Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 24 September 2020[1]

Case C-398/19

BY
joined party:
Generalstaatsanwaltschaft Berlin

(Request for a preliminary ruling from the Kammergericht Berlin (Higher Regional Court, Berlin, Germany))

(Reference for a preliminary ruling — Citizenship of the Union — Extradition to a third country of a national of a Member State — Requested person has only obtained the citizenship of the Union after it had transferred its centre of interest to the requested Member State — Protection of nationals against extradition — Obligations of the requested State and the Member State of origin of the citizen of the Union — Objective of preventing the risk of impunity in criminal proceedings)

I. Introduction

1. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States[2] has greatly simplified the surrender regime in respect of suspected persons as between Member States. As the present case clearly shows, however, difficulties nonetheless arise in relation to extradition requests emanating from third countries.

2. While one might have thought that such third country requests should in principle fall outside the scope of EU law, yet, the specific issue which arises in this request for a preliminary reference stems from the fact that most Member States[3] preclude the extradition of their own nationals to third countries,[4] preferring instead to apply in such instances the '*aut judicare*' limb of the principle of *aut*

1 Original language: English.

2 OJ 2002 L 190, p. 1, as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584').

3 21 Member States of the European Union have attached a declaration to the European Convention on Extradition of the Council of Europe of 13 December 1957 (*European Treaty Series* – No 24) declaring that they will not extradite nationals and/or defining the meaning of the term 'nationals' for that purpose under the European Convention on Extradition, sometimes with limitations or extensions. Thus, for example, Denmark, Finland and Sweden have extended the exception to nationals of those countries as well as those of Norway and Iceland and to people domiciled in one of those countries. Poland and Romania, on the other hand, have extended the exception to persons who have been granted asylum in their countries. Declarations and reservations are available online on the website of the Council of Europe, https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/024/declarations?p_auth=nQgwv713 (last accessed 11 September 2020). This is indicative of the prevalence of the nationality exception. For information on the German declaration, see point 11 of this Opinion.

4 The 'nationality exception'. Note here the comments made in Deen-Ryacsmány, Z., and Judge Blekxtoon, R., 'The Decline of the Nationality Exception in European Extradition', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13(3), Brill Nijhof, p. 317-364, where the authors at page 322 point out that 'The history of the non-extradition of nationals in Europe dates back to at least the 18-19th century. The dominance of civil law systems resulted in the nationality exception being a recognised rule, sanctified by constitutional provisions, national statutes and extradition agreements. Even treaties concluded with common law States – not opposed to extraditing their nationals – usually left the freedom of the parties not to extradite their citizens unaffected.'

dedere, aut judicare (either extradite or prosecute).[5] Given that those Member States who refuse to extradite their own nationals to third countries also invariably provide in their own domestic legislation that the commission of such offences by their citizens anywhere in the world is triable in their State under a principle of extraterritorial jurisdiction in criminal cases widely accepted in international law (that is, what is known as the 'active personality principle'),[6] this restriction on extradition is in practice somewhat less problematic than it might otherwise have been.

3. It is at this point that the difficulties first presented by the facts of the decision of this Court of 6 September 2016 in *Petruhhin*[7] come into view. What is the situation where a citizen of one Member State exercises free movement rights to move to another Member State where that other State refuses to extradite its own nationals to third countries and avails of the principle of *aut dedere, aut judicare*? Do the principles of non-discrimination on grounds of nationality (Article 18 TFEU) and the right of free movement (Article 21 TFEU) mean that the host Member State is also in principle obliged in some fashion to extend the rule prohibiting the extradition of its own nationals to citizens of other Member States who have availed of their free movement rights?

4. An affirmative – if highly qualified – answer was given to these questions by the Court in *Petruhhin*. In so doing, however, the Court also recognised that the position of what I might term the free mover in this example could not be completely assimilated to that of the citizen of the host Member State, precisely because the Member States' domestic legislations do not generally envisage the exercise of jurisdiction in respect of extraterritorial offences committed by non-citizens abroad, at least without some qualifications. As the Court put it:

'… although … the non-extradition of its own nationals is generally counterbalanced by the possibility for the requested Member State to prosecute such nationals for serious offences committed outside its territory, that Member State as a general rule has no jurisdiction to try cases concerning such acts when neither the perpetrator nor the victim of the alleged offence is a national of that Member State'.[8]

That dilemma is at the heart of the *Petruhhin* jurisprudence.

5. This brings us immediately to the present request for a preliminary ruling. With its request, the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) seeks to obtain clarification in respect of the obligations under the TFEU of a Member State whose law prohibits the third country extradition of its own citizens for the purpose of criminal proceedings in respect of extradition requests concerning citizens of other Member States who are currently staying or residing within its borders.

5 As Advocate General Bot has already pointed out in his Opinion in *Petruhhin* (C-182/15, EU:C:2016:330, footnote 25), the 'obligation to prosecute' is the term which is most frequently used in this context. In effect, however, the obligation is actually limited to submitting the case to the prosecuting authorities. It does not involve an actual obligation to initiate prosecution. Whether proceedings will be instituted rather depends on the evidence: see generally 'The obligation to extradite or prosecute (*aut dedere aut judicare*)', Final Report of the International Law Commission 2014, paragraph 21).

6 See, e.g., the decision of the Permanent Court of International Justice of 7 September 1927, *The Case of the SS Lotus*, *France* v. *Turkey*, Ser. A. No 10.

7 Judgment of 6 September 2016 (C-182/15, EU:C:2016:630) ('*Petruhhin*')

8 Paragraph 39 of *Petruhhin*.

6. The Court is thus invited, once more, to clarify the obligations of Member States arising from the principles described in *Petruhhin*.[9] It is its own measure of the novelty of the solution proposed in *Petruhhin* that that decision does not perhaps appear to have enjoyed universal acceptance on the part of the Member States. Some have pointed to the legal and practical difficulties it poses for the Member States so far as its application is concerned. Yet before considering any of these issues, it is necessary first to set out the relevant legislative provisions which are at issue and then to summarise the facts of the present case.

II. Legal framework

A. European Convention on Extradition 1957[10]

7. Article 1 of the European Convention on Extradition 1957 is worded as follows:

'The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.'

8. Article 6 of the European Convention on Extradition 1957 provides:

'1 a A Contracting Party shall have the right to refuse extradition of its nationals.;

b Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term "nationals" within the meaning of this Convention.;

c Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognised as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph a of this article.

2 If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.'

9 Paragraph 50 of *Petruhhin*.

10 Entered into force in Germany on 1 January 1977 and in Ukraine on 9 June 1998. The European Convention on Extradition 1957 is also in force in Romania since 9 December 1997.

9. Article 12 of the European Convention on Extradition 1957 (as inserted by the Second Additional Protocol to the European Convention on Extradition 1957 [11]) now provides:

'1 The request shall be in writing and shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party; however, use of the diplomatic channel is not excluded. Other means of communication may be arranged by direct agreement between two or more Parties.[[12]]

2 The request shall be supported by:

a the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

b a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

c a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.'

10. Article 17 of the European Convention on Extradition 1957 is entitled 'Conflicting requests' and it provides:

'If extradition is requested concurrently by more than one State, either for the same offence or for different offences, the requested Party shall make its decision having regard to all the circumstances and especially the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State.'

11. The Federal Republic of Germany made the following declaration at the time of deposit of the instrument of ratification, on 2 October 1976, in connection with Article 6 of the European Convention on Extradition 1957:

'Extradition of Germans from the Federal Republic of Germany to a foreign country is not permitted by virtue of Article 16, paragraph 2, first sentence, of the Basic Law for the Federal Republic of Germany and must, therefore, be refused in every case. The term "nationals" within the meaning of Article 6, paragraph 1 b, of the European Convention on Extradition 1957 covers all Germans within the meaning of Article 116, paragraph 1, of the Basic Law for the Federal Republic of Germany.'

