Periodic Country Report: Italy

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Introduction

This report highlights key legal issues emerged from Italian case-law on the implementation by Law no. 69/2005 of the Framework Decision 2002/584 on the European Arrest Warrant (EAW) as amended first in 2017 (Law No. 117/2017) and more radically by Legislative Decree no. 10/ 2021. What follows needs to be read with a number of important caveats.

First, Italian case-law on the EAW is very rich: 21 decisions of the Constitutional Court[1], with several affirming the unconstitutional nature of law 69/2005, including two pivotal pending cases; more than 700 decisions of the Court of Cassation[2] and countless decisions of lower jurisdictions, in particular the Court of appeals, the judicial body in charge of executing the EAWs have been adopted. A selection has been made according to the suggested criteria: (i) relevance of the decision to show how national courts have received the CJEU case-law and interpreted national law accordingly; (ii) cases in which a conflict between Italian law and the EU law emerged due to the specificities of the national legal order (being it of Constitutional or lower level); (iii) cases showing the will to interpret national law in the light of the mutual recognition principle, even when harmonisation is still lacking.

Second, a large majority of the legal issues emerging from the case-law are referred to the execution of foreign EAWs. The issuing procedure of EAWs in order to obtain the surrender to Italy seems far less problematic from the point of view of Italian courts, even because legal issues were mainly raised against the arrest warrant or the decision to be executed rather that against the EAW itself. The main problem in the issuing procedure proved to be related to the internal distribution of competence among different judicial authorities rather than on defence rights.

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1 Decisions of the Corte costituzionale mentioned in this report can be found at www.cortecostituzionale.it.

2 Decisions of the Corte di Cassazione mentioned in this report can be found at http://www.italgiure.giustizia.it/.

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Third, the case-law used for this report is almost entirely related to the previous version of Law 69/2005, in force until February 2021. The Legislative Decree no. 10/ 2021 changed radically the spirit of the Italian EAW legal framework. Originally oriented toward a nation-based rigid control and the multiplication of mandatory grounds of refusal, the newly amended legislation is now adopting a much more European-oriented approach, welcoming the indications of the Court of justice in terms of mutual recognition, rule of law and protection of fundamental rights, optimizing the procedure and reducing the many grounds of refusal. We thus chose to focus only on legal issues that maintain their validity with the amended law. Nevertheless, a brief historical overview and the description of the content of the old and new rules on grounds of refusal are necessary to understand the case-law and the criteria used to select the decisions.

Law 69/2005 implemented the EAW FD 2002/584 in a very restrictive way, departing from the mutual recognition approach, that informs the latter, and maintaining a strong national control in terms of respect of national Constitutional guarantees. More adherent to the spirit of the EAW FD 2002/584 was the procedural setting, with no political intervention and entirely judicial procedure conferred to the Court of Appeal of the district in which the defendant or offender is resident or temporarily living in the moment the procedure is received from the judicial authority, or the Court of Appeal of Rome when the residency is unknown.

In a nutshell, the original text privileged the protection of the constitutional fundamental rights over European mutual trust. To this aim, Law 69/2005 adopted a general clause on the need for EAWs to respect fundamental rights and principles contained in both international treaties and the Constitution, mentioning the pivotal role of Article 5 and 6 of the ECHR.

Law 69/2005 also transformed all European grounds of refusal into mandatory grounds and added additional ones. Here below the list of the mandatory ones that generated the majority of the cases mentioned in this report as listed in the original version of Law 69/2005: a) if the arrest warrant is based on discrimination reasons; b) if the right affected by the criminal offence has been infringed by consent of whom, in accordance with the Italian law, may validly dispose of it; c) if, according to the Italian law, the deed consists of exercise of a right, fulfilment of an obligation, or it has been determined by coincidence or force majeure; d) if the alleged misconduct is expression of freedom of association, freedom of press or other means of communication; e) if the law of the Member State of issuing does not envisage maximum limits for pre-trial detention; f) if the EAW refers to a political crime; g) if the final judgement has been the product of an unfair trial; h) in case of serious risk of death penalty, torture or inhuman treatments; i) if the request concerns a minor of 14 years at the moment when the offence was committed, or a minor of 18, when the offence is punished by a sentence below four years; l) if the crime is extinguished because of an amnesty declared by Italy when Italian law is applicable; m) in case of a previous final judgement for the same facts by an EU Member State as long as, in case of conviction, the penalty has been executed; n) if the crime for which the EAW has been issued could have been judged in Italy and, according to Italian law, a statute of limitation of the crime or of the penalty would have applied; o) a criminal proceedings is ongoing in Italy for the same facts; p) the EAW refers to offences totally or partially committed on Italian territory; q) if a judicial decision of non-lieu has been pronounced in Italy; r) if the EAW has been issued for purpose of execution of penalty or detention order, in case the wanted person is an Italian citizen, provided that the Court of Appeal disposes that this penalty or detention order is executed in Italy in accordance with its domestic law; s) if the person to surrender is a pregnant woman or mother of children under the age of three living together with her, unless the need of the restrictive measure appears of exceptional severity; t) if the pre-trial detention order on which the EAW is based is not motivated; u) if the

surrender according to the Italian law enjoys immunity; v) if the decision for which the EAW has been issued is not compatible with the fundamental principles of the Italian law.

This long list of mandatory grounds for refusal was first reduced and made flexible by law No. 117/2019, and finally entirely reformed in February 2021 by Legislative Decree 2 February 2021 No. 10. Article 1 now states that the EAW execution is based on mutual recognition, witnessing this shift of perspective.

In the light of the general concerns raised by EU institutions on the deterioration of the Rule of Law in several Member States, the Italian legislator decided to include additional clauses to address these issues. Two general clauses are now protecting fundamental rights: no EAW issued by an EU Member State whose participation in the reciprocity mechanism has been suspended by the EU Council because of serious and persistent violation of the EU Treaty will be executed (Article 1(3 ter)). And as a general and mandatory ground of refusal, EAW implying any breach of fundamental rights protected by the Italian Constitution or by the European Charter of fundamental rights or, lastly, by the European Convention of Human Rights cannot be executed. (Article 2). In this way, Italian legislator codified the two steps assessment established first in the *Aranyosi and Caldararu*[3] case and further elaborated by the CJEU in the *LM* case[4], requiring national courts to assess first the systemic and generalised risk together with an individualised analysis of how it might impact the position of the individual for which an EAW has been issued.

Additional rules are now protecting specific fair trial guarantees when the person has not appeared in person during the trial for which an EAW has been adopted, must provide for an indication of effective knowledge of the trial, of the presence of a lawyer and of the right of the person to file an appeal for a new trial, if he did not expressly waived such a right (article 6), in line with Article 4a of the FD EAW and its related case-law[5].

