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Sen. Klobuchar Introduces Exclusionary Conduct Bill That Would Significantly Alter U.S. Antitrust Law

On March 10, Sen. Amy Klobuchar (D-MN) introduced in the Senate the Anticompetitive Exclusionary Conduct Prevention Act of 2020. The bill would shift the burden to defendants with market shares of greater than 50% (or that "otherwise have substantial market power") to show that their conduct is not anticompetitive if it disadvantages a competitor. The bill would also loosen requirements for proving certain monopolization claims, do away with most implied immunities from the antitrust laws based on federal regulations, and, in certain circumstances, obviate the need for plaintiffs to prove market definition. These measures, if enacted, would represent significant changes to existing U.S. antitrust law, and likely would result in a substantial increase in private antitrust litigation and potentially in government enforcement as well. They would also raise new challenges for businesses in defending against such actions.

The Proposed Legislation and Changes to Existing Antitrust Law

The stated purposes of Sen. Klobuchar's proposed legislation are to "deter exclusionary conduct that harms competition, particularly by dominant firms," and to "enhance antitrust enforcement" by government agencies (including the DOJ, FTC and states) and by private parties. The bill proposes to accomplish these goals by altering existing federal antitrust law on monopolization and exclusionary conduct in several ways, starting with the definition of such conduct.

First, it is a cornerstone of modern antitrust jurisprudence that the antitrust laws were enacted for the protection of "competition, not competitors," and that, accordingly, harm to a competitor is not sufficient to demonstrate exclusionary conduct. Sen. Klobuchar's bill, however, defines exclusionary conduct as "conduct that (i) materially disadvantages 1 or more actual or potential competitors; or (ii) tends to foreclose or limit the opportunity of 1 or more actual or potential competitors to compete." By focusing on conduct that disadvantages individual competitors, as opposed to marketwide competition, the bill represents a significant departure from existing law and Supreme Court precedent.

Second, existing law requires plaintiffs asserting violations of section 2 of the Sherman Act (monopolization) to plead and prove that the defendant has monopoly power in a relevant market and that its conduct has caused or threatens to cause a substantial harm to competition in that market. The proposed legislation, however, would create a rebuttable presumption that exclusionary conduct presents a risk of harm to competition if it is undertaken "by a person or by a group of more than 1 person acting in concert" with a market share of greater than 50 percent or with "significant market power." Defendants would bear the burden of rebutting this presumption of harm to competition by proving that the conduct at issue has

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"distinct procompetitive benefits" which "eliminate the risk of harming competition;" that other firms have entered or "expanded their presence in the market;" or that "the exclusionary conduct does not present an appreciable risk of harming competition."

Third, the legislation would loosen the requirements for proving certain types of exclusionary conduct. For example, under current law, a plaintiff seeking to establish liability for a defendant's unilateral refusal to deal is required to prove that the defendant terminated an existing, profitable course of dealing. The proposed legislation, however, would remove this requirement as well as any requirement for plaintiffs to show "that the conduct of the defendant makes no economic sense apart from its tendency to reduce competition." The legislation would also substantially alter current law on predatory pricing, which requires (among other things) proof that the defendant is pricing below an appropriate measure of costs. The proposed legislation would not require plaintiffs to prove "that any price of the defendant for a product or service was below *any* measure of the costs to the defendant of providing the product or service," and suggests that the presumption "that above-cost pricing cannot harm competition" is a "flawed assumption."

Fourth, whereas existing law requires plaintiffs to plead and prove the definition of a relevant market in order to establish most violations, the proposed legislation provides that market definition is not required except where it is explicitly referenced in a statute. And, if a plaintiff puts forth direct evidence of harm to competition, then under the proposed legislation "neither a court nor the Federal Trade Commission shall require definition of a relevant market in order to evaluate the evidence, to find liability, or to find that a claim has been stated under the antitrust laws."

Fifth, courts have from time to time found that the antitrust laws do not apply to certain types of conduct that are the subject of a pervasive federal regulatory scheme—like, for example, the federal securities laws—even where there is no explicit preemption. The proposed legislation, however, would prohibit courts from finding implied immunities to the antitrust laws in most circumstances.

Finally, the bill would establish civil penalties for violators of 15 percent of the defendant's prior year United States revenue or 30 percent of the defendant's revenue "in any line of commerce affected or targeted by the unlawful conduct during the period of the unlawful conduct." The civil penalty provision is significant: under current law, the federal agencies are generally limited to injunctive relief for civil antitrust violations (though the United States may sue for damages it has sustained as a result of illegal conduct).

Significance

If Sen. Kobuchar's bill were to become law, private plaintiffs and government agencies may find it easier to bring successful cases challenging certain types of conduct, and defendants may lose the ability to present arguments in their defense. For example, more firms may become subject to liability for monopolization offenses given the presumption of exclusionary conduct, and plaintiffs may be able to allege that a wider variety of conduct is exclusionary. Defendants may also lose the ability to exit from antitrust lawsuits by

arguing that plaintiffs have failed to allege or prove proper relevant markets – a common argument under current law. Given these looser standards and relaxed burdens for plaintiffs, it is likely that the proposed legislation would result in an increase in antitrust litigation filed by private plaintiffs. The legislation could also spur state and federal government authorities to bring more exclusionary conduct cases, which have been relatively rare in recent years.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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