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Could New York's 21st Century Antitrust Act Usher a New Chapter in the History of Anti-Monopoly Legislation?

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Over the last year, much-deserved attention has been paid to the ongoing Congressional antitrust investigation of Big Tech and the antitrust case that the DOJ is apparently building against Google. But at the same time, an important, but much less eye-catching effort to bring Big Tech to justice is brewing in the New York State Senate.

Earlier this summer, Deputy Majority Leader Michael Gianaris introduced a Bill that would make it easier for the State and New Yorkers to sue Amazon, Facebook, Google and Apple, among others, in our courts.[2]

On Monday, September 14, the New York Senate held a public hearing to discuss the Bill. One of the Bill's most notable supporters is the State's Attorney General, Letitia James, who argued that currently her office is "handicapped" by the limitations of existing antitrust law and that New Yorkers are suffering as a result. In her testimony on Monday, AG James also revealed that her office is conducting several investigations into Big Tech – perhaps signaling that State AG will utilize the new bill if passed later this year.

The Senate invited me to testify on behalf of the Institute for Local Self-Reliance and during the hearing I also argued in favor of the Bill, pointing out that the pandemic has exposed the economic concentration problem our communities are facing at this moment of crisis. I argued that the wealth of the few has reached unparalleled levels while the earnings for the average worker have barely increased, leaving many New Yorkers with no cushion to blunt the force of the downturn when COVID-19 struck.

Overview of the Proposed 21st Century Antitrust Act

Unlike the federal Sherman Act, New York's existing antitrust law, the Donnelly Act of 1893, does not contain a provision that explicitly prohibits single-firm anticompetitive conduct or monopolization claims. As a result, the case law in interpreting the scope and the reach of the act is a mixed bag.

The bill put forward by Senator Gianaris, S.8700-A, seeks to remedy this outcome by expressly allowing monopolization claims styled similarly to those brought under Section 2 of the Sherman Act.

But the bill goes a step forward by introducing the legal concept of abuse of dominance – which is prevalent in many foreign jurisdictions. In Europe and other jurisdictions the abuse of dominance standard encompasses firms with market shares of 50 percent or less as opposed to a market share of roughly 65-70 percent required under existing federal law precedent. During the hearing, AG James suggested that the market share threshold under New York law should be set at 40 percent.

In addition, many foreign jurisdictions impose on dominant firms a "special responsibility" to avoid certain types of conduct that could potentially harm competition. It is unclear whether such

a duty will be imposed under New York law, but supporters of the bill such as Jay Himes argued for the adoption of the standard.

Finally, in jurisdictions where the "abuse of dominance" standard is enforced, additional types of conduct are deemed anti-competitive and therefore prohibited, such as monopoly leveraging, margin squeezing, essential facilities, refusal to deal, excessive pricing, and more. But again, it is currently unclear whether, and to what degree, this existing precedent will inform New York's elected officials.

In fact, in its current form, the bill does not provide a precise definition of the term "abuse of dominance," adopting broad and expansive language that emulates the Sherman Act to great extent.

Opposition to the Bill in Its Current Form

During the hearing, various parties opposing the Bill argued that adopting a new and undefined standard will introduce uncertainty, confusion, and compliance difficulties and thus have a "chilling" effect on both large and small firms that operate in growing or emerging markets.[3]

During his testimony Himes rejected these arguments. He pointed out that "dominant" firms are rare and therefore the proposed Bill will cover the conduct of only a limited set of companies. He also argued that those larger firms also possess the financial resources and expertise to guide and even defend their conduct in the courts.

The Criminal Provisions in the Bill

Some supporters of the Bill raised concerns surrounding the implementation of criminal charges for unilateral anticompetitive conduct. I personally think that these concerns are unwarranted.

When serving as Acting Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division under President George W Bush, Scott Hammond made a convincing case for enhancing criminal liability for antitrust violations. In the context of cartels, he argued that that an increase in criminal penalties "will bring antitrust penalties in line with those for other white-collar crimes and will ensure the penalties more accurately reflect the enormous harm inflicted by cartels in today's marketplace."[4] And I believe that this statement accurately reflects both the need and the justification for imposing criminal liability under the new law.

In my testimony, I pointed out that monopoly power undermines small businesses and is harming dairy farmers in Central New York. It has also contributed to desolation of Main Street in many small towns and urban neighborhoods in the State and to the death of many vital local New York newspapers. I also mentioned that recent studies have linked monopolies to racial inequality.[5]

Other studies have also demonstrated that monopolies harm working people by foreclosing competition over labor which forces tens of thousands to rely on "gig" non-union jobs.[6]

Accordingly, the Bill must include criminal penalties to more accurately reflect the enormous harm inflicted by monopolists in today's marketplace.

In addition, it will be erroneous to make any special distinction with respect to criminal liability based upon the fact that the Bill will potentially reach new classes of offenders or new types of unilateral conduct. It is true that currently criminal liability is imposed almost exclusively by courts in Section 1 cases, but as Judge Learned Hand pointed out, a firm's power to set a monopolist's price is exactly the same species of evil as the unlawful power of conspirators to fix their price.[7] The power to fix prices is the gist of monopoly power, and when monopoly power is unlawfully obtained or employed, the monopolist pursues the same proximate goal for himself as the price-fixing conspirators aim to share together.[8] After all, bank robbers are prosecuted even if they act alone.

