

To Our Clients and Friends

Memorandum



friedfrank.com

From Frankfurt to Behind American Bars – The Story of Romano Piscioti and its Impact on Executives Working for Companies Involved in Cartel Behaviour

In July 2014, yet another attempt by Romano Piscioti to challenge his extradition from Germany to the United States on cartel charges failed when the EU's General Court rejected his appeal against the European Commission's resistance to intervene. Mr. Piscioti's case is a reminder to companies and their executives of the far reach of US antitrust authorities in criminal cases, as well as the willingness of other nations, in this case Germany, to comply with American requests for extradition. It underlines the importance of complying with antitrust rules when conducting business around the world.

I. The Piscioti case – facts and key findings

On 3 April 2014, Romano Piscioti, an Italian national, was extradited from Germany to the US on cartel charges. This is only the second case in which the US Department of Justice's ("DOJ") antitrust department has won an extradition.¹

Mr. Piscioti once worked at Parker ITR, a company involved in the marine hose cartel. He was arrested in Frankfurt, Germany, in June 2013 due to a pending US arrest warrant for charges involving his participation in the marine hose cartel.

The marine hose cartel concerned the bidrigging and market sharing of the worldwide market for marine hoses between 1986 and 2007. It involved all of the major producers, i.e., Bridgestone, Dunlop Oil & Marine/Continental, Trelleborg, Parker ITR and Manuli, as well as Yokohama. The European Commission imposed fines of €131.5 million on the cartel participants.² US and UK authorities pursued individuals (including Mr. Piscioti) under criminal law rules.

Mr. Piscioti was arrested while transferring at Frankfurt airport when flying from Nigeria to Italy. The Higher Regional Court of Frankfurt then ceded to requests from the US DOJ and extradited Mr. Piscioti on 3 April 2014 to face prosecution in a Florida court.

¹ The other case being the extradition of Mr. Ian Norris in March 2010, cf. United States v. Norris, No. 2:03-cr-00632 (E.D. Pa. Dec. 13, 2010).

² Case COMP/39406 Marine Hoses.

Following his extradition, Mr. Piscioti pleaded guilty in the US and was, on 24 April 2014, sentenced to 24 months in custody.³

In parallel, Mr. Piscioti challenged his extradition in a number of ways.

Challenge of extradition under German law

Mr. Piscioti first tried to prevent his extradition by seeking judicial redress under German law. However, the Higher Regional Court of Frankfurt dismissed Mr. Piscioti's appeal. It found that Mr. Piscioti could lawfully be extradited to the United States for the following reasons⁴:

- The United States and Germany concluded a bilateral treaty⁵ that allows for the extradition of individuals from either country to the other if certain conditions are met. These conditions were met in Mr. Piscioti's case. More specifically:
- There was no exception from the obligation to extradite under the Treaty, as Mr. Piscioti is not a German national. Under the Treaty, both countries are obliged to extradite persons found in the territory of one of the two contracting countries that have been charged with an offence or are wanted by the other contracting country for an offence committed in the territory of the requesting country.⁶ At the same time, none of the two contracting countries are bound to extradite their own nationals.⁷ As Mr. Piscioti is not a German citizen (but Italian), the German authorities could not rely on this exception, and were bound under the Treaty to extradite him to the US.
- In addition, the alleged crime also has to be punishable under the criminal laws of the extraditing country (so-called principle of "dual criminality"). More specifically, under the Treaty, extradition shall be granted in respect of an extraditable offence if the offence is punishable under the laws of both countries by deprivation of liberty for a maximum period of more than one year.⁸ In Mr. Piscioti's case, the alleged conduct was punishable under US law as a "*contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce*" under the Sherman Act (15 U.S. Code § 1) with imprisonment of up to 10 years. The same conduct was punishable under section 298 of the German Criminal Code as "*restricting competition through agreements in the context of public bids*" (i.e., bidrigging) with imprisonment of up to five years. Whether or not the factual punishments imposed by courts differ in both countries is irrelevant for the decision to extradite.⁹

Challenge of extradition under EU law

Mr. Piscioti then demanded the European Commission to intervene and to initiate an infringement procedure against Germany based on the allegation that the German court's decision amounted to an

³ Cf. <http://www.justice.gov/opa/pr/2014/April/14-at-426.html>.

⁴ Cf. OLG Frankfurt, decision of 6 August 2013 (file no. 2 Ausl A 140/13) and OLG Frankfurt, decision of 16 August 2013 (file no 2 Ausl A 104/13).

⁵ Treaty between the Federal Republic of Germany and the United States of America concerning extradition, 20 July 1978 (as amended on 21 October 1986 and 18 April 2006) (the "**Treaty**").

⁶ See Article 1 of the Treaty.

⁷ See Article 7 of the Treaty. In fact, Germany's constitution, the Basic Law, prohibits any extradition of German national categorically, cf. Article 16(2) Basic Law.

⁸ See Article 2(2) a) of the Treaty.

