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EC's Reinterpretation of EUMR Article 22 Increases Enforcement Risk for Small Transactions

By Marguerite Sullivan, Tara Lynn Tavernia, and Kimon Triantafyllou[1]

In recent years, global competition authorities have increased their focus on so-called "killer acquisitions," in which large, purportedly dominant firms acquire emerging competitors to eliminate perceived competitive threats.[2]

In the United States, the Federal Trade Commission (FTC) and Department of Justice have announced several initiatives aimed at identifying and protecting against such transactions, including investigating previously consummated transactions of five global

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1 The authors note that Latham & Watkins represents GRAIL in connection with the Illumina-GRAIL transaction referenced herein. However, this article reflects only public developments regarding EUMR Article 22 and does not contain confidential information.

2 *See* OECD, START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL – NOTE BY THE UNITED STATES at 10 (June 11, 2020), *available at* https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf ("Commentators have noted that, in certain cases, a firm may acquire another firm merely to terminate or suspend innovative activity or the development of a product perceived to be a competitive threat to the acquiring firm. These transactions, when consummated, are sometimes referred to as 'killer acquisitions' because they are said to result in a product or service being 'killed' or terminated rather than brought to market.").

technology firms: Alphabet (Google), Amazon, Apple, Facebook, and Microsoft.[3] In Europe, Margrethe Vestager, the Commissioner for Competition of the European Commission (EC) announced in September 2020 that the EC would utilize Article 22 of the European Union Merger Regulation (EUMR) to enable the EC to accept merger review referrals from national competition authorities even where the transaction at issue does not meet the referring country's merger control thresholds.[4] This move was intended to capture "killer acquisitions" that had, in the EC's view, historically evaded review. In March 2021, the EC issued guidance on Commissioner Vestager's proposed change in enforcement policy.[5]

The EC's recent challenge under this changed policy of the proposed acquisition of GRAIL, Inc.—which has developed a breakthrough non-invasive, early detection cancer screening test based on DNA sequencing—by Illumina, Inc.— which provides the sequencing used in GRAIL's tests—offers a glimpse into the new risks that merging companies may encounter in merger review in the EU.

The EC's unprecedented approach to the Illumina/GRAIL transaction should be cautiously taken into account by in-house attorneys when counseling clients on potential transactions.

Background on EUMR Article 22

Since 1990, the EUMR has provided the EC exclusive jurisdiction to review merger transactions that have an "EU dimension," as defined by turnover thresholds.[6] Article 22 provides for an exception to this nexus requirement by permitting EU member states to refer to the EC for review any transaction that lacks an EU dimension—and thus would be otherwise unreviewable by the EC—where the transaction (1) "affects trade between Member States" and (2) "threatens to significantly affect competition within the territory of the Member State or States making the request."[7] In other words, the Article 22 referral mechanism provides another vector for EC merger review in addition to its exclusive jurisdiction over transactions with an EU dimension.

A member state seeking to refer a transaction under Article 22 must do so within 15 working days of the date of national notification or, if no national notification is triggered, within 15 working days of the date when the transaction was "made known" to the

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3 *See id.* at 14–15 (describing several recent initiatives, including, among other things, FTC's October 17, 2018 hearings on *Acquisitions of Nascent and Potential Competitors in Digital Technology Markets*; DOJ's July 23, 2019 review of competitive practices of market-leading online platforms; and the Special Orders issued by FTC pursuant to Section 6(b) of the FTC Act described above).

4 Margrethe Vestager, The future of EU merger control, Remarks to International Bar Association 24th Annual Competition Conference (Sept. 11, 2020), *available at* https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

5 EUROPEAN COMMISSION, COMMISSION GUIDANCE ON THE APPLICATION OF THE REFERRAL MECHANISM SET OUT IN ARTICLE 22 OF THE MERGER REGULATION TO CERTAIN CATEGORIES OF CASES (Mar. 26, 2021) [hereinafter *Commission Guidance*], *available at* https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

6 *Id.* at 1.

