

**THE EVOLUTION OF SURRENDER**  
*with special regard to the surrender from Hungary*



**TEAM HUNGARY**

**Authors:**

**Szilvia Aleku**

**András Farkas**

**Csaba Tamás**

*trainee prosecutors*

**Trainer:**

**Zoltán Csicsák**

*prosecutor*

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## **I. PROLOGUE**

The subject of this study is related to the European criminal law, especially the subject of the European Arrest Warrant (EAW), and the analysis of its Hungarian legislation and practice. After the general outlook for surrender, we would like to pay a special attention to the problematic issues raised in this process more in detail.

Why is the surrender process? In this topic many scientific-theoretical and practical studies have been published, including a study focusing on its international outlook and a guiding paper that defines legislative standards will help those who want to deal with this issue in detail. It is to be welcomed that the cooperation between the acting authorities is becoming more and more streamlined in surrender proceedings (thanks to the increasing number of international conferences in recent years), but there are number of cases when it is unclear so that the procedure can be conducted.

When writing our dissertation, we sought to first describe the characteristic attributes of the surrender process, and then gradually shift to a critical analysis of the the (Hungarian) practice, trying to explain the related legal issues.

## **II. ABOUT EXTRADITION AND SURRENDER**

There are several forms of extradition arrangements throughout the world<sup>1</sup> and the earliest „convention on extradition” was adopted in 1280 BC among the Egyptian pharaoh Ramses II and Hattusili III, Hittite king, who agreed in a peace treaty on the extradition of subjects of their states. The modern extradition and its purpose was defined by Hugo Grotius in 1625 in his book 'Ius belli ac pacis' along with the principle of 'aut dedere, aut iudicare', which has become the foundation of the cooperation in criminal matters between the states. The modern principles of extradition were consolidated in criminal codexes and bilateral legal assistance treaties in the 19<sup>th</sup> century.<sup>2</sup>

On 13<sup>th</sup> of december 1957, as an answer to the spreading transnational crime, the Member States of the Council of Europe have adopted the European Convention on Extradition in Paris and later its two additional protocols (in 1975 and 1993), which became the base of the international cooperation in extraditional cases between the states of Europe, until the European Arrest Warrant was created.<sup>3</sup>

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<sup>1</sup> See Tim Burton: Extradition as a tool in the Fight against Transnational Crime: a Holistic Evaluation. Jura, 2011/2., 171-179. pp.

<sup>2</sup> Péter Polt: The nightfall of the extradition – a new legal institution: The European Arrest Warrant, European Law 2002/2., 3. p.

<sup>3</sup> Péter M. Nyitrai: The reconsideration of extradition in Europe – the idea of the European Arrest Warrant and the dilemmas of its application. Hungarian Law, 2003/7., 101. p.

## II. 1. European Convention on Extradition

By signing the Convention, the contracting parties undertook to surrender to each other if the provisions and conditions laid down in the convention are met (Article 1). According to Article 2, the extraditable offences are the ones that are punishable by deprivation of liberty or under a detention order for a maximum period of at least one year or by more severe penalty. Double criminality<sup>4</sup> is the main principle of extradition, thereof the offences should be punishable with the mentioned penalties both under the law of the requesting and the requested state. It is possible to extradite convicts when a prison sentence has been occurred or a detention order has been made in the territory of the requesting party and the punishment awarded lasts for at least of four months. If the request includes several separate offences and each offences are punishable both under the requesting state and the requested state by deprivation of liberty or under a detention order, but some of them do not fulfil the condition of the awarded punishment, the requested state also have the right to grant extradition for the latter offences (Article 2).

According to Paragraph 1 of Article 6 of the Convention, a contracting party shall have the right to refuse extradition of its nationals. If the requested party does not extradite its national, then at the request of the requesting party it shall submit the case to the competent authorities in order to take the proceedings if they are considered appropriate and the requesting party should be informed about the result of its request (Paragraph 2 of Article 6).<sup>5</sup>

The rule of speciality also worth mentioning. As a main rule, the person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom (Paragraph 1 of Article 14).<sup>6</sup>

Originally Paragraph 1 of Article 12 of the Convention provides that the request shall be communicated through the diplomatic channels of the states and Paragraph 2 itemized the documents and information that should support the request. The Article 4 of the second additional protocol amended the Paragraph 1 and made the Ministries of Justice of the states the sender and the recipient of the requests, but the protocol did not exclude the use of diplomatic channel, and the other means of communication could be arranged by direct agreement between the states.

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<sup>4</sup> The double criminality *in abstracto* means that an act is punishable under the laws of both states, *in concreto* it means there are no grounds for excuse in the case of the offender. Péter Polt: cit. op., 4. p., For grounds of excuse in the Hungarian Criminal Code see Krisztina Karsai – Zsolt Szomora: Criminal law in Hungary. Kluwer Law International, 2010. 81-86. pp.; If a state verifies the condition of double criminality it should consider the factual elements underlying the offence instead of its name. Ferenc Kondorosi – Katalin Ligeti: The handbook of European Criminal Law. Budapest, 2008. 88. p.

<sup>5</sup> Ferenc Kondorosi – Katalin Ligeti: cit. op., 90-91. pp.

<sup>6</sup> Exceptions are written in Article 14 of the Convention.

## **II. 2 The Hungarian Act on International Legal Assistance in Criminal Matters**

The Hungarian Parliament adopted Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters on 22<sup>th</sup> of May 1996 and it was amended several times, recently with Act XXXIX of 2017. The Act shall be applied in international criminal cooperation with states out of the European Union, including extraditional procedures.

Double criminality is provided by the General Part of the Act, which concerns all forms of legal assistance, including extradition (Section 4). According to Paragraph 1 of Section 5, legal assistance may only be submitted or performed on condition that the act is punishable according to both Hungarian law and the law of the Foreign State. Another condition of the legal assistance is that it should not be related to political offences or other closely related offences, nor to military offenses.

