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'Abuse of dominance': Was this what Congress originally intended for Section 2?

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Senator Amy Klobuchar's proposed Competition and Antitrust Law Enforcement Act has been heralded as a broad, "sweeping revamp,"[1] and "the most ambitious antitrust reform in nearly half a century."[2]

Among other things, Klobuchar's proposed legislation seeks to strengthen U.S. antitrust enforcement by cracking down on single-firm dominance, breaking up conglomerates, enhancing merger restrictions, and encouraging the entrance of new market participants.

In the age of technology giants, Klobuchar's approach seems novel and bold: for almost twenty years, monopoly power has come to be seen as almost benign, at least where there is no evidence of barriers to entry or actual anticompetitive effects.

Both Klobuchar and Khan appear to agree that single-firm dominance diminishes sound competition by reducing innovation, product quality, and product variety.

Reinforcing the impression that the Democrats are set to use their increased power in Washington, D.C. to take on 21st century counterparts to Theodore Roosevelt's "malefactors of great wealth," President Biden appointed Columbia Law Professor Lina M. Khan to the Federal Trade Commission.

Further underscoring the Biden administration's seriousness regarding antitrust reform, shortly after the new Commissioner was sworn in on June 15, 2021, Senator Klobuchar announced that the President had named Khan to be the FTC's chair.

As a law student three years ago, Khan set the antitrust world abuzz when she argued that single-firm dominance has been tolerated in the U.S. to the detriment of the health of the market as a whole.

In a *Yale Law Journal* article that cheekily name-checked Robert Bork's 1978 book that launched the Chicago School revolution in antitrust law,[3] she argued that our current antitrust law framework, with its single-minded focus on low consumer prices, cannot reckon with the anticompetitive effects of platform-based business models such as Amazon's.[4]

Both Klobuchar and Khan appear to agree that single-firm dominance diminishes sound competition by reducing innovation, product quality, and product variety.[5] But their arguments for forcefully policing single-firm conduct are not new.[6]

Historically, U.S. antitrust enforcers and courts were suspicious of the concentration of market power in the hands of a single economic actor. Single-firm dominance was thought to diminish, not enhance, healthy competition.

Moreover, this "new" thinking regarding single-firm dominance mirrors the way in which substantial market power is treated by regulators in the EU and other jurisdictions.

The European "abuse of dominance" standard encourages rivalry and competition, and imposes limits on the exploitation of a dominant position by a single firm.

Although the EU and U.S. approaches to single-firm conduct have diverged in recent decades, these recent developments suggest that we may be on the brink of a new convergence.

Historical approaches to single-firm dominance in the U.S. and the EU

For most of the 20th century, the United States had the most robust competition law regime in the world. Many jurisdictions did not have competition laws at all, and some of those that had such laws did not always enforce them.

With the increased globalization of trade, however, competition regulators in the U.S., the EU and other jurisdictions have converged in their approaches to concerted restraints of trade and cartel enforcement — the type of conduct that in the U.S. is unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1.

The story is different when it comes to single-firm conduct (monopolization and attempted monopolization), which in the U.S. is governed by Section 2 of the Sherman Act, 15 U.S.C. § 2. Section 2 states in relevant part that it is unlawful for any person to "monopolize, or attempt to monopolize ... any part of the trade or commerce among the several States, or with foreign nations."

Historically, a monopolist (or even an entity with substantial market power) might have expected its conduct to come under scrutiny,

and might have been forced to modify its conduct upon a showing of the mere threat of anticompetitive effects.

U.S. monopoly enforcement in the first half of the 20th century foreshadowed in many respects the "abuse of dominance" standard developed later by European competition enforcers. But while a more robust standard was taking hold in the EU, U.S. enforcers and courts moved in the opposite direction.

The EU's abuse of dominance doctrine is grounded in Article 102 of the Treaty on the Functioning of the European Union ("Article 102"). Article 102 does not explicitly define "abuse" in the competition law context, but lists categories of abusive behavior aimed at deterring single-form dominance.

For example, Article 102(a) prohibits directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; article 102(b) prohibits limiting production to the prejudice of consumers; and article 102(c) prohibits applying dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage.

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Broadly, these categories can be grouped into (i) exclusionary abuses (where a dominant company strategically seeks to exclude its rivals and thereby restricts competition) and (ii) exploitative abuses (where a dominant firm uses its market power to extract rents from consumers).