7 *Id.* at 2.

member state.[8] Notably, Article 22 does not specify how a transaction is "made known" to a member state, and the EC's guidance offers little assistance. The EC's interpretation is that a member state has sufficient knowledge when it has "sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of [a] referral."[9]

When a referral request is made, the EC must inform other member states and the merging parties "without delay."[10] Other member states then have 15 additional working days to join the request.[11] Once the merging parties are informed that a referral request has been made, Article 7 of the EUMR prohibits the parties from consummating the transaction.[12] The parties are prevented from closing regardless of whether there has been any determination that the member state's referral request meets the standard to request a referral under Article 22.[13]

The EC has ten working days from the deadline to join to decide whether to accept the request.[14] If the request is accepted, the EC will review the transaction.[15]

Article 22 was originally created to address scenarios in which a member state lacked its own merger control rules.[16] In public statements on the shift in enforcement policy, the EC has disclosed that it had "a practice of discouraging" member states from referring transactions to the EC where the member states lacked jurisdiction to review those transactions under their own national merger control rules.[17] The EC's rationale was that such transactions would likely not have a significant impact on the EU.[18] Though that rationale was sound and its reasoning still clearly applies, the EC's practice has dramatically changed. In the case of the Illumina/GRAIL transaction, far from discouraging referral, the EC actually *invited* member states to submit referral requests pursuant to Article 22(5).[19]

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8 *Id.* at 6-7.

9 *Id.*

10 *Id.* at 7.

11 *Id.*

12 Council Regulation (EC) 139/2004 of 20 January 2004, on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24/1), art. 22(4).

13 *See Commission Guidance*, *supra* Note 5, at 7.

14 *Id.* art. 22(3).

15 *Id.*

16 Stephen A. Ryan, *The revised system of case referral under the Merger Regulation: experiences to date*, European Comm'n Competition Pol'y Newsl., Number 3 – Autumn 2005, at 38, 42, *available at* https://ec.europa.eu/competition/publications/cpn/2005_3_38.pdf.

17 European Commission, Commission staff working document evaluation of procedural and jurisdictional aspects of EU merger control, 19 (Mar. 26, 2021), *available at* https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf.

18 *Id.*

19 Natalie McNelis & Nicholas Hirst, *Illumina-Grail case exposes controversy behind EU grab for non-notifiable mergers* (Apr. 7, 2021), *available at* https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/mergers-and-acquisitions/illumina-grail-case-exposes-controversy-behind-eu-grab-for-non-notifiable-mergers.

Recent Reinterpretation of Article 22

On September 11, 2020, EC Commissioner Margrethe Vestager announced that, in mid-2021, the EC would "start accepting referrals from national competition authorities of mergers [under Article 22] that are worth reviewing at the EU level—whether or not those authorities ha[ve] the power to review the case themselves."[20] The EC claimed that this policy change was due to a perceived enforcement gap in EC and national merger rules, especially with respect to "killer acquisitions" involving targets with revenues that are too low to trigger existing review thresholds.[21]

On March 26, 2021, the EC issued guidance on Article 22, claiming that "[i]t is clear from the wording, the legislative history and the purpose of Article 22 . . . , as well as from the Commission's enforcement practice, that Article 22 is applicable to all concentrations, not only those that meet the respective jurisdictional criteria of the referring Member States."[22] The guidance explicitly identifies "transactions in the digital and pharma sectors" as areas where potentially anticompetitive transactions have escaped national and EC scrutiny.[23]

In the March 2021 guidance, the EC clarified that the first prong of Article 22—*i.e.*, whether a transaction "affect[s] trade between Member States"—is triggered when the transaction "is liable to have some discernible influence on the pattern of trade between Member States."[24] The EC identified four factors that should be considered in making this assessment: (1) the location of (potential) customers, (2) the availability and offering of the products or services at stake, (3) the collection of data in several member states, and (4) the development and implementation of R&D projects whose results, including intellectual property rights, if successful, may be commercialized in more than one member state.[25] With respect to the second prong—*i.e.*, whether a transaction "threaten[s] to significantly affect competition within the territory of the Member State or States making the request"—the EC identified the following relevant considerations: "[T]he creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or

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20 Vestager, *supra* note 4.

21 *See id.*

22 *Commission Guidance*, *supra* Note 5, at 2.

