

Bigger Stick, Bigger Carrot

New Proposal Ratchets Up Criminal Antitrust Penalties, Sweetens Incentives for Self-Reporting and Cooperation

In a year when energy legislation, Medicare reform, and assorted judicial nominees have been the subjects of filibusters and strident, party-line rhetoric, a new legislative proposal has underscored once again that criminal antitrust enforcement is very much a bipartisan enterprise.

Aggressive criminal antitrust enforcement has been a staple of Department of Justice policy consistently since Sherman Act violations become felonies in the mid-1970s. That this continues to be the case was reconfirmed recently when the Antitrust Criminal Penalty Enhancement and Reform Act of 2003 (S. 1797) was sponsored jointly by the Republican chairman and the Democratic ranking member of the Senate Judiciary Committee's subcommittee responsible for antitrust and competition policy matters.

This important bill provides the Department of Justice with a "bigger stick" by enhancing criminal antitrust penalties for businesses and individuals.

- ◆ The maximum prison sentence is increased to 10 years from the current three years.
- ◆ The maximum individual fine is raised to \$1 million from the current \$350,000.
- ◆ The maximum corporate fine is raised to \$100 million from the current \$10 million.

These significant increases mirror the recent and substantial toughening of other criminal sanctions for dishonest or fraudulent

business conduct, such as those embodied in the Sarbanes-Oxley Act of 2002.

At the same time, the bill provides a "bigger carrot" by increasing incentives for self-reporting and cooperation in criminal antitrust matters. In the past, corporations and individuals reporting their involvement in antitrust violations could receive immunity from prosecution under the Department's leniency program. Securing amnesty in this fashion insulated applicants from criminal fines and imprisonment. Yet it provided no protection against private antitrust litigation, in which plaintiffs can recover triple damages from antitrust violators. The potential for ruinous "treble damage" litigation remained a significant deterrent for companies considering amnesty applications.

The current bill would limit the private litigation exposure of cooperating companies and individuals to "actual" or "single" damages, as opposed to the trebled damages authorized generally by the antitrust laws. This reduction in civil liability would be available to participants in the corporate leniency program on the condition that they not only cooperate in criminal prosecutions, but also cooperate with civil plaintiffs and offer restitution to those harmed by their conduct.

Taken together, the enhanced penalties and cooperation incentives in this proposal should encourage self-reporting and cooperation by both companies and

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individuals engaging in price fixing, market allocation, and similar antitrust violations.

New Extradition Treaty Enhances the International 'Reach' of DOJ Criminal Antitrust Enforcement

The Department of Justice is poised to add another weapon to its international criminal antitrust enforcement arsenal with the signing of an extradition treaty that should expedite the extradition of executives from the United Kingdom to the United States in cartel enforcement cases. This development follows on the heels of the enactment in the

United Kingdom of the Enterprise Act of 2002, which criminalizes certain competition law violations.

Ratification of the treaty is expected in Parliament and the US Senate before Christmas. The fast track extradition process will apply to cartel conduct occurring after the effective date of the Enterprise Act, and to obstruction of justice offenses committed even earlier.

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