S.933-A (Gianaris) / A.1812-A (Dinowitz): An Analysis

The Business Council of New York State, Inc.

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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 about ensuring market forces determine market outcomes while protecting the consumer. S.933-A (Gianaris) / A.1812-A (Dinowitz) replaces New York's antitrust laws with a law modeled on European antitrust laws, both removing the consumer from any consideration and making New York the only state in the Union to abandon consumer-centric antitrust law. On behalf of our 2400 members we present this detailed analysis of S.933-A (Gianaris) / A.1812-A (Dinowitz). It highlights how this legislation would negatively impact small businesses and consumers alike.

EXECUTIVE SUMMARY

The Business Council opposes S.933-A (Gianaris) / A.1812-A (Dinowitz), which would amend the Donnelly Act, New York State's antitrust law. We are in favor of a strong and vibrant antitrust enforcement regime and are open to amendments to the Donnelly Act to update it for the modern era. This legislation, however, fails to accomplish that goal, and would instead have an extraordinary number of harmful (likely unintended) repercussions for the local New York economy and local businesses. The proposed legislation makes a number of dramatic alterations to New York's antitrust law that are astonishing both in their scope and in their potential to disrupt and damage the local business environment. Most critically, the proposed legislation prohibits "abuse" of a "dominant position" and creates a new state-level notification requirement for M&A transactions. Both changes have vast implications for the New York business climate and will not accomplish the drafters' presumed objective of reining in the power of large companies.

The proposed new "abuse of dominance" standard:

- Would dramatically impact the New York economy and local businesses:
  - It is ***not restricted to big companies*** and would instead 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, and similar businesses;
  - It could apply to ***any company in the State that uses standard conditions or terms***—including many small and medium size businesses;
- Would create ***enormous compliance costs for local businesses*** and others:
  - The standard has no precedent in U.S. antitrust jurisprudence, leaving businesses with little guidance as to what conduct is permissible and what is not;
  - It uses vague and overbroad language;
- Seeks to import ***European-style regulation*** into New York and the United States;
- Appears to ***prohibit ordinary and procompetitive business conduct***, such as exclusive supply, distribution, and joint venture relationships, even where such conduct benefits consumers;
- Is an invitation to ***endless class action litigation*** against our local businesses:
  - The new standard can be enforced by private parties and class actions, potentially unleashing a torrent of class-action litigation against local New York businesses.

Second, the new premerger notification requirement:

- Would represent a ***first-in-the-nation requirement*** to notify a state Attorney General of M&A or similar transactions, creating a huge additional burden on ordinary business transactions;
- Includes 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;
- Requires ***a waiting period of 60 days for every transaction*** it covers, compared to 30 days under federal law, thus disrupting thousands of global transactions, even where there are no competitive issues;
- ***Violates international best practices*** promulgated by the International Competition Network, a group of leading international antitrust enforcers that includes the U.S. DOJ and the FTC;
- Would ***make New York an outlier in terms of following international norms*** and best practices for regulating international commerce.

Given the deep flaws in these major components of S.933-A (Gianaris) / A.1812-A (Dinowitz), it is clear that the legislation should be rejected by the state legislature and its provisions studied in much greater detail prior to any contemplated re-introduction.

"ABUSE OF DOMINANT POSITION" STANDARD

The proposed legislation seeks to prohibit companies from "abus[ing]" a "dominant position." This standard has no precedent in the U.S., and is instead imported from European legal standards. Even apart from the dubious decision to look to Europe to guide our antitrust laws, however, the provisions of the proposed bill suffer from numerous additional flaws.

Overbroad Definition of "Dominance" or "Dominant Position" The legislation defines "dominance" too broadly. Under current law, the monopolization prohibitions of the Sherman Act apply to companies with "monopoly power," or perhaps "market power." These are well-understood concepts under U.S. law, with definitions that have been developed by the federal and state judiciaries for decades. Adopting more European-style concepts and language, this bill would regulate any company that could be found to have a "dominant position" in a relevant market. But the bill does little to define what it means to have a "dominant position." The vagueness of this definition leaves it very poorly tailored to the problem it was meant to solve, and creates an enormous risk that the statute will be applied in an untold number of additional circumstances that the drafters of the legislation probably never intended.