23 *Id.* at 3. To capture such transactions, the guidance provides that a transaction may be referred "where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential," such as when (1) the target is a start-up or recent entrant with significant competitive potential and low (or no) revenues; (2) the target is an important innovator or is conducting potentially important research; (3) the target is a an actual or potential important competitive force; (4) the target has access to competitively significant assets (such as raw materials, infrastructure, data, or intellectual property rights); (5) the target provides products or services that are key inputs/components for other industries; or (6) the value of the consideration received by the seller is particularly high compared to the current turnover of the target. *Id.* at 5.

24 *Id.* at 4.

25 *Id.*

the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices."[26]

Beyond these two legal requirements, the EC provided some insight into how it intends to use its discretionary power to accept referral requests presented by member states: "the categories of cases that will normally be appropriate for a referral under Article 22 . . . where the merger is not notifiable in the referring Member State(s) consist of transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential," such as cases where the target "(1) is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model); (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/components for other industries."[27]

While the guidance suggests that the EC generally will not consider a referral appropriate if a deal has closed more than six months prior to the referral, it may do so if there is sufficient potential harm to competition or to consumers.[28] This potentially creates limitless intervention powers for the EC.

Illumina/GRAIL Case Study

On September 21, 2020, Illumina, a U.S.-based biotech company focused on DNA sequencing, announced its proposed acquisition of GRAIL, a U.S.-based startup developing multi-cancer screening tests that utilize DNA sequencing technology for $7.1 billion.[29]

On March 31, 2020, the FTC filed an administrative complaint and authorized a federal court challenge of the Illumina/GRAIL transaction. In its complaint, the FTC alleged that "the proposed acquisition will diminish innovation in the U.S. market for [multi-cancer early detection] tests. . . . As the only viable supplier of a critical input [DNA sequencing], Illumina can raise prices charged to Grail competitors . . . ; impede Grail competitors' research and development efforts; or refuse or delay executing license agreements that all [multi-cancer early detection] test developers need to distribute their tests to third-party laboratories."[30]

Although the Illumina/GRAIL transaction had been announced in September 2020, seven months later, on April 20, 2021, the EC announced that it had accepted a referral from the national competition authority of France—joined by Belgium, Greece, Iceland, the

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26 *Id.*

27 *Id.* at 5.

28 *Id.*

29 Jonathan D. Rockoff, *Sequencing Firm Illumina to Pay $7.1 Billion for Liquid-Biopsy Firm Grail*,WALL STREET JOURNAL(Sept. 21, 2020), *available at* https://www.wsj.com/articles/sequencing-firm-illumina-to-pay-7-1-billion-for-liquid-biopsy-firm-grail-11600682402.

30 Press Release, FTC, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

Netherlands, and Norway—to review the transaction pursuant to the EC's new Article 22 policy.[31] The EC accepted these referrals.

Illumina has challenged this action in the General Court of the EC, seeking annulment of the decision.[32] According to Illumina, the EC's decision to review the transaction "without proper engagement with the parties leaves businesses uncertain as to how the EU Merger Regulation will be applied," and the decision "will stifle innovation, fail patients and increase healthcare costs by needlessly delaying this transaction."[33] At the same time, Illumina is working with the EC to file the notification for review while the legal challenge is pending.[34] Either path likely will take months to resolve, delaying consummation of a vertical transaction that the parties claim will save lives.[35]

Meanwhile, the FTC is using the EC's maneuver to its advantage. On May 20, 2021, the FTC relied on the pending EU proceedings as a basis to dismiss its federal court challenge without prejudice, noting that "[n]ow that the European Commission is investigating, Illumina and GRAIL cannot implement the transaction without obtaining clearance from the European Commission."[36] The FTC argued that it no longer needs a preliminary injunction and can rely entirely on the Part III administrative proceedings to adjudicate the merits of the FTC's challenge. The FTC sought a dismissal without prejudice, rather than with prejudice, because it wanted to preserve the ability to go back to court to seek relief if, at some point, it becomes "possible" for the parties to close. Although the parties argued that this was pure "procedural gamesmanship" by the FTC, Judge Cathy

