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3 Executive Summary

This Report will explore the implementation of three instruments of judicial cooperation – namely, the European Arrest Warrant (hereinafter EAW), the European Investigation Order (hereinafter EIO), and Regulation 1805/2018 - into the Italian framework, recalling the process of adaptation of national legislation to the EU laws and the reforms adopted over the years, while highlighting inconsistencies in the transposition of provisions and troubles in the compliant interpretation by the case law.

Concerning the EAW Framework Decision (hereinafter EAW FD), the analysis will illustrate two aspects of the national implementation that raised the most of concerns in terms of compliance with the original text of the instrument, namely the grounds for refusal and the rights of the suspect or accused. From the analysis conducted it will be possible to evince that, after a quite tortuous process of implementation, the Italian text is now mostly compliant with the EAW FD. Nevertheless, certain aspects would still require further legislative or judicial intervention to allow a smoother issuance and execution of EAWs. As it will emerge in this Report, it would be advisable to enhance conformity in the transposition of the grounds for refusal and the provisions on the right to translation, and to increase consistency in the interpretation of the right to be assisted by a lawyer compared to domestic standards.

Concerning the EIO, this Report will show that the transposition into the Italian system is overall compliant with the Directive 2014/41/EU (hereinafter EIO D). Some minor incongruities have also been flagged in the cooperation procedure and in the implementation of the principle of proportionality, but they may be easy to overcome in practice through communication between authorities. With regard to the special investigatory acts, the spotlight will on real-time monitoring and controlled deliveries, which are not formally provided by Italian law. Other major inconsistencies concern the grounds for non-recognition or execution and remedies. For these transposition deficiencies, a legislative intervention is highly recommended.

Concerning Regulation 1805/2018 (hereinafter Regulation), the implementation process has been less linear. The Italian legislator adopted the necessary changes for the smooth application of the Regulation only in 2023, with the enactment of Legislative Decree n. 203 (hereinafter Legislative Decree n. 203/2023). Nevertheless, even after the recent legislative intervention, serious uncertainties remain at interpretative level. This Report will examine in detail issues concerning the question of whether victims are entitled to request

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a freezing order under the Regulation, and the ambiguity surrounding the definition of "criminal matter".

4 The implementation of criminal mutual recognition instruments in Italy

4.1 Introduction

4.1.1 Overview of the criminal procedural system

After an historical reform in 1988, the Italian criminal procedural system abandoned the inquisitorial tradition (underlying the previous code of 1930) and embraced the accusatorial-adversarial model.[1114] This section offers an overview of some pivotal features of the criminal process in Italy, focusing on the structure of the proceedings and the regime of evidence, precautionary measures (including on *things*, "cautelari reali", in Italian), and the role of the public prosecutor.

The renewed criminal procedural system is based on a strong separation between the preliminary phase and the trial: fact-finding is designed to take place in the trial only, where both the prosecution and the defence share equal chances to present their case before an impartial judge. Evidence is collected in adversarial way at trial, through the method of cross-examination of witnesses, while the evidence gathered during the investigations cannot in principle be used to reach the decision on the defendant's criminal responsibility, although some exceptions are foreseen at the constitutional level, as explained below. To preserve this partition and the judge's impartiality, a system of two dossiers (*doppio fascicolo*) is introduced: on the one hand, the parties' dossier (*fascicolo delle parti*) contains the evidence collected in the preliminary phase and is unknown to the judge; on the other, the trial dossier (*fascicolo del dibattimento*) includes all the evidence that is collected during the trial and will be used by the judge in for the adjudication of the case.

[1114] Alberto Camon and others, *Fondamenti di procedura penale* (4th edn, Wolters Kluver 2023), 36 ff; Renzo Orlandi, 'La Prolusione di Rocco e le dottrine del processo penale' (2015) 1 Revista Brasileira De Direito Processual Penal 1. On the 1988 reform, see also Giulio Illuminati 'The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)' (2005) 4 Wash. U. Global Stud. L. Rev. 567.

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The core features of the 1988 reform were later engraved with the Constitutional Law no. 2/2003. Art 111 of the Constitution (hereinafter Const) now enshrines the principles of the "fair trial" (*giusto processo*), and even though the Italian version of this provision does not express an explicit preference for the adversarial model, its features are clearly represented in its wording. Art 111(2) Const provides that any process is conducted according to the adversarial principle (*contraddittorio*). In this regard, Art 111(3) Const lists a series of prerogatives inspired by Art 6(3) of the European Charter of Fundamental Rights (hereinafter ECHR), such as: the right to be informed promptly of the nature and cause of the accusation against her; the right to have adequate time and facilities for the preparation of her defence; to examine or have examined witnesses against her and to obtain the attendance and examination of witnesses on her behalf under the same conditions as witnesses against her; to have the free assistance of an interpreter if she cannot understand or speak the language used in court. Importantly, Art 111(4) Const provides that in criminal proceedings "the formation of evidence is based on the principle of adversary hearings". Only evidence that was formed in the presence and with the participation of both the defence and the prosecution can justify a finding of criminal responsibility. That is why it is established that the defendant's guilt cannot be established based on statements by persons who, out of their own free choice, have always voluntarily avoided the cross-examination by the defendant or the defence counsel. Art 111(5) Const, however, provides for derogations to the principle of adversarial formation of evidence, specifically, in cases of consent of the defendant, reasons of ascertained objective impossibility or proven illicit conduct. Based on these exceptions, unrepeatable evidence (e.g., reports of interception of communications, seized materials, on which see below) can be inserted in the trial dossier even though they were not collected according to the adversarial scheme. Also, following her consent, the defendant may agree on including in the trial dossier evidentiary elements collected in the preliminary phase, or opt for special proceedings lacking for the trial (e.g. application of punishment upon request, summary trial procedure).

The constitutional provisions on the adversarial formation of evidence have a direct bearing on the rules of the Italian Code of Criminal Procedure (hereinafter CCP). Specifically, the regime of evidence is contained in Book III of the CCP, which provides for general principles (Title I), regulations on the means of evidence (*mezzi di prova*, Title II) and the means of seeking evidence (*mezzi di ricerca della prova*, Title III). While the means of evidence, such as testimony, yield results that are immediately usable by the judge, the

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means of seeking evidence (interceptions, searches, inspections, and seizures) are not in themselves sources of persuasion for the judge, but serve to acquire material things, traces, or statements that can be used as evidence. In addition, the means of evidence are usually formed in the adversarial hearing; in contrast, the means of finding evidence are unrepeatable acts carried out during the investigation, and the results of which are intended to go into the trial file (Art 431 CCP).

The first of the general principles regarding evidence is that of relevance, set forth in Art 187 CCP: to be relevant, evidence must relate to the charge. In addition to this requirement, to be admissible, the evidence must not be prohibited by law and not be manifestly superfluous, as in the case where the factual issue is already covered by other evidence or concerns well-known facts (Art 190 CCP). Art 189 CCP, on the other hand, deals with the admission of evidence not regulated by the CCP, referred to as "atypical evidence" (*prova atipica*). In these cases, in addition to the general rules of admission, the evidence is required to be suitable for the ascertainment of the facts, that is, it must be able to provide a reliable reconstruction of the fact. Regarding the acquisition of evidence instead, Art 188 CCP precludes evidence (especially declarative evidence such as testimonies) from being gathered by methods and techniques that are likely to affect freedom of self-determination or alter the ability to remember and evaluate facts. Based on this rule, questions that may harm the sincerity of answers are prohibited during the examination of witnesses at trial (Art 499(2) CCP).

Furthermore, the alignment to the adversarial model also brought to the abolishment of the inquisitorial figure of the investigating judge (*giudice istruttore*), who merged both prosecuting and adjudicating functions. The prosecution role is now attributed to the public prosecutor only, who is the head of the preliminary investigations and brings the case to trial[1115]. In this regard, the Italian system adheres to the principle of mandatory prosecution (Art 112 Const), understood as a corollary of the principles of equality (Art 3 Const) and of non-discrimination[1116] Mandatory prosecution means that the prosecutor, when deciding

[1115] On the figure of the public prosecutor in Italy, see generally Michele Caianiello, 'Increasing Discretionary Prosecutor's Powers: The Pivotal Role of the Italian Prosecutor in the Pretrial Investigation Phase', *Oxford Handbook Topics in Criminology and Criminal Justice* (2012; online edn, Oxford Academic, 2 June 2014).

[1116] The reasoning behind is that if all citizens are equal before the law, the criminal justice system should ensure that anyone that commits a criminal offence incurs the same risks of being prosecuted.

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whether to bring the case to trial or dismiss it, can exercise a only technical discretion, excluding instead all political or strategic evaluations.

Moreover, under the Italian Constitution, the public prosecutor qualifies as a "judicial authority" (*autorità giudiziaria*) that can issue warrants for searches and seizures of evidence[1117]. From an institutional perspective indeed, the public prosecutor shares with the judge the status of magistrate. This means that prosecutors, as judges, are irremovable from their office (*inamovibili*, Art 107 Const) and are not dependent from the Ministry of Justice, which can only oversee their activities without being able to impose orders. Although this safeguard is considered enough to assert the external independence of prosecutors, these remain incorporated in a hierarchical structure and may thus be subject to the orders of their Head of the Prosecution Office (*procura*). The independence (*rectius* the impartiality) of the public prosecutor remains ambiguous also in relation to the parties of the proceedings. Although she must generally oversee the respect of the law (Art 73 Royal Decree n. 12/1940[1118]) and may thus act in favor of the defendant where necessary, she still plays the role of the accusation in an adversarial setting. Based on these considerations, the independence and impartiality of the Italian public prosecutor in its role of party to the proceedings has been questioned lately, at least in light of European standards[1119].

[1117] The qualification of the public prosecutor as a judicial authority is supported by the jurisprudence of the Italian Constitutional Court, who notes that a systematic reading of the Constitution highlights that some provisions use the specific term "judge", while other refer to the expression "judicial authority". This distinction leads interpreters to believe that when the Constitution mentions the judicial authority, it points out not only to the judge, but also to the public prosecutor as the competent authority.

[1118] Royal Decree n. 12 of 30 January 1941, Judiciary system. (OJ No. 28, 04-02-1941) (*Regio Decreto 30 gennaio 1941, n. 12. Ordinamento giudiziario. (GU n.28 del 04-02-1941)*).Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1941-01-30;12.

[1119] For example, this issue emerged concerning the possibility for the prosecutor to have recourse to investigative acts that entail a significant limitation of fundamental rights, such as the access to communications metadata (*dati esterni alle comunicazioni*). If previously the competence for this measure was attributed to the public prosecutor only, following some decisions of the Court of Justice of the European Union (CJEU) (for instance, *Prokuratuur*), the legislator decided to give to the judge the power to decide on the requests for access to such data. Not being a party to the proceedings, the judge seems to satisfy more closely the standards of independence and impartiality enshrined in the European jurisprudence. On this topic, see Giulia Lasagni, 'Dalla riforma dei tabulati a nuovi modelli di integrazione fra diritti di difesa e tutela della privacy' (2022) 3 La Legislazione Penale 124; Isadora Neroni Rezende, 'Dati Esterni alle Comunicazioni e Processo Penale: Questioni Ancora Aperte in Tema di Data Retention' (2020) 5 Sistema Penale 183.

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The public prosecutor may also apply to the judge for precautionary measures, which involve a restriction of personal freedom of the suspect or defendant prior to final conviction. Constitutionally, such measures involve a restriction of personal liberty (protected by Art 13 Const), as well as the presumption of innocence (Art 27 Const), which requires not treating the defendant as guilty until final conviction. For this reason, in addition to the presence of serious indications of guilt of the suspect or accused (Art 273 CCP), the code requires that the measure be supported by precautionary needs, namely: the danger of contaminating of evidence; the risk of flight; the danger of reiteration of serious crimes, or offenses of the same nature (Art 274 CCP). Precautionary measures are divided into coercive and disqualifying. The former affect the physical freedom of the suspect or defendant (as in the case of precautionary detention in prison or house arrests), while the latter reduce his or her freedom in carrying out activities or exercising some authority. Such measures are distinguished from the measures of the arrest *in flagrante delicto* (Arts 380-382 CCP), temporary detention (Art 384 CCP), and the urgent injunction to stay away from the family home (Art 384-*bis* CCP). These are not adopted by the judge at the request of the prosecutor, but are provisionally taken by the judicial police, who must submit them for validation by the judge. Following the validation hearing, in fact, these measures can be transformed into precautionary measures.

The public prosecutor may also ask for the so-called real precautionary measures, which concern things, and have been significantly affected by the implementation of the Regulation in Italian legal system. In particular, the instrument through which freezing orders are executed in the national context is the preventive seizure, i.e. that instrument of "freezing" requested by the prosecutor because there is a well-founded reason to believe that the "free availability of material items related to the offence aggravate or extend the consequences of the offence or facilitate the commission of other offences (...)" (Art 321 CCP). However, it must be emphasized that, in Italy, the prosecutor is not the only procedural actor legitimized to request a precautionary measure *in rem*. In addition to him, the victim (who intends to seek damages in the criminal trial against the defendant) can also request the adoption of a seizure, which this time will take the form and name of "conservative seizure" (Art 316 CCP). The purposes and prerequisites of the conservative seizure, as will be seen below (§ 4.4), are different and essentially related to the "reasonable grounds to believe that the securities for civil obligations deriving from the offence are

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lacking or will be dispersed, the civil party may request the conservative seizure of the property of the accused or of the person with civil liability for damages" (Art 316 CCP).

Concerning the figure of the defense counsel, a few caveats are necessary. First, the categories of the public defender and the legal aid should be kept distinct. On the one hand, being assisted by a public defender does not necessarily mean that the suspect or accused person has access to legal aid. The public defender is subsidiary to the retained lawyer and is appointed anytime the suspect or accused person does not have a counsel of their choice. This rule is explained by the fact that legal assistance is mandatory in criminal proceedings in Italy. The appointment of a public defender may have a stable nature (Art 97(1) CCP) or a provisionary one (Art 97(4) CCP). Moreover, the public defender is generally to be paid by the suspect or accused person as specified by Art 369-*bis* CCP, which provides that the information about the appointment of the public defender must be accompanied by the notice that her professional activity is at the charge of the client, unless the conditions to access the legal aid are satisfied. Second, legal aid finds its basis in Art 24(2) Const, which foresees that the "[t]he poor are entitled by law to proper means for action or defense in all courts". At the legislative level this right translates into Art 98 CCP, which legitimizes the accused person (and the suspect), the injured person who intends to join the proceedings as a civil party, and the person with civil liability for damages to apply for legal aid. These persons may potentially benefit from the services of a court-appointed lawyer, or appoint a retained lawyer of their choice, provided that the latter is enrolled in one of the dedicated registers.

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4.1.2 Overview of the implementation roadmap

The implementation into the Italian system of the EU instruments of judicial cooperation – namely, the European Arrest Warrant, the European Investigation Order, and the Regulation 1805/2018 on the Mutual Recognition on Freezing and Confiscation Orders – followed very different paths, depending on the margin of discretion allowed by each EU legislative instrument and the entity of discrepancies with the national procedural law.

The European Arrest Warrant was introduced in the Italian legal system after a long debate[1121], as several perplexities emerged on the compatibility of the EAW FD with principles and guarantees provided in the Italian Constitution[1122]. At the time of the adoption of the EAW FD, the Italian Government published a declaration suggesting a reversal of the adaptation process, *i.e*. the EAW to the national system, and not

[1120] On atypical evidence and investigations, see *inter alia* Adolfo Scalfati (ed), *Le indagini atipiche* (2nd ed, Giappichelli, 2019).

[1121] On the topic, see Lorenzo Salazar, 'La decisione quadro sul mandato d'arresto europeo: genesi, contenuto e finalità del nuovo sistema normativo' (Programma "Grotius penale" della Commissione europea. Incontro di studio sul tema "Cooperazione Giudiziaria Europea: dall'estradizione al mandato d'arresto europeo", Rome, 10-12 November 2003) 13-17; Vincenzo Caianiello and Giuliano Vassalli, 'Parere sulla proposta di decisione-quadro sul mandato di arresto europeo' (2002) Cassazione Penale 462.

[1122] For instance, considering the constitutional principle of legality of criminal offences, criticisms were moved against the exemption from the double criminality check of the categories of offences listed in Art 2(2) EAW FD, as their wording did not correspond to the formulation of their national equivalents; likewise, concern was manifested for the infringement of the constitutional principle of equality due to the potentially lower guarantees for the suspect or accused than those provided for in the Italian system.

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viceversa[1123]. This emblematically represents the controversial approach adopted by Italy at the first stage of the transposition process and outlines the ideological mindset grounding the first version of the implementation law[1124].

The European Investigation Order was enacted in Italy after two years of legislative interventions for the adaptation of the Italian procedural law to the existing EU legislation[1125]. Thus, differently to what happened with the EAW FD, the Directive was implemented in the context of a general effort to align the Italian system with the EU procedures for judicial cooperation and create an organic and long-lasting framework. The great innovation brought by the EIO – as transposed in the Italian system – is the central role of the district prosecutor[1126], both in the passive and active procedure. This marks a turning point, since the protagonist of the judicial cooperation used to be the General prosecutor attached to the Court of Appeals. Furthermore, the EIO D fosters the direct contact between judicial authorities: compared to the Law n. 69/2005, in Legislative Decree n. 108/2017 the role of the Ministry of Justice throughout the process is reduced, as it is not involved in the transmission procedures – it must only be provided with a copy of the EIO.

The Regulation 1805/2018 on the Mutual Recognition on Freezing and Confiscation Orders (hereinafter Regulation or Regulation 1805/2018) required adjustments on the definition of the concrete scope of application of the instrument in order to adapt to the Italian legal system. During the negotiation process, the Italian perspective on the matter of freezing and confiscation of assets had a significant impact for the drafting of a suitable EU instrument. With respect to the original version of the Regulation proposed by the European Commission, which established the mutual recognition of freezing and

[1123] In the press release issued by the Italian government on 11 December 2001, the text of the declaration was as follows: "In order to implement the Framework Decision on the European arrest warrant, the Italian Government will have to initiate the internal procedures to make the Framework Decision itself compatible with the supreme principles of the constitutional order about fundamental rights". The declaration was of non-binding nature.

[1124] Vincenzo Picciotti, 'La riforma del mandato d'arresto europeo. Note di sintesi a margine del D.Lgs. 2 febbraio 2021, n. 10' (2021) Cassazione Penale 2.

[1125] On this topic, see Gaetano De Amicis, 'Dalle rogatorie all'ordine europeo d'indagine: verso un nuovo diritto della cooperazione giudiziaria penale' (2019) 1 Cassazione Penale, 22 ff.; Luigi Kalb, 'Cooperazione Giudiziaria: le novità del recepimento delle fonti sovranazionali' (2016) Diritto Penale e Processo, 989 et seq.; Michele Caianiello, 'L'OEI dalla Direttiva al Decreto N. 108 del 2017' in Roberto Kostoris and Marcello Daniele (eds), *L'Ordine Europeo D'Indagine Penale. Il nuovo volto della raccolta transnazionale delle prove nel d.lgs. n. 108 del 2017* (Giappichelli 2018) 18.

[1126] Art 51 CCP.

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confiscation orders issued in the context of "criminal proceedings", the final text was extended on the Italian initiative to include the mutual recognition of orders issued in the context of "proceedings in criminal matters". Accordingly, the scope of application was broadened to orders adopted in the context of the Italian prevention proceedings, which are non-conviction based. Even though such adjustment allowed the Regulation to encompass also anti-mafia proceedings, it was not welcomed by States like Germany, which do not provide for similar measures in their systems and thus flagged a potential violation of fundamental rights[1127].

The present Report aims to illustrate the process of implementation in the Italian procedural law of these EU cooperation instruments, carefully analysing the most noteworthy issues that have emerged over the years.

4.2 The implementation of Framework decision 2002/584

The European Arrest Warrant was established by the "Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA"[1128]. In the Italian context, the instrument was transposed – with a significant delay – in Law n. 69 of 22 April 2005[1129] (hereinafter Law n. 69/2005), establishing requirements, procedures, and safeguards for the issuance and execution of EAWs involving Italy. The transposition process has been long and highly debated, as several perplexities emerged on the compatibility of the EAW FD with principles and guarantees provided in the Italian Constitution.

From a formal perspective, the initial text of Law n. 69/2005 presented serious issues of consistency, due to, *inter alia*, an exceeding list of grounds for refusal that hampered a smooth operability of the instrument. Indeed, the Italian legislator took advantage of the

[1127] Ciro Grandi, 'Il Mutuo Riconoscimento dei Provvedimenti di Confisca alla luce del Regolamento (UE) 2018/1805' (2021) La Legislazione Penale.

[1128] For a brief overview in English, see Massimo Fichera, *The implementation of the European Arrest Warrant in the European Union: law, policy and practice* (Intersentia 2011), 136 ff.

[1129] Law n. 69 of 22 April 2005, Provisions to bring domestic law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (*Legge 22 aprile 2005, n. 69, Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri, G.U. n. 98 del 29/04/2005*). Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2005;69.

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room for *manoeuvre* typically left by framework decisions, and transposed the original text at times creatively, at times *verbatim*.

The lack of correspondence of certain provisions of Law no. 69/2005 in the EAW FD fostered the necessity for more conformity. Eventually, on the 2 February 2021, Legislative Decree n. 10 (Legislative Decree n. 10/2021)[1130] brought substantial changes to Law n. 69/2005 through the amendment of several Articles. The core purpose of the reform was to circumvent the criticalities that hindered the principle of mutual recognition underpinning the EAW, and to enhance the consistency of the transposition with the EAW Framework Decision.

Among all modifications, Legislative Decree 10/2021 intervened on Art 1 Law n. 69/2005, deleting the clause that limited the execution in the event of incompatibility with supreme principles of the constitutional order in terms of fundamental rights, freedom, and due process. Thus, paragraph 1 of Art 2 was reformulated so that the execution of the EAW may not, under any circumstances, entail the violation of the supreme principles of the constitutional order of the State, the inalienable rights recognised by the Constitution, and fundamental rights and principles enshrined in Art 6 of the Treaty on European Union (TEU) and in the ECHR. This change aims to narrow the grounds for non-execution of a EAW, limiting the circumstances for refusal to those enlisted in the EAW FD, in order to enhance the effectiveness of the instrument.

By the same token, paragraph 1-*bis* was added to Art 6 Law n. 69/2005, following the amendment of the EAW FD that introduced Art 4(a), in order to regulate the conditions for refusal in case of a trial held *in absentia*, as introduced by the Framework Decision 2009/299/GAI. Furthermore, the last paragraphs of Art 6 are repealed, as they aimed at controlling the merits of the warrant, thus restricting, and even inhibiting, the execution in a way deemed incompatible with the principle of mutual trust.

The reform also touched the double criminality clause, reviewing the list of cases for which surrender is mandatory, contained in Art 8 Law n. 69/2005. That list has always been criticized for being more demanding than the EAW FD, thus mandating a double criminality

[1130] Legislative Decree n. 10 of 2 February 2021, "Provisions for the full alignment of national legislation with the provisions of Framework Decision 2002/584/JHA, on the European arrest warrant and surrender procedures between Member States, implementing the delegations provided for in Article 6 of Law no. 117 of 4 October 2019 (*Disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni della decisione quadro 2002/584/GAI, relativa al mandato d'arresto europeo e alle procedure di consegna tra stati membri, in attuazione delle delega di cui all'articolo 6 della legge 4 ottobre 2019, n. 117*, *GU n. 30 of 05/02/2021*). https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2021;010.

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check that was contrary to the rationale of mutual trust. In its new shape, the list now transposes Art 2(2) EAW FD in a more consistent way.

Similarly, the list of grounds for non-execution contained in Arts 18 and 18-*bis* was reduced, deleting those circumstances not directly provided for by Arts 3 and 4 EAW FD.[1131] Furthermore, Art 18-*ter* is added to implement the new Art 4-*bis* EAW FD on *in absentia* trials. In this new version of Art 18-*bis*, not all optional grounds for refusal provided in the EAW FD are currently recognized. It is curious that Italian law first exceeded in formulating grounds for refusal and, later on, made the possibility not to execute an EAW even narrower than what provided by the EU standards.

4.2.1 Scope

The scope of application of the EAW cooperation mechanism, defined by Art 2 EAW FD, is mirrored in Italian law in Arts 7 and 8 Law n. 69/2005.

According to Art 7, Italy shall execute the European arrest warrant only where the act described in the warrant constitutes a criminal offence under national law, irrespective of its legal classification and the single constituent elements of the offence.

The rule is highlighted in cases of tax and customs related offences, where Art 7 explicitly states (in conformity with Arts 2 and 4(1) EAW FD) that it is not necessary that Italian law imposes or contains exactly the same kind of taxes or duties as the law of the issuing Member State.

In line with the EAW FD text, the same provision also requires minimum penalties for the EAW to be legitimate: a maximum duration of at least than twelve months in case of custodial sentence or security measure, in case of accusation EAW, and a minimum duration of at least four months in case of executive EAW.

Last, again in compliance with the EAW FD, the scope of the EAW mechanism is partially different with regard to the 32 offences listed by Art 2(2) EAW FD. In such cases, Art 8 Law n. 69/2005 does not require any check of the double criminality requirement and the maximum penalty is lowered to custodial sentences or detention orders of at least three years.

[1131] In Article 18 of Law no. 69/2005, those pertaining to the *ne bis in idem*, the minor age of the surrendee, and the amnesty remain. In Art 18-*bis* the optional ground for non-execution in case of a decision involving an Italian citizen or a person residing in Italy, applies when the period of residence or stay in Italy is at least of five years.

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4.2.2 Grounds for non-recognition and non-execution

The regulation of grounds for refusal has been one of the most troubled areas in Italy's transposition of the EAW FD. While at first Art 18, Law n. 69/2005 listed twenty grounds for refusal, to which other hypotheses were added throughout the text, today the catalog has been greatly reduced, especially regarding optional grounds for refusal. The evolution of the regime of grounds for refusal has also been affected by the gradual introduction of fundamental rights considerations into the EU system of mutual recognition in criminal matters.

4.2.2.1 Mandatory grounds of refusal

The mandatory grounds of refusal are implemented in Art 18 Law n. 69/2005.

Art 18(1)(a) transposes almost *verbatim* the ground of refusal that applies when the offence is covered by amnesty (Art 3(1) EAW FD) and does not raise any compliance issues.

Art 18(1)(b) Law n. 69/2005 transposes the ground of refusal based on the *ne bis in idem* principle (Art 3(2) EAW FD). The national provision clarifies the meaning of "finally judged" in the EU text by listing the types of decisions that satisfy this requirement in the domestic system: **irrevocable judgements**, **criminal decrees of conviction**[1132], **judgements of no grounds to proceed**[1133] which are no longer subject to an appeal, and **final judgments** of other EU Member States. Among these, the inclusion of judgements of no grounds to proceed in the category of decisions giving rise to mandatory refusals based on *ne bis in idem* raises some issues. In fact, these decisions do not become "final" under national law even when they are no longer subject to appeal, meaning that the case can always be

[1132] The proceedings by decree (Arts 459 ff. of the Criminal Procedural Code, CCP) are a special form of proceedings where the prosecutor, if s/he considers that only a financial penalty shall be applied, submits a reasoned request for issuing a criminal decree of conviction to the Preliminary Investigation Judge. The judge, where s/he agrees with the prosecutor's request, issues the criminal decree of conviction (Art 460 CCP).

