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<http://hdl.handle.net/11067/7557>

<https://doi.org/10.34628/9ZZ0-NS50>

Metadados

Data de Publicação	2024
Editor	Universidade Lusíada Editora
Palavras Chave	Extradição - Países da União Europeia, Extradição - Jurisprudência
Tipo	article
Revisão de Pares	yes
Coleções	[ULL-FD] LD, s. 2, n. 31 (2024)

Esta página foi gerada automaticamente em 2024-11-14T18:23:46Z com
informação proveniente do Repositório

**«GREAT EXPECTATIONS»:
EXTRADITION TO THIRD COUNTRIES
FROM PETRUHHIN TO GENERALSTAATSANWALTSCHAFT
MÜNCHEN**

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DOI: <https://doi.org/10.34628/9ZZ0-NS50>

Gostaria de agradecer à Comissão Organizadora e particularmente à Professora Raquel Cardoso o convite muito honroso para participar neste evento na Universidade Lusíada do Porto, repleto de intervenientes distintos e dedicado ao desafiante domínio do Direito Penal Europeu. A jurisprudência do Tribunal de Justiça da União Europeia que proponho tratar, iniciada em 2016, resulta de uma intersecção entre aquele domínio e o da extradição clássica. Uma intersecção que ao tempo se me mostrou algo surpreendente, mas que era, bem vistas as coisas, inevitável.

1. It is well known that at first EU Criminal Law was mainly intent on exerting a repressive function, with the European Arrest Warrant (EAW) as its foremost instrument. This initial drive was arguably legitimate by design, for it was already a response to the drawbacks naturally brought by the freedoms created by the EU project itself. In time, however, it became clear that a disparity had settled in which needed rectifying, and it is now widely acknowledged that at one point EU Criminal Law did undertake to develop its protective function.

At present, it would seem that it is labouring towards fine-tuning the balance between those two conflicting functions (that of ‘sword’ and that of ‘shield’), which is but the normal challenge for any democratic criminal justice system – or, at any rate, criminal justice system *in the making* (if EU Criminal Law is not to be regarded as an actual system just yet).

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2. It was in the second phase mentioned above, in that ambience of individual rights being brought to the forefront, that the Court of Justice of the EU delivered its ruling in *Petruhhin* (C-182/15), in 2016,² the same year in which other, seemingly unrelated events were taking place, such as the enactment of the second wave of Directives on Procedural Rights in criminal and EAW proceedings, propelled by the Commission,³ and the momentous ruling of the Court of Justice in *Aranyosi & Căldăraru* (C404/15 and C659/15 PPU).⁴

Yet, as noted, a third phase ensued, dominated by a resolve to recalibrate EU Criminal Law after the impact of the former phase. And now – notwithstanding further breakthroughs in individual protection, both within the EAW scheme⁵ and insofar as concerns extradition to third States⁶ – the Court is for instance developing a body of case law on guarantees under which otherwise problematic EAWs might after all be granted.⁷ In the same vein, it has recently upheld that, for the purposes of the ‘two-step examination’ conceived in *Aranyosi & Căldăraru*, the absence of systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State (first step) already precludes the examination of the particular circumstances of the case (second step), such that the execution of the warrant cannot be refused on this ground.⁸ Moreover – which is the relevant issue for the purposes of this text –, the Court has made some adjustments to the *Petruhhin* doctrine which seem aimed at placating the practical difficulties it has purportedly brought.

Let us then address *Petruhhin* and the follow-up case law.

3. The basic facts of *Petruhhin* are well known: it involved an Estonian citizen who was arrested in Latvia owing to an extradition request issued by Russia. The fundamental question was that as to whether Member States must grant citizens of other Member States the same treatment as to their own citizens in

² Judgment of 6 September 2016, ECLI:EU:C:2016:630.

³ The Directive 2016/343 on the presumption of innocence and the right to be present at the trial; the Directive 2016/800 on juvenile defendants, and the Directive 2016/1919 on legal aid.

⁴ Judgment of 5 April 2016, ECLI:EU:C:2016:198.

⁵ See *v.g. E. D. L. (Motif de refus fondé sur la maladie)* (C-699/21), Judgment of 18 April 2023, ECLI:EU:C:2023:295.