The Chapter II consists the special rules of extradition from Hungary. Paragraph 1 of Section 11 states that at the request of a Foreign State, persons found in the territory of Hungary may be extradited for the purposes of conducting a criminal proceeding, enforcement of a sentence of imprisonment or measures for deprivation of personal liberty. Paragraph 2 provides that extradition is permitted for the purposes of conducting criminal proceedings, if the act on the grounds of which extradition is requested is punishable under the laws of both Hungary and the Requesting State by imprisonment of at least one year. Concerning the enforcement of a sentence of imprisonment or measures for the deprivation of personal liberty, extradition is permissible if at least six months of the sentence or measures imposed remain to be enforced. Therefore beside double criminality, the measure of the penalty should be examined as well, whether the request's purpose is to conduct a procedure or to give effect to an awarded punishment or an imposed measure.<sup>7</sup>

The Article 13 of the Act provides that the extradition of a Hungarian national – unless the Act makes exception – shall be granted only when the person is claimed is also simultaneously a national of another state and not resident in Hungary. Thus in the extraditional system the main rule is the denial of the extradition of Hungarian nationals and the Act solely provides an exception to that rule.

Requests for extradition shall be received by the Minister of Justice and shall immediately be forwarded by him to the Budapest Metropolitan Court (Section 18). According to Paragraph 2, the matters that fall under the jurisdiction of the court, in which the Metropolitan Court shall act exclusively, as a single judge and appeals can be lodged against its ruling, unless the Act forbids it. Appeals have no delaying effect.

If the whereabouts of the sought person is unknown, the Metropolitan Court shall order apprehension of the person and the police shall take such person in custody, which may last a maximum of 72 hours (Section 19).

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<sup>7</sup> Ferenc Kondorosi – Katalin Ligeti: cit. op., 92-93. pp.

Besides the Minister of Justice and the Metropolitan Court, the public prosecutor takes part in the extradition procedure as well. The Metropolitan Court sends the documents to the Metropolitan Chief Prosecution Office for the purpose of having his motion made. The Court may appoint a counsel if its participation is required and the person has no defence counsel of his/her own choice. The Court shall carry out a hearing and question the person with regard to any conditions influencing extradition pursuant to the Act. If the conditions for extradition are fulfilled, it shall order the arrest for extradition of the person<sup>8</sup> (Article 20). The Court shall send the files of the case to the Minister of Justice, who will decide about the extradition of the wanted person (Article 26).<sup>9</sup>

### **II. 3. Surrender – European Arrest Warrant (EAW)**

The Article 31 of the Treaty of Amsterdam enlists the reform of extraditional system among the Member States as one of the purposes of the cooperation in criminal matters.<sup>10</sup> According to the Conclusions of Tampere European Council the formal extradition procedure shall be speeded up among the Member States,<sup>11</sup> which was intended to be done with the application of the mutual recognition.<sup>12</sup> The September 11 attacks of USA has accelerated the development of the fight against transnational crime in the European Union,<sup>13</sup> therefore the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) was adopted by the Council Of the European Union. The Framework Decision has abolished the old extraditional procedure in cooperation of criminal matters between the Member States and placed the new system on the base of mutual recognition. The European arrest warrant is a new legal institute, which is not the renewal of the extradition.<sup>14</sup>

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 criminal prosecution or executing a custodial sentence or detention order (Paragraph 1 of Article 1). On the basis of mutual recognition, the Member States shall execute any EAW accordingly to the provisions of the Framework Decision. (Paragraph 2 of Article 1).

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<sup>8</sup> Péter Mohácsi: International Co-operation in Criminal Matters, with Special Reference to Extradition. *Acta Juridica Hungarica*, 1995/3-4., 284-285. pp.

<sup>9</sup> Ferenc Kondorosi – Katalin Ligeti: cit. op., 92. p.

<sup>10</sup> Péter Polt: cit. op., 3-4. pp.

<sup>11</sup> Ferenc Kondorosi – Katalin Ligeti: cit. op., 96. p.

<sup>12</sup> Ferenc Kondorosi – Katalin Ligeti: cit. op., 158-156. p.; Since the Treaty of Amsterdam, the mutual recognition is the main principle of the cooperation, which refers to the decisions of the judicial authorities of the Member States in criminal proceedings. Krisztina Karsai: Article 82-89 of the Treaty on the Functioning of the European Union. In: András Osztoivits: Commentaries on the Treaty on European Union and the Treaty on the Functioning of the European Union. Complex, 1689-1690. pp.

<sup>13</sup> Gabriella Lída Elek: The interchange and evolution of the European Arrest Warrant. *European Law*, 2017/6. 1. p.

<sup>14</sup> Péter Polt: cit. op., 3. p.

In Article 2 the Framework Decision states that a EAW may be issued for acts punishable by a custodial sentence or a detention order for a maximum period of at least 12 months, but in contrary with the European Convention of Extradition, it refers only to the maximum possible punishment for the offence laid down in the national law of the issuing Member State, therefore the measure of the punishment in the executing State is irrelevant.<sup>15</sup>

The Framework Decision itemizes 32 categories of offences in respect of which the verification of double criminality does not apply. Before issuing the EAW, the competent authority should determine whether one or more of the offences belong to one of the 32 categories. Hence the executing State shall fulfill the EAW regardless of the double criminality.<sup>16</sup> However, the Framework Decision provides that if the EAW relates to one of the 32 offences the requirement of passing over the validation of double criminality is that the offence shall be punishable in the issuing state by a custodial sentence or a detention order for a maximum period of three years. According to Paragraph 4, for offences other than covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State.

