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From:	General Secretariat of the Council
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Delegations will find in the Annex the Joint report of Eurojust and the European Judicial Network in Criminal Matters (EJN) on the Extradition of the EU citizens to third countries.

# Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries

November 2020

*Criminal justice across borders*



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## Executive summary

In its 2016 *Petruhhin* judgment, the Court of Justice of the European Union (CJEU) introduced specific obligations for Member States that do not extradite their own nationals and receive an extradition request for the prosecution of an EU citizen who is a national of another Member State and has exercised his right to free movement.

On 4 June 2020, the Council requested that the European Union Agency for Criminal Justice Cooperation (Eurojust) and the European Judicial Network (EJN) analyse how cases of requests for the extradition of EU citizens by third countries are handled in practice, and that they report to the Council by 1 December 2020.

The aim of this joint report by Eurojust and the EJN is to inform the Council of the main difficulties encountered by practitioners in this field. It is based on an analysis of Eurojust cases registered after the delivery of the *Petruhhin* judgment in September 2016 and on the experience of the EJN. Therefore, the report does not aim at providing an exhaustive overview of all possible issues raised by the abovementioned case-law across the EU, but focuses only on issues identified by Eurojust and the EJN in their respective casework.

The report confirms that the application of the CJEU's case-law on the extradition of EU citizens raises several practical and legal issues, and that Eurojust and the EJN have played an important role in facilitating cooperation between the Member States involved, and sometimes also with third countries.

The most relevant issues identified, followed where possible by Eurojust's/the EJN's recommendations, are as follows.

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

Further clarification of the scope of the CJEU's case-law is recommended.

- Practical and legal issues concerning the consultation procedure.
  - Difficulties to identify the competent authorities in the Member State of nationality.
  - Different practices relating to the required information to be provided to the Member State of nationality concerning the extradition request.
  - Uncertainties as to which Member State should be responsible for the translation of the information provided to the Member State of nationality and bear its costs.
  - Different practices relating to the time limits given for the decision by the Member State of nationality on whether to prosecute the requested person.
  - Different practices relating to the type of assessment carried out by the Member State of nationality when deciding whether to prosecute the requested person.
  - Uncertainties as to the judicial cooperation instrument to be used to ensure prosecution in the Member State of nationality, particularly if the thresholds for issuing a national arrest warrant and/or a European arrest warrant are not met.



- Relevance of addressing not only the question of the jurisdiction, but also that of which country is best placed to prosecute and consequently prevent impunity.
- Tensions between obligations stemming from EU law on the one hand and obligations stemming from bilateral and multilateral extradition treaties on the other hand.

Further clarification on the abovementioned issues is recommended.

- The results of the consultation procedure.
  - In the vast majority of analysed cases, the consultation procedure activated by the requested Member State did not lead to the prosecution of the EU citizen in their Member State of nationality. Such a mechanism appears to be beneficial only where parallel proceedings are already ongoing against the requested person in the Member State of nationality.
- The role of Eurojust and of the EJN.
  - Both Eurojust and the EJN have played and will continue to play an important role in assisting and supporting national authorities with practical and legal issues.

A detailed explanation of the practical and legal issues/recommendations mentioned above, including several other ongoing issues, can be found in this report. In addition, (anonymised) case examples, presented by Eurojust and the EJN, have been provided to help in explaining the issues at stake.

## 1. Introduction

On 6 September 2016, the CJEU introduced, in its *Petruhhin* judgment<sup>(1)</sup>, specific obligations for Member States that do not allow extradition of their own nationals, where they receive an extradition request concerning an EU citizen who is a national of another Member State (see Section 3). This new approach was confirmed and, to a certain extent, refined in subsequent case-law.

The application of this case-law has proved difficult in practice. Despite numerous discussions and meetings dedicated to *Petruhhin*<sup>(2)</sup>, *Raugevicius*<sup>(3)</sup> and the other related judgments (see Section 3), many questions of a legal and practical nature have remained. The existence of said issues is also acknowledged by Advocate General Hogan in his opinion in case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, currently pending before the CJEU<sup>(4)</sup>.

On 4 June 2020, the Council invited Eurojust and EJM to analyse how cases of requests for the extradition of EU citizens by third countries are handled in practice, and to report to the Council by 1 December 2020. The findings of the report would also allow the Commission, if appropriate, to further explore possible steps towards a common approach at the EU level on how to handle extradition requests from third countries for EU citizens<sup>(5)</sup>.

The analysis covers a period of 4 years, starting from the publication date of the *Petruhhin* judgment. This report is not aimed at providing an exhaustive overview of all possible issues raised by the abovementioned case-law across the EU, but focuses only on the issues identified by Eurojust and the EJM (see Section 2). After a brief overview of the CJEU case-law (Section 3), this report provides an overview of recurring practical and legal issues that have been encountered in Eurojust casework and in the experience of the EJM in the process of implementing the obligations stemming from the CJEU's case-law on extradition requests from third countries (see Section 4). As the support that Eurojust and EJM contact points provided to national authorities predominantly occurred during the 'consultation procedure', the part of the report that deals with that procedure (see Section 4.2) is more extensive than the part on the extradition proceedings (see Section 4.3). The report also highlights the roles of Eurojust and the EJM in relation to such cases (see Section 4.4). It then concludes with the main findings of the analysis (see Section 5).

<sup>(1)</sup> Judgment of the Court of Justice of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630.

<sup>(2)</sup> See, for example, Council documents 15002/16 (Questions regarding recent decisions of the CJEU), 10429/17 (Comments and questions by the Commission on recent case law, including a proposal to establish national focal points), 15786/17 (Note by Eurojust on the *Petruhhin* judgment (Case C-182/15) and the role of Eurojust), 15207/17 (Extracts from Conclusions of Plenary meetings of the EJM concerning case-law on the EAW), 14745/18 (Discussion on providing information to the State of nationality in case of surrender, paper by Germany) and 6228/20 (Extradition of EU citizens to third countries, exchange of views).

<sup>(3)</sup> See, for example, Council document 14568/19 (Note by AT on the application of the CJEU judgment in Case C-247/17 (*Raugevicius*) - EAW and third States).

<sup>(4)</sup> See opinion of Advocate General Hogan of 24 September 2020 in pending case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, C-398/19. The questions submitted relate to a possible obligation for the Member State of nationality to request that the requesting third country provide the case files; and a possible obligation for the requested Member State to refuse extradition and take over the criminal prosecution, if it is possible to do so under its law.