The reform confirmed only three mandatory grounds of refusal: 1) the crime object of the EAW is extinguished by amnesty according to Italian law when the latter is applicable; 2) a previous final decision on the same facts has been adopted by Italian or other MS courts and the related penalty has been executed or cannot be executed anymore according to the relevant law; 3) the person in question committed the offence when he was less than 14 years old (Article 18).

Additional grounds are optional and left to the appreciation of the Court of Appeal. According to Article 18-bis, when the EAW is related to an ongoing procedure, the execution can be refused: 1) when the EAW concerns crimes that, under Italian law, are considered to have been wholly or partially committed in Italian territory, or

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[3] CJEU, judgement of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2017:866.

[4] CJEU, judgment of 25 July 2018, LM, C-216/18, EU:C:2018:586.

[5] The CJEU interpreted Article 4a(1) EAW FD,as the exhaustive harmonization of the circumstances in which the execution of the EAW must be regarded as compatible with the rights of the defence, imposing the irrelevance of any additional requirements based on national law (*Melloni* CJEU, judgement of 23 February 2013, Melloni; EU:C:2013:107). The CJEU affirmed that the terms 'summoned in person' and 'actually received by other means […] in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' of Article 4a(1)(a)(i) EAW FD constitute autonomous concepts of EU law that need to be interpreted uniformly throughout the EU (*Dworzecki, Judgment of 24 May 2016, C-108/16 PPU, EU:C:2016:346).*

concerns crimes committed outside the national territory of the issuing State and Italian law won't allow prosecution for the same crimes committed outside Italian territory (Article 18-bis) 2) when a criminal procedure is pending in in Italy for the same facts. 3) When the EAW has been issued to execute the penalty for an Italian citizen or for a citizen of another Member State domiciled in Italy for at least 5 years, unless the Court of Appeal decides that the penalty will be executed in Italy according to Italian law. Same conditions justify the request of Italy that the person will be transferred to Italy for the execution of the penalty when the EAW has been issued to conduct a criminal prosecution (Article 19 Law 69/2005).

In the following sections we will focus on the legal issues that are still sensitive under the new legal framework, applicable only the EAWs received after the 21st February 2021.

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

The issuing of EAWs by Italian judicial authorities generated far less litigation before national courts (see Section II). Only a minority of the decisions of the Cassation court are dealing with issues raised with reference to the Italian issuing procedure.

I.1. Issuing of an EAW: judicial authority

The nature of the authority who is entitled to adopt an EAW has never been questioned in terms of independence or impartiality. Two authorities are entitled to issue an EAW: a judge whereas the EAW is based on a pre-trial detention order or on a house arrest order; a prosecutor only when the EAW is meant to execute a custodial sentence or a different measure based on a final judgement.

In particular, Italian law confers the power to issue a 'procedural' EAW (i.e. for the purposes of conducting a criminal prosecution) only to a fully-fledged judicial authority: the judge who ordered the pre-trial detention or the house arrest. It is worth noticing that this judicial authority might vary according to the different phases of the procedure: first conferred to the judge controlling the investigation, it follows the proceedings and consequently it is conferred to the judge of the preliminary hearing and later on to the court that is competent for the merit. The concrete identification of this judicial authority was at the epicentre of a conflict among two interpretations: one side the ones affirming that that power resides always in the hands of the first judge who applied the underlying measure (arrest or pre-trial detention order)[6] or, as it has finally prevailed, the judge who is in charge of the proceedings in the moment in which the need of the EAW might intervene[7]. This second interpretation seems more in line with the scope of the EAW itself and with the need to better protect personal freedom conferring such a power to the judge who is dealing with the merit, allowing for example that power to the Court of Appeal when the proceedings is under appeal instead of referring it back to the magistrate who decided on the arrest order or on the pre-trial detention order during the investigations.

As for the prosecutor, Italian Constitution recognises the full independence of the latter from any interference of other powers, including the Ministry of Justice. Italian prosecutors are considered as independent judicial authority, they are part of the judiciary and submitted to the disciplinary powers of the Supreme Council of the Judiciary.

I.2. Proportionality in the issuing of EAW

The issue of *proportionality* implies several levels of analysis as it involves both the selection of criminal offences and of judicial decisions for which an EAW can be issued. In order to offer guidelines to the competent authorities in addressing those issues, the Italian Ministry of Justice adopted a Vademecum for judicial authorities[8].

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6 Corte di Cassazione, judgment of 19 April 2006, Abdelwahab, IT:CASS:2006:16478PEN.

7 Corte di Cassazione, judgment of 29 April 2008, Confl. Comp. Ragusa, IT:CASS:2008:26635PEN, then confirmed by Cass., 28 November 2013, Pizzata, IT:CASS:2014:2850PEN.

8 Accessible at https://www.giustizia.it/resources/cms/documents/Vademecum_mandato_arresto_europeo.pdf

First and foremost, the Vademecum states that there is the possibility but no duty to issue an EAW especially when the judicial authorities have doubts on the *an debeatur* – i.e. on the grounds justifying the limitation of liberty – in the concrete case.

Second, it offered guidelines on i) what crimes might justify the issuing of an EAW in relation to the amount of the penalty; and ii) to the specific *an debeatur* assessment in case of 'procedural' EAW issued on the basis of an house arrest order for the sake of proportionality in relation to deprivation of liberty pending trial.

i) Arrest and surrender can be requested only when the EAW is directed to the execution of a penalty or of a pre-trial detention order (that includes pre-trial detention in prison as well as house arrest). No EAW can be adopted when the measure has no impact on personal liberty comparable to a detention measure. Therefore, when Italian authorities are required to issue an EAW to conduct a criminal prosecution ('procedural EAW'), the minimum penalty required is the same as the one that the Italian code of criminal procedure imposes for the issuing of a pre-trial detention order (at least 4 years of imprisonment) or for an order of house arrest (3 years),[9] both longer than the 1 year foreseen by the FR 2002/584. When the EAW is issued to execute a custodial sentence ('executive EAW'), the minimum penalty imposed should be of one year and not 4 months as foreseen by the DF 2002/584.

ii) According to the Vademecum, practical and systemic reasons would suggest to refrain from issuing an EAW based on a house arrest, a measure not foreseen by the FD 2002/584 and for which no harmonisation has been promoted by the EU. Consequently, some judicial authorities have questioned the existence of house arrest in the foreign system as a pre-condition to adopt the EAW[10]. To better respect the *favor libertatis*, when the Italian issuing authority was called to adopt an EAW in order to execute a house arrest order and there was a doubt about the existence of this measure in the country where the defendant seems to be present, the Italian judicial authority might refrain from issuing the EAW,[11] and in some cases they also decided to substitute the measure with a non-detention one.[12] The ratio was to avoid that, in the lack of a measure corresponding to a house arrest, the executing authorities might impose the more restrictive measure of pre-trial detention just for the aim to execute the Italian EAW.
The Cassation court rejected this approach and firmly quashed the refusal of the judge to issue the EAW as its role when requested to adopt the EAW is limited to ascertain the existence of a decision of pre-trial detention, house arrest of a final judgement to be executed; the presence of the person in another Member State; the *an debeatur*, based on the principles of proportionality of judicial cooperation within the EU[13]. This limited discretional power does not include the re-evaluation of the underlying order[14] nor the Vademecum should be considered as authorising this act ultra vires[15].

