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Abstract: The ECJ has rendered – in occasion of the Petruhhin case - its first decision regarding the extradition of EU citizens by EU Member States to third States. While there are two more cases with similar legal issues pending before the Court, this decision provides a first guidance on how to deal with these situations. The Court has ruled clearly in favour of citizenship and non-discrimination, which in regards of the post-Zambrano trend is quite surprising. In practical terms, the decision obliges the Member States detaining an EU citizen to cooperate with the home Member State of the accused before extraditing him to the third State that requested the extradition.

Structure: Introduction. **1.** Context: Extradition in the EU. **2.** Context: Non-discrimination in the EU. **3.** Petruhhin Case: Facts and Preliminary Questions. **4.** Petruhhin Case: The Decision. **5.** Impact of the decision for the future of EU law, in particular on other pending cases. **6.** Conclusion.

Introduction

On September 6 2016, the Court of Justice of the European Union ("ECJ" or "The Court") rendered a long awaited decision. Following a request for a preliminary ruling by the Latvian Supreme Court,[1] the ECJ - sitting as a Grand Chamber - answered three questions dealing with the extradition of EU-citizens.[2]

In an always more globalized and interconnected world, crime gets more international as well.[3] Extraditions are thus becoming more important and becoming an essential tool to fight delinquency.[4]

The EU has reacted to this evolution and has undertaken several steps.

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* Peer reviewed.

1 The request was made by decision of 26 March 2015 by the *Augstākā tiesa* and received by the Court on the 22 April 2015.

2 ECJ, 6 September 2016, *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*, case C-182/15.

3 See the on this the analysis available at *https://www.anwalt.de/rechtstipps/internationales-strafrecht-das-verbrechen-kennt-keine-grenzen_005605.html.* Data in the context of Interpol for the year 2014 are available at: *https://static.mediapart.fr/files/2016/03/07/gi02-02-2015-fr-web.pdf* while statistics on the use of the European Arrest Warrant are available at: *https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do* [Accessed 2 February 2017].

4 See for instance the report on the administration of justice by the Italian Ministry of Justice, Inauguration of the Judicial Year 2015, available at: *https://www.giustizia.it/resources/cms/documents/Anno_giudiziario_2015_DAG.pdf* [Accessed 2 February 2017].

First, it regulated intra EU cases through the European Arrest Warrant (EAW), over ten years ago via a framework-decision.[5]

Second, it started signing extradition and mutual legal assistance on criminal matters agreements with third countries, most notably with the United States[6] and Japan.[7]

However, these steps were not enough to clarify a very important issue, which the present ECJ decision finally addresses.

It is a well-settled principle in the extradition practice that States do not extradite their own nationals. A vast majority of States worldwide have an according provision in their national laws and such clauses are present in most international treaties.[8]

The EAW introduced a big exception to this principle, as EU Member States cannot – in principle - refuse any longer the extradition of their own citizens, who have committed a serious crime in another EU Member State, relying solely on the fact that they are their own nationals.[9]

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[5] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, [2002] OJ L190/1 (EWA-Decision). According to art. 34 TEU, as amended by the Treaty of Nice, the Council adopted framework-decisions *"for the purpose of approximation of the laws and regulations of the Member States"*. Clearly inspired by the directives, these acts *"shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods."* Unlike the directives, *"[t]hey shall not entail direct effect"*.

Framework-decisions were used in the third pillar, notably in in police and judicial co-operation in criminal justice matters. However, since Lisbon Treaty entered into force in 2009, and with the ending of the pillars structure, this kind of acts was abolished and does not exist anymore in the EU. For a more detailed analysis of such instruments, see L. DANIELE, *Diritto dell'Unione Europea*, Milano, 2014, pp. 226-233.

Before 2002, the European Convention on Extradition, signed in Paris on 13.12.1957, governed extradition between EU Member States. The Convention still plays a role for extraditions to non-EU Council of Europe Member States as well as to some third States, such as South Africa, South Korean and Israel.

[6] Agreement on extradition between the European Union and the United States of America of 19 July 2003, OJ L 181/27, approved by the Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America, OJ L 291/40 of 7.11.2009.

The EU signed the agreement in 2003, but it only entered into force in 2010.

[7] Council Decision 2010/88/CFSP/JHA of 30 November 2009 on the signing, on behalf of the European Union, of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters, OJ L39/19. In addition, the EU also has agreements with Iceland and Norway.

[8] Art. 16 (2) German Constitution; art. 696-1 ff. *Code de procédure pénale* in France; art. 33 (1) Portuguese Constitution; § 12 Abs. 1 ARHG for Austria etc. For further examples cf.: R. ESSER - M. RÜBENSTAHL - B. BOERGER, *Der Schutz von Unionsbürgern in Deutschland vor einer Auslieferung an einen Nicht-EU-Staat*, in *NZWiSt*, 2014, at p. 401, fn. 1 and 2.