⁶ Notably concerning what may be called the ‘external efficacy’ of EU law’s *ne bis in idem*: see – albeit somewhat autonomous in relation to the *Petruhhin* case law – *Bundesrepublik Deutschland (Notice rouge d’Interpol)* (C505/19), Judgment of 12 May 2021, ECLI:EU:C:2021:376, and *Generalstaatsanwaltschaft München (and ne bis in idem)* (C435/22 PPU), Judgment of 28 October 2022, ECLI:EU:C:2022:852.

⁷ See *v.g., Generalstaatsanwaltschaft Bremen* (C-220/18 PPU), Judgment of 25 July 2018, ECLI:EU:C:2018:589, and *Dorobantu* (C-128/18), Judgment of 15 October 2019, ECLI:EU:C:2019:857.

⁸ See *Puig Gordi and Others* (C-158/21), Judgment of 31 January 2023, ECLI:EU:C:2023:57, § 111.

the context of extradition, namely whether they should refuse to extradite them if in similar circumstances they would not extradite an own citizen, based on the classic nationality exception.

There was also the question as to whether the Charter of Fundamental Rights, namely the prohibition to extradite in case there is a risk of capital punishment, torture or ill-treatment, enshrined in Article 19 (2), applied to third States – a question that the Court answered in the affirmative. Only in this aspect – rightful though it most certainly was – the ruling was not really surprising, which is why the wide interest attracted by *Petruhhin* has focused on the dimension of it that concerned EU citizenship.

And on this dimension the Court stated, in a nutshell and roughly speaking, that: being liable to be extradited by another Member State is detrimental to the freedom of movement enshrined in Article 21 (1) TFEU (although in my view this will only be the case if the person was protected by a nationality exception in the Member State of origin to begin with); if the host Member State would not in a similar situation extradite an own national, then extraditing other EU citizens certainly constitutes a differentiation based on nationality; such a differentiation will amount to actual discrimination prohibited by Article 18 (1) TFEU unless other EU citizens are not in a situation comparable to that of own nationals in the light of the risk of impunity. Regarding the risk of impunity, the Court asserted that Member States generally have no jurisdiction to prosecute non-nationals for extraterritorial acts [I shall come back to this later], but they can and shall give the Member State of origin the opportunity to issue an EAW for its national.

The function herein bestowed on the EAW is, at the conceptual level, one of the more interesting aspects of *Petruhhin*: EU's landmark instrument of crime repression was now being used, not for its original repressive purposes, but in a protective manner. Of course, it should still serve a criminal law finality; it is not a train or a plane ticket back home. It does however present itself here as the lesser of two evils for the individual: if he must face criminal action somewhere, then in principle better in his own Member State or at any rate within the Union than elsewhere, outside of this common legal framework, with all that this entails. [Which, incidentally, in my view, justifies that the conditions for issuing and executing the EAW in these cases be construed very flexibly, even with recourse to analogy, for it operates *in bonam partem* here. An example: Portugal cannot issue an EAW or an extradition request based on active nationality, as this basis for jurisdiction requires the presence of the person in 'Portuguese territory';⁹ for the purposes of issuing an EAW with the ultimate aim of avoiding the extradition of an own national to a third State, that should be equated to 'any EU territory'.]

⁹ See Article 5 (1) (e) (i) of the Penal Code.

As with many other developments of EU Criminal Law carried out through the case law of the Court, that under analysis here brings to mind the idea of a chemical reaction: the entering of a given national norm (in this case, the classic nationality exception to extradition) into contact with free movement and equal treatment generates a new compound (in this case, something of a 'EU citizenship exception to extradition').

4. *Petruhhin* was met with enthusiasm by many authors, who saw in it a further step towards fully-fledged EU citizenship: '*civis europaeus sum*'! However, this view did not seem to capture the situation accurately. Due precisely to its structure of 'chemical reaction', *Petruhhin* was never meant to apply in each and every situation, on the strength of EU citizenship alone, but only insofar as, and to the extent that, the elements necessary for producing such a compound come into contact with each other. Notably: if the host Member State extradites its own nationals, then it may as well extradite other EU citizens, for in that case there is no discrimination. Thus, EU citizenship is a necessary, but not a sufficient condition for protection against extradition in other Member States.

