

Responding To DOJ's Increasing Int'l Antitrust Extraditions

By **Ann O'Brien, Jeff Martino, Brian Song and Audrey van Duyn** (April 1, 2020)

"The Antitrust Division will leave no stone unturned including working with enforcers around the world to bring to justice those who infect international markets with collusion," wrote Assistant Attorney General Makan Delrahim.[1]

Breaking news that an international fugitive, long wanted by the U.S. government, has been extradited is usually reserved for a terrorist or an infamous drug lord such as Joaquin "El Chapo" Guzman.

However, extradition is increasingly becoming a tool used by the Antitrust Division of the U.S. Department of Justice to prosecute individuals alleged to have violated U.S. law through anti-competitive conduct. These individuals are then faced with the difficult choice of remaining a fugitive in the eyes of the U.S. or fighting to defend themselves in a foreign land.

Recent Extradition Cases

On March 3, the DOJ announced the extradition from Germany of Eun Soo Kim, a former key accounts manager for Continental Automotive Korea Ltd. and a South Korean national.[2] Kim, who was indicted for his role in an international auto parts antitrust conspiracy, had remained outside the reach of U.S. authorities for five years, until he was apprehended by German authorities in Frankfurt in September.

Kim agreed to extradition and pleaded guilty to participating in an international market allocation and bid-rigging conspiracy involving the sale of instrument panel clusters sold to South Korean automobile producers and their subsidiaries in the U.S. and elsewhere. Kim was sentenced to nine months in prison with credit for time served while in custody pending extradition and a \$130,000 fine.[3]

Kim's extradition is the third based solely on an antitrust charge and comes on the heels of the recent extradition from Italy of Maria Christina "Meta" Ullings.[4] Ullings, a Dutch national and former senior vice president of cargo sales and marketing for Martinair Holland NV, was indicted in 2010 for participating in a long-running worldwide antitrust conspiracy to fix prices of air cargo.[5]

Ullings remained outside the reach of U.S. authorities for almost 10 years, until she was apprehended while visiting Sicily in July 2019. She contested extradition in the Italian courts, but after the Court of Appeals of Palermo ruled that she be extradited, she waived her appeal and made her initial appearance in U.S. federal court on Jan. 13. She was sentenced to 14 months in prison with credit for time served while in Italian custody and fined \$20,000.

While Germany and Italy are the only countries to extradite a defendant based solely on an antitrust charge thus far, the Antitrust Division has also successfully extradited other defendants from Bulgaria, Canada, Israel, Madagascar and the U.K. for charges, including



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non-Sherman Act crimes.

Yuval Marshak

Yuval Marshak was charged with defrauding the Foreign Military Financing program and with money laundering related to bid-rigging for FMF contracts. Marshak was arrested in Bulgaria in July 2016 and extradited to the U.S. in October 2016. Marshak pled guilty to the fraud charges in March 2017 and was sentenced to serve 30 months in prison and to pay a \$7,500 criminal fine and \$41,170 in restitution.[6]

John Bennett

In March 2016, John Bennett, a Canadian citizen and former CEO of a Canadian hazardous waste treatment company, was convicted of defrauding the U.S. government and conspiring to pay kickbacks in obtaining subcontracts for the treatment and disposal of contaminated soil at a New Jersey Superfund site overseen by the federal government. Bennett resisted the DOJ's efforts to extradite him from Canada, ultimately appealing to Canada's highest court. He lost and was extradited to the U.S. in November 2014.

After a three-week jury trial, Bennett was convicted of committing major fraud against the U.S. and conspiring to pay \$1.3 million in kickbacks. He was sentenced to serve 63 months in prison and to pay a \$12,500 criminal fine and \$3.8 million in restitution.[7]

Romano Piscioti

In 2014, Romano Piscioti, an Italian national and former executive of a marine hose company, pleaded guilty and was sentenced to serve two years in prison and to pay a \$50,000 criminal fine for participating in a conspiracy to rig bids, fix prices and allocate market shares of marine hoses sold in the U.S. Piscioti was arrested in and extradited from Germany in the first successfully litigated extradition on an antitrust charge.[8]

David Porath

In 2012, David Porath, an Israeli national and U.S. citizen, pleaded guilty to conspiring to rig bids on contracts for insulation services to a New York hospital, tax conspiracy and filing a false tax return. Initially, Porath was set to plead guilty to an Information, but then absconded. At the time of the indictment, Porath was living in Israel. He was extradited and returned to the U.S. in February 2012 and sentenced to time served.[9]