Will apply to local New York companies. Although seemingly aimed at regulating huge national companies that might be expected to have large positions in their markets, the proposed bill would apply to both local firms that focus on the New York market and firms that compete nationally. The legislation allows a company to be presumed "dominant" at a much lower level of market share than necessary for a presumption of "monopoly power" under U.S. law. The proposed legislation sets a presumption of market dominance at market shares as low as 30-40%. Although there may be circumstances where a company of that size could have market power, such circumstances are rare. These presumptions, which could be applied to a company that might be the second—or even third—largest competitor in a market, would leave New York with a lower threshold for finding dominance than the rest of the nation, as well as most other global jurisdictions.

Applicable to any company using standard terms and conditions. Additionally, the latest version of the proposed legislation appears to consider a company "dominant" if it has "the unilateral power to set prices, terms, conditions, or standards . . . [or to] dictate non-price contractual terms without compensation." The overbreadth of this provision makes it incredibly vague, potentially sweeping in all types of companies that use standard waivers in their businesses. The definition could be read to include, for example, a liability waiver required by a gymnasium or athletic facility, or clickwrap terms required when ordering delivery online from a local restaurant. This provision contributes even more to the overbreadth and unpredictability of the definition of what companies might be found to be "dominant" under the proposed legislation.

Types of local firms that could be affected. The vague and broad definition of "dominance" will rope in local firms and industries that are likely not the intended target of this bill's legal burdens. Many small businesses could be considered to have a "dominant position" in a local geographic area, and could therefore be susceptible to the market-share-dominance standards in the bill. Many other firms—again, even small and medium size businesses—might use standard terms and conditions for their customers. Below is a list of some of the types of firms that have been considered to have "market power" by courts or antitrust enforcers in the U.S.—any of these types of firms could be considered "dominant" under the vague statutory standard in this bill:

- Hospitals[1]
- Physician practices[2]
- Dining cruises[3]
- Tour buses[4]
- Department stores/Outlet malls[6]
- Grocery stores[7]
- Dairy farms[8]
- Waste management companies[9]
- Resorts[10]

This bill does not make any exceptions in its definition of dominance, meaning that many of the above types of firms will likely be subject to the new and vague "abuse of dominance" standard, as well as the private treble damages litigation, including class actions, that are likely to follow. These firms thus face a significant risk of expensive antitrust litigation for engaging in conduct that has historically been considered perfectly lawful in the U.S., but the legality of which is now ambiguous under the ill-defined and broad definitions in the current bill. In seeking to avoid future antitrust litigation or investigations, these local firms will be forced to incur significant compliance costs as they try to figure out what the requirements of this new legislation might be as applied to their local businesses.

Overbroad Definition of "Abuse"

Second, the proposed bill's definition of "abuse" is also vague and overbroad. Because the "abuse of dominance" standard is new to the United States, no U.S. precedent exists to assist courts or companies in determining what types of conduct might be considered the "abuse" of a dominant position. And, since European antitrust law has developed under different economic and cultural conditions than U.S. law, defining an "abuse" is not as simple as importing European definitions. For example, European law sometimes aims to protect small businesses, even at the expense of the consumer. Indeed, European law did not even consider cartels to be criminal conduct until very recently. It is not exactly clear how New York state courts would incorporate such principles into U.S. jurisprudence, which focuses more closely on protecting consumers.

Potentially toxic combination of European standards with U.S. class actions. European law also developed in an environment where there was a less robust system of private antitrust litigation, and no treble damages. As such, the cost of a finding of an antitrust violation in Europe has not typically involved the same level of exposure to expensive, follow-on private damages litigation, as is the case in the U.S. Given these differences, it is wrong to believe that the U.S. system can simply import European standards of interventionist regulation into U.S. antitrust law while leaving other aspects of the U.S. enforcement system untouched. There is simply no system in the world that combines European standards of intervention with the U.S. system of private treble damages and class action enforcement.

