

# ASPECTS REGARDING THE IMPLEMENTATION OF THE EUROPEAN ARREST WARRANT

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## **Abstract:**

*The Treaty of Amsterdam stipulated the fact that the European Union must maintain and develop an area of freedom, security and justice, freedom assuming the existence of a common judicial area in which European citizens are able to seek justice in any of the member state same as in their own country.*

*This goal aims to eliminate the possibility that criminals exploit the differences between the legal systems of the member states, imposing that the judgments are recognized and enforced abroad without the formalities laid down by the classical conventions on international judicial assistance.*

*The Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, materialized the decision taken in Tampere, following that between EU Member States to be replace the formal extradition procedure of the people who evade the execution of a sentence of imprisonment imposed by a judgment of conviction became final, with a simplified surrender procedure..*

**Keywords:** *European warrant, arrest, judicial cooperation, criminal matters*

**JEL Classification:** K14

## **1. Introductory concepts**

The European Union citizens have the right to travel freely, to choose the place to work or to live without any other restriction. Although this fundamental right seems to be simple to elaborate, we must not ignore the fact that there are numerous obstacles that need to be overcome for people to fully benefit from this right, mainly given the desire to create a European security, freedom and justice space.

The Amsterdam treaty sets forth the fact that the European Union must maintain and develop a freedom, security and justice space, the freedom meaning the existence of a common judicial space, where the European citizens could resort to justice in any of the member states as they do in their own country.

Moreover, this desire aims at the removal of the possibility of the offenders to exploit the differences between the legal systems of the states, setting forth as well that the court decisions should be acknowledged and enforced abroad without the formalities set forth by the classical conventions on the international legal assistance (Ministry of Justice, 2008).

During the Tampere European Council organized between October 15 and 16, 1999, the mutual acknowledgement of the decisions was set forth as *the corner stone* of the legal cooperation between the EU member states. Moreover, during the Dutch presidency of the EU Council, the Hague Program was adopted, aiming at the speeding up of the measures meant to form a common legal space.

Although, the conventions initially had a large share, during the last years the solution of adopting some frame decisions and Council decisions have been selected, these having the advantage of not needing the ratification by the EU member states, thus easing the legislation harmonisation (Ministry of Justice, 2006).

Through the Frame Decision of the EU Council no. 2002/584/JHA from June 13, 2002, on the European arrest warrant and the surrender procedures between the member states, the Tampere decision was enforced, aiming at the fact that the formal extradition procedure should be replaced between the EU member states, in the case of persons who avoid the enforcement of a detention punishment, applied through a final conviction decision, with a simplified surrender procedure.

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Upon taking such a decision, on the establishment of a European arrest warrant which replaces the formal extradition procedure, the objective that the European Union should become a freedom, security and justice space has been mainly considered, objective which cannot be reached optimally within the extradition conventions system, which establishes a formal and difficult procedure (Ministry of Justice, 2005).

The European arrest warrant seems to be defined as being a legal decision issued by the relevant legal authority of an EU member state, in order to arrest and surrender to a member state of a particular individual, in order to establish the criminal investigation, the trial or to enforce the punishment or a detention measure.

We must emphasise the fact that the European arrest warrant must not be confused with the preventive arrest warrant within the internal law, because the European arrest warrant is a legal decision that has always as basis a preventive arrest warrant or a warrant to enforce the punishment issued internally according to the law.

Moreover, the European arrest warrant is issued only when a preventive arrest warrant or the warrant to enforce a punishment cannot be enforced in the country, because the person in question avoids this, being present on the territory of another member state of the European Union.

Therefore, the European arrest warrant constitutes the first concrete measure taken for the application of the mutual acknowledgement principle of the criminal decisions, for the member states that implement the frame decision, this replacing, in principle, the extradition procedure, as shown in the Recitals of the Frame Decision 2002/584/JHA.

By introducing this new simplified system of surrendering the convicted or suspected persons for the enforcement of the criminal sentences or investigations, the possibility of removing the complexity and the associated existing delay causes in the extradition procedure has been created.

The European arrest warrant mechanism is based on a high degree of trust between the member states.

