U.K. Court Rules In Favor Of U.S. Extradition Request In Price-Fixing Case As Trend Toward Greater International Antitrust Enforcement Continues

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On June 1, 2005, U.K. District Court Judge Nicholas Evans issued a ruling in favor of the United States Department of Justice ("DOJ") in connection with its request to extradite Ian Norris, the former CEO of The Morgan Crucible Company plc, on charges of price-fixing and obstruction of justice. Satisfied that both sets of charges constitute "extradition offenses" and that an extradition would not be unjust or oppressive due to the passage of time or be incompatible with the European Convention on Human Rights, Judge Evans sent the case to the U.K. Secretary of State for his decision on whether to grant the DOJ's extradition request. If the DOJ ultimately succeeds in extraditing Norris, this will reportedly be the first time the DOJ has successfully extradited a foreign national to the United States on price-fixing charges.

Background

The DOJ alleges that between late 1989 and May 2000 Norris conspired with senior executives at other companies to fix prices of carbon products sold in the United States, and that Norris obstructed justice in connection with the related U.S. grand jury investigation.

Price-fixing did not become a criminal offense in the United Kingdom, however, until the 2002 Enterprise Act went into effect in 2003, well after the alleged events. Thus, to establish the necessary extradition requirement of "dual criminality"— *i.e.*, that the U.S. crime was also a crime in the United Kingdom— the DOJ argued that the charges would equate in the United Kingdom to seven counts of "conspiracy to defraud," as well as two counts of attempting to pervert the course of justice by hiding evidence of the alleged cartel. Norris's lawyers argued that there was no known case in the United Kingdom in which a bare agreement to fix prices was held to constitute a conspiracy to defraud. (It is possible that, even if Norris ultimately prevails in his appeal on this point, he could still be extradited on the obstruction of justice charges.)

Judge Evans's Ruling

Judge Evans ruled that both the price-fixing and the obstruction of justice charges were "extradition offenses." The Judge held that "[t]he so-called 'double criminality rule' does not require me to find a U.K. criminal offence to match the U.S. offence." Rather, the Judge concluded that since Norris's alleged conduct as a party to a "dishonest cartel" amounted to conspiracy to defraud, a U.K. offense carrying more than 12 months of imprisonment as punishment, the conduct amounted to an "extradition offense." Similarly, Judge Evans held that Norris's alleged obstruction of justice was an "extradition offense" since, had it occurred in the United Kingdom and had it been aimed at interfering with or obstructing a criminal investigation or judicial investigation in the United Kingdom, it would have constituted a U.K. offense carrying imprisonment of 12 months or greater.

The court further rejected Norris's arguments that his extradition would be unjust or oppressive given the passage of time since the alleged conduct took place. The court considered that the alleged offense was still continuing as recently as six years ago and that Norris's own activity with regard to the alleged obstruction of justice could have had a delaying effect. Judge Evans found that Norris's deteriorating mental and physical health, while a factor, would not prevent extradition.

The court also rejected Norris's arguments that extradition would violate his right to a "private and family life" under the European Convention on Human Rights. The court held that no "exceptional circumstances" making the extradition request a disproportionate and unjustified interference with the right to a family life were established. Instead Judge Evans found this to be a "serious case in which important issues arise" and in which the DOJ has sufficient reasons to want to prosecute Norris in the United States. Moreover, the court noted that Norris's own expert on American criminal law offered some reassurance on the constitutional and statutory safeguards in the United States that were designed to ensure that criminal allegations were adjudicated fairly and justly.

Norris's lawyers have announced that they will appeal this decision all the way to the House of Lords if necessary. The British Secretary of State will now have two months to decide whether or not to extradite Norris. If the Secretary decides to extradite him, Norris may appeal both Judge Evans's and the Secretary's decisions to the High Court. After that, Norris's last potential appeal would be to the House of Lords. Norris's extradition will be suspended pending the outcome of any appeal.

Norris's lawyers have also announced that they will apply for judicial review of the new United States-United Kingdom Extradition Treaty (the "Treaty") that has been increasingly used in relation to white-collar crimes. The British Parliament passed the 2003 Extradition Act as enabling legislation for the Treaty, largely as part of an effort to fight

terrorism. Since then, the British Home Secretary has refused to remove the United States from the list of countries given "fast track" extradition from the United Kingdom even though the U.S. government has not yet signed a reciprocal "fast track" agreement for extradition to the United Kingdom. That is, the United States need only allege an "extraditable" offense—one carrying a maximum prison sentence of at least one year—while the United Kingdom must still show that it has "probable cause" when seeking to extradite a U.S. national. Under the 2003 Extradition Act and the Treaty, there have been 43 extradition requests from American prosecutors, of which 22 have been for alleged white-collar criminals (including three British bankers that the British Home Secretary last month approved for extradition on Enron-related fraud charges) and only three have been for terrorism suspects.

Broader Implications For U.S. Criminal Antitrust Enforcement Against International Cartels

U.S. authorities have historically been unable to secure extraditions for antitrust crimes because the United States is one of the few jurisdictions in which price-fixing and other antitrust offenses are prosecuted criminally. As a result, foreign executives indicted for price-fixing and other violations of the Sherman Act have avoided U.S. trials and potential prison terms by remaining outside the United States.

The Norris case marks the latest chapter in the DOJ's efforts to enforce the U.S. antitrust laws against international cartels and other anti-competitive conspiracies. The DOJ initiated these efforts in the mid-1990's when it revitalized its Corporate Leniency Program (offering complete immunity from prosecution to companies and their executives that report antitrust violations to the DOJ). As a direct result of that effort, the DOJ's Antitrust Division has reported several successes over the past ten years including fines of more than $10 million against each of 49 corporations, eight of which were fined more than $100 million. In the last five years alone, more than 80 individuals have served prison sentences for antitrust crimes (including 18 foreign nationals from nine different countries). Approximately half the corporate defendants and a quarter of the individual defendants in U.S. criminal antitrust cases in the past few years have been foreign-based.

Indeed, the DOJ has been particularly focused on the refusal of foreign executives to travel to the United States to face antitrust charges. Consequently, the DOJ has begun placing foreign nationals who have been indicted in antitrust criminal 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 also view a red notice as a standing request for provisional arrest and detention. The DOJ has pointed out that several criminal antitrust defendants have already been provisionally arrested through this system though it appears that none have been successfully extradited so far.

In June 2004, President Bush also signed into law the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, further strengthening the DOJ's international cartel program. This new law raised the maximum fine for corporations to $100 million and the maximum penalty for individuals to $1 million and 10 years in prison, thus making penalties for antitrust crimes more consistent with those for other white-collar crimes. (An alternative fine provision providing for twice the gain or loss from the offense that generated the fines greater than $100 million also remains available.) This legislation also increased the incentives for companies to uncover cartels and become members of the DOJ's Corporate Leniency Program by reducing the damages for which firms in the DOJ's Corporate Leniency Program could be potentially liable to private plaintiffs from treble (triple) to actual (single) damages.[1]

Enforcement of U.S. antitrust laws against international cartels remains a priority for the DOJ, and the DOJ continues to receive a significant number of leniency applications. Regardless of the ultimate disposition of Norris's case, the DOJ 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.

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[1] The European Commission has also recently enhanced its Leniency Program.

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