COMPETITION LAW UPDATE

House of Lords Hands Norris a Victory in Extradition Battle with US DOJ

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On March 12, 2008, the Appellate Committee of the House of Lords upheld, in part, an appeal by Ian Norris against a decision to extradite him to the United States to face charges arising out of a price-fixing cartel in the carbon industry (*Norris v Government of the United States of America and others* [2008] UKHL 16).

Although the decision has the effect of stalling the attempt by the United States Department of Justice to bring Mr. Norris to trial, and is clearly a significant victory for Mr. Norris on one important issue, the matter is not yet closed. The House of Lords remitted the proceedings to the Magistrates Court to determine whether Mr. Norris could yet be extradited on the basis of lesser charges of obstructing justice (including alleged tampering with evidence in connection with the price-fixing cartel).

The case demonstrates yet again the desire of the United States Justice Department to exercise extra-jurisdictional powers in dealing with criminal cartel matters, and comes as a timely reminder of the risks of price-fixing arrangements in a world of increasingly global enforcement techniques.

I. BACKGROUND FACTS

In September 2004, a grand jury in Pennsylvania indicted Mr. Norris on four counts relating to price-fixing in the carbon industry in violation of U.S. criminal antitrust laws. The indictment followed an investigation into allegations of a price-fixing cartel that is alleged to have operated from at least 1989 to 2000. During that time, Mr. Norris was working in the carbon division at Morgan Crucible, a role that he held for 29 years (including 4 years as chief executive officer of the group).

The House of Lords' judgment notes that Morgan Crucible subsidiaries in the United States paid substantial fines in connection with the price-fixing cartel, and that most directors, officers and employees of the company were granted immunity from prosecution as part of a plea bargain arrangement. However, Mr. Norris was not covered by that arrangement, and the indictment alleges that he:

- Conspired with other producers of carbon products (used in the transport, industrial and consumer product markets) to operate a price-fixing cartel in a number of countries including the United States (Count 1); and

- Conspired to obstruct justice, tamper with witnesses and cause persons to alter, destroy, mutilate or conceal objects with the intent to impair the objects' availability for use in official proceedings (Counts 2, 3 and 4).

Following the return of the indictment by the U.S. grand jury, the United States Justice Department sought to have Mr. Norris, a national of the United Kingdom, extradited to the United States to face trial. On June 1, 2005 District Judge Evans sent the case to the Home Secretary, and on September 29, 2005, the Home Secretary ordered that Mr. Norris be extradited. Evans DJ's decision was upheld by the Queens Bench Divisional Court.

II. FINDINGS IN RELATION TO PRICE-FIXING

Mr. Norris appealed against the decisions of the lower courts on the basis that, during the relevant time (1989 to 2000), participation in a price-fixing cartel was not a criminal offence in the United Kingdom, although it later became one in 2003. As the Extradition Act 2003 requires that conduct be criminal in both the requesting and the requested countries, it would follow that Mr. Norris could not be extradited to the United States. Conversely, the United States government argued that Mr. Norris had been involved in a conspiracy to defraud, and that this constituted a criminal offence at common law.

After reviewing the case law and legislative history in the area, the House of Lords concluded that in the absence of "aggravating factors" such as dishonest misrepresentation, fraud, intimidation, violence, or interference with contractual rights, participation in a price-fixing cartel is not a criminal offence at common law (although a price-fixing agreement may be void and unenforceable as between its members).

Put another way, an agreement to fix prices is not, in and of itself, a common law offence. Where, however, the parties involved in the cartel have also resorted to misrepresentation and deception (or other aggravating conduct), they may be prosecuted for conspiracy to defraud.

As it was not suggested that Mr. Norris' conduct involved any aggravating factors of the sort identified above, it followed that his actions had not been indictable in the United Kingdom at the time of the cartel conduct.