Following the entry into force of its national law giving effect to Framework Decision 2002/584, and subsequent to a decision by the Bundesverfassungsgericht (Federal Constitutional Court, Germany) regarding this matter, the Federal Republic of Germany supplemented that declaration in order to give precedence to Framework Decision 2002/584 in the mutual relationship between Germany and the other Member States of the European Union. [13]

11 *European Treaty Series* No 98, in force for the Federal Republic of Germany since 6 June 1991, for Romania since 9 December 1997 and for Ukraine since 9 June 1998. The Fourth Additional Protocol to the European Convention on Extradition, Council of Europe Treaty Series No. 212 that contains further changes to Article 12 of the European Convention on Extradition 1957 is not applicable here as it has not been ratified by the Federal Republic of Germany so far and does therefore not apply as between Germany and Ukraine.

12 As per Article 5 of the Second Additional Protocol to the European Convention on Extradition of 17 March 1978, *European Treaty Series* No 98.

13 Declaration contained in a Note Verbale from the Permanent Representation of Germany, dated 8 November 2010, registered at the Secretariat General of the Treaty Office of the Council of Europe on 9 November 2010.

B. EU law

12. Article 8 of Framework Decision 2002/584, dealing with the content and form of the European arrest warrant, provides:

'1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

(a) the identity and nationality of the requested person;

(b) the name, address, telephone and fax numbers and email address of the issuing judicial authority;

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

(d) the nature and legal classification of the offence, particularly in respect of Article 2;

(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

(g) if possible, other consequences of the offence.

…'

13. The first and third paragraphs of Article 16 of Framework Decision 2002/584, headed 'Decision in the event of multiple requests' are worded as follows:

'1. If two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.

…

3. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention.

…'

C. German law

14. Paragraph 2 of Article 16 of the Grundgesetz für die Bundesrepublik Deutschland of 23 May 1949 (Basic Law for the Federal Republic of Germany) [14] provides:

'No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a Member State of the European Union or to an international court, provided that the rule of law is observed.'

15. Paragraph 7 of the Strafgesetzbuch (German Criminal Code) [15] provides:

'(1) German criminal law applies to offences committed abroad against a German national ….

(2) German criminal law applies to other offences committed abroad if the act is a criminal offence at the place of its commission or if that place is not subject to any criminal law jurisdiction and if the offender

1. was a German national … or

2. was a foreign national at the time of the offence, was found to be staying in Germany and, although extradition legislation would permit extradition for such an offence, is not extradited because no request for extradition is made within a reasonable period, is rejected or the extradition is not feasible.'

III. Facts of the main proceedings and the request for a preliminary ruling

16. The requested person in these proceedings, BY, is a Ukrainian national. In 2012 he moved from Ukraine to Germany (which for convenience I propose to describe as the 'host Member State' or the 'requested State'). In 2014 he also obtained Romanian nationality by virtue of the fact that he was a descendent of former Romanian nationals living in former Romanian Bukovina. He has, however, never had his centre of interest in Romania (in this case the 'home Member State').

17. BY is the subject of an arrest warrant issued by the District Court of Zastavna (Ukraine) on 26 February 2016. It is alleged that he misappropriated funds of a Ukrainian State-owned enterprise during the years 2010 and 2011. On 15 March 2016 the General Prosecutor's Office of Ukraine (which I propose to describe as the 'third country' or the 'requesting State') issued a formal extradition request which was transmitted to the Federal Republic of Germany through the respective ministries of justice according to Article 5 of the Second Additional Protocol to the European Convention on Extradition 1957. Lest it be otherwise overlooked, it is important to state that BY naturally enjoys a presumption of innocence. This Opinion accordingly proceeds on this basis.

18. Subsequent to that extradition request, BY was provisionally arrested on 26 July 2016 pursuant to Paragraph 19 of the Gesetz über die internationale Rechtshilfe in Strafsachen. [16] On 28 November 2016, the Kammergericht Berlin (Higher Regional Court, Berlin) ordered BY's release from detention pending extradition against payment of a security and subject to certain conditions. After the security had been lodged, BY was released from detention on 2 December 2016.

14 BGBl. 1949, p. 1, as amended by Gesetz zur Änderung des Grundgesetzes (Artikel 16) [Law amending the Basic Law (Article 16)] of 29 November 2000, BGBl. I 2000, p. 1633.

15 In the version published on 13 November 1998 (BGBl. I, p. 3322), as last amended by Article 62 of the Act of 20 November 2019 (BGBl. I, p. 1626).

16 Act on International Cooperation in Criminal Matters in the version published on 27 June 1994, BGBl. I S. 1537, *as subsequently amended* ('the IRG').

19. In view of the Romanian nationality of BY and with reference to the judgment of the Court in *Petruhhin*, the Generalstaatsanwaltschaft Berlin (General Prosecutor's Office in Berlin) informed the Ministry of Justice of Romania of the extradition request by letter of 9 November 2016, enclosing a copy of the referring court's order of 1 August 2016 in which BY's detention pending extradition had been ordered. It inquired whether the Romanian authorities intended to take over the criminal prosecution of BY.

20. This was initially refused and the Ministry of Justice of Romania responded that a request from the Ukrainian law-enforcement authorities was considered necessary. The Berlin General Prosecutor's Office then inquired whether Romanian criminal law allowed the prosecution for the offences with which BY is charged, irrespective of a request by the Ukrainian law-enforcement authorities for the prosecution to be taken over (within the meaning of Article 6(2) of the European Convention on Extradition 1957). In response, the Ministry of Justice of Romania informed the General Prosecutor's Office that, as a prerequisite for a European arrest warrant, the issuing of a national arrest warrant required a sufficient body of evidence pointing to the commission of the offences in question by the individual sought. It requested that the General Prosecutor's office in Berlin provide documents and copies of the evidence from Ukraine.

21. The referring court assumes from this exchange of correspondence that Romanian law, in principle, allows for the prosecution of a Romanian citizen for offences committed in a third country.

22. The referring court considers that the extradition of BY to Ukraine, which has been applied for by the General Public Prosecutor's Office in Berlin would in principle be permissible according to German law. It feels restricted, however, by the judgment of the Court in *Petruhhin*, because, so far, the Romanian judicial authorities have neither decided for nor against a prosecution of BY in respect of the alleged crimes which are at the heart of the extradition request. It points, however, first to the factual differences of the present case in that BY did not have Romanian nationality at the time when he moved his centre of interest from Ukraine to the Federal Republic of Germany. It is contended, however, that when establishing his residence in the Federal Republic of Germany he did not do so in the exercise of his free movement rights arising from Article 21(1) TFEU.

23. Second, the referring court points to practical difficulties in the application of the principles set out in *Petruhhin*. The Romanian law-enforcement authorities requested evidence from Germany against BY in order to examine the offences that he is alleged to have committed. That evidence would allow them to decide on the issuing of a national arrest warrant on the basis of which a European arrest warrant could then be issued. The German authorities are not, however, in possession of such information. This is not surprising as Ukraine based its request on the European Convention on Extradition 1957. Article 12(2) of that convention does not require the requesting State to provide such documents and Ukraine did therefore not provide them.

24. In these circumstances, the referring court wonders whether the home Member State itself is obliged to request the files from the requesting State that would enable it to decide whether to take over the prosecution. The referring court further points out that even if the German authorities were in possession of documents supplied by the requesting State, it is not clear whether they could automatically be sent by the requested State to the home Member State of the EU national whose extradition had been sought or whether the consent of the requesting State would be necessary for this purpose.

25. If, however, basic information regarding the extradition request is not sufficient for the home Member State to verify whether to take over the prosecution and the home Member State must seek the case files from the requesting State, this would entail substantial delay in the proceedings. Such delay would be due to communication via the diplomatic channels as well as the necessity for translation. The referring court observes that this poses particular problems if the individual sought is in custody.

26. The referring court further points out that a request for the file by the requested State would also be impractical as it is not in a position to assess whether prosecution by the home Member State is possible under that State's national law. The same problems exist as to lack of familiarity by the host Member State of the home Member State's law as well as inevitable delays thereby entailed if the requested Member State were to ask the requesting State to send to the home Member State a request for it to take over the prosecution.

27. Third, given that point 2 of Paragraph 7(2) of the German Criminal Code foresees a subsidiary competence for crimes committed abroad, including by foreign nationals, the referring court wonders whether it is obliged, in order to satisfy the principle of non-discrimination enshrined in Article 18 TFEU, to declare the extradition illegal. The German criminal prosecuting authorities would then have to take over the prosecution.