[1133] The judgements of no grounds to proceed is the decision of dismissal issued by the Judge of the Preliminary Hearing at the end of such hearing (Art 425 CCP). Judgements of no grounds to proceed have been introduced in Art 18(1) of the transposition law only in the last 2021 reform. The new formulation takes into account the case law of the Court of Justice of the European Union (CJEU), which has clarified when a judicial decision can be considered "final" for the purposes of the *ne bis in idem* principle. According to the Court, any decision on the merits of a case precluding the initiation of new proceedings can be considered "final" under Art 50 of the Charter. Specifically, with regard to the Italian system, the Court indicated that the judgements of no grounds to proceed meet this requirement. See Case C-398/12 *M* ECLI:EU:C:2014:1057.

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reopened if new evidence comes to light (Art 434 CCP). Given this, judgements of no grounds to proceed appear more in line with a decision to halt proceedings, which is indicated in Art 4(3) EAW FD only as a basis for a non-mandatory ground of refusal (see below §4.2.2.2). Considering this, the Italian law does not seem to correctly implement the Framework Decision.

The domestic decisions relying on this ground of refusal are scarce but reflect a contradictory approach by the Court of Cassation. One contentious issue concerns what kind of final decisions trigger the applicability of the *ne bis in idem* principle in the EU. According to a more restrictive interpretation, endorsed by the Court of Justice of the European Union (CJEU)[1134], only decisions including an assessment on the ***merits*** of a case preclude that the accused is tried again for the same facts in the Union. Conversely, a more extensive approach includes judgements finally disposing of a case on ***procedural*** grounds.

Two judgements of the Court of Cassation deal with this issue in relation to judgements that had finally closed previous EAW proceedings. Firstly, in a 2014 judgement, the Court of Cassation excluded the applicability of the *ne bis in idem* principle regarding a judgement based on procedural grounds only[1135]. The case involved an EAW issued by the Romanian authorities to Italy. Previously, the French authorities had refused to surrender the person concerned to Romania because of procedural issues. The Italian Court of Cassation decided not to take into account this circumstance for refusing the surrender, considering that the European *ne bis in idem* principle applies only to substantive assessments of liability for criminal acts, and not also to purely procedural ones.

A more recent judgement, however, apparently contradicts this approach. According to the Court of Cassation indeed, the principle of *ne bis in idem* applied to the irrevocable judgment refusing surrender due to the failure of the issuing State to send the requested supplementary documentation[1136]. In the case at stake, Poland had transmitted an EAW to the Italian authorities, which had requested further documentation to decide on the request. Nonetheless, the issuing authorities had not complied with such demand and the EAW proceedings had been closed with a decision refusing surrender, which became final. The Polish authorities later reiterated the request with all the necessary documentation.

[1134] cf Case C-469/03 *Miraglia* ECLI:EU:C:2005:156.
[1135] Cass. pen., sec. VI, n.1695 of 14/01/2014.
[1136] Cass. pen., sec. VI, n. 35290 of 19/07/2018.

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Deciding on the matter, however, the Court of Cassation excluded that the competent Court of Appeals could rule again on the same request, modifying the previous decision of refusal.

This last decision seems to embrace a more extensive interpretation of the *ne bis in idem* principle, acknowledging that also final decisions relying on procedural grounds (e.g., the lack of documentation) could trigger the applicability of the ground of refusal established by Art 18(2) Law n. 69/2005. Arguably, this approach is not in line with the interpretation of the principle made by the CJEU. Yet, the judgement appears to be an isolated case, so it might be too soon to state that the interpretation of the national provision raises compliance issues with EU law.

Lastly, Art 18(3) fully implements Art 3(3) EAW FD. The national provision foresees a mandatory ground of refusal when the warrant is issued in relation to facts committed by the person requested when s/he was under **fourteen**, which is the minimum age of criminal responsibility in Italy. The Court of Cassation has interpreted this ground of refusal in a rather strict manner, which appears to be in line with a literal reading of the relevant EU provision. For example, in a case where France had requested the surrender of a child located in Italy, the defense in the executing State had argued for the applicability of this ground of refusal, highlighting that surrender might have exposed the accused to detention conditions incompatible with the best interest of the child. Nonetheless, the Court excluded the applicability of Art 18(3) Law n. 69/2005, which only concerns the refusals of EAWs when the person committed the act when he or she was under fourteen and does allow to consider other interests of the child, such as those relating to detention conditions[1137].

4.2.2.2Non-mandatory grounds of refusal

The Italian transposition of the non-mandatory grounds of refusal is rather minimal, especially after the amendments of Law n. 69/2005 to bring it back to compliance with the EAW FD text.

As a result, not all optional grounds for refusal provided in the Framework Decision are currently recognized under Italian law. Being non-mandatory, this lacuna does not represent a criticism in relation to the compliance with EU law. Nonetheless, it could be considered curious how Italian law first exceeded in the creation of grounds for refusal and later on made the possibility not to execute an EAW even narrower than what allowed by the EU standards.

[1137] Cass. pen., sec. VI, n. 41102 of 28/10/2022.

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In particular, Law n. 69/2005 provides for the possibility to refuse an EAW in case the latter is based on a conduct that does not constitute a crime under Italian law, with the exception of the tax domain, where (as anticipated) it is not necessary – for the purpose of cooperating – that exactly the same kind of tax or duty or rules as regards taxes, duties and customs and exchange regulations are established in Italy (Article 4(1) EAW FD, transposed in Art 7 Law n. 69/2005).

Likewise, Law n. 69/2005 also provides for an optional ground for refusal in case the person who is the subject of the European arrest warrant is being prosecuted in Italy for the same act as that on which the European arrest warrant is based (Article 18-*bis*, c. 1, let b).

Last, Law n. 69/2005 establishes the possibility to refuse the execution of an EAW where the requested person is staying in, or is a national or a resident of the Italian State and Italy undertakes to execute the sentence or detention order in accordance with its domestic law.

According to Article 18, c. 2 and 2-*bis*, the Court of Appeals may refuse the surrender of the Italian citizen or a person who lawfully and effectively resides or has resided continuously for at least five years on the Italian territory, provided that it orders that such penalty or security measure be executed in Italy in accordance with its domestic law. Following a recent ruling of the Constitutional court (decision n. 178 of 6-28 July 2023), for the purpose of verifying the lawful and effective residence or abode on the Italian territory of the person requested to be surrendered, the Court of Appeals shall ascertain whether the execution of the punishment or security measure on the territory is in practice suitable to enhance his or her opportunities for social reintegration, taking into account: the duration, nature and manner of residence or abode the time elapsed between the commission of the crime on the basis of which the EAW was issued and the beginning of the period of residence or abode; the commission of offenses and the regular fulfillment of social security and tax obligations during that period; compliance with national rules on the entry and residence of foreigners; family, linguistic, cultural, social, economic or other ties that the person has on Italian territory; and any other relevant factors. The judgment is null and void if it does not contain the specific indication of the elements referred to in the first sentence and the criteria for their evaluation.

On the other side, the non-mandatory grounds for refusal established by Art 4(3) and (5) EAW FD are not recognized under Italian law. These refer to the cases in which the executing Member State has decided either not to prosecute for the offence on which the

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EAW is based or to halt proceedings, or where a final judgment has been passed upon the requested person, in respect of the same acts, which prevents further proceedings (para 3) and to the cases in which the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country (para 5).

The only exception seems to be the closure of the proceedings with a judgements of no grounds to proceed, which could be related to the decision to halt proceedings. However, as illustrated above (§ 4.2.2.1), this case is considered by Italian law a mandatory ground for refusal. In this regard, therefore, the Italian transposition does not seem to correctly implement the EAW FD.

A transposition gap may be observed also to the ground for refusal provided for by Article 4(4) EAW FD, i.e. the situation where criminal prosecution or punishment of the requested person is statute-barred. This circumstance, actually, was in part originally included in Italian legislation as a mandatory ground for refusal under Art 18(1) let. n), Law n. 69/2005. The provision however was later amended and mostly deleted to conform the Italian transposition to the original text of the EAW FD. With the amendment of the Italian legislation, the ground for refusal of Article 4(4) EAW FD was not included in the optional list to decline the execution of an EAW under Italian law.

4.2.2.3Fundamental rights and proportionality issues

Law n. 69/2005 provides for a specific norm regulating the interplay between mutual trust and fundamental rights in pursuance of **Art 1(3)** and recitals (12) and (13) EAW FD. The national provision has recently undergone significant amendments specifically with the aim of aligning domestic regulations with the EAW FD outlines (Art 2(1) Law n. 69/2005, as amended by Legislative Decree n. 10/2021). Hence, according to Art 2(1), the execution of an EAW shall not, under any circumstances, entail a violation either of the supreme principles of the Italian constitutional order or of the inalienable rights of the person recognised by the Constitution, or of the fundamental rights and principles enshrined by Art 6 TEU as well as the fundamental rights guaranteed by the ECHR. Furthermore, the EAW execution is to be refused whether the issuing State has been suspended by the EU Council due to **serious and persistent violation** of Art 6(1) TEU[1138].

[1138] Art 1(3) Law n. 69/2005, as amended by Legislative Decree n. 10/2021.

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By striving to rebuild a proportionate balance between **mutual trust** and the **protection of fundamental rights**, Art 2(1) Law n. 69/2005 no longer enables the issuing State to be required to provide appropriate safeguards. Nonetheless, the question of the control entrusted to national courts to ensure – case by case – the protection of fundamental rights remains of primary importance.

In fact, the domestic decisions relying on Article 2(1) are quite relevant. Even before the 2021 legislative reform, the Court of Cassation acknowledged that the '**real risk of inhuman or degrading treatment**', relying on the grounds of refusal under Article 18(1)(h) Law n. 69/2005, shall be inferred from supplementary information provided by the requesting State. Given the specific characteristic of the case, the requested State shall not refuse to surrender whenever such a risk is to be excluded[1139]. Arguably, whether conditions of detention are at stake, national judges shall entangle the 'symbiotic relationship' between mutual trust and fundamental rights[1140] in due observance of the Court of Justice of the European Union case law entrenched in *Aranyosi and Căldăraru*[1141] and, afterward, developed in *LM*[1142] and *EDL* (on which see further below). More in detail, national judges share the two-steps approach and require individualised information on the conditions of detention to be applied by the issuing State, avoiding merely general assessments in disregard with the specific characteristics of the case[1143].

Without dwelling upon the proceedings *in absentia*[1144], the spectrum of approaches on **precautionary measures** is also worth mentioning[1145]. Seeking the effectiveness of mutual trust, the Court of cassation held that even if the period of pre-trial detention served in Italy exceeds the terms established by the issuing State, there is no valid circumstance for

[1139] Cass. pen., sec. II, 24/01/2017, n. 3679.
[1140] See Valsamis Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', 6(4) NJECL 457, 466. Among the Italian scholars, see Marta Bargis, 'Mandato di arresto europeo e diritti fondamentali: recenti itinerari "virtuosi" della Corte di Giustizia tra compromessi e nodi irrisolti' (2017) 2 Dir Pen Cont 177, 178.
[1141] Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198, paras 88, 105.
[1142] Case C-216/18 *LM* ECLI:EU:C:2018:586, paras 58-62. On the supranational dimension, Valentina Covolo, 'Mutual recognition and absolute standards of effective judicial protection' in Silvia Allegrezza and Valentina Covolo (eds) *Effective Defense Rights in Criminal Proceedings* (Wolters Kluwer 2018), 197.
[1143] See the already mentioned judgement Cass. pen., sec. II, n. 3679 of 24/02/2017, as well as Cass. pen., sec. VI, n. 5472 of 01/02/2017.
[1144] Cass. pen., sec. VI, n. 5400 of 30/01/2008.
[1145] See for a broader analysis, Adriano Martufi, Christina Peristeridou, 'Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework' (2020) 5(3) European papers 1477.

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refusing the surrender[1146]. Conversely, this is not the case if the person has already fully served a period of custody in the form of pre-trial detention that corresponds to the full sentence imposed by the requesting State. In this event, an intolerable violation of the person's fundamental rights would prevent the execution of the EAW[1147].

The interplay between automatic mechanisms of mutual trust and case by case assessments based on general criterion such as **proportionality** is by tradition quite complex and yields substantial differences. On the one hand, the national law does not explicitly refer to the proportionality test to supervise cooperation instruments that rely on mutual recognition. On the other, domestic case law has gradually displayed a wider sensitivity to the issue.

In a nutshell, in a *Vademecum* published by the Ministry of Justice to set out guidelines for issuing EAW, the proportionality test has been acknowledged as optional for national judges to establish whether or not to order the warrant[1148]. In reverse, some recent case law has enhanced the principle of proportionality. The Court of cassation stated that EAW issued for the sole purpose of investigations, i.e. detached from the pursuit of a criminal prosecution, cannot be executed.[1149] A proportionate use of the mutual trust must be ensured preferring non-coercive means of judicial cooperation, along the lines of the EIO D. Consistently, a subsequent judgment stated that the principle of proportionality set out in Article 7 of Legislative Decree n. 108/2017 is not infringed by the decision to surrender the defendant for the purpose of participating in criminal proceedings against her if a less invasive procedural option for the same purpose has already been unsuccessfully pursued[1150].

Lastly, the Constitutional Court has recently played a significant role in facing the challenges which trigger the application of fundamental rights as well as paving the way for new developments in national case law. Examining the non-mandatory grounds of refusal, the Court dealt with discriminations against third-country nationals (see retro, § 4.2.2.2) and the **protection of health** under Article 4 of the CFREU. The case addressed a person suffering from a serious illness whose surrender could pose a risk of harm to her health; in

[1146] Cass. pen., sec. VI, n. 16544 of 27/04/2010.
[1147] Cass. pen., sec. VI, n. 6416 of 06/02/2008.
[1148] Ministero della Giustizia, 'Vademecum per l'emissione del Mandato di Arresto Europeo', 3 <https://www.giustizia.it/resources/cms/documents/Vademecum_mandato_arresto_europeo.pdf> accessed 14 October 2024.
[1149] Cass. pen., sec. VI, n. 7861 of 21/02/2023.
[1150] Cass. pen., sec. VI, 12 n. 37474 of /09/2023.

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particular, the defendant had a psychotic disorder requiring treatment with medication and psychotherapy to avoid probable episodes of psychiatric decompensation. A significant risk of suicide in the event of imprisonment was also identified. According to the preliminary ruling, the EAW FD does not allow the executing judicial authorities to refuse to execute an EAW 'solely on the ground that the person who is the subject of such an arrest warrant suffers from serious, chronic and potentially irreversible illnesses'. In particular, the Court of Justice stated that 'having regard to the principle of mutual trust which underlies the area of freedom, security and justice, there is a presumption that the care and treatment provided in the Member States for the management of, inter alia, such illnesses will be adequate […] whether in prisons or in the context of alternative arrangements for making that person available to the judicial authorities of the issuing Member State'. However, 'in exceptional circumstances, relating, inter alia, to the life or health of the requested person being manifestly endangered, surrender may be temporarily postponed' (Art 23(4) EAW FD). Then, within a reasonable period of time, individualised information shall be requested from the issuing State in order to assess whether or not exist that risk of harm. If so, the executing judicial authority cannot give effect to the EAW[1151].

Likewise, the Constitutional Court has recently stated that – in accordance with Art 4 of the Charter and Arts 2 and 32 Const – the executing judicial authority may postpone temporarily the surrender of the requested person, provided that there are serious reasons for believing, on objective grounds such as medical certificates or expert reports, that the execution of the arrest warrant manifestly risks endangering the health of that person. Thus, a direct dialogue shall be established between the judicial authorities with a view to finding a solution that avoids serious risks to the requested person's health. It may in turn lead to the surrender being carried out, or to a final decision refusing surrender in the residual hypothesis that no such solution can be found[1152].

4.2.3 Execution procedure

Law n. 69/2005, transposing the EAW FD, foresees an active and a passive procedure for executing an EAW. The **active procedure** takes place when the Italian authorities issue a warrant to obtain the surrender of a person located in the territory of another EU Member State (Arts 28-33 Law n. 69/2005). Conversely, the **passive procedure** occurs when the

[1151] Case C-699/21 *E.D.L.* ECLI:EU:C:2023:295, paras 35-36.
[1152] Italian Constitutional Court 28/07/2023, n. 177.

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Italian authorities are requested to surrender someone in the national territory (Arts 5-27 Law n. 69/2005). The passive proceedings are regulated in a more detailed way in the law of transposition, which foresees two separate procedures according to how the Italian authorities receive the EAW.

On the one hand, the ordinary procedure begins when the EAW is directly transmitted to the competent judicial authority, which is tasked with issuing a precautionary measure (Arts 9-10 Law n. 69/2005). On the other hand, the passive procedure is initiated by the police when they receive an alert for the requested person through the Schengen Information System (SIS) (Arts 11-12 Law n. 69/2005) and proceed with her arrest. These procedures will be detailed in the following subsections[1153].

4.2.3.1 Passive procedure

In the passive procedure, the **competent authority** to execute the EAW is the **Court of Appeals** (Art 5 Law n. 69/2005), which falls within the concept of "judicial authority" in Art 6(2) EAW FD. The transmission of the warrant to the competent judicial authorities always takes place through the intermediation of the central authority designated under Art 7(2) EAW FD, that is the Ministry of Justice (Art 9 Law n. 69/2005).

Generally, the territorial competence lies with the Court in whose district the surrendee has her residence or domicile (Art 5(2) Law n. 69/2005). If the competence cannot be determined this way, then the Court of Appeals of Rome will be competent (Art 5(3) Law n. 69/2005). When the EAW concerns more than one person and the competent court cannot be identified based on the residence criterion, the Court of Appeals of Rome will also be competent (Art 5(4) Law n. 69/2005). In the proceedings initiated by the police, the competence lies with the Court of Appeals in whose district the arrest took place (Art 5(5))[1154].

Some competence issues have been raised in proceedings where the EAW concerned a person who was underage (but older than 14) at the time of the facts. In such cases, the jurisprudence clarified that a twofold competence exists for issuing the precautionary measures preventing absconding and deciding on the final surrender of the person. On the one hand, the President of the Court of Appeals remains competent to validate the arrest made by the judicial police and, if requested, to issue the precautionary measure before the

[1153] See subsection 4.2.3.1. for the passive procedure and subsection 4.2.3.2. for the active procedure.
[1154] As confirmed by the case law of the Court of Cassation, see Cass. pen., sec. F, n. 32162 of 07/08/2012.

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surrender. On the other hand, the **juvenile section** of the Court of Appeals is responsible for ascertaining whether the conditions for surrender exist. For this purpose, once the precautionary proceedings are over, the case file must be forwarded by the President of the Court of Appeals to the juvenile section[1155].

Another issue was raised in relation to the competence for adopting a precautionary measure after the validation of the arrest made by the police. In the ordinary procedure, the competence to order a precautionary measure lies with the Court of Appeals, which is composed of three judges (Art 9(4)). Instead, in the police-initiated procedure, the functional competence to validate the arrest belongs to the **President of the Court of Appeals** only (Art 13 Law n. 69/2005). After validation, the President should, if necessary, adopt a precautionary measure to ensure the surrender of the person. The decision should be adopted according to the rules of Arts 9 and 10 Law n. 69/2005 (Art 13(2)).

It was unclear whether the competence to adopt the precautionary measure after arrest validation belonged to the President only, or to the whole Court. The jurisprudence clarified that the President functional competence to validate the arrest did not exclude the possibility for the whole Court to participate in decision to order a precautionary measure[1156].

Art 6 Law n. 69/2005 regulates the essential **contents** of the EAW and reproduces the formulation of Art 8(1)(a-g) EAW FD almost *verbatim*. With regard to the "evidence of an enforceable judgement" (Art 8, lett. c) EAW FD), Art 6(1)(c) Law n. 69/2005 tries to define the expression, by referring to a precautionary measure or any other enforceable judicial decision having the same force.

In 2021, the national legislator introduced additional requirements for when the EAW is aimed to execute a custodial sentence or detention order issued at the end of a trial at which the person did not appear in person (Art 6(1-*bis*))[1157]. In this case, the EAW should also indicate the reasons that, according to Article 4(a) EAW FD, would not hamper the

[1155] Cass. pen., sec. VI, n. 23259 of 19/05/2016.

[1156] Cass. pen., sec. F, n. 35001 of 13/09/2007; see also Cass. Pen., sec. VI, no. 20550 of 05/06/2006; Cass. pen., sec. VI, no. 40614 of 21/11/2006.

[1157] Legislative Decree n. 10 of 2 February 2021, Provisions for the full adaptation of national legislation to the provisions of Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member states, implementing the delegation referred to in Article 6 of Law n. 117 of 4 October 2019 (*Decreto Legislativo 2 Febbraio 2021, n. 10, Disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni della decisione quadro 2002/584/GAI, relativa al mandato d'arresto europeo e alle procedure di consegna tra stati membri, in attuazione delle delega di cui all'articolo 6 della legge 4 ottobre 2019, n. 117, G.U. n. 30 del 05/02/2021*)

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surrender of the person judged ***in absentia***. While Art 6(1-*bis*) Law n. 69/2005 seems to add further content requirements, this does not raise any cooperation issues. In fact, after the introduction of Art 4(a) EAW FD, the EAW template annexed to the EAW FD includes a section on the reasons why the surrender should not be refused in the case of *in absentia* proceedings.[1158] Therefore, the national provision does not introduce a new requirement, but merely aligns the national law to the contents of the annexed template[1159].

The arrest enforced in execution of a European arrest warrant, as provided for in Art 12 EAW FD, must be validated by the competent judicial authority. The corresponding Art 13(1) Law n. 69/2005 establishes that, within forty-eight hours of receipt of the arrest report, the President of the Court of Appeals shall hear the arrested person, in the presence of the defense counsel, and provide him or her with all the information regarding the powers indicated in Art 10(1) of the same law. If it emerges that the arrest has been carried out in error of person or outside the cases provided for by law, the President of the Court of Appeals shall order, by means of a reasoned decree, that the arrested person be set free immediately. Outside this case, the arrest's validation is done by means of an order (Arts 9 and 10 Law n. 69/2005), and a decree is issued for scheduling the unpublic hearing for the decision (Art 10(4) Law n. 69/2005).

The second part of Art 12 EAW FD has not been transposed; therefore, there is no provision in the Italian legislation foreseeing the provisional release of the person, nor any explicit obligation for the competent authority to take measures to prevent the person from absconding if the arrest is not validated. In this sense, Art 12 EAW FD can be considered partially implemented.

Expenses incurred in the Italian territory for the execution of an EAW are borne by Italy. Other costs are borne by the State whose judicial authority issued the EAW (Art 37 Law n. 69/2005, transposing Art 30 EAW FD).

Beyond these common requirements, the passive proceedings differ based on how the EAW is transmitted to the Italian authorities. The following subsections outline the specific

[1158] The form used by the Italian authorities can be found at the following link: https://www.giustizia.it/resources/cms/documents/modelloMAE.pdf - the form mostly corresponds to the annex of EAW FD, with some more detailed information required in case of trial in absentia (let d) of the form).

[1159] Stefano Montaldo, Lorenzo Grossio, 'La riforma della disciplina di recepimento del mandato d'arresto europeo: il nuovo assetto dei limiti all'esecuzione della richiesta di consegna' (2021) 3 Freedom, Security & Justice: European Legal Studies 95, 102-103.

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steps of both procedures and highlight the related issues in terms of fundamental rights and cross-border cooperation.

4.2.3.1.1 Direct transmission to the judicial authorities

The transmission of the warrant to the Italian judicial authorities shall be made through the designated central authority. Art 4 Law n. 69/2005, implementing Art 7 EAW FD, identifies such an authority in the **Minister of Justice**. The Minister of Justice is responsible for the administrative transmission and reception of European arrest warrants and related official correspondence. When the Minister of Justice receives an EAW, it shall forward it without delay to the judicial authority having territorial jurisdiction. At any rate, direct correspondence between judicial authorities may be permitted under conditions of reciprocity. In this case, the competent judicial authority shall immediately inform the Ministry of Justice of the receipt or issue of a European arrest warrant. The warrant, as well as any other document, shall circulate between judicial offices by electronic means (Art 27-*bis* Law n. 69/2005).

Upon reception of the warrant, the President of the competent Court of Appeals proceeds with the urgent acts and gathers the whole Court. The panel of three judges hears the general public prosecutor attached to the Court of Appeals on the matter and, if necessary, applies a precautionary measure by reasoned order. The measure is adopted by paying special attention to the need to prevent that requested person absconds (Art 9(4), Law n. 69/2005). However, this cannot be applied if it can be reasonably believed that there are reasons to refuse the surrender (Art 9(6) Law n. 69/2005).

Importantly, when deciding on the measure, the Court shall take into account some **general rules on precautionary measures** established in the CCP (Art 9(5) Law n. 69/2005). These are the rules contained in Chapter I ("General provisions"), Chapter II ("Coercive measures"), Chapter IV ("Expiration of precautionary measures"), Chapter VIII ("Compensation for unfair detention") of the IV Book CCP. Some rules, however, are excluded in these proceedings. For example, the Court shall not consider Arts 273 and 274(1)(a) and (c) CCP. This means that it shall not verify the existence of serious indications of guilt, as well as the presence of dangers for the authenticity of evidence or the commission of specific offences. Conversely, it shall consider the **real and immediate risk of flight**. Moreover, the Court shall disregard the internal limits to the application of precautionary measures in terms of minimum punishment (Arts 278 and 280 CCP). The

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limits to the application of precautionary detention and house arrests (Art 275(2-*bis*) CCP) are also excluded. Furthermore, some rules on the maximum time limits (Art 297 CCP) expiration of the measures (Art 300(4) CCP) do not apply to the EAW proceedings. In the proceedings involving a **juvenile defendant**, the Court shall not consider some specific rules on precautionary measures laid down in Art 19(1-3) of the Decree of the President of the Republic no. 448/1988[1160]. This means that the need not to interrupt the ongoing education processes, as well as the conditions for the application of prison detention, are disregarded. Also, when a precautionary measure is adopted, the child is not entrusted to the juvenile services.

Pending the decision, the person requested shall be heard by a judicial authority assisted by **another person designated by the requesting court** (Arts 18(1)(a) and 19 EAW FD). Alternatively, the executing authority shall agree to the **temporary transfer** of the requested person (Art 18(1)(b) EAW FD).

Art 15(1) Law n. 69/2005 fully implements these obligations. Where the EAW was issued for the purposes of criminal prosecution, the President of the Court of Appeals can authorize the hearing (Art 15(2) Law n. 69/2005). In this case, it shall inform the Minister of Justice for timely communication to the requesting judicial authority and for any necessary arrangements also regarding the date of the performance of the act. Then, the questioning is carried out by a magistrate of the appeals court designated by the President, with the assistance of any person designated by the requesting authority in accordance with the law of the issuing Member State, and any necessary interpreter. The person should be heard observing the general rules on questioning (Arts 64-65 CCP), and those on the questioning of the person subject to a precautionary measure (Art 294(4) CCP). The public prosecutor and the defense lawyer are immediately informed of the questioning, and the presence of the counsel is mandatory. Minutes are taken of the questioning. Lastly, Art 15(3) Law n. 69/2005 perfectly mirrors Art 18(2) and (3) EAW FD on the arrangements concerning the

[1160] Decree of The President of The Republic, n. 448 of 22/09/1988, "Approval of the provisions on the criminal trial of juvenile defendants" (OJ General Series No. 250 of 24-10-1988 - Ordinary Suppl. n. 92) (*Decreto del Presidente della Repubblica 22 settembre 1988, n. 448, Approvazione delle disposizioni sul processo penale a carico di imputati minorenni, GU n. 250 del 24/10/1988 - Suppl. Ordinario n. 92*). Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:presidente.repubblica:decreto:1988-09-22;448!vig=. On the limitation and deprivation of liberty in proceedings involving minors, also in light of the Directive (EU) 2016/800, see Marianna Biral and others, 'The Italian Implementation of the EU Directives on Procedural Safeguards for Accused Persons in Criminal Proceedings' (2022) Sistema Penale https://www.sistemapenale.it/pdf_contenuti/1669131660_report-italiano-crossjustice.pdf accessed 14 October 2024, 109-110.

conditions and duration of the transfer and on the need for the person to be returned to take part in the hearings relating to the EAW execution procedure

Concerning the modalities of the questioning, it is important to note that the Directive 2843/2023[1161] has amended the EAW FD, the EIO D, and Regulation 1805/2018 to the extent necessary to bring the procedures in line with the Regulation 2844/2024[1162] on the digitalization of judicial cooperation. In particular, Art 18(1)(a) EAW FD was amended to include the possibility of hearing the wanted person by videoconference. The deadline for the transposition has not expired yet at the time of writing[1163], so the national framework can still be considered compliant with EU law.

