S.933-A (Gianaris) / A.1812-A (Dinowitz)

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BILL

S.933-A (Gianaris) / A.1812-A (Dinowitz)

SUBJECT

Twenty-First Century Anti-Trust Act

DATE

May 28, 2021

OPPOSE

The Business Council is strongly opposes S.933-A (Gianaris) / A.1812-A (Dinowitz), 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 antitrust, by authorizing private class action suits for the recovery of damages.

This legislation is rife with issues that would damage small businesses, undermine federalist principles and violate international anti-competitive norms and agreements. Specifically, but not exclusively, the bill would do the following:

On "Abuse of Dominant Position"

- The proposed provision is extraordinarily broad and has no basis in U.S. antitrust jurisprudence;

- It would seek to import European-style concepts of how companies should behave into the U.S;
- The statute is not restricted to big companies, it would apply to any company within New York that has a strong position in its local market, which could include hospitals, physician practices, resorts, tourism services, outlet stores, waste management companies, etc.;
- Any company in the State that uses standard conditions or terms – including many small and medium size business – could be found to be "dominant" under the statute;
- The bill prohibit ordinary and procompetitive business conduct, such exclusive suppliers, distributors, business partners, and joint venture partners, without regard to whether the proposed conduct overall was better for consumers;
- For enforcement, the bill is not limited to the New York AG, but rather permits enforcement by private parties and class action attorneys, potentially unleashing a torrent of class action litigation against New York businesses based on this vague and unpredictable standard.

On the Bill's Requirement for a New Merger Notification Requirement

- The Bill would propose a first in the nation requirement to notify the New York AG of transactions, creating a huge burden on commerce and ordinary business transactions;
- The Bill has an extraordinarily low notification requirement of only $9 million, which would pull in thousands upon thousands of transactions, most of which raise no competitive issues;
- The Bill proposes a waiting period of 60 days for every transaction it covers, as compared to the 30 day requirement under federal law, thus putting a halt to thousands of transactions for months even where there are no competitive problems;
- The Bill violates numerous best practices that have been promulgated by the ICN, a group of leading international antitrust enforcers, including our own federal antitrust agencies;
- Instead of being a leader in excellence for antitrust enforcement, it would make New York an outlier in terms of following international norms and best practices for regulating international commerce.

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.

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.

As stated by the Senate sponsor, 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-A (Gianaris) / A.1812-A (Dinowitz).