The intent of Article 102 is to prevent actions that might "prejudice the consumer." The doctrine is taken seriously: On April 21, 2021 Andrea Coscelli, Chief Executive of the Competition and Markets Authority, warned against relaxing competition rules as a result of Covid-19 and argued that it is important that countries emerge from the crisis with competitive markets.[7]

In her 2017 *Yale Law Journal* article, Khan suggested that the original intent of the U.S. antitrust laws was very similar to what is now accepted doctrine in Europe.

She wrote that "Congress enacted antitrust laws to rein in the power of industrial trusts, the large business organizations that had emerged in the late nineteenth century.

Responding to a fear of concentrated power, antitrust sought to distribute it. ... The law was 'for diversity and access to markets; it was against high concentration and abuses of power.'"[8]

The paradigm case for this earlier era of antitrust thinking was *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), in which the U.S. Supreme Court found that railroads needed access to a rail bridge over the Mississippi River in order to effectively compete, and ordered the railroad consortium that owned the bridge to allow competitors to use the bridge as well.

In *Associated Press v. United States*, 326 U.S. 1, 16 (1945), the Court held that a newswire service violated the Sherman Act by permitting member newspapers to veto membership by competing newspapers.

Similarly, in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973), the Court held that "[u]se of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of [section] 2 of the Sherman Act."

Relying on these cases, some lower courts crafted the "essential facilities" doctrine, which provided that in certain circumstances a monopolist could be required to share facilities with a competitor.[9]

This thinking appeared to reach its zenith in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 607-611 (1985), in which the Supreme Court held that the operator of three ski resorts in Aspen, Colorado must allow customers of a fourth, smaller resort to access the larger operator's resorts.

The normalization of monopoly power

Those who had read *Aspen Skiing* as indicating the Supreme Court's endorsement of an "essential facilities" approach to single-firm conduct were disappointed by the landmark decision in *Verizon v. Trinko*, 540 U.S. 398, 407 (2004), in which the Court suggested that monopolies were in many circumstances benign.

The Court stated that "[t]he opportunity to charge monopoly prices — at least for a short period — is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." (emphasis in original). *Id. Trinko* significantly raised the bar for plaintiffs alleging monopolization or attempted monopolization, and Section 2 of the Sherman Act seemed to have become Section 1's impoverished sibling.

In the almost twenty years since *Trinko*, a number of companies have come to the fore in the information technology, online marketing, and social media sectors whose reach and scope would have been unimaginable at the time.

Critics have pointed out that the courts' and antitrust agencies' narrow focus on lower prices as the sole measure of consumer welfare might be seriously misplaced.

Lina Khan argued that without changes in antitrust law, the options available to enforcers were limited; her proposed alternatives included "restoring traditional [pre-*Trinko*] antitrust and competition policy principles."[10]

Similarly, in 2018, former FTC Commissioner Terrell McSweeny testified that "[w]e need pro-competitive policies that give power back to Americans in the form of more rights and greater control."[11]

And now, Senator Klobuchar's proposed legislation reflects this attitude as well, when it states that "the anticompetitive effects of monopoly power or buyer market power include higher prices,

lower quality, lessened choice, reduced innovation, foreclosure of competitors, and increased entry barriers."

Her Competition and Antitrust Law Enforcement Reform Act of 2021, if approved, would crack down on single-firm abuses by "deter[ring] anticompetitive exclusionary conduct that presents an appreciable risk of harming competition," with "exclusionary conduct" being defined as conduct that "materially disadvantages" competitors or "tends to foreclose or limit [their] ability or incentive" to compete.

The bill would give rise to a presumption of competitive harm where a company engaging in exclusionary conduct controls more than 50% of the relevant market or otherwise has "significant market power."

Once a plaintiff had satisfied this prima facie showing of competitive harm, the burden would shift to the dominant firm to prove that its conduct was not anticompetitive, such as through evidence of "distinct procompetitive benefits" or the entry of new market participants that increased competition.

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This would be a marked departure from the current framework, where the plaintiff has the initial burden of proving actual competitive injury.[12]

Furthermore, Klobuchar's bill would greatly reduce a plaintiff's need to prove a relevant market in order to establish liability in most single-firm cases, especially where there is direct evidence of market power.

Under the bill, "[e]stablishing liability under the antitrust laws [would] not require the definition of a relevant market," except when a statute explicitly references the terms "relevant market," "market concentration," or "market share." These long-standing requirements of antitrust law are, of course, judicially created and are not found in the text of Sections 1 and 2 of the Sherman Act.

