

# Antitrust and Competition Law Update

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## *Important Changes to U.S. Antitrust Statutes Become Law*

**O**n June 22, 2004, President Bush signed into law perhaps the most significant amendments to the U.S. antitrust statutes since the Hart-Scott-Rodino Antitrust Improvements Act of 1976. These changes, enacted as H.R. 1086, will have substantial implications for several areas of antitrust enforcement. These include:

- limiting potential civil actions against standard-setting organizations;
- increasing even further incentives for antitrust wrongdoers to participate in the Antitrust Division's corporate leniency program;
- increasing criminal penalties for corporations and individuals; and
- enhancing judicial scrutiny of antitrust consent decrees.

### **Standards Development Organization Advancement Act of 2004**

In the United States, private "standard-setting organizations" often develop industry technical standards that enhance quality and safety and reduce costs. Through the Standards Development Organization Advancement Act of 2004, Congress has sought to address concerns that the threat of treble-damage antitrust actions -- for example, by suppliers of equipment that does not meet industry standards -- may be chilling the development of socially beneficial standards.

The legislation amends the National Cooperative Research and Production Act of 1993 (NCRPA), 15 U.S.C. § 4301 et seq., to limit the potential civil liability of "Standard Development Organizations" (SDO) in certain circumstances. The legislation limits awards against SDOs in federal or state antitrust suits to actual (rather than treble) damages and attorneys' fees and costs, if:

- the SDO provides the Federal Trade Commission and Attorney General with timely written notice disclosing (a) its name and principal place of business; and (b) documents showing the nature and scope of its standard-setting activities; and
- the antitrust claim results from conduct within the scope of the notification.

In addition to the single-damages provision, the legislation benefits SDOs by (a) specifying that all antitrust claims against them shall be judged under the rule of reason; and (b) providing that SDOs prevailing in litigation may recover attorneys' fees and costs if the court determines that the claim or the plaintiff's conduct during the litigation "was frivolous, unreasonable, without foundation or in bad faith."

Although the legislation provides some relief for SDOs, there are very important limitations on its effects. The legislation explicitly limits its relief only to **SDOs themselves and their full-time employees**. Unlike the NCRPA provisions relating to research and production joint ventures, the legislation does nothing to protect corporations (or their employees) that participate in standard-setting activities. Given the central role that industry participants play in these activities, this limitation raises questions whether the Act will achieve its goal of preventing antitrust exposure from chilling beneficial standard setting activities.

Further, the legislation expressly excludes from its protections specified conduct that falls outside the scope of legitimate "standards development activity." This includes exchanges of information among competitors relating to "cost, sales, profitability, prices, marketing, or distribution" that is not reasonably required to develop or assess conformity with standards; market allocation agreements; and agreements to fix prices.

## **Antitrust Criminal Penalty Enhancement and Reform Act of 2004**

The bill also included the Antitrust Criminal Penalty Enforcement and Reform Act of 2004. This Act has important implications for cartels and related civil actions; criminal penalties for antitrust violations; and the process by which courts approve Department of Justice consent decrees.

### *Cartels and Related Civil Actions*

Since 1993, the DoJ's Antitrust Division has operated a "Corporate Leniency Program," under which DoJ grants immunity from criminal prosecution to corporations (and their officers, directors, and employees) that are the first in the door to self-report conduct (usually cartels) that violates the antitrust laws. By creating strong incentives for cartel participants to blow the whistle and thus destabilize antitrust conspiracies, the leniency program has been instrumental in dramatically increasing the number of cartels that DoJ has been able to prosecute successfully.

The Antitrust Division was concerned, however, that the prospect of treble-damage civil lawsuits was dissuading some antitrust wrongdoers from participating in the program. In particular, cartel participants had to weigh the benefits of immunity from criminal prosecution against the strong likelihood of federal and state treble-damage claims based on their admitted wrongdoing. Furthermore, leniency program participants might find themselves liable not only for triple the damages suffered by customers that they dealt with, but also for three-times the damages to their co-conspirators' customers under joint and several liability rules.

To address these concerns, the legislation limits the total private civil liability of corporations that have entered into leniency agreements with the Antitrust Division (combined with that of their officers, directors, and employees who are covered

by the agreement) to actual damages “attributable to the commerce done by the applicant in the goods or services affected by the violation” (*i.e.*, single damages), plus attorneys’ fees, costs, and interest. This limitation applies both to federal claims under Section 1 or 3 of the Sherman Act and to claims brought under similar state laws. (The legislation will cease to have effect in five years unless Congress re-enacts it.)

Notably, under the legislation, leniency program participants are no longer jointly and severally liable for damages suffered by their co-conspirators’ customers. The legislation will, conversely, *increase* the potential liability for cartel participants that do not obtain leniency because they may be jointly and severally liable for two-times the actual damages suffered by customers of the leniency applicant, which that wrongdoer has avoided through its cooperation.

This relief comes at some price to the leniency program participant, however. While program participants have always been required to cooperate closely with the Antitrust Division, to obtain the benefit of reduced damage exposure they must also cooperate with *private plaintiffs*. In particular, the trial court must determine that the corporation (and any individuals covered by the leniency agreement) has provided “satisfactory cooperation to the claimant with respect to the civil action.” The corporation and individuals must (a) “provid[e] a full account to the claimant of all facts” known to them that “are potentially relevant to the civil action” and (b) “furnish[] all documents or other items potentially relevant to the civil action” in their possession, custody, or control “wherever they are located.” Additionally, cooperating individuals must sit for any interviews, depositions, or testimony that the plaintiff reasonably requests and must respond completely and truthfully to all questions the plaintiff asks. The corporation must use its best efforts to secure and facilitate the cooperation of its personnel.

Companies that have participated in antitrust violations have always been well-advised seri-

ously to consider applying for leniency under the Corporate Leniency Program to obtain amnesty from criminal prosecution. Given the prospects for relief from civil damages and the increased criminal penalties (*see below*) that the legislation creates, they now have even greater incentive to apply for leniency.

### ***Enhanced Criminal Penalties***

The legislation also dramatically increases potential criminal penalties for violations of Section 1 of the Sherman Act. Congress’s stated purpose here was to make criminal penalties for antitrust offenses more consistent with the harsh -- and arguably draconian -- penalties for white collar offenses that Sarbanes-Oxley and other recent legislation established. Maximum penalties are increased as follows:

- criminal fines for corporations from \$10 million to \$100 million;
- criminal fines for individuals from \$350,000 to \$1 million; and
- prison sentences from three to ten years.

Although the legislation itself only increases maximum penalties, we expect the U.S. Sentencing Commission to increase sentencing guideline ranges in accordance with the increased maximums, as it did with the Sarbanes-Oxley amendments.

The Criminal Fines Improvements Act of 1987, 18 U.S.C. § 3571, already provides that a court may impose, as an alternative to the maximum fine set forth in the Sherman Act, a fine equal to twice the gain or loss caused by the crime. Accordingly, at least for fines against corporations, the amendment’s most significant effect will be to relieve the government of the need to prove the gain or loss attributable to an antitrust wrongdoer’s conduct in order to obtain a fine over \$10 million. Although most fines result from plea agreements, the government’s (often difficult) burden of proving the amount of gain or loss in a contested case has

always limited its leverage in plea negotiations. Now the government will not need to prove the amount of gain or loss unless it is seeking a fine of over \$100 million, which is rarely the case. As a practical matter, this will substantially increase the government's bargaining power in plea negotiations with corporate defendants.

The amendments also mean that individuals convicted of antitrust offenses are likely to spend much more time in jail. Unfortunately, Congress failed to hold any hearings or otherwise undertake any reasoned public analysis to determine whether current sentences for antitrust offenses have proven inadequate to meet goals of deterrence, retribution, or incapacitation.

Finally, we note that the Supreme Court's decision last week in *Blakely v. Washington* may have important implications for the sentencing of both individuals and corporations convicted of antitrust violations. That decision sharply limits the factors that a court may take into account in sentencing that were not proven to a jury or admitted by the defendant. It remains to be seen exactly how *Blakely* will affect sentencing in antitrust and other areas where courts have traditionally relied on facts -- such as the amount of loss resulting from the offense -- that were not proven to the jury or admitted by the defendant.

### ***Amendments to Tunney Act***

The Tunney Act of 1974, 15 U.S.C. § 16, requires that the Department of Justice publish for public comment proposed consent judgments, and that courts determine whether the proposal is "in the public interest" before entering judgment. In recent years, however, some have expressed concern that the courts have been "rubber stamping" consent decrees without subjecting them to significant independent review.

This concern grew largely out of decisions of the D.C. Circuit that construed narrowly the district courts' authority to reject consent decrees. Most prominently, in *United States v. Microsoft*, 56 F.3d

1448 (D.C. Cir. 1995), the D.C. Circuit overruled the district court's refusal to enter a consent decree between the United States and Microsoft and observed that, unless an antitrust consent decree would "make a mockery of the judicial power," the "Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of attorney general." *Id.* at 1462.

With the new legislation, Congress has tried to clarify that district courts are to undertake a more thorough, independent determination whether a proposed consent decree is in the public interest. To that effect, Congress made findings that:

- "[the] purpose of the Tunney Act was to ensure that the entry of antitrust consent judgments is in the public interest"; and
- "it would misconstrue the meaning of the Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust judgments solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function.'"

In addition, Congress changed the Tunney Act's language that the court "may" consider an enumerated list of factors in determining whether to enter a proposed consent judgment to a command that the court "shall" consider those factors. The factors that courts now must consider, which the legislation modified slightly from the original Tunney Act, are:

- (a) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, *whether its terms are ambiguous*, and other competitive considerations bearing upon the adequacy of such judgment *that the court deems necessary to a determination of whether the consent judgment is in the public interest*; and

(b) the impact of entry of such judgment *upon competition in the relevant market or markets*, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(The new language is italicized.)

It is difficult to predict the extent to which, if any, the amendments to the Tunney Act will cause courts more often to reject or hold extensive hearings concerning proposed consent decrees. The amendments expressly state that Tunney Act “shall not be construed to require the court to conduct an evidentiary hearing or to require the court to per-

mit anyone to intervene.” We believe, however, that the amendments will, at the margin, probably introduce more uncertainty into the process of negotiating consent decrees with the Justice Department. They may also create more opportunities for parties opposed to consent decrees to receive fuller consideration from district courts or perhaps obtain concessions from settling parties that wish to avoid contested Tunney Act proceedings.

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The amendments we discuss above all have potentially important consequences for businesses and individuals affected by the U.S. antitrust laws. It will remain to be seen how they change the dynamics of antitrust enforcement in practice.

Please contact any of us if you would like further information about the new legislation.

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