iii) Limiting the issuing of an EAW to the execution of a pre-trial detention or a house arrest order implies that the case is mature enough and that the prosecutor collected sufficient elements of guiltiness against the defendant. Article 273 Italian Code of Criminal Procedure (hereinafter, It. c.p.p.) requires indeed the existence of a solid set of evidentiary elements against the defendant for those measures to be adopted. These serious suspicions against the defendant do not necessarily imply that the case should be ready for

[9] Article 28 Law 69/2005.

[10] Corte di Cassazione, judgment of 18 February 2020, Urso, IT:CASS:2020:10473PEN.

[11] A practice mentioned in Corte di Cassazione, judgment of 28 June 2016, Castillo De Los Santos, IT:CASS:2016:35879PEN.

[12] Corte di Cassazione, judgment of 18 February 2020, Urso, IT:CASS:2020:10473PEN.

[13] Corte di Cassazione, judgment of 28 November 2013, conlf in c. Pizzata, IT:CASS:2014:2850PEN.

[14] Corte di Cassazione, judgment of 18 February 2020, Urso, IT:CASS:2020:10473PEN.; Corte di Cassazione, judgment of 12 January 2016, Piccinno, T:CASS:2016:8209PEN.

[15] Corte di Cassazione, judgment of 28 June 2016, Castillo De Los Santos, IT:CASS:2016:35879PEN.

trial, being the need of additional investigation always possible, but it means that the EAW cannot be adopted when the investigation just started if the collected evidence does not justify the limitation of personal liberty.

I.3. Judicial Review: The Limits to appeal an Italian EAW before Italian courts

The issuing decision of an Italian EAW cannot be appealed before Italian courts.

The Italian Cassation court rejected in several occasions to allow an appeal before Italian courts of the EAW internally issued, being that control limited to the execution in the executing Member State and only in relation to the execution modalities. The person concerned may only appeal before an Italian court the underlying decision adopted by an Italian judicial authority on which the EAW is based, being it the pre-trial detention order or the final judgement.[16] This interpretation runs counter to Article 111§7 of the Italian Constitution, according to which any decision having an impact on personal liberty can be appealed at least before the Cassation court. Nevertheless, as the EAW is not an autonomous order but it is based on another judicial decision, the possibility to internally appeal the latter is considered enough.

This leaves room to doubt on the efficacy of judicial control over proportionality of the issued EAWs and on the correct and homogeneous application of the Vademecum that has been considered as non-mandatory by the cassation court[17].

[16] Corte di Cassazione, judgment of 21 June 2012, Caiazzo, IT:CASS:2012:30769PEN; Cass., 22 October 2012, Parasiliti Mollica, IT:CASS:2012:44160PEN.

[17] Corte di Cassazione, judgment of 28 June 2016, Castillo De Los Santos, IT:CASS:2016:35879PEN.

Section II – The execution of EAWs: national judicial authorities as monitors of trust

In this section we will analyse the rich case-law related to the execution by Italian judicial authorities of EAWs issued by other EU Member States. More than 600 decisions have been adopted by the Court of Cassation to solve issues related to the executing procedure[18]. Entirely conferred to the judicial authorities – the Italian territory is divided into 24 districts of Court of Appeal – that procedure proved to be very rich in litigation mostly because of the clash between two factors: the few provisions on the protection of fundamental rights in the Framework Decision on the one hand, and the enormous amount of grounds of refusal provided by the original version of Law no. 69/2005, in force from 2005 to 2017, on the other hand (see Intro).

It might be worth notice that the recent reform of February 2021 limited the possibility of a judicial review before the Cassation Court to

With the aim to ensure clarity, we isolated three core issues emerging from Italian case-law that are still interesting in light of the recent reforms and might nourish the dialogue at EU level:

i) The respect of the EU fair trial rights in the criminal proceedings of the issuing Member State as a ground of refusal;

ii) Detention conditions in the issuing State as a ground of refusal;

iii) Specificities of the Italian system – stemming from the Italian Constitution and well as from the code of criminal procedure - as obstacles to mutual recognition.

II.1. The respect of the EU fair trial rights in the criminal proceedings of the issuing Member State as a ground of refusal.

In this first part we will analyse the Italian decisions dealing with fair trial rights as guaranteed under EU law, and developed by the CJEU, with the aim to assess how the European case-law has been metabolised by national courts. It is worth noticing that Italian concept of fair trail right is wider and has a Constitutional dimension since almost twenty years[19]. Cases related to those fair trial rights for which the CJEU has not yet provided any guideline will be analysed in part 3 as specificities of the Italian system.

II.1.1. On the concept of judicial authority:

Many internal decisions are dealing with the concept of 'judicial authority' entitled to issue the EAW. Since the very first cases, the Italian Supreme court clearly stated that it includes all national authorities that, without being of a *stricto sensu* 'jurisdictional' nature, are somehow part of the judicial system of the country and are recognized as independent in the exercise of their functions, upon condition that the EAW would then be validated by a fully-fledged judicial scrutiny[20]. The Italian Cassation court makes constant reference to the ECHR

[18] Decisions of the Corte di Cassazione mentioned in this report can be found at http://www.italgiure.giustizia.it/.

[19] Ferrua, P. (2012), Il giusto processo, Zanichelli, Bologna.

[20] In the specific case, the EAW was issued by an Austrian prosecutor and confirmed by an Austrian court; Corte di Cassazione, judgment of 21 May 2020, PG in c Lucaci, IT:CASS:2020:15922PEN; Corte di Cassazione, judgment of 1st July 2020, Emma Gioacchino, IT:CASS:2020:20571PEN.

case-law on Article 5 ECHR and in particular on the absolute need of an effective judicial review to preserve the *habeas corpus*. To this aim, the executing State should rely on the information exchange as a mechanism to obtain additional information as to whether the EAW adopted by the police or the prosecutor will be submitted to a fully-fledged judicial review even as an appeal on request of the person concerned[21].

