

## Memorandum 2023-29

**Antitrust Law: Status Report**

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This memorandum provides an update on the status of the Commission's study of antitrust law.<sup>1</sup> The latest developments are as follows:

- At the June 22, 2023, meeting, Professor of Law Alison Jones of King's College London, will make a presentation on European Union competition law. A brief biography of Professor Jones was attached in an Exhibit to Memorandum 2023-27. The staff is grateful to Professor Jones for sharing her time and expertise.
- Due to other pressing constraints on his time, Professor Jonathan Baker has withdrawn from the working group on mergers. The staff appreciates his contributions to date.
- The Commission received a letter from Kaitlyn Harger, PhD, Senior Economist at the Chamber of Progress. It is attached. Her letter references three papers that she believes the Commission would benefit from reading. In the interest of keeping this memorandum to a manageable size, the papers cited by Dr. Harger were not attached. However, footnotes in the letter include working links to all three.

Respectfully submitted,

Brian Hebert  
Executive Director

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Most materials can be downloaded from the Commission's website ([www.clrc.ca.gov](http://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.



May 23rd, 2023

Dr. David Carrillo, Chairperson  
California Law Revision Commission  
c/o UC Davis School of Law  
400 Mrak Hall Drive  
Davis, CA 95616

**Re: California Law Revision Commission - Study B-750 (Antitrust Law)**

Dear Chairperson Carrillo and Members of the Commission:

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

At the Commission's February 16, 2023 meeting, you heard a presentation from Professor Thomas Greene regarding the traditional "consumer welfare" standard in antitrust law and proposed reforms of that standard.<sup>1</sup>

To aid your ongoing examination of this issue, I have attached two papers that provide valuable insights into the potential ramifications of eliminating the consumer welfare standard.

A 2019 [report](#) published by the [International Center for Law and Economics](#), a nonprofit and nonpartisan research center collaborating with over fifty academic affiliates and research centers worldwide, delves into the benefits of the consumer welfare standard.

The report describes how consumers benefit from both lower prices and more choices that are byproducts of the consumer welfare standard:

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<sup>1</sup> <http://www.clrc.ca.gov/pub/2023/MM23-11s1.pdf>

*“This is to say that these firms are tailoring their own output to consumer preferences, thereby enabling them to expand production at theoretically lower prices (a theory which appears to be empirically verifiable for anyone using one of these platforms). Thus, **the remedy that would be imposed—prohibiting firms from acting upon information that would optimize their production processes—is equivalent to demanding that production of goods and services be less efficient, and consumers thereby pay higher prices and have less choice.**”<sup>2</sup>*

Abandoning the consumer welfare standard would alter the incentives for businesses and is likely to result in a decrease in product offerings and higher prices for consumers.

Distinguished Professor Carl Shapiro, from the Haas School of Business and the Department of Economics at the University of California Berkeley, expands on this concept in his work "[Regulating Big Tech: Factual Foundations and Policy Goals](#)". Shapiro discusses the importance of enabling companies that offer the greatest benefits to consumers to thrive. He frames his discussion around a report issued by the House Judiciary Committee in October 2020, which, “served as the evidentiary basis for the bills related to competition and digital platforms” considered by the committee and related antitrust reform proposals.

He writes,

*“I am concerned that the HJC Report takes a negative view of actions by the Big Tech firms that enable them to gain or extend their competitive advantage over their rivals by lowering their costs or expanding their product offerings. **Stopping market leaders from better serving customers does not promote competition; it reduces competition and harms consumers.**”<sup>3</sup>*

Abandoning the consumer welfare standard could result in decreased competition, subsequently depriving consumers of benefits such as lower prices and a wider array of product offerings.

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<https://laweconcenter.org/wp-content/uploads/2019/07/Concluding-Comments-The-Weaknesses-of-Interventionist-Claims-FTC-Hearings-ICLE-Comment-11.pdf>, emphasis added

<sup>3</sup> <https://www.networklawreview.org/shapiro-big-tech/>, emphasis added

In 2019, Professor Shapiro published a paper in *Antitrust Magazine* titled, “[Antitrust: What Went Wrong and How to Fix it](#)”. In this study, Shapiro discusses how the consumer welfare standard is important for incentivizing economic growth and maintaining U.S. competitiveness. Shapiro writes,

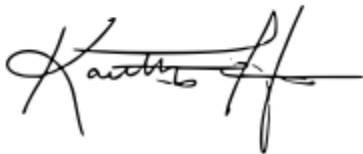
*“Breaking up successful, efficient, and innovative companies merely because they have grown too large or powerful is antithetical to the competitive process. Economic theory and evidence indicate that a widespread campaign to break up large firms on a “no-fault” basis would **slow economic growth by making our economy less competitive and less innovative.**”<sup>4</sup>*

Overall, Shapiro's research suggests that **eliminating the consumer welfare standard would have detrimental effects on consumers, reducing competition, and stifling innovation within the U.S. economy.**

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

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

Respectfully,

A handwritten signature in black ink, appearing to read 'Kaitlyn Harger', with a long horizontal flourish extending to the right.

Kaitlyn Harger, PhD  
Senior Economist  
Chamber of Progress

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<sup>4</sup> <https://conference.nber.org/confer/2022/IOs22/Shapiro.pdf>