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# Antitrust Criminal Sanctions: The Evolution of Executive Punishment

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Judge Douglas H. Ginsburg and Professor Joshua D. Wright's excellent study of antitrust sanctions for corporations and individuals concludes with a strong recommendation that individual penalties, specifically incarceration, will be the most appropriate and effective penalties for antitrust violations.<sup>1</sup> This article will analyze the punishment of defendant executives as it has evolved during the era of international cartel enforcement (1995 to 2010) and will conclude that, although it was slow to get there, the current enforcement policy and practice focuses much more directly on the defendant executive than it ever has and is approaching the Ginsburg-Wright model as the major deterrence factor. The article also argues that both the Antitrust Division and corporate compliance training must inform the corporate executives much more effectively of the harsh penalties executives will face if they violate the law. Finally, the article reviews several activities that may cause defendant executives greater risk during an antitrust investigation and provides important advice to the executives, counsel, and board members to navigate around those serious risks.

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## I. Introduction

Despite the continuing assessment of huge corporate fines, and the seeming competition between the United States and the European Commission to achieve the highest corporate fines, the clear enforcement trend in the United States in its fight against cartels is to focus on punishing the defendant executive. There are strong proponents for this trend: Senior enforcement officials at the Antitrust Division of the U.S. Department of Justice have long argued that incarceration for senior executives is the greatest deterrent to antitrust violations. More specifically, Judge Douglas H. Ginsburg and Professor Joshua D. Wright's excellent study of antitrust sanctions for corporations and individuals, included elsewhere in this journal, presents a strong recommendation that jail sentences for defendant executives are the most appropriate and effective penalties for antitrust violations.<sup>2</sup> The increased focus on the defendant executive also raises a number of problems that will keep company counsel, as well as targeted executives and their independent counsel, awake at night.

The shift to focusing more intensively on the actions of the defendant executive, not only in the United States, but also in the United Kingdom, Australia, Brazil, Canada, and Japan, is creating greater risks and will require more intensive and sophisticated compliance training. The identification of these issues provides the opportunity to limit the risk that the defendant executive may face by being implicated in a cartel enforcement action.

The United States has, in fact, been moving slowly but consistently in the direction that Judge Ginsburg and Professor Wright suggest with respect to executives, although the enforcers continue to pursue steadfastly the corporate monetary penalties that Judge Ginsburg and Professor Wright would challenge and eliminate. Over the past fifteen years, corporate fines have increased dramatically. With the first of the blockbuster corporate fines of the international cartel era, the \$100 million Archer-Daniels-Midland ("ADM") fine, the Antitrust Division shifted its corporate fine methodology completely away from the old standard of a \$10 million statutory maximum and, in effect, warned that the \$100 million fine would be far more common than the \$10 million one.<sup>3</sup> Thus began the era when the shock and trauma of \$100 million corporate fines became the rule and, for the next fifteen years, the calculation of \$100 million fines became the essential boast of the Antitrust Division utilizing graphs and charts to display the success of the Division's program, including a \$1 billion in corporate fines in 2009.<sup>4</sup>

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## II. The Development of the Antitrust Division's Criminal Penalties for Defendant Executives

It has taken a very long time for the incarceration of corporate executives, especially corporate executives from outside the United States, to become the standard penalty for antitrust misconduct. The Sherman Act was a criminal statute from the outset and individuals were prosecuted from the earliest days of the law when Sherman Act violations were criminal misdemeanors. In 1921, four contractors were first sentenced to jail—but only for a total of ten months. The next jail sentences—90 days—came in the hand tool investigation in 1959. They were followed by the great electrical equipment conspiracy cases where seven executives were sentenced to two to six months each, still under the misdemeanor statute<sup>5</sup>. When the Sherman Act was made a felony in 1974—and the maximum prison sentence was increased to three years—the Antitrust Division still had very limited success in convincing judges to send convicted antitrust felons to jail, even for a few months. It was only with the creation of the U.S. Sentencing Commission in 1984 and the implementation of the Sentencing Guidelines in 1987 that a consistent and transparent process of calculating antitrust sentences for executives emerged. Even with the Guidelines, however,

THIS PROBLEM WAS HIGHLIGHTED BY THE UTTER DISASTER OF THE INDUSTRIAL DIAMONDS CASE, WHERE THE DIVISION COULD NOT GAIN JURISDICTION OVER ITS DEFENDANTS AND ITS WITNESSES.

only 37 percent of convicted antitrust felons served any jail time during the 1990s. That was certainly not the type of deterrence that Judge Ginsburg and Professor Wright are contemplating in their analysis.

