

GIBSON DUNN



Antitrust & Competition Update

January 15, 2025

Staff of California Law Revision Commission Proposes Changes to California Antitrust Laws

Gibson Dunn lawyers are monitoring the recommendations and are available to discuss the implications for your business or assist in preparing a public comment for submission to the CLRC.

California has long had antitrust and unfair competition laws, including the Cartwright Act,^[1] Unfair Competition Law,^[2] and Unfair Practices Act.^[3] In August 2022, the California Legislature directed the California Law Revision Commission (the CLRC) to recommend potential changes to these laws.^[4] The CLRC created eight working groups, received public comments, and held hearings. On January 13, 2025, the staff of the California Law Revision Commission recommended extensive changes to California's antitrust laws, including: (1) adopting a law on unilateral anticompetitive conduct by a company, (2) revising the state process for merger review, and (3) expanding private plaintiffs' ability to sue while restricting available defenses.

The staff recommendations are submitted to the CLRC's commissioners, who will ultimately decide whether to recommend revisions to the legislature. Typically, the CLRC will make a tentative recommendation within 2–3 months and then open a period of public comment on those recommendations. The CLRC's final recommendations across a wide range of laws have historically been enacted into law over 90% of the time.^[5] Gibson Dunn attorneys are monitoring these recommendations and are available to discuss the implications for your business or assist in preparing a public comment for submission to the CLRC.

Staff Report's Recommendations for Change

First, the staff recommended adopting a law to reach unilateral acts by a single company. Currently, California's Cartwright Act is similar to Section 1 of the federal Sherman Act, which prohibits anticompetitive agreements between two or more entities, but the Cartwright Act contains no provision analogous to the unilateral conduct provisions of Section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize. The CLRC staff recommended adopting such an analogue, though they rejected wholesale adoption of Section 2, on the view that it had developed too many "jurisprudential limitations that can undermine effective enforcement."^[6] The CLRC staff instead preferred a bespoke, and more enforcement-friendly, standard that modifies the general federal standard with express language rejecting certain limitations that have arisen out of federal case law. While the staff did not enumerate these modifications, they may include provisions restricting a company's ability to refuse to deal with competitors,^[7] easing the requirements for predatory pricing claims,^[8] and eliminating the requirement that plaintiffs define and prove a relevant market.^[9] The staff also recommended "integrating elements" of an "abuse of dominance" standard—the prevailing standard used in European competition enforcement—to further "challenge dominant companies' conduct that defy a ready application" of federal law.^[10]

Second, the CLRC staff made two recommendations for changing merger law. The staff recommended that California adopt its own regime for premerger notification and merger approval and that the regime prohibit mergers that create an "appreciable risk" of lessening competition – a standard that would go beyond the prevailing federal test.^[11] If adopted, this would reduce the burden on the California Attorney General in challenging mergers and allow for challenges based on alleged harm to "labor, innovation, and other nonprice elements"—even though the Mergers and Acquisitions Working Group recognized such a change "could impose significant burdens" and may be unnecessary as courts could "adjust . . . with no change in the relevant antitrust statutes."^[12]

Third, the CLRC staff noted a number of other potential changes that, if adopted, would give more plaintiffs standing to bring antitrust claims, ease their burden in doing so, and restrict the defenses available to defendants. These include adopting a "proximate cause" test to determine standing under the Cartwright Act; eliminating the Cartwright Act's limitation to tying claims involving only commodities and services; precluding defendants from offering business justifications for tying; codifying that resale price maintenance in California is per se illegal; and "strengthen[ing] laws on information sharing by competitors."^[13]

Notably, the CLRC staff recommended against adopting certain changes, including advising against laws specific to technology companies, preferring general changes.

Takeaways

If adopted, the CLRC staff's proposed changes would proscribe conduct that was previously lawful under both federal and state law and encourage competition lawsuits to be filed under California law. The proposed revisions to California's merger laws would expand the role of California's Attorney General in investigating mergers. Merging parties could face increased burden associated with pre-merger filings, longer merger reviews, and potentially inconsistent outcomes under federal and state review. If enacted into law, these changes thus would expand

potential liability; enhance the risk of facing investigations, enforcement actions, or private lawsuits; and complicate or frustrate potential acquisitions and other deals.

Furthermore, the California Assistant Attorney General has previously threatened to “reinvigorat[e] criminal prosecutions under the Cartwright Act.”^[14] The proposed Cartwright Act revisions from the staff memo could embolden an aggressive enforcement agenda and provide new ground for prosecutors to test new theories, including those beyond federal antitrust law.

Because the CLRC’s recommendations historically have been adopted into law at a high rate, companies should think carefully about how the staff’s proposed changes may affect their businesses and whether to provide comments for the CLRC to consider before issuing a final recommendation to the legislature. Attorneys from Gibson Dunn are available to help in preparing a public comment for submission to the CLRC or to the legislature as they consider potential bills, to discuss how these proposed changes may apply to your business, or to address any other questions you may have regarding the issues discussed in this update.

^[1] Bus. & Prof. Code §§ 16700 – 16770.

^[2] Bus. & Prof. Code §§ 17200 – 17210.

^[3] Bus. & Prof. Code §§ 17000 – 17101.

^[4] 2022 Cal. Stat. Res. Ch. 147 (ACR 95). Specifically, the legislature asked the CLRC to study: (1) Whether the law should be revised to outlaw monopolies by single companies; (2) Whether the law should be revised in the context of technology companies; and (3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state’s antitrust laws. *Id.*

^[5] Cal. L. Revision Comm’n, <https://clrc.ca.gov/> (last visited Jan. 15, 2025).

^[6] Memorandum, [Initial Recommendations for ACR 95 Questions](#), Cal. L. Revision Comm’n (Jan. 13, 2025) at 5 [henceforth “Staff Memo”].

^[7] Memorandum, [Single-Firm Conduct Working Group](#), Cal. L. Revision Comm’n (Jan. 25, 2024), at 7, 13, 17.

^[8] *Id.* at 6, 13, 17 (8(iii)).

^[9] *Id.* at 18.

^[10] Staff Memo at 8.

^[11] *Id.* at 12.

^[12] *Id.*; see also Memorandum, [California Antitrust Law and Mergers](#), Cal. L. Revision Comm’n (May 28, 2024), at 20.

[13] *Id.* at 13.

[14] Bonnie Erslinger, *Top Calif. Antitrust Atty Says Criminal Cases On The Horizon*, Law360, Mar. 6, 2024 <https://www.law360.com/california/articles/1810754>. Criminal penalties under the Cartwright Act can be quite strong: fines of up to the greater of \$1 million or twice the pecuniary gain or loss for corporations and fines of up to the greater of \$250,000 or twice the pecuniary gain or loss and up to three years imprisonment for individuals. Bus. & Prof. Code § 16755(a).

The following Gibson Dunn lawyers prepared this update: Rachel Brass, Dan Swanson, Caeli Higney, Julian Kleinbrodt, Sarah Roberts, and Gaby Candes.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's Antitrust and Competition, Mergers and Acquisitions, or Private Equity practice groups in California:

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