SIXTH SUPPLEMENT TO MEMORANDUM 2024-24

Antitrust Law: Status Update (Experts' Slides and Public Comment)

This supplement provides power point presentations for the expert reports on Mergers and Acquisitions and Technology Platforms. Those presentations will be presented at the Commission's June 20, 2024, meeting and are attached as Exhibits.[1]

This supplement also provides additional public comment that the staff has received relative to the Antitrust Study. The staff has received a number of public comments relating to the Antitrust Study. The most recent comments are attached as Exhibits to this memorandum. If the staff receives additional public comments, the comments will be provided in another supplemental memorandum.

PUBLIC COMMENT

California Chamber of Commerce

This comment is submitted by Loren Kay on behalf of the California Chamber of Commerce. The comment relates to the expert reports on the Commission's meeting agendas for the June 20, 2024, and August 15, 2024, meeting agendas. According to its website:

> The California Chamber of Commerce is the largest broad-based business advocate to government in California, working at the state and federal levels for policies to strengthen California.
>
> Policy advocates testify regularly at public hearings of the Legislature, state

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent 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. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

agencies and regulatory bodies on a broad array of issues and topics affecting how California businesses do business. In addition, the CalChamber policy advocates are deeply involved in behind-the-scenes meetings and discussions, helping shape proposed laws and regulations to streamline government and improve the jobs climate.

Google

This comment is submitted by Michael Appel on behalf of Google. As indicated in the Fourth Supplement to Memorandum 2024-24, Google is on the panel to provide responses to the expert reports on the June 20, 2024, agenda. More information on Google and Aaron Benjamin, who is presenting on behalf of Google, can be found in that supplement.[2]

Elayna Trucker, Napa Bookmine

This comment is submitted by Elayna Trucker, on behalf of Napa Bookmine, an independent bookstore in Napa County. This comment expresses concerns about the impact of merger regulations on independent bookstores.

Respectfully submitted,

Sharon Reilly
Executive Director

[2] See p. 3 and EX p. 2.

Report of the Working Group on Merger and Acquisitions

California Law Revision Commission

Sacramento June 2024

Members of Study Group

- In attendance
  - Prasad Krishnamurthy, Professor of Law, UC Berkeley
  - John Kwoka, Finnegan Professor of Economics, Northeastern University
- Other members
  - Richard Gilbert, Distinguished Professor of Economics (emeritus), UC Berkeley
  - Daniel Sokol, Franklin Chair in Law, Professor of Law and Business, USC
  - Guofu Tan, Professor of Economics, USC

Mergers and enforcement

- Two major types of mergers: horizontal mergers and vertical mergers
  - Each can harm competition in terms of price and quality of goods, wages and working conditions for workers, or ability of independent rivals to compete
  - Each can also achieve efficiencies and other benefits
- Key federal statute is the Clayton Act
  - Prohibits mergers and acquisitions whose effect "may be substantially to lessen competition or to tend to create a monopoly"
- Key statute in California is Cartwright Act
  - Prohibits "trusts" but does not cover merger

Schools of thought

- Status quo view reflects Chicago School/free market position that mergers are almost always efficiency enhancing
- Greater enforcement would jeopardize efficiency and innovation
- A centrist or “Post-Chicago” view is more skeptical and believes that some adjustment is warranted
  - Based on evidence of under-enforcement and adverse consequences
- “Neo-Brandeisian” view sees antitrust as policy for broader goals
  - Includes reductions in corporate power, inequality, other social purpose

Concerns and evidence on mergers and policy

- Increasing concern in recent years that merger enforcement has been too permissive. This is based on a variety of evidence
  - Large number of industries that have undergone major consolidation
  - Rates of new firm startup (often a source of innovation as well as competition) have declined
  - Economic profit rates have risen to historically high level

- Economic studies show the effect of merger control policy over past 25 years
  - Large fraction of "cleared" horizontal mergers have resulted in higher prices
  - Scarcley any challenges to vertical mergers, or those affecting wages, or those eliminating potential competitors
  - Tech companies have collectively acquired more than 900 firms, until recently without significant review

New Merger Guidelines

- FTC/DOJ Merger Guidelines have recently been updated to address many of these issues
  - Sharpen the standards for horizontal mergers
  - Set out criteria for assessing vertical mergers
  - Clarify approach to mergers that eliminate a potential competitor
  - Address mergers that entrench a dominant position
  - Explain relevance of trend toward consolidation, or multiple acquisitions ("roll-ups")
  - Make clear that buyer power ("monopsony") and wage effects are subject to same standards
  - Explain how mergers involving platforms and innovation are analyzed
- Effectiveness depends on agency action and acceptance by courts

I. Scope of Cartwright Act

- Working Group is in agreement on importance of state authority to review mergers
  - This would assist in bringing cases of special significant to California
  - At present, lack of specific state merger authority is atypical
- Cartwright Act could be amended specifically to cover mergers
  - Could simply include "mergers and acquisitions"
  - Could reproduce language and standards of Clayton Act
- Other changes would be more far-reaching

II. Standards of review

- No agreement on other possible changes to establish stronger merger standards
  - "Material lessening of competition" instead of "significant lessening"
  - Presumption against significant mergers in highly concentrated industries
  - Prohibition on acquisitions by dominant firms
  - Shift in burden of proof so that certain mergers would have to show benefits
  - Tighten approach to efficiencies
- Rationale would be to push back against current overly permissive interpretation of statutes and enforcement, ensure continuity at state level
- Stronger standards would raise practical issues
  - Consistency with federal standards, especially for mergers spanning multiple states
  - Enforceability at state level
  - Resource availability

III. Notification and review

- Working Group sees role for prenotification of mergers at state level
- California could set state reporting threshold that is lower (in dollar terms) than the current federal standard
  - Could expand notification requirements on sectors in addition to health care, pharmacies, and supermarkets
  - Could adopt ULC's proposed Antitrust Pre-Merger Notification Act, but subject to any California sectoral-specific standards
- Any of these changes should be tailored to avoid undue burden on state resources

IV. Innovation and the tech sector

- Report recognizes that tech sector and innovation raise both merger and nonmerger issues
- Mergers can have divergent effects on innovation
  - Can facilitate innovation by combining complementary capabilities
  - Can impede innovation by abandoning or slowing an existing or potentially competing innovation ("killer acquisitions")
- Going forward, California could reasonably rely on provisions of existing merger statutes and new Merger Guidelines regarding innovation
  - New Merger Guidelines also explain conditions under which acquisitions by platform companies might raise competitive concerns
- Nonmerger issues are addressed by that working group

Technology Platforms Working Group

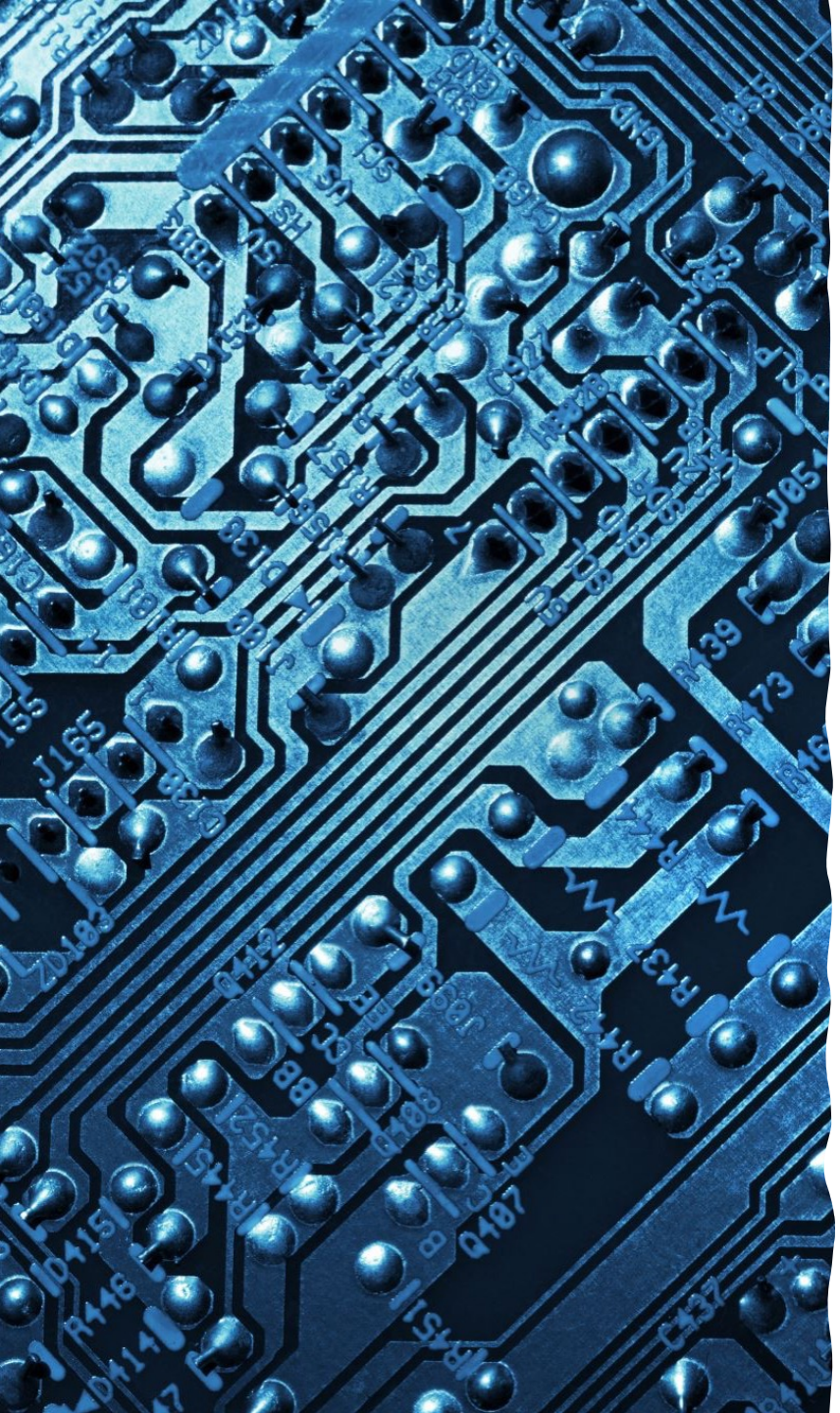
California Law Revision Commission

June 20, 2024

EX 11

The Key Question

Should California enact antitrust legislation focused on the technology sector, specifically “Big Tech”?



