ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION
SCHUMPETER PROJECT ON COMPETITION POLICY

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COMMENTS OF ITIF

Before the

California Law Review Commission Study of Antitrust Law

Washington, DC

In the Matter of:	)	
Mergers and Acquistions & Technology Platforms	)	Public Comment

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MERGERS AND INNOVATION: KEEPING CALIFORNIA THE WORLD'S DIGITAL LEADER

CONTENTS

INTRODUCTION

On March 26, 2024, the Technology Platforms Working Group of the California Law Revision Commission ("the Commission") Study of Antitrust Law issued a report ("Technology Platforms Report") discussing potential changes to California's antitrust laws aimed specifically at technology platforms.[1] On the same day, the Mergers and Acquisitions Working Group issued its own report ("Mergers and Acquisitions Report") analyzing antitrust merger policy.[2] The reports come amidst an ongoing process commissioned by the California legislature in 2022 to review the state's antitrust laws.[3]

The Information Technology and Innovation Foundation (ITIF) appreciates the opportunity to comment on the reports of the Technology Platforms and Mergers and Acquisitions Working Groups, and in particular to ensure that California and the United States more generally maintain their roles as the leading innovation hubs of the world. This comment follows ITIF's previous comment[4] to the Commission on its Single Firm Conduct[5] and Concentration[6] Reports. While ITIF applauds the Commission for its efforts to evaluate the adequacy of California's competition laws and consider possible changes, this comment highlights concerns with both the Technology Platform and Mergers and Acquisitions Reports, specifically regarding their respective legal and economic findings from the standpoint of promoting innovation.

This comment proceeds in four parts. The first analyzes the findings of the Technology Platforms Report and specifically whether the status quo, new general legislation, or some form of specific legislation for technology platforms is the best approach for California going forward. The second part considers the Mergers and Acquisitions Report and, in particular, the need to ensure that merger policy is consistent with Schumpeterian competition and benefits from scale, which can be chilled by structural presumptions of harm. Next, the comment provides the Commission with several recommendations to consider as it continues to reflect upon new legislation. A brief conclusion follows.

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[1] A. Garcia et al., Tech Platforms Working Group's Report (Mar. 26, 2024) [hereinafter Technology Platforms Report].

[2] R. Gilbert at al., California Antitrust Law and Mergers (Mar. 26, 2024) [hereinafter Mergers and Acquisitions Report].

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

[4] 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) [hereinafter ITIF California Comment].

[5] A. Edlin et al., Single-Firm Conduct Working Group, California Law Review Commission of Antitrust (Jan. 25, 2024).

[6] C. Johnson et al., Concentration and Competition in California: (Mar. 26, 2024).

CALIFORNIA'S ANTITRUST *STATUS QUO* IS WORKING

The Technology Platforms Report reflects concerns that the antitrust *status quo* may not be working as it regards the growth of large technology platforms or "Big Tech." But as the report admits, not only is it "universally acknowledged that California's technology sector is world class," [7] but of the world's 10 most valuable firms by market capitalization, eight are American and four are headquartered in California: Alphabet, Apple, Meta and Nvidia.[8] Indeed, as the report also recognizes, the revenues from the technology industry account for about a sixth of the Californian economy and over 1.5 million employees.[9] As such, large technology companies have not only made California the world's leading innovation hub, but brought opportunities to its economy as a whole. Moreover, rather than stagnate, California's digital markets are again leading the world in the next technological revolution associated with artificial intelligence,[10] driven in part by billions of dollars in investments by "Big Tech." These are digital markets that are thriving, not failing.

The benefits of this antitrust *status quo* in the U.S. and California are clear relative to Europe. Unlike the U.S., Europe lacks any large digital giants of its own and has seen its share of global wealth fall precipitously over the past 40 years. One simple reason for this divergence has to do with competition policy. Whereas the U.S. moved away from a structure focused antitrust regime that effectively equated conduct that increased concentration with harm to competition in favor of one that required proof of harm to consumers and reduced market performance, the Europeans continued much more along the former lines—competitive order meant some degree effective competition order in a way that was inherently opposed to monopoly.[11] Additionally, European competition law even proscribed exploitative offenses like excessive pricing, which can reduce the ability for firms to recoup the costs of innovation.[12]

