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Proposed "Radical" Changes to New York's Antitrust Law

Proposed Legislation Would (1) Delay for 60 Days the Consummation of Many Transactions Valued as Low as $9.2 Million and (2) Establish a New "Abuse of Dominance" Standard Subjecting Many Small Businesses to Treble Damages

On June 7, 2021, the New York State Senate passed the "Twenty-First Century Anti-Trust Act" (available here). New York State Senator Michael Gianaris, who co-sponsored the bill, described it as addressing what he viewed as the "desperate need to radically alter our regulatory efforts on antitrust."[1] Although New York's General Assembly did not take up the proposed legislation before the legislative session ended on June 10, Senator Gianaris is reported to be committed to advancing the bill next session.[2]

Two aspects of the proposal are particularly noteworthy:

(1) Creation of a new pre-merger notification requirement and 60-day waiting period before even very small transactions with a tangential relationship to New York would be permitted to close, including essentially any sale of voting securities valued at over $9.2 million involving an institution with a connection to New York, and

(2) Adoption of Europe's "abuse of dominance" standard to impose liability on conduct that would not otherwise be illegal under federal antitrust law; the breadth of the approach would likely subject many small businesses in New York to claims that they are abusing a dominant position in their local region.

Although the proposed law was purportedly designed to deal with "big tech," its application is wide-ranging. If enacted, these proposals would make illegal many common industry practices, including, for instance, the daily buying and selling of the securities necessary to support the low-cost index funds preferred by many investors. The constitutionality of these far-reaching burdens on interstate commerce would likely be the subject of significant litigation, especially if other state legislatures adopt similar restraints on businesses with similarly tangential connections to their own states.

Expansive premerger-notification requirement and 60-day waiting period. The proposed law creates a mandatory premerger notification regime similar to—but of far greater scope than—the regime established under the federal Hart-Scott-Rodino ("HSR") Act. Under the HSR Act, parties seeking to engage in certain transactions valued in excess of $92 million are required to inform federal antitrust enforcers about the proposed transaction and wait either 15 days in the case of cash tender offers or, more commonly, 30 days before the transaction can be completed (unless the federal antitrust enforcers either shorten the statutory waiting period or extend it by issuing a request for additional information).

The proposed New York law would create a new 60-day waiting period and substantially expands the kinds of transactions that are subject to a delay before closing. For instance, the proposed law imposes a waiting period on any transaction valued at as little as $9.2 million if "the acquiring or acquired person has assets or annual net sales within [New York]" in excess of $9.2 million—a tiny figure given the size of many mergers and acquisitions.

The only noteworthy exemptions to the proposed filing requirements are for "acquisitions of goods or realty transferred in the ordinary course of business" and "acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities." Thus, the proposed law does not recognize many crucial exemptions from the HSR Act's filing requirements, including those dealing with (1) "passive investors" that engage in a substantial amount of securities trading (including block trading), much of which occurs in New York, (2) real property acquisitions such as office residential property and retail rental space, (3) acquisitions subject to approval by a federal banking agency, (4) acquisitions of entities of which the acquiring person already owns 50% or more, and (5) acquisitions by non-U.S. persons of minority interests in non-U.S. issuers. The proposed law also does not explicitly address many other common transactions, including the acquisition of minority interests in LLCs or partnerships or indemnification reinsurance. To illustrate the extraordinary breadth of these provisions, the following two transactions would implicate the proposed premerger filing requirement:

- A company in Florida with $1 billion in nationwide sales, of which 1%, or $10 million, derives from New York, acquires a company in California with $800 million in sales and no sales in New York.
- A stock index fund acquires 1/1000th of the shares of virtually any of the 100 largest public companies.

The proposed legislation is designed to "take effect immediately" upon passage. That alacrity stands in sharp contrast to the considered notice and comment period that preceded implementation of the HSR Act's waiting period, which Congress designed to give the Federal Trade Commission and the Department of Justice time to consider the effects of the premerger filing regime on the business community and enact reasonable implementing regulations. The proposed legislation also gives no indication how the New York Attorney General's Antitrust Bureau, which currently lists only 17 individuals on its webpage,[3] is capable of meaningfully reviewing the thousands of filings that the proposed legislation would generate.

It is also worth observing that both the American Bar Association's Antitrust Law Section and the New York State Bar Association's Mergers Committee recently recommended against adopting a New York-specific waiting period in view of its significant costs on the one hand and speculative, minor potential benefits on the other.[4] The sponsors of the legislation have offered no cost-benefit analysis or other analytical justification for disregarding those views.

Abuse of dominance. In addition to adopting a provision that is in line with Section 2 of the Sherman Act (the federal statute addressing monopolization), the proposed law also makes it "unlawful for any person … with a dominant position … to abuse that dominant position." Such a "dominance" standard borrows from Article 102 of the Treaty on the Functioning of the European Union and has not previously been imported to federal or state law in the United States. It is a notoriously subjective test, and there is far less case law in Europe to provide guidance about what constitutes an abuse of a dominant position than there is in the United States about what constitutes monopolization under Section 2.