[9] Member States may still – under certain circumstances – grant an advantageous treatment for their own nationals, see art. 4 nr. 6 and especially art. 5 (3) of the EWA-Decision, after what *"surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State"*. However, the Court has ruled that Member States must grant citizens of other EU member states residing in the country - under certain circumstances - the same rights as its own nationals: ECJ, 6 October 2009, *Dominic Wolzenburg*, case C-123/08, and ECJ, 5 September 2012,

Logically, this only applies to intra-EU extraditions. The EU international extradition treaties do not contain a clause of this kind. EU Member States cannot deny the extradition of Member States nationals because they are EU citizens. However, these treaties comprehend a clause that allows the Member States to refuse the extraditions of their own nationals.[10] Furthermore, Member States bilateral treaties usually have this kind of clause, which likewise only apply to their own nationals.[11]

The question on whether this practice does not violate the non-discrimination principle, enshrined in art. 18 of the Treaty on the functioning of the European Union (TFEU) should have aroused quite quickly.[12] In fact, the non-discrimination principle is more than just a Treaty provision: since its earlier decisions, the ECJ has ruled that the prohibition of discrimination laid down in the Treaty are *"merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law"*.[13] It represents thus a fundamental principle of EU law, recognised even prior to the establishment of European citizenship in 1992.[14] The fact that with the Treaty of Lisbon the provision was moved from the Treaty of European Union (TEU), art. 12, to the TFEU, art. 18 (in the citizenship section) does not alter its importance.[15] Its new place, in the context of EU citizenship, underlines its importance for what according to the Court "*is destined to be the fundamental status of nationals of the Member States*".[16]

According to settled ECJ case law, the fact that a certain matter does not fall under the scope of EU law – as are extraditions in absence of an EU treaty – does not mean that, in situations covered by EU law, national rules do not need to respect the non-discrimination principle.[17] The Court considers this a natural consequence of EU law's primacy.[18]

Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge, case C-42/11.

[10] See for instance art. 17, (2) of the EU-US Agreement.

[11] See for instance art. 7 (1) of the Treaty between the Federal Republic of Germany and the United States of America Concerning Extradition.

[12] See on this O. GARCÍA, *Dürfen Unionsbürger an die USA ausgeliefert werden*?, in http://blog.delegibus.com/2014/03/23/duerfen-unionsbuerger-an-die-usa-ausgeliefert-werden/ [Accessed 2 February 2017].

[13] ECJ, 19 October 1977, *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co c./ Hauptzollamt Hamburg-St. Annen, Diamalt AG v Hauptzollamt Itzehoe*, joined cases 117/76 and 16/77, point 7.

[14] V. JOROVA, *Garantir au citoyen européen liberté, sécurité et justice*, in *L'Observateur de Bruxelles*, n. 100/2015, pp. 9-10.

[15] A. HARATSCH - C. KÖNIG - M. PECHSTEIN, *Europarecht*, Tübingen, 2010, p. 316; R. M. MOURA RAMOS, *Artigo 18 TFUE*, in M. LOPES PORTO - G. ANASTÁCIO (eds), *Tratado de Lisboa Anotado e Comentado*, Lisbon, 2012.

[16] ECJ, 20 September 2001, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, case C-184/99, point 31.

[17] ECJ, 24 November 1998, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, case C-274/96, point 17. In A. HARATSCH, C. KÖNIG, M. PECHSTEIN, *Europarecht*, *op. cit.*, p. 320. The authors note that due to this extensive application of the principle, only very few circumstances in which EU law does not apply remain.

[18] ECJ, *Commission of the European Communities v Hellenic Republic*, 16 December 1992, case C-210/91, point 19: *"When making use of [their] competence [Member States] are, however, required to comply with Community law and its general principles"*. ECJ, 13 April 2010, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française*, case C-73/08, point 28: *"[I]t should be recalled that whilst European Union law does not detract from*

EU law always covers extraditions of citizens of other EU Member States, since the person involved has made use of its freedom to move freely pursuant art. 21 TFEU.

Nevertheless, this issue did not really call much attention, neither in the public sector nor in the academic discussion.[19]

This is quite surprising, given the importance and sensibility of the rights at stake.

Finally, in the last couple of years, several cases have drawn the attention to this subject and slowly long needed questions are starting getting answered.

The first of these answers is the case that is being discussed here. The present essay will start with putting the problem into context, briefly presenting the evolutions of extraditions within the EU (1) and of the non-discrimination principle in EU-law (2).

Subsequently, the Petruhhin case will be introduced (3) and the ECJ's decision discussed (4).

As a final point before concluding (6), the essay will try to assess this decision's impact on the future of EU extraditions (5).

1. Extradition in the EU

Extradition[20] has, being part of criminal law, traditionally been an exclusive Member States' competence. Member States concluded bilateral agreements both with third States and amongst each other.[21] The latter practice came to an end with the institution of the EAW, which also put extradition on the EU map. The development of such instrument was strictly linked to the free movement of people in the EU, therefore it can be seen as a necessary element for the functioning of the area of freedom, security and justice.[22]

The purpose of the EAW consists in the replacement of the multilateral system of extradition previously in force between Member States, *"with a system of surrender between judicial authorities of convicted or*

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the power of the Member States as regards to […],the fact remains that, when exercising [their] power, Member States must comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States". A. SAVARONA, *La Giurisprudenza della Corte di Giustizia delle Comunità europee in materia di imposizione diretta*, in the acts of the bilateral Italian-German conference *"Towards European legislation on taxation?"* (17-18 October 2003), published by *Ordine dei Dottori Commercialisti di Milano*, available at: *http://www.odcec.mi.it/docs/default-source/commissione-normative-comunitarie/Relazione_Gardone.pdf?sfvrsn=0* [Accessed 2 February 2017].

