

Extradition: The New Sword or the Mouse that Roared?

James A. Wilson

In March 2010, the U.S. Department of Justice Antitrust Division for the first time gained the extradition of a foreign national. Ian Norris, a retired English executive, was extradited to the United States from the United Kingdom on charges related to an antitrust investigation. Mr. Norris was subsequently convicted and sentenced to serve eighteen months in prison for conspiracy to obstruct justice.¹

In the multi-year effort to extradite Mr. Norris preceding this conviction, the Antitrust Division made clear its view that these efforts were intended to overturn the perception that foreign nationals were safe from antitrust prosecution in the United States unless they voluntarily decided to face such charges, usually as part of a plea deal. Thus, the head of the Division's criminal enforcement section asserted that with the "increased willingness [of foreign governments] to assist the United States in tracking down and prosecuting cartel offenders, the safe harbors for offenders are rapidly shrinking."² Similarly, the Assistant Attorney General for Antitrust asserted: "The United States's efforts in the *Norris* case should send a powerful signal that cartelists will not be allowed to hide behind borders."³

Has the Norris extradition changed the landscape for foreign executives facing antitrust charges in the United States? This article asserts that it has not: extradition is likely still to be the exception to the rule, and in most jurisdictions, the executive who chooses not to come to the United States to face charges is not likely to be forced to do so.

The *Norris* Case

In 2002, in connection with a U.S. antitrust investigation, the Morgan Crucible Company plc, based in Windsor, England, pleaded guilty to one count of tampering with witnesses and one count of document destruction. The company paid a \$1 million criminal fine.⁴

In 2004, a federal grand jury indicted Norris, a citizen of the United Kingdom, and former CEO of Morgan Crucible, on one count of fixing prices of carbon brushes and other carbon products, one count of conspiring to obstruct justice, and two counts of obstructing justice in connection with the Department of Justice's antitrust investigation of price fixing in the carbon products industry.⁵ The Department alleged that Norris conspired with his subordinates to obstruct the

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James A. Wilson is a Partner at Vorys, Sater, Seymour and Pease LLP, and a former Chair of the ABA Section of Antitrust Law.

¹ United States v. Norris, No. 2:03-cr-00632 (E.D. Pa. Dec. 13, 2010) (judgment entering sentence).

² Scott D. Hammond, Deputy Ass't Att'y Gen., Address at the ABA Section of Antitrust Law Cartel Enforcement Roundtable: An Update of the Antitrust Division's Criminal Enforcement Program (Nov. 16, 2005), available at <http://www.justice.gov/atr/public/speeches/213247.htm>.

³ Thomas O. Barnett, Assistant Att'y Gen., Presentation to the 11th Annual Competition Law & Policy Workshop at the European Union Institute: Seven Steps to Better Cartel Enforcement (June 2, 2006), available at <http://www.justice.gov/atr/public/speeches/216453.htm>.

⁴ Press Release, U.S. Dept. of Justice Antitrust Div., U.S. Company and U.K. Parent to Plead Guilty to Charges Involving an International Electrical Carbon Products Cartel (Nov. 4, 2002), available at http://www.justice.gov/atr/public/press_releases/2002/200423.htm.

⁵ United States v. Norris, No. 2:03-cr-00632 (E.D. Pa. Sept. 28, 2004) (second superseding indictment).

grand jury's investigation. Specifically, Morgan Crucible employees allegedly conspired with Norris to create a false script that employees of both Morgan Crucible and a competitor were to follow when questioned in the investigation. In addition, a document destruction task force was allegedly formed to collect and destroy or conceal documents from the grand jury.

The United States sought Norris's extradition from the United Kingdom on both price fixing and obstruction of justice charges. Initially, this attempt was successful, with both the trial court and the Supreme Court of the United Kingdom ordering Norris's extradition to the United States on the price-fixing charges.⁶ However, in March 2008, Norris won a significant victory when the House of Lords ruled that he could not be extradited to the United States to stand trial on price-fixing charges because price fixing was not a criminal offense in the United Kingdom at the time he was alleged to have committed it.⁷ The allegations related to the 1990s and price fixing did not become a criminal offense in the United Kingdom until 2003.