California's Technology Market

- California has the largest "tech workforce" in the U.S.
- Nearly 1.5 million California employees are tech employees
- In 2021, the tech industry accounted for 16.7% of the California economy

EX 13

“Big Tech”

“Big Tech” generally refers to:

- Alphabet (Google)
- Amazon
- Apple
- Meta (Facebook)
- Microsoft

In 2021, Big Tech companies had a combined revenue of nearly $1.14 trillion

Options for Legislature

1. No Legislation -Maintain the Status Quo

2. Legislation to Address Single Firm Conduct

3. Legislation to Specifically Address Tech Platforms

EX 15

Arguments in Favor of Status Quo

New legislation could stifle innovation

California could become less hospitable to tech companies

The market can address most concerns (e.g. AOL and Yahoo from an earlier era)

Arguments Against Status Quo

Modern antitrust law does not effectively address consolidation of market power, particularly in Big Tech

Modern antitrust law not well suited to address competition given Big Tech "walled gardens"

Specific legislation needed to prevent Big Tech from acquiring nascent competitors

Addressing Single Firm Conduct

- Specific legislation addressing tech platforms may not be necessary
- Existing law may be sufficient to address single firm conduct if some modern antitrust decisions are reversed through legislative action
- Enact broader legislation that reaches single firm conduct in California

Proposed Federal Legislation Addressing Tech Platforms

Proposed federal legislation has been introduced to address Big Tech – but Congress has not yet passed

Proposed federal legislation borrows from European Union law, including the 2022 Digital Markets Act

Proposed federal legislation addresses Big Tech "covered platforms" – Alphabet (Google), Amazon, Apple, Meta (Facebook), Microsoft, and TikTok

Potential California Specific Legislation

Potential Framework for Big Tech specific legislation:

1. The tech platform would have some connection with California, include 50 million or more active U.S. users, and have sales/market capitalization of $550 billion
2. It would be presumptively unlawful to engage in (a) self-preferencing, (b) discrimination that harms competition, (c) restrictions on interoperability, (d) tying, or (e) using data from a covered platform to support another business line
3. Any acquisition by a covered platform of another tech-based company would be subject to automatic merger review

Proposed Legislation and EU Law

Proposed Federal Legislation

- American Innovation and Choice Online Act
- Open App Markets Act
- Trust Busting for the Twenty-First Century Act
- Digital Consumer Protection Act
- Competition and Antitrust Law Enforcement Reform Act

Proposed New York Legislation

- Expansion of the New York Donnelly Act

European Union Legislation

- 2022 Digital Markets Act

American Innovation and Choice Online Act

Covered platform:

- Owned or controlled by a publicly traded company:
  - At least 50 million US-based monthly users or 100,000 US-based monthly active business users
  - US net annual sales or average market capitalization of $550 billion, or 1 billion monthly active users
  - Critical trading partnerships related to products or services on the platform

American Innovation and Choice Online Act

Unlawful Conduct:

- Self-preferencing
- Discrimination that harms competition
- Restricting interoperability
- Conditioning platform access to purchase of services
- Using nonpublic data obtained from platform
- Materially restricting access to data
- Restricting users from uninstalling software
- Retaliating for raising concerns with law enforcement

Open App Markets Act

Covered Company

Any person that owns or controls an app store for which users in the United States exceed 50 million

App Store

A publicly available website, software application, or other electronic service that distributes apps from third-party developers to users of a computer, mobile device, or any other general purpose computing device

Open App Markets Act

Unlawful Conduct

Prohibits exclusivity and tying; prohibits interference with legitimate business communications, nonpublic business information, interoperability, and self-preferencing

Security and Privacy of Users

Allowing user to opt in prior to enabling installation of third-party apps, removing malicious or fraudulent aps, providing user with options to limit the sharing of data

Trust Busting for the Twenty-First Century Act

Overview

- Proposed legislation to amend the Sherman Act and Clayton Act
- Includes provisions to address “dominant digital firms”
- FTC would have power to designate dominant digital firms
- Any acquisition greater than $1 million would be presumed unfair or deceptive act or practice
- Bans dominant digital firms from self-preferencing

Trust Busting for the Twenty-First Century Act

Proposed Amendments – Sherman Act Section 2

- Once either substantial market power or detrimental effects are established by preponderance of evidence, no need to define scope of relevant market or establish market share
- Procompetitive effects of conduct must clearly outweigh anticompetitive effects
- Requires disgorgement of profits

Trust Busting for the Twenty-First Century Act

Proposed Amendments – Clayton Act

- No person with a market capitalization exceeding $100 million shall acquire the stock or assets where the effect of such acquisition lessens competition
- No need to establish market shares or concentration in any particular market
- No acquisition shall be presumed to not substantially lessen competition because the parties do not directly compete at the time of the acquisition

Digital Consumer Protection Commission Act

Covered Entity

Any person that collects, processes, or transfers personal data, but excludes government entities, government service providers, and designated nonprofit entities related to missing and exploited children

Dominant Platform

A platform that meets certain requirements based on ownership and control, user count, critical trading partnerships, market capitalization, net annual sales, or assets and earnings

Digital Consumer Protection Commission Act

Proposed Digital Consumer Protection Commission

- Independent, bipartisan regulator
- Promote competition, protect privacy and consumers, and strengthen national security
- Investigative, enforcement, and rule-making authority
- Consists of 5 commissioners appointed by the President to serve 5-year, staggered terms
- Establish a public complaint process

Competition and Antitrust Law Enforcement Reform Act

Comprehensive Reform to Mergers and Anticompetitive Conduct

- Stricter standard for permissible mergers by prohibiting mergers that:
  - "create an appreciable risk of materially lessening competition;" or
  - unfairly lower the prices of goods or wages because of a lack of competition among buyers or employers (i.e., a monopsony)
- For larger mergers or mergers that meet certain concertation thresholds, the bill shifts burden of proof to the merging parties.
- Prohibits exclusionary conduct that presents an appreciable risk of harming competition.
- Establishes GAO report on success of merger remedies in recent consent decrees and the impact of mergers on wages, employment, innovation, and new business formation.

Proposed Reforms to New York Donnelly Act

New York Senate Bill S933A/S6748B (Twenty-First Century Antitrust Act) proposes modifications to New York Donnelly Act

Applicable to all industries but legislation focused on Big Tech

Proposed Reforms to New York Donnelly Act

Establishes premerger notification requirement to Attorney General

- Premerger notification requirement for any transaction meeting the HSR requirements

Prohibits “abuse of dominance” (monopolization)

- Dominance: 40% share for sellers, 30% for buyers

Enhances criminal penalties

- *Individuals*:
  - Increases maximum fine from $100,000 to $1 million
  - Increases maximum imprisonment from 4 years to 15 years
- *Corporations:*
  - Increases fines from $1 million to $100 million

Permit antitrust class actions and recovery of damages/costs

- Authorizes class actions with damages/costs under Donnelly Act

European Union – 2022 Digital Markets Act

Covers “gatekeepers” – large digital platforms including online intermediation services, operating systems, and web browsers

Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft

Gatekeepers must share data with rivals and ensure interoperability with hardware or software features of the platform

The aim of the legislation is to create greater competition and to prevent gatekeepers from leveraging their position into adjacent markets and protect users from unfair practices

Key Takeaways

Big Tech companies have an immense impact on California's economy

Concerns about Big Tech could potentially be addressed by enacting antitrust legislation addressing single firm conduct in California

Proponents of Big Tech specific legislation argue that current antitrust laws inadequate to meaningfully address unique challenges posed by Big Tech

Critics warn against over-regulation which could stifle innovation and make California less hospitable to tech companies

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June 18, 2024

The Honorable Ambassador David Huebner, Chairperson
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Re: Antitrust Law – Study B-750 – Additional Comment On Behalf Of The California Chamber Of Commerce

Dear Chairperson Huebner and Commissioners:

We write as counsel for the California Chamber of Commerce ("CalChamber").[1] CalChamber is a non-profit business association with more than 14,000 members, both individual and corporate, representing twenty-five percent of the State's private-sector workforce and virtually every economic interest in California. While CalChamber represents several of the largest corporations in California, seventy percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

CalChamber thanks the California Law Revision Commission (the "CLRC") for the opportunity to comment further on the important work the CLRC is undertaking with respect to California's antitrust laws, Study B-750. CalChamber looks forward to continuing to work with the CLRC on developing policies that ensure a strong and dynamic business environment that benefits all Californians. We submit these comments in advance of the CLRC's June 20, 2024 hearing on the topics of Mergers and Acquisitions and Technology Platforms, and its August 15, 2024 hearing on the topics of Concerted Action; the Consumer Welfare Standard; and Enforcement and Exemptions. As you know, Working Groups have submitted reports to the CLRC on each of these topics (together, the "Working Group Reports" and individually the "Mergers and Acquisitions Report," the "Technology Platforms Report," the "Concerted Action Report," the "Consumer Welfare Standard Report," and the "Enforcement and Exemptions Report"). This comment is in addition to our submission on April 25, 2024, which was primarily focused on the Single-Firm Conduct Working Group Report and my testimony at the CLRC's May 2, 2024 hearing.