[19] The lack of discussion regarding this issue has also been pointed out in: R. ESSER - M. RÜBENSTAHL - B. BOERGER, *op. cit.*, p. 401; and J. RUNG, *Auslieferung eines Unionsbürgers zur Strafverfolgung wegen Verstoßes gegen Wettbewerbsrecht an die USA? Pflicht zur Vorlage an den EuGH?*, in EWS, 2014, p. 276.

[20] *"Extradition is the legal process by which an individual is transferred from one state to another for the purposes of facing trial or sentence"*. See main features of mutual legal assistance and extradition, available on the website of the European Commission at *http://ec.europa.eu/justice/criminal/judicial-cooperation/legal-assistance/index_en.htm* [Accessed 2 February 2017].

[21] See in particular the European Convention on Extradition, cited above.

[22] S. LAUGIER-DESLANDES, *Les incidences de la création du mandat d'arrêt européen sur les conventions d'extradition*, in *Annuaire français de droit international*, n. 1/Vol. 48/2002, pp. 695-714.

suspected persons for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition".[23] The main goal is to facilitate and to accelerate judicial cooperation among Member States. through the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, with a view to contributing to the objective set for the EU *"to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States".*[24]

However, since this instrument does not play a decisive role for the underlying case, it will not be addressed in length in the present analysis.

The United States-European Union agreement on Extradition and Legal mutual assistance (US-EU agreement), which was signed by the EU alone thanks to the competence pursuant art. 24 and 38 of the EU Treaty, gave the Union an international dimension.

The US-EU agreement was signed in 2003, in response to the 9/11 attacks, with a view to increase cooperation in penal matters. Its character is particularly interesting because, as it has been pointed out, it is at the same time a bilateral and multilateral agreement.[25] In fact EU Member States, which had previously signed an agreement with the US on the same matter, must conform to the one signed by the EU.

2. Non-discrimination in the EU

The prohibition of discrimination on grounds of nationality has always played a central role in EU law.[26] In order to guarantee the effective functioning of the internal market, it is crucial to overcome preferential treatment by Member States to their own nationals. It is part, as a principle, of all fundamental freedoms, where it has become a fundamental basis for the removal of inequalities in the EU, notably in the context of the free movement of persons. In addition, it is enshrined in article 18 of the TFEU, which concretizes this general principle.[27]

By prohibiting *"any discrimination on grounds of nationality"*, article 18 TFEU requires Member States to place EU citizens, in a situation governed by EU law, on an equal footing with their nationals. However, the Court has already emphasized that there are some limits to this principle. In particular, situations of non-national citizens and nationals must be comparable: a violation of the principle of

[23] ECJ, 26 May 2015, *Minister for Justice and Equality v Francis Lanigan*, case C-237/15, points 27-28.
[24] ECJ, *Lanigan*, cited above. For a detailed commentary of the decision see H. LABAYLE, *Observations* in F. PICOD (eds.), *Jurisprudence de la CJUE 2015 – Décisions et commentaires*, Bruxelles, 2015, pp. 563-570.
[25] M. CHERIF BASSIOUNI, *International Extradition: United States Law and Practice,* Oxford, 2014, pp. 32-33.
[26] For an overview on the origins and evolution of the EU's anti-discrimination law not based on grounds of nationality cf.: P. CRAIG - G. De BÚRCA, *EU Law*, Oxford, 2011, p. 855.
[27] ECJ, 16 October 1980, *René Hochstrass v Court of Justice*, case 147/79.

non-discrimination can consist of the application of different rules to comparable situations, or the application of the same rule to different situations.[28]

For instance, the Court does not allow automatically an extension of equal treatment to European citizens who do not have the right of residence in another Member State, because the citizens who reside in the host State and those who do not, would not in fact be in a comparable situation.[29]

Discriminations can be based either directly or indirectly on nationality. The principle prohibits not only apparent discrimination based on nationality, but also all covert forms of discrimination that, by the application of other criteria, lead to the same result.[30]

According to its wording, article 18 TFEU applies if the following three cumulative conditions are fulfilled: there is no specific non-discrimination principle applicable (2.1); the scope of applicability of the TFEU and TEU is opened (2.2); and there is a direct or indirect discrimination based upon nationality (2.3).

2.1. No specific non-discrimination principle is applicable

Art. 18 TFEU only applies *"without prejudice to any special provisions"*, concretizing the principle of specification. In other words, the provision is only applicable if there is no other, more specific EU law provision that explicitly provides the right to non-discrimination to the individual who is invoking the Treaty provisions.

In fact, besides article 18 TFEU there are various specific non-discrimination principles prohibiting a discrimination based upon nationality, i.e. article 45 (2) TFEU (free movement of workers), article 49 (2) TFEU (freedom of establishment), article 57 (3) TFEU (freedom to provide services). These provisions apply as *leges speciales*.[31] Consequently, cases in which article 18 TFEU can be directly applicable are, in practice, limited. *"[I]t should first be ascertained whether a person [...] can benefit from the provisions of secondary law [...] Should that not be the case, it would then have to be ascertained whether a person [...] can base a right [...] directly on the provisions of the FEU Treaty concerning the citizenship of the Union"*.[32]

Moreover, the articles of the Treaty can only be invoked if the provisions of secondary law do not apply, on the sole condition that the persons in question are not eligible to any specific rights "*under*

