



INSIGHT

EU LAW AND EXTRADITION AGREEMENTS OF MEMBER STATES: THE *PETRUHHIN* CASE

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ABSTRACT: The *Insight* analyses the recent judgment of the Court of Justice in the *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* case (judgment of 6 December 2016, case C-182/15). The preliminary ruling deals with the relationship between EU law and Member States' extradition agreements with third countries. The decision focuses on the compatibility of the nationality exception provided by an extradition agreement between Latvia and Russia with the prohibition of discrimination on grounds of nationality and with the freedom of movement of EU citizens. While the nationality exception can be considered as pursuing a legitimate objective under EU law, namely to prevent the risk of impunity, the Court of Justice identifies the existence of less restrictive measures within the internal criminal cooperation system. Member States are thus required to extend the protection of nationals to EU citizens that have exercised their freedom of movement and, according to the principle *aut dedere aut judicare*, to refuse the extradition and to surrender the requested person to the Member State having jurisdiction to prosecute the offender.

KEYWORDS: extradition agreements – nationality exception – discrimination on grounds of nationality – European arrest warrant – *aut dedere aut judicare* – risk of torture or inhuman and degrading treatment.

I. INTRODUCTION AND FACTUAL BACKGROUND

EU law and international agreements of Member States do not frequently interact. When they do, it is usually at the detriment of international agreements, including those concluded with third countries. This is perfectly understandable from the perspective of EU law, since the EU legal order should not be affected by treaties concluded by Member States. The EU, according to Art. 216 TFEU, is only bound by agreements it has concluded by itself.¹ Of course, the issue is much more problematic from the point of view

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¹ With the exception of those in which it has succeeded to its Member States, given the attribution of exclusive competence in a certain field. On the so called doctrine of functional succession see R. SCHÜTZE,

of third countries, which do only expect that international obligations owed to them by EU Member States are executed in good faith.² The *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* case, decided by the Court of Justice on 6 December 2016,³ deals exactly with such an issue and confirms that EU law has to take precedence over international obligations of Member States or, at least, that the execution of those obligation must not impair EU general principles, such as the prohibition of discrimination on grounds of nationality.

The case originated from the extradition of Mr Petruhhin, an Estonian national, requested by Russia to the Latvian government. Mr Petruhhin was arrested in Latvia on 30 September 2014 and the request from Russia was received on 21 October 2014, based on the bilateral extradition treaty existing between Russia and Latvia. In fact, he had been accused of being involved in a large-scale drug-trafficking criminal organisation and had been already subject to a Red Notice of the Interpol in 2010. Mr Petruhhin filed an appeal against the Latvian public prosecutor's decision to grant the extradition, claiming that, under the 1992 treaty among Estonia, Latvia and Lithuania on judicial assistance and judicial relations (hereinafter, the 1992 agreement),⁴ he enjoyed the same protection of Latvian nationals against unjust extradition. The claim was based on the fact that the extradition agreement concluded in 1993 between Latvia and Russia only provided for the nationality of one of the contracting States as a ground to refuse the extradition request. However, according to Art. 1 of the earlier 1992 agreement, the rights of the nationals of one of the contracting parties shall enjoy the same protection in the territory of all other contracting parties. By relying on this provision, Mr Petruhhin was seeking an extension of the nationality exception enshrined in the extradition agreement between Russia and Latvia.

The Supreme Court of Latvia, to which the proceedings had been transmitted, on its own initiative recognised that the matter was raising not just the issue of the effects of the 1992 agreement, but also a more general problem of the scope of application of the nationality exception provided by the Russia-Latvia extradition treaty in relation to the prohibition of discrimination, deriving from EU citizenship. Indeed, since the nationality exception only refers to the nationals of the contracting States and does only apply on the territory of those countries, the non-recognition of the same protection to other EU

Foreign Affairs and the EU Constitution. Selected Essays, Cambridge: Cambridge University Press, 2014, p. 91 *et seq.*

² See Art. 26 of the 1969 Vienna Convention on the Law of Treaties. On the duties deriving from the principle of good faith in relation to treaty performance see R. KOLB, *La bonne foi en droit international public*, Geneva: Graduate Institute Publications, 2000, p. 278 *et seq.*

³ Court of Justice, judgment of 6 December 2016, case C-182/15, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* [GC].