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[31] Press Release, European Comm'n, Mergers: Commission to assess proposed acquisition of GRAIL by Illumina (Apr. 20, 2021), *available at* https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846; Nicholas Hirst & Natalie McNelis, *Comment: Illumina-Grail deal reveals rift between EU competition authorities over M&A powers* (Apr. 20, 2021), *available at* https://www.mlex.com/GlobalAdvisory/DetailView.aspx?CID=1285390&Alert=True&uid=3463. By contrast, the national authorities of Spain, Austria, and Slovenia declined to join the referral because they claim they lack jurisdiction over the transaction. Similarly, the Irish, Lithuanian, Latvian, German, and Swedish authorities declined to send the merger to the EC, while Hungary expressed concern over legal certainty for companies following the referral. *Id.*

[32] Conor Hale, *Illumina sues European Commission to stop investigation of $8B Grail acquisition*, FIERCE BIOTECH (Apr. 29, 2021), *available at* https://www.fiercebiotech.com/medtech/illumina-sues-european-commission-to-stop-investigation-8b-grail-acquisition.

[33] Press Release, Illumina, Illumina Files Action for Annulment of European Commission's Decision Asserting Jurisdiction to Review GRAIL Acquisition (Apr. 29, 2021), *available at* https://investor.illumina.com/news/press-release-details/2021/Illumina-Files-Action-for-Annulment-of-European-Commissions-Decision-Asserting-Jurisdiction-to-Review-GRAIL-Acquisition/default.aspx.

[34] Diane Alter, *EC's GRAIL/Illumina Review Prompted in Part By Input from Rivals*,CTFN (Apr. 30, 2021), *available at* https://ctfn.news/news/apr-30-2021-ilmn-426888 (subscription required)

[35] *See, e.g.*, Francis deSouza, *FTC Imperils a Cancer Breakthrough*, WALL STREET JOURNAL (May 6, 2021), *available at* https://www.wsj.com/articles/ftc-imperils-a-cancer-breakthrough-11620340479 (publishing an opinion piece from Illumina's CEO explaining that the FTC's challenge of the Illumina-Grail transaction "will slow access to a groundbreaking early-stage cancer-screening test.").

[36] FTC Press Release, *Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case* (May 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth.

Bencivengo of the U.S. District Court for the Southern District of California granted the motion and dismissed the FTC's case.[37]

Key Takeaways for In-House Attorneys

The EC's decision to utilize Article 22 to exercise jurisdiction over the Illumina/GRAIL transaction is an unprecedented and significant development that—if upheld by the General Court—has the potential to permanently change obligations for merging parties going forward.

Merging parties will need to account for the risk that member states may take interest in a transaction (or the EC may invite them to do so) regardless of whether the parties are obligated to notify regulators in Europe. This means that the potential for—and timing of—an EC review should be considered even for transactions that do not trigger formal filing thresholds in Europe.

In addition, in-house counsel should be aware that referral requests under Article 22 can occur months after a transaction is announced (or even closed). The vague requirement that member states refer the transaction within 15 working days of the transaction being "made known" to them could allow an almost indefinite review period. For small transactions in industries with frequent M&A, a member state could easily overlook the announcement of a particular transaction, only to initiate the referral process months later.

The flexible timeline of the Article 22 referral process also creates an opportunity for jurisdictions to lobby each other to take action against potential transactions. Cross-border lobbying efforts could cause an increased focus on certain companies or industries based on the political motivations of a given jurisdiction, regardless of whether a particular transaction actually raises competitive concerns elsewhere. Moreover, as the FTC's recent motion to dismiss illustrates, U.S. or global agencies may use the Article 22 review period to artificially extend their own timeline for challenging a transaction.

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[37] Ben Remaly, *FTC granted dismissal of its Illumina/Grail challenge* (Global Competition Review June 1, 2021), https://globalcompetitionreview.com/gcr-usa/european-commission/ftc-granted-dismissal-of-its-illuminagrail-challenge.

In short, firms should be aware that they may face increased scrutiny when pursuing even small acquisitions. It will be crucial for such companies, prior to announcing those transactions, to be able to articulate robust procompetitive justifications, and to be prepared to counter allegations of purported horizontal or vertical concerns.