[28] ECJ, 3 October 2000, *Angelo Ferlini v Centre hospitalier de Luxembourg*, case C-411/98, point 51.
[29] ECJ, 14 September 1999, *Frans Gschwind v Finanzamt Aachen-Außenstadt*, case C- 391/97, points 22-23.
[30] ECJ, 16 September 2004, *Gerard Merida v Bundesrepublik*, case C-400/02, point 21.
[31] On the importance of the non-discrimination principle in the context of the four freedoms see: C. BARNARD, *The Substantive Law of the EU, The Four Freedoms*, Oxford, 2010, p. 17: *"The principle of non-discrimination on the grounds of nationality is the cornerstone of the four freedoms."*
[32] ECJ, 8 November 2012, *Yoshikazu Iida v Stadt Ulm*, case C-40/11, points 34-35.

other provisions of Community law".[33] The provisions of the Treaty are therefore only applicable on a subsidiary basis.

Furthermore, these principles must be distinguished from provisions prohibiting a discrimination based upon other origins, like gender, race, ethnic origin, religion, political attitude, disability or sexual orientation. The scope of art. 18 only concerns discrimination based on nationality, whereas the other kind of discrimination mentioned above are forbidden through other legislative instruments, in particular through directives.[34]

2.2. Scope of application of the Treaties

Furthermore, the case at stake must fall within the scope of applicability of the Treaties (material scope of application).

The most obvious cases are therefore areas of law that fall within the scope of the treaties, i.e. of EU law.

In addition, according to the Court of Justice, EU law may also apply to areas that fall within Member States' (exclusive) competence. Concretely, it may apply to situations involving the exercise of the fundamental freedoms guaranteed by the Treaties, in particular the freedom to move and reside within the territory of the Member States, as conferred by article 21 TFEU.[35] In several decisions, the ECJ emphasized the following principle: citizens of the Union who move or reside legally in another Member State can rely on article 18 TFEU. In other words, the scope of EU law always applies to public provisions related to legal residence. In case of legal residence, art. 18 TFEU consequently provides an absolute prohibition of discrimination of other Union citizens. To citizens of the Union *"in all Member States the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation"* must be granted.[36]

Article 18 (1) TFEU applies to citizens of the Union pursuant article 20 (1) TFEU, meaning every person holding the nationality of a Member State (personal scope of application).[37]

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[33] ECJ, 19 October 2004, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, case C-200/02, point 24.

[34] See for instance: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[35] ECJ, 23 October 2007, *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren*, joined cases C-11/06 and C-12/06; ECJ, 11 September 2007, *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach*, case C-76/05.

[36] ECJ, 23 April 2009, *Uwe Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu*, case C-544/07.

[37] C. BLUMANN, *Citoyenneté européenne et champ d'application personnel du droit communautaire*, in *Revue des Affaires Européennes,* n.1/2004, pp. 73-82.

Moreover, the application of art. 18 TFEU requires a cross-border aspect. Nevertheless, at the same time, there is no need for an actual border crossing. That is due to the undeniable circumstance that even though, in principle, the EU law has no vocation to be applied in purely internal situations, the Court is interpreting extensively provisions on freedom of movement.[38] Therefore, the holding of the nationality of another Member State was considered in some cases as a sufficient link to freedom of movement, through the concept of *"potential exercise of the right to freedom of movement"*.[39]

2.3. Discrimination based upon nationality

Article 18 TFEU prohibits any discrimination on grounds of nationality. This prohibition comprises both direct and indirect discriminations.

Direct discrimination occurs when a Member State's legislation provides a different treatment between its own nationals and citizens from other Member States, exclusively on ground of nationality. For instance when a non-national is asked to satisfy a supplementary condition in order to access to a social benefit, while nationals are not asked.

Indirect discrimination is often less obvious: it occurs when there is an unreasonable provision, apparently neutral, that applies equally for everyone but has an unfair effect on people who share a particular attribute.

The typical example of indirect discrimination is related to residence. It is not *per se* directly based on nationality, at least in theory. However, nationals will satisfy this condition more easily than non-nationals will.[40]

2.4. Justification

According to settled case law, discriminations, including direct ones, may be justified under certain conditions.[41] Depending on the type of discrimination, the demands for justification can differ.

In earlier decisions, the ECJ ruled that the non-discrimination principle requires that comparable situations should not be treated differently unless such differentiation is objectively justified.[42] Furthermore, these differentiations must be limited to the strict minimum. Hence, the non-discrimination principle is a particular shaping of the general principle of equality, in which comparable

[38] P. CRAIG - G. DE BÚRCA, *EU Law*, *op. cit.*, p. 829.
[39] ECJ, 2 October 2003, *Carlos Garcia Avello v Belgian State*, case C-148/02, point 27; ECJ, *Zhu and Chen*, cited above, points 19-20; ECJ, 8 March 2011, *Gerardo Ruiz Zambrano v Office national de l'emploi*, case C-34/09, point 44.
[40] For a detailed analysis of direct and indirect discrimination see AA.VV., *Handbook on European non-discrimination law*, European Agency for Fundamental Rights, European Court of Human Rights – Council of Europe, Luxembourg, (Publications Office of the European Union ed., 2011), pp. 22-31.
[41] ECJ, 20 March 1997, *David Charles Hayes and Jeannette Karen Hayes v Kronenberger GmbH*, case C-323/95.
[42] ECJ, *Hochstrass*, cited above.

situations may not be treated differently and different situations may not be treated the same way, unless such treatment is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued.[43] Direct discriminations can only be justified in situations predicted in the legal provisions, while indirect ones can be justified through the reference to a legitimate aim, identified by the Court case law.[44] Moreover, the means of achieving such aim must be appropriate and necessary.[45]

While provisions justifying direct discrimination are fixed, legitimate aims do not constitute a *numerus clausus*. Examples of legitimate aims are the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.[46]

Not surprisingly, the Court interprets freedoms largely and justifications strictly.[47]

As it will become clear in the next chapters, the Court once again showed in the present case how direct discriminations are strictly interpreted, and consequently how generously art. 18 TFUE can be applied.

