



Cartels and extradition: Norris case

UK APPEAL COURT CONFIRMS: COLLUSION MAY CONSTITUTE COMMON LAW CRIMINAL CONSPIRACY TO DEFRAUD; UK NATIONALS MAY BE EXTRADITED TO US FOR ENGAGING IN CARTELS.

US antitrust enforcers moved a step closer last week to securing the extradition of Mr Ian Norris, a British citizen. His appeals were dismissed against an English High Court ruling extraditing him to the US to face charges of conspiracy to fix prices, obstructing the course of justice, and interference with witnesses. This briefing looks at the implications of the decision for cartel enforcement.

US antitrust enforcers moved a step closer to securing the extradition of Mr Ian Norris, a British citizen, on 25 January. His appeals were dismissed against an English High Court ruling extraditing him to the US to face charges of conspiracy to fix prices, obstructing the course of justice, and interference with witnesses.

The Court found that although Mr Norris' alleged conduct took place before June 2003, when the Enterprise Act 2002 came into force in the UK creating a statutory cartel offence, the conduct alleged would have amounted to a common law criminal conspiracy to defraud. The Court specifically rejected the submission that the creation of the cartel offence showed that cartel activity was not criminal before June 2003.

The US authorities allege, among other things, that Mr Norris discussed and exchanged price quotations and submitted collusive, non-competitive or otherwise rigged bids. They also allege that he did so dishonestly. The Court found that the allegation was, therefore, equivalent to an allegation of conspiracy to defraud.

The offence of conspiracy to defraud consists of 'an agreement between two or more persons dishonestly to prejudice or to risk prejudicing another's right, knowing that they have no right to do so'. The Court rejected Mr Norris' argument that to amount to dishonesty a positive act of deception beyond mere secrecy was required. It found that 'secrecy, which almost always must have as its object misleading customers into believing that they are paying a market or near market price, instead of one rigged by suppliers in the market, is and was at the

material time clearly capable of being regarded by an English jury as dishonest'. Previous examples in the case law in which bid rigging and cartels had not been held to constitute criminal conspiracy were distinguished on the grounds that dishonesty had either not been raised or not found on the facts.

The case could yet go to the House of Lords or to the European Court of Human Rights in Strasbourg. Mr Norris' arguments that extradition would infringe his right to a respect for his private and family life (article 8 of the European Convention on Human Rights, ECHR) and that extradition would constitute 'unjustified discrimination in the enjoyment of his Convention rights (article 14 of the ECHR) were also rejected, as were arguments relating to unfair retrospectivity contrary to article 7 of the ECHR.

Implications for UK companies

If the judgment stands, some interesting questions arise.

- Given that the cartel offence under section 188 of the 2002 Act is limited to individuals, are undertakings exposed to the risk of criminal sanctions if they commit the common law offence of conspiracy to defraud? It appears that the clear answer to this, at least theoretically, is 'yes'.
- What exactly is the scope of application of conspiracy to defraud in the context of anticompetitive conduct and how much wider is it than the cartel offence? In other words, will any secret agreement to charge an excessive price now be potentially criminal? The

judgment certainly leaves open the scope for arguing that other anticompetitive conduct could be criminal.

- Importantly, will the immunity programme of the Office of Fair Trading (OFT) be undermined, given that its statutory powers to grant immunity regarding the cartel offence under the 2002 Act do not extend to common law conspiracy to defraud? The Court did not think so, and the OFT and Serious Fraud Office (SFO) have made statements to try to allay concerns on this score in the past. In particular, the Court highlighted that use of a common law offence as an improper means of circumventing the limitations in the use of a statutory offence would amount to an abuse of process. The OFT has also recently expressed a similar view that a prosecution for conspiracy to defraud using the same factual matrix as is applied when a no-action letter is given would be viewed by the courts as unfair and an abuse of process. It stated that the risk of this happening is very low and noted that the director of the SFO has also given assurances that the SFO would not pursue a charge of conspiracy to defraud in such circumstances.

Whatever the position on these issues, the practical effect of the ruling is that individuals will continue to face the risk of extradition if they engage in hard core cartel activity.

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