⁴ The Agreement on Legal Assistance and Legal Relations between the Republic of Lithuania, the Republic of Estonia and the Republic of Latvia, signed at Tallinn on 11 November 1992.

citizens could amount to an unjust discrimination on grounds of nationality, forbidden by Art. 18, para. 1, TFEU and by Art. 2, para. 2, of the Charter of Fundamental Rights of the European Union (hereinafter, the Charter). The Latvian court referred to the Court of Justice different questions, asking, firstly, whether, in case of an extradition request from a third country, a Member States is obliged to guarantee the same level of protection to all EU citizens and, secondly, whether the national judge should apply to the extradition proceeding the conditions for extradition of the Member States of which the person concerned is a national or that in which he has his habitual residence. Moreover, the referring court also raised the issue of obligations of Member States deriving from Art. 19, para. 2, of the Charter, which provides for protection in the event of removal, expulsion or extradition.⁵

II. THE SCOPE OF APPLICATION OF EU LAW

The AG and the Court of Justice followed the same line of reasoning, though reaching a different conclusion. Since the first question regarded the possibility of considering the nationality exception in the extradition treaty as a difference in treatment among EU citizens, the first requirement to be verified was whether the situation of Mr Petruhhin would fall within the scope of application of EU law. The answer to the latter question would have been relevant also for determining the applicability of the Charter, namely as regards the protection against extradition when there is the risk of being subject to death penalty, torture or inhuman treatment in the requesting State, a risk that Mr Petruhhin had invoked before the national court.

II.1. FREEDOM OF MOVEMENT AND THE APPLICABILITY OF EU LAW

Both AG Bot and the Court of Justice held that EU law was applicable to the case, including the principle of non-discrimination. Some intervening governments had claimed that, since the EU had no competence regarding extradition matters, the extradition of Mr Petruhhin fell outside the scope of EU law.⁶ Indeed, Member States are currently still free to conclude bilateral extradition treaties with third countries, since the related competence neither has been attributed exclusively to the EU nor can an exclusive competence of the EU derive from the pre-emption doctrine. Even if the EU has concluded a number of extradition agreements with third countries, these only supplement Member States international agreements on extradition matters, by providing addition-

⁵ *Ibidem*, para. 17.

⁶ Opinion of AG Bot delivered on 10 May 2016, case C-182/15, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, para. 33.

al and uniform rules.⁷ This could not exclude, however, that the situation of Mr Petruhhin fell outside the scope of EU law.

According to a settled case law of the CJEU, a main feature of the status of EU citizens is the right not to suffer any discrimination on grounds of nationality within the scope of application *ratione personae* of the TFEU.⁸ In order for EU law to cover a specific situation, both the personal and the material scope of application should be assessed. Even if the difference between the two has sometimes been unclear,⁹ it is usually accepted that the personal criterion is satisfied by possessing the nationality of a Member State, while the material scope – which encompasses the right to equal treatment – includes those situations involving the exercise of a fundamental freedom guaranteed by the Treaties, in particular that to move and to reside in another Member State.¹⁰ Thus, the sole fact that a situation belongs to a matter falling within a retained competence of the Member States does not *per se* exclude that certain factual elements of that situation are governed by EU law, specifically by the right of free movement.¹¹

It is on this premise that AG Bot affirmed that Arts 18 and 21 TFEU were applicable to Mr Petruhhin's situation: by moving from his country of origin to Latvia, he had exercised his right to free movement under EU law. Consequently, he was entitled to the same treatment of nationals of the host State.¹² Contrary to what the intervening Member States had observed, the exercise by Mr Petruhhin of his freedom of movement throughout the EU territory is, according to the AG, perfectly sufficient to trigger the protection deriving from the citizenship status, since the factual situation involved the necessary link with EU law, notwithstanding the fact that extradition matters are still a retained competence of Member States.¹³ Quite the contrary, when Member States act in a field covered by their own competence, as it is for the execution of a bilateral ex-

⁷ S. PEERS, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, 2012, p. 750. On the relationship between EU law and extradition agreements of Member States see F. CASOLARI, *EU Member States' International Engagements in AFSJ Domain: Between Subordination, Complementarity and Incorporation*, in C. FLAESH-MOUGIN, L.S. ROSSI (dir.), *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union européenne après le Traité de Lisbonne*, Bruxelles: Bruylant, 2013, p. 23 *et seq.*

⁸ Court of Justice, judgment of 12 May 1998, case C-85/96, *María Martínez Sala v. Freistaat Bayern*, para. 62.

