of allocating limited enforcement resources wisely, focusing on markets and products that exhibit clear signs of competitive harm. Professor Herbert Hovenkamp states,

*“Whenever enforcement resources are limited, as they typically are, it is important that they be spent in the right place. For antitrust policy, the right places are markets and products that exhibit stagnant growth, stable market shares, lack of new entry, signs of oligopoly or widespread price fixing, or lack of innovation. Focusing on the internet economy is a bad choice on every score. **The AICOA approach selects for specialized, aggressive enforcement a portion of the economy that is working better than most.**”*³

Second, one of the significant shortcomings of legislative approaches like AICOA and OAMA is their narrow focus on a select group of tech companies. Furthermore, the AICOA legislation is overly broad in its inclusion of all product lines within a company, when determining market power.

Professor Herbert Hovenkamp states,

*“Failure to distinguish between the overall footprint of firms that operate on platforms and the market shares of their individual products **largely undermines the AICOA’s effectiveness as a tool for improving competition.** It is useful to remember as a starting position that **market power attaches to products, not to firms.**”*⁴

To further illustrate this concern, Professor Herbert Hovenkamp provides an example involving Amazon's grocery product line. Under AICOA, Amazon would be designated as a covered platform, and this designation would be applied to all product lines offered by the

² Hovenkamp, Herbert, Gatekeeper Competition Policy (May 30, 2023). Michigan Technology Law Review (2023), Available at SSRN: <https://ssrn.com/abstract=4347768> or <http://dx.doi.org/10.2139/ssrn.4347768>

³ Hovenkamp, Gatekeeper Competition Policy.

⁴ Hovenkamp, Gatekeeper Competition Policy.

company, regardless of their individual market shares. As a result, as Professor Herbert Hovenkamp states, “the bill’s prohibitions would attach to sale of, say, groceries, even though Amazon’s share of the overall grocery market is a little over 1%.”⁵

Other experts, including [Erik Hovenkamp](#), an Associate Professor of Law at University of Southern California’s Gould School of Law, have raised similar concerns about the legislation’s **overgeneralization across product lines**. In a 2022 [article](#) forthcoming in *Antitrust Chronicle*, Professor Erik Hovenkamp argues that these policy proposals assume market power within all product categories by presuming large platforms will disrupt competition. He states,

*“This is problematic given that **most large tech platforms operate in many different product markets** that vary widely in the extent to which they rely upon the platform. For example, suppose Amazon sells its own coffee, but that 99% of all retail-level coffee is purchased in brick-and-mortar grocery stores. Then it is hard to see how Amazon could hope to undermine competition in the coffee market. As this illustrates, **the fact that a platform is large does not imply that it has the power to thwart competition in every market that it operates in.**”⁶*

Third, OAMA would likely result in higher prices for consumers in other product markets (e.g. iPhones and Android Phones), harming many consumers while benefiting only consumers who spend a lot on mobile games via in-app purchases.

Professor Erik Hovenkamp explains that businesses with vertical integration across app stores and devices, Apple and Google for example, will recapture the revenue lost from the app store by charging higher prices for devices. He states, **“the result will be cheaper app transactions but more expensive mobile devices.”⁷**

As a result, Professor Erik Hovenkamp concludes that due to the expected price increases, OAMA,

“effectively asks the large majority of mobile device users (most of whom do not spend much on apps) to subsidize a relatively small group comprising mainly children and young adults who spend a lot on mobile games.”⁸

⁵ Hovenkamp, Gatekeeper Competition Policy

⁶ Hovenkamp, Erik, Proposed Antitrust Reforms in Big Tech: What Do They Imply for Competition and Innovation? (June 22, 2022). *CPI Antitrust Chronicle* (2022 Forthcoming), Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4127334

⁷ Hovenkamp, Erik, Proposed Antitrust Reforms in Big Tech

⁸ Hovenkamp, Erik, Proposed Antitrust Reforms in Big Tech

Finally, research suggests that this legislation will harm small and medium businesses (SMBs) if platforms are forced to separate lines of business.

A 2022 [paper](#) written by [Liad Wagman](#), the John and Mae Calamos Dean Endowed Chair and Professor of Economics at Illinois Institute of Technology, and [Cameron Miller](#), Associate Professor of Management at Syracuse University's Whitman School of Management, detailed the expected impacts to SMBs if tech-specific antitrust legislation is enacted:

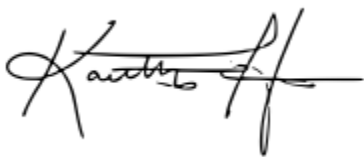
“By forcing platform owners to separate lines of business, legislation could disrupt the ability of SMBs to access affordable high-quality integrated computing solutions. This would increase SMB costs and likely would also diminish the quality of service they provide to their customers. It would also harm SMBs competitively, relative to larger firms that build or operate their own e-commerce solutions and so not rely on platform owners for access to vital digital tools.”⁹

Overall, this research suggests that if California adopts legislation similar to AICOA and OAMA, Californians will likely experience adverse negative consequences.

I hope this research is helpful to the Commission as it continues its vital work to strengthen California's laws and policies.

Thank you for considering our letter and the research summarized above.

Respectfully,



Kaitlyn Harger, PhD
Senior Economist
Chamber of Progress

⁹ Miller, Cameron D. and Wagman, Liad, How Populist Antitrust legislation Would Harm the U.S. Tech Startup Ecosystem. Data Catalyst Institute White Paper. July, 2022. Available at <https://datacatalyst.org/wp-content/uploads/2022/07/How-Populist-Antitrust-Legislation-Would-Harm-the-U.S.-Tech-Startup-Ecosystem.pdf>