

NY's Proposed Antitrust Laws Are Out Of Sync With US Law

By **Pat Pascarella** (September 14, 2020, 4:53 PM EDT)

Let me begin by saying I love New York! But the recently proposed amendments to its antitrust laws? Not so much.

Under the guise of placing New York antitrust enforcers on par with their federal counterparts by giving them the ability to challenge unilateral anti-competitive conduct under New York state antitrust law, two New York state senators have in fact proposed the adoption of a new set of competition laws based on underlying policies and economic theories largely rejected by U.S. courts.



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These proposed amendments not only appear to capture conduct viewed as neutral if not potentially pro-competitive under current U.S. antitrust law, they also attach significant criminal penalties to these inchoate offenses. The potential impact at a national level should New York adopt these amendments could be significant.

What are the proposed amendments?

Today, New York's state antitrust law, the Donnelly Act, proscribes only anti-competitive conduct flowing from combinations or conspiracies — akin to Section 1 of the Sherman Act.

As currently written, the Donnelly Act does not proscribe unilateral anti-competitive conduct. This of course is a significant divergence from federal antitrust law, which reaches unilateral predatory or anti-competitive conduct under Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act.

The proposed amendments, S. 8700-A, do in fact close this loophole with the addition of a clause that largely tracks the language of Section 2:

for any person or persons to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any business, trade or commerce or the furnishing of any service in this state

The proposed amendments do not, however, rest there. In addition to adding anti-competitive unilateral conduct to the proscriptions of the Donnelly Act, they also seek to insert a clause that reflects a significant departure from current U.S. antitrust law and underlying economics. This amendment is

apparently intended to capture conduct that today would not be proscribed by federal competition laws or state antitrust laws that largely mirror federal law:

for any person or persons with a dominant position in the conduct of any business, trade or commerce or in the furnishing of any service in this state to abuse that dominant position.

To those familiar with the competition laws of Europe, Mexico and other foreign jurisdictions, this language is instantly recognizable. Many of these jurisdictions employ an abuse of dominance proscription — as opposed to Section 2's prohibition on monopolization — which tends to impose antitrust liability on parties and conduct that the U.S. courts have opted to exclude from Section 2's reach.

In general, the abuse of dominance analysis employed by these foreign jurisdictions lowers the market-power threshold required under Section 2 — i.e., a firm lacking monopoly power under U.S. law may still be found dominant — imposes on dominant firms an affirmative duty not to distort competition and includes causes of action, theories of liability and rules relating to burdens of proof that U.S. courts have rejected or abandoned.

In addition, and unlike even the European law the New York amendments appear to be based upon, the amendments propose attaching significant criminal penalties to abuse of dominance offenses.

Abuse-of-dominance jurisdictions tend to protect competitors.

At their core, U.S. antitrust laws tolerate concentrated markets when achieved via superior products or business acumen, whereas abuse of dominance jurisdictions tend to retain some of the old-world big-is-bad viewpoint. Abuse-of-dominance jurisdictions typically strive to protect and encourage some level of rivalry in the marketplace — at times without regard to the effect of that intervention on businesses' incentives to innovate and compete aggressively.

The generally espoused rationale for protecting competitors is that by maintaining a rival-based marketplace enforcers are enabling competition which ultimately leads to greater levels of consumer welfare. U.S. courts moved away from this competitor-welfare theory decades ago in favor of the consumer-welfare standard as the appropriate measure upon which to judge conduct under the antitrust laws.^[1] And for good reason.

A primary reason U.S. courts rejected a pro-rivalry bias was a concern that laws based on this approach could lead to false positives — i.e., erroneously finding anti-competitive conduct that, in fact, is neutral or even pro-competitive when examined from the perspective of the ultimate goal of the antitrust laws — consumer welfare.

Proscribing or punishing pro-competitive conduct of course results in a loss of consumer welfare, both from the specific actions enjoined as well as the resulting chilling effect as companies dial down their competitive zeal to avoid potential liability and litigation.

It has taken decades for the U.S. antitrust laws to evolve away from theories of liability that inadvertently captured conduct that while harmful to individual competitors, was not harmful to competition or consumer welfare.

One example is predatory pricing. For years a complainant could maintain an action for predatory pricing merely by alleging that its rival was selling products or services below some measure of cost. In

less than a decade beginning in the mid-1980's the U.S. Supreme Court amended that cause of action.

Recognizing that while below-cost prices might harm individual competitors, they do not necessarily harm consumers unless the predator is likely to be able to recoup its losses via subsequent supracompetitive pricing, i.e., prices above a competitive level, the court added a recoupment element to the predatory pricing cause of action.[2]

While the proposed amendments to the Donnelly Act do not define either abuse or dominance, it is reasonable to assume the language is not merely redundant of the proposed Section 2-like language, but rather is an attempt to expand the reach of the New York law by reintroducing into American jurisprudence the competitor-welfare bias found in the laws of Europe and other jurisdictions.

Investigations and findings in these jurisdictions give us a preview of what we might expect should these proposed amendments become law. In short, we can expect investigations and complaints based on theories of liability and causes of actions rejected by U.S. courts such as margin squeeze and monopoly leveraging as well as a predatory-pricing sans the likelihood of recoupment element.

And denying a rival access to facilities or some other essential input is more likely to be viewed as anti-competitive under an abuse of dominance test than as a violation of Section 2 and the all-but-retired essential facilities doctrine.

The proposed amendments also may shift or change burden of proof requirements in ways inconsistent with Supreme Court precedent. And of course, firms that would not be found to have monopoly power under existing federal antitrust law may well be categorized as dominant under this new law and subject to an affirmative duty not to distort competition — whatever that means.

In short, the proposed amendments to the Donnelly Act appear to reflect an intent to target conduct that U.S. courts have for the most part determined can be pro-competitive, encourages innovation, and either does not impact, or actually increases, consumer welfare.

And there are other curiosities in the proposed amendments.

The proposed amendments appear to resurrect another theory of liability largely dismissed today by U.S. courts: that of shared monopoly. The proposed abuse of dominance amendment includes the phrase — "person or persons with a dominant position."

Since the Donnelly Act already has a Section 1 targeted at conspiracies in restraint of trade, including cartels, one might ask what conduct is this change intended to target? Perhaps two competitors unilaterally abusing their respective dominance? Could this be an effort to avoid the requirements of Twombly?

Relatedly, the amendments also broaden the Donnelly Act's current and relatively standard definition of conspiracy. Under the proposed amendments, concerted action now "includes, but is not limited to, a contract, combination, agreement, or conspiracy." This begs the question: What other type of concerted action is there?

What exactly is proscribed?

The above highlights the biggest problem with the proposed amendments. Per the Supreme Court in

Pacific Bell Telephone Co. v. linkLine Communications Inc.: "[w]e have repeatedly emphasized the importance of clear rules in antitrust law." The amendments, however, provide no definition of dominance or abuse or any explanation of the apparent expansion of the conspiracy definition.

While, admittedly, federal antitrust law is equally ambiguous as written, over a century of judicial analyses, interpretations and precedents have resulted in fairly well-defined antitrust rules. And it is relatively clear today what sort of conduct is and is not proscribed by U.S. antitrust laws.

With the proposed amendments, New York essentially would be starting from scratch, which would render advising clients on the parameters of the currently parameter-less amendments problematic. The unavoidable result should these amendments become law will be the chilling of aggressive consumer welfare-enhancing competition for fear of running afoul of the new undefined proscriptions, particularly given that the proposed law also permits potentially hefty jail sentences.

Should New York's interests be permitted to impact U.S. consumers?

Finally, what would be the impact on a national level of New York adopting competition laws out of sync with the rest of the country's antitrust rules, state as well as federal? To answer that question one can look at the few instances that exist today where state and federal antitrust laws diverge.

While much of the current federal/state divergence relates to issues of standing, a few are more substantive. In cases of substantive differences, the unfortunate result is a loss of consumer welfare as most regional or national companies, unable to operate under different business models in different states, are compelled to play by the strictest rule.

This outcome can be seen today in the area of minimum resale pricing. Over a decade ago, in *Leegin Creative Leather Products Inc. v. PSKS Inc.* the Supreme Court determined that because there are scenarios under which manufacturer-imposed limitations on a retailer's ability to discount the price of its products can result in greater interbrand competition — albeit at the loss of some intrabrand competition — defendants should be given the opportunity to make that demonstration and defend their conduct under a rule of reason analysis.^[3]

A few states, however, have refused to follow that holding and maintain either by statute or espoused prosecutorial intent a per se standard for minimum resale price maintenance. The result — a business that determines unilaterally that it will be a stronger competitor in the more important interbrand marketplace if it can limit retail discounting must choose between ignoring its own business acumen or risking challenge in these anti-Leegin states.

The proposed amendments to the Donnelly Act appear to expand potential antitrust liability — both civil and criminal — in a lot more areas than minimum resale price maintenance. One could speculate that the adoption of these new laws would render New York to some extent the de facto standard for antitrust compliance.

Should this proposed law pass, it would no doubt be subject to challenge under various theories, not the least of which would be vagueness. The results of such challenges may well determine the future of the consumer welfare standard as the cornerstone of U.S. competition laws.

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[1] See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (antitrust laws enacted for "the protection of competition, not competitors"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

[2] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). "[C]utting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U. S. 574, 594 (1986). In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are "especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Ibid.*; see also *Brooke Group*, 509 U. S., at 226; *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U. S. 104, 121–122, n. 17 (1986).

[3] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).