Nevertheless, the nationality exception does still constitute a very symbolic element of the bond between citizens and their States, and now it was being given EU-wide projection. And *Petruhhin* was bold in other ways too: it was at once bringing EU law into a realm for which Member States generally held themselves exclusively competent, and potentially asserting the primacy of EU law over erstwhile public international law instruments concluded by Member States and third States [an issue which will be briefly touched upon further below]. All things considered, this ruling indeed was a landmark. The EU had exposed its citizens (not only them, of course, but mainly them) to extremely effective repressive mechanisms internally, within the space of the Union. Now it was raising obstacles to their exposure to external criminal justice systems – and to achieve that it was making use precisely of one of those internal mechanisms, the EAW. Very interesting no doubt.

5. And the Court kept going, with a set of rulings (all of which raise interesting issues that cannot be properly addressed here) which overall can be said to have extended the *situations* where the *Petruhhin* doctrine should apply: *Schotthoffer & Steiner* (C-473/15);¹⁰ *Pisciotti* (C-191/16);¹¹ *Raugevicius* (C-247/17);¹² *Ruska Federacija* (C-897/19 PPU).¹³⁻¹⁴

¹⁰ Order of 6 September 2017, ECLI:EU:C:2017:633.

¹¹ Judgment 10 April 2018, of ECLI:EU:C:2018:222.

¹² Judgment of 13 November 2018, ECLI:EU:C:2018:898.

¹³ Judgment of 2 April 2020, ECLI:EU:C:2020:262.

¹⁴ On this line of case law, with further references, see *Revista Portuguesa de Ciência Criminal*

However, the *obligations* befalling Member States in such *Petruhhin*-type situations remained unclarified, and in the meantime signals had arisen that the Member States were not enthusiastic about this case law. Which is very interesting: most Member States still generally refuse to extradite their own nationals; and yet, now that they are being provided with a long-armed nationality exception, that enables them to reach for their nationals in other Member States and thus avoid their extradition, they do not show much interest in using it. [Which I think says much about the nationality exception itself, but this is a different topic.]

In the same vein, the Council had called on Eurojust and the European Judicial Network to assess the state of play, and their joint report, published at the end of 2020, identified a number of practical difficulties and confirmed the lack of interest by the Member States, concluding that: “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.”¹⁵ All too often, the Member States of which the concerned person is a national do not issue an EAW because – quite simply – they have “[n]o interest” (*sic*).¹⁶

6. Then came *Generalstaatsanwaltschaft Berlin (Extradition vers l’Ukraine)* (C-398/19), concerning B.Y., whose extradition was requested to Germany by Ukraine.¹⁷ He was a Ukrainian national of Romanian ancestry who had been living in Germany since 2012 and had obtained Romanian nationality in 2014 without having ever resided in Romania. Based on the *Petruhhin* doctrine, Germany informed Romania of the extradition request, but Romania did not formally decide whether or not to issue an EAW. There were several points of interest in the case, notably the fact that when B.Y. moved to Germany in 2012 he was not yet a Romanian national and thus not a EU citizen, an aspect in which the ruling again extended the *scope* of application of *Petruhhin*. In addition, the Court provided relevant specifications on the functioning of the consultation procedure established therein, placating some of the practical difficulties and clarifying some

[RPCC] 29(2) (2019), pp. 345-387; RPCC 29(3) (2019), pp. 589-628; RPCC 30(1) (2020), pp. 139-165; RPCC 32(1) (2022), pp. 209-244.

¹⁵ “Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries”, The Hague, November 2020, p. 5. The report was then reflected later in the Commission’s work: see “Guidelines on Extradition to Third States”, C(2022) 3626 final, Brussels, 7 June 2022, p. 7 f.

¹⁶ *Ibid.*, p. 16 *et passim*.

¹⁷ Judgment of 17 December 2020, ECLI:EU:C:2020:1032.

of the doubts that had emerged in that regard.¹⁸ The main question, however, concerned the *obligations* befalling Member States.

Adding to the aforementioned resistance of the Member States to *Petruhhin*, Advocate General Hogan, in his Opinion on the present case, had propounded that *Petruhhin* be plainly reverted, abandoned.¹⁹ ‘Let’s call the whole thing off.’ This was based (not exclusively, but) largely on the argument that there is no discrimination in these cases, since (so the argument goes) host Member States do not generally have jurisdiction on extraterritorial facts committed by non-nationals, such that these individuals are not in a situation comparable to that of own nationals. I respectfully but strongly disagree.