A specific mention should be made of the critical situation of independence and impartiality of the judiciary in some EU Member States which raised many issues in Italian case law. The Court of Cassation has been entirely respectful of the Court of Justice criteria as established in the *LM* case[22] and the *L and P* case of 17 December 2020[23]. Once reaffirmed the need to respect the principle of mutual recognition and the duty to proceed with a strict scrutiny of grounds of refusal, the Cassation court fully relied on the CJEU case law: the national court cannot deny the status of 'issuing judicial authority' to the court which issued the EAW and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial. No general allegation based on the EU resolutions - in the specific case the Resolution of the EU Parliament of 17 September 2020 on the risk of breach of the rule of law in Poland - might suffice to justify the refusal to execute an EAW without "carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled a concrete risk in the specific case having been proved".[24] In the lightof these considerations, the Italian courts approach is in line with the indications of the CJEU stemming from the *L and P* decision.

The Italian courts impose on the defendant the burden to prove the potential breach of fundamental rights because of the systemic or generalised deficiencies concerning the independence of the judiciary.

A recent decision is interestingly dealing with the concept of 'executing judicial authority' within the context of Article 28(3) FD 2002/584. More specifically, the person was first surrendered by the Netherlands to Italy in force of six Italian EAWs and then requested by German authorities in relation to ongoing proceedings for different offences. The competent Court of Appeal decided to execute the German EAW once received the consent from the Amsterdam Public Prosecutor Office and not from the Dutch judicial authority that first authorised the surrender to Italy. Basing its decision on the CJEU case-law (in particular on *West*[25] and *Pustovarov*[26]), the Cassation court annulled the decision of the lower court arguing that the concept of 'executing judicial authority' in Article 28 FD 2002/584 should be interpreted as excluding that the mere consent of a prosecutor might suffice, being a duty for the MS that received the person to ask for a 'judicial authority' to give that consent. This reasoning is based on the nature and the intensity of the scrutiny demanded to the executing judicial authority by Article 28(3) FD 2002/584, including the guarantees that might be asked to the issuing authority according to Article 5 2002/584. As a consequence, the Italian Cassation court

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21 Corte di Cassazione, judgment of 5 March 2020, Occhipinti Calogero, IT:CASS:2020:9582PEN.

22 CJEU, judgment of 25 July 2018, LM, C-216/18, EU:C:2018:586.

23 CJEU, judgement of 17 December 2020, L (C-354/20 PPU), P (C-412/20 PPU) EU:C:2020:1033.

24 Corte di Cassazione, judgment of 17 February 2021, Mokrycki, 280657, IT:CASS:2020:15922PEN, quoting CJEU, judgment of 17 December 2020, L and P (C-354/20 PPU), P (C-412/20 PPU), EU:C:2020:1033. A previous decision in the same case already affirmed the same principle, Corte di Cassazione, judgment of 21 May 2020, Mokrycki (not published).

25 CJEU, judgment of 28 June 2012, West, C-192/12 PPU, EU:C:2012:40.

26 CJEU, judgment of 10 December 2008, Leymann e Pustovarov, C-388/08 PPU, § 43, EU:C:2008:669.

requires that the 'executing judicial authority' entitled to grant the consent for the 'second' EAW should present the same guarantees of independence and impartiality as it is required for the execution of the first EAW, without necessarily being composed by the same persons.[27]

II.1.2. On trials in absentia:

In several decisions the Italian Supreme Court had to solve legal issues related to the execution of EAWs based on decisions adopted by other Member States in *in absentia* proceedings. Referring explicitly to the CJEU case-law, the Italian court recognised the principles enshrined in Article 4-bis of FD 2002/584 and excluded the refusal when the conditions the latter provides for are respected,[28] in particular when there is the possibility to appeal the previous conviction and obtain a new trial.[29]

A specific angle of analysis has emerged on the relationship between defence rights and *in absentia* proceedings. As for the EAW adopted to execute a penalty adopted *in absentia*, when no defence lawyer was present during trial, the execution of the EAW is submitted to the specific guarantee of the issuing State on the possibility for the person once surrendered to have a new trial. Italian authorities are in these cases asking for specific guarantees to confirm the effectiveness of such a right.[30]

II.1.3. On the right to translation

Several cases dealt with the right of the person to obtain the translation of documents related to the EAW in a language he might understand. The Supreme court confirmed the duty to translate the EAW – even though that translation can also intervene during the proceedings for the execution of the EAW and not necessarily for the validation of the arrest[31] – and to ensure that Italian authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with interpretation (Article 2(7) Directive 2010/64). However, the Cassation court excluded the need to translate all the documents of the case file received from the foreign authorities[32] when an interpreter assisted the person during the hearing and the person did not ask for such a translation[33]. That translation might be requested directly to the competent issuing authorities[34].

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[27] Corte di Cassazione, judgment of 5 March 2020, Occhipinti Calogero, IT:CASS:2020:9582PEN.

[28] Corte di Cassazione, judgment of 23 February 2021, Delic, IT:CASS:2021:7275PEN, recalling CJEU, judgement of 23 February 2013, Melloni; EU:C:2013:107; CJEU, judgement of 10 August 2017, Tupikas, C-270/17 PPU, § 55, EU:C:2017:628; CJEU, judgement 17 December 2020, TR, C-416/20 PPU, EU:C:2020:1042.

[29] Ex multis Corte di Cassazione, judgment of 30 March 2017, Locorotondo, IT:CASS:2017:19226PEN; Corte di Cassazione, judgment of 9 October 2012, Neagu, IT:CASS:2012:43542PEN.

[30] Corte di Cassazione, judgment of 22 March 2019, Balescu, IT:CASS:2019:12923PEN.

[31] Corte di Cassazione, judgment of 5 April 2017, Jabri, IT:CASS:2017:19025PEN.

[32] Corte di Cassazione, judgment of 15 September 2017, Ponti, IT:CASS:2017:43136PEN.

[33] Corte di Cassazione, judgment of 22 October 2009, M., IT:CASS:2009:41631PEN; Corte di Cassazione, judgment of 8 January 2015, Ivancescu, IT:CASS:2015:1199PEN.

[34] Corte di Cassazione, judgment of 24 November 2016, Aleksishvili, IT:CASS:2016:50814PEN.

II.1.4. On Ne bis in idem

The same deferential approach to the CJEU case-law has been adopted in dealing with cases of *ne bis in idem*. The Cassation court highlighted how the identity of facts should be the only applicable rule, denying any residual role to formal criteria based on the legal definition of the offence. *Ne bis in idem* is recognised as an autonomous concept of European law, as defined in the *Mantello* case[35]; as such, it deserves a uniform application throughout the EU. Hence, no *marge d'appréciation* is left to national authorities in scrutinising the identity of the conducts[36].