3. Case facts and preliminary questions

After this theoretical introduction, the facts of the case at stake will now be presented, another necessary step to fully understand the reasoning made by the Court in this decision.

Mr. Petruhhin, an Estonian National, had been accused by the Russian Federation of attempted large-scale, organised drug trafficking. Russian law heavily punishes this kind of criminal offence, which is punished with a term of imprisonment of between 8 and 20 years. By decision of 9 February 2009, Russian authorities initiated criminal proceedings against Mr. Petruhhin. One year later, on 22 July 2010, the accused was made subject of a priority Red Notice on Interpol's website.

It was only four years later, on 30 September 2014, that Mr. Petruhhin was arrested. It happened in the Latvian town of Bauska, in which he was placed in provisional custody.

The Russian Prosecutor-General quickly reacted and three weeks later, on the 21st of October, sent an extradition request to the Latvian authorities. The latter, concretely Latvijas Republikas Ģenerālprokuratūra (Public Prosecutor's Office of the Republic of Latvia), did authorize the extradition, which could however not be carried out, due to an appeal by the defendant against this decision. He argued that the treaty concluded by the Republic of Estonia, the Republic of Latvia and

[43] ECJ, 14 February 1995, *Finanzamt Köln-Altstadt v Roland Schumacker*, case C-279/93.
[44] J. MALISZEWSKA-NIENARTOWICZ, *Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?*, in *International Journal of Social Sciences*, 2004, pp. 41–55.
[45] ECJ, 22 November 2005, *Werner Mangold v Rüdiger Helm*, case C-144/04, point 58.
[46] ECJ, 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, case 120/78, point 8.
[47] ECJ, 28 October 1975, *Roland Rutili v Ministre de l'intérieur*, case 36-75, point 27.

the Republic of Lithuania on judicial assistance and judicial relations[48] granted him, pursuant art. 1, the same rights in Latvia as a Latvian national. Subsequently, the extradition decision by the Public Prosecutor's office was in his opinion unjustified and directly discriminatory, since Latvia would not be extraditing an own national. Such extraditions are indeed limited by art. 98 of the Latvian Constitution and art. 696 and art. 697 of the Latvian Code of Criminal Procedure.

The Augstākā tiesa, the Latvian Supreme Court, rejected Mr. Petruhhin's arguments, observing that protection against extradition only applies to Latvian nationals. Neither the Latvian national law nor any international agreements with Russia or Estonia granted an Estonian citizen such a protection.

However, the national Court felt that another international agreement, namely the TFEU, might be granting Mr. Petruhhin the right to be treated like a Latvian citizen.[49]

Therefore, it referred to the ECJ under the preliminary ruling procedure and asked three questions that can be resumed as follows:

- When a non-Member State requests extradition to a Member State, shall articles 18 and 21 TFUE be interpreted in the sense that the requested Member State shall treat citizens of another Member State as if they were its own nationals?

- Must nationals of another Member State benefit from the rule, which prohibits the extradition by the Member State at stake of its own nationals?

- Lastly, the Court is asked to explain whether a Member State, who has been asked by a third state to extradite a national of another Member State, must verify that the extradition will not prejudice the accused rights referred to in article 19 of the Charter. In case of the affirmative, the Court has to specify which criteria must be taken into account in order to verify that the rights of art. 19 will not be infringed in case of extradition.

4. Decision

The Court starts by assessing the admissibility of the questions referred (points 18-24).[50] This was necessary, since Mr. Petruhhin had left Latvia at the time of the Court's decision and consequently the

[48] The English version of this treaty is available at *http://m.likumi.lv/doc.php?id=211888* [Accessed 2 February 2017].

[49] *"The referring court expresses the view that, under EU law, where there is a request for the extradition of a national of a Member State to a third State, the requested Member State should ensure the same level of protection for citizens of the Union as for its own nationals"*, Opinion of Advocate General Bot delivered on 10 May 2016, regarding case *Aleksei Petruhhin*, cited above, point 19.

[50] For an overview on the admissibility of preliminary rulings, see R. SCHÜTZE, *European Constitutional Law*, Cambridge, 2012, pp. 289-302.

issue on whether the questions referred were devoid of interest in order to decide the dispute in the main proceedings had to be addressed.

The Court starts by recalling its case law on referrals, in particular that:

"The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it".

In the present case, since Mr. Petruhhin has left Latvia, an extradition – no matter how the Court answers the questions referred – is highly unlikely, since it is improbable that the accused will return to Latvia. Nevertheless, the Court points out that the case in front of the Latvian Supreme Court is still pending and since the Public Prosecutor's Office has not withdrawn its decision authorising Mr Petruhhin's extradition, the Supreme Court will have to rule on the lawfulness of the extradition. The questions referred are therefore relevant for the decision and thus admissible.

