

Extradition & antitrust: cautionary tales for global cartel compliance

Christopher Thomas and Gianni De Stefano examine the growing threat of extradition for international cartelists



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CAUTIONARY TALES FOR GLOBAL CARTEL COMPLIANCE

Christopher Thomas and **Gianni De Stefano** examine the growing threat of extradition for international cartelists

Criminal enforcement of cartel laws ultimately relies on the extent to which extradition is a realistic prospect. The United States Department of Justice (DOJ) has secured its first litigated extradition on antitrust charges: Romano Piscioti, an Italian national, was extradited from Germany (where he was catching a connecting flight) on charges related to the marine-hose cartel. As more jurisdictions criminalize cartel conduct and increase cooperation with enforcement regimes around the globe, the threat of extradition in cartel cases becomes more and more real. The extradition risk needs to be taken into account in shaping global cartel compliance programs, and in advising companies and executives caught in cartel conduct.

1. The Romano Piscioti extradition saga

In 2014, the DOJ secured the first ever extradition on cartel charges. But behind the success of the agency, there is the story of an individual, Romano Piscioti, who was unaware of having been placed on an Interpol Red Notice, spent several months as a convict in a grim cell in a US federal prison, and today is unemployed because prospective employers can find on the internet the hundreds of headlines and articles making him the unwilling poster child for international cartel enforcement. Mr Piscioti today is convinced that his extradition was unfair and discriminatory because the German government extradited him as a non-German citizen, while refusing to do the same for a German executive at another company caught in the same marine-hose cartel, who remains at large as a fugitive from the US in Germany.

In 2013 Mr Piscioti, a former senior executive with Parker ITR, a marine-hose manufacturer headquartered in Italy, was arrested by Germany in a stopover at Frankfurt airport. We now know that he had been indicted “under seal” (i.e., filed with a court without becoming a matter of public record) in 2012 for various alleged antitrust violations, and was placed on an Interpol Red Notice by the US government.

The extradition request was based on the 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 US and elsewhere (marine hose is a flexible rubber hose used to transfer oil between tankers and storage facilities).¹ The European Commission and the Japan Fair Trade Commission had also investigated the marine-hose case,² and according to the Court of Justice of the EU, Mr Piscioti’s employer, Parker ITR, played a coordinating role in that alleged cartel for some time.³

A few years earlier, Mr Piscioti had been arrested in Switzerland, but released within hours, when that country determined it would not extradite him, and had traveled to the UK, where he had two days of interviews with prosecutors at the US embassy (the DOJ had issued a letter of “safe passage”, giving Mr Piscioti assurance that he would not be arrested).

In 2014, after nine months of legal battles, Mr Piscioti was extradited from Germany to the US. Once on US soil, Mr Piscioti pled guilty to the DOJ’s charges, resulting in a two-year period of imprisonment and a \$50,000 criminal fine.⁴

Mr Piscioti fought against his extradition before different courts at the national and the supra-national level, without success. First, the higher regional court of Frankfurt⁵ and the German constitutional court⁶ dismissed Mr Piscioti's arguments that the extradition violated EU law, and in particular the principle of non-discrimination; both courts ruled that EU law was not applicable to extradition matters between Germany and the US.

Second, an Italian court dismissed an interim action against the German extradition.⁷

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

Fourth, the European Commission refused to open infringement proceedings against Germany for violation of EU law.⁹ 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 Treaty on the Functioning of the European Union (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 there. And on the alleged violation of the non-discrimination principle (Article 18 TFEU), the commission stated that it was assessing whether EU law could apply to the question whether the extradition treaty between Germany and the US should apply to German and other EU citizens on the same terms. The commission did not ultimately provide any answer to this question.

The EU Courts in Luxembourg dismissed Mr Piscioti's appeals against the European Commission's decision on procedural grounds: it is settled law that 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.¹⁰

Last, but not least, since he could not succeed in avoiding his extradition to the US, Mr Piscioti initiated proceedings before the regional court of Berlin, claiming damages from the German state. The Berlin court has decided to stay proceedings and refer the case to the Court of Justice for a preliminary ruling on whether it is compatible with the principle of non-discrimination under EU law that Germany extradites an Italian citizen to the US under cartel charges while at the same time refusing to do the same with its own nationals.¹¹

The German referral order shows that the Berlin court has

serious doubts as to the compatibility of German extradition practice with EU law, and in particular the EU law principle of non-discrimination.¹² The order also suggests that more will need to be proven for Mr Piscioti to establish his damages claim.¹³

The forthcoming Court of Justice preliminary ruling on (non-) discrimination of EU Member States' extradition laws will be the next episode of this saga, though a recent judgment in a related matter offers some insight into what may happen.