Differently, where the temporary transfer is ordered, the President of the Court of Appeals shall inform the Ministry of Justice for prompt communication to the requesting judicial authority also for the purposes of the necessary arrangements concerning the conditions and duration of the transfer. Account shall in any case be taken of the need for the person to be returned to be able to take part in the hearings relating to the procedure for the execution of the arrest warrant (Art 15(3) Law n. 69/2005).

According to Art 13(1) EAW FD, the arrested person may express his or her **consent** to surrender and the renunciation of entitlement to the "speciality rule". This must be given before the executing judicial authority and formally recorded. The Italian legislator fully implemented the provision into Art 14(1) and (2) Law n. 69/2005, adding procedural

[1161] Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation, PE/51/2023/REV/1, OJ L, 2023/2843, 27.12.2023.

[1162] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, PE/50/2023/REV/1, OJ L, 2023/2844, 27.12.2023.

[1163] The deadline for the transposition of athis provision is set at Art 12 of Directive 2843/2023, which reads as follows: "Member States shall adopt and publish, within two years of the entry into force of the corresponding implementing act referred to in Article 10(3)(a) of Regulation (EU) 2023/2844 the laws, regulations and administrative provisions necessary to comply with Articles 2 and 11 of this Directive. They shall immediately inform the Commission thereof.

They shall apply those provisions from the first day of the month following the period of two years after the entry into force of the corresponding implementing act referred to in Article 10(3)(a) of Regulation (EU) 2023/2844.

When Member States adopt those provisions, they shall contain a reference to Articles 2 and 11 of this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States".

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formalities in accordance with the national legal system. Specifically, after being duly informed on the possibility of consenting to surrender and of renouncing to the "speciality rule" (according to Art 10(1) Law n. 69/2005), if the requested person consents to its surrender before the Court of Appeals (according to Arts 10(1) and 13(1)), or during the hearing scheduled in accordance with Arts 10(4), and 10(4)-*bis* Law n. 69/2005, the President of the Court of Appeals shall collect the arrested person's declarations (of consent and renunciation) and schedule an unpublic hearing for the decision on the surrender within four days, by means of a decree, which is communicated to the prosecutor within 24 hours (Art 14(4) Law n. 69/2005).

The safeguard concerning the **voluntary nature** of the consent, provided by Art 13(2) EAW FD, is not present in the wording of the Italian implementation; however, the necessary presence of the counsellor, and - where appropriate - of an interpreter could be considered as sufficient guarantees for the voluntariness of the statements of the person whose surrender is requested. On the other hand, the implementation of Art 13(5) EAW FD on the **irrevocability** of consent does not pose any issue, as Art 14(3) Law n. 69/2005 simply states that consent is not revocable at all.

If the consent is declared to be validly given, the Court of Appeals hears the prosecutor, the defense counsel and – if present – the surrendee, and decides on the request for surrender (with the possibility to postpone the decision of maximum three days). The **outcome of the hearing for the decision** is embodied by an order, which is read out by the Court of Appeals and thus notified to the parties (Art 14(5) Law n. 69/2005). If no appeal is lodged against the order, the decision is immediately communicated to the Ministry of Justice, who is responsible for informing the competent issuing authority and, in case of surrender, also the Service for International Police Cooperation (complying with Art 22 EAW FD). If an appeal is opposed to the decision, the Ministry of Justice informs the issuing authority that a delay in adopting the final decision (beyond the ten-days limit after the expression of consent) is occurring.

Outside the case envisaged in Art 14 Law n. 69/2005, *i.e.* when the requested person has not consented to surrender, the Court of Appeals decides (within fifteen days from the arrest) on the request for surrender in an unpublic hearing the prosecutor, the defense counsel, and – if present – the surrendee (Art 17 Law n. 69/2005).

With regard to the right of the person to be surrendered to be heard by the Court of Appeals (in accordance with Art 14 EAW FD), the wording of the Italian transposition is

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however somehow ambiguous. Indeed, Arts 17(1) and 14(4) Law n. 69/2005, while ensuring that such person is represented at the hearing by a lawyer, prescribe that the surrendee be heard "if present".

The issue may be critical in the case of detained persons, whose participation in hearings is subjected to the availability of the detention facilities personnel in accompanying him/her to court. In decision no. 36397 of the 29 August 2023, the Italian Court of Cassation established that the hearing before the Court of Appeals for the decision on the execution of the EAW must be postponed when the surrendering person, having expressed the willingness to be hear, cannot be present for a justifiable reason [1164]. Therefore, reading the legislative provision in light of the jurisprudence, Art 14 EAW FD can be considered fully implemented in the Italian legislation.

When the Court of Appeals deems the information transmitted by the requesting authority is **not sufficient** to decide on the request of surrender (Art 15 EAW FD), it urgently requests the issuing Member State the necessary additional information, as prescribed by Art 16 Law n. 69/2005. The deadline for the decision can be postponed (by a maximum of three days according to Art 14(4), or by ten days according to Art 17(2)-*bis* Law n. 69/2005). The Court of Appeals, *ex officio* or upon request of the parties, may also order any further investigation it deems necessary, respecting the same deadlines (Art 16(2) Law n. 69/2005).

After this procedure, the final decision on surrender may be impacted by several factors. For instance, Art 20 EAW FD concerns the **privileges and immunities** of the person requested and is fully transposed at Art 17(3) Law n. 69/2005 in relation to the passive procedure. This provision ensures that the issuing authority is promptly informed when the person enjoys a privilege or immunity under Italian law, and immediately forwards the request to waive such prerogatives to the competent domestic body.

The surrender of the requested person *may* also be subject to **special guarantees** in the particular cases of Art 5 EAW FD. The Italian legislator decided to recourse to this possibility, by fully implementing the EU provision in Art 19 Law n. 69/2005. Importantly, the provision of the special guarantees is construed differently in the national text, depending on whether the surrender is asked for a person that may be subject to life imprisonment (Art 19 Law n. 69/2005; Art 5(2) EAW FD), or the requested person is a national or resident of the executing State (Art 19(2) Law n. 69/2005; Art 5(3) EAW FD). While in the former case the provision of the guarantees is mandatory, in the latter it is only

[1164] Cass. pen., sec. F, n. 36397 of 29/08/2023.

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optional. Nonetheless, this does not seem to raise issues of compliance with EU law. In fact, Art 5 EAW FD only gives Member States the possibility to ask for special safeguards. Whether Member States decide to make these conditions mandatory or not seems something that falls within their margin of discretion.

As requested by Art 28 EAW FD, transposed in Italian law by Article 25 Law n. 69/2005, the surrender of the person is subject to the condition that the person:

a) is not **surrendered to another Member State** pursuant to an EAW issued for an offence committed prior to the surrender that person, without the consent of the Court of Appeals which ordered the execution of the arrest warrant

b) nor extradited to a third State without consent to **subsequent extradition** granted pursuant to of the international conventions in force for the State and Art 711 CCP (see Art 25 Law n. 69/2005).

The same exceptions provided for by the EAW FD (manifest intention to remain in the state to which the person was surrendered; express consent, given in a 'protected' context; non-application of the principle of speciality) are reported in Law n. 69/2005, specifically in Art 25(3) Law n. 69/2005.

However, an important difference should be noted, with particular reference to consent in the context of surrender or subsequent extradition. Whereas Art 28(2)(b) EAW FD dwells particularly on the need for an informed consent of the requested person and his/her right to legal counsel while expressing it, there is no such reference to the latter right in the implementing law. However, Law n. 69/2005 states that the consent of the Italian Court of Appeals is not necessary when, *inter alia*, the requested person does not benefit from the principle of speciality pursuant to Art 26(2)(f), Law n. 69/2005, on the voluntary renunciation of the principle of speciality. In that context, Italian law states that consent must be given "in forms equivalent to those indicated in Art 14", *i.e.* in the presence of the defence counsel. Therefore, a systematic interpretation leads to the application of these formalities at all times, when the procedure requires the person's consent.

The specific rules on how consent is to be expressed by the Italian executing authority (Art28(3) EAW FD) are correctly implemented by Art 25(2) Law n. 69/2005. However, there is no mention of the cases in which consent to subsequent surrender may be refused (Art 28(3) sub-paragraph d, which refers to Arts 3 and 4 EAW FD). The reference in the Italian legislation must therefore be considered implicit.

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The Supreme Court has affirmed the principle that an Italian judicial authority which, after having taken over a detainee following the issuance of an EAW, subsequently surrenders him/her to another Member State under Art 25, Law n. 69/2005, is required to ascertain whether the necessary consent to that final surrender on the part of the State that ordered the initial surrender comes from the competent judicial body on the basis of the rules specifically set out in Art 28(3) EAW FD and, in the case of a public prosecutor's office, whether the relevant legal system provides for the possibility of appeal[1165].

According to Law n. 69/2005, which correctly implements Art 22 EAW FD, in all cases where a decision on the execution of the EAW is taken by the Italian authorities, the **competent authorities of the issuing Member State must be informed**[1166].

The case of **multiple requests issued by several Member States** against the same person (Art 16 EAW FD) is transposed correctly into Italian law. According to Art 20(1) Law n. 69/2005, in such situation, the Court of Appeals shall decide which arrest warrant shall be executed, taking into account all relevant factors of assessment and, in particular, the seriousness of the offences for which the warrants were issued, the place where the offences were committed and the dates on which the arrest warrants were issued and considering, in this context, whether the warrants were issued in the course of criminal proceedings or for the execution of a penalty or security measure that involves a deprivation of liberty. For the purposes of taking such a decision, the Court of Appeals may order any necessary investigation and seek advice from Eurojust.

A similar procedure applies also in the case of **an overlap between a European Arrest Warrant and an extradition request**, issued by a third State. In this context, the Court of Appeals, after hearing the Minister for Justice, shall decide whether precedence should be given to the arrest warrant or to the extradition request, taking into account the seriousness of the facts, the order in which the requests have been made, and any other element relevant to the decision (Art 20(3) Law n. 69/2005).

Last, with regard to the need for the EAW mechanism not to prejudice to Member States' obligations under the Statute of the **International Criminal Court** (Art 16(4) EAW FD), the Italian law provides for a broad transposition, by referring in more general term to the “international conventions in force for the Italian state” (Art 25(1) Law n. 69/2005).

[1165] Cass. Pen., sec. VI, n. 9582 of 05/03/2020, Occhipinti.
[1166] See, in particular, Arts 14(5); 22(5-*bis*), last sentence; 17(7); 22(5); 22-*bis*(1) Law n. 69/2005.

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More problematic is instead the transposition of Art 21 EAW FD, which concerns the situation of competing international obligations, ruling that no prejudice shall be caused by the EAW mechanism to the obligations of the executing Member State where the requested person has been extradited to that Member State from a third State and where that person is protected by provisions of the arrangement under which he or she was extradited concerning speciality. In this case, Art 38(1-2) Law n. 69/2005 does recognize the need not to jeopardize international obligations in light of the speciality principle. It also prescribed that the Minister of Justice shall request in a timely manner the State from which the wanted person has been extradited to consent to the surrender to the issuing Member State, and that the time limits of the procedure shall run from the day on which the principle of speciality ceases to apply. However, the Italian Law does not provide explicitly that, in this context, pending the decision of the State from which the requested person was extradited, the executing Member State will ensure that the material conditions necessary for effective surrender remain fulfilled.

As regards the **transit** through Italian territory of persons subject to EAW, paragraphs 1 and 2 of Art 25 EAW FD are slavishly transposed by Art 27 Law n. 69/2005, paragraphs 2 and 3. Accordingly, the Minister of Justice may refuse the request when:

(a) he or she has not received information regarding the identity and nationality of the person subject to the European arrest warrant, the existence of an EAW, the nature and legal classification of the offence and the description of the circumstances of the offence, including the date and place of commission;

b) the requested person is an Italian national or a national of another Member State of the European Union lawfully and effectively residing in Italy for at least five years and transit is requested for the purpose of executing a custodial sentence or detention order.

It should be noted only that the position of the Italian citizen is equated - consistently with what is admitted by the EAW FD itself - to that of the person who has been lawfully and effectively resident in Italy for at least five years.

However, there is no mention of the form of the transit request (Art 25(3) EAW FD), which is in line with the choice of the Italian legislator not to give any indication as to how the EAW should be transmitted. So, no national provision explicitly states the need for Italian authorities to notify the authorities of the State requesting the transit. The fulfilment of this formality is therefore left to good practice.

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Also, there is no trace in the implementing law of rules equivalent to paragraphs 4 and 5 of Art 25 EAW FD. These establish, respectively, the non-applicability of the decision to **'mere transit**' by air (subject to reporting requirements in the case of an unscheduled stopover) and a mutatis mutandis clause for the transit of the extradited person to a Member State. According to the Parliamentary report attached to the legislative decree n. 10/2021 (which amends law n. 69/2005)[1167], the non-implementation would be due to the applicability of the general principles of criminal procedural law. In relation to mere transit, indeed, the general reporting requirements under Art 700 CCP[1168] seem to largely overlap with those required by the EAW FD. As for the lack of a provision that makes EAW FD rules applicable, mutatis mutandis, to transit, it seems correct to speak of non-implementation in Italian law. The expansion of the scope of Art 712 CCP (concerning «Transit» in the extradition procedure), which follows this absence, essentially nullifies the advantages brought by mutual recognition. Nor does it appear that the obligation of interpretation in conformity with EU law[1169] can correct this antinomy.

In line with Art 23 EAW FD, the requested person shall be surrendered to the issuing Member State as soon as possible and, in any case, within ten days of the final judgement executing the EAW or of the final order to surrender (Art 23(1) Law n. 69/2005). When reasons of force majeure occur preventing the delivery within the time limit, the execution of the order must be suspended, and the executing (or issuing) authority must be informed, through a Minister of Justice's communication. After the cessation of *force majeure*, of which the Minister of Justice shall be immediately informed, the issuing and executing authorities must agree on a new surrender date and the 10-days limit starts to run again (Art 23(2) and (4) Law n. 69/2005). With no discrepancies, Articles 23(5) of the European and Italian texts establish that, after expiry of the deadline, the pre-trial detention shall cease to have effect, and the person must be released. Eventually, upon surrender, the

[1167] Camera dei Deputati, 'Schema di decreto legislativo recante disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni della decisione quadro 2002/584/GAI, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri (201)', 49 (Prot: 2020/0001361/TN, 02 November 2020)<https://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0201_F001.pdf&leg=XVIII> accessed 14 October 2024.

[1168] Art 700 CCP is applicable because it is implicitly recalled by Art 712(4) CCP: "Authorization is not required when transit takes place by air and a stopover in the territory of the State is not foreseen. However, if the stopover occurs, the provisions of the previous paragraphs and those of section II of this chapter apply, insofar as they are compatible".

[1169] C-398/22 *RQ* ECLI:EU:C:2023:1031, paras 47-48.

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Court of Appeals shall transmit to the issuing authority the information necessary to allow the deduction of the period of custody imposed for the European arrest warrant from the total duration of detention resulting from the conviction or for the determination of the maximum duration of pre-trial detention (Art 23(6) Law n. 69/2005 and Art 26(2) EAW FD).

Clearly, the implementation of Art 23 EAW FD into Art 23 Law n. 69/2005 is quite faithful and does not pose any issue of inconsistency. Different is the case of Art 23(4) EAW FD, which has been implemented only in part. In fact, the national provision on **humanitarian grounds and danger for the life and health** of the person (Art 23(3) Law n. 69/2005) does not specifically mention that the execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist, and that the executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date.

In the decision ordering the execution of the European arrest warrant, the Court of Appeals may also **postpone** the surrender of the person so that him/her can be subject to criminal proceeding in Italy or serve the sentence to which s/he has been sentenced for an offence other than the offence covered by the arrest warrant (Art 24(1) Law n. 69/2005). In that case, the Court of Appeals may, upon request and agreement with the issuing authority, allow the temporary transfer of the requested person to the issuing Member State (Art 24(2) Law n. 69/2005). This procedure perfectly matches the one established by Art 24 EAW FD, except for the fact that the Italian legislation does not explicitly provide that the agreement shall be made in writing and that the conditions shall be binding on all the authorities in the issuing Member State.

Concerning the **speciality rule**, Art 27(2), (3), and (4) EAW FD has been transposed into the Italian law almost *verbatim*. Therefore, the eventualities of prosecution for offences different from those in the European arrest warrant, the related exceptions and procedures are accurately implemented by Art 26(1), (2), and (3) Law n. 69/2005. The sole discrepancy affects the very last sentence of Art 27(4) EAW FD, concerning the situations mentioned in Art 5, for which the issuing Member State must give the guarantees provided for therein. Those guarantees, that the transposition law enlists in Art 19, are not explicitly referred to in Art 26(3) Law n. 69/2005. In fact, this provision allows to prosecute or deprive the surrendered person of liberty for facts other than those grounding the European arrest warrant only when the offence permits the surrender “under the terms of the Framework

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Decision". This clause might include the guarantees of Art 5 but remains too generic to ensure that the safeguards are effectively implemented in the procedure.

4.2.3.1.2 Transmission through the SIS system

Within forty-eight hours of receipt of the arrest report, the President of the Court of Appeals (or a magistrate of the court delegated by him/her) hears the arrested person in the presence of a retained or court-appointed lawyer, and if necessary, of an interpreter (Art 13 (1) Law n. 69/2005).

If it is evident that the arrest has been carried out in error of person or outside the cases provided for by law, the President of the Court of Appeals shall order by reasoned decree that the arrested person be set free immediately. The judge applies no precautionary measure and sets by decree a hearing for the final decision on surrender within fifteen days. The decree is communicated to the general public prosecution at the Court of Appeals and served to the requested person and his/her defence lawyer at least five days before the hearing (Art 13(2) Law n. 69/2005).

Conversely, if the arrest is validated, the Court proceeds with issuing a precautionary measure according to the rules laid down for the ordinary procedure (Art 13(2), Arts 9 and 10(4) Law n. 69/2005). This means that the Court considers some rules on precautionary measures established in the CCP, as explained above[1170], and does not apply the measure when it believes that there might be reasons to refuse the surrender. The Court sets the hearing for the final decision according to the same rules foreseen for the ordinary procedure. Pending the final decision, the person requested shall also be heard by a judicial authority assisted by **another person designated by the requesting court** according to Art 15 Law n. 69/2005, as outlined above[1171].

The jurisprudence has cleared up some **procedural aspects** concerning the validation hearing. For example, it pointed out that the time limit of forty-eight hours laid down for validating the arrest also extends to the adoption of the precautionary measure, meaning that the two decisions shall be made within the same timeframe[1172]. Also, the case law has clarified the scope of the control exercised by the judge when validating the arrest. Specifically, The Court of Cassation explained that the validation of an arrest of a person

[1170] See subsection 4.2.3.1.1.
[1171] See subsection 4.2.3.1.1.
[1172] Cass. pen., sec. VI, n. 27357 of 19/06/2013.

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whose data has been entered in the SIS is limited to a **paper verification** that does not affect the outcome of the surrender proceedings[1173]. The decision on the arrest validation does neither affect the possibility that a precautionary measure is more appropriate to the needs of the individual case and, in any case, suitable to ensure the surrender of the person to the issuing State.

4.2.3.2 Active procedure

In the active procedure, the competence to issue an EAW belongs to different authorities, depending on the phase which the internal proceedings are at. Article 28 Law n. 69/2005 provides that the warrant is issued:

- when the proceedings are still ongoing, by the **judge** who adopted the precautionary measure of pre-trial detention or house arrest;
- after the judgement becomes final, the by the **public prosecutor** who is established at the competent sentence enforcement court (Art 665 CCP), and has issued the enforcement injunction (Art 656 CCP), when the custodial penalty is at least of one year of imprisonment and there is no suspension of the enforcement[1174];
- when a security measure is applied[1175], by the **public prosecutor** competent under Article 658 CCP.

In this case too, the **Minister of Justice** is designed as central authority responsible for assisting the judicial authorities in the administrative tasks of forwarding and receiving the EAWs. Specifically, in the active procedure, the issuing authority forwards the warrant to

[1173] Cass. pen., sec. VI, n. 5547 of 19/01/2016.

[1174] Under Art 665(5) CCP, there is suspension of the enforcement of a custodial penalty when the "imprisonment does not exceed three or four years in the cases provided for in Art 47-*ter*, paragraph 1, of Law n. 354 of 26 July 1975, or six years in the cases referred to in Arts 90 and 94 of the Consolidated Text approved by Decree n. 309 of the President of the Republic of 9 October 1990, as amended".

[1175] In the Italian system, security measures (Art 199 of the Criminal Code, CC) are aimed at keeping the person away from the opportunity of committing further crimes. They are applied to offenders, whether or not they can be charged, after ascertaining their social dangerousness, in order to prevent the danger of reoffending. They differ from punishment because they do not have a retributive function but only and exclusively a function of re-educating the offender. Therefore, they are also applied to non-chargeable offenders, and their application presupposes the concrete ascertainment of the social dangerousness of the subject. For a general overview of security measures in the Italian system, see Giorgio Marinucci, Emilio Dolcini, Gian Luigi Gatta, *Manuale di diritto penale* (12th edn, Giuffrè 2023), 897 ff.

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the Minister, which provides for its **translation** and subsequent transmission to the executing authorities (Art 28(2) Law n. 69/2005). The Service for International Police Cooperation shall be notified immediately of the issuing of the warrant.

According to Art 29 Law n. 69/2005, whichever authority is responsible, it must make a choice depending on whether the accused or convicted person is resident, domiciled or staying in a Member State and whether his/her whereabouts are known (which is the only decisive factor for the EAW FD see Art 9(1)). If this is the case, the issuing authority must issue an EAW.

If, on the other hand, the place of residence, domicile or abode is not known, the authority must proceed to enter an alert in the SIS, pursuant to Article 95 of the Convention of 19 June 1990. As prescribed by the Framework Decision, the alert in the SIS is equivalent to an EAW accompanied by the information provided for in Art 30 Law n. 69/2005 (correctly transposing Art 8 EAW FD). According to the Italian *Vademecum* for issuing an EAW, the issuance is commonly preceded or accompanied by the distribution of a search for the individual's arrest through international cooperation services: S.I.re.N.E. in the Schengen area and Interpol for the rest of the world. These procedures are vital not only when the person's location is unknown but also in cases of uncertainty or when there's a risk of the person changing their address [1176]. Lastly, if the requested person benefits from an **immunity or privilege** recognized by a State other than the executing State or by an international organisation, the judicial authority shall forward the request for revocation of the privilege or for exclusion of the immunity (as foreseen by Art 20(2) EAW FD, fully transposed by Art 29(3) Law n. 69/2005).

In any case, the Court of Cassation has established that the EAW issued by the Italian judicial authority in the active procedure cannot be challenged in Italy: any vices of the act will have to be raised according to the rules, forms and times of the executing authority[1177].

There is no description in the Italian transposition law of the procedure provided for in the first 4 paragraphs of Art 10 EAW FD, which describes the contact with the European Judicial Network, the use of the Interpol system and the means of transmission of the EAW. However, case law, soft law and practice seem to make up for this lack of explicit implementation[1178]:

[1176] Ministero della Giustizia (n. 35), 9.
[1177] Cass. Pen., sec. un., n. 30769 of 21/06/2012.
[1178] This is the reason why the Italian legislator did not specifically implement these paragraphs, according to the Parliamentary Report attached to the legislative decree n. 10 of 2021 (which amends law n. 69/2005)

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As regards the use of the Interpol system, the aforementioned *Vademecum* encourages the indiscriminate use of this tool - regardless of the condition that it is not possible to use the SIS, as instead established in the EAW FD (see Art 10(3) - in order to ensure the widest possible scope for searches aimed at arrest and surrender[1179]).

As regards the forms of transmission, the Italian Court of Cassation ruled that the transmission of the original EAW or of an authenticated copy thereof is not required: the EAW can, in fact, be transmitted by any secure means capable of producing a written record [1180], provided that it allows the executing authority to verify its origin and authenticity (see Art 10(4) EAW FD) [1181]. We can therefore speak of *de facto* implementation.

Arts 34-36 Law n. 69/2005 deal with the initiative of the issuing authority to request, together with the surrender of the person, also the handing over of property that may be required as evidence or has been acquired by the requested person as a result of the offence. According to the Italian law, that correctly transposes Arti 29 EAW FD, the seized property shall be surrendered even if the European arrest warrant cannot be executed due to the death or escape of the requested person. At the request of the judicial authority that issued the European arrest warrant, or ex officio, the Court of Appeals may order the seizure of property necessary for evidentiary purposes or liable to confiscation insofar as they constitute the proceeds, profit or price of the offence which are available to the requested person. The handing over of the seized items to the requesting judicial authority shall take place in accordance with the modalities and agreements agreed with it through the Minister of Justice and in application of the rules concerning seizure established by the code of criminal procedure[1182].

When the surrender is requested for the purpose of trial, the Court of Appeals shall provide that the surrender shall remain subject to the condition that the property be returned once the procedural exigencies have been met. On the other hand, the Court shall

[1179] Ministero della Giustizia (n. 35), para 9.4. On the procedure for notyfing the INTERPOL, see also the Memorandum of 24 June 2005 of the Italian Directorate General for criminal justice.
[1180] It should also be noted that Directive 2843/2023 amended the EAW Framework Decision introducing Art 8-*bis*: communications between competent authorities of the Member states will take place by means of a 'secure, efficient and reliable decentralised computer system' and no longer by 'any means capable of producing a written record'.
[1181] The principle has been reaffirmed several times with reference to passive proceedings (see, among others, Cass. Pen., sec. 6, n. 16542 of 8/5/2006, Cusini). However, according to the Ministero della Giustizia (n.35), this would also apply for the active procedure (see para. 8.2).
[1182] See Arts 253, 254, 255, 256, 258, 259, 260(1) and (2), and 719 CCP.

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order the seizure while safeguarding any rights acquired on the property by the Italian State or by third parties.

Art 32 Law n. 69/2005 fully implements the **speciality rule** in the active procedure. The provision also refers to the derogations foreseen in Art 26 of the same law, discussed above, which mirror the exceptions set out in Article 27 EAW FD.

The amendment to the transposition law operated by the Legislative Decree n. 10 of 2 February 2021, has implemented the provisions on surrender or subsequent extradition of Art 28 EAW FD also in active procedures.

Accordingly, where, after having received the person it requested as issuing Member State, Italy is requested to surrender the same person to another Member State, it has to seek consent from the state of the executing authority (Art 31-*bis* Law n. 69/2005). The cases in which consent is not required are indicated by a mere reference to the article on the principle of speciality, instead of a slavish transposition of Art 28(2) EAW FD. Moreover, there is no reference to the transmission of the request for consent; nor is there a specific reference to the particular cases mentioned in Art 5 EAW FD, for which specific guarantees are required (Art 28(3) EAW FD, last line).