And keep a close eye on the result of the appeal to the General Court in Illumina/GRAIL. If the court upholds the EC's exercise of jurisdiction, companies may need to consider notifying all member states of every transaction that could even arguably meet the Article 22 standard in the future.

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A Comparison of Proposed Antitrust Legislation in 2021: Federal and New York State

By Sonia Pfaffenroth, Justin Hedge, and Monique Boyce

Debate about legislative reform to the antitrust laws continues to intensify. 2021 has seen the introduction of not only federal bills, but also significant changes proposed at the state level, such as in New York. Some proposals have the potential to radically alter the current legal landscape; while it is unclear if any of the pending legislation will ultimately become law, support for some level of change across political parties is growing. This article highlights some of the major changes proposed to the federal and New York antitrust laws.

Background

Federal

At the federal level, there are three core antitrust laws: (1) the Sherman Act, in which Section 1 outlaws "every contract, combination, or conspiracy in [unreasonable] restraint of trade," and Section 2 outlaws any "monopolization, attempted monopolization, or conspiracy or combination to monopolize";[1] (2) the Federal Trade Commission Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices";[2] and (3) Section 7 of the Clayton Act, which prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[3] Criminal violations of the Sherman Act carry a maximum penalty of a $100 million fine for corporations, and a maximum penalty of 10 years in prison and a $1 million fine for individuals. A prevailing plaintiff in a civil suit can recover treble damages and attorneys' fees. But federal law currently does not provide for civil penalties when the government brings an antitrust case, only injunctive relief.

Federal lawmakers have introduced three pieces of legislation aimed at antitrust reform, with more potentially on the way. On February 4, 2021, Senator Amy Klobuchar (D-MN), chair of the Senate Judiciary Committee's Antitrust Subcommittee, introduced the Competition and Antitrust Law Enforcement Reform Act of 2021 ("CALERA"),[4] which purports to "overhaul[ ] and moderniz[e]"[5] federal antitrust laws. Among the proposed

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1 15 U.S.C. §§ 1-2.

2 15 U.S.C. § 45.

3 15 U.S.C. § 18.

4 Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), introduced on Feb. 4, 2021, https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf [hereinafter "CALERA"].

5 News Release, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement, Feb. 4, 2021, https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

changes are: lowering the threshold for finding certain mergers or acquisitions unlawful; shifting the burden of proof to the merging parties in certain cases to prove that a proposed transaction would not materially harm competition; prohibiting dominant firms from "exclusionary conduct that presents an appreciable risk of harming competition"; redefining "market power" to include the ability of a firm to impose certain terms that it could not impose in a competitive market; removing the requirement for a plaintiff to define a relevant market to establish liability; authorizing civil penalties for antitrust violations; increasing structural and financial support to the DOJ and FTC to enforce the antitrust laws; and others.

On April 12, 2021, Senator Joshua Hawley (R-MO), introduced[6] the Trust-Busting for the Twenty-First Century Act ("Trust-Busting Act"), in order to "bust up" major corporations and "restore competition."[7] In particular, the Trust-Busting Act zeroes in on "dominant digital firms" that provide internet services and possess dominant market power.[8] The Trust-Busting Act proposes: prohibiting mergers by companies with market capitalization exceeding $100 billion; prohibiting "dominant digital firms" from acquiring potential emerging competitors; prohibiting dominant digital firms from promoting their own search results over those of their competitors; lowering the threshold for finding a merger or acquisition unlawful; and requiring disgorgement of profits earned as a result of anticompetitive conduct in any case brought by the DOJ or FTC.

Additionally, on May 13, 2021, the Senate Judiciary Committee passed the bi-partisan Merger Filing Fee Modernization Act of 2021, co-sponsored by Amy Klobuchar and Chuck Grassley (R-IA). The bill would increase the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR") filing fees for the largest merger transactions. Deals worth over $161.5 million would see an increase in filing fees ranging from $55,000 to $1.97 million over the current fees. For example, deals worth $5 billion or more would see the filing fee increase from $280,000 to $2.25 million. The smallest mergers, however, would see a decrease such that mergers under $161.5 million would have a fee of $30,000 rather than $45,000.

