

## INTERNATIONAL LAW



### Aspects related to the Delayed Surrender and to the Temporary Surrender of the Person based on the Admission of the Execution of a European Arrest Warrant

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**Abstract:** Starting from January 1st, 2004, the provisions of the international agreements with bilateral or multilateral character regarding extradition have been replaced by the provisions regarding the European arrest warrant in the reports between the member states of the European Union, a simpler way to surrender those persons which try to evade from the justice act and to cooperate in the fight against the severe manifestations of transnational criminality. Within the surrender procedure, following to the admission of the request and to putting to execution the warrant, to the judicial authority of execution is acknowledged the right to delay the surrender of the wanted person, as well as the right to temporarily surrender that person to the issuing member state, in conditions which are going to be established by mutual agreement between the judicial authority of execution and the issuing authority. Regarding the latter possibility of temporary surrender, we consider that the Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States does not comprise a clear text, but one which leaves room for interpretation, aspect which I have presented in this study.

**Keywords:** European arrest warrant, delayed surrender, temporary surrender, wanted person

### 1. Introduction

By initially creating the European Communities, which had later on evolved to the actual European Union, the Member States have had as objective, among others, to create a space where to be a real circulation of their citizens. For achieving this objective, the checks at the internal borders of the Union have been removed, over time. However, in order to achieve a real

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circulation of the European citizens without encouraging and favouring an unlimited movement of offenders, measures had to be taken so that to intensify the controls at the Union's external borders, to establish common rules for all third party states and to be able to facilitate a collaboration between the judicial authorities and the Police bodies in due time, when it is necessary for preventing and fighting against the criminal phenomenon.

For fulfilling these objectives, at the level of the European Union, over time, important steps have been made for concluding agreements<sup>1</sup> and for including express provisions in the treaties<sup>2</sup> on judicial and police cooperation, on the European institutions with competency in the area and on the acts they could conclude in the area, on the professional training of the magistrates and of those from the legal system of the member states, on the possibility to adopt at Union level some minimum norms in penal matters on defining some offences and establishing some sanctions for facts of severe criminality and of cross-border dimensions.

At the same time, at the level of the European Union, as well as at international level, the states convened, in penal matters, to grant legal assistance in penal cases with extraneity elements. This assistance is performed having at its basis the rules established in the international treaties concluded – bilaterally or multilaterally – for this. For the European Union, the development of the reciprocal legal assistance has been much supported by the Convention from May 29<sup>th</sup>, 2000, which dealt with reciprocal legal assistance in penal matters between the member states, having as purpose to guarantee an efficient and as fast as possible legal assistance between these states, allowing the usage of modern ways of this assistance, as well as, for example, monitored deliveries, hearings by videoconference, cross-border monitoring and spontaneous transfer of information. Subsequently, after being approved by the member states, they had become a part of the Union's Acquis and of the Conventions from 1995 – on the simplified extradition procedure – and 1996 – on the extradition between the member states (through which it was performed a greater reduction or simplification of this procedure between the states of the Union).

In order to simplify the extradition procedures between the member states, an objective outlined at the European Council from Tampere dated October 15<sup>th</sup> and 16<sup>th</sup>, 1999, dealt with adopting a Framework Decision on the

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<sup>1</sup> The Schengen Agreement, concluded on June 14<sup>th</sup>, 1985, by which Belgium, Holland, Germany, France and Luxembourg had established a series of goals on a long time, for eliminating the control at their borders step by step, being mandatory to establish also measures for judicial and police cooperation.

<sup>2</sup> We have in view the Maastricht Treaty, Amsterdam Treaty and Lisbon Treaty.

European arrest warrant, as a simpler way to surrender those individuals who run from the justice act and to cooperate in the fight against the severe manifestations of transnational criminality<sup>1</sup>. Through Framework Decision 2002/584/JHA of the Council dated June 13<sup>th</sup>, on the European arrest warrant and the surrender procedures between Member States, the objective of the Council above mentioned was fulfilled in the year 2002 only; through this European arrest warrant, at Union level, the formal extradition procedure was replaced with a much simpler one which dealt with those persons who run from penal prosecution and judgement. Accordingly, starting with January 1<sup>st</sup>, 2004, the provisions of the international agreements with bilateral or multilateral character on extradition have been replaced in the reports between the member states with the provisions regarding the European arrest warrant, as it is expressly provided by art. 3, paragraph (1) of the above mentioned Framework Decision.

## **2. The European Arrest Warrant, the Delay of the Surrender and the Temporary Transfer of the Wanted Person**

According to the definition given by art. 1, paragraph (1) of the Framework Decision 2002/584/JHA, "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a penal prosecution or executing a custodial sentence or detention order". The facts that enter within the scope of the European arrest warrant are also expressly provided in the mentioned Framework Decision, in art. 2, paragraph (1). According to it, such a mandate may be issued for acts which the law of the issuing Member State sanction, by custodial sentence or detention order which have a maximum duration of at least 1 year, as well as for facts for which, when a custodial sentence was ordered or a safety measure was decided, this conviction is of at least four months. At the same time, a European arrest warrant can be issued also for certain offences enumerated restrictively in paragraph (2) of art. 2, which are punished by the issuing state with a custodial sentence or a detention order which has a maximum duration of at least 3 months.

