

ITALY

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Overview Respondents in the Empirical Part of the Research

Respondent	Function	Place of interview	Date	Comment
R1	Judge	Parma	17/10/2016	
R2	Lawyer	Salerno	4/11/2016	Skype call
R3	Public Prosecutor	Bologna	10/11/2016	Together with R4
R4	Public Prosecutor	Bologna	10/11/2016	Together with R3
R5	Lawyer	Padua	11/11/2016	
R6	NGO representative	Bologna	01/12/2016	Together with R7
R7	NGO representative	Bologna	01/12/2016	Together with R6
R8	Lawyer	Rome	02/12/2016	
R9	NGO representative	Rome	14/12/2016	

1. Meaning and scope of the fundamental rights subject to this study in the national legal order

1.1 Protection against torture and degrading treatment

a) Status and content of the protection against torture and degrading treatment based on Italian legislation and case-law

The Italian legislation on torture is very recent. The *Codice Penale* (hereinafter *CP*) has expressly identified torture as a criminal offence only in July 2017. Art 582 *CP* dealing with bodily harm,³ used to be considered sufficient to prosecute violent acts, including torture.⁴ This was a patent inconsistency in our legal system, which also frustrates the Constitution.⁵ Over the last years, however, pressure has become ever stronger, especially after a set of rulings by the ECtHR, which repeatedly found Italy liable for the violation of art 3, especially for inhuman and degrading treatment of detainees. Such cases concerned, for example, the overcrowding of Italian prisons⁶, the vexation undergone by some prisoners,⁷ the incompatibility of the punishment with the prisoners' health conditions,⁸ the violent acts perpetrated by some police officers,⁹ the expulsion of extra EU citizens to countries allowing torture.¹⁰ Finally, in 2015 the ECtHR expressly pointed out the responsibility of the legislator and called for a reform in the field.¹¹ The Court found that Italy had violated the prohibition of torture. The violation was twofold: on "substantive" grounds, owing to the serious ill-treatment of the applicant, and on "procedural" grounds, owing to the lack of adequate investigations and punishment for the officers who were responsible for the acts of torture. On point of law, the Court held that the national legislation "had proved both inadequate in terms of the requirement to punish the acts of torture in issue and devoid of any deterrent effect capable of preventing similar future violations of art. 3". As a matter of fact, in light of this undeniable structural problem, the Court has considered necessary to introduce legal mechanisms capable of imposing appropriate penalties and preventing offenders from benefiting from measures incompatible with the case-law of the Court".¹²

³ It states that anyone who causes injuries to other persons resulting in physical or mental disability is subject to a prison sentence of between 3 months and 10 years. The injury is considered "serious" and is subject to a prison sentence of between 3 and 7 years if it causes a disability or temporary incapacity for more than forty days (art 583 CP). Art 585 CP increases penalties by up to a third where aggravating circumstances occur.

⁴ To this end, in addition to art 582, other CP provisions could be referred to, as for instance i) specific protection against strokes (art 581), ii) duress (art 610), iii) safeguards against illegal arrest, undue restriction of personal liberty (art 606), iv) abuse of office against detainees and prisoners, illegal inspections and personal searches (art 608 and other provisions).

⁵ Costituzione, art 13 (4). See F Zacché, 'Caso Cestaro c. Italia: dalla prima condanna della Corte EDU sull'irruzione alla Diaz l'obbligo di introdurre il delitto di tortura' (2015), Quad. Cost 462, 466; R Gabrieli, 'La tortura in Italia. Il reato che non c'è' (2016), Riv. criminologia, vittimologia e sicurezza 53, 65.

⁶ Applications nos 57574/00 and 57575/00 *Sulejmanovic & Others v Italy*, Judgment (2nd Section) of the 8 November 2002, CE:ECHR:2002:1108JUD005757400; Applications nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10 *Torreggiani & Others v Italy*, Judgment (2nd Section) of the 8 January 2013, CE:ECHR:2013:0108JUD004351709.

⁷ Application no 36629/10 *Saba v Italy*, Judgment (2nd Section) of the 01 July 2014, CE:ECHR:2014:0701JUD003662910.

⁸ Application no 126/05 *Scoppola v Italy*, Judgment (Grand Chamber) of the 22 May 2012, CE:ECHR:2012:0522JUD000012605.

⁹ Application no 15397/11 *Alberti v Italy*, Judgment (2nd Section) of the 24 June 2014, CE:ECHR:2014:0624JUD001539711.

¹⁰ Application no 38128/06 *Ben Salah v Italy*, Judgment (2nd Section) of the 24 March 2009, CE:ECHR:2009:0324JUD003812806; Application no 37201/06 *Saadi v Italy*, Judgment (Grand Chamber) of the 28 February 2008, CE:ECHR:2008:0228JUD003720106; Application no 246/07 *Ben Khemais v Italy*, Judgment (2nd Section) of the 24 February 2009, CE:ECHR:2009:0224JUD000024607.

¹¹ Application 6884/11 *Cestaro v Italy*, Judgment (4th Section) of the 7 July 2015, ECHR:2015:0407JUD000688411

¹² Ibid.

As a response to these concerns, a new *Draft Law* has been launched in 2015, completing its parliamentary process after just a couple of years. Through the *Legge 14 luglio 2017, n. 110 Introduzione del delitto di tortura nell'ordinamento italiano* (hereinafter *L 110/2017*), Italy is finally equipped with a legislation on torture, filling a regrettable long-standing legal vacuum. Nevertheless, the text recently approved by the national assembly has been received with less than glowing enthusiasm both at domestic and international level.¹³ This new piece of legislation is regarded as being politically acceptable, but practically inapplicable. Notably, most of the criticism have been addressed to the restriction of the scope of this type of crime, since *a*) for torture to occur, multiple acts (*più condotte*) of serious violence or threats or cruelty are required; *b*) psychological torture is limited to those emotional traumas that can be verified. Furthermore, great disappointment has been expressed in respect of two additional issues, that is, the lack of special rules on the statute of limitations, as a result of which ordinary time barring periods shall apply, and the adoption of a notion of torture, encompassing also conducts committed by private persons.

b) The protection against torture and degrading treatment and its relevance in judicial cooperation in criminal matters

The role of the competent authorities

In Italy jurisdictional relations with foreign authorities are governed by the Book XI of the *Codice di Procedura Penale* (hereinafter *CPP*),¹⁴ by the relevant international agreements and by general principles of international law. The latter are considered *lex specialis* in relation to the ordinary law, that provides for the primacy of conventions and general international law (art 696 *CPP*). Overall, the relevant *CPP* rules are founded on an internationally-based rationale; as a result, they are characterised by the discretionary power in the hand of the executive.¹⁵ Basically, both extraditions and procedures aimed at recognising foreign judgments are divided into two phases: the first one, political in nature, attaches to the Minister of Justice (hereinafter *MoJ*) the power to initiate the active procedure as well as to decide on the requests coming from abroad on the basis of political expediency. The second one concerns the judicial check. In the passive procedure, this is firstly performed by the General Public Prosecutor (called upon to carry out the necessary preliminary ascertainment) and, then by the Court of Appeal, in charge to assess whether the conditions set by law to agree the request have been met. In the active procedure, as far as extradition is concerned, the General Public Prosecutor forwards the request, together with the necessary documents and evidences to the *MoJ*, that will decide on the case. The same procedure applies also to the recognition of Italian judgments abroad, but in this case the prior approval of the Court of Appeal is necessary.

It is worth noting that, under no circumstances the two procedures at issue can be applied in breach of the principle protecting individuals from persecution or discrimination or cruel, inhuman degrading penalties or treatment.¹⁶ Furthermore, as far as extradition cases are concerned, the Court cannot surrender the requested person if there is the serious risk that the persons concerned may be subject to torture in the requesting State.¹⁷ An appeal can be

¹³ See the Letter sent by the CoE - Commissioner for the Human Rights to the Italian Parliament on the 16 June 2017 (Ref: CommHR/NM/sf 027-2017). See also Preve M., 'Vittime, avvocati e giudici: "La nuova legge sulla tortura è una truffa', *La Repubblica* (Genova, 17 may 2017) http://genova.repubblica.it/cronaca/2017/05/17/news/vittime_avvocati_e_giudici_la_nuova_legge_sulla_tortura_e_una_truffa_-165692947/.

¹⁴ *CPP*, arts 697-719.

¹⁵ *CPP*, arts 742-743.

¹⁶ *CPP*, arts 698, 705 and 744 as amended by the Law 149 of the 21 July 2016.

¹⁷ *Legge 110/2017*, art 3, Recently amended by the D.lgs 25 Luglio 1998, n 286 concerning immigration and the status of foreign citizens.

always lodged with the Court of Cassation, also based on the merits of the case. Nonetheless, the final word stays with the political power, especially in extradition cases. As already mentioned, the above provisions do not apply in the cases covered by *FD EAW*, *FD 2008/909* and *FD 2008/947*, since the latter are *lex specialis*. By and large, in order to comply with the EU cooperation patterns, the political role played by the *MoJ* is removed as well as the preliminary assessment carried out by the General Public Prosecutor. With regard to the EAW, the competence to decide on the case remains with the Court of Appeal, that with a view to approve or reject the request is formally obliged to assess whether there is as serious risk for the requested person being liable to the death penalty, torture or other inhuman or degrading punishments or treatment.¹⁸ If that is the case, the Court must dismiss the request, since the above condition amounts to a mandatory ground for refusal in the domestic legal order. As concerns the national provisions implementing the other two FDs, specific provisions impeding the recognition of the judgment/decision due to violation of the above principle have not been envisaged; nonetheless, they both provide for a safeguard clause prohibiting the application of such rules in case they are not compatible with the fundamentals of the Constitution.¹⁹

Criteria for review

The way Italy has addressed the prohibition of torture and degrading treatments in judicial cooperation field is peculiar. With a delay of around 30 years the Legislator has amended national legislation with a view to adapt it to international constraints, but these fragile attempts will probably remain empty words in substance. Despite this, in implementing the EU legal instruments under consideration great attention has been paid to this subject. A case in point is certainly the legislation implementing the EAW, that includes a mandatory ground for refusal preventing the surrender if there is as serious risk for the requested person being liable to the death penalty, torture or other inhuman or degrading punishments or treatment.

As far as the concrete application of this rule is concerned, such a ground has been poorly relied on and where called into question, the Court of Cassation has generally dismissed the case. By and large, in light of the research findings, within the framework of judicial cooperation procedures affecting the application of mutual recognition, problems concerning the prohibition of torture or degrading treatment have not been really at a stake so far. This issue is considered just in extradition cases involving non-EU Countries. In this regard, however, a U-turn has been recently marked, due to the seminal CJEU judgment in the case *Aranyosi and Caldăraru*,²⁰ since this triggered a trend in the national case-law, requiring the authorities competent for the execution to pay greater attention to the prison conditions in the issuing Country. In that regard, the Courts of Appeal has now the duty to ascertain that the transfer will not result in the violation of the basic rights of the person concerned. In order to perform this task, general information concerning the conditions of the whole prison system are no longer sufficient. The executing authority is required to assess *in concreto* the conditions of the structure in which the requested person will be detained (e.g. the name of the structure, data on the personal space, sanitary requirements, healthiness of the accommodation, monitoring system in place to assess the above conditions effectively). Basically, a time-limit of 30 days is set by law for the issuing authority to reply; at any rate, if these evidences are provided after the deadline, but in a reasonable time, the Court can

¹⁸ L 69/2005, art 18 (1) (h).

¹⁹ Costituzione, art 27 “[...] Punishment cannot consist in inhuman treatment and must aim at the rehabilitation of the convicted person. The death penalty is not permitted.”

²⁰ Joined cases C-404/15 e C-659/15 PPU *Pál Aranyosi e Robert Căldăraru*, Judgment of the Court (Grand Chamber) of 5 April 2016, EU:C:2016:198.

review its decision. If the above information is not forwarded on time or if these are not deemed sufficient, the request can be declined.²¹

Regarding the *FD 2008/909*, a ground for non-recognition based on the same issue has not been foreseen. The relevant national provisions only prescribe that the execution of the penalty/security measure must be aimed at fostering the chances of social rehabilitation of the person concerned, but they do not provide guidance as to the criteria to be used to ascertain if the executing State is the most suited place for this purpose. Likewise, in active procedure there is no prior assessment of the prison conditions in the executing Country.

1.2. Fair trial

a) Status and content of the right to fair trial based on national legislation and case-law

National sources

Fair trial is a general principle enshrined by art 111 of the Constitution and applying to all jurisdictions. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law also provides for the reasonable duration of trials. In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence. The defendant is entitled to the assistance of an interpreter in the case that s/he does not speak or understand the language in which the court proceedings are conducted.

Notably, in criminal law proceedings the formation of evidence is based on the principle of adversary hearings. The guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defence counsel. The law regulates the cases in which the formation of evidence does not occur in an adversary proceeding with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct. All judicial decisions shall include a statement of reasons. Appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts. This rule can only be waived in cases of sentences by military tribunals in time of war; while, appeals to the Court of Cassation against decisions of the Council of State and the Court of Auditors are permitted only for reasons of jurisdiction. The provision at issue is the result of an important reform,²² aimed at strengthening fair trial principle, giving it a constitutional value and better conforming the Italian legal system to art 6 ECHR. Statutory laws shall comply with the Constitutional provisions and the principles therein, they may derogate from the fair trial principles only if a balance with other constitutional principles is required but, in any case, they cannot completely depart from them. The most important European sources (art 6 ECHR and art 47 CFR) are often quoted in Italian judgments and have become an inner part of our legal culture, thanks also to the continuous dialogue between European and national courts.

European sources

²¹ Corte di Cassazione, 28/04/2017, n 20690; Corte di Cassazione, 01/06/2016, n 23277.