Prohibition on pro-consumer conduct. In a provision recently added to the Senate bill, the proposed changes to the Donnelly Act actually go even further than European law. Indeed, the bill's proposed § 340(2)(b)(iii) appears to prohibit companies from justifying their conduct based on benefits of that conduct to consumers where those benefits outweigh any negative effects on competitors. Such a rule would appear to prohibit business conduct that has some minor restrictive effects on competitors, but is overall unambiguously procompetitive and positive for consumers. All sorts of conduct that is lawful and procompetitive in the U.S. and Europe—such as joint ventures, certain types of discounts, exclusive deals, and even a company's unilateral choice on whether to deal with a competitor—would appear to be per se illegal under this proposed provision. This would be an astonishing outcome and go much further than the law in Europe and virtually anywhere in the world. Indeed, it is generally recognized globally that antitrust law must permit and protect conduct by firms that may have some ancillary restrictive effects on some competitors, but overall is beneficial for competition and consumers. The proposed bill's abandonment of this elementary principle of antitrust law is shocking.

For example, under the statute, it is unclear whether a hospital could make an exclusive agreement with a practice of anesthesiologists to impose higher training and privacy standards on that practice—for the benefit of that hospital's patients. Under the Senate bill, even if that arrangement were pro-consumer and had significant pro-competitive and pro-patient benefits, it could be illegal because it would limit competition by anesthesiologists that are not part of the exclusive group. Similarly, the proposed legislation could potentially prohibit a business from appointing an exclusive distributor for its product in order to encourage that distributor to learn more about the product and invest in marketing and education for customers.

Enforcement not limited to public enforcers; an invitation for class action litigation. One might have hoped that the drafters of a bill with such a vague standard of liability would at least limit enforcement to an enforcement body that is required to exercise its discretion to serve the public interest, such as the New York Attorney General. But this bill instead delegates enforcement authority for these questionable new standards to the private plaintiffs' bar and class action lawyers. That raises the risk that cases will be brought not to serve the public interest but instead as a vehicle for class action attorneys to seek a profit opportunity. The legislation is an invitation to class action firms to bring cases against local businesses that such businesses simply cannot afford to defend, in order to extract a settlement. Given the extraordinary cost and financial exposure such cases may present to such firms, these cases may very well be profitable for plaintiffs' attorneys to bring regardless of the actual merit of the suit.

Role of New York in the federal system. Given the constitutional federalism principles facing the proposed legislation, it is actually possible that the statute will only (or at least primarily) be enforced against local businesses. While New York has a right under the Constitution to regulate its own commerce, there are constitutional limits to its authority to regulate the conduct of out-of-state firms operating in interstate commerce. Under the "dormant commerce clause" constitutional principles, federal courts have held, for instance, that a state cannot "impose[…] a burden on interstate commerce incommensurate with the local benefits"[11] or enforce a statute that has "the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question."[12] It would be ironic if legislation aimed at curbing the power of large national corporations instead was primarily used against local New York firms in markets where no competitive problem has been identified by the legislature.

Even if New York were able to overcome constitutional challenges to the proposed legislation, the principle underlying the statute risks opening the floodgates for other states to regulate out-of-state businesses. That would subject national firms to burdensome, duplicative, and potentially inconsistent standards. Moreover, while New York might enjoy being able to set national antitrust standards, it is not clear how New Yorkers would feel about allowing the legislatures of Texas or Georgia to make laws that regulate how businesses can behave—and what services they may offer—in New York.

STATE LEVEL PREMERGER NOTIFICATION REQUIREMENT

The proposed legislation also seeks to create a first-in-the-nation state premerger notification system. The proposed new requirements are poorly, and seemingly arbitrarily, designed. They violate the best practices that leading antitrust and competition agencies worldwide—including our own federal agencies—have promoted abroad when other nations have considered passing premerger notification laws. The bill contains filing thresholds that are too low and waiting periods that are too long. And it imposes these costs and burdens on commerce for no obvious purpose—there is simply no connection between these burdensome requirements and a desire to curb the power of giant national companies. Instead, the proposed premerger notification requirements would simply add costs and unnecessary delays to thousands of transactions that raise no competitive issues and have almost no connection to New York State. Indeed, it is unclear what, if any, benefit the proposed legislation offers above the filing requirements that already exist under the federal Hart-Scott-Rodino Act (the "HSR Act").