II.1.5. Assessing double criminality

Dealing with cases where double criminality needs to be verified by the executing authorities, the Italian case law has never required the precise correspondence of the foreign offence with the one provided for by the Italian legal order, being sufficient that the facts could be punished on both systems even when the legal definition or some additional elements might differ.[37]

The Cassation court has always operated a very strict scrutiny on how the lower courts have assessed the factual elements as described in the EAW in order to verify the existence in the Italian legal order of a similar crime sanctioning that misconduct. This scrutiny does not aim to identify *in abstracto* an identical offence in national law, but rather to confirm the existence of a crime that Italian law would affirm should the alleged facts be proven, even though the penalty might differ. This is recognised as a duty for national courts dealing with one of the 32 offences listed as mandatory as well as for crimes for which double criminality is required.[38]

When dealing with fiscal offences, that traditionally differ among Member States, the EAW should be executed even when the concrete offence would not qualify as 'criminal' in Italy because of the higher threshold foreseen by Italian law, a mere assimilation by analogy being sufficient.[39] Therefore the execution might be granted even when the systems provide for different thresholds.[40]

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[35] CJEU, judgment of 16 November 2010, Mantello, C-261/09, EU:C:2010:683.

[36] Corte di Cassazione, judgment of 7 May 2020, M., 278849 (ECLI not available).

[37] Corte di Cassazione, judgment of 13 March 2007, Stoimenovski, IT:CASS:2007:11598PEN; Corte di Cassazione, judgment of 18 June 2007, Porta (not published); Corte di Cassazione, judgment of 1st February 2012, Cozma, IT:CASS:2012:4538PEN; Corte di Cassazione, judgment of 17 May 2012, Ferrari, IT:CASS:2012:19406PEN; Corte di Cassazione, judgment of 3 May 2017, Bernard Pascale, IT:CASS:2017:22249PEN; Corte di Cassazione, judgment of 29 May 2017, Majkowska, IT:CASS:2017:27483PEN.

[38] Corte di Cassazione, judgment of 27 August 2019, Lorenzon, IT:CASS:2019:36844PEN; Corte di Cassazione, judgment of 29 May 2017, Majkowska, IT:CASS:2017:27483PEN; Corte di Cassazione, judgment of 3 May 2017, Bernard Pascale, IT:CASS:2017:22249PEN.

[39] Corte di Cassazione, judgment of 30 October 2019, Distefano, IT:CASS:2019:51014PEN; Corte di Cassazione, judgment of 20 July 2017, Crisci, IT:CASS:2017:39522PEN.

[40] Corte di Cassazione, judgment of 30 October 2019, Distefano, IT:CASS:2019:51014PEN.

As a general principle, it is nevertheless necessary that the facts are punished in Italy via a fully-fledged criminal offence and not with an administrative fine; in the latter case the EAW should be refused[41]. This interpretation has been confirmed by the Cassation court even after the last reform of February 2021[42].

II.2. Detention conditions in the issuing State as a ground of refusal

Italian case-law fully recognized the *Aaranyosi and Caldararu* two-steps test on preventing breaches of fundamental rights because of poor detention conditions[43] banning any automatism in decision making but imposing on Appeal courts the duty to assess the systemic risk of inhuman and degrading treatment, asking for individualized information to be provided by foreign authorities[44].

When the risk of poor detention conditions has been determined according to international assessments or ECHR decisions, the Italian Supreme court does not authorize the Courts of Appeals to simply execute the EAW (although provided by Article 18(h) Law 69/2005) but imposes on them the duty to ask for additional information from the issuing authorities[45]. That information should be complete (including the indication of the specific detention premise that will be used, the space available inside the cell, the hours to be spent outside, when the specific detention regime allows it). A constant updated is needed in order to verify any change intervened in the foreign prison system[46]. When the foreign authorities have clarified which specific measures they intend to adopt to prevent such a risk (in terms of air, light, space, hygienic services and food quality, right to visits and phone calls, and specific features of the detention premises) the EAW shall be executed[47].

Recent case-law shows a strong will to execute the EAWs according to the principle of mutual recognition unless specific reasons are raised by the defendant showing concrete risk to suffer of an inhuman and degrading treatment because of the poor detention conditions. In a case related to Belgium, where the defendant merely raised the argument of poor detention condition without bringing concrete elements to justify his request, the Court of Cassation did not require the competent Court of Appeal to ask to Belgian authorities for additional information but simply confirmed the execution of the EAW on the basis of the Conclusions of the European Council in 2016.[48] In a similar case adopted a few months later, though, that duty to request specific information from the issuing judicial authorities has been confirmed to exclude the 'serious risk' of poor detention conditions, as proved by the report of the Council of Europe's Committee for the

[41] Corte di Cassazione, judgment of 26 May 2021, 21336, not yet published but accessible at https://canestrinilex.com/risorse/mae-e-doppia-incriminabilita-cass-2133621/.

[42] Corte di Cassazione, judgment of 26 May 2021, 21336 (not yet published).

[43] Corte di Cassazione, judgment of 11 October 2017, Enache, IT:CASS:2017:47891PEN.

[44] Corte di Cassazione, judgment of 24 January 2017, Ilie, IT:CASS:2017:3679PEN; in relation to Belgium, Corte di Cassazione, judgment of 3 May 2017, Bernard Pascale, IT:CASS:2017:22249PEN.

[45] Corte di Cassazione, judgment of 11 October 2017, Enache, IT:CASS:2017:47891PEN. confirmed by Corte di Cassazione, judgment of 16 March 2021, Istrate, IT:CASS:2021:10822PEN.

[46] Corte di Cassazione, judgment of 16 March 2021, Istrate, IT:CASS:2021:10822PEN.

[47] Corte di Cassazione, judgment of 9 November 2018, Moisa, IT:CASS:2018:52541PEN.

[48] Corte di Cassazione, judgment of 28 February 2018, Jovanovic, IT:CASS:2018:9391PEN.

Prevention of Torture and Inhuman or Degrading Treatment or Punishment on the CPT's March/April 2017 visit to Belgium[49].

Specific attention has been given to the space available to the detainee, even though certain compensatory measures are accepted, in line with the ECHR case law on poor detention conditions. Therefore, the EAW cannot be refused even when the space is less than 3 squared meters (in the case limited to 2,83 m") if there are compensating measures such as 1) a short-term detention (with the possibility to be 'promoted' to semi-detention in a reasonable time); 2) an increase of hours to be spent outside and 3) decent detention conditions.[50] When the EAW concerns the execution of a penalty in regime of semi-detention, the risk of poor detention conditions is reduced if the detention premises are used only for the night time and hygienic services.[51] The refusal in this case should only be based on specific, individual and concrete reasons highlighted by the defence[52]

Even though the recent reform of February 2021 abrogated the specific ground of refusal based on the risk of inhuman and degrading treatment in case of surrender (previous Article 18(h) Law 69/2005), the Cassation court immediately stated that the same principle is still in force thanks to the general clause of protection of fundamental rights as recognised by the Italian Constitution, by Article 6 TEU and by the ECHR. Consequently, it is a duty for the Italian court when executing EAWs to verify the existence of a general risk of degrading and inhuman treatment examining the relevant documentation and asking for additional information[53], even when this implies a postponement of the surrender. If no additional reassuring information is offered by the issuing authorities within reasonable time, the Italian court should refuse to execute the EAW.[54] The rigid temporal sequence imposed by the recent reform[55] does not ban the postponement of the surrender when there is the need for additional information, imposing on the executing authorities the mere duty to inform the foreign authorities on the reasons justifying the delay.[56]

II.3. Specificities of the Italian system – stemming from the Italian Constitution and well as from the code of criminal procedure – as obstacles to mutual recognition.