In so doing, whereas the U.S. approach was open to the Schumpeterian scale driven competition that characterized so much of Silicon Valley's success, Europe's competition regime was inapposite to it. Specifically, as ITIF explained in its prior comment, "the success of Silicon Valley and the high-tech economy in America is a testament to Schumpeterian competition at work: for example, IBM's leadership in personal computing was displaced by Microsoft's paradigm shifting operating system, which was in turn leapfrogged both by Apple with its mobile platform as well as by Google (who surpassed Yahoo!) in general search, who in turn saw its position in advertising challenged by Facebook (overcoming MySpace) in social media."[13] Indeed, in the early 2000s, when the results of this transatlantic antitrust experiment were becoming clear, Europe began to adopt a "more economic approach" to antitrust enforcement.[14] But unfortunately for Europe, it was already too late: by the end of 2004, Google had gone public, Apple was drawing up the iPhone, and Meta had already been founded.

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[7] *See* Technology Platforms Report at 1.

[8] *Largest Companies by Market Cap*, COMPANIES MARKET CAP, https://companiesmarketcap.com/ (last visited Jun. 18, 2024).

[9] Technology Platforms Report at 1.

[10] Executive Department, State of California, Executive Order N-12-23, GSS_9534-1E-20230905164825 (ca.gov).

[11] *See, e.g.*, Joseph V. Coniglio, *Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism*, CPI ANTITRUST CHRON. (Summer 2017).

[12] *See, e.g.*, David S. Evans, & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 1 J. COMP. L. & ECON. 97 (2005).

[13] ITIF California Comment at 4.

[14] *See, e.g.*, Mario Monti, European Comm'r for Competition, Comments to the Speech of Hew Pate: Antitrust in a Transatlantic Context, Brussels, Belg. (June 7, 2004) ("[W]e have a great debt to the United States in helping us to forge our developments, including very recent ones, in antitrust policy and enforcement.").

The neo-Brandeisian concerns cited by the Technology Platforms Report do not suffice to cast doubt on a system that is working well. First, despite claims that current antitrust laws are insufficient to police "Big Tech," not only were both Microsoft and Intel to consent decrees by the Department of Justice (DOJ)[15] and Federal Trade Commission (FTC)[16] respectively, but antitrust lawsuits are currently ongoing against Google, Apple—both signed on by California—Amazon, and Meta. Accordingly, the idea that antitrust law "inordinately" focused on higher prices neglects that the consumer welfare standard and antitrust law more generally have long and consistently been viewed to encompass innovation.[17] Moreover, as concerns harm to potential competition from mergers and acquisitions, the perception of inadequate enforcement is explainable by cases like *Meta/Within*, which makes clear that, even for transactions that the agencies are aware of, actions alleging harm to potential competition appropriately face substantial burdens of proof to ensure that the antitrust laws are not used to chill procompetitive transactions based on speculative theories.[18]

Nor are any general changes to California's antitrust law necessary to address concerns with digital markets. First, such changes would be almost by definition overbroad, and thus not proportional to issues in digital markets, with the result being increased costs and false positives burdening the Californian economy. Indeed, as ITIF has noted previously, general changes in unilateral conduct enforcement being considered would, among other things, harm—not help—competition in California.[19] Moreover, the Technology Platforms Report itself identifies the House Antitrust Subcommittee's recommendation to override the Supreme Court's decision in *Spectrum Sports* but fails to mention that creating anticompetitive liability for leveraging that falls short of creating monopoly or market power would condemn behavior that does not necessarily result in any harm to consumers, but on the contrary very often benefits them, like self-preferencing. Similarly, eliminating the recoupment requirement for *Brooke Group*[20] and *Weyerhauser*[21] would condemn behavior that merely harms competitors without any ultimate harm to consumers and competition and thus also generate false positives.[22]

The alternative of adopting specific legislation to address tech platforms, of which the EU's Digital Markets Act (DMA) is given as an example, would be even more detrimental to Californian consumers and competition. Indeed, similar legislation in the United States, including the Open App Markets Act and the American Innovation and Choice Online Act (AICOA) have so far stalled in Congress, and for good reason. For example, as concerns the AICOA, Professor Hovenkamp has explained that the "AICOA was a bill that

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[15] *See* United States v. Microsoft Corp., 231 F. Supp. 2d 144, 149–150 (D.D.C. 2002), *aff'd*, 373 F.3d 1199, 1250 (D.C. Cir. 2004). The DOJ also entered into a settlement with Microsoft to resolve antitrust issues in 1994.

[16] Decision and Order, *In re* Intel Corp., FTC File No. 061-0247, FTC Docket No. 9341 (Nov. 2, 2010).