CalChamber also thanks the members of the Working Groups for their efforts in drafting the Working Group Reports. For the most part, the Working Group Reports contain accurate statements of the law and present the CLRC with options it could take in recommending revisions to California's antitrust laws, including the option of recommending no changes. The Working Group Reports,

[1] CalChamber is also being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with Berkeley Research Group.

however, do not justify the CLRC in making any particular legislative proposal to the California Legislature, for several reasons.

One, as we noted in our April response to the Single-Firm Conduct Working Group Report, the Working Group Reports do not demonstrate a need for revising California's antitrust laws. There has been no showing that Californians are suffering from higher prices, inferior products or services, or less competition under the current California antitrust regime. Passing statutory revisions without a demonstrated need for those revisions is bad policy. Two, as we also noted in our response to the Single-Firm Conduct Working Group Report, none of the Working Group Reports provide any cost-benefit analysis of the quantitative and qualitative effects – both economically beneficial and economically harmful – that are likely to result from statutory revisions. Antitrust policy making should utilize a cost-benefit methodology in order to craft policies that improve economic performance and efficiency, ultimately benefiting consumers and workers in California. Three, these two shortcomings are compounded by the fact that many of the options identified in the Working Group Reports are not minor tweaks, but are instead major shifts in California antitrust law and enforcement that, in some cases, are not necessary given federal antitrust law and, in all cases, may impact every level of the economy. Four, because the Working Group Reports do not offer specific legislative proposals,[2] they are too general and imprecise for stakeholders to analyze and comment on, and they cannot be used by the CLRC as guides for crafting a specific legislative proposal to the Legislature. CalChamber recommends that the CLRC not propose any revisions to California's antitrust laws unless and until (1) There is a demonstrated need for such revisions; (2) An independent cost-benefit analysis has been performed suggesting the revisions are, on balance, good for California; and (3) Specific statutory language has been crafted and released for stakeholder analysis and comment.

Below, we provide a brief summary of the Working Group Reports and an overarching commentary that relates to the recommendations and proposals in the Working Group Reports.

The Working Group Reports Provide General Options The CLRC Could Pursue

Mergers and Acquisitions:

The Mergers and Acquisitions Report indicates that there are several options to consider with respect to mergers and acquisitions, one of which is to maintain the status quo.[3] Another is to add language to California law related to mergers:

> As noted, one option is to amend California antitrust law to specifically address mergers and acquisitions. It is arguable whether such amendment is necessary given that California antitrust authorities can challenge mergers under the Clayton Act. On the other hand, such an amendment would allow antitrust cases to proceed in state courts and

[2] To be clear, this is not a critique of the Working Groups. It is CalChamber's understanding that the CLRC did not request specific legislative proposals from the Working Groups, and most abided by that request.

[3] Mergers and Acquisitions Report, p. 17.

allow California judges to develop legal standards that differ from the federal standards.[4,5]

The Mergers and Acquisitions Report also mentions possibly coordinating with other states on reporting requirements for mergers. Specifically, it notes that state-level pre-merger notification is under discussion at the Uniform Law Commission, which has a committee drafting proposed language.[6] The goal of this effort is to standardize state notification requirements,[7] which at present can have different timelines and filing thresholds,[8] and the Mergers and Acquisitions Report also states that one option would be to apply the obligation to report transactions only to those that primarily affect commerce in California (e.g., mergers of physician practices).[9]

Mergers are an important part of a healthy economy, as assets are re-combined over time to promote efficiencies and enhance the development of new products and services. Thus, amending California antitrust law to address mergers may have an immense and potentially unpredictable impact on California businesses and the California economy overall, depending on the specifics of the legislative language adopted. For instance, if the substantive test for merger illegality under California law does not closely conform to federal standards on issues such as the definition of markets, structural presumptions of illegality, the evaluation of effects on competition, and analysis of efficiencies, there will be great uncertainty in the marketplace. Likewise, the adoption of new substantive tests and analytical approaches to mergers and acquisitions may chill competitively neutral or beneficial

[4] The Mergers and Acquisitions Report notes benefits from having alternative venues to federal court for merger cases, stating at p. 18, that "Given the importance of the courts, much of merger policy takes place through appointments to the federal judiciary. The composition of the California state court is different than the federal judiciary and California courts would produce different merger decisions, even with an identically-worded statute. California could even consider constituting a specialized court that would hear merger or other antitrust cases or a specialized administrative agency that would enact rules governing merger policy. There would be costs and benefits to the divergence from federal law that this would create. Businesses would bear the costs of another set of merger laws."

[5] Mergers and Acquisitions Report, p. 17. The Mergers and Acquisitions Report addresses additional potential gains and downsides from this option, stating, "A state court might bring superior information and perspective to some matters, and this venue might give the state added credibility. On the other hand, state-based merger challenges might raise issues of costs as well as consistency with federal standards." Mergers and Acquisitions Report, p. 16 (citation omitted).

[6] Mergers and Acquisitions Report, p. 16. To the extent it is determined that there is a need for a pre-merger notification protocol in California, which remains an open question, CalChamber is of the view that such a protocol should be developed jointly with other states so as to minimize the burdens imposed by needing to file in multiple states with inconsistent standards. Ideally this protocol would be directed at transactions that affect local markets (*e.g.*, in certain healthcare markets) not regional or national markets which would be covered by HSR filing requirements and review by the Department of Justice and Federal trade Commission.

[7] The Mergers and Acquisitions Report, at p. 19, describes the Uniform Law Commission as suggesting "a joint filing for federal and state antitrust enforcers (subject to confidentiality protection) that balances the need for state level information for potential enforcement actions with the potential burdens of to the merging parties. Specifically, the drafting committee will address issues such as substantial nexus to the transaction; the scope of the information required to be provided to the state, timing, confidentiality, and fees that would make state antitrust enforcement unreasonable."

[8] Mergers and Acquisitions Report, p. 16.

[9] Mergers and Acquisitions Report, p. 17.

transactions. Uncertainty regarding legality under new standards increases business costs and stifles innovative businesses. Finally, if national or international mergers will be evaluated both by the California Attorney General and the federal government – even if using the same legal tests and analytical techniques – enforcement decisions could differ, creating even more uncertainty and increasing costs. Given all of this, in addition to the fact that a California merger review process is not necessary in light of the federal regime already in place, CalChamber cautions the CLRC in attempting to adopt a California merger regime.

Technology Platforms:

The Technology Platforms Report indicates that there are three options to consider related to technology platforms: "(1) enact no new legislation and maintain the status quo; (2) amend California's antitrust laws generally, without specifically focusing on [technology] platforms; and (3) enact specific legislation addressing [technology] platforms."[10] Instead of proposing specific legislation as to the third option, the Technology Platforms Report sets forth a basic framework for technology platform-specific legislation, such as size of business thresholds and ties to California necessary for the legislation to apply; the types of conduct that could be deemed presumptively unlawful ("(a) self-preferencing; (b) discrimination that harms competition;[11] (c) restrictions on interoperability; (d) tying; or (e) using data from the covered platform to support another business line."[12]); and that "[a]ny acquisition by a covered platform of another technology-based company would be subject to automatic merger review by the California Attorney General, regardless of market size or the value of the acquisition."[13]

To be certain, development of an *ex ante* regulatory framework for technology platforms is a sea change in the current approach taken in the U.S. Such a dramatic departure from current practice can have substantial effects on technology companies, investments in the development of new platform services, and the products and services made available to consumers. Technology platforms have revolutionized numerous industries in the U.S. and globally. They are a source of economic vibrancy and innovation, and due to that innovation, technology platforms have driven growth in the U.S. and especially in the California economy. This economic dynamism has generated enormous value for businesses, consumers, and workers. Indeed, economists generally recognize the importance of innovation in driving improvements in the standard of living and the overall performance of the economy.[14] Changes in the regulatory framework applied to technology platforms need to be carefully evaluated to be sure they will improve economic performance. The potential for the adoption of an *ex ante* regulatory framework to have significant and adverse unintended consequences is, in our view, significant. Finally, we note that any amendments to California antitrust law intended to address

[10] Technology Platforms Report, p. 3.

[11] Even though it is described as "presumptively unlawful" in this legislative framework, discrimination would need to harm competition to be unlawful, which would appear to require an effects analysis. Given the need for an effects analysis, discrimination would appear to be evaluated using a rule of reason analysis in this proposed legislative framework.

[12] Technology Platforms Report, p. 12.

[13] Technology Platforms Report, p. 12.

[14] See, for example, Nordhaus, William D., "Schumpeterian Profits in the American Economy: Theory and Measurement," National Bureau of Economic Research Working Paper 10433, April 2004, Abstract.

perceived concerns about technology platforms, but applied across the economy may have even wider adverse consequences, harming California businesses, consumers, and workers.