Similarly to the extraditional system, the Framework Decision on EAW also lays down the main rule of speciality (According to Paragraph 2 of Article 27, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.<sup>17</sup>

One of the main changes compared to extradition is the influence of the European citizenship on the surrender proceeding.<sup>18</sup> The grounds for optional non-execution of the EAW are much narrower considering the nationals of the executing state than it was in the case of extradition (see above). According to Article 4, the executing judicial authority may refuse to execute the EAW if it has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

The Paragraph 3 of Article 5 makes it possible for the executing judicial authority to subject the execution of the EAW, by the law of the executing Member State, to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State, if a person who is the subject of a EAW for the purpose of prosecution is a national or resident of the executing Member State.

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<sup>15</sup> Handbook on how to issue and execute a European Arrest Warrant (hereinafter: Handbook),15.

<sup>16</sup> Ferenc Kondorosi – Katalin Ligeti: cit. op., 160. p.

<sup>17</sup> The Framework Decision itmeziex exceptions to the rule of specaility in Paragraphs 1 and 3 of Article 27.

<sup>18</sup> Krisztina Karsai: The EAW and the surrender, Acta Juridica et Politica, Szeged, 2004., 7. p.

In the new system of surrender the requests shall be sent from the judicial authority of the issuing State to the executing authority of the executing State. The Article 6 of the Framework Decision determines the competent judicial authorities.<sup>19</sup> The issuing judicial authority shall be the judicial authority of the Member State which is competent to issue the EAW by virtue of law of that State, and the executing judicial authority is the judicial authority of the executing Member State which is competent to execute the EAW by virtue of the law of that State. The Court of Justice in case *Poltarak and Kovalkas* ruled that the words 'judicial authority' are not limited to designating only the judges or courts of a Member State, but may extend to the authorities required to participate in administering justice in the legal system concerned. However, the Court of Justice found that the term 'judicial authority', referred to in that provision, cannot be interpreted as also covering the police service or an organ of the executive of a Member State, such as a ministry, and that acts issued by such authorities cannot be regarded as 'judicial decisions'.<sup>20</sup> In case *Özçelik* the Court clarified the meaning of 'judicial decision' and concluded that a confirmation by the public prosecutor's office of a national arrest warrant that was issued previously by a police service in connection with criminal proceedings constitutes a 'judicial decision' and shall be considered as a valid EAW.<sup>21</sup>

The Article 7 of the Framework Decision provides that each Member State may designate one or more central authority, but their role in procedure is restricted to assist the competent judicial authorities, or at the most, if it is necessary as a result of the organisation of the Member State's judicial system, the central authorities may be responsible for the transmission and reception of the EAW.<sup>22</sup>

#### **II. 4. Hungarian Act on the criminal cooperation with the Member States of the European Union**

On 1st May 2004 Hungary has joined the European Union and the Hungarian Government has prepared several bills which aimed to fulfill the obligations that were undertaken by the EU-accession. Thus, the Hungarian Parliament adopted the The Act CXXX of 2003 on the Cooperation with the Member States of the European Union in Criminal Matters to implement the Union legal instruments on judicial cooperation in criminal matters, including the Framework Decision on EAW. This Act was in force until 1st January 2013 and has been replaced with the Act CLXXX of 2012 on the Criminal Cooperation with the Member States of the European Union (hereinafter: Act).

The Act shall be applied in cooperating with Member States of the European Union in criminal matters and in surrender proceedings conducted under a European Arrest Warrant. Upon request of a Member State a person staying in Hungary may be surrendered for the

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<sup>19</sup> Ferenc Kondorosi – Katalin Ligeti: cit. op., 159-160. pp.

<sup>20</sup> Handbook, 13.

<sup>21</sup> Handbook, 17.

<sup>22</sup> Gabriella Lída Elek: cit op., 1. p.



purposes of conducting criminal proceedings against him/her or for executing a sentence of imprisonment or a measure involving deprivation of liberty against him/her. If the intention of the surrender is to conduct a criminal proceeding, the sought person's act shall be punishable by the laws of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months. If the purpose is to execute a sentence of imprisonment or a measure involving deprivation of liberty, the imposed sanction has to be at least 4 months or more (Paragraph 1 of Act 3).

The Annex I of the Act itemizes several offences. If the EAW refers to one of those offences and it is punishable under the issuing Member State's law by a custodial sentence or a detention order for a maximum period of at least 3 years, surrender shall be granted regardless of the double criminality (Paragraph 2 of Article 3). If the offence is not covered by the Annex I or the maximum period of the sanction prescribed by the issuing Member State's law is less than 3 years, then the verification of the double criminality is necessary, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of Hungary (Paragraph 3 of Article 3).

The Paragraph 1 of Article 5 of the Act contains the list of grounds for mandatory non-execution of the EAW (see below). According to Paragraph 4 of Article 5, the execution of the EAW shall also be refused, if the requested person is national and resident of Hungary and the purposes of the EAW is to execute an imposed sanction and the requested person does not consent to the surrender. The amendment of the Act which entered into force on 1 January 2018 stipulates that the court subsequently with the refusal of the EAW shall order the provisional arrest for surrender for the execution of the imposed sentence, such arrest may last for 30 days. During the 30 days the court shall obtain the verdict and other documents from the issuing State and shall hold another trial where the judge shall examine the conditions of the acceptance of the enforcement of sentence of imprisonment.

The Act designates the Hungarian judicial authorities which are competent to execute a EAW received from another Member State and conduct the surrender proceedings.<sup>23</sup> The Hungarian executive judicial authority is the Budapest Metropolitan Court, which shall act exclusively as a single judge. Unless appeal is excluded under the Act, Metropolitan Courts' decisions shall be subject to appeal which shall be adjudicated by the Budapest Regional Court of Appeal at a session in camera. Appeals shall have no suspensory effect (Article 4).

