Senator Amy Klobuchar Leads Charge on Updating U.S. Antitrust Laws

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Overview

Senator Amy Klobuchar, a candidate for the Democratic presidential nominee in 2020, has recently made a strong push to update the U.S. antitrust laws. Senator Klobuchar has used her presidential campaign and position in the U.S. Senate to call for and introduce legislation that strengthens U.S. antitrust enforcement agencies’ ability to deter and punish antitrust violations.

Monopolization Deterrence Act

In August, Senator Klobuchar, the ranking member of the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, alongside Senator Richard Blumenthal (D-CT) introduced a bill giving the Federal Trade Commission (FTC) and Department of Justice (DOJ) an additional enforcement tool to punish antitrust violations under Section 2 of the Sherman Act² and Section 5 of the Federal Trade Commission Act.³ The bill, titled the Monopolization Deterrence Act,⁴ is co-sponsored by Senator Dianne Feinstein (D-CA) and Senator Ed Markey (D-MA). The Monopolization Deterrence Act would enable the FTC and DOJ to seek civil monetary penalties against individuals and corporations that engage in monopolistic behavior under current U.S. antitrust laws, an enforcement tool they do not currently possess. The offices of the sponsoring senators released a statement saying that, “[o]ur legislation will increase the ability of the Justice Department and the FTC to deter companies from engaging in monopolistic practices that hurt competition, consumers, and innovation in our economy.”⁵ The current version of the Sherman Act and Federal Trade Commission Act carry civil penalties in the form of treble damages, injunctive relief, and consent decrees. Criminal penalties are also available for conspiratorial conduct under Section 1 and predatory monopoly conduct under Section 2 of the Sherman Act. These fines are currently capped at $100 million for a corporation, $1 million for an individual, and carry a potential prison term of up to 10 years.⁶ Senator Klobuchar’s bill rests on the belief that the available monetary and criminal penalties have proved insufficient to deter monopolistic conduct. Charlotte Slaiman, competition policy counsel at the consumer interest group Public Knowledge, agrees with Senator Klobuchar’s concerns and supports her proposal: “Adding monetary penalties as a percentage of a company’s U.S. revenue could help deter anticompetitive conduct and give the antitrust enforcement agencies more leverage to promote competition in these types of cases.”⁷ Senator Klobuchar’s bill seeks to change the reality that despite the available codified penalties for courts to wield, the common remedy handed down is nearly always injunctive relief halting the unlawful activity. Senator Klobuchar expressed that “[t]he threat of an injunction isn’t always enough to deter this unlawful conduct from happening in the first place. Dominant companies need to be put on notice that there will be serious financial consequences for illegal monopolistic behavior.”⁸

The bill’s proposed fines would seek a civil penalty of not more than the greater amount of 15 percent of the violator’s total U.S. revenues or 30 percent of the violator’s U.S. revenues in the affected markets.¹² Further, the bill requires the FTC and DOJ to release joint guidelines on agency policies for determining the appropriate amount of civil penalties within one year of the bill’s enactment with the goal of promoting transparency.¹³ The belief is that the civil penalties would be crafted to be large enough in order to deter future unlawful activity but also be proportionate to the gravity of the violation. The bill would require FTC and DOJ to consider the following factors when determining the size of a penalty: (1) the volume of the commerce affected; (2) the

¹ Matthew Hayden is a law student at Seton Hall University School of Law.
⁸ Id.
⁹ Press Release, Shiva Stella, Public Knowledge Applauds Sen. Klobuchar for Bill Enhancing FTC, DOJ Antitrust Fines, Public Knowledge (August 2, 2019). https://www.publicknowledge.org/press-release/public-knowledge-applauds-sen-klobuchar-for-bill-enhancing-ftc-doj-antitrust-fines/ (Charlotte Slaiman also explains that “Section 2 monopolization cases are more difficult to bring than other cases, and if the government wins at court, it usually can do no more than stop the offending company from engaging in the same anticompetitive behavior in the future. Adding monetary penalties as a percentage of a company’s U.S. revenue could help deter anticompetitive conduct and give the antitrust enforcement agencies more leverage to promote competition in these types of cases.”).
¹⁰ Id.
¹² Jon Leibowitz, Evolving Remedies from “Time-Outs” to Civil Penalties (Not the Third Rail of Antitrust), 80 TUL. L. REV. 595, 603 (2005) (“Indeed, I would almost be willing to trade away restitution, which may involve potential duplicative recovery, but also may result in nothing, for the ability to get a court to sanction an antitrust violator monetarily.”).
¹¹ Id.
duration and severity of the unlawful conduct; (3) any action taken or attempted by the person to conceal the unlawful conduct; (4) the extent to which the unlawful conduct was egregious or a clear violation of the law; (5) whether the civil penalty is to be applied in combination with other remedies for the unlawful conduct, including structural remedies, behavioral conditions, or equitable monetary relief, including disgorgement and restitution; (6) whether the person has previously engaged in the same or similar anticompetitive conduct; and (7) whether the person undertook the conduct in violation of a preexisting consent decree or court order. It is currently unclear if the civil fines would be returned to the U.S. Treasury or proportioned out to the injured parties.

**The Monopolization Deterrence Act’s European Counterpart**

Senator Klobuchar’s proposal appears to be blueprinted from the European Commission’s system for imposing fines on EU competition law violators. The European Commission’s penalty system mirrors Senator Klobuchar’s proposal in that it gives discretion to the enforcers to impose fines based on the gravity and duration of the violations. Further, European enforcers analyze similar factors to Senator Klobuchar’s proposal, such as the nature of the infringement, the geographic scope, and whether the infringer is a repeat offender. Ultimately, both plans seek to punish and deter violators through substantial monetary penalties. One difference between the two laws is the methodology of the caps on fines imposed. Senator Klobuchar’s bill has a cap of 15 percent of U.S. revenue while the European Commission’s cap is 10 percent of the violator’s worldwide turnover. It is unclear if the civil penalties under Senator Klobuchar’s plan would be subject to appeal; the European Courts have discretion to review all aspects of the Commission’s decisions, but over 90 percent of the value of the fines are maintained on appeal.

The European Commission’s civil monetary penalty system is active in its mission to punish bad actors and deter recidivism and first-time violations. In the ten-year period between 1998 and 2008, the Commission imposed civil fines in fourteen Article 102 cases. The deterrence efforts of the European Commission are understood by the substantial fines imposed on competition law violators. The European Commission has most recently imposed fines of 4.3 billion and 2.42 billion on Google for alleged abuse of dominance. Further, total customer savings from cartel intervention decisions (KPI 1) in 2018 varied between EUR 1.3-1.9 billion.

**Conclusion**

The use of civil monetary fines for monopolization in the European Union shows that Senator Klobuchar’s Monopolization Deterrence Act could be a feasible response to the call for updating U.S. antitrust laws. The proposal would arm U.S. antitrust enforcers with an additional tool to punish and deter antitrust violations through increased penalties. This bill is now in the first stage of the legislative process and will next be considered by the antitrust committee before potentially being sent on to the House or Senate.

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14 Id.
15 The European Union’s competition laws are set out in Article 101 and 102 of the TFEU, and the fines are set out in Article 103.
16 “Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty”, OJ [1998] C 9 p. 3.
18 The European Commission’s cap allowing them to pose substantial fines on global companies.
20 Article 103 of the TFEU.
21 Id.
24 DG Competition calculation.