

THE EFFECTS OF THE CASE LAW OF THE ECJ ON EXTRADITION

According to the program, I will do a brief presentation on the effects of the case law of the ECJ on extradition.

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In November 2020, Eurojust and EJM published a Joint report regarding the extradition of EU citizens to third countries, which is available on the Eurojust website

As you know, in 2016, the European Court of Justice, in a case known as “Petruhhin case”, introduced specific obligations for Member States that do not extradite their own nationals and receive an extradition request for the prosecution of an EU citizen who is a national of another Member State and has exercised his right to free movement.

The aim of this joint report was to collect information on the practical experience of national judicial authorities in this field and to identify the most relevant issues.

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It is important to focus now on the most relevant ECJ judgments in this field, identify on the slide.

First of all the Petruhhin case.

“(…) The Petruhhin case concerned a request for a preliminary ruling by the Latvian Supreme Court in the context of a request for extradition for prosecution by Russia addressed to Latvia, concerning an Estonian national. The CJEU was asked to interpret Articles 18 and 21 of the Treaty on the Functioning of the European Union (TFEU) and Article 19 of the Charter of Fundamental Rights of the European Union (the Charter) in relation to the execution of an extradition request.

In its judgment, the CJEU introduced an obligation to carry out a consultation procedure between the requested Member State and the Member State of nationality of the EU citizen, and clarified questions on a human rights assessment.(…)”¹

Regarding the consultation procedure, “(…) The CJEU stated that a law that provides for the non-extradition of a Member State’s own nationals – while allowing the extradition of EU citizens who are nationals of another Member State – constitutes unequal treatment and

¹ Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries, November 2020, pg. 7

gives rise to a restriction of freedom of movement within the meaning of Article 21 of the TFEU.

This restriction can be justified if it is based on a legitimate objective and if it is proportionate. The CJEU agreed that ‘preventing the risk of impunity for persons who have committed an offence’ is a legitimate objective in EU law. However, the CJEU also found that granting an extradition request is not the most proportionate measure to attain this aim. According to the CJEU, a more proportionate measure would be to apply all the cooperation and mutual assistance mechanisms provided for in EU criminal law. In the case at hand, this implied an obligation for the requested Member State to inform the Member State of nationality of the extradition request, to give that Member State the possibility to issue a European Arrest Warrant (EAW), as far as it has jurisdiction, and to give priority to that potential EAW over the extradition request.”(...)”²

Another point that I would like to emphasise is the purpose of the extradition request – if the request is to prosecution or to execution of a custodial sentence.

“(…) In *Raugevicius* case, which concerned an extradition request concerning an EU citizen for the purpose of the execution of a custodial sentence, the CJEU followed, to some extent, *Petruhhin*, but the outcome was different.

In line with *Petruhhin*, the CJEU confirmed that unequal treatment, which allows the extradition of an EU citizen who is a national of another Member State, gives rise to a restriction of free movement within the meaning of Article 21 of the TFEU; this can be justified where it is based on objective considerations and proportionate to the legitimate objective.

In *Petruhhin*, the CJEU had ruled that the requested Member State should give the Member State of nationality the possibility to issue an EAW.

In *Raugevicius*, the CJEU acknowledged that the principle of *ne bis in idem* may be an obstacle to the prosecution by a Member State of persons covered by an extradition request for the purpose of enforcing a sentence. However, the CJEU held that there are other mechanisms under national and/or international law that make it possible for those persons to serve their sentences ABROAD (for example the 1983 Convention on the Transfer of Sentenced Persons).

In light of the facts of this case, where the requested person was a long-term resident in the requested Member State, the CJEU did not follow the path chosen in *Petruhhin* or *Pisciotti* (consultation mechanism with the Member State of nationality). Instead, the CJEU concluded that the requested state was required to ensure that that EU citizen, if they reside permanently in its territory, receives the same treatment as that accorded to its own

² Cf note 1

nationals in relation to extradition. In other words, the requested Member State should explore the possibility that the requested person serve the sentence pronounced abroad on its territory. (...)”³

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About the **Human rights assessment**, “(...) The CJEU held that, where a Member State receives a request from a third country seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter. In line with the Aranyosi and Căldăraru judgment, the CJEU recalled that the requested Member State must base its assessment on information that is objective, reliable, specific and properly updated. (...)”⁴

Bearing in mind this decision and the others that followed in the cases I mentioned before, I would like to highlight the following points:

1. The duty of consultation with the Member State of nationality only arises if there is a legal basis for the extradition;
2. The obligation to inform the Member State of nationality of the extradition request only applies if the requested EU Member State prohibits the extradition of its own nationals (“nationality exception”);
3. The consultation procedure only arises if the requested person made use of the right of EU citizens to free movement.