As a general matter, it is easier to establish liability under European dominance standards than under U.S. monopolization standards. For instance, charging "excessive" prices is an abuse of dominance under EC law,[5] whereas charging monopoly prices "is not only not unlawful" under federal monopolization law but it is considered "an important element of the free-market system" because it "induces risk taking that produces innovation and economic growth."[6]

The proposed law would also adopt a number of specific provisions that courts have rejected under the Sherman Act, effectively making it more appealing for plaintiffs to bring claims and easier for those claims to prevail in court. For instance, the proposed law would allow plaintiffs to prevail without establishing the existence of a relevant market and instead by relying on "direct evidence" of an abuse of dominance. Relevant "direct evidence" would include evidence of "the unilateral power" either to "set prices" or to "dictate non-price contractual terms without compensation," and, in labor markets, "the use of non-compete clauses" or the "unilateral power to set wages." Because all businesses set their own prices and salaries to some extent, these provisions potentially create liability for a far broader category of businesses than those that currently face liability under federal antitrust laws.

The proposed law would also allow plaintiffs to establish presumptively a defendant's dominant position by showing that a defendant that is a seller has a 40% or greater market share and that a defendant that is a buyer has a 30% or greater market share. This would represent another significant departure from traditional Section 2 jurisprudence, under which significantly higher market shares are generally necessary to establish the existence of monopoly power. The low thresholds under the proposed law have the potential to result in the odd scenario in which multiple competitors in the same market (for instance, the only two doctors in a rural part of New York) would simultaneously be considered dominant.

The "abuse of dominant position" aimed to be prevented by the proposed law is "conduct that tends to foreclose or limit the ability" of "competitors to compete." This focus on the protection of competitors, rather than competition or customers, is an additional and major departure from traditional Sherman Act monopolization jurisprudence. As the Supreme Court has explained, the purpose of the Sherman Act "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."[7] The proposed law makes that focus on competitors explicit by making clear that the "[e]vidence of pro-competitive effects shall not be a defense" to abuse of dominance claims. The potential sweep of such a doctrine is extremely broad because all businesses seeking to maximize shareholder value are trying to get as large a share of the market as they can, and that competition typically benefits consumers by speeding up innovation and driving down prices. And its practical effects would be magnified by the additional proposal to allow private class actions under New York antitrust law.

Finally, the proposed legislation would give the New York Attorney General broad authority to define and issue guidance about what conduct does and does not constitute an abuse of dominance. There is no analogue to that power respecting the federal Sherman Act, whose provisions have been construed by courts, not prosecutors charged with executing the law.

Observations. If enacted, the Twenty-First Century Anti-Trust Act would mark a substantial change in the antitrust ecosystem. Numerous transactions that would not trigger an HSR filing requirement or federal waiting period would be subject to filing requirements and a 60-day waiting period as a matter of New York law. And, because New York has some nexus to many businesses, an abuse-of-dominance provision would likely become a preferred litigation tool, especially in light of the proposed law's focus on competitor well-being as opposed to competition and consumers. In addition, this statute could lead to other states adopting their own antitrust statutes, resulting in a crazy quilt of inconsistent laws adversely affecting mergers and even ordinary stock purchases that have no competitive effect. There is a meaningful possibility that, if enacted, the Act would be subject to constitutional and other legal challenges.

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ENDNOTES

[1] Michael N. Gianaris, *Senate Deputy Leader Delivers Floor Speech on 21st Century Antitrust Act*, YouTube (June 7, 2021), https://youtu.be/whPT1PlqYaA.

[2] Ryan Tracy, *New York Senate Passes Antitrust Bill Targeting Tech Giants*, Wall Street Journal (June 7, 2021), https://www.wsj.com/articles/new-york-senate-passes-antitrust-bill-targeting-tech-giants-11623098225.

[3] *Antitrust Bureau Staff Directory*, New York State Attorney General, https://ag.ny.gov/antitrust/antitrust-bureau-staff-directory (last visited June 16, 2021).

[4] *Comments of the American Bar Association on Certain Aspects of New York Senate Bill 933A, New York Assembly Bill 1812A, and New York Assembly Bill 3399*, American Bar Association Antitrust Law Section (June 14, 2021), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/june-2021/comments-ny-donnelly-61421.pdf; *Donnelly Act Revision Committee Report*, New York State Bar Association Merger Committee (Oct. 12, 2018), https://nysba.org/NYSBA/Meetings%20Department/2019%20Annual%20Meeting/Coursebooks/Antitrust%20Section/Panel%205%20Revised-NYSBA_Mergers_Committee_DARC_Report%20(10-12-18)%20(5).pdf.

[5] Consolidated version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115); *Antitrust: Commission accepts commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns*, European Commission (Feb. 10, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_524.

[6] *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[7] *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993).

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