In the Framework Decision on the European arrest warrant, the reasons for not executing such a warrant, split into mandatory and facultative, are presented, among others and also the surrender procedure, in its Chapter 2. Within the surrender procedure, following to admitting the application and to putting to execution the warrant, *the right to delay the surrender of the*

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<sup>1</sup> Florin-Răzvan Radu, *European and International Criminal Law*, C. H. Beck Publishing House, Bucharest 2013, p. 222

wanted *person* is acknowledged to the executing judicial authority. This is so that the respective person can be penally prosecuted in the execution Member State or, in case it is already convicted, in order to execute, on its territory, a punishment received for other facts than the one provided in the respective warrant (art. 24, paragraph (1)). In paragraph (2) of art. 24 of the Framework Decision 2002/584/JHA, the possibility which the executing judicial authority has, “*instead of delaying the surrender*”, to “*temporarily surrender* the wanted person to the issuing Member State, in conditions which are going to be mutually established between the executing and issuing judicial authorities”, is also provided.

There is another situation when the executing judicial authority must accept the temporary transfer of the wanted person. This is expressly mentioned in the Framework Decision in art. 18 referring to “*situation of waiting for the decision*”. At letter (b) of paragraph (1) of this art.18, it is provided that “*where the European arrest warrant has been issued for the purpose of conducting a penal prosecution, the executing judicial authority must (...) accept the temporary transfer of the wanted person*”. This transfer is going to be done in the conditions and on the duration mutually established by the issuing and executing judicial authorities, as it is shown in paragraph (2) of art. 18 and the return of the person to the executing member state for developing the surrender procedure to be ensured, according to paragraph (3) of the same article. However, in this case, the necessity of a temporary transfer of the wanted person is based on procedural aspects related to solving the penal case where the issuing of the European arrest warrant is required, aspects which are of interest to the issuing judicial authority and not on one of the reasons which determine delaying the surrender, reasons which, this time, are of interest for the executing judicial authority.

By analysing the two paragraphs of art. 24 of the Framework Decision, we might conclude, we believe, that in certain cases, the executing judicial authority has the possibility to choose, as case maybe, either delaying the surrender of the wanted person, or its temporary surrender, but not both measures in the same case. This is due to using the conjunctive phrase “*instead of (delaying the surrender)*” used in the second paragraph of the text we refer to.

In our opinion, it is logical to be able to grant the temporary surrender of the person in case when, with due cause, the executing judicial authority decided to delay the respective person’s surrender, because, in case all would develop according to the regular procedure of executing an European arrest warrant, which has an emergency character, we cannot see which would be the point of such a temporary surrender. We believe, in fact, that just in those cases, let’s call them special or exceptional, when there are

reasons with legal grounds for which it is required the delay in surrendering the requested person, its temporary surrender might be advisable, in the conditions of and complying with the guarantees which the involved judicial authorities decide.

As a matter of fact, from the cases met in the European practice, at least in the cases when the Romanian judicial authorities have the capacity of executing authorities of the European arrest warrant, we observe that the Supreme Court stated that it is possible, in the same case, to both delay the surrender and to temporary surrender the person which is object of the European arrest warrant. To this sense, we give as example Decision no. 653 of the High Court of Cassation and Justice, Penal Section, given in 22<sup>nd</sup> June, 2017<sup>1</sup>. The High Court stated that in case it was decided to execute the European arrest warrant and to delay the surrender of the wanted person, the executing Romanian Court will be able to allow the request made by the issuing judicial authority of temporary surrender of the same person, for its participation to solving its own remedy at law formulated against the conviction decision for which the respective warrant was issued. The temporary surrender will be allowed (however) for a clearly determined duration and in the conditions when the authorities of the applicant state guarantee the return of the requested person in detention state, even in case the formulated remedy at law will be allowed and the conviction decision will be abrogated. The High Court decided thus according to the provisions of art. 112 reported to art. 58, paragraphs (1)-(5) and (7) of Law no. 302/2004 on international judicial cooperation in penal matters.

In conclusion, we consider that the provisions of art. 24 of the Framework Decision 2002/584/JHA, as they were formulated, denote an unfortunate expression missed out by its editors and that, actually, it cannot be about deciding alternatively, either to delay the surrender, or to temporarily surrender the requested person, but the executing Court should be allowed, in case it established with due cause to delay the surrender of the wanted person, to be able to decide, based on the request of the issuing Court, the temporary surrender of the same person, in the conditions convened in writing by the two authorities. Accordingly, we believe it is achieved a real, useful, fast and reciprocal support of the Member States in the fight against criminality, the fundamental rights of the persons which are object to some European arrest warrants are complied with and practically, the purpose for which the Framework Decision was adopted is fulfilled.

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<sup>1</sup> [www.scj.ro](http://www.scj.ro).

### **3. Conclusions**

Following to issuing a European arrest warrant, the executing Court of law can refuse its execution in certain conditions, or it can allow it. In the latter case, it will take all measures necessary in order to surrender the requested person as soon as possible. There are many cases when the executing judicial authority can delay the surrender of the person, namely so that either it can be penally prosecuted in the executing state, or to be able to execute a conviction on the territory of this state, in case it was already convicted for a deed different from the one provided in the European arrest warrant. In this case, of delaying the surrender of the person, the executing Court has the possibility to decide the temporary transfer of the respective person, in case it received a request to this extent from the authorities of the applicant state (issuers of the respective warrant) and after mutually establishing with them, in writing, the conditions necessary and the guarantees which the applicant state must give. Regarding this latter possibility we referred to, of temporary surrender, we consider that the Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between the member states, do not comprise a clear text, but one which leaves room for interpretation, aspect which I have presented in this study. However, it is encouraging the fact that, in spite of the shortcomings of the law text mentioned, the member states have proved a real collaboration and high trust among them, offering real support in the fight against criminality and in sanctioning in due time those trying to escape the justice act, taking care, at the same time, to comply with all rights legally acknowledged to citizens.

### **4. References**

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