Concerted Action:

The Concerted Action Report addresses several potential areas for legislative action. These are:

- The legislature could clarify that the Cartwright Act is broader than federal antitrust law and has its own common law.[15]
- The legislature could "eliminate the distinction between commodities and services in §16720 (b) to (e) and §16727."[16]
- The legislature could clarify California law on tying. Though available under federal law, the Concerted Action Report notes that it is unclear whether California law allows a legitimate business justification defense to a tying claim.[17]
- The legislature could revise or delete subsections §16720 (b) to (e). The Concerted Action Report states that "[i]t is arguable that these subsections … do not add significantly to the general condemnation provided in §16720(a)," with two exceptions:
    - First, "§16720(e)(3) provides an express condemnation of resale price maintenance (RPM), and the California Supreme Court has held that such restraints are 'per se' illegal." The Concerted Action Report states that "[r]etaining §16720(e)(3) would… ensure that any effort to impose RPM in California would be subject at least to strict scrutiny."

[15] Concerted Action Report, p. 8 ("To the extent that federal courts continue to assert that the Cartwright Act mirrors federal antitrust law, the California legislature could eliminate this confusion by clarifying that the Cartwright Act is broader than federal antitrust law and has its own common law.").

[16] Concerted Action Report, p. 62 ("Although §16720 (a) applies generally to any restraint, the following subsections (b) to (e) apply only to 'commodities.' In addition, §16727 that condemns tying applies only to commodities. Hence, tying contracts that involve services or real property are not subject to this stricter standard although they can still be condemned under §16720(a). From an economic and market perspective there is no rational basis for distinguishing between commodities and other goods or services in the market. As a result, it would make sense to revise these provisions to include all goods, services, and real property.").

[17] Concerted Action Report, pp. 62-63 ("With respect to tying, federal case law refers to such contracts as 'per se' illegal but applies only when a number of pre-conditions are satisfied including significant market power. California law distinguishes between ties that violate §16720(a) which require proof of market power and an effect on a significant amount of commerce and those that violate §16727 which require only an effect on a substantial amount of commerce.… If … the statutes make clear that §16725 provides a route for the justification of an otherwise objectionable tying contract that would resolve concern that the stricter standard of §17627 would cause any adverse effect" (footnotes omitted)).

- Second, §16720(c) explicitly condemns restraints affecting the buying side of the market, and the Concerted Action Report recommends that this provision be retained.[18]

- The legislature could declare that §16725 provides the standard for upholding restraints. The Concerted Action Report states that California courts have placed "little or no reliance on §16725 or explain[ed] when and how it applies to restraints of trade." It explains that "California's statutory scheme provides … a general condemnation of all restraints in §16720, §16722, and §16726, but §16725 provides an affirmative defense if the [defendants] demonstrate[] that [the restraint] functions ' … to promote, encourage or increase competition in any trade or industry, or … [is] in furtherance of trade.'" The "focus of analysis [of a restraint] would be on the function of the restraint in the market context in which it operates. To implement this, the legislature could update the wording of §16725 to be explicit that any non-exempt restraint must satisfy this section."[19]

- The Concerted Action Report argues that there is little empirical support that RPM results in economically desirable outcomes and that other less anticompetitive restraints can achieve almost all the benefits claimed for RPM. The Concerted Action Report argues that, together, these considerations suggest "the legislature could decide that the potential benefits of RPM, even if subject to a strict §16725 review, are not worth the potential costs and so it should be categorically condemned" and that "the condemnation in §16720(b)(3) could be revised either explicitly to condemn RPM as illegal or to exclude it from inclusion in those restraints that are reviewable under §16725."[20]

Outside of "hardcore offenses" like price fixing and bid rigging, which are *per se* unlawful, restraints of trade are generally evaluated under both federal and California law using a rule-of-reason standard.[21] The rule-of-reason considers the facts of the industry and business to which the restraint is applied, the nature and effects of the restraint, as well as the history of the restraint and reasons for its adoption. This is to assess whether the restraint is more likely to promote or hinder competition. Outside of the *per se* realm, various types of restraints are recognized as having the potential to be either pro- or anti-competitive, and therefore a factual rule of reason assessment is necessary to prohibit harmful restraints while leaving intact beneficial restraints. This balancing of potentially harmful and beneficial effects is economically appropriate when certain types of conduct have the potential to be either harmful or beneficial. Revising the analytical approach used to assess RPM, for example, to *per se* illegality is only appropriate economically if RPM is always anticompetitive. If there are specific instances wherein RPM is viewed as being procompetitive, even if it is adverse in many other instances, adopting a *per se* standard of illegality would prohibit beneficial conduct – which is precisely why RPM is evaluated under the rule of reason under federal law. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (holding that vertical price restraints, like RPM, are to be judged under the rule

[18] Concerted Action Report, pp. 63-64. The Concerted Action Report notes that the California Supreme Court holding that RPM is *per se* illegal in California preceded the United States Supreme Court's decision in *Leegin* that treats RPM as presumptively lawful unless the party imposing the RPM has substantial market power.

[19] Concerted Action Report, pp. 64-66. The Concerted Action Report states that "[t]his would require California courts to focus their analysis on the function of the restraint at issue and determine whether it 'promote[s], encourage[s], or increase[s] competition.'"

[20] Concerted Action Report, p. 66 (footnote omitted).

[21] See, for example, Concerted Action Report at p. 9.

of reason, rather than being treated as *per se* unlawful). Changing the standard for assessment of RPM, and other business conduct, will create uncertainty in the marketplace and risks chilling conduct that is, on balance, procompetitive.

Consumer Welfare Standard:

The Consumer Welfare Standard Report does not include any proposed legislation, but does suggest that the legislature adopt a core principle around which to shape any legislation:

> In the view of the committee, the label is less important than the substantive principle on which antitrust law is based. The principle is this: conduct that maintains, increases, or enhances market power to the detriment of trading partners, whether customers or suppliers, is unlawful, unless that conduct can be justified as reasonably necessary to provide welfare-enhancing benefits for those trading partners…. If the legislature were to embrace this principle, … it could then focus on the important question of shaping an antitrust law that would effectively promote welfare ….”[22]

The consumer welfare standard has guided courts for decades, but the Consumer Welfare Standard Working Group Report notes that the courts have not clearly defined what the consumer welfare standard means. Even so, given the consumer welfare standard has been used for decades and is currently familiar to courts and businesses, adopting a new core principle defining this standard is unlikely to improve antitrust enforcement. Instead, it is more likely to confuse courts and businesses as they evaluate antitrust issues. That confusion is more likely than not to result in unintended, adverse consequences, as well as differing opinions by the courts.

Enforcement and Exemptions:

The Enforcement and Exemptions Report provides this summary of potential actions to be taken by the legislature:

> “• Amend [the] Cartwright [Act] to be applicable to single firm conduct.
>
> • Create an option for the courts to utilize a ’structured rule of reason’ standard or burden-shifting process where warranted in Cartwright [Act] cases.[23]

[22] Consumer Welfare Standard Report, p. 8.

[23] A structured rule of reason analysis is simpler than a full rule of reason analysis. The proposal is not specific, but the Enforcement and Exemptions Report notes several characteristics of a structured rule of reason approach, including that (1) it would apply when a plaintiff shows “such clear and harmful real-world effects on competition that consumer harm is obvious,” (2) there would be no need for a plaintiff to define and prove a relevant product market and a relevant geographic market, (3) it is the defendant’s burden to prove any pro-competitive effects, (4) the court has discretion to disallow certain defenses, and (5) the court’s balancing of pro-competitive and anti-competitive effects to determine whether the conduct is in fact procompetitive is vigorous.” Enforcement and Exemptions Report, pp. 6-7. The Enforcement and Exemptions Report notes, for example, that the Working Group has not specified whether there would be a presumption of illegality after the first step, what defenses would be disallowed, and what, if any, defenses would be available to defendants.

• Clarify that antitrust standing requirement under [the] Cartwright [Act] is based on general proximate cause rules, *i.e.* the target area test.[24]

• Clarify that [RPM] remains *per se* unlawful under the Cartwright Act notwithstanding the US Supreme Court's ruling in the *Leegin* case.

• Adopt a Pre-Merger Notification law only in conjunction with additional measures relating to payment of fees, expanded staffing of the Antitrust Law Section, penalties for violations.

• Add [a] Cartwright [Act] amendment declaring that contractual waivers (in boilerplate arbitration clauses) of treble damages, attorneys' fees, and statute of limitations are unenforceable as against public policy.

• Consider amending [the] Cartwright [Act] to apply to mergers and acquisitions."[25]

The Enforcement and Exemptions Report also provides other recommendations to the legislature that are not included in this summary. Most significant are the recommendations on the application of the Cartwright Act to "Big Tech." The recommendation includes considering the *ex ante* regulation of the sector.[26] Though no formal regulatory proposal is offered, certain principles for implementation are summarized. These include:

"-Limit application of the law to the very largest tech companies offering digital platforms and/or services dependent on digital technologies…;

-Designate certain special obligations that those companies will have to government…, or competitors…, or consumers…;

-Establish a regulatory agency or specialized group to promulgate rules and administer the law;

-Specify a set of business practices known to have exclusionary effects to be the primary (but not exclusive) focus of regulation. They include: (a) impeding data-portability, (b) self-preferencing on the platform, (c) discriminatory platform access, and (d) undue interference with pricing or payments."[27]

Finally, the Enforcement and Exemptions Report highlights that certain exemptions from antitrust laws are provided by law that "could be brought to the attention of the legislature," such as the

[24] "Traditionally, any party within the 'target area' of the challenged anticompetitive conduct has standing to sue under the Cartwright Act. Under this test, the plaintiff's business or transactions must come within the zone of the market endangered by the antitrust violation, as opposed to being 'incidentally injured.'" Enforcement and Exemptions Report, p. 9.