As the cartel enforcement program became more targeted on global cartels, not simply U.S. cartels, the use of imprisonment as a powerful deterrent began to develop—although it did not develop quickly. In the early 1990s, the Antitrust Division had the interest and the resolve to tackle international cartels, but it did not have the ability to obtain the evidence of witnesses outside the United States. This problem was highlighted by the utter disaster of the industrial diamonds case, where the Division could not gain jurisdiction over its defendants and its witnesses. The Court dismissed the ill-fated case at the close of the government's case. This was, indeed, a major setback to the Division's enforcement program.<sup>6</sup> After the trial, the Antitrust Division analyzed its mistakes and developed a strategy to obtain the evidence it needed in international cartel cases.

### A. 1996—NON-U.S. EXECUTIVES DO NOT GO TO JAIL

In the aftermath of the industrial diamonds case, the Division opened a substantial number of international cartel investigations. The focus was clearly on criminally charging large corporations with substantial volumes of commerce in the United States and assessing huge corporate fines. This is obviously not consistent

with the Ginsburg-Wright thesis which asserts both that prison sentences are the strongest deterrent and that high fines for corporations have little deterrent effect, inasmuch as high fines punish the shareholders and consumers. The Division, however, did not have the luxury of compelling witnesses and documents from the rest of the world. The Division at this time had to focus on obtaining the evidence from the non-U.S. executives and, as a result, had to offer them more lenient treatment. Except for the three ADM executives—all U.S. citizens—who were indicted, went to trial, and were convicted, non-U.S. corporate executives took advantage of an Antitrust Division policy that encouraged their cooperation.

Non-U.S. executives who cooperated with the Division were required to surrender to U.S. jurisdiction, plead guilty to a felony, and pay an individual fine. For their cooperation, often against the U.S. executives with whom they conspired to fix prices, they were given no-jail deals and their immigration status as felons was pre-adjudicated so they could travel to the United States freely even though they were convicted of a felony. This was, indeed, an excellent deal for the globetrotting non-U.S. executives, and it provided the necessary incentives to persuade reluctant executives to surrender to U.S. authorities and cooperate fully. With the guarantee of no jail and a friendly immigration decision, many non-U.S. executives took on the mantle of cooperating witnesses and helped the Division build a strong record of enforcement success.

As time went on, however, there were serious inequalities in the sentences different executives received. In the graphite electrode case, the non-U.S. chief executive, who created and operated the cartel with his U.S. chief executive counterpart, pled guilty, was assessed a significant fine that was paid by the company, and received an immigration “all clear.” Meanwhile, his counterpart, who lived in the United States, was sentenced to seventeen months incarceration and fined \$1.25 million that, by statute, he had to pay out of his own resources. This is the starkest example of the sentencing disparities caused by this otherwise brilliant idea of motivating non-U.S. defendants to cooperate with the U.S. investigation. The no jail policy got the international cartel enforcement program off to a strong start in the United States by building strong cases quickly.

WITH THE GUARANTEE OF NO JAIL AND A FRIENDLY IMMIGRATION DECISION, MANY NON-U.S. EXECUTIVES TOOK ON THE MANTLE OF COOPERATING WITNESSES AND HELPED THE DIVISION BUILD A STRONG RECORD OF ENFORCEMENT SUCCESS.

## B. 1998—THE NEW LENIENCY POLICY TAKES HOLD

The perfect complement to the no jail policy was the new U.S. leniency program. Announced in August 1993, the program expanded the opportunity to obtain leniency by making leniency available after an investigation had started, assuming that the Antitrust Division did not yet have sufficient evidence to

establish a case.<sup>7</sup> While it is hard to believe today, the 1993 leniency policy was slow to gain traction. It was only after the dramatic announcement of the \$100 million fine assessed on ADM in 1996, and the assurances by Division officials that this was how the Division would calculate sentencing recommendations in the future, that companies appreciated the value of the leniency program.