New York

The Donnelly Act, New York's state antitrust law, prohibits "contract[s], agreements[s], arrangement[s], or combination[s]" that establish or maintain a monopoly or restrain competition or trade.[9] Violations of the Donnelly Act result in civil fines of up to $1 million for corporations and $100,000 for individuals, and criminal fines of up to $1 million for corporations and up to $100,000 and four years in prison for individuals.

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6 Trust-Busting for the Twenty-First Century Act, introduced on April 12, 2021, https://www.hawley.senate.gov/sites/default/files/2021-04/The%20Trust-Busting%20for%20the%20Twenty-First%20Century%20Act.pdf [hereinafter "Trust-Busting Act"].

7 Press Release, "Senator Hawley Introduces The 'Trust-Busting for the Twenty-First Century Act': A Plan to Bust Up Anti-Competitive Big Businesses," April 12, 2021, https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big.

8 Trust-Busting Act, § 10A.

9 N.Y. Gen. Bus. Law §§ 340-347.

In early 2021, New York state legislators proposed three state Assembly and Senate bills to reform the Donnelly Act.[10] Key provisions of the original bills include incorporating language from Section 2 of the federal Sherman Act to prohibit unilateral conduct that creates or maintains a monopoly; adding a provision prohibiting "abuse of dominance" that mirrors European antitrust laws and granting the Attorney General rulemaking authority; requiring merger notifications of at least 60 days prior to consummation of transactions valued over $8 million in assets or voting securities; increasing fines for antitrust violations; and authorizing *parens patriae* actions by the Attorney General on behalf of injured persons.

Similar Proposals

Merger Review Standards. The federal and New York proposals make a number of changes that would benefit the government in merger enforcement actions. First, proposals at both levels shift the burden of demonstrating harm to competition from the government to the merging parties. Additionally, CALERA attempts to lower the standard for finding a merger anticompetitive from a substantial lessening of competition standard to those that "create an appreciable risk of materially lessening competition."[11] The Trust-Busting Act attempts to increase merger enforcement by specifying that an antitrust agency can establish unlawful conduct without defining a relevant market if it can establish direct evidence of harm.[12] Similarly, proposed legislation in New York would place the burden on the merging parties to "prove by a preponderance of the evidence that the pro-competitive benefits of the transaction . . . outweigh the anticompetitive effects."[13]

Exclusionary Conduct/Abuse of Dominance. At the federal level, unilateral conduct is typically challenged under Section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize. Although some courts have held that the Donnelly Act applies to unilateral conduct, decisions are mixed as the Act addresses "contract[s], agreements[s], arrangement[s], or combination[s]." Proposals at the federal and New York level both seek to expand enforcement against unilateral conduct.

Proposed legislation in both instances would add provisions intended to prohibit dominant entities from engaging in exclusionary conduct. CALERA expands the focus from prohibiting exclusionary conduct that could harm competition to prohibiting conduct that materially disadvantages an actual or potential competitor, or limits its ability to compete.[14] It would create a presumption that the conduct created "appreciable risk" whenever the dominant firm has a market share of 50% or more or otherwise has

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10 *See* Twenty-First Century Anti-Trust Act, S933, introduced on Jan. 6, 2021 by Senator and Deputy Majority Leader Michael Gianaris (D-12th District), § 340.2.(a).(i), https://legislation.nysenate.gov/pdf/bills/2021/S933; A3399, introduced on Jan. 26, 2021 by Assemblyman Ron Kim (D-40th District), § 340.7.(a)-(d), https://legislation.nysenate.gov/pdf/bills/2021/A3399; A1812, introduced on Jan. 11, 2021 by Assemblyman Jeffrey Dinowitz (D-81st District), §§ 340-341, https://legislation.nysenate.gov/pdf/bills/2021/A1812. On June 8, 2021, the New York State Senate passed the 21st Century Antitrust Act (S933), and the legislation has advanced to the New York State Assembly for committee debate and potential vote.