[25] Enforcement and Exemptions Report, pp. 21-22.

[26] Enforcement and Exemptions Report, pp. 16-17 ("An *ex ante* regulatory approach of the kind being implemented in other jurisdictions may afford more effective as well as more economical enforcement with regard to certain practices and therefore should be explored.").

[27] Enforcement and Exemptions Report, pp. 16-17.

regulation of beer by the Alcoholic Beverage Control Board.[28] Additional areas discussed include occupational licensure *(e.g.*, real estate agents)[29] and agricultural marketing boards.[30] Specific recommended changes in exemptions are not discussed.

As we noted in our April response to the Single-Firm Conduct Working Group Report, amending the Cartwright Act to address unilateral conduct carries with it great risks that are unnecessary, given existing federal antitrust law. Those concerns are equally applicable to the merger portions of the Enforcement and Exemptions Report. Likewise, CalChamber's comments, above, warning against creating a California merger review regime and an *ex ante* regulatory scheme for technology platforms also apply to those same suggestions in the Enforcement and Exemptions Report. In short, taking these drastic actions have the potential of harming important drivers of innovation and dynamism in the U.S. and California economies.

The Working Group Reports Do Not Provide A Basis For Recommending Amendment To California's Antitrust Laws Because The Recommendations Are Not Based On A Need For Amendment, They Have No Supporting Cost-Benefit Analysis, And They Are Too General To Support A Legislative Proposal

It is clear that a significant amount of work went into preparing the Working Group Reports. But they do not support the CLRC in making any particular legislative proposal to the California Legislature regarding revisions to the California antitrust law, for several reasons.

One, as we noted in our April response to the Single-Firm Conduct Working Group Report, the Working Group Reports do not demonstrate a need for revising California's antitrust laws. There has been no showing that Californians are suffering from higher prices, inferior products or services, or less competition due to the current California antitrust regime. Indeed, several of the Working Group Reports note that taking no action and maintaining the status quo is a legitimate option for the CLRC. Legislating for legislation's sake or based on subjective beliefs that competition in California is not as robust as it could be is bad for California businesses and ultimately California consumers and workers. It is CalChamber's view that the CLRC should not consider any revisions to California's antitrust laws unless and until there is a demonstrated need for such revisions through some sort of empirical analysis.

Two, none of the Working Group Reports provide any cost-benefit analysis to understand the quantitative and qualitative effects – both economically beneficial and economically harmful – that are likely to result from the possible statutory changes. A cost-benefit analysis of proposed legislation compares the anticipated benefits to be derived from the proposed legislation to the anticipated costs of that proposed legislation if it were to be enacted. The goal of the analysis is to assess, in an unbiased and thorough manner, the net economic benefits that would flow from the legislation. Good public policy involves making changes that are, on balance, beneficial. For antitrust policy, utilizing a proper

[28] Enforcement and Exemptions Report, p. 21 ("A decades-old three-tier strategy to separate manufacturers from retailers through establishment of an independent wholesale market (with rate regulation and licensing by geographic area) has morphed over the last two decades into a very different economic picture in which a very small number of very large wholesalers may exert wide control over the shelf space of retailers, raising concerns about consolidation in this sector and complaints of market exclusion on the part of craft breweries among others.").

[29] Enforcement and Exemptions Report, p. 20.

[30] Enforcement and Exemptions Report, pp. 20-21.

cost-benefit methodology as part of decision-making will lead to policies that improve economic performance and efficiency, ultimately benefiting consumers and workers in California.

Three, demonstrating a need for change and conducting a careful analysis of policy choices is particularly important here because the changes being considered are not small adjustments of existing California policy, but instead represent significant changes in both substantive antitrust analysis and the nature of antitrust enforcement. As detailed in the Technology Platforms Report:

> [T]here is not a consensus among the antitrust advisors of this working group that specific legislation is needed to address Big Tech or that these [three options presented] are the most effective ways to address concerns about Big Tech. Some within the working group have expressed concern that, at a minimum, more study is needed of the potential impact of the the [sic] recommendations below – as they would further expand the scope of California's antitrust laws beyond existing federal law.[31]

CalChamber concurs. The technology sector is an incredibly important driver of the California economy and is a source of dynamism in the overall U.S. economy. Changes in policy that may affect the incentives to innovate or invest in California – such as the development and implementation of *ex ante* regulation – should be considered carefully before any changes in policy are made. This concern is not limited to the application of antitrust standards or regulation to technology companies, but rather applies across the broader California economy. Moreover, some of the suggested options are just not necessary given existing federal law. For example, concerns about concerted action and mergers and acquisitions are already adequately address by existing federal law. Accordingly, CalChamber recommends that no legislation be proposed by the CLRC to the California legislature until a cost-benefit analysis of that legislation is performed and released for public for review and comment.

Finally, many of the recommendations provided in the Working Group Reports are too general and imprecise to analyze or use as guides for drafting legislation. Examples include the recommendation to amend the Cartwright Act to apply to mergers and acquisitions in the Enforcement and Exemptions Report (and a similar recommendation in the Merger and Acquisitions Report)[32] and the option of enacting legislation addressing technology platforms in the Technology Platforms Report (and related recommendations in the Enforcement and Exemptions Report). No specifics are provided regarding what California merger or technology platform legislation should say. For example, what standards would apply to merger reviews, and what defenses, if any, would platforms have available to them to justify their business conduct? Both merger and technology platform legislation have the potential to involve dramatic changes in the legal and economic environments in which California businesses operate. Therefore, CalChamber recommends that no such legislation be proposed by the

[31] Technology Platforms Report, pp. 11-12.

[32] The Merger and Acquisitions Report also states that one option is to amend California law to address mergers and acquisitions. As with the similar recommendation in the Enforcement and Exemptions Report, this option in the Mergers and Acquisitions Report lacks specifics as to the detail of how California law should be amended. For example, the Mergers and Acquisitions Report does not describe to which transactions the new California merger law would apply, nor does it detail what standard for evaluation would be used.

CLRC to the California legislature before proposed legislative text is released to the public for review and comment.

Conclusion

CalChamber has long supported robust antitrust enforcement, sound competition policy and reasonable efforts to simplify, clarify and reform California law when necessary. But the Working Group Reports simply do not provide the CLRC with a basis to recommend revision of California's antitrust laws. The Working Group Reports are not supported by a finding that there is a need to amend California's antitrust laws. The sweeping changes offered in the Working Group Reports are not underpinned by a robust cost-benefit analysis of the effects that are likely to result from statutory revisions. And the Working Group Reports do not contain specific legislative proposals that can be analyzed by stakeholders or used by the CLRC as a guide for recommended revisions. CalChamber recommends that the CLRC not propose any revisions to California's antitrust laws unless there is a demonstrated need for such revisions, an independent cost-benefit analysis has been performed that suggests the revisions are, on balance, good for California, and specific statutory language has been proposed and analyzed by stakeholders.

Sincerely,

Eric P. Enson

Eric P. Enson

On Behalf Of The
California Chamber Of
Commerce

Submission to California Law Revision Commission

Google is a homegrown California technology company, and grateful for the opportunity to contribute to the Commission's deliberations. For more than half a century, California has been a global epicenter of technology, supported by policies that encourage innovation to benefit consumers. The pipeline of new California technology firms shows no sign of slowing, with "35 of the world's 50 leading AI companies" based here. Now questions are being asked whether different approaches would solve perceived problems, potentially reshaping California's world-leading tech economy.

In our view, interventions come with trade-offs. Measures to improve the prominence of one group of businesses (or alleviate competitive pressures that they perceive to be "unfair") may harm others, decreasing overall economic output. Well-meaning principles like "fairness" might result in less certainty for businesses and worse outcomes for consumers. And rigid rules that restrict useful product designs would have knock-on effects on a wide range of small, independent businesses.

To illustrate these trade-offs, we urge the Committee to consider the evidence. (1) California's technology sector is thriving under the existing antitrust regime; (2) new *ex ante* regulation – rigid product design rules that do not consider harms or benefits – creates trade-offs, risking negative outcomes for consumers and small businesses; and (3) the Digital Markets Act (DMA) in Europe remains a global outlier.

We believe that current well-established antitrust laws have fostered positive overall outcomes, helping a wide range of consumers and business customers, while prohibiting anti-competitive, anti-consumer conduct. Rigid *ex ante* rules, on the other hand, risk causing unintended consequences, benefiting a handful of intermediaries at the expense of a much larger number of affected businesses and consumers. There are sound policy reasons not to follow this path.

(1) Existing competition law and policy have enabled enormous innovation

California's robust antitrust laws provide strong safeguards. Indeed, notably absent from the comments advocating for changes to California's rulebook is evidence that current business practices have led to reduced competition, higher consumer prices, or decreased innovation that could not already be addressed by antitrust laws.