2. Can extradition be discriminatory between non-citizens and own-citizens of the requested state?

Several jurisdictions have laws that prevent the extradition of their own citizens.¹⁴ Mr Piscioti, for example, was an Italian citizen traveling through Germany when he was detained and ultimately extradited to the US. He would have not been extradited by Germany had he been a German citizen, because the Constitution of that country does not allow the extradition of its own nationals. While in Italy, Mr Piscioti was not extradited because the Italian Constitution has the same type of provision.

In an ironic twist, Germany, the country that extradited Mr Piscioti, refuses to extradite one of his alleged co-conspirators who has been charged with identical crimes, and who today remains at large as a US-indicted fugitive in Germany.¹⁵

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"*.¹⁶ Based on this provision, Germany grants privileged treatment to its own citizens in relation to extradition matters.

This gave rise to claims from Mr Piscioti before the regional court of Berlin that he was being discriminated against based on his citizenship, and that he should accordingly receive compensation from the German government.

The Berlin court referred four questions to the Court of Justice of the EU, giving the Luxembourg judges an opportunity to offer guidance on fundamental questions relating to the applicability of EU law to extradition matters involving non-EU Member States (such as the US) and the compatibility with the non-discrimination principle (under Article 18 TFEU) of domestic laws privileging a Member State's own nationals over nationals of other EU Member States.¹⁷

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A recent ruling in a similar case may shed some light on this legal conundrum. On 6 September 2016, the Court of Justice issued a judgment in relation to an Estonian national, Aleksei Petruhhin, who was made the subject of a Red Notice on Interpol's website and was later arrested on Latvian soil. Russia made an extradition request to Latvia as Mr Petruhhin was accused of attempted organized drug-trafficking, which is a criminal offense in Russia punishable with eight to 20 years' imprisonment. According to the Court, EU law did apply, as Mr Petruhhin had exercised his right to move freely within the EU by moving to Latvia.¹⁸ However, according to the Court, the difference in treatment between a Member State's own citizens and citizens of another Member State does not violate EU law in so far as it is justified by the legitimate objective in EU law of preventing the risk of impunity for persons who have committed an offense (in the light of the maxim *'aut dedere aut judicare'* – either extradite or prosecute). The non-extradition of its own nationals is generally counterbalanced by the possibility for the requested Member State to prosecute such nationals for serious offenses committed outside its territory. But that Member State as a general rule has no jurisdiction to try cases concerning such acts when neither the perpetrator nor the victim of the alleged offense is a national of that Member State.¹⁹

Several jurisdictions have laws that prevent the extradition of their own citizens

It is possible that the Court of Justice, when deciding on the case of Mr Piscioti (as well as other extradition cases),²⁰ will follow the principles set forth in this *Petruhhin* ruling, thus confirming that the non-extradition of a Member State's own nationals generally falls within their discretion.²¹ In practical terms, it may be that EU Member States can continue to extradite nationals of other Member States to non-EU jurisdictions, such as the US, while refusing extradition of their own citizens.

Finally, it is worth noting that the Court of Justice also held in the *Petruhhin* case that, before extraditing the citizen of another Member State, the requested Member State must give priority to the exchange of information with the Member State of origin and allow that Member State to request the citizen's surrender for the purposes of prosecution (with a European arrest warrant).

3. Extradition is no easy task...

Antitrust agencies around the globe ultimately rely on extradition to prosecute foreign nationals. The US is clearly committed to ensuring that culpable foreign nationals serve prison sentences for violating the US antitrust laws. Other

jurisdictions that have criminalized cartel conduct might follow the same path in the future.

Many indicted foreign executives have assessed the risk of extradition and made a calculated decision to give themselves up,²² and the US has so far criminally charged more than 60 foreign nationals.²³

Others have decided to take the gamble and remain at large.²⁴ The Interpol website contains a few examples,²⁵ although most indictments remain under seal so that the fugitive is not aware of his or her status and can be apprehended while traveling, as happened to Mr Piscioti.