Nevertheless, the House of Lords left open the possibility that Norris could be extradited on obstruction of justice charges. In 2009, a UK judge ruled that the obstruction charge was of such gravity that Norris should be sent to the United States to face trial.⁸ Norris appealed that decision in the UK Supreme Court, arguing that extradition would infringe his human right to a private and family life and could exacerbate his health problems. The appeal was unanimously rejected,⁹ prompting Norris to seek relief from the European Court of Human Rights (ECHR) as a last-ditch appeal. The ECHR declined to hear the appeal.¹⁰

Norris was extradited to the United States in March 2010. On July 27, 2010, Norris was convicted by a federal jury of conspiring to obstruct justice. On December 10, 2010, Norris was sentenced to serve eighteen months in prison. His conviction was affirmed by the Court of Appeals for the Third Circuit on March 23, 2011.¹¹

Extradition and the Antitrust/Competition Laws: The Basic Framework

Prior to the successful extradition of Ian Norris, the Antitrust Division had not been successful in gaining the extradition of any foreign national on antitrust charges. Has the *Norris* case fundamentally changed the risk that foreign nationals will be extradited into the United States on such charges? While executives certainly cannot assume there is no risk of being prosecuted in the United States for antitrust violations, several of the most important hurdles to extraditing such individuals remain just as difficult as before the *Norris* case.¹²

The United States has extradition treaties with most countries.¹³ While early extradition treaties listed the offenses that either nation agreed were a basis for extradition,¹⁴ many more recent extra-

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⁶ *Norris v. Government of the United States of Am.*, [2007] EWHC (Admin) 71, [21], [180], [2007] 2 All E.R. 29 (Eng.).

⁷ *Norris v. Government of the United States of Am.*, [2008] UKHL 16, [62], [2008] 2 All E.R. 1103 (Eng.).

⁸ [2009] EWHC (Admin) 995, [2009] Lloyd's Rep FC 475 (Eng.).

⁹ [2010] UKSC 9, [2010] All E.R. 256 (Eng.).

¹⁰ See Helia Ebrahimi, *Norris Loses Fight Against Extradition*, DAILY TELEGRAPH, Mar. 17, 2010, available at 2010 WLNR 5514829.

¹¹ *United States v. Norris*, No. 10-4658, 2011 U.S. App. LEXIS 5946 (3d Cir. Mar. 23, 2011) (unpublished opinion).

¹² For a more comprehensive review of the process by which the United States can seek to extradite an individual accused of a criminal violation, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (5th ed. 2007), and MICHAEL ABBELL, *EXTRADITION TO AND FROM THE UNITED STATES* (2010).

¹³ The United States lacks extradition treaties with only a few nations, including Russia, the People's Republic of China, Namibia, the United Arab Emirates, and North Korea. BASSIOUNI, *supra* note 13, at 983–92.

¹⁴ The author's research has not found any country with which the United States has a "list" extradition treaty (an older form of extradition treaty in which all extraditable offenses were listed) that includes cartel offenses in its list.

dition treaties rely on the principle of dual criminality.¹⁵ Under this standard, an offense that is the basis for extradition must be a violation of the criminal laws of both the country requesting extradition and the country to which the request is made.¹⁶

Criminalization of the antitrust laws is a growing trend, but the number of jurisdictions that have adopted criminal sanctions for antitrust violations (e.g., hard core cartel conduct) remains relatively small. The United Kingdom,¹⁷ Israel,¹⁸ Ireland,¹⁹ South Korea,²⁰ Australia,²¹ Japan,²² Canada,²³ Greece,²⁴ Brazil,²⁵ and Russia²⁶ have adopted criminal antitrust penalties for cartel offenses.