²² Legge Costituzionale no 2/1999.

Fair trial is further guaranteed by the legislation implementing the *Directives 2010/64, 2012/13 and 2013/48*. Nonetheless, their actual impact is quite limited, since due to their minimalist wording, just a few amendments were necessary to formally meet the EU goals.²³ The *Directive 2010/64*²⁴ on the right to interpretation and translation can well illustrate this because both the relevant national legislation and case-law were already coherent with the EU rules and they can even be regarded as a forerunner of the *Covaci* jurisprudence.²⁵ Despite that, the adoption of this new piece of legislation would have been an excellent chance for a proper discussion on a genuine enhancement of the linguistic assistance service in Italy and for filling those gaps hindering the effective exercise of such a right in practice. More to the point, the *Directive* addresses two key spheres: *a)* the extension of the scope of application of the right to interpretation and translation from one hand, and *b)* the quality of the linguistic assistance service from the other hand. In this respect, the Legislator has focused just on the former aspect, overlooking the quality-related problems. As far as the extension of the guarantees at issue is concerned, the changes introduced are certainly welcomed, especially those pertaining to the court expenses, thanks to which the charges for interpretation and translation have to be met by the State, irrespective of the outcome of the proceedings.²⁶ As a matter of principle, the same can be said about the amendments made to the CPP, allowing to grant the right to interpretation, free of charge, for all the communications between suspected or accused persons and their legal counsel, including those occurring before any hearing and those arranged to submit a request or a statement during the proceeding.²⁷ Such a guarantee applies also during the period of pre-trial detention or in the event of arrest or temporary detention.²⁸ Furthermore, the translation of the fundamental acts of the proceeding now covers criminal judgments and decisions of conviction as well as orders enforcing precautionary measures; thus, embracing also those decisions, the aim of which is not to deprive but just limit the personal freedom of the individual concerned.

Having mentioned these bright spots, it is however necessary considering the shadows rising from the implementing law, that are likely to mitigate the effectiveness of the above provisions. The first factor to be considered is their scope of application, maybe too much wide in terms of affordability. The second one is the limited impact of the rules regarding the quality of the interpretation and translation service. The latter were intended to create or enhance the conditions for the individual concerned to genuinely understand the proceeding and to be properly understood; while their Italian version seems to be more oriented to meet a formal compliance. Just to give an example, in order to comply with art 5 of the *Directive*,

²³ M Caianiello, 'Dal terzo pilastro ai nuovi strumenti: diritti fondamentali, "road map" e l'impatto delle nuove direttive' (2015), *Dir. pen. Contemporaneo* 70, 85; M Gialuz, 'L'assistenza linguistica nella prassi giudiziaria e la difficile attuazione della Direttiva 2010/64/UE', C Falbo, M Viezzi (eds), 'Traduzione e interpretazione per la società e le istituzioni' (2014); M Gialuz, 'Il D.lgs di attuazione della Direttiva sull'assistenza linguistica' (n. 32 del 2014): un'occasione sprecata per modernizzare l'ordinamento italiano' (2014), *Diritto Penale Contemporaneo* <<https://www.penalecontemporaneo.it/d/2968-il-decreto-legislativo-di-attuazione-della-direttiva-sull-assistenza-linguistica-n-32-del-2014-un-o>>; M Gialuz, 'È scaduta la Direttiva sull'assistenza linguistica. spunti per una trasposizione ritardata, ma (almeno) meditata' (2013) *Diritto Penale Contemporaneo*, <<https://www.penalecontemporaneo.it/d/2612-e--scaduta-la-direttiva-sull-assistenza-linguistica-spunti-per-una-trasposizione-ritardata-ma-almeno>>

²⁴ Implemented through the *D.lgs 32/2014*.

²⁵ Case C-216/14 *Covaci*, Judgment of the Court (First Chamber) of the 15 October 2015, ECLI:EU:C:2015:686. See also Corte di Cassazione, 12/01/2015, n 1199. However, the written translation is ensured only for the fundamental documents. See Corte di Cassazione, 1/04/2015, n 25287; Corte di Cassazione, 12/02/2015, n 20634; Corte di Cassazione, 26/06/2007, n 36541.

²⁶ See D.lgs 4 Marzo 2014, n 32, art 3.

²⁷ CPP, art 143 (1).

²⁸ CPP, art 104 (4) bis.

a Public Register of translators and interpreters in each tribunal has been established; nonetheless, an obligation for the judge to appoint professionals only from this Register has not been foreseen, thus eluding the EU rule. The wording of art 221 CPP has never been changed, so that judges may continue to appoint experts by choosing them also *from among persons having high skills in the specific field*. In actual cases, unofficial lists are used by the authority to appoint “linguistic experts”. These lists are for the most made up of persons, which almost totally lack professional qualifications.²⁹ At any rate, the main shortcoming lies in the absence of provisions addressing the professional requirements to be met by both legal translators and Court interpreters. So far, rules listing the conditions to be met in order to be registered as an expert are not available; likewise, any quality assurance systems have been established as well as mechanisms to challenge the expertise of interpreters and translators. Only basic provisions to form and review the Register are currently into force. In light of the above, it is not so hard to assume that the broader scope of application of the right to interpretation and translation, coupled with the poor quality of the service provided, cannot result in the genuine and effective enjoyment of the above safeguard.

The same points can be raised with regard to the other two pieces of legislation at issue, since in both cases, just a few integrations and corrective actions turned out to be necessary to comply with the EU legal instruments concerned. As far as the *Directive 2012/13*³⁰ is concerned, the CPP has been amended so as to introduce an obligation for the Public Prosecutor to inform the accused person of the possible changes affecting the allegations against him/her,³¹ and the duty for the criminal police to provide the persons concerned of the *Letter of Rights on Arrest*, listing the full catalogue of the rights they enjoy in the in case of arrest or temporary detention in a clear and detailed manner (that includes the written translation of the above document if the person concerned is not familiar with the Italian language, unless this cannot be promptly supplied in a desired language).³² On the contrary, the questions related to the information on case material have been overlooked.³³ With respect to the *Directive 2013/48*,³⁴ changes relates to the possibility for the lawyer to attend the identification of persons during the investigation stage.³⁵ The latter is a measure entirely appropriate, given that over the last years, such an “informal identification” has been used in actual cases during the trial.³⁶ Furthermore, it is welcomed the decision to favour the access to defence in both the requesting and requested Member States in EAW cases. From one hand, the Courts are called upon to make available a list of court-appointed lawyers (*lista turno arrestati*), from which the person arrested abroad can choose.³⁷ Likewise, in the case

²⁹ M Gialuz, ‘L’assistenza linguistica nella prassi giudiziaria’ (2014) op cit; M Gialuz, ‘Il D.lgsdi attuazione della Direttiva sull’assistenza linguistica’ (2014) op cit; M Gialuz, ‘È scaduta la Direttiva sull’assistenza linguistica’ (2013) op cit.

³⁰ Adopted through the D.lgs 101/2014.

³¹ CPP, art 369. Please, consider that the same information must be provided also to the victim (persona offesa dal reato).

³² CPP arts 293(1) and 386 covering the duties of the criminal police in charge to enforce the order directing precautionary detention in prison and those pertaining to the cases of arrest and temporary detention respectively.

³³ S Ciampi, ‘Diritto all’informazione nei procedimenti penali: il recepimento low profile della Direttiva 2012/13/UE da parte del D.Lgs. 1° Luglio 2014 N. 101. Letter of Rights e Full Disclosure nel procedimento penale italiano’ (2014) *Diritto Penale Contemporaneo*, <<http://www.penalecontemporaneo.it/d/3300-diritto-all-informazione-nei-procedimenti-penali-il-recepimento-low-profile-della-direttiva-201213u>>

³⁴ Transposed with the D.lgs184/2016.

³⁵ CPP, art 364.

³⁶ S Quattrocchio, ‘Interventi minimi in materia di diritto di accesso al difensore: la recente trasposizione della Direttiva 2013/48/UE’ (2016) *Eurojus*, accessed on the 15 October 2016, < <http://rivista.eurojus.it/interventi-minimi-in-materia-di-diritto-di-accesso-al-difensore-la-recente-trasposizione-della-direttiva-201348ue/>>

³⁷ To this aim, the Implementing Provisions of the CPP have been amended so as to provide for a faster mechanism to be used to appoint a lawyer in EAW cases. Please, see *infra*.

of passive EAWs, the requested person, arrested in the Italian territory, has to be informed of the possibility to appoint a lawyer also in the requesting State.

b) The protection of the right to fair trial

The role of the competent authorities

The information provided in the section concerning the prohibition of torture and degrading treatment equally apply to the argument at issue as to the role played by the national authorities and the scope of their powers. As will be explained in the following paragraph, in order to approve the request for cooperation submitted by another Member State, the competent authority has to assess several provisions focused on the respect of fair trial guarantees. The same applies, although to a lesser extent, when Italy acts as an issuing State.

Criteria for review

Defence is an inviolable right at every stage and instance of legal proceedings; for this reason, national law places great emphasis to the respect of fair trial right also in the context of judicial cooperation. As a result, all the legal instruments under consideration contain a safeguard clause preventing the application of the procedures at issue when fair trial guarantees protected at a Constitutional level are likely to be violated. They also envisage other specific provisions that – whether explicitly or indirectly – protect the above rights. The clearest example is represented by the stream of additional (and mandatory) grounds for non-recognition based on fair-trial requirements that have been included in the legislation implementing the EAW, borrowing from the Italian legal tradition.

With regard to the guarantees covered by the EU package on procedural rights, it is worth observing that within the legislation implementing the three FDs they are poorly referred to. The EAW has paid limited attention on this argument, with the exception of the right to access to a lawyer; while, in the legal instruments transposing the FDs 2008/909 and 2008/947 respectively, the same guarantees are almost never mentioned. Despite this, a high level of protection is in any case ensured, since the general rules provided for by the national legislation apply.

Overall, it can be affirmed that the domestic order gives proof of high sensitivity toward fair-trial guarantees in criminal proceedings. The weak spot cannot be detected in what the legislation into force prescribes. Although there is room to improve the Italian regulatory structure, what is often lacking is not regulation. Almost all the lawyers interviewed as well as the NGO's representatives have stressed the strong connection between the social and economic status of the person concerned and the quality of the defence service. As a matter of fact, affording a highly skilled and resourced legal counsel affects significantly the possibility to rely on a qualified linguistic assistance during the proceeding as well as on contacts with professionals in other Countries, that can provide fundamental information on the foreign legal environment. As a matter of fact, trans-national mechanisms aimed at making easier the interaction among defendants across the borders are not available so far, and the recent legislative developments occurred with entry into force of the *Directive 2013/48* cannot entirely fill the gap.

Also problems touching the insufficient training for legal professionals in this field have been repeatedly reported.

1.3. Family life

a) Status and content of the right to family life based on National legislation and case-law (including the concept of family)

In the last decades, family law has undergone remarkable innovations, both from a substantial and procedural point of view. Important reforms have been approved on a variety of issues such as: the shared responsibility of the parents on the children (*L 54/2006*); the

equal status between children born under marriage and out-of-marriage (*L 219/2012* and *D.lgs 154/2013*); the introduction of out-of-court procedures for consensual legal separation and divorce, like the “negotiation procedure” assisted by lawyers or the agreement before a civil registrar (usually the mayor of the municipality) which stands for a court decision (*L 162/2014*); the legal recognition of new models of stable union and civil partnership, between two persons of same or opposite sex (*L 76/2016*).³⁸

The right to family life is guaranteed by art 29 of the Constitution, according to which the rights of the family as a natural society is founded on marriage and the latter is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family. Overall, this concept is still based on marriage between two spouses of different sex and, until 2016, the Italian law did not recognize any effects to civil partnerships other than marriage. Some protection to cohabiting couples *more uxorio*³⁹ was however derived from art 2 of the Constitution, as interpreted in various court judgments over years and from sector-specific legislation, but it was far away from the level of protection granted to married couples. In any case, it did not refer to same-sex couples, for whom there was no regulation at all.⁴⁰ Despite the evolution of the case law and the vivid debate in the society showing an evident vacuum in the legal system, the legislator was blind and deaf for many years and didn't take any action to regulate civil partnerships. The topic is very controversial in Italy since the public opinion doesn't show a common attitude, a common social and cultural sensitiveness.⁴¹ The ECtHR increased pressure on Italy. In 2015 the Court ruled that Italy violated ECHR failing to offer adequate legal protection to same-sex couples and called for a reform on the matter.⁴² Finally, the *Legge 76/2016* introduced some alternative unions to marriage, both for homosexual and heterosexual couples. The word *family* is however omitted (probably) to distinguish civil unions from the traditional families, even if the regulation is similar with some limitations.⁴³

b) The protection of the right to family life

The role of the competent authorities

As in the cases above, the role of the competent judicial authorities as well as the mechanisms of review stay the same. The next paragraphs will show, however, that great importance is attached to the right to family life in the national case-law. As a matter of fact, in spite of the cooperative attitude usually characterizing the action played by the judiciary in this field, when a case deals with the above guarantee or, more in general, with the protection of the child and family unit, the interpretation of the relevant rules turns to be

³⁸ Legge 8/02/2006, n 54 *Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli*; Legge 10/12/2012, n 219 *Disposizioni in materia di riconoscimento dei figli naturali*; Decreto Legislativo 28/12/2013, n 154 *Revisione delle disposizioni vigenti in materia di filiazione, a norma dell'articolo 2 della legge 10 dicembre 2012, n. 219*; Legge 10/11/2014, n 162 *Conversione in legge, con modificazioni, del decreto-legge 12 settembre 2014, n. 132, recante misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile*; Legge 20/05/2016, n 76 *Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*.

³⁹ Called also "de facto" or "natural families".

