

49th Plenary Meeting of the European Judicial Network

21-23 November 2017, Tallinn

COVER NOTE

From: EJN Secretariat

To: EJN Contact Points

Subject: Executing a European arrest warrant in line with Articles 15(1) and 23 EAW Framework Decision in the event of *force majeure* being established when it comes to setting a surrender date where the first two surrender attempts have failed on account of the resistance put up by the requested person, raised by the judgment of the Court of Justice of the European Union in Case C-640/15 Vilkas

On 25 January 2017, the Court of Justice of the European Union (CJEU) delivered its judgment Case C-640/16 Vilkas. The Court interpreted Articles 15(1) and 23 EAW Framework Decision (FD) and concluded that the authorities responsible for executing a EAW must, in the event of *force majeure* being established, set a third surrender date where the first two surrender attempts have failed on account of the resistance put up by the requested person. In its judgment, the CJEU clarifies the meaning of the concept "*force majeure*" ("circumstances beyond the control of the Member States concerned") in the context of the EAW FD but underlined that it is for the national court to make the final assessment as to whether the circumstances in the case at hand constitute "*force majeure*" or not.

The CJEU also concluded that authorities remain obliged to agree on a new surrender date if the time limits mentioned in Article 23 have expired.

The Contact Points are invited to discuss this matter on the basis of the enclosed Discussion paper.

Discussion paper for the Workshop II –

On aspects of executing a European arrest warrant in line with Articles 15(1) and 23 FD on EAW¹ in the event of *force majeure* and the obligation to carry on with the procedure for executing an EAW after the expiry of the prescribed timelines in Article 23, raised by the judgment of the Court of Justice of the European Union in Case C-640/16 Vilkas.²

I Introduction of the case

Tomas Vilkas was a subject of two European arrest warrants (EAW) issued by a Lithuanian court. The Irish authorities attempted to surrender him to the Lithuanian authorities by using a commercial flight. However, he was not allowed on the flight because of the resistance he put up. Two weeks later, a second surrender attempt, also by means of a commercial flight, failed following a series of similar events.

The Irish Minister for Justice and Equality then applied to the High Court (Ireland) for authorisation for a third attempt at surrendering Mr Vilkas. However, the High Court held that it lacked jurisdiction to hear this application and ordered Mr Vilkas's release.

The Minister appealed this decision to the Court of Appeal, which in turn referred the question to the CJEU as to **whether Article 23 EAW FD allows the authorities to agree on a new surrender date on more than one occasion in the event of circumstances beyond one of the Member States' control** and, if so, in what situations. The CJEU ruled the following:

- i. Article 23(2) of the FD states that the requested person is to be surrendered no later than 10 days after the final decision on the execution of the EAW (para 22).
- ii. Article 23 of the FD is designed in particular to accelerate judicial cooperation by imposing time limits (for surrender) in relation to the EAW, which the Member States are obliged to comply with (para 32).³
- iii. Article 23 (3) is to be interpreted as requiring the authorities concerned to agree on a new surrender date where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision is prevented by circumstances beyond one of the Member States' control (para 39).

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; OJ 2002 L 190, p. 1.

² Case C-640/15, Vilkas, Judgment of 25 January 2017.

³ C-237/15 PPU, Lanigan, Judgment of 16 July 2015, para 29 and 33. In December 2012, the British authorities issued a EAW in respect of Francis Lanigan, regarding criminal proceedings brought against him in the United Kingdom for the alleged offences, committed in the United Kingdom in 1998, of murder and possession of a firearm with intent to endanger life. In January 2013, Mr Lanigan was arrested on the basis of that EAW by the Irish authorities. The Irish High Court was not able to begin its examination of Mr Lanigan's situation until 30 June 2014, following a series of adjournments resulting from procedural incidents. The examination of the case thus continued until Mr Lanigan submitted, in December 2014, that the fact that the time-limits laid down in the FD within which a decision on the execution of the EAW is to be taken (namely, 60 days after the arrest, with a possible extension of an additional 30 days) meant that proceedings could not be continued. The High Court asks the Court of Justice whether the failure to observe those time-limits precludes it from taking a decision on the execution of the EAW and whether Mr Lanigan may be held in custody even though the total duration of the period he has spent in custody exceeds those time-limits.