THE DIVISION COULD NOW SAY IT DID NOT NEED THE NON-U.S. EXECUTIVE AS CRITICALLY AS IT NEEDED HIM IN 1996, THUS THE NEED FOR THE GENEROUS NO JAIL PLEA AGREEMENTS DECREASED IN IMPORTANCE AND THE DIVISION BECAME MUCH MORE AGGRESSIVE WITH NON-U.S. EXECUTIVES.

The Antitrust Division, which three years earlier believed that it needed to give no jail deals to non-U.S. executives who were seriously culpable, now saw the increasing number of leniency and leniency plus candidates as providing more than significant evidence of global antitrust violations. The necessary evidence of cartel behavior formerly provided by the non-U.S. executive was now increasingly provided by leniency applicants. The Division could now

say it did not need the non-U.S. executive as critically as it needed him in 1996, thus the need for the generous no jail plea agreements decreased in importance and the Division became much more aggressive with non-U.S. executives.

### C. 1999—THE VITAMINS ERA: INCARCERATION FOR ALL DEFENDANTS

The massive vitamins cartel was a picture perfect opportunity to bring about the change the Division's policy regarding non-U.S. executives in cartel cases. The vitamins cartel had a leniency applicant who did not surface until the investigation was ongoing for some time. During that investigation, the Antitrust Division negotiated a plea agreement with a Swiss vitamins executive who agreed to plead guilty and serve a jail term of four months in the United States.<sup>8</sup> The Division announced that it would no longer agree to a "no jail" deal with such key executives. While the Division would continue to pre-adjudicate the immigration status of convicted executives to make it easier for them to continue to travel to the United States, it would insist that they go to jail for limited sentences. This was a major shift in policy.

Looking back to this policy shift, many practitioners believed that non-U.S. executives would never agree to surrender to U.S. jurisdiction and voluntarily agree to go to jail. Yet, a substantial number of non-U.S. executives implicated in these cases have submitted to U.S. jurisdiction and have agreed to serve jail time in the United States. Between 1999 and today, over 45 executives from France, Norway, the Netherlands, Germany, Switzerland, Sweden, the United Kingdom, Japan, Korea, and Taiwan<sup>9</sup> have submitted to U.S. jurisdiction. A review of Antitrust Division press releases and plea agreements confirm that while the initial sentences in 1999 were in the range of three- to six-months, sentences had increased to the nine-month range by 2009.

What incentives do the Antitrust Division provide for these executives to leave their homes and families to go to a foreign country and give up their liberty? Discussions with Division officials and with affected executives suggest that there are generally three incentives. First, if an executive cooperates and serves his sentence, he will be able to travel freely to the United States and continue his career as an international businessman—effectively, his career will continue as it was after this short interruption. While most U.S. companies terminate their convicted executives, this is not often the case in Europe or Asia. Second, the executive makes the sacrifice for his company and his job. The executive understands that the company must cooperate with the Antitrust Division and his lack of cooperation could harm the company's deal with the Division. Since he wants to continue his employment, he will do what the company wishes him to do. He believes his job security is better if he is a good corporate citizen and “takes one for the team.” Finally, the executive understands the perils of being what the Antitrust Division calls an “international fugitive” who is on the INTERPOL Red Notice and is subject to being detained as he enters many countries around the world. He also worries about the risk of his government cooperating with the United States at some future time regarding extradition or other attempts to expedite his surrender. The executive does not want to be hunted and constantly look over his shoulder for antitrust enforcement officials. If the sentence is short enough, the incentive to cooperate is strong; if the sentences are too long, the non-U.S. executives will simply stay home.

WHAT INCENTIVES DO THE ANTITRUST DIVISION PROVIDE FOR THESE EXECUTIVES TO LEAVE THEIR HOMES AND FAMILIES TO GO TO A FOREIGN COUNTRY AND GIVE UP THEIR LIBERTY?