⁴⁰ Some cities have established registers of “civil unions” between unmarried persons of the same sex or of different sexes. However, the registration has a merely symbolic value.

⁴¹ M Dogliotti, ‘Dal concubinato alle unioni civili e alle convivenze (o famiglie?) di fatto’ (2016) *Fam. e dir.* 868, 880.

⁴² Applications nos 18766/11 and 36030/11 *Oliari and others v. Italy*, Judgment (4th Section) of the 21 October 2015, CE:ECHR:2015:0721JUD001876611. See also S Kirchgaessner, ‘Italy violates human rights of same-sex couples, court rules’ *Guardian* (Rome, 21 July 2015)

<https://www.theguardian.com/world/2015/jul/21/italy-violates-human-rights-of-same-sex-couples-court-rules>.

⁴³ Such distinction does not emerge in the common language (as well as in the case law and among the professionals) where civil unions are generally depicted as new family models.

more restrictive. Overall, it can be observed that in the attempt to reach a balance between cooperation and protection of the family, the second seems to prevail.

Criteria for review

As far as the EAW procedures are concerned, several provisions balance the need for a smooth cooperation and the protection of family life. As an example, economic and family bonds amount to a specific and mandatory ground for refusal limiting the surrender of the requested person, provided that the competent national authority orders the custodial sentence or detention order be executed in Italy in accordance with its internal legislation. This provision is one of the most referred to by the Italian executing authorities to decline requests for cooperation coming from abroad and, over the last years, has been applied in a flexible manner, going beyond both the mere residence status of the person concerned as well as the traditional notion of family. Case-law shows that, in order to evaluate whether a permanent basis in Italy has been established, the development of genuine and stable *emotional bonds* in the Country has prevailed over formal requirements such as the duration of the legal stay, the conclusion of employment contracts or the existence of marriage ties. Together with the above ground for refusal, the implementing legislation envisages a further bar to surrender based on the protection of motherhood. Also in this case, the national authority has widened the scope of application of this clause in limited but significant circumstances. Priority has been given to the interest of the child, especially in comparison with the low interest to punish resulting from crime on the basis of which the EAW was issued.⁴⁴ With regard to the *FD 2008/909* specific criteria have not been laid down, but *soft law* arrangements have been recently adopted by the MoJ to assess the family and social roots of the individuals concerned. In this respect, however, it is worth noting that, although the aim of this assessment system is in principle evaluating the potential of the transfer process in terms of rehabilitation, there are signs of a strong connection between the better use of this mechanism and the roadmap designed to address problems affecting prisons.

2. National legal framework implementing the obligation of mutual recognition in the EAW, FD 2008/909 and FD 2008/947

2.1. The status of the principle of mutual recognition and mutual trust in the national legal order

By virtue of the *Legge 149/2016*,⁴⁵ the principle of mutual recognition of judgments and judicial decisions will be soon integrated for the first time within the CPP.⁴⁶ This is a significant change since, so far, the variety of EU legal instruments applying this principle have been integrated at a domestic level through a close web of implementing rules. Overall, Italy has addressed this issue with a very cautious approach. Despite the enthusiasm that has usually marked the Italian participation in the EU project, the adoption of provisions affecting so closely the national sovereignty has raised widespread fears that some of the fundamentals of the national legal order could crash over the mutual trust ideal. In this respect, the adoption of the *EAW* is certainly the first and most symptomatic of this trend.⁴⁷

⁴⁴ Corte di Cassazione, 15/04/2013, n 21988.

⁴⁵ Legge 21/07/2016, n 149 *Ratifica ed esecuzione della Convenzione relativa all'assistenza giudiziaria in materia penale tra gli Stati membri dell'Unione europea, fatta a Bruxelles il 29/05/2000, e delega al Governo per la sua attuazione. Delega al Governo per la riforma del libro XI del CPP. Modifiche alle disposizioni in materia di estradizione per l'estero: termine per la consegna e durata massima delle misure coercitive*

⁴⁶ F Ruggieri, 'La legge delega in tema di cooperazione penale internazionale. La montagna ha partorito un topolini?' (2017) *Processo penale e giustizia* 310, 316. See also L Camaldo, F Manfredini, 'La cooperazione giudiziaria nell'era delle minacce globali e la riforma del Libro XI del Codice di Procedura Penale, in Cassazione Penale' (2016) *Cass. Pen.* 3043.

⁴⁷ Please, see L Marin, 'The European Arrest Warrant in the Italian Republic' (2008) *European Constitutional Law Review* 251, 273. See also, F Impala, 'The European Arrest Warrant in the Italian legal system. Between

The reasons for this attitude have essentially felt into two categories. The first one touching the conflict between politics and judiciary.⁴⁸ The second one affecting the possible incompatibilities with the Constitution, especially with regard to the principle of ‘sufficient certainty’ (*tassatività* or *tipicità*)⁴⁹ and to the personal freedom principles,⁵⁰ whose high degree of protection was (and still is) considered to be among the most advanced in Europe.⁵¹ Likewise, the EAW has been considered as potentially breaching one of the principle of the ordinary court pre-established by law.⁵² For this reason, the *FD EAW* has been applied in the Country through a restrictive regime, requiring controls even stricter than those operating under the Schengen Agreement and the CoE Convention on Extradition.⁵³

“The most of the EAW case-files relates to passive EAWs. The Court of Appeal in Bologna, for example, receives approximately 60 EAW cases per year” (Public Prosecutor)

The same can be said in respect of the other two *FDs*, although to a lesser extent. The implementing legislation in these cases is, indeed, basically consistent with the indications provided at EU level, even if it foreseen a few (but important) alterations, potentially limiting the practical application of the relevant provisions.

Having said that, it is worth highlighting that the approach of the Legislator has been balanced by the EU oriented case-law of the courts, especially in EAW cases. An exception is represented by certain core guarantees under the domestic legal tradition, that national judges are not keen to sacrifice.⁵⁴ As far as the *FD 2008/909* is concerned, the cooperative attitude can be observed, but in this case the rationale underlying such a behaviour seems to be appreciably different. Beyond the EU spirit of collaboration that uses to drive the judiciary’s action, the ever-growing recourse to the transfer procedure seems to be tied to the situation highlighted by the ECtHR ruling in the case *Torreggiani*.

2.2. The functioning of the EAW for the purpose of executing a custodial sentence or detention order

EAW has been adopted with the *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"* (hereinafter *L 69/2005*), that has come into force more than one year beyond schedule. The transposition process at a national level is, indeed, known for having been a long and complex affair, resulted in an implementing legislation, that appears to be far removed from the goal pursued by the EU. The quantity (and the nature) of differences between the *FD* and the national provisions is remarkable and has given rise to an extensive case-law of the national courts aimed at mitigating such discrepancies by means of the consistent interpretation technique. Despite its faltering launch, over the last decade this legal instrument has become an increasingly popular way to cooperate across the EU borders and,

mutual recognition and mutual fear within the European area of Freedom, Security and Justice’ (2005) *Utrecht Law Review* 63, and L Kalb (ed), ‘Mandato d’Arresto Europeo e procedure di consegna, Commento alla legge 22 Aprile 2005 n 69’ (2005).

⁴⁸ L Kalb (ed), ‘Mandato d’Arresto Europeo e procedure di consegna’ (2005) op cit.

⁴⁹ F Impala, ‘The European Arrest Warrant in the Italian legal system’ (2005) op cit, 63.

⁵⁰ Costituzione, arts 104 and 11.

⁵¹ Cft L Kalb (ed), ‘Mandato d’Arresto Europeo e procedure di consegna’ (2005) op cit 16, 27.

⁵² Costituzione, art 102.

⁵³ G Lattanzi, ‘Il mandato di arresto europeo nell’ordinamento italiano, Intervento all’Incontro trilaterale tra la Corte costituzionale italiana e i Tribunali costituzionali di Spagna e Portogallo’ (Speech at the meeting between the Italian Constitutional Court and the constitutional tribunal of Spain and Portugal held on the 16 November 2012, Lisbon), in <www.cortecostituzionale.it>.

⁵⁴ We refer to the ground for refusal protecting minors and motherhood. For a deeper analysis please see infra.

nowadays, almost 2000 EAWs are exchanged by Italy on a yearly basis (including both active and passive procedures).⁵⁵

The warrants issued by Italy represents the 39% of the number of case-files analysed,⁵⁶ while the percentage of the requests for cooperation received from abroad amounts to 61%. To be more specific, most of the cases dealt with by the Italian authorities concerns requests to surrender individuals for prosecution purposes, representing the warrants issued and received with a view to execute a sentence a minor percentage. As to the latter, it is worth highlighting that the range of Member States with which Italy maintains cooperative relations in this field is large and diverse. Requests for cooperation are exchanged, although to a different extent, with a plethora of Countries, belonging to diverse geographic, political and socio-economic areas. Nevertheless, the largest amount of EAWs issued by Italy for execution purposes is addressed to Romania (31 %).⁵⁷ The same can be said for the EAWs received by our Country (66%). Notably, in the view of large part of the Italian magistrates such a critical mass of requests for cooperation mutually exchanged by the two Counties is primarily accounted for by the huge differences between the judicial and legal systems of the two States. A common view is that the Italian prison system is generally regarded as being more lenient in respect to that operating in Romania, because of the availability of a variety of forms of diversion as well as of legal benefits – whether granted on a regular basis or upon special circumstances. Furthermore, it has been stressed that for the same type of offence the Italian legislation often envisages less severe penalties. The combination of these two factors is supposed to constitute the main incentive to move in Italy after an offence has been perpetrated abroad (whether in the home Country or in another EU Member State) or to conduct criminal activity in there.

Some of the practitioners interviewed take the view that the high-level of guarantees protected by the domestic prison and criminal system is one of the main reasons for foreign criminals to seek refuge in Italy.

“One of the most used grounds for refusal is article 18 (1) (r) allowing the convicted person to ask for the penalty to be executed in the Country where s/he lives, has a family and a stable job. What really happens is that most people try to use such a ground as an escamotages for being transferred to Italy. This is the case for a high percentage of Romanian people, which often make an attempt to stay in Italy because the sanctions are often less strict than in their Country. We call it a kind of “judicial tourism”. (Judge)

“Italian legal and judicial system seem to be regarded as a “judicial laundry”. For criminals coming from abroad our system represents a good way to serve the prison

⁵⁵ Please, note that this figure includes pending cases.

⁵⁶ Please, note that these figures have been elaborated on the basis of a sample of 344 EAW case-files made available by the MoJ. They all relate to 2014. As far as the empirical analysis is concerned, it is worth to highlight that in carrying out data collection activities concerning EAW procedures, huge difficulties have been faced. Even if the EAW is operational from 2005, the MoJ has never developed a comprehensive database. For this reason, in order to obtain basic quantitative data, the analysis of the hard copies of the case-files is necessary. The whole number of cases per year (both incoming and outgoing procedures) is almost 2000, including pending cases. For this reason, a specific calendar year has been selected, with a view to give a picture closer to the implementing scenario for the selected period. Notably, the choice has fallen upon 2014 for two main reasons. First of all, providing an overview of one of the latest years, but not as much recent as to include a massive number of pending cases. Secondly, it was necessary taking into account the adoption of a new electronic filing system starting from 2015. The latter, indeed, has made trickier the examination of cases registered after June 2015, because the risk of double registration events is supposed to be very high. It is worth mentioning that the new filing system is supposed to become operational starting from 2017.

⁵⁷ These figures are coherent with the statistics concerning the foreign population in Italian prisons, according to which Romanians currently rank second in the list (last update on 31 March 2017). They represent the 14,2% of the whole foreign population in the Italian prisons.

sentence within a more lenient penal system; furthermore, our legislation envisages certain legal benefits that are not provided for in other legal systems (just like Romania, for instance). Someone can even elude justice. Just consider the pardon possibilities offered by our legislation, thanks to which a number of Italian and foreign criminals can serve their sentence out of the prison. (Judge)

Certainly, this kind of explanations are just based on the perception of the practitioners interviewed and, in order to confirm or deny them, a closer examination should be carried out. That being said, if on the one hand sufficient and objective evidences to corroborate such an assumption are not available at present, on the other hand, observing the widespread recourse to art 18 (1) (r) of the *L 69/2005* can be revealing. Such a provision, transposing art 4 (6) FD EAW, is one of the most referred to by the Italian executing authorities to decline requests for cooperation coming from abroad (85%). Having recourse to such a ground is entirely legitimate as well as welcome, in so far as it allows to increase the chances of reintegration into society of the person concerned. Nonetheless, the analysis of the relevant case-law reveals facts that could constitute evidence of attempts of misuse. As an example, following an EAW for execution purposes issued by the Court of Mehedinti (Romania), a woman contested the decision of the Court of Appeal to surrender her to the requesting authority. She claimed the violation of article 18 (1) (r), giving emphasis on her social bonds in the Country. Notably, she brought to the attention of the Court her residence certificate, the work contract of limited duration, and other evidences giving proof of the presence of her two daughters in Italy. Nevertheless, the Court of Cassation took the view that a strong and genuine connection with Italy cannot be found. First of all, the Court considered the time elapsed between the judgment issued by the Romanian authority and the date starting from which the stable presence of the claimant in the Country was registered, founding that the transfer occurred just a few days after the Court's ruling. It was further observed that also the lease agreement was registered the day before the EAW was issued. Having assessed the documents submitted to give proof of her status in Italy, the Court of Cassation dismissed the request, due to the lack of an effective establishment in the Country, resulting from a genuine and unconditional life choice. On the contrary, evidences seemed to suggest that the outcome of the proceeding held in Romania exercised a decisive influence in the decision to establish the centre of her main interests in Italy.⁵⁸

In this respect, it is worth noting that the interviewed have noticed a recurring dynamic, according to which after the judgment issued, the individuals affected by an EAW move in Italy seeking to purposely establish there the center of their social and working interests, so as to elude justice in their home Country or, at least, serve the sentence within a more lenient penal system. In the view of some of the professionals interviewed, this trend is also favored by the attitude of the competent judicial authorities in dealing with these cases.

