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BLOG

New York Considers Most Sweeping Antitrust Law in the Nation

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On September 14, 2020, the New York Senate Standing Committee on Consumer Protection held a hearing to discuss New York's antitrust laws, and specifically the Twenty-First Century Antitrust Act (S. 8700-A), which was introduced in July by Senate Deputy Leader Michael Gianaris and Senator Rachel May. As Senator Gianaris noted discussing S. 8700-A, New York's current antitrust law, the Donnelly Act, was "written over a century ago," and was "intended to deal with an economy that no longer exists." The hearing was therefore intended to "explore emerging antitrust issues in the growing global technology market, including allegations of antitrust misconduct committed by Big Tech, and the need to expand and update the Donnelly Act to tackle such issues."

THE TWENTY-FIRST CENTURY ANTITRUST ACT (S. 8700-A)

S. 8700-A contains five important updates to New York's antitrust laws. The first and most discussed of these updates are two new provisions addressing unilateral conduct. Currently, the Donnelly Act does not explicitly bar unilateral or other single firm anti-competitive conduct. Using largely the same language as Section 2 of the federal Sherman Act, S. 8700-A makes monopolization, attempted monopolization, and conspiracy to monopolize a state law violation as well. While some questioned how effective this new law would be, given the lack of federal enforcement in recent years, this provision nonetheless gives New York an important enforcement mechanism to challenge unilateral conduct.

In addition, and perhaps more importantly, S. 8700-A creates a new claim for abuse of dominance, making it unlawful for "any person or persons with a dominant position in the conduct of any business, trade or commerce or in the furnishing of any service in this state to abuse that dominant position." This claim would be unique to New York, as abuse of dominance is not a feature of the federal antitrust laws or the laws of any other state. The claim is not completely novel, however, and is part of the antitrust regimes in many foreign jurisdictions, specifically in Europe. Because this claim would allow enforcement against firms with lower market share than that required for monopolization under the Sherman Act and S. 8700-A, it would implicate conduct not otherwise subject to federal antitrust law.

Second, S. 8700-A contains increased penalties and enhanced criminal enforcement. The Donnelly Act currently imposes a maximum fine of $1,000,000 for corporations and $100,000 for individuals, and a four-year maximum

term of imprisonment. These penalties, however, were set 45 years ago and have not been updated since. S. 8700 would increase the maximum penalties to $100 million for corporations and $1 million for individuals, consistent with the federal levels. The maximum term of imprisonment would increase to 15 years, exceeding the federal limit of 10 years. In addition, the law would allow for criminal enforcement of abuse of dominance claims, which are not provided for in federal antitrust laws.

Third, S. 8700-A would expressly allow private treble damages class actions for violations of the law. This provision overturns *Sperry v. Crompton Corp*., 8 N.Y.3d 204 (2007), in which the New York Court of Appeals held that the Donnelly Act did not allow class actions. Once again the law allows claims that extend beyond those in the federal antitrust laws given the ability to bring private class actions for abuse of dominance.

And finally, S. 8700-A increases the current statute of limitations for criminal cases from three to five years, conforming the period with federal law.

NEW YORK SENATE HEARING TO DISCUSS ANTITRUST LAWS

On September 14, over the course of approximately four hours, the Senate Standing Committee on Consumer Protection heard testimony from a variety of witnesses on New York antitrust law in general and S. 8700-A in particular. Senator Kevin Thomas, Chair of the Committee and host of the hearing, recognized the "need to modernize [New York's] antitrust laws to meet the demands of the 21st century" to ensure that the "economy remains competitive, innovation continues to thrive, and consumers are protected." Throughout the hearing, proponents of S. 8700-A highlighted benefits to consumers that would result from increased antitrust enforcement, while opponents criticized the law as vague and severe and predicted a negative effect on New York's economy, specifically in the technology sector.

New York Attorney General Letitia James began the hearings by asserting that she supported "passage of this act because 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." Attorney General James noted specifically that companies had "prevented competitors from entering the market through exclusionary tactics" and that the current penalties, set in 1975, were no longer a "meaningful deterrent." Tim Wu, Columbia Law Professor and author of *The Curse of Bigness: Antitrust in the New Gilded Age*, also voiced support for the law, arguing that it would revive antitrust enforcement and "restore or put New York in a position of leadership" in the United States. He asserted that the abuse of dominance standard would fill "a very important loophole in the monopoly requirement of Section 2" in that it would reach large, dominant entities who, though not technically monopolies, engage in abusive tactics and are beyond the reach of antitrust enforcement. He also recognized the law's important impact outside of the technology industry, particularly in pharmaceuticals and telecommunications. Jay Himes, former Chief of the Antitrust Bureau of the New York Attorney General's Office, provided additional support, arguing that strengthening the Donnelly Act would benefit consumers, workers, and the business community by enabling New York to respond to increasingly concentrated economic power.

Opponents of the law focused on the abuse of dominance provision, but also criticized the more severe penalties and class actions provision. As currently written, S. 8700-A does not define "dominant position" or "abuse," and opponents believe this could lead to uncertainty as to what conduct was prohibited and what size companies would be covered. According to Kathy Wylde, President and CEO of the Partnership for the City of New York, the "over-broad" abuse of dominance standard could "affect small, medium size, as well as large businesses." Testimony from tech:nyc, a non-profit coalition of New York technology companies, warned that the law may force technology companies to reconsider "locating or expanding in New York."

Despite this criticism from advocacy groups like tech:nyc and TechNet, however, not all in the technology industry opposed S. 8700-A. Luther Lowe, Senior VP of Public Policy for Yelp, expressed Yelp's strong support for the law. Using Google as an example, Lowe discussed in detail how self-dealing by dominant companies can threaten others in the tech space and how S. A8700 would provide protection against such threats. According to Lowe, S. 8700-A would establish New York as a leader in antitrust enforcement while simultaneously "allow[ing] for true competition

and innovation within the internet." Lowe also indicated that, while advocacy groups such as TechNet represented many within the technology industry, often the largest members influenced the groups' major decisions.

TAKEAWAY

Monday's hearing ultimately gave New York legislators a wide range of perspectives as they consider S. 08700-A, and even provided some suggestions on how the law could be improved before passing. Regardless, if enacted in its current form, S. 08700-A would give regulators and litigants a powerful antitrust tool that could greatly benefit consumers in New York and the rest of the United States. The legal, economic, and possible deterrent effect on businesses located in New York, however, and the law's extraterritorial application, remain very much unknown and will likely to continue to be debated. This uncertainty could lead to significant litigation and disputes in the future.

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