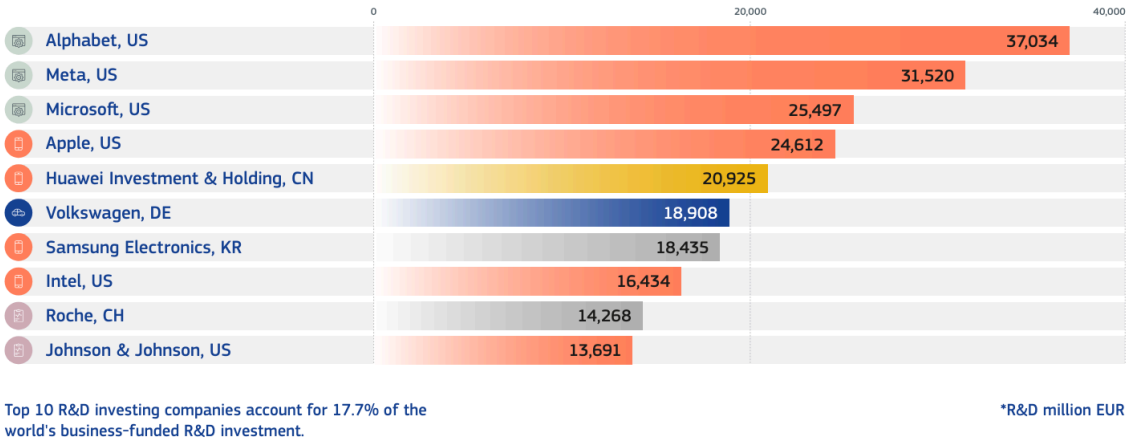
Were existing laws incapable of keeping markets competitive and serving the public interest, we would expect to see that reflected in market outcomes, including higher prices and slower

innovation. But the data on the tech industry's growth, investment, innovation, and value-creation says the opposite. The sector is likely the most competitive part of California's economy, with free or falling prices, rapid innovation, and extensive new firm formation. Competition is robust.

Growth. The growth of the technology industry in California has been spectacular. The roots of modern day Silicon Valley can be traced back to the semiconductor industry in the 1950s. Globally recognized California companies like Apple, Cisco, Dolby, eBay, Google, Meta, Netflix, OpenAI, PayPal, Qualcomm, and Salesforce followed this early success, leading technology transformations from semiconductors to software to the internet to mobile to AI. This has had a profound impact on California's economy. Today, Google alone employs around 180,000 people, with 52,000 of our employees based in California. Last year, Google helped provide more than $166 billion of economic activity for hundreds of thousands of California businesses, non-profits, publishers, creators, and developers. And we've invested over $4 billion in California-based startups.

Investment. US technology companies invest relentlessly in research and development, outstripping their peers in other countries and industries. Last year, Google spent over $45 billion in R&D (up 15% from the prior year). Research by the European Commission confirms that US tech firms, including Google, lead the way in R&D investments. In 2022, they were the top four R&D investing firms globally. Out of the world's top 2,500 R&D-investing companies, over 40% are based in the US. Information technology companies far outstrip other industries in R&D intensity. Investment is costly and risky, with no guarantees of success; Google has launched unsuccessful products as have other tech companies. The existing antitrust framework provides a stable basis for firms to take risks and pursue returns on those products that *do* succeed, even if it means accepting a certain number of failures along the way.

European Commission, Industrial R&D Investment Scoreboard
(Investment figures for 2022)



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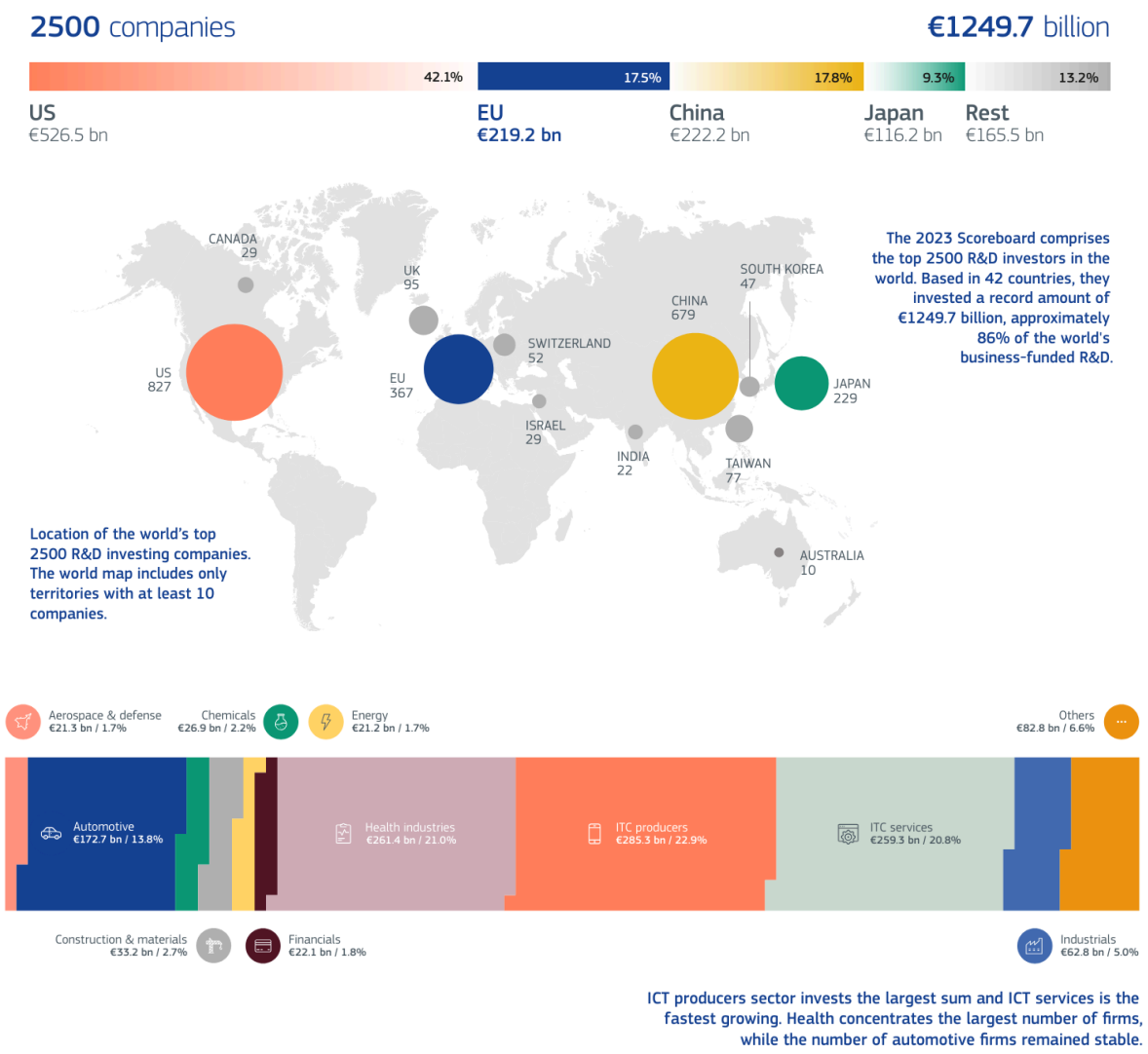
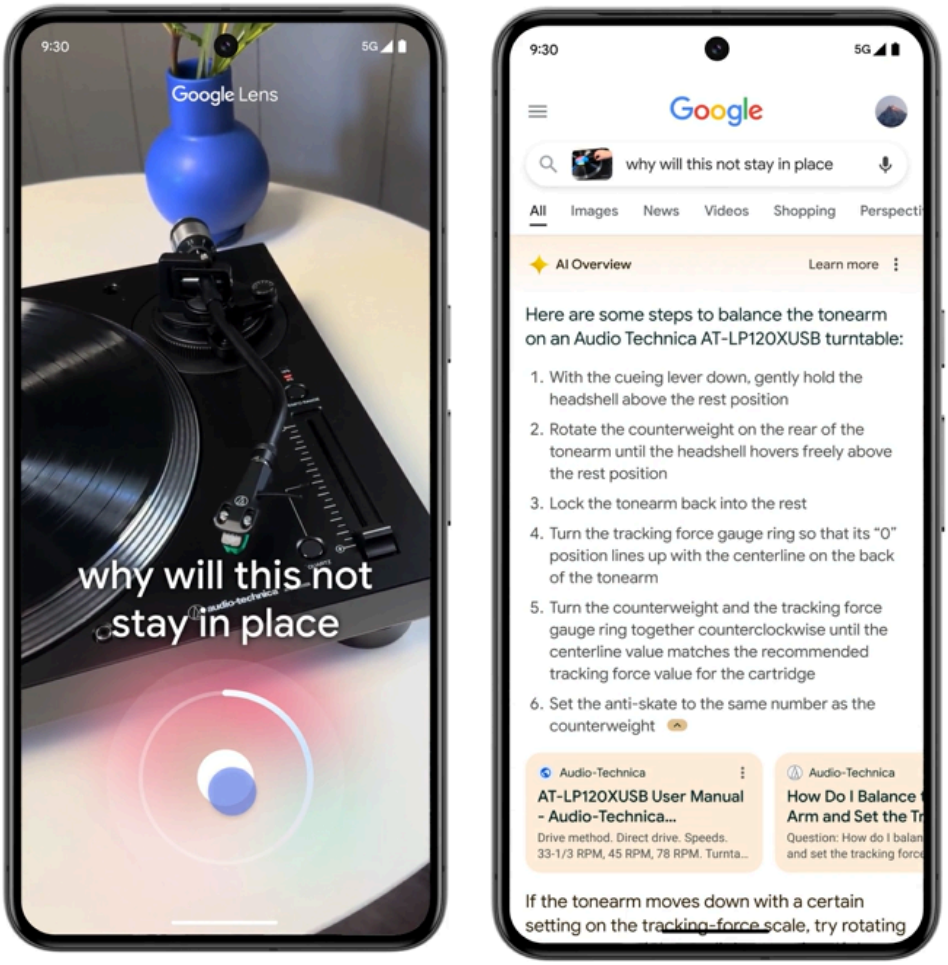


Innovation. The pace of innovation by California companies has been staggering. Pioneering semiconductor development has come from Intel, Nvidia, Broadcom, and Qualcomm. Internet routing advances have been led by companies like Cisco and Juniper Networks. Meta, Oracle, Salesforce, Adobe, Intuit, Agilent, among numerous others, are leaders in software. Netflix, Paramount+, and Disney stream entertainment to the world. Our groundbreaking Google Search product has enabled people to find what they need to on the sprawling World Wide Web quickly – and at no cost to consumers.