## **2. The implementation of the European arrest warrant in the Romanian law**

The Frame decision no. 2002/584/JHA of the European Union Council, on the European arrest warrant and the surrender procedures between the EU member states, has been harmonised in Title III of Law no. 302/2004 on the international criminal legal cooperation, as amended and supplemented by Law no. 224/2006, published in the Official Gazette no. 534 from June 21, 2006.

According to the provisions of art. 78, related to the art. 81, para. 1 from Law no. 302/2004, the court of law, issuing an enforcement or preventive arrest warrant, has competence to issue a European arrest warrant, either ex officio or upon the Prosecutor's request.

Therefore, the court shall be able to issue a European arrest warrant only based on a pre-existing title, which could be an arrest warrant, an enforcement warrant of the applied punishment or a court decision through which a detention security measure has been applied.

During the criminal investigation or trial, the European arrest warrant cannot be issued unless the punishment set forth by the law is equal or higher than a year in prison, and this cannot be issued for the enforcement of the punishment unless the ruled punishment is higher than four months in prison. Moreover, the European arrest warrant may be issued for detention security measures as well set forth for a period equal or higher than four months.

If the location of the person in question is known, the Romanian issuing legal authority can forward the European arrest warrant straight to the enforcement legal authority.

If the pursued person is not exactly localised, the forwarding of the European arrest warrant shall be performed by means of the Schengen Information System (SIS) or, if this

is impossible, it shall be forwarded through the International Organisation of Criminal Police (Interpol).

Until the commissioning of SIS in Romania, the forwarding shall be performed by means of the National Information Signalling System (SINS) (Official Gazette no. 866/26.09.2005: GEO no. 128/2005), the data provision to SINS being performed through the SIRENE Office, from the date on which it shall become operational.

Considering the fact that the forwarding to SIS or SINS equals to a European arrest warrant, given the fact that such forwarding comprises the information set forth in paragraph 1 of art. 79 from Law no. 302/2004, in the case of the arrest of the person in question, the issuing court is forced to provide the enforcement authority, during the term set forth by it, with the original and the translation of the European arrest warrant.

According to the provisions of art. 83, the forwarding of the European arrest warrant shall be performed by any written means, allowing the enforcement legal authority to ensure the authenticity of the submitted document, such as a letter, a fax or electronic message of the numbered documents. A copy of the European arrest warrant shall always be sent to the Ministry of Justice, the International Law and Treaties Division (art. 83, para. 6).

When the drawing up of emergency documents is considered or of documents requesting the presence of the person in question or for the prevention of the repeated postponement of the cause, the Romanian issuing court has the possibility to request the enforcement authority the hearing of the person in question or his/her temporary transfer, until the ruling of a decision to the enforcement authority on the surrender procedure.

The surrender of the person in question to the Romanian authorities must be performed within 10 days from the date of the final decision of the foreign enforcement legal authority, exceeding this term leading to the release of the person in question.

If, in case of a force majeure event or from independent reasons, the surrender cannot take place within the above-mentioned term, the Romanian relevant receiving authority must immediately notify the foreign authority on the case that makes the receipt impossible, following which this should take place at least until the expiry of another term of 10 days.

The forwarding on the national (SINS) and international (INTERPOL) systems must stop when the person is surrendered to the relevant authorities, the deregistration of the SINS signalling automatically triggering the deregistration of the SIS signalling.

The surrender allows only the performance of the investigations or the enforcement of the punishment or the security measure for which the foreign legal authority has granted the surrender, except for the case when the pursued person or the enforcement member state has waived the speciality principle.

The Romanian relevant authorities to enforce the European arrest warrants issued by the legal authorities of other member states are the Appeal courts. Thus, when the foreign legal authority knows the place where the person sought is located on the Romanian territory, it may directly address the European arrest warrant, in original or certified copy, by any safe written means, to the relevant Appeal court.

While waiting for the adaptation to SIS, art. 9 of the Frame Decision sets forth that a signalling in SIS equals to a European arrest warrant, while waiting for the original document, in good and adequate form, by the enforcement legal authority. During this transition period, the original or certified copy of the European arrest warrant must be forwarded to the relevant Appeal court at the latest within 48 hours from the arrest date of the person in question.

If the Appeal court to which the European arrest warrant was addressed considers that it has no competence on the territory to enforce it, it has the duty to forward it without delay to the territorially relevant Appeal court and to notify the legal authority of the issuing member state.