In light of the dual criminality requirement, extradition to the United States for an alleged violation of the Sherman Act is only possible if the country from which extradition is sought has criminalized cartel conduct or has listed antitrust offenses as a category of extraditable offense. This limits the number of jurisdictions from which extradition might be possible.

The requirement of dual criminality is not the only obstacle to extradition for antitrust offenses. Some countries forbid extradition of their own citizens by law.²⁷ For other countries, their treaty obligations with the United States do not require extradition of their own citizens.²⁸

Accordingly, assessment of the likely impact of the Norris extradition requires a jurisdiction-by-jurisdiction analysis of whether those few jurisdictions criminalizing cartel offenses also (1) have dual criminality provision in its treaty with the United States or otherwise allow extradition for antitrust offenses; and (2) permit the extradition of their own citizens.²⁹

¹⁵ See William V. Dunlap, *Dual Criminality in Penal Transfer Treaties*, 29 VA. J. INT'L L. 813, 829 (1989) ("Dual criminality remains virtually universal in extradition, recognized by nearly every international extradition treaty, act of national implementing legislation, judicial opinion and scholarly commentary on the subject.") (footnotes omitted); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1459 (1988) ("A maxim of international law, and a standard provision in nearly every United States extradition treaty, is that extradition will not take place unless the offense charged is a crime in both the demanding and the requested country."); see also Johanthan O. Hafen, *International Extradition: Problems Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191, 194 (2003).

¹⁶ See, e.g., *Clarey v. Gregg*, 138 F.3d 764 (9th Cir. 1998).

¹⁷ Section 188 of the Enterprise Act of 2002, available at <http://www.legislation.gov.uk/ukpga/2002/40/section/188>.

¹⁸ Restrictive Trade Practices Law of 1988, available at <http://www.antitrust.gov.il/Files/HPLinks/RTP%20Law.pdf>.

¹⁹ Section 6 of the Competition Act of 2002, available at <http://tca.ie/EN/Enforcing-Competition-Law/Competition-Law.aspx>.

²⁰ Article 66 of the Monopoly Regulation and Fair Trade Act, available at <http://eng.ftc.go.kr/legalauthority/recentlaw.jsp?pageId=0301>.

²¹ Competition and Consumer Act of 2010, available at <http://www.comlaw.gov.au/Details/C2011C00003>.

²² Japan Fair Trade Comm'n, Summary of the Amendment to the Antimonopoly Act (June 2009), available at <http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf>.

²³ Canadian Competition Bureau, A Guide to Amendments to the Competition Act (Apr. 22, 2009), available at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html>.

²⁴ Article 29 of Law 703/1977.

²⁵ Law No. 8,137 of December 27, 1990, as amended by Law No. 8884 of June 11, 1994, available at <http://www.oecd.org/dataoecd/14/41/1817679.pdf>.

²⁶ Federal LAW No. 216-FZ of 29th July, 2009, available at http://en.fas.gov.ru/legislation/legislation_50483.html.

²⁷ See, e.g., Basic Law for the Federal Republic of Germany, Article 16 (2), 29 July 2009, available at <http://www.iuscomp.org/gla/statutes/GG.htm#16>; Article 8 of the Extradition Law of the People's Republic of China, available at http://www.gov.cn/english/laws/2005-09/22/content_68710.htm; Article 4 of the Law of Extradition of the Republic of China, available at http://law.moj.gov.tw/Eng/news/news_detail.aspx?id=192; Article 2, Law of Extradition of Japan, available at <http://www.moj.go.jp/ENGLISH/information/loe-01.html>. See also Julian M. Joshua & Peter D. Camesasca, *An Antitrust NATO—the DOJ's "Foreign Policy" in the War Against International Cartels*, in EUROPEAN ANTITRUST REVIEW 2006, available at http://www.howrey.com/docs/AnAntitrustNATO_GCR-EuropeanATReview.pdf.