As a matter of fact, if, on one hand, the national jurisprudence has repeatedly stated that a genuine and stable connection with the host Country is requested to enjoy the possibility envisaged by art 18 (1) (r),⁵⁹ on the other hand, in assessing whether the EU citizen has developed emotional bonds in Italy, national judges have sometimes adopted a flexible approach in applying the non-discrimination criteria laid down by the CJEU jurisprudence.⁶⁰ As an example, in order to evaluate whether a permanent basis in Italy has been established, in some cases less than 5 years of residence or abode have been requested. A judgement recently issued by the Court of Cassation can confirm this. In the case at issue, refusal to surrender on the basis of art 18 (1) (r) has been confirmed by the judge of last instance, even

⁵⁸ Corte di Cassazione, 04/01/2017, n 520/17.

⁵⁹ See inter alia Corte di Cassazione, 30/06/2011, n 25879/11; Corte di Cassazione, 18/04/2014, n 17706/14.

⁶⁰ Case C -66/08 *Szymon Kozłowski*, Judgment of the Court (Grand Chamber) of 17 July 2008, EU:C:2008:437
Case C-123/08 *Wolzenburg*, Judgment of the Court (Grand Chamber) of the 6 October 2009, EU:C:2009:616.

if the claimant had moved in Italy for a few months and after the conviction sentence was issued by the foreign authority. In this case, the Court has given much notice to the stable emotional connection with a person living in Italy for more than 15 years as well as to the employment situation of the individual concerned, holding a proper work contract.⁶¹

Issuing authority

The Italian issuing authority is determined under article 28 (1) of the *L 69/2005*. Accordingly, in case of EAW for prosecution purposes, the latter is issued by the judge who has applied the precautionary measure of prison custody or house arrest. It can also be forwarded by the Public Prosecutor attached to the judge with competence for the execution⁶² or by the Public Prosecutor attached to the Supervisory Penitentiary Tribunal as far as the execution of detention order or judgment is concerned.⁶³ As mentioned above the EAW can be directly sent to the foreign national authority competent for the execution; nevertheless, it is usually forwarded to the Ministry of Justice, that is in charge to deal with both translation and transmission tasks.⁶⁴

Executing authority

The Italian executing judicial authority is the Court of Appeal.⁶⁵ More in detail, jurisdiction to enforce an EAW is determined according to the general territorial criteria, with a view to ensure higher level of specialisation and the full respect of the time limits imposed by the surrender procedure. Consequently, it firstly belongs to the Court of Appeal in which district the sentenced or suspected person is resident, has his place of abode or is domiciled at the time the warrant is received by the judicial authority. When an EAW is issued concurrently against more than one person having different residence or domicile, the Court of Appeal of the district in which the greatest number of these persons are resident, staying or domiciled shall have jurisdiction. If a person has been arrested following a SIS alert, jurisdiction to rule on surrender shall lie with the Court of Appeal of the district in which the arrest was made. The Court of Appeal of Rome has a residual competence, since this is entitled to decide in EAW cases only where jurisdiction cannot be determined following the above criteria.

“The Courts of Appeal does not usually have specialized units in charge to deal with international judicial cooperation. Just a few examples are available in the Italian judicial landscape, such as the Section I “Criminal” of the Court of Appeal in Venice, addressing almost exclusively EAWs, extraditions and recognition of foreign judgments. [...] Overall, judges and prosecutors do not have sufficient training in judicial cooperation. Practices is mainly defined by case-law. The same is for the lawyers, since only a few of them have a satisfactory knowledge of EU Law”. (Public Prosecutor)

2.3. FD 2008/909 transfer of prisoners

The *FD 2008/909/JHA* has been transposed in Italy with the *D.lgs 7 settembre 2010, n.161 “Disposizioni per conformare il diritto interno alla Decisione quadro 2008/909/GAI relativa all'applicazione del principio del reciproco riconoscimento alle sentenze penali che irrogano pene detentive o misure privative della libertà personale, ai fini della loro esecuzione nell'Unione europea”* (hereinafter *D.lgs 161/2010*),⁶⁶ that covers custodial security measures, sentences or any measure involving deprivation of liberty imposed for a

⁶¹ Corte di Cassazione, 1–7/09/2016, n 37195/16.

⁶² CPP, art 665.

⁶³ CPP, art 658.

⁶⁴ Please, note that with a view to consider the SIS Alert valid, all the EAW contents must be included. If the latter condition is not met, after the arrest is performed, the requesting authority has to forward the warrant to the Member State where the requested person has been arrested.

⁶⁵ *L 69/2005*, art 5.

⁶⁶ *D.lgs161/2010*.

limited or unlimited period on account of a criminal offence on the basis of criminal proceedings. It applies to all the natural persons on whom one of the afore mentioned measures has been rendered - whether nationals or foreigners.

This piece of legislation has entered into force at the end of 2010; nevertheless, according to the quantitative data provided for by the MoJ, it has become operational only from 2014. It is sufficient to note the sharp rise in the number of the requests for recognition authorised by the foreign judicial authorities in the selected period (2012-2015), that has increased from 0 to 121. This swift grow is certainly strongly tied to the ECtHR ruling in the case *Torreggiani*, issued in 2013, and its effects on the domestic prison systems. As it is well-known, this judgment has shed light on the overcrowding problems affecting Italian detention centres and has triggered an unprecedented institutional response. In the aftermath of the Court decision, the President of the Italian Republic has invited the Parliament to consider a number of solutions and to launch a debate on this pressing emergency.⁶⁷ It is worth noticing that, in addressing the Houses, emphasis has been placed on the better application of the supranational instruments allowing foreign people to serve a prison sentence in their Country of origin. The same approach has been further embraced, although in part, within the framework of the *Stati Generali dell'Esecuzione Penale (States-General for criminal sentences execution)*, that is a wide and unique public consultation convened by the MoJ in 2015 to discuss the main aspects of the execution of criminal sentences and to contribute to the implementation of the penal reform launched in the same period.

The available data concerning the operation of the *FD 2008/909* confirm this trend, and so do the soft law instruments recently adopted by the Department of Prison Administration of the MoJ. As will be explained in the followings paragraphs, the latter clearly create a close connection between the smooth functioning of the EU transfer mechanism and the so-called *post-Torreggiani Action Plan*. The Official Guidelines 2017 of the MoJ also endorses this approach, placing the better application of the transfer procedures among its international policy top priorities.

a) Forwarding judgments imposing sentence and transfer of convicted persons (issuing state)

Right to initiate the proceedings for transfer and the scope of application of FD 2008/909 on transfer of prisoners

According to art 4 of the *D.lgs 161/2010*, when Italy acts as an issuing State, the forwarding of the judgment imposing a custodial sentence is carried out by the Public Prosecutor attached to the judge with competence for the execution,⁶⁸ while in the case of security measures involving the deprivation of liberty, the judicial decision is forwarded by the Public Prosecutor attached to the Supervisory Penitentiary Tribunal. The execution State and the sentenced person are also entitled to ask for the forwarding of the Italian judgment abroad.⁶⁹ Notably, the convicted person can submit an *ad hoc* request to this effect to the MoJ and is further granted the right to seek for an administrative review in case of both negative response or silent refusal.

Criteria for determining where the convicted person will be transferred and the factors taken into consideration when deciding about the transfer

⁶⁷ Official message sent by the President of the Italian Republic Giorgio Napolitano to the Parliament, ex art 87 (2) of the Constitution, 7 October 2013, <https://www.senato.it/service/PDF/PDFServer/BGT/719662.pdf>

⁶⁸ CPP, art 665.

⁶⁹ D.lgs161/2010, art 6 (1).

By and large, the approach of the Legislator has been consistent with the indications provided at EU level.⁷⁰ Nevertheless, in defining the requirements to be met in order to forward the national judgment abroad, a number of further conditions have been included. Just to give an example, the forwarding cannot be allowed if any ground for suspension of the sentence occurs. Moreover, constraints related to the duration of the sentence have been included. As an example, the national authority is not allowed to forward a judgment, where the offence in respect of which the convicted person has been sentenced is punishable by a measure involving the deprivation of liberty for not less than three years. Likewise, the recognition of the judgment abroad cannot be asked for when the remainder of the sentence amounts to less than six months.

In line with the *FD*, the prior **consent** of the sentenced person is no longer, or nearly, a criteria to be met, being that approval not required in the vast majority of cases. Exactly, individuals concerned are allowed to express their consent (both in writing and orally) only where the judgment is forwarded to the Member State that is under no obligation to recognize and execute the sentence.⁷¹ This provision, however, can be disregarded in the event that the judgment is forwarded to the State where the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him/her or following the conviction in Italy. Certainly, this may entail the impairment of the convicted person's prerogatives, who (with a few rare exceptions) is in no position to prevent his/her relocation, even if the latter may not result in the better reintegration into society once the sentence is served. To be taken into consideration are, for instance, those cases where the foreign prisoners are supposed to be transferred to their own Member State of origin (or to a different Member State where they maintain stronger social bonds), but their rehabilitation needs would be better met in the sentencing State, because of prison overcrowding problems or fundamental rights deficiencies in the Country of destination.⁷² Generally, although the official policy justifications supporting the relocation of sentenced persons mainly rely on humanitarian arguments, when applied to actual cases they need to be balanced with both practical basis and public protection issues.⁷³ It follows that, should the latter motivations prevail, the transfer may not be in the best interests of the individual concerned. In this light, the question arises as to the ability of the relevant EU rules to reconcile rehabilitation purposes and the elimination of the "consent requirement", since social rehabilitation necessarily involves the cooperative attitude of the person concerned.

With regard to this, it is worth noting that the implementing legislation is silent about the **criteria** to be used in order to decide where the convicted person has to be transferred and, especially, whether the executing State is the most suited place for enhancing the chances of social rehabilitation of the convicted person. The relevant provisions only prescribe that "the execution of the penalty or security measure aims at fostering the rehabilitation of the sentenced person",⁷⁴ but they do not provide guidance as to the factors to be considered to

⁷⁰ We especially refer to the constraints related to the reintegration goals to be pursued as well as to those concerning the presence of the convicted person in either the issuing or the executing State. See D.lgs161/2010, art 5 (2) (a) and (b).

⁷¹ Please, see the D.lgs161/2010, arts 5 (4) and 6 (2) jointly.

⁷² In this respect, please consider the case reported in the Romanian National Report, par "Other further empirical findings". See *infra*.

⁷³ For instance, considerations related to the reduction of the administrative and financial burden can play a role in those States, whose prison population is largely made up of foreign detainees. In Italy, for instance, the 34% of the total prison population is currently made up of foreign detainees. Here the overall prison population amounts to 54.195 detainees, of which 18.311 foreigners (last updated on the 31/08/2016). https://www.giustizia.it/giustizia/it/mg_1_14_1.page;jsessionid=c+8-bsO-atuiKyNc9YLPHuFT?contentId=SST1268354&previousPage=mg_1_14,

⁷⁴ D.lgs161/2010, art 5 (2) (a).

evaluate whether the convicted person will actually benefit of the transfer abroad. Likewise, even if the national authority competent to forward the judgment abroad is required to consult the executing authority with a view to ascertain the latter condition, nothing is provided by the law (nor by the case law) about the legal effects resulting from such a **consultation**,⁷⁵ with the exception of the few cases where the prior consent of the executing State is necessary.⁷⁶ This gap, however, seems to have been partially filled by the soft law instruments mentioned in the previous paragraph, that have been recently introduced by the MoJ to favour the better and faster application of the *FD*. Notably, among these initiatives the Ministry has set up a kind of *ex ante* assessment mechanism to be used before the transfer process takes place, to verify whether the conditions to forward the judgment abroad are met. More in details, the directors of the detention centres are encouraged to collaborate actively with the Prosecutor Offices competent for the establishment of the active procedure, making available the lists of the foreign detainees falling within the scope of application of the *FD 2008/909* and drafting individual fiches, that include information concerning their family and working situation as well as their residence status.

As a matter of principle, the aim of this assessment system is to check if the foreign prisoner meets the requirements to have his/her prison judgment executed abroad and to further provide the issuing authority basic data on the social roots of the person concerned.⁷⁷ However, the MoJ has made no secret of the relationship between the better use of this mechanism and the plan put in place to relieve the pressure in the Italian prisons. Its smooth functioning has been probably seen as a low-sacrifice opportunity (certainly not decisive) to combine rehabilitation purposes with prison overcrowding remedies.⁷⁸ As proof of this, Italy is keen to strengthen bilateral contacts with those Member States, whose population is higher in the list of the nationalities making up the foreign prison population in Italy. For instance, a *memorandum of understanding* with Romania has been adopted in 2015 to lower the main obstacles hindering cooperation between the two parties,⁷⁹ above all issues pertaining the consultation mechanism to be used for information exchange or translation issues.⁸⁰

In this respect, it should be noted that the **prison conditions** in the executing Country are not included in the list of information to be evaluated in conducting such a pre-screening. For this reason, it is to be hoped that prison-related issues are reported by the executing State within the framework of the consultations mentioned above; even if, the effectiveness

⁷⁵ D.lgs161/2010, art 6.

⁷⁶ The consent of the executing State is requested only if the executing State is other than the State of nationality of the person concerned where s/he lives or where s/he will be expelled after the prison sentence is served. See D.lgs161/2010, art 5 (3) (c).