But to successfully extradite a fugitive for an antitrust violation is no easy task. First, there must be an existing extradition treaty. The presence of an extradition treaty can be largely assumed in most jurisdictions. For example, the US has treaties with all but a handful of countries.²⁶

Second, the alleged antitrust violation must be considered punishable under the criminal laws of both the requesting and the surrendering jurisdictions: this is the double-criminality requirement. Historically very few jurisdictions had criminal cartels on their books, leaving the DOJ unable to pursue extradition in most if not all fugitives' cases. But antitrust violations today can be considered a criminal offense in several jurisdictions around the globe. Not only in the US (since the enactment of the Sherman Act in 1890)²⁷ or Canada (where criminal antitrust law has existed even longer, since 1889, and where, on paper, cartel sanctions for individuals are the most severe in the world), but also in several EU Member States, such as the United Kingdom and Denmark; several other Member States have criminalized cartel conduct to a lesser extent, for example in Germany and Italy criminal sanctions may apply to bid-rigging. On a global basis, there is indeed a trend toward criminalization of cartel conduct, and more than 30 countries around the world have adopted criminal penalties for cartel activity, including in the Americas (Mexico and Brazil), the Middle East (Israel), Asia (Japan, Korea and Russia) and the southern hemisphere (Australia, New Zealand and, most recently, South Africa).

Romano Piscioti was accused of, among other things, bid rigging, which is a criminal offense in Germany.²⁸ And he was a non-German citizen transiting on German soil. That is why he became the first individual extradited to the US on cartel charges.

It is worth noting that the US-EU extradition agreement²⁹

provides that the requested State, at its discretion, may grant extradition even if its laws do not provide for the punishment of an offense committed outside its territory in similar circumstances.³⁰ This increases the odds of an EU Member State extraditing a citizen of another Member State.

Third, as discussed above, the nationality of the defendant may prevent or reduce the chance of extradition, because several jurisdictions have laws that prevent the extradition of their own citizens. Mr Piscioti would have not been extradited by Germany had he been a German citizen. Another notable example: so far, Japan has not extradited its own citizens to the US.

Last, but not least, there are other legal and/or procedural hurdles to extradition. For example, the US-Japan extradition treaty requires that the requesting country must prove probable cause.³¹ The procedural steps are also very burdensome, as extradition requests are usually made through diplomatic channels, and national agencies and courts retain much discretion.³²

4. ...but it remains a strong deterrent in global cartel enforcement

Even with all these hurdles, extradition remains a strong deterrent.

First, the statistics on extradition in antitrust cases are on the rise. The first ever extradition specifically on an antitrust charge was the one of Romano Piscioti in 2014. But the US government had already demonstrated its ability to extradite individuals on counts closely related to cartel violations.

- In 2010, the DOJ secured the extradition of Ian Norris, a retired British CEO, on obstruction-of-justice charges relating to an antitrust investigation in the carbon and graphite products cartel, after a multi-year battle;³³ he was convicted of the same in the US, and sentenced to 18 months' imprisonment.³⁴
- In 2012, David Porath, a dual US and Israeli citizen, was extradited from Israel and eventually pleaded guilty to three charges, including a bid-rigging count for contracts at a major New York City healthcare facility; he was sentenced to time served, one year probation, and restitution.³⁵
- In 2014, John Bennett, a Canadian citizen, was extradited from Canada for charges including fraud, kickbacks and bid rigging involving contracts for the treatment and disposal of contaminated soil;³⁶ he was convicted and sentenced to 63 months in US prison and to pay restitution.

- In 2016, Paul Thompson, a former Rabobank trader indicted for manipulating London InterBank Offered Rate (Libor) for USD and Japanese Yen, consented to his extradition from Australia to the US.³⁷
- More cases are in the pipeline: for example, it is understood that the US government may seek extradition of a UK citizen involved in the investigation into manipulation of foreign exchange rates,³⁸ and several Japanese executives involved in the automotive steel tubes case, for which the DOJ has already indicted their employing corporation.³⁹

Second, indictments and extradition requests do not go away. Mr Piscioti's 2014 extradition was based on bid rigging that began at least as early as 1998, and Mr Porath's 2012 extradition arose from a scheme that began in early 2000. Similarly, Mr Bennett's extradition in 2014 arose from criminal conduct in 2001. The Norris extradition in 2010 involved a scheme to mislead and obstruct the investigation in the 1999-2000 time period, and the extradition itself was a multi-year battle.