The role of the Minister of Justice has been significantly lowered, compared to the extraditorial proceeding. In surrender proceedings, the Minister of Justice has only administrative function, for example if additional information is needed to make the decision about surrender, the Metropolitan Court shall request the issuing Member State for supplementary information via the Minister of Justice (Paragraph 2 of Article 10) or if the

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<sup>23</sup> Article 25 of the Act provides the conditions of issuing a EAW in Hungary and designates the competent authorities.

execution of the EAW is declined or the surrender proceeding gets terminated, it is also the Minister of Justice who shall inform the issuing Member State about those decisions (Paragraph 3 of Article 15).

## **II. 5. Apprehension and Custody**

If a person sought by a EAW gets caught in Hungary, he/she shall be taken into custody, which may last for a maximum of 72 hours (Paragraph 1 of Article 7). If the person has no defence counsel of his/her own choice, the authority that ordered the custody shall appoint one. (Paragraph 2 of Article 7). The wanted person shall be brought before the Metropolitan Court, then the Court shall hold a trial.

In most cases the Hungarian authorities recognize it during a border crossing that somebody is wanted by another State because of crime. As throughout the Schengen area visitors and goods became generally free to move without border control you could ask how the authorities recognise it. Well such border-free travel would not be possible without the Schengen Information System (SIS) which is a database created to ensure that participating countries have access to relevant information on individuals and properties.<sup>24</sup> Each state operating the SIS has set up a national SIRENE (Supplementary Information Request at National Entry) Office which operating from 0 to 24 hours, and is responsible for information exchange and coordination of activities related to SIS alerts.<sup>25</sup> In Hungary the main organization of the European criminal cooperation called International Criminal Cooperation Centre (hereinafter referred to NEBEK), and also the Sirene Office works in the frameworks of NEBEK. The Schengen Information System among others contains persons wanted for arrest in surrender or extradition proceedings. The first thing in the surrender/extradition proceedings that the Hungarian authorities match a person to a SIS alert, and if his or her identity is verified, they alert the SIRENE Office and take him or her into custody immediately. The acting authority checks the person's identity mainly according to his or her available documents.

## **II. 6. Measures before the trial**

European arrest warrants (and international arrest warrant) cases shall be adjudicated solely by the Metropolitan Court no matter where the defendant was caught in Hungary. Because of this from everywhere in Hungary the police shall bring the defendants to the capital of Hungary, where the Metropolitan Court seats. As mentioned before, the Metropolitan Court shall act as a single judge in this cases. Three specialized judge is taking care of the surrender/extradition cases in the Budapest Metropolitan Court.

After the capture, the NEBEK shall immediately notify the Budapest Metropolitan Court and the Metropolitan Chief Prosecution Office. The NEBEK transmits all the relevant

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<sup>24</sup> <https://www.naih.hu/schengen-information-system.html>

<sup>25</sup> [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/sirene-cooperation\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/sirene-cooperation_en)

documents, the original arrest warrant, the SIS II alert and the Hungarian translation of the alert to the court and the public prosecutor via e-mail. The public prosecutor of the Metropolitan Chief Prosecution Office shall make a written motion about the conditions of surrender and the Metropolitan Court shall decide about the surrender/extradition within 72 hours.

It well exemplifies that the Hungarian system works effectively that in most cases the court adjudicates the case within 12-24 hours after the capture of the defendant. It is not rare that the court tries 3-4 surrender cases in one day, mostly on Monday and Friday. The Metropolitan Chief Prosecution Office always has one public prosecutor in standby to make the motions and participate in the trials.

The participation of the public prosecutor and the defence counsel is obligatory in the trial. The Court has to summon the defence counsel to the trial, and if the sought person does not speak Hungarian, an interpreter shall be assigned as well (Article 8). The presence of the appointed defence counsel is ordinary, because the defendant do not have the time and money to choose a defence council of his/her own choice. In Hungary in European arrest warrant cases the appointed defence counsel and even the interpreter is a person who specified to surrender and extradition cases because of the speciality of the procedure and in order to ensure the rights of the defendants at the highest level.

Before the start of the trial the defendants shall consult in their mother tongue with the appointed defence counsel with the help of an interpreter about the case. This is the first time the defendants get more information about the reasons of the arrest, the proceedings and their rights. The appointed defence counsel also explains the essence of the SIS alert to the defendant.

## **II. 7. The Trial of the Metropolitan Court**

After the opening of the trial, the judge introduces the participants (the public prosecutor, defence counsel, the interpreter, court reporter, and himself/herself) to the defendant, and presents the substance of the European arrest warrant (international arrest warrant). After the motion of the prosecution the procedure continues with the identification of the defendant.

Before the hearing of the defendant the judge shall inform him or her about the procedure, about the rights of the defendants during the proceedings. The judge shall advise the defendant about the right to remain silent, and warns the defendant that he or she can be punished if he or she accuse someone else false with a crime in his or her confession.

It's very important that Metropolitan Court does not examines the evidence of the case because of which the other state issued the arrest warrant. The Hungarian judge only decides about the surrender/extradition, the person staying in Hungary shall be surrendered/extradited or not. The judge also informs the defendant about the possibility of the so called simplified procedure and its consequences, and about the "speciality" rule.

If the defendant consented to her/his surrender and the conditions of the surrender are fulfilled, the Metropolitan Court shall order the arrest for surrender and the simplified surrender. (Paragraph 1 of Article 18). In the case of the simplified extradition the accused should be surrendered in 10 days to the requesting State. If the accused is not surrendered during these 10 days, the arrest shall immediately be terminated and the defendant should be released from the arrest. In the simplified procedure there is no appeal against the Budapest Metropolitan Court's decision.

