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Interview: Update on "Antitrust Criminal Sanctions: The Evolution of Executive Punishment"

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INTERVIEW:
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As part of our Spring 2012 issue, CPI is presenting a retrospective of our best articles in the past and providing updates. One of our selections is "Antitrust Criminal Sanctions: The Evolution of Executive Punishment," originally appearing in the Fall 2010 issue of the Journal. With me today is the author, Donald Klawiter.

Don is a partner in the Antitrust and Trade Regulation practice group of Sheppard Mullin's DC office. His practice focuses on international cartel investigations and litigation. Don has defended corporations and executives from around the world in a number of different sectors. He chaired the ABA's Section of Antitrust Law from 2005 to 2006, and he is the current chair of the Section's International Cartel Task Force.

In your article, you write that, "the clear enforcement trend in the United States in its fight against cartels is to focus on punishing the defendant executive." You note that this trend can also be observed in the U.K., Australia, Brazil, Canada, and Japan. What can you say about how this trend has developed in the two years since the article was published?

One of the interesting things is that the trend has actually been developed further in the United States in those past two years, and before getting to the other countries, let me just make a quick comment about that. In 2011, with the first of the cases involving the auto parts industry, the Department of Justice has actually increased the prison terms that it has recommended for executives who are defendants in various cases. It's interesting because, until that time, the prison sentences for executives who are outside the United States and had to subject themselves to the jurisdiction of the United States in order to be convicted,

those individuals always had a lower sentence than someone who was resident in the United States would have. In recent years, that has been in the range of six to eight months, for the most part. With the newest cases within the last year, the Antitrust Division has actually gotten sentences that are much higher, beginning at a year and a day and going to a range of about two years. This basically puts the non-U.S. executives in a similar range of sentences as the U.S. resident executives, and that is a major change and development in United States antitrust enforcement.

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As to the other countries, there has been much interest in all of the jurisdictions you mentioned in pursuing criminal cases. The United Kingdom was very successful in the first case it pursued, and it did it in conjunction with the Antitrust Division of the United States Department of Justice. By having individuals convicted in both the U.K. and in the U.S. and having comparable prison sentences for them, they would only have to serve one of the prison sentences, but it had to be of similar duration to the U.S. sentence in order for the U.S. to sign off on a U.K. prison sentence. That was the *Marine Hose* case. It is interesting to note that since that case, and the great success of it, the U.K. has been stalled in terms of bringing further cases. The one that they brought, involving the airline industry, and British Airways executives in particular, actually went to trial and the case had to be dismissed early in the trial for lack of evidence and other procedural issues. So that was not a great success at all, but the U.K. vows that they will continue to bring these cases as criminal prosecutions.

Canada is an interesting example as well. There is new legislation in Canada which actually made conviction for an antitrust criminal case easier than it had been. There had been a standard known as "undueness" that the Canadian law required, and that standard has been repealed now, and the prosecution standard in Canada is quite similar to that in the U.S.

Brazil is another jurisdiction that has moved to increased use of criminal penalties and bringing cases as criminal cases. It's been slow in coming, but they are certainly committed to significant criminal cases in the future.

Japan, similarly, has opened several investigations, and noted that they were criminal investigations, but we haven't seen the outcome of those yet. Time will tell whether that is an enforcement trend in Japan, and in other places.

Would you be able to speak more on the tension between leniency and imprisonment? Do you think they can work together as complementary tools of enforcement?

I think leniency and prison are the carrot and stick of antitrust enforcement. It was very interesting in the 1990s—and this was not imprisonment, but it was higher fines—but the leniency policy that was implemented by the U.S. Department of Justice in 1993 took a few years to become popular and be used by companies and individuals, in part because until 1996 or so, the penalties were lower than they are today.

For example, on the side of the fines, the highest fine the U.S. recommended to a court before 1996 with the ADM case was a fine of $10 million. Companies did not seem to think of that as a high number, and hence there were very few people who felt motivated to come in and obtain leniency because they would take their chances with the current system. After the fine level went up to $100 million and higher with the ADM case, we saw a flurry of companies going in for leniency, and I think the same principle applies to individual leniency. Individuals, if they see the likelihood that they would spend one, two, or three years in jail, they would be more likely to go in and try to get leniency. Similarly, companies would go in on behalf of the company itself and its executives, and the executives who cooperate with the leniency program would receive a free pass and would not go to jail, and that is certainly a big deal. So I think the two are very complementary and work well together on the enforcement side. The penalties over the past ten years have gotten higher both for corporations and for individuals, and I think that has really fueled the leniency program and made it so successful.

You cite to Doug Ginsburg and Josh Wright's article, "Antitrust Sanctions," which actually appears in the same issue of the Journal as your article. Ginsburg and Wright call for not just imprisonment as a deterrent, but they also endorse debarment. What are your thoughts on this? Does debarment go too far if the carve out designation is also a significant deterrent, especially for non-U.S. executives?

