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The Perplexities of the Petruhhin Judgment

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It is not often that an Advocate General of the Court of Justice of the European Union (CJEU) calls on the Court to clarify its position in view of the mounting questions coming from national courts. Yet this is what Advocate General Hogan did in his Opinion of 24 September 2020 in the *BY case*. He was referring to the Court's 2016 *Petruhhin* ruling, that an EU country which is requested by a non-EU country to extradite a national of another EU Member State must first ask that Member State if it wishes to prosecute its own national rather than fulfil the extradition request. "*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*". This Briefing explains what lies behind this comment and considers the perspectives for this controversial judgment.

The new dicta of *Petruhhin*

Petruhhin, an Estonian national, had long been on Interpol's radar for large-scale drug trafficking. The Russian authorities eventually issued an extradition request against him and asked him to be placed in custody. Petruhhin was arrested in Latvia, where the course of the case took a significantly different turn. According to the Latvian Constitution, Latvian citizens may not be extradited to a foreign country, i.e. outside the EU, unless a specific international agreement allows so. In the case at hand there was a bilateral agreement between Latvia and Russia on judicial assistance which explicitly excluded the extradition of the nationals of the contracting parties. There was no similar bilateral agreement between Estonia and Russia. In these circumstances the Latvian courts, in reviewing the decision of the prosecutor granting the extradition, referred the matter to the CJEU, asking if Petruhhin, as an EU citizen living in Latvia, should benefit from the same protection from being extradited as enjoyed by Latvian nationals.

The Court constructed the issue by placing EU citizenship at the centre of its analysis and reviewed the extradition rules applicable in Latvia from this premise. The Court found that two aspects of EU citizenship were affected, namely non-discrimination based on nationality and freedom of movement. It concluded that the rules not only treated Latvian and other EU nationals differently for extradition purposes, but were themselves liable to hinder free movement. The Court accepted that the prevention of the risk of impunity which animates extradition is a legitimate objective when justifying the limitation of rights stemming from EU citizenship. However, it concluded that the same objective could be attained by less restrictive measures. It was therefore natural to look to the European Arrest Warrant (EAW), which has less of an impact on the exercise of EU citizenship rights while being equally effective in preventing the risk of impunity for a person alleged to have committed a criminal offence.

Having found how best to preserve EU citizenship rights and the interests of criminal justice at the same time, the Court put forward its new dicta. According to this, when an EU country is requested by a third country with which it has an extradition agreement to extradite a national of another EU country (the 'home Member State'), the requested country (the 'host Member State') should first

inform the home Member State that it has received an extradition request for its national from a third country instead of proceeding with the extradition. On this basis the home Member State may decide to request the surrender of its own national under an EAW provided that it has jurisdiction to prosecute its own nationals for crimes committed abroad.

Petruhhin in practice

One of the intriguing aspects of the *Petruhhin* judgment is how this new dicta shapes the granting of international extradition requests received by an EU Member State. Extradition between an EU Member State and a third country takes place on the basis of either (1) reciprocity or a bilateral agreement, (2) the 1957 European Extradition Convention concluded under the auspices of the Council of Europe, or (3) an agreement concluded by the EU itself (with USA, Japan, Norway, Iceland). *Petruhhin* affected the first category (bilateral extradition agreements) which the CJEU, despite their origin in international law, clearly pulled under EU law. The judgment was, before long, extended to the extradition agreements concluded by the EU (in relation to the EU-US extradition agreement see *Pisciotti*, re the Norway Iceland Agreement see *Ruska Federacija*). Subsequently, extradition requests made not to prosecute but to enforce a custodial sentence, were also found to give way to an eventual EAW from the home Member State (*Raugevicius*).

The practical implications of the obligation imposed on both countries concerned cannot be underestimated. The requested Member State must now immediately inform the home Member State that its national was requested in the context of an international extradition, to allow for the possibility that the home Member State may want to prosecute that person itself, provided it has jurisdiction to do so. However, that jurisdiction cannot be taken for granted, as states have different views on whether to extend their jurisdiction to offences committed by their own nationals abroad.

For the purposes of issuing an EAW to prosecute in the home Member State, it is far from certain that the information contained in the third country's extradition request is sufficient to bring a charge, let alone to prosecute successfully. If more information is required, from whom will the home Member State obtain it? If it is the requesting third country, what happens if there are no underlying legal arrangements between that country and the home Member State to share this information, as was the case in *Petruhhin* itself? If the home Member State cannot directly contact the requesting third country, it must rely on the host Member State.

But then, what is the role of the host Member State in securing information for the home Member State? Should it request supplementary information from the third country? Can the information so acquired be transmitted directly to the home Member State or is the consent of the third country needed?

More generally, what is the timeline for the home Member State to take a decision on whether it wants to prosecute; and for how long can the requested host Member State keep the requested person in detention while it awaits that decision, knowing that there must be an ultimate time limit for detention?

And to what extent is the obligation of the requested Member State to inform the host Member State affected if the EU citizen concerned is already established in that Member State and his/her centre of interest now lies there? In such situations should the requested Member State itself take over the prosecution if its national law so permits?

Perspectives after *Petruhhin*

These uncertainties are not merely of practical relevance. Two fundamental premises of international extradition are affected. The first is the objective of preventing the risk of impunity in criminal proceedings. Despite the fact that the CJEU itself recognised this objective, all the practical implications of the *Petruhhin* dicta seem to work against it. The home Member State of which the requested person is a national may seem to be the preferred venue for prosecution (or for the execution of a custodial sentence) from the viewpoint of EU citizenship but this is certainly not the case from the viewpoint of the criminal justice system. The time, effort and logistics needed to acquire information for a home Member State prosecution could potentially weaken the case for the prosecution and therefore put at risk the objective of preventing impunity.

The second issue at stake here relates to the very origin of extradition, which is a treaty obligation. The *Petruhhin* dicta stems from the CJEU's interpretation, which is authoritative for EU Member States, but also directly affects international treaty obligations. Requiring the requested Member State to give precedence to the EAW issued by the home EU Member State over its obligations under an extradition agreement is to essentially ask the host Member State to disregard its treaty obligation.

Extradition agreements generally leave ample grounds on which to refuse requests. However, surrender to another EU Member State on the basis of an EAW is certainly not among these. As a consequence, the requested EU Member State will have to look for some other basis if it is to argue that treaty obligations are carried out in good faith.

To complicate matters further, the 1957 European Convention on Extradition provides for a regime where the scope for refusal of requests has been gradually narrowed, precisely with a view to ensuring that the principal treaty obligation to extradite is better attained. Putting obligations under the 1957 Convention at risk is certainly an undesirable consequence, and is the issue which lies at the heart of the *BY* case. It is this concern that prompted Advocate General Hogan to conclude his Opinion by asking the CJEU to rethink its decision in *Petruhhin* and to retreat in a dignified fashion before it is too late.