According to the rule of "speciality" a surrendered person shall not be prosecuted, sentenced or otherwise deprived of his or her liberty for a criminal offence other than the one on which his or her surrender is based. (Article 30) Every defendant have the possibility to resign about this benefit, but those who should afraid of other procedures factually its better to not to resign. It worth mentioning that according to the Paragraph 2 of Article 30 the rule of speciality does not apply

- if the requested person, having had an opportunity to leave the territory of Hungary, has not done so within 45 days of his final discharge, or has returned there after leaving it;
- the criminal offence is not punishable by imprisonment or detention, nor by a measure of deprivation of liberty,
- the prosecution is not terminated with a sentence of imprisonment or a measure of deprivation of liberty, / the person is not finally sentenced of imprisonment or deprived of his/her liberty;
- the person is punishable with a penalty or a measure not involving deprivation of liberty, particularly a fine, even if the penalty or measure might lead to the restriction of personal liberty;
- the person has renounced the speciality rule in the course of the surrender procedure;
- after his/her surrender, the person expressly renounced his/her entitlement to apply the speciality rule in respect of specific offences committed prior to his/her surrender, or
- the Member State judicial authority which surrendered the person gives its consent (the Requesting State shall issue a new EAW against the surrendered person for the newly discovered crimes, and the Metropolitan Court shall give its consent if the conditions of the surrender are met).

After the Budapest Metropolitan Court fulfilled all obligations of directions and the defendant received all the necessary information, the judge asks the defendant if he or she understood all these information, including the essence of the SIS alert, and the reasons of the custody. If the defendant decides not to remain in silence, the judge asks him or her to give his or her statement about the simplified procedure and about the rule of speciality. It's very important that the consent to the simplified procedure and the resignation from the application of the rule of speciality is not revocable.

If the defendant does not consent to the simplified procedure, he or she could be in provisional arrest for surrender until 60 days. During this 60 days the Metropolitan Court shall obtain the entire text of the European arrest warrant from the issuing State. The original EAW shall be translated to Hungarian. After the translation, the public prosecutor of the Metropolitan Chief Prosecution Office shall make a final written motion and the Metropolitan Court shall hold another trial to decide about the surrender.

The Metropolitan Court shall obtain additional information if the facts and data presented by the Requesting State is not sufficient to decide about the surrender. For example if the date or the place of the commitment, the amount of the damage is missing. Until the final decision, the Court shall order the provisional arrest for surrender of the person (Paragraph 1 of Article 9). The Court forwards his decision to the Minister of Justice, who shall notify the issuing Member State in interest of immediate transmission of the EAW (Paragraph 5 of Article 9). The court shall request the additional information via the Minister of Justice. The court shall set a deadline to get the additional information.

If the sought person is a Hungarian national, and only the legal guarantee is needed (the guarantee of the issuing Member State that in case of imposing a custodial sentence or a detention order against him or her, the defendant will be returned to Hungary in order to serve the custodial sentence or detention order passed against him in the issuing Member State), the Metropolitan Court shall order the provisional arrest for surrender and shall obtain the legal guarantee from the issuing Member State via the Hungarian Minister of Justice. If the legal guarantee is granted, the Metropolitan Court shall order the arrest for surrender and the surrender, the court shall not hold another trial, the court shall decide at a session in camera.

If surrender/extradition of the same person is requested by more than one state, the decision on the surrender/extradition shall be made by taking into account, in particular, the place where the offence was committed, the nationality of the person claimed, the purpose of the warrant (conducting criminal proceedings or executing an imprisonment), the chronological order in which the requests were received and, if the requests pertain to different offences, the gravity of the offences.

Until 1<sup>st</sup> January 2017 the provisional arrest for surrender could not be replaced by other constraint measures restricting personal liberty. But after that, an amendment to the Act made it possible for the court to order the provisional house arrest or the provisional restraining order from leaving the territory of residence of the requested person, if – considering the sought person's personal circumstances, the character of the offence, the measures of the sanction which shall be carried out, or the circumstances of capturing the wanted person – the purposes of the temporary arrest can be achieved by a slighter coercive measure. (Paragraph 1 of Article 9/A). The order of the alternative coercive measures is not common in the practice of the Metropolitan Court.

## **II. 8. After the trial**

If the claimed person is wanted in Hungary too, the Metropolitan Court may, after deciding to execute the arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in Hungary, or if he or she has already been sentenced, so that he or she may serve, in its territory a sentence passed for an act other than that referred to in the European arrest warrant.

If the surrender of the claimed person has been postponed, the Metropolitan Court may, upon request of the Requesting State, authorize the temporarily surrender of the person to the Requesting State with a view to carrying out an urgent procedural act. The person claimed shall only be temporarily surrendered if it is ensured that he/she shall be kept in custody in the Requesting State and shall be returned within the stipulated period of time

The defendant shall serve the provisional arrest for surrender in the Metropolitan Penitentiary Institution until his or her actual surrender to the Requesting State. If somebody is wanted for executing a sentence of imprisonment, the entire duration of the preliminary detention in Hungary shall be included in the final sentence.

Surrender of the person shall be arranged by NEBEK, in cooperation with the police. Expenses incurred in the territory of Hungary in the course of the execution of a EAW issued by the Member State judicial authority shall be deemed as the cost of criminal proceedings and shall be borne by State of Hungary, so the defendant shall not pay the cost of the procedure. It's one of the features of these cases that significant costs are generated with the transportation, guarding, alimentation, placement and interpretation but in this way there is reciprocity between the States, and finally it's a common interest to take a stand effectively against crime.

### **Some statistics for the European arrest warrant cases in Hungary**

#### **I.**

<b>Year</b>	<b>Number of motions of the prosecution</b>
<b>2011</b>	<b>287</b>
<b>2012</b>	<b>315</b>
<b>2013</b>	<b>325</b>
<b>2014</b>	<b>363</b>
<b>2015</b>	<b>314</b>
<b>2016</b>	<b>419</b>
<b>2017</b>	<b>543</b>
<b>2018 (until March 20)</b>	<b>98</b>

The number of trials of the Metropolitan Court is nearly the same, but in cases specified in the Act the court has the option to decide without trial (for example, as mentioned before, if only the legal guarantee is needed for the final decision).