The filing thresholds are far too low. As currently written, the bill appears to require filing for many transactions valued at over approximately $9 million. This compares to the current federal filing threshold of transactions valued at approximately $90 million. This $9 million level is surprising in light of the fact that the legislation is supposedly aimed at curbing the economic power of huge, national companies. Instead of covering competitively important transactions by these large national companies, the low threshold in the legislation instead will target thousands of smaller transactions that are the bread and butter of the New York economy—and likely irrelevant to competition by large national conglomerates.

Indeed, the overbroad nature of the $9 million filing threshold violates international norms and best practices, such those promoted by the International Competition Network ("ICN"). The ICN—a group of leading international competition authorities that includes the U.S. Department of Justice and Federal Trade Commission—recommends that "Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns."[13] The proposed legislation flunks that test.

The waiting period is too long. The proposed bill also includes a 60-day waiting period that applies to every transaction that must be filed. This is 30 days longer than the waiting period that applies under the federal HSR Act. New York is therefore adding an additional 30-day period of delay for thousands of small transactions that likely have no real-world competitive significance. This provision appears to violate another ICN best practice, which states that "Merger reviews should be completed within a reasonable period of time."[14]

Additionally, the federal agencies frequently grant "early termination" of the waiting period for transactions that raise no competitive issues, thus requiring little to no waiting time for parties to close such transactions. The proposed bill has no such provision. That means that the bill may add significantly more than 30 days of extra waiting time to these thousands of competitively unimportant transactions. For example, if the federal agencies grant early termination within 10 days, and the parties to the transaction still have to wait 60 days to close due to the New York bill, then the federal agencies' early termination has become irrelevant and an additional 50 days of delay has been imposed by New York on these competitively unimportant transactions.

The proposed system is impractical and irresponsible. The federal agencies—the DOJ and FTC—receive filings for thousands of transactions under the HSR Act. The HSR Act has numerous exemptions for competitively unimportant filings, and the Premerger Office of the FTC has a significant staff that responds to questions and assists parties in evaluating whether a filing is required. With a state filing threshold that is 90% lower than the federal threshold, the number of filings that could be expected under the proposed legislation would be exponentially higher. But the bill provides no new staff or funding for the New York Attorney General to develop a team of attorneys to answer questions about the filing requirements—questions that could come pouring in from throughout the world from parties whose transactions have small connections with the State of New York. It is irresponsible to rush this proposed premerger filing system into place unless and until it is clear that New York State is able to provide the global business community with such guidance and otherwise administer the proposed program in a way that complies with international standards and norms.

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1 E.g., Katie Thomas, Sutter Health to Pay $575 Million to Settle Antitrust Lawsuit, N.Y. Times (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/health/sutter-health-settlement-california.html.
2 E.g., State v. Anesthesia Pro. Ass'n, 1984 WL 15697 (Me Super. Ct. June 28, 1984).
3 E.g., Assurance of Discontinuance, In re Investigation of Hornblower Grp., Inc., Assurance No. 19-103 (Sept. 30, 2019).
4 E.g., United States v. Twin Am., LLC, 12-CV-8989 (S.D.N.Y. Mar. 16, 2015).
5 E.g., Settlement, New York v. May Dep't Stores Co., 94-cv-6456L (W.D.N.Y. Mar. 6, 1995).
6 E.g., Assurance of Discontinuance, In re Investigation of Simon Prop. Grp., Inc., Assurance No. 17-154 (Aug. 21, 2017).
7 E.g., Settlement, California v. Vons Cos., 05-cv-08972 (C.D. Cal. Jan. 3, 2006).
8 E.g. Complaint, United States v. Dairy Farmers of Am., 03-cv-206 (E.D. Ky. Apr. 24, 2003).
9 E.g., Utah v. Stericycle, Inc., 03-cv-49 (D. Utah Jan. 21, 2003).
10 E.g., Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984).
11 Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 108 (2d Cir. 2001).
12 Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 216 (2d Cir. 2004).
13 ICN Best Practices V.B
14 ICN Best Practices IV.A. The best practices also provide that "[i]nitial review periods should expire within six weeks or less . . . ." ICN Best Practices IV.A, cmt. 2.