If the European arrest warrant is not accompanied by translations, the court, either shall request the translation of the warrant, case in which this must be performed urgently within at the most two working days, or shall request the issuing legal authority to proceed to the translation of the warrant, case in which the procedure is suspended until the receipt of the translation.

If the warrant is compliant with the provisions set forth in para. 1 of art. 79 from Law no. 302/2004, the Appeal court takes measures to identify the person in question, by notifying the general prosecutor of the office attached to the respective Appeal court. The prosecutor, after verifying the identity of the person in question, is bound to notify him/her, in a language that is understood by the person, on the existence of the European arrest warrant whose subject he/she is, according to the information held.

We have to emphasise the fact that the person held for the enforcement of the European arrest warrant must be presented within 24 hours from his/her detention before the relevant Appeal court. Moreover, according to the provisions of art. 91, the arrested person has the right to be informed on the content of the European arrest warrant, to be assisted by a defence attorney chosen by him/her or ex officio by the court, and if he/she does not understand or speak the Romanian language, he/she has the right to an interpreter, provided free of charge by the court.

Thus, after the person in question has been brought before the relevant court, the arrest of the respective person shall be ruled through a justified sentence. This sentence may be attacked with an appeal within 24 hours from its ruling or verbally during the hearing when the sentence has been ruled. If the appeal has been declared in writing, the justification shall be performed through the appeal application, and if the appeal has been declared verbally, the justification shall be elaborated in writing, through a separate document, which should be submitted within 24 hours from its declaration.

The High Court of Cassation and Justice is the court that judges the appeal, within at the most three days from the submission of the file, the appeal not being suspensory from the enforcement in this case.

The 48 hour term during which the Appeal court must proceed to the hearing of the person in question on the warrant, shall be calculated from the date on which the arrest measure was declared final either by not declaring the appeal or by its rejection.

If the person in question declares that he/she agrees to his/her surrender, he/she shall be notified on the legal consequences of the consent and on its final nature after the respective moment.

According to the provisions of paragraph 3 of art. 90 from Law no. 302/2004, the Romanian law maker has understood to confer an irrevocable nature to the consent to the surrender, unlike the Belgian, Danish, Irish, Finish and Swedish law makers, who have shown the intention to confer a revocable nature to the consent to surrender expressed by the person in question (Official website of the European Union, 2002).

If the court finds that the legal conditions for the enforcement of the European arrest warrant are met, it shall rule a final sentence by which it shall be notified on the consent of the person in question, deciding within 10 days from his/her presentation before the court.

If the person in question declares that he/she does not consent to his/her surrender, the court shall decide within 5 days from the date on which the hearing of the person took place.

During the course of the procedure, the person in question may be released, the court being bound to take the necessary measures to avoid his/her running away, including the preventive measures set forth by the law. Moreover, the person in question may be bound to comply with one or several judicial control obligations.

The court shall be able to rule the suspension of the distraint or the amendment of the judicial control obligations of the person in question, as well as to issue an arrest warrant against the person, when he/she avoids the respective obligations.

Upon the request of the issuing legal authority, the Appeal court shall be able to approve the temporary transfer of the person in question, setting forth the conditions and the term until the person shall be surrendered to Romania. If such a transfer is considered not to ensure the timely return of the person in question, or if, from any reasons, the temporary transfer is not justified, the court shall proceed to the hearing of the person in question if the issuing authority requests this. A person appointed by the issuing legal authority shall assist the hearing, without the need to draw up a legal letter rogatory.

Regarding the control exercised by the Romanian court, we emphasise the fact that, unlike the extradition procedure, the verification of the compliance with the double incrimination condition for 32 offence categories has been removed from the field of the European arrest warrant. For the other deeds, the Romanian law maker has chosen to allow the legal body to decide whether to enforce the European arrest warrant or not, when the double incrimination condition is not fulfilled.

Regarding the verification of the punishment quantum, these are controlled exclusively according to the law of the issuing member state, without any other condition regarding the punishment applied or set forth by the Romanian legislation.

Unlike the current legal provisions on extradition, in the field of the European arrest warrant the prescription in the Romanian law is no longer a reason to refuse the surrender nor does the Romanian citizenship of the person in question constitute a mandatory reason to refuse the surrender.

