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Antitrust Case Laws e-Bulletin

Preview

The US New York State Senate proposes legislation to modernize state antitrust law and expands the State's and private litigants' ability to litigate against companies for anticompetitive conduct (*Twenty-First Century Anti-Trust Act*)

DOMINANCE (ABUSE), DOMINANCE (NOTION), DAMAGES, ALL BUSINESS SECTORS, SANCTIONS / FINES / PENALTIES, PRIVATE ENFORCEMENT, FINE MITIGATING, REFORM, UNITED STATES OF AMERICA, CLASS ACTION, COMPETITION POLICY, GENERAL ANTITRUST

New-York State Senate, *Notice of Online Public Hearing*, 14 September 2020
New-York State Senate, *Twenty-First Century Anti-Trust Act*, 8 July 2020

Grant Petrosyan | Constantine Cannon (New York)

e-Competitions News Issue Preview

New York Could Lead the Nation Into 21st Century Antitrust Enforcement*

New York is on the verge of revamping state antitrust enforcement to tackle competition issues of the 21st Century.

On September 14, 2020, the Consumer Protection Committee of the New York State Senate held a *virtual antitrust hearing* regarding Senate Bill S8700, which is known as the "*Twenty-First Century Anti-Trust Act*." The *proposed legislation*, which, New York State Senator Michael Gianaris introduced in July 2020, would modernize existing state antitrust law and expand the State's and private litigants' ability to litigate against companies for anticompetitive conduct. The bill, if passed, would place New York at the forefront of antitrust enforcement in the nation.

It is no secret that there has been a significant increase in consolidation in recent years across many industries, including wireless telecommunications, agriculture, and healthcare, to name just a few. This consolidation is the result of decades of lax antitrust enforcement, which has led to historic levels of market concentration. At the September 14 hearing, New York Attorney General Letitia James expressed her support for the proposed legislation *stating*, "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."

Passage of the Twenty-First Century Anti-Trust Act would transform New York's antitrust law, known as the Donnelly Act, in several important ways. First, the bill would broaden the scope of conduct subject to antitrust enforcement. Specifically, it would allow lawsuits against corporations that act unilaterally to stifle competition. Though such lawsuits are permissible under the federal Sherman Act, the Donnelly Act does not explicitly prohibit single-firm anticompetitive conduct. Therefore, under existing New York law, an action cannot be brought against anticompetitive conduct unless two or more companies are collaborating or conspiring to restrain competition. The proposed bill would further align New York state antitrust law with federal law and, in particular, with Section 2 of the Sherman Act, which specifically proscribes single-firm conduct that creates or maintains a monopoly.

Second, the proposed legislation would allow private class action antitrust lawsuits. New York's class-action rule—CPLR 901(b)—prohibits certification of class actions in which the plaintiff seeks to recover a “penalty,” unless specifically authorized by statute. The Donnelly Act does not authorize class actions. In *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 214 (2007), the New York Court of Appeals concluded that treble damages under the Donnelly Act constitute a penalty insofar as class actions are concerned. Accordingly, the Court held class actions may not be brought under the Donnelly Act.

Third, the bill would raise the penalty limits imposed on individuals and corporations in violation of state antitrust law to \$1 million and \$100 million, respectively. This represents a significant increase from the *current levels* under the Donnelly Act—namely, \$100,000 for individuals and \$1 million for corporations.

During the September 14 hearing, it became clear that one of the most controversial aspects of the bill is expanding the type of conduct that would be illegal under state antitrust law. Under the *bill*, it would be 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*.” (Emphasis added.) Critics of the bill argue that this goes beyond the standard under existing U.S. antitrust law. However, this language is used in competition laws in other jurisdictions around the world, including the *European Union*. Several witnesses during the hearing, including representatives from the business community, stated that the standard is too vague as “dominant position” is not defined. To address this concern, proponents of the bill suggested that New York could model this provision after *Article 102* of the Treaty on the Functioning of the European Union, which provides a list of categories of conduct that would constitute an abuse of a “dominant position.”

The hearing held on September 14 was meant to serve as a platform for state senators, antitrust experts, and representatives of the business community to discuss the proposed legislation and provide testimony to the Committee concerning antitrust issues. Whether the bill will pass as initially written, or with some amendments, remains to be seen. However, it is clear that New York antitrust law should be updated to sufficiently address new issues and anticompetitive behavior that did not exist in the late 19th century when the Donnelly Act was enacted.

As the main sponsor of the bill, State Sen. Gianaris, *stated*, “our antitrust laws are broken. They were written over a century ago. They were intended to deal with an economy that no longer exists.”

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