## II.

<b>Year</b>	<b>Number of extradition/surrender from Hungary</b>	<b>Number of extradition/surrender to Hungary</b>
<b>2016</b>	<b>359</b>	<b>391</b>
<b>2017</b>	<b>364</b>	<b>221</b>

It shows the efficiency of the Hungarian system that in only one case was the defendant set free from the arrest because he or she was not surrendered in time. The Metropolitan Court adjudicates mostly surrender cases, 90-95 percent of the arrest warrant cases are based on EAW, and only 5-10 percent is based on international arrest warrant. The most frequent requesting States are Germany, Austria, Romania, Croatia, the Netherlands but EAW from every other Member State occurs. The Hungarian authorities captures mostly Serbian, Ukrainian, Romanian defendants in the border.

## III. EUROPEAN ARREST WARRANT CASES

As mentioned before, the Metropolitan Court hasn't got any competence to examine the evidence of the crime because of which the arrest warrant was issued, that's why the surrender/extradition trials in Hungary usually holds no big surprises. Although the cases are very similar and the trials usually happen in the same way within the framework of the Act CLXXX of 2012, these cases are special because the defendants are even more vulnerable than in the regular criminal proceedings. They are in a foreign country, they usually don't speak the Hungarian language and they have difficulties to understand the legal procedure. Even if they have an interpreter it may cause difficulties that they can't understand that they have no chance to defend themselves in connection with the crime they are accused with, the Hungarian court do not adjudicates the actual crime, only decides about the surrender. Because of these circumstances these cases often require more patience and understanding from the participants.

On 2nd of February 2018, Metropolitan Court ordered the arrest for surrender of an Ukrainian defendant who was wanted by the German authorities. According to the European arrest warrant he and his partners delivered significant amount of drugs especially heroin to Germany in order to sell it. The German Prosecution wanted to conduct criminal procedure against the Ukrainian defendant because of drug trafficking. Despite of the judge's legal instructions that the surrender lasts 10 or 60 days, the Ukrainian defendant asked the judge to let him stay in Hungary for 15 days. He explained it with the fact that his family could visit him much more easier in Hungary than in Germany, so he stucked to the 15 days. After the judge explained him again that it is determined by the relevant Act and he can't choose the duration of the arrest, the Ukrainian defendant finally consented to the simplified procedure and the Metropolitan Court ordered his arrest for surrender for 10 days, and the judge informed him

that his appointed defence counsel may help him to contact and notify his family. The Ukrainian defendant didn't resign about the application of the rule of speciality, so in Germany he can't be prosecuted because of other crime than drug trafficking.

On 22<sup>nd</sup> of March 2017 the Budapest Metropolitan Court ordered the arrest for surrender of a Syrian defendant who tried to kill a person in Germany. According to the fact of the crime, several months after a quarrel the Syrian man stabbed the injured party several times with a knife. Thanks to the urgent medical help the doctors could save the injured party's life, but without medical help the death of him would have been inevitable. The German authorities issued a European arrest warrant against the Syrian man for attempt of homicide. The Hungarian police captured the Syrian defendant. The Syrian man consented to the simplified procedure but he did not resign about the application of the rule of speciality. According to Budapest Metropolitan Court's order the Syrian man stayed in Hungary 10 days before he had been surrendered to the German authorities.<sup>26</sup>

European arrest warrant cases are not always as simple as in those above mentioned two cases. Sometimes there are differences between the view of the authorities of the issuing and the executing States, and also national law may contain differences with the European regulation. The Metropolitan Court have to examine carefully the execution of the EAW and establish whether any grounds for refusal of the execution of the EAW or not.

#### **IV. GROUNDS FOR NON-EXECUTION OF THE EUROPEAN ARREST WARRANT**

2002/584 / JHA of the Council of the European Union is emphasizing the higher level of cooperation in criminal matters and narrowed the cases of refusal of surrender. Unlike in the past ("every Member State takes the necessary action")<sup>27</sup>, the drafting of the legislation is novel, the rights and obligations contained therein, are clearly defined and broken down in relation to the surrender process by its diplomatic nature by deploying the procedure to the competent judicial authority, including an examination of the existence of absolute or relative grounds for refusal. When constructing the law, traditional, internationally known principles of law were taken into account. The Council defined mandatory (absolute) and discretionary (relative) cases of the refusal of the execution of the European arrest warrant. In the former case, the provisions of the law of a Member State (Framework Decision) ex lege excludes the execution of the EAW, while in the second case, the judicial authority of the executing Member State has the discretion right to refuse the execution of the EAW.

The list contained in the Framework Decision is taxative, but it can only be invoked if it has been transformed into national law. The Framework Decision imposes a non-transfer in only three cases, which: 1.) in the executing Member State, the underlying crime falls under

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[http://fovarositorvenyszek.birosag.hu/sites/default/files/field\\_attachment/0324\\_atadasi\\_letartoztatas\\_es\\_egyszerusített\\_atadas\\_0.pdf](http://fovarositorvenyszek.birosag.hu/sites/default/files/field_attachment/0324_atadasi_letartoztatas_es_egyszerusített_atadas_0.pdf)

27 Krisztina Karsai: cit. op., 7. p.



amnesty; 2.) *res iudicata* - because of the same offense the person sought has been finally convicted if the punishment has been already enforced, enforcement is in progress or is no longer enforceable; 3.) in the executing Member State because of his age the person sought can not be held criminally liable.

