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New York State Senate Passes 'Twenty-First Century Anti-Trust Act,' Aimed to Curb Big Tech

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In June 2021, the New York State Senate passed the "Twenty-First Century Anti-Trust Act" (the "Act"). The Act, which varies in considerable ways from the previously proposed bills, contains sweeping changes to the state's antitrust laws, which includes prohibiting certain conduct for companies with a "dominant position," requiring state-level pre-merger filings, and providing additional protections for employees in labor markets.

This development brings New York one step closer to enacting antitrust reforms that would dramatically alter the competitive landscape in the state and potentially more broadly. The Act expressly departs from decades of settled judicial precedent on issues such as the burden of proof in establishing a firm's power to monopolize a market, and on a firm's ability to offer pro-competitive justifications to rebut a challenged "abuse" of its "dominant position." And while the Act's sponsors expressly said it was intended to target Big Tech, it will apply far more broadly than that if passed, affecting nearly every industry doing business in New York. New York raises the specter of dramatic overhauls to the antitrust laws at the state level that may overtake the federal enforcement regime.

The act moved to the New York State Assembly but has not yet been voted on. The legislative calendar ended for the year on June 10, so unless a special session is convened to vote on the Act, the Act will need to be reintroduced next year.

Background

It is no secret that the Act, which was first introduced last year in a slimmed-down format, is targeted at Big Tech. New York state Senator Michael Gianaris noted, "We have a problem in this country. We have a problem that there is tremendous market power in very, very few hands. . . . Small startups and medium-sized businesses don't have the opportunity to grow and innovate."[1]

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Now, the Act has passed through the Senate with a vote along party lines, with Democratic Senators leading its passage by a margin of 43-20.

Key Provisions

The Act is noteworthy for many reasons, not least its impact on nearly every aspect of antitrust enforcement, from cartelization to single-firm activity (including employment covenants), whether pursued in state enforcement actions (civil or criminal) or in private class litigation. The Act would also create another suspensory pre-merger notification requirement for many transactions on top of the existing filing requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act").

Targeting Big Tech, the Act seeks to "update, expand and clarify" New York's state laws "to ensure that these large corporations are subject to strict and appropriate oversight by the state." Further, the Act states that:

- "there is great concern for the growing accumulation of power in the hands of large corporations";
- "effective enforcement against unilateral anti-competitive conduct has been impeded by courts, for example, applying narrow definitions of monopolies and monopolization, limiting the scope of unilateral conduct covered by the federal anti-trust laws, and unreasonably heightening the legal standards that plaintiffs must overcome to establish violations of those laws";
- "one of the purposes of the state's anti-trust laws is to ensure that its labor markets are open and fair"; and
- "anti-competitive practices harm great numbers of citizens and therefore must ensure that class actions may be raised in anti-trust suits."[2]

"Dominant Position"

One of the more controversial aspects of the Act is its prohibition on unilateral "abuse" of a "dominant position." The New York Senate finds that unilateral conduct is "as harmful" as "contracts or agreements of multiple parties . . . and should be treated similarly under the law." This viewpoint is at odds with federal law, as the Sherman Act treats multi-firm conduct (Section 1) differently from single-firm conduct (Section 2).

Moreover, the U.S. Supreme Court has often noted that Section 2 of the Sherman Act "does not forbid market power to be acquired 'as a consequence of a superior product, [or] business acumen.'"[3]

While the original Act left the terms undefined, the updated version explains the criteria for establishing (1) a firm's "dominant position" using direct or indirect evidence, and (2) an "abuse" of that position. In the latest version, direct evidence of a firm's "dominant position" includes "the unilateral power to set prices, terms, conditions, or standards; the unilateral power to dictate non-price contractual terms without compensation; or other evidence that a person is not constrained by meaningful competitive pressures, such as the ability to degrade quality without a suffering reduction in profitability." Indirect evidence of a "dominant position" can be shown by market shares, with sellers having a share of forty percent or greater.

The Act defines "abuse" of a "dominant position" as conduct that "tends to . . . limit the ability or incentive" of actual or potential competitors to compete. By targeting conduct that only "tends to" produce those effects, the Act arguably prohibits at least some pro-competitive conduct. Just as troubling, the Act would not obligate enforcers to distinguish one from the other: it states that evidence of pro- competitive effects cannot be used to rebut a showing of an "abuse" of a "dominant position." This change is a dramatic departure from Sherman Act precedent that obligates courts to identify the actual anti-competitive effects of a challenged practice, and balance them against proffered pro-competitive rationales.

One prominent example of "abuse" cited in the Act is a "dominant" party's refusal to do business with another party in a way that "unnecessarily exclude[es] or handicap[s] actual or potential competitors." This example turns on its head the standard for refusals to deal at the federal level, where the courts have long coalesced around the position that "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[4]

Pre-Merger Notifications in New York

The Act would alter the landscape of competition enforcement not just over conduct matters, but merger enforcement as well. The Act updates the state's pre-merger notification requirements, building off of the HSR Act's size of person and size of transaction tests. As to New York's size of transaction threshold, that prong is met where the acquiring person will hold an aggregate total amount of voting securities and assets

"in excess of ten per centum of the current thresholds specified by the United States Federal Trade Commission."

