

Advocate General: CJEU Should Give Up Petruhhin Decision



Thomas Wahl

News

In his [opinion in case C-398/19 \(BY – Generalstaatsanwaltschaft Berlin\)](#), delivered on 24 September 2020, Advocate General (AG) *Gerard Hogan* recommends that his colleagues on the Luxembourg judges' bench no longer follow the [judgement in *Petruhhin*](#) (C-182/15 --> [eucrim 3/2016, 131](#)). The AG explains the legal and practical difficulties in the application of the maxim in the *Petruhhin* judgment: in situations of extradition requests to Union citizens from third countries, the requested EU Member State (= host State) is required to give the home Member State the opportunity to prosecute the offences of his/her own national as well as to give priority to a potential EAW of that Member State over the extradition request of the third country.

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Facts of the case

In the case at issue, the person concerned (BY) is a Ukrainian national, who moved from Ukraine to Germany in 2012. Since he was a descendent of former Romanian nationals, he obtained Romanian nationality in 2014; however, he never had his life centre in Romania. In 2016, a Ukrainian criminal court issued an arrest warrant against BY, alleging him of misappropriation of funds in 2010 and 2011. Subsequent to the Ukrainian extradition request, BY was arrested in Berlin (but later released from extradition detention on bail). In view of his Romanian nationality and in application of the CJEU's *Petruhhin* decision, the Berlin General Prosecutor's Office inquired whether Romania intends to take over criminal prosecution of BY. The Romanian Ministry of Justice has not clearly answered this yet. It informed the Berlin General Prosecutor, *inter alia*, that (as a prerequisite for an EAW) the issuing of a national request required a sufficient body of evidence underpinning the commission of the offences abroad. It requested the General Prosecutor's Office in Berlin to provide documents and copies of the evidence from Ukraine.

Questions referred

The referring court (*Kammergericht Berlin*) feels restricted to allow extradition of BY to Ukraine by the CJEU's judgment in *Petruhhin*, because, so far, the Romanian authorities have neither decided for nor against a prosecution of BY in respect of the alleged offences, which are at the heart of the extradition request. The German court seeks clarifications from the CJEU as regards the obligations of the Member States arising from the principles established in *Petruhhin* and poses the following three questions:

- In contrast to the *Petruhhin* case, the person concerned did not possess the nationality of an EU Member State when he moved to Germany, which is why it must be questioned whether the rights deriving from Union citizenship (Arts. 18 and 21 TFEU) actually apply?



- Is the home Member State (here: Romania) obliged to request that the requesting third country (here: Ukraine) provides the case files for the purpose of examining whether to take over the prosecution?
- If Germany declares the extradition illegal, in order to satisfy the principle of non-discrimination enshrined in Art. 18 TFEU, would it then be obliged to take over the prosecution of the Union citizen itself (provided that it is possible to do so under its national law under certain conditions)?

The AG's criticism of the Petruhhin concept

By way of a preliminary analysis, the AG questions whether *Petruhhin* was correctly decided. He points out that there is a decisive difference between the position of own nationals of the requested State (who enjoy the right not to be extradited, as conferred, for instance, in the applicable Art. 6 of the CoE 1957 Extradition Convention) and that of non-nationals who hold the nationality of another EU Member State. As regards own nationals, the requested Member State applies the principle *aut dedere aut iudicare* (either extradite or prosecute) without restrictions, i.e. it can exercise extraterritorial jurisdiction over criminal acts of its citizens on the basis of the "active personality principle". This is not the case for non-nationals/Union citizens, in respect of whom extraterritorial jurisdiction can be exercised only under limited circumstances. The reason for this is that under the principles of international law, there must be at least a general link if acts were committed by a foreigner on foreign territory. Hence, from a legal point of view, the AG sees a material difference in the circumstances of a risk of impunity and, as a consequence, a non-violation of the principle of non-discrimination in Art. 18 TFEU depending on the nationality of the requested person. As a result, he reaches the same conclusion as his colleague AG Yves [Bot in his opinion on the Petruhhin case](#).

In addition, AG *Hogan* lists a series of practical difficulties that resulted from the *Petruhhin* judgment, such as the problem of lacking deadlines by which the host Member State can expect an answer from the home Member State or insufficient information on the part of the home Member State for issuing an EAW if it is approached by a host Member State following an extradition request by a third country. In sum, AG *Hogan* concludes that "the [*Petruhhin*] judgment of 6 September 2016 was, with respect, wrongly decided and should not now be followed by this Court."

Reply to the questions posed

If the CJEU would like to stick to the *Petruhhin* judgment, the AG answers the questions of the referring court as follows:

- The Union citizen is entitled to rely on the rights guaranteed by Arts. 18 and 21 TFEU, regardless of when he obtained such citizenship and whether he actually crossed a border;
- The home Member State is not obliged under EU law to request that the requesting third country provide the case files for the purpose of examining whether to take over the prosecution;
- EU law imposes no obligation on the requested State itself to take over the prosecution of a non-national who has been the subject of a third-country extradition request.

Put in focus

The case at issue shows again that the CJEU's *Petruhhin* judgment constitutes a paradigm shift in international extradition law. It must be questioned whether it unduly restricts cooperation between EU countries and third countries, considering that not only EU cooperation but also international cooperation is based on mutual trust and pursues the aim of avoiding impunity. In this context, it is worth referring to the recent judgment of the Higher Regional Court of Frankfurt a.M. that combined the "*Petruhhin* principles" with the concepts of the transnational effects of *ne bis in idem* (→ [eucrim 2/2020, 110](#)). The Frankfurt court had denied the extradition of an Italian citizen (charged with gang fraud (art forgery)) to the USA, because he had previously been sentenced in Italy on the same charges.

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