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COMMENTS OF ITIF

Before the

California Law Revision Commission Study of Antitrust Law

Washington, DC

In the Matter of: Concerted Action, Consumer Welfare Standard, & Enforcement and Exemptions	)	Public Comment

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THE FUTURE OF ANTITRUST IN CALIFORNIA: THE CONSUMER WELFARE STANDARD, CONCERTED ACTION, AND OTHER ISSUES

CONTENTS

Introduction 2
Consumer Welfare Standard 3
Concerted Action 5
Enforcement and Exemptions 7
Recommendations 9
Conclusion 9

INTRODUCTION

On January 26, 2024, the Consumer Welfare Committee of the California Law Revision Commission ("the Commission") Study of Antitrust Law issued a report ("A Report of the Consumer Welfare Committee: What Constitutes Antitrust Harm?") discussing the standard that should be applied to determine whether business conduct violates the antitrust laws.[1] Two months later, the Commission released a report discussing California's restraint of trade rules ("Concerted Action Report").[2] At the same time, the Enforcement and Immunities Working Group issued its own report ("Enforcement and Exemptions Report") analyzing both state and federal antitrust enforcement and outlining proposed legislative changes.[3] The reports come amidst an ongoing process commissioned by the California legislature in 2022 to review the state's antitrust laws.[4]

The Information Technology and Innovation Foundation (ITIF) appreciates the opportunity to comment on these three reports and, in particular, to ensure that California and the United States more broadly maintain their roles as the leading innovation hubs of the world. This comment follows ITIF's previous comments to the Commission on its Single Firm Conduct and Concentration reports as well as its comment on its Mergers and Acquisitions & Technology Platforms reports.[5] While ITIF applauds the Commission for its continued efforts to evaluate the adequacy of California's competition laws and consider possible changes, this comment highlights concerns with the Consumer Welfare, Concerted Action and Enforcement and Exemptions reports, and specifically regarding their findings and proposals from the standpoint of promoting innovation.

This comment proceeds in five parts. The first analyzes the findings of the Consumer Welfare Report, and particularly its suggestion to embrace a competitive process or trading partner welfare standard. The second

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[1] A Report of the Consumer Welfare Committee: What Constitutes Antitrust Harm? (Jan. 26, 2024) [hereinafter Consumer Welfare Report].

[2] California Law Review Commission Study of Antitrust Law (Mar. 26, 2024) [hereinafter Concerted Action Report].

[3] K Foote et al., Enforcement and Immunities Working Group Report (Mar. 26, 2024) [hereinafter Enforcement and Exemptions Report].

[4] *See* California Law Review Commission, Antitrust Law – Study B-750, Antitrust Law -- B-750 (ca.gov).

[5] Joseph V. Coniglio and Trelysa Long, *Comments for the California Law Review Commission Study of Antitrust Law Regarding Single-Firm Conduct and Concentration*, ITIF (May 2024); Joseph V. Coniglio, *Mergers and Innovation: Keeping California the World's Digital Leader*, ITIF (June 2024).

part considers the Concerted Action Report and its four recommended changes to the Cartwright Act. The third part discusses the Enforcement and Exemptions Report with a focus on its summary of potential actions that the California legislature could take to implement antitrust reforms. Next, the comment provides the Commission with several recommendations to consider as it continues to reflect upon possible new legislation. A brief conclusion follows.

CONSUMER WELFARE STANDARD

The Consumer Welfare Report criticizes the consumer welfare standard on the grounds that is ambiguous, writing that "[n]either the Supreme Court nor lower courts have defined the label 'consumer welfare' or clarified what harm to the consumer welfare entails."[6] But this is not correct. As the Supreme Court has made clear, the antitrust laws condemn behavior that harms "competition and consumer welfare."[7] Specifically, "the protection of "*competition*, not *competitors*" is the *purpose* of the antitrust enterprise.[8] Consumer welfare is the *standard* that courts use to give effect to that goal and which takes the form of proscribing behavior that results in "reduced output, increased prices, or decreased quality in the relevant market."[9] Diminished innovation is also a cognizable consumer welfare harm.[10] And the various *rules* courts apply—e.g., the *per se* rule, the predatory pricing rule in *Brooke Group*—are the way they evaluate whether competition and consumer welfare have been harmed for particular categories of conduct.[11]

