

**No Place To Hide:
Foreign Nationals Face Extradition for Anticompetitive Conduct Overseas**

By Ann O'Brien, Jeff Martino, Brian Song and Audrey van Duyn¹

“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.”

– Assistant Attorney General for Antitrust Makan Delrahim²

Breaking news that an international fugitive long wanted by the United States government has been extradited is usually reserved for an alleged terrorist or an infamous drug lord such as Joaquin “El Chapo” Guzman. However, extradition is becoming an increasingly effective tool used by the Antitrust Division of the United States Department of Justice (DOJ) to prosecute individuals alleged to have violated U.S. law through anticompetitive conduct. Antitrust Division Deputy Assistant Attorney General Richard A. Powers recently³ remarked that the Antitrust Division’s successful extraditions are “a reminder that individuals who violate U.S. antitrust laws and seek to evade justice will find no place to hide.”³ These individuals are thus faced with the difficult choice of remaining a “fugitive” in the eyes of the United States or fighting to defend themselves in a foreign land.

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² Press Release, U.S. Department of Justice, *Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge*, Rel. No. 20-260 (Mar. 3, 2020), <https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge>.

³ Richard A. Powers, deputy assistant attorney general, *A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement* (Feb. 19, 2020), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international>.

Recent Antitrust 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.⁴ 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 2019. 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 to South Korean automobile producers and their subsidiaries in the United States and elsewhere. Kim was sentenced to nine months in prison, with credit for time served while in custody pending extradition, and fined \$130,000.⁵ The court entered an order of judicial removal providing that upon completion of the term of imprisonment Kim was to be removed from the United States to the Republic of Korea.⁶ Kim consented to the court's judicial removal order and completed his sentence in June.

However, in July, Kim's attorney notified the court that Kim had not yet been released from U.S. Immigration and Customs Enforcement (ICE) custody. Kim was detained by ICE after serving his time and faced significant delays returning to South Korea, despite his offers to self-deport and pay for his own airline ticket.⁷ The court ordered ICE to comply with the judicial removal order or show cause why it could not,⁸ and Kim is now believed to be back in Korea.

⁴ *Id.*

⁵ *Id.*

⁶ Order of Judicial Removal, *United States v. Kim*, No. 3:15-cr-00002-TCB (N.D. Ga. Mar. 4, 2020), ECF No. 19.

⁷ Max Fillion, *Cartelists' Deportations Highlight Arbitrary US Immigrations Enforcement*, MLEX (Jul. 17, 2020), <https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1208810&siteid=244&rdir=1>.

⁸ Order, *United States v. Kim*, No. 3:15-cr-00002-TCB (N.D. Ga. July 7, 2020), ECF No. 28.

Kim's extradition was the third based solely on an antitrust charge, and it came on the heels of the recent extradition from Italy of Maria Christina "Meta" Ullings.⁹ Ullings, a Dutch national and former senior vice president of cargo sales and marketing for Martinair N.V., was indicted in 2010 for participating in a long-running worldwide antitrust conspiracy to fix prices of air cargo.¹⁰ 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. The court entered an order of judicial removal to ensure Ullings' prompt removal from the United States upon completion of the term of imprisonment.¹¹ In May, the court granted the defendant's motion for compassionate release premised on COVID-19 health considerations and reduced Ullings' sentence to time served, ordering ICE to remove her from the United States to the Netherlands or allow her to voluntarily remove herself at her own expense.¹² Unlike Kim, Ullings was able to voluntarily return to the Netherlands after her release.¹³

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

⁹ 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>.

¹⁰ *Id.*

¹¹ Order of Judicial Removal, *Maria Christina "Meta" Ullings*, No. 1:10-cr-00406-MLB (N.D. Ga. Jan. 23, 2020), ECF No. 23.

¹² Opinion and Order, *Maria Christina "Meta" Ullings*, No. 1:10-cr-00406-MLB (N.D. Ga. May 12, 2020), ECF No. 34.

¹³ Max Fillion, *Cartelists' Deportations Highlight Arbitrary US Immigrations Enforcement*, MLEX (Jul. 17, 2020), <https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1208810&siteid=244&rdir=1>.

defendants from Bulgaria, Canada, Israel, Madagascar and the United Kingdom for charges that include non-Sherman Act crimes.

- Yuval Marshak: Yuval Marshak was charged with defrauding the Foreign Military Financing (FMF) program and with money laundering related to bid-rigging for FMF contracts. He was arrested in Bulgaria in July 2016 and extradited to the United States in October 2016. Marshak pleaded guilty to the fraud charges in March 2017 and was sentenced to serve 30 months in prison and pay a \$7,500 criminal fine and \$41,170 in restitution.¹⁴
- 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 U.S. 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 United States in November 2014. After a three-week jury trial, Bennett was convicted of committing major fraud against the United States and conspiring to pay \$1.3 million in kickbacks. He was sentenced to serve 63 months in prison and pay a \$12,500 criminal fine and \$3.8 million in restitution.¹⁵

¹⁴ 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>.

¹⁵ 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 (Mar. 16, 2016), <https://www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-convicted-conspiracy-pay-kickbacks-and>; U.S. Department of

- Romano Piscioti: In 2014, Romano Piscioti, an Italian national and a former executive of a marine hose company, pleaded guilty and was sentenced to serve two years in prison and 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 United States. Piscioti was arrested in and extradited from Germany in the first successfully litigated extradition on an antitrust charge.¹⁶
- David Porath: In 2012, David Porath, an Israeli national and a United States citizen, pleaded guilty to conspiring to rig bids on contracts for insulation services for 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 United States in February 2012 and sentenced to time served.¹⁷
- 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 United States. 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 United States to face the obstruction of justice charges against him. Following his

Justice, *Division Update Spring 2016* (Apr. 5, 2016), <https://www.justice.gov/atr/division-wins-conviction-former-ceo-extradited-role-kickback-and-fraud-conspiracy>.