For 2021, the minimum value requiring a filing under the HSR Act is $92 million, meaning a New York filing would be required for any transaction in excess of $9.2 million. As to the size of person prong of the New York test, the Act dictates that the companies must have "assets or annual net sales within the state in excess of two and one-half per centum of the current thresholds specified by the United States Federal Trade Commission," which would be $2.3 million for 2021. Where transacting parties meet both of these thresholds, the Act requires a state-specific pre-merger notification 60 days prior to closing and does not provide for any early termination mechanism.

In addition, for those deals that trigger a federal filing under the HSR Act, the parties must provide a copy of that filing to New York at the same time as the HSR Act's filing is made.

The Act also confers upon New York's Attorney General the ability to consider the transaction's effect on labor markets, which expands the state's ability to block transactions. Furthermore, the Act strengthens the state's recourse for merging parties' noncompliance, with failure to abide by the pre-merger notification requirements resulting in penalties of up to $10,000 per day.

Labor Rights

The Act takes direct aim at alleged anti-competitive practices that harm labor markets, and contains explicit protections for employees. In labor markets, "abuse" of a "dominant position" may include "imposing contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind, or restricting the freedom of workers and independent contractors to disclose wage and benefit information." Direct evidence of a "dominant position" in labor markets includes the use of no-poach agreements, non-compete clauses, or employers having the unilateral power to set wages.

Employees and independent contractors were explicitly added to the section discussing the rights of workingpersons to join in unions, organizations, and associations not organized for profit. The Act further adds that collective bargaining of wages, and terms and conditions of employment may not be prohibited or restricted. Lastly, the Act provides that a bona fide collective bargaining agreement, or terms therein, shall not be considered evidence of a violation of a "dominant position."

Other Changes

Several other changes take shape in the most current iteration of the Act:

- Monopsonies are now included alongside monopolies in all relevant provisions of the Act;
- New York's Attorney General may sue on behalf of private citizens within five years of a violation of the Act, as opposed to three years; and
- Private litigants would be able to collect fees and costs for expert witnesses and consultants, provided they are successful in their lawsuit.

This version of the Act also retained the increased penalties for an antitrust violation, with individuals facing a fine of $1 million and/or four years imprisonment, and corporations facing fines up to $100 million.

Takeaways

There are several key takeaways if the Act ultimately becomes law, many of which are certain to create challenges for firms seeking to comply with the statute and/or defend themselves in court.

First, defining a relevant market historically has been a dispositive threshold issue in determining the outcome of an antitrust case. By obviating this requirement, the Act would significantly lower the bar for plaintiffs, likely resulting in extensive new litigation.

Second, the mere presence of a non-compete agreement between employers and employees may be considered direct evidence of a firm having a "dominant position" in a labor market. If established, a court could conclude a firm has "abused" its "dominant position" if the contract restrains a person "from engaging in a lawful profession, trade, or business of any kind." The Act follows a trend at both the state and federal levels calling for increased scrutiny over the use of non- solicitation and non-compete agreements.[5]

Third, the Act requires parties to notify New York 60 days prior to closing transactions that trigger the Act's pre-merger notification thresholds.

Furthermore, unlike under the federal regime, the state has no statutory ability to terminate the 60-day period early. And where pre-merger notifications are required under the HSR Act, the merging parties must be prepared to submit those notifications to New York at the same time as the notifications are sent to the federal agencies. The Act's pre-merger requirements

will not only add new burdens on transacting parties, but they could further delay closings while New York reviews deals.

Finally, the New York Act would require state notifications in many situations where the HSR Act does not require notifications because of the Act's lower reporting thresholds and failure to recognize reporting exemptions in the HSR Act.

Notes

1. Ryan Tracy, *New York Senate Passes Antitrust Bill Targeting Tech Giants*, *The Wall Street Journal* (June 7, 2021), *https://www.wsj.com/articles/new-york-senate-passes-antitrust-bill-targeting-tech-giants-11623098225*.
2. N.Y. Legis. S. S-933A.
3. *Copperweld v. Independence Tube*, 467 U.S. 752 (1984).
4. *FTC v. Qualcomm Inc.*, D.C. No.19-16122 (9th Cir. Aug. 11, 2020).
5. *See* "Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets," Department of Justice, Antitrust Division and Federal Trade Commission, April 2020, *available at https://www.justice.gov/opa/press-release/file/1268506/download*. *See also* "Public Comments of 19 State Attorneys General in Response to the Federal Trade Commission's January 9, 2020 Workshop on Non-Compete Clauses in the Workplace," *available at https://oag.ca.gov/system/files/attachments/press-docs/FTC-Comment-Letter-Non-Compete-Clauses-Workplace.pdf* (urging the FTC to enjoin "abusive" covenants not to compete).

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