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PERSPECTIVE

Klobuchar proposes bill that would overhaul US antitrust law

By David Pearl

In February, Senator Amy Klobuchar, Chair of the Senate Antitrust Subcommittee, introduced the Competition and Antitrust Law Enforcement Reform Act of 2021 to “overhaul” U.S. antitrust law. This follows several years of increased activity in the antitrust sphere. The Department of Justice, the Federal Trade Commission, and state attorneys general have conducted high-profile investigations of tech companies and in some cases filed suit. Congress has held numerous hearings, and last year the House Judiciary Committee released reports regarding the application of antitrust laws to the digital economy.

What Would Senator Klobuchar’s Bill Do?

The Klobuchar bill would change long-standing legal standards associated with DOJ and FTC review of mergers and for unilateral conduct and make other adjustments to buttress these two agencies’ existing enforcement powers, respectively. These changes would place new burdens on businesses and make it easier for the DOJ and FTC, and other plaintiffs to bring cases and succeed in court. And while it may have been crafted with tech companies in mind, the actual language of the Klobuchar bill has no such limitation — its impact would be felt across industries.

Mergers

Under current law, mergers that may “substantially lessen competition” are forbidden. The Klobuchar bill would change this standard to ban mergers that “create an appreciable risk of materially lessening competition.” This would lower the bar for the DOJ and FTC to block certain types



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Sen. Amy Klobuchar (D-Minn.) during a hearing in Washington on April 27, 2021.

of transactions, particularly those involving acquisition of nascent competitors.

The Klobuchar bill would also flip the traditional burden of proof: Rather than the DOJ and FTC needing to show that a transaction would likely harm competition, the merging parties would have to demonstrate that their transaction likely would not harm competition. This burden shift would impact, among others, transactions valued at greater than \$5 billion, where one party has assets in excess of \$100 billion, or where one party has a market share of greater than 50%. This would make transactions involving large companies in any sector presumptively unlawful, granting the FTC and DOJ much greater leverage to extract significant remedies in return for clearing a transaction.

Unilateral Conduct

The Klobuchar bill would create a statutory bar on “exclusionary conduct,” which it defines as “conduct that materially disadvantages an actual or potential competitor, or tends to limit their ability or incentive to compete.” It would presume harm from such exclusionary conduct by an entity that has a market share greater than 50%. And it would also overrule court precedent to lower plaintiffs’ burdens of proof for specified conduct, such as refusals to deal, predatory pricing, and harm involving two-sided platforms.

The antitrust laws have long focused on stopping harm to consumers and the competitive process, but these changes would rather dramatically reorient the law toward addressing harm to individual competitors. This

David Pearl is an attorney at Axinn, Veltrop & Harkrider LLP. His practice focuses on antitrust law, particularly merger review, government investigations, and counseling.



would function to protect incumbent players, as anything that negatively impacts an existing competitor — even things that would benefit consumers like lower prices or superior products — could be characterized as an antitrust violation.

Other Changes

The Klobuchar bill would also give the FTC and DOJ:

More Money: \$651 million for the FTC and \$484.5 million for the DOJ — an increase of more than \$300 million for each agency.

More Data: The Klobuchar bill would augment the FTC's data collection abilities, and parties to merger review settlements would be required for five years post-closing to provide the FTC and DOJ with a variety of information, including on prices, efficiencies flowing from the transaction, and success of any imposed remedies.

More Power: The FTC and DOJ would be able to impose signifi-

cant civil penalties for violations, a new power which, on top of the treble damages available in private antitrust cases, would create serious financial exposure for companies accused of anticompetitive conduct.

Will the Klobuchar Bill Pass?

The Klobuchar bill is a long way from becoming law. The House has not yet passed its own antitrust bill, and passage in the Senate is far from assured. While many people think of a bill as only requiring a simple majority of senators to pass, the real story is more complicated due to the filibuster, which has become a routine obstacle to the passage of virtually any bill of substance. As such, Democrats likely will have to persuade 10 Republicans to support the Klobuchar bill in order for it to pass.

There is a process called budget reconciliation for passing revenue-related bills, which can-

not be filibustered, and thus can be a vehicle to pass majority party priorities with only 51 votes. Save for the increase in DOJ and FTC funding, however, the Klobuchar bill's connection to the budget is fairly attenuated, so reconciliation is not likely an available option.

Could the Klobuchar bill attract ten Republican Senators? Republicans are not necessarily opposed to all the ideas contained therein and, indeed, many have signaled interest in antitrust reform. Sen. Mike Lee, the ranking member of the antitrust subcommittee reportedly has a strong working relationship with Klobuchar, recently co-sponsoring a bill with her that would prevent transfer of venue in antitrust enforcement actions brought by state attorneys general. And Sen. Josh Hawley, who also sits on the antitrust subcommittee, has introduced his own comprehensive antitrust reform bill that goes even further than the Klobuchar bill.

On the other hand, no one has co-sponsored Hawley's bill, and Lee has called departing from the consumer welfare standard a "non-starter." Lee has further expressed a preference for "ensuring that we are adequately enforcing existing laws, rather than pursuing drastic changes." These comments indicate that some of the more dramatic pieces in the Klobuchar bill, such as shifting burdens of proof to defendants and the emphasis on competitor welfare, may be a bridge too far for Republicans.

That said, more modest elements, such as increased funding or increased data collection powers for the FTC and DOJ, may be sufficiently appealing to enough Senators to enable a scaled-back version to overcome a filibuster. While this would fall short of overhauling antitrust, a major funding increase for the agencies alone would likely have a significant impact on enforcement. ■