²⁸ See M. Plachta, *(Non) Extradition of Nationals: A Neverending Story*, 13 EMORY INT'L L. REV. 77, 82–84 (1999).

²⁹ Other obstacles to extradition may also exist, which would have to be addressed on a case-by-case basis. For example, some extradition treaties, particularly those of civil law countries, allow extradition only for offenses that occur within the territorial jurisdiction of the country seeking extradition. See ABBELL, *supra* note 12, at 74–77 & 325–26.

[T]he hurdles to extradition in the vast majority of jurisdictions make it unlikely that Norris represents a turning point in the ability of the United States to routinely gain the extradition of foreign nationals for cartel offenses.

Of the countries with criminal antitrust penalties: (1) Russia does not have an extradition treaty with the United States;³⁰ (2) three jurisdictions—Israel, Brazil, and Greece—do not contain dual criminality provisions but rather list the offenses for which extradition will be allowed³¹ and none contains a provision for extradition of cartel offenders; and (3) four jurisdictions that have criminalized cartel offenses—South Korea,³² Australia,³³ Japan,³⁴ and Brazil³⁵—either by treaty or statute, limit the extradition of their own citizens.

Put differently, only the United Kingdom, Ireland and Canada (a) criminalize cartel conduct; (b) have extradition treaties with the United States that contain dual criminality provisions; and (c) do not have obstacles to the extradition of their own citizens in their extradition treaties or statutes.

Thus, only a few jurisdictions around the world appear candidates for a successful extradition of their own citizens.³⁶

Conclusion

The real lesson of *Norris* may be that foreign nationals face a greater risk of extradition for obstruction of justice than for committing a cartel offense. Given the typical requirements for extradition of a foreign national to the United States, only those countries that have criminalized cartel offenses are potential candidates for a successful extradition. Of those jurisdictions that have adopted such criminal sanctions—substantial hurdles, such as the lack of an extradition treaty, the absence of cartel conduct as an extraditable offense, or protection for citizens of those jurisdictions—remain to the successful extradition of foreign nationals for antitrust offenses. While residents of the United Kingdom, Ireland, and Canada face a clearer risk of extradition than before the *Norris* case, citizens of numerous other jurisdictions, even those which have criminalized antitrust offenses, remain unlikely to be extradited to the United States on antitrust charges.

The *Norris* case certainly demonstrates that the United States will be resolute in seeking extradition when it appears feasible. Nevertheless, the hurdles to extradition in the vast majority of jurisdictions make it unlikely that *Norris* represents a turning point in the ability of the United States to routinely gain the extradition of foreign nationals for cartel offenses. ●

³⁰ See 18 U.S.C. § 3181 (listing jurisdictions that currently have extradition treaties with the U.S.).

³¹ 14 U.S.T. 1707, art. II (Israel); 15 U.S.T. 2093, art. II (Brazil); 47 Stat. 2185 art. II (Greece).

³² 1998 U.S.T. LEXIS 248, art. 3 (“Neither Contracting State shall be bound to extradite its own nationals, but the Requested State shall have the power to extradite such person if, in its discretion, it be deemed proper to do so.”).

³³ 27 U.S.T. 957, art. V (“Neither of the Contracting Parties shall be bound to deliver up its own nationals under this Treaty but the executive authority of each Contracting Party shall have the power to deliver them up if, in its discretion, it considers that it is proper to do so.”).

³⁴ Article 2, Law of Extradition of Japan, available at <http://www.moj.go.jp/ENGLISH/information/loe-01.html>.

³⁵ 15 U.S.T. 2093, art. VII (“There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, subject to the appropriate laws of that State, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so.”).

³⁶ *Id.* Obviously, the potential exists for a non-citizen of a dual criminality country to be apprehended in that country, in which case he or she would not have the protection of such restrictions on the extradition of a citizen. To date, however, no such extradition has occurred in an antitrust case.