28. The referring court considers such an approach would compromise effective criminal prosecution of such offences. It would mean that the extradition of a national of a Member State becomes prima facie unlawful because of the possibility of the German authorities to take over the prosecution. This in turn would make it in effect impossible under German law to issue an arrest warrant either for the purposes of extradition [17] or within the scope of a prosecution in Germany. [18] The delay caused by this might allow the accused (once again) to evade prosecution.

29. In those circumstances, the referring court stayed the proceedings on 23 May 2019 and referred the following questions to the Court for a preliminary ruling:

'(1) Do the principles resulting from the judgment of the Court of Justice of the European Union of 6 September 2016 in the *Petruhhin* case (C-182/15) in relation to the application of Article 18 and 21 TFEU in the case where a third country requests the extradition of a Union citizen also apply if the individual sought moved his centre of interest to the requested Member State at a time when he was not yet a Union citizen?

(2) Is the home Member State that has been informed of an extradition request obliged, on the basis of the judgment of the Court of Justice of the European Union of 6 September 2016 in the *Petruhhin* case (C-182/15), to request that the requesting third country provide the case files for the purpose of examining whether to take over the prosecution?

(3) Is a Member State that has been requested by a third country to extradite a Union citizen obliged, on the basis of the judgment of the Court of Justice of the European Union of 6 September 2016 in the *Petruhhin* case (C-182/15), to refuse extradition and to take over the criminal prosecution itself if it is possible for it to do so under its national law?'

30. Written observations were submitted on behalf of BY, the German Government, Ireland, the Greek, Latvian, Hungarian, Austrian, Polish and Romanian Governments and the European Commission. The hearing itself took place during the course of the COVID-19 pandemic and representatives of BY, the German Government and the Commission made oral submissions at the hearing, which was held on 16 June 2020. With the permission of the Court, Ireland was allowed to appear remotely and written submissions made by the Latvian and Polish Governments were read out in the presence of the members of the Court and the representatives of the parties present.

17 Paragraph 15 of the IRG provides in its second subparagraph that no order may be made for the individual sought to be detained pending extradition where the extradition appears to be prima facie unlawful.

18 Paragraph 112(1) of the Strafprozeßordnung (Code of Criminal Procedure) provides that the issuance of an arrest warrant requires 'strong suspicion' which can only be established on the basis of the examination of the available evidence. As has been seen above, the requested State is generally not in possession of the file to do so.

IV. Analysis

A. The reasoning of the Court in Petruhhin

31. As the application of the Court's findings in *Petruhhin* – as confirmed by the Court in subsequent decisions such as *Pisciotti*[19] and *Raugevicius*[20] – to the facts in this case is at the heart of the referring court's questions, it is necessary to consider both the facts and the Court's reasoning in that case.

32. In *Petruhhin* the applicant was an Estonian national who had moved to Latvia. The Latvian authorities subsequently received an extradition request from the Prosecutor-General of the Russian Federation in which it was alleged that Mr Petruhhin was wanted for large-scale drug trafficking associated with the activities of a criminal organisation. Latvian law, however, precluded the extradition of its own nationals and Mr Petruhhin's fundamental case was that the failure to extend this right to him as another EU national who had exercised his free movement rights would amount to unjustified discrimination for the purposes of Article 18 TFEU.

33. In his Opinion delivered on 10 May 2016, Advocate General Bot agreed that it was true that Latvian nationals enjoyed a protection under the law not extended to Latvian non-nationals.[21] To that extent, the citizens of other Member States were treated differently for this purpose. Advocate General Bot considered, however, that this different treatment was objectively justified by the fact that, whereas Latvia enjoyed extraterritorial jurisdiction in respect of offences committed abroad by its nationals, Latvian law did *not* generally provide for such a right in regards to non-nationals such as Mr Petruhhin (who had no permanent right to reside in Latvia[22]).[23] Having concluded that Mr Petruhhin could 'not be prosecuted in Latvia for an offence which he is suspected of having committed in Russia', Advocate General Bot held that:

'… in the light of the objective of preventing the impunity of persons suspected of having committed an offence in a third State, that national is not in a situation comparable with that of Latvian nationals.

Accordingly, 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.'[24]

34. As it happens, however, the Court did not follow this aspect of the Opinion of Advocate General Bot, a point to which I will presently return. By contrast, the Court held that if the national law of one Member State precludes the extradition of its own nationals, then the principle of equal treatment contained in Article 18 TFEU meant that this rule of non-extradition must also be extended to non-nationals. The failure to do so would furthermore constitute a restriction on freedom of movement, within the meaning of Article 21 TFEU.[25]

19 Judgment of 10 April 2018 (C-191/16, EU:C:2018:222).

20 Judgment of 13 November 2018 (C-247/17, EU:C:2018:898).

21 Opinion of Advocate General Bot in *Petruhhin* (C-182/15, EU:C:2016:330).

22 The holding of a permanent residence permit for Latvia constituted a further ground for extraterritorial jurisdiction under the Latvian penal law; see Opinion of Advocate General Bot in *Petruhhin* (C-182/15, EU:C:2016:330, point 65).

23 See points 49 to 70 of the Opinion of Advocate General Bot in *Petruhhin* (C-182/15, EU:C:2016:330).

24 Opinion of Advocate General Bot in *Petruhhin* (C-182/15, EU:C:2016:330, points 68 and 69).

25 Paragraph 33 of *Petruhhin*.

35. The Court further stated that such a restriction, in order to be justified, must be based on objective considerations and must be proportionate to the legitimate objective pursued. It noted that whereas States that do not extradite their own citizens are usually in a position to take over the prosecution of those citizens, this is generally not the case for citizens of third countries. There was thus a concern that the alleged offence risked remaining unpunished. Ensuring that this risk was mitigated was a legitimate objective of EU law. [26]

36. In view of these difficulties, the Court then proposed a measure which it considered would meet the requisite proportionality test. This was based on the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU. The Court held that, in the absence of rules of EU law governing extradition, this principle obliges Member States to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law. [27] The Court thus held that:

'… Article 18 TFEU and Article 21 TFEU must be interpreted as meaning that, when a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must 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.' [28]

B. The European Convention on Extradition 1957

37. I shall shortly return to the decision in *Petruhhin* and its implications for the present case. It is, however, necessary at this point to say something more about the European Convention on Extradition 1957. As the Commission points out in its written observations, there is no international agreement in place between the European Union and Ukraine regarding extradition. Under such circumstances, the rules on extradition fall within the competence of the Member States. In this case, it is apparent from the reference that the international agreement according to which extradition is sought by Ukraine is the European Convention on Extradition 1957. The Convention is a Council of Europe agreement to which Germany and Ukraine, as well as Romania, are contracting parties. Before proceeding further, I propose to examine how the application of the principles set out in *Petruhhin* [29] would impact upon the application of that Convention.

38. Article 1 of the European Convention on Extradition 1957 contains an obligation to extradite provided the person sought is charged with an extraditable offence. There seems to be no doubt that the offence BY is charged with fulfils the criteria set out in Article 2 of that Convention for an 'extraditable offence'. The Convention contains several exceptions in which extradition may or shall be refused (for example, for political offences according to its Article 3 or if the offence has been committed within the territory of the requested State according to its Article 7) which are clearly not relevant here. Article 6 of the European Convention on Extradition 1957 also allows a contracting party the right to refuse the extradition of its nationals. Clearly, this is not the case here, because while BY has both Romanian and Ukrainian nationality, he is not a German citizen.

26 Paragraph 37 of *Petruhhin*. See also judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraphs 46 and 47 and the case-law cited).

27 Paragraphs 42 and 47 of *Petruhhin*.

28 Paragraph 50 of *Petruhhin*.

29 Paragraph 50 of *Petruhhin*.

39. The question accordingly arises whether and how a requested State can fulfil its obligations under Articles 18 and 21(1) TFEU (which include the obligation to surrender the person sought to the home Member State in accordance with the provisions of Framework Decision 2002/584),[30] if the home Member State issues a European arrest warrant, at the same time as fulfilling its obligations under the Convention.