<sup>(5)</sup> In light of the ruling of the CJEU in *Ruska Federacija* (see footnote 20), it is clear that any findings or conclusions in this Report regarding extradition requests for EU citizens apply *mutatis mutandis* to extradition requests for nationals of states of the European Free Trade Association (EFTA).

## 2. Methodology

Eurojust and the EJM used different methodologies to contribute to this report (see Sections 2.1 and 2.2). If the report refers to issues identified by both Eurojust and the EJM it will be referred to as 'the analysis'. If the report refers to issues identified by either Eurojust or the EJM it will be referred to as either 'the Eurojust analysis' or 'the EJM analysis'.

### 2.1. Eurojust

Eurojust identified 72 cases registered in its Case Management System that concerned extradition requests from third countries regarding EU citizens. These cases were opened by nine national desks <sup>(6)</sup> and the representative of Denmark, and related to extradition requests from different third countries <sup>(7)</sup>. All cases identified – except one – were referred by the competent authorities of the requested Member States. Relevant information from these cases was extracted based on the replies to a questionnaire.

Not all of the 72 cases could be analysed in depth, for the following reasons.

- Some cases had already been closed and therefore the available information was very limited.
- In some cases the support requested from Eurojust did not relate to the consultation mechanism of the *Petruhhin* doctrine.
- In some cases the requested person had returned to the Member State of nationality before the assessment took place and/or the extradition request was withdrawn, and therefore the cases were not relevant any more.

### 2.2. The European Judicial Network

The EJM set up an EJM *Petruhhin* reference group (hereinafter 'the EJM Reference Group') composed of EJM contact points from 15 EU Member States <sup>(8)</sup> and four third countries (two of them European Free Trade Association (EFTA) states) <sup>(9)</sup>. The group was set up following a request that the EJM national correspondents identify EJM contact points with experience in handling cases involving '*Petruhhin* situations'. The EJM Reference Group met twice and identified the relevant issues experienced in their practice when dealing with extradition of EU citizens in the application of the *Petruhhin* doctrine. The discussions of the EJM Reference Group were based on a questionnaire aimed at collecting information on the practical experience of the national judicial authorities in their capacity as requested EU Member State, EU Member State of nationality and requesting third country.

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<sup>(6)</sup> Bulgaria, Czech Republic, Germany, Spain, Croatia, Hungary, Netherlands, Romania and Slovakia.

<sup>(7)</sup> The third countries involved were, inter alia: Argentina, Bosnia and Herzegovina, Brazil, Iran, Japan, Liechtenstein, Moldova, Morocco, North Macedonia, Norway, Paraguay, Peru, Russia, Serbia, Switzerland, Thailand, Turkey, Ukraine, United States, Uruguay, Uzbekistan and Venezuela.

<sup>(8)</sup> Belgium, Czech Republic, Denmark, Germany, Spain, France, Croatia, Italy, Lithuania, Poland, Portugal, Romania, Slovenia, Slovakia and Sweden.

<sup>(9)</sup> Bosnia and Herzegovina, Norway, Serbia and Switzerland.



### 3. Background: the Court of Justice's case-law on extradition of EU citizens

The *Petruhhin* case concerned a request for a preliminary ruling by the Latvian Supreme Court in the context of a request for extradition for prosecution by Russia addressed to Latvia (the requested Member State), concerning an Estonian national <sup>(10)</sup>. The CJEU was asked to interpret Articles 18 and 21(1) of the Treaty on the Functioning of the European Union (TFEU) and Article 19 of the Charter of Fundamental Rights of the European Union (the Charter) in relation to the execution of an extradition request. In its judgment, the CJEU introduced an obligation to carry out a consultation procedure between the requested Member State and the Member State of nationality of the EU citizen, and clarified questions on a human rights assessment.

- **Consultation procedure.** The CJEU stated that a law that provides for the non-extradition of a Member State's own nationals – while allowing the extradition of EU citizens who are nationals of another Member State – constitutes unequal treatment and gives rise to a restriction of freedom of movement within the meaning of Article 21 of the TFEU <sup>(11)</sup>. Said restriction can be justified if it is based on a legitimate objective and if it is proportionate <sup>(12)</sup>. The CJEU agreed that 'preventing the risk of impunity for persons who have committed an offence' is a legitimate objective in EU law <sup>(13)</sup>. However, the CJEU also found that granting an extradition request is not the most proportionate measure to attain this aim. According to the CJEU, a more proportionate measure would be to apply all the cooperation and mutual assistance mechanisms provided for in EU criminal law <sup>(14)</sup>. In the case at hand, this implied an obligation for the requested Member State to inform the Member State of nationality of the extradition request, to give that Member State the possibility to issue a European Arrest Warrant (EAW), as far as it has jurisdiction, and to give priority to that potential EAW over the extradition request <sup>(15)</sup>.
- **Human rights assessment.** The CJEU held that, where a Member State receives a request from a third country seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter <sup>(16)</sup>. In line with the *Aranyosi and Căldăraru* judgment <sup>(17)</sup>, the CJEU recalled that the requested Member State must base its assessment on information that is objective, reliable, specific and properly updated <sup>(18)</sup>.

<sup>(10)</sup> *Petruhhin*.

<sup>(11)</sup> *Petruhhin*, paragraph 33. Unlike Advocate General Bot, who had argued in his opinion in the *Petruhhin* case that such a difference in treatment did not constitute discrimination prohibited by Article 18 of the TFEU (paragraphs 31 to 70). See also, more recently, Advocate General Hogan's opinion in pending case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, paragraphs 42 to 48, arguing that *Petruhhin* was not correctly decided.

<sup>(12)</sup> *Petruhhin*, paragraph 34.

<sup>(13)</sup> *Petruhhin*, paragraph 37.

<sup>(14)</sup> *Petruhhin*, paragraph 47.

<sup>(15)</sup> *Petruhhin*, paragraphs 48 and 49.

<sup>(16)</sup> *Petruhhin*, paragraph 60.

<sup>(17)</sup> Judgment of the Court of Justice of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

<sup>(18)</sup> *Petruhhin*, paragraph 59.

The CJEU confirmed and refined the *Petruhhin* judgment in subsequent decisions such as *Pisciotti* <sup>(19)</sup>, and *Ruska Federacija* <sup>(20)</sup>. Further clarifications will probably come from future case-law of the CJEU, particularly in case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)* <sup>(21)</sup>.

