

CJEU Maintains Petruhhin Doctrine: Extradition of EU Citizens to Third States Only in Agreement with Member State of Nationality



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News

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On 17 December 2020, the CJEU rendered a decision in the extradition case of a Ukrainian-Romanian national (*Case C-398/19 (BY – Generalstaatsanwaltschaft Berlin)*). The Ukraine sought the extradition from Germany, where the person concerned had moved to in 2012. The case gave the CJEU the opportunity to specify the case law established in the *Petruhhin* judgment (à [euclid 3/2016, 131](#)), in particular as to the conditions under which a Union citizen may be extradited to a third country. In the *Petruhhin* case – subsequently confirmed by other judgments – the CJEU established that an EU Member State faced with an extradition request from a third country concerning a citizen of another EU Member State is obliged to initiate a consultation procedure with the Member State of nationality of the EU citizen, thus giving the latter the opportunity to prosecute its citizen by means of a European Arrest Warrant.

Background of the case

The peculiarities of the case at issue were that the defendant (BY) had never resided in Romania and that the Romanian Ministry of Justice did not clearly answer the question by the Berlin General Prosecutor's Office as to whether Romania intend to take over criminal prosecution of the person concerned. The referring court was uncertain on the conclusions to be drawn from the *Petruhhin* judgment in this specific case. It submitted to the Court questions concerning the interpretation of Arts. 18 and 21 TFEU (relating to, respectively, the principle of non-discrimination on grounds of nationality and the right of Union citizens to move and reside freely within the territory of the Member States) and concerning the obligations of Germany, as requested State, in relation to the extradition of the Union citizen. For details on the facts of the case, the referred questions, and the AG's opinion → [euclid 3/2020, 190-191](#).

Findings of the CJEU

The CJEU, sitting in Grand Chamber, first confirmed that Arts. 18 and 21 TFEU also apply in situations such as those in the present case. It is only of relevance whether a national of one EU Member State resides in the territory of another EU Member State and whether he/she is the subject of an extradition request sent to the latter Member State by a third State. The fact that BY moved the centre of his interests to that other Member State (here: Germany) at a time at which he did not have Union citizenship has no effect in this regard.

Second, the CJEU clarified the obligations incumbent to the requested EU Member State as regards the exchanging of information within the consultation procedure as set out in *Petruhhin*. The Member State of

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nationality (here: Romania) must be in a position to request the surrender of the person concerned by means of an EAW. This means:

- The Member State of nationality must be duly informed of all the elements of fact and law communicated by the third State in the context of the extradition request and of any changes in the situation of the requested person that might be relevant to the possibility of issuing an EAW;
- Under EU law, neither of the EU Member States involved (here: Germany and Romania) are obliged to ask the third State requesting extradition (here: Ukraine) to send to them a copy of the criminal investigation file;
- The requested Member State must impose a reasonable time limit (taking into account all circumstances of the case, in particular the extradition detention of the person and the complexity of the case) upon the Member State of nationality. If the Member State of nationality does not issue an EAW within the time limit, the requested EU Member State can continue the extradition procedure and, if appropriate, carry out the extradition.

Third, the CJEU holds that Arts. 18 and 21 TFEU must be interpreted as meaning that the Member State to which a third State submits an extradition request for the purpose of criminal prosecution of a Union citizen who is a national of another Member State is not obliged to refuse extradition and to conduct a criminal prosecution itself where its national law permits it to do so. Otherwise, the requested EU Member State could no longer exercise its discretion to decide itself on the appropriateness of conducting prosecution – such an obligation would be beyond EU law.

Put in focus:

The judges in Luxembourg did not heed the criticism that followed their *Petruhhin* concept. [In the case at issue, AG Hogan](#) detailed the numerous legal and practical challenges involving the consultation procedure and the preference for criminal prosecution by the Member State of nationality, although the crimes at issue had been regularly committed on the territory of the third country requesting extradition of the perpetrator. This criticism was also voiced by practitioners in the recent joint report by Eurojust and the EJM on extradition of EU citizens to third countries (à separate news item).

The CJEU stresses, however, that EU law answers (and must answer) the question of “whether the requested (EU) Member State is able to adopt a course of action, with respect to that Union citizen, which would be less prejudicial to the exercise of that citizen’s right to free movement and residence by considering that he or she should be surrendered to the Member State of which he or she is a national rather than extradited to the third State that is requesting extradition.”

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