

The Regional Court of Berlin refers the extradition of an Italian citizen from Germany to the United States for cartel charges to the European Court of Justice to rule on whether Member State extradition can violate the principle of non-discrimination under EU law (Romano Piscioti)

Procedures, Criminal sanctions, Preliminary ruling (Art. 267 TFEU), Cartel, Services

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On 18 March 2016, the Regional Court of Berlin (RC Berlin) in *Romano Piscioti v. Federal Republic of Germany* referred four questions to the European Court of Justice to seek guidance on whether Mr Piscioti could argue that he had suffered discrimination and claim compensation from the German government. The RC Berlin suggested that the German government may have breached the principle of non-discrimination (as set out in Article 18 of the Treaty on the Functioning of the European Union, TFEU), by extraditing to the United States (U.S.) an Italian citizen transiting through Germany, despite the fact that the German Constitution prevents German citizens from being extradited to any foreign country [1]. The forthcoming Court of Justice preliminary ruling will determine whether EU Member States can extradite nationals of other Member States to non-EU jurisdictions such as the U.S. while refusing extradition of their own citizens. It will also greatly affect the role of extradition as a deterrent in the fight against global cartels.

1. The Romano Piscioti extradition saga

In 2013 Romano Piscioti (the plaintiff claiming for damages from the German government in the present case) was arrested by the German state (the defendant) in a stopover at the Frankfurt airport. In 2014 he was extradited to the U.S. The extradition request was based on the U.S. Department of Justice (DOJ) accusing Mr Piscioti of having participated in a conspiracy to suppress and eliminate competition by rigging bids, fixing prices and allocating market shares for sales of marine hose sold in the U.S. and elsewhere (marine hose being a flexible rubber hose used to

transfer oil between tankers and storage facilities) [2]. Once on U.S. soil, Mr Piscioti pleaded guilty to the DOJ's charge, resulting in a two year period of imprisonment.

The European Commission and the Japanese Federal Trade Commission had also investigated the cartel [3]. According to a recent judgment of the European Court of Justice, Mr Piscioti's former employer, ITR, played a coordinating role in the cartel for a couple of years [4].

Prior to launching the present damages claim before the RC Berlin, Mr Piscioti had sought relief before different courts at the national and the supra-national level, without success. Firstly, the Higher Regional Court of Frankfurt [5] and subsequently the German Constitutional Court [6] denied Romano Piscioti's action against the extradition mainly because both courts found that EU law was not applicable to extradition matters between Germany and the U.S.

Secondly, an Italian court dismissed an interim action against the German extradition [7].

Thirdly, the European Court for Human Rights declared Mr Piscioti's action inadmissible because Mr Piscioti had not exhausted all domestic remedies available to him [8].

Finally, the European Commission refused to open infringement proceedings against Germany for violation of EU law [9]. The EU Courts in Luxembourg also dismissed Mr Piscioti's appeals against the Commission decision on procedural grounds: individuals are not entitled to bring proceedings against a refusal by the Commission to institute infringement proceedings against a Member State for failure to fulfil its obligations under EU law, as per settled case law Case T-403/14, *Piscioti v. Commission*, EU:T:2014:692 and Case C-411/14 P, *Piscioti v. Commission*, EU:C:2015:48.. It is worth noting that the European Commission in its decision had stated, in relation to the alleged violation of the non-discrimination principle under Article 18 of the TFEU, that it was assessing whether EU law (and the 2003 agreement between the EU and the U.S. on extradition) could apply to the question whether the extradition treaty between Germany and the U.S. should apply to German and other EU citizens on the same terms [10].

In 2014 Mr Piscioti initiated the present proceedings before the RC Berlin claiming damages from the German state.

2. Piscioti's claim that the German extradition system discriminated against him

In the present case Mr Piscioti claims damages from the German government as it (allegedly) manifestly and gravely disregarded the limits of its discretion in his arrest and extradition. Mr Piscioti argues that the German state violated Articles 18 (principle of non-discrimination), 21 (freedom of movement) and 56 (freedom to provide services) of the TFEU.

While Germany extradited Mr Piscioti to the U.S., it refuses to extradite German citizens facing similar charges. The reason for this differentiation lies in a specific provision of the German Constitution stating: "*No German citizen may be extradited to a foreign country. The law may provide otherwise for extraditions to a Member State of the EU or to an international court, provided that the rule of law is observed*" [11]. Based on this provision, Germany grants privileged treatment to its own citizens in relation to extradition matters.

Remarkably, Germany took the decision not to extradite another businessman involved in the same

marine hoses cartel: a German national formerly associated with Dunlop Marine and Oil Ltd. remains at large as a U.S.-indicted fugitive [12]. This gave rise to claims from Mr Piscioti that he was being discriminated against based on his citizenship.

