

## **Anonymised version**

Translation

C-398/19 — 1

**Case C-398/19**

### **Request for a preliminary ruling**

**Date lodged:**

23 May 2019

**Referring court:**

Kammergericht Berlin (Germany)

**Date of the decision to refer:**

14 May 2019

**Extradition case concerning:**

BY

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**KAMMERGERICHT**  
**(Higher Regional Court)**

**Order**

[...]

In the extradition case concerning

the Ukrainian and Romanian national  
BY,  
born on 6 October 1973 in Zastavna, Ukraine,  
residing in [...] Berlin, [...]

alias  
BY,

the 4th Criminal Chamber of the Kammergericht in Berlin made the following order on 14 May 2019:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

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 [**Or. 2**] of Articles 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?

Grounds:

1 I. The facts:

1. The Ukrainian authorities sent, through the diplomatic channel (Article 5 of the additional Protocol to the European Convention on Extradition), a formal extradition request of the General Prosecutor's Office of Ukraine of 15 March 2016 [...], which complied with the requirements of Article 12 of the European Convention on Extradition, and requested that the individual sought be arrested and extradited for the purpose of criminal prosecution. Those authorities stated that the individual sought is the subject of an arrest warrant of 26 February 2016 issued by Zastavna district court, by way of which the individual sought was ordered to be remanded in custody pending trial on the basis of the offences that are the subject of the present [**Or. 3**] case. According to the request and the description of the offences contained in the attached application of 26 February 2016 made by the investigation department of the police department of the town of Zastavna and in the arrest warrant, the individual sought is alleged to have misappropriated funds [in a Ukrainian State-owned enterprise] on several occasions. Specifically:

- 2 (a) In the period from 8 August to 1 September 2010, the individual sought allegedly misappropriated 2 044 litres of diesel fuel worth UAH 11 589 from a quantity made available to the branch for the purpose of addressing the consequences of a natural disaster, and, for concealment purposes, produced together with other accomplices false documents in which fictitious vehicles were designated as the ostensible recipients of the diesel fuel for the intended purpose.

(b) On 24 January 2011, the individual sought allegedly authorised the payment from funds [of the enterprise concerned] of an administrative penalty of UAH 1 700 to be paid by him personally following a decision of the Pension Fund of Ukraine. The payment was allegedly made by payment order of 29 March 2011.

(c) In January/February 2011, the individual sought allegedly made a private journey to the Federal Republic of Germany, but declared the journey as a supposed business trip for the purpose of entering into contracts for the supply of road-construction equipment. After he had returned, he allegedly claimed pay, to which he was not actually entitled, for the duration of the supposed business trip and received UAH 2 333.70 in that regard.

(d) On 1 August 2011, the individual sought allegedly authorised the payment from funds [of the enterprise concerned] of an administrative penalty of UAH 3 400 to be paid by him personally following a decision of the Pension Fund of Ukraine. The payment was allegedly made after it had fallen due.

- 3 2. The individual sought was provisionally arrested pursuant to Paragraph 19 of the Gesetz über die internationale Rechtshilfe in Strafsachen (Law on international judicial co-operation in criminal matters; ‘the IRG’) on 26 July 2016. In his judicial hearings held on the same date pursuant to Paragraph 22 of the IRG and on 23 August 2016 pursuant to Paragraph 28 [Or. 4] of the IRG, he raised objections to his extradition, declared that he was not in agreement with the simplified extradition procedure (Paragraph 41 of the IRG) and — in his most recent hearing — also did not waive his right to compliance with the rule of speciality (Article 14 of the European Convention on Extradition).
- 4 The present Chamber, by order of 1 August 2016, ordered that the individual sought be detained pending extradition and, by order of 29 September 2016, ordered the continuation of that detention. By order of 28 November 2016, the present Chamber spared the individual sought from further enforcement of the detention pending extradition against payment of a security of EUR 10 000 and subject to reporting obligations, and prohibited him from leaving the Federal Republic of Germany without the consent of the present Chamber. After security had been lodged on 2 December 2016, the individual sought was released from detention on that day.
- 5 3. The individual sought is (also) a Romanian national, but — so far as can be ascertained — had never based his centre of interest in Romania; rather, in 2012, he moved from Ukraine, where he had lived up to that point, to Germany. It was (only) in 2014 that he obtained Romanian nationality upon application as being a descendent of former Romanian nationals living in former Romanian Bukovina.
- 6 In view of the Romanian nationality of the individual sought, the General Prosecutor’s Office in Berlin — making reference to the judgment of the Court of Justice of the European Union of 6 September 2016 in the *Petruhhin* case (C-182/15) — informed the Ministry of Justice of Romania of the extradition

request by letter of 9 November 2016, enclosing an authenticated copy of the order of the present Chamber of 1 August 2016, and asked whether it was minded to take over the criminal prosecution. The Ministry of Justice of Romania responded to that question by letter of 22 November 2016, in which it stated that a decision regarding the taking-over of the criminal prosecution could be taken only upon request of the Ukrainian law-enforcement authorities. At the instigation of the present Chamber, the General Prosecutor's Office additionally asked the Ministry of Justice of Romania, by letter of [Or. 5] 2 January 2017, whether the applicability of Romanian criminal law to the offences with which the individual sought is charged could be considered even 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). In its response of 15 March 2017, the Ministry of Justice of Romania stated that, as a prerequisite for a European arrest warrant, the issuing of a national arrest warrant required a sufficient body of evidence pointing to commission of the offences in question by the individual sought, and requested that the General Prosecutor's Office in Berlin accordingly provide documents and copies of the evidence from Ukraine. The present Chamber interprets this letter, which does not directly answer the question posed in the letter to which it responds, to mean that Romanian law does in principle allow the prosecution of a Romanian citizen for offences committed in a foreign country.

7 4. The General Prosecutor's Office in Berlin requested that the extradition of the individual sought to Ukraine for the purpose of criminal prosecution for the offences specified in the extradition request of the General Prosecutor's Office of Ukraine of 15 March 2016 [...] be declared to be lawful.

8 5. The present Chamber considers the extradition of the individual sought to be lawful. However, it believes that a decision to that effect is precluded by the judgment of the Court of Justice of the European Union of 6 September 2016 in the *Petruhhin* case (C-182/15), as the Romanian judicial authorities have not yet issued either a positive or negative decision on the prosecution in Romania of the criminal offences that are the subject of the extradition request.

9 II. Grounds for the questions referred

1. The Federal Republic of Germany does not extradite its own citizens to third countries. Article 16(2) of the Grundgesetz (Basic Constitutional Law; 'the GG') provides as follows in this respect: [Or. 6]

*No German national may be extradited to a foreign country. Statutory provision in derogation from the foregoing may be made for extradition to a Member State of the European Union or to an international court of justice, provided that the principles of the rule of law are observed.*

10 There is no comparable statutory prohibition on extradition for nationals of other Member States.

- 11 However, such a prohibition does arise — under certain conditions — from the judgment of the Court of Justice of the European Union of 6 September 2016 in the *Petruhhin* case (C-182/15). This takes account, having due regard for the principle of non-discrimination arising from Article 18 TFEU, of the right to free movement under Article 21(1) TFEU, which gives every Union citizen the right to move and reside freely within the territory of the Member States.
- 12 However, the present case deviates from the facts and circumstances underlying [the] judgment of the Court of Justice of the European Union of 6 September 2016 in the *Petruhhin* case (C-182/15) in so far as the individual sought did not yet have Romanian nationality at the time when he moved his centre of interest from Ukraine to the Federal Republic of Germany, but rather was exclusively a Ukrainian citizen. The individual sought therefore did not establish the basis for his residence in the Federal Republic of Germany by exercising the right arising from Article 21(1) TFEU.

- 13 The present Chamber therefore asks:

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 Articles 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? [Or. 7]

- 14 2. The Romanian law-enforcement authorities explained clearly that, in order to decide on the issuing of a national arrest warrant on the basis of which a European arrest warrant could then be issued, they require any available evidence against the individual sought in order to examine the offences that he is suspected of committing.
- 15 The German authorities are not in possession of this evidence, as evidence does not generally have to be attached to an extradition request in mutual assistance under an agreement. Article 12(2) of the European Convention on Extradition merely requires the following in this respect:

*The request shall be supported by:*

(...)

- (b) *a statement of the offence[s] 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;*

(...)

16 It is therefore not possible for the German authorities to send to the Romanian law-enforcement authorities the evidence underlying the offences that are the subject of the extradition request. Moreover, it also appears doubtful whether, if that evidence were to be submitted in the context of the extradition request, it could be automatically sent to another country, or whether that would not instead be subject solely to the sovereign discretion of the requesting third country. The same applies with regard to the provision to the home Member State of the entire extradition request, which, however, is generally not sufficient for the decision on the issuing of an arrest warrant in any event.

17 The implementation of 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) on the application of Articles 18 and 21 TFEU therefore gives rise to the practical problem that [Or. 8] mere information about the extradition request is not sufficient to enable the home Member State to examine whether to take over the prosecution, but rather the home Member State must request the case files from the requesting third country. Owing both to the diplomatic channel that must be complied with and to the requirement that the — in some cases very extensive — case files be translated, this would entail a substantial loss of time, which seems extremely difficult to justify, particularly when the individual sought is in custody for extradition purposes.

18 The loss of time would not be any less substantial if the requested Member State were to ask the requesting third country to send to the home Member State a request for it to take over the prosecution. This route would, however, most likely also be impracticable for the simple reason that the requested Member State is generally not in a position to assess whether prosecution by the home Member State is possible under its national law in the first place.

19 The present Chamber therefore asks:

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?

20 3. German law does provide a basis for (subsidiary) jurisdiction to prosecute offences committed abroad in the event that the individual is not extradited. Paragraph 7 of the Strafgesetzbuch (Criminal Code; ‘the StGB’) is worded as follows:

*(1) German criminal law shall apply to offences committed abroad against a German national, if the act is also a criminal offence at the place of its commission or if that place is not subject to any criminal jurisdiction.*

(2) *German criminal law shall apply to other offences committed abroad if the act is also a criminal offence at the place of its commission or if that place is not subject to any criminal jurisdiction and if the offender [Or. 9]*

1. *was a German national at the time of the act or became a German national after the act, or*

2. *was not a German national at the time of the act, is discovered in Germany and, although the Auslieferungsgesetz (Law on extradition) would permit extradition depending on the nature of the act, is not extradited because an extradition request is not made within a reasonable period of time or is rejected, or extradition is not feasible.*

21 According to this, it would also 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 on the ground that discrimination against a German would be unlawful under EU law, and by the criminal prosecution being taken over by the German criminal prosecution authorities.

22 The present Chamber, however, believes that such an approach would pose a significant threat to effective criminal prosecution. If the extradition of a Union citizen from Germany to a third country is *prima facie* unlawful owing to the possibility of Germany taking over the criminal prosecution itself, as provided for by point 2 of Paragraph 7(2) of the StGB, an arrest warrant issued for the purposes of extradition could not come into consideration either. The reason for this is that Paragraph 15 of the IRG reads as follows:

(1) *On receipt of the request for extradition, an order may be made for the individual sought to be detained pending extradition, where (...)*

(2) *Subparagraph (1) shall not apply where the extradition appears to be prima facie unlawful.*

23 On the other hand, the issuing of a German national arrest warrant at this stage of the proceedings is not possible either, as this requires strong suspicion (first sentence of Paragraph 112(1) of the Strafprozeßordnung (Code of Criminal Procedure; ‘the StPO’)), which can be established only on the basis of an examination of the available evidence against the individual sought. In order to obtain that evidence, the German authorities would have to offer to take over the prosecution from the third country or initiate a request to that effect from the third country. There would be a [Or. 10] concern that the individual sought would use the time required for this, during which procedural safeguards would not be possible, to further escape justice and thus evade prosecution (once again).

24 The present Chamber therefore asks:

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?

[...]

WORKING DOCUMENT