



INSIGHT

GENERALSTAATSANWALTSCHAFT BERLIN: A FURTHER DEVELOPMENT OF EXTRADITION RULES OF UNION CITIZENS TO THIRD COUNTRIES

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ABSTRACT: Case C-398/19 *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)* introduces relevant developments to the case-law on extradition of Union citizens to third countries. The Court of Justice establishes that the rules defined in its previous case-law apply to a Union citizen who has acquired the nationality of a Member State after having moved to another Member State. However, it denies the existence of two further obligations stemming from EU law: namely the duty to request additional information from the third State to enable the home Member State to decide on the surrender of its national for prosecution purposes and secondly, the host Member State's duty to refuse extradition and take charge of the prosecution if admissible under its national law. This *Insight* analyses the reasoning of the Court and the Advocate General, discusses the case in light of the previous jurisprudence, and offers some reflection on the practical issues arising from the implementation of the "*Petruhhin* doctrine".

KEYWORDS: EU citizenship – extradition – *Petruhhin* doctrine – European Arrest Warrant – freedom of movement – discrimination.

I. INTRODUCTION AND FACTS OF THE CASE

In December 2020, the Court of Justice delivered its judgment in *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*,¹ on the issue of extradition of a Union citizen and the related obligations of the Member States. This preliminary ruling constitutes a development of the so-called "*Petruhhin* doctrine",² since it offers relevant clarifications about obligations incumbent upon Member States. The Court established in *Petruhhin* that when a Member State (hereafter "host Member State") is requested to extradite a

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¹ Case C-398/19 *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)* ECLI:EU:C:2020:1032.

² In addition to the rulings considered hereafter concerning extradition for the purposes of conducting criminal prosecution, the Court has used a similar line of reasoning in case the Union citizen was requested by a third State with a view to enforce a sentence, such as in Case C-247/17 *Raugevicious* ECLI:EU:C:2018:898.



Union citizen, firstly, it must inform his/her Member State of nationality (hereafter “home Member State”). Secondly, the home Member State can require the surrender of the person to be prosecuted, according to the rules defined in Framework Decision 2002/584 on the European Arrest Warrant, subject to the condition that its domestic law allows for the prosecution of the offences committed aboard.³ However, Union citizens staying in a host Member State can be extradited to a third country provided that the home Member State has been duly informed, and does not require the surrender of the person.⁴

The subject of the extradition request in *Generalstaatsanwaltschaft Berlin* is BY, a Ukrainian national, who has been residing in Germany since 2012, and who acquired Romanian nationality in 2014 despite never having lived in that country. So, at the time of the proceedings, BY had both Ukrainian and Romanian nationalities. In 2016, a Ukrainian court required his extradition to the German authorities with the aim of conducting criminal prosecution for misappropriation of funds of a state-owned enterprise in Ukraine.⁵ The extradition procedure involving Germany and Ukraine is governed by the European Convention on Extradition, signed within the framework of the Council of Europe. In line with *Petruhhin*, the German prosecutor informed the Romanian Ministry of Justice of the purpose of assessing whether the home Member State was willing to take charge of BY’s criminal prosecution, and whether that would have been possible under its domestic law. Romanian authorities replied that they could determine the possibility of conducting criminal prosecution only if asked to do so by Ukraine, and on the basis of additional evidence that had to be sent by German authorities.⁶ Since the referring court had some doubts concerning the extent of Member States obligations, it stayed the proceedings and requested a preliminary ruling to the Court of Justice.⁷

This *Insight* examines in turn the three main issues of the case. First, applying the “*Petruhhin* doctrine” if a person has acquired Union citizenship *after* having moved to a host Member State. Second, the existence of a duty incumbent upon those Member States involved to request additional evidence from the third State for the purposes of assessing whether the home Member State can conduct criminal prosecution. Third, whether the host Member State is obliged to refuse the extradition request and conduct the criminal prosecution itself, if that is admissible according to its domestic law. The conclusive remarks are a brief illustration of the contribution of this preliminary ruling to refine the Court’s approach to EU extradition law.

³ Case C-182/15 *Aleksei Petruhhin* ECLI:EU:C:2016:630 para. 50.

⁴ Case C-191/16 *Romano Pisciotti v Bundesrepublik Deutschland* ECLI:EU:C:2018:222 para. 56.

⁵ *Generalstaatsanwaltschaft Berlin (Extradition vers l’Ukraine)* cit. paras 10-11.

⁶ *Ibid.* para. 13.

⁷ *Ibid.* para. 21.

