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New York's Latest Experiment in Antitrust Law

This article explores the changes introduced by the latest version of the Twenty-First Century Anti-Trust Act, which, if enacted, would reflect the most progressive changes to antitrust law in the United States in recent memory.

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Last summer, two New York State Senators introduced the "Twenty-First Century Anti-Trust Act." The bill attracted attention for the sweeping changes it would bring to New York antitrust law by exposing "dominant" corporations—particularly technology companies—to liability for unilaterally abusing their dominant positions.

After a flurry of commentary and a committee hearing, last month, one of the bill's sponsors introduced a revised version of the bill. Among other changes, the revised bill would give the New York Attorney General a powerful role in both enforcing and interpreting the state's antitrust laws.

While the original version of the bill has received extensive commentary, little attention has been paid to the revised version of the Twenty-First Century Anti-Trust Act. This article explores the changes introduced by the latest version of the bill, which, if enacted, would reflect the most progressive changes to antitrust law in the United States in recent memory.

New York's Existing Antitrust Laws

New York's existing antitrust law, the Donnelly Act, dates to 1899. It has remained largely unchanged since then. The key provision mirrors Section One of the Sherman Act in prohibiting any agreement that creates or maintains a monopoly or otherwise restrains trade.

But the Donnelly Act, in its current form, does not go as far as the Sherman or Clayton Acts. Unlike those laws, New York's antitrust law does not bar unilateral anticompetitive conduct. And, unlike the Clayton Act, New York law has been interpreted to preclude class plaintiffs from recovering treble damages for antitrust violations. See *Sperry v. Crompton*, 863 N.E.2d 1012 (N.Y. 2007).

The Original Proposed Legislation

The Twenty-First Century Anti-Trust Act, introduced in July 2020,

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sought to fill those gaps: It proposed to authorize treble damages for class actions and cover unilateral anticompetitive conduct. And it proposed to enhance penalties for violations of the Donnelly Act, making all criminal violations punishable by up to fifteen years' imprisonment (up from four years) for individuals and up to $100 million in fines (up from $1 million) for corporations.

The bill's key innovation, though, is that it would make it unlawful for any "dominant" entity to abuse its "position." Though undefined in the legislation, "abuse of dominance" concept was borrowed from Europe, where dominance typically requires approximately 40% of market share and "abuse" may include harm to competition, even if that harm does not injure consumers. That is a big change from the roughly two-thirds market share typically required for a monopoly under state and federal law in the United States and the consumer-harm focus American antitrust law has had since the mid-twentieth century.

Under an abuse-of-dominance standard, corporations could be held liable for unilateral conduct like undercutting competitors or bundling products to stop a rival from entering the market. Punishing that type of conduct would shift the focus of antitrust law away from the consumer and toward competitors. After all, anticompetitive unilateral conduct like predatory pricing sometimes benefits the consumer, which is why it often is not punishable under existing antitrust laws.

The Revised Legislation and Its Implications

In January 2021, an amended version of the Twenty-First Century Anti-Trust Act was introduced. Much of the legislation remains the same: It still makes it unlawful for any person or entity with a dominant position to unilaterally abuse that position. But the revised legislation includes an important change: It delegates power to the Attorney General to promulgate rules and issue guidance on how to "interpret market shares and other relevant market conditions" of the abuse-of-dominance provision.

It is unclear exactly what guidance the Attorney General would issue, but the legislation requires her to consider "the important role of small and medium-sized businesses" in New York's economy. The legislation also subjects any rule the Attorney General promulgates to veto by either house of the State legislature.

The amendments introduced a few other notable changes. For example, the revised bill includes a "[p]remerger notification" provision requiring individuals who intend to acquire voting securities exceeding a certain threshold to file a notice with the Attorney General at least sixty days in advance. It also backs away from some of the severe penalties in the earlier version, making them inapplicable to abuse-of-dominance offenses.

These revisions could have major repercussions for antitrust law. The delegation of rulemaking power to the Attorney General, for example, could set the model for future antitrust legislation. Federal antitrust law, for example, is based on fairly broad statutes that have been narrowed and interpreted by the courts—although, over time, the Department of Justice and Federal Trade Commission have come to shape antitrust laws through their own guidelines and rules as well as enforcement decisions. The revised New York legislation would put the Attorney General on the front line of interpreting the revised antitrust law before any court has done so. That strategy may reduce uncertainty surrounding the legislation by giving regulated entities and individuals advance warning about the statute's scope and interpretation.

The premerger notification provision reflects a growing willingness by states to intervene before corporations reach monopoly status. Indeed, the legislative findings in the bill lament that once "monopolies have been established, it is typically too late to repair or mitigate the damage which has been done." The premerger provision aims to curb excessive corporate power regardless of whether the entity is a monopolist.

The Twenty-First Century Anti-Trust Act embodies the emerging enthusiasm for states to innovate in antitrust law. After all, if states are the laboratories of democracy, why not for antitrust, too?

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