In the first place – even leaving on the side the option of Member States of nationality issuing an EAW based on primary jurisdiction –, some Member States do have secondary (vicarious) jurisdiction which enables them to prosecute any acts for which they receive extradition requests that they cannot grant,²⁰ as is precisely the case with Portugal, as well as with Germany, which in this instance happened to be the host Member State. More importantly, the argument does not reflect the *nature* of the nationality exception. States do not have this rule in place in order to prosecute their nationals (they would not need it, as jurisdiction based on active nationality would suffice to that end); rather, in order to protect them from foreign criminal justice systems. This is why it is possible that a State be at the same time obliged to refuse extradition based on a nationality exception, but prevented from prosecuting based on active nationality: for instance, if the person was not yet a national of that State when the crime was committed (because, in order for there to be primary jurisdiction, the link between the acts and a given legal system must be present in the moment when the acts are committed).²¹ Thus, the nationality exception is a rule that takes the shape of a *privilege* conferred by States on their nationals. The exercise of jurisdiction, based on active nationality or otherwise, is a subsequent and indeed merely eventual issue. That being the nature of the nationality exception, it is crystal clear that it is prone to generating unequal treatment. At the very least when, as it was provenly the case, impunity can in the abstract be avoided within the EU. The Court of Justice

¹⁸ See esp. §§ 47 ff.

¹⁹ Opinion of 24 September 2020, ECLI:EU:C:2020:748, §§ 42-67 (although noting that at present only Ireland is “urging” the Court to “depart” from *Petruhhin*: § 42).

²⁰ Or at least ‘universal-like’ jurisdiction which enables them to prosecute a sizeable number of acts of a certain gravity. See the comparative analysis in *New Journal of European Criminal Law* 8(2) (2017), pp. 201 ff.

²¹ This is the case in Portugal. Not quite so in Germany, as § 7 (2) of the *Strafgesetzbuch* encompasses individuals who became German nationals after the act – which, however, seems to come conceptually closer to subsidiary jurisdiction than to (an extension of) primary jurisdiction based on active nationality, and which in any case was irrelevant for the purposes of the case at hand.

got this right in *Petruhhin*, and it was right to maintain this view in the present case, rebuffing the opinion of the Advocate General.

7. Unfortunately, the Court did not draw all due consequences of its own core understanding. It was faced with questions that were decisive to determine the actual significance of the *Petruhhin* doctrine, notably: whether the Member State of nationality must issue an EAW in order to satisfy the non-impunity condition and thereby avoid the extradition of his national to a third State; and whether the host Member State must prosecute the EU citizen itself, if it has jurisdiction to do so, in order to satisfy the non-impunity condition and thereby avoid his extradition to a third State. And it replied negatively to both questions.

As to the former, it did not quite address it directly (nor had it been formulated in such terms), but its reasoning arguably applies *a fortiori*.²² Regarding the latter, it explicitly held that the host Member State is not obliged to prosecute in order to avoid extradition. The Court began by reinstating the erroneous premise that Member States do not generally have jurisdiction in such cases. Providentially, however, Germany did have jurisdiction, and the referring court stated so, which the Court of Justice was therefore bound to accept at face value. No longer able to rely on that equivocal premise, the Court of Justice brought forward a new argument that dispelled the existence of an obligation to prosecute: the consequence of such an obligation would be that the host Member State “would be deprived of the opportunity to decide itself on 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. Accordingly, such an obligation would go beyond the limits that EU law may impose on the exercise of the discretion enjoyed by that Member State with respect to whether or not prosecution is appropriate in an area such as criminal law which falls, in accordance with the Court’s settled case-law, within the competence of the Member States, even though they must exercise that competence with due regard for EU law”.²³

Again, I respectfully but completely disagree with this view. When a nationality exception applies, a State has an ‘obligation to refuse extradition’. Only after refusing extradition will it decide whether or not to prosecute – be this decision based on opportunity, on legality or on something in between, which at any rate is a matter of its national law. If it decides *not* to prosecute, extradition does not become possible because of such a decision: the State will still be prevented from extraditing.

²² See *v.g.* §§ 50-51.

²³ § 65.