Article 88 from Law no. 302/2004 sets forth the mandatory reasons to refuse the surrender of the person in question, as well as the optional reasons for this refusal. The mandatory reasons for refusal comprise the following situations: when, according to the information held, it is found that a final decision has been ruled for the person in question for the same deeds by a member state, different from the issuing state, provided that, in case of conviction, the sanction should have been enforced or should be in progress or the enforcement has been prescribed, the punishment should have been absolved or the offence should have been amnestied or another deed impeding the enforcement has intervened, according to the law of the enforcement state; when the offence based on which the European arrest warrant has been issued is covered by amnesty in Romania, if the Romanian authorities are entitled to investigate the offence; when the person in question does not answer from a criminal point of view, because of his/her age, for the deed based on which the European arrest warrant has been issued according to the Romanian law.

According to para. 2 of art. 88, the optional reasons for refusal are the following: if the condition of double incrimination may be verified, exceptionally in the case of taxes and fees, the customs fees and exchange rate fees; when the person in question is subject to a criminal procedure in Romania for the same deed based on which the European arrest warrant has been issued; when against the person in question a final decision has been ruled in another EU member state for the same deeds; when the European arrest warrant has been issued for the enforcement of a punishment, if the person in question is a Romanian citizen, and the relevant court rules the enforcement of the punishment in Romania, according to the Romanian law; when the person in question has been ruled a final decision for the same deeds in another third party state provided that, in case of conviction, the sanction should have been enforced, should be in progress or should be prescribed, or the offence should have been amnestied or the punishment should have been absolved according to the enforcement state; when the warrant refers to offences that, according to the Romanian law, are committed on the Romanian territory; when the European warrant comprises offences committed outside the territory of the issuing



state and the Romanian law does not allow the investigation of these deeds when they have been committed outside the Romanian territory; when, according to the Romanian state legislation, the liability for the offence based on which the European arrest warrant has been issued or the enforcement of the applied punishment has been prescribed, if the deeds have fallen under the competence of the Romanian authorities; when the Romanian relevant legal authority has decided not to investigate, either to stop the investigation of the person in question for the deed based on which the European arrest warrant has been issued.

Following the decision justified by the Appeal court, a surrender decision, a surrender refusal or a conditioned surrender may be ruled, this decision being notified to the person in question, and when the decision becomes final, it shall be immediately notified by any means to the issuing foreign authority.

If the person in question has consented to his/her surrender, the decision ruled by the Appeal court cannot be subjected to any remedy, unlike the situation when the person in question has not consented to his/her surrender, having the possibility to attack this decision with appeal within 5 days from the ruling, if the person has been present, or from the notification, if the person has been absent on the ruling date.

If the appeal has been verbally declared, the appeal reasons shall be drawn up in writing, through a separate document, which has to be submitted within 5 days from its declaration, and if the appeal has been declared in writing, the justification shall be made through the appeal request itself, without any different term set forth by the law in this case for the drawing up of the appeal reasons.

The appeal declared against this decision shall be judged by the High Court of Cassation and Justice, within at the most three days from the submission of the file, the appeal being, in this case, suspensory of enforcement.

The person in question should be surrendered to the member state issuing authorities within ten days from the final decision of the Appeal court, except for a legal reason for the surrender postponement. We have to mention that the lack of efforts from the part of the foreign authorities to organise the surrender triggers the release of the person in question.

If the person in question is released upon the decision that authorises the surrender, he/she may be arrested in order to be surrendered, upon the proposal of the general prosecutor, in the extent to which this person avoids the surrender.

The surrender may be postponed from serious humanitarian reasons or if the person in question is criminally investigated in Romania or he/she has to enforce a punishment applied for another deed than the one set forth by the European arrest warrant. This last hypothesis may allow the temporary surrender of the person in question.

If several member states have issued a European arrest warrant against the same person, including for different deeds, the choice of the warrant that must be enforced is performed by the Appeal court, if necessary after the Eurojust consultation, considering all the case circumstances and, especially, the place and the seriousness of the offence, upon the date of warrants issue, as well as the situation in which the mandate has been issued in order to enforce the criminal investigation, of the trial or in order to enforce one punishment or a security measure.