40. It is precisely for that reason that Germany has referred to Article 17 of the European Convention on Extradition 1957 dealing with conflicting requests, as well as to Article 16(3) of Framework Decision 2002/584 dealing with conflicts between a European arrest warrant and a request for extradition presented by a third country. While both provisions deal with conflicting requests, they by no means give clear precedence to the request by the home Member State. Given, however, that the European Convention on Extradition 1957 is an international convention to which the Union is not a party, it, unlike Framework Decision 2002/584, does not fall to be interpreted by the Court. It is nonetheless useful to refer to the provisions of the Convention as they form the background to Ukraine's extradition request.

41. As the declaration contained in a Note Verbale from the Permanent Representation of Germany, dated 8 November 2010, registered at the Secretariat General of the Treaty Office of the Council of Europe on 9 November 2010 regarding the European Convention on Extradition 1957, only covers relationships with other Member States, Article 17 of the European Convention on Extradition 1957 remains applicable for Germany in its dealings with Ukraine. Any interpretation of Article 16(3) of Framework Decision 2002/584 by the Court would thus not resolve the issue with respect to Article 17 of the European Convention on Extradition 1957. I propose to revert to this issue at a later stage.

C. Some preliminary remarks: was Petruhhin correctly decided?

42. While I will presently address the three questions posed, I think it is necessary first to confront the question of whether *Petruhhin* was correctly decided, even though, as confirmed at the oral hearing, only Ireland is currently urging the Court to depart from that decision. For my part, however, I think that Advocate General Bot was entirely correct in his analysis of the Article 18 TFEU issue. As he pointed out, a rule which precludes the extradition of one's own nationals is closely associated with the notion of State sovereignty in respect of its nationals and a corresponding duty on the part of the State to protect its own nationals 'from the application of a foreign legal system, of whose procedures and language they are ignorant and in the context of which it may be difficult for them to mount their defence'.[31]

43. While it may be that the rule regarding the non-extradition of one's own nationals reflects a traditional sense of distrust of foreign legal systems and that it has its origins in a less globalised world, that is not quite the point. The real point of the State practice relating to *aut dedere, aut judicare* was that the State of nationality of the requested person had the option of prosecuting that person under its own laws in respect of offences committed abroad. It enjoyed that extraterritorial jurisdiction by virtue of the exercise of its sovereignty in respect of its own nationals. It is true that – as the classic decision of the Permanent Court of International Justice in the *Lotus* case[32] itself illustrates – there are some circumstances in which a State may also exercise jurisdiction in respect of offences committed abroad by persons who are not its own nationals. It is nevertheless the case that, absent specific international agreements conferring universal jurisdiction in respect of certain crimes, that jurisdiction is generally confined to particular circumstances where the events, acts and persons

30 This implies that the courts of the home Member State have jurisdiction pursuant to their national law to prosecute that person for the offences committed outside that State's territory.

31 Opinion of Advocate General Bot in *Petruhhin* (C-182/15, EU:C:2016:330, point 51).

32 Decision of the Permanent Court of International Justice of 7 September 1927, *The Case of the SS Lotus*, *France* v. *Turkey*, Ser. A. No 10.

to which the enactment applies with extraterritorial effect bear upon the peace, order and good government of the State in question or at least on the interests of a national of that State so that there is a *genuine link* between the exercise of the extraterritorial jurisdiction in respect of non-nationals and the State exercising it.[33]

44. While the rationale and reasoning of the Permanent Court's decision in the *Lotus* case[34] has been the subject of extensive analysis in the last 90 or so years since it was first decided and the limitations and, indeed, the relevance of that judgment to modern conditions has been a matter for debate,[35] for my part I cannot improve on the following statement of contemporary international law and practice contained in the separate opinion of President Guillaume in the *Arrest Warrant* decision of the International Court of Justice:

'States primarily exercise their criminal jurisdiction in their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or, at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction …'[36]

45. This passage finds echoes of what the Court acknowledged in *Petruhhin*, namely, a Member State 'as a general rule has no jurisdiction to try offences concerning' acts amounting to serious offences 'committed outside its territory' when 'neither the perpetrator nor the victim of the alleged offence is a national of that Member State'.[37]

46. All of this is sufficient to demonstrate that there is in fact a material difference between the position of the citizen of a State which does not extradite its own nationals on the one hand and non-citizens on the other so far as the extraterritorial application of the criminal law of that State is concerned. As Advocate General Bot observed in *Petruhhin*,[38] there is a risk of impunity in such circumstances in the case of the latter which does not arise in the case of the former.

47. Although the State in question may elect to prosecute its own nationals in respect of alleged offences committed abroad, the situation is normally different in the case of alleged offences abroad committed by non-nationals. While the extent of the ambit of a State's extraterritorial jurisdiction in such latter cases may be open to debate, what is not in dispute is that international law and practice places certain limitations on the capacity of a State to legislate with extraterritorial effect in respect of offences committed by non-nationals outside of its own territory which are different to those applicable in the case of its own nationals. The facts of *Petruhhin* in their own way bear testament to this because under Latvian law an Estonian national who did not have a permanent right of residence in Latvia could not be prosecuted in Latvia in respect of his alleged engagement in drug-trafficking activities within the Russian Federation.[39]

33 See O'Connell, D., *International Law*, 2nd ed., Vol. 2, Stevens, 1979, p. 602; Crawford, J., *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, 2012, p. 457; Ipsen, K., *Völkerrecht*, 6th ed., paragraphs 71 to 74; see also Combacau, J., and Sur, S., *Droit international public*, 13th ed., p. 390, who point out that the exercise of extraterritorial normative power, if neither a territorial nor a nationality link are present, is highly subsidiary and limited to very few cases. The exercise of this prescriptive principle of jurisdiction is well illustrated by Article 4(3) of the Latvian criminal law at issue in *Petruhhin* which allowed for the prosecution of non-nationals for 'serious or very serious' offences committed outside of Latvia which have been directed 'against the interests of the Republic of Latvia or the interests of its inhabitants': see point 67 of Opinion of Advocate General Bot in *Petruhhin* (C-182/15, EU:C:2016:330).

34 Decision of the Permanent Court of International Justice of 7 September 1927, *The Case of the SS Lotus*, *France* v. *Turkey*, Ser. A. No 10.

35 See, e.g., Ryngaert, C., *Jurisdiction in International Law*, 2nd ed., Oxford University Press, 2015, at pp. 30-48; Beaulac, S., 'The *Lotus* Case in Context' in Allen, S., et al., *Oxford Handbook of Jurisdiction in International Law*, Oxford University Press, 2019, pp. 40-58.

36 Decision of the International Court of Justice of 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* [2002] ICJ Reports 2002, paragraph 16 of the separate opinion of President Guillaume.

37 See, to that effect, paragraph 39 of *Petruhhin*.

38 Points 68 and 69 of the Opinion (C-182/15, EU:C:2016:330).

39 Opinion of Advocate General Bot in *Petruhhin* (C-182/15, EU:C:2016:330, point 68).

48. All of this demonstrates that nationals of their own Member State on the one hand and other Union citizens on the other are not in comparable situations for the purposes of a rule whereby the host Member State refuses to extradite its own nationals. In the light of this fundamental difference I take the view that there was – and is – in fact no discrimination for the purposes of Article 18 TFEU with respect to the application of the nationality exception, by reason of the different rules regarding the exercise of extraterritorial jurisdiction in respect of offences committed abroad depending on whether the person concerned is a citizen of that Member State or not. To repeat, therefore, in such circumstances there is a risk of criminal impunity in the latter case which is not present in the case of the former. This is the material difference between the two sets of circumstances which means that these differing rules regarding extradition depending on the nationality of the requested person do not, in my view, amount to discrimination for the purposes of Article 18 TFEU.

49. It is true that *Petruhhin* is a relatively recent decision of a Grand Chamber of this Court. Yet even in the relatively short time since it was decided it has given rise to a series of increasingly complex cases, all of which in their own way have shown how difficult the application in practice of the *Petruhhin* principles [40] really is.

50. This is illustrated by the Court's decision in *Raugevicius*, [41] a case where the Russian Federation had sought the extradition from Finland of a Lithuanian citizen who also held Russian nationality for the purposes of enforcing a custodial sentence which had been imposed by a Russian court. Although Finnish law prohibited the extradition to third countries of its own nationals, it did provide in its own law for a mechanism whereby sentences pronounced in third countries in respect of Finnish citizens 'or a foreign national permanently residing in Finland' could be served in its own territory. The question then arose as to whether the *Petruhhin* principles could be applied in these circumstances.