The Court then moves to the examination of the questions referred, addressing the first and second question together.

It starts by acknowledging that according to the majority of Member States that have submitted their observations to the Court, the rules on extradition fall exclusively within Member States' competence, since there is no international extradition agreement in place between the EU and Russia - the third country concerned (point 26).[51]

However, the Court reminds its settled case law that *"in situations covered by EU law, the national rules concerned must have due regard to the latter"*, making a reference to the Rottmann decision.[52]

In order to verify if Mr. Petruhhin finds himself in a situation falling within the scope of application of the Treaties, the Court observes that, as an Estonian national, he made use of his right to move freely within the European Union, by moving to Latvia, where he has been arrested (points 30-31). Therefore, articles 18 and 21 TFEU are applicable here.

The Court observes that national rules on extradition, like those in the main proceedings, give rise to a difference in treatment vis-à-vis nationals and European citizens from another Member State. In fact, non-nationals, such as Mr Petruhhin, are not granted the same protection against extradition than by nationals of the Member State in question. It is clear that, in doing so, these rules are liable to affect the freedom of nationals of other Member States to move within the EU. This difference in treatment gives rise to a restriction of freedom of movement pursuant art. 21 TFEU (point 33).

[51] See on this also the Opinion of Advocate General Bot, cited above.

[52] ECJ, 2 March 2010, *Janko Rottman v Freistaat Bayern*, case C-135/08.

This represents the first relevant difference to the Opinion of the Adovcate General (AG). AG Bot did not identify a discrimination – and consequently a violation of art. 21 TFEU – because *"the difference in treatment between non-Latvian citizens of the Union residing in Latvia and Latvian nationals does not constitute discrimination prohibited by the first paragraph of article 18 TFEU, in so far as it is justified by the objective of combating the impunity of persons suspected of having committed an offence in a third State"*.[53]

In other words, while the Court quickly affirmed the existence of a discrimination and then examined the possibility of a justification, as it will be seen below, the AG stopped one-step sooner and denied the existence of a discrimination. According to his reasoning, Latvian and non-Latvian citizens are not in a comparable situation, due to the fact that Latvia can prosecute its citizens for crimes committed abroad but cannot do the same to foreign citizens. This differentiation is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued, which in this case is the impunity of criminals.

This different approach by the Court and the AG (discrimination that can be justified vis-à-vis the lack of a discrimination) is not only different from a purely legal and academic point of view, but it has, as will be shown below, very relevant practical consequences.

After having recognised a violation of art. 21 TFEU, the Court reminds that it is a well-established principle that restrictions to free movement can be justified, in some cases. In particular, restrictions must be based on objective considerations and proportionate to the legitimate objective of the national provisions.[54]

The Court then examines the justification put forward by several Member States, i.e. that the *"measure providing for the extradition was adopted in the context of international criminal cooperation, in accordance with an extradition agreement, and seeks to prevent the risk of impunity"* (point 35).

It acknowledges, as the AG did, that objective of preventing the risk of impunity for persons who have committed an offence is indeed a legitimate objective of EU law (point 37).

However, it immediately points out that *"measures which restrict a fundamental freedom, such as that laid down in article 21 TFEU, may be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures"* (point 38).

It is precisely in the context of the analysis of the existence of less restrictive measures – an analysis that the AG did not carry out – that the Court differs significantly from the AG's opinion.

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[53] Opinion of Advocate General Bot, cited above, point 70.

[54] ECJ, 12 May 2011, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, case C-391/09, point 83.

The Court holds that the immediate extradition is not the less restrictive measure. Member States must - taking into account the principle of sincere cooperation set out in art. 4(3) TEU and the "cornerstone of judicial cooperation", the EAW – *"inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Framework Decision 2002/584, provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory"* (point 50).

In other words, Member States are obliged to first inform the home Member State of the accused EU citizen and give it the opportunity to prosecute him there. Only in those cases in which the Member State refuses or is not able to prosecute its citizens for crimes committed abroad, an extradition to a third State may take place.

This "procedure" is the main difference compared to the AG's opinion, which did not impose any cooperation between Member States.[55]

Finally, the third and last question is briefly addressed. The Court points out art. 19 of the Charter establishes that 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 other inhuman or degrading treatment or punishment.

The Latvian court asks if, in order to verify if the extradition could lead to a violation of art. 19, the requested Member State may simply check if the requesting State is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which prohibits torture, or whether the situation of that State must be specifically examined taking into account the Council of Europe's assessment of it.

The Court logically opens its analysis by observing that, in principle, accession to international treaties guaranteeing respect for fundamental rights by the third State is not a sufficient element to ensure adequate protection against the risk of ill-treatment in its territory. In fact, reliable sources have reported practices resorted to or tolerated by the authorities, which are manifestly contrary to the principles of the ECHR. In support of this reasoning, the ECJ mentions here a judgement by the European Court of Human Rights.[56]

Therefore, national authorities of the requested Member State that are in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State, must assess the existence of that risk when deciding on the extradition of a person to that State. The authorities must

[55] *"The Court of Justice started from the same premise but it reached quite an opposite conclusion"*, S. SALUZZO, *EU Law and Extradition Agreements of Member States: The Petruhhin Case,* in *European Papers, European Forum,* Insight of 21 March 2017.