For about ten years, the Division and defense counsel have struggled to develop the correct balance between negotiating plea agreements that place non-U.S. executives in prison and non-U.S. executives deciding to stay out of the United States and other countries that may cooperate with the United States. Many of these executives are at the end of their careers and do not put a premium on international travel, particularly to the United States. This is a clear option for the executive—and each needs to determine what is right for him and his family.

If an executive decides to submit to U.S. jurisdiction, enters a plea agreement, and pleads guilty, that individual will be required to report to a prison facility in the United States. In almost all cases these facilities are minimum security camps such as Lompac (California) or Morgantown (West Virginia). He will be housed in a dormitory setting with other inmates, will be required to work in the prison community, and will have limited opportunities to talk to or visit with friends and relatives.

The ability of non-U.S. executives to have an alternative to not surrendering to U.S. authorities undoubtedly affects the deterrence calculation of the Ginsburg-Wright analysis. As sentences proposed for non-U.S. executives get

longer, many more non-U.S. executives will opt to stay in their homelands. Longer sentences will shift the costs and benefits of surrender significantly towards staying home.

#### D. THE CONCEPT OF THE “CARVE OUT”

Since the late 1990s, the Division has entered into plea agreements with corporate defendants that specifically define the scope of cooperation that the corporate defendant will provide, but expressly exclude certain corporate executives from the cooperation provision of the plea agreement. This list of excluded executives has come to be known as “carve outs.” If an executive is “carved out,” it means that the Division will not, at the time of the plea agreement, consider the executive to be a cooperating witness and he will be a potential candidate for indictment. All other cooperating employees receive a non-prosecution promise that provides some certainty as to their futures. In early plea agreements, the

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Division would also enumerate those individuals whose cooperation they expressly required. In recent times, the Division has not listed the required cooperators; it has only listed the “carve outs.”

The Division has made much of the designation of “carve outs.” On one hand, it has used the growing number of “carve outs” to indicate that the Division is pursuing more and more executives, noting that the later a company seeks cooperation, the more executives will be on the “carve out” list. In some of the more recent cases, as many as seven or eight executives have been listed as potential defendants—a long way from the single executive charged in the late 1990s.

While the Division uses the “carve out” list to press its aggressive pursuit of corporate executives, a careful comparison of the carve out lists against the list of executives actually charged seems to reveal that only a limited percentage of “carved out” executives are actually prosecuted. In fairness, the Division does not represent that all “carve outs” will be prosecuted, but the simple fact is that the Division wants the world to know that these are people who are at great risk of being prosecuted.

Being “carved out,” in many respects, is a significant form of punishment in itself. The executive is placed on a very public list that will be known to the executive’s employer, to his customers, to his family and friends, and to his financial advisors and creditors. If the executive resides outside of the United States, he is unlikely to be able to travel to the United States or to any country with an extradition treaty with the United States unless or until his status is changed. There is no time limitation to the “carve out” designation, so the executive does not know if and when he can resume his business career. While the executive can negotiate a plea agreement with the enforcers, it is virtually certain that a plea agreement will require the executive to serve jail time. Many “carve outs”



have been living under these conditions for several years. That, itself, is real punishment and limits the executive's career and travel opportunities substantially.

### E. 2004-05—TOUGHER MAXIMUM SENTENCES FOCUS ON EXECUTIVES

In June 2004, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 went into effect. The Act increased the maximum corporate fine from \$10 million to \$100 million or “twice the gain or twice the loss.” More importantly, it increased the maximum penalties for corporate executives from three to ten years imprisonment and from \$350,000 to \$1 million in individual fines. Since the Antitrust Division already had the ability to obtain fines of \$100 million and more through the alternative fine provision, 18 U.S.C. 3571(d), the major impact of the legislation was the ten-year maximum prison sentence.

As a result of the new legislation, the U.S. Sentencing Commission held hearings designed to amend the Sentencing Guideline for antitrust violations, consistent with the higher penalties. The entire hearing focused on the issue of longer prison sentences and deterrence. The Sentencing Commission revised the Antitrust Guideline to a higher starting point for guidelines calculation and established a larger number of enhancements for the volume of commerce affected. The Commission showed considerable restraint in amending the Antitrust Guideline, U.S.S.G. 2R1.1, understanding that sentences that are too harsh will affect the incentives for defendants to cooperate.