II. FINE-TUNING SETTLED CASE-LAW: THE COURT'S JUDGMENT

II.1. THE SCOPE OF UNION CITIZENSHIP IN EXTRADITION CASES

The first question referred to the Court of Justice concerns the application of art. 18 TFEU prohibiting discrimination on grounds of nationality and art. 21 TFEU on the freedom of movement of Union citizens to the case at issue. The central matter at stake here is that BY obtained Union citizenship *after* having moved to Germany. This issue is crucial not only to determine the rights that BY can enjoy as a Union citizen, but also to establish whether *per se* the case falls within the scope of EU law.

The Court follows its previous jurisprudence arguing that the crucial element in determining the application of EU law, and consequently the possibility of enjoying the rights established in art. 18 and 21 TFEU, is the fact that the Union citizen is lawfully resident in the host Member State. Also, the Court considers that the effectiveness of the fundamental status of Union citizenship would be hampered if EU law was deemed not applicable in the case of a third country national who acquired Member State citizenship, and therefore Union citizenship as well, after having moved to another Member State.⁸ Moreover, as already stated in *Raugevicius*, the fact that the wanted person is also a national of the third State requesting extradition does not affect this conclusion.⁹ In essence, the specific point in time when Union citizenship has been obtained is not relevant for the purposes of determining the application of EU law.¹⁰ Therefore, the Court confirms that the two above-mentioned articles apply to BY's situation.

II.2. THE LIMITS OF MEMBER STATES DUTY TO REQUEST ADDITIONAL INFORMATION FROM THE THIRD STATE

The second question deals with the exchange of information among the three States concerned and in particular the obligation of the Member States involved to request the criminal investigation file from the third State. The Court of Justice confirms the assessment and rules established in its previous judgments. However, it excludes the Member States' obligation to request this type of additional documentation from the third State.

This section discusses two relevant aspects in depth, namely the influence of practical difficulties that Member States may encounter when applying the "*Petruhhin* doctrine" on the reasoning of the Court, and the arguments supporting its answers.

The first innovative element of the judgment is the Court's increased attention towards practical issues that can emerge in the actual implementation of the "*Petruhhin* doctrine". Some critical elements that risk hampering the procedure established by the

⁸ *Ibid.* paras 29-31.

⁹ *Ibid.* para. 32.

¹⁰ Case C-398/19, *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*, opinion of AG Hogan, para. 76.

Court are, for instance, the lack of adequate information to determine whether prosecution is possible, issues concerning the third State's consent to transmitting the documents, absence of set deadlines for the home Member State to reply, and potentially problematic delays especially if the wanted person is held in custody.¹¹ Despite the language used by the Court being quite vague, *Generalstaatsanwaltschaft Berlin* provides some indication concerning these issues. In fact, the judgment clarifies that the information duty incumbent upon the host Member State towards the home Member State includes the notification of the extradition request, the transmission of "all the matters of fact and law communicated by the third State", respecting the confidentiality required by that State. Furthermore, it is under the duty to keep the home Member State authorities informed about "any changes in the situation of the requested person that might be of relevance [...]".¹² In addition, in order to ensure legal certainty, the Court indicates the host Member State should impose a time limit for the home Member State to issue a European Arrest Warrant, considering all the circumstances of the case, in particular the fact that the person is in custody. At the expiry of that time period, the host Member State is allowed to execute the extradition procedure if the home Member State has not adopted a formal decision concerning the issuance of the European Arrest Warrant.¹³

The second issue to be examined regarding this part of the judgment concerns the Court's answer, which states that EU law does not impose on the Member States involved an obligation to request the criminal investigation file from the third State. Such an answer might appear at odds with other indications of the Court, where it is claimed that the home Member State must be "put in a position" to determine whether it can issue a European Arrest Warrant for the purposes of criminal prosecution.¹⁴ It is questionable to what extent the home Member State can be deemed able to decide whether to take charge of the criminal proceeding if it lacks the necessary information to do so. This issue is not only relevant in the case at stake, where Romanian authorities report they are only able to perform this assessment if they have access to incriminating evidence,¹⁵ but also in other Member States. As mentioned in the previous paragraph, lack of sufficient information to start the criminal proceedings constitutes a generalised problem in implementing the "*Petruhhin* doctrine". In fact, it could be argued that the obligation to request the criminal investigation file is the logical consequence of the duty incumbent upon the host

¹¹ See Eurojust and European Judicial Network, Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries of 3 December 2020, Document 2020/00263 12-16; A Pozdnakova, 'Alekssei Petruhhin: Extradition of EU Citizens to Third States' European Papers (European Forum Insight of 18 April 2017) www.europeanpapers.eu 216-217; *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*, opinion of AG Hogan, cit. paras 59-65.

¹² *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)* cit. para. 48.

¹³ *Ibid.* paras 54-55.

¹⁴ *Ibid.* para. 47. See also *Romano Piscioti v Bundesrepublik Deutschland* cit. para. 56.