[56] ECHR, 28 February 2008, *Saadi v Italy*, point 147.

take into account information that is objective, reliable, specific and properly updated. This kind of information may notably be obtained from judgments of international courts, such as judgments of the European Court of Human Rights (ECtHR), as well as decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations.

Therefore, following the Advocate General in his conclusions, the Court rules that a Member State that receives a request from a third State seeking the extradition of a national of another Member State, must verify that the extradition will not prejudice the rights referred to in art. 19 of the Charter.

On the one hand, this might appear as a logical solution, and that is why it is so short. It is clear: being part of the ECHR does not automatically mean that signatory States respect its contents; otherwise, there would be no need to have a European Court of Human Rights.

On the other hand, this solution might be seen as a provocation to Russia, whose relations with the Council of Europe are becoming increasingly tense.[57]

In this aptitude of the Court, a political dimension cannot be denied. In such a delicate historical context, where several states signatory of the ECHR are constantly posing perplexities and feeding discussions around its respect of fundamental rights, it might be obvious (and necessary) for the Court to take a position.

5. Impact

The decision had very distinct receptions. Quite surprisingly several media outlets interpreted the decision as an acceptance of discrimination by the Court in this subject.[58]

This view is not very accurate nor understandable. It is not as if the Court denied the existence of discrimination, as the AG did. On the contrary, the ECJ ruled that provisions privileging own nationals are in fact discriminatory and can only be justified in certain cases, under certain specific conditions.

First of all – although the Court did not explicitly mention this point in its decisions – Member States, which have provisions allowing criminal procedures against foreign nationals for crimes committed abroad, will not be able to extradite EU-citizens from other Member States.[59] In such cases, there will not be a risk of a crime remaining unpunished nor a violation of the *aut dedere aut judicare* principle. A justification of the discrimination will consequently not be possible.

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[57] See *"La Russie ne respecte pas les arrêts de la CEDH"* in *Le Figaro*, http://www.lefigaro.fr/flash-actu/2016/08/23/97001-20160823FILWWW00131-la-russie-ne-respecte-pas-les-arrets-de-la-cedh.php [Accessed 2 February 2017].

[58] See for instance *Legal Tribune Online*, which titled the article reporting the case as *"Privilege for own citizens lawful"*, available at http://www.lto.de/recht/nachrichten/n/eugh-urteil-c-18215-auslieferung-unionsbuerger-abkommen-diskriminierung/ [Accessed 2 February 2017].

[59] Lithuania does not have such a provision, but other Member States do, for instance Germany, where this possibility is set out in § 7 II Nr. 2 penal code (StGB).

Secondly, the home States of the accused will have the opportunity to avoid the extradition to the third State, since the extraditing Member State will have to always contact the home Member State before extraditing the defendant to the third State. Most probably, the majority of Member States will avoid the extradition of their own citizens; if they refuse the extradition of their nationals when they are arrested inland, why should they agree to it only because the accused has been arrested in another Member State. Some governments will possibly even have a constitutional obligation to act this way.

Thus, when taking into account these two possibilities, it appears clear that the number of extraditions of EU citizens to third States will significantly diminish.

Exact predictions are however still not possible, since the Court has not cleared all existing question yet. It will however have the chance to do this in two cases that are still pending before it: C-473/15 *Schotthöfer & Steiner*[60] and C-191/16 *Romano Pisciotti*.[61]

Both cases are closely related to the present one, since both referring national courts, the Bezirksgericht Linz and the Landgericht Berlin, asked the ECJ *inter alia* whether national norms protecting the own nationals are discriminatory. While the Austrian case deals with an extradition to the United Arab Emirates – which have no extradition agreement in place with the EU – the Court's answer will most probably be the same as in the present case and there should not be any further explanations.[62]

In the Pisciotti case, on the other hand, the circumstances are different.[63] First of all, it deals with an extradition to the United States, i.e. a third State with an extradition agreement in place with the EU. The Court will therefore have the possibility to clarify whether the existence of such an agreement changes something regarding the application of EU law and the non-discrimination principle in comparison to the present case. Secondly, the main proceedings regard a damages claim by Mr. Pisciotti against Germany, because the latter agreed on his extradition to the United States, which, in his view, violated EU law. In other words, the main proceedings deal with an *ex post* situation. The Court will thus have the opportunity to clarify whether extraditions carried out by those Member States privileging their own citizens in the past – and which in light of the Petruhhin decision violated EU law – constitute *"a manifest and serious breach"* of EU law, [64] necessary condition for the damages claim

[60] ECJ, *Peter Schotthöfer & Florian Steiner GbR v Eugen Adelsmayr*, case C-473/15, OJ C 406/15, Request for preliminary ruling from the Bezirksgericht Linz (Austria), September 7, 2015.

[61] ECJ, *Romano Pisciotti v. Bundesrepublik Deutschland*, case C-191/16, OJ C 270/16, Request for preliminary ruling from the Landgericht Berlin (Germany), April 5, 2016.

[62] For a background of the case see http://ooe.orf.at/news/stories/2781451/ [Accessed 2 February 2017].

[63] See on this pending case C. RITZ - B. VASCONCELOS, *Extradition discrimination*?, in *European Competition Law Review*, n.7/2016, pp. 277-281.

