

Executive Summary: Italy

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Executive Summary

Issuing Procedures

- Very few cases as 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.
- Independence of the judicial body adopting the EAW has never been questioned:
- The prosecutor is competent **only** to issue an EAW to execute a custodial sentence or a different measure based on a final judgement.
- 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 or the trial court if the procedure reached that stage.
- The Italian Ministry of Justice adopted a Vademecum for judicial authorities called to adopt an EAW.
- 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 (meaning only for crimes punished at least with 4 years of imprisonment for pre-trial detention or house arrest or to execute a sentence of at least 1 year).
- 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.

Executing Procedures

- More than 600 decisions have been adopted by the Court of Cassation to solve issues related to the executing procedure
- **On the concept of the judicial authority:** 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 of 17 December 2020.
- The Italian Cassation court makes constant reference to the ECHR 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
- **On trials in absentia:** 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,¹ in particular when there is the possibility to appeal the previous conviction and obtain a new trial.²
- **On the right to translation:** 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 EAW³. Italian authorities provide persons subject to such proceedings who do not speak or understand the Italian language 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 authorities⁴ when an interpreter assisted the person during the hearing and the person did not ask for such a translation⁵. That translation might be requested directly to the competent issuing authorities⁶.
- **Double criminality:** 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.⁷ 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 refused⁸.

¹ 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.

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.

³ Corte di Cassazione, judgment of 5 April 2017, Jabri, IT:CASS:2017:19025PEN.

⁴ Corte di Cassazione, judgment of 15 September 2017, Ponti, IT:CASS:2017:43136PEN.

⁵ 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.

⁶ Corte di Cassazione, judgment of 24 November 2016, Aleksishvili, IT:CASS:2016:50814PEN.

⁷ 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.

⁸ 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/>.

- **Poor detention conditions:** Italian case-law fully recognized the *Aaranyosi and Caldaru* two-steps test on preventing breaches of fundamental rights because of poor detention conditions⁹ 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 authorities¹⁰.
- **Maximum duration of pre-trial detention:** 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 granting a continuous review at regular intervals over the legitimacy of pre-trial detention
- **Accusatorial rules of evidence:** 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. 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 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.

Key interpretation and implementation challenges

- 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
- 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.
- 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.
- **Implementation challenges for 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
 - 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
- **Implementation challenges for issuing 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 case¹¹.
 - Health issues Surrender of Italian citizen or of an EU citizen.

⁹ Corte di Cassazione, judgment of 11 October 2017, Enache, IT:CASS:2017:47891PEN.

¹⁰ 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.

¹¹ Corte di Cassazione, judgment of 29 October 2019, M., IT:CASS:2019:44397PEN.