¹⁵ *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)* cit. para. 17.

Member State to inform the home Member State. The apparent ambiguity between this claim and the Court's answer is due to a lack of legal basis under EU law that could justify imposing such an obligation. In addition, two other aspects have guided the Court's reasoning so far, and allow for the restriction of the rights afforded by virtue of the Union citizenship. The first one is the objective of preventing impunity, which in the Court's opinion could be undermined by the delays and complexities that the procedure risks being subject to. The second element is the importance attached to the sovereign discretion that Member States enjoy in criminal matters, including in their decision to request further documentation from the third State.¹⁶ In fact, according to the Court, while both Member States are not obliged to request the criminal investigation file from the third State, this possibility is not explicitly precluded.

All in all, the Court has developed a compromise. The scope of the information duty of the host Member State is limited to avoiding any asymmetry of information between the two Member States, and it is fulfilled when it transmits the documentation at its disposal to the home Member State, as well as communicating any subsequent relevant information. At the same time, Member States retain in principle the possibility to determine whether it is appropriate to request further evidence from the third State. The judgment appears to suggest implicitly that Member States should consider the avoidance of impunity as a compelling rule, when carrying out this assessment.

II.3. MEMBER STATES OBLIGATION TO REFUSE EXTRADITION AND CONDUCT CRIMINAL PROSECUTION

The final part of the judgment deals with the question on the existence of the host Member State's obligation to deny extradition and conduct the criminal prosecution of the Union citizen concerned if this is possible under its national law. In fact, various Member States, including Germany, could exercise the so-called vicarious jurisdiction. This means that their domestic law allows for the prosecution of accused persons whose extradition is not possible, without the need to acknowledge a connection between the offence or the offender and the Member State where the trial takes place.¹⁷ In the first place, this section provides an overview of the Court's answer and the Advocate General's Opinion; secondly, it briefly engages with academic literature on previous case-law concerning extradition of Union citizens to third countries.

The Court starts its reasoning arguing that "the appropriateness of conducting a prosecution of that citizen on the basis of national law, in the light of all the circumstances of the particular case, including the prospect of that prosecution resulting in a conviction, taking account of the evidence available" rests within Member States discretion in criminal matters. In addition, it reiterates that the host Member State's obligation is limited to as-

¹⁶ *Ibid.* paras 50-52.

¹⁷ MJ Costa, 'The emerging EU extradition Law. Petruhhin and beyond' (2017) NJECL 201.

sessing whether it can adopt measures that are less detrimental to the person's right to free movement and residence, so that he/she is surrendered to the home Member State rather than to the third State. Hence, the Court rules that EU law does not impose a duty on the host Member State to refuse extradition and prosecute the wanted person.¹⁸

The Advocate General claimed that this obligation would also be incompatible with Member State's other international obligations.¹⁹ Moreover, such a restriction to the freedom of action in criminal matters could decrease the confidence of third States, that would be unwilling to enter into agreements of mutual legal assistance with Member States. In turn, such a situation would not be acceptable since it risks undermining the Union's objective of ensuring the development of an area of freedom, security and justice.²⁰

In this part of the judgment, the similarities with *Pisciotti* are evident, since the issue at stake is almost identical and the Court uses the same arguments to justify its stance. In both cases, the Court considers the surrender to the home Member State as the solution which allows for the minor restrictions of Union citizens' rights. When this is not possible, according to the Court, the second-best option is that of granting extradition to the third State. Such an approach has already been criticised in the literature,²¹ since it does not take into account the option of prosecuting Union citizens in the host Member State. This solution could be preferred to extradition, since it would restrict Union citizens' rights less.²² This stance can be justifiable because it would correspond to the subsidiary protection that Member States must afford to Union citizens when their home Member States cannot do so. Moreover, it would respect the accused person's interest in being protected during trial by a common set of safeguards shared at EU level; and contribute to prevent impunity.²³

Therefore, this ruling confirms the assumption that the protection afforded by Union citizenship against extradition does not automatically follow from this status, although it can be subordinated,²⁴ meaning that it can for instance be balanced with the need to prevent impunity. Also, the judgment is a further example of the particular interpretation that the Court gives to the *aut dedere aut judicare* principle, which is used

¹⁸ See *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)* cit. paras 65-67.

¹⁹ In the case at stake, the European Convention on Extradition allows signatory parties only to refuse the surrender of their own nationals, but not of foreign citizens. This could be the case also in other extradition agreements.

²⁰ See *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*, opinion of AG Hogan, cit. para. 105.