For what concerns the **effects of the surrender**, Art 33 Law n. 69/2005 (transposing Art 26 EAW FD) prescribes that the period of pre-trial detention suffered abroad in the execution of the EAW shall be counted in deduction of the total period of detention to be served in Italy[1183].

4.2.3.3 Issues for the rights of the suspect, accused and other parties

Art 11 EAW FD, on the **rights of the requested person**, is implemented by Arts 10(1), 9(5-*bis*), and 12(1) Law n. 69/2005.

Arts 10(1) and 9(5-*bis*) concern the passive ordinary procedure. Art 9(5-*bis*) provides that when the judicial police proceed with executing the precautionary measure ordered by the Court of Appeals, they shall inform the person concerned that s/he may appoint a lawyer in the issuing State. The President of the Court of Appeals shall notify the competent authority of the issuing State of the appointment or willingness of the person concerned to have legal counsel in such State.

[1183] Thanks to the intervention of the Italian Constitutional Court, that declared the unconstitutionality of Art 33, insofar as it did not provide that pre-trial detention suffered abroad in execution of the warrant European arrest warrant is also taken into account for the purposes of the duration of the phase periods provided for in Article 303(1), (2) and (3) CCP, see Const. Court, n. 143 of 07/05/2008.

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Art 10(1) Law n. 69/2005 refers to the subsequent hearing of the person arrested. It provides that, within five days of the execution of the precautionary measure, the President of the Court of Appeals (or the delegated magistrate) shall proceed to hear the person subject to the measure, informing him/her, in a language known to him/her, of the content of the European arrest warrant and of the procedure for its execution, as well as the right to consent to his surrender to the requesting judicial authority and to waive the benefit of not being prosecuted for other offences committed prior to his surrender.

Instead, Art 12(1) Law n. 69/2005 concerns the passive procedure initiated by the police. In this case, the judicial police officer who made the arrest shall inform the person, in a language s/he understands, of the warrant issued and its contents, of the possibility of consenting to his/her surrender to the issuing judicial authority and shall warn him/her of the right to appoint a defence counsel and the right to be assisted by an interpreter. If the arrested person does not appoint a defence counsel, the judicial police shall immediately proceed to identify a public defender pursuant to Art 97 of the CCP[1184]. Art 12(1-*bis*) also refers to Art 9(5-*bis*), meaning that the arresting officer must inform the arrestee of his/her right to appoint a lawyer in the issuing State.

Art 12(2-3) Law n. 69/2005 includes some **guarantees making sure that the right to legal assistance is effectively implemented** in the proceedings. On the one hand, paragraph 2 foresees that the judicial police shall give timely notice of the arrest to the defence counsel. On the other hand, paragraph 3 indicates that the arrest report shall record, under penalty of nullity, the fulfilments indicated in subparagraphs 1 and 2. This provision does not include a reference to paragraph 1-*bis* as well, which concerns the right of the arrestee to appoint a lawyer in the issuing State. This obligation was indeed introduced in the transposition law at a later moment, so the gap can be explained as a lack of text coordination between provisions, although the Court of Cassation has argued otherwise.[1185] At any rate, this does not raise issues for the rights of the requested person, considering

[1184] For a brief overview of the right to access a lawyer in the Italian system, and the mechanisms provided by Article 97 CCP, see Biral and others (n. 47), 57-58. From the point of view of sanctions, there are three types of nullities in the Italian criminal procedural system: absolute nullities (*nullità assolute*), intermediate nullities (*nullità intermedie*), and relative nullities (*nullità relative*). Relative nullities have the least serious consequences on the procedure, as they can be raised only by the parties (and not *ex officio* by the judge), within the strict time limits of Art 181 CCP, and the with the general limitations of Arts 182-183 CCP.

[1185] cf Cass. pen., sec. VI, n. 52013 of 16/10/2018, which has argued that the lack of any sanctions for the failure to inform the arrested person of the right to appoint a lawyer in the issuing State corresponds to an intentional choice of the legislator, considering that no sanctions are also provided for the same failure in the ordinary procedure (Art 9(5-*bis*), Law n. 69/2005).

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that the judge must reiterate the notices foreseen in Art 10(1) in the subsequent hearing, as explained below.

Nonetheless, some procedural issues concerning the right to information, the right to be assisted by a lawyer, and the right to translation have arisen in the Italian EAW procedure. These aspects will be examined in the following subsections.

4.2.3.3.1 The right to information

Jurisprudence has interpreted provisions on the right to information in a rather anti-formalistic manner. Concerning the **warnings given by the police at the time of the arrest**, the Court of Cassation clarified that no nullity arises where notice of the right to appoint a defence counsel in the issuing State is given to the person concerned by the judge at the time of validation of the arrest, rather than by the judicial police immediately upon arrest[1186]. This interpretation was then integrated into the text of the transposition law. Art 13(1) Law n. 69/2005 provides now that the judge presiding the arrest validation hearing must give to the requested person all the information on procedural rights foreseen in Art 10(1).

The fact that all the necessary information about procedural rights is not given to the requested person at the moment of his/her first contact with the executing authorities (the police) does not raise any particular compliance issues. Art 11 EAW FD foresees indeed that such information is provided to the person concerned "in accordance with its national law" and does not set specific requirements or limits to the provision of such information.

Therefore, any implementation gap should be analyzed in terms of the effectiveness of information rights: if the notice is given too late in the procedure, the requested person might be placed in a position to effectively exercise his/her right to legal assistance before the issuing and executing authorities. This problem does not seem to arise in the Italian system. The information about the rights available in the EAW procedure is given, at the latest within five days of the execution of the precautionary measure in the ordinary

[1186] Cass. pen., sec. VI, no. 52013 of 16/10/2018; Cass. pen., sec. VI, n. 51289 of 6/11/2017. In such cases, the Court considers the supplementary notices given by the judge at the validation hearing to be sufficient, according to the general rules of Arts 294(1-*bis*) and 391(2) CCP Previously, however, the case law had established that the absence of the notice gave rise to an intermediate nullity, that had to be flagged by the defence at the latest at the hearing to validate the arrest, see Cass. pen., sec. VI, n. 51289 of 06/11/2017; Cass. pen., sec. VI, n. 24301 of 9/05/2017.

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proceedings, or within forty-eight hours of the arrest in the police-initiated procedure. Such timeframes appear short enough to ensure the fairness of the proceedings.

4.2.3.3.2 The right to be assisted by a lawyer

The case law has shown some flexibility also in the interpretation of the procedural rights granted at the hearing for the validation of the arrest. With regard to the **right to be assisted by a retained lawyer**, the Court of Cassation established that there is no provision to observe a period of notice for notifying the defence counsel of the validation hearing[1187]. The need to facilitate the participation of the defence counsel must be balanced against the urgency of the procedure, so that no nullity can be found where the defence counsel is not in a position to participate in the hearing or, at least, to appoint a substitute.

This jurisprudence does not raise particular issues when the requested person was informed of his/her right to appoint a retained lawyer at the time of the arrest and exercised such right before the validation hearing. Nonetheless, this approach may raise problems when the person concerned was not placed, from the beginning, in a position to exercise this prerogative.

As seen above, the Court of Cassation established indeed that failure to indicate the fulfilment of the information requirements set out in Art 12(1-2) constitutes a case of relative nullity, the effects of which may be remedied according to the general rules set out in Art 183 CCP[1188]. Importantly, however, such delayed notices do not compensate for the missed opportunity of the person requested to be assisted by a lawyer of *his/her choice*, when information about this right was not provided at the time of arrest.

Generally, indeed, domestic courts tend to interpret the right to be assisted by a lawyer to high standard. Suspects or accused persons have a right to be assisted not by *any* lawyer, but by the lawyer of their choice[1189]. Specifically, in a decision not pertaining to the EAW, the Court of Cassation acknowledged that the failure to give notice of the hearing to the retained lawyer promptly appointed by the person concerned constitutes an absolute

[1187] Cass. pen., sec. VI, n. 7025 of 08/01/2021; Cass. pen., sec. VI, n. 17918 of 29/04/2009. This applies also where the court-appointed lawyer was not notified of the validation hearing, cf. Cass. Pen. sec. fer., n. 34958 of 04/09/2008.
[1188] Cass. pen., sec. VI, n. 48127 of 29/11/2013.
[1189] Marianna Biral and others (n. 47), 57-58.

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nullity when its presence is mandatory, although the notification was made to another lawyer and that a substitute was present at the hearing[1190].

Following this line of reasoning, one could wonder whether an absolute nullity occurs at the validation hearing where the requested person was not informed of the right to be assisted by a retained lawyer. This approach would contradict the position taken by the Court of Cassation in the specific context of the EAW procedure, but it is unsure whether such issue would raise actual compliance problems with the Framework Decision. In this case as well, indeed, Art 11(2) establishes the right to be assisted by a legal counsel "in accordance with the national law of the executing Member State". The EU provision does not set any specific standards in terms of being assisted by a retained or court-appointed lawyer. Given this, the impossibility of being assisted by a retained lawyer at the validation hearing does not raise compliance issues. Nonetheless, from a purely domestic perspective, more coherence on the contents of the right to be assisted by a lawyer would be welcomed.

4.2.3.3.3 The right to interpretation and translation

There are reasons to argue that the right to translation of essential documents is **not fully implemented** in the national system. Art 11 EAW FD establishes that the person concerned has a right to be informed of the European arrest warrant and of its contents and should be assisted by an interpreter. While such prerogatives should be ensured "in accordance with the national law of the executing Member State", the standards of protection granted in the national system should also be aligned with those foreseen in the Directive 2010/64/EU[1191].

Art 3(6) of this Directive provides indeed that "[i]n proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document".

[1190] Cass. pen., sec. V, n. 181/2021. Art 13 of the Framework Decision does not specify whether the presence of the lawyer at the validation hearing is necessary, with the consequence that his/her absence results in an absolute nullity. However, the case law has already admitted to the possibility of extending the general rules of the Italian CCP on arrest validation hearings (Art 391) to the police-initiated procedure (Art 13). According to this line of reasoning, the presence of the lawyer at the validation hearing in the EAW should be considered mandatory.

[1191] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings OJ L 280, 26.10.2010, p. 1–7.

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Therefore, *as a rule*, the person arrested for the execution of a EAW should be handed a written translation of the warrant. Such prerogative is aimed at ensuring the effectiveness of the participation to the proceedings of the defence: it is certainly better for the person requested to have a written document, which can be later analysed with the interpreter and the defence counsel[1192].

When the transposition law for the Directive was adopted[1193], the Italian legislator did not intervene on Art 12 Law n. 69/2005, which enshrines the rights of the person arrested for the execution of an EAW. The current version of the text **only foresees an oral summary** of the contents of the warrant. This situation is seen as an exception according to the Directive, while the written translation of the document should be the rule. Given this, the implementation of the right to translation in the EAW procedure cannot be considered fully satisfactory[1194].

4.2.4 Cooperation issues between executing and issuing authorities

The implementation of the EAW in Italy does not raise particular issues in terms of cooperation. Nonetheless, some minor problems were identified regarding the obligation to prevent the surrendee from abscomding and – to some extent – the transposition of the speciality rule, as described below.

Art 12 EAW FD, which concerns the situation where the requested person is **kept in detention pending the decision on surrender**, is implemented by several provisions of the transposition law. Generally, when adopting a precautionary measure, the Court of Appeals shall pay special attention to the need to prevent that the requested person absconds (Art 9(4) Law n. 69/2005). A measure of pre-trial detention or house arrest can be deemed necessary, but the Court can also apply less invasive measures like a prohibition to leave

[1192] Marta Bargis, 'Il mandato di arresto europeo dalla decisione quadro del 2002 alle odierne prospettive' (2015) 4 Dir Pen Cont 61, 65.

[1193] The Directive was transposed with the Legislative Decree n. 32 of 4 March 2014 (*Attuazione della direttiva 2010/64/UE sul diritto all'interpretazione e alla traduzione nei procedimenti penali. (14G00041) (GU Serie Generale n.64 del 18-03-2014*).

[1194] Marta Bargis (n 79), 66. The case law has not provided a useful response to this gap. The Court of Cassation acknowledges that the EAW constitutes an essential act of the proceedings, which the accused has a right to have translated according to Art 143 CCP. However, it recognises this prerogative *only if* the requested person presents a reasoned request, while the Directive provides for this right to be implemented automatically. See Cass. pen., sec. VI, n. 50814 of 24/11/2016.

the country (Art 281 CCP), or an obligation to appear before the criminal police (Art 282 CCP).

While this provision is considered fully implemented, issues may arise when the Court does **not apply a precautionary measure**. In this case, neither Art 10(4-*bis*) Law n. 69/2005 (relating to the ordinary procedure), nor Art 13(2) (relating to the police-initiated procedure) foresee explicit obligations for the competent authority to take *other* measures to prevent the person from absconding. For example, when the Court believes that there are reasons to refuse the surrender, it cannot apply *any* coercive measure. Indeed, these include not only pre-trial detention and house arrests, but also the other less invasive measures mentioned above (Arts 281-282 CCP). This prohibition then hampers the judge from taking any measure, even different from detention, to ensure the surrender of the person concerned. That is why Art 12 EAW FD cannot be considered fully implemented in the Italian system.

The **speciality rule** is implemented at Art 26 Law n. 69/2005. Italy has not made the notification foreseen at Article 27(1) EAW FD[1195]. Therefore, in the EAW proceedings involving Italy, it **cannot be presumed** that the requested person has given consent for the prosecution, sentencing or detention of offences other than those listed in the warrant and committed prior to the surrender. Indeed, Art 26(1) provides that surrender is always subject to the condition that the person requested is not prosecuted for such other offences. However, this principle does not apply in the situations listed at Art 26(2)(a-f) and (3), which fully mirror the derogations foreseen in the Framework Decision (Art 27(3)(a-g) EAW FD).

Some issues may arise where the other offences for which prosecution is demanded could require the **special guarantees** enshrined in Art 5 EAW FD[1196]. In fact, Art 26 Law n. 69/2005 does not include any reference to the same text, which implements the obligation to provide such safeguards in the national system. Also, Art 26(3) (last sentence) Law n. 69/2005 clarifies that consent may not be given only where one of the grounds of refusal of Arts 18, 18-*bis*, and 18-*ter* Law n. 69/2005 applies, excluding that the lack of special guarantees can serve as grounds to reject the prosecution of other offences.

[1195] European Commission, Commission Notice — Handbook on how to issue and execute a European arrest warrant (2017/C 335/01) 2017, p. 18.
[1196] On the special guarantees of Article 5 EAW FD, see subsection 4.2.3.1.1.

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While this provision broadens the possibilities of cooperation, it affects negatively the rights of the requested person, who may be exposed to additional prosecution as a result of the execution of an EAW. Also, a combined reading of the relevant provisions of the Framework Decision does not allow us to conclude that the provision of special guarantees of Art 5 is mandatory when the surrendee waives the speciality rule. On the one hand, Art 27(4) (last sentence) foresees that "[f]or the situations mentioned in Art 5 the issuing Member State *must* give the guarantees provided therein" [emphasis added]. The formulation suggests that the provision of such guarantees is mandatory in the cases of prosecution of other offences. On the other hand, however, the formulation of Art 5 itself suggests that such guarantees are only optional in the situations referred to in the same provision[1197].

It is unclear then if the provision of the special safeguards is always mandatory in the cases of prosecution of other offences, or if Member States are only given the possibility to ask for such guarantees but remain free not to do so. A literal reading of Art 27(4)(last sentence) EAW FD seems to suggest that the provision of the particular guarantees is mandatory when it comes to revoking the speciality rule. Also, from a systematic point of view, a higher standard of protection may be justified when the requested person is subject to prosecution or detention for other offences than those that legitimized the surrender, meaning that the guarantees in Art 5 EAW FD shall be considered mandatory in the special cases of Art 27 EAW FD. If this interpretation is correct, then Art 26(3)(last sentence) Law n. 69/2005 cannot be considered fully implemented, since it allows not to give consent to further prosecution only in the cases of Arts 18, 18-*bis*, 18-*ter*, without mentioning Art 19 Law n. 69/2005 on the special guarantees.

4.2.5 Remedies

Against the surrender decision, the surrendering person has the right to appeal by Cassation, only on the grounds of violation of law (Art 606(1)(a)-(b)-(c) CCP), within five days of having acquired knowledge of the ruling. The Court of Cassation shall decide within ten days of receipt of the file, which shall occur the next day of the appeal's filing at the latest (Art 22, Law n. 69/2005). Pending the decision, the surrender is suspended. The same

[1197] In fact, Art 5(1) EAW FD reads that "[t]he execution of the European arrest warrant by the executing authority *may*, by the law of the executing Member State, be subject to the following conditions (…)"

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remedy is provided against an order consenting to surrender upon the person's consent, within a three-day period (Art 22(5-*bis*)). Despite having a suspensive effect, this remedy may not be considered "effective" by European standards, for the reasons outlined below.

First, the Court of Cassation does not have the power to intervene on the merits of the case, as required by the case law of the European Court of Human Rights (hereinafter ECtHR)[1198]. This shortcoming could be critical when the surrender poses a risk of inhuman and degrading treatment: in this regard, national case law has specified that such grievances can be raised before the Cassation, for the first time, only when the risk of violation of fundamental rights is notorious or recently established by other judgments of the Court[1199]. In this sense, the cassation appeal on the grounds of risk of inhuman and degrading treatment seems "mediated" *de facto*, that is, effective only in relation to the existence of other decisions on the merits of the possible fundamental rights violation.

Second, the remedy cannot always be considered effective for the defendant that does not understand Italian. In fact, the Supreme Court has established that there is no right to the translation of the surrender judgment and that the person requested may be assisted by a trusted interpreter, possibly paid by legal aid; in this case, a postponement of the deadline for filing the appeal is also possible to allow for translation[1200]. The possibility of access to legal aid is not, however, always assured in EAW proceedings. Indeed, while in the ordinary procedure the arrested person receives all the information on procedural rights provided for in domestic law, including information on the right to legal aid, this is not the case in the (more frequent) procedure at the initiative of the judicial police[1201]. Without this support, the right to the translation of the judgement – and consequently, to challenge it – may be jeopardized.

4.3 The implementation of Directive 2014/41

The European Investigation Order, introduced with the Directive 2014/41/UE of the 3 April 2014 (hereinafter EIO D), was transposed into the Italian legal framework by means of

[1198] cf *Glas Nadezhda Eood and Elenkov v. Bulgaria* App no 14134/02 (ECtHR, 11 October 2007), para 69.
[1199] Cass. pen., sec. VI, n. 10119 of 7/03/2024.
[1200] Cass. pen., sec. VI, n. 17535 of 30/04/2024.
[1201] In fact, Art 9(5), concerning the ordinary procedure, includes a general reference to the rules relating to precautionary measures, among which there is Art 293 CCP, providing for all the information rights to be given to the person arrested at the moment of the execution of a precautionary measure. The same reference is not provided, however, in Art 12, concerning the arrest made at the initiative of the judicial police.

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Legislative Decree n. 108 of the 21 June 2017 (hereinafter Legislative Decree n. 108/2017). So far, Legislative Decree n. 108/2017 has been affected by a sole reform: Art 2-*bis*(6) of Legislative Decree n. 105 of the 10 August 2023[1202] amended to a small extent Art 4(1) Legislative Decree n. 108/2017, broadening the circumstances requiring the involvement and coordination with the Anti-terrorism and Anti-mafia Prosecutor in the execution of a EIO.

As it will be illustrated in this Report, the Italian Government preserved a certain degree of autonomy in the implementation process. Some provisions of Legislative Decree n. 108/2017 mirror the EIO D thoroughly, sometimes even *verbatim*, while other provisions are overabundant or not formally transposed. For instance, concerning the grounds for non-recognition or non-execution, Arts 10(1)(a) and 10(3) Legislative Decree n. 108/2017 are not grounded in any paragraph of Art 11 EIO D. At the same time, certain paragraphs of Art 11 EIO D lack an explicit or even indirect transposition, such as Arts 11(1)(a), 11(1)(b), 11(1)(c), 11(1)(h), 11(1)(e), 11(5).

From a formal point of view, the active and the passive procedures of recognition and execution are almost correctly transposed in the Italian legislation – even though few inconsistencies can still be detected.

4.3.1 Scope

At the EU level, the scope of the Directive can be determined by a combined reading of Articles 2(c) and 4, relating to the concept of "issuing authority" and the types of proceedings for which the EIO can be issued, respectively. These provisions are implemented by Art 27 Legislative Decree n. 108/2017, which defines the conditions for issuing an EIO in Italy (so-called active procedure).

Art 27 provides that the public prosecutor and the prosecuting judge may, within their respective powers, issue an EIO "in criminal proceedings or proceedings for the application of a measure of asset prevention". This definition arguably implements Art 4(a) and (c) EIO

[1202] Law Decree n. 105 of 10 August 2023, "Urgent provisions on criminal trial, civil trial, combating forest fires, recovery from drug addiction, health and culture, as well as on the personnel of the judiciary and public administration. (23G00118)" (*Disposizioni urgenti in materia di processo penale, di processo civile, di contrasto agli incendi boschivi, di recupero dalle tossicodipendenze, di salute e di cultura, nonché in materia di personale della magistratura e della pubblica amministrazione.*), GU n.162 of 13/07/2023. Passed into law by Law n. 137 of 9 October 2023. Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2023;137,

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D, while the Italian legislator does not seem to have attributed the competence to issue an EIO to administrative authorities, as foreseen by Art 4(b) EIO D[1203].

The national system also provides for the possibility to issue an EIO in proceedings where a legal person may be held liable or punished in Italy. That is possible in proceedings relating to offences committed by a natural person in the interest or advantage of a legal person, regulated by the Legislative Decree n. 231 of 2001[1204]. In this context, the company is held liable for a criminal offence committed by an individual, even though its responsibility is formally administrative[1205]. The facts giving rise to corporate liability are ascertained within criminal proceedings, in which an EIO may be issued. In fact, Art 696-*septies* CCP explicitly extends the applicability of EU law provisions – thus including those relating to the EIO – to proceedings involving legal persons[1206].

4.3.2 Grounds for non-recognition and non-execution

Art 10 Legislative Decree n. 108/2017 implements Art 11 EIO D, listing the grounds for non-recognition or non-execution of a European Investigation Order. In the transposition, some gaps and inconsistencies are present. Specifically, some paragraphs lack an explicit or even indirect transposition (see Arts 11(1)(a), 11(1)(b), 11(1)(c), 11(1)(h), 11(1)(e), 11(5) EIO

[1203] The possibility to include administrative authorities, such as OLAF, in the category of authorities competent to issue an EIO under Article 2(c) of the Directive was raised, before the adoption of the national law, by Salvatore Tesoriero, 'La cooperazione transnazionale nelle indagini in materia di frodi IVA e doganali: strumenti tradizionali e nuove opportunità' in Adriano Di Pietro and Michele Caianiello (eds) *Indagini penali e amministrative in materia di frodi IVA e doganali*. *L'impatto dell'European Investigation Order sulla cooperazione transnazionale* (Cacucci Editore 2016), 68.

[1204] Legislative Decree n. 231 of 8 June 2001, Discipline of administrative responsibility of legal persons, companies and associations, including those without legal personality, pursuant to Article 11 of Law No. 300 of September 29, 2000 (Disciplina della responsabilita' amministrativa delle persone giuridiche, delle societa' e delle associazioni anche prive di personalita' giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300), GU Serie Generale n.140 del 19-06-2001, link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2001;231; Art 696-*septies* CCP reads as follows: "With regard to mutual recognition of judicial decisions concerning the criminal liability of entities, in relations with Member States of the European Union, the rules of this title as well as those contained in other legal provisions implementing European Union law shall be observed".

[1205] Carlo Enrico Paliero, 'Bowling a Columbine: la Cassazione bersaglia i *basic principles* della *corporate liability*' (2011) Le Società, 1084; Alberto Alessandri, 'Riflessioni penalistiche sulla nuova disciplina' in *La responsabilità amministrativa degli enti* (Ipsoa 2002), 50 (speaking of "responsabilità punitiva", that is punitive responsibility).

[1206] Mauro Trogu, 'Sub art 27' in Antonella Marandola (ed) *Cooperazione giudiziaria penale* (Giuffrè 2018), 1076.

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D), while a couple of provisions are overabundant (see Arts 10(1)(a) and 10(3) Legislative Decree n. 108/2017).

In general terms, except for ambiguity surrounding Arts 10(1)(a) and 10(3) Legislative Decree n. 108/2017 – which is irremediable, the presence of lacunas in the transposition of certain grounds for refusal does not pose serious issues in terms compliance with the Directive, as they can be considered covered by other provisions of Legislative Decree n. 108/2017 thanks to a broad interpretation of terms. In the same way, the inclusion of additional conditions for the recognition and execution of EAWs is not particularly problematic in terms of compliance, since these requirements should be abided by in case as provided by other provisions of the Directive. Surely, the implementation would have appeared more linear if the Italian legislator had been more consistent with the literal transposition.

The following analysis will point out the major transposition issues and the related case law with regard to the grounds for refusal.

In first place, considering the overabundant grounds, Art 10(1)(a) Legislative Decree n. 108/2017 establishes that a EIO may be non-executed or non-recognized if it contains manifestly wrong or mismatched information. This paragraph does not reflect any ground for refusal set forth in the EIO D and seems to stem from the initiative of the Italian legislator, even though it could be drawn from the original text as an implicit condition (in particular, Art 5 EIO D). Coherently, the Court of Cassation confirmed that it is by means of the decree recognizing the EIO that the prosecutor must assess, *inter alia*, the incompleteness of the Order, the erroneous nature of the information contained therein, or the mismatch between the information and the type of act [1207]. In this regard, the Court has mitigated the impact of this additional ground for non-recognition by specifying that a decree of recognition of a EIO can be opposed because of flaws only when those flaws substantially affect fundamental rights of the person[1208].

A similar situation affects Art 10(3) Legislative Decree n. 108/2017, which sets a ground for non-recognition that is not reflected in Art 11 EIO D. According to Art 10(3), a EIO issued by an authority other than a judicial authority, or not validated by it, must not be recognized and is returned to the issuing authority. A corresponding obligation can be attributed to Art 2(c) EIO D, that sets the definition of a competent issuing authority and regulates the

[1207] Cass. pen., sec. VI, n. 14413 of 2/02/2019.
[1208] Cass. pen., sec. VI, n. 30885 of 15/09/2020.

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requirement of validation. Furthermore, as recalled by the Court of Cassation[1209], the verification of the legitimacy of the issuing authority must be conducted by the prosecutor and reported in the decree recognizing the EIO.

The latter two cases can be regarded as situations of formal non-compliance: the content or origin of the EIO were not deemed by the European legislator to be so important as to possibly ground non-recognition. However, in practice, such an autonomous formulation by the Italian legislation does not pose serious issues in terms of implementation, as those requirements can be easily inferred as necessary from other EIO D provisions.

The opposite situation characterizes the transposition of Art 11(1)(e) EIO D concerning territoriality issues, as it is completely omitted. Anyway, considering that the EIO D explicitly states that execution 'may' be refused in those cases listed in its Art 11, the lack of the territoriality ground does not amount to a case of non-compliance with the Directive. Indeed, the absence of a ground for refusal in national legislation appears to reinforce the principle of mutual trust.

Furthermore, paragraph (5) of Art 11 EIO D, on the power to waive the privilege or immunity, lacks a specific implementation.