I accept that there being jurisdiction may be decisive for the situation of own nationals and that of other EU citizens to be comparable in view of the concern with impunity. I think that this concern is overstated in different ways – normative as well as pragmatic –, but I do accept that it may be relevant for the evaluation required by the EU law principle of equal treatment, much in the same way as it would for an evaluation of constitutionality under the principle of equality. However, the question whether or not a Member State ultimately does prosecute is irrelevant to the question whether or not extradition to the third State should be refused, because, as stated above, it is subsequent. When a State refuses extradition based on the nationality exception and subsequently contemplates prosecuting based on active nationality, it is not sure to actually prosecute. Not least of all because active nationality, although a primary basis for jurisdiction, is still conditioned by all the typical difficulties of any prosecution of extraterritorial acts. This situation is therefore identical to that of other EU citizens in *Petruhhin*-type cases, meaning that in *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)* the Court – although, truth be told, did save *Petruhhin* from sheer extinction – still admitted a breach of the principle of equal treatment.

At the risk of repetition but for the sake of clarity: by requiring Member States to refuse extradition to third States, EU law would not be imposing on them any obligation to prosecute, but simply expecting them to evaluate – after refusing extradition – whether they would indeed prosecute, which is precisely what they already do when they refuse extradition of an own national based on the nationality exception. By leaving to the discretion of the Member States the decision whether or not to refuse extradition of EU citizens to third States, all that this case law will have generated is an awkward new prerogative for Member States: although the refusal of extradition in these cases has been asserted in the name of core norms of EU law that have a strong dimension of subjective rights (free movement and equal treatment), Member States may choose to refuse it or not as they please, with no furtherance, therefore, of the subjective position of EU citizens, who do not know beforehand whether or not they will be treated equally when they exercise their free movement.

I understand that the approach taken by the Court in *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)* is probably sensible in the light of the attitude shown by the Member States and of the relation of the EU with (especially with *certain*) third States.²⁴ I do not wish to discuss to what extent pragmatic considerations should – much less whether in this case they actually did – play a relevant role. My claim is that, at the legal level, the ruling is flawed.

²⁴ A point regarding which the Court seems to have again retracted, in its recent ruling in *Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)* (C237/21), Judgment of 22 December 2022, ECLI:EU:C:2022:1017.

8. It may be worth sharing that I am not even an enthusiast of the nationality exception. Much to the contrary, I see no axiological bases for States not to extradite their own nationals *as a principle*, exclusively because they are their nationals, for acts committed elsewhere. Not currently, after the humanitarian function that the nationality exception was once entrusted to perform has been taken over by 'second-generation grounds for refusal' specifically aimed at protecting human rights.²⁵ That is precisely what the EU has accomplished internally, with the abolition of the nationality exception in the EAW system, which is one of the reasons why it has been so successful.

But if Member States still do refuse to extradite their own nationals to third States, and if equal treatment is an essential tenet of EU law, then I fail to see why Member States should be completely free to choose whether or not to refuse extradition of EU citizens falling under that protection. Although the refusal may be unpleasant from a diplomatic perspective and troublesome from a perspective of avoiding impunity, so fundamental are free movement and equal treatment to EU law and to the EU project as a whole that they should admit no compromise of this sort. If some impunity is thereby created – and as stated above this risk is probably overstated, but fair enough –, then let Member States reconsider their own nationality exceptions, for if there are no nationality exceptions there will be no discrimination in extraditing other EU citizens. If they do not – as they most likely will not –, then let this be a price to pay for avoiding the erosion of fundamental principles of EU law.

9. Afterword:

When the *Petruhhin* ruling was delivered I was so eager as to see in it the birth of a "EU extradition law"; after *Generaalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)* I claimed that the "death" of the *Petruhhin* doctrine was "foretold" all along – at least since *Pisciotti*, where the Court gave a clear signal that it would not be acknowledging an actual obligation to avoid extradition to third States. I do not see an incoherence there. I still think that *Petruhhin* opened a new segment within European Criminal Law, an area where primary EU law and traditional international cooperation in criminal matters intersect. The many rulings that have been subsequently delivered and the variety of issues touched upon by that intersection lend strength to this view. Only I do also think that this 'EU extradition law' is not developing too well.

As if the above proclamations were not enough, I am now speaking of "great expectations". Because I thought that this reference might help illustrate

²⁵ See *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, Leiden: Brill, 2019, 547-559.

the faltering evolution of this case law. And because I am still hopeful that the Court of Justice might draft an alternative – if itself not entirely satisfying – ending to this tale.