⁹ See E. SPAVENTA, *Seeing the Wood despite the Trees: On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2008, p. 14.

¹⁰ Court of Justice, judgment of 11 July 2002, case C-224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi*, para. 29.

¹¹ At the same time, there can be situations not covered by EU law even if the matter falls partly under an EU legislative measure. See Court of Justice, judgment of 16 April 2015, joined cases C-446/12 and C-449/12, *W. P. Willems et al. v. Burgemeester van Nuth et al.*, para. 47 *et seq.*

¹² Opinion of AG Bot, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, cit., para. 34.

¹³ *Ibidem*, para. 39.

tradition treaty, they must do so in a manner consistent with EU law, thus paying due regard to individual rights derived from EU primary and secondary provisions.¹⁴

The Court of Justice has simply confirmed the position of the AG, by recognising that the exercise by Mr Petruhhin of his freedom of movement constituted a sufficient basis to consider the extradition proceedings covered by the protection of EU law against discrimination.¹⁵ This passage reveals how relevant the judgment could be for future extradition requests coming from third countries and addressed to Member States. The assessment made by the Court of Justice, even if referred only to the specific situation, has broad implications for extradition matters. In fact, if one considers that EU law applies whenever a citizen of the EU has exercised his freedom of movement, this will entail that all extradition requests related to a citizen who is not a national of the requested Member State will be essentially covered by EU law.¹⁶ Moreover, this is likely to happen not just when the movement from one Member State to another is voluntary, but also when the individual has been previously surrendered by virtue of a cooperation instrument such as the European Arrest Warrant (EAW).

Once established the applicability of Arts 18 and 21, para. 1, TFEU to the case at hand, it is rather evident that the nationality exception enshrined in extradition treaties constitutes a discrimination on grounds of nationality forbidden by EU law. Whether this discrimination could be justified on the basis of legitimate reasons, as the need to prevent risks of impunity, is a different issue, that needs to be addressed separately.¹⁷

II.2. THE PROTECTION AGAINST EXTRADITION UNDER THE CHARTER OF FUNDAMENTAL RIGHTS

Before examining the content of the nationality exception in extradition agreements and its compatibility with EU law, the role of the Charter must be taken into consideration. Indeed, once the applicability of EU law is established in relation to a certain situation, this also triggers the obligation for Member States to act in conformity with the Charter.¹⁸ The Court of Justice has confirmed that “situations cannot exist which are

¹⁴ This is a traditional construction of the Court’s case law, which has been confirmed also in relation to the exercise of Member States’ foreign powers. See e.g. Court of Justice, judgment of 4 May 2010, case C-533/08, *TNT Express Netherland v. AXA Versicherung AG*, para. 52.

¹⁵ *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, cit., paras 30-31.

¹⁶ Note also that the extension of the protection to mere EU citizens having exercised the freedom of movement would be in this case much wider than the one usually applicable to optional grounds of refusal of EAW execution in relation to non-nationals. See *infra*, footnote 25 and the case-law cited therein.

¹⁷ See *infra*, section 3.

¹⁸ According to Art. 51 of the Charter “[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”.

covered in that way by EU law without those fundamental rights being applicable".¹⁹ This holds true not only when national authorities are implementing EU law, but also in cases in which Member States enjoy a wide margin of discretion or even adopt measures derogating from EU law.²⁰

Mr Petruhhin had claimed before the Latvian court that his extradition to Russia would have been barred – regardless to the principle of non-discrimination – on ground of Art. 19, para. 2, of the Charter, according to which “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or inhuman or degrading treatment or punishment”. The Court of Justice reiterated in the judgment that the decision of a Member State to extradite a national of another Member State who had availed himself of his freedom of movement falls within the scope of EU law (namely of Arts 18 and 21 TFEU) and therefore needs to comply with the Charter.²¹ This is the first time the Court of Justice has applied the protection under Art. 19 of the Charter to extradition towards third countries. The requirements identified by the Court are thus extensively drawn upon its previous case-law on the EAW.

The Member State which has received the extradition request from a third country is required to verify the presence of elements excluding the risks envisaged by Art. 19, para. 2, of the Charter. The evaluation must be firstly conducted in the light of the case-law of the European Court of Human Rights on the interpretation of Art. 3 of the European Convention of Human Rights.²² Beside this, the Court expressly made reference to its previous judgment *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, in which it established that, in order to determine the existence of a risk of inhuman or degrading treatment, the national competent authority must rely on information that is objective, reliable, specific and properly updated.²³ It is interesting to note that the Court of

¹⁹ Court of Justice, judgment of 26 February 2013, case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, para. 21.