⁷⁷ Please, see the Ministero Della Giustizia - Direzione Generale Per La Giustizia Penale, Circolare: trasferimento dei detenuti in attuazione della Decisione Quadro 2008/909/GAI, 28 aprile 2014. See also Dipartimento Amministrazione Penitenziaria, Circolare: trasferimento dei detenuti verso il loro Paese d'origine in attuazione della Decisione Quadro 2008/909/GAI, 18 aprile 2014.

⁷⁸ This assumption can be backed up by the conclusions of the so-called Stati Generali dell'Esecuzione Penale. For further information please see https://www.giustizia.it/giustizia/it/mg_2_19.page

⁷⁹ According to the figures published by the Italian Prisons Service Central Administration in 2017, Romanian citizens are number two in the list of the most represented nationalities making up the foreign prison population in Italy and this trend is all but new. Under the Strasbourg Convention a bilateral agreement was signed between the two States, with a view to eliminate the need to comply with the consent requirement in the cases where the prison sentence was followed by an expulsion order. See, Ministero Della Giustizia, Direttiva generale per l'attività amministrativa e la gestione per l'anno 2017, 27 February 2017, available at www.giustizia.it/giustizia/it/contentview.page?contentId=ART1313800&previousPage=mg_1_29_6_2

⁸⁰ See Ministero Della Giustizia - Direzione Generale Per La Giustizia Penale, Circolare: trasferimento dei detenuti in attuazione della Decisione Quadro 2008/909/GAI. Rapporti con la Romania, 19 settembre 2016.

of such a remedy can be called into question, in so far as nothing is said about the legal value of the reasoned opinion of the executing authority.

As an alternative, the same issue could be brought up by the sentenced person, especially when s/he is called upon to express his/her **opinion** on the transfer. However, it must be said that also this option is really rather theoretical. First of all, in actual cases to raise such a point may be very difficult for the person concerned, given that s/he cannot easily rely on mechanisms through which obtain information in the executing State. Secondly, as it is well-known, in no case the opinion of the person concerned can prevent the transfer. This has more properly to be considered just as a necessary procedural step to be performed in the event that the sentenced person is in the national territory.

The analysis of the Italian case-files clearly proves this. The prisoner is formally granted the right to express his/her view about the transfer and this procedural step is always observed in practice; nevertheless, the cases analyzed show that the dissenting opinion of the person concerned is not a sufficient condition to dissuade the competent authority to pursue the transfer.

The Italian legislation, indeed, distinguishes very clearly the cases where the convicted person is only allowed to express his/her view on the transfer from those where his/her prior consent is necessary to approve or refuse the recognition of the foreign judgment. Likewise, it also makes clear the legal effects resulting from the two scenarios. In this regard, it is worth mentioning the Circular of the MoJ issued on the September 19th, 2016 that reads as follow: *“the positive opinion expressed by the convicted person - forming a factor of absolute importance for the purpose of the social rehabilitation prognosis – smooths the procedure, lowering the risk of a negative response of the executing State”*. It follows that, in the view of the Italian central authorities obtaining in due time the (positive) opinion of the person concerned is first and foremost a way to reduce obstacles in cooperation.

The Ministry stresses the importance to properly fill the section of the certificate concerning the opinion expressed by the convicted person (box k) and it further pays attention on the need to enable s/he to form an informed opinion. The opinion of the convicted person is considered a key source to assess the existence of social ties in Italy. (MoJ Circular of the 19/9/2016). At any rate, interviews with lawyers and magistrates together with the analysis of the case-files cannot corroborate these statements.

“In any case the opinion of the convicted person can prevent his/her transfer. It is quite rare that the judicial authority takes in due account such an opinion. The arguments of the person concerned must be very, very convincing and confirmed by strong evidences, but this is not an easy task for a foreign national” (Prosecutor)

In principle, the same can be said in respect to the recourse to the expulsion order. In the same Circular the MoJ seems to encourage the “proper use” of this instrument, highlighting that “within the framework of the *FD 2008/909* such a measure makes irrelevant the denial of the convicted person and allows to avoid the assessment of his/her social bond in Italy also in those cases where the consent is a mandatory requirement to be met to forward the judgment”. However, case-law shows that this can be also used to adopt solutions aimed at protecting other legitimate interests, such as those of victims. A case in point is a recent judgment concerning ill-treatment of minors. The offender was convicted for grievous bodily harm against his daughter and his nephew respectively and for sexual abuse on his minor daughter. The Public Prosecutor issued the certificate to asks the foreign competent authority to recognise and execute the sentence. The requested Member State was the State of nationality, but it was not the place where this person used to live. Italy, indeed, was the place to which this person was attached based on habitual residence and on elements such as family and professional ties. Nonetheless, he was not allowed to express his consent because an expulsion order was included in the judgment, allowing to waive the provision above.

This seems to entail a violation of the relevant national provisions governing the consent requirement. However, no violations actually occurred. With his criminal conduct, the convicted person caused serious harm to his own family.

- *Specific guarantees concerning underage or mentally disordered persons*

The *D.L.* does not lay down specific conditions to comply with when the transfer concerns **underage or mentally disordered persons**, including the most suited methods to be used to enable them to express their consent or opinion. Nevertheless, the general safeguards granted to children alleged of or accused of a crime and the provisions protecting mentally disordered persons within the criminal procedure cannot be disregarded. In this respect, it is worth remembering that the Italian criminal system is based upon the concept of chargeability, according to which the necessary foundation to having the criminal sanction applied is the individual capacity to be aware of the legal and social value of individuals' actions. Arts 85-98 of the CP identify two categories of individuals for which this kind of capacity is presumed to be missing, namely children under the age of fourteen and mentally disordered persons.

As a rule, in order to be able to take legal proceedings against a **minor** it is necessary an assessment of the his/her capability of being found guilty of a crime and thus subject to a punishment. According to the CP (arts 97 and 98), children under the age of 14 cannot be held criminally liable for any offence, while persons aged 14 to 17 (inclusive) can only be held criminally liable where they have been assessed capable of forming the necessary criminal intent in relation to the specific offence (assessment case by case). Furthermore, Juvenile Courts are established and a Juvenile Code of Criminal Procedure (hereinafter JCPP) applies to minors.⁸¹ As far as **mentally disordered persons** are concerned, the *D.L.* does not address them nor their special needs. For this reason, also in this case, the general guarantees provided for by the Italian Legislation must be taken into consideration.⁸²

Principle of speciality

Overall, the prisoner cannot be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed before his or her relocation other than that for which s/he was transferred.⁸³ At any rate, in the event that after the transfer has taken place, the executing authority asks Italy to waive this provision, an official request has to be submitted to the Court of Appeal. With a view to decide about the application of the speciality principle, the provisions governing the passive procedure basically apply.⁸⁴ The competent Court is, indeed, firstly called upon to verify whether the necessary information concerning both the prisoner and the judgment have been duly included in the request.⁸⁵ Having performed this check, the national authority assess if grounds for refusal apply.

It is worth to stress that the implementing legislation does not make clear if the convicted person can apply against a decision made by the Italian authority to waive the speciality principle. In spite of that, in light of the systematic reading of the *D.L.* it can be supposed that the person concerned can rely on such a remedy⁸⁶ and jurisprudence confirm this.⁸⁷

b) The obligation to recognize foreign judgments and execute the sentence (executing state)

⁸¹ Decreto del Presidente della Repubblica 448/1988.

⁸² CPP arts 88 and 70-71. See also the judgment of the Corte Costituzionale n 340/1992 of the 07-20 July 1992.

⁸³ D.lgs161/2010, art 7 (4).

⁸⁴ For a deeper analysis please, see the paragraph below.

⁸⁵ To carry out this task, the Court must refer to the corresponding provisions set forth in the EAW implementing legislation, that transposes almost verbatim the FD EAW. See the FD 2002/584, art 8 (1).

⁸⁶ D.lgs161/2010, arts 6, 10, 13.

⁸⁷ Please, see *infra*.

Law governing enforcement and adaptation of the sentence

Having received the foreign judgment, the MoJ forwards it to the Court of Appeal (the authority competent for the execution), in which district the sentenced person is resident, has his place of abode or is domiciled at the time the certificate is received by the judicial authority. If jurisdiction cannot be determined in accordance with this criterion, the Court of Appeal of Rome has jurisdiction under the cases covered by *FD 909*.

In order to decide whether to accept or refuse the request forwarded by another Member State, the Court is firstly called upon to assess whether the **conditions** set forth by the *D.lgs 161/2010* are met. Overall, with a view to have the foreign prison judgment recognised and executed, it has to be assessed whether the person concerned actually live in the Country. For this reason, having habitual residence or domicile in Italy is the basic condition to be met, regardless of nationality. The same applies also in the case Italy is the Member State to which the sentenced person will be deported, once s/he is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure taken consequential to the judgment. Together with these conditions, also the following requirements must be satisfied jointly: *a)* the interested person is in the Italian territory or in the territory of the Member State that has issued the judgment; the interested person has given his/her consent (where relevant); *b)* the judgment relates to acts which constitute an offence under the Italian law, irrespective of the constitutive elements of the offence and the national legal classification of the offence; *c)* the duration and the nature of the sentence (or alternatively of the security measure) issued by the sentencing State are compatible with the Italian legislation.⁸⁸

In this regard, it is worth pointing out that, as in the case of the active procedure, the implementing rules do not provide detailed criteria to be referred to for assessing whether the convicted person can actually benefit of his/her transfer in Italy.⁸⁹ On the contrary, in line with the FD, the implementing law provides for a number of solutions aimed at smoothing out the edges, so as to avoid that differences in the national legal and judicial system could hinder this cooperation mechanism. First and foremost, in case of incompatibility the executing authority can decide to **adapt** the sentence as an alternative to refusal.⁹⁰ Notably, it is expressly provided that the (adapted) sentence cannot be less than the maximum penalty provided for similar offences and has to correspond as closely as possible to the sentence imposed under Italian law. This is an automatic determination, not implying discretionary power, due to the maximum limit provided by the domestic law.⁹¹

Furthermore, in the case that the recognition of the judgment in whole is not considered appropriate, the Court of Appeal competent for the execution can **recognise and execute it in part**, rather than decline the request. In this event, the issuing authority has to be consulted in order to find an agreed solution, that cannot result in the aggravation of the duration of the sentence. In the absence of such an agreement, the certificate can be withdrawn. Finally, the recognition of the judgment can be also **postponed** until a reasonable deadline set by the Court of Appeal for the certificate to be completed or corrected, where this lacks fundamental information or manifestly does not correspond to the judgment. The executing authority may further ask the issuing State the translation of the sentence or essential parts of it.

⁸⁸ The possibility to adapt the sentence is expressly provided by article 10 (5).

⁸⁹ The soft law tools adopted by the Ministry of Justice refers just to the active procedure. Nonetheless, they have been drawn up to assess if foreign prisoners have established in Italy the main centre of their personal and professional life; thus, the application of the same guidelines to the passive procedure cannot be excluded.

⁹⁰ D.lgs161/2010, art 10 (5).

⁹¹ Corte di Cassazione, 30/01/2014, n 4413.

By and large, it should be highlighted that Italy is keen to favour the **exchange of information between issuing and executing States** before the recognition and the execution process takes place. Although, this does not represent a duty to comply with for both the issuing and the executing States,⁹² such a trans-national dialogue in the pre-forwarding stage can play a pivotal role in determining the chances of social rehabilitation of the sentenced person. One need only think that the information concerning the penalty already served in the issuing State can be taken into consideration during the execution stage to determine the remainder of the sentence. For that reason, the MoJ has further highlighted the importance of the prior exchange of information between States, especially as to the main features of the judgment as well as the legislation into force in matter of early or conditional release.⁹³ Likewise, the Court of Cassation has given emphasis to the information exchange concerning the period of detention already spent in another EU Member State (on the basis of a judgment issued in that Country).⁹⁴

Time limits for the decision to recognize

The *D.lgs 161/2010* prescribes to take the final decision on the request for cooperation within a period of 60 days of receipt of the judgment and the certificate. Due to special circumstances the deadline may be extended by a further 30 days.⁹⁵ Notably, the decision to recognise the foreign judgment is taken in chambers and an appeal can be lodged in Cassation, suspending the enforcement of the foreign sentence.⁹⁶ The final decision is communicated to the MoJ without delay, so that the Ministry can inform the competent authorities of the issuing State as well as the International Police Cooperation Service of the Ministry of Home Affairs.

Principle of speciality

As a general rule, persons transferred in Italy cannot be prosecuted, sentenced or otherwise deprived of their liberty for an offence committed before their transfer other than that for which they have been transferred.⁹⁷ In spite of that, a number of exceptions to this general provision have been defined (e.g. in the case that the sentenced person consented to the

⁹² Italian executing authorities are not obliged to inform the issuing State about the national provisions concerning early/conditional release and pardon applicable to the convicted person. Such information can be provided by the MoJ upon request, before the transfer takes place. Different is the case of decisions adopted by the issuing State, on the basis of which the penalties or security measures are no more enforceable (immediately or within a time limit). Since the forwarded sentence can be reviewed only by the issuing State, in this event the Italian authorities have to stop execution, as soon as they are informed (art 17).

⁹³ This issue has raised concern among the Italian authorities in respect to the cases concerning Romanian citizens. The Romanian Court of Cassation has recently ruled that after the transfer of the sentenced person from abroad has taken place, the duration of the penalty already served in the issuing State shall not be deducted from that to be served in Romania. It will be possible taking it into consideration under other legal arrangements provided by the Romanian law. See the Romanian Court of Cassation, judgment n 15/2015 of the 22 may 2015). The rationale for this concern is mainly due to the ECtHR judgment *Szabo v. Sweden* (Application no 28578/03), in light of which “the Court does not exclude the possibility that a flagrantly longer de facto term of imprisonment in the administering State could give rise to an issue under article 5, and hence engage the responsibility of the sentencing State under that article.” See, the Ministry of Justice Circular of the September 19th, 2016, on the transfer of prisoners under the FD 2008/909/JHA and the relations with Romania.