Ian P. Norris

In 2010, Ian P. Norris, a British national, was convicted by a federal jury for his involvement in a conspiracy to obstruct a federal grand jury investigation into price-fixing of carbon products sold in the U.S. Norris resisted the DOJ's efforts to extradite him for years, but a U.K. court ultimately ruled that he could be extradited to the U.S. to face the obstruction of justice charges against him. Following his extradition in March 2010 and his conviction in July 2010, Norris was sentenced to serve 18 months in prison and pay a \$25,000 criminal fine.[10]

Bobby Keith Moser

In 2004, after agreeing to plead guilty to money laundering charges brought by the Antitrust Division, former Little Rock, Arkansas, tax attorney Bobby Keith Moser fled to

Madagascar instead of appearing for his scheduled guilty plea.[11] Moser was detained in Madagascar and transported back to the U.S., where he later pleaded guilty to numerous additional charges involving theft of client funds and obstruction of justice and was sentenced in 2005 to more than 15 years in prison.[12] While Moser was not a foreign national, his case shows the resolve and ability of the Antitrust Division to track down defendants.

INTERPOL Red Notice

While the details of how these Antitrust Division defendants were apprehended rarely come out, it is safe to assume that these individuals were placed on INTERPOL Red Notices. A Red Notice acts as an international wanted notice and is a request to law enforcement agencies within the 194 member countries of INTERPOL to arrest a person pending extradition.[13] In 2001, the Antitrust Division adopted a policy of placing indicted fugitives on the Red Notice list, and that policy appears to still be in place.[14]

The DOJ's recent successful extraditions demonstrate that countries have so far been unwilling to extradite their own citizens on an antitrust charge. While Bennet, Porath and Norris were extradited from their home countries, their extraditions were not based on antitrust charges. Kim, Ullings and Piscioti traveled from one jurisdiction to another, leading to their apprehension and subjecting them to the extradition process of the jurisdictions in which they were found. Even if they had defeated extradition in the foreign countries where they were found, they would have remained exposed to arrest again while traveling home due to the Red Notices on them.

While the Antitrust Division does not publish statistics on the number of fugitive defendants, and some cases may be under seal and unknown to the public, there are believed to be at least dozens of Antitrust Division-indicted foreign defendants who are considered to be fugitives and are most likely on Red Notices.[15]

Given the string of Antitrust Division prosecutions of executives living in Asia for participating in antitrust conspiracies in the dynamic random access memory,[16] LCD,[17] auto parts,[18] suspension assemblies[19] and South Korean fuel supply matters,[20] there are potentially large numbers of indicted executives in Asia deemed fugitives by the Antitrust Division and presumably on Red Notices.

Fold, Hide, Fight or Flight

Foreign nationals facing prosecution by the Antitrust Division are confronted with several choices.

Plead guilty and potentially serve time in a U.S. prison.

A defendant who is aware of potential charges can try to negotiate a plea agreement with the Antitrust Division, which has potential benefits. The defendant's cooperation and willingness to submit to U.S. jurisdiction could be rewarded with a lower sentencing recommendation. In addition, a plea agreement may include immigration relief that would allow the defendant to travel to the U.S. after conviction.

The Antitrust Division has a unique memorandum of understanding that has been in place since 1996 with the Immigration and Naturalization Service and is now implemented by the U.S. Department of Homeland Security. Under the MOU, the Antitrust Division may petition for the preadjudication of the immigration status of a cooperating alien to allow

them to obtain a nonimmigrant visa to travel in and out of the U.S. after conviction for an antitrust offense.[21]

Without this waiver of inadmissibility, a convicted antitrust defendant would otherwise not be able to obtain a visa to travel to the U.S., since antitrust offenses are considered crimes of moral turpitude by U.S. immigration officials. This option can be appealing for antitrust defendants who want to resolve their criminal charges and continue to travel after conviction.

Since the late 1990s, the Antitrust Division's stated policy is to reject no jail deals from foreign nationals. Defendants should consider that the division and sentencing courts have been more open to mitigating arguments based on the nature and circumstances of a particular defendant, i.e., how they are situated vis-à-vis any other co-defendant and/or the applicable range of jail time under the sentencing guidelines.

Hunker down.

A defendant who stays in his or her home country and does not travel abroad is unlikely to be extradited to the US. to face antitrust charges. However, because fraud, corruption, tax or obstruction charges can go hand in hand with antitrust offenses, there remains a risk of extradition for those other offenses, as was the case with Norris, Porath, Marshak and Bennett.

Try to fight from abroad.

A defendant may seek to have charges dismissed from abroad on constitutional or statute of limitations grounds, while remaining a fugitive outside the jurisdiction of the U.S. Under these circumstances, the government will typically raise the fugitive disentitlement doctrine, which is an equitable doctrine that allows a court to deny reaching the merits of such a request if the defendant does not submit to the jurisdiction of the court.