II.3.1. Health conditions as a ground for refusal

The Court of Appeal of Milan has recently requested to ascertain the compliance of articles 18 and 18 *bis* of the Law 69/2005 – transposing the Council Framework Decision 2002/584 (JHA) – with the principles enshrined in articles 2

[49] Corte di Cassazione, judgment of 29 October 2019, M., IT:CASS:2019:44397PEN, see Colaiacovo, G. (2020), "Mandato di arresto europeo, limiti all'applicazione della legge penale e sovraffollamento carcerario in una sentenza della Corte di cassazione", Sistema Penale, 28. July 2020.

[50] Corte di Cassazione, judgment of 9 November 2017, P., 271577 (ECLI not available); Cass., 26 February 2020, Barzoi, IT:CASS:2020:7979PEN.

[51] Corte di Cassazione, judgment of 5 June 2018, PG in p. Chira, IT:CASS:2018:26383PEN.

[52] Corte di Cassazione, judgment of 5 June 2018, PG in p. Chira, IT:CASS:2018:26383PEN.

[53] Corte di Cassazione, judgment of 6 May 2021, Scutaru,IT:CASS:2021:18126PEN.

[54] Corte di Cassazione, judgment of 14 April 2021, Zlotea, IT:CASS:2021:14220PEN, confirming previous decisions: Corte di Cassazione, judgment of 1 June 2016, Barbu, IT:CASS:2016:23277PEN, and Corte di Cassazione, judgment of 5 April 2017, Bulai, IT:CASS:2017:17592PENall related to EAWs issued by Roumenian authorities.

[55] For the specific time limits for the procedure, see Article 10 ff. of Law no. 69/2005.

[56] Corte di Cassazione, judgment of 14 April 2021, Zlotea, IT:CASS:2021:14220PEN.

and 32 of the Italian Constitution. Requested to execute a Croatian EAW based on a pre-trial detention order, the Court of Appeal found that the mental illness that afflicts the defendant, ascertained via medical documentation produced by the defence and confirmed by an expert witness nominated by the Court, could be worsened by the transfer to Croatia. The latter could determine the interruption of his therapies and expose him to a concrete risk of worsening of his psychiatric conditions as well as to a risk of suicide[57]. The request addressed to the Constitutional court is justified by the lack of any specific ground of refusal based on health risk. Such specific ground is neither set out in the Directive, nor in the Law no. 69/2005. Art.23 of Law 69/2005, that reproduces verbatim art.23 of the FD, only allows to postpone the surrender when there are humanitarian reasons or serious grounds for believing that it would endanger the requested person's life or health.

The Court of appeal of Milan esteems these rules insufficient in protecting human rights, in light of articles 2 and 32 of the Italian Constitution (stating the right to individual inviolability and the right to health), arguing that the right to personal inviolability and to receive adequate health cares is statutorily affirmed by the European Charter of Fundamental Rights. A very meaningful reference is done to the additional Roadmap on procedural rights of the 'vulnerable' defendant, currently under scrutiny.

II.3.2. Italian accusatorial turn and fair trial rights related to evidence

The accusatorial turn of Italian criminal procedure intervened with the new code approved in 1988, and even more with the reform of Article 111 Constitution[58]. The latter states that in order to have a fully-fledged 'fair trial', a criminal proceeding shall respect very detailed rules on adversarial confrontation and cross-examination of witnesses. National Courts started to doubt about the possibility to execute EAWs adopted according to national rules based on a more continental view of the right to confrontation – where the right to confrontation is intended as *débat contradictoire,* as a possibility for the parties to discuss the evidence collected but not to intervene on the collection of evidence itself playing an active role in cross-examining witnesses in trial[59] – and consequently not respectful of the new Italian constitutional features[60]. However, the Cassation court ruled out the possibility to base a refusal of those EAWs because of the 'less adversarial' and less 'fair' trial rules. The relevant 'fair trial' in the field of EAW should be the one described by Article 6 ECHR and related case-law.[61] The Cassation court clarified that when Italian courts are executing EAWs, no scrutiny is admissible on evidence assessment or evidence gathering made according to the rules of a different Member State even when they differ from the internal ones.[62] They should nevertheless control the respect of the ECHR because the mutual trust that justifies the principle of mutual recognition depends on the effective respect of those conventional rules. As a consequence, the Court of Appeal

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57 Corte d'appello of Milano, order of 17 September 2020, no. 194.

58 Panzavolta, M. (2004-2005), "Reforms and Counter reforms", 30 N.C.J. Int'l L. & Com. Reg. 577-623; Marafioti, L. (2008), "Italian Criminal Procedure: A System Caught Between Two Traditions', in J. Jackson, M. Langer, P. Tillers (eds.), *Crime, Procedure and Evidence in a Comparative and International Context*, Hart: Oxford and Portland, Oregon, 2008, 81 ff.; Illuminati, G. (2005), "*The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988"*, 4 Wash. U. Global Stud. L. Rev., 567-581.

59 Ferrua, P., Grifantini, F.M., Illuminati, G., Orlandi R.(2010), La prova nel dibattimento penale, 4ª ed., Giappichelli, Torino.

60 On the Italian Constitutional framework on the right to confrontation, Ferrua, P. (2012), Il giusto processo, Zanichelli, Bologna.

61 Corte di Cassazione, judgment of 3 May 2007, Melina, IT:CASS:2007:17632PEN; Aprile, E. (2008) "Garanzie del giusto processo e divieto di testimonianza indiretta della polizia giudiziaria, nell'esecuzione in Italia del mandato di arresto europeo", Cassazione Penale, vol. 7-8, p. 2929.

62 Corte di Cassazione, judgment of 27 January 2012, Baldi, IT:CASS:2012:4528PEN.

should for example exclude the execution of an EAW when the underlying foreign decision is based on the confessions of the defendant with no legal assistance[63].