In *Raugevicius* <sup>(22)</sup>, which concerned an extradition request concerning an EU citizen for the purpose of the execution of a custodial sentence, the CJEU followed, to some extent, *Petruhhin*, but the outcome was different. In line with *Petruhhin*, the CJEU confirmed that unequal treatment, which allows the extradition of an EU citizen who is a national of another Member State, gives rise to a restriction of free movement within the meaning of Article 21 of the TFEU; this can be justified where it is based on objective considerations and proportionate to the legitimate objective <sup>(23)</sup>. In *Petruhhin*, the CJEU had ruled that the requested Member State should give the Member State of nationality the possibility to issue an EAW. In *Raugevicius*, the CJEU acknowledged that the principle of *ne bis in idem* may be an obstacle to the prosecution by a Member State of persons covered by an extradition request for the purpose of enforcing a sentence <sup>(24)</sup>. However, the CJEU held that there are other mechanisms under national and/or international law that make it possible for those persons to serve their sentences, in particular in the Member State of which they are nationals, in view of increasing their chances of social rehabilitation, for example the 1983 Convention on the Transfer of Sentenced Persons <sup>(25)</sup>. In light of the facts of this case, where the requested person was a long-term resident in the requested Member State, the CJEU did not follow the path chosen in *Petruhhin* or *Pisciotti* (consultation mechanism with the Member State of nationality). Instead, the CJEU concluded that the requested state was required to ensure that that EU citizen, if they reside permanently in its territory, receives the same treatment as that accorded to its own nationals in relation to extradition. In other words, the requested Member State should explore the possibility that the requested person serve the sentence pronounced abroad on its territory.

<sup>(19)</sup> Judgment of the Court of Justice of 10 April 2018, *Pisciotti*, C-191/16, ECLI:EU:C:2018:222. The CJEU ruled that a Member State is not required to extend a prohibition on the extradition of its own nationals to the United States to every EU citizen travelling in its territory. However, before extraditing an EU citizen, a requested Member State must put the Member State of nationality of that citizen in a position to seek the surrender of that citizen pursuant to an EAW.

<sup>(20)</sup> Judgment of the Court of Justice of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262. When a Member State is required to rule on an extradition request by a third country concerning a national of an EFTA state which is a party to the Agreement on the European Economic Area, it must verify that that national will not be subject to the death penalty, torture or other inhuman or degrading treatment or punishment. Before proposing to execute the request for extradition, the Member State must inform the EFTA state of the request, to enable that state to seek the surrender of its national.

<sup>(21)</sup> See opinion of Advocate General Hogan in pending case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*. See also opinion of Advocate General Bobek of 19 November 2020 in pending case *Bundesrepublik Deutschland (Interpol Red Notice)*, C-505/19, ECLI:EU:C:2020:939, who argues that the prohibition of double jeopardy applicable to the Schengen area may also bar extradition to a third country.

<sup>(22)</sup> Judgment of the Court of Justice of 13 November 2018, *Raugevicius*, C-247/17, ECLI:EU:C:2018:898.

<sup>(23)</sup> *Raugevicius*, paragraphs 30 and 31.

<sup>(24)</sup> *Raugevicius*, paragraph 36.

<sup>(25)</sup> *Raugevicius*, paragraphs 36 and 37.



## 4. The results of the analysis

### 4.1. The scope of the Court of Justice's case-law

The analysis shows that practitioners often apply the consultation procedure without verifying the different elements that, in principle, should be present for the application of this mechanism (see Sections 4.1.1–4.1.6). Questions have arisen particularly as to the applicability of the CJEU's legal reasoning to extradition requests for the execution of a custodial sentence, in light of the *Petruhhin* and *Raugevicius* judgments, and the approach to take in such cases (see Section 4.1.5). In practice it is not always clear for practitioners which obligations should apply to which scenarios.

#### 4.1.1. The legal basis for the extradition request

The duty of consultation with the Member State of nationality only arises if there is a legal basis for the extradition. The analysis indicates that different legal bases were applied, including the 1957 Council of Europe Convention on Extradition, the 2003 Agreement on Extradition between the European Union and the United States of America, specific bilateral treaties and provisions in national laws. On the other hand, according to practical experience, the *Petruhhin* mechanism is often applied without the explicit reference to the applicable legal basis.

#### 4.1.2. The nationality exception

The obligation to inform the Member State of nationality of the extradition request only applies if the requested EU Member State prohibits the extradition of its own nationals ('nationality exception'). The reply as to whether such a nationality exception applies is not always straightforward, as some Member States have agreed on exceptions in bilateral treaties and/or some Member States have different approaches to extradition requests for the purpose of prosecution and extradition requests to execute a custodial sentence. This implies that – depending on the legal basis applicable and depending on the purpose of the extradition request – there may or may not be 'unequal treatment that gives rise to a restriction of free movement' within the meaning of Article 21 of the TFEU and, consequently, a need to consult or not. The analysis shows that national authorities in practice do not include any specific reference to this condition.

#### 4.1.3. The requested person's exercise of free movement rights and his legal status in the requested Member State

The consultation procedure only arises if the requested person made use of the right of EU citizens to free movement. In all the cases subject to the analysis the requested person had crossed the border and was on the territory of another Member State, yet no specific information was available on the legal status of the requested person in the requested Member State (e.g. short-term stay, long-term resident). As the CJEU has always interpreted the 'free movement' requirement very broadly, this condition is easily met <sup>(26)</sup>.

<sup>(26)</sup> See, for example, *Petruhhin*, paragraph 31 (the person had moved to the requested Member State); and *Ruska Federacija* (the requested person was on holiday in the requested Member State). See also the opinion of Advocate General Hogan in pending case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, paragraphs 73 to 79.

The legal status of the requested person in the requested Member State could be a relevant factor when deciding on which mechanism should be applicable, particularly in cases that concern extradition requests for the purpose of the execution of a custodial sentence (see Section 4.1.5). In the cases that were analysed, the legal status of the requested person was not always clear from the information available in the case files.

#### 4.1.4. The requested person's consent to the extradition

In at least one Eurojust case, the requested person had first expressed their wish to be extradited as soon as possible, but then, at the extradition hearing, changed their mind and opposed their extradition. The requested Member State then decided to proceed with the consultation mechanism. In relation to this issue, the EJN Reference Group discussed a potential scenario in which the EU citizen agrees to the extradition and discussed whether or not the obligation to inform the Member State of nationality would still be applicable in such circumstances. The question is related to whether, in extradition matters, Articles 18 and 21(1) of the TFEU and Article 19 of the Charter guarantee a right of the individual that can be waived, or rather protect an interest of the Member States.