Romano Piscioti spent several months in a US federal prison in a room with around 40 inmates and a single corner toilet

Third, indictments and extradition requests can be strategic. The agencies can charge other crimes that can provide a basis for extradition, even in countries where price-fixing is not strictly a criminal offense. Mr Piscioti could be extradited from Germany, which does not currently criminalize price-fixing generally, but where bid-rigging is criminal. Mr Norris's case is also illustrative: the obstruction arising

from the DOJ's investigation was admitted in guilty pleas by Mr Norris' subordinates in the US that implicated him – their CEO – located in the UK.

Fourth, unseen circumstances can occur, and antitrust agencies will be ready to seize the moment. The DOJ and other regulators may rely on Interpol Red Notices: the persons concerned are wanted by national jurisdictions for prosecution or to serve a sentence based on an arrest warrant or court decision, which is often "under seal". Interpol's role is to assist the national police forces in identifying and locating these persons with a view to their arrest and extradition.⁴⁰ Even if executives live in a country that will not extradite, if they travel to another country, they are going to be increasingly at high risk of being extradited.⁴¹ And as noted above, EU Member States may extradite nationals of other Member States to non-EU jurisdictions, such as the US, while refusing extradition of their own citizens. In the case of Mr Piscioti, the Red Notice list worked.

Last, but not least, at the end of the extradition journey, extradited white-collar fugitives do not get any special treatment. Mr Piscioti, who after his extradition cooperated with investigators and pleaded guilty, still spent more than

two years in custody, including several months in a US federal prison in a room with around 40 inmates and a single corner toilet. While the DOJ credited him for the nine months that he had been held in custody in Germany pending his extradition request, his actual release date was one month later than the scheduled date because the US prison management had lost his passport. Mr Piscioti could not be returned to his home country, Italy, for completion of his sentence, even though his plea agreement allowed for this option (as do several extradition treaties and the Council of Europe Convention on the Transfer of Sentenced Persons).⁴² Why not? Because of delays while the Italian Ministry of Justice waited for certain documentation from the US regarding the case.⁴³ Finally, Mr Piscioti is today unemployed.⁴⁴

In conclusion, extradition remains a strong deterrent for executives caught up in cartels. But it is also a factor to be taken into account by corporations in shaping their cartel compliance programs as well as their strategic choices when facing cartel investigations.

5. The solution remains global cartel compliance and strategy

We have seen how the threat of extradition in cartel cases has become more and more real. This increased risk of extradition has to be factored in by individuals and corporations.

In light of the legal hurdles to extradition, many indicted nationals are taking their chances and remain fugitives. On the other hand, many foreign executives have voluntarily chosen to turn up, cooperate, and serve jail time. There is no certainty that an indicted foreign citizen will not be extradited as the requested country retains considerable discretion on whether to surrender. Although the odds are currently in the indicted individual's favor, there is still a possibility that the extradition will succeed. Thus, for those not feeling lucky, it may be better to cooperate fully in order to avoid harsher punishment in the event they are extradited.

If indicted foreign nationals prefer to remain at large, they will essentially be prisoners within their own country. With the

advent of international agencies such as Interpol, an indicted individual would forever wonder if their next international trip will lead them to a federal prison in the US or elsewhere. Weather conditions could trigger an unexpected unfolding of events.

The uncertainty of extradition success cuts in both directions. And this uncertainty works in favor of the antitrust agencies, which can use extradition as an imminent and ever-present peril, a modern sword of Damocles. Executives should seek advice from a counsel that is cartel-savvy and has a global perspective so as to weigh carefully the options.

Corporations should make sure they have a carefully tailored global compliance program, and access to experienced counsel

This “increased extradition factor” also affects global cartel compliance. In the past, senior executives would surely have an idea that what they were doing could be considered a violation of antitrust laws, but perhaps they had less appreciation of the consequences: extradition, Red Notices and jail will now increase compliance culture and reduce the options open to individuals.

Corporations should take that into account in shaping their compliance programs, for example by offering their executives in all subsidiaries around the world a way to report bad conduct anonymously.

