



## DOJ Warns Extradition ‘Safe Havens’ Fading and Promises More Extradition Fights

The U.S. Department of Justice (DOJ) continues to push the extraterritorial reach of U.S. criminal laws. In the recent months, DOJ has demonstrated that its international enforcement efforts in the white-collar criminal front will include aggressive use of extradition requests for foreign nationals who participate in crimes impacting United States commerce. However, a recent decision by an Austrian Court demonstrates that DOJ cannot rely on a presumption that its enforcement of criminal justice is well founded or properly motivated. There an Austrian Judge found that allegations of Foreign Corrupt Practices Act (FCPA) violations lacked probable cause and were politically motivated. DOJ and the Department of State have subsequently indicated that DOJ has no plans to drop the pressure on foreign targets any time soon.

DOJ's threshold success in extraditing a foreign national in an antitrust case came in April 2014. DOJ secured an Italian national and a former executive with a marine hose company, Romano Piscotti, who was charged with participating in a cartel in the early 2000s. Piscotti was arrested while making a connection at Frankfurt Airport and ultimately extradited in April 2014 by Germany. At least two similar extradition requests in antitrust cases are pending before foreign judges. DOJ is also currently pursuing another extradition from Canada of an individual charged for his role in a Superfund site kickback scheme in New Jersey. With the ongoing indictment of Japanese executives in auto-part industry, one can foresee that the Division will be stepping up its efforts to extradite individuals from Japan. The division has also been taking on more high-tech types of antitrust violations of late, including its first criminal charge against a man accused of conspiring with a rival poster seller on an online retailer to use algorithms to fix prices. While not the first foreign nationals extradited to face criminal charges in the U.S., these recent requests are a milestone in the white-collar area in general and in antitrust enforcement specifically. DOJ's indictment in connection with the Fédération Internationale de Football Association (FIFA) officials further demonstrates its expansive approach to extraterritorial jurisdiction.

Recently, DOJ has issued several statements indicating that it intends to aggressively pursue foreign nationals for trial in the U.S. on such charges. On May 15, 2015, Antitrust Division chief Bill Baer stated that DOJ will continue to work with ministries of justice worldwide to seek extraditions to the U.S. Even in

absence of an extradition treaty DOJ can, and has used, Interpol Red Notices as a useful mechanism in arresting anyone who has sought to evade charges by traveling abroad. “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,” Baer said. “So there is a real cost to not coming to grips with antitrust misconduct even if you’re a foreign national and even if the country in which you reside does not have extradition treaty with the United States.” DOJ has seen companies and defense lawyers become increasingly aware of that dual extradition risk, according to Baer. “What that threat, in addition to the extradition threat, has done is it has caused many individuals to agree to come to the United States, to plead guilty, to serve a sentence in a U.S. jail, to basically accept U.S. justice because the costs of being a fugitive are very, very real.” Baer said.

Baer’s statement echoes DOJ Deputy Assistant Attorney General for Criminal Enforcement, Bren Snyder’s warning that the growing criminalization of antitrust violations around the world meant that foreign executives charged in the U.S. should think twice before seeking “safe havens” abroad. According to Snyder, with more countries criminalizing antitrust violations, the likelihood that the DOJ will be able to win future extraditions will only increase. Snyder added “[w]e believe that will hopefully either encourage more people who are either actual fugitives or contemplating being fugitives to come in, accept responsibility and put this behind them because there are going to be, I think, fewer and fewer safe havens all the time. ... You may believe you live in a country that will not extradite to the United States, but if you want to get on an airplane, you want to travel to another country, you are going to increasingly be at a high risk of being extradited to the United States.”

Similarly, Scott Hammond, then-Deputy Assistant Attorney General of the Division’s Criminal Enforcement program, stated in connection with the indictment of two Japanese nationals arising from the auto parts investigation: “The Antitrust Division is working with competition enforcers abroad to ensure that there are no safe harbors for executives who engage in international cartel crimes.”

Last year, in response to Seventh Circuit’s inquiry to address concerns raised by several foreign governments, including South Korea and Taiwan, about the expanded application of the foreign reach of U.S. antitrust law in *Motorola Mobility LLC v. AU Optronics Corp., et al.*, case number 14-8003, DOJ filed a brief stating that the Foreign Trade Antitrust Improvements Act reaffirmed the well-established application of antitrust law to alleged conduct that involving even solely foreign commerce, which has produced a substantial adverse effect in the U.S.

DOJ’s request to extradite Dmitry Firtash, Ukrainian businessman who was arrested in Vienna, Austria in March 2014 on racketeering and money laundering and conspiracy to violate the FCPA charges was another example of DOJ’s enhanced policy toward extradition of foreign nationals. However, here DOJ suffered a major setback. DOJ alleged that Firtash engaged in a conspiracy to bribe Indian officials to secure titanium mining rights. Yet, during extradition proceedings, DOJ failed to rebut a defense argument that Firtash’s arrest –was really an effort by the U.S. to minimize his political influence in Ukraine and that DOJ did not have evidence to establish probable cause that a crime was committed. On April 30, 2015, the Austrian court denied DOJ’s request to extradite Firtash calling the application “politically motivated and therefore [finding] extradition [is] inadmissible.” Austrian Judge Bauer also cited a lack of evidence about the FCPA case that supported the extradition request. DOJ provided no evidence to the Austrian court despite numerous requests and only responded to Judge Bauer’s inquires days before the hearing.

Thus, foreign nationals indicted in the U.S. may no longer elude prosecution simply by avoiding entry into the United States. Even where their resident countries do not establish dual criminality, the Piscioti

extradition demonstrates that DOJ is ready and willing to move beyond “border watch” lists, which monitor individuals’ entry into and exit from the United States, to using Interpol “Red Notices” to secure the extradition of foreign nationals, who may not be subject to extradition from their home country, when they travel. Executives operating in international markets who travel to different countries now do so at significantly more peril than before. The risk is heightened if the indicted foreign national is initially detained in a country that offers fewer protections from extradition to foreign nationals than to its own citizens.

This *GT Alert* was prepared by **Sanford M. Saunders, Jr., A. John Pappalardo**, and **Nicoleta Timofti**. Questions about issues surrounding the extraterritorial application of U.S. criminal statutes can be directed to:

- > [Sanford M. Saunders](mailto:saunderss@gtlaw.com) | +1 202.331.3130 | [saunderss@gtlaw.com](mailto:saunderss@gtlaw.com)
- > [A. John Pappalardo](mailto:pappalardoj@gtlaw.com) | +1 617.310.6072 | [pappalardoj@gtlaw.com](mailto:pappalardoj@gtlaw.com)
- > [Nicoleta Timofti](mailto:timoftin@gtlaw.com) | +1 202.530.8536 | [timoftin@gtlaw.com](mailto:timoftin@gtlaw.com)
- > Or your [Greenberg Traurig](#) attorney

<b>Albany</b> +1 518.689.1400	<b>Denver</b> +1 303.572.6500	<b>New York</b> +1 212.801.9200	<b>Shanghai</b> +86 (0) 21 6391 6633
<b>Amsterdam</b> + 31 (0) 20 301 7300	<b>Fort Lauderdale</b> +1 954.765.0500	<b>Northern Virginia</b> +1 703.749.1300	<b>Silicon Valley</b> +1 650.328.8500
<b>Atlanta</b> +1 678.553.2100	<b>Houston</b> +1 713.374.3500	<b>Orange County</b> +1 949.732.6500	<b>Tallahassee</b> +1 850.222.6891
<b>Austin</b> +1 512.320.7200	<b>Las Vegas</b> +1 702.792.3773	<b>Orlando</b> +1 407.420.1000	<b>Tampa</b> +1 813.318.5700
<b>Boca Raton</b> +1 561.955.7600	<b>London*</b> +44 (0) 203 349 8700	<b>Philadelphia</b> +1 215.988.7800	<b>Tel Aviv^</b> +972 (0) 3 636 6000
<b>Boston</b> +1 617.310.6000	<b>Los Angeles</b> +1 310.586.7700	<b>Phoenix</b> +1 602.445.8000	<b>Tokyo<sup>‡</sup></b> +81 (0)3 3216 7211
<b>Chicago</b> +1 312.456.8400	<b>Mexico City+</b> +52 (1) 55 5029.0000	<b>Sacramento</b> +1 916.442.1111	<b>Warsaw<sup>~</sup></b> +48 22 690 6100
<b>Dallas</b> +1 214.665.3600	<b>Miami</b> +1 305.579.0500	<b>San Francisco</b> +1 415.655.1300	<b>Washington, D.C.</b> +1 202.331.3100
<b>Delaware</b> +1 302.661.7000	<b>New Jersey</b> +1 973.360.7900	<b>Seoul<sup>∞</sup></b> +82 (0) 2 369 1000	<b>Westchester County</b> +1 914.286.2900
			<b>West Palm Beach</b> +1 561.650.7900

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