#### 4.1.5. The purpose of the extradition request (prosecution/execution of a custodial sentence)

A limited number of Eurojust cases concerned extradition requests for the purpose of the execution of a custodial sentence. In these cases the requested person was not a long-term resident, and therefore did not fall within the scope of the *Raugevicius* judgment. The question raised was whether in such circumstances the '*Petruhhin* doctrine' and/or any other mechanism applied. The analysis revealed various approaches.

- In some cases the Member States simply applied the '*Petruhhin* doctrine' without raising any possible issues. In other words, the requested Member State asked the Member State of nationality whether it would issue an EAW and the Member State of nationality simply replied that it would not issue an EAW.
- In other cases the Member State of nationality, when consulted on whether it would issue an EAW, replied that the consultation mechanism of *Petruhhin* should not apply and/or that the requested Member State should consider taking over the custodial sentence itself in light of *Raugevicius*. The requested Member State then replied that the *Raugevicius* case could not be applied either as, unlike in *Raugevicius*, the requested person was not a long-term resident in the requested Member State. The requested Member State then continued the extradition procedure.
- In some cases the Member State of nationality and the requested Member State reflected on other possible forms of judicial cooperation to apply in such cases. One of the possibilities discussed was that the Member State of nationality would liaise and reach an agreement with the third country to discuss the taking over of the custodial sentence by the Member State of nationality. Provided that (i) the Member State of nationality and the third country reach an agreement on the taking over of the sentence, (ii) the requested person consents and (iii) there is a legal basis for this transfer, the Member State of nationality could issue an EAW for the execution of that sentence. Such a mechanism would serve the aims of both avoiding impunity



and ensuring reintegration. Yet, in the end, the national authorities did not explore this possibility further.

The EJM Reference Group also discussed and concluded that, at this stage, it is not clear whether the Member State of nationality should be also informed when the extradition request is for the purpose of the execution of a custodial sentence and whether the Member State of nationality could take over the execution of the sentence.

In view of the legal uncertainty and the limited practical experience with cases in which the Member State of nationality considers taking over a custodial sentence, the analysis (see Section 4.2) focuses on the consultation procedure related to extradition requests for the purpose of prosecution.

#### **4.1.6. Extradition requests from European Free Trade Association states**

EFTA states should not be regarded as ordinary third countries in *Petruhhin*-related situations, in view of the free movement agreements they have concluded with the EU, which also include the rule of non-discrimination <sup>(27)</sup>.

### **4.2. Consultation procedure between the Member States**

#### **4.2.1. Initiation of the consultation procedure**

The CJEU's case-law does not specify at what moment a Member State that has received an extradition request from a third country against an EU citizen should inform the Member State of nationality. The analysis shows that significant procedural differences exist among the Member States in this respect. In some Member States, the authorities can inform the Member State of nationality as soon as the competent authorities become aware that the requested person is on their territory, before the arrest and/or before receiving the formal extradition request. In several other Member States, however, this consultation occurs only at a later stage, when a court must decide upon the extradition request following the requested person's provisional arrest. These differences in the initiation of the consultation procedure may have an impact on the type of information that the requested Member State can transmit to the Member State of nationality, as well as on the length of the extradition proceedings as a whole.

#### **4.2.2. Competent authorities in the Member State of nationality and channels used to inform them**

A problematic issue identified in the analysis consists in the lack of any clear criteria on which authorities of the Member State of nationality are competent to receive information about a pending extradition request from a third country against its citizen. As a result, a direct dialogue between the judicial authorities of the two Member States involved cannot take place at the initial stage, and the requested Member State instead uses various different channels to exchange this information with the Member State of nationality. These channels include central authorities under the framework decision on the EAW and extradition, EJM contact points, Eurojust, diplomatic channels, police channels (such as Interpol and Sirene bureaux) and liaison magistrates. The practice varies from Member State to Member State.

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<sup>(27)</sup> See also *Ruska Federacija*.

The Eurojust analysis shows that requested Member States very often use many of these channels simultaneously to ensure that the information reaches the competent authority. However, the recourse to multiple authorities for conveying the information to the Member State of nationality often leads to a duplication of efforts and, ultimately, to uncertainties and confusion as to whether and when the information has actually reached the competent authorities. For instance, in several Eurojust cases the requested Member State contacted Eurojust only at a later stage, when the recourse to other channels had failed because they had not received a reply from the authorities previously contacted. Conversely, in cases in which the requested Member State had used only one channel, and had contacted Eurojust from the beginning to facilitate the identification of the competent authorities in the Member State of nationality, the consultation procedure was more effective.

Similar conclusions were also reached by the EJM Reference Group. It actively supported the national judicial authorities in transmitting information about pending extradition requests to the Member State of nationality and in establishing direct contact between the authorities. The EJM Reference Group concluded that the exchange of information between the requested Member State and the Member State of nationality would be clearer and the procedure more efficient if the Member States were to identify one competent authority to receive and send information about the pending extradition request against its nationals.

Once the Member State of nationality is informed, the practice shows that, depending on the Member State and on the purpose of the extradition request, different authorities can be involved in the decision-making process. Nonetheless, even where the decision is finalised or conveyed by the ministry of justice or other bodies (e.g. police authorities, liaison magistrates), the decision on whether to initiate criminal proceedings with a view to issuing an EAW ultimately rests on public prosecutor's offices. Yet difficulties may arise also in identifying the specific public prosecutor's office that should be consulted. To that end, certain Member States adopt the criterion of the place of last domicile of the requested person, which may sometimes be hard to determine. In several cases, Eurojust and the EJM assisted in identifying the public prosecutor's office that was competent to receive the information from the requested Member State. Other Member States instead report that it would be necessary to consult all the public prosecutor's offices that might have an interest in the case, which is virtually impossible to do.

In view of the above, there seems to be a need for more clarity concerning the authorities of the Member State of nationality that are competent to receive the information on extradition requests against its nationals. This would enable the requested Member State to channel the information through one single authority, rather than through multiple ones. The use of a single channel of communication indeed seems essential to ensure the effectiveness of the consultation procedure and to avoid the duplication of efforts.

#### **4.2.3. Type of information transmitted**

The analysis reveals that there is no uniform approach across the Member States to the type and extent of information that a requested Member State transmits to the Member State of nationality in relation to a request for the extradition of an EU citizen. There are various explanations for the divergences in Member States' practices. For instance, the fact that Member States activate the consultation procedure at different stages necessarily implies that more or less information is available to the requested Member State. Moreover, the legal basis for the extradition may also have an impact on the amount of information that is made available to the requested Member State in the first place and that it then can exchange with the Member State of nationality.