Interestingly, Hungarian legislation (Act CLXXX of 2012), besides the mandatory cases listed in the Framework Decision, has also determined a number of relative reasons as "absolute", thus excluding the execution of the EAW and the surrender by virtue of the law. However, the deepening of European criminal integration has led to a change in the Hungarian legislator who made regulations that were closer to the Framework Decision than before.

#### **IV. 1. Grounds for mandatory non-execution of the EAW (Act CLXXX of 2012)**

The Metropolitan Court shall refuse the execution of the EAW if punishability of the person claimed has been ceased by **pardon/amnesty**. Amnesty is a symbolic and normative resignation of the public prosecution, a pardon extended by the government to a group or class of persons, usually for a political offense.<sup>28</sup> In Hungary, since 1989, the Parliament had only four occasions of amnesty, therefore practical application in criminal cooperation is very rare.

Article 16 of the Act C of 2012 on the Hungarian Criminal Code defines the minimum **age** of criminal responsibility. Persons under the age of fourteen years at the time the criminal offences was committed shall be exempt from criminal responsibility, with the exception of homicide, voluntary manslaughter, battery, acts of terrorism, robbery, and plundering, if over the age of twelve years at the time the criminal offence was committed, and if having the capacity to understand the nature and consequences of his acts. We found no actual case where the Metropolitan Court refused the enforcement of the EAW because of the age of the defendant.

For reasons of absolute refusal, the scope of application of **res iudicata** can be regarded as very problematic for practical application. The principle of *ne bis in idem* has already been interpreted by the European Court of Justice from several perspectives, but it is still in many cases raised questions by the executive judicial authorities in the Member States. The text of the Framework Decision was examined by the Luxembourg Court in several cases<sup>29</sup> and it developed a common interpretation during time. The court stated in its decisions that (1) the finality of a decision must be assessed in accordance with the law of the Member State in which the judgment was delivered; (2) Acquittal judgments based on absence or lack of proof must also be regarded as final judgments, as the law does not refer to the content of the final judgment; (3) a decision which does not eliminate criminal liability on a national level in respect of certain acts in accordance with the law of the Member State which initiated criminal proceedings may in no way constitute a procedural obstacle to the fact that in another Member

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<sup>28</sup> Péter Váczi: Pardon! The institution of amnesty and nullity laws, <http://dfk-online.sze.hu/images/egyedi/bihari/v%C3%A1czi.pdf> download: 2018. 03. 01

<sup>29</sup> C-467/ 04. – Gasparini, C-261/ 09. – Mantello, C- 367/ 05. – Kraaijenbrink, C-469/ 03. – Miraglia.

State against the same person criminal proceedings should be initiated or resumed. Accepting this interpretation, if a Hungarian court convicted or acquitted the requested person for the same crime, then this final decision has a *res iudicata* effect and *ex lege* excludes the execution of the EAW.

At present, the Hungarian Act CLXXX of 2012 extends the above with three cases. The first case is that the court needs to examine whether the offense underlying the surrender is a criminal offense under the Hungarian law and if the act is not constitute a punishable act according to the Hungarian law, the Hungarian court shall refuse the execution of the EAW in cases where the upper limit of the punishment in the requesting State is less than three years of imprisonment, as well as for non-cataloged offenses.

The second case is a protection for a Hungarian citizen residing in Hungary. The Court shall refuse to execute the EAW if the requested person is a national and resident of Hungary and the issuing Member State does not provide an appropriate legal guarantee for that in case of imposing a custodial sentence or a detention order, the execution of the sanction will be returned to Hungary (legal guarantee rule). Therefore the Hungarian judicial authority can not deny the execution of an EAW which aims the surrender of a Hungarian national on the grounds of the sought person's domestic nationality anymore if the legal guarantee is granted. The requesting States provided the necessary legal guarantee to the Metropolitan Court in every case, so actually this refusal is somehow symbolic.

Here clearly appears the protection of the state's own citizens and the citizenship as a special legal relationship. This is accompanied by the *aut dedere aut iudicare* principle, which, in such cases, makes obligation of accountability to the national state.<sup>30</sup> The reason for this policy is that the punishment is generally more favorable to the person concerned if he or she can serve it in his/her own state. It is a fact that the Hungarian citizen is also a citizen of the European Union and in such capacity it could be justified to serve his/her punishment in the issuing State, but in such cases it is not really the nationality which is decisive. Indeed, the place of residence as a fact of personal attachment, which justifies the existence of the above mentioned mandatory refusal in the Hungarian legislation and the probability of the perpetrator's resocialization is even greater if the perpetrator can serve his/her punishment in the country where he/she habitually lives.

The third case that appears to be somewhat abstract, when the Metropolitan Court denies the surrender and the execution of the EAW, with reference to infringement of the fundamental rights. Such a case may be typical if the court refuses to execute the EAW referring the possible infringement of right to defense or a fair trial.

We consider that this reason for refusal, as a result of the principle of mutual recognition, has not got really a place in Hungarian legislation, since the Member States, which share the same political and social perception, are actually calling into question the commitment of

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<sup>30</sup> PR.: Karsai, 2004, 21. p.

another Member State to legal certainty, fairness and fundamental rights. We found one case when the Metropolitan Court refused the execution of the EAW based on this cause. A Slovakian citizen was wanted by the Slovakian Court for theft. The Slovakian citizen does not consented to the surrender therefore the Metropolitan Court ordered his provisional arrest for surrender and requested the EAW and additional information from the Requesting State. The defendant stated that the Slovakian police violated his rights, because the police used coercion to get his confession. The Slovakian authorities informed the Metropolitan Court that indeed a criminal proceeding has been initiated against a policeman who coerced the defendant to confess the theft, and the defendant suffered several injuries during the interrogation. The Metropolitan Court found that the defendant human rights were violated, therefore refused the execution of the EAW.