Thus, there may now be a change in the wind. Senator Klobuchar's proposed new antitrust act, Professor Khan's appointment to the Federal Trade Commission, and President Biden's reported consideration of the creation of a White House "antitrust czar," indicate a new concern with reinvigorating antitrust enforcement, particularly in the areas of technology and single-firm dominance.[13]

Republican Senator Josh Hawley recently introduced the proposed "Trust-Busting for the 21st Century Act," which would ban mergers and acquisitions by companies with a market capitalization of over $100 billion, empower the FTC to prohibit "digital dominant firms" from buying out potential competitors, and force companies that lose antitrust lawsuits to forfeit profits from monopolistic conduct.[14]

This was followed by the introduction on June 11, 2021 of a bipartisan package of five antitrust bills in the House and Senate clearly aimed at Amazon, Apple, Facebook, and Google.[15]

The proposed legislation would (among other things): expressly make it harder for dominant firms to complete mergers; preclude their giving their own products and services advantages over those of competitors on their platforms; and require dominant platforms to maintain certain standards of data portability and interoperability (thus, making it easier for consumers to switch to rival platforms).

This unusual bipartisanship on antitrust issues may be a further sign that the tide is turning in the U.S. with regard to single-firm dominance.

Notes

[1] Laura Feiner, *Klobuchar unveils sweeping revamp of antitrust enforcement, laying out vision as new subcommittee chair*, CNBC (Feb. 2, 2021), https://cnb.cx/364KBac.

[2] Amrita Khalid, *4 Ways Senator Amy Klobuchar's Antitrust Plan Would Change Startup Acquisitions: The Competition and Antitrust Law Enforcement Reform Act aims to rein in anti-competitive M&A activity and protect new businesses*, Inc. Magazine (March 29, 2021), https://bit.ly/3qEdBPx.

[3] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 720 (2017), https://bit.ly/3ho9Vgp.

[4] *Id.* at 774.

[5] *See id.* at 721; Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 2 (2021).

[6] Indeed, what they now advocate was foreshadowed a few years ago by what was dubbed the "New Brandeis School," a movement among younger antitrust scholars that, like Justice Brandeis, was critical of "bigness" and market concentration. *See, e.g.,* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. Eur. *Competition* L. & Prac. 131, 132 (2018); Robert Levine, *Antitrust law never envisioned massive tech companies like Google*, Bos. Globe (June 13, 2018), https://bit.ly/3w9JS27.; David Dayen, *This Budding Movement Wants to Smash Monopolies*, The Nation (April 4, 2017), https://bit.ly/2UcYksW.

[7] Competition & Markets Authority, Joint Statement on Merger Control and Enforcement (April 2021), https://bit.ly/2TqKFhD.

[8] Khan, *supra* n. 3 at 739-740.

[9] *See, e.g., City of Anaheim v. S. Cal. Edison Co.,* 955 F.2d 1373, 1380 (9th Cir. 1992); *City of Chanute v. Williams Natural Gas Co.,* 955 F.2d 641, 647 (10th Cir. 1992); *City of Malden v. Union Elec. Co.,* 887 F.2d 157, 160 (8th Cir. 1989); *Ferguson v. Greater Pocatello Chamber of Commerce,* 848 F.2d 976, 983 (9th Cir. 1988); *Interface Group v. Mass. Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987); *MCI Communications v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1983).

[10] Khan, *supra* n. 3 at 758, 792.

[11] Kevin Bankson, et al., New America's Open Technology Institute, *In re Competition and Consumer Protection in the 21st Century: The Intersection Between Privacy, Big Data, and Competition*, (FTC Public Comments Aug. 20, 2018), https://bit.ly/3duht0f.

[12] The Bill also proposes the elimination of several long-established antitrust defenses by doing away with the need for a finding that, for example: (a) the defendant had "altered or terminated a prior course of dealing"; (b) the defendant had treated persons subject to the exclusionary conduct differently than the defendant treated other persons; (c) the defendant's prices were set "below any measure of [defendant's] costs; (d) a defendant is likely to recoup its short-term losses from below-cost pricing; or (e) "the conduct of the defendant makes no economic sense apart from its tendency to harm competition."

[13] Diana Bartz, *Biden administration considers creating White House antitrust czar – sources*, Reuters (January 19, 20210), https://reut.rs/362TXDd.

[14] Musadiq Bidar, *Josh Hawley proposes ban to curb growth of biggest U.S. tech companies*, CBS News (April 13, 2021), https://cbsn.ws/3Ai8s3S.

[15] Lauren Feiner, *Lawmakers unveil major bipartisan antitrust reforms that could reshape Amazon, Apple, Facebook and Google*, CNBC (June 11, 2021), https://cnb.cx/3w8WqH0

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