- iv. **The mere expiry of the prescribed time limits cannot relieve the executing Member State of its obligation to carry on with the procedure for executing the EAW and to surrender the requested person** and the authorities concerned must agree, for that purpose, on a new surrender date (para 72). See also C-237/15 PPU Lanigan.⁴
- v. Article 23(5) of the Framework Decision provides that, upon expiry of the time limits referred to in Article 23(2) to (4), if the requested person is still being held in custody he is to be released (para 35).
- vi. Where the authorities concerned agree on a second new surrender date pursuant to Article 23(3) of the FD, the executing judicial authority will be able to decide to hold the requested person in custody, in accordance with Article 6 of the Charter of Fundamental Rights only in so far as the surrender procedure has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the custody is not excessive. In order to ensure that the latter is the case, that authority will be required to carry out a concrete review of the situation at issue, taking account of all of the relevant factors (para 43).⁵
- vii. **If the surrender of the requested person is prevented in the event of circumstances beyond the control of any of the Issuing or Executing Member State (force majeure in the French version of the Framework Decision)** the judicial authorities may agree on a new surrender date (para 24).
- viii. The concept of *force majeure* must be interpreted strictly (para 56), despite certain divergence between the various language versions of Article 23(3) (para 43). It must be referred to in the sense of abnormal and unforeseeable circumstances, of which consequences could not have been avoided despite the exercise of all due care (para 53).
- ix. The resistance put up by a requested person to his surrender may properly be regarded as an abnormal circumstance outside the control of the authorities concerned. On the other hand, that situation cannot, in principle, be classified as an unforeseeable circumstance (para 59). Where the requested person has already resisted a first surrender attempt, the fact that he also resists a second attempt cannot normally be regarded as unforeseeable (para 60). **It is for the referring court to ascertain whether the existence of such unforeseeable circumstances has been established (para 65).**

⁴ In C-237/15 PPU Lanigan the CJEU stated that in the light, first, of the central function of the obligation to execute the EAW in the system put in place by the FD and, second, of the absence of any explicit indication therein as to a limitation of the temporal validity of that obligation, the rule set out in Article 15(1) of the FD cannot be interpreted as meaning that, once the time-limits stipulated in Article 17 of the FD have expired, the executing judicial authority is no longer able to adopt the decision on the execution of the EAW or that the executing Member State is no longer required to carry out the execution procedure in that regard.

⁵ If the person is detained in the executing State in the meantime, the limits on detention set out in C-237/15 PPU Lanigan apply, referring that the person can not be detained indefinitely pending execution of an EAW. In this case the CJEU stated that the issuing of a EAW cannot, as such, justify the holding of the requested person for a period the total duration of which exceeds the time necessary to execute that warrant, the executing judicial authority may decide to hold that person in custody, in accordance with Article 6 of the Charter of Fundamental Rights of the EU, only in so far as the procedure for the execution of the EAW has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the custody is not excessive (para 58). (With the latter the CJEU also referred to the European Court of Human Rights judgments in Quinn v France (1995) and Gallardo Sanchez v Italy (2015)). In order to ensure that that is indeed the case, the executing judicial authority will be required to carry out a concrete review of the situation at issue, taking account of all of the relevant factors with a view to evaluating the justification for the duration of the procedure (para 59).

Relevant provisions from the FD 2002/584/JHA related to VILKAS case

Article 15(1):

'The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.'