THE ENHANCEMENTS TO THE GUIDELINES, HOWEVER, RAISED THE STAKES CONSIDERABLY.

The enhancements to the Guidelines, however, raised the stakes considerably. As in any negotiation, if the Antitrust Division presses too hard and increases its sentencing recommendations too aggressively, the result may be that more defendants go to trial, which uses a significant amount of scarce prosecutorial resources. It may also mean that more and more non-U.S. executives will stay in their homelands and refuse to surrender to U.S. jurisdiction. Neither of these alternatives is very satisfying or valuable to the Antitrust Division.<sup>10</sup> Restraint and balance should guide the Antitrust Division. Excessive sentencing recommendations will weaken the Division's program substantially.

### F. 2007—USING LENIENCY APPLICANTS TO CONDUCT A COVERT INVESTIGATION

In several investigations, the Antitrust Division has asked leniency applicants to continue to participate in the conspiracy that they reported while the Division gathers more and better evidence. This “covert” investigation often takes the form of telephone conversations that are recorded by the FBI, but the most successful operation to date is the Division's video surveillance in the marine hose investigation. Representatives of the major competitors in the marine hose business—virtually all of whom were non-U.S. citizens living abroad—traveled to

Houston, Texas to attend the Offshore Technology Conference, the major annual conference of the offshore oil and gas businesses. Executives from companies in France, Italy, Japan, and the United Kingdom organized a meeting of the competitors at the conference and the leniency applicant, who had been covertly working with the Division, provided the location so the Division could place a video camera in the room and record the meeting. At the meeting, the paid organizer of the cartel made a presentation of how successful the cartel had been for the members, stating that this was not the time for the group to disband.

Armed with a video recording of this meeting, the Antitrust Division obtained arrest warrants and executed them on the participants in their hotel rooms in the early morning hours of the next day. They were arrested and sent to the Houston lockup where they were housed with very dangerous inmates awaiting hearings and trials. They were released on bond, but the court took their passports and limited their ability to travel. They could not return home until they pled guilty and served their sentences or went to trial. Not only were they held in the United States for many months while they negotiated their plea agreements (the “shortest” was over eight months from arrest to incarceration), but because the enforcers caught them on U.S. soil, they were treated for sentencing purposes like U.S. citizens and were not given the usual sentencing discount for submitting to U.S. jurisdiction. Rather than the six to eight month sentences that were

common for non-U.S. executives at that time, the sentences ranged from a low of fourteen months to a high of thirty months.

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The Marine hose matter changed the focus and the equation for sentencing in U.S. antitrust cases. Because the executives were

arrested and held in the United States absent their passports, time became an important condition for the executives. There was a great incentive to cooperate and negotiate a plea agreement because any delay meant a longer time away from their homes and families. Importantly, the Division made the executives the focal point of the investigation and the plea negotiations of the executives took precedence over the corporate plea process, a considerable change in Division focus.

One of the interesting dynamics that took place in marine hose was that the Division first received detailed information about the conduct from the proffers and interviews of the executives, rather than the proffers that are usually controlled by company counsel. Indeed, this reverse process made the “omnibus question” (the inquiry of whether the individual is aware of any anticompetitive conduct in other products) much more of a threat against the company’s opportunity to receive “leniency plus” credit. In this setting, it can be quite easy for the executive to provide evidence of other violations on his own—preempting the company from obtaining “leniency plus” credit. As such, astute counsel for the company and the executive have to plan strategies to make certain that both the

company and the executive received proper credit under the leniency policy for information first provided by the executive.

The marine hose investigation changed the dynamic of criminal prosecutions and made the executive the focal point of the race to the courthouse and the plea agreement process. Obviously, a marine hose case replete with video surveillance is an infrequent occurrence, but it does underscore the far greater interest in pursuing executives rather than corporations in major global cases.