This analysis turns on the threshold issue of whether the defendant is a fugitive.[22] The DOJ and Antitrust Division have generally been successful in fending off such challenges from defendants who remain abroad.[23] However, in a recent case, at least one judge appears to have had some sympathy for a motion to unseal and challenge to an indictment from abroad, where the indictment appears to have been under seal for a decade and the defendant was in his home country the entire time.[24] .

When refusing to apply the fugitive disentitlement doctrine, the judge noted, "[c]itizens are not fugitives by virtue of residing in another country." This type of judicial thinking could open the door to arguments from antitrust defendants indicted long ago while residing in foreign countries but who did not abscond from the U.S. like a more traditional fugitive.

A defendant may take the risk of traveling for business or pleasure, but they will always be looking over their shoulder and worrying that, like Ullings, Piscioti or Kim, a vacation in Sicily or a flight connection in Germany may result in getting arrested, imprisoned in a foreign country and extradited to the U.S.

Conclusion

Given their limited options, it is not surprising that many foreign defendants choose to work out a plea agreement with the Antitrust Division. Cooperation and voluntary entry into the U.S. to face criminal charges may be beneficial to indicted foreign executives.

The Antitrust Division may consider a foreign executive's cooperation in reducing a prison sentence or criminal fine or perhaps dropping the charges altogether. Given the Antitrust Division's recent string of extradition successes, foreign-located defendants should appreciate the very real possibility of extradition and assess their options carefully.

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[1] Press Release, U.S. Department of Justice, Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge, Rel. No. 20-260 (March 3, 2020), <https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge>.

[2] Id.

[3] Id.

[4] Press Release, U.S. Department of Justice, Former Air Cargo Executive Extradited From Italy for Price-Fixing, Rel. No. 20-29 (Jan. 13, 2020), <https://www.justice.gov/opa/pr/former-air-cargo-executive-extradited-italy-price-fixing>.

[5] Id.

[6] Press Release, U.S. Department of Justice, Israeli Executive Sentenced to Prison for Defrauding the Foreign Military Financing Program, Rel. No. 17-638 (June 12, 2017), <https://www.justice.gov/opa/pr/israeli-executive-sentenced-prison-defrauding-foreign-military-financing-program>.

[7] Press Release, U.S. Department of Justice, Former CEO of Canadian Hazardous Waste Treatment Company Sentenced to Serve 63 Months in Prison for Role in Kickback and Fraud Schemes Against the United States, Rel. No. 16-921 (Aug. 9, 2016), <https://www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-sentenced-serve-63-months-prison-role>; Press Release, U.S. Department of Justice, Former CEO of Canadian Hazardous Waste Treatment Company Convicted of Conspiracy to Pay Kickbacks and Committing Major Fraud against the United States, Rel. No. 16-303 (March 16, 2016), <https://www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-convicted-conspiracy-pay-kickbacks-and>; U.S. Department of Justice, Division Update Spring 2016 (April 5, 2016), <https://www.justice.gov/atr/division-wins-conviction-former-ceo-extradited-role-kickback-and-fraud-conspiracy>.

[8] Press Release, U.S. Department of Justice, Former Marine Hose Executive Who Was Extradited to United States Pleads Guilty for Participating in Worldwide Bid-Rigging Conspiracy, Rel. No. 14-426 (April 24, 2014), <https://www.justice.gov/opa/pr/former->

marine-hose-executive-who-was-extradited-united-states-pleads-guilty-participating.

[9] Press Release, U.S. Department of Justice, Owner of Insulation Service Company Pleads Guilty to Million Dollar Bid-Rigging and Fraud Conspiracies at New York City Hospital, Rel. No. 12-865 (July 11, 2012), <https://www.justice.gov/opa/pr/owner-insulation-service-company-pleads-guilty-million-dollar-bid-rigging-and-fraud>.

[10] Press Release, U.S. Department of Justice, Former CEO of the Morgan Crucible Co. Sentenced to Serve 18 Months in Prison for Role in Conspiracy to Obstruct Justice, Rel. No. 10-1426 (Dec. 10, 2010), <https://www.justice.gov/opa/pr/former-ceo-morgan-crucible-co-sentenced-serve-18-months-prison-role-conspiracy-obstruct>.

[11] Press Release, U.S. Attorney for the Eastern District of Arkansas (May 5, 2005), <https://www.justice.gov/archive/usao/are/news/2005/may/05-05-2005.pdf>.

[12] Id.

[13] Red Notices, Interpol, <https://www.interpol.int/en/How-we-work/Notices/Red-Notices>.

[14] U.S. Department of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades (Feb. 25, 2010), <https://www.justice.gov/atr/file/518241/download>.