[17] *See, e.g.*, Lorain J. Co. v. United States, 342 U.S. 143 (1951); Int'l Salt Co. v. United States, 332 U.S. 392 (1947); IBM Corp. v. United States, 298 U.S. 131 (1936); Standard Oil Co. (Indiana) v. United States, 283 U.S. 163 (1931). Indeed, as one data point, between 2004 and 2014, the FTC alleged harm to innovation in approximately 54 of the transactions it challenged—approximately a third overall. *See* Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1931–32 (2015).

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

[19] *See* ITIF California Comment.

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

[21] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

[22] *See generally* Timothy J. Muris & Joseph V. Coniglio, *What Group Hath Joined Let None Put Asunder: The Need for the Price-Cost Recoupment Prongs in Analyzing Digital Predation,* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 1334 (2020) ("These conditions capture the essence of the recoupment requirement that is central to the modern rule—namely, that a predator be able not only to exclude competitors, but also recover its losses and harm consumers in the process.").

deserved to die" as "[m]any of its consequences are uncertain, but others are just plain bad."[23] Specifically, not only does the AICOA unfairly target innovative markets and firms based on size rather than market power, but its substantive rules would "condemn competitively harmless conduct by firms defined as gatekeepers."[24]

More generally, not only is digital regulation justifiable solely in the case of market failure—of which there is scant evidence—but the regulation must also improve the status quo relative to non-regulation. And yet, as the U.S. experience with regulation confirms,[25] ex-ante competition regimes raise a host of problems associated with chilling innovation and regulatory capture or the picking of winners and losers. For example, as with the DMA, applying broad *per se* rules to myriad forms of very often procompetitive behavior like self-preferencing or certain refusals to deal will inevitably chill procompetitive behavior. Indeed, even in the short time it has been enforceable, the DMA has already resulted in both harm to consumers as well as small businesses while effectively picking winners and losers by sending traffic to large intermediaries.[26] To be sure, while the proposal in the report suggests a regime where platforms could offer procompetitive defenses for their behavior, as ITIF previously explained, making a rule of reason balancing test the general standard for evaluating unilateral conduct will not only be unadministrable but also chill procompetitive behavior.[27]

MERGERS AND INNOVATION

In its review of antitrust merger enforcement, the Mergers and Acquisitions Report contains several notable oversights that risk clouding its analysis of potential changes. First, as the Supreme Court made clear in *Brown Shoe*—a case which is not cited in the report—for the Clayton Act, "the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."[28] Nowhere in its extensive discussion of the purposes behind the Clayton Act did the Supreme Court in *Brown Shoe* expressly invoke the panoply of specific non-competition goals—"protecting democracy, opportunity, and societal values"—mentioned in the report. To be sure, the Court did link a "rising tide of economic concentration" with a "lessening of competition," but as early as *Philadelphia Nat'l Bank* the Court made clear that structural evidence must be tied to some harm to market performance,[29] and *General Dynamics* confirmed that increases in market concentration do not necessarily suffice to meet the plaintiff's burden and create a presumption of harm.[30]

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[23] Herbert Hovenkamp, *Gatekeeper Competition Policy*, MICH. TECH. L. REV. (2023), Gatekeeper Competition Policy by Herbert Hovenkamp :: SSRN.

[24] *Id.*

[25] For a survey, see Douglas H. Ginsburg, *The Future of Regulation: What We Can Learn From the Past*, in FINDING NEW IDEAS IN OLD ONES 89 (2014).

[26] *See* Hadi Houalla, *The EU's DMA Investigations Place Innovation Under Microscope*, ITIF (May 28, 2024), The EU's DMA Investigations Place Innovation Under Microscope | ITIF (discussing how in addition to creating a worse user interface, the DMA's restrictions on Google have resulted in a shift in traffic away from small businesses like hotels and restaurants and toward Google's rivals like TripAdvisor and Expedia—effectively picking winners and losers).

[27] *See* ITIF California Comment at 10–11. By contrast, to the extent that the proposal should be interpreted to apply a no-economic sense test whereby a procompetitive justification was sufficient for legality, it would likely result both in false negatives for conduct like tying where procompetitive benefits may be outweighed by anticompetitive harms, as well as false positives relative to a sham innovation test applied for predatory innovation. *See* Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP, 592 F.3d 991 (9th Cir. 2010).

[28] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[29] United States v. Philadelphia National Bank, 374 U.S. 321, 370 (1963).