Eurojust is a new European body, established in 2002, in order to increase the cooperation and the efficiency of the relevant authorities within the member states that have to criminally investigate the organised and cross-border crime (European Institute of Romania, 2005).

The agreement on the cooperation between Romania and Eurojust, signed in Bruxelles on December 2, 2005, and on the regulation of measures referring to the representation of Romania in Eurojust, during the period prior to the adherence and after

the date of EU adherence, was ratified by Law no. 58/2006, published in the Official Gazette no. 300 from April 4, 2006.

In case of the competition between the European arrest warrant and an extradition request, the Appeal court may decide the postponement of the ruling of the surrender decision, until the receipt of the justifying documents for the support of the extradition request, considering all the circumstances.

According to the provisions of paragraph 2 of art. 108 from Law no. 302/2004, the extradition procedures in progress, at the moment of entering into force of the European arrest warrant, shall continue to be settled according to the extradition procedures.

### **3. The implementation of the European arrest warrant in the other member states of the European Union**

The terrorist attacks from September 11, 2001, from the United States of America offered the necessary drive to take a decision, when political declaration at the highest level were made for the creation of the European arrest warrant. Several days later, the Commission presented officially the Frame Decision, this document having been on the agenda for several months. After difficult negotiations carried out following a predetermined schedule, the Belgian chairman offered a political agreement on December 11, 2001, the Frame Decision being officially adopted on June 13, 2002 (European Parliament, 2005).

Although the Frame Decision entered into force on January 1, 2004, at that date only Belgium, Denmark, Spain, Finland, Ireland, Portugal and Sweden had harmonised the decision text with the internal legislation.

The difficulties in the implementation of the Frame Decision occurred when several national courts declared that this is incompatible with their constitutional provisions. Thus, the Polish Constitutional Court gave such a verdict on April 27, 2005, the German Constitutional Court on July 18, 2005, and the Cyprian one on November 7, 2005.

France, Italy and Austria expressed their intention to continue with the request of the extradition system for the deeds committed before January 1, 2004, regarding Italy and Austria, and for the deeds committed before November 1, 1993, regarding France (Official website of the European Union, 2002).

On February 23, 2005, the Commission presented the evaluation report on the implementation of the European arrest warrant that considered that it did reach the proposed objectives. Upon that date, the warrant was implemented and applied in all the states, except Italy (Official website of the European Union, 2005).

The surrender of the persons in question between the member states is an entirely legal procedure without any intervention from the enforcement authorities. The general purpose of the decision is to reduce the number of the rejection reasons upon surrender and to significantly limit the offence categories for which the double incrimination rule is applicable.

Nevertheless, difficulties still exist, considering that the Czech Republic, Luxembourg and Slovenia have unilaterally reduced the time scope of the European arrest warrant, contrary to the Frame Decision provisions.

Two of the member states, respectively the Czech Republic and the Netherlands, requested a change in the punishment limits, in order for these to be harmonised with the ones from the national legislative systems of the two countries, fact that re-enacted the double incrimination condition. Other states, such as Denmark, the Netherlands, Malta, Portugal and Great Britain introduced rejection reasons upon surrender contrary to the Frame Decision, such as the risk of political discrimination, national security issues, etc.

The greatest innovation of the Frame Decision is the surrender of the citizens that is now a reality, although the majority of the member states have chosen to apply the condition to enforce the punishment of the citizens on their territory.

From a statistical point of view, 653 persons were arrested and 104 persons surrender from the total of 2603 issued warrants until September 2004 (Official website of the European Union, 2005).

Since the entry into force of the Framework Decision provisions, the average time needed to enforce a European arrest warrant has been estimated to be reduced from more than nine months to 45 days, this estimation not including the frequent cases when the persons in question consent to the surrender, case when the necessary time is of approximately 18 days.

We have to emphasise that the European arrest warrant is not only faster and more efficient than the extradition procedure, but also it complies with the individual fundamental guarantees. Thus, a legal authority may always refuse the enforcement of such a warrant if the procedure is compromised by the breach of the provisions of art. 6 from the European Union Treaty, setting forth the fundamental rights.

The improvements due to the introduction of the European arrest warrant are applied to the persons involved that, in practice, consent to their surrender in more than half of the presented cases. The decision is also more precise than its prior provisions regarding the application of the non bis in idem principle, regarding the right to legal assistance, as well as the right to deduce the already enforced period.