The report also states that it is "unaware of any judicial opinion in which a court concluded that efficiency is a legitimate justification for harm to consumers."[12] This is also misleading. For several forms of unilateral conduct, and in particular "predatory innovation," courts like the Ninth Circuit in *Allied Orthopedic v. Tyco* have applied what commentators called a "sham innovation test" pursuant to which courts inquire "whether the innovation makes at least some consumers better off."[13] That is, if the innovation has procompetitive benefits, some courts will treat it as lawful—regardless of whether there may be anticompetitive harms from the conduct that ultimately outweigh those benefits. Importantly, such a rule is not inconsistent with the broader economic approach to antitrust law, but rather accounts for the harms that can arise from the application of a rule of reason balancing test in cases where there are tradeoffs between static and dynamic welfare, both in the form of chilling innovation and increasing administrative costs.[14]

The Consumer Welfare Report continues by identifying two presumptions that "have eroded the capacity of the antitrust enterprise to protect competition."[15] The first is the idea that antitrust rules should prioritize

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[6] Consumer Welfare Report at 2.

[7] Leegin Creative Lether Products v. PSKS, Inc.., 127 S.Ct. 2705, 2724 (2007).

[8] Brown Shoe Co. v. United States, 370 U.S. 294, 338 (1962).

[9] Ohio v. Amer. Express Co., 138 S.Ct. 2274, 2284 (2018).

[10] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[11] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[12] Consumer Welfare Report at 3.

[13] *See* Jonathan Jacobson, Scott Sher & Edward Holman, *Predatory Innovation: An Analysis of Allied Orthopedic v. Tyco in the Context of Section 2 Jurisprudence*, 23 LOY. CONSUMER L. REV. 1, 30 (2010).

[14] 592 F.3d at 1000 ("To weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable. There are no criteria that courts can use to calculate the 'right' amount of innovation, which would maximize social gains and minimize competitive injury. A seemingly minor technological improvement today can lead to much greater advances in the future. The balancing test proposed by plaintiffs would therefore require courts to weigh as-yet-unknown benefits against current competitive injuries. Our precedents and the precedents we have relied upon strongly counsel against such a test.").

[15] Consumer Welfare Report at 7.

minimizing false positives.[16] But the popular criticism of this presumption—that the self-correction assumptions upon which it relies are tantamount to a doctrine of faith in "market forces"—is misplaced.[17] The modern assumptions surrounding self-correction that support a focus on avoiding false positives are ultimately derived from the rational expectations model of neoclassical economics, which neoliberal law and economics theorists like Milton Friedman justify on the grounds of providing the best means of predicting economic behavior.[18] Put another way, regardless of whether self-correction assumptions are actually true—and no doubt in some cases they are not—the absence of such an assumption would create an antitrust regime that is unable to produce clear and workable rules: if rationality assumptions are abandoned, it becomes extremely difficult for courts to ascertain the effects on any anticompetitive behavior at all.[19]

The second presumption is similar in orientation and concerns modern antitrust's disposition to hold that "vertical arrangements and unilateral conduct are unlikely to harm competition."[20] Of course, at one level, this presumption is undoubtedly correct: vertical agreements and unilateral behavior of various types by numerous firms are ubiquitous across the economy, and only an extremely small subset, even in principle, gives rise to potential antitrust concerns: namely, conduct done in conjunction with market and monopoly power respectively. And, even in the case of vertical agreements buttressed by market power or unilateral conduct by a monopolist, typically antitrust is limited to a group of well-defined conduct forms that can harm competition, like exclusive dealing or predatory pricing. For this reason, and in contrast to horizontal collusion—which is much more likely to be harmful—there is no economic basis to treat vertical agreements or unilateral conduct generally as not unlikely to harm competition.

The Consumer Welfare Report concludes by advocating for a movement away from the consumer welfare standard and the related notion that "consumers should be favored in an antitrust analysis against the welfare interests of other market participants."[21] To its credit, the report identifies problems with the neo-Brandeisian model of politicized antitrust enforcement, and specifically notes that "it would result in arbitrary and unpredictable antitrust decisions that would often reduce competition or economic welfare."[22] As an alternative, the report puts forward a "competitive process" or "trading partner welfare" standard, whereby "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."[23]

The problem with this approach is that condemning business conduct which, for example, harms suppliers, may ultimately actually come at the expense of not just consumers but society. For example, practices which create countervailing buyer power that falls short of monopsony may reduce producer surplus and harm suppliers, but ultimately enhance both consumer surplus through lower prices *and* total surplus by increasing

[16] *Id.* at 6–7.

