Extending the long arm of US antitrust law: the Ian Norris extradition battle

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For a successful executive in a multinational corporation, there is almost no fate more frightening than going to jail. For many European and Asian executives, it is hard to imagine that their business dealings could really lead to a US prison. The cautionary tale of a 70-year old former CEO from England may make this prospect seem more real – while heralding the aggressive approach of the US Department of Justice to global cartel enforcement.

United States v Norris

On 30 September 2005, the UK Home Secretary, Charles Clarke, ordered the extradition to the US of Ian Norris. The former Morgan Crucible CEO will face charges of price-fixing and obstruction of justice. If the justice department ultimately succeeds in extraditing Norris, this will be the first time it has successfully extradited a foreign national for price-fixing. The department alleges that Norris conspired with competitors to fix the prices of carbon products sold in the United States, and that Norris obstructed justice in connection with the related US grand jury investigation.

In the UK on 1 June 2005, District Judge Nicholas Evans, issued a ruling that found Norris extraditable. Satisfied that both sets of charges constitute 'extradition offences' and that an extradition would not be unjust or oppressive owing to the passage of time, or be incompatible with the European Convention on Human Rights, Judge Evans sent the case to the home secretary for his decision on whether to grant the extradition request. After Clarke confirmed the ruling, the Home Office explained through a spokesman that it is a "matter for the district judge, not the Home Secretary, to determine whether alleged offences are extradition offences." – effectively reducing the Home Office's involvement to that of a rubber-stamping exercise.

Norris's lawyers say they will appeal this decision all the way to the House of Lords if necessary, but the first appeal will be to the High Court. Norris is also likely to apply for a High Court review of the 2003 United States-United Kingdom Extradition Treaty, which has been increasingly used in relation to white-collar crimes. Norris's extradition will be suspended pending any appeals.

Norris finds himself in the unfortunate position at the centre of a small but very important battle in the justice department's larger war on international cartels. Over the last 10 years, the justice department's enforcement has been remarkably active, breaking up numerous cartels, fining companies hundreds of millions of dollars, sending countless individuals to prison, and successfully pressing for legislation in support of its efforts. But there is one battle it has not yet won. Many executives located outside the United States may not have perceived a real risk that violating US antitrust laws would actually lead to a prison term – because extradition was, literally, unprecedented.

Putting it in context

The Norris case has shown the justice department's willingness to take a very aggressive position against foreign executives for price-fixing charges. UK ratification of the Extradition Treaty, which requires mere allegation of an extraditable offence rather than a showing of probable cause, and its adoption of the 2002 Enterprise Act, which explicitly criminalises price-fixing, has made extradition more feasible. This is a significant change from the high-profile auction house cases less than five years ago, when the justice department was apparently unable to extradite former Christie's chairman, Sir Anthony Tennant, from the UK.

However, Norris's extradition has not been entirely straightforward. As the justice department's price-fixing charges predated the Enterprise Act, it had to show 'dual criminality', even though the alleged price-fixing occurred at a time when it was not a criminal offence in the UK. The justice department's determination to seek Norris's extradition despite these complications – and its success so far – are testament to its resolve prosecuting antitrust offences.

History

This case is part of the justice department's broader push to increase international cartel enforcement efforts, which started in the mid-1990s with the revitalised Corporate Leniency Program. The programme offered complete immunity from prosecution to companies and their executives that report antitrust violations. As a direct result, the justice department has reported numerous successes over the past ten years, including fines of at least US$10 million against more than 50 corporations, nine of which were fined at least US$100 million. In the last five years alone, more than 80 individuals have served prison sentences for antitrust crimes. Approximately half the corporate defendants and a quarter of individual defendants in US criminal antitrust cases in recent years have been foreign-based.

The Bush administration has kept up the pressure. In June 2004, President Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act, which raised the maximum corporate fine for antitrust offences to US$100 million and the maximum penalty for individuals to US$1 million and 10 years in prison. This legislation also increased the incentives for companies to uncover and report cartels by reducing the damages for which firms in the leniency programme could be potentially liable, from treble (triple) to actual (single) damages.

But the justice department recognises that it may well be the fear of prison cells – and not of financial consequences – that does most to deter or destabilise cartels and spur corporate amnesty applications. Thus, the department has indicted foreign executives, placed them on border watches, and pressured their employers to persuade the individuals to cooperate and plead guilty. In most cases, however, implicated foreign executives simply refuse to travel to the US, and until recently, the justice department has had little recourse.

In response, the department has recently been placing foreign nationals who have been indicted in criminal antitrust cases on Interpol's 'red notice' list. Several Interpol

member states use this list in their immigration and border control procedures and many such nations view a red notice as a standing request for provisional arrest and detention. Several criminal antitrust defendants have already been provisionally arrested through this system. For example, one Japanese executive was detained in India pursuant to a red notice, and had to remain there for three months while the justice department fought (unsuccessfully) for his extradition.

For some younger executives, in particular, the prospect of a lifetime of fear and uncertainty about being arrested while travelling, often coupled with pressure from the corporate employer, has actually made plea bargains an alternative to consider. As a result of the justice department's efforts, at least 18 foreign nationals from nine different countries have pleaded guilty and been sentenced to prison.