Considering the less serious lacunas, Art 10(1)(b) Legislative Decree n. 108/2017, which implements Art 11(1)(a) EIO D setting grounds for non-execution in the case of immunity, is not correctly transposed, as the Italian law does not explicitly prevent recognition in case of crimes relating to freedom of press and expression. Nonetheless, this deficiency can be covered by Art 10(1)(e) Legislative Decree n. 108/2017, which allows to refuse execution when it would be incompatible with the CFREU[1210].

Moreover, Article 10(1)(c) Legislative Decree n. 108/2017 should reflect Article 11(1)(b) EIO D and set national security reasons as grounds for non-execution. The Italian transposition is not as detailed as the text of the EIO D, since it does not mention dangers for the source of intelligence and the use of classified information. Anyway, by only mentioning "national security reasons" as a possible reason for refusal, the wording of the law seems capable of including all the specific cases mentioned in the EIO D.

[1209] Cass. pen., sec. VI, n. 14413 of 2/02/2019.
[1210] See, *ex multissimis*, Cass. pen., sec. un., n. 37140 of 30/05/2001, and Cass. pen., sec. II, n. 51439 of 19/12/2013.

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Similarly, Art 11(1)(c) EIO D – the investigative measure would not be authorized in a similar domestic case – and (h) – restrictions on some offences – have not been explicitly implemented. Nonetheless, the Legislative Decree n. 108/2017 explicitly states that if the Italian prosecutor cannot perform the requested investigative act because the Italian requirements are not met, he or she must perform those acts that, being provided under Italian law, allow reaching the same objectives (Art 9(1) Legislative Decree n. 108/2017). If the latter is impossible, the prosecutor must refuse execution (Art 9(3) Legislative Decree n. 108/2017). It can thus be argued that this ground for refusal has been indirectly implemented.

Moving to those provisions that have been successfully transposed, Art 11(1)(d) EIO D on *ne bis in idem* principle is fully implemented by the Italian Art 10(1)(d).

As for the case of an investigative measure of a EIO that is incompatible with the executing State's obligations set forth by Article 6 TEU and the CFREU, Art 10(1)(e) Legislative Decree n. 108/2017 faithfully reproduces Art 11(1)(f) EIO D and establishes a ground for non-execution. In turn, the issue of potential grounds for non-recognition in case of violation of such rights and principles has been clarified though jurisprudence. In this regard, a more in-depth analysis is carried out in the following paragraph.

Lastly, Art 11(1)(g) EIO D, concerning conducts not constituting offences under the law of the executing State, finds its full implementation in Art 10(1)(f), even though the transposition is far from being literal. Likewise, paragraphs (2), (3), and (4) of Art 11 EIO D (*i.e.*, the exemption of certain investigative measures that must always be available from the possibility of non-execution or execution; the impossibility to refuse the recognition or execution in case of crimes concerning taxes on the ground that the law of the executing State does not impose the same kind of tax; the duty for the executing authority to consult the issuing authority before deciding on the non-recognition or execution in certain circumstances) have been unambiguously implemented, respectively, by Arts 10(1)(f) and 9(5), Art 10(2), and Art 6(2) Legislative Decree n. 108/2017 law.

4.3.2.1 Fundamental rights and proportionality issues

4.3.2.1.1 Fundamental rights

As anticipated, the Italian transposition law has implemented the provisions of the Directive dealing with the safeguard of fundamental rights.

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Coherently, Art 10(1)(e) Legislative Decree n. 108/2017 includes a ground for non-recognition or non-execution in case of violation of Art 6 TEU and the CFREU, as established by Art 11(1)(f) of the Directive. The transposition of the provision does not cause any issue as it is almost *verbatim,* whereas uncertainties around the concrete application have been addressed through case law.

The Italian system recognizes that the gathering of evidence is conducted by the executing state in accordance with its own procedures and guarantees. It thus may be presumed that the executing authority respects the relevant rules and the fundamental rights established by the CFREU, as well as the principle of proportionality, unless there is concrete evidence to the contrary[1211]. Such reasoning is in line with the principle of mutual trust that underpins the cooperation procedure. Furthermore, the Court of Cassation confirmed that a decree of recognition of a EIO can be opposed because of flaws only when those flaws substantially affect fundamental rights of the person according to Art 6 of TEU and the CFREU[1212].

The specific eventuality where fundamental rights of the defense are put at stake during a EIO proceeding has been tackled in decision n. 8320 of 31 January 2019[1213]. According to the Court of Cassation, in case of late communication to the defense counsel of the decree recognizing the EIO, fair trial rights shall be considered violated, as the suspect and the defense counsel are prevented from lodging a timely objection. As a consequence, the execution of the EIO is not interrupted (Art 13(4) and (7) Legislative Decree n. 108/2017), but the transfer of the results of the activities carried out may be suspended if the Public Prosecutor considers that, in practice, "serious and irreparable harm" may be caused to the suspect, the accused, or to the person "in any event affected" by the performance of the act (Art 13(4) Legislative Decree n. 108/2017). The highest chamber of the Court of Cassation has ruled on the Sky-ECC case, establishing that the possibility to use in an Italian criminal proceeding the results of interceptions arranged by a foreign judicial authority in criminal proceedings pending before it, and carried out on an encrypted computer platform and on cryptophones, shall be excluded if the prosecutor in the proceedings in which those findings were obtained finds that, in relation to them, there has been a violation of fundamental rights. The burden of establishing and proving the facts on

[1211] Cass. pen., sec. VI, n. 48330 of 25/10/2022.
[1212] Cass. pen., sec. VI, n. 30885 of 15/09/2020.
[1213] Cass. pen., sec. VI, n. 8320 of 31/01/2019.

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which such infringement is based rests with the party concerned. On that occasion, the Court also established that the impossibility of the defense to access the algorithm used in a communications system to encrypt the text of the communication does not constitute a violation of fundamental rights the content of each message is inseparably matched to its encryption key, and a bad key has no chance of decrypting it even partially[1214].

7.3.2.1.2 Proportionality

The principle of necessity and proportionality enshrined in Art 6 EIO D has been implemented by the Italian legislator in Art 7 Legislative Decree n. 108/2017: during recognition and execution, Italian authorities must verify the proportionality between the rights of the suspect (or any other person involved in the proceeding) and the needs of the investigation.

The letter provision is far more precise than the corresponding Art 6(1)(a) EIO D, as it specifically states the parameters according to which proportionality must be assessed[1215]. However, the Italian law does not prescribe as a requisite that the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case (as done in Art 6(1)(b) EIO D), nor states that the conditions in Art 6(1) EIO D shall be assessed by the issuing authority itself. This deficiency must be indicated as formal non-compliance with the EIO D. Although formally non-compliant, Italian law leaves to the communications between authorities the agreement on how to overcome disproportionality[1216]. This partly mitigates the negative assessment of the implementation of the Directive into Italian law as to the proportionality principle.

As confirmed by the Court of Cassation in decision n. 8320 of 31 January 2019[1217], the Italian judicial authority is required to carry out a test of proportionality between the sacrifice of the legal sphere of the suspect, or of the persons involved in the performance of the requested acts, and the investigative or evidentiary needs of the specific case, taking

[1214] Cass. pen., sec. un., n. 23756 of 14/06/2024.
[1215] These include rights and liberties of the suspect or third parties, investigative or evidentiary needs, the seriousness of the offences for which proceedings are being conducted and the penalty established for these offences (Art 7 Legislative Decree no. 108/2017).
[1216] When the investigative measure indicated in the EIO is deemed to be disproportionate, Italian authorities should contact the issuing authority in order to agree on how to proceed with a less intrusive act. See Cass. pen, sec. VI, decision n. 8320 of 31/01/2019. Extensively on this topic, see Cosimo Emanuele Gatto, 'Il principio di proporzionalità nell'ordine europeo di indagine penale' (2019) 2 Sistema Penale.
[1217] Cass. pen., sec. VI, n. 8320 of 31/01/2019.

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into account the seriousness of the offence and the penalty provided for it, *unless* the act requested falls within those provided for in Art 10(2) EIO D. The Court specified that where the act of investigation is disproportionate, one must proceed with the performance of the equivalent and least intrusive act to that requested, as inferable from Art 9 Legislative Decree n. 108/2017. Accordingly, the requesting authority must be given notice of the possibility of proceeding with a different and equally suitable act for achieving the same purpose. Such an interpretation by the Italian judge is in line with the procedure provided for in the Directive.

Finally, the proportionality assessment must be reported by the Italian prosecutor by means of a decree, which shall be motivated[1218]. The respect of the proportionality principle by the executing authority of another Member State is usually presumed, as it is for the respect of fundamental rights, because of the principle of mutual trust governing cooperation, unless there is clear evidence that shows the contrary[1219].

4.3.3 Execution procedure

Legislative Decree n. 108/2017, transposing the EIO D, foresees an active and a passive procedure for executing an EIO. The **active procedure** takes place when the Italian authorities issue an order to obtain some evidence located in the territory of another EU Member State (Arts 27-45 Legislative Decree n. 108/2017). Conversely, the **passive procedure** occurs when the Italian authorities are requested to gather some evidence in the national territory (Arts 4-26 Legislative Decree n. 108/2017). Both procedures are outlined below.

4.3.3.1 Passive procedure

In the passive procedure, the competence to recognize and execute the EIO is allocated in a way that fully respects the requirements of Art 2(d) EIO D, which defines the concept of "executing authority". Generally, the **competent authority** to execute the EIO is the **public prosecutor at the court of the district capital in which the acts must be performed** (Art 4(1) Legislative Decree n. 108/2017). Nonetheless, where the issuing authority or Italian law require that the act is performed by the judge, the public prosecutor recognizes the order, and then makes a request to the judge for preliminary investigations to proceed with

[1218] Cass. pen., sec. VI, n. 14413 of 2/02/2019.
[1219] Cass. pen., sec. VI, no. 48330 of 25/10/2022.

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its execution (Art 5(1) Legislative Decree n. 108/2017). Moreover, in accordance with Art 4(5-6) Legislative Decree n. 108/2017, if the EIO relates to acts that must be execute in multiple districts, the execution shall be carried out by the prosecutor of the district in which the greatest number of acts is to be performed, or, if of equal number, that in whose district the act of greatest investigative importance is to be performed[1220].

Arts 4 and 6 Legislative Decree n. 108/2017, that correctly transpose Art 9 EIO D, state that the execution of an EIO shall be carried out within ninety days from receipt, observing the forms expressly requested by the issuing authority that are not contrary to the principles of the legal order of the State. The performance of some specific investigative acts, however, like undercover operations and delay or renounce to arrest or seizure shall in any case be governed by Italian law.

According to Art 33(1-2) Legislative Decree n. 108/2017, which seems applicable both to passive and active procedures, the judicial authority which issued the EIO shall agree with the executing authority on the modalities for carrying out the act of investigation or evidence, specifically indicating the rights and faculties accorded by law to the parties and their defence counsel.

Last, Art 6 Legislative Decree n. 108/2017 provides that the receipt of the investigation order shall be notified within seven days, to the issuing authority, by transmitting the form set out in Annex B Legislative Decree n. 108/2017. The form shall indicate the modalities of execution when from the latter derives the impossibility of ensuring the confidentiality of the facts and content of the investigation order.

In case a ground to refuse cooperation is assessed, the issuing authority shall be notified without delay, before the decision is taken, in order to remove, where possible, such obstacle. Likewise, where the EIO content appears to be disproportionate, the issuing authority shall be promptly informed, to assess the appropriateness of a new request or to withdraw the investigation order. A decision refusing recognition or delaying execution shall immediately be communicated to the issuing authority. Notice shall likewise be given of an appeal and of the of the decision annulling the recognition decree.

The **contents** of the EIO are laid down in Art 30 Legislative Decree n. 108/2017, which will be examined below. This provision is included in the chapter dedicated to the active

[1220] If the public prosecutor who has received the investigation order considers that another office must recognise and execute the order, s/he shall immediately transmit it to the latter, notifying the issuing authority; in case of conflict [among prosecutor's offices] Arts 54, 54-*bis* and 54-*ter* CCP shall apply.

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procedure, but it can be considered applicable to the passive procedure as well. Art 10(1)(a) Legislative Decree n. 108/2017 foresees indeed that the national authority may refuse to recognize the EIO when the order is incomplete. From a systematic point of view, therefore, the parameter to assess the completeness of the order received is logically Art 30 Legislative Decree n. 108/2017. The legislative text also includes an EIO template, which reproduces that annexed to the EIO D. Therefore, no compliance issues are seen in this respect. Importantly[1221], Italy has indicated that it will accept EIOs in its official language only, as allowed for in Art 5(2) EIO D.

The **time limits** foreseen in Art 4 Legislative Decree n. 108/2017 correctly implement those laid down in Art 12 EIO D. Also, in the procedure of recognition and execution, the prosecutor shall take into account the obligation foreseen in Art 696-*octies* CCP, which provides that national judicial authorities shall recognize and enforce decisions and judicial measures of other Member States "without delay and in such a manner as to ensure their promptness and effectiveness". Although of a general nature and different formulation, this provision applies to EIO procedure, and reasonably transposes the obligation of Art 12(1) EIO D, under which executing authorities shall recognize and execute EIOs "with the same celerity and priority as for a similar domestic case". Some transposition issues, however, arise when the Italian executing authority cannot meet the time limits set in the Directive or by the issuing authorities. In these cases, the obligations to promptly inform the issuing authority of the delay (Art 12(5-6) EIO D) are poorly transposed. This profile will be examined below in relation to possible cooperation[1222].

The time limits set in Art 12 EIO D are disregarded also when there is a **ground for postponement of recognition or execution**. The relevant EU provision (Art 15 EIO D) is implemented by Art 14 Legislative Decree n. 108/2017. This provision correctly transposes the situations where a postponement of the recognition or execution is possible, that is when the EIO might jeopardize ongoing investigations or trials, or when the things, documents, or data requested are already subject to seizure in Italy. Nonetheless, the obligations to communicate with the issuing authority in postponement cases are not fully transposed. While Art 14(3) Legislative Decree n. 108/2017 provides for an obligation to inform the issuing authorities of the decision to postpone the recognition or execution, no

[1221] Jorge Angel Espina Ramos, 'Additional accepted languages for executing European Investigation Orders: Dismantling the Tower of Babel? (2019) 10 NJECL 324, 326.
[1222] See subsection 4.3.4.

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such obligation is foreseen when the cause for postponement has ceased to exist (Art 14(4) Legislative Decree n. 108/2017), as required instead by the EIO D (Art 15(2) EIO D).

According to Art 29 Legislative Decree n. 108/2017, transposing Article 9(4) EIO D, the prosecutor, with the agreement of the executing authority, may directly participate, or allow one or more police officers to participate, in the execution of the investigation order. To this end, the prosecutor may also promote the establishment of a joint investigation team[1223].

In accordance with the provisions of the EIO D (Art 17), an official of the issuing authority who participates in the execution of the investigation order in Italy takes on a status analogous to Italian officials, also for the scope of criminal law (Art 8(4) Legislative Decree n. 108/2017). The rule also applies to undercover operations (Art 21(4) Legislative Decree n. 108/2017).

Damages caused by the issuing authority are compensated by the Italian State (even during undercover operations), without prejudice to rights of redress against the issuing state, according to Arts 8(5) and 21(5) Legislative Decree n. 108/2017. However, the clause limiting compensation against other states in Art 18(3) EIO D is not provided for.

Arts 12 and 14 Legislative Decree n. 108/2017, that transpose Art 13 EIO D, state that evidence collected in execution of an EIO shall be transmitted without delay to the issuing authority, together with the reports of the acts performed. The prosecutor may order the temporary transfer of the *corpus reus* or of things pertaining to the offence when it does not impede the expeditious handling of the ongoing proceedings, agreeing with the issuing authority on the modalities of the transfer and the time limit for restitution. To this end, if the prosecutor already issued the indictment, s/he shall request the authorization of the competent judge. The judge shall proceed after hearing the parties. In case an opposition against the decree that recognizes the EIO is launched, no suspensive effect is foreseen on the execution of the investigation order and the transmission of the results of the activities carried out. The prosecutor may, however, refrain from transmitting the results of the activities carried out if that could cause serious and irreparable damage to the person under investigation, to the accused or to the person concerned by the performance of the act.

[1223] In this case, the provisions of Legislative Decree n. 34 of 15 February 2016 shall apply. Legislative Decree about "Implementing rules for Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams". (Norme di attuazione della decisione quadro 2002/465/GAI del Consiglio, del 13 giugno 2002, relativa alle squadre investigative comuni). Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2016;034.

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Last, attention should be put to the possibility of recurring to **a different type of investigative measure** (Art 10 EIO D), as an alternative to refusing the execution of the EIO. The provision is mostly implemented well by Art 9 Legislative Decree n. 108/2017.

According to it, when the act required for the execution of EIO is not provided for by Italian law, or does not fulfil the conditions which Italian law requires it to be carried out, or does not appear proportionate, the prosecutor shall, after notifying the issuing authority, proceed by carrying out one or more different acts, however appropriate to achieve the same purpose.

The possibility to substitute the requested measure is in any case excluded for a series of investigative acts, as prescribed by Art 10(2) EIO D. In this regard, Art 9 Legislative Decree n. 108/2017 provides a smooth transposition with concern to: investigative acts that do not affect personal freedom and the inviolability of domicile; the acquisition of information contained in databases accessible to the judicial authority; the hearing of persons informed of the facts, witnesses, expert witnesses and consultants, victims, as well as of the persons under investigation or the accused present in the territory of the State; the identification of persons holding a subscription of a specific telephone number or e-mail address or IP address. More ambiguous is the reference of Art 10(2)(a) EIO D, that is information or evidence which is already in the possession of the executing authority and that could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO. In this regard, in fact, Art 9(5)(a) Legislative Decree n. 108/2017 mentions only “the acquisition of records (minutes) of evidence of other proceedings”; therefore, it does not seem to refer neither to information in the possession of the executing authority regardless of the existence of a specific proceedings, nor to evidence that could have been obtained according to the law of the executing State.

4.3.3.2 Active procedure

In the active procedure, the **competence** to recognize and execute the EIO is allocated in a way that fully respects the requirements of Art 2(c) EIO D, which defines the concept of “issuing authority”. Art 27(1) Legislative Decree n. 108/2017 provides indeed that, “in criminal proceedings or proceedings for the application of a measure of asset prevention, the **prosecutor** and the **proceeding judge** may, within their respective powers, issue an

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investigation order and transmit it directly to the enforcement authority. The judge issues the investigation order after hearing the parties".

Pursuant to Art 1(3) EIO D, the law of transposition foresees the possibility for the defence counsel of the suspect, accused, or the person to whom the application of a preventive measure is proposed, to request the prosecutor or prosecuting judge to issue an investigation order (Art 31 Legislative Decree n. 108/2017). In this case, to be admissible, the request shall contain an indication of the act of investigation or evidence and the reasons justifying its performance. If the request is addressed to the public prosecutor, the latter may refuse by issuing a reasoned decree. When the request relates to a seizure order, and the public prosecutor believes that the seizure requested by the person concerned must not be carried out, he shall forward the request, along with his opinion, to the preliminary investigation judge (Art 368 CCP). If, instead, the defence requests the EIO to the judge, this shall proceed by order, after hearing the parties.

Art 30 Legislative Decree n. 108/2017 determines the **content** of the EIO, and reproduces almost *verbatim* the information requirements listed in Art 5(1)(a-e) EIO D. The national provision also obliges the issuing authority to use the template in Annex A of the same law[1224], which translates the one included in Annex A of the Directive. Art 32 Legislative Decree n. 108/2017 also provides that the EIO is transmitted in the official of the executing State or in the language specifically indicated by the executing authority, in compliance with Art 5(3) EIO D. The investigation order and any communication for its execution shall be transmitted to the executing authority in such a way as to guarantee the authenticity of the origin, including with the assistance of the central authority if necessary. The transmission may take place via the telecommunications system of the European Judicial Network, that might also help in identifying the competent executing authority. Therefore, no problems of implementation are found in relation to the contents and form of the EIO.

When an investigation order is issued, in the same or another proceeding, to supplement or complement an earlier one, reference shall be made to it in Section D of the form set out in the already mentioned standard template of Annex A (Art 34 Legislative Decree n. 108/2017, correctly transposing Art 8 EIO D).

[1224] The Italian template is available at this link.

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In full compliance with the EIO D, the Italian State shall be liable for damages caused by its officials during operations (Art 29(3) Legislative Decree n. 108/2017, which recalls the equivalent provision in the context of the Joint Investigations Teams[1225]).

4.3.3.3 Issues for the rights of the suspect or accused person

For the analysis of the issues for the rights of suspects and accused persons, please refer to Section 7.3.2.1.2. on the principle of proportionality, and the Sections examining the specific investigative measures below.

4.3.4 Cooperation issues between executing and issuing authorities

The Italian implementation of the EIO D presents some issues in terms of cooperation, for instance, regarding the communications and consultation obligations, as well as the sharing of costs between the issuing and executing State. Both profiles are examined below.

As anticipated[1226], **communication and consultation obligations** between the issuing and the executing authority are not always fully transposed in the national system. In particular, Art 6 Legislative Decree n. 108/2017 does not foresee all the cooperation obligations in relation to the delays in the recognition or execution of the EIO. For instance, Art 6(4) provides for an obligation to promptly inform the issuing authority only when the delay concerns the *execution*, and not also the *recognition* of the EIO. In this sense, Art 12(5) EIO D cannot be considered fully transposed, although this gap may not raise major problems in practice. Even when the delay concerns the execution of the order, Art 6(4) requires the national authority to inform the issuing State but does not specify that it shall also give reasons for such delay, nor consult with the requesting authority to agree on the appropriate timing to carry out the investigative measure. Therefore, Art 12(6) EIO D cannot be considered fully implemented.

Moreover, in relation to **costs**, Art 15 Legislative Decree n. 108/2017 (related to the passive procedure) only partially implements Art 21 EIO D. While the general rule on expense allocation is correctly transposed, some issues may arise when the execution of the order requires exceptionally high costs. In this case, the public prosecutor shall inform the issuing and central authority to assess the sharing of the expenses with the issuing State

[1225] Legislative Decree n. 34 of 15 February 2016.
[1226] See subsection 4.3.3.1.

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(Art 15(2) Legislative Decree n. 108/2017). However, the provision does not foresee any explicit obligation for the executing authority to inform the issuing authority beforehand of the **specifications** of the exceptionally high costs. It is unclear whether this gap causes cooperation issues in the practice[1227], but the EU provision remains poorly transposed in the national system. Conversely, Art 15(3) EIO D can be considered fully transposed by Art 33(2) Legislative Decree n. 108/2017, which regulates the case where no agreement on cost sharing is reached: in such situations, the Italian issuing authorities shall decide whether to withdraw, even partially the EIO, or bear the exceeding costs.

4.3.5 Specific investigative acts

4.3.5.1 Temporary transfer of persons held in custody

In the Directive, the temporary transfer of persons held in custody is articulated in two separated investigative measures: the temporary transfer to the *issuing State* of persons held in custody (Art 22 Legislative Decree n. 108/2017) and the temporary transfer to the *executing State* of the same persons (Art 23 Legislative Decree n. 108/2017). The Italian law of transposition implements these provisions, foreseeing for each one of them an active and passive procedure.

4.3.5.1.1 Temporary transfer to the issuing State of persons held in custody

In the **passive procedure**, the judicial authorities of a Member State issue a EIO for the transfer, in their own territory, of a person held in custody in Italy. In the executing State (Italy), the order is executed with the authorization from the prosecuting magistrate, identified in accordance with Art 279 CCP[1228]. When the detained person is a convicted person or an inmate, the authorisation is requested from the supervisory penitentiary magistrate.

The national system correctly implements the specific grounds of refusal of this investigative measure. On the one hand, Art 22(2)(a) EIO D is explicitly transposed by Art 16(1) Legislative Decree n. 108/2017, which foresees that the investigation order issued for

[1227] For example, the lack of previous communication on the specifications of the exceptionally high costs might hinder subsequent consultations on how such expenses shall be shared.
[1228] Under Art 279 CCP, the application and revocation of precautionary measures, as well as their methods of enforcement are ordered by the proceeding court. Prior to criminal prosecution, the Preliminary Investigation Judge shall decide on such issues.

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the temporary transfer shall be executed **provided that the person gives consent**. On the other hand, Art 22(2)(b) EIO D is indirectly implemented by Art 16(3) Legislative Decree n. 108/2017, which provides that the public prosecutor agrees with the issuing authority on the modalities of the transfer and identifies the date of return of the detained person before the expiry of the maximum term of pre-trial detention[1229] or the termination of the sentence being served. While these terms are not explicitly laid down as grounds of refusal, they are certainly liable to prolong the detention of the person in custody. Therefore, it is reasonable to consider that, when respecting such time limits is not possible and the agreement is not reached, this will be a reason for not executing the investigation order.

Art 22(3) EIO D, instead, is only partially implemented. In fact, Art 16(2) Legislative Decree n. 108/2017 provides that, for executing the EIO, the authorizing judge shall consider the age of the person and his/her physical or mental health condition but does not explicitly foresee that the legal representative of the person in custody may express his or her opinion on the temporary transfer. When the person is a minor, it is a duty for the judge (or the prosecutor) to gather any useful information about the child from people who had relations with him or her, such as the parents or the legal representatives, to take any decision in the proceedings (Art 9 of the D.P.R. 488 of 1988). However, this provision alone cannot bring the national system to full compliance with EU law, as Art 9 of the D.P.R. 488 of 1988 does not specifically lay down an obligation for the judge or the prosecutor to hear the opinion of the child defendant's legal representative.

In relation to the **transit** of the person concerned through the territory of another Member State, Art 22(4) EIO D has not been implemented in the national system, although this gap does not seem to raise significant compliance issues. The provision appears clear and precise enough to be directly applied by the authorities concerned.

Art 22(5) EIO D, regarding the **practical arrangements of the transfer**, is not fully implemented in the national law. As said, Art 16(3) Legislative Decree n. 108/2017 prescribes that the prosecutor reaches an agreement with the issuing authorities on such arrangements. Nonetheless, this provision does not explicitly consider custody conditions, safeguards for the person's physical and mental conditions, and the level of security required in the issuing State as terms of the agreement. Therefore, national authorities are under no obligation to specifically agree on such conditions ensuring the well-being of the person concerned.

[1229] The maximum limits of the pre-trial detention are foreseen at Art 303 CCP.

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Regarding the **detention in the issuing State of the person transferred**, Art 22(6) EIO D provides that the person shall remain in custody in the territory of the issuing State or, where applicable, of the State of transit. This provision is not transposed in the national system, but the gap is reasonable, as in this case the domestic authorities simply execute the order by transferring the person to the foreign executing authorities, who are instead bound by the obligation of detaining the surrendered person. In this regard, however, Art 16(5) Legislative Decree n. 108/2017 correctly implements Art 22(7) EIO D, providing that the period of detention spent abroad shall be counted for all purposes in the duration of the pre-trial detention. In the case of a prisoner serving a sentence, the period of detention spent abroad shall be deemed to have been spent in Italy.

Art 16(6) Legislative Decree n. 108/2017 fully transposes the **speciality rule** applying to the person transferred to the issuing State (Art 22(7-8) EIO D). Under this provision, the person concerned shall not be subjected to a restriction of liberty for the execution of a custodial sentence or detention order, or to any other measure restricting his/her liberty, for an act prior to and different from that for which the temporary transfer was ordered. Also the derogations from this rule are correctly implemented: the same provision foresees that the person temporarily may be subject to a restriction of liberty for offences other than those for which the transfer was ordered when the person, having had the opportunity, has not left the territory of the State after a period of fifteen days from the time when his or her presence was no longer required or, having left it, has voluntarily returned to it.

