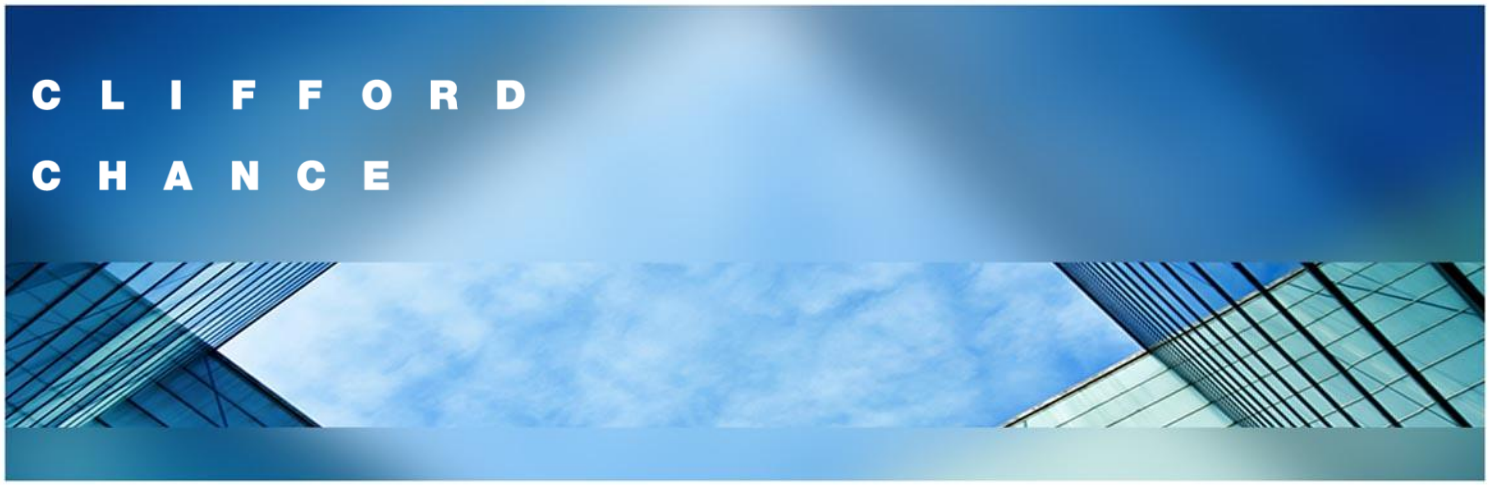


# NEW YORK SENATE TAKES AIM AT BIG TECH WITH 21ST CENTURY ANTITRUST ACT, HOLDS HEARING ON UNFAIR COMPETITION

The state of New York is considering legislation intended to ramp up its scrutiny of Big Tech companies, and potentially many other market participants. Earlier this summer, two New York state senators proposed significant legislative reforms to the state's antitrust enforcement statute. The proposed legislation, introduced earlier this summer as the 21st Century Antitrust Act (the "Act"), would for the first time empower New York state authorities to pursue unilateral conduct that allegedly restrains competition. Importantly, the Act, as drafted, could potentially reach a broad array of unilateral conduct that does not violate federal antitrust laws. The Act would also increase the potential criminal and civil liability for violations by companies and individuals. If passed as drafted, the proposed amendments would provide NY state prosecutors with stronger enforcement tools to challenge Big Tech companies, an objective of the bill's sponsors.

Passage of the bill is not expected until early next year (if at all), but the amendment is gaining momentum. Earlier this month, New York lawmakers held a hearing on the proposed law, receiving testimony from industry leaders and Attorney General Letitia James, the state's chief enforcement officer.

## BACKGROUND AND OVERVIEW OF THE PROPOSED LEGISLATION

New York's antitrust law, the Donnelly Act, was enacted in 1899. The Donnelly Act prohibits agreements and other joint conduct that unreasonably restrain trade

or establish or maintain a monopoly.[1] Unlike its federal counterpart, the Sherman Antitrust Act, the Donnelly Act does not presently apply to unilateral conduct that restrains trade—that is, conduct prohibited as actual or attempted "monopolization" under the Sherman Act. And New York's highest court has ruled that the Donnelly Act, as presently worded, does not permit classes of private plaintiffs to seek treble (or, three-fold) damages, which are available under the Sherman Act.

To address these differences, the proposed amendment would make four significant changes:

First, the Act would prohibit any company with a "dominant position" from "abus[ing] that dominant position."

Second, the bill toughens criminal penalties for antitrust violations. The law authorizes fines of USD 100 million for corporations and USD 1 million for individuals—a tenfold increase that would bring the statute's monetary penalties closer to what federal law provides.[2] The amendment also increases the maximum prison time an individual violator can receive from four to 15 years—a length that exceeds the federal maximum of 10 years.

Third, the Act would explicitly authorize private classes of litigants to recover treble damages.[3]

Finally, the bill extends the statute of limitations period from three to five years for actions prosecuted by the state.

## ANALYSIS

If enacted, the impact of the proposed legislation could be significant. For one thing, it would have broad reach: the Act applies to conduct anywhere that affects competition in New York, a global financial center and technology hub.

Among the most notable parts of the Act is its proposed prohibition on unilateral abuse of a "dominant position." This term of art appears to be borrowed from Article 102 of the Treaty on the Functioning of the European Union, one of the key provisions of EU antitrust law enforced by the European Commission. Article 102 imposes on dominant companies a special responsibility not to "abuse" their market position to disadvantage competitors or charge supracompetitive prices.