²⁰ For a comprehensive analysis, especially in relation to criminal cooperation matters, see S. MONTALDO, *I limiti della cooperazione in materia penale nell'Unione europea*, Napoli: Editoriale Scientifica, 2015, pp. 464-469.

²¹ *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, cit., para. 52, expressly recalling *Åklagaren v. Hans Åkerberg Fransson*, cit.

²² Opinion of AG Bot, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, cit., para. 77 *et seq.*

²³ The national authority can consider, *inter alia*, judgments of international courts, such as the European Court of Human Rights, judgments of the courts of the requesting State and also decisions, reports or other documents produced by the Council of Europe or under the aegis of the United Nations, cf. Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*. See also S. MONTALDO, *On A Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 990 *et seq.*; N. LAZZERINI, *Gli obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato d'arresto*

Justice – supported by AG Bot²⁴ – has deemed that the content of the protection afforded to individuals by Art. 19 of the Charter is essentially the same of that provided in Art. 4 of the Charter, on the prohibition of torture and inhuman or degrading treatment. By reference to the *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* judgment, the Court of Justice has thus made clear that the standards of protection applicable in the case of a European arrest warrant also apply in relation to extradition requests received by Member States from third countries.

III. THE CLASH BETWEEN THE NATIONALITY EXCEPTION AND THE PRINCIPLE OF NON-DISCRIMINATION

The main point of interest in *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* is the Court of Justice's assessment of the compatibility with EU law of nationality exceptions enshrined in extradition agreements. The question raised by the Latvian Supreme Court concerned the possibility of extending the protection of nationals against extradition to habitual or permanent residents. There are examples, in international law, of treaties providing for the non-extradition of residents beside nationals, but they are usually restricted to certain countries (in particular Scandinavian States)²⁵ and, in any case, the protection is expressly granted by the extradition treaty itself.²⁶ Evidently, the referring court was also trying to draw an analogy with the EAW system, in which the requested Member State is under the obligation to refuse the surrender of nationals of another Member State having resided in its territory for a number of years should it apply this exception to its own nationals.²⁷

européo: la sentenza Aranyosi e C Aranyosi and Căldăraru, in *Diritti umani e diritto internazionale*, 2016, p. 445 *et seq.*

²⁴ See Opinion of AG Bot, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, cit., para. 83, affirming that the methodology defined by the Court in relation to the European arrest warrant can be transposed to the case in which the Member State receiving the extradition request from a third country must ascertain the requirements sets forth in Art. 19, para. 2, of the Charter.

²⁵ See Z. DEEN-RACSMÁNY, *Modernizing the Nationality Exception: Is the Non-Extradition of Residents a Better Rule?*, in *Nordic Journal of International Law*, 2006, p. 36 *et seq.* See e.g. Art. 6, para. 1, let. b) of the 1957 European Convention on Extradition; see also Art. 15, para. 3, let. a) of the 2002 London Scheme for Extradition within the Commonwealth.

²⁶ Mr Petruhhin had claimed before the Latvian authorities that he enjoyed the same protection as Latvian nationals by virtue of the agreement between Latvia, Estonia and Lithuania. However, it would have been difficult to recognise that the mentioned agreement was applicable in relation to a third country, given the principle of relativity of treaties.

²⁷ On the notion of residence and the requirements deriving from the principle of non-discrimination in relation to a EAW execution see Court of Justice, judgment of 17 July 2008, case C-66/08, *Szymon Kozłowski* [GC], paras 36-54; Court of Justice, judgment of 6 October 2009, case C-123/08, *Dominic Wolzenburg* [GC], paras 43-46; Court of Justice, judgment of 5 September 2012, case C-42/11, *João Pedro Lopes Da Silva Jorge* [GC], paras 40-45. See generally L. MARIN, "A Spectre is Haunting Europe": *European Citizenship in the Area of Freedom, Security and Justice*, in *European Public Law*, 2011, p. 705 *et seq.*; S.

Both the AG and the Court of Justice went beyond the question put forward by the national judge and addressed the issue from a wider perspective, by analysing, firstly, whether the nationality exception in extradition treaties²⁸ could be considered as a discrimination on grounds of nationality and, secondly, to what extent this derogation from the principle of non-discrimination could be justified under the pursuit of a legitimate aim, such as to avoid the risk of impunity of the requested person.