#### 4.2.3.1. *Limited or extensive approach*

Some requested Member States transmitted limited information on the extradition request, for instance by providing the Interpol red notice or the national court's decision to consult the Member State of nationality, which includes extracts of the extradition request with basic information about the offence. On other occasions, however, the requested Member States followed a different approach. They sent the whole extradition file to the Member State of nationality. Based on the case files it was not clear whether they sought the prior consent of the third country to do so. In this respect, the EJM analysis indicates that obtaining the consent of the third country to forward the extradition file to the Member State of nationality is problematic <sup>(28)</sup>. Unless the third country has an interest in transferring the proceedings to the Member State of nationality, the former is normally very reluctant to grant its consent, as that may lead to refusing the extradition request and thus to jeopardising its own criminal proceedings. The EJM contact points from non-EU countries pointed out that sharing information and documents about the extradition proceedings with the Member State of nationality without the consent of the requesting non-EU country may lead to a breach of international agreements.

While it is important that sufficient information be provided to enable the Member State to take an informed decision, at the same time transmitting excessive and irrelevant information to the Member State of nationality should be avoided. The practice shows that the automatic sharing of the whole extradition file without selecting only those documents necessary for the decision by the Member State of nationality could cause delays in the consultation procedure, along with further difficulties, for example in relation to the translation of the documents exchanged.

#### 4.2.3.2. *Requests for additional information*

Sometimes the Member State of nationality requested additional information before taking a decision, particularly if the initial information was limited. Mostly, the requested Member State provided that information, not always with the involvement of the third country. Exceptionally, the Member State of nationality itself contacted the third country to obtain additional evidence.

In some Eurojust cases, the Member State of nationality, when consulted, provided useful information to the requested Member State. This occurred in particular where the Member State of nationality had previously also received an extradition request from that third country concerning the same person and had refused to grant it. In such cases it was sometimes relevant for the requested Member State to learn the reasons why the Member State of nationality had previously refused the extradition request, for instance to see whether those reasons would also be applicable in the extradition proceedings in the requested Member State.

#### 4.2.4. **Translation of the information exchanged**

In the majority of cases, the requested Member State sent the information (see Section 4.2.3) already translated into either the language of the Member State of nationality or another vehicular language. However, it also occurred that the requested Member State sent the documents in their original language and the Member State of nationality took care of their translation.

The analysis thus reveals different practices as to which Member State should take care of and bear the costs for translating the information submitted to the Member State of nationality. The lack of common

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<sup>(28)</sup> This issue is raised also by Advocate General Hogan in his opinion in pending case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, paragraph 65.

rules on the linguistic regime applicable to the consultation procedure<sup>(29)</sup> sometimes leads to disagreements between the Member States involved on who should take care of it and bear its costs. Similar discussions occurred especially where translation was expensive and cumbersome due to the length of the extradition file, and they often caused the consultation procedure to come to a standstill. In a few urgent cases the issue was solved at a practical level because Eurojust was able to provide the required translation service in a timely manner. In one case the whole extradition file was sent for translation, and on the day that the translation was ready to be sent to the Member State of nationality, the latter Member State, before receiving the translation, informed the requested Member State that it would not issue an EAW.

In light of the above, clarification at the EU level of which Member State should take care of the translation of the information provided to the Member State of nationality and bear its costs would be beneficial, taking into account that this consultation mechanism seems primarily to serve the interests of the Member State of nationality.

#### **4.2.5. Deadlines for the reply by the Member State of nationality**

##### **4.2.5.1. Different deadlines**

The analysis confirms significant differences in Member States' practices concerning the time limits for the reply by the Member State of nationality. National judicial authorities seem to decide this on a case-by-case basis, depending on the specific circumstances of the case at issue. In some cases there is no specific deadline, but the requested Member State indicates that the request is urgent. Yet, in the majority of cases, the requested Member State indicates a precise time limit for the reply. The period given to the Member State of nationality ranges from a few days to up to 30, 45 or even 60 days. The deadline is usually shorter if the requested person is in detention based on the extradition request. While very short deadlines may be difficult for the Member State of nationality to respect, longer deadlines may lead to delays not only in the extradition proceedings, thus possibly prolonging the requested person's detention, but also in the criminal proceedings ongoing in the third country<sup>(30)</sup>.

##### **4.2.5.2. (Non-)binding nature of the deadline**

The analysis indicates that it was not always clear whether the deadline given by the requested Member State was binding, and whether late replies by the Member State of nationality could nevertheless be taken into account for the purposes of deciding on the extradition request. In addition, the EJN Reference Group expressed uncertainty vis-à-vis the effects of a reply received after the imposed deadline in situations in which a final decision on the extradition request has been already rendered. In several cases, the requested Member State clearly specified that a lack of reply within the deadline would be understood as a decision by the Member State of nationality not to exercise its jurisdiction, and that an EAW against its own national would not be issued. In other cases, a late reply was taken fully into consideration. The analysis shows that in the majority of cases the Member State of nationality provided a reply within the given deadline, even if a very short one. However, this often required sending several reminders to the authorities involved or several requests to extend the deadlines.

<sup>(29)</sup> For instance like the one provided for under Article 16 of the 1959 European Convention on Mutual Assistance in Criminal Matters.

<sup>(30)</sup> The practical issue of how long the requested Member State should have to wait before a decision is taken by the home Member State was also raised by Advocate General Hogan in his opinion in pending case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, paragraphs 60 to 64.



#### 4.2.5.3. *Uncertainty as to when the deadline starts running*

The analysis reveals that difficulties sometimes arose when determining the date from which the deadline set for the Member State of nationality started running, when the deadline was expressed in a specific number of days rather than by giving a concrete date. This occurred mostly where the requested Member State had transmitted the information concerning the extradition request to the Member State of nationality through several parallel channels, and it became necessary to establish which authority had received it first. In several cases the authorities considered the transmission via Eurojust to be decisive. Accordingly, they started counting from the day on which the Eurojust national desk of the Member State of nationality had sent a letter/email to the competent national authorities and had received a confirmation of receipt. Similar experience was confirmed by the EJN Reference Group, namely that according to their practice the deadline starts running from the day the competent national authority of the requested Member State informs the Member State of nationality.

#### 4.2.6. **The assessment carried out by the Member State of nationality**

The analysis shows that the competent authorities of the Member State of nationality take into account several factors for assessing and deciding on whether they will prosecute and issue an EAW.