II.3.3. Right to a lawyer

According to Italian case law, defence in criminal proceedings represents a right with no exception. In particular, the right to a lawyer cannot be delayed because of the absence of the defendant. Therefore, proceedings *in absentia* are not legitimate when the defendant is deprived of the presence of a lawyer (in the specific case, the Greek court did not nominate any lawyer because of the absence of the defendant and of his fiduciary lawyer). Interestingly the Court of Appeal of Lecce[64] based its decision on both CJEU decision in the *VW case*[65], the ECHR case law as well as on very specific feature of the Italian Constitutional provisions related to evidence.

II.3.4. Presumption of innocence and pre-trial detention orders: the requirement of a high level of suspicion

Italian law requires specific guarantees and procedures in adopting pre-trial detention orders. In particular, a high level of suspicion is necessary for the judicial authorities to adopt the order and specific time limits are imposed to limit the deprivation of liberty pending trial. These requirements are provided by Article 273 ff of the Italian CCP to comply with the presumption of innocence as established by Article 27 of the Italian Constitution. They also apply when Italian courts are called to execute foreign EAWs.

As for the necessary high level of suspicion, specific cases have dealt with the compatibility with national rules of EAW issued by foreign authorities to obtain the presence of the defendant in order to conduct criminal investigation. When this is the case, the same level of suspicion as required in Italy is also mandatory. Italian courts are called to assess the high level of probability that the subject for which the EAW has been issued has committed the crime according to the elements that should be transmitted by the issuing authority on their own initiative, or as requested by Italian authorities. To this aim, the issuing authorities should specify on what evidence their request is based.[66] When the issuing authorities do not offer sufficient explanation, or the elements collected are not convergent, or there are lacunas as to the role and accountability of the subject in the commission of the crime, Italian courts shall refuse to execute the EAW[67].

II.3.5. Maximum duration of pre-trial detention

Since the very first cases of EAW execution, Italian courts have been called to solve the issue of the lack in foreign systems of a maximum duration of pre-trial detention, a requirement imposed by Article 13 of the Italian Constitution: "the law shall establish the maximum duration of preventive detention". Since 2007 the Grand Chamber of the Cassation court established that the absence of strict time limits for pre-trial detention should not justify the refusal of the EAW execution when the foreign system provides for specific mechanism

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[63] Corte di Cassazione, judgment of 27 January 2012, Baldi, IT:CASS:2012:4528PEN.

[64] Corte d'appello of Lecce, decision of 15 gennaio 2021, no. 9, accessible at https://www.giurisprudenzapenale.com/wp-content/uploads/2021/02/corte-appello-lecce-mae.pdf.

[65] CJEU, decision of 12 March 2020, VW, C-659/18, EU:C:2020:201

[66] Corte di Cassazione, judgment of 28 agosto 2020, Katic Milena, IT:CASS:2020:23952PEN.

[67] Corte di Cassazione, judgment of 28 agosto 2020, Katic Milena, IT:CASS:2020:23952PEN; Corte di Cassazione, judgement of 30 July 2019, Gursoy Hasan, IT:CASS:2019:35186PEN.

granting a continuous review at regular intervals over the legitimacy of pre-trial detention. These controls have in fact the same role and function – i.e. to limit the restriction of personal liberty pending the presumption of innocence – of the Italian rules on maximum duration[68].

II.3.6. Nature of the decision to be executed

According to Article 648 of the Italian Code of Criminal Procedure, a judgement is 'enforceable' only when it is considered as final– i.e. a judgement that cannot be appealed anymore, having acquired the effect of *res iudicata.* If the issuing State considers a judgement as enforceable even when an appeal is still possible, or even when the reasons have not been delivered by the competent court, the Italian executing authorities cannot automatically refuse to execute the EAW. This interpretation, now confirmed by the new Article 1(3) of Law 69/2005 as amended in February 2021, was already possible in the previous regime, as the FD 2002/584 merely requires the judgement on which the EAW is based to be 'enforceable' and not 'final'. Italian judicial authorities cannot question the legitimacy of the foreign practice to enforce non-final decisions even when this enforceability precedes the delivery of the reasons justifying the conviction and have been declared not compliant with the Constitution by the foreign Supreme Court, as the issuing authorities – the Rumanian in the specific case - are the only one in charge of the verifying the legality of the title on which the EAW is based[69].

II.3.7. EAW and asylum

In only one case[70] the Cassation court rejected to consider a pending request on asylum as a ground of automatic refusal of the EAW. In a nutshell, the court relied on the Geneva Convention according to which the 'non-refoulement' principle should apply only in cases in which, in case of surrender, there would be a real risk for the life or liberty of the person or the latter might. suffer from discrimination based on sex, religion, nationality, ethnicity or political opinions. Being the specific case related to an EAW adopted by French authorities, these risks were absent.

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[68] Corte di Cassazione, judgment of 30 January 2007, Ramoci, IT:CASS:2007:4614PEN (in relation to Germany), confirmed by Corte di Cassazione, judgment of 22 January 2020, Boyko, IT:CASS:2020:2739PEN, and Corte di Cassazione, judgment of 30 December 2014, Chitoroaga, IT:CASS:2015:49PEN, (Ungary); Corte di Cassazione, judgment of 11 July 2017, Ovieroba, IT:CASS:2017:34439PEN; Corte di Cassazione, judgment of 22 November 2013, Busuioc, IT:CASS:2013:47013PEN. See also Corte di Cassazione, judgment of 2 July 2010, Mancioppi, IT:CASS:2010:26194PEN with reference to the Scottish system that provides for a maximum duration for pre-trial detention during criminal investigations and a second pending trial.

[69] Corte di Cassazione, judgment of 14 April 2021, Zlotea, IT:CASS:2021:14220PEN.

[70] Corte di Cassazione, judgment of 10 March 2021, Gazi, IT:CASS:2021:9821PEN.

Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in Italy

Since the implementation of the FD 2002/584 on the EAW, Italian courts have shown a strong will to operate according to the principle of mutual recognition. Despite the rigidity of the original implementation law and the long list of mandatory grounds of refusal, Italian courts generally adopted an EU-oriented approach, always looking for a way to interpret Italian law in a way to better serve the EU objectives of DF 2002/584 without renouncing to a serious attempt to preserve fundamental rights.

The case-law described in Sections I and II shows how frequently Italian courts have been asked to intervene to solve conflicts between the internal rules and the foreign systems and what strong emphasis was put on mutual recognition to find a solution that might privilege the latter. To this aim, Italian courts mostly relied on three different methods.