The rule on the non-extradition of nationals has its origins in national legislations of civil law countries. It has lately been codified in the majority of extradition agreements, although without reaching the status of international customary law.²⁹ The rationale behind the rule is traditionally identified in a general distrust in the legal system of third countries and in the need for the State to protect its own nationals from prosecution in other jurisdictions. At the same time, the nationality exception is usually deemed not applicable to individuals that have acquired the nationality of the requested State after the extradition request.

In the first part of the reasoning, the Court of Justice followed the AG opinion, by considering that the nationality exception, in so far as it produces a different treatment of EU citizens, amounts under EU law to a discrimination on grounds of nationality. In doing so, the rule protecting nationals against extradition also negatively affects the freedom of movement within the EU.³⁰

Many of the intervening States, together with the European Commission, had observed before the Court that the difference in treatment of EU citizens was justified under the need to combat impunity of persons suspected of having committed an offence abroad. Where extradition is requested by a third State, in fact, avoiding any room for impunity should be considered as a legitimate objective under EU law. Indeed, the Court had already recognised that preventing impunity can be considered an interest guaranteed by the EU legal order.³¹ Following this argument, AG Bot observed that a proper discrimination could only occur when the two categories of EU citizens are in a comparable situation. In the context of an extradition request, a comparable situation means that both EU citizens can be prosecuted in the requested EU Member State for

PEERS, *The European Arrest Warrant: The Dilemma of Mutual Recognition, Human Rights and EU Citizenship*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty-Years of Case-law*, The Hague: T.M.C. Asser Press, 2013, p. 533 *et seq.*

²⁸ Even if the Court of Justice made reference to “national rules on extradition” the nationality exception was also provided by Art. 62 of the Agreement of 3 February 1993 between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters (hereinafter, the 1992 extradition agreement between Latvia and Russia).

²⁹ J.M. THOUVENIN, *Le principe de non extradition des nationaux*, in *Droit international et nationalité. Colloque de Poitiers*, Paris: Pedone, 2012, pp. 131-132.

³⁰ *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, cit., paras 31-32.

³¹ Court of Justice, judgment of 27 May 2014, case C-129/14, *Zoran Spasic* [GC], paras 63-64, 72.

an offence committed in the requesting third State. Here is where the principle *aut dedere aut judicare* becomes relevant.

The *aut dedere aut judicare* principle is a long-established feature of international extradition law, according to which the State, when deciding to refuse the extradition of the requested person, has the duty to prosecute him according to its national rules. The principle has assumed in international practice various forms. In the so called "Hague Formula" (from the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft)³² the State is under an obligation to prosecute the responsible for the conducts described in the convention, but it has the faculty to avoid the execution of the obligation if it extradites the responsible to another requesting State party.³³ Conversely, there are cases in which the principle is applicable just in relation to a refusal to extradite on the ground of the nationality exception. For instance, the UN Convention against Organised Crime provides that a State refusing the extradition solely on the ground of nationality "shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution".³⁴ In order to abide by the principle and avoid incurring into international responsibility, the refusing State must have the capacity to exercise jurisdiction over the offences concerned. Thus, the question of the jurisdictional basis for prosecution – being them provided by international or national law – is a logical priority when dealing with the *aut dedere aut judicare* principle.

AG Bot had observed that, when the requested State has the jurisdiction to try and prosecute the offender, the nationality exception cannot be justified under EU law. In fact, the State has the possibility to extend the protection against extradition to all EU citizens, provided that it can respect the principle *aut dedere aut judicare*. In the latter case, indeed, the risk of impunity, which would justify the derogation from the prohibition of discrimination, would be overcome by the possibility for the requested State to directly prosecute the offender. The risk, however, persists when the Member State "has not made provision in its domestic law for jurisdiction allowing it to try a national of another Member State suspected of having committed an offence on the territory of a third State".³⁵ Since Latvia, according to its national criminal code, had no jurisdiction to try Mr Petruhhin for the conducts realised in the Russian territory, the AG concluded

³² See International Law Commission, Final Report on the International Law Commission, *The obligation to extradite or prosecute*, 2014, para. 15 *et seq.* The Hague Formula has been codified in a number of international conventions dealing with extradition, including the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³³ This kind of mechanism is accompanied by the duty to criminalise a certain conduct and to establish jurisdiction over it. See in this regard International Court of Justice, *Questions Relating to the Obligation to prosecute or Extradite* (Belgium v. Senegal), judgment of 20 July 2012, para. 74.

