BCLP. Client Intelligent

Insights

NEW ANTITRUST BILLS HIGHLIGHT CONTINUED BIG TECH SCRUTINY

Jun 22, 2021

2021 has been a busy year for antitrust legislation. On February 4, 2021, Senator Amy Klobuchar (D-MN) and four other senators introduced the Competition and Antitrust Law Enforcement Act of 2021 ("Klobuchar Bill").[1] On April 19, 2021, Senator Josh Hawley (R-MO) unveiled the Trust-Busting for the Twenty-First Century Act ("Hawley Bill").[2] And, on June 14, 2021, Senators Mike Lee (R-UT) and Chuck Grassley (R-IA) introduced the Tougher Enforcement Against Monopolies Act ("TEAM Act").[3] In addition to the Senate bills discussed below, the House of Representatives introduced five bills on June 11, 2021 that largely cover the same ground as the Klobuchar and Hawley bills.[4] Collectively, the focus of all this activity is large technology companies.

All three bills amend the Clayton Act to (1) relax the standards to determine whether an acquisition is anticompetitive; (2) restrict mergers by "extremely large" companies; and (3) enhance the antitrust enforcement powers of both private plaintiffs and the federal government.

Ban on Mergers by Extremely Large Companies

All three bills would place restrictions on mergers by large companies. In the Klobuchar Bill, acquisitions of $50 million or more of the securities or assets of another company by "extremely large" companies[5] would be presumed to be anticompetitive. The "extremely large" acquiring company would bear the burden of rebutting the presumption of anticompetitive harm by demonstrating that the acquisition will not materially harm competition.

The Hawley Bill goes a step further by banning extremely large companies[6] from acquiring, "directly or indirectly," the stock or assets, no matter how small, of any persons where the effect of the acquisition "may be to lessen competition in any way." In addition, the bill gives the FTC enhanced enforcement authority over "dominant digital firms" (i.e. Big Tech). A "dominant digital firm" is an entity that (1) "provides a website or service accessible through the internet; and (2) possesses dominant market power in any market related to that website or service." If the FTC designates a platform as a "dominant digital firm," the entity would be banned from any merger in excess of just

$1 million. Any "dominant digital firm" would also be banned from using "search functionality"—any website feature designed to rank or list search results—to favor their own results.

The TEAM Act would establish a rebuttable presumption that a merger is unlawful if the DOJ shows, by a preponderance of the evidence, that the combined entity (1) would "meaningfully" increase prices, while reducing output, innovation, or quality in a market; or (2) would combine persons that compete such that the combined entity would have a post-transaction market share above 33%. The presumption is rebuttable by showing the post-transaction entity would not be able to exercise market power, or that the anticompetitive effects are insubstantial and clearly outweighed by procompetitive benefits. If the post-transaction entity's market share is greater than 66%, an almost irrebutable presumption is created, which can only be overridden by a showing that the transaction is necessary to prevent serious harm to the national economy.

Amending the Evidentiary Burden for Anticompetitive Conduct

The bills would also modify the standards for analyzing whether a merger or acquisition is anticompetitive. The Klobuchar Bill would revise the Clayton Act's Section 7 standards for analyzing mergers by substituting a "to create an appreciable risk of materially lessening competition" standard for the current "substantially to lessen competition" standard. Additionally, the Klobuchar Bill adds a specific provision regarding "exclusionary conduct." It provides that "exclusionary conduct" means conduct that (1) "materially disadvantages 1 or more actual or potential competitors;" or (2) "tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete." The Klobuchar Bill changes an important antitrust principle—from a "harm to competition" to a "materially disadvantages competitor" standard—thereby focusing on protecting individual competitors, not competition as a whole.

The Hawley Bill keeps intact the protecting competition standard. Anticompetitive conduct is evaluated to ensure "the protection of economic competition within the United States." However, to prove conduct is anticompetitive, the plaintiff need only establish, by a preponderance of the evidence, and by use of direct or indirect evidence, that a company has substantial market power or is engaging in activities that are either anticompetitive or otherwise detrimental to economic competition. The plaintiff does not need to establish either the scope of the relevant market or the share of the market controlled by the defendant. The defendant can rebut the presumption of anticompetitive conduct by showing (1) clear and convincing evidence of procompetitive effects, and (2) that there are no commercially reasonable alternatives to achieve the procompetitive effects.

The TEAM Act will codify the Consumer Welfare Standard where courts can only consider the anticompetitive effects—price, output, quality, innovation, and consumer choice—with regard to consumer welfare. The TEAM Act permits the use of direct evidence that there was a clear intent to prevent competition to prove anticompetitive conduct, lowering the evidentiary bar. During civil actions, courts can still consider procompetitive effects as a mitigating factor, but only if the

procompetitive conduct is "tied to the market in which competition or consumers are harmed."[7] All three bills, thus, make it easier for an antitrust plaintiff to prove liability.

Enhance the Enforcement Powers of the DOJ and FTC

Finally, all three bills increase the enforcement powers of the DOJ, while the Klobuchar and Hawley bills also increase the FTC's enforcement powers. The Klobuchar Bill authorizes the government to seek civil penalties for antitrust violations of either (1) 15 percent of the violator's total U.S. revenue in the prior calendar year, or (2) 30 percent of the revenues of the targeted company for the entire period of the unlawful conduct. Prejudgment interest on treble damages would become a mandatory part of an award. In suits brought by the United States or FTC, the Hawley Bill goes further by mandating "disgorgement of all profits earned by the defendant as a result of the conduct constituting that violation."

The TEAM Act consolidates all federal antitrust authority at the DOJ by transferring the FTC's competition-related funding, resources, and personnel to the DOJ. Aside from obtaining all of the FTC's enforcement powers, resources, and staff, the DOJ's new enforcement powers include: (1) increased funding for the DOJ's Antitrust Division, (2) the ability for the Assistant Attorney General to recover and distribute treble damages on behalf of consumers, and (3) the issuance of civil fines for "knowing violations of the antitrust laws" including the requirement to explain any decision not to file a civil action after a compulsory investigation. In addition to the DOJ's powers, the Act allows indirect purchasers to recover damages for antitrust violations.[8] The additional penalty options would not only increase the scope of liability for antitrust defendants, but would sweeten the pot for potential plaintiffs, incentivizing private antitrust lawsuits. The potential financial penalties in all three bills provide a sizeable deterrent to activity that may not even be anticompetitive.

All three bills would have a chilling effect on Big Tech companies by restricting acquisitions, even unrelated to the core technology business, of companies with large market capitalization. While the target of the three bills may be Big Tech, the proposed modifications would also negatively impact the business activities of other types of large companies considering potential acquisitions.

Bryan Cave Leighton Paisner's experienced antitrust attorneys help clients navigate complex antitrust issues including these potential changes in the law. We represent clients across diverse industries during all stages of antitrust compliance, merger and conduct investigations, and litigation. For more information, please contact a member of the Antitrust and Competition team.

---

1. "Competition and Antitrust Law Enforcement Reform Act of 2021," S. 225 117th Cong. (2021). For a more in depth review of the Klobuchar Bill, see "Big Tech Under Fire: New Antitrust Bill Targets "Extremely Large" Companies, https://www.bclplaw.com/en-US/insights/big-tech-under-fire-new-antitrust-bill-targets-extremely-large-companies.html.

2. "Trust-Busting for the Twenty-First Century Act," S. 1074 117th Cong. (2021).

3. “Tougher Enforcement Against Monopolies Act,” S. 2039 117th Cong. (2021).

4. See “Merger Filing Fee Modernization Act of 2021,” H.R. 3843 117th Cong. (2021) (increasing merger approval fees for large mergers to fund enforcement activities by the FTC and DOJ); “Platform Competition and Opportunity Act of 2021,” H.R. 3826 117th Cong. (2021) (prohibiting “dominant firms” from acquiring, directly or indirectly, the stock or assets of any actual or potential competitors); “Ending Platform Monopolies Act,” H.R. 3825 117th Cong. (2021) (prohibiting online platforms from owning, controlling, or benefiting from “a line of business” in which it has a conflict of interest); “American Choice and Innovation Online Act,” H.R. 3816 117th Cong. (2021) (prohibiting companies that run “designated platforms” from self-preferencing their business in those marketplaces); and “The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act,” H.R. ____ 117th Cong. (2021) (mandating that platforms collecting user information must make such information portable and interoperable with other services).

See also “House Lawmakers Release Anti-Monopoly Agenda for “A Stronger Online Economy: Opportunity, Innovation, Choice,” Congressman David Cicilline (June 11, 2021) https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-stronger-online-economy-opportunity.

5. Companies with total assets, net annual sales, or a market capitalization greater than $100 billion. This is likely only a few hundred companies globally.

6. These are also companies with a market capitalization greater than $100 billion.

7. This language may be intended to overrule the Supreme Court’s decision in Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018), although the language is unclear.

8. The TEAM Act seeks to overturn both Hanover Shoe v. United Shoe Machinery, 392 U.S. 481 (1968) (holding that a defendant cannot assert as a defense that the defendant “pass[ed] on” overcharges), and Illinois Brick v. Illinois, 431 U.S. 720 (1977) (holding that because of Hanover Shoe, plaintiffs could not allege an antitrust violation against a defendant for illegal overcharges where the plaintiff is an indirect purchaser).

RELATED PRACTICE AREAS

- Antitrust Class Actions

MEET THE TEAM

Rebecca A. D. Nelson

St. Louis / Washington

rebecca.nelson@bclplaw.com
+1 314 259 2412

Philip D. Bartz

Washington

philip.bartz@bclplaw.com
+1 202 508 6022