A Private Cause of Action

Other supporters raised concerns with the Bill's provisions which provide for a private cause of action. These concerns echo similar concerns that are often raised on the federal level by various think tanks and members of the defense bar.

But from a purely economic perspective, allowing for a private cause of action will not increase the costs of compliance with the new law. The only perceived additional cost to firms will emanate from more frequent litigation of alleged antitrust violations. But our court systems already possess the tool to deter frivolous and meritless litigation by imposing high pleading standards and sanctioning parties that bring pointless legal action. And there can be no serious argument that meritorious action should not be brought only due to the nature of the party bringing suit.

On the other hand, the elimination of private cause of action under the new abuse of dominance standard will greatly increase the danger of regulatory capture. If New York would be the only state in the nation to possess the means to bring Big Tech to heal, and the AG's office would become the only entity that could do so, the risk of such capture will become even greater.

Perhaps more importantly, in the Harvard Law Review article "A Capture Theory of Antitrust Federalism," Judge John Shepard Wiley Jr.'s pointed out that even the perceived threat of regulatory capture had led courts, including the Supreme Court to impose new and elaborate burdens in cases brought by state agencies.[9]

What Can Be Improved

New York has a particularly long and illustrious history of combating monopolies and curbing corporate power. For example, in 1838 New York's legislature passed the first anti-monopoly law in the nation, which broke-up the stranglehold large and well-connected banks imposed on New Yorkers. Similarly, the rise of the Robber Barons during the Gilded Age drove the State to pass the Donnelly Antitrust Act in 1893.

Surprisingly, the-now-largely-ineffective-127-year-old-Act remains the only major antitrust law New York has on its books today. But for decades this wasn't a problem, because New Yorkers could rely on our Federal courts and agencies to effectively police and prosecute monopolists.

However, over the last 40 years, our federal judicial system and enforcement agencies began to reverse course and significant antimonopoly precedent was eroded. The magnitude of the shift cannot be overstated: The Supreme Court stealthily overturned existing precedent and unleashed the relentless growth of the corporate goliaths, and our communities are footing the bill.

This experience must inform New York. It should not leave the job of interpreting its new "abuse of dominance" standard to the judicial branch. In fact, I would argue that the concentration and monopoly crisis we are currently facing is due, in part, to the limitations set by courts upon broad statutes such as the Sherman Act and their adoption of a narrow interpretation of their purpose and scope. The courts may still strike down the Bill if it finds it arbitrary, capricious, or unreasonable, but we should be wary of allowing the Judiciary to once again erect their prejudices into legal principles. Our democratically elected representatives, being familiar with local conditions, are in the best position to formulate and articulate this legal standard. And for those who doubt their ability, recent examples such as the *Amex*[10] and *Qualcomm*[11] decisions demonstrate that at times the judiciary is equally out of touch with market realities.[12]

By setting bright-line rules and clearly articulating what constitutes a violation of the new law, New York could become a leader and an example for future Federal or State legislation.

One such rule should be the imposition of a presumption of anticompetitive behavior when a certain market share or market power threshold is met. Another, is clearly articulating a lower market-share-threshold under the abuse of dominance standard than that currently applied under the Sherman Act.

Historically, New York has been at the forefront of the fight against monopoly power. It is now time for New York to reinvigorate its antitrust laws and lead the antimonopoly movement once again. By introducing such bright-line rules, our elected officials will ensure that this momentous legislative achievement is not squandered by bad precedent and judicial prejudice.

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[2] https://www.nysenate.gov/legislation/bills/2019/s8700/amendment/original.

[3] Testimony submitted by TechNet: https://www.nysenate.gov/sites/default/files/technet_memo_in_opp.pdf

[4] https://www.justice.gov/archive/atr/public/press_releases/2004/204319.htm

[5] Brian Callaci, Control Without Responsibility: The Legal Creation of Franchising, 1960–1980. Enterprise & Society, 1-27 (2020): https://www.cambridge.org/core/journals/enterprise-and-society/article/control-without-responsibility-the-legal-creation-of-franchising-19601980/0C5B894F5E216BC25D396D36B9FA45E6.

[6] Marshall Steinbaum, Antitrust, the Gig Economy, and Labor Market Power, 82 Law and Contemporary Problems 45-64 (2019): https://scholarship.law.duke.edu/lcp/vol82/iss3/3/

[7] *United States v. Aluminum Co. of America*, 148 F.2d 416, 427-28 (2d Cir. 1945).

[8] *Berkey Photo, Inc. v. Eastman Kodak Co*., 457 F. Supp. 404, 423 (S.D.N.Y. 1978).

[9] https://www.jstor.org/stable/1341043: “A growing suspicion that producers have "captured" the political bodies regulating them has inclined people to view regulation as the product and protector of producer interests…Thus, it is hardly surprising that courts have, under the guise of the very state action doctrine that was meant to protect state sovereignty, intruded more and more on state and local regulatory policy.”

[10] *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018): https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf.

[11] *FTC v. Qualcomm Inc*., 969 F.3d 974 (9th Cir. 2020): https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/11/19-16122.pdf.

[12] For example, see A. Douglas Melamed, *The American Express Case: Back to the Future*, 18 Colo. Tech. L. J. (2020): “The Court's decision is not compelled, or even supported, by precedent, and it appears unsound with respect to either economic analysis or legal process concerns.”