⁹⁴ Corte di Cassazione, 30/7/2012, n 31012; Corte di Cassazione, 26/03/2013, n 14357.

⁹⁵ The Legislator has opted for this very tight schedule because of the need to respect the timescale established by the FD as well as to ensure consistency with the EAW requiring similar time limits (L 69/2005, art 17). See the *Schema di D.Lgs.– Disposizioni per conformare il diritto interno alla Decisione Quadro 2008/909/GAI relative al reciproco riconoscimento alle sentenze penali, ai fini della loro esecuzione nell’Unione Europea – Relazione.*

⁹⁶ Please, see D.lgs161/2010, art 12 (10).

⁹⁷ D.lgs 161/2010, art 18.

transfer or if s/he has expressly renounced entitlement to this rule, etc). Among all these, particular attention should be paid to the possibility to disregard the specialty principle in the case, upon request of the executing State, the issuing Country expresses its consent.⁹⁸ As a matter of fact, outside the possibilities of derogation expressly listed by the *D.lgs 161/2010*, after the transfer has taken place the competent Court can ask the issuing State its prior consent to prosecute, sentence or otherwise deprive of his/her liberty the person concerned for offences other than those on the basis of which s/he has been transferred. In this case, however, the conditions set forth by the *FD EAW* concerning the content and form of the EAW applies.⁹⁹

2.4. FD 2008/947

a) Scope of application

The *FD 2008/947* has been implemented almost four years after the deadline set for the transposition. The Decreto Legislativo 15 febbraio 2016, n. 38 “*Disposizioni per conformare il diritto interno alla decisione quadro 2008/947/GAI del Consiglio, del 27 novembre 2008, relativa all'applicazione del principio del reciproco riconoscimento alle sentenze e alle decisioni*” (hereinafter *D.lgs 38/2016*) has entered into force only in 2016.¹⁰⁰ The latter is made up of three sections, two of which focused on the active and the passive procedures respectively and the last one to “general provisions”. As far as the latter are concerned, it is worth pointing out that a degree of lack of clarity characterises some of these rules. First and foremost, the introductory provision does not provide for a detailed list of the types of judgment and decision falling under its scope of application. Likewise, nothing is said on transferring competencies for the supervision of such measures as well as on the cases in respect of which the *FD* does not apply to.¹⁰¹ Art 2 complements the above proviso, laying down the definitions to be referred to for the purpose of the *FD*, but here too, some differences can be observed, since a number of “Italian definitions” diverges from the EU ones.¹⁰² As far as the type of measures and sanctions that Italy undertakes to recognize and execute, art 4 reproduces almost blindly the list provided for by the *FD*, deciding not to extend such a catalogue to measures and sanctions other than those envisaged at EU level. Nonetheless, the same provision deviates from the *FD* in so far as it does not refer only to probation measures and alternative sanctions, but also to conditional release.

b) The procedure

As far as the forwarding of the judgment abroad is concerned,¹⁰³ the Public Prosecutor attached to the judge competent for the execution is entitled to initiate the procedure and to send the decision to the competent authority of the Member State in which the sentenced person is lawfully and ordinarily residing. Upon request of the latter, the decision can be also forwarded to the Member State other than that where the person concerned uses to reside, on condition that this latter authority has consented to such forwarding. Having checked that the probation measure or alternative sanction is of not less than six months’

⁹⁸ D.lgs 161/2010, art 18 (3) lett. (g).

⁹⁹ Please, see art 18 (3) of the D.lgs 161/2010, recalling art 26 (1) of the L 69/2005.

¹⁰⁰ D.lgs 38/2016 (Official Journal n 61 of the 14 March 2016).

¹⁰¹ Please, see the *FD 2008/947*, art 1 (3) (a) and (b).

¹⁰² Please, see A Maffeo, ‘Recepita la Decisione Quadro 2008/947/GAI: il principio del reciproco riconoscimento esteso alle decisioni che impongono sanzioni sostitutive alla detenzione o la liberazione condizionale’, Eurojus, published on the 03/04/2016, < <http://rivista.eurojus.it/recepita-la-decisione-quadro-2008947gai-il-principio-del-reciproco-riconoscimento-esteso-alle-decisioni-che-impongono-sanzioni-sostitutive-alla-detenzione-o-la-liberazione-condizionale/?print=pdf>>. See also F Ruggieri (ed), ‘Processo penale e regole europee: atti, diritti, soggetti e decisioni’ (2017).

¹⁰³ D.lgs 38/2016, arts 5-8.

duration, the Prosecutor can forward the decision immediately after a final decision/judgment has been handed down by the competent court. The judgement/decision to be recognized abroad can be forwarded to the requested State - together with the certificate – only in the case this can enhance the chances of social rehabilitation of the person concerned and favor the protection of the victims and the community. The prior consent of the executing State is required, in the case such a State is different from the Country of residence or nationality of the sentenced person. Before the execution process takes place, the certificate forwarded can be withdrawn by the Public Prosecutors in two cases: *a*) if the executing State notify the Italian authority that its applicable law foreseen measures limiting the personal freedom lasting more than the corresponding Italian measures; *b*) if the executing State intends to execute the Italian measure, but adapting it under its domestic law.

With regard to the passive procedure, the authority in charge to decide whether accept or decline the request for cooperation is the Court of Appeal, in whose district the person concerned is lawfully and ordinarily residing when the certificate is forwarded or the Court, in whose district the person concerned has expressed the will to transfer his/her residence. In order to decide whether to recognize the foreign judgment/decision or to decline the request of cooperation, the Court of Appeal proceeds in chambers within 30 days following the receipt of the request (art 12).

3. Limitations on mutual recognition provided in the EAW, FD 2008/909 and FD 2008/947 as implemented in the National legal order

3.1 EAW for the purpose of executing a custodial sentence or detention order

a) Safeguards for the requested (convicted) person

Access to lawyer

In Italy, defence is an inviolable right at every stage and instance of legal proceeding. Arts 24 and 111 (3) of the Constitution entitle all the citizens - including foreigners and stateless persons - of such a guarantee, also enabling disadvantaged persons of proper means for action or defence in all courts. As a result, persons meeting special income requirements can be assisted by a lawyer free of legal fees or costs.¹⁰⁴ Overall, it is possible to appoint a private counsel and ask for a meeting right after arrest, detention or custody. In the event that the person alleged of or accused of a crime is on bail, a private counsel can be appointed at any time. The legal defence within the criminal process is mandatory. For this reason, if the suspect/defendant has not nominated a retained lawyer, the competent judicial authority has the duty to designate a court-appointed attorney from a special public register.¹⁰⁵

According art 2 of the *L 69/2005*, Italy enforces the EAW in compliance with the Constitutional provisions pertaining to a fair trial, especially those covering the right to defence. This general rule is complemented by a stream of other specific provisions relating to the passive procedure, that explicitly confer on the requested persons the right of access to a lawyer – whether retained or court-appointed - from the very moment in which they are informed of the charges against them and until the end of the procedure (including the appeal stage). Notably, after the proceeding has been initiated, the presence of a lawyer is an essential condition to properly validate the arrest and eventually apply coercive measures. The criminal police officer carrying out the arrest has the duty to provide the requested person, in a language s/he can understand, basic information concerning the warrant issued against him/her, including information on the right to appoint a retained lawyer or to have a

¹⁰⁴ All the nationals or foreign citizens, including minors or stateless persons resident in Italy can be awarded of legal aid for trial pending before criminal courts, whether income requirements are met. Please, see the Decreto Presidenziale n 115 of 30 May 2002.

¹⁰⁵ Defense in Italy is obligatory in nature and self-defense is not allowed, even if the accused person is sufficiently trained.

court-appointed one.¹⁰⁶ The arrest warrant minutes must refer to the above actions, otherwise the warrant shall be considered null and void (art 12.3). The same approach also applies to all the procedural steps requiring the person concerned to be heard, being the presence of the legal counsel in these occasions a prerequisite to consider the hearing legally carried out. In practice, such a rule can be subject to limitation only in the context of the validation of the arrest. In the view of the Cassation the validation procedure envisaged by the EAW is characterized by a “minimum defence ratio”, because the arrest performed by the criminal police (arts 11 and 12), urgent in nature, is comparable to the arrest in *flagrante delicto*,¹⁰⁷ as a result, this can be validated even though the lawyer was not notified in due time.¹⁰⁸

It is worth highlighting that the legislation implementing the EAW has been recently amended through the entry into force of the *Directive 48/2013*. Actually, this new piece of legislation did not have a remarkable impact on the domestic legislation, since the standards proposed are below the level of protection already ensured in the Country.¹⁰⁹ Nonetheless, the changes introduced are welcome, since they are aimed at ensuring that the individual concerned benefit from legal assistance within the framework of both the proceeding pending in the issuing State and the one pending in the executing State. The *L 69/2005* now includes a further provision, according to which the criminal police must inform the requested person, without undue delay, that s/he has the right to appoint a lawyer in the issuing Member State. Such a lawyer is entitled to assist the legal counsel in the executing Member State by providing information and advice and to favour, in turn, the effective exercise of the defence rights of requested persons.¹¹⁰ This provision fills an important gap, fostering the protection of the requested person, which generally lacks adequate legal assistance in the issuing State. In this light, it is appropriate the decision to make accessible a list of available lawyers from which the suspect or accused person could choose. To achieve this goal a faster mechanism to be used to appoint a lawyer in EAW cases has been adopted.¹¹¹ Through a special IT system the national bar association provides for the list of the available lawyers, especially when Italy is the issuing State.

In light of the above it is safe to say that the right of access to a lawyer is adequately protected at a national level, at least according to what law on the book prescribes. The Italian implementing legislation clearly provides for such a guarantee and, even in cases where detailed indications are not envisaged, reference to the general system of fair trial protection is ensured.

In spite of that, in practice a series of problems raises for the requested persons as to the effective enjoyment of the above safeguards. As repeatedly emphasised by the professionals interviewed, the main problem lies in the lack of sufficient training of lawyers in cross-

¹⁰⁶ L 69/2005, art 12.

¹⁰⁷ CPP, art 390 (2).

¹⁰⁸ Corte di Cassazione, 28-29/04/2009

¹⁰⁹ L Bachmaier Winter, ‘The EU Directive on the right to access to a lawyer: a critical assessment’, in S Ruggieri (ed), ‘Human Rights in European Criminal Law’ (2015); C Amalfitano, ‘La terza tappa della tabella di marcia per il rafforzamento dei diritti processuali di imputati o indagati in procedimenti penali: la direttiva 2013/48 UE sul diritto di accesso al difensore’ (2014) *Legislazione penale*, 21.

¹¹⁰ The role to be played by the lawyer appointed in the issuing State is stressed in the Relazione illustrativa attached to the Schema di decreto legislativo A.G. 317 (Attuazione della direttiva 2013/48/UE del Parlamento europeo e del Consiglio del 22 ottobre 2013 relativa al diritto di avvalersi di un difensore nel procedimento penale e nel procedimento di esecuzione del mandato di arresto europeo, al diritto di informare un terzo al momento della privazione della libertà personale e al diritto delle persone private della libertà personale di comunicare con terzi e con le autorità consolari), available at http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0317_F001.pdf&leg=XVII.

¹¹¹ Implementing Provisions of the CPP, art 29.

border cases. From one hand, the Italian system of higher education does not provide for specialised courses on judicial cooperation in criminal field. Basically, attendance to vocational training courses dealing with these topics depends on the personal interest and initiative of the individual lawyer. From the other hand, practical training can rarely fill this gap, since the cooperation procedures under consideration are considered as a niche sector of specialization. The number of cases dealt with per year can be rather low, after all; as a result, a few legal professionals and law firms are familiar with those issues, especially with their practical operation. Along with this, the economic factor should not be disregarded. Almost all the lawyers interviewed as well as the NGO's representatives have stressed the strong connection between the social and economic status of the requested person and the quality of the defence service on which they can rely. In most cases, these persons belong to socio-economically disadvantaged groups, with low living standards; they often cannot appoint a specialised retained lawyer, but they have to count on a court-appointed one. By and large, the chances that the latter lacks specialization in this matter significantly increase, since they use to deal with a variety fields of law and a wide range of cases. Furthermore, often defence lawyers (especially court-appointed ones) are less equipped to support their clients in obtaining high-quality interpretation and translation services as well as to gain important information on the foreign legal and judicial system. In this respect, it is worth of interest that almost all the practitioners interviewed have complained about the absence of a trans-national mechanism aimed at making easier interaction among defence lawyers across the EU and, thus, favouring cross- fertilisation. Valuable tools for cooperation have been conceived only to smooth collaboration in the prosecution field, but no action has been taken at European level to ensure that defence lawyers can rely on similar mechanism too. This issue should not be underestimated, since the general sense of mistrust towards a foreign legal system may lead to exacerbate a prudential approach. The defence lawyer for example is usually inclined to oppose the surrender, but in many cases, s/he doesn't know if the transfer abroad could result in a more indulgent solution for the requested person. What emerges is that the socio-economically condition of the requested person can affect the effective exercise of the defence right much more than in a domestic case. If the person concerned can afford a well-resourced lawyer, comfortable in working in an international context, the chances to fully enjoy of the above guarantees are likely to grow up.