3. The German order requesting a preliminary ruling from the Court of Justice

3.1 The referral order and its reasoning

The RC Berlin referred four questions to the Court of Justice, giving the Luxembourg Court the opportunity to offer guidance on some fundamental questions of EU law, mainly in relation to the applicability of EU law to extradition matters involving non-EU Member States (such as the U.S.) and the compatibility with the non-discrimination principle (under Article 18 of the TFEU) of domestic laws privileging a Member State's own nationals over other EU Member States' nationals.

The referral for a preliminary ruling of the RC Berlin reveals that the German court has serious doubts regarding the compatibility of Mr Piscioti's extradition with EU law. The RC Berlin considers that extra-EU extraditions fall within the scope of EU law. It argues that in a case where fundamental principles or freedoms are at issue (as in the present case), EU law should also apply, even if extradition generally falls within Member States' competence.

3.2 *The four questions in the referral order*

In summary, the RC Berlin has referred the following four questions to the Court of Justice for a preliminary ruling:

The first question concerns the applicability of EU law to extradition matters between a Member State and a third country, in general (question 1a), and specifically in relation to the U.S. in the light of the agreement on extradition between the EU and the U.S. (question 1b).

The second question assumes that extraditions of EU Member States to the U.S. are not generally excluded from the scope of EU law and asks whether a Member State acting on the basis of a constitutional rule privileging its own citizens over citizens of other EU Member States (such as Article 16 of the German Constitution) constitutes an unjustified violation of the non-discrimination principle under Article 18 of the TFEU.

In the event that the Court responds affirmatively to the second question, question three and question four relate to the interpretation of the case law of the Court of Justice as to the sufficiency of a violation by a Member State for purposes of establishing liability (in the specific context of Mr Piscioti's damages claim against the German government where there had been previous decisions of German courts in the same matter).

3.3 *On the applicability of EU law*

According to the RC Berlin, extradition matters between an EU and a non-EU Member State like the U.S. fall within the scope of EU law. The RC Berlin bases its argument on what it views as settled case law of the Court of Justice holding that the non-discrimination principle under EU law, together with the fundamental freedoms guaranteed under the EU Treaties are directly applicable even in

areas supposedly falling outside the competence of the EU [13].

Both German courts that had previously assessed Mr Piscioti's claims had argued that EU law was not applicable to extraditions of EU nationals to non-EU Member States as extradition was solely within a Member State's exclusive competence. They both denied the applicability of EU law (namely Articles 18 of the TFEU on the non-discrimination principle, as well as Articles 21 and 56 of the TFEU on the freedoms of movement and to provide services) to Mr Piscioti's claims. But the RC Berlin clearly disagrees with them.

3.4 On the violation of EU law

The RC Berlin asserts that a national provision like Article 16 of the German Constitution may violate Article 18 of the TFEU. The German Constitution prohibits the extradition of German nationals to a foreign country. A German national would have not been extradited under the same circumstances. In addition, according to the RC Berlin, the arrest and extradition of Mr Piscioti may also have violated fundamental freedoms under EU law such as the freedom of movement (Article 21 TFEU) and the freedom to provide services (Article 56 TFEU).

The RC Berlin also calls into question a derogation that both the Frankfurt court and the German Constitutional Court had relied on to dismiss Mr Piscioti's actions, namely the EU-US agreement on extradition of 2003 [14] (in particular, Article 17(2) that states that "*where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States*"). The RC Berlin states that this cannot be considered a reasonable justification for violating rules of EU law such as the principle of non-discrimination.

The RC Berlin considers whether other possible derogations may be applicable to the present case, namely Article 4(2) of the Treaty of the European Union that provides that the EU is obliged to respect "*the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*" or a general unwritten principle according to which Member States can grant own nationals wider protection when extraditing to third countries. The RC Berlin concludes that neither of these derogations is sufficiently robust to justify such discrimination between German citizens and those of other EU Member States, and therefore the German court prefers to refer the case to Luxembourg for a preliminary ruling.

4. Practical significance for the Piscioti case and for extradition in cartel matters

Extraditions require special agreements or treaties between the requesting and the extraditing jurisdictions. The EU-U.S. agreement on extraditions, for example, requires "dual criminality", namely that a defendant can only be extradited if the alleged criminal conduct is considered punishable under the laws of both the surrendering and requesting jurisdictions. In many EU Member States, antitrust violations are generally not criminally prosecuted in the same way as in the U.S. (with some notable exceptions like Germany, Austria and the United Kingdom). Thus, the conditions for extradition are rarely met in cartel cases or, when they are, the Member State refuses to extradite its own national (as in the case of the former employee of Dunlop Marine and Oil Ltd.

mentioned above). In the present case, Romano Piscioti was accused amongst other things of bid-rigging, which is an offence in Germany (under section 298 of the German criminal code), and he was a non-German citizen transiting on German soil. That is why he became the first extradited individual to the U.S. on cartel charges.

The referral order in the present case shows that the RC Berlin has serious doubts as to the compatibility of German extradition practice with EU law, and in particular the EU law principle of non-discrimination. Such an assessment is contrary to what other (higher) courts in Germany had previously decided in relation to the same case.