##### 4.2.6.1. *Jurisdiction for the offence mentioned in the extradition request*

The first and prevailing approach consists in assessing whether the Member State of nationality has jurisdiction to prosecute the offence mentioned in the extradition request. If the Member State of nationality concludes that it has extraterritorial jurisdiction *in abstracto* for that specific offence (first step), it will then consider whether there are sufficient elements available *in concreto* to open an investigation and, subsequently, to issue an EAW (second step) <sup>(31)</sup>. Within this second step of the assessment the authorities not only look at the available information/evidence but will sometimes also take into consideration whether the third country would perhaps be best placed to prosecute that offence in view of certain factors, for example the location of the evidence or the interests of the victims <sup>(32)</sup>.

The second step in the assessment is mostly only successful if the Member State of nationality already has parallel proceedings ongoing for that same offence. In most cases such parallel proceedings did not exist. In such cases, the evidence provided by the requested Member State was mostly insufficient for the purposes of opening an investigation, let alone for issuing an EAW. The analysis shows that, in some cases, very long delays occurred due to the fact that the Member State of nationality decided to open an own investigation based on limited information/evidence. However, similar delays risk unduly prolonging the extradition procedure in violation of international human rights obligations stemming from the European Convention of Human Rights (ECHR). In one case the requested Member State had stayed the extradition proceedings, giving the Member State of nationality an additional 1-year deadline to decide whether to issue an EAW. After that deadline, the Member State of nationality informed the requested Member State that it would not issue an EAW.

<sup>(31)</sup> The different principles concerning prosecution applicable in the Member State of nationality also come into play (principle of legality or opportunity principle). Yet, an assessment of the evidence available in order to initiate a criminal proceeding is applicable in both cases.

<sup>(32)</sup> For instance, in one case the requested person, who had very strong links with the third country, had been accused of having committed sexual offences against his own daughter in the territory of the third country, where the victim was a long-term resident.

#### 4.2.6.2. *Ongoing investigations for other offences committed by the requested person*

In some cases, the competent authorities of the Member State of nationality took a different approach. They focused instead on whether the requested person was involved in ongoing criminal investigations concerning offences other than those mentioned in the extradition request, as this triggered an interest in requesting the surrender of their own national. Where no investigations were pending against the requested person, the Member State of nationality simply concluded that it had no interest in prosecuting, irrespective of whether it would have jurisdiction to prosecute the specific offence mentioned in the extradition request.

#### 4.2.7. **The decision by the Member State of nationality**

The analysis clearly shows that, in the vast majority of cases, the Member State of nationality decided not to initiate criminal proceedings and not to issue an EAW against its national. The arguments advanced in support of said decision are the following.

- Lack of extraterritorial jurisdiction to prosecute the offence for which the extradition is requested <sup>(33)</sup>;
- Lack of sufficient evidence available to open an investigation or to issue an EAW. Sometimes this argument is also coupled with the finding that the third country is best placed to prosecute an offence committed on its territory;
- No interest in obtaining the surrender of the requested person, premised on the absence of any criminal investigations pending against that person in the Member State of nationality.

Eurojust has identified only two cases in which the consultation procedure had a positive outcome and the Member State of nationality expressed an interest in prosecuting the requested person for the offence mentioned in the extradition request (see Sections 4.2.7.1 and 4.2.7.2). It is worth noting that in both cases there were already parallel investigations ongoing in the Member State of nationality against the requested person for the same offence that was the object of the extradition request. Interestingly, in both cases, the Member State of nationality did not issue an EAW for the purposes of prosecution, but resorted to other mechanisms that eventually allowed the prosecution of its own national.

The EJN Reference Group also identified only two cases in which there were already ongoing national investigations for the same criminal offence in the Member State of nationality and the consultation procedure had a positive outcome, even though no EAW was issued by the Member State of nationality against its national (see Sections 4.2.7.3 and 4.3.2).

##### 4.2.7.1. *Case 1 – Not possible to issue a European Arrest Warrant, but voluntary return to the Member State of nationality*

Eurojust supported a case in which the Member State of nationality, when consulted, informed the requested Member State that it was carrying out parallel investigations against the requested person for the same facts, and it expressed its intention to prosecute the requested person for the offence mentioned in the extradition request. However, the Member State of nationality noted that the national threshold for issuing an arrest warrant was not met in the circumstances at hand (as there was no flight risk) and therefore it could not issue an EAW. The Member State of nationality then asked the requested Member State to refuse the extradition and release the requested person, while ensuring that he would

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<sup>(33)</sup> In many cases, however, Member States have extraterritorial jurisdiction concerning offences committed by its nationals.



fly to the Member State of nationality, in view of the proceedings against him, the same day. The competent authorities of the requested Member State agreed to give priority to prosecution by the Member State of nationality despite the absence of an EAW. As a result, the requested Member State refused the extradition and allowed the requested person to return to the Member State of nationality in view of the proceedings against him.

**4.2.7.2. Case 2 – Not possible to issue a European Arrest Warrant, but hearing of the requested person via videoconference (European Investigation Order)**

Eurojust supported another case in which parallel proceedings were also pending in the Member State of nationality. When consulted, the competent authority in the Member State of nationality informed the requested Member State that criminal proceedings were ongoing against the requested person. However, as in the previous case, the authority informed the requested Member State that it did not intend to issue an EAW, as the national threshold for issuing an arrest warrant was not met (no flight risk). Instead of an EAW, the competent authority issued a European Investigation Order for the hearing of the defendant via videoconference at the trial hearing, as the defendant had agreed to be tried *in absentia*. Initially, the requested Member State objected to this approach. It argued that, in light of *Petruhhin*, in the absence of an EAW, it could not stay the extradition proceedings until the date planned for the trial hearing in the Member State of nationality. The Member State of nationality insisted, however, that it was already exercising its jurisdiction over the offence and that the requested Member State had a duty to give priority to the Member State of nationality, even if an EAW had not been issued. The two Member States finally agreed on this approach and, following the execution of the European Investigation Order, the Member State of nationality convicted the requested person. In light of that conviction, the requested Member State refused the extradition to the third country based on the principle of *ne bis in idem* (see also Section 4.3.3). No further information is available on whether the Member State of nationality then issued an EAW for the execution of the custodial sentence.

**4.2.7.3. Case 3 – Not possible to issue a European Arrest Warrant, but application of European *ne bis in idem***

The EJN supported a case where, after a consultation pursuant to the *Petruhhin* doctrine, the Member State of nationality informed the requested Member State that no EAW would be issued for the prosecution of their national. However, it informed the requested Member State that the same person had already been convicted in the Member State of nationality, for potentially the same offences, to 1 year of imprisonment, and it submitted a copy of that judgment. The Member State of nationality underlined that, should the requested Member State establish that the criminal acts were the same as those for which the extradition was requested, the principle of *ne bis in idem* enshrined in Article 50 of the Charter should apply. The requested Member State finally refused to execute the extradition request on the ground that the criminal acts in the extradition request were the same for which the person was already convicted in the Member State of nationality, and thus applied the *ne bis in idem* principle.