Concerning the **active procedure**, Art 37(1) Legislative Decree n. 108/2017 fully implements Art 22 EIO D. Under the national provision, the Italian public prosecutor and the prosecuting judge may issue, within the limits of their respective powers, an investigation order for the temporary transfer **to Italian territory** of a person held in custody in another Member State, agreeing with the executing authority on the modalities of the transfer and the time limit within which the person held in custody must return to the executing State. Art 17(2) Legislative Decree n. 108/2017 applies, meaning the public prosecutor orders that the person be kept, for the duration of the temporary transfer, in the prison of the place where the act of investigation or evidence is to be carried out.

Lastly, in relation to **costs**, Art 22(10) was not explicitly transposed. However, this gap does not raise significant compliance issues, considering that the general provision about the sharing of the costs between issuing and executing authorities (Art 21 EIO D) has been transposed and shall apply to this specific investigative act too. In particular, it is reasonable

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to consider that the allocation of the expenses incurred from the investigative act might be part of the agreement mentioned in Art 16(1) Legislative Decree n. 108/2017. Some aspects, like the maintenance costs of the person transferred to the issuing State, are specifically regulated by the law: for instance, Art 37(2) Legislative Decree n. 108/2017 clarifies that such expenses are borne by Italy when this is the issuing State. Still, some doubts arise in relation to the obligation for the issuing State – laid down in Art 22(10) EIO D – to also bear the costs of the transfer to and from that State. The transposition law foresees this obligation only when national authorities issue an order for the transfer of a person detained in Italy to another Member State (Art 38(3) Legislative Decree n. 108/2017), although it remains unclear whether this provision applies also to the case where Italy issues the order, but the person is detained in another Member State.

4.3.5.1.2 Temporary transfer to the executing State of persons held in custody

In the **passive** procedure, another Member State issues a EIO to obtain the transfer of a person detained in its own territory to Italy, with the aim of performing there an investigative act (Art 23 EIO D). In this case, the Italian competent prosecutor – acting as the executing authority – agrees with the issuing State the modalities of the temporary transfer and the date within which the person concerned shall return to the issuing State (Art 17(1) Legislative Decree n. 108/2017). For the purposes of execution, the prosecutor orders the person to be held, for the duration of the temporary transfer, in the prison of the place where the investigative act is to be carried out. Maintenance costs are borne by the State (Art 17(2) Legislative Decree n. 108/2017).

In this case as well, the **speciality rule** applies. Art 17(3) Legislative Decree n. 108/2017 foresees that the person concerned shall not be subjected to a restriction of liberty for the execution of a custodial sentence or detention order, or to any other measure restricting his liberty, for an act prior to and different from that for which the temporary transfer was ordered. Once again, the exceptions to this rule concern the situations where the person has given consent to such restriction or where s/he, having had the opportunity, has not left the territory of the State after a period of fifteen days from the time when his or her presence was no longer required or, having left it, has voluntarily returned to it (Art 17(3) Legislative Decree n. 108/2017).

Concerning the **active procedure**, Art 38(1) Legislative Decree n. 108/2017 provides that the prosecutor and the judge, within the scope of their respective powers, may issue

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an investigation order for the temporary transfer to another Member State of a person detained in Italy for the purpose of carrying out an investigative act that requires the presence in the executing State of the detained person. In this case, the national law provides – in compliance with Article 23(3) of the Directive – that the costs of the temporary transfer are borne by the (Italian) State; for the other expenses, the general provision on the allocation of costs applies (Art 15 Legislative Decree n. 108/2017)[1230].

Art 23 Legislative Decree n. 108/2017 refers to the provisions of Art 22(2a) and (3-9) EIO D – regulating the transfer to the issuing State of a person held in another Member State – which shall apply *mutatis mutandis*. While paragraphs 4 and 6 do not receive specific transposition, Art 38(3) Legislative Decree n. 108/2017 refers to Art 16 of the same law, which shall apply as far as compatible. For the analysis of these provisions, and the identified gaps in implementation, see above section 7.3.5.1.1.

4.3.5.2 Hearing by videoconference and phone conference

Art 24 EIO D concerns the hearing by videoconference or other audiovisual transmission, and it is transposed in Italian law by Arts 18 (for the passive procedure) and 39 (for the active procedure) Legislative Decree n. 108/2017.

In the passive procedure, Art 18(1) allows for the execution of the request for a hearing by videoconference of the accused, the defendant, witnesses, and expert witnesses, after prior agreement with the issuing authority on the modalities of the hearing, also with regard to the measures concerning the protection of the person to be heard.

According to Article 18(2), consent is mandatory in case of accused and defendants.

The prosecutor, or the judge shall ensure that the fundamental principles are respected in the performance of the act. Contrary to Art 24(2)(b) EIO D, Art 18(6)(second part) Legislative Decree n. 108/2017 does not exactly formulate this aspect as a ground for refusal, but rather creates a positive obligation for the execution phase. Given that Art 24 expresses the possibility to refuse in facultative form, however, the discrepancies do not seem to have practical implication.

Art 18(4-5) lists the **duties** incumbent upon the execution of such an EIO. In particular, the prosecutor and the judge, within the scope of their respective powers shall appoint an interpreter in cases provided for by law; identify the person to be heard; notify to him/her

[1230] See subsection 4.3.4. for an analysis of the issues relating to the allocation of costs in the national system.

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the time and place of appearance; summon the person, in the manner laid down in the Code of Criminal Procedure and, in case of accused or defendant, inform him/her of the rights and faculties accorded under the law of the issuing State, in case of witnesses or expert witnesses, inform them of the right of abstention recognised by domestic law[1231] and that of the issuing State.

The hearing is then conducted directly by the issuing authority or under its direction. The prosecutor, or the judge shall ensure that the fundamental principles are respected in the performance of the act.

In the active procedure, Art 39 allows the prosecutor or the competent judge to issue, within the scope of their respective competences, an EIO with the same goal, provided that the executing authority has the availability or access to the necessary technical means. In this case, the Italian law specifies the conditions that allow such an EIO to be issued: (a) when for the listed persons there are justified reasons rendering their presence on the national territory inappropriate; (b) when the person to be questioned or examined is in any capacity detained in the Member State; (c) in cases of need to examine undercover operators, collaboratori di giustizia and accused of crimes connected with the main proceedings.

Similarly to the passive procedure, consent is mandatory in case of accused and defendants.

The modalities of the hearing shall be agreed by the Italian judicial authority with the executing authority. If the executing authority does not have the availability or access to the necessary technical means, the Italian judicial authority that has issued the EIO may provide the necessary means, putting them at the disposal of the executing authority via the central contact point.

The same rules apply also with regard to the hearing by means of a telephone conference of witnesses or expert witnesses who are not in the territory of the State, when it is not convenient or possible for them to appear in person before the issuing authority (Art 25 EIO D, transposed by Art 19 Legislative Decree n. 108/2017).

[1231] According to Italian law, in particular (Article 18(8) Legislative Decree n. 108/2017) the provisions of Arts 366 (Refusal of legally due offices), 367 (Simulation of an offence), 368 (Slander), 369 (Self-slander), 371-*bis* (False information to the Public Prosecutor or the Prosecutor of the International Criminal Court), 372 (False testimony) and 373 (False expertise or interpretation) of the Penal Code shall apply to acts committed in the course of hearing by videoconference.

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4.3.5.3 Information on bank and financial accounts

The possibility to use an EIO to obtain information on banks and other financial accounts, as well as on specific bank accounts or banking operations is realized in Italian law by a combination of explicit and indirect transposition of Arts 26 and 27 EIO D.

Arts 20 (passive procedure) and 40 (active procedure) Legislative Decree n. 108/2017 define the main rules, by largely referring to the pre-existing regulation of seizure of documents owned by banks, provided by Arts 255- 256 CCP.

According to the latter, the authority may proceed with the seizure from banks of documents, securities, sums deposited in current accounts and any other thing, even if contained in safe-deposit boxes, when it has reasonable grounds to believe that they are pertinent to the offence, even if they do not belong to the accused or are not registered in his/her name.

It is true that the reference to Arts 255 and 256 CCP seems to limit the execution of such EIOs to the cases and modalities prescribed by national law for the same acts. This could represent a problem as, contrary to the case of wiretapping, such a limitation is not found in Arts 26 and 27 EIO D. However, arguably those domestic provisions are so little demanding when it comes to procedural requirements, that the reference can hardly be seen as introducing additional grounds for non-recognition.

In the passive procedure, should the EIO not set out the reasons why the investigative act is relevant to the proceedings, before executing it, the prosecutor shall request the issuing authority to provide such data, together with any other information useful for the timely and effective execution of the requested activity (Art 20(3) Legislative Decree n. 108/2017). Likewise, in case it is Italy the issuing State, Art 40(1) specifically requires to explicit the reasons for the relevance of the investigation, as well as information useful for the identification of the banks or institutions concerned.

4.3.5.4 Real-time monitoring and controlled deliveries

The possibility to use an EIO to perform real-time monitoring of banking and financial operations, as well as controlled deliveries (Art 28 of the Directive) is realized in Italian law by a combination of explicit and indirect transposition. In these cases, however, passive and active procedure are not equally covered, and this raises some problems in terms of equality of treatment.

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In case Italy is the executing state, for the real-time acquisition of "telematic flows" originating from or directed to banks and financial institutions, Art 20(2) Legislative Decree n. 108/2017 states that the prosecutor shall proceed in accordance with the wiretapping regulation (Articles 266 et seq. CCP), which includes a request for authorization before the judge for preliminary investigations.

However, nothing is established where Italy is the issuing authority: that is because real-time monitoring of banking and financial data is not an investigative measure explicitly available in internal criminal investigations. Already before the entry into force of the EIO D, this gap left open the debate on whether prosecutor cannot perform the measure at all in internal proceedings, or whether, as preferred by the case-law, such measure shall be considered an atypical investigative measure (Art 189 CCP), thus generally subject only to the authorization of the prosecutor.

Art 20 Legislative Decree n. 108/2017 intervened in this uncertain situation.

On the one hand, it increased the safeguards for the affected persons in case an EIO shall be executed in Italy. On the other hand, by doing so, it generated a disparity in comparison to a purely internal situation (or, arguably, in case Italy would be an issuing authority), as in these contexts the level of protection is lower. While the problem is not strictly a transposition issue, it is likely to raise constitutional concerns in light of the equality principle in the domestic dimension (or in light of the non-discrimination principle at the EU level).

To a certain extent, a gap may be found also with regard to controlled deliveries.

This investigative act does not have a specific regime under Italian law in domestic cases and the Italian transposition of the EIO Directive does not explicitly mention it either.

However, a general regulation may apply in both situations.

In the past, controlled deliveries were actually explicitly regulated by some specific legislative provisions, for instance with regard to drug related offences (Art 98 DPR 309/1990). Currently, however, the latter has been replaced by a general rule, contained in Art 9, Law n. 146 of 16 March 2006. The provision regulates the general framework of undercover operations (in this regard, see also below, § 4.3.5.5), which under Italian law include also controlled deliveries.

In particular, Art 9(6-6-*bis*-7) of Law n. 146/2006 establishes that, for a limited number of crimes, police officers may omit or delay otherwise due acts within their jurisdiction: for instance, by refraining from seizing an item and allowing a controlled delivery.

Police shall give immediate notice of this decision to the prosecutor (in writing or orally) and transmit to him/her a reasoned report within the next forty-eight hours. The Prosecutor, in turn, may order police to act as prescribed by the criminal procedure code (eg by seizing the item). For anti-drug activities, the same immediate notice must also reach the Central Directorate for Drug Services for the necessary coordination also at the international level.

In the same circumstances established by Art 9(6-6*bis*-7), also the prosecutor may, by reasoned decree, delay the execution of measures applying a precautionary measure, detention of the suspect of a crime, or of an order for the execution of prison sentences or seizure. In cases of urgency, the delay in the execution of the above measures may also be ordered orally, but the relevant decree must be issued within the next forty-eight hours.

At any rate, the prosecutor shall also order police to undertake all necessary measures for the control of the development of the criminal activity, communicating the adopted measures to the judicial competent authority (i.e. the authority located in the place where the operation is carried out; or through which the transit out of or into the territory of the State of the things that are the object, product, profit or means for committing the crimes as well as the narcotic or psychotropic substances are located).

Arguably, these rules apply also when the controlled delivery is to be executed upon the receipt of an EIO or is requested by the Italian authorities with the issuing of an EIO.

4.3.5.5 Covert investigations

The national law of transposition regulates covert investigations in EIO proceedings by referring to **Art 9 of Law N. 146 of 16 March 2006**[1232], a key provision in defining the scope and conditions of such operations in the domestic system. In fact, both Art 21 (on the passive procedure), and Art 41 (on the active procedure) Legislative Decree n. 108/2017 foresee that EIOs to perform covert investigations may, respectively, be recognized or

[1232] Law n. 146, March 16, 2006 Ratifying and implementing the United Nations Convention and Protocols against Transnational Organized Crime, adopted by the General Assembly on November 15, 2000 and May 31, 2001. (OJ General Series n. 85, 11-04-2006 - Ordinary Suppl. n. 91). (*Legge 16 marzo 2006, n. 146 Ratifica ed esecuzione della Convenzione e dei Protocolli delle Nazioni Unite contro il crimine organizzato transnazionale, adottati dall'Assemblea generale il 15 novembre 2000 ed il 31 maggio 2001. (GU Serie Generale n.85 del 11-04-2006 - Suppl. Ordinario n. 91)*). Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006-03-16;146!vig=.

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issued only in the cases and according to the procedures provided for in Art 9 of Law n. 146 of 16 March 2006.

This provision allows covert investigations in two situations. Firstly, judicial police officers may, in the context of specific undercover operations, give refuge or assist criminal associates; purchase, receive, replace or conceal money, weapons, documents, narcotics, goods or things which are the object, product, profit or means of committing criminal offences. These actions are exempted from criminal prosecution only these are aimed at gathering evidence for specific offences identified by the law[1233]. Secondly, judicial police officers specialized in counter-terrorism and subversion activities may carry out the same activities for the sole purpose of gathering evidence to investigate terrorism-related offences. In both situations, the officers of the judicial police may use documents, identities or cover details also to enter into contact with people and websites, informing the public prosecutor as soon as possible and in any case within forty-eight hours from the beginning of the activities.

The specific **grounds of refusal** for this investigative act (Art 29(3)(a-b) EIO D) are fully implemented in the national system. On the one hand, as said, Art 21(1) Legislative Decree n. 108/2017 provides that the EIO may be recognized only where the conditions set in Art 9 of Law n. 146 of 16 March 2006 are met, meaning that the order will be refused in every case where the act would not be authorized in similar domestic case. The same conclusion can be reached by looking at Art 9(1) and (3) Legislative Decree n. 108/2017, which foresees a general ground of refusal for the situations where (i) the investigative act is not foreseen in the national law altogether, or (ii) the requirements set for performing the act in the domestic system are not satisfied. On the other hand, Art 21(2) Legislative Decree n. 108/2017 indirectly implements Art 29(3)(b) EIO D. In fact, the absence of an agreement on the modalities of execution of the EIO is not explicitly foreseen as a ground for refusal but Art 21 Legislative Decree n. 108/2017 foresees that the issuing and executing authority shall agree upon the terms of execution of the covert investigations. Reasonably, when such an agreement is not reached, the order will not be executed.

[1233] These are: money laundering (Arts 648-*bis* and 648-*ter* CCP); enslavement (Art 600 CP); child prostitution (Art 600-*bis*); child pornography (Art 600-*ter*); possession and access to child pornography (Art 600-*quarter*); virtual pornography (Art 600-*quater*1); organization of tourist trips aimed at the exploitation of child prostitution (Art 600-*quinquies*); offences involving the use of arms; ammunitions; explosives; prostitution exploitation; the offences relating to the illegal entry of foreigners in the national territory.

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As for the **modalities to execute** the covert investigations in the national territory, Art 21(1-5) Legislative Decree n. 108/2017 fully implements Art 29(4) EIO D. The domestic provision foresees that, generally, the way the operations are to be carried out shall be agreed with the executing authority. Additionally, the EIO shall be executed by respecting the conditions of Art 9 of Law n. 146 of 16 March 2006. Moreover, with also the possibility of setting up joint investigation teams and involving officers of the issuing State, who shall benefit, for the purposes of criminal law, of the quality of public officials and the special cause of non-responsibility foreseen in Art 9 of Law n. 146 of 16 March 2006.

4.3.5.6 Interception of communications

In Legislative Decree n. 108/2017, the interception of communications is dealt with separately as regards passive and active procedures.

4.3.5.6.1 Passive procedure

Where the authorities of a Member State deem it necessary to intercept communications with the technical assistance of Italy, one need to refer to Article 23 Legislative Decree n. 108/2017, which transposes Art 30 EIO D.

It is provided that the competence for the recognition of the investigation order for the interception lies with the district prosecutor, who must verify the regularity of the investigation order. In addition to the existence of the elements set out in paragraphs 3 and 4 of Art 30 (information on the subject of the interception; desired duration; sufficient technical data; reasons for relevance), the prosecutor must also verify the existence of an order or judgment authorizing to carry out the interception. Once recognized, the order is forwarded to the judge for preliminary investigations for a decision on its execution. The judge may deny execution in the cases provided for in Art 10 Legislative Decree n. 108/2017 and "if the conditions of admissibility provided for by domestic law are not met"[1234]. The refusal must be promptly notified to the requesting authority. If the judge authorizes the execution, an immediate or subsequent transmission is made as provided for by the EIO D.

[1234] Italy has therefore made use of the possibility provided for in paragraph 5 of Art 30 of the Directive.

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If, during the interceptions, intelligence communications are acquired, the public prosecutor must classify the communications before transmitting the results to the requesting authority, as provided for by the Italian law (Art 270-*bis* CCP)

Rules on requesting transcripts and costs are slavishly implemented (paragraphs 7 and 8 of Art 30).

If no technical assistance is needed (Art 31 EIO D and Art 24 Legislative Decree n. 108/2017), upon receipt of the notification of the commencement of operations, the Italian prosecutor will immediately transmit the information to the judge, who may order the cessation of operations if the interception concerns an offence for which such an investigative measure is not allowed in Italy. According to the instructions issued by the Ministry of Justice[1235],the judge's control in case the interception does not require the assistance of Italy does not cover all the conditions of admissibility provided for by domestic law, but only the correspondence of the offence for which the issuing authority is prosecuting with one of those listed in the Italian legislation on interceptions. This control would be milder than in the case of interceptions requiring assistance mentioned above. It will then be the public prosecutor - again the district prosecutor - who will notify the judicial authority of the Member State within 96 hours after the receipt of the notification, pointing out the interceptions carried out shall be unusable. There is no express provision for making the usability subject to compliance with specific conditions (see Art 31(3)(b) EIO D), but this seems admissible by virtue of a conforming interpretation.

If the EIO relates to telephone or computer records, the public prosecutor shall execute it in the form and manner provided for by the CCP concerning the production of acts and documents, including those covered by secrecy (see Art 25 Legislative Decree n. 108/2017 and Art 256 CCP). Thus, the Italian legislation expressly implements Recital n. 30 of the Directive, according to which “an EIO issued to obtain historical traffic and location data related to telecommunications should be dealt with under the general regime related to the execution of the EIO”.

4.3.5.6.2 Active procedure

Pursuant to Art 43 Legislative Decree n. 108/2017, if the Italian prosecutor deems it necessary to intercept communications in another Member State, he will have to draw up

[1235] See Memorandum of the Ministry of Justice of 26/10/2017 (*Circolare 26 ottobre 2017 - Attuazione della direttiva 2014/41/UE relativa all’ordine europeo di indagine penale – Manuale operativo*).

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an investigation order which must contain the data relating to the authority ordering the interception, useful elements to identify the person to be intercepted, the technical data required for the operation and its duration, and the reasons for the relevance of the act, as provided for by Arti 30(2) and (3) EIO D.

Even if the investigation order is issued by the public prosecutor, the latter will still have to obtain a valid authorisation by the judge for preliminary investigations. This document shall be expressly mentioned in the investigation order. It is the judge who verifies the prerequisites of the request, according to the rules set out in Art 266 et seq. of the code of criminal procedure, and then - if necessary - rejects it in the absence of the prerequisites. In the request, the prosecutor will indicate whether the technical assistance consists in the immediate transmission of telecommunications or in the subsequent transmission of the results.

If the interception is to be carried out on a device located in another Member State, but the technical assistance of the latter is not required (Arts 31 EIO D and 44 Legislative Decree n. 108/2017), the prosecutor shall inform the competent judicial authority of the progress of the operations, either from the beginning or as soon as it becomes aware that the device is located in another State. In case the foreign judicial authority informs that the interception cannot be continued, the public prosecutor shall stop the operations.

In full compliance with the provisions of the Directive, it is the foreign State that dictates the conditions for the usability of the interceptions previously carried out (see Art 31(3)(b) EIO D and Art 44, last paragraph, Legislative Decree 108/2017). Nonetheless, there was a stark contrast in the case law on the procedural nature (and thus the usability regime) of the interception of encrypted messages on the SKY-ECC platform obtained from abroad via the EIO[1236]. On 29 February 2024, the Supreme Court of Cassation decided that the transfer to the Italian judicial authority of the content of communications made through 'cryptophones' and already acquired and decrypted by a foreign judicial authority does not necessarily have to be subject to judicial authorisation in the country providing the

[1236] According to some Supreme Court cases (Sec. I., n. 6364 of 13/10/2022, Calderon; Sec. IV, n. 16347 of 05/04/2023, Papalia; Sec. III, n. 47201 of 19/10/2023, Bruzzaniti Leone) such conversations were admissible in the form of documents (see Art 234-*bis* CCP); however, according to judgment of Sec. VI, n. 44154 of 29/02/2024, Iaria, the rules of seizure applied, if the acquisitive activity takes place in the "static" phase; instead, the rules of the interception were to be followed if the acquisitive activity relates to communications occurred in the "dynamic" phase. On 3 November 2023, the matter was referred to the United Sections of the Supreme Court of Cassation, the body appointed to settle these contrasts.

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interceptions but is only subject to a control in Italy concerning the respect of fundamental rights and the right of defense[1237].

A specific provision (Art 45 Legislative Decree n. 108/2017) is dedicated to the acquisition of so-called telephone or telematic printouts. The law refers to these as 'external data relating to telephone or telematic traffic' to emphasise the absence of the content of telephone calls or information exchanges. Printouts may be requested by the public prosecutor or the judge depending on the stage of the proceedings. The EIO must contain the information needed to locate the user and identify the person under investigation, as well as the offence for which proceedings are being conducted. This provision also implements Recital 30 EIO D (see above, passive procedure).

4.3.6 Remedies

The Italian legislature did not introduce new remedies when it comes to EIO procedures.[1238]

However, at least to a certain extent, remedies already available for internal investigative measures may find application also in the EIO context.

More specifically, the Italian framework provides for an equivalence clause of legal remedies in explicit terms with regard to seizure for evidentiary purposes. Art 28(1-2) Legislative Decree n. 108/2017 states that, against an EIO concerning the seizure for evidentiary purposes, the accused or the defendant, his/her defence counsel, the person from whom the evidence or property has been seized and the person who would be entitled to their return, may submit a request for review before a judicial authority, pursuant to Art 324 CCP (*riesame*).

For other investigative measures, in the passive procedure, a general principle may be derived from Art 4(4) Legislative Decree n. 108/2017. According to it, the decree recognizing

[1237] See judgements Cass. Pen., Sec. un., n. 23755 of 29/02/2024, and Cass. pen., Sec. un., n. 23756 of 29/02/2024.

[1238] A limited remedy is established only for the case where **the defence counsel of the accused askes the prosecutor or the judge to** lodge an EIO and the request is rejected (Art 31 (1 to 4) Legislative Decree n. 108/2017). The request shall contain, under penalty of inadmissibility, the indication of the act of investigation or evidence and the reasons justifying its performance. If the request is refused, the prosecutor shall issue a reasoned decree. The judge shall decide by order, after hearing the parties. When the request relates to a seizure order, Art 368 CCP shall apply (*When, in the course of the preliminary investigation, the prosecutor considers that the seizure requested by the person concerned should not be ordered, s/he shall transmit the request, with her/his opinion, to the judge for preliminary investigations*).

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an EIO is communicated by the secretariat of the prosecutor's office to the defence counsel of the accused, within the time limit set for the purpose of the notice under Italian law about the performance of the investigative act at stake. Where Italian law provides only for the right of the defence counsel to attend the performance of the act without a notice, the decree of recognition shall be communicated at the time the act is performed or immediately thereafter.

Within five days of such communication, the accused and his/her lawyer may lodge an objection against the recognition decree before the judge for preliminary investigations. The judge decides by order, after hearing the prosecutor, and the order shall be communicated to the prosecutor and notified to the person concerned. Following the opposition to the EIO lodged by a party, the prosecutor shall inform without delay the issuing authority of the decision. If the opposition is upheld, the recognition decree shall be annulled (Art 13(1-2-3) Legislative Decree n. 108/2017).

Still, the opposition against the decree that recognizes the EIO shall not have suspensive effect on the execution of the investigation order and the transmission of the results of the activities carried out. The prosecutor may, however, refrain from transmitting the results of the activities carried out, if that could cause serious and irreparable damage to the accused or to other persons concerned by the performance of the act (Art 13(4) Legislative Decree n. 108/2017). The situation is much more problematic in active procedures. In this regard, in fact, the Italian transposition did not provide for any remedy, or even general framework. This lacuna raises serious concerns about the fairness of proceedings involving evidence collected via EIO.

4.4 The coordination with Regulation 2018/1805

4.4.1 Scope

As illustrated in the introduction, Italy has recently adopted the Legislative Decree n. 203/2023[1239], in force since 6 January 2024, 'for the complete adaptation of national

[1239] Legislative Decree n. 203 of 7 December 2023, in force since 6 January 2024, Official Gazette n. 298 of 22 December 2023 Provisions for the full adaptation of national legislation to the provisions of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on mutual recognition of freezing and confiscation orders. (*Disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni del Regolamento (UE) 2018/1805 del Parlamento europeo e del Consiglio, del 14 novembre 2018, relativo al riconoscimento reciproco dei provvedimenti di congelamento e di confisca*).

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legislation to the provisions of Regulation (EU) 2018/1805'. Nevertheless, the recent legislative decree has not fully resolved all coordination problems between the Regulation and national legislation, requiring the interpreter to make a coordinated approach between various sources: Regulation 1805/2018, the recent Legislative Decree n. 203/2023, but also the previous legislation, Legislative Decrees n. 137/2015, 35/2016 and, no less important, the Ministry of Justice Circular of 18 February 2021 and that of the Ministry of the Interior, Department of Public Security, of 12 January 2021.

Italy, therefore, did not adapt to the Regulation for a long time, in the sense, it should be pointed out, that it did not make the small changes necessary to allow its broader application. Before Legislative Decree n. 203/2023, in fact, in Italy the application of the Regulation was made through: (i) direct application of the Regulation, as an immediately applicable legal act; (ii) analogical procedural interpretation, using as a term of comparison Legislative Decree n. 137/2015[1240], on the recognition of confiscation orders and Legislative Decree n. 35/2016[1241], on the recognition of seizure orders; (iii) reference to the circulars of the Ministry of Justice and the Interior already mentioned and that, with a pragmatic approach, address quite a few application issues.

As is well known, the Regulation was immediately applicable in Italy even before the Legislative Decree n. 203/2023, which adapted the domestic procedural system to the EU instrument[1242]. And yet, it must be underlined that, especially at this initial phase, there are several interpretative issues unresolved by Legislative Decree n. 203/2023, and for which one must still refer to the other sources already mentioned above, or to the

Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2023-12-07;203.