[15] Robert E. Connolly, A Comment on the Fugitive Disentitlement Doctrine (Jan. 25, 2019), <http://antitrustconnect.com/2019/01/25/a-comment-on-the-fugitive-disentitlement-doctrine/>.

[16] On April 19, 2007, the DOJ announced that II Ung Kim, a South Korean citizen and executive at Samsung Electronics Ltd., became the sixth Samsung executive to plead guilty for participating in a global conspiracy to fix dynamic random access memory (DRAM) prices. Kim agreed to serve 14 months in a U.S. prison. Press Release, U.S. Department of Justice, Sixth Samsung Executive Agrees to Plead Guilty to Participating in DRAM Price-Fixing Cartel, Rel. No. 07-263 (April 19, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/222770.htm.

[17] On April 29, 2013, the DOJ announced that Shiu Lung Leung was sentenced to serve 24 months in prison and pay a \$50,000 criminal fine for his participation in a worldwide thin-film transistor-liquid display price-fixing conspiracy. Eight companies and 22 executives have been charged in relation to this conspiracy. Press Release, U.S. Department of Justice, Au Optronics Corporation Executive Sentenced for Role in LCD Price-Fixing Conspiracy, Rel. No. 13-486 (April 29, 2013), <https://www.justice.gov/opa/pr/au-optronics-corporation-executive-sentenced-role-lcd-price-fixing-conspiracy>. As part of this conspiracy, the DOJ previously announced the pleas of the first Taiwanese nationals to face imprisonment in the United States for an antitrust offense. Press Release, U.S. Department of Justice, Four Executives Agree to Plead Guilty in Global LCD Price-Fixing Conspiracy, Rel. No. 09-046 (Jan. 15, 2009), <https://www.justice.gov/opa/pr/four-executives-agree-plead-guilty-global-lcd-price-fixing-conspiracy>.

[18] Press Release, U.S. Department of Justice, Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge, Rel. No. 20-260 (March 3, 2020), <https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge>.

[19] On Feb. 14, the Antitrust Division announced the indictment of Hitoshi Hashimoto and

Hiroyuki Tamura, both Japanese citizens, for their alleged role in a global conspiracy to fix prices for suspension assemblies used in hard disk drives. Press Release, U.S. Department of Justice, Two Executives Indicted in Long-Running Antitrust Conspiracy to Fix Prices for Disk Drive Components, Rel. No. 20-187 (Feb. 14, 2020), <https://www.justice.gov/opa/pr/two-executives-indicted-long-running-antitrust-conspiracy-fix-prices-disk-drive-components>. Hashimoto and Tamura are former top sales executives at NHK Spring Co. Ltd. which pled guilty to the same conspiracy to fix prices and paid a \$28.5 million fine in July 2019. Press Release, U.S. Department of Justice, Japanese Manufacturer Agrees to Plead Guilty to Fixing Prices for Suspension Assemblies Used in Hard Drives, Rel. No. 19-818 (July 29, 2019), <https://www.justice.gov/opa/pr/japanese-manufacturer-agrees-plead-guilty-fixing-prices-suspension-assemblies-used-hard-disk>.

[20] In March 2019, seven South Korean executives were indicted for their alleged role in a bid-rigging conspiracy that targeted contracts to supply fuel to U.S. military bases in South Korea. Press Release, U.S. Department of Justice, More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea, Rel. No. 19-249 (March 20, 2019), <https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense>.

[21] Memorandum of Understanding between the Antitrust Division, U.S. Department of Justice and the Immigration and Naturalization Service, U.S. Department of Justice (March 15, 1996), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/05/9951.pdf>.

[22] See *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993); *Degen v. United States*, 517 U.S. 820 (1996).

[23] See *United States v. Yeh*, 3:10-cr-00231 (WHA) (N.D. Cal. May 15, 2013) (denying motion to dismiss); *United States v. Hayes*, 118 F. Supp. 3d 620, 626 (S.D.N.Y. 2015) (holding that the fugitive disentitlement doctrine bars defendant's motion to dismiss); *United States v. Bokhari*, 757 F.3d 664 (7th Cir. 2014) (declining to reach the merits of the fugitive disentitlement doctrine, but upholding denial of motion to dismiss).

[24] See *United States v. Khoury*, 4:17-MC-2553 (S.D. Tex. June 11, 2018), <https://cases.justia.com/federal/district-courts/texas/txsdce/4:2017mc02553/1457713/22/0.pdf?ts=1528793191>; see also Michelle Casady, *Feds Defend 10-Year Delay In Unsealing Gas Kickback Case*, Law 360 (May 28, 2019), <https://www.law360.com/articles/1163482/feds-defend-10-year-delay-in-unsealing-gas-kickback-case>.