

US accused of unfair antitrust tactic

By Kara Scannell in New York

US authorities are using a little-known immigration provision to secure guilty pleas by foreign businessmen in antitrust cases, a move defence lawyers say unfairly presses non-US executives into co-operating with investigations.

The tactic is likely to be brought to bear in the ongoing US and UK investigation into alleged collusion in the setting of the London and Tokyo interbank markets, which has ensnared US, European and Japanese banks and their employees. No individuals have been charged with any wrongdoing.

The US Department of Justice's leverage in securing guilty pleas arises from the fact that foreign executives convicted of felonies can be banned from entering the US for more than a decade.

The US's leverage is a 1996 memorandum of understanding between the DoJ and US immigration officials that US officials say provides immigration certainty for co-operators. The MoU is unique to antitrust cases and lawyers say the MoU is included in nearly every plea agreement. The net result is that in exchange for co-operation and a guilty plea, the US government will grant exemptions from travel restrictions to foreign executives.

The tactic is working. The DoJ has sent 50 foreign businessmen to prison for antitrust offenses since 1999. Only one has gone to trial, defence lawyers say. The exception was Briton Ian Norris, the former chief executive of engineering firm Morgan Crucible, who was accused of colluding with competitors to rig the price of auto parts. Mr Norris lost his fight against extradition and was convicted on charges of conspiracy to obstruct justice. He was sentenced to 18 months in a US prison.

Scott Hammond, deputy assistant attorney-general for criminal enforcement of the DoJ's antitrust division, told the Financial Times that "the MoU was created to provide a potential inducement and benefit for non-US citizens residing outside the US who are

willing to accept responsibility, plead guilty, and serve prison time for violations of US antitrust laws. It's a good carrot."

He said the US was not singling out foreign executives but was trying to hold them to the same standards of accountability as their US counterparts charged with the same crimes. Its one of several stiffer postures taken by the antitrust division. In 1999 DoJ stopped offering no-jail co-operation deals for foreign executives and in 2001 made it department policy to place indicted defendants on Interpol red notice lists for possible arrest and extradition.

Foreign executives are serving more time in prison, averaging 10-month terms in 2010, from an average of four and a half months in 2005. The terms are catching up to the average sentence for all defendants, both US and non-US citizens, at 30 months. DoJ says that since it has sought prison time for foreign executives, it has not had any repeat offenders.

Eric Grannon, a defence lawyer with White & Case, disagrees and says the MoU is a stick. "The rub is this MoU unquestionably is depriving non-US executives of their right to stand trial before a jury. They're being pressured with immigration consequences" and as a result are unwilling to challenge the antitrust allegations, said Mr Grannon.

Unlike many other frauds, collusion has only recently been recognised as a crime by other countries, including the UK in 2003. It is not a crime in most Asian countries.

Other lawyers say that immigration restrictions are at the forefront of their clients' decisions to plead guilty because some of them plan to resume working for their employer after they serve prison time.

"Trading Club Med prison is tolerable when you know your whole future in the business is not ruined because you can't travel to the US," said Larry Callaghan, a former antitrust prosecutor who represents foreign executives in antitrust cases. He says prosecutors use the entry restrictions "brilliantly" to win co-operation.

Another former prosecutor said some businessmen in Asian countries where collusion is not a crime "don't understand the system here. All they are looking for is a pragmatic way out."

The immigration waiver was included in the guilty pleas of Taiwanese businessman Jau Yang Ho, who pleaded guilty to an alleged conspiracy to fix prices of LCD panels;

Christian Caleca, a French citizen who pleaded guilty to conspiracy to fix prices of sales of marine hoses in the US; and K.C. Suh, a Korean marketing executive who pleaded guilty to fixing prices of memory chips sold to computer makers, according to court filings.

Mr Hammond of the DoJ said the idea that someone would plead guilty and serve time in a US prison for a crime they did not commit to gain entry to the US was “far-fetched”.