51. In his Opinion [42] Advocate General Bot drew attention to the potential difficulties. The Lithuanian judicial authorities could not be asked to be given the opportunity of issuing a European arrest warrant for the purposes of issuing a fresh prosecution as this would be contrary to the *ne bis in idem* principle. [43] Advocate General Bot then observed:

'I also do not think that it is conceivable to devise a mechanism enabling the Lithuanian judicial authorities to issue a European arrest warrant for the purposes of enforcing the sentence on Lithuanian soil. Besides the legal obstacles arising from the fact that the sentence to be enforced was imposed by a court of a third State, I should point out that in such a situation, the Finnish authorities would be entitled to invoke the ground for optional non-execution of the European arrest warrant, set out in Article 4(6) of Framework Decision 2002/584, under which the executing judicial authority may refuse to execute a warrant issued for the purpose of enforcing a custodial sentence where the requested person "is staying in, or is a national or a resident of the executing Member State" and that State undertakes to enforce the sentence in accordance with its domestic law.' [44]

52. The Court, however, took a different view. It noted that the Finnish nationality exception was prima facie discriminatory for the purposes of Article 18 TFEU and held further that, applying the *Petruhhin* principles, [45] such a rule could only be justified 'where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions'. [46]

40 Paragraph 50 of *Petruhhin*.

41 Judgment of 13 November 2018 (C-247/17, EU:C:2018:898).

42 Opinion of Advocate General Bot in *Raugevicius* (C-247/17, EU:C:2018:616).

43 Opinion of Advocate General Bot in *Raugevicius* (C-247/17, EU:C:2018:616, point 55).

44 Opinion of Advocate General Bot in *Raugevicius* (C-247/17, EU:C:2018:616, point 56).

45 Paragraph 50 of *Petruhhin*.

46 Judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraph 31).

53. The Court then turned to the question of whether the *Petruhhin* principles applied in the context of a third party extradition request in respect of the enforcement of a sentence. It accepted that a fresh prosecution of a person who has already been tried and sentenced in the requesting State might be contrary to the principle of *ne bis in idem*. The Court then continued;

'….although the principle of *ne bis in idem*, as guaranteed by national law, 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, the fact remains that, in order to prevent the risk of such persons remaining unpunished, there are mechanisms under national law and/or international law which make it possible for those persons to serve their sentences, in particular, in the State of which they are nationals and, in doing so, increase their chances of social reintegration after they have completed their sentences.'[47]

54. The Court then went on to refer to the Convention on the Transfer of Sentenced Persons of 21 March 1983[48] to which all Member States and the Russian Federation are parties. The Sentenced Persons Convention allows for the transfer under certain circumstances of persons serving sentences in foreign jails to serve their sentences in prisons in their home Member State.

55. The Court then noted that Finland allowed both its own nationals and those non-nationals who were permanently resident in Finland to benefit from this Convention. It was thus possible that Mr Raugevicius might be regarded as permanently resident in Finland and thus serve out the balance of the sentence in Finland, assuming that both he and the Russian Federation so consented.

56. The Court then concluded:

'… Articles 18 and 21 TFEU require that nationals of other Member States who reside permanently in Finland and whose extradition is requested by a third country for the purpose of enforcing a custodial sentence should benefit from the provision preventing extradition from being applied to Finnish nationals and may, under the same conditions as Finnish nationals, serve their sentences on Finnish territory. If, on the other hand, a citizen such as Mr Raugevicius may not be regarded as residing permanently in the requested Member State, the issue of his extradition is to be settled on the basis of the applicable national or international law.'[49]

57. While it is true that *Raugevicius*[50] concerned the slightly different situation of seeking extradition for the purposes of enforcing a sentence, in its own way it nonetheless highlights the limits of *Petruhhin*, precisely because there generally *are* differences for extradition purposes between the position of nationals of the home Member State on the one hand and those from other Member States on the other.

58. The net effect of the decision in *Raugevicius*[51] was that the Court acknowledged that unless Finnish law assimilated the position of the requested person to that of its own citizens,[52] so that the Convention on the Transfer of Sentenced Persons 1983 might apply to him, then the decision in *Petruhhin* would have been impossible to apply on the facts of that case.

47 Judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, at paragraph 36).

48 *European Treaty Series* No 112 ('Convention on the Transfer of Sentenced Persons').

49 Judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraphs 47 and 48).

50 Judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898).

51 Judgment of 13 November 2018 (C-247/17, EU:C:2018:898).

52 That is, by finding (if it be the case) that Mr Raugevicius was a long term resident of Finland and therefore entitled to be treated as if he were a Finnish citizen.

59. In addition, I fear that *Petruhhin* is liable to cause practical difficulties, essentially because both the legislation and practice touching on surrender and extradition – whether as reflected in Framework Decision 2002/584 or the European Convention on Extradition 1957 – are not necessarily well adapted to requests made by the host Member State to the prosecuting authorities of the home Member State in respect of the prosecution of the home Member State's own national for offences committed in a third country or, indeed, for that matter, requests by either the home Member State or the host Member State to the third country in which the offence has been committed.

60. Some of these practical issues raised by *Petruhhin* were touched on by the referring court and were also raised in the course of the oral hearing by the representatives of the various Member States. These practical problems all raise issues in relation to the issue of potential criminal impunity. How long, for example, does the host Member State have to wait before a decision is taken by the home Member State? One might observe in passing that such delays might be particularly problematic where the requested person remained in custody in the host Member State. While that State might not be willing to subject the requested person to an extended period of detention while awaiting the outcome of the request to his home Member State, any decision to release that person on a provisional basis might also be problematic, especially if that person was considered to be a flight risk.

61. In this context there is virtual agreement between all the Member States that are parties to the proceedings that the home Member State does not have sufficient information to issue a European arrest warrant if it is approached by a host Member State with the information that a third country seeks the extradition of one of its citizens present in the host Member State and to decide on the question whether it wants to seek the surrender of its national in order to take over the prosecution.

62. There is also virtual agreement by all the Member States that there is no one specific deadline that can be applied in all cases in which the host Member State can expect an answer from the home Member State on whether it intends to issue a European arrest warrant or indeed by when it must have issued such a European arrest warrant if it wishes to do so. Though this was not a question referred by the referring court, the question of such deadlines was raised in the questions to the parties for the oral hearing and it was a subject of the written answer of the Commission to a question by the Court aimed at gaining an insight into the application of the *Petruhhin* principles [53] in the practice of the Member States. There accordingly seems to be general agreement by the Member States (including those present at the oral hearing as well as according to the documents provided by the Commission which sought to examine the practical application of *Petruhhin*), that the home Member State should take its decision on whether to issue a European arrest warrant as soon as possible but that the time limit will depend on the specific facts of the case at issue. One of the main considerations is whether the person concerned is in custody for the purpose of extradition.

63. Nevertheless, it appears from answers that the Commission has sought from the Member States [54] that deadlines set will be between 10 and 45 days with longer deadlines granted only by a few States or in exceptional cases. [55] Only a few Member States do not set deadlines at all. This will, however, lead to a considerable amount of uncertainty.

64. It is difficult to avoid the impression that any deadlines set will generally be too short for either the home Member State or the host Member State to contact the requesting State via a request for mutual legal assistance, receive an answer and translate and assess a file which might contain hundreds of pages. The time frame is extremely tight and will certainly very often be too short, even if mutual legal assistance treaties are in place. In all cases in which this is not the case and diplomatic channels

53 Paragraph 50 of *Petruhhin*.

54 The Commission points out that these were sought at short notice and only at staff level which means that the Member States can supplement and/or give more detail regarding their answer at any time.

55 Longer time periods will be less problematic if the person sought is already in detention for an offence other than the one he is sought for.

have to be used, it may be all but impossible for a home Member State to issue a European arrest warrant within such a time frame. At the hearing, the agent for the Commission pointed out that this might only be different in the exceptional case that the home Member State has already, in parallel, started an investigation on the person in question.