²¹ See, for instance, S Coumts, 'From Union citizens to national subjects: *Pisciotti*' (2019) CMLRev 532; M Böse, 'Mutual recognition, extradition to third countries and Union citizenship: *Petruhhin*' (2017) CMLRev 1796; and S Saluzzo, 'Impunity and EU or Member States' Extradition Agreements with Third Countries' in L Marin and S Montaldo (eds), *The Fight Against Impunity in EU Law* (Hart Publishing 2020) 307

²² See S Coumts, 'From Union citizens to national subjects: *Pisciotti*' cit. 532.

²³ See M Böse, 'Mutual recognition, extradition to third countries and Union citizenship: *Petruhhin*' cit. 1794-1796.

²⁴ See MJ Costa, 'The emerging EU extradition Law. *Petruhhin* and beyond' cit. 199.

as “a guidance to identify less restrictive measures”.²⁵ In turn, this leads to prioritising the option of prosecuting the offence rather than extraditing the wanted person.²⁶ This premise is indeed at the basis of the “*Petruhhin* doctrine” and it is not questioned in the present case, since the obligation to give the possibility to the home Member State to prosecute the offence remains untouched. However, *Generalstaatsanwaltschaft Berlin* calls for a refinement of the consequent claim according to which Union citizens would be protected against extradition if the offence is prosecuted in at least one EU Member State.²⁷ In fact, the case examined in this *Insight* implicitly specifies that such a guarantee must be ensured only if the prosecution takes place in the home Member State, whereas the host Member State is not obliged under EU law to afford this type of protection. Thus, it can be concluded that, once again, the Court favours the interest of the home Member State to choose to protect its own nationals, rather than protecting Union citizens’ rights derived by the EU legal order.²⁸

III. CONCLUSIVE REMARKS

Generalstaatsanwaltschaft Berlin contributes to the expansion of the Court of Justice case-law on the issue of extradition of Union citizens to third States and to a more detailed determination of the procedure applicable in extraditions to third countries. On one hand, the Court confirms the main elements established in its previous judgments. On the other, it excludes certain obligations from the scope of Member States duties in extradition cases. These brief final considerations aim at summing up the main innovative elements of the judgment, as well as discussing it within the broader jurisprudence of the Court on the same issue, in order to identify points of continuity and divergences with the previous case-law.

Firstly, the *Generalstaatsanwaltschaft Berlin* has managed to include people that have acquired Union citizenship after having moved to a host Member State within the scope of the rights granted by EU law and consequently within the rules regulating extradition of Union citizens to third States. Consequently, the relevance of the present judgment is that it widens the number of situations in which the “*Petruhhin* doctrine” applies, thus empowering Union citizenship status.

Secondly, the Court has touched upon practical aspects and problems that can arise in the implementation of the “*Petruhhin* doctrine”. In fact, it has imposed further

²⁵ See S Saluzzo, ‘EU Law and Extradition Agreements of Member States: The *Petruhhin* Case’ European Papers (European Forum of 21 March 2017) www.europeanpapers.eu 444.

²⁶ See MJ Costa, ‘The emerging EU extradition Law. *Petruhhin* and beyond’ cit. 199.

²⁷ This analysis is provided in MJ Costa, ‘The emerging EU extradition Law. *Petruhhin* and beyond’ cit. 199; and S Saluzzo, ‘Impunity and EU or Member States’ Extradition Agreements with Third Countries’ cit. 307.

²⁸ This argument is presented with reference to *Pisciotti* in S Coutts, ‘From Union citizens to national subjects: *Pisciotti*’ cit. 536.

rules on Member States concerning the information to be transmitted and deadlines to be set regarding the home Member State's reply. These innovations better define the limits of the duty incumbent upon the host Member State in order to keep the home Member State informed of the situation. Nevertheless, the Court has left national authorities considerable room for manoeuvre concerning the ability to request further evidence from the third State, without determining an obligation to do so *a priori*. This choice can be considered a further demonstration of the importance the Court attaches to Member States' sovereignty in criminal matters and the need to prevent impunity.

The third remarkable outcome of the case is that the host Member State's obligation to refuse extradition and undertake the criminal prosecution has been completely and explicitly ruled out. Despite the reasoning in *Pisciotti* which already showed a tendency towards that direction, the Court has removed any possible remaining ambiguity by deciding on this specific issue.

To conclude, *Generalstaatsanwaltschaft Berlin* is a logical continuation of previous judgments, especially considering the more restrictive character that the "*Petruhhin* doctrine" acquired in *Pisciotti*.²⁹ All in all, it appears that the Court is willing to protect the rights enjoyed by Union citizens, but only to the extent that they do not risk hampering other objectives, such as the prevention of impunity, or that they do not encroach upon the Member States sovereign choices in the domain of criminal justice. It remains to be seen how Member States will actually decide how to use their discretion in practice, as it is widely recognised by the Court of Justice.

²⁹ *Ibid.* 530.