The trend in innovation is exemplified by the rapid development of AI in recent years. We've developed and rolled out fresh products to enable new AI solutions, as have numerous competitors, large and small. And once again, California is the heart of technological innovation in this exciting new field, with many of the leading innovators in AI models and the semiconductors and other infrastructure needed to bring them to consumers and businesses being founded and centered here. Google's own core products and services are going

through fundamental changes and improvements to harness the capabilities that AI offers. Many instances of AI integration were announced at Google I/O in May 2024. For example:

- Google Search has traditionally been associated with words in a textbox; now, people will be able to pose questions by recording a video of the problem they want Google to solve. Say you bought a record player at a thrift shop, but it's not working when you turn it on due to the metal arm not staying in place. Searching with video saves the time and trouble of finding the right words to describe this issue, providing an AI Overview with steps and resources to troubleshoot.



- On Android, we are testing a new AI fraud protection feature. Using Gemini Nano, this feature aims to provide real-time alerts during a call if it detects conversation patterns commonly associated with scams – such as a "bank representative" asking for an urgent transfer of funds, payment with a gift card, or PINs or passwords.

Value. The value of goods and services offered by large technology firms is vast; yet many of those products come at no cost to the businesses and consumers who use them. Nobody has to pay – for example – to use Google Search, YouTube, Maps, Android, and many other popular products and services. In California alone, more than 2.15 million California businesses used Google's free tools to receive phone calls, bookings, reviews, requests for directions, or other direct connections to their customers last year.

(2) *Ex ante* regulation risks hurting consumers and small businesses

If the performance dashboard is bright green in California, how does the situation compare to Europe? The EU has enacted novel *ex ante* regulation with the DMA, which includes a list of dos and don't focused on the largest technology firms? It's still early days, with most new legal obligations only having come into force in March 2024. That said, early indications underscore the trade-offs that should be considered in any proposals for similar regulation.

Worse user experience. Any *ex ante* regulation – rigid product design rules that do not consider impact on consumers – risks worse outcomes for consumers. Take, for example, changes that Google has implemented to Search in the EU to address complaints from large intermediaries who are pushing for more prominence in our results than previous designs that highlighted direct suppliers like airlines, restaurants, and hotels:

- The increased friction of looking up places or businesses has led to public complaints by users and requests to 'opt back in' to the prior product design.[1] Developers have even started building browser extensions to replicate the experience that users see outside the EU (*i.e.,* to restore fast access to Maps results).
- We have removed useful Google Search features for flights, hotels, and local businesses. This means that if you search for a flight in Europe, we can no longer show a full array of information about carriers, flight times, and prices. This benefits a small number of large travel intermediaries, but harms a wider range of airlines, hotel operators and small firms who now find it harder to reach customers directly.[2]

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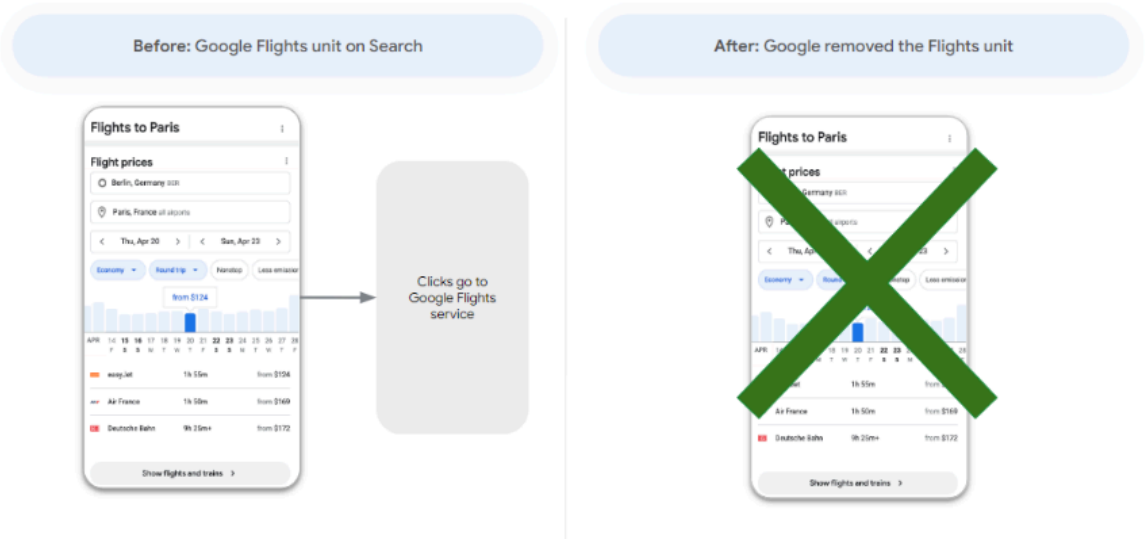
1 *See, e.g.*, user comments on the Google Search help forum (2 March 2024). *See also* Reddit thread: Why doesn't maps show up under Google searches anymore? and Liberation, Mais t'es où: Pourquoi Google Maps ne fonctionne plus directement dans la recherche Google (5 March 2024).

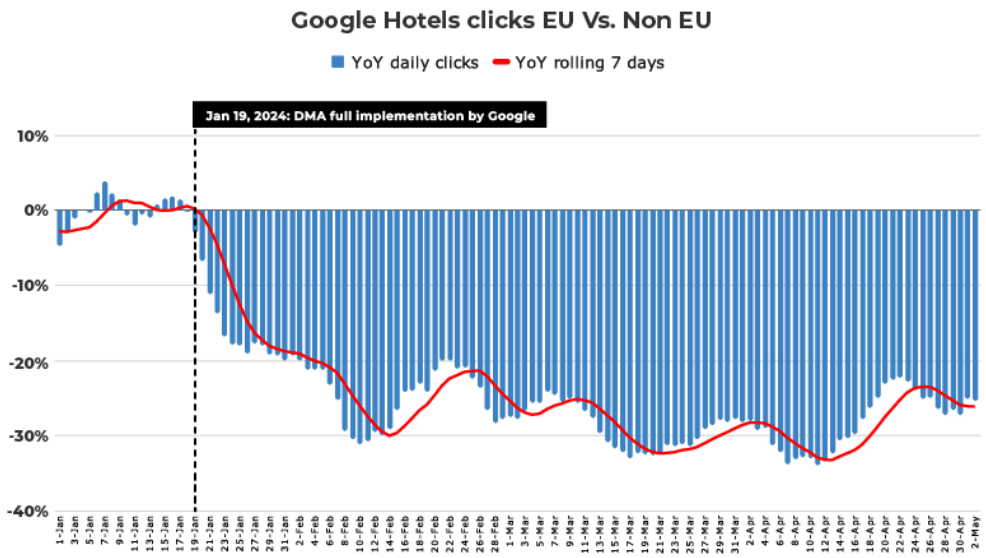
2 *See* Google's The Keyword, New competition rules come with trade-offs (5 April 2024).

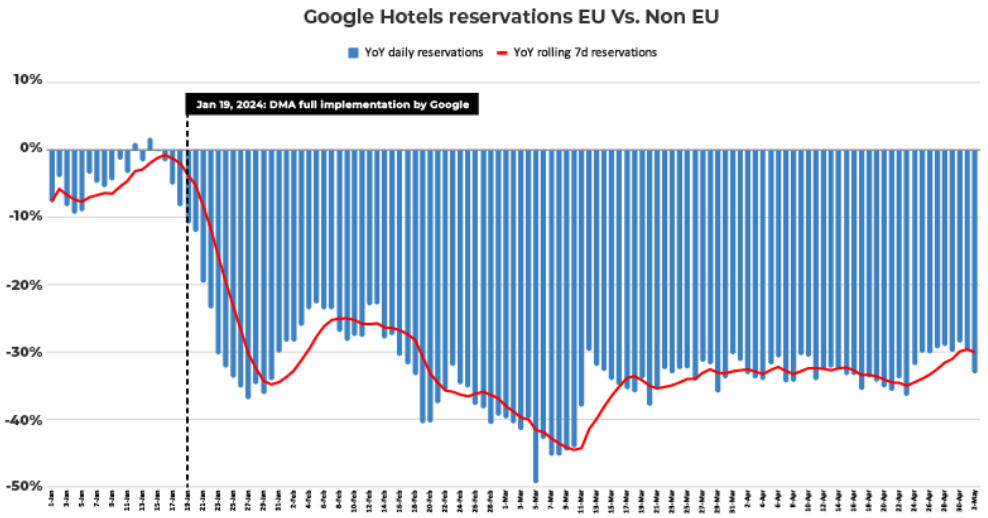


- We introduced these types of Google Search features to help consumers, making it easier for people to access accurate information. We developed Google Images to show a photo instead of just a link to a photo. We launched Google Maps to help people go directly to a local business, not just websites that mention its address. Hundreds of millions of consumers enjoy these free innovations. *Ex ante* rules that do not consider consumer benefits or competitive effects risk rolling back these innovations.

