Developments in Antitrust Law: Keep an Eye on New York

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Although much attention recently has been focused upon debates in Congress, potential legislative changes to U.S. antitrust law are not limited to proposals at the federal level. Many states are considering changes to their own antitrust laws, which usually can be enforced by state attorneys general and private plaintiffs. Importantly, New York legislators have introduced two bills that propose sweeping changes to the State's antitrust law, the Donnelly Act, building on measures introduced in New York's last legislative session.

These proposals, if enacted, would make New York's single firm conduct statutory provisions the most aggressive in the United States and would give the New York Attorney General a more prominent role in reviewing transactions—including by creating a first-of-its-kind state merger notification requirement. These changes would allow New York's antitrust law to reach a range of conduct not actionable under any existing federal or state antitrust law, and would introduce European-style antitrust standards to New York. Accordingly, this reform would create considerable new compliance challenges and risk for companies potentially subject to New York antitrust law, whether or not those companies are located in New York.

Other U.S. states and territories are considering antitrust law changes, but the New York proposals are the most significant. Although much of the conversation concerning developments in antitrust law has focused on "Big Tech" companies, these proposals would affect businesses across all sectors of the economy. This alert discusses these legislative proposals and key implications for businesses.

Overview of New York Antitrust Legislation

In January 2021, New York State Senator and Deputy Majority Leader Michael Gianaris (D-12th District) reintroduced the 21st Century Antitrust Act (S933), seeking changes to New York's antitrust law that are more sweeping than those proposed in a version of the bill introduced in 2020. The revised legislation would:

- Prohibit unilateral conduct that creates or maintains a monopoly—similar to Section 2 of the Sherman Act.
- Create an unprecedented (in the United States) "abuse of dominance" offense, based on European law, and give the New York Attorney General rulemaking authority to carry out the provision.
- Require merger notifications to the New York Attorney General at least 60 days prior to consummation for transactions that result in the acquirer holding more than $8 million in assets or voting securities of the target—the first state-level merger reporting requirement in the United States.
- Authorize significantly higher fines for violations of the Donnelly Act.
- Authorize parens patriae actions by the New York Attorney General on behalf of injured individuals and businesses for violations of the Donnelly Act, as well as private class actions.

New York Attorney General Letitia James testified in support of the prior version of the bill in a hearing before the Senate Consumer Protection Committee, stating that "it will give New York's antitrust laws the scope and the flexibility needed for effective antitrust enforcement in this era of increasing economic concentration."

In late January Assemblyman Ron Kim (D-40th District) proposed A3399, an equally extensive rewrite of the Donnelly Act.[1] In addition to prohibiting abuse of dominance, the Assembly bill would bar mergers under language that parallels Section 7 of the federal Clayton Act[2] and would impose on the merging parties the burden of showing that the procompetitive benefits of the transaction outweigh any anticompetitive effects.

Analysis of Significant Proposed Changes

- **European-Inspired "Abuse of Dominance" Offense**

The Donnelly Act does not contain an analog to Section 2 of the Sherman Act, which prohibits single firm conduct that creates or maintains monopoly power. Senator Gianaris' proposal would amend the statute with language that is similar to Section 2.[3] However, the proposal would go substantially further than federal or any other U.S. state's law in addressing single firm conduct; it

[1] Assemblyman Jeffrey Dinowitz (D-81st District) has introduced in the State Assembly the same version of the 21st Century Antitrust Act introduced last session (A1812).

[2] The bill mirrors language in the Clayton Act that prohibits certain transactions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." *See* 15 U.S.C. § 18.

[3] *See* 21st Century Antitrust Act. S933, introduced on Jan. 6, 2021, § 340.2.(a).(i).

would prohibit companies "with a dominant position in the conduct of any business, trade, [] commerce [or service]" from "abus[ing] that dominant position."

S933 does not define "dominant position" or what might constitute "abuse." Instead, it empowers the New York Attorney General to issue rules to "carry out" the provision, using the processes in the New York Administrative Procedures Act.[4] In effect, the bill transforms the state's attorney general from an antitrust enforcement agency into an antitrust rule maker.[5] The rules would then be subject to an unusual review procedure, by which either house of the state legislature could void a proposed rule by resolution. The New York Attorney General is also directed to issue guidance regarding market shares and other "market conditions" to be used in adjudicating potential violations of the provision.[6]

Importantly, the abuse of dominance language in S933 is similar to the prohibition on "abuse of a dominant position" in Article 102 of the Treaty of Functioning of the European Union ("TFEU").[7] Senator Gianaris has confirmed that the standard is inspired by antitrust laws in other parts of the world, including the European Union—which may lead the New York Attorney General to look to European law when construing the law under her rulemaking authority.[8]

The European Commission ("EC") has interpreted the EU's abuse of dominance provision to prohibit a broader set of conduct than Section 2 of the Sherman Act in several respects.