As to Mr Piscioti's damages claim, questions three and four of the referral order of the RC Berlin show that – even if the Court of Justice were to confirm that the extradition of Mr Piscioti to the U.S. was an unjustified violation of EU law – this would not necessarily lead to the RC Berlin granting Mr Piscioti damages against the German government. Rather, the right to damages will depend on further specific legal issues, namely whether Germany manifestly and gravely disregarded the limits on its discretion, including in the light of the fact that there had been previous decisions of German courts in the same matter.

More generally, should the Court of Justice in its forthcoming preliminary ruling agree with RC Berlin's legal assessment in this case, this judgment would likely have a significant impact on the extradition practice of Germany as well as many other Member States, particularly in cartel matters. EU Member States, when responding to an extradition request, would have to extend the preferential treatment of their own nationals to citizens of other EU Member States. This could *de facto* put an end to extradition of EU nationals to the U.S. on cartel charges, at least for those Member States that follow the nationality principles such as Germany.

As to the question of whether the non-discrimination principle under EU law applies to the extradition system of a Member State, there are currently two other referral cases before the Court of Justice, in addition to that of the RC Berlin. The first concerns an extradition request by Russia to Latvia in relation to an Estonian national who had been arrested on Latvian soil. Advocate General Bot has proposed that the Court of Justice should conclude that EU law applies to domestic extradition but that the difference in treatment between a Member State's own citizens and citizens of another Member State does not constitute discrimination prohibited by Article 18 TFEU in so far as it is justified by the overriding objective to either extradite or prosecute, and thereby combat the impunity of persons suspected of having committed an offence in a third State [15]. The other case (relating to an Austrian doctor sentenced to life imprisonment in Dubai for mercy killing) is still pending before the Court of Justice [16].

[1] The case is registered at the Court of Justice as Case C-191/16, and the request for a preliminary ruling has been published in OJ 2016 C 270/29.

[2] For further information see the case file of the U.S. DOJ at: <https://www.justice.gov/atr/case/us-v-romano-pisciotti>.

[3] See European Commission decision of 28 January 2009, at paragraph 64, available at:

http://ec.europa.eu/competition/antitrust/cases/dec_docs/39406/39406_1902_1.pdf.

[4] Case T-146/09 RENV, *Parker Hannifin Manufacturing and Other v Commission*, ECLI:EU:T:2016:411, paragraphs 106-7 and 118: "First, it is apparent from those communications that ITR's employee, Mr P., presented himself as coordinator of a sub-group of participants in the cartel, which confirms Yokohama [i.e., the whistle-blower]'s statements. Secondly, that correspondence shows that, during that period, that employee of ITR took the initiative in gathering confidential information from other participants, in particular Yokohama and Trelleborg, and coordinating the participation of Yokohama and Trelleborg in calls for tenders [...] In the light of all of the evidence which has just been examined, it must be held that the Commission was right in classifying ITR as a leader in the cartel in respect of the period covering at least from 11 June 1999 to 30 September 2001".

[5] Order of the higher regional court of Frankfurt dated 22 January 2014, 2 Ausl A 104/13.

[6] Order of the German Constitutional Court dated 17 February 2014, 2 BvQ 4/14.

[7] Mr Piscioti has filed lawsuits with the courts of Varese and Catania. The Varese judge dismissed the action whereas the case was withdrawn from the Catania judge as in the meantime Mr Piscioti had been extradited to the U.S.

[8] Decision of the European Court of Human Rights dated 17 April 2014.

[9] European Commission, decision of 11 April 2014.

[10] On the alleged violation of the rules on the freedom of movement and the freedom to provide services under Articles 21 and 56 of the TFEU, the Commission took the position that being held in custody pending an extradition request does not relate to the freedom of movement in the EU, and that Mr Piscioti was transiting through Germany and not offering services therein.

[11] Article 16 (2) of the German Constitution, unofficial translation.

[12] See the U.S. DOJ press release:

<https://www.justice.gov/opa/pr/former-marine-hose-executive-who-was-extradited-united-states-plead-s-guilty-participating>. This businessman declared to the press that he received a notification from the Hamburg prosecutor that he would not be extradited, see MLex clipping of 21 May 2014 entitled "Comment: US wins one extradition, but dozens of alleged price fixers remain out of reach".

[13] The RC Berlin's order refers to Case C-274/96, *Bickel und Franz*, EU:C:1998:563; Case C-186/87, *Cowan*, EU:C:1989:47; and Case C-148/02, *Garcia Avello*, EU:C:2003:539.

[14] The EU-U.S. treaty on extradition is available at:
<http://ec.europa.eu/world/agreements/SummartOfTreatyAction.do?step=0&treatyId=5461>.

[15] C-182/15, *Alexksei Petruhhin*, ECLI:EU:C:2016:330, Opinion of Advocate General Bot delivered on 10 May 2016, at paragraphs 43, 58 and 69.

[16] C-473/15, *Peter Schotthöfer & Florian Steiner GbR v Eugen Adelsmayr*, request for preliminary ruling from the Bezirksgericht Linz (Austria), 7 September 2015.

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