Antitrust and Competition Law

Senate Democrats Propose Dramatic Changes to Antitrust Law in New Omnibus Reform Bill

By: Lee K. Van Voorhis and Jay K. Simmons

Stating that Congress "can't take on trillion-dollar companies with Band-Aids and duct tape," Senator Amy Klobuchar (D-MN) on Thursday took the latest step in a campaign to significantly overhaul antitrust law.[1] The Competition and Antitrust Law Enforcement Reform Act of 2021 (the Bill),[2] introduced by Senators Amy Klobuchar, Richard Blumenthal, Cory Booker, Ed Markey, and Brian Schatz, seeks to amend the Clayton Act to modify the standard for unlawful acquisition, making it harder for large companies to obtain merger approvals, as well as bolster the civil enforcement power of the Department of Justice (DOJ) and Federal Trade Commission (FTC).

This is the latest in a series of initiatives by congressional Democrats to reform competition policy and address alleged dominance of "big tech" firms. In October 2020, the Democratic staff of the House Antitrust Subcommittee released a 449-page report on the Subcommittee's investigation into several leading tech companies. That report—a political document with no legal force—included proposals to: (1) promote fair competition in digital markets; (2) strengthen laws relating to mergers and monopolization; and (3) restore vigorous oversight and enforcement of the antitrust laws. Earlier in 2020, Senator Klobuchar proposed similar reforms designed to expand antitrust enforcement to conduct presenting "an appreciable risk of harming competition," and which presumed an "appreciable risk of harming competition" if such conduct was undertaken by a firm or group with market share greater than 50% of the relevant market.[3]

This Bill represents an even more sweeping set of reforms. If passed into law, the Bill would entail a major shakeup of existing antitrust principles and usher in a new era of competition enforcement with dramatic consequences for companies doing business in the United States. Although congressional investigations into the tech sector have not yet culminated in any meaningful legislative reforms to antitrust law, several of Senator Klobuchar's proposals could find support in a Democratic Congress. This Bill should therefore be top of mind for US business leaders and legal professionals, particularly in the tech and communications sectors, who will likely experience greater merger scrutiny and tougher civil enforcement if its key terms are passed into law. This alert summarizes the key aspects of the Bill as a primer on incipient reform in US competition policy.

In many ways, the Bill's underlying thesis reflects an assault on the current state of US antitrust law. If adopted, the Bill would explicitly counter courts' and regulators' decades-long acceptance of the Chicago School economic paradigm. Section 2(9), for example, scrutinizes "conglomerate mergers" as having the "potential to increase market power and cause anticompetitive harm," which runs directly counter to current economic thought and the state of US antitrust law.[4] In addition, the Bill bemoans "some court decisions and enforcement policies," which have purportedly "limited the vitality of the Clayton Act" with respect to anticompetitive mergers.[5] Specifically, the Bill claims courts' interpretations of the Clayton Act have "underestimated the dangers" of horizontal, vertical, and conglomerate mergers; impose onerous standards on the government to prove harmful effects of mergers "to a near certainty"; and discount "previously accepted presumptions" (since rejected by prevailing economic thinking) that "certain acquisitions" are anticompetitive.[6]

Most critically, Section 2(21) suggests that courts have, in some cases, "declined to rigorously examine the facts in favor of relying on inaccurate economic assumptions" that the Bill claims are "inconsistent with contemporary economic learning," such as the notions that market power is not durable and can self-correct; that monopolies can drive innovation in a competitive market; and that above-cost pricing cannot harm competition.[7] The Bill further suggests that existing civil remedies for Sherman Act violations, including injunctions, private damages, and equitable relief, are insufficient "on their own" to deter anticompetitive conduct, and federal agencies lack sufficient resources to ensure healthy competition in the marketplace.[8]

The text of the bill, as currently proposed, includes the following reforms:

- Section 4(b) largely reflects the concern that "big is bad" with numerous meaningful changes designed to assert an unlawful acquisition under Section 7 of the Clayton Act, 18 U.S.C. § 18:
  - It would amend the Clayton Act's definition of unlawful acquisitions to reduce the standard for an unlawful acquisition. Specifically, the Bill proposes striking the phrase "substantially to lessen" and replacing it with a lower hurtle to block an acquisition: "to create an appreciable risk of materially lessening" competition.[9]
  - The Bill further shifts the burden to the acquiring company to prove, by a preponderance of the evidence, that the effect of a qualifying acquisition will not create an appreciable risk of materially lessening competition or tend to create a monopoly or a monopsony.[10] "Materially" is defined to mean "more than a de minimis amount."[11] Currently, the burden is on the government enforcer to show that the proposed transaction would substantially reduce competition.
  - An "appreciable risk of materially lessening competition" is specifically defined to include:
    - acquisitions that significantly increase market concentration;
    - acquisitions of entities that have a reasonable probability of competing with an acquiring entity, where the acquiring entity has a market share of greater than 50% of a relevant market, as a buyer or seller, or possess significant market power;
    - acquisitions of a disruptive competitor;
    - acquisitions that would enable the acquiring firm to unilaterally exercise market power, as a buyer or seller;
    - acquisitions in which the acquiring firm would hold aggregate total voting securities of an acquired firm in excess of $5,000,000,000;
    - acquisitions in which the acquiring firm has assets, net annual sales, or a market capitalization greater than $100,000,000,000 and the acquisition would grant the acquirer aggregate voting securities in the acquired firm in excess of $50,000,000.

  In other words, simply being a very large company would trigger a presumption that any transaction violates the Clayton Act.

- Section 9, regarding exclusionary conduct, would similarly amend Clayton Act Section 26 by adding a prohibition on "exclusionary conduct."[12] The Bill makes unlawful any conduct that "presents an appreciable risk of harming competition," and presumes such a risk if conduct was undertaken by a firm or group with market share greater than 50% of the relevant market, as a buyer or seller. In addition, Section 9 would place the burden on the defendant to show, by preponderance of the evidence, that exclusionary conduct does not present an appreciable risk of harming competition; that procompetitive benefits “eliminate the risk” of harming competition; or that one or more other entities has entered or expanded presence in the market “with the effect of eliminating the risk of harming competition” posed by the alleged exclusionary conduct. The proposal also would create civil penalties recoverable by federal enforcers of 15% of the offender’s annual US revenues or 30% of US revenues of the person in any line of commerce affected or targeted by the unlawful conduct during the relevant period. The practical effect of this reform would make it harder for a large firm to demonstrate that a proposed merger would not constitute exclusionary conduct, because such conduct would encompass acts that disadvantage current or potential competitors’ ability or incentive to compete.

- Section 10 of the Bill would enhance civil penalties for Sherman Act and FTC Act violations. The Bill would permit federal antitrust enforcers to seek civil penalties for restraint of trade and monopoly offenses under Section 2 of the Sherman Act.[13] The penalties mirror proposed civil penalties for the proposed exclusionary conduct offense: 15% of the offender’s annual US revenues or 30% of US revenues of the person in any line of commerce affected or targeted by the unlawful conduct during the relevant period.[14] Additionally, the Bill would permit the FTC to commence civil actions targeting unfair methods of competition that constitute Sherman Act violations, and to recover civil penalties on the same schedule.[15]

- Section 13 would eliminate the requirement, for the purpose of establishing antitrust liability, that a party define a relevant market—except where the definition is required to establish a presumption or resolve a claim under a statute that “explicitly references the terms ‘relevant market,’ ‘market concentration,’ or ‘market share.’”[16] The Bill would still permit a court or the FTC to consider evidence relating to a proposed market definition “to evaluate the merits of a claim” asserted under antitrust laws.[17] However, this change would alter a foundational requirement to state and prove many claims under existing antitrust statutes, which do not explicitly require the definition of a market.