UK reaction

Following the decision to extradite Norris, the UK Home Office confirmed the UK government's position that "the extradition of individuals for alleged white collar crimes pursuant to valid extradition requests is an important part of upholding the rule of law in the international economy." That decision, however, has met with significant parliamentary and press opposition, giving rise to calls for amendment of the 2003 Extradition Act, which implemented the Extradition Treaty.

Foremost among these concerns is the constitutional criticism that the treaty was negotiated directly between the UK and US governments, and was published only some six weeks after it was signed, without any scrutiny or debate by parliament. That concern is heightened by the reduced legal protection the treaty affords UK citizens, particularly by the removal of the home secretary's discretion in granting extradition requests and of the requirement that the US show probable cause. The lack of reciprocity between the two countries, both in terms of the UK alone having to adduce substantive evidence in support of extradition requests, and in the failure of the US Senate to ratify the treaty, is the source of contentious debate. The UK government has so far resisted these criticisms, and has declined to remove the 'fast-track' extradition procedure from the justice department's enforcement arsenal.

In any event, the reaction that matters most to the justice department is that foreign executives and their lawyers are aware of the Norris case. And while there remains some level of ambiguity regarding how widely extradition will be sought, such uncertainty only works to the justice department's benefit. As long as foreign executives and their counsel are considering the risk of extradition to the US for antitrust offences, the justice department undoubtedly feels that it is making progress.

Going forward

The Norris case makes clear that the justice department will continue to devote significant resources to pursuing the extradition of international price-fixing suspects to the highest levels of foreign legal systems. This will not happen in every case, of course, but the justice department will act methodically to establish an extradition precedent and then expand it step by step. The Norris case provides insights into the types of factors it is likely to consider as it chooses its next extradition battles, but it also demonstrates that they are not waiting for the perfect case.

Price-fixing and dual criminality

Most extradition treaties require 'dual criminality', showing that the US crime at issue was also a crime in the foreign country from which a suspect's extradition is sought, at the time of the offence. Very few countries make price-fixing a criminal offence punishable by a year or more in prison. Other than the UK, some of the more significant jurisdictions to do so are Canada, Japan and, in limited circumstances, France. We are aware of at least one other instance in the past where the justice department seriously considered seeking the extradition of a price-fixing suspect from Japan but ultimately decided not to do so. The Norris case demonstrates, however, that the justice department will take an aggressive approach, having argued (so far, successfully) that price-fixing charges would equate to the common law 'conspiracy to defraud'. Continuing to take such an approach could certainly expand the list of countries from which the justice department could potentially pursue extradition. Still, the fact that price-fixing has since become a crime in the UK must have made the English courts seem like a more receptive forum than in other countries.

Favourable extradition treaties

Since 9/11, the US has signed and revised many extradition and mutual legal assistance treaties – with countries as diverse as Peru, India, Lithuania and Israel – with a view to fighting terrorism. These treaties often contain an expansion of extraditable offences to include conspiracies and attempts to engage in unlawful conduct, as well as granting extradition for accompanying charges that do not independently meet extradition requirements. All of these have obvious repercussions on criminal antitrust enforcement.

Indeed, the UK parliament passed the 2003 Extradition Act, the enabling legislation for the Extradition Treaty, largely as part of an effort to fight terrorism. Under this act and treaty, there have been 43 extradition requests from US prosecutors, of which 22 have been for alleged white collar criminals – and only three for terrorism suspects. Analysing the risk of extradition in a particular case requires a detailed analysis of the relevant extradition treaty.

Friendly governments with similar legal systems

The US has increasingly pushed for the harmonisation of global antitrust laws, particularly with countries that share their goals of antitrust enforcement and whose courts are familiar with the complexities of competition law. The UK, EU and Commonwealth countries (especially Canada and Australia) have increasingly cooperated on initiatives intended to coordinate the prosecution of international cartels – and the US has shown a willingness to reciprocate. As early as 1995, US authorities reportedly acceded to the extradition of an individual accused of violating the Canadian Competition Act, although this was for a deceptive advertising charge rather than an antitrust offence. There is every reason to believe that the justice department would be similarly amenable to extradition in the context of a criminal antitrust offence affecting Canada or another country, but not affecting the US.

One would expect the justice department to continue to focus on extradition from friendly governments with similar legal systems to the United States, particularly those that have been cooperating on antitrust matters.

Obstruction of justice

Finally, the obstruction of justice charges in the Norris case are instructive. Unlike price-fixing, there are plenty of jurisdictions that have crimes similar to obstruction of justice. It is easy to surmise that this activity played a major role in the justice department's selection of this particular case, and similar activity could well be outcome-determinative in future cases. It is critical that as soon as potential price-fixing is suspected, counsel must emphasise to executives how important it is not to do anything like destroying documents, making false statements to government officials, or encouraging others to do so.

Regardless of the ultimate disposition of Norris's case, the justice department has made clear that it will continue aggressively to seek to identify appropriate cases in which to pursue the extradition of foreign executives on price-fixing charges. Win or lose, the case has already made many in the business and legal communities outside of the United States sit up and take note.