First, Italian courts have always followed the indications coming from the Court of Justice in terms of interpretation of the DF 2002/584 with no reservation. In no case Italian judicial decisions departed from the content of the CJEU case law. Examples of this deferential approach can be found in cases related to:

- *Aranyosi* and *Dorobantu* on the two-steps test to determine the risk of poor detention conditions (Section II, 2);
- On *LM* and the ban for national courts to presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial merely based on general allegations but the obligation to carry out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled a concrete risk in the specific case having been proved (Section II, 1, a).
- On *Melloni* and the duty to execute the EAW when basic procedural safeguards are adopted in relation to in absentia proceedings (Section II, 1, b);
- On the precarious independence and impartiality of the judiciary in some EU Member States, the Court of Cassation has been entirely respectful of the Court of Justice criteria as established in the *LM* case and the *L and P* case as well as on *West* and *Pustovarov* (Section II, 1, a).
- On the *Mantello* case in relation to the determination of the same acts for the application of the *ne bis in idem* (Section II, 1, d).

Second, when no case-law from the CJEU is available, Italian courts are always referring to the ECHR decisions accepting foreign legal systems respectful of the minimum level of harmonisation established by the ECHR case-law offers. This interpretative choice proved to be particularly important in the field of evidence gathering or pre-trial detention where no previous harmonisation nor existing guidelines are offered by Union law and where, on the contrary, a very rich case-law exists based on Article 5 and 6 ECHR. Examples are offered in the previous sections in relation to:

- The need to preserve the *habeas corpus* via mandatory judicial scrutiny (section II, 1, a).

- the maximum duration of pre-trial detention (Section II, 2)[71].
- even more important, the reference to the ECHR reduced the impact on mutual recognition of the accusatorial/adversarial rules of evidence adopted by the Italian criminal justice system (Section II, 3, b). In its turn into a more accusatorial system, Italy conferred to the defence the possibility to collect, present and discuss evidence in criminal proceedings, including the principle of cross-examination as the golden rule for the gathering of testimony in trial.
- This accusatorial turn implies a far more relevant role for the defence in general, especially when compared with countries still rules by a traditional, inquisitorial system. This difference of role and function justifies a more rigorous analysis when it comes to the presence of the defence lawyer during trial and the reluctance of Italian court to accept verdicts rendered at the mere presence of the court and the prosecutor. The reference to the ECHR reduces the impact on mutual recognition even though Italian courts are very attentive on assessing the concrete respect of defence rights (Section II, 3, c).

Third, Italian Cassation court emphasised the importance of a constant dialogue between European judicial authorities in order to overcome differences in legal frameworks hindering a smooth cooperation. We should highlight the importance of the request of information according to Article 16 law 65/2005, very often used by Italian courts to trigger a judicial dialogue on the respect of fundamental rights.[72]

To this aim, the Cassation often forced the Court of Appeals to ask directly to foreign colleagues to communicate additional information that might help clarifying apparent clashes of rules, insisting on the need to use formal communication channels to grant the reception of the request,[73] and imposing the non-execution of the EAW when the foreign authorities are not responding adequately.[74] This method produced excellent results in solving specific issues, such as the lack of maximum duration of pre-trial detention, where the rigidity of the Italian Constitutional framework could have brought to a systematic refusal of several EAWs.

Thanks to the efforts made by judicial authorities at every level, Italian surrender procedure of the EAW generally runs smoothly. Nevertheless, some remaining issues still exist in relation to the following matters:

As for the issuing procedure:

- Penalty limits for both the 'procedural' EAW and the EAW issued to execute a penalty are significantly higher than what established by the EAW: four years (or three years for house arrest) are foreseen to issue a 'procedural' EAW and one year as for the execution of a final penalty. The aforementioned limits in terms of penalty imply that only serious crimes are considered for the issuing of an EAW and that the case-readiness depends on the existence of a high level of suspicion to justify the use of an EAW to conduct a criminal prosecution. (see Section I, 2).
- Reluctance to issue an EAW in case of house arrest for the risk that the person will be subject to pre-trial detention in case the other Member State lacks the milder house detention. Further harmonisation of house arrest (and in general of measures alternative to pre-trial detention) at European level is needed

[71] Corte di Cassazione, judgment of 30 January 2007, Ramoci, IT:CASS:2007:4614PEN; Corte di Cassazione, judgment of 3 May 2007, Melina, IT:CASS:2007:17632PEN; Corte di Cassazione, judgment of 27 January 2012, Baldi, IT:CASS:2012:4528PEN.

[72] Corte di Cassazione, judgment of 27 January 2012, Baldi, IT:CASS:2012:4528PEN.

[73] Corte di Cassazione, judgment of 18 June 2020, PG in c Alì Alì, IT:CASS:2020:18711PEN, in which the Court criticized the choice to send the request via e-mail.

[74] Corte di Cassazione, judgment of 4 March 2020, Martin, IT:CASS:2020:9039PEN,. A simple delay does not preclude the execution of the EAW.

in order to allow a better functioning of the mutual recognition without breaching the proportionality principle (see Section I, 3).

As for the executing procedure:

- Detention conditions: Italian courts are willing to exclude any automatism but to personalize the solution based on detailed and updated information on the targeted country and on the specific case[75].
- Health issues should be considered in deciding on the surrender (waiting for the decision of the Constitutional court, see Section II, a).
- Surrender of Italian citizen or of an EU citizen of other Member States who has been permanently staying in Italy for at least 5 years, in accordance with the *Kozlowski*[76] and *Wolzenburg* doctrine.[77] This issue has been debated for several years by Italian courts, including an intervention of the Constitutional Court that extended to the EU citizens with stable territorial roots in Italy the same privileges recognized to the Italian citizens.[78]

The solutions elaborated by the case-law are now fully recognized by law: the execution of an EAW for Italian citizens or for EU citizens with more than 5 years of permanent staying can be refused and the penalty executed in Italy (Article 18-bis Law no. 69/2005) and the transfer may be granted upon condition that the 'citizen' will be transferred back to Italy for the execution of the sentence in case of 'procedural' EAW (Article 19 Law no. 69/2005).

A residual issue is currently debated in relation to the exclusion from such a privilege of the non-EU citizen permanently staying in the Italian territory. The Constitutional Court recently analysed the case but the request for Constitutional check was sent back to the referring Court because of recent reforms of the law concerned[79].

The current legal framework is creating some frictions with other Member States in the light of the FD 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences. The problem arises when Italy refuses to surrender the citizen while applying a remission of sentence (indulto) without consulting the authorities of the issuing Member State, whose expectation for the penalty to be executed are being frustrated without any previous consultation.

[75] Corte di Cassazione, judgment of 29 October 2019, M., IT:CASS:2019:44397PEN.

[76] CJEU 17 July 2008, Kozłowski,C-66/08, EU:C:2008:437.

[77] CJEU, Judgement of 6 October 2009, Wolzenburg, C-123/08, EU:C:2009:616.

[78] Corte Costituzionale, Judgement of the 12 May 2010, no. 227.

[79] Corte Costituzionale, Order of the 11 March 2021, no. 60.