The Business Council

S.933 (Gianaris)

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BILL
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SUBJECT
"Twenty-First Century Anti-Trust Act"
DATE
January 27, 2021
OPPOSE

The Business Council is opposed to this legislation, which would make significant amendments to the state's General Business Law's provisions regarding illegal monopolies.

Existing Article 22 of the General Business Law (also referred to as the Donnelly Act) was adopted in 1899, modeled on the federal Sherman Antitrust Act. It bans contracts or other forms of agreements that either result in a monopoly "in the conduct of any business or in the furnishing of any service, or that restrains trade" or that otherwise result in a constraint of trade. Through amendment and more than a century of judicial interpretation, the Donnelly Act has come to follow closely the federal Sherman Act.

Today, modern application of antitrust law is focused on addressing anti-competitive conduct and its impact on consumers.

In contrast, this proposed legislation would apply significantly increased criminal penalties to violations that constitute the "abuse" of a "dominant position" in the conduct of any business or commerce – key terms that are undefined in the legislation. While it is important for antitrust laws to be enforced against anti-competitive conduct, the resulting vague and broad provisions of this bill would allow enforcement and penalties against business conduct that is clearly pro-competitive and results in consumer benefits. The bill would also significantly expand the opportunity to bring cases under the Donnelly Act, by authorizing private class action suits for the recovery of damages.

As an association representing 2,400 businesses in a wide range of industry sectors, The Business Council understands and supports the importance of our antitrust laws in helping to promote healthy competition in our free market. The protection provided to markets by antitrust laws has fostered economic growth and innovation, allowing consumers to benefit from higher quality products and better services, all at lower prices.

The system works well. Historically, antitrust laws have been narrowly written and applied, and have focused on protecting consumers from anti-competitive actions. Even so, current federal and state antitrust laws remain actively enforced, and their core principles have been adapted to apply to new types of industries, businesses and markets.

In contrast, this proposed legislation would result in a dramatic change to the Donnelly Act, and provide expansive authority for both the Attorney General and private plaintiffs to bring cases in response to market activities they disfavor.

The bill provides no guidance as to what constitutes a “dominant position,” nor does it provide any specifics on what would constitute the abuse of such position.

Attacking a dominant firm that earned its dominance by outcompeting its competitors, punishes success and usurps the power of consumers to pick winners and losers in the market. Further, to suggest a successful firm is abusing its prominent role in the market is often an allegation made by a competitor, but without demonstratable harm to the consumer it should not give rise to an antitrust concern. Companies should be incentivized to compete to win market share and encouraged to compete aggressively by offering innovative product or services.

As important, the implications of these proposed changes do not solely target “big business”. Businesses of all sizes can be viewed as holding a “dominant position” depending on how the market is defined. A narrow market definition can make a small or medium sized business dominant allowing a plaintiff to argue that business is dominant and its conduct is abusive.

Antitrust enforcement today appropriately places consumers at the heart of the law. This legislation would move away from that standard as it does not require any showing of potential or actual harm to consumers arising from the business conduct in question. In fact, contrary to existing federal and state antitrust statutes, aimed clearly at assuring market competition for the benefit of consumers, this legislation seems to provide protection to other market participants, including those impacted by more successful competitors. As the U.S. Supreme Court has said in United States v. Grinnell Corp., 384 U.S. 563 (1966), the purpose of antitrust law “is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.” Consumers are the main beneficiaries of competition, and antitrust is intended to protect them from business conduct that damages such competition.

The bill also dramatically increases the applicable criminal penalties. For a natural person, the criminal penalty is increased from a Class E to a Class C felony, increasing the potential imprisonment from four to fifteen years and increasing the maximum fine from $100,000 to $1 million; for incorporated entities, the maximum fine is increased from $1 million to $100 million.

Clearly, these penalty levels are not only a deterrent against illegal act, they also provide significant leverage against a defendant whose only “crime” was to out-performed competitors, but is now facing ruinous criminal penalties under a vaguely worded statute.

As stated by the sponsors, this push is intended to go after the largest tech companies, but its impact will be felt across all business sectors. Such broad powers held by state antitrust enforcers would provide enormous leverage over all categories of business and could dictate specific outcomes in each sector of the economy, giving the state the ability to pick winners and losers among competing businesses.

The Business Council is committed to promoting vigorous competition among businesses in our economy and the just and effective enforcement of current law. Antitrust is not regulation. Antitrust is about ensuring market forces determine market outcomes. In contrast, regulation is a conscious decision to steer specific outcomes in the market. Efforts to change the antitrust law in New York should not alter antitrust into a tool to steer market outcomes. The Donnelly Act has served the state well, and remains adequate to address this important public policy concern. However, we believe that this legislation would serve to undermine competition rather than enhance it, by creating and applying new, undefined criteria to regulate market behavior.

For these reasons, we strongly oppose adoption of S.933 (Gianaris).