I think that's exactly right. I think that in the United States, as I mentioned in the section of the paper entitled "Maintaining Employment is Very Difficult," that in the United States, by virtue of the Sarbanes-Oxley legislation of several years ago, in the midst of a lot of corporate misconduct, it has become very, very difficult for an executive in the United States to keep his job if he is convicted of a violation of the antitrust laws or even if he is carved out, as part of the company's plea agreement. So I think that that issue, with respect to U.S. companies

and U.S. citizens, pretty much takes care of itself without the need for a separate debarment procedure.

With respect to other countries, there is no trend that is yet formed, in terms of either terminating people or keeping them on. In many countries, there is still a culture that they would keep the individuals on after they serve their sentence. That is largely the rationale in many of the Asian countries that we're seeing with companies under prosecution right now. But I think the simple fact is it would be hard to reach those companies under U.S. law if the individuals and the corporations are outside the United States. But I think that in those situations, especially if you are talking about not a conviction, but a carve out, that that carve out has no impact other than to say that the Department of Justice lawyers believe that that individual is subject to prosecution or could be prosecuted. Many of the individuals on the carve out list are never prosecuted, and if they are subject to debarment without any court proceeding to find them guilty or not guilty, that, I think, would be a serious violation of due process.

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So I think we should keep thinking and talking about what the penalties are, and whether debarment is a good step or a necessary step, but I think as to the U.S. citizens, Sarbanes-Oxley and the general corporate environment take care of that already. That's probably the extent of the reach of U.S. antitrust law for U.S. companies and U.S. citizens, and that's just the situation.

You highlight the role compliance programs must play in informing executives of criminal behavior and penalties. What is your idea of an ideal compliance program that is fully transparent and communicative?

I think, as I noted in the article, that most companies still do not do compliance programs very well. Some are terrific, but most will focus on what I refer to as "reading people the Ten Commandments"—you shall not fix prices, you shall not rig bids, that sort of approach; or, just giving out a written statement to people or asking them to do a little compliance training on the computer. I don't think any of those give the individual any indication of what it is like to face questions about whether you are colluding with a competitor, whether you're fixing prices, or whether you're coordinating anything with a competitor.

So being prepared for the investigation is, I think, akin to being prepared for a fire in any major building, where there would be specific things you need to know in order to keep yourself safe

What we like to do is to have a very intensive session, especially with the senior management of the company, and we try to do four different things:

The first is to work through a series of case studies of conduct where you're in a situation and here's what a competitor says, here's what you say, here's what happens: are you violating the antitrust laws? Those are much more nuanced, they are much more focused, and we are told by many of the executives who sit through them that it is much more of a real-life situation where they can see where something they may think is not at all a problem turns out to be a criminal violation of the antitrust laws. So, that's number one, and that's really the focus of the compliance program.

The second thing we do is we actually take people through the different things that will happen during the course of an antitrust investigation, particularly looking at things like a dawn raid, a drop-by visit by the FBI to an executive's home—which is a common occurrence in the U.S.—being stopped at the border if you're a non-U.S. citizen and asked questions about the investigation, those sorts of things, so that executives know that if there is an investigation, this will happen, and they should not panic. And, most importantly, they should not lie to the officials because that can only cause them greater trouble in the future. So being prepared for the investigation is, I think, akin to being prepared for a fire in any major building, where there would be specific things you need to know in order to keep yourself safe. I think that that is true in training people on how to deal with an investigation.

The third one is to talk to people about using certain words and phrases that typically end up being important words and phrases in antitrust cases. The fact that people are talking about "coordinating," they're talking about "respecting each other's customers," they're talking about "collaboration" of one kind or another, but they are all things that, at the end of the day, will create words and phrases that not only are suspicious to the Department of Justice, but in this era of electronic discovery, are key words that will be searched to determine if people are using them and then to read into those words some more nefarious meanings. So it's good for people to learn to communicate with each other in a way that does not use those words or phrases and thus would get them in trouble if they tended to communicate that way. Emails are a notorious problem because people write what they would normally say—they don't think about it, they don't edit, and there are often things in emails that would come back to haunt people in a criminal antitrust investigation.

And finally, the last part of what we do is explain the context of how the Antitrust Division, the European Commission, and other agencies around the world work. There are criminal fines for corporations, there is imprisonment, and we essentially make them familiar with what they may occasionally read in the *Wall Street Journal* but with which they may not understand fully what is going on. We give them a little more perspective on what the government is looking to investigate, and how, so they know that if they do have a problem, they can come back to the company and bring it to the company's attention and be saved or exempted from prosecution because they would probably, in that instance, be the leniency candidate.

Procedures of that kind are very, very important so they know where to report, who to talk to, who to discuss these matters with—either within the company or with outside counsel—so we see compliance as really being very comprehensive and taking more than one or two hours. It is really something where you need to sit down and work through these issues and get input from the executives. But most importantly, a corporation should know what is legal and illegal and how to deal with investigations when they come. We found that to be a very effective means of training people and keeping them out of harm's way.

Don, thank you so much for this update, and for sharing your insights into antitrust penalties, deterrence, and compliance. This has been a terrific discussion.