### **G. THE DEFENDANT EXECUTIVE HAS BECOME MORE CENTRAL AND MORE VISIBLE AS THE INTERNATIONAL CARTEL ERA HAS MATURED**

The prosecution of senior executives has evolved and matured since the first international cartel cases in the mid 1990s. From the decision to seek jail for cooperating non-U.S. executives, to the proliferation of “carve outs,” to the arrested executives who were center stage in the marine hose investigation, the Antitrust Division is moving much more in the direction of the Ginsburg-Wright analysis. Other jurisdictions, from Australia to the United Kingdom, from Brazil to Japan, are also shifting their enforcement efforts to the executives. All of those jurisdictions are just beginning serious pursuit of the executives, which will undoubtedly complicate the process for enforcers and defenders alike. Enforcers are not completely there yet, but the focus on executives is certainly evolving—and quickly. The next five years will be a very interesting time for anti-cartel enforcement and for continuing to apply the Ginsburg-Wright thesis.

## **III. Knowledge of Illegal Activity: What Should Keep Implicated Executives and Their Counsel Awake at Night?**

One of the major difficulties in deterring corporate executives from violating the antitrust laws is the lack of knowledge executives have about antitrust enforcement. How can they be deterred if they do not understand that executives just like them are going to jail regularly for cooperating with their competitors? Without greater knowledge of the enforcement environment, executives will continue to find ways to justify their illegal conduct, believing that they are helping their companies, preventing unemployment, and generally not harming anyone. Neither the Antitrust Division nor corporate compliance programs have been aggressive enough at imparting information that will literally keep executives and their counsel up at night. In the deterrence analysis at the core of

NEITHER THE ANTITRUST DIVISION NOR CORPORATE COMPLIANCE PROGRAMS HAVE BEEN AGGRESSIVE ENOUGH AT IMPARTING INFORMATION THAT WILL LITERALLY KEEP EXECUTIVES AND THEIR COUNSEL UP AT NIGHT.

the Ginsburg-Wright thesis, a fundamental element is that executives must know and understand the great risk of cartel behavior, as well as the array of dangers that continue even after the investigation begins. Within the current enforcement cycle of fifteen years, executives and their lawyers have seen every danger and many of them have made executives' personal exposure even greater.

### **A. JUDICIAL AND ENFORCEMENT ATTITUDES ARE MUCH MORE AGGRESSIVE THAN TEN YEARS AGO**

The evolution of the criminal enforcement of the antitrust laws against executives has been dramatic—and very successful. In the United States and throughout the world, the judiciary and the bar have defined this business conduct as “fraud” and “stealing.” That perception was clearly expressed in the Sentencing Commission hearings on the Guidelines revisions, and resulted in the enhanced penalties. Undoubtedly, the ADM and marine hose videotapes, and the realization that very senior corporate executives could conduct themselves with complete disregard of the law, changed the perception of judges, enforcers, and consumers alike. The blatant conduct played out on the ADM tapes brought very strong judicial reaction which obviously affected sentencing decisions. The opening paragraph of Judge Kanne’s opinion in *Andreas*<sup>11</sup> conveys the shock and disgust of the judiciary after seeing the conduct played out on a video screen:

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“For many years, Archer Daniels Midland Co.’s philosophy of customer relations could be summed up by a quote from former ADM President James Randall. “Our competitors are our friends. Our customers are the enemy.” This motto animated the company’s business dealings and ultimately led to blatant violations of U.S. antitrust law, a guilty plea and a staggering criminal fine against the company. It also led to the criminal charges against three top ADM executives that are the subject of this appeal. The facts involved in this case reflect an inexplicable lack of business ethics and an atmosphere of general lawlessness that infected the very heart of one of America’s leading corporate citizens. Top executives at ADM and its Asian co-conspirators throughout the early 1990s spied on each other, fabricated aliases and front organizations to hide their activities, hired prostitutes to gather information from competitors, lied, cheated, embezzled, extorted and obstructed justice.”

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Executives in companies around the globe need to understand that this judge was not overreacting. To a court that viewed the videos and heard the testimony, the reaction was a strong one. Making this understanding a serious part of antitrust compliance is the first step to demonstrating to the executives that the

judiciary will react strongly. If they are participating in similar conduct, they should be terrified.

The first step in antitrust compliance is to teach the executives that prosecutors and courts view this conduct as theft, not as normal business practice, and that if the executive is involved, he is in very serious trouble.

