Crowell

CLIENT ALERT

While Federal Antitrust Reform Legislation Slowly Moves Along, States May Chart Their Own Course

June 15, 2021

House Antitrust Subcommittee leaders David Cicilline and Ken Buck unveiled last Friday five antitrust reform bills that would target the largest technology platforms, as well as the need to increase federal enforcement agency budgets. The effort follows the Subcommittee's extensive Fall 2020 report and earlier proposed legislation by Senator Amy Klobuchar that would expand the federal antitrust laws' coverage of exclusionary conduct and unlawful mergers.

While these federal bills wind their way through protracted efforts to achieve bipartisan support, state legislatures, particularly those with single-party political majorities, may fill the perceived gap in antitrust enforcement with their own measures. Case in point is the "Twenty-First Century Anti-Trust Act," an expansive antitrust bill passed by a vote of 43-20 earlier last week by the New York State Senate. However, this bill was not enacted because it did not pass the Democratic-led Assembly by the end of the legislature's session. Nonetheless, New York legislators are likely to renew their efforts to pass this bill in the next legislative session or soon thereafter.

In passing this bill, the New York Senate explained that the bill is meant to ensure that "large corporations are subject to strict and appropriate oversight by the state." Indeed, if it becomes law in a future legislative session, the bill would not only fundamentally reshape New York antitrust enforcement, but could make companies liable for a wide range of conduct that does not currently violate either federal or state law. The bill could also become a template for other state legislators seeking to pass similar bills during a period where there is broad support in some quarters for enhanced and expanded antitrust enforcement.

The New York Senate bill departs from federal antitrust law by making "abuse" of a "dominant position" illegal. The U.S. Supreme Court has held that there is a "gap" in the 130-year-old Sherman Act, one that the bill is intended to close. Although Section 1 of the Sherman Act covers concerted action that unreasonably restrains trade, unilateral conduct is judged more leniently under Section 2 of the Sherman Act, which only prohibits conduct that rises to the level of monopolization or attempt to monopolize. Some unilateral conduct, even if it results in anticompetitive effects sufficient to satisfy Section 1's rule of reason standard, falls outside the reach of the Sherman Act. Critics have argued that, together with the case law holding that antitrust laws generally protect "competition, not competitors," this gap has provided insufficient protection to smaller companies and new entrants that challenge larger and more well-established firms by failing to adequately protect the "competitive process."

The New York Senate bill is explicitly intended to eliminate this perceived gap. Single firms that meet the bill's definition of "dominance" could violate the law by engaging in a range of conduct identified as abusive, some of which has been placed beyond the reach of today's federal and state antitrust laws by the courts. In explaining its aims, the New York Senate expressed its concern for "the important role of small and medium-sized businesses." The bill's departure from established antitrust principles in the U.S. puts the bill more in line with European and other foreign competition regimes and consistent with reforms advocated by some of the most vocal critics of current federal antitrust enforcement, including FTC Commissioner nominee Lina

Khan. Those critics also point to the fact that plaintiffs rarely succeed on antitrust claims for a monopolist's tie-ins, efforts to leverage power from one market to another, and refusals to deal, and the New York Senate bill specifies that these are examples of unlawful abuse of a dominant position.

Critics of the scope and application of U.S. antitrust laws have also highlighted what they view as an insufficient attention to monopsony or "buyer" power. The bill would place buyer power concerns on equal footing with seller power. One particular area of concern is labor market practices in which employers have market power. The New York Senate bill also has potential far-reaching implications for employers, therefore, by specifying that employee non-compete provisions can represent an abuse of a dominant market position.

The bill would make it much easier for plaintiffs to show "dominance," in contrast to the current requirements for establishing "monopoly" power. It would establish presumptions for both seller and buyer dominance: sellers with 40% market share would be deemed dominant, as would buyers with 30% shares. Alternatively, plaintiffs would be allowed to bypass the often expensive task of defining a relevant market to facilitate market share calculations by showing a dominant position using direct evidence, such as a defendant's power to set prices or dictate non-price contractual terms, or, in labor markets, use of non-compete clauses.

The New York Senate bill includes other important potential changes, such as the first state-level premerger notification requirements, dramatically increased corporate fines of up to $100 million, and new recovery options via class actions.

Although the New York Senate bill was not enacted in the legislative session that recently adjourned, it will be important to see not only whether New York takes up similar legislation in the next session, but also whether other states pass their own versions of expansive antitrust legislation. If other states follow New York's lead, the current predominant alignment of federal and state antitrust law could be replaced by a patchwork of differing legal standards that could ensnare companies that operate in multiple states and might put further pressure on Congress to enact additional federal legislation that sets forth a common framework for our national economy.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Shira Liu
Counsel – Orange County
Phone: +1.949.798.1325
Email: sliu@crowell.com

Olivier N. Antoine
Partner – New York
Phone: +1.212.803.4022
Email: oantoine@crowell.com

Juan A. Arteaga
Partner – New York, Washington, D.C.
Phone: +1.212.803.4053
Email: jarteaga@crowell.com

Jeane A. Thomas, CIPP/E

Partner – Washington, D.C., Brussels
Phone: +1.202.624.2877, +32.2.282.4082
Email: jthomas@crowell.com

Andrew I. Gavil
Senior Of Counsel – Washington, D.C.
Phone: +1.202.628.2823
Email: agavil@crowell.com