The extradition factor should also be taken into account by corporations in their strategic choices when caught in cartel conduct. An executive facing the threat of extradition may help the company in shaping their cooperation with regulators, or indeed in helping to rebut the allegations.

In conclusion, corporations should make sure they have a carefully tailored global compliance program, and that they have access to counsel with a track record in advising companies involved in global cartels. The options are different now, and the stakes are high. ■

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Footnotes

- 1 See the DOJ case file, *available at*: <https://www.justice.gov/atr/case/us-v-romano-pisciotti>.
- 2 See the 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.
- 3 Case T-146/09 RENV, *Parker Hannifin Manufacturing and Other v Commission*, ECLI:EU:T:2016:411, paragraphs 106-7 and 118.
- 4 See the DOJ press release, *available at*: <https://www.fbi.gov/contact-us/field-offices/houston/news/press-releases/former-marine-hose-executive-who-was-extradited-to-united-states-pleads-guilty-to-participating-in-worldwide-bid-rigging-conspiracy>.
- 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 Italian 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 US.
- 8 Decision of the European Court of Human Rights dated 17 April 2014.
- 9 Decision of the European Commission dated 11 April 2014.
- 10 Case T-403/14, *Pisciotti v. Commission*, EU:T:2014:692 and Case C-411/14 P, *Pisciotti v. Commission*, EU:C:2015:48.
- 11 Case C-191/16, Request for a preliminary ruling from the Landgericht Berlin lodged on 5 April 2016, *Romano Pisciotti v Bundesrepublik Deutschland*, Official Journal 2016/C 270/33.
- 12 The assessment of the Berlin court is contrary to the decisions of the higher regional court of Frankfurt and even the German federal constitutional court in the same case.
- 13 The questions of the German referral order of the regional court of Berlin show that – even if the Court of Justice were to confirm that the extradition of Mr Piscioti to the US was an unjustified violation of EU law – this would not necessarily lead to the Berlin court 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.
- 14 The Law Library of US Congress has published a chart containing information on the terms that apply to the extradition of citizens in 157 jurisdictions around the globe. The statistics are *available at*: <http://www.loc.gov/law/help/extradition-of-citizens/chart.php?locr=bloglaw>. Of the countries surveyed, 60 were found to have laws that prevent the extradition of their own citizens. Other requirements may apply in different countries, or they may have a provision that simply allows a government minister to refuse the extradition of a citizen.
- 15 See the US DOJ press release, *available at*: <https://www.justice.gov/opa/pr/former-marine-hose-executive-who-was-extradited-united-states-pleads-guilty-participating>. This German businessman, formerly associated with Dunlop Marine and Oil Ltd., has 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, “US wins one extradition, but dozens of alleged price fixers remain out of reach”. He was also held in Spain but not extradited to the US, see MLex clipping of 17 March 2015, “Failed arrest, embassy interview smoothed way for Piscioti extradition”.
- 16 Article 16(2) of the German Constitution, unofficial translation.
- 17 The German referral order reveals that the German court has serious doubts regarding the compatibility of Mr Piscioti’s extradition with EU law, considering that extra-EU extraditions should fall within the scope of EU law and calling into questions any possible derogations to the EU principle of non-discrimination (such as the one in the EU-US agreement on extradition stating that the requested State may refuse extradition based on constitutional principles, or the one in Article 4(2) of the Treaty of the European Union referring to “national identities”). The Berlin court 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.
- 18 C-182/15, *Aleksei Petruhhin*, ECLI:EU:C:2016:630, paragraph 31.
- 19 C-182/15, *Aleksei Petruhhin*, ECLI:EU:C:2016:630, paragraph 37 and 39. See also C-182/15, *Aleksei Petruhhin*, ECLI:EU:C:2016:330, Opinion of Advocate General Bot delivered on 10 May 2016, at paragraphs 43, 58 and 69.
- 20 Another case, relating to an Austrian doctor sentenced to life imprisonment in Dubai for mercy killing, is still pending before the Court of Justice. C-473/15, *Peter Schotthöfer & Florian Steiner GbR v Eugen Adelsmayr*, request for preliminary ruling from the Bezirksgericht Linz (Austria), 7 September 2015.
- 21 We note that Mr Piscioti had not moved to Germany, like Mr Petruhhin had done to Latvia, but was only catching a flight therein. However it is likely that the Court of Justice will confirm that EU law also applies to the case of Mr Piscioti.
- 22 For example, some UK traders decided to waive extradition and face trial in the US, see MLex clippings of 20 October 2015, “British ex-Rabobank trade says that US charges ‘terrified’ him”, and of 27 October 2015, “Former Rabobank trade takes stand, denies improperly moving Libor”.
- 23 DOJ already in 2011 stated that “*since May 1999, 49 foreign defendants have served, or are currently serving, sentences in US prisons for violating the Sherman Antitrust Act or obstructing a Federal antitrust investigation. The ‘no-jail’ sentencing recommendations that were once available to qualifying foreign nationals in the 1990s are no longer an option. Culpable foreign nationals, just like US co-conspirators, are expected to serve jail sentences in order to resolve their criminal culpability*”. Since then, 10 foreign nationals were sentenced to imprisonment in 2013 (with an average prison sentence of 15 months) and two in 2012 (with average sentence of 16 months, including two 36-month sentences imposed upon individuals from Taiwan convicted at trial for conspiring to fix prices in the LCD industry and 24-month sentences for two Japanese executives for their participation in conspiracies to fix prices and rig bids in the auto-parts industry). See the DOJ statistics, *available at*: <https://www.justice.gov/atr/public-documents/division-update-spring-2011/criminal-program-update-2011>, <https://www.justice.gov/atr/public-documents/division-update-spring-2013/criminal-program>, and <https://www.justice.gov/atr/division-update/2014/criminal-program>.
- 24 For instance, Matsuo Electric has declined to allow three of its employees to travel to the US for depositions in a civil damages suit, citing their risk of arrest in a related criminal cartel probe on capacitors (which are used in electronic devices to store electrical charge). See MLex press clipping of 12 February 2016, “Capacitor plaintiffs seek order on US depositions as Matsuo, other defendants ask for interviews in Japan”.

- 25 It is possible to search the Interpol website (*available at*: <http://www.interpol.int/notice/search/wanted>) by inserting the search term ‘Sherman’ in the ‘free text’ field to obtain a few Red Notices for cartel cases.
- 26 A list of the US extradition treaties is *available at*: <http://www.state.gov/s/l/treaty/faqs/70138.htm>.
- 27 The government’s practice now is to insist on jail sentences for all defendants, domestic and foreign: see Belinda A. Barnett, today Deputy Chief Legal Adviser – Criminal at the DOJ, Criminalization of Cartel Conduct – The Changing Landscape, 3 April 2009, *available at*: <http://www.justice.gov/sites/default/files/atrl/legacy/2009/07/10/247824.pdf>.
- 28 Mr Piscioti was accused of engaging in a bid-rigging conspiracy, and therefore he was extraditable from Germany a country where bid rigging (but not price fixing or other collusive conduct) is a criminal offense. Bid rigging may be a criminal offense also in Italy, but the Italian government would not extradite Mr. Piscioti because he was an Italian citizen.
- 29 The agreement on extradition between the European Union and the United States of America (OJ L 181, 19.7.2003, p. 27–33, *available at*: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22003A0719\(01\)&qid=1472817060507&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22003A0719(01)&qid=1472817060507&from=EN)) entered into force in 2010, and it supplements the bilateral extradition treaties between EU countries and the US. As a matter of EU law, the Member States are obliged to comply, in their bilateral relationships with the United States, with the requirements flowing from the EU-US agreement (see the Handbook on the practical application of the EU-US Mutual Legal assistance and Extradition Agreements by the Council of the European Union dated 25 March 2011, *available at*: <http://www.statewatch.org/news/2011/mar/eu-council-eu-usa-mla-handbook-8024-11.pdf>).
- 30 See Article 4(4) of the agreement on extradition between the European Union and the United States of America, see footnote 29 above.
- 31 See the extradition treaty between Japan and the United States, *available at*: <https://treaties.un.org/doc/Publication/UNTS/volume%201203/volume-1203-I-19228-English.pdf>.
- 32 See the practical guidelines of the European Commission (*available at*: http://ec.europa.eu/justice/criminal/judicial-cooperation/legal-assistance/index_en.htm), the Japanese government (*available at*: <http://www.moj.go.jp/ENGLISH/information/loe-01.html>), and the US Attorneys’ Manual to extradition, Title 9: Criminal 9-15.000 – International Extradition And Related Matters (*available at*: <https://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters>).
- 33 In 2008 the UK’s then supreme court, the House of Lords, refused to extradite Mr Norris on price-fixing charges because price-fixing was not a criminal offense in the UK at the time of his alleged conduct, and the principle of double criminality barred extradition. But it allowed extradition on obstruction-of-justice charges. In 2009, a UK court ordered Mr Norris extradited to the US to stand trial for obstruction of justice. He was unsuccessful in appeal efforts that went all the way to new UK Supreme Court in relation to the question of whether the extradition would be incompatible with his rights under Article 8 of the European Convention on Human Rights: the right to respect for his private and family life (as both Mr and Mrs Norris had health problems at the time). The UK Supreme Court found that in an extradition case the consequences of any interference with Article 8 rights would have to be exceptionally serious before this could outweigh the public importance of extradition. This was not such a case. The alleged offenses of obstructing justice, although subsidiary to the price-fixing charge, were very serious. See *Norris v Government of United States of America* ([2010] UKSC 9), judgment of 24 February 2010.
- 34 See the DOJ press release *available at*: <https://www.justice.gov/opa/pr/former-ceo-morgan-crucible-co-sentenced-serve-18-months-prison-role-conspiracy-obstruct>.
- 35 See the DOJ press release, *available at*: <https://www.justice.gov/opa/pr/owner-insulation-service-company-pleads-guilty-million-dollar-bid-rigging-and-fraud>.
- 36 See the DOJ press release, *available at*: <https://www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-convicted-conspiracy-pay-kickbacks-and>.
- 37 See the DOJ press release, *available at*: <https://www.justice.gov/opa/pr/former-rabobank-derivatives-trader-pleads-guilty-scheme-manipulate-libor-benchmark> (“The department also thanked the Australian Attorney-General’s Department, the Australian Federal Police and the Western Australia Police for their assistance”).
- 38 MLex clipping of 20 July 2016, “US forex probe so far yields antitrust charges for banks, fraud charges for bankers”. Note, however, that the UK closure of the probe into the manipulation of the foreign exchange trades, and the acquittals of businessmen accused of manipulating the interest benchmark Libor, may make it less likely that the DOJ pursues extradition in these cases, see MLex clippings of 27 January 2016 “Brokers acquitted in Libor case still face US charges, though perhaps only in theory”, and of 23 March 2016 “After SFO [UK Serious Fraud Office] closure, DOJ left with tough choices in forex probe”.
- 39 MLex clipping of 15 June 2016, “Car parts case sees first indictments since AUO in 2010”.
- 40 See Interpol’s website, *available at*: <http://www.interpol.int/INTERPOL-expertise/Notices>. See also the DOJ Attorneys’ Manual, section on Red Notices, *available at*: <https://www.justice.gov/usam/criminal-resource-manual-611-interpol-red-notices>.
- 41 Bill Baer, Assistant Attorney General for the Antitrust Division (today Acting Associate Attorney General) stated that: “Even if you’re not extradited immediately from your home country, you may not be able to travel for fear you’ll get stopped ... and detained somewhere else until we can sort out whether extradition is appropriate”, see interview of 15 May 2015, *available at*: <http://www.law360.com/articles/656850/exclusive-doj-s-baer-promises-more-extradition-fights>.
- 42 The Law Library of US Congress offers statistics, *available at*: <http://blogs.loc.gov/law/2016/03/new-resource-covers-the-laws-of-157-countries-on-the-extradition-of-citizens/>.
- 43 The transfer provision has been used before in a few antitrust cases and foreign executives have returned to Luxembourg and France to serve out sentences. The French businessman Christian Caleca involved in the marine-hose cartel was released from custody on arriving home. And no one from Japan has ever been known to petition for a transfer. See MLex clipping of 31 October 2014, “Cartel offenders can try, but US prison transfers to home countries are rare”.
- 44 The American Antitrust Institute has sent a letter to the head of the DOJ antitrust division, asking to improve criminal plea agreements by prohibiting companies from rehiring individuals convicted of price fixing; see the letter of 28 December 2014, *available at*: <http://www.antitrustinstitute.org/sites/default/files/AAI%20to%20DOJ%20re%20criminal%20reemployment12.29.14.pdf>.