[64] ECJ, 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, joined cases C-46/93 and C-48/93; for the most important aspects of this decision see M. PECHSTEIN, *Entscheidungen des EuGH*, Tübingen, 2009, pp. 239-243.

developed in the Francovich decision.[65] The Court will be able to judge not only the behaviour of the German government, which extradited Mr. Pisciotti, but also of Germany's Constitutional Court, which ruled on this exact case – prior to the successful extradition - without referring the question to the ECJ, as the Landgericht Berlin did.[66]

In fact, the present case already constitutes a reprimand for the German Constitutional Court (as well as for other courts throughout the EU), which ignores the ECJ's settled case law and denies the applicability of EU law in cases related to areas in which the Union is not competent, even though they present a cross-border component.[67] Accordingly, in the Pisciotti case it ruled that art. 18 TFEU was not applicable and thus there was no need to refer the question to the ECJ.[68]

Anyway, no matter how the two pending judgments will be decided, this judgment already represents an "advent of a new area in within EU criminal law".[69]

6. Conclusion

The ECJ decision is certainly a welcome one. It is favourable to EU citizenship, which taking into account the trend in the last couple of years, especially in the social benefits area,[70] is surprising.

In fact, the Court ruled as much in favour of citizenship as it could.[71] Declaring the privileging of own nationals discriminatory without the possibility to justify it, would have been irresponsible. It would

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[65] ECJ, 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, joined cases C-6/90 and C-9/90; for further information on this decision see J. I. UGARTEMENDIA - J. BENGOETXEA, *Breves Apuntes sobre las sentencias básicas del Tribunal de Justicia de la Unión Europea*, in *Teoría y Realidad Constitucional*, 2014, pp. 465-467.

[66] German Constitutional Court, *Pisciotti*, Unreported February 17, 2014 (2 BvQ 4/14).

[67] See on this issue M. STEINBEIS, *Unionsbürger und Art. 16 II GG: Unangenehme Neuigkeiten für Karlsruhe*, in Verfassungsblog, http://verfassungsblog.de/unionsbuerger-und-art-16-ii-gg-unangenehme-neuigkeiten-fuer-karlsruhe/; O. GARCÍA, *EuGH überprüft Auslieferungsrechtsprechung des BVerfG*, in *De Legibus Blog*, http://blog.delegibus.com/2016/03/20/eugh-ueberprueft-auslieferungsrechtsprechung-des-bverfg/ [Both accessed 2 February 2017]; C. ZEHETGRUBER, *Nationale Gericht vs. EuGH? Zur (fragwürdigen) Auslieferung eines sich rechtmäßig in Deutschland aufhaltenden EU-Bürders an die USA*, in StraFO, 2015 p. 133.

[68] This is just another episode in the tense relationship between the ECJ and some constitutional courts, which shows some difficulties in completely shaping its judgements on the ECJ's decisions. One of the most famous illustration concerns human rights, where the Italian and German Constitutional Courts states their will to "save" their say on the respect of fundamental rights related matters (Absolute Supremacy v. relative supremacy, cf. R. SCHÜTZE, *op. cit.*, p. 347). This shows that not only national governments, but also national courts, face difficulties when it comes to accepting "sacrifices" in terms of sovereignty. If on one hand this aptitude may be comprehensible, on the other had an effort is required at national level, in order to push forward EU law.

[69] M. J. COSTA, *The Emerging EU Extradition Law – Petruhhin and Beyond*, in *Journal of European Criminal Law*, n.8/2017.

[70] ECJ, 11 November 2014, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, case C-333/13; ECJ, 15 September 2015, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and others*, case C-67/14. For further comments on these cases, see M. BENLOLO CARABOT, *Observations*, in F. Picod (eds.), *op. cit.*, pp. 229-238.

[71] For an analysis of the impact of these extradition cases on European Citizenship and the "*European Way of Life*" cf. T. ZIMMERMANN, *Der "Fall" Pisciotti vor dem EuGH*, in *Zeitschrift für Strafrechtsdogmatik*, n.4 / 2017 and *Editorial Comments*, in *CMLR* vol. 54, 2017.

have led to cases in which potential criminals would have been set free, without criminal proceedings. This scenario would be incompatible with the purpose of countering pan-EU threats and crime more effectively, which is one of the EU's priorities.

Instead, the home State of the accused will have the last word on the extradition of their nationals. This fortifies the concept of EU citizenship and shows the outside world the unity in the European Union. In addition, it will allow European citizens to be judged and, if the case, imprisoned in the EU, which will mean in most cases fairer judgements and more human prison conditions. In addition, even if the extradition to a third state should take place, member states will have to determine whether the rights of the accused pursuant art. 19 of the Charter will be preserved.

It thus strengthens and stresses once again the importance of the non-discrimination principle in the EU. As the submissions by the Member States show, the fact that there are only very few areas left in which discrimination is still tolerated, is still not very clear.

From a practical point of view, Member States will have to adapt their legislation, or at least interpret it from now on in compliance with EU law. The EU on the other hand does not necessarily need to intervene: as the Court itself pointed out, Member States will be able to use the EAW rules to cooperate and communicate with each other and carry on the extraditions.

Finally, the answer to the third question gave the Court the possibility to restate once again the relevance of fundamental rights in the EU and the role that national courts have in enforcing them.