“There is no link between the defence lawyers in the two member States involved in the procedure. For example, the convicted person could refuse the transfer, even if s/he could benefit of better prison conditions in the requesting Country. But s/he cannot know this, because - acting as a defense lawyer – I cannot know this as well. I do not have any contact with my colleagues in the issuing Country.” (Lawyer)

“The creation of a defense lawyers network would be welcome [...] Relying on association of lawyers is not really effective, since the rationale behind these bodies is often visibility rather than efficiency. On the contrary, creating a genuine cooperation system could improve lawyers' skills and could eventually be beneficial for both the accused and the victims.” (Lawyer)

“Information and communication should be more fluid across Member States” (NGO representative)

Access to documents, translation and the right to information

Italian Law recognizes the **right to be informed** at a Constitutional level (art 111). The fair trial principle cannot be separated by the right of the accused person to be informed of his/her own rights within the criminal proceeding without delay. Such a right is granted to

both suspects and defendants.¹¹² With regard to the EAW, the implementing legislation expressly mentions the right of the requested person to be informed, especially within the framework of the passive procedure. Notably, law prescribes the full enjoyment of such a right from the very moment when proceeding is opened. After the EAW has been received and the necessary precautionary measures have been executed, the requested person has to be informed about both the contents of the EAW and the execution of the procedure, including the possibility to relinquish the protection offered by the principle of speciality. Information must be provided in a language the interest person can understand and in the presence of the legal counsel (art 10). The same guarantees apply when the proceeding is triggered by the arrest carried out by the criminal police. In this event, it is also made explicit that the arrested person has also to be informed of the possibility of consenting to his/her surrender to the issuing judicial authority as well as of the right to appoint a lawyer and to be assisted by an interpreter (art 12). In this respect, it has to be pointed out that with the entry into force of the *Directive 2012/13*, the latter provision has been amended so as to make the suspected person/defendant well aware of the rights s/he is entitled to during the whole criminal proceeding, including those aimed at executing the EAW. In this light, the police officer carrying out the arrest has to provide the afore mentioned information in writing, in a clear and accurate language and, if the suspected person/defendant is not an Italian-speaker, in a language s/he can understand.

The *L 69/2005*, finally, awards the requested person of the right to be informed in two other crucial steps of the procedure. The first one relates to the consent to surrender, since the individual concerned must be informed that when expressed this is irrevocable. The second one concerns the guarantees to be granted to the requested person pursuant to an EAW issued as a result of trial celebrated *in absentia*.

Strongly connected to the afore guarantees is the actual ability of the person concerned to understand and to be understood, especially for foreign citizens, who are not familiar with the Italian language. To this end, Italy recognises the **right to translation and interpretation** of the essential documents - or at least the relevant passages of such documents – for the benefit of suspected or accused persons, who do not speak or understand the language used during the criminal proceeding, with a view to provide them effectively for the fair trial guarantees enshrined in article 6 (3) ECHR. Within the Italian legal order the rules covering criminal proceedings are strongly linked to the use of the Italian language. Despite this, art 111 of the Constitution gives a great boost to the right of the foreign suspects/defendants to understand and to be understood. Furthermore, the Constitutional jurisprudence played a role in the development of a new way to consider interpretation and translation in criminal proceedings too, stressing their close connection with the effective exercise of defence rights.¹¹³

With regard to the EAW, the implementing legislation does not expressly mention the right to have the relevant documents translated within the framework of both the passive and the active procedures. It only refers to the need to receive the translation of the judicial decision on the basis of which the EAW has been issued, together with the translation of all the integrative documents requested when Italy is the executing Member State.¹¹⁴ Likewise, it stresses the duty for the Italian authorities to translate the EAW to be transmitted abroad into the language of the requested Member State. In this respect, it is worth mentioning that the entry into force of the *Directive 2010/64*¹¹⁵ has contributed to mark a step forward. Accordingly, the CPP (art 143) has been amended so as to detail the list of documents the

¹¹² Art 61 CPP covers the rights of the suspect during the preliminary investigation stage.

¹¹³ The Court provided a broader interpretation of art 143 of the CPP.

¹¹⁴ L 69/2005, art 6 (5).

¹¹⁵ The Directive has been implemented through the D.lgs 32/2014.

translation of which is considered mandatory and to entitle the competent judge – upon request of the defendant - to order the translation of additional documents that are considered essential to the understanding of the charges levelled against the accused person. Moreover, the CPP (art 104) has been modified so as to strengthen the right to linguistic assistance of the defendant also when consulting his/her lawyer.¹¹⁶

Overall, the Italian legal order gives proof of high sensitivity toward the fundamental guarantees of the requested person and it is safe to say that what is often lacking is not regulation. Problems result rather from the actual possibilities to rely on a qualified linguistic assistance. Almost all the professionals interviewed stressed this point. From one hand, the shortcomings already mentioned affecting the use of linguistic experts should be considered.¹¹⁷ This can include cases in which only the translation/interpretation in the language considered to be as closest as possible to the mother tongue of the person concerned is available. With regard to this, it is worth of attention that the requested person opposes this option quite rarely, so as not to appear as hindering justice, although this inevitably frustrate the effectiveness of fair trial principle.

Furthermore, it should be considered that, even when the interpretation/translation in the mother tongue of the person concerned is available, the right to understand and to be understood cannot be taken for granted. Interpreters and translators, especially the less-experienced ones, can properly convert the relevant information in a different language, but they can run into problems in fully explain its implications.

“The quality of translation is very low. It is mainly oral, not written translation, because there are no money and no time to go ahead with a good translation” (Lawyer).

“It is not always possible to look for an interpreter speaking the convicted person’s mother tongue: it happens that this is in a different language, such as English or French. Hence, the convicted person cannot understand properly” (Lawyer).

“The problem is not only with the oral, but also with the written translation. Interpreters and translator sometimes are not familiar with legal concepts and they just provide a literal translation” (Judge).

“There are problems with interpretation, because the defence lawyer is a court-appointed one in the most of cases (this mainly depends on the social status of the convicted person) and he uses to choose not the best interpreters ever. You need professionals with language skills in the field” (NGO representative)

Right to be heard

It goes without saying that the two prerogatives described above represent a *conditio sine qua non* for the genuine exercise of the right of the requested person to be heard. This right, however, is not expressly mentioned by the *L 69/2005*, to the extent that this is envisaged as a procedural obligation which need to be fulfilled by the national authority, rather than as a prerogative to be enjoyed by the person concerned. The provisions marking the opening of the proceeding (arts 10 (1), 13 (1) and 14) all refer to the duty of the authority competent for the execution to hear the requested person, whether the procedure is triggered by the forwarding of the EAW to the MoJ or following the arrest performed by criminal police officers (most frequent situation). In both cases, the Court has the duty to hear the person concerned, so as to make her/him well aware of the content of the warrant, the execution of

¹¹⁶ Actually, in transposing the *Directive*, the Legislator missed to include the EAW proceedings within the scope of application of the implementing legislation. This regulatory gap, however, has been filled by the Court of Cassation. See Corte di Cassazione, judgment n 1190 of the 13 January 2015.

¹¹⁷ See paragraph 1.2, a), ii of the present National Report.

the surrender procedure, the possibility to benefit of the specialty rule and last but not least of the right to consent or express opposition regarding the request to be surrendered.¹¹⁸ In the case searches has been launched via S.I.S., following the arrest the criminal police is responsible to provide the above information; nevertheless, the Court of Appeal is in charge to hear the requested person in order to validate the arrest and to take the measures to prevent the person absconding, where necessary.

In this context, to comply with this procedural step, ensuring the effective enjoyment of the right to be heard, is all the more appropriate as in this stage the authority competent for the execution is required to ascertain whether the arrest has been performed against the wrong person or in contrast with the cases provided by law.

“The convicted person has the right to be heard according to the national legislation. By the way, most of the people do not know anything about the proceedings and their rights. Hence, they do not have too much to say” (Lawyer).

It is worth highlighting that the implementing law refers to the possibility for requested person to be heard also when the Court has to decide on the surrender.¹¹⁹ This prerogative, however, is exercised only if appearing in Court. In a nutshell, participating actively in the proceeding is a matter of choice and, as a rule, failing to be present during the hearing cannot prevent the execution of the EAW. This issue, however, has been debated by doctrine and has been even called into question by the Cassation over the last months. In particular, the Court has affirmed that, without prejudice to the full respect of the features characterizing the EAW procedure, the basic rights of the requested person cannot be sacrificed for the sake of speed.¹²⁰

b) Grounds for non-execution of an EAW for the purpose of executing a custodial sentence or detention order

As mentioned above, the national Legislator has opted for a more stringent blocking system by widening and strengthening the refusal regime in the Country. From one hand, the range of reasons on which the national authority can rely to decide not to recognize and execute an EAW is much more extensive than the catalogue provided for by the *FD*. Italy has, indeed, a total of twenty *official* grounds for refusal, in addition to which further *hidden* grounds are laid down between the lines of the implementing legislation. From the other hand, all the above grounds – whether explicitly provided for or not - are mandatory in nature, since the Italian legislator has not established optional ones,¹²¹ depriving the judiciary of the discretionary power to decide on a case-by-case basis.

More in detail, the *L 69/2005* provides for three categories of legal basis to dismiss requests for cooperation. The first group includes the **regular** grounds for refusal, that is those set forth in arts 3 and 4 the *FD*. The latter have all been transposed into the national legal order, albeit with a stricter approach. As an example, article 3 (3) *FD* only forbids the surrender if the minor is granted of a full immunity status in the execution Member State; whilst the Italian legislation requests the competent authority to assess the provisions in matter of

¹¹⁸ L 69/2005, art 14.

¹¹⁹ L 69/2005, arts 14 and 17. Art 14 provides for a fast-track to be used when the consent has been already validly expressed, for instance, during the validation of the arrest; whilst art 17 refers to the “regular” proceeding in chambers aimed to ascertain if the conditions to approve the request are met.

¹²⁰ Corte di Cassazione, VI Sez, 10/12/2015, n. 48943/15. In the case at issue, the Court annulled the decision to surrender a foreign national, who had already consented to be surrendered, but had not participated in the hearing.

¹²¹ The optional ground for refusal provided for in art 4 (5), referred to the case where requested person has been finally judged by a third State in respect of the same acts, has not been incorporated in the Italian implementing legislation. Likewise, the optional ground for refusal provided for in art 4 (3) has been partially transposed.

criminal responsibility and juvenile prison regime into force in the issuing State. In this respect, Italy has even adopted less flexible provisions than those operating in extradition cases.¹²² The same can be said even more with regards to article 4 *FD*, owing to the compulsory nature that Italy has attached to these refusal clauses. In transposing point 1, for instance, the exception relating to taxes and duties has been made more restrictive, limiting the possibility for the national authority to derogate the double criminality check only in the case taxes/duties/custom-related offences, on the basis of which the EAW has been issued, are comparable to taxes and duties whose non-observance under the domestic law gives rise to a penalty punished with a period of detention for a maximum duration of three or more years.¹²³ Likewise, in transposing point (3)¹²⁴ further restrictions have been adopted - not included either in the extradition rules of the CPP - imposing upon the judiciary the duty to assess whether conditions to withdraw the decision not to prosecute apply and, in this latter event, to refuse the surrender.

The second group encompasses the remarkable number of **additional** legal basis, not envisaged by the *FD*, that the Italian national authority has the duty to rely on to decline requests for cooperation. This is the case, for instance, of the prohibition to surrender concerning the protection of the freedom of association, press and more in general the use of other means of communication or the ground aimed at avoiding that the requested person could run the risk to be liable to the death penalty, torture or other inhuman or degrading punishments or treatment. Furthermore, other extra-grounds have been borrowed directly from the CP, preventing the judge to approve the surrender of the requested person when the latter disposes the right under Italian law to grant consent (art 50 CP) as well as in the case that the offence has been committed to exercise a right or to fulfil a duty (art 51 CP) or in case of force majeure (art 45 CP). Refusal to surrender can also be opposed where the legislation of the issuing Member State does not set any maximum limit to preventive detention or, more broadly, if the sentence for the execution of which surrender is requested contains provisions contrary to the fundamental principles of the Italian legal system. The Italian implementing legislation has also introduced a basis justifying refusal in case of political offences, that is clearly totally at odds with the principles on which the ideal of European judicial cooperation is based.

Finally, the third group comprises a number of **hidden** refusal clauses that, unlike the previous ones, are not included in the official list provided for by article 18 of the *L 69/2005*, even if they serve the same purpose. Art 6 (6), for instance, obliges national authority to reject the EAW in the case the documents received miss the necessary information or attachments. Likewise, according to article 17 (4) in the event of EAWs issued for prosecution purposes the surrender is to be made conditional on the existence of serious evidence of culpability. In this respect, it is worth highlighting that also two provisions ranking among the fundamental principles underpinning the *L 69/2005* as a whole fall within the scope of this category. These are article 1 (3) and 2 (3). The former requiring the national authorities to reject the EAW when the latter lacks sufficient motivation or the signature of a judge (prosecution purposes) as well as when the judgment on the basis of which the EAW has been issued cannot be considered irrevocable; the latter imposing the refusal in the event of a serious and persistent breach by the issuing Member

¹²² Italian law does not provide for specific provisions to be applied to minors in extradition cases; the sole exception is represented by the role to be played by the Juvenile Section of the Courts of Appeal (see art 18 Decreto del Presidente della Repubblica 448/88).

¹²³ *L 69/2005*, art 7 (2).

¹²⁴ Art 4 (3) concerns the possibility for the authority competent for the execution to reject the request of the issuing State if a decision not to prosecute has been issued for the same acts.

State of the principles set out in article 6 (1) TEU, determined by the Council pursuant to article 7 (1) of the said Treaty.

It goes without saying that this legal framework results in two main shortcomings. First and foremost, a general problem of compliance with the FD, since the Legislator has introduced a more restrictive regime in respect to the EU intended to establish. From an operational viewpoint, this affects the operation of the passive procedure, creating discrimination among the EU citizens addressed by a warrant, as the scope of the controls performed by the Italian judiciary is much broader than in other Member States.