The House of Lords noted a number of factors that supported this position, including that:

- No individual or company has ever been successfully prosecuted in the United Kingdom for being a party, or giving effect, to a price fixing agreement (without aggravating factors being present);

- Statutory criminalization of cartels was first introduced by the Enterprise Act 2002 (which came into effect in 2003). Consultation papers and comments by relevant Ministers in the lead-up to the introduction of the criminal provisions confirmed that individuals were not previously subject to criminal sanctions for participating in a cartel, and also that the Enterprise Act would not have retrospective effect in relation to conduct occurring prior to the Enterprise Act coming into force; and

- No person should be punished for an act that was not clearly and ascertainably punishable when the act was done (see *R v Rimmington* [2006] 1 AC 459). The House of Lords considered that there had been a consistent message from Parliament, the judiciary, ministerial statements and textbooks in the period leading up until the 1990s that price-fixing was not of itself capable of constituting a crime, and that it would be contrary to that principle subsequently to find that price fixing agreements constituted a common law offence during the relevant period.

Accordingly, Mr. Norris' appeal in relation to Count 1 was allowed. As outlined below, however, the House of Lords dismissed Mr. Norris' appeal in relation to Counts 2, 3 and 4 of obstructing justice.

III. FINDINGS IN RELATION TO OBSTRUCTION OF JUSTICE

Mr. Norris had argued that Counts 2 to 4 were not "extradition offences" for the purpose of the Extradition Act 2003, because "it would not have been an offence under English law for Mr. Norris to conspire in England to obstruct the criminal investigation … in Pennsylvania". Relying on the reasoning of Lord Millett in *R (Al Fawwaz) v Governor of Brixton Prison* [2002] 1 AC 556, however, the House of Lords concluded that the appropriate test was whether it would have been an offence under English law to obstruct a criminal investigation into price-fixing in the carbon products industry that was being conducted by the appropriate investigatory body in England.

The House of Lords was satisfied that, if Mr. Norris had done in England what he is alleged by Counts 2 to 4 to have done in the United States, he would have been guilty of criminal offences that could have attracted a sentence of 12 months' imprisonment.

IV. NEXT STEPS

Under section 87(1) of the Extradition Act 2003, the extradition judge must determine whether it would be consistent with a person's human rights to extradite him or her from the United Kingdom. Essentially, this requires the judge to consider whether extradition is a proportionate response in the circumstances, having regard to the accused person's rights, and the nature of the alleged offences.

The District Judge has previously undertaken this assessment in relation to Count 1 of the indictment, and resolved it adversely to Mr. Norris. However, the House of Lords decided to remit the matter back to the Magistrates Court to carry out the balancing exercise again, in relation to what the House of Lords termed "the subsidiary counts".

Accordingly, although the House of Lords decision is being heralded as a significant victory for Mr. Norris, there remains the possibility that he will ultimately be extradited to the United States to face trial on Counts 2 to 4 of the indictment. The legal battle that commenced in 2004 has not finished yet, and the United States government is likely to keep fighting hard to bring Mr. Norris before its own courts.

V. IMPLICATIONS OF DECISION

The House of Lords judgment will be welcomed by individuals who were involved in price-fixing arrangements prior to the date on which the criminalization provisions in the Enterprise Act 2002 came into effect (in 2003), and who might otherwise have faced the risk of extradition in connection with that conduct. At its most basic, the effect of the judgment is that such persons cannot be extradited to face charges in connection with the price-fixing conduct.

However, there are a number of important qualifications to that position:

- Price-fixing conduct that occurred after the Enterprise Act 2002 came into force will be considered a criminal offence, and will therefore give rise to the risk of extradition. The judgment in *Norris* is therefore likely to have a diminishing effect in future years (in light of the fact that the criminalization provisions have been in force for nearly 5 years already); and

- Price-fixing conduct that finished before the Enterprise Act 2002 commenced would not, of itself, amount to criminal conduct for the purpose of the Extradition Act. However, if the relevant conduct involved any of the "aggravating factors" referred to in the House of Lords decision, then the

persons involved are unlikely to be able to rely on the *Norris* judgment, and could face prosecution for the offence of conspiracy to defraud.

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