First, showing "dominance" under EU law is a lower bar than showing monopoly power under Section 2 of the Sherman Act. In the United States, courts generally require more than a 50 or 60 percent market share (and often substantially higher), together with high entry barriers, to find monopoly power.[9] In Europe, the Court of Justice has held that a firm with less than a 40 percent market share was dominant because it was able to act independently from its rivals, customers,

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[4] *Id.*, §§ 340.2.(b).(i) and (ii); and § 341.

[5] Some commentators have argued that the FTC should issue rules proscribing unfair methods of competition under its FTC Act 6(g) authority (15 U.S.C. § 46(g)). *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020). The FTC has used this rulemaking power only once in its history. Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 CFR Part 412 (1968).

[6] 21st Century Antitrust Act, S933, § 340.2.(b).(iii).

[7] Consolidated Version of the Treaty on the Functioning of the European Union ("TFEU"), 2008 O.J. C 115.47.

[8] *See* Annie McDonough, *City & State: Can New York Lead the Nation on Antitrust Enforcement?*, Sept. 14, 2020.

[9] *See* Areeda & Hovenkamp, Antitrust Law, ¶ 532c (4th ed. 2018) (reviewing circuit court decisions and concluding "we would presume that market shares below 50 or 60 percent do not constitute monopoly power"); *see also* Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160 (4th Cir. 2014) (finding shares below 60 percent to be insufficient, notwithstanding high entry barriers); Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 129 (2d Cir. 1981) (a jury may be instructed that "a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power").

and consumers, by, for example, imposing a unilateral price on its suppliers,[10] and the court routinely presumes dominance where the defendant has a 50 percent market share or higher.[11]

Second, although Section 2 of the Sherman Act prohibits only exclusionary conduct that harms the competitive process, the EU abuse of dominance standard reaches "exploitation" of market power.[12] Exploitation of market power includes charging supracompetitive prices or unilaterally reducing production or innovation "to the prejudice of consumers."[13] For example, the EC investigated a drug manufacturer for charging "excessive" prices for six cancer drugs, closing its inquiry only after the defendant agreed to lower its prices by an average of 73 percent.[14]

Third, at least as the EU courts have applied the abuse of dominance standard, certain unilateral conduct such as predatory pricing, tying, and monopoly leveraging is easier to challenge in Europe than under Section 2 of the Sherman Act in the U.S. For example, a successful predatory pricing claim under TFEU Article 102 does not require a showing that the defendant will recoup its foregone profits, as it does under U.S. law.[15] It is not clear, however, that these differences in evaluating conduct are inherent in applying an abuse of dominance standard rather than a monopolization standard.[16]

Assemblyman Kim's bill also prohibits abuse of a dominant position. However, instead of giving the New York Attorney General rulemaking authority, it provides a non-exhaustive list of unlawful acts, some of which are copied from Article 102.[17] Specifically prohibited "abuses" include unfair purchase or selling prices; refusals to deal; demanding exclusivity or discriminatory terms; tying; and predatory pricing.[18] A3399 also provides that a plaintiff need not prove harm to consumer welfare to prevail on such a claim.[19] This would constitute a significant departure from prevailing

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[10] CJEU, Case T-219/99, British Airways v. Commission, at 189-223.

[11] CJEU, Case C-62/86 AKZO Chemie.

[12] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) ("[T]he mere possession of monopoly power, and the charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

[13] TFEU, Article 102.

[14] Eur. Comm'n, Press Release, Antitrust: Commission accepts commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns, Feb. 10, 2021.

[15] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). EU law does not impose a recoupment bar for predation claims. *See* CJEU, Case C-202/07 P, France Télécom v. Commission, at 108-109; Eur. Comm'n, Press Release, Antitrust: Commission fines US chipmaker Qualcomm €242 million for engaging in predatory pricing, July 18, 2019.

[16] For instance, antitrust in the EU is part of a larger political toolbox to achieve the European Internal Market.

[17] A3399, introduced on Jan. 26, 2021, § 340.7.(a)-(d).

[18] *Id.*, §§ 340.7.(e)-(i).

[19] *Id.*, § 340.8.

U.S. antitrust law, which evaluates challenged conduct based on its effects on consumers, not on other types of policy objectives.[20]

– A Mandatory Pre-Merger Notification

S933 would require companies to notify the New York Attorney General of any transaction that would result in the acquirer holding more than $8 million in assets or voting securities of the target, in the aggregate, if either the acquirer or the target are subject to the jurisdiction of the New York courts.[21] Notice would be required at least 60 days prior to the close of the transaction.[22] This requirement would be the first merger notification provision under state antitrust law in the United States.[23]

For mergers that are reportable to both the FTC and the DOJ under the federal Hart-Scott-Rodino Act ("HSR") and to New York under the new notice proposal, merging parties would be required to provide their HSR notifications and accompanying materials to the New York Attorney General.[24] Unlike the HSR Act, however, the bill does not impose on the parties any waiting period before they can consummate their transaction beyond the 60-day notice, even if the Attorney General opens an investigation. Still, the 60-day notice requirement could delay some transactions. Deals reported under the HSR Act that are not subject to an extended "second request" investigation can close after a 30-day initial waiting period (or earlier, if early termination is granted),[25] and the proposed New York statute would capture many deals that are not HSR reportable at all.