## **B. AN EXECUTIVE SHOULD BE TRAINED TO UNDERSTAND THAT HIS CONDUCT DURING THE INVESTIGATION CAN HAVE SERIOUS CONSEQUENCES**

What do senior executives need to know about antitrust investigations? Senior executives are almost always ill prepared for an investigation. Many of the critical pressure points of the antitrust investigation are dangerous for senior executives because they are simply untutored about investigations—they do not understand law enforcement rules and procedures. For example, senior executives are often visited at their homes by the FBI and Antitrust Division on the day before a formal criminal investigation begins. The enforcers exploit the element of surprise and are often highly successful at getting the executive to provide significant information, including information that will implicate the executive in criminal conduct. Because many executives believe they will look guilty if they do not talk to the enforcers, and because they truly believe they have nothing to hide, executives often provide substantial incriminating information to enforcers at these meetings. In the worst case, executives believe they can persuade the enforcers to go away by minimizing the impact of the conduct, leaving out important details, or just straight out lying to the enforcers.

It is for these reasons that executives should receive compliance training to understand the rationale for these interviews and think of the consequences carefully. The executive will not fully understand the implications of illegal antitrust behavior unless he receives careful and detailed training on a regular basis.

## **C. ACTIONS IN THE BOARDROOM CAN ALSO HAVE SERIOUS CONSEQUENCES**

Independent counsel representing corporate executives in international cartel investigations not only represent their clients in the courtroom; they represent them in the boardroom as well. To be effective, independent counsel must advise their clients carefully to avoid additional—and far greater—criminal risk once the antitrust investigation begins.

Imagine a corporate CEO or other high level executive who was involved directly in cartel meetings and, therefore, is completely aware of the cartel activity when the investigation starts. The day that the investigation begins the CEO may receive inquiries from the Chair of his Board's Audit Committee about the

investigation and the CEO decides he must meet with the entire Board immediately. The CEO is contacted by major customers who want an explanation, as do securities analysts with significant investments in the company. Further, the analysts

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wish to have a videoconference and record the meeting, as is their standard procedure. And while all of these meetings are being scheduled, the CEO invites the General Counsel and those assisting in the investigation to brief him on the evidence and the investigative strategy.

All of these are normal activities that the CEO is expected to perform, but they become minefields when the CEO or other senior executives are implicated in the illegal conduct. Independent counsel for the CEO is the person who is most likely to succeed in moving the CEO away from all of these activities. Even the General Counsel, who probably serves at the pleasure of the CEO and is a close friend of the CEO, will have a difficult time moving the CEO away from these “normal” duties. Yet, moving the CEO away from these normal activities is essential to keeping the CEO out of serious trouble—the analysts videotape is perhaps the most dangerous evidence imaginable, and such videotapes have been used effectively in past Antitrust Division trials.<sup>12</sup>

The only way the executive will become aware that these normal duties are dangerous is through careful and detailed compliance training and the strong advice of independent counsel who can guide the executive through this very dangerous time.

#### D. MAINTAINING EMPLOYMENT IS VERY DIFFICULT

In the age of Sarbanes-Oxley and corporate ethics reform, the fate of a senior executive who is charged with antitrust misconduct is perilous—and often very complicated. Many U.S. corporations have zero tolerance for executive misconduct and termination is often viewed as the only appropriate action. In other parts of the world, procedures are not as well defined. There have been examples of European companies that have terminated senior executives, while others have not. The issue is still a new and undefined one in Asia.

One of the major issues that confronts a company when one of its senior executives is a target of the investigation is how the executive’s removal affects the company’s ability to defend itself in the investigation and subsequent litigation. The company that wishes to cooperate with the Division’s investigation and obtain the maximum credit for cooperation needs the cooperation of its executives who were involved in the conduct. An involved executive, at the same time, knows that he will likely be terminated if he pleads guilty or goes to trial, yet he knows that his continued income stream is entirely dependent on the company’s good will towards him. The result is often a very nuanced dance

among the parties. The principal issue is often not salary and benefits; it is the continued advancement of legal fees under an indemnification agreement.<sup>13</sup>

In practice, it is in the company's best interest to pay these fees so that the executive and his counsel maintain a dialogue—and a joint defense agreement—with the company so that the company obtains helpful evidence from that executive. The company will likely need his evidence to assist with the Division investigation and in the private damage litigation that follows.