³⁴ Art. 16, para. 10, of the 2000 United Nations Convention against Transnational Organized Crime.

³⁵ Opinion of AG Bot, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, cit., paras 64-65.

that the difference in treatment deriving from the nationality exception should be considered legitimate.

The Court of Justice started from the same premise but it reached quite an opposite conclusion. Considering that the nationality exception certainly constitutes a difference in treatment prohibited under Art. 18 TFEU, it confirmed that the risk of impunity is a legitimate objective in EU law, which has to be attained by Member States according to the principle of necessity and proportionality, and thus by “less restrictive measures”.³⁶ According to the Court of Justice, the principle *aut dedere aut judicare* provides a guidance to identify less restrictive measures, in so far as it allows to extend the protection against extradition to other EU citizens provided that at least one Member State has the jurisdiction to prosecute the offender. Here the Court of Justice deviates from AG Bot’s opinion, by affirming that, within the EU legal order, even in the case the requested Member State has no jurisdiction over the offender’s conduct, it can always resort to the EAW mechanism, in order to surrender the offender to the Member State possessing the jurisdiction to prosecute him. This would generally be the State of nationality and in fact the Court of Justice noted that Latvia could have surrendered Mr Petruhhin to the competent Estonian authorities for the purposes of prosecution. Moreover, Member States requested of extradition by a third country can also resort to the EU’s exchange information system in order to identify which Member State can exercise jurisdiction over conducts committed abroad.³⁷ The application of all the cooperation and mutual assistance instruments provided by EU law will thus be sufficient to strike the balance between the necessity to avoid the risk of impunity and the guarantee of fundamental freedoms and principles of EU law.

IV. CONCLUSIONS

The *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* case exemplifies how complex the balance between EU law obligations and the execution of international agreements concluded with third countries can be for Member States.

It is somehow surprising that neither the referring court nor the Court of Justice mentioned Art. 351 TFEU, the so called ‘subordination clause’, which gives precedence over EU law to Member States’ international commitments assumed before the 1 January 1958 or before their accession. Since Latvia became a Member of EU only on 1 May 2004, it would have been reasonable to consider its treaty with Russia as a prior agreement prevailing on EU law obligations under Art. 351, para. 1, TFEU.³⁸ The reason for avoiding any reference

³⁶ *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, cit., para. 38.

³⁷ *Ibidem*, para. 48.

³⁸ The Court can also reformulate the questions referred as to include aspects of EU law not expressly addressed by the national judge. See K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, p. 235. See also Court of Justice, judgment of 23 February 2006, case C-

to the subordination clause could have resided in the will to exclude any possible conflict between the latter and fundamental rights of EU citizens such as the protection against discrimination. It is to be recalled, in fact, that in the *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* case the Court of Justice made clear that international obligations of Member States, even when covered by Art. 351 TFEU, cannot derogate from fundamental rights guaranteed within the EU legal order.³⁹

However, Art. 351 TFEU does not merely provides for a derogation to the principle of primacy of EU law,⁴⁰ but instead it also establishes certain obligations Member States have under EU law in relation to conflicting treaty obligations. In particular, according to Art. 351, para. 2, TFEU, to the extent that the agreement is incompatible with the Treaties, Member States are required “to take all the appropriate steps to eliminate the incompatibilities established”. Moreover, Member States “shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude”.⁴¹ Among these steps, Member States can first of all attempt a consistent interpretation of treaty provisions with obligations deriving from EU law.⁴² Beside this, the Member State concerned have to amend the incompatible treaty provision by entering into negotiation with its counterpart. The Court, however, has qualified the provision of Art. 351, para. 2, TFEU as an obligation of result, so that, when amendments are not suitable to solve the conflict or when an agreement with the third country concerned is not reached, Member States have to terminate the treaty.⁴³

As already observed, in the *Petruhhin* judgment the Court of Justice has refrained from expressly qualifying the relationship between the principle of non-discrimination and the nationality exception of the extradition agreement as a conflicting one. In the last paragraph, however, I have tried to demonstrate that such a conflict – in a norma-

513/13, *van Hilten-van der Heijden*, paras 23-27; Court of Justice, judgment of 10 February 2011, joined cases C-307/09 to C-309/09, *Vicoplus et al.*, paras 22-25.