In the case of Mr László Aranyosi (C-404/15), the Hungarian Court issued firstly an European arrest warrant on 4 November 2014 against Ms László Aranyosi because of theft. On 3 August 2014, Mr Aranyosi entered to a dwelling house in Sajohidveg (Hungary) and he stole EUR 2500 and HUF 100000 (approximately EUR 313) in cash, and various objects of value. Further, according to the second European arrest warrant issued on 31 December 2014, Mr Aranyosi was accused of entering by a window, on 19 January 2014 in a school in Sajohidveg, and forcing open a number of doors within the building and stealing technical equipment and cash. The value of the theft was HUF 244000 (approximately EUR 760) and the value of material damage was HUF 55000 (approximately EUR 170). Mr Aranyosi was provisionally arrested on 14 January 2015 in Bremen (Germany) as a result of an alert having been entered in the Schengen Information System but the German Court did not decide about his surrender. According to the German statement, the detention conditions in a number of Hungarian prisons did not satisfy minimum European standards because of their overcrowding, and in this case Mr Aranyosi might be subject to conditions of detention that damages his fundamental rights. In order to examine that surrender can be refused with reference to the conditions of detention or not, The German Supreme Court initiated the preliminary proceedings of the European Court of Justice. According to The European Court of Justice, execution of the EAW can't be refused automatically with reference to the conditions of detention in general; it should be examined in the concrete case what will happen with the defendant after his surrender. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information about the conditions of the detention in Hungary <sup>31</sup>

## **IV. 2. Grounds for optional non-execution of the European arrest warrant**

Relative surrender barriers are those cases in which the executing judicial authority acting in a discretionary power may refuse the surrender on the basis of the following.

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<sup>31</sup>[http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=HU&text=&pageIndex=0&part=1&mode=lst&docid=175547&occ=first&dir=&cid=800637](http://curia.europa.eu/juris/document/document_print.jsf?doclang=HU&text=&pageIndex=0&part=1&mode=lst&docid=175547&occ=first&dir=&cid=800637)

The existing Hungarian legislation is similar to the provisions of the Framework Decision, however, in the interpretation of certain cases, problems may arise due to different rulings of criminal law in the Member States.

The Hungarian Act CLXXX of 2012 specifies five optional non-execution cause. The Metropolitan Court may refuse the execution of the EAW if

- the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
- the Hungarian judicial authority, including the Hungarian investigating authority decided not to prosecute (refusal of the investigation, termination of the investigation or the criminal proceeding) for the offence on which the European arrest warrant is based (the Framework Decision adds to the fact that the decision must be final);
- the criminal prosecution or punishment of the requested person is statute-barred according to the Hungarian law and the acts fall within the jurisdiction of Hungary;
- the executing judicial authority is informed that the requested person has been finally judged (convicted or acquitted) by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;
- the EAW refers to a crime which was fully or partly committed in Hungary.

The legally binding nature of a decision must be assessed under the law of the Member State in which it was delivered. This does not prevent the issuing Member State authority from carrying out further investigative actions, but the grammatical interpretation of the regulation leads to the refusal to execute the EAW in such cases (in the case of a final decision). This regulation ensures the full application of the *ne bis in idem*'s principle, but in some cases it may be an abusive reference basis executing the EAW.

It also shows the effect of the *ne bis in idem* that in Hungary any kind of final judgment (conviction or refusal) in a Third State constitutes a relative ground for refusal. The Framework Decision has different regulation, because only the conviction by a third State could be a ground of the optional non-execution of the EAW. We found one recent case of the Metropolitan Court in relation to this. The defendant was an Egyptian man, who married to a Hungarian woman and they lived habitually in Hungary. Returning to Hungary the defendant was caught by the police because the Polish authorities issued an EAW against him. According to the warrant the Egyptian man between November 2014 and October 2017 caused about 72.000 Euro damage with fake bills to an Egyptian company which should have received this amount of money from a Polish company. The Metropolitan Court ordered the arrest for surrender of the defendant. As he did not consent to the simplified procedure, the court obtained the relevant documents from Poland and Egypt via the Ministry of Justice. The documents verified that the Egyptian defendant was sentenced to 3 years of imprisonment in Egypt by the first instance

court because of the same crime the Polish authorities issued the EAW, but the appellate court in second instance found him not guilty. The Polish authorities did not transfer the criminal proceeding to Egypt, and the Polish authorities maintained the EAW after the Egyptian sentence and they expressed that the participation of the defendant in the Polish proceeding is indispensable. According to the view of the defense, the surrender should be refused because of “res iudicata”, so because the Egyptian man was cleared of charges in a final judgement in Egypt, and the Polish court can’t prosecute him again for the same crime. Eventually the Metropolitan Court terminated the arrest for surrender of the Egyptian man and set him free and refused the execution of the EAW.

The Act stipulates one additional ground of refusal. The Metropolitan Court shall refuse the execution of the EAW if the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment (Paragraph 5-6 of Article 5)

## **V. SUMMARY**

With the changing over from extradition system to the rules of surrender, the proceeding has become faster and more effective. The mutual recognition is the core of the proceedings, thus the sovereignty of the Member States are less emphasized and it does not obstructs the transfer of wanted persons as much as it did in the extradition cases.

However, Hungary is still insisting on its sovereignty, which can be recognised on the rules of grounds for non-execution in the Hungarian law. With implementing the optional grounds of non-execution written in the Framework Decision as mandatory grounds, the Hungarian legislator hinders the judge in his decision. If the court is convinced that a EAW has to be executed, regardless of the nationality and the residence of the wanted person, the judge has to procure a guarantee from the issuing Member State in any case, which could delay the proceeding.

The Hungarian Act that implemented the Framework Decision has been amended several times in the recent past, and the Hungarian regulation became much more comfortable with the provisions of the Framework Decision. Hopefully this tendency will continue in the future and the divergences will be resolved.

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