11 CALERA, § 4(b).

12 Trust-Busting Act, § 1(B)(b)(1).

13 CALERA, § 4(b); A3399, § 352-dd(3).

14 CALERA, § 9.

significant market power. Likewise, the Trust-Busting Act would prohibit dominant digital firms that operate search engines from excluding competitors by promoting their own search results over competitor results without disclosing the affiliation.[15]

The New York proposals would prohibit companies with a dominant position from abusing their dominant position.[16] This language goes farther than the proposed language in CALERA, which focuses on excluding competitors from the market. It mirrors the European Union's abuse of dominance law, which also penalizes exploitative abuses of customers, in which a dominant firm uses its dominant market position to extract high prices or discriminate against customers.[17] For example, two of the New York proposals could also potentially prohibit dominant firms from setting unfair prices, terms and conditions; refusing to deal with customers; dictating contractual terms without compensation; degrading product quality while maintaining profitability; using non-compete clauses or no-poach agreements; prohibiting collective bargaining; or limiting production to prejudice consumers.[18]

Increased Penalties. CALERA would authorize the FTC and DOJ to seek civil penalties for antitrust violations above and beyond the traditional injunctive relief that is currently available in civil cases.[19] The Trust-Busting Act would authorize courts to order disgorgement of profits earned as a result of conduct constituting antitrust violations.[20] Two of the New York proposals would increase the maximum fines for criminal and civil antitrust violations to $100 million for corporations (up from $1 million), and $1 million for individuals (up from $100,000).[21] The proposed New York legislation would also provide treble damages for private class action lawsuits.[22]

Differences in Proposed Legislation

Each of the proposed federal bills and the NY legislation would make unique changes as well. For example, CALERA also proposes to:

- Amend Section 7 of the Clayton Act to make mergers that create monopsony power unlawful.[23]
- Amend the Hart-Scott-Rodino Act[24] to require parties that entered into merger consent decrees in reportable transactions to report data to the FTC for a five-year period post-merger.[25]
- Impose limits on implied immunity.[26]

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15 Trust-Busting Act, § 4.

16 S933, 340.2.(a).(ii); A1812, § 340(2); A3399(7).

17 Consolidated Version of the Treaty on the Functioning of the European Union ("TFEU"), 2008 O.J. C 115.47.

18 S933, § 340(2)(b); A3399, § 340(7).

19 CALERA, §§ 9-10.

20 Trust-Busting Act, § 2(B)(b).

21 S933, § 341; A1812, § 341.

22 *Id*.

23 CALERA, § 4(a).

24 15 U.S.C. § 18a.

25 CALERA, § 5.

26 CALERA, § 14.

- Increase protections for whistleblowers.[27]
- Establish an Office of the Competition Advocate within the FTC to make recommendations to the FTC and DOJ, collect data, and publish reports on competition.[28]
- Grant antitrust plaintiffs the right to obtain prejudgment interest on damage awards.[29]

The Trust-Busting Act also proposes to:

- Prohibit acquisitions by companies exceeding $100 billion.
- Treat acquisitions by “dominant digital firms” valued at over $1 million as a presumptively unfair or deceptive transaction under the FTC Act.

The proposed New York legislation also proposes to:

- Implement a premerger notification system unique to New York that has both a lower transaction value threshold than the HSR Act (proposals include $8 million or 10% of the federal threshold, currently $92 million), and double the waiting period (60 days vs, typically 30 days).[30]
- Require merging parties that must report and file HSR materials to the federal government to also provide the HSR materials to the New York Attorney General.[31]
- Authorize class action lawsuits for antitrust violations.[32]
- Authorize the Attorney General to bring *parens patriae* lawsuits to recover damages on behalf of New York residents and businesses for antitrust violations.[33]

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27 CALERA, § 16.

28 CALERA, § 8.

29 CALERA, § 17.

30 S933, §§ 340.10.(a), 340.11.(b).

31 S933, § 340.10.(c).(iv).

32 S933, § 340.9; A1812, § 2; A3399, § 340(7)(i)(9).

33 S933, § 342-b.

Conclusion

Pending legislative proposals to amend federal and New York antitrust laws are varied and potentially sweeping in 2021. Although it is unknown how federal and state legislators will respond, it appears that calls for change will only continue to grow. And the most common calls for change include shifting the burden of proving that mergers are procompetitive to the parties, clamping down on exclusionary conduct and imposing penalties on parties that violate the antitrust laws.

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