[1240] Legislative Decree n. 137 of August 7, 2015 'on the implementation of Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders', in force since 17/09/2015 (Official Journal n. 203 of 2 September 2015). (*Attuazione della decisione quadro 2006/783/GAI relativa all'applicazione del principio del reciproco riconoscimento delle decisioni di confisca*). Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015;137.

[1241] Legislative Decree N. 35 of February 15, 2016, 'implementing Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of freezing orders', in force since March 26, 2016 (Official Journal n. 59 of March 11, 2016). (Attuazione della decisione quadro 2003/577/GAI del Consiglio, del 22 luglio 2003, relativa all'esecuzione nell'Unione europea dei provvedimenti di blocco dei beni o di sequestro probatorio). Link: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2016;35.

[1242] Especially from the perspective of recognition and execution procedures, i.e. where Italy is the executing State. For active procedures, therefore, the Regulation operates directly, and it continues to be useful to refer, insofar as they are compatible, to other and pre-existing national legislation as well. E.g., Arts 11 and 12 of Legislative Decree 35/2016 provide some useful directive for requests to execute a freezing order in the territory of another Member State.

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interpretative role of the case law[1243]. Among these, the Circulars of the Ministry of Justice and of the Ministry of the Interior maintain centrality, as they have taken care, since the beginning, for example, of expressly indicating which measures of patrimonial prevention fall within the scope of the Regulation (thus, for example, the same Circulars, to be read together, already clarified that the Regulation must also be applied to the cases of the so-called seizure of prevention, i.e. issued in the ambit of the anti-mafia regulations, regulated by Legislative Decree no. 159/2011)[1244].

With this brief overview of the recent legislative evolution, it should be immediately appreciated that with Regulation 1805/2018 the European Union intended to bring judicial cooperation between Member States to a new level for at least two reasons: 1) the legislative instrument used; 2) the breadth and specificity of the regulatory intervention.

Under the first profile, it must be considered that with the Regulation, the EU attempted to overcome the fragmentary nature of the instruments that existed until then, specifically, Directive 2014/42/EU. By comparing the two opening articles of the two legislative acts (Directive 2014/42 and Regulation 1805/2018), the direction that the Regulation intended to give to the cooperation between States is clear. The Directive set out a series of "minimum rules"[1245] on freezing property with a view to possible subsequent confiscation. The Regulation, for its part, aspires more simply and widely to regulate (all) the procedures for the recognition and execution of freezing and confiscation orders within the EU Member States[1246].

[1243] It's sufficient to read this judgment issued before the Legislative Decree n. 203/2023 to appreciate this issue. Court of Cassation, 06/10/2023, n. 47141 stated: "on the subject of recognition and execution of freezing orders of assets functional to confiscation issued by the authority of an EU member state, the "self-executing" provisions of the Regulation apply - pending the approval of the implementing legislation of the EU Regulation 2018/1805 - and, for matters not fully regulated therein, the provisions of Legislative Decree N. 35 of February 15, 2016, and Legislative Decree N. 137 of August 7, 2015".

[1244] The Ministry of the Interior circular, specifically, states that "the expression 'proceedings in criminal matters,' used by the European legislator, is also suitable to include the measures governed by the Code of Anti-Mafia Laws and Measures of Prevention (Legislative Decree 159/2011), since they presuppose an assessment of social dangerousness, based on the existence of indicia of the commission of crimes, and an ascertainment of the illicit origin of assets".

[1245] Art 1 Directive 2014/42/EU states "[t]his Directive establishes minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters". Differently, the Regulation states "This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters".

[1246] Art 1(1), states "This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters".

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Regarding the object of the regulatory intervention, from an Italian perspective, it is necessary to define what can and should be understood by "freezing"[1247] at the level of domestic procedural law. There is no instrument going by the same name in the Italian Code of Criminal Procedure (CCP). The most closely related instruments are seizures, "sequestri".

In Italy, there are two types of seizures understood as real precautionary measures: preventive ("sequestro preventivo", in Italian) and conservative ("sequestro conservativo", in Italian). Without claiming to be exhaustive, consider that, in a nutshell, the preventive seizure is that measure requested by the prosecutor to prevent that property, in the availability of the defendant, may lead to more serious consequences of the crime, this seizure may also be ordered on things for which confiscation would be possible[1248]. This instrument, therefore, has purely public purposes. On the other hand, the conservative seizure is that measure requested to protect credit[1249], that is, in order to prevent the defendant from dissipating the economic guarantees aimed to safeguard, for example, compensation for damages. Although the conservative seizure can also be requested by the prosecutor, it must be said that there is another procedural party particularly interested in this measure, and that is the civil party, i.e., who acts in the criminal trial for the sole purpose of claiming compensation for damages suffered and arising from the crime[1250]. It is well understood, therefore, how this measure is mostly of a private nature, that is, to protect the private interests of the creditor.

[1247] Confiscation, for its part, does not generate too many problems of interpretation, as it corresponds to the Italian institution of "confisca". Reference should be made to Art 240 and ff CC). Simplifying, the measure's purpose is to deprive the subject of the assets seized within the confiscation order, which become part of the public assets.

[1248] Art 321 CCP, Preventive Seizure, states that "when there is a risk that the free availability of an asset relating to the offence may aggravate the consequences of the offence or facilitate the commission of other offences, at the request of the public prosecutor, the judge (...) shall order its [preventive] seizure (...). The judge may also order the seizure of the objects whose confiscation is allowed".

[1249] For our purposes, consider in particular that the claim arising from damages. For exhaustiveness, Art 316 states that "If there are reasonable grounds to believe that the securities for the payment of a financial penalty, costs of proceedings and any other sum owed to the Treasury of the State are lacking or will be dispersed, the Public Prosecutor, at any stage and instance of the proceedings, after the initiation of criminal prosecution, shall request the conservative seizure of the accused person's movable or immovable property or the sums or objects owed to him, within the limits set by law for their distress. If there are reasonable grounds to believe that the securities for civil obligations deriving from the offence are lacking or will be dispersed, the civil party may request the conservative seizure of the property of the accused or of the person with civil liability for damages as provided for in paragraph 1. The seizure ordered upon the request of the Public Prosecutor shall also be in favour of the civil party".

[1250] See previous footnote on the reasons why the civil party may apply for a conservative seizure.

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Among these types of seizure, therefore, for the purposes of the Regulation prevalence should be given to preventive one (sequestro preventivo, in CCP). That preventive seizure can, presumably, be assimilated to the freezing order foreseen in the Regulation, as deduced from the finality of the freezing order indicated by Art 2 of the Regulation, which describes the "freezing order means a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof". Considering that these are freezing orders aimed at confiscation, also Art 321 CCP comes to mind, which has a similar approach and states that a preventive seizure may be requested in cases where there is a risk of aggravating the consequences of the offence or facilitating the commission of other offences and, not least, the preventive seizure of assets for which confiscation would then be allowed.

If this is true in general, the absence of a clear statement by the legislators (European and national), bring the interpreter face to face with a complex legal question, if seen from an Italian perspective: can the freezing order under the Regulation be issued only in cases where a preventive seizure would be possible in Italy? And then, can the victim request it directly?

This brings to one of the critical profiles on the matter, that is the role of the victim according to the Regulation. After looking at this aspect in depth in the following paragraph, it will be necessary to focus on the meaning to be given to the concept of "criminal matter", when viewed from the perspective of Italian law. Finally, the procedural aspects will be dealt with, to understand the concrete functioning of the instrument, including the reference to the "double criminality" requirement and whether it operates, if so, in the case of the Regulation and, finally, attention will be devoted to the freezing and confiscation certificates, through which the Regulation 'comes to life'.

4.4.1.1 The role of the victim

The role of the victim is one of the issues on the table and raising the most difficulties in interpretation and application of the Regulation. To properly understand the terms of the problem, it is necessary to briefly frame what opportunities are recognized in Italy to the victim in criminal proceedings. The victim of the crime can choose whether to exercise his or her right to damages directly in the criminal trial (or not). If he/she makes this decision,

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then he/she will have to formalize it through the so-called act of "constitution as a civil party" (assuming this name as a party in the proceedings). This act must comply with strict formalities that make it clear that only civil interests are at stake. Indeed, it must be considered that under Art 78 CCP, "The declaration of constitution as civil party (...) must contain, under penalty of inadmissibility:(...) a statement of the reasons justifying the claim for civil purposes" [1251]. As is evident, the civil party acts in the criminal trial to have compensation for the damages suffered. It follows that the civil party may also have an interest in taking precautionary action in order to prevent, having reasonable grounds, the defendant from dissipating the guarantees protecting the civil claim (e.g., if the defendant disposed of his/her assets to avoid payment of damages). As mentioned in the previous paragraph, the procedural tool exists, and it is the conservative seizure.

Conservative seizure is different, in its principles and purposes, from the preventive one. Underlying the freezing, in these cases, is a purely civil requirement, of protection of the claim abstractly referable to the criminal proceedings. The victim could be the recipient of damages, the security for the benefit of which, however, could be purposely dispersed by the defendant and at the same time debtor. To avoid the dispersion of the collateral, the law grants - to the civil party constituted - the right to apply for attachment.

With this instrument, the civil party requests (and aspires to obtain) a restriction on the defendant's property, which becomes unavailable to him/her, as a guarantee for the civil party's claims. At this point, the Regulation comes into relevance for the civil party's interests. As it can easily be imagined, if the civil party could apply for a freezing order under the Regulation, i.e., being able to rely on an EU-wide instrument, this would be a huge procedural advantage. Indeed, the civil party would be able to freeze assets held in other EU countries, and for the practical application of the instrument, it could also count on the human and logistical resources of the States involved in the mutual recognition instrument (the issuing and executing Member States).

[1251] This is particularly true after the so-called Cartabia Reform, the wide-ranging reform introduced by Legislative Decree 150/2022 to reorganize criminal justice in Italy. The Cartabia Reform also intervened on Article 78 of the Italian Code of Criminal Procedure, making it even clearer that the civil party exercises purely civil claims in criminal proceedings. This was also expressed by the Cass. Pen. Sez. Un., in judgment no. 38481/2023, which states that "a precise indication of the causa petendi will be necessary similarly to the forms prescribed for the claim brought in civil proceedings (...) for the purposes of the admissibility of the constitution, it will no longer be sufficient to refer to the commission of an offence but it will be necessary to refer to the reasons on the basis of which it is claimed that prejudicial consequences have arisen from the offence, as well as the title legitimating the claim".

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Imagine that the victim (and civil party in the proceeding) of one of the offences included in the list of those covered by the Regulation requests a conservative seizure. The civil party, having seen the investigation documents, discovers, based on investigations by the judicial authority, that there have been numerous money transfers to another Member State in order to prevent the victim from recovering his/her loss in Italy. At that point, the victim would have to embark on a long road to recover the sums that he or she believes are owed to him or her. He/she would then have to obtain a condemnment to reimbursement of damage and then take the difficult road to recovery.

And instead, if he/she could take advantage of the Regulation he/she would have, in order:

1. information derived from the judicial police that it could immediately exploit for the purpose of applying for a seizure;

2. if requested and obtained, the public authorities, the State, within the framework of this judicial cooperation, would take charge of executing the freezing order; in doing so, the victim would not only be able to rely on the human resources of Italy (which is assumed here as the issuing State), which would actually prepare the file to be sent to the executing State, but also on the human resources of the executing country. There, in fact, public security officers would seize the assets to meet the request for cooperation.

Whether this was the intention of the European legislator, or, on the contrary, such an approach could be considered a stretch, however, remains uncertain. The considerations that follow are intended to outline a guideline of possible interpretation that is in agreement with both the literal datum emerging from the Regulation and the ratio legis.

To answer the theoretical question[1252], it is necessary to see what the Regulation says on this subject. It must be observed that it is a bit cryptic and, likewise, the Italian legislation does not help to immediately understand the solution to the question. According to the Regulation (Art 1), it is called to operate “in criminal matters” and not “(...) in civil or administrative matters”. In Italy, a civil action in criminal trial, although formally instituted in criminal proceedings, must nevertheless be considered as a civil action. The formalities of a civil action make this assumption clear (Art 78 CCP). The doctrine on this point also specifies that “[the civil action can be] exercised in the criminal trial, attributing to the latter

[1252] It is useful to repeat the interpretative question that is being researched*: can the freezing order under the Regulation be issued only in cases where a preventive seizure would be possible in Italy? And then, can the victim request it directly?*

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a further part (...) qualified as "possible/eventual" (...) because its presence in the trial depends on a free and unquestionable option - in this sense uncertain and, therefore, eventual: that of deciding whether to apply to the criminal judge and not to the civil one to find satisfaction of his/her claim deriving from a crime (...). The relationship between [the two actions, civil and criminal] is governed (...) on the basis of the principle of the autonomy of the respective [ascertainment]: the tendency to separate the civil trial from the criminal trial, in fact, testifies to the pre-eminence of the requirements of celerity (...) of the criminal proceedings with respect to the interest of the victim in exercising his/her [civil] action before the same judge who also ascertains the conditions for punishment"[1253]. In addition to this, it is worth recalling Art 2 of the Regulation, which, on the subject of Definitions, states that "[f]or the purpose of this Regulation, the following definitions apply: (1) 'freezing order' means a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof". As can easily be seen, there is no mention of the possibility of immediately satisfying civil interests through the Regulation, nor the possibility for the victim to apply for the freezing order to protect civil reasons directly.

Lastly, it is necessary to point out a clue that can be deduced from the recent Legislative Decree n. 203/2023 and that seems to point definitively towards the hermeneutic option proposed here, namely the lack of legitimacy of the civil party to be able to directly apply for a freezing order under the Regulation. Art 2 Legislative Decree n. 203/2023, in fact, states that for the execution of freezing orders issued pursuant to the Regulation 'the provisions of the CCP concerning the execution, revocation and appeal of the preventive seizure decree shall be observed, insofar as they are compatible'. Here, too, therefore, albeit seen from the Italian perspective, no mention of the conservative seizure is to be found, which further supports the validity of the interpretative choice advanced here[1254].

Finally, it must be admitted that the Regulation is concerned with the victim, recognising the latter a sort of right of priority over the sums which the issuing State has obtained through the Regulation procedure. In these terms, however, it would seem that in the vision of the European legislator the victim would not be allowed to apply directly for

[1253] Maria Lucia Di Bitonto, 'I Soggetti' in Alberto Camon, Eleonora Cesari, Marcello Daniele, Maria Lucia Di Bitonto, Daniele Negri, Pier Paolo Paulesu (eds) *Fondamenti di procedura penale* (Wolters Kluwer 2023), 200 ff.

[1254] Namely the lack of legitimacy of the civil party to be able to directly apply for a freezing order under the Regulation.

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a freezing order under the Regulation, but he/she would come back into play at the end of the procedure and, at that point, his/her right to restitution would be particularly valued, recognising him/her as the beneficiary of the assets which the executing State will have succeeded in recovering. This appears to be the solution most in line with the ratio of the discipline. As can be deduced from the discussion, granting the victim the possibility to apply directly for a freezing order for civil purposes (i.e. for cases where in Italy it would be possible to apply for a so-called ''conservative seizure'') may lead to an implementation distortion, with not insignificant practical repercussions. This obliges the interpreter to wonder, finally, about possible friction with the rights of the defendant if this were to become the majority interpretation. Allowing the civil party to directly leverage the tools of the Regulation may rise issue of legal basis and a doubt as to whether the victim has direct legal capacity to apply directly for a freezing order under the Regulation, this may also pose a question as to whether the right to an effective remedy and the right of defence of the person affected by the freezing order has been violated.

On the first aspect, recalling the arguments presented above, it should be added that even a glance at the freezing certificate, in the section on ‘restitutions’, provides further arguments in favour of the interpretative approach proposed here (namely the lack of legitimacy of the civil party to be able to directly apply for a freezing order under the Regulation.). Section "K” of the freezing certificate is entitled ‘possible restitution to the victim’ and asks whether there is, in accordance with domestic law, a decision (which, therefore, already appears to be a decision additional and different from the freezing order) that has recognized the victim’s right to restitution. Not only that, the last part of section "K" specifically asks the issuing State to indicate whether, on the contrary, a procedure is pending which will establish the right of the victim to the possible return of "frozen" goods (to be understood, therefore, as already frozen for reasons falling within the Regulation's reasons of public interest)[1255].

No less important is Art 29 of the Regulation, which regulates precisely the ‘restitution of frozen property to the victim’ which again refers to the restitution of (already) frozen property and would also like to identify the cases in which it is possible, i.e. "(a) the victim's title to the property is not disputed; (b) the property is not sought as evidence in criminal

[1255] Art 29 of the Regulation also expresses in similar terms, stating that “Where the issuing authority or another competent authority of the issuing State has issued a decision, in accordance with its national law, to restitute frozen property to the victim, the issuing authority shall include information on that decision in the freezing certificate or communicate information on that decision to the executing authority at a later stage”.

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proceedings in the executing State; and (c) the rights of the persons concerned are not affected"[1256]. The verbal tense ("frozen") and the listing of cases in which assets are returned to the victim suggest that he/she cannot directly request a seizure under Regulation. "Frozen" seems to refer to already frozen assets and, no less important, the 'scope' and 'list' of definitions[1257] represent a *numerus clausus* in which there is no mention of a possible direct action by the victim to request a freezing order..

Still on the role of the victim, it is also useful to look at the issue from the perspective of the provisions about remedies. Art 33 of the Regulation, titled "[l]egal remedies in the executing State against the recognition and execution of a freezing order or confiscation order", states that "[a]ffected persons shall have the right to effective legal remedies in the executing State against the decision on the recognition and execution of freezing orders (…). The right to a legal remedy shall be invoked before a court in the executing State in accordance with its law (…). 2. The substantive reasons for issuing the freezing order or confiscation order shall not be challenged before a court in the executing State". The rule provides that the person affected by the order should be able to appeal in the executing State the decision to recognize and execute the freezing order. Questions of merit, however, can only be appealed in the issuing State. However, what remedies could the person affected by the freezing have and in which State? What grounds could he or she assert in the executing State? And what remedies could he or she exercise in the issuing State? Here, theoretically, the defendant will have to assert issues on the merits, but these will concern the merits of the victim's claim for damages, not the merits of the criminal charge, and will likely be raised in the very early stages of criminal proceedings. In addition to the grounds on the merits, can the lack of a legal basis for the civil party also be invoked in the issuing State?

Questions such as these, which are not resolved per tabulas by the European legislator (nor by the Italian one) attract the interest of the interpreter, whose efforts must be aimed at preventing that the instrument of the Regulation from becoming responsible for a deprivation of the rights of defendants. The reading advanced here also shows that these hurdles can be solved by linking the application of the Regulation both to the strict literal

[1256] There are also other useful references in the Regulation to explore the issue in depth, but they cannot all be cited in the space of this paper. Consider, however, recitals nn. 45 and 46.

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interpretation of its provisions and to the overall ratio of this mutual recognition instrument.

4.4.1.2 Criminal matter

Lastly, the scope of application of the Regulation is ambiguous if seen from the Italian perspective for what concerns the definition of “criminal proceedings”.

Art 1 of the Regulation, indeed, states that it applies in the field of proceedings "in criminal matters". Its Recital 13, moreover, states that "[p]roceedings in criminal matters is an autonomous concept of Union law interpreted by the Court of Justice of the European Union, notwithstanding the case law of the ECtHR. The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence (…) It also covers other types of order issued without a final conviction. While such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognise and execute such an order issued by another Member State (…)".

The issue is relevant in Italy, especially concerning the anti-mafia prevention legislation and proceedings. In the national system, there exists a structured para-sanctioning system (or, at any rate, a preventive one, simplifying as much as possible) aimed at striking the assets of mafia-type criminal associations. Within this mechanism, the instruments of seizure and confiscation are of the outmost importance.

Therefore, can the scope of the Regulation cover also anti-mafia prevention proceedings? To reconstruct the answer to the question, two ministerial circulars on the subject are worth mentioning: the Ministry of Justice Circular of 18 February 2021 and that of the Ministry of the Interior, Department of Public Security, of 12 January 2021. The latter considers that the Regulation can also be applied in so-called 'anti-mafia prevention proceedings', i.e. proceedings based on the deemed 'social dangerousness' inferred from 'indications of commission of offences' (in Italy governed by Legislative Decree n. 159/2011). The Ministry's interpretation should be underlined because it extends to the possibility of applying the Regulation.

As it can be read in the Circular of the Ministry of Justice, this was one of the goals of the Italian authorities on the road that led to the Regulation. In fact, the legislator intended to facilitate the mutual recognition of freezing orders even if issued, in Italy, under anti-

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mafia legislation, i.e. as preventive measures. On this point, therefore, it is convenient to mention, in excerpts, the salient parts of the circular which concern this theme. “On December 21, 2016, the European Commission therefore presented a proposal for a Regulation on the mutual recognition of freezing and confiscation orders issued in the context of ‘criminal proceedings’, a proposal (...) was then extended during the negotiations(...) to include the mutual recognition of orders issued in the context of ‘proceedings in criminal matters’, so as to broaden the scope of application also to orders adopted in the context of Italian prevention proceedings (…). It can be said that a correct interpretation of the Regulation can today extend its applicative perimeter to the Italian measures of patrimonial prevention (which must, therefore, be recognized and executed also in the Member States whose national legislation does not provide for such measures)”[1258]. In the face of this, however, it must be admitted that the resolution of the issue is not so straightforward and has long interested scholars. This cannot be the place to take up the complex issue and the debates around it in its entirety, but some very brief insights are worth to be mentioned. The concept of criminal matter to which the Italian circular also refers has concerned the jurisprudence of the ECtHR[1259] for the benefit of defendants, namely to reiterate a principle that even where, formally, a sanction is not described as criminal in a legal system, it is necessary to observe whether, in substance, it

[1258] In the Report on Eurojust's Casework in Asset Recovery, published in February 2019, the following were noted “difficulties caused due to different styles of preventive measures utilised in some national legislation in the pursuit of criminal assets, such as unexplained wealth, non-conviction-based orders or civil confiscation orders. The difficulty becomes acute if national legislation in the requesting/issuing State is not reflected in the requested/executing State” [footnote also mentioned in the Ministry of Justice Circular of 18 February 2021].

[1259] ECtHR, Grand Chamber, Case of De Tommaso v. Italy, App no. 43395/09. In doctrine on this point, see, among others Francesco Menditto, ‘La sentenza De Tommaso c. Italia: verso la piena modernizzazione e la compatibilità convenzionale del sistema della prevenzione’ (2017) 4 Diritto Penale Contemporaneo; Anna Maria Maugeri, ‘Misure di prevenzione e fattispecie a pericolosità generica: la Corte europea condanna l’Italia per la mancanza di qualità della “legge”, ma una rondine non fa primavera. Nota a Corte EDU, Grande Camera, sent. 23 febbraio 2017, de Tommaso c. Italia’ (2017) 3 Diritto Penale Contemporaneo. The author, already in 2017, moreover, acutely noted that "If the approach of the European Court expressed in the De Tommaso judgment were to be consolidated in future rulings, it could represent a vital stimulus to rethink the personal and patrimonial prevention measures, perhaps together with the future Regulation on the mutual recognition of confiscation orders issued in criminal proceedings, - should the Commission's proposal of 21 December 2016 be approved -, a regulation that will require the consideration of the possibility of bringing the patrimonial prevention proceedings back to the criminal matter and the related guarantees". See also ECtHR, Grand Chamber, Case of G.I.E.M. S.R.L. and others v. Italy, Applications n. 1828/06 and 2 others. See also Vittorio Manes and Michele Caianiello, *Introduzione al diritto penale europeo* (Giappichelli 2020).

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should be considered so. If the answer to this question is positive, then it means that measure is in substance criminal and the person subjected must be accorded some rights, including the respect for the principle of legality or due process. The application advocated by the Ministry today intends to resume that long debate but leveraging it "against the accused", that is, favouring the enforcement extension of measures with a sure sanctioning character (in this case: freezing and confiscation orders)[1260].

The recently adopted Legislative Decree n. 203/2023 does not mention the type of proceedings to which the Regulation applies. So, pending to see how the case law will orient itself, the practice proposed in the circulars must still be considered.

4.4.2 Procedure

The instrument is obviously based on mutual recognition between Member States and this aspect characterises several provisions of the Regulation. Through this cooperation, a 'double criminality' check for the facts being prosecuted is also overcome (in some cases). Specifically, for the purpose of Art 3 of the Regulation, the double criminality check is not carried out if the facts are punishable in the issuing State with a penalty of not less than three years and constitute one or more of the offences listed in Art 3, according to the issuing State legal system. It is, therefore, a requirement to be fulfilled jointly and not separately. Outside such cases, double criminality may be verified by the executing State before adopting the requested measure and the Legislative Decree n. 203/2023 (Art 1), provides for such a control in the passive procedure (that is, when Italy is the executing State)[1261].

[1260] If on the efficacy and incidence of the interpretative option endorsed by the Ministry, one cannot doubt, on the procedural guarantees, some doubt can arise, due to the particularly expeditious procedure that is that of prevention, with fewer guarantees compared to the "purer" criminal trial.

[1261] This aspect may also come to the fore as a ground for refusal under Arts 8 (1(e)) and 19 (1(f)) . In order to properly apply this ground for refusal, it is possible to interpret the double criminality principle in light of the case law of the Italian Supreme Court of Cassation. The Cass. Pen., sec. VI, judgment n. 35818/2020, when referring to the double criminality principle as a possible ground for refusal of the European Arrest Warrant, stated that it is not strictly necessary for the abstract scheme of the incriminating rule of the foreign legal system to have an exact correspondence in a rule of the Italian legal system. It is instead sufficient for the concrete case to be punishable as a crime in both legal systems, regardless of any differences in the penalty treatment or in title or other elements required.

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As for the dynamic part of the procedure, i.e. the request for cooperation, this takes place through the issuance and transmission of the freezing[1262] and confiscation certificate and the related order. Regarding this, it should be noted that once the freezing or confiscation order is compiled in the issuing State, this will have to be transmitted to the authority of the executing State. At the same time, the issuing State must transmit the freezing or confiscation certificate (see below), which is attached to the Regulation. When Italy is the executing State, the order must be transmitted to the competent national authorities in a certified copy, as required, most recently, by Art 1(3) Legislative Decree n. 203/2023.

[1262] Art 4 of Regulation states “A freezing order shall be transmitted by means of a freezing certificate”. Similarly, Art 14 provides for confiscation: 'A confiscation order shall be transmitted by means of a confiscation certificate”.

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FREEZING CERTIFICATE

SECTION A:

Issuing State: .....

Issuing authority: .....

Validating authority (if applicable): .....

Executing State: .....

Executing authority (if known): .....

SECTION B: Urgency and/or requested date for execution

1. Please indicate the particular grounds for urgency:

☐ There are legitimate grounds to believe that the property in question will imminently be removed or destroyed, namely:

.....

.....

☐ Investigative or procedural needs in the issuing State, namely:

.....

.....

2. Date for execution:

☐ A specific date is requested, namely: .....

☐ Coordination needed between the Member States involved

Grounds for this request:

.....

.....

SECTION C: Affected person(s)

Identity of the person(s) against whom the freezing order is issued, or of the person(s) that owns/own the property that is covered by the freezing order (if more than one person is affected, please provide the information for each person):

1. Identification data

(i) In the case of natural person(s)

Name: .....

First name(s): .....

Other relevant name(s), if applicable: .....

Aliases, if applicable: .....

Sex: .....

Nationality: .....

Identity number or social security number, if available: .....

Type and number of the identity document(s) (identity card or passport), if available:

.....

Date of birth: .....

Place of birth: .....

Residence and/or known address (if the address is not known, the last known address):

.....