65. Other, additional, problems are never far from view. Is the host Member State free to transmit the documents transmitted by the third country to the home Member State or is the consent of the third country required for this purpose? And if, in the present case, Romania were to agree to take over the prosecution and a European arrest warrant was issued for this purpose, there would be at least an issue – subject to Article 17 of the Convention – as to whether Germany had in this instance complied with its obligations under Article 1 of the Convention, because this would necessarily involve a refusal to sanction the extradition of the suspect to Ukraine for reasons not previously set out in the various declarations lodged by Germany for the purposes of Article 6 of the Convention.[56] There is also the question of what is to happen if the requested person does not wish for his/her prosecution to be taken over by his/her home Member State.

66. Practice and experience has accordingly shown that the situations of nationals and non-nationals are not in fact comparable for the purposes of the application of the Article 18 TFEU equality principles. These practical problems relating to potential criminal impunity are compounded by the absence of an appropriate EU legislative structure. I would therefore accordingly invite the Court to depart from the decision in *Petruhhin* for all the reasons just stated.

67. In the event, however, that the Court does not accept this analysis, I will now nevertheless proceed to answer the three questions posed by the referring Court. In so doing, I will assume for this purpose that (contrary to my own view) *Petruhhin* was correctly decided.

D. The first question

68. By its first question the referring court seeks to establish whether the principles described above regarding the application of Article 18 and 21 TFEU also apply if the person concerned only acquired European citizenship after having taken up residence in a Member State other than his or her home Member State. As the argument of the Court in *Petruhhin* is, clearly, based on the fact that a restriction of a Union citizen's freedom of movement, within the meaning of Article 21 TFEU, is at stake, the question arises whether Article 21 TFEU is affected in the present case.

69. Ireland argues that, in order to trigger other Union rights attendant upon the exercise of free movement, the person claiming such rights must, first, exercise a right of free movement and, second, do this *at the time* that he or she holds citizenship. It is agreed that BY was not a Union citizen at the time he took up residence in Germany. Ireland accordingly maintains that, precisely for this very reason, he had not exercised any EU right of free movement by merely residing in Germany.

70. As the Commission points out in its written observations, there is no international agreement in place between the European Union and Ukraine regarding extradition. Under such circumstances, the rules on extradition fall within the competence of the Member States. In this case, it is apparent from the reference that the international agreement according to which extradition is sought by Ukraine is the European Convention on Extradition 1957 of which Germany, Ukraine as well as Romania are contracting parties. The obligations under that Convention have been ratified into national law. Such national rules must, of course, in situations covered by EU law, have due regard to the latter.[57] Indeed, although in principle criminal legislation and the rules of criminal procedure are, to a large

56 Though this is not a decisive factor due to the supremacy of EU law with regard to international treaties to which the European Union is not itself a party. See also below, point 107 of this Opinion.

57 Judgments of 20 March 1997, *Hayes* (C-323/95, EU:C:1997:169, paragraph 13), and paragraph 27 of *Petruhhin* and the case-law cited.

degree, matters for which the Member States are responsible, the Court has consistently held that Union law sets certain limits to their power. Indeed, that power of the Member States must be exercised in line with not only the fundamental freedoms guaranteed by EU law, but also EU law as a whole, in particular primary EU law.[58] Such legislative provisions may therefore not discriminate against persons to whom Union law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Union law.[59]

71. According to the settled case-law of the Court,[60] citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of EU law, the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. The situations falling within the scope *ratione materiae* of Union law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States as conferred by Article 21(1) TFEU.

72. On the other hand, the citizenship of the Union, established by Article 20 TFEU, is not intended to extend the scope *ratione materiae* of the Treaty to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State.[61]

73. The wording of Article 21(1) TFEU provides that 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States'. The Court has consistently held in this context that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly whereas derogations from that principle must be interpreted strictly.[62]

74. I do not think that this analysis is affected by the judgment in *McCarthy*.[63] That case concerned the case of Ms McCarthy who had dual nationality, including the nationality of the country in which she had been residing. The Court came to the conclusion that no element of her situation indicated that the national measure at issue had the effect of depriving her of genuine enjoyment of the substance of the rights associated with her status as a Union citizen.[64] The Court nevertheless found that the fact that a Union citizen has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation.[65]

75. Likewise, in *Schempp*, the fact that it was not Mr Schempp himself but rather only his former spouse who had exercised her right to free movement was considered to take the facts outside a merely internal situation.[66] Neither did the Court consider in *Zhu and Chen* that the situation of a national of a Member State who was born in the host Member State and who had not made use of the right to freedom of movement, could, for that reason alone, be assimilated to a purely internal

58 See, to that effect, judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 57).

59 See, to that effect, judgments of 2 February 1989, *Cowan* (186/87, EU:C:1989:47, paragraph 19); of 24 November 1998, *Bickel and Franz* (C-274/96, EU:C:1998:563, paragraph 17); and of 28 April 2011, *El Dridi* (C-61/11 PPU, EU:C:2011:268, paragraphs 53 and 54).

60 Judgments of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 22 to 24), and of 13 June 2019, *TopFit and Biffi* (C-22/18, EU:C:2019:497, paragraph 28 and the case-law cited). See also, to that effect, judgment of 2 April 2020, *I.N.* (C-897/19 PPU, EU:C:2020:262, paragraph 40).

61 Judgment of 5 May 2011, *McCarthy* (C-434/09, EU:C:2011:277, paragraph 45 and the case-law cited).

62 Judgment of 9 November 2000, *Yiadom* (C-357/98, EU:C:2000:604, paragraph 24 and the case-law cited), and, for the first part of that statement, judgment of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 31).

63 Judgment of 5 May 2011 (C-434/09, EU:C:2011:277).

64 Judgment of 5 May 2011, *McCarthy* (C-434/09, EU:C:2011:277, paragraph 49).

65 Judgment of 5 May 2011, *McCarthy* (C-434/09, EU:C:2011:277, at paragraph 46).

66 Judgment of 12 July 2005, *Schempp* (C-403/03, EU:C:2005:446, paragraph 25).

situation, thereby depriving that national of the benefit in the host Member State of the provisions of Union law on freedom of movement and of residence.[67] And in *Garcia Avello* the Court specifically stated that a link with Union law existed in regard to persons who are nationals of one Member State who are lawfully resident in the territory of another Member State.[68]

76. This line of reasoning can be applied to BY. He had his residence in Germany at the time that he obtained Romanian citizenship and, by extension, citizenship of the Union. In these circumstances, it does not matter when a citizen of the EU has obtained such citizenship. Neither is it necessary for an EU citizen actually to cross a border for the application of Article 21 TFEU.

77. For the sake of completeness I would add that the fact that BY holds dual nationality, one of them not being the nationality of an EU Member State, does not deprive him either of the freedoms that he holds as a citizen of a Member State that derive from EU law.[69] In that regard the present case *is* different from that of *McCarthy*[70] because unlike that case there is no suggestion in the present case that BY's current right to reside in Germany derives otherwise than from EU law: BY enjoys that right by virtue of the fact that *qua* Romanian citizen he is entitled to stay and reside there, even if this was not so at the time he first moved to Germany in 2012.

78. In so far as Ireland relies on the Court's judgment in *Lounes*[71] and more particularly on paragraph 55 of that judgment where the Court held that 'a Member State cannot restrict the effects that follow from holding the nationality of another Member State, in particular the rights which are attendant thereon under EU law and which are triggered by a citizen exercising his freedom of movement', the underlying thinking seems to be that the exercise of rights under Article 21(1) TFEU always involves the crossing of a border. This, however, is, as seen above, not necessarily the case.

79. In light of these considerations I consider that Articles 18 and 21 TFEU must be interpreted as not precluding a Union citizen from relying on the rights emanating from those provisions merely because he or she has only obtained such Union citizenship after he or she has taken residence in a Member State different from the Member State whose nationality he or she later obtains and has thus not exercised his or her rights to free movement after having become a Union citizen. Where (as here) the Union citizen's right to reside in a Member State derives from EU law, then that citizen is entitled to rely on the rights guaranteed by Articles 18 and 21 TFEU.

E. The second question

80. By its second question the referring court inquires as to the extent of the obligations of the home Member State where that State has been informed of an extradition request made by a third country to another Member State concerning the national of that home Member State. Specifically, the question arises as to whether the home Member State is then obliged to request that the third country seeking extradition provide it with the relevant case files.

81. With the exception of the Greek Government, all the Member States that have submitted their observations in this case agree that the home Member State is not obliged to take any action under EU law. This is also the position of the Commission. The Member States are also in agreement that the home Member State does not have sufficient information at its disposal to decide on whether to issue

67 Judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 19).

68 Judgment of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 27).

69 Judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraph 29), see also judgment of 7 July 1992, *Micheletti and Others* (C-369/90, EU:C:1992:295, paragraph 19).

70 Judgment of 5 May 2011, *McCarthy* (C-434/09, EU:C:2011:277).

71 Judgment of 14 November 2017 (C-165/16, EU:C:2017:862).

a European arrest warrant if it is only provided with the information that a request for extradition has to contain according to Article 12 of the European Convention on Extradition 1957. This means – according to the Member States – that it is virtually impossible for the home Member State to decide on whether to issue a European arrest warrant.

1. The judgment in Petruhhin *and the home Member State*

82. Apart from introductory paragraphs setting out the facts, it is perhaps striking that, with the possible exception of paragraphs 48 and 49 of the judgment, rather little was said in *Petruhhin* itself regarding the obligations and entitlements of the home Member State. While in those paragraphs, *the obligation of the host Member State* to exchange information with the home Member State is discussed, nothing is said about the possible obligations of the home Member State.

83. It would thus seem that the judgment in *Petruhhin* does not expressly deal with any obligations of the home Member State and, for that matter, nor does it do so by implication. The present question posed by the referring court thus obliges us to consider whether the underlying principle in that case might oblige the home Member State to take steps of this nature.

84. As set out above, the Court ruled in *Petruhhin*,[72] that the host Member State whose nationality exception infringes Articles 18 and 21 TFEU is obliged by virtue of the rule of sincere cooperation in Article 4(3) TEU to cooperate with the home Member State.

85. The situation of the home Member State is, however, quite different. It has to take a decision on whether to take over the prosecution of the requested person who is one of its citizens. This is necessary in order to fulfil the requirements regarding the content of a European arrest warrant according to Article 8(1)(c) to (f) of Framework Decision 2002/584. The one requirement that is of more than just a formalistic nature is that of Article 8(1)(c) of Framework Decision 2002/584, which requires it to issue a national arrest warrant, according to the requirements of its national laws.

86. The question whether to commence criminal proceedings is, of course, entirely a matter for each Member State's national law, as are the administrative and other measures which it takes in order to ascertain the facts enabling it to take such a decision. As according to the settled case-law of the Court, in situations covered by EU law, the national rules concerned must have due regard to EU law, BY, who has made use of his right of free movement, must not be discriminated against for that reason. It has not, however, been argued by any of the parties that Romania treats BY differently in this assessment from its (other) citizens that have not made use of their right to free movement and there is no indication that that might be the case.[73]

87. Therefore, contrary to the case of the host Member State, Romania does not find itself in a situation where its application of national rules constitutes an infringement of Articles 18 and 21 TFEU that requires justification. Such an obligation on the part of the home Member State would therefore arise in the context of another Member State's discriminatory rules leading to an infringement of the freedom of movement of Union citizens.

72 See, to that effect, paragraph 42 of *Petruhhin*.

73 Given that the requested person is a national of the home Member State, only reverse discrimination could bring his case within the ambit of Articles 18 and 21 TFEU. In its decision in judgment of 11 July 2002, *D'Hoop* (C-224/98, EU:C:2002:432, paragraph 30), the Court found that 'it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement'. These cases concern nationals returning to their home country after having availed of their right of free movement and being treated differently to nationals who have stayed in their home country. That is not the case with regard to BY. See also, to that effect, judgment of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296, paragraph 23).

2. Obligations of the host Member State?

88. Several Member States have also commented on whether it might not be the requested Member State which should provide the home Member State with additional information, and whether, for that purpose, the requested Member State might be obliged to request from the third country the information that the home Member State requires from the requesting State in order to make a decision on whether to take over the prosecution. Once that information has been received, it would obviously have to be passed on to the home Member State in order to serve that purpose.

89. Latvia has in fact changed its domestic law on the foot of the judgment of the Court in *Petruhhin* in order to implement the Court's judgment. It has added a second paragraph to Article 704 of the Kriminālprocesa likums (Code of Criminal Procedure)[74] dealing with the case where the extradition of an EU citizen is sought. In that case, the public prosecutor is required to send information to the country of citizenship of the person sought regarding the possibility for the submission of a European arrest warrant and specify a deadline for the submission of such a warrant.

90. Many of the parties have contended that with its judgment in *Pisciotti* the Court has already in effect determined this issue. In that case the Court held that, in respect of a third country request for the extradition of the citizen of another Member State, the requirements of Articles 18 and 21 TFEU were satisfied where the requested Member State which does not extradite its own citizens 'put[s] the competent authorities of the Member Sate of which the citizen is a national in a position to seek the surrender of that citizen pursuant to a European arrest warrant and the latter Member State has not taken any action in that regard' prior to the extradition of such a person.[75]

91. In *Pisciotti*, an Italian national had been arrested in transit at Frankfurt airport on foot of an extradition request made by the United States of America to the Federal Republic of Germany. In that case, however, Italian consular officials had been kept informed of Mr Pisciotti's situation before the German courts made the relevant extradition order and no European arrest warrant had been issued by the Italian authorities. In effect, therefore, the Court held that the *Petruhhin* obligations[76] had been satisfied in that case because the home Member State – namely, in this example, Italy – was fully informed in respect of the case and had been put in a position by the host Member State – namely, in this example, Germany – 'to seek the surrender of that citizen pursuant to a European arrest warrant and the [home] Member State has not taken any action in that regard'.[77] This seems to conform to the reading of the judgment by the Latvian legislator.

92. In my view, the decision in *Pisciotti*[78] is more or less dispositive of this question. As that judgment makes clear, the extent of the *Petruhhin* obligation[79] on the part of the host Member State is simply to place the home Member State in a position whereby it in turn can decide to seek the surrender of its own citizen and try him in that jurisdiction in respect of the offences specified in the extradition request of the third country. In the present case, therefore, it would be sufficient for Germany to transfer the Ukrainian request to Romania so that the appropriate prosecution authorities in that State can make a decision as to whether to seek a European arrest warrant for the surrender of BY from Germany for the purposes of prosecution. The decision in *Pisciotti*[80] makes it clear that Germany has no further obligations in that regard.

74 Latvijas Vēstnesis, 11.05.2005, Nr 74 (3232). Available on: https://likumi.lv/ta/en/en/id/107820 (last accessed 11 September 2020). According to the Commission's written answer to a question put by the Court, the Republic of Austria has also changed its law in a similar way by adding a new subparagraph (1a) to paragraph 31 of the Bundesgesetz über die Auslieferung und die Rechtshilfe in Strafsachen (Extradition and Mutual Assistance Act), published in BGBl. I. No. 20/2020, that entered into force on 1 June 2020.

75 Judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraph 56).

76 Paragraph 50 of *Petruhhin*.

77 Judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraph 56).

78 Judgment of 10 April 2018 (C-191/16, EU:C:2018:222).

79 Paragraph 50 of *Petruhhin*.

80 Judgment of 10 April 2018 (C-191/16, EU:C:2018:222).

93. It follows, therefore, that in answer to the second question, I consider that neither the home Member State nor the host Member State are obliged, on the basis of the judgment in *Petruhhin*, to request that the requesting State provide the case files for the purpose of examining whether to take over the prosecution.

F. The third question

94. By its third question the referring court inquires whether a Member State which has been requested by a third country to extradite a Union citizen is obliged by virtue of *Petruhhin* to refuse to make an order for the extradition of that person but instead to take over the criminal prosecution itself if it is possible for it to do so under its own national law.

95. According to the settled case-law of the Court, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the ultimate judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Union law, the Court is in principle bound to give a ruling.[81] The Court will, however, where appropriate, examine the circumstances in which the case was referred to it by a national court in order to assess whether it has jurisdiction and, in particular, determine whether the interpretation of EU law that is sought bears any relation to the facts of the main action or its purpose, so that the Court is not led to deliver advisory opinions on general or hypothetical questions.[82]

96. The referring court relies on point 2 of Paragraph 7(2) of the German Criminal Code, arguing that it would be possible for the prohibition of discrimination under Article 18 TFEU to be taken into account by declaring the extradition of a Union citizen to a third country to be unlawful and by the criminal prosecution being taken over by the German criminal prosecution authorities. However, according to the German Government, citing a recent case of the Bundesgerichtshof (Federal Court of Justice, Germany),[83] the jurisdiction of German courts based on point 2 of Paragraph 7(2) of the German Criminal Code is merely subsidiary in nature. This means that jurisdiction only lies with German courts on the foot of that provision if no foreign State can or wants to take over the prosecution. This is not the case here, as Ukraine clearly has jurisdiction to try BY and wants to exercise that jurisdiction.[84] On that basis, the third question as put by the referring court, appears to be irrelevant for the outcome of the case and therefore inadmissible.

97. One must, of course, recall that it is not for the Court to rule on the interpretation and applicability of provisions of national law. Rather, the Court must take account, under the division of jurisdiction between the Union Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the question put to it is set.[85]

81 Judgment of 28 June 2018, *Crespo Rey* (C-2/17, EU:C:2018:511, paragraph 34 and the case-law cited).

82 Judgment of 24 October 2013, *Stoilov i Ko* (C-180/12, EU:C:2013:693, paragraph 38 and the case-law cited).

83 Bundesgerichtshof, Order of 23 April 2019 (4StR 41/19), available on the Federal Court of Justice's website: https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=09ff6a4c826bba36ff9531132f1210e7&nr=96151&pos=0&anz=1 (last accessed 11 September 2020).

84 See also Opinion of Advocate General Bot in *Pisciotti* (C-191/16, EU:C:2017:878, point 48), and judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraph 49), which refer to the same reading of that provision.

85 Judgment of 13 June 2013, *Kostov* (C-62/12, EU:C:2013:391, paragraphs 24 and 25 and the case-law cited).

98. As this question seems to be in issue between the parties [86] and the premiss underlying the third question proves that the referring court has, at least not yet, made any other determination, the question cannot be considered to be *obviously* irrelevant. The third question should therefore be examined under the legislative context described, or rather which underlies the reference by the referring court.

99. An underlying assumption of the Court in *Petruhhin* is, as we have seen, that Member States, as a general rule, have no jurisdiction to try cases if an offence was neither committed on their territory, nor by their nationals or if the victim of the alleged offence is not a national of that Member State. [87] Starting from this premiss, the Court concluded that any impunity could be avoided in the absence of extradition once the home Member State had jurisdiction, pursuant to its national law, to prosecute the person sought for offences committed outside its national territory. The situation it had in mind was one that prevails in many Member States where national law prevents them from extraditing their own nationals.

100. In contrast to the present case, if one follows the apparent interpretation of point 2 of Paragraph 7(2) of the German Criminal Code by the referring court, in *Petruhhin* Latvian law did not provide for extraterritorial jurisdiction in cases in which neither the offender nor the victim were Latvian nationals or, in the first case, were holders of permanent residence permits in Latvia. In that context, the Court nevertheless endeavoured to secure equality of treatment for the EU free mover where the host Member State had a rule which precluded the extradition of its own nationals to third countries. As we have seen, the solution to this problem was to inform the authorities of the home Member State of the request and to facilitate, if necessary, a European arrest warrant to effect the surrender of the requested person for the purposes of trial in the home Member State. That, however, is the extent of the obligation and by taking such steps, the host Member State secures *Petruhhin*-style equality.

101. In this respect I agree with the arguments of the Commission which were advanced at the oral hearing, that, in its judgment in *Petruhhin*, the Court found a novel solution to the question of equal treatment in that context and that it set out a limited set of obligations of a host Member State that does not extradite its own nationals. This serves the interest of legal certainty which is of the utmost importance for parties acting in the area of criminal law. There is, in my view, no obligation on the host Member State as a matter of European Union law to go any further. Specifically, a finding that the host Member State should automatically refuse to extradite a Union citizen of another Member State and to take over the criminal prosecution itself would, once again, seem a very prescriptive solution which was at odds with the general independence and autonomy of the host Member State's prosecuting authorities.

102. The Court in *Petruhhin* did not consider other measures that are less restrictive than extradition that a host Member State might have to take in order to fulfil its obligations under Articles 18 and 21 TFEU.

103. This is not the first time that this Court is faced with the German provision at issue here and the reasoning that a Member State should, if it had jurisdiction to do so, take over the prosecution of the national of another Member State itself, as a measure less restrictive than extradition to a third country. This presupposes, obviously, that that Member State does not extradite its own nationals, as any limitation on extradition under EU law is derived from that rule, rather than a right that is inherent to EU citizenship.

86 Counsel for BY argued that the provision is applicable to the present case.

87 Paragraph 39 of *Petruhhin*.

104. It may be noted that in *Pisciotti*[88] the applicant had also raised this argument. In this respect, Advocate General Bot referred to the German Government's explanation that Paragraph 7(2) of the German Criminal Code was not applicable as one of the conditions of that provision, namely that the extradition requested cannot be implemented, was not fulfilled.[89] The Court, on the other hand, pointed out that 'the only question [was] whether the Federal Republic of Germany could adopt a course of action with regard to Mr Pisciotti which would be less prejudicial to the exercise of his right to free movement by considering surrendering him to the Italian Republic rather than extraditing him to the United States of America'.[90]

105. Above and beyond this, to oblige a Member State to take over the prosecution of a foreign national itself rather than extraditing him or her, would, in many cases, be at odds with obligations that Member State has under international treaties on extradition. Article 6 of the European Convention on Extradition 1957 allows contracting parties to refuse extradition of its nationals, provided, at the request of the requesting State, it submits the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. No comparable provision exists in case a contracting party takes over the prosecution of a foreign national. As has been pointed out by several parties to the proceedings, international legal assistance in criminal matters, and in particular in the area of extradition, depends on the different contracting parties' confidence in one another. A further restriction on the extradition of alleged criminal offenders might lead to reluctance by other contracting parties in entering into agreements with Member States of the EU. This, however, cannot be in the interest of the European Union which, as is set out clearly in the recitals to the Treaty on the European Union, 'resolved to facilitate the free movement of persons while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice …'.

106. In any event, after all this long discussion it is sufficient to say in response to the third question that there is in fact no such obligation imposed by *Petruhhin* on the requested State itself to take over the prosecution of a non-national who has been the subject of a third country extradition request.

V. Conclusion

107. In summary, therefore, I would conclude as follows:

The judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630), was, with respect, wrongly decided and should not now be followed by this Court. Practice and experience has shown that the situation of a citizen of a Member State which does not extradite its own nationals and that of citizens of other Member States are not in fact comparable for the purpose of the application of Article 18 TFEU. These practical problems relating to potential criminal impunity are compounded by the absence of an appropriate EU legislative structure. I would therefore accordingly invite the Court to depart from the decision in *Petruhhin* for all the reasons stated above.

108. Irrespective of whether the Court agrees with this analysis or not, I have arrived at the conclusion that the Court should answer the questions posed by the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) as follows:

(1) Articles 18 and 21 TFEU must be interpreted as not precluding aUnion citizen from relying on the rights emanating from these provisions merely because he or she has only obtained such Union citizenship after he or she has taken residence in a Member State different from the Member State whose nationality he or she later obtains and has thus not exercised his or her rights to free

88 Judgment of 10 April 2018 (C-191/16, EU:C:2018:222).

89 Opinion of Advocate General Bot in *Pisciotti* (C-191/16, EU:C:2017:878, point 48).

90 Judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraph 50).

movement after having become a Union citizen. Where (as here) the Union citizen's right to reside in a Member State derives from EU law, then that citizen is entitled to rely on the rights guaranteed by Articles 18 and 21 TFEU.

(2) The home Member State is not obliged under EU law to request that the requesting third country provide the case files for the purpose of examining whether to take over the prosecution.

(3) EU law imposes no obligation on the requested State itself to take over the prosecution of a non-national who has been the subject of a third country extradition request.