¹⁶ 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 (Apr. 24, 2014), <https://www.justice.gov/opa/pr/former-marine-hose-executive-who-was-extradited-united-states-pleads-guilty-participating>.

¹⁷ 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>.

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.¹⁸

- Bobby Keith Moser: In 2004, after agreeing to plead guilty to money laundering charges brought by the Antitrust Division, former Arkansas tax attorney Bobby Keith Moser fled to Madagascar instead of appearing for his scheduled guilty plea.¹⁹ Moser was detained in Madagascar and transported back to the United States, where he later pleaded guilty to numerous additional charges involving theft of client funds and obstruction of justice. He was sentenced in 2005 to more than 15 years in prison.²⁰ 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 the subjects of 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.²¹ 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.²²

The DOJ’s recent successful extraditions demonstrate that countries so far have been unwilling to extradite their own citizens on antitrust charges. While Bennet, Porath and Norris

¹⁸ 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>.

¹⁹ Press Release, U.S. Attorney for the Eastern District of Arkansas (May 5, 2005), <https://www.justice.gov/archive/usa/are/news/2005/may/05-05-2005.pdf>.

²⁰ *Id.*

²¹ Red Notices, INTERPOL, <https://www.interpol.int/en/How-we-work/Notices/Red-Notices>.

²² 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>.

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 issued for them.

While the Antitrust Division does not publish statistics on the number of fugitive defendants, which in 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 fugitives and are most likely the subjects of Red Notices.²³ Given the string of Antitrust Division prosecutions of executives living in Asia for participating in antitrust conspiracies in the dynamic random access memory (DRAM),²⁴ liquid crystal display (LCD),²⁵

²³ 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/>.

²⁴ On April 19, 2007, the DOJ announced that II Ung Kim, a South Korean citizen and an executive at Samsung Electronics Ltd., became the sixth Samsung executive to plead guilty for participating in a global conspiracy to fix 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 (Apr. 19, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/222770.htm.

²⁵ On April 29, 2013, the DOJ announced that Shiu Lung Leung was sentenced to serve 24 months in prison and to pay a \$50,000 criminal fine for his participation in a worldwide thin-film transistor LCD 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 (Apr. 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>.

auto parts,²⁶ suspension assemblies²⁷ and South Korean fuel supply matters,²⁸ there are potentially large numbers of indicted executives in Asia deemed fugitives by the Antitrust Division and presumably the subjects of Red Notices.

Fold, Hide, Fight or Flight

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

- 1) **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, an action that has potential benefits. The defendant's cooperation and willingness to submit to U.S. jurisdiction could be rewarded with a recommendation of a lower sentence. In addition, a plea agreement may include immigration relief that would allow the defendant to travel to the United States after conviction. The Antitrust Division has a unique memorandum of understanding (MOU) with the Immigration and Naturalization Service that has been in place since 1996 and is now implemented by the Department of Homeland Security. Under the MOU, the Antitrust Division may petition for the

²⁶ Press Release, U.S. Department of Justice, *Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge*, Rel. No. 20-260 (Mar. 3, 2020), <https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge>.

²⁷ 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 pleaded 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>.

²⁸ 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 (Mar. 20, 2019), <https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense>.

preadjudication of the immigration status of cooperating aliens to allow them to obtain a nonimmigrant visa to travel in and out of the United States after conviction for an antitrust offense.²⁹ Without this waiver of inadmissibility, a convicted antitrust defendant would not be able to obtain a visa to travel to the United States, given that 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 for 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 he or she is situated vis-à-vis any other co-defendant and/or the applicable range of jail time under the sentencing guidelines. The issue of ICE detainers delaying antitrust defendants from returning to their home countries after serving time, like the delay faced by Kim, could act as a disincentive to antitrust defendants in foreign locations agreeing to submit to U.S. jurisdiction and serve their time. Notably, however, while Kim pled guilty after extradition, he did not receive the MOU protections available to cooperating antitrust defendants.

- 2) **Hunker down**: A defendant who stays in his or her home country and does not travel abroad is unlikely to be extradited to the United States 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.

²⁹ MOU between the Antitrust Division, the DOJ and the Immigration and Naturalization Service, U.S. Department of Justice (Mar. 15, 1996), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/05/9951.pdf>.

- 3) **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 United States. 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.³⁰ The DOJ and the Antitrust Division have generally been successful in fending off such challenges from defendants who remain abroad.³¹ However, in a recent case, at least one judge appears to have had some sympathy for a motion to unseal and challenge 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.³² 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 who did not abscond from the United States like a more traditional fugitive.
- 4) **Travel, and hope they don’t get caught:** Defendants may take the risk of traveling for business or pleasure, but they will always be looking over their shoulder and worrying that, like for Ullings, Piscioti or Kim, a vacation in Sicily or a flight connection in

³⁰ See *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993); *Degen v. United States*, 517 U.S. 820 (1996).

³¹ 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).

³² 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*, Law360 (May 28, 2019), <https://www.law360.com/articles/1163482/feds-defend-10-year-delay-in-unsealing-gas-kickback-case>.

Germany may result in their getting arrested, imprisoned in a foreign country and extradited to the United States.

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 United States 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 a 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.