⁹ See decision of OLG Frankfurt of 6 August 2013 (n. 4), para. 9.

infringement of Mr. Piscioti's freedom of service under the Treaty on the Functioning of the European Union ("TFEU"). The European Commission, however, dismissed this request, pointing out that Mr. Piscioti did not travel to Germany to offer any services whatsoever, but was simply in transit. Also, the EU had no competence to rule on matters of extradition between one of its Member States and an independent third country such as the US.

Mr. Piscioti then challenged the European Commission's refusal to act against Germany by way of appealing to the European Union's General Court. On 2 July 2014, the General Court rejected Mr. Piscioti's challenge as manifestly inadmissible, as EU citizens have no standing to challenge EU decisions not to open infringement proceedings against governments of EU Member States.¹⁰

Challenge of extradition to European Court of Human Rights

In parallel, Mr. Piscioti also challenged the German decision to extradite him to the US in front of the European Court of Human Rights (the "ECHR") in Strasbourg, which is separate from the European Union. Mr. Piscioti alleged that Germany was guilty of discrimination on the basis of nationality and of unjust incursions into his right to liberty and a private life. However, the ECHR found that Mr. Piscioti's appeal was inadmissible, referring to provisions requiring individuals to exhaust all domestic remedies before turning to the ECHR.¹¹

II. Practical impact of Piscioti case

The Piscioti case confirms the US authorities' determination to seek extraditions of executives involved in alleged criminal cartel offences (and other countries' willingness to comply with such requests). It may serve as yet another example of the growing internationalisation of cartel enforcement activities around the world.

The following factors will have to be taken into account when assessing the risk of extradition for cartel involvement to executives:

- Extraditions can be sought by those countries that penalise the participation of individuals in cartel-related activities. Prominent examples of countries with criminal laws relating to cartel offences are the United States of America, the United Kingdom, and, to a lesser extent, Germany; but also Asian countries, such as Japan and South Korea, as well as Brazil and Russia. The US appears to be the country that is most interested in extraditions to date. The US authorities have indicted more than 42 Japanese, Korean and Taiwanese executives for price fixing, all of whom remain outside the country and could hence face extradition.¹² Other countries may follow the US example to bolster their cartel prosecution credibility.
- Bilateral extradition treaties must enable the extradition. While this has to be analysed on a case-by-case basis, most developed countries have bilateral extradition treaties in place with the majority of all other developed countries. By way of example, the US has extradition treaties with

¹⁰ Based on publicly available information (e.g., MLex, 21 July 2014, "EU court rejects cartel executive's challenge to German extradition", <http://www.mlex.com/EU/Content.aspx?ID=563361>), as General Court's decision not published.

¹¹ Based on publicly available information (e.g., MLex, 29 May 2014, "Human-rights court rejects case of extradited Italian cartel executive", <http://www.mlex.com/EU/Content.aspx?ID=542522>), as General Court's decision not published.

¹² MLex, Comment: US wins one extradition, but dozens of alleged price fixers remain out of reach, 21 May 2014, <http://www.mlex.com/EU/Content.aspx?ID=537832>.

most countries, but not with Russia, China, Namibia, the United Arab Emirates, and North Korea.¹³

- At the same time, most bilateral extradition treaties contain dual criminality clauses. The offence has to be punishable under both the requesting country's and the extraditing country's laws to enable extradition. This requirement limits the exposure of executives involved in cartel offences significantly, as only the minority of countries penalise cartel behaviour. With regard to Germany, this means that only bidrigging constitutes an extraditable offence, while other violations of antitrust rules, such as price fixing or market sharing, are not penalised under criminal law and hence do not constitute an extraditable offence.

When seeking advice on personal exposure to a potential extradition for cartel-related offences, *inter alia* the following questions will have to be assessed carefully:

- Was the individual in question personally involved in any known or unknown cartel offences in a specific jurisdiction?
- Does this involvement (at least potentially) amount to a criminal offence in one or more jurisdictions?
- Does the individual travel to (or via) jurisdictions that have bilateral extradition treaties in place with those countries where the criminal cartel offence was committed?
- And do these jurisdictions penalise the same conduct under their own criminal laws?

Depending on the answers, the direct impact on individual lives can be significant. As a colleague of Mr. Piscioti, the German national Uwe Bangert (who was allegedly also involved in the marine hose cartel and who remains at large in Germany) puts it: "*I don't travel.*"¹⁴ Only the strict compliance with antitrust rules ensures that such far-reaching consequences for companies and for the executives acting on their behalf can be avoided.

* * *

Authors:

Dr. Tobias Caspary

Lars Goerlitz

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

¹³ Cf. Note 13 in James A. Wilson, Extradition: *The New Sword or the Mouse that Roared?*, theantitrustsource.com, April 2011.

¹⁴ Quote from MLex, Comment: US wins one extradition, but dozens of alleged price fixers remain out of reach, 21 May 2014, <http://www.mlex.com/EU/Content.aspx?ID=537832>.