[30] United States v. General Dynamics Corp., 415 U.S. 486, 501 (1974).

Second, from an economic standpoint, the report's trifurcation of antitrust merger policy into a Chicagoan model, a centrist camp presumably associated with the "post-Chicago" school mentioned elsewhere in the report, and the neo-Brandeisian movement overlooks several other key models for antitrust policy. In addition to the Harvard School, which was critical to the formation of the prior antitrust consensus,[31] one of these alternative models is a dynamic view of antitrust rooted in the work of Austrian economists like Joseph Schumpeter.[32] As ITIF has previously explained, Schumpeterian competition and creative destruction, whereby firms compete for the market by creating new products, captures the essence of the American technology success story:

> IBM's leadership in personal computing was displaced by Microsoft's paradigm-shifting operating system, which was in turn leapfrogged by the Internet tidal wave beginning with Google (who surpassed Yahoo!) in general search, who saw its position in advertising challenged by Facebook (overcoming MySpace) in social media. This cycle, which continues today, led to the rise of the American technology titans that are the economic envy of the world—each not only driving innovation, but competing with one another as they do it. And that technological leadership led to increased global market share, driving U.S. jobs and competitiveness.[33]

Unfortunately, in its discussion of innovation, the Mergers and Acquisitions Report attempts to cabin Schumpeterian innovation incentives in cases of "imperfect intellectual property rights" and other unspecified conditions, which minimizes the robust body of empirical evidence consistent with Schumpeter's theory.[34] As ITIF explained in its prior comments:

> Schumpeter's insights have more than withstood the test of time. While the general relationship between market structure and innovation has long been a matter of great debate, numerous studies across many economies around the world continue to confirm that the relationship often takes the form of an inverted-U, where markets characterized by many firms are less innovative than markets with a few firms, and markets with a few firms exhibit more innovation than those characterized by monopoly. In fact, for some U.S. studies the relationship is negative, and thus strongly supportive of the Schumpeterian thesis that firms in less concentrated markets lack robust incentives to engage in the risk-taking and R&D that drives innovation.[35]

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[31] *See* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, COLUM. BUS. L. REV. 1 (2007).

[32] *See, e.g.*, J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5(4) J. COMP. L. & ECON. 581 (2009); *see also* Joseph V. Coniglio, *Twilight of the Lodestars: Brandeis, Chicago, Schumpeter, and the Future of Competition Policy*, CPI NA COLUMN (July 2021).

[33] Joseph V. Coniglio, *Protecting Innovation: Why the Draft Merger Guidelines Fall Short*, ITIF (Sept. 2023), https://itif.org/publications/2023/09/27/comments-regarding-premerger-notification-reporting-and-waiting-period-requirements/.

[34] *See* Philippe Aghion et al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 701 (2005); Michael R. Peneder & Martin Woerter, *Competition, R&D and Innovation: Testing the Inverted-U in a Simultaneous System*, 24 J. of EVOLUTIONARY ECON. 653 (2014) (Switzerland); Michiyuki Yagi & Shunsuke Managi, *Competition and Innovation: An Inverted-U Relationship Using Japanese Industry Data*, Discussion Papers 13062, Research Institute of Economy, Trade and Industry (RIETI) (2013) (Japan); Michael Polder & Erik Veldhuizen, *Innovation and Competition in the Netherlands: Testing the Inverted-U for Industries and Firms*, 12 J. INDUS. COMPETITION AND TRADE 67 (2012) (Netherlands); Chiara Peroni & Ivete Gomes Ferreira, *Market Competition and Innovation in Luxembourg*, 12 J. INDUS. COMPETITION AND TRADE 93 (2012) (Luxembourg).

[35] ITIF California Comment at 3.

Moreover, the Mergers and Acquisitions Report fails to note that while the new Merger Guidelines "make frequent reference to the potential for mergers to harm competition by suppressing innovation,"[36] as ITIF noted in comments, any serious consideration of the incentives underlying Schumpeterian competition is omitted in favor of a thoroughly Arrowian view:

> Conspicuously absent from this discussion is any recognition of how mergers can facilitate innovation, including by enhancing the ability for appropriation, increasing scope and scale, and supporting investment in R&D—that is, basic themes of Schumpeterian competition. Although the Draft Merger Guidelines acknowledge that "[d]evelopment of new features depends on having the appropriate expertise and resources," the only inference they draw is that a merger between two such firms "with specialized employees, development facilities, intellectual property, or research projects in a particular area" can harm competition by reducing innovation—and not that a merger can increase innovation by creating "the appropriate expertise and resources" to foster dynamic competition.[37]