- Our metrics suggest consumers interacting with products subject to *ex ante* regulation are having more difficulty finding what they are looking for. As an example, these changes led to an increase in manual refinements for Search queries, where users re-enter or refine their query.

Damaging small businesses. *Ex ante* regulation risks giving a small number of online intermediaries disproportionately large exposure relative to consumers. The intermediaries benefiting from the reengineering of web traffic are often quite large themselves. If regulation redirects traffic from direct suppliers, including small, local businesses, to large intermediaries, this harms direct suppliers and increases user friction, making it more difficult for people who are looking for direct suppliers. For example, hotel technology company Mirai reports that hotel booking clicks are down as much as 30% since Google's DMA compliance changes were implemented; direct bookings have dropped even further, thereby "*increasing hotel dependence on intermediaries, which seriously damages their profitability*".





Reduced and delayed launches. We can already observe how uncertainties around the implementation of the new rules and associated compliance costs have resulted in loss of access to new products for European consumers. Google has delayed the roll-out of some of our most advanced AI products and we have observed that other companies have similarly delayed, withdrawn, or reduced the functionality of their products in Europe.

High burden on resources. Compliance measures can absorb thousands of employees, vast engineering hours, and substantial financial resources that could otherwise be dedicated to competing with new and improved products. What's more, new European regulation may increasingly draw companies' focus from solving commercial and engineering problems to addressing legal ones. The President of the EU General Court, Marc van der Woude,

presciently described the legislation as follows in 2023: "*Probably the end of this year, beginning of next year we might see the first cases and I don't think it will stop […] if I might call it like this, it will be a lawyer's paradise*". Having to second-guess each product decision for fear of litigation will slow the pace of innovation.

(3) An *ex ante* approach with no consumer safeguards remains a global outlier

The EU's new regulatory approach is unique. As the DMA states – and as enshrined in the underlying EU Treaty provision – it is explicitly not concerned with competition or antitrust policy. Instead, it pursues goals of fairness, contestability, and aligning market rules and conditions throughout the European Union. It is not calibrated to address matters of antitrust policy nor employ the rigorous, evidence-based standards used in existing California and federal law. And it does not consider consumer welfare, product quality, or the need to avoid benefiting a few intermediaries at the expense of the many more merchants and businesses who sell their own products and services.

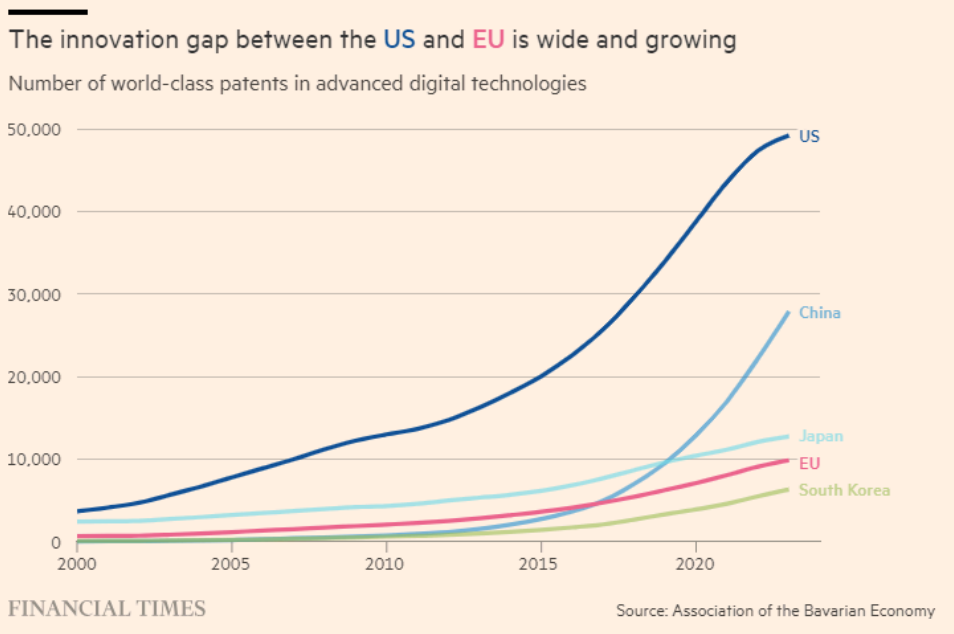
These problems may explain why other countries have not copy-pasted the European legislation into their own rulebooks. Even regimes looking into new approaches to regulation – such as the UK – are adopting different regulatory designs. In Japan, new legislation borrows some ideas from Europe, but with safeguards around consumer benefits and product utility.

These considerations should be important to the whole of the US and California in particular, where stable antitrust rules, freedom of contract, and robust property rights have provided the foundations for a leading tech sector.

California should be wary that importing Europe's regulatory approach may also end up importing its economic challenges. In stark contrast to the innovation and global reach of California's robust technology industries, there is a dearth of European tech companies with similar levels of success. As Christine Lagarde, President of the European Central Bank, noted in April this year: "*It's just mind boggling that productivity [growth] in the United States between 2019 and now has been 6%. In Europe, 0.6%.*" This is reflected in recent data, with *The New York Times* reporting that "A 'competitiveness crisis' is raising alarms for officials and business leaders in the European Union, where investment, income and productivity are lagging."

In this regard, two articles from the *Financial Times* last month are worth noting. The first declares that "*The great American innovation engine is firing again*", calling out public policies and private sector investment. The second asks "*Can Europe's economy ever hope to rival the US again?*". Citing an executive of the European Central Bank, it noted that "*many European companies are too small and constrained by regulation to fully exploit new technology*". It also reported a major innovation gap between the two sides of the Atlantic (see also recent comments from Slovenia's Former Minister of Digital Transformation ("Europe's at risk of losing

the global tech race" and Scott Marcus (suggesting that legislators "reflect as much as possible a pause in new legislation, and a focus on correct implementation of the many laws that were just put in place.").



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In conclusion, a few points are clear. First, the market outcomes of California's tech industry are enviably positive. Existing policy frameworks have enabled enormous innovation and consumer benefits. Second, recent experience suggests that *ex ante* regulation comes with significant trade-offs, which could deliver worse outcomes for consumers and smaller businesses. Third, the EU's new approach remains an unusual regulatory model and a global outlier, part of a European policy framework and economy characterized by much heavier regulation than the dynamic economy in the US. All of this recommends caution when considering importing similar rules to California.

EMAIL FROM ELAYNA TRUCKER, NAPA BOOKMINE (6/18/24)

My name is Elayna Trucker, Lead Buyer and Operations Manager for Napa Bookmine, an independent bookstore in Napa County. We appreciate the opportunity to provide these comments in connection with the request seeking input on mergers and acquisitions.

Over the past four decades, merger regulations have failed to address how markets actually function. As a result, independent booksellers like me have found it difficult to stay afloat and to grow. Indeed, in the last few decades, the number of independent bookstores has dropped from over 7,000 to 2,500 and tech entrepreneurs see corporate dominance as a barrier to entry for new industry technology, for example.

As critical contributors to local and national economies, independent bookstores hold a direct, tangible interest in the approach taken towards enforcing mergers. As we've seen with Amazon, the absence of strong merger law enforcement has allowed Amazon to become a monopoly and a monopsony in our industry. Its unchecked industry domination has given them a stranglehold on our industry: influencing what's published, defining industry terms, and deterring competition and innovation.

As a small business manager, I oppose market consolidation due to its enduring adverse effects—not only harming independent bookstores, but displacing jobs and storefronts in communities and reducing choice and opportunities for consumers and entrepreneurs respectively.

We routinely see people wandering our stores to find books they want and then buying them on Amazon because Amazon is able to offer the same product at a much cheaper price. It's been long acknowledged that books are a loss leader for Amazon: they buy in such bulk numbers that they can sell them at an incredibly cheap price that no brick & mortar store can compete with, and use the data collected from book sales to conduct market research that undercuts local businesses. If Amazon were required to legally separate its book business from its cloud computing business, which is hugely profitable and dramatically skews Amazon's financial reports, it would quickly become apparent that Amazon's book and third party seller marketplaces are deeply unhealthy and do not represent fair competition to other sellers.

Furthermore, mergers within the retail and publishing sectors have ultimately led to a market environment that is considerably less competitive. In the realm of publishing, mergers curtail opportunities for new or historically marginalized authors to secure publishing deals, sustain their livelihoods through their craft, or, in cases where published by smaller entities, ensure proper distribution channels for their books. Beyond limiting the potential for emerging writers to blossom into accomplished authors, this also

restricts the range of fresh perspectives and titles accessible to consumers and the ability for bookstores to meet consumer demand for these authors.

Our bookstores are being forced to carry products we don't believe in from suppliers who have so much power that they dictate the market itself in order to achieve a miniscule profit margin. Additionally, it's not difficult to see how AI could soon replace most authors if its reach is not reined in by legal means. It must be acknowledged that while technology absolutely provides opportunities, particularly for consumer who live in rural or underserved areas, a website is no replacement for a thriving, locally-owned business that employs community members and provides services such as donations to local schools and nonprofits, school book fairs and classroom materials, and much-needed sales tax revenue to support the city and county's operational health.

Thank you for your consideration,

Elayna