- Section 5 would amend Section 7A of the Clayton Act to require firms that enter agreements with the FTC or DOJ to resolve claims under the FTC Act, 15 U.S.C. § 41 *et seq.*, to provide to the FTC or Assistant Attorney General five years of post-settlement data to “assess the competitive impact of the acquisition.”[18] The data firms must report is far-reaching, including: (A) pricing, availability, and quality of products or services in any market covered by the agreement; (B) the source and resulting extent of any cost-saving efficiencies or any benefits to consumers or trading partners claimed as a benefit of the acquisition, and the extent to which any savings were passed on to consumers or trading partners; and (C) the effectiveness of divestitures or any conditions placed on the acquisition in restoring competition. Any agreement to resolve claims brought by FTC or DOJ described in this section must include the requirement for the firm to provide the information described in subparts (A)-(C).

- Section 8 would create a new Office of the Competition Advocate (the Competition Advocate) within the FTC, who shall report directly to the FTC Chairman and be appointed by the Chairman.[19] This new official will recommend processes that allow the FTC and DOJ Antitrust Division to solicit information on consumers and market participants about potential anticompetitive practices or adverse effects of market concentration, as well as provide recommendations to federal agencies about competitive effects of various administrative actions. The Competition Advocate will also have subpoena power to require submission of reports from covered companies to assess “competition and its impact on the United States.” In addition, the Competition Advocate will maintain a Data Center to compile commercial data in a manner accessible to the public regarding market concentration, merger enforcement, and other databases it deems necessary. Finally, Section 8 contemplates a Division of Market Analysis within the Competition Advocate, designed to conduct investigations of markets or industry sectors to evaluate competitive conditions affecting those sectors at the direction of the FTC Chairman or Competition Advocate, including investigations about the effects of recently consummated acquisitions.

Clearly, there is a long way from proposing a bill to its ultimate signing into law, and changes along the way are nearly certain. But with a Democrat House majority and effective Senate majority, and a number of Republican lawmakers voicing concerns about large companies, especially technology companies, the chance of a significant change to antitrust laws seems greater today than in many years. Jenner & Block will continue to monitor the situation and provide updates as events warrant.

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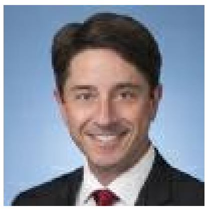

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[1] Lauren Feiner, “Klobuchar unveils sweeping revamp of antitrust enforcement, laying out vision as new subcommittee chair,” CNBC (9:34 AM Feb. 4, 2021), https://www.cnbc.com/2021/02/04/klobuchar-unveils-sweeping-antitrust-bill-laying-out-her-vision-as-new-subcommittee-chair-.html. Senator Klobuchar currently serves as Ranking Member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights and has been an outspoken advocate for reform to federal competition policy.

[2] Competition and Antitrust Law Enforcement Reform Act of 2021, S. 235, 117th Cong. (as reported by S. Comm. On the Judiciary, Feb. 4, 2021).

[3] Anticompetitive Exclusionary Conduct Prevention Act of 2020, S. 3426, 116th Cong. § 4(a) (as reported by S. Comm. on the Judiciary, Mar. 10, 2020).

[4] Competition and Antitrust Law Enforcement Reform Act of 2021, S. 235, 117th Cong. § 2(9).

[5] *Id.* § 2(15).

[6] *Id.*

[7] *Id.* § 2(21).

[8] *Id.* §§ 2(23), 2(25).

[9] *Id.* § 4(b)(1).

[10] *Id.* § 4(b)(3).

[11] *Id.*

[12] *Id.* § 9(a).

[13] *Id.* §§ 10(a)(1)-(2).

[14] *Id.*

[15] *Id.* § 10(a)(3).

[16] *Id.* § 13(a).

[17] *Id.* § 13(c).

[18] *Id.* § 5.

[19] *See id.* § 8(b) *et seq.*