Proposed Legislation Would Significantly Alter Antitrust Merger Standards, Particularly for Big Tech Companies

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Recent action by legislators has revealed bipartisan support for increased antitrust enforcement against mergers, in particular those involving big tech companies. The proposals, if enacted, could have significant negative effects on mergers across all sectors. Legislative proposals range from lowering the standard antitrust regulators must meet to block transactions, to requiring that merging parties in transactions involving high market shares or large parties prove that their merger will improve competition. One proposal would make acquisitions by dominant technology platforms presumptively unlawful. Regardless of whether specific proposed changes are enacted, funding for the antitrust agencies is likely to increase appreciably because that measure is particularly popular on both sides of the aisle.

Proposed Changes Affecting All Sectors. On February 4, 2021, Sen. Amy Klobuchar, the new chair of the Senate Judiciary Subcommittee on Antitrust, introduced the Competition and Antitrust Law Enforcement Reform Act. The bill, which is not limited to big tech companies, would substantially lower the bar for antitrust agencies seeking to prevent mergers by lessening the governing legal standard, shifting the burden of proof, and removing the need to define a relevant market when challenging a merger. Acting FTC Chair Rebecca Kelly Slaughter described the legislation as a "total game-changer," as it would make enforcement "eminently easier."

First, the bill would lower the bar to blocking mergers by amending Section 7 of the Clayton Act to prohibit mergers that "create an appreciable risk of materially lessening competition." By contrast, Section 7 currently only prohibits transactions that risk "substantially lessening competition."

Second, Sen. Klobuchar's bill would relieve the DOJ and FTC of the burden of proof when challenging certain large mergers or those that involve dominant companies. Instead, the merging parties would bear the burden of proving their merger will benefit consumers and competition where the merger:

- significantly increases market concentration;

- results in an acquirer having a 50% market share after acquiring a competitor or competitive assets;
- involves a maverick (*e.g.*, price-cutting) competitor;
- involves an acquisition exceeding $5 billion; or
- involves a company with a market cap above $100 billion making an acquisition exceeding the $92 million HSR filing threshold.

Third, the Competition and Antitrust Law Enforcement Reform Act would also make clear that establishing liability under the antitrust laws does not require defining a relevant market, unless explicitly required by statute. Today, when agencies challenge a merger, case law requires them to define the relevant product and geographic markets affected by the transaction. Many recent merger challenges involved pitched battles over which products or geographies compose the relevant market. The bill clarifies that the federal antitrust laws do not require regulators to precisely define the markets that are the subject of a challenged merger, in particular where there is direct proof of market power. The bill does not affect statutory schemes that expressly require proof, so enforcers would still be required to define the relevant market if the governing statute requires it.

The extent of support for Sen. Klobuchar's proposed bill is not yet clear. Notably, though, some Republicans previously have expressed support for reforming the burden of proof in merger cases and clarifying that market definition is not required when there is direct proof of market power, two hallmarks of Sen. Klobuchar's proposed bill.

If enacted, Sen. Klobuchar's proposal will make it more likely that the government will challenge mergers and that those challenges will be successful. Even today, the antitrust agencies often rely on a legal presumption that a merger will have anticompetitive effects and leverage that presumption to win the majority of merger challenges. Indeed, parties often abandon mergers in the face of a challenge. Lowering the legal standard for courts to block mergers and shifting the burden to parties to prove their transaction will be procompetitive will significantly raise the bar for merging parties.

Proposed Changes Affecting Dominant Online Platforms. Other recent legislative proposals have taken sharper aim at big tech specifically. These proposals largely stem from a 450-page report, *Investigation of Competition in Digital Markets*, which was issued by the House Judiciary Subcommittee on Antitrust. The report followed a sixteen-month inquiry into big tech companies and called on Congress to restrict big tech companies' market power by restoring competition in the digital economy, bolstering the antitrust laws, and strengthening the antitrust agencies' enforcement powers.

Sen. Josh Hawley (R-MO) recently introduced a budget amendment to broadly limit big tech company mergers. The proposal would impose a presumptive prohibition on all mergers and acquisitions by companies that operate "market-dominant online platforms." Sen. Hawley's amendment failed to define the characteristics of a "market-dominant online platform," but in announcing his proposal, he took aim at Amazon and Google. Rep. David Cicilline (D-RI), chair of the House Judiciary Subcommittee on Antitrust, is also currently drafting legislation that is expected to propose a ban on operating a dominant online platform while simultaneously using that platform to compete with other sellers.

Additional Funding for Antitrust Enforcement. Sen. Klobuchar's proposed act would increase funding to the DOJ's Antitrust Division and the FTC by $300 million each, making the Antitrust Division's total budget $484.5 million and nearly doubling the FTC's budget to $651 million. Funding for the antitrust agencies has been essentially flat for over a decade, while merger filings have seen double-digit increases. FTC Chair Slaughter recently lamented: "the FTC had roughly 50% more full-time employees at [the] beginning of the Reagan Administration than it does today."

As noted, there appears to be bipartisan support for increased agency funding. In October 2020, four Republican lawmakers, in a statement addressing the *Investigation of Competition in Digital Markets* report, agreed with the call to expand resources for antitrust regulators, noting that U.S. antitrust agencies have a budget of around $510 million, while big tech companies have a $2 trillion market cap and "unfailingly deep pockets."

Even if Congress does not substantively change merger review law, significant additional funding for antitrust regulators likely will increase the number of merger investigations and merger challenges.

How Debevoise Can Help. The proposed and forthcoming bills are not yet law, but they provide insight into how legislators and regulators are thinking about the expansion and application of the antitrust laws to large mergers and online platforms. Although recent congressional efforts previously had focused explicitly on a handful of tech conglomerates, some of the legislative efforts described above will necessarily reach many other market sectors. If some or all of the substantive changes are adopted, it will be even more important to consult antitrust counsel on the competitive implications of potential strategic transactions.

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