³⁹ See Court of Justice, judgment of 3 September 2008, joined cases C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, para. 304, where the Court stated that Art. 351 TFEU “may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights”.

⁴⁰ Cf. R. SCHÜTZE, *An Introduction to European Law*, Cambridge: Cambridge University Press, 2012, p. 138.

⁴¹ These duties also derive from the principle of sincere cooperation enshrined in Art. 4, para. 3, TEU. See P. KOUTRAKOS, *EU International Relations Law*, Oxford: Hart Publishing, 2015, p. 324; see also Opinion of AG Maduro delivered on 10 July 2008, joined cases C-205/06 and C-249/06, *Commission v. Austria and Commission v. Sweden*, paras 33-34.

⁴² Court of Justice, judgment of 18 November 2003, case C-216/01, *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*, para. 169.

⁴³ Provided that the termination – usually made by means of a denunciation – is possible under international law. See Court of Justice, judgment of 4 July 2000, case C-62/98, *Commission of the European Communities v. Portuguese Republic*, para. 34.

tive sense – exists and it can extend to a wide range of Member States' extradition agreements concluded with third countries. This implies that, should these agreements fall within the temporal scope of application of Art. 351, para. 2, TFEU, Member States will be under the obligation to amend them in order to include a protection for all EU citizens having exercised their freedom of movement or, as a last resort, to terminate them. This could appear as a rather drastic solution, but by applying Art. 351 TFEU the Court of Justice could have at least taken the opportunity to clarify the scope and the content of Member States' obligations in relation to extradition agreements conflicting with EU law.

Obviously neither the AG nor the Court of Justice could have addressed the issue posed by the *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* case specifically from the perspective of international law, especially in the light of the limits to the Court of Justice's jurisdiction.⁴⁴ It is quite evident, though, that the extension of the protection provided by the nationality exception to EU citizens – against the terms of the bilateral treaty – could be considered by third countries as a violation of the extradition agreement. Although the application made by the Court of Justice of the international obligation to prosecute or extradite has been used to establish the precedence of internal mechanisms of cooperation – such as the EAW – over extradition agreements, this precedence can be justified by Member State on the international level provided that at least one EU Member State has the jurisdiction to prosecute the offender. In such a case, in fact, the refusal to extradite the offender would be justified by the opening of a prosecution proceeding in one of the Member State. This solution, however, is not a conclusive one.

It seems, in fact, that the Court of Justice considered the *aut dedere aut judicare* principle as a general principle applicable to any situation. However, this is not the case in the international legal order, within which the principle has not acquired a customary nature, given the fragmented practice in relation to its codification.⁴⁵ It is thus clear that, notwithstanding the fact that in the *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra* case the principle was applicable,⁴⁶ there could be situations in which it has no relevance. What will happen in those cases remains an unsettled ques-

⁴⁴ The Court has repeatedly confirmed its lack of competence to interpret international agreement to which the EU is not a party. E.g., with regard to the 1951 Geneva Convention on Refugees, Court of Justice, judgment of 17 July 2014, case C-481/13, *Mohammad Ferooz Qurbani*, paras 22-23.

⁴⁵ International Law Commission, *The obligation to extradite or prosecute*, cit., para. 49 *et seq.* An international customary norm on the *aut dedere aut judicare* principle could perhaps be established in relation to certain specific crimes, such as terrorism or torture. See A. CALIGIURI, *L'obbligo aut dedere aut judicare nel diritto internazionale*, Milano: Giuffrè, 2012, p. 225 *et seq.*

⁴⁶ Even if no mention of such a clause is to be found in the reported provisions of the Latvia-Russia extradition agreement. The applicability of the principle could however be derived from the UN Convention against Transnational Organised Crime, since Mr Petruhhin was suspected of having participated in a transnational large-scale drug trafficking organisation.

tion. Following the Court of Justice's reasoning, this will essentially depend on the applicability of the *aut dedere aut judicare* principle in the specific case. In cases where the principle is not enshrined in the bilateral treaty or is not anywhere else provided, it could not be invoked to justify the extension of EU citizenship rights *vis-à-vis* third States.⁴⁷

⁴⁷ The same holds true for situations in which no Member State of the EU has jurisdiction to prosecute the offender. However, since most of European national legislations provides for active nationality as a ground for the exercise of criminal jurisdiction, this remains an unlikely scenario.