Finally, as a result of the fastness of the enforcement, the European arrest warrant contributes to a better compliance with the reasonable time limit principle in the legal field.

#### **4. Differences between the European arrest warrant and the extradition procedure**

The major new element in the field of the European arrest warrant compared to the extradition procedure is the elimination of the administrative stage.

Thus, according to the extradition legal instruments, this procedure implies two stages: an administrative one and a legal one. During the administrative stage, the central authorities have an important role, especially in the case of an active extradition, when the central authority of the requesting state draws up, upon the proposal of the relevant legal authority, and submits directly or through diplomacy the extradition request, but also in the case of the passive extradition, when the central authority of the requested state verifies the extradition requests received according to their aspect, the form, the international regularity and either report to the relevant legal authority or return the extradition request, with justification, if the form conditions are not met.

Through the new surrender system based on the European arrest warrant, the administrative stage is eliminated, the cooperation for the surrender of the persons that avoid the criminal investigation, the trial or the enforcement of the punishments, being almost exclusively achieved between the relevant legal authorities from the member states, the central authorities being able to potentially assist the relevant legal authorities or to have the role of transmitting authorities.

Therefore, if, in the case of the extradition procedure, the final decision on the surrender or not of the person in question is a political one, in the case of the European arrest warrant, the entire procedure is carried out between the issuing legal authority and the enforcement legal authority, these being assisted by the central authority appointed for this purpose in the related member states, respectively by the contact points of the European Legal Network.

Regarding the surrender conditions and the procedure rules, these are similar to the ones of classical extradition system in the case of the European arrest warrant.

An important difference between the European arrest warrant and the extradition procedure refers to the conditions on the deed, the new system setting forth as exceptions



from the rule of double incrimination 32 serious offence categories, in these cases the surrender being granted without verifying the double incrimination condition.

Regarding the procedure duration, the European arrest warrant system regulates a time limit of the surrender procedure unlike the extradition, where there is no such limit.

Thus, the European arrest warrant shall be elaborated and enforced as urgent, the deadline being of 10 days, if the person whose surrender is requested consents to the surrender, and 60 days in the other cases, with the possibility of extending with other 30 days. Moreover, a short time limit, of 10 days has been set forth for the actual surrender of the person in question, with a possibility to extend the limit in certain circumstances.

The measure of provisional arrest in order to extradite the person in question may stop if, during a range of 18 days from such a measure, the requested state is not notified with the extradition formal request and the justifying documents, and, in any case, this term cannot exceed 40 days if the extradition document are not received during the above-mentioned time frame. These provisions constitute the main inefficiency cause of the extradition procedure.

In the European arrest warrant system, the relevant legal authority notified with such a warrant is bound to verify and enforce as urgent the respective warrant, fact that implies the arrest of the person in question during the procedure before the enforcement legal authority. Therefore, the European arrest warrant ensures the needed balance between efficiency and strictness of guarantees for the compliance with the fundamental rights of the person in question. Consequently, any arrested person based on a European warrant has the right to be assisted by a defence attorney, and, if necessary, by an interpreter, and if the trial has been performed in absence of the person in question, this has the right to be judged again. If a person arrested based on a European warrant has been convicted to life imprisonment, the requested state may ask, as a condition of warrant enforcement, that the person should have the right to regular review of his/her situation.

Finally, according to the system of the European arrest warrant, the member states of the European Union cannot reject the surrender of their own citizens anymore. This system is based on the principle according to which each EU citizen must be liable for his/her deeds before the courts of the entire Union. It is, however, likely for a member state to request, upon the surrender of the person in question, the return of the person for the enforcement of the punishment, for a better social rehabilitation.

In conclusion, the Frame Decision no. 2002/584/JHA from June 13, 2002, of the European Union Council on the European arrest warrant and the surrender procedures between the EU member states is the first concrete measure adopted in the criminal law, that seems as a natural consequence of the attempt to maintain and develop a freedom, security and justice space within the EU, the more so as within the Tampere European Council from October 15 - 16, 1999, it was declared that the mutual acknowledgement of the decisions is the *corner stone* of the legal cooperation between the EU member states.

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