Article 23 'Time limits for surrender of the person':

1. *The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.*
2. *He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.*
3. *If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.*
4. *The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.*
5. *Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.'*

Other relevant provision from the FD 2002/584/JHA

Article 17

Time limits and procedures for the decision to execute the European arrest warrant

1. *A European arrest warrant shall be dealt with and executed as a matter of urgency.*
2. *In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.*
3. *In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.*
4. *Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.*
5. *As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.*
6. *Reasons must be given for any refusal to execute a European arrest warrant.*
7. *Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.*

II Discussion points

1. Time limits and procedures for the decision to execute an EAW (Art 17 EAW FD) and for surrender of the person (Article 23 EAW FD)

According to the CJEU, Articles 15(1) and 23 must be interpreted as meaning that issuing and executing authorities remain obliged to agree on a new surrender date if the time limits prescribed in Article 23 have expired, whereas the number of new surrender dates are not expressly limited where surrender has failed more than 10 days. Also, Article 15(1) of the FD cannot be interpreted as meaning that, once the time-limits stipulated in Article 17 of the FD have expired, the executing judicial authority is no longer able to adopt the decision on the execution of the EAW or that the executing Member State is no longer required to carry out the execution procedure in that regard.

- a. Is there national regulation in your Member State that provides for mandatory time limits for the *total* duration of the procedure for surrender of the person concerned (i.e. including the time for the decision to execute an EAW and for the surrender of the person)?
- b. If not, do you think such time limits should be necessary in order to avoid indefinite delay of the execution of an EAW?
- c. In your Member State, is there a regulation in place that provides for a mechanism to agree on a new surrender date(s) when the time limits in Article 23 have expired for any reason?

2. Postponement of the surrender of the requested person because of “circumstances beyond the control of any of the Member States” (*force majeure*) (Art 23(3) EAW FD)

The CJEU admits that there is a divergence between the various language versions of Article 23(3), which provides for that a new surrender date may be agreed upon between the issuing and executing Member States when “circumstances beyond the control of any of the Member States” i.e. *force majeure* occurs on surrender.

- a. Is there a reference to *force majeure* in the national legislation of your Member State (as in the French version of the FD) OR are there any other circumstances referred to in the national legislation as ground for not being possible to carry out the surrender (as might be derived from the English version of the FD)?
- b. What examples of circumstances can you bring from your experience, which can be defined as *force majeure* in the context of executing of an EAW, in particular of attempting to surrender?

3. Detention and release of the requested person

CJEU is referring that the person can be kept in detention during pending execution of an EAW if the duration of the detention is not excessive in light of Article 6 Charter (and not merely upon expiry of the time limits as stated in Article 23 (5)).

- a. What is the time limit for the *total* duration of the detention (e.g. including the time for the decision to execute an EAW and for surrender of the person), which the national authorities and courts in your Member State would apply?

- b. Is the frame of reference for this time limit provided for in the national legislation of your Member State or is any other source referred to (i.e. the Charter)?
- c. Does the national legislation of your Member State provide for other measures deemed necessary to prevent the person absconding in case of releasing the person concerned from detention (in line with the Article 12 of the FD on the EAW)?

4. Best Practices

Please reflect on the possible best practices between the issuing and executing Member States with regard to surrendering the person concerned.

- a. As an executing Member State, have you encountered a situation when the issuing Member State is not able or willing to collect the requested person in time or as an issuing Member State, have you failed to collect the requested person in time – which resulted in the requested person being released from detention?
- b. If yes, how could such a situation have been prevented?
- c. As an executing Member State, have you encountered a situation where the initiative to set a new surrender date comes from the *issuing* Member State instead and not from the authorities of your Member State, which is executing an EAW?
- d. As an issuing Member State, if you have been in a situation described in point c, what where the reasons behind such an initiative?
- e. Would you highlight any best practices from your experience or could you think of any best practices, which aim at efficient (bilateral) cooperation with another Member State when it comes to surrender the person requested (e.g. a form for notifying the other Member State, practical procedures to facilitate surrendering/collecting the person, cost saving methods etc).

5. Role for the EJC Contact Points

How do you see the role of the EJC Contact Points in relation to the Vilkas judgment, especially regarding the consultation between the issuing and executing Member States when it comes to agreeing upon (new) date(s) of surrender?

6. EJC Website

Would you consider it necessary to have additional information available on the EJC website on this topic (i.e. time limits in national legislation)?

7. Eurojust

Would further assistance be required from Eurojust on this topic and if yes, what kind of assistance?