**4.2.8. The notification of the Member State of nationality's decision to the requested state**

The Eurojust analysis indicates that formalities for notifying the requested Member State vary greatly from case to case, and may give rise to practical issues. Sometimes, the competent authority in the Member State of nationality issues a formal decision and transmits it to the requested Member State. More often, it remains simply an informal communication exchange by email. Yet this latter practice may give rise to additional issues, since an informal communication is not always acceptable within the

framework of the extradition proceedings in the requested Member State, and in some cases at least a formal cover letter was necessary.

### **4.3. The extradition proceedings**

#### **4.3.1. The effect of the consultation procedure on the extradition proceedings**

The analysis indicates that, in many cases, the requested Member State stayed the extradition proceedings for the duration of the deadline or until the Member State of nationality provided its reply. However, the EJM analysis indicates that there have been cases in which the extradition proceedings continued pending the consultation with the Member State of nationality. On the basis of Eurojust's analysis, the staying of the extradition proceedings during the consultation procedure could ensure the effectiveness of such a mechanism.

#### **4.3.2. Fundamental rights assessment**

When deciding on the extradition request, the requested Member State has the obligation to assess whether the extradition would lead to a serious risk of infringement of the requested person's fundamental rights, protected under the Charter (see Section 3). However, limited information is available on whether fundamental rights concerns were raised in the cases analysed and on whether said assessment was indeed carried out. In a few cases, fundamental rights concerns were indeed raised by the requested person, and the court of the requested Member State therefore engaged in a specific human rights assessment. For instance, in one case supported by Eurojust, the court considered whether the mandatory ground of refusal for violation of fundamental rights, as provided by the national law on extradition, was applicable. The court first noted that in several cases from 2016 and 2017 the European Court of Human Rights had found that the third country concerned had not observed either Article 6 or Articles 3, 5, 8 and 10 of the ECHR. However, the court noted that those judgments were referring to concrete situations from the past. Furthermore, it considered that, in the specific case at hand, the third country had expressly guaranteed that it would respect the right to a fair trial of the requested person. In light of the specific circumstances of this case, the court thus decided that the extradition would not expose the requested person to a serious risk of breach of fundamental rights, and it finally granted the extradition request.

In another case, supported by the EJM, it became apparent during the consultation procedure that the requested person had been previously investigated in the Member State of nationality for offences similar to those that were the object of the extradition request issued by the third country for the purposes of prosecution. The investigations in the Member State of nationality had been closed for lack of sufficient evidence. However, the connection between the two investigations was not clearly established. The Member State of nationality decided not to issue an EAW against its national, while the requested Member State refused the extradition request on the ground that its execution would expose the EU national to a serious risk of breach of his fundamental rights. The requested person was therefore released and returned to the Member State of nationality. Subsequently, the third country submitted to the Member State of nationality a request for the recognition of the sentence that was issued as a result of the same criminal proceedings in which the extradition request for the purposes of prosecution was initially made to the other Member State. No decision has yet been taken as to the request for recognition of the sentence.



Finally, there were also cases in which the Member State of nationality had already previously refused an extradition request concerning the same person from that specific third country, and it informed the requested Member State thereof so that it would be able to take this circumstance into account.

#### 4.3.3. The outcome of the extradition proceedings

Unfortunately, little information is available on the outcome of the extradition proceedings in the cases handled at Eurojust.

In relation to the few cases in which Eurojust obtained information on the outcome, it appears that in those cases where the Member State of nationality did not show an interest in the requested person, the extradition was finally granted at judicial level. Sometimes, when granting the extradition, the national court also made an explicit reference in the judgment to the negative outcome of the consultation procedure that had been activated to comply with the CJEU's *Petruhhin* ruling.

In relation to the three abovementioned cases, in which priority was given to the Member State of nationality (see Section 4.2.7.), the requested Member State refused the extradition to the third country.

In the first case (Section 4.2.7.1), the legal basis for refusing the extradition was a provision of the extradition agreement allowing discretion on the part of the requested Member State in determining to which country it will surrender the person in the case of several competing requests by different states.

In the second and third cases (Sections 4.2.7.2 and 4.2.7.3), the refusal was based on the principle of *ne bis in idem*, as the requested person had been convicted in relation to the same acts in the Member State of nationality. By doing so, the requested Member State went beyond the provisions of the applicable extradition treaty, which only provided for a *ne bis in idem* ground for a previous conviction in the requested Member State (not in another state)<sup>(34)</sup>.

In relation to the outcome of extradition proceedings, the EJM Reference Group also pointed to the legal obligations for the requested Member State arising from (bilateral) extradition treaties, particularly in relation to limited grounds for refusal and provisions on conflicting requests, which do not always allow the automatic prioritisation of the EAW issued by the Member State of nationality<sup>(35)</sup>. The EJM Reference Group considers that, even in situations where the Member State of nationality decides to issue an EAW against its national, a competent national authority (depending on the national procedural rules) has to make an additional assessment, in accordance with Article 16(3) of the framework decision on the EAW, on whether the extradition request or the EAW should have priority and will be granted execution.

#### 4.4. The role of Eurojust and the European Judicial Network

The analysis carried out shows that both Eurojust and the EJM play an important role in facilitating the consultation procedure developed by the CJEU's case-law where a Member State is faced with an extradition request from a third country concerning a citizen of another EU Member State.

More specifically, Eurojust national desks and EJM contact points often provide support to the national authorities in, for example:

<sup>(34)</sup> This issue is addressed also by Advocate General Bobek in his opinion in pending case *Bundesrepublik Deutschland (Interpol Red Notice)*.

<sup>(35)</sup> This issue is raised also by Advocate General Hogan in his opinion in pending case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, paragraphs 39 and 40.

- identifying the authority of the Member State of nationality competent to receive the information on the extradition request by a third country;
- transmitting the request for extradition to the Member State of nationality, and forwarding the reply and any request for additional information by the Member State of nationality to the competent authorities in the requested Member State;
- facilitating the exchange of further information on the extradition request from the third country, with the support of the Eurojust liaison prosecutors and EJM contact points in many third countries;
- speeding up the processing of the request and paving the way for a timely response within the stipulated deadline;
- clarifying practical issues, for instance regarding deadlines, translation, documents to be provided and legal issues;
- clarifying legal issues such as which judicial cooperation instrument to use, for instance, if the thresholds for issuing national arrest warrants and/or EAWs are not met;
- clarifying the applicable national requirements and procedures.