Language(s) which the affected person understands .....

Please indicate the position of the affected person in the proceedings:

☐ person against whom the freezing order is directed

☐ person that owns the property that is covered by the freezing order

Scrolling quickly through the freezing certificate, as seen, a not at all marginal set of information is indicated, which may be useful for the executing State to carry out correctly the issuing State's request for execution.

The general rule would be that the certification, i.e. the request for execution of the order on the territory of another State, is addressed to only one State at a time. Only exceptionally, when, for example, there are reasons for considering that the enforcement

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requires continuous actions in more than one member State, may it be transmitted to more than one State.

The executing authority, upon receipt of the order, executes it in the manner it would have done in a domestic procedure. The passage is not irrelevant because it touches on the essence of the mutual recognition of measures between States. Recalling the modalities that would have been proper in the execution State also means referring to an ambitious "principle of equivalence" of the foreign measure with respect to the domestic one, perhaps the highest point of mutual recognition instruments.

If that is true in general terms, it must also be acknowledged that there are some grounds for refusal (see § 4.4.3 below). The cases are enumerated in Art 8 of the Regulation and, while not mentioning all of them, they may refer to: cases of ne bis in idem; formal and/or procedural flaws, such as incompleteness of the certificate; or in the event that - when there are serious grounds and with specific and objective elements - fundamental rights may be affected. However, a special duty of cooperation is also prescribed in this circumstance. In fact, the executing State, before proceeding with nonrecognition, is called upon to enter an adversarial process with the issuing State. The aim is evidently to save the instrument, by means of any additional information that the issuing State will be able to send because of the rejection notice. It may be argued that this cross-examination is indeed somewhat informal. Beyond the formal procedure of the instrument under consideration, there are also eminently political logics that at least in part support this freer approach in form.

Art 9 of the Regulation specifies that the execution State should execute as quickly as possible, which it would use, again, for the case even if that had happened in the internal legal system. This type of acts are characterized by the need to be executed with a certain timeframe.

This applies even more to freezing orders, which by their nature are characterized by a higher need for celerity. For the same reasons, with regard to the latter, there is also the possibility for the issuing State to request urgent performance from the executing State, which, in these circumstances, must decide within 48 hours on recognition and then within the following 48 hours provide for execution.

The Italian legislation has a mechanism for the urgent execution of preventive seizure orders. In cases of urgency, in fact, either the public prosecutor or the police may provide for preventive seizure, subject to validation by the judge for preliminary investigations

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within 48 hours. Well, in the case of the Regulation, Art 9(3) operates as a special norm (derogating the general one and provided for by Art 321 CCP), requiring Italy, when it is the executing State, to comply with it. Specifically, the issuing Member State also can request the urgent performance of the freezing order from the executing State, which, in these circumstances, must decide within 48 hours on recognition and then within the following 48 hours provide for the execution. The aforesaid time limits are not stated to be peremptory - because they would otherwise reverberate against the issuing State itself - and therefore, even if the executing State should fail to comply in time, the expiry of the time limits does not exempt it from compliance in any event. This procedure is regulated in Italy by Art 2(4) of Legislative Decree n. 203/2023, which reiterates the provision of the Regulation (Art 9). Specifically, it imposes the prosecutor to give an opinion on the request for cooperation within 24 hours of receipt of the request for execution, after which the judge may proceed even without the prosecutor's opinion, precisely in order to ensure compliance with the reasons for urgency.

Returning to the "ordinary" recognition and enforcement procedure, it should be recalled, from the Italian perspective, how, for freezing orders and in cases in which Italy is executing State, "on the request for recognition and execution of the freezing order the judge for preliminary investigations decides by reasoned decree, having acquired the opinion of the public prosecutor and having taken (...) all necessary information. The prosecutor shall render the opinion within ten days (...). Once these time limits have expired, the judge (...) shall also take action in the absence of the prosecutor's opinion" (Art 2 Legislative Decree n. 2023/2023). The rules and procedures, including remedies, proper to preventive seizure are observed[1263]. For confiscation, when Italy is the executing State, the competent authority is the Court of Appeal where the assets to be confiscated are located, or, if credits are involved, the Court of Appeal where the debtor resides (Art 3 Legislative Decree n. 203/2023). The Court of Appeal must set a hearing within twenty days of receiving the certificate and confiscation order. The notice of the hearing is communicated to the Prosecutor General at the Court of Appeal, the authority that requested the confiscation order, the person against whom the order is issued, and those who have rights to the property for which confiscation is claimed. The Court decides by

[1263] This fact, moreover, supports, at least in part, the circumstance that it must be requested for public and not civil law purposes.

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sentence on the request for recognition and execution of the confiscation within the next 15 days. Appeal against the judgment is admissible to the Court of Cassation.

It should also be mentioned that under Art 1(3) Legislative Decree n. 203/2023: an authentic copy of the freezing or confiscation order is always attached to the freezing and confiscation certificates. In Italy, the Ministry of Justice is designated as central authority.

Having recalled the procedure for the execution of freezing and confiscation orders, between Regulation and Legislative Decree n. 203/2023, a quick and schematic reminder of the essential aspects seems useful. Just few quick recalls, with the intention of making clear - albeit with some simplification - a procedure that is not immediately easy to understand.

At this point it is clear: a distinction must be made between the times when seizure is requested and those when confiscation is requested. The first act is by its nature a so-called 'surprise' act, in which, therefore, there will be no prior hearing. The second, on the other hand, is not characterised by this "surprise" element, thus suggesting the imposition of an adversarial procedure in the forms discussed above in the text.

In both cases, the issuing State, once the freezing and confiscation order has come into existence in its legal system, if it considers to request its recognition in another Member State (because it considers the property subject to the order to be kept there), must prepare the certificate (shown as an image above in the text), inserting the information required and useful to the executing State to enforce the order. Assuming for the purposes of this writing that it is the transmission of an order to Italy (identified, therefore, as the executing State), the issuing State must then transmit the certificate, together with an authenticated and translated copy of the order whose execution is sought to Italy, requesting recognition.

At this point the procedure differs depending on whether it is seizure or confiscation. If the measure (seizure or confiscation) is recognised in Italy, at that point the national authorities will take care - without delay - of its execution, with the same modalities that would have been used to execute a similar domestic measure.

4.4.3 Grounds for non-recognition and non-execution

Grounds for non-recognition or non-enforcement are dealt with in Arts 8 and 19 of the Regulation for freezing and confiscation orders, respectively. The two rules, except for some peculiarities, are similar; for this reason they can be treated together. The alignment of the Italian legislation with these provisions, inherently self-executing, is realized through

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Legislative Decree n. 203/2023. Moreover, through a regulatory technique aimed at specifying only one ground for non-recognition; for the rest, having to consider the Regulation operative in its entirety, to which the domestic legislation merely makes a reference. The case to which the Italian legislature devotes attention is only that of the double criminality condition and which will be examined shortly in this section. Lastly, efforts to enhance coordination between national legislation and the European framework are outlined in non-legislative instruments, such as circulars. Specifically, the Circular of the Ministry of Justice of 18 February 2021 details and analyse all the refusal grounds given by the Regulation.

Among the grounds for non-recognition or non-execution, common to Arts 8 and 9 of the Regulation should be mentioned: i) the case of ne bis in idem; ii) the existence of immunities to protect the subject one would like to target with the measures under consideration; iii) the absence of the requirement of double criminality, when required; iiii) the lack or deficiency of the freezing or confiscation certificate.

It is necessary to start with the requirement of double criminality. The Regulation is ambitious on this point and, in Art 3, identifies a whole series of hypothetical offenses in which the double criminality condition is not required to be met. This is a list of 32 offenses for which the Regulation applies anyway. Art 3(2), on the other hand, identifies an exception, which leaves some discretion to the States. To be more precise, "[f]or criminal offences other than those referred to in paragraph 1, the executing State may make the recognition and execution of a freezing order or confiscation order subject to the condition that the acts giving rise to the freezing order or confiscation order constitute a criminal offence under the law of the executing State, whatever its constituent elements or however it is described under the law of the issuing State". Italy has declared it will avail itself of this authority through the following declaration: For criminal offences other than those referred to in Art 3(1), the Italian Republic declares that it will avail itself of the authority envisaged in paragraph 2 of the same Article. Consequently, as executing State it will make the recognition and execution of the freezing or confiscation order subject to the condition that the acts giving rise to the order itself constitute a criminal offence under Italian law.

In order to properly coordinate with this specific ground for refusal, Art 1 (2) Legislative Decree n. 203/2023 states that, notwithstanding the conditions outlined in Arts 3 (1), 8 (1) (e), and 19 (1) (f) of the Regulation, the recognition and execution of orders shall be based

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on the circumstance that the facts constitute an offense under Italian law, regardless of their legal classification or description by the issuing state.

It follows, therefore, that the assessment to be made regarding the double criminality requirement does not depend on the nomen iuris of the offence. Italian rules intend to refer to the "facts" alleged in the proceedings in which the freezing or confiscation order is applied and not to the legal qualification of those facts. This, in principle, may allow a widening of the cases of recognition of the above-mentioned measures freezing and confiscation orders, because they are not strictly linked to the legal qualification but to an evaluation of the facts and their correspondence to an Italian incriminating provision. This approach is also reflected in the text of Recital 20 of the Regulation.

Another ground for non-recognition and non-execution that deserves mention is that relating to the absence or serious deficiency of the certificate of freezing or confiscation. As noted above, the certificates, attached to the Regulation, assume great importance in order to enable proper execution of the measure requested by the issuing State. Those certificates will contain, if properly filled out, all the data useful for identifying: i) the reasons justifying the measure; ii) the offenses for which the measure is being enforced; iii) the person against whom the application of the measure of freezing or confiscation is requested; iiii) the judicial order granted in the issuing State for which action is being taken; iiiii) the possible presence of a victim to whom restitution may have to be recognized.

For these reasons, the European legislator prescribes a cross-party procedure between States under which any shortcomings of the certificates should be made up by the issuing State at the request of the executing one. Only if this inter-state, fairly informal procedure is unsuccessful then a ground for non-recognition, which is common to freezing orders (Art 8) and confiscation orders (Art 19), may apply. The Italian approach, when Italy is the executing State, can be considered in line, as it appears clear even in the circular of the Ministry of Justice of 18 February 2021: the “recognition may be refused when the certificate of freezing or confiscation is incomplete or manifestly inaccurate, provided that the issuing authority has not completed or amended the same certificate following consultations that the executing authority is required to initiate”.

However, Art 19(g) contains an additional case of grounds for non-recognition or non-execution than those provided for freezing orders (Art 8), and that is the circumstance in which the defendant did not participate in his/ger trial.

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The alignment of Italian legislation with the refusal ground provided by Art 19(1)(g), applicable solely to confiscation orders, prompted amendments to the CCP made by Legislative Decree n. 203/2023. In the Italian legislation, the right to be present at trial find its discipline at the stage of the preliminary hearing. When specific conditions are fulfilled, the absence of the defendant can be considered willful, and the trial is allowed to proceed without him/her being present (Art 420-*bis* CCP). More specifically, it is possible to proceed in absence of the accused only in case he/she has expressly waived to the right to be present, as stated by article 420-*bis*(1) CCP. Alternatively, that can be inferred on the basis of some specific requirements established by the Code; the waiver in these cases is considered tacit (art 420-*bis* (2) CCP). Outside all these cases, the trial must be suspended (Article 420-*quarter* CCP).

Moreover, Article 19(1)(g) also requires that the person "was informed in due time that such a confiscation order could be handed down if that person did not appear at the trial". As a result, the provisions of the Code of Criminal Procedure concerning the content of the notice for the preliminary hearing (Art 419(1)), the decree ordering the trial (Art 429(1)(f)) and the decree of direct summons (Art 552(1)(d)) have been amended by Legislative Decree n. 203/2023.

Last, Art 19(1)(h) (and so Art 8(f)) provides for a ground for refusal concerning related to the possible violation of fundamental rights. In this regard, the Court of Cassation specifies that a "the possible lack of proportionality of the measure is not, therefore, expressly contemplated as a ground for refusal (*i.e.*: non-recognition), nor can it be made part of the concept of infringement of a fundamental right of defense"[1264].

4.4.4 Postponement or impossibility to execute the freezing or confiscation orders

It must be considered that there may be cases in which the execution of the requested measure (be it a freezing or confiscation order) must be postponed. These are the cases referred to in Art 10 of the Regulation for freezing orders and Art 20 for confiscation orders. Next to these, finally, it should be mentioned that there may be cases of impossibility to execute freezing or confiscation orders, regulated in Arts 13 and 21.

[1264] Cass. Pen. sec. II, n. 34212 of 27/05/2022.

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On the postponement, these are cases in which, for example, the execution of the freezing or confiscation order would result in prejudice or risks to ongoing investigations in the executing State, or for an impossibility of an objective nature, that is to say all those times when the property to be frozen, for example, is already the subject of execution in progress. Even in the case of the events just mentioned, the burden is on the issuing State to inform the executing State of the occurrences of one of the cases of impossibility to proceed. No less important, if and when the cause for postponement of execution falls, the enforcing State must immediately implement the measures necessary for the execution of the provision. The rule, therefore, constructs an automatic obligation for the executing State, which is obliged to resume proceedings as soon as it becomes aware that the ground for revocation has ceased to exist.

Domestic legislation, Legislative Decree n. 203/2023, on the point, is quite deficient. It is worth mentioning only Art 3(3) of Legislative Decree n. 203/2023, which deals with the case of postponement of the execution of confiscation and which, in line with the provisions of the Regulation states that "In the cases provided for in Art 21 of the Regulation, the court of appeal shall order the postponement of the recognition and execution of the confiscation order by reasoned decree adopted without formality and orders, at the same time, the preventive seizure of the property and sums of money subject to of the confiscation order", thus providing for the safeguarding of the assets that, in the future, may possibly be affected by the confiscation order when it becomes enforceable again.

4.4.5 Cooperation issues between executing and issuing authorities

These aspects, that concern the cooperation issues between executing and issuing authorities, must characterise the execution of the measures under discussion. It is more appreciated, however, when problematic cases of execution are discussed.

In general terms, Arts 9 and 20 of the Regulation deal with time limits for the recognition of freezing and confiscation orders. It must be premised that the recent Legislative Decree n. 203/2023 has not yet intervened on this specific issue and, therefore, some passages of the Regulation - if observed from an eminently applicative perspective (in fact, one would say that they are immediately applicable) - remain not entirely clear from the Italian perspective.

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Art 9 of the Regulation leaves it to the executing State, once it has received the freezing certificate, to decide on its recognition and execution 'without delay'. As is evident, the terminology used by the European legislator does not represent a peremptory term and therefore the absence of a specific Italian rule on the point is justified. The rules of the CCP will apply, which already invite judges - in the same sense as the Regulation - to execute them as soon as possible.

In addition, the Regulation - appreciating the value of good cooperation between States - gives the issuing one the right to indicate whether it requires the execution of the measure on a specific date. The Regulation does not construct a corresponding obligation on the executing State to comply with the issuing State's request but calls on the executing State to take the highest possible account of the indication received.

Cooperation, however, becomes more stringent when the issuing State declares that an immediate freezing of the assets is necessary because there are reasons to believe that they will otherwise be lost. As mentioned above, in this case the executing State will decide on the request within 48 hours, unless it is not possible to meet these deadlines. In the latter hypothesis, however, the executing State will have to inform the issuing State of the reasons why it was unable to comply with the urgent request and try to construct together with the executing State a plan of action appropriate to the specific situation. The Regulation envisages a closing and safeguarding rule, stating that in no case can failure to comply with the time limits justify - in absolute terms – the non-execution of the measure. In a few words, the enforcement authority will still have to decide on the recognition and enforcement of the measure, even if the time limits (not peremptory, it is confirmed here) of Article 9 Reg. have expired.

4.4.6 Remedies

Art 33 of the Regulation establishes the legal remedies accessible to individuals affected by the freezing or confiscation order within the executing state. The proposed approach adheres closely to the double “check” typically adopted in forms of cooperation based on the principle of mutual recognition and mutual trust. That is, in the executing State individuals can make use of the existing legal remedies accorded by national law against decisions of recognition or execution, but they cannot challenge the substantive grounds

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underlying the decisions to issue the measure. Those, in fact, can only be challenged in the issuing State.

Coordination with the rules on appeal against the recognition and execution of the freezing and confiscation order is made by Legislative Decree n. 203/2023. Art 2(5) of such Decree makes a general reference to the rules of the CCP for challenging the preventive seizure order. In particular, the appeal remedies against the preventive seizure order provided for in the CCP are riesame (Art 322 and Art 324 CCP), Appeal (Art 322-*bis* CCP) and Appeal to the Court of Cassation (Art 325 CCP).

Art 3(5) Legislative Decree n. 203/2023 also outlines the legal remedy available against a confiscation order. This remedy takes the form of an appeal to the Court of cassation, which in this case can only be grounded on the basis of violation of law in accordance with Art 606 CCP.

5 Conclusions

This Report analysed in detail the implementation of three instruments of judicial into the Italian framework, recalling the process of adaptation of national legislation to the EU laws and the reforms adopted over the years, while highlighting inconsistencies in the transposition of provisions and troubles in the compliant interpretation by the case law.

Concerning the EAW, the analysis illustrated two aspects of the national implementation that raised the most of concerns in terms of compliance with the original text of the instrument, namely the grounds for refusal and the rights of the suspect or accused.

The Italian transposition of the mandatory grounds for refusal, and the related case law, cannot be considered fully compliant with EU law. Nonetheless, the inconsistencies are minor, such as the definition of judgements of no grounds to proceed as a “final judgment” for the purposes of *ne bis in idem* under Art 3(2) EAW FD, or the application of the *ne bis in idem* clause for procedural flaws. As for the non-mandatory grounds for refusal, the Italian transposition still does not encompass all the optional grounds provided in the EU law; however, their absence does not cause concrete concerns, as they are optional by nature.

Considering the rights of the suspect or accused, the Report showed that the formal transposition of the rights to information and access to a lawyer conforms to EU law, even though the jurisprudential interpretation of the relevant safeguards appears less rigorous

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than in domestic circumstances. On the contrary, the right to translation cannot be considered fully implemented since the transposition does not mirror the original text of the instrument.

From the analysis conducted it was possible to evince that, after a quite tortuous process of implementation, the Italian text is now mostly compliant with the EAW FD. Nevertheless, certain aspects would still require further legislative or judicial intervention to allow a smoother issuance and execution of EAWs. As emerged in this Report, it would be advisable to enhance conformity in the transposition of the grounds for refusal and the provisions on the right to translation, and to increase consistency in the interpretation of the right to be assisted by a lawyer compared to domestic standards.

Concerning the EIO, this Report showed that the transposition into the Italian system is overall compliant with the EIO D, even though some inconsistencies have been detected. Regarding the grounds for non-recognition or execution, the EIO D can be considered correctly implemented, with some exceptions – for instance, the complete omission of the territoriality clause contained in Art 11(1)(e) EIO D and of the immunity clause of Art 11(5) EIO D, and the deliberate elevation of two formal requirements as grounds for non-recognition or execution (Arts 2(c) and 5 EIO D). Some minor inconsistences have also been flagged in the cooperation procedure and in the implementation of the principle of proportionality, but they may be easy to overcome in practice through communication between authorities.

With regard to the special investigatory acts, apart from slight discrepancies that can be solved through a broad interpretation of the legislation – as for temporary transfer of persons held in custody – or through the contact between authorities – as for covert investigations, the spotlight has been on real-time monitoring and controlled deliveries, which are not formally provided by Italian law. The former was regulated by the legislator for the sole execution phase, generating significant discrepancy between the guarantees provided in the active and passive procedures; the latter are omitted from the transposition law. In light of this, a legislative intervention to bridge the gap left in the Italian transposition of these special investigatory acts is highly recommended.

The last noteworthy inconsistency concerning the EIO is related to the transposed provisions on remedies, which are seriously deficient. While no remedy is provided for the active procedure, in the passive one remedy is linked to the notification of recognition by the prosecutor, which is not always mandatory. Therefore, in clear contrast with the EIO D,

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in the Italian transposition law the right to remedy is not fully granted. In this case as well, a legislative intervention to fix such a significant deficiency is highly recommended.

Concerning the Regulation, the implementation process has been less linear. The Italian legislator adopted the necessary changes for the smooth application of the Regulation only in 2023, with the enactment of Legislative Decree n. 203/2023. Nevertheless, even after the recent legislative intervention, serious uncertainties remain at interpretative level.

In first place, the question whether victims are entitled to request a freezing order under the Regulation was left unsolved in both national and European legislations. The reasoning conducted in this Report combined both the literal interpretation of the Regulation and the Italian legislation – emblematically, Art 1 of the Regulation and Art 78 CCP – and the *ratio* underpinning the instrument. Considering that such a prerogative in the hands of the victim might impair the balance towards the accused and contravene express legal provisions, the most suitable conclusion proposed at the end of the analysis is that the victim should not be considered attributed the right to request a freezing order under the Regulation.

Second, the ambiguity surrounding the definition of "criminal matter" casts doubts on the scope of application of the Regulation and questions the possibility to apply this instrument to anti-mafia prevention proceedings when such measure is not envisaged by the law of the executing Member State. Considering that Ministerial Circulars confirmed the application of the Regulation to anti-mafia prevention proceedings and that Recital 13 of the Regulation affirms that Member States should recognise and issue an order even though such order does not exist in its legal system, it could be suggested that the Regulation does cover anti-mafia prevention proceedings. However, the recent Legislative Decree n. 203/2023 does not rule this aspect. Therefore, since the Regulation has still not been so frequently deployed in Italy, upcoming case law must be waited in order to infer the judicial orientation on the matter.

Overall, notwithstanding the often-debated process of transposition, the implementation in the Italian system of the three instruments is overall consistent, in the sense that it does not present serious hampers for the smooth functioning of cooperation procedures between Member States. Still, some inconsistencies have emerged throughout the analysis conducted in the present Report and have been carefully examined to highlight concrete effects on the cooperation practice. Therefore, aiming to a more compliant

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implementation into the national system, the authors flagged those provisions where a harmonizing intervention of the Italian legislation would be advisable.

6 References

Alberto Alessandri, 'Riflessioni penalistiche sulla nuova disciplina' in *La responsabilità amministrativa degli enti* (Ipsoa 2002).

Marta Bargis, 'Il mandato di arresto europeo dalla decisione quadro del 2002 alle odierne prospettive' (2015) 4 Dir Pen Cont 61.

Marta Bargis, 'Mandato di arresto europeo e diritti fondamentali: recenti itinerari "virtuosi" della Corte di Giustizia tra compromessi e nodi irrisolti' (2017) 2 Dir Pen Cont 177.

Marianna Biral and others, 'The Italian Implementation of the EU Directives on Procedural Safeguards for Accused Persons in Criminal Proceedings' (2022) Sistema Penale <https://www.sistemapenale.it/pdf_contenuti/1669131660_report-italiano-crossjustice.pdf> accessed 14 October 2024.

Michele Caianiello, 'Increasing Discretionary Prosecutor's Powers: The Pivotal Role of the Italian Prosecutor in the Pretrial Investigation Phase', *Oxford Handbook Topics in Criminology and Criminal Justice* (2012; online edn, Oxford Academic, 2 June 2014).

Michele Caianiello, 'L'OEI dalla Direttiva al Decreto N. 108 del 2017' in Roberto E. Kostoris and Marcello Daniele (eds) *L'Ordine Europeo D'Indagine Penale. Il nuovo volto della raccolta transnazionale delle prove nel d.lgs. n. 108 del 2017* (Giappichelli 2018).

Vincenzo Caianiello and Giuliano Vassalli, 'Parere sulla proposta di decisione-quadro sul mandato di arresto europeo' (2002) Cassazione Penale 462.

Camera dei Deputati, 'Schema di decreto legislativo recante disposizioni per il compiuto adeguamento della normativa nazionale alle disposizioni della decisione quadro 2002/584/GAI, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri (201)' (Prot: 2020/0001361/TN, 02 November 2020)

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<https://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0201_F001.pdf&leg=XVIII> accessed 14 October 2024.

Alberto Camon and others, *Fondamenti di procedura penale* (4th edn, Wolters Kluver 2023).

Valentina Covolo, 'Mutual recognition and absolute standards of effective judicial protection' in Silvia Allegrezza and Valentina Covolo (eds) *Effective Defense Rights in Criminal Proceedings* (Wolters Kluwer 2018).

Gaetano De Amicis, 'Dalle rogatorie all'ordine europeo d'indagine: verso un nuovo diritto della cooperazione giudiziaria penale' (2019) 1 Cassazione Penale.

Jorge Angel Espina Ramos, 'Additional accepted languages for executing European Investigation Orders: Dismantling the Tower of Babel? (2019) 10 NJECL 324.

Massimo Fichera, 'The implementation of the European Arrest Warrant in the European Union: law, policy and practice' (Intersentia 2011).

Cosimo Emanuele Gatto, 'Il principio di proporzionalità nell'ordine europeo di indagine penale' (2019) 2 Diritto Penale Contemporaneo.

Ciro Grandi, 'Il Mutuo Riconoscimento dei Provvedimenti di Confisca alla luce del Regolamento (UE) 2018/1805' (2021) La Legislazione Penale.

Giulio Illuminati 'The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)' (2005) 4 Wash. U. Global Stud. L. Rev. 567.

Luigi Kalb, 'Cooperazione Giudiziaria: le novità del recepimento delle fonti sovranazionali' (2016) Diritto Penale e Processo 989.

Giulia Lasagni, 'Dalla riforma dei tabulati a nuovi modelli di integrazione fra diritti di difesa e tutela della privacy' (2022) 3 La Legislazione Penale 124.

Giorgio Marinucci, Emilio Dolcini, Gian Luigi Gatta, *Manuale di diritto penale* (12th edn, Giuffrè 2023).

Adriano Martufi, Christina Peristeridou, 'Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework' (2020) 5(3) European papers 1477.

Valsamis Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', 6(4) NJECL 457.

Stefano Montaldo, Lorenzo Grossio, 'La riforma della disciplina di recepimento del mandato d'arresto europeo: il nuovo assetto dei limiti all'esecuzione della richiesta di consegna' (2021) 3 Freedom, Security & Justice: European Legal Studies 95.

Ministero della Giustizia, 'Vademecum Per L'emissione Del Mandato Di Arresto Europeo' <https://www.giustizia.it/resources/cms/documents/Vademecum_mandato_arresto_europeo.pdf> accessed 14 October 2024.

Isadora Neroni Rezende, 'Dati Esterni alle Comunicazioni e Processo Penale: Questioni Ancora Aperte in Tema di Data Retention' (2020) 5 Sistema Penale 183.

Lorenzo Salazar, 'La decisione quadro sul mandato d'arresto europeo: genesi, contenuto e finalità del nuovo sistema normativo', Programma "Grotius penale" della Commissione europea. Incontro di studio sul tema "Cooperazione Giudiziaria Europea: dall'estradizione al mandato d'arresto europeo", Rome, 10-12 November 2003.

Adolfo Scalfati (ed), 'Le indagini atipiche' (2nd ed, Giappichelli, 2019).

Salvatore Tesoriero, 'La cooperazione transnazionale nelle indagini in materia di frodi IVA e doganali: strumenti tradizionali e nuove opportunità' in Adriano Di Pietro and Michele Caianiello (eds) *Indagini penali e amministrative in materia di frodi IVA e doganali. L'impatto dell'European Investigation Order sulla cooperazione transnazionale* (Cacucci Editore 2016).

Mauro Trogu, 'Sub art 27' in Antonella Marandola (ed) *Cooperazione giudiziaria penale* (Giuffrè 2018).