One proposal identified by the Mergers and Acquisitions Report is to amend California's antitrust law to address mergers and acquisitions. And yet, as the report itself notes, "the state Attorney General's office has exercised enforcement powers under the Clayton Act both on national mergers as well as on mergers of state and local importance."[38] Furthermore, the report acknowledges that "California cannot, as a practical matter, enact a merger statute that is more lenient than the federal standard."[39] But it is not all clear how a stricter standard would be worthwhile. For example, the report notes the "appreciable risk" standard under the proposed Consolidation Prevention and Competition Promotion Act (CPCA), which is defined as "more than a *de minimis* amount."[40] Deviating from *Brown Shoe*'s warning that merger policy not focus on "ephemeral possibilities" but transactions that have a "probable anticompetitive effect"[41] would open a Pandora's Box that would have absurd results in a dynamic economy full of possibility—thousands of ultimately procompetitive mergers may be thought to have some "appreciable risk" of harm ex-ante.

Another proposal identified in the report is the Platform Competition and Opportunity Act, which is targeted specifically at acquisitions by digital platforms. It places the burden on the platform to show that its deal is not anticompetitive using clear and convincing evidence, in large part to address concerns with so called "killer acquisitions."[42] However, as ITIF has explained, "fears about underenforcement in the form of failing to protect potential competition in technology markets from 'killer acquisitions' appear to be overstated. In particular, concerns about killer acquisitions may be more well-founded in pharmaceutical markets characterized by drastic innovations, and where innovation milestones are easy to observe, rather than in technology markets."[43]

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[36] Mergers and Acquisitions Report at 14.

[37] Joseph V. Coniglio, *Protecting Innovation: Why the Draft Merger Guidelines Fall Short*, ITIF (Sept. 2023), https://itif.org/publications/2023/09/27/comments-regarding-premerger-notification-reporting-and-waiting-period-requirements/.

[38] Mergers and Acquisitions Report at 1.

[39] *Id.* at 18.

[40] *Id.*

[41] Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

[42] Mergers and Acquisitions Report at 19.

[43] Joseph V. Coniglio, *Comments to the FTC and DOJ Regarding Premerger Notification Reporting and Waiting Period Requirements*, ITIF (Sept. 2023), https://itif.org/publications/2023/09/27/comments-regarding-premerger-notification-reporting-and-waiting-period-requirements/.

RECOMMENDATIONS

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

- **Reassess the need for antitrust changes:** California has been the global hub of innovation for the past several decades. Its economy is driven by dynamic Schumpeterian competition in the tech sector, which is experiencing yet another gale of creative destruction with artificial intelligence. Rather than impede this innovation, California should look to conserve the legal ecosystem that made it the innovation leader of the world.
- **The status quo is working:** Unlike Europe, the U.S. and California have a booming tech sector because they were open to the Schumpeterian competition that continues to characterize so much of Silicon Valley's dynamism. Market concentration is a feature, not a bug, of this type of competition, and proposals to expand antitrust liability either generally or for digital markets specifically are likely to have the overwhelming effect of chilling procompetitive behavior that benefits consumers.
- **Mergers can drive dynamic efficiencies:** Mergers are often a crucial way to create the scale necessary for the flourishing of Schumpeterian competition, which has been established by a robust body of literature showing that innovation is often maximized when there are only a few firms in a market. California already enjoys sufficient tools to police anticompetitive mergers, and should avoid taking cues from neo-Brandeisian inspired merger guidelines or legislative proposals that seek to take merger enforcement well beyond its proper scope.

CONCLUSION

As intimated in our prior comment, California's digital markets are, without exaggeration, perhaps one of the greatest economic success stories in modern history. In just a few decades, California has become home to four of the most valuable companies in the world, which continue to drive innovation and technological progress forward into the new frontiers of artificial intelligence, robotics, and much more. California's digital markets thus exhibit the very opposite of the sort of market failure that could justify substantial changes to California's antitrust regime modeled after federal proposals, which are ironically perhaps far less likely to succeed than responsive Congressional action aimed at curbing antitrust expansionism at the state level. At bottom, amidst continued gales of creative destruction, the antitrust policies that enabled the Schumpeterian and scale-driven competition that made California the economic success story that it is remain just as necessary going forward.

Thank you for your consideration.

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