In addition to the legal fees, there is often an opportunity to negotiate a severance agreement that will move the executive out of the company but provide him with some income that will be helpful as he serves a jail term and then begins to rebuild his life. Whether there is a settlement or not depends on a number of special circumstances in the case as well as the executive's value to the company in resolving the case. Without such an arrangement, the executive and the company may each act against the other's interests, often triggering even more litigation, which could be helpful only to the enforcers and the private plaintiffs.

WITHOUT SUCH AN ARRANGEMENT, THE EXECUTIVE AND THE COMPANY MAY EACH ACT AGAINST THE OTHER'S INTERESTS, OFTEN TRIGGERING EVEN MORE LITIGATION, WHICH COULD BE VERY HELPFUL ONLY TO THE ENFORCERS AND THE PRIVATE PLAINTIFFS.

## IV. Working to Keep the Executives Out of Harm's Way

Executives need to be tutored regularly on the perils and consequences of antitrust misconduct. Deterrence cannot be successful unless the stark reality of criminal enforcement and the likelihood of jail are known to the executive. This tutoring is the only way to drive home the impact of a criminal investigation, the trauma of going to jail, and the horror of job removal. By making these events real, deterrence has a chance to work. That is what corporate counsel should highlight and reinforce. Such effective compliance training—not the lecture or slide show, but a candid meeting that examines the subtle issues—ultimately focuses on the corporate executive and the similarity of circumstances between him and those who serve terms in jail and it brings home the tragic consequences of enforcement actions. Only in that environment can Judge Ginsburg and Professor Wright's concept of deterrence have a fighting chance to be successful. ▼

1 Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6(2) COMPETITION POL'Y INT'L, (Autumn 2010).

- 2 *Id.*
- 3 *United States v. Archer-Daniels-Midland*, CR No. 96-CR-00640 (N.D.II, October 15, 1996).
- 4 According to the Antitrust Division's fine chart, 18 companies have been fined \$100 million or more and 57 have been fined between \$10 million and \$100 million.
- 5 See generally Donald C. Klawiter & Jennifer M. Driscoll, *Sentencing Individuals In Antitrust Cases*, 23 ANTITRUST MAG. 75 (Spring 2009). For a more detailed history of criminal sentencing, see Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, EUR. COMPETITION J. (2009), available at <http://www.usdoj.gov/atr/public/articles/240611.htm>.
- 6 *United States v. General Electric Co.*, No CR-2-94-019 (S.D. OH, Feb. 17, 1994).
- 7 The original U.S. leniency policy was announced in 1978 by then-Assistant Attorney General John H. Shenefield. It provided that the first company to report its illegal conduct before any investigation was initiated would not be prosecuted criminally nor would its cooperating executives. A small number of companies took advantage of the program. The new leniency policy was announced in 1993 by then-Assistant Attorney General Anne Bingaman. That policy maintained most of the initial program but added the opportunity to seek leniency after an investigation had begun. Leniency was available to the first company in and all of its cooperating executives if the Division did not yet have evidence sufficient to establish a case.
- 8 *United States v. Kuno Sommer*, CR 3:99 CR 201-R (N.D. Tx, May 20, 1999). Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Feb. 25, 2010, at 7, available at <http://www.justice.gov/atr/public/speeches/255515.htm>.
- 9 *Id.* at 7.
- 10 For a more expansive discussion of these strategy considerations and the likely results of aggressive sentences, see Klawiter & Driscoll, *supra* note 5.
- 11 *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000).
- 12 For a more detailed discussion of these difficult activities see Donald C. Klawiter, *Please Show This To Senior Executives: Risks of Antitrust Investigations in the Courtroom and the Boardroom*, COMPETITION L. INT'L (October 2006) at 32.
- 13 At the beginning of an investigation, senior executives that may be involved in the conduct under investigation are asked to execute an undertaking by which the company agrees to advance them their legal fees and the executive agrees that if he is determined to have acted contrary to the company's interests he commits to repaying the advanced fees. The fees in these cases may add up to hundreds of thousands or millions of dollars and are thus substantial revenues for the executive.