[17] *See, e.g.,* Lina M. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EURO. COMP. L. & PRACTICE 131, 123 (2018).

[18] MILTON FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3, 15 (1953).

[19] *See, e.g.*, Alan Devlin & Michael Jacobs, *The Empty Promise of Behavioral Antitrust*, 37. HARV. J. L. & PUB. POL'Y 1009, 1023 (2015) (writing that "the behavioral account of competition cannot generate coherent rules of decision").

[20] Consumer Welfare Report at 7.

[21] *Id.*

[22] *Id.* at 8.

[23] *Id.*

output.[24] As such, a standard that condemns business conduct that reduces economic surplus to *any* group (i.e., not just consumers, but suppliers or workers, etc.) is likely to result in false positives relative to, for example, the comprehensive total surplus standard favored by the Chicago School.[25] Moreover, adding worker harms to the mix will not only create similar tradeoffs—conduct that may improve worker welfare and increase wages could harm small businesses and producer surplus—but also seem to deviate from the standard partial equilibrium models upon which modern antitrust is based, and thus risk going beyond the scope of administrable economic analysis.[26]

CONCERTED ACTION

Unlike the Sherman Act, which is a broad antitrust statute that can apply to agreements, unilateral conduct, and mergers (albeit the latter typically challenged using the Clayton Act), California's Cartwright Act is focused on agreements in restraint of trade (excluding mergers[27]). To be sure, as the Concerted Action report notes, the Cartwright Act reflects an antitrust regime "independent" from federal law.[28] However, courts have not only treated Sherman Act jurisprudence as "applicable" to the Cartwright Act.[29] They have also made clear that the Cartwright Act "mirrors" the Sherman Act's prohibition of restraints of trade.[30] Nonetheless, the report suggests that legislation could clarify that the "Cartwright Act is broader than federal antitrust law and has its own common law"[31] and contemplates using the Cartwright Act to condemn behavior that does not violate federal law.

As ITIF has previously explained, as a general matter, such an expansion of the Cartwright Act may result in issues that ultimately undermine state antitrust enforcement. Specifically, taking this approach could:

> …create tensions within the broader U.S. antitrust enforcement landscape. And, although it is true that Supreme Court in *California v. ARC Am. Corp.* held that state antitrust laws can prohibit behavior that is not unlawful under federal standards, this is not a blanket constitutional protection. That is, state antitrust laws could be pre-empted by Congress, and indeed courts have in some cases pre-empted state antitrust laws if they are incompatible with federal standards. Indeed, as distinct from the courts, Congressional pre-emption could also be used to address problems associated with state enforcement actions that go beyond accepted federal standards and create a fragmented antitrust enforcement landscape.[32]

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[24] *See* Peter Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULL. 271, 330–31 (2008).

[25] ROBERT BORK, THE ANTITRUST PARADOX (1978).

[26] *Cf.* Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 455, 471 (2018) (concluding that "the significant work and advancement in the modeling of general equilibrium and Pareto optimality has led to a dead end as far as relevance for antitrust analysis" and that the Pareto criteria are "basically unworkable for antitrust purposes because it cannot distinguish between an unlimited number of Pareto optimal points and it cannot make judgments between situations that involve a loss to any individual").

[27] State of California ex rel. Van de Kamp v. Texaco, Inc., 46 Cal. 3d 1147 (1988).

[28] Concerted Action Report at 5.

[29] *Id.* (citing Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc., 55 Cal. App. 5th 381, 400, 269 Cal. Rptr. 3d 446, 461 (2020)).

[30] *See, e.g.*, PLS.Com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824, 831–32 (9th Cir. 2022).

[31] Concerted Action Report at 8.

[32] Joseph V. Coniglio and Trelysa Long, *Comments for the California Law Review Commission Study of Antitrust Law Regarding Single-Firm Conduct and Concentration*, ITIF at 9 (May 2024).

The Concerted Action report identifies four specific areas for changes. First, the report considers eliminating the distinction between commodities and services for purposes of tying offenses under §16727 under the Cartwright Act, which at present only applies to commodities, claiming that "[f]rom an economic and market perspective there is no rational basis for distinguishing between commodities and other goods and services in the market."[33] ITIF agrees with this recommendation. Moreover, and importantly, such a change would not expand the Cartwright Act beyond federal law, but rather harmonize California's antitrust regime with existing national standards, as while tying claims under §3 of the Clayton Act are limited to sales or leases of goods or commodities, §1 of the Sherman Act allows for tying claims involving services.

The second reform proposal put forward by the report involves revising or deleting §16720(b)–(e), with the view that those sections "do not add significantly to the general condemnation in §16720(a)" of concerted restraints.[34] However, the report recommends retaining both §16720(e)(3), which specifically condemns resale price maintenance (RPM), and (c), which involves an "explicit condemnation of restraints affecting the buying side of the market (§16720(c))."[35] ITIF takes no issue with the first recommendation to eliminate §16720(b)–(e), which is in line with the Sherman Act's "common law statute" model, as distinct from a more rule focused approach.[36] However, excepting §16720(e)(3) on the grounds that RPM should be flagged for stricter scrutiny may result in problematic and unnecessary divergence from federal standards.[37] And, with respect to §16720(c), as noted *supra*, specific protections against buyer power not only risk straying from the federal consumer welfare standard, but put courts in the position of having to condemn conduct that may, for example, harm suppliers but increase both consumer and total surplus.

Third, the Concerted Action report suggests a reframing of the Cartwright Act's analytical structure whereby the "statutes impose a general condemnation of all restraints in §16720, §16722, and §16726, but §16725 provides an affirmative defense if the party defending a restraint demonstrates that it functions "…to promote, encourage or increase competition in any trade or industry, or …[is] in furtherance of trade."[38] ITIF has concerns with this proposal. Excepting cartel agreements, which will be *per se* unlawful, the report seems to suggest that the burden of proof or at least the initial burden of production may be with defendants having to show that their conduct is procompetitive, rather than with the plaintiff to show that the conduct will result in anticompetitive effects or harm. However, as highlighted *supra*, the vast majority of agreements to which the Cartwright Act is applicable do not raise anticompetitive concerns—either due to a lack of market power, the nature of the conduct, or the existence of procompetitive benefits—making such a shift in the evidentiary burden unjustifiable to the extent contemplated by the report.

Finally, the Concerted Action report highlights RPM as a practice that "should be categorically condemned."[39] Specifically, the report suggests 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."[40] In support of this approach, which is tantamount to treating RPM as *per se* unlawful, the report states without citation that "there is in fact little empirical support for the claim that

[33] Concerted Action Report at 62.

[34] *Id.* at 63.

[35] *Id.*

[36] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[37] *Id.*

[38] Concerted Action Report at 65.

[39] *Id.* at 66.

[40] *Id.*

RPM results in economically desirable outcomes."[41] However, there continue to be studies showing how RPM can result in welfare enhancing outcomes.[42] This supports the rule of reason approach taken by the Supreme Court in *Leegin*.[43] As such, *per se* condemnation for RPM remains inadvisable as an economic matter.

ENFORCEMENT AND EXEMPTIONS

The Enforcement and Exemptions report includes several potential actions for the California legislature to consider for purposes of modifying its antitrust regime. First, the report calls "to amend Cartwright to be applicable to single firm conduct."[44] As concerns this recommendation, as ITIF has previously explained, "[c]reating additional state antitrust liability should be a response to some failure of federal antitrust enforcement to adequately ensure competition and innovation in California," which does not appear to be the case.[45] Moreover, "even if amending the Cartwright Act to encompass unilateral conduct were a response to some limitations with respect to the existing legal framework," while adding a unilateral conduct regime for California is not necessarily problematic in principle, to the extent such a regime is justified on the grounds of going beyond the Sherman Act, it risks creating both substantive and practical issues that make it a suboptimal policy choice.[46]

A second potential action item asks "for the courts to utilize a 'structured rule of reason' standard or burden-shifting process where warranted in Cartwright cases."[47] According to the report, this "structured rule of reason" was applied by the California Supreme Court as a rule distinct from the traditional *per se*, rule of reason, and even quick look approaches.[48] Rather, in the words of the U.S. Supreme Court, this test reflects "an enquiry meet for the case" akin to "something of a sliding scale" whereby antitrust rules are commensurate with the severity of the conduct at issue.[49] Here the report may be based on a misunderstanding. That is, this "structured rule of reason" is not itself a rule that applies to determine whether a particular *instance* of conduct is unlawful (e.g., tying by firm X in market Y), but instead the means of determining which antitrust rule should apply to a conduct *category* (e.g., tying), or what commentators have called a "meta-rule of reason" in the context of Sherman Act §2 and which is rooted in a broader decision theoretic framework.[50] In other words, under this structured rule of reason, conduct that is extremely likely to harm competition, like horizontal collusion, is to be evaluated using a *per se* rule; by contrast, for conduct that is generally competitively neutral or procompetitive, like vertical non-price restraints, a rule of reason applies.

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[41] *Id.*

[42] *See, e.g.*, Rhys J. Williams, *Empirical Effects of Resale Price Maintenance: Evidence From Fixed Book Price Policies in Europe*, 20 J. COMP. L. & ECON. 108 (2024); Kohei Kawaguchi, Jeff Qiu & Yi Zhang, *Competitive Effects of Resale Price Maintenance Through Inventory: Evidence from Publishing Industry*, Economic Analysis Group Discussion Paper (2022).

[43] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S.Ct. 2705, 2715 (2007) ("Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance.").

[44] Enforcement and Exemptions Report at 21.

[45] Joseph V. Coniglio and Trelysa Long, *Comments for the California Law Review Commission Study of Antitrust Law Regarding Single-Firm Conduct and Concentration*, ITIF at 7–8 (May 2024).

[46] *Id.* at 7–9.

[47] Enforcement and Exemptions Report at 21.

[48] *See* In re Cipro Cases I & II, 61 Cal. 4th 116 (2015).

[49] Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 780–81 (1999); *see also* Fed. Trade Comm'n v. Actavis, Inc., 133 S.Ct. 2223 (2013).

[50] Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules* 73 ANTITRUST L.J. 435, 456 (2006).

Next, the Enforcement and Exemptions report invites the legislature to "[c]larify that antitrust standing requirement under Cartwright is based on general proximate cause rules, i.e. target area test."[51] Specifically, the report finds that California courts continued reliance on the factors in the Supreme Court's decision in *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters* that determine standing under the Sherman Act is based on "the erroneous view that California's antitrust statute and related standing doctrine are coextensive with the Sherman Act."[52] And, as the report intimates, the "target area test" is typically viewed as a lower bar to standing than the *AGC* test.[53] However, as noted *supra*, not only must California be wary of deviations from federal standards that may ultimately have unintended effects like undercutting California's antitrust regime, but it must also avoid major changes which substantially increase antitrust liability and open the door to "a deluge of litigation" that places substantial burdens on California's judicial system.[54]

A fourth potential action is given as clarifying "that resale price maintenance remains per se unlawful under the Cartwright Act notwithstanding the US Supreme Court's ruling in the *Leegin* case."[55] However, and as discussed *supra*, not only do empirical studies continue to demonstrate the procompetitive benefits of RPM, but treating RPM as *per se* unlawful would create a substantial gulf between California law and federal law, and thus contribute to fragmentation in the broader U.S. antitrust landscape. Indeed, condemning RPM as *per se* unlawful is also out of step with state antitrust practices, with Maryland being the only state that currently has a *per se* rule against minimum RPM (in New York, minimum RPM is not treated as *per se* unlawful, but unenforceable).[56] As such, following through with a *per se* approach risks making California an outlier among both state and federal antitrust norms regarding the treatment of RPM.

The Enforcement and Exemptions report further recommends consideration of whether the Cartwright Act should be amended to apply to mergers and acquisitions.[57] However, as the report itself notes, states already have the right to challenge mergers under the Clayton Act, which suggests that additional authority under the Cartwright Act would be, at least in theory, superfluous.[58] In fact, the Commission elsewhere acknowledged that "California cannot, as a practical matter, enact a merger statute that is more lenient than the federal standard."[59] And, as ITIF previously explained, "it is not at all clear how a stricter standard would be worthwhile."[60] Indeed, rather than be responsive to some failure of federal law to police anticompetitive acquisitions in California, there is already an extreme amount of scrutiny by the DOJ and FTC of, for example, acquisitions by large California technology companies thought to have a risk of harming potential competition.[61] And, of course, in court many of these theories of harm don't even pass muster.[62]

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[51] Enforcement and Exemptions Report at 21.

[52] *Id.* at 10.

[53] *Id.* at 9.

[54] Joseph V. Coniglio and Trelysa Long, *Comments for the California Law Review Commission Study of Antitrust Law Regarding Single-Firm Conduct and Concentration*, ITIF at 8 (May 2024).

[55] Enforcement and Exemptions at 21.

[56] See New York v. Tempur-Pedic International, Inc., 30 Misc. 3d 986 (N.Y. Sup. Ct. 2011), *aff'd*, 944 N.Y.S.2d 518 (1st Dep't 2012).

[57] Enforcement and Exemptions Report at 22.

[58] *Id.* at 2.

[59] R. Gilbert at al., California Antitrust Law and Mergers at 18 (Mar. 26, 2024).

[60] Joseph V. Coniglio, *Mergers and Innovation: Keeping California the World's Digital Leader*, ITIF at 7 (June 2024).

[61] *See, e.g.*, Jonathan Kanter, Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div., *Antitrust AAG Kanter Statement After Adobe and Figma Abandon Merger* (Dec. 18, 2023).

[62] Fed. Trade Comm'n v. Meta Platforms, Inc., No. 5:22-cv-04325-EJD, 2022 WL 16637996 (N.D. Cal. Nov. 2, 2022).

Relatedly, the Exemptions and Enforcement report countenances adoption of a "[p]re-Merger notification law only in conjunction with additional measures relating to payment of fees, expanded staffing of the Antitrust law Section, [and] penalties for violations."[63] Of course, the reason for this financial caveat is explainable by virtue of, as identified in the report, the substantial costs associated with running a merger control regime. Indeed, these costs are likely prohibitive for California to the extent it wishes to have a merger control regime that materially improves the status quo. To give one data point, whereas the federal antitrust agencies reviewed over 3,000 transactions in 2022, the report admits that the California Attorney General reviews "no more than half a dozen of them."[64] This is a huge gap that is consistent with the view that no reasonably practicable increase in funding is likely to add meaningful benefits on top of the existing and extensive federal merger control regime.[65]

RECOMMENDATIONS

For these reasons, ITIF has concerns with several of the proposals identified in the reports and offers the following recommendations:

- **Maintain the consumer welfare standard:** The Commission rightly strays away from the politicized neo-Brandeisian antitrust model which protects competitors rather than competition. However, its "competitive process" and "trading partner welfare" alternatives to the consumer welfare standard raise a number of acute problems both substantively and with respect to creating considerable fragmentation between California and federal antitrust law, which has long been guided by the view that the antitrust laws are a "consumer welfare proscription."
- **Keep the Cartwright Act's concerted action rules consistent with federal law:** While ITIF commends certain proposals, like extending tying liability to include services and making the language of the Cartwright consistent with the Sherman Act model of a "common law statute," preserving more specific rules to place greater scrutiny on RPM and buyer power is out of step with sound economic and legal principles. Moreover, for all restraints of trade, both the burden of proof and the initial burden of production should always rest with the plaintiff to produce evidence that the conduct in question is anticompetitive.
- **Radical reforms are unnecessary**: There is no need to radically expand California's antitrust regime by, for example, expanding it to encompass unilateral conduct or mergers, as well as through the creation of a costly and administratively burdensome merger control regime. Additionally, the use of a "structured rule of reason" is already a feature of modern antitrust jurisprudence, not as an alternative to the *per se*, quick look, or rule of reason tests for evaluating particular behavior, but as a mechanism for determining which of such (and other) rules will be used for general conduct categories.

CONCLUSION

ITIF appreciates the opportunity to submit comments to the Commission in connection with its ongoing review of California's antitrust regime. At bottom, changes to California's antitrust law should be grounded in empirically demonstrable failures by the *status quo* to protect competition and consumers. And yet, in reality, the past forty years have been a world-renowned success story for California's economy fueled by innovation and technological revolutions that continue to drive its dynamic businesses and benefit consumers. This

[63] Enforcement and Exemptions Report at 21.

[64] *Id.* at 13.

[65] FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2022 (2023).

system has been enabled not just by the creativity and entrepreneurial values that are key to California's culture, but also by a sound system of antitrust policy focused on protecting competition and consumers.

Thank you for your consideration.

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