As a matter of principle, most of the arguments introduced by Italy cannot be easily justified from an EU perspective. This is the case, for instance, of article 18 (1) (f), that prevent the surrender of the requested person for political offences. Italian authorities have strongly focused on this subject during the transposition stage, claiming for the breach of the constitutional principles in extradition matter,¹²⁵ but the introduction of such a ground is likely to raise puzzlement for a variety of reasons. In the first place, the Italian legislation lacks a definition of political offence and diverging theories coexist on the content to be attributed to this label.¹²⁶ Furthermore, it should be considered that the mechanism of cooperation put in place under the EAW is intended to move forward the political dimension of the traditional judicial cooperation instruments, making faster and more straightforward administratively the transnational dialogue between national authorities. The application of such a ground requires a factual evaluation that is not consistent with the *FD* in nature. This seems to be a step backwards from the developments occurred in extradition law moving towards the de-politicisation of this type of crime. Moreover, it should not fall within the judicial authority's remit. Overall, avoiding the factual assessment of the case is the reason why the EU Legislator decided not to place certain issues among the ground for refusal envisaged by the FD EAW, just recalling them in the recitals (e.g. the "discrimination clause").¹²⁷ Accordingly, Member States are called to respect the relevant supranational provisions when applying the EAW, but they should not be allowed to use that as a basis to reject requests of cooperation.

Besides that, the number and the variety of the Italian refusal clauses together with their mandatory nature both exercise a detrimental effect on the relations between the Court of Appeal and the issuing authority, since the surrender scheme set forth by the *FD* is significantly altered. The jurisdiction of the Italian Court is, indeed, extended to domains falling within the competence of the foreign authority, which is in charge to deal with the pending criminal proceeding in the issuing State. In addition, a number of information requested to decide on the surrender (see arts 6 and 18) are not included in the form to be used to issue the EAW; as a consequence, the Italian Courts have very often to ask the issuing authority for integrations, thus hindering the smooth functioning of the procedure.

Last but not least, the total absence of optional grounds affects the exercise of judicial functions. This is not merely about the failure to comply with the rationale underlying the *FD*, but touches also the powers attributed to the judicial authorities within the framework of this system of cooperation. The EU legislator was evidently willing to favour the discretionary decision of the judicial authorities in all the cases covered by article 4, referring to them as the authority in charge to decide whether to apply optional grounds for refusal. Thus, having transposed all these grounds as mandatory, the Italian Legislator has deprived

¹²⁵ Please, see C Grasso, 'The European Arrest Warrant under the scrutiny of the Italian Constitutional Court' (2013) *New Journal of European Criminal Law* 24, 25.

¹²⁶ *Ibid*, p 124, footnote n. 22.

¹²⁷ See G De Amicis, G Iuzzolino, 'Guida al Mandato d'Arresto Europeo' (2008) 72-74.

the judiciary of the discretionary power that the EU provision assigns to them to decide on a case-by-case basis, taking in due consideration the relevant factors of the case at hand.¹²⁸

In spite of this scenario (discouraging from a EU perspective), in practice the most of the additional grounds for refusal have been poorly referred to or, where invoked, their scope of application has been remarkably mitigated by the jurisprudence of the Cassation. The same can be said in respect to those grounds referred to in article 4 of the *FD* that have been subject to substantial changes during the transposition stage as, for instance, art 4 (6) of the *FD*. In its original wording, the *L 69/2005* applied only to nationals, thus violating art 18 TFEU as well as the Constitution (arts 117,¹²⁹ 3 and 27).¹³⁰

Double incrimination

The systematic reading of arts 7.2 and 8.2 of the *L 69/2005* shows that, despite the rationale underpinning the EU surrender system, Italy has substantially reintroduced through the back door the verification of double criminality, growing the ranks of the *hidden* grounds for refusal mentioned above.¹³¹ During the transposition stage, the provision at issue received a frosty reception, since the list provided by the *FD EAW*, considered too vague and broad, has been deemed as a serious threat to the constitutional principle of sufficient certainty (*tassatività*). For this reason, a number of “corrective actions” have been introduced. From one hand, art 8 provides for a much more detailed list of serious crimes, based on the features of the national legislation and, in some cases, even more accurate than those provided by the CP. From the other hand, the Italian implementing legislation has introduced a general rule that expressly considers any departure from the double criminality principle an exception. According “Italy shall enforce the EAW only in cases where the act is also considered to be an offence under Italian law”.¹³² It goes without saying that, the automatism that underpins the procedure at issue has been eluded in practice, since the national authority is entitled to go into the details of the case, assessing whether the crimes for which surrender has been requested correspond to the definitions given at national level. Despite this, in actual cases the divergence between EU Law and national implementing rules showed not to have a detrimental impact in practice.¹³³

c) What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?

As it is well-known, the EAW epitomizes a model of cooperation based on “automaticity, speed and a minimum of formality”¹³⁴ that, over the last years, has raised a variety of questions as to the existence of a genuine level playing field within the EU.¹³⁵ On this basis, just like many other Member States, Italy has intended to counter the effects of the EU maximalist approach to mutual recognition, addressing strongly fundamental rights concerns in its implementing legislation. Beyond the *umbrella rule* providing for general positive

¹²⁸ Council of the EU, ‘Evaluation Report on the fourth round of mutual evaluations “the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States’, 23 February 2009, 5832/1/09 REV 1, RESTREINT UE.

¹²⁹ Costituzione, art 117. English version available at

https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

¹³⁰ Corte Costituzionale, n 227 Judgment 21 - 24 June 2010. Please, note that in the aftermath of this judgment art 18 (1) (r) of the Law 69/2005 has been reworded.

¹³¹ F Impalà, ‘The European Arrest Warrant in the Italian legal system’ (2005) op cit; L Marin, ‘The European Arrest Warrant in the Italian Republic’ (2008) op cit.

¹³² L 69/2005, art 7 (2).

¹³³ A Damato, P De Pasquale, N Parisi, ‘Argomenti di diritto penale europeo’ (2011).

¹³⁴ V Mitsilegas, ‘The EU criminal law after Lisbon. Rights, trust and the transformation of Justice in Europe’ (2016) 124.

¹³⁵ Ibid.

obligations,¹³⁶ the *L 69/2005* outlines two different mechanisms allowing to refuse an EAW because of the violation of fundamental rights occurred in the issuing State. The first one is political in nature and stems from the safeguard clause envisaged by article 2 (3) of the *L 69/2005*, reproducing *Recital 10* of the *FD*. This is a kind of emergency brake to be used in case of democratic backsliding in the issuing State, that does not fall within the judiciary remit.¹³⁷ It clearly denotes exceptional circumstances, since it may be referred to only in the event that the procedure *ex* article 7 TEU is triggered and, as it is well-known, this circumstance has never occurred so far (and it will not probably occur in the near future).¹³⁸ The second one rests instead on the judicial activity of the national courts, that are required to reject arrest warrants in all the cases covered by the provisions providing for grounds for refusal, including hidden ones.

As far as the latter mechanism is concerned, it is worth highlighting that a first group of grounds for refusal based on fundamental rights issues cannot be considered as entirely new, since it finds a legal basis (although indirect) in the *FD*. As an example, the non-discrimination bar to surrender provided for by art 18 (1) (a) is clearly inspired to the first part of the *Recital 12* of the *FD*, according to which nothing in the *FD* may be interpreted as rejecting a request for cooperation in the case that an *EAW* has been issued for the purpose of prosecuting or punishing a person on the grounds of his/her sex, race, religion, ethnic origin, etc. The same can be said for the ground to refuse requests for cooperation founded on potential violation of both the freedom of association and the freedom of expression. Likewise, the prohibition to surrender the requested person, where he/she could be liable to the death penalty, torture or other inhuman or degrading punishments or treatment in the issuing Member State has been derived from *Recital 13*.

The *L 69/2005* also provides for a ground for refusal based on the protection of motherhood, that seems otherwise having no relations whatsoever, since any provision in the *FD* refers to privileges concerning pregnancy or maternity.¹³⁹ Nevertheless, a deeper analysis can reveal a substantial coherence with the *FD* and with the EU law in general. This provision allows national authorities to decline a request to surrender a pregnant woman or a mother of children under the age of three years living with her unless, in the case of a *EAW* issued as a part of a proceeding, the precautionary measures justifying the restrictive order issued by the judicial authority prove to be exceptionally serious. In a nutshell, it mirrors the child-friendly approach of the Legislator already expressed in transposing article 3 (3) *FD*.

Shifting the view from the mother *status* to the child's one makes it easier to "justify" such a deviation from the *FD*, since in light of the post-Lisbon legal framework, the EU policies

¹³⁶ Art 2 (1) of the *L 69/2005* transposes art 1 (3) of the *FD EAW*, but widening its scope of application to the Constitutional rules and principles concerning due process and equality as well as those pertaining to both criminal responsibility and criminal sanctions.

¹³⁷ Having in mind the purposes of art 1 (3) *FD EAW* the Italian authorities can ask the issuing Member State for appropriate guarantees and even refuse or suspend the surrender of the requested person should the Council determine, pursuant to article 7(1) TEU, a serious and persistent breach of the values and principles set out in art 6 (1) of the Treaty in the issuing Member State. Please, consider that democratic backsliding we refer to "the state-led debilitation or elimination of the political institutions sustaining an existing democracy". See for instance N Bermeo, 'On democratic backsliding' (2016) *Journal of Democracy* 5, 19.

¹³⁸ Both in the case of Hungary and Poland decisive steps to trigger this mechanism have not been taken. Notably, in the Polish case the EU Commission launched an unfruitful dialogue with the Government, recently resulted in the odd (and unpublished) Polish statement of the 20 February 2017, that does not seem to leave much room for a compromise solution. In spite of that, the Commission looks like to prefer informal negotiations with the Member States as its next steps, rather than leading an attempt to trigger the procedure *ex* art 7 TEU. See L Pech, KL Scheppele, 'Poland and the European Commission, Part III: requiem for the Rule of Law', *Verfassungsblog*, <www.verfassungsblog.de>, last updated 3 March 2017.

¹³⁹ This provision has been borrowed by art 275(4) CPP having however a different *ratio iuris*, since it is aimed at avoiding preventive custody in prison in the domestic proceeding.

directly or indirectly affecting children must be designed, implemented and monitored taking into account the principle of the best interests of the child. Such rule, thus, imposes to the public authority to carry out such an assessment in practice. Nevertheless, the fact remains that creating a mandatory ground for refusal on this basis is particularly strong and intrusive and recourse to a case by case logic would have been more appropriate.

Finally, a third set grounds to refuse cooperation lies on fair-trial requirements. Accordingly, the competent national authority must refuse the surrender of the requested person if the legislation of the issuing Member State does not set any maximum limit to preventive detention and if there is any reason to suppose that the final sentence forming the object of the EAW is not the result of a due and fair process carried out in respect of the minimum rights of the defendant, as provided ECHR and in its Protocol n. 7. Unlike the group of grounds (indirectly) relying on the *FD*, those concerning the respect of fair trial are borrowed from the domestic CP. In this respect, the sole exception is represented by the article 19 (1) (a) of the L 69/2005 providing the *in absentia*-related requirements to be met to approve the request sent by the issuing Member State.¹⁴⁰

In the view of the foregoing, the picture resulting from the Italian landscape is far from being considered satisfactory from an EU perspective. The (formal) distance between the supranational way to conceive cooperation and the Italian one has, indeed, prompted the reaction of the EU Institutions. Notably, both the Commission and the Council have taken the view that the introduction of grounds not provided for in the *FD* is disturbing, since this does not envisage non-recognition/non-execution clauses based on fundamental rights, especially those involving examination of the merits of a case. This view equally applies to the grounds for refusal inspired to *Recitals* 12 and 13, since “*however legitimate they may be, even if they do exceed the Framework Decision, these grounds should only be invoked in exceptional circumstances within the Union*”. Therefore, as a matter of principle the national authority cannot justify the refusal to cooperate having recourse to allegations blaming the existence of less satisfying guarantees in the issuing Member State.¹⁴¹ Despite this, the impact of this diverging approach in actual cases has been much less serious than expected. With an eye to fully embrace the EU spirit of cooperation, the great majority of these grounds for refusal has been poorly referred to or, where invoked, their scope of application has been remarkably mitigated by the domestic jurisprudence, so as to give an interpretation as close as possible to the EU rules from which they stem.

Past violations

The Italian legislation sets down a variety of legal basis that require the national authorities not to execute an EAW issued for *execution purposes*, because of violations occurred in the issuing Member State.¹⁴² These refer to both substantial and procedural aspects and entail

¹⁴⁰ D.lgs 31/2016 transposing the FD 299/2009, has entered into force on the 23 March 2016. See C Amalfitano, ‘Recepiti nove decisioni quadro e una decisione ex terzo pilastro. La pubblicazione dei primi decreti legislativi di attuazione in Gazzetta Ufficiale’ (2016), Eurojus, published on 14/03/2016. Available at <http://rivista.eurojus.it/recepiti-nove-decisioni-quadro-e-una-decisione-ex-terzo-pilastro-la-pubblicazione-dei-primi-decre-ti-legislativi-di-attuazione-in-gazzetta-ufficiale/>.

¹⁴¹ Please, see C Amalfitano, ‘Mandato d’arresto europeo: reciproco riconoscimento vs diritti fondamentali?’, in R Mastroianni, D Savy (eds), ‘L’integrazione europea attraverso il diritto processuale penale’ (2013). It is worth mentioning that, irrespective of the letter of the FD EAW, part of the legal doctrine considers that in light of recitals 12 and 13 and article 1 (3), national authorities competent for the execution can be substantially allowed to refuse a request to surrender an individual under the EAW, where fundamental rights concerns arise. For a detailed bibliography please see C Amalfitano, ‘Mandato d’arresto europeo: reciproco riconoