

CJEU: Extradition Justifiable Despite EU's Prohibition of Discrimination

Thomas Wahl

News

On 10 April 2018, the CJEU delivered a [long-awaited judgment](#) in a delicate legal question: whether the Union's prohibition of discrimination on grounds of nationality (Art. 18 TFEU) affects national provisions that only ban the extradition of one's Member States own nationals to third countries. In the affirmative, these national bans need to be extended to all Union citizens.

The debate was sparked by the CJEU's [judgment of 6 September 2016](#) in the *Petruhhin* case (C-182/15, see also [euclid 3/2016, p. 131](#)) and experienced a boost from the present "*Pisciotti* case" (C-191/16).

In the case at issue, *Romano Pisciotti*, an Italian businessman, was arrested on 17 June 2013 at Frankfurt airport during a stopover on his flight from Nigeria to Italy. The arrest was based on an extradition request from the United States, where Mr. Pisciotti had been criminally charged for cartel infringements. German courts, i.e. the Higher Regional Court of Frankfurt a.M. and the Federal Constitutional Court, considered extradition to the US permissible. They specifically rejected the defendant's argument that a provision in the German constitution, according to which "no German may be extradited to a foreign country" (Art. 16(2) sentence 1 of the Basic Law), is unlawfully confined to German nationals. The German courts held that the Union's principle of non-discrimination on grounds of nationality referred to in Art. 18 TFEU is not applicable to extradition to third States.

After the German government had granted Mr. Pisciotti's extradition, he sued the German state for damages before the civil law division of the Regional Court of Berlin (*Landgericht Berlin*) – the first-instance court in Germany for damages against the State. These civil law claim proceedings must be distinguished from the extradition proceedings.

The Regional Court of Berlin indicated that it did not share the opinion of the Federal Constitutional Court and the Higher Regional Court of Frankfurt in the extradition proceedings. Consequently, the Regional Court referred questions for a preliminary ruling to the CJEU. In essence, the Regional Court of Berlin wished to know whether the "extradition courts" were manifestly wrong when they denied the applicability of Art. 18 TFEU and unlawfully treated nationals of other EU Member States unequally compared to German nationals.

First, following its *Petruhhin* judgment, the CJEU states that the extradition of *Mr. Pisciotti* to the USA indeed falls within the scope of Art. 18 TFEU for two reasons: first, the extradition request was made based on the 2003 EU-USA extradition agreement; second, Mr. Pisciotti exercised his freedom to move and reside within the territory of the EU Member States, as conferred by Art. 21 TFEU. The fact that Mr. Pisciotti was arrested when he was in transit in Germany is irrelevant in this regard.

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the
Study of Crime, Security and
Law

ISSN: 1862-6947

<https://euclid.eu>



Secondly, the CJEU notes that the 2003 EU-USA agreement on extradition allows an EU Member state to prohibit extradition of its own nationals on the basis of either the provisions of a bilateral treaty or rules of its constitutional law. However, this discretion must be exercised in accordance with primary Union law. In this context, the CJEU further rules that there is indeed a difference in treatment within the meaning of Art. 18 TFEU. The unequal treatment of an Italian citizen compared to German nationals, however, and the resulting restriction to the free movement of a person under Art. 21 TFEU can be justified in the given case.

In this context, the Court again refers to the *Petruhhin* judgment and stresses that preventing the risk of impunity is a decisive issue when assessing its justification. In addition, the CJEU found, as in *Petruhhin*, that the objective of the measure (here: extradition to third countries) must not be attained by less restrictive measures. Yet, importantly, the CJEU made the point that the requested EU Member State must consider extradition to the home country of the person sought, i.e. Italy, as a less restrictive solution. Hence, the requested EU Member State is obliged to inform the Member States of which the Union citizen is a national when applying an extradition agreement and to give priority to a possible EAW, provided that state has jurisdiction and wants to prosecute the same offence. The CJEU expressly rejects arguments put forward by some governments that this “*Petruhhin* approach” would undermine the effectiveness of extradition rules on determining the state to which the person should be surrendered in case of multiple extradition requests (e.g., Art. 10 EU-USA extradition agreement).

The CJEU ultimately holds, however, that the German authorities maintained the rule of less restrictive measures by having informed the Italian consulate upon *Mr. Piscioti*'s arrest and further communicated with the consulate during the extradition proceedings. Since Italy did not issue a European Arrest Warrant between the time of *Mr. Piscioti*'s extradition detention in Germany and the time of his surrender to the USA, the extradition at issue could be lawfully granted in terms of EU law.

The CJEU's judgment in *Piscioti* further solidifies the CJEU's groundbreaking judgment in the *Petruhhin* case. It follows the main lines of argument that were already put forward by AG *Bot* in his [opinion](#) of 21 November 2017. Interestingly, beyond the CJEU's judgment, the AG further points out the legal and practical difficulties for EU Member States in following the CJEU's judgment in *Petruhhin*. One problem is that the home country of the Union citizen rarely has the necessary information to issue a European Arrest Warrant and start its own prosecution if the crime was committed abroad. Furthermore, the AG stressed that clauses in the FD EAW and in extradition agreements on how to handle multiple extradition requests counteract the rationale of the CJEU in *Petruhhin* in that a EAW should always be given priority over an extradition request to an Union citizen from a third state.

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The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



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