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So at this point, I would like to focus on the most relevant issues identified by Eurojust and EJNI in the report and which can be divided into 2 categories:

1. Uncertainty on the scope of the CJEU’s case-law

- a. Lack of clarity as to the extent of the requested Member State’s obligations in case of an extradition request for the execution of a custodial sentence;
- b. Possible application of the consultation mechanism in cases that do not fulfil all the conditions of the CJEU’s case-law.

2. Practical and legal issues concerning the consultation procedure:

- a. Difficulty to identify the competent authorities in the Member State of nationality.

³ Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries, November 2020, pg. 8

⁴ Cf note 1

- b. Different practices relating to the required information to be provided to the Member State of nationality concerning the extradition request.
- c. Uncertainty as to which Member State should be responsible for the translation of the information provided to the Member State of nationality and bear its costs.
- d. Different practices relating to the time limits given for the decision by the Member State of nationality on whether to prosecute the requested person.
- e. Different practices relating to the type of assessment carried out by the Member State of nationality when deciding whether to prosecute the requested person.
- f. Uncertainty as to which judicial cooperation instrument will be used to prosecute in the Member State of nationality, particularly if the requirements for issuing a national arrest warrant and/or a European arrest warrant are not fulfilled.
- g. Relevance of addressing not only the question of the jurisdiction, but also that of which country is best placed to prosecute and consequently prevent impunity.
- h. Tensions between obligations stemming from EU law on the one hand and obligations stemming from bilateral and multilateral extradition treaties on the other hand.

3. The results of the consultation procedure:

- a. In the vast majority of analysed cases, the consultation procedure activated by the requested Member State did not lead to the prosecution of the EU citizen in their Member State of nationality. Such a mechanism appears to be beneficial only where parallel proceedings are already ongoing against the requested person in the Member State of nationality.

Eurojust and EJN can help to solve these problems:

- Identifying the competent authority.
- Transmitting the extradition request and facilitating the exchange of further information, with the Member State of nationality and the third country.
- Speeding up the procedure.
- Clarifying legal and practical issues.

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To conclude I would like to share some remarks about the most recent CJEU judgment regarding this matter on the Case C-398/19 Generalstaatsanwaltschaft Berlin which brought important further clarifications.

- Articles 18 and 21 TFEU must be interpreted as **being applicable** to the situation of a citizen to a national of a Member State, who is residing in the territory of another Member State and who is the subject of an extradition request sent to the latter one by a third State, **even where that citizen moved the centre of his life to that other Member State at a time when he did not have Union citizenship**;
- Articles 18 and 21 TFEU must be interpreted as meaning that **where the Member State of nationality has been informed** by other Member State of the existence of the request, **neither of those Member States is obliged to ask the third State requesting extradition** to send to them a copy of the criminal investigation file in order to enable the Member State of which that person is a national to assess the possibility that it might itself conduct a criminal prosecution of that person;
- Provided that the Member State of nationality was informed of the existence of the extradition request and of all the elements that might be relevant to the possibility of issuing a European arrest warrant, the Member State from which extradition is requested may extradite that person without being obliged to wait for a formal decision, where the Member State of nationality fails to issue such an arrest warrant before the expiry of a reasonable time limit imposed on it for that purpose by the Member State from which extradition is requested;
- The Member State to which a third State submits an extradition request for the purposes of a criminal prosecution of a Union citizen who is a national of another Member State is not obliged to refuse extradition and itself to conduct a criminal prosecution where its national law permits it to do so.

The report analysis confirms that there are still questions on the exact consequences of the CJEU's case-law regarding the extradition of EU citizens to third countries. Further clarification on some key issues could be helpful for practitioners.