The $8 million aggregate holdings threshold in S933 is substantially lower than the current $92 million size-of-the-transaction test for reportability under the federal HSR Act. In 2020, more than two thousand transactions were noticed under the higher HSR threshold.[26]

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[20] The Supreme Court has stated that "Congress designed the Sherman Act as a "consumer welfare prescription."" Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[21] 21st Century Antitrust Act, S933, § 340.10.(a).

[22] *Id.*, § 340.11.(b).

[23] Some states have industry-specific pre-merger notification requirements. *See*, *e.g.*, Nevada for financial institutions (Nev. Rev. Stat. § 666.035); New York for certain non-profit organizations (N.Y. Stat. Ann. § 907).

[24] 21st Century Antitrust Act, S933, § 340.10.(c).(iv).

[25] If the FTC or the DOJ determines that it needs more information to review the proposed transaction, the agency can issue a second request, which extends the waiting period and prevents the parties from closing until they have "substantially complied" with the second request (which can take several months or longer) and observed a second 30-day waiting period. *See* 15 U.S.C. § 18a.

[26] Fed. Trade Comm'n, Pre-Merger Notification Program.

As with the abuse of dominance standard, the Attorney General would be authorized to issue rules to implement the bill's pre-merger notification requirement.[27] The bill would allow the Attorney General, under her rulemaking authority, to exempt transactions not likely to violate the statute.[28]

The proposed A3399 Assembly bill also addresses mergers. It would add to the Donnelly Act a bar on anticompetitive mergers using identical language contained in Section 7 of the Clayton Act.[29] However, unlike under federal law, the bill would impose on the merging parties in a merger challenge the burden to show that "the pro-competitive benefits of the transaction . . . outweigh the anticompetitive effects," rather than the standard under federal law, which requires the challenger to prove that the effect of the transaction "may be substantially to lessen competition."[30]

– **Other Proposed Changes to the Donnelly Act**

Both proposed statutes would make other changes to the Donnelly Act. For example, S933 would increase the maximum fines for criminal and civil violations to $100 million for corporations (up from $1 million), and $1 million for individuals (up from $100,000).[31] It would also allow private treble damages class actions under the Donnelly Act, overturning the New York Court of Appeals' decision in *Sperry v. Crompton Corp*.[32] And the bill would allow the Attorney General to bring *parens patriae* lawsuits to recover damages on behalf of New York residents and businesses for Donnelly Act violations.[33] This provision is similar to existing federal law, which allows state attorneys general to sue in federal courts as *parens patriae* on behalf of natural persons that reside in their states and allows private plaintiffs to bring class actions.[34] A3399 contains similar provisions.

What's Next in New York and Other States

The original 21st Century Antitrust Act was introduced too late in last year's session to pass, though the State Senate did hold a hearing. Given the intense public focus on antitrust, there is reason to believe that the legislature will seriously consider these bills. In addition, Attorney General Letitia James testified in support of the version of S933 that Senator Gianaris' introduced last session, and she has had great success securing legislative passage of bills she supports. Several new laws General James has supported have augmented the power of her office, including an overhaul of

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[27] 21st Century Antitrust Act, S933, § 340.10.(f).(iii).

[28] *Id.*, § 340.10.(f).(ii).

[29] 15 U.S.C. § 18.

[30] *Compare* A3399, § 352-dd *with* 15 U.S.C. § 18.

[31] 21st Century Antitrust Act. S933, § 341.

[32] 8 N.Y.3d 204 (2007) (holding that class actions seeking treble damages are not permitted under the Donnelly Act).

[33] 21st Century Antitrust Act, S933, § 342-b.

[34] 15 U.S.C. §§ 15 and 15c; F.R.C.P. 23. S933 would be to allow the Attorney General to proceed in state court and to bring such actions on behalf of businesses as well as natural persons under state law.

state cybersecurity law, an amendment to the Martin Act (the state's securities law), and an expansion of state price gouging law.

An open question is whether other states will pursue antitrust law changes. While not as sweeping as the New York bills, other states have and continue to consider their own measures. Last year, Colorado amended its antitrust law to allow its Attorney General to challenge mergers that have been reviewed but not challenged by the federal authorities.[35] And a bill in the Puerto Rico legislature would enable the Attorney General to bring actions to recover treble damages and attorneys' fees as *parens patriae* on behalf of indirect buyers of products that were subject to cartel activity. Given the growing spotlight on antitrust, other state legislatures may consider their own bills in the coming months. Meanwhile, Europe is considering changes to its competition policy, which could also inspire legislative changes in the United States.

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[35] This year, legislators in several states (Arizona, Georgia, Minnesota, North Dakota) have introduced bills that would ban app stores from imposing limits on third-party app distribution and payment options (such as a requirement that an app use a designated payment function as its exclusive mode of in-app payments). The North Dakota bill was voted down in the state Senate, while the Arizona bill passed the state House.