By contrast, US law generally prohibits actual or attempted "monopolization," which is limited to efforts by monopolists to exclude competitors from the market. US courts have coalesced around an antitrust standard that assesses consumer welfare. Under that standard, US law does ***not*** prohibit the charging of monopoly prices, nor does it condemn sharp-elbowed competition by dominant businesses; indeed, US courts have recognized that consumers may not ultimately benefit from an enforcement view that obligates dominant firms to prop up less-efficient rivals.

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1 *See* N.Y. Gen. Bus. Law §§ 340–47.

2 The Sherman Act imposes criminal penalties of up to USD 100 million for a corporation and USD 1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over USD 100 million.

3 *See Sperry v. Crompton Corp*., 8 N.Y.3d 204 (2007).

The divergence between EU and US standards can help explain the differing approaches of their respective antitrust enforcement agencies in the technology sector. Whereas the European Commission has imposed billions in penalties on large technology companies under their "abuse of dominance" standard, the US agencies have held back amidst debate about how the consumer welfare standard should evaluate technology issues. Indeed, one of the Act's sponsors reasoned that the Act was necessary because, in his view, "the federal government is not being aggressive enough" in challenging technology companies under the antitrust laws, including with respect to issues such as large companies' acquisitions of nascent competitors. Federal enforcers have expressed uncertainty over whether existing federal antitrust law prohibits such acquisitions.

The proposed Act is all the more striking because, as drafted, it would *criminalize* that broader array of unilateral conduct. The federal antitrust laws technically provide for criminal penalties for monopolization claims, but as a matter of policy, the US Department of Justice, Antitrust Division, seeks criminal penalties only for "hard core" antitrust violations—specifically, horizontal cartel conduct. There is no guarantee New York's state attorney general would adopt a similar policy of restraint in the event the Act is passed as drafted. Indeed, the New York Department of Financial Services, created in the aftermath of the global financial crisis, has been aggressive in carrying out its enforcement mandate, often in parallel to federal agencies.

## SUPPORT AND CRITICISM OF THE PROPOSED LAW

On September 14, New York lawmakers held a virtual hearing on the proposed law, taking testimony from thirteen witnesses, including state attorney general Letitia James.

James—who had previously expressed support for the bill—praised the proposed amendments. She acknowledged that the Act represented a "much more aggressive approach" to enforcement that was modeled after European law. But she testified that it is "critically important to have this toolkit," arguing that enforcement in the US against unilateral anticompetitive conduct has "significantly weakened" in recent years. Referring to the Act's increased penalties, James stated that the existing penalties were too low and did not adequately deter anticompetitive conduct, given they were established 45 years ago.

The feedback from other witnesses was mixed. Some were in favor of the bill, agreeing with the attorney general that current enforcement was not sufficient and arguing that more regulation was needed for tech giants like Amazon and Google. Others worried, however, that the bill would actually *harm* consumers. One witness argued that the EU has used its abuse of dominance standard for protectionist purposes, bolstering EU businesses at the expense of foreign rivals. Another worried that the law could have unintended consequences, including harming small and medium businesses. In response to this concern, James said that in her view the law would "rarely" apply to small businesses—a noteworthy comment that may give a window into her office's enforcement priorities.

James also said that any uncertainty created by the statute could be addressed through rulemaking, indicating that her office would take an active role not only in enforcing the law, but also in shaping it.

As for the lawmakers themselves, they primarily sought feedback and questions as they considered the bill, although at one point the chairman of the hearing took issue with testimony from a lobbyist that works with several Big Tech companies, calling his assertions "completely absurd."

## CONCLUSION AND TAKEAWAYS

The proposed Act is a reminder to businesses that US antitrust risk can arise not just at the federal level, but also with the states. State enforcers have increasingly investigated and prosecuted anticompetitive conduct, sometimes more aggressively than their federal counterparts. For example, last year, state attorneys general launched an unsuccessful suit to block the T-Mobile-Sprint merger on antitrust grounds, even after the Department of Justice, Antitrust Division had approved the deal.[4] New York's attorney general Letitia James is also leading coalitions of state enforcers investigating big tech companies like Google and Facebook for antitrust violations, in parallel to investigations by federal enforcers.

Businesses must stay nimble and be prepared to adjust and respond to this changing competition landscape.

[4] *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

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# CONTACTS

**Timothy Cornell**
Partner

T +1 202 912 5220
E timothy.cornell
@cliffordchance.com

**John Friel**
Partner

T +1 212 878 3386
E john.friel
@cliffordchance.com

**Robert Houck**
Partner

T +1 212 878 3224
E robert.houck
@cliffordchance.com

**Peter Mucchetti**
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

**Sharis Pozen**
Partner

T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

**Brian Concklin**
Counsel

T +1 202 912 5060
E brian.concklin
@cliffordchance.com

**Michael Van Arsdall**
Counsel

T +1 202 912 5072
E michael.vanarsdall
@cliffordchance.com

**Esther Lee**
Associate

T +1 202 912 5561
E esther.lee
@cliffordchance.com

**Brian Yin**
Associate

T +1 212 878 4980
E brian.yin
@cliffordchance.com



www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA