

Recent Developments in Antitrust and Competition Law

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Bill to Increase Fines and Prison Sentences for Antitrust Violations Becomes Law

On June 23, 2004, President Bush signed a bill that substantially modifies individuals' and corporations' potential exposure for antitrust violations - increasing the maximum sanctions in certain circumstances and reducing penalties in others. The bill (Pub. L. No. 108-237) includes two parts, the "Antitrust Criminal Penalty Enhancement and Reform Act of 2004" and the "Standards Development Organization Advancement Act of 2004." These Acts:

- Increase the maximum sanctions for criminal violations of the Sherman Act. Individuals now face up to 10 years in prison (up from 3 years) and maximum fines of \$1 million (up from \$350,000). Corporations face maximum fines of \$100 million (up from \$10 million);
- Reduce the potential exposure of corporations cooperating with Department of Justice ("DOJ") price fixing investigations to single damages (as opposed to treble damages) in subsequent private litigations if the corporation agrees to pay restitution to private plaintiffs and assist the private plaintiffs in other antitrust suits;
- Prohibit courts from entering DOJ consent judgments unless the court makes a finding to support the DOJ's conclusion that the consent judgment is in the public interest - effectively reversing the current standard; and
- Reduce potential antitrust liability for standards-development organizations to single damages in private suits, if the organization had previously notified the DOJ/Federal Trade Commission ("FTC") of the standard they intended to adopt and the agencies did not object at the time.

Important Changes to Competition Policy and Enforcement in the European Union

Effective May 1, 2004, the European Union's ("EU") competition law underwent a number of significant changes. In large part, these changes bring European competition law closer to United States antitrust principles and practice. In particular:

- The process of individual "notification" of non-merger agreements has been eliminated. Companies entering into agreements that could be deemed restrictive of competition will have to do their own assessments of the risks under the EU competition laws - as they have historically done under the U.S. antitrust laws.
- There will be greater coordination among EU member states on issues of antitrust enforcement, concurrent with greater independence and power on both the local and EU levels. National competition authorities and courts are empowered to apply and interpret the EU's competition law; at the same time, the European Commission's own investigative and enforcement powers have been enhanced. A new "European Competition Network" has been established to enhance sharing of information across national borders and ensure uniform application of EU competition rules.
- A new regulation went into effect relating to transfers of patent, know-how and software copyright licensing rights in the EU. The new "Technology Transfer Block Exemption," or "TTBE," protects from scrutiny license agreements between non-competitors whose individual market shares do not exceed 30%, and between competitors whose combined market shares do not exceed 20%, as long as those agreements do not include certain prohibited

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clauses. Outside of these safe harbors, the competition authorities in the EU will generally apply a fact-intensive analysis of actual competitive effects, very similar to the "rule of reason" test applied in the United States.

- The EU merger control regime has been modified to enhance the European Commission's review authority. The new law specifically empowers the Commission to challenge mergers that "significantly impede effective competition," including mergers in highly concentrated, oligopolistic markets, even when the mergers do not result in a single dominant entity. In addition, the new guidelines make clear that the authorities will rely more heavily on economic theory in assessing the unilateral and/or coordinated effects of mergers and the validity of claimed efficiencies resulting from the merger. Again, these changes bring EU competition law more into line with U.S. merger analysis.

- Finally, some significant changes have been made to the timing of the Commission's investigation and approval of mergers. Among other things, parties can now submit a pre-merger notification prior to signing an agreement, including on the basis of a Memorandum of Understanding (as in the U.S.). The review process on the whole has also been lengthened to give the Commission more time to review and investigate mergers.

Proposed Amendments to Hart-Scott-Rodino Rules Relating to the Formation of, and Acquisitions of Interests in, Non-Corporate Entities

In a long-anticipated move, the Premerger Notification Office of the FTC has proposed new rules under the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the "HSR Act") that would, among other things, substantially change the treatment of partnerships and other unincorporated entities under the HSR Act. The proposals are intended to narrow the existing "partnership loophole" and allow the federal antitrust authorities to treat corporations and unincorporated entities more uniformly.

The HSR Act requires parties contemplating transactions that satisfy certain jurisdictional thresholds to notify the transaction to the federal antitrust enforcement agencies, pay substantial filing fees, and observe mandatory pre-closing waiting periods. Until now, acquisitions involving corporations and unincorporated entities have been treated quite differently under the HSR rules. For example, under the current rules, the formation of - and virtually all acquisitions of interests in - partnerships are excluded from the pre-merger notification process, while the formation of corporations and the acquisition of corporate securities must be pre-reported and are subject to the waiting periods. The treatment of limited liability companies (LLCs) has evolved over time, but has also diverged in significant ways from the treatment of acquisitions involving ordinary corporate entities.

The Agencies have long believed that these differences create an incentive to choose one corporate form over another (i.e., to structure a merger as the formation of a partnership rather than a corporate entity), even though the form itself generally has no competitive significance. To address this concern, the FTC has proposed a number of changes to the HSR Act that will effectively eliminate the disparate HSR treatment of corporations and non-corporate entities including partnerships and LLCs.

Comments on the proposed rules were due as of June 4, 2004. The proposed rules will not become effective until thirty days after they are republished as final rules in the Federal Register.

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This document is intended as an informational notice and does not constitute legal advice. If you have any questions or would like to discuss a particular transaction, you should contact your usual Wiggin and Dana attorney or one of the following:

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