Eurojust can also support the Member States involved by providing a translation service for relevant documents exchanged in the consultation procedure in relation to the extradition request, where there is an uncommon language or a very urgent situation. Furthermore, in those cases in which the Member State of nationality has an interest in the requested person, Eurojust could assist that authority in taking an appropriate and well-informed decision by facilitating and coordinating a discussion on the country best placed to prosecute<sup>(36)</sup>, considering all relevant factors. In some cases, Eurojust could also provide support in relation to which request should have priority<sup>(37)</sup>.

Finally, the EJM website – a specialised repository for information on judicial cooperation in criminal matters – could be used in the future for hosting information on the authority that is competent to receive information about pending extradition requests against EU citizens. This information could be collected from the Member States and made available on the EJM website to provide an easy reference source to all practitioners. The EJM Secretariat, in close cooperation with the national authorities in the Member States, would ensure that such a list was regularly updated. Considering the widespread use of the EJM website among practitioners, the inclusion of this information would diminish uncertainty as to which authority is competent to handle the information, and the procedure would be more efficient.

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<sup>(36)</sup> See Eurojust's *Guidelines for Deciding 'Which Jurisdiction Should Prosecute?'* (revised 2016).

<sup>(37)</sup> Following the *Petruhhin* judgment, if the Member State of nationality decides to issue an EAW, the requested Member State should give priority to that EAW over an extradition request (paragraph 49). However, if, in a specific case, the requested person has dual nationality of two EU Member States, there could be a conflict between the extradition request and two competing EAWs. Then the possible role of Eurojust in giving advice on the priority (Article 16(2) framework decision on the EAW) would become very pertinent. See Eurojust's *Guidelines for Deciding on Competing Requests for Surrender and Extradition* (2019).



## 5. Conclusions

### 5.1. Much consultation, little prosecution in the Member State of nationality

The analysis shows that only in a very few cases has the CJEU's case-law regarding EU citizens to third countries resulted in the requested Member State giving priority to a prosecution in the Member State of nationality. The consultation procedure is, in the eyes of many practitioners, a bureaucratic formality, which mostly merely delays the extradition procedure and is – depending on how it is applied in a concrete case – costly and time consuming.

However, the analysis also reveals that in cases in which parallel criminal proceedings are ongoing in the Member State of nationality for the offence mentioned in the extradition request, such a mechanism can actually be beneficial. It allows the Member State of nationality to become aware of the extradition proceedings and/or to take action to prevent its criminal proceedings from being affected by the execution of the extradition request. In cases in which parallel proceedings exist in the Member State of nationality this can trigger challenging questions, for example on which instrument to use, as it is not always possible for the Member State of nationality to issue an EAW.

In light of the analysis, it seems doubtful that the exercise of jurisdiction by the Member State of nationality would be successful/preferable in cases in which no parallel proceedings are ongoing and limited information is available, and particularly when the third country is reluctant to cooperate.

### 5.2. Extradition requests for prosecution versus extradition requests for execution of a custodial sentence

In relation to the scope of the CJEU's case-law, some questions remain. So far, the CJEU has clarified that, in relation to extradition requests for prosecution, the requested Member State should contact the Member State of nationality (consultation mechanism). The CJEU has also clarified that, in relation to extradition requests for the execution of a custodial sentence where the requested person is a long-term resident in the requested state, the requested Member State should consider the possibility that the requested person serve the sentence on its territory. The question remains about what the requested Member State should do in case of an extradition request for the purpose of the execution of a custodial sentence where the requested person is not a long-term resident in the requested state. In such a scenario, should it inform the Member State of nationality (consultation mechanism) and explore the possibility of applying certain 'cooperation and mutual assistance mechanisms' (e.g. the taking over of the sentence by the Member State of nationality)? If the reply is affirmative, there are many questions as to how this would work.

### 5.3. Conditions for applying the consultation procedure

The CJEU's case-law implies that certain specific conditions need to be fulfilled for the consultation procedure to be triggered (see Section 4.1). Yet it is not clear from the analysis whether (i) these conditions are indeed always verified, but simply not explicitly mentioned in the contacts between the authorities, or (ii) the conditions are not systematically checked and the consultation mechanism is possibly applied beyond the scope of the CJEU's case-law.

#### 5.4. Practical and legal issues concerning the consultation mechanism

The analysis confirms that in many cases the authorities struggled with practical and legal issues, particularly in relation to the following.

- The authorities to be approached and the channels to be used.
- The information to be provided.
- The documents to be translated and who should bear the costs.
- The time limits necessary for the assessment and decision-making.
- The type of assessment expected from the Member State of nationality.
- The judicial cooperation instrument to be used, particularly if thresholds for issuing a national arrest warrant and/or an EAW are not met, or if it concerns an extradition request for the purpose of the execution of a custodial sentence.
- The country best placed to prosecute: the CJEU's case-law strongly focuses on the question of jurisdiction, yet an equally valid question that sometimes seems a bit forgotten in the discussions is the question of which country is best placed to prosecute. In cases in which the Member State of nationality has jurisdiction and a potential interest in prosecuting the requested person, it seems important that – before issuing an EAW – it take an informed decision, taking into account all relevant factors for deciding which country is best placed to prosecute.
- The tension between obligations stemming from EU law and bilateral and multilateral extradition treaties (e.g. the information to be provided to the Member State of nationality, the legal ground to refuse extradition).

Both Eurojust and the EJM have played and will continue to play an important role in assisting and supporting national authorities with any practical and legal questions they may have.

#### 5.5. The need for further clarification, with room for flexibility

The analysis confirms that there are still questions on the exact consequences of the CJEU's case-law regarding the extradition of EU citizens to third countries.

Further clarification on some key issues mentioned in this report could be helpful for practitioners. Such clarification could come from the CJEU's case-law, guidelines developed by the Commission or any other approach deemed desirable. The analysis suggests that clarification should not necessarily mean adopting a single uniform approach on each single issue. Rather, on the contrary, the practice shows that flexibility is crucial for the effectiveness of the procedure, in view of the procedural differences in the national legal systems, including on extradition; the specific circumstances of the facts of each case; and the different international instruments applicable to a specific case.

In view of the CJEU's pending case *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, and particularly the opinion of Advocate General Hogan, it might be wise to wait until the CJEU's judgment is published before taking any further steps on possible guidelines.





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