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NOTE

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Subject:	Extradition of EU citizens to third countries - Exchange of views

1. Some delegations requested to hold a discussion at ministerial level on the extradition to third countries of EU citizens from an EU Member State different from the Member State of their nationality. This situation is regulated by national legislation, international treaties and conventions (in particular the 1957 European Convention on Extradition¹), and the European Court of Human Rights' case-law, as well as by EU law as interpreted by the European Court of Justice (hereinafter 'the Court').
2. The Court has consistently held that Union citizenship grants a fundamental status to nationals of the Member States, and that EU law precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of their rights as conferred by the Treaties and the Charter of Fundamental Rights².

¹ European Convention on Extradition of 13 December 1957, Council of Europe.

² Such as Article 4 of the Charter of Fundamental Rights on the prohibition of torture and inhuman or degrading treatment or punishment. See also Article 47 of the Charter on the right to a fair trial.

3. In September 2016 the Court delivered its judgment in Case C-182/15 *Petruhhin*, on the issue of extradition of EU citizens to third countries in cases where such citizens have exercised their rights of free movement to another EU Member State which does not extradite its own nationals. The Court stated, *inter alia*, that:

- In its relations with the wider world, the EU is to uphold and promote its values and interests and contribute to the protection of its citizens, in accordance with Article 3(5) TEU. That protection is being built up gradually by means of cooperation instruments such as extradition agreements concluded between the European Union and third countries;
- National rules on extradition, where they provide for the non-extradition of own nationals, entail differences in the treatment of EU citizens depending on whether the person concerned is a national of the extraditing Member State or a national of another Member State, and therefore entail unequal treatment. Nevertheless, such differences of treatment, which constitute a restriction to free movement, appear appropriate to achieve the legitimate objective of preventing the risk of impunity for persons who have committed an offence;
- In the light of the maxim ‘aut dedere, aut judicare’ (either extradite or prosecute), if the Member State which receives the extradition request applies the principle of non-extradition of its own nationals, this is generally counterbalanced by the possibility for that Member State to prosecute its own nationals for serious offences committed outside its territory³;
- However, Member States, as a general rule, have no jurisdiction to try cases concerning serious offences committed outside their territory when neither the perpetrator nor the victim of the alleged offence is a national of the Member State in question. Extradition thus allows offences committed in the territory of a State by persons who have fled that territory not to remain unpunished;

³ On extradition of nationals, see also Article 6 of the 1957 European Convention.

- It must, however, be ascertained whether there is an alternative measure less prejudicial to the exercise of the rights conferred by Article 21 TFEU in order to avoid as far as possible the risk of impunity for a person alleged to have committed a criminal offence. In the absence of an international agreement between the EU and the third country concerned and/or rules of EU law governing extradition between the Member States and a third country, ‘it is necessary, in order to safeguard EU nationals from measures liable to deprive them of the rights of free movement and residence provided for in Article 21 TFEU [EU citizenship], while combatting impunity in respect of criminal offences, to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law’⁴.

4. The Court referred to the European Arrest Warrant (hereinafter the ‘EAW’)⁵ as a possible mechanism which could be used in order to ensure such mutual assistance, and specified that in a case such as the *Petruhhin* case, ‘*the exchange of information with the Member State of which the person concerned is a national must be given priority in order to afford the authorities of that Member State, in so far as they have jurisdiction, pursuant to their national law, to prosecute that person for offences committed outside national territory, the opportunity to issue a European arrest warrant for the purposes of prosecution*’.⁶

⁴ Court’s judgment in Case C-182/15, *Petruhhin*, paragraph 47.

⁵ Framework Decision 2002/584.

⁶ See Court’s judgment in Case C-182/15, *Petruhhin*, para. 42-50. There are other cases judged or pending before the Court concerning situations similar to the one referred to in *Petruhhin*, although the situations under assessment in those cases are not always comparable to the one referred to in *Petruhhin*: Case C-473/15, *Schötthofer & Steiner*, Order of the Court of 6 September 2017; Case C-191/16, *Pisciotti*, judgment of 10 April 2018 (see in particular paragraphs 51 and 52, with regard to a situation where an international agreement on extradition between the EU and a third country applied); Case C-247/17, *Raugevicius*, judgment of 13 November 2018; C-505/19 *Bundesrepublik Deutschland*, still pending; C-398/19 *Generalstaatsanwaltschaft Berlin*, still pending; C-897/19 *PPU Ruska Federacija*, still pending.

5. In accordance with this case-law, before extraditing an EU citizen to a third country, a Member State which does not extradite its own nationals is obliged to inform the Member State of which the citizen is a national, in order to allow that Member State the possibility to request the citizen's surrender on the basis of an EAW for the purposes of prosecution. In cooperating with the Member State of which the person concerned is a national and giving priority to that potential arrest warrant over the extradition request, the host Member State acts in a manner which is, in so far as possible, less prejudicial to the exercise of free movement while avoiding the risk of impunity and non-compliance with international obligations.
6. The practical application of the *Petruhhin* case-law has raised several questions related to the extradition of EU citizens to third countries for the purposes of prosecution (e.g. time limits, communication channels and refusal of a requested person to notify the home Member State).⁷

In this context, it should be observed that the Member State which has been requested by a third country to extradite an EU citizen is not obliged to pass on the request or other detailed information on the case to the Member State of which the citizen is a national. Indeed, there might be legal obstacles to do so, such as confidentiality, data protection rules or other rights of the person concerned. In many cases, the Member State of which the citizen is a national will have to rely on the third country to obtain information which is sufficient for opening criminal proceedings.⁸ However, the third country might not be cooperative in this regard.

⁷ These questions include the following:

1) Which authority of the home Member State shall be informed; since as long as there are no ongoing investigations, there is no public prosecutor involved (see 15002/16, p. 3); therefore the Commission proposal to designate focal points (see 10429/17, p. 4).

2) Refusal of the concerned person to notify the home Member State (see 14745/18).

3) What information should be conveyed, since the host Member State may not be entitled to convey information about criminal proceedings ongoing in the third state to any other state, including the home state (see 15002/16, p. 4 and 15786/17, p. 8); the European Investigation Order Directive (EIO) provides in Article 1(1): 'The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.' However, the EIO Directive is silent under what conditions information from third states could be shared. Regarding the spontaneous exchange of information, Article 7 of the 2000 MLA Convention provides the legal basis, and not the EIO Directive. See the Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, 11168/1/19 REV 1.

⁸ See in this regard Case C-398/19 *Generalstaatsanwaltschaft Berlin*, still pending.

7. The solution put forward by the Court in *Petruhhin* case-law, consisting of making use of the EAW, is only applicable in some circumstances. In fact, in some cases no EAW can be issued because the thresholds in Article 2 are not met.⁹ Further, the case-law only applies to Member States which do not extradite their own nationals to third countries. As a consequence, a solution to the issue needs to take into account existing search instruments, in particular Interpol. Moreover, the *Petruhhin* case-law is based on the assumption that the extradition to the third country pursues the legitimate objective to prevent the risk of impunity. This is not the case if there are clear indications that the extradition instrument concerned is not used properly by the third country (politically motivated).
8. In 2016 the Member States decided to apply a case-by-case approach based on preliminary ruling references instead of defining common working arrangements¹⁰.

However, certain recent cases show the need to explore, at least, possible avenues for sharing good practices among the Member States, as well as enhancing mutual cooperation and exchange of information.

9. In this context, it is appropriate to observe that uncertainties could arise in several cases due to differences between the treatment of EU citizens who are nationals of the Member State receiving the extradition request and EU citizens who are permanent residents of, or only temporarily staying or transiting in that Member State. These uncertainties may also vary depending on whether the extradition request is made for the purpose of prosecution or for the purpose of enforcing a sentence¹¹. They can also arise from differences between Member States in relation to types of offences and the level of penalties, or due to the lack of jurisdiction of one of the Member States involved.

⁹ Under Article 2(1) of the EAW Framework Decision, an EAW cannot be issued in the EU Member State of the citizen's nationality to other EU Member States if the request of extradition from the third country is based on an offence which is not punishable in the EU Member State of the citizen's nationality or not punishable by a sentence of at least 12 months.

¹⁰ See 15714/16, p. 3.

¹¹ The judgment in Case C-247/17, *Raugevicius*, related to an extradition request from a third country to an EU Member State for the purpose of enforcing a custodial sentence, and therefore the Court also addressed social rehabilitation of the requested person (as the EU national concerned was a permanent resident in the EU Member State in question).

10. As a consequence, communication via diplomatic and judicial channels is essential to ensuring the free movement of EU citizens and protecting their fundamental rights while avoiding impunity and ensuring compliance by Member States with their international obligations.
11. In the light of the above, Ministers are invited to exchange views in order to collect the experiences of the Member States in relation to how they cooperate with each other when they receive a request from a third country to extradite a national of another Member State. More particularly, they are invited to reply to the following questions:
- a. when your Member State is confronted with an extradition request issued by a third country that concerns an EU citizen of another Member State, which international, EU or national legal instruments does your Member State apply in dealings with the Member State of the citizenship of the requested person, in particular when it is not possible for the latter Member State to issue an EAW? Should the exchange of information between Member States in these situations be improved, and if so, how?**
 - b. have your authorities been informed, by authorities of another Member State, about an extradition request by a third country against one of your nationals, and if so, what was your experience of the matter? Were criminal proceedings opened? Did an exchange of information with the third country take place? Was an EAW issued? Was the national concerned surrendered?**
 - c. have you encountered a situation in which a third country requested the extradition from your Member State of an EU citizen and there were clear indications that the search instrument was not applied for proper purposes (politically motivated)? If so, how have your authorities handled such cases? Which solutions have been found? If the 1957 Council of Europe Convention on Extradition was used, was Article 6 invoked?**

- d. would it be appropriate to explore establishing a common approach, possibly to be laid down in guidelines, on how to handle extradition requests by third countries for EU citizens, taking into account the EU Member States' obligations stemming from international agreements as well as the need to avoid impunity?**

12. On the basis of the input to be provided by the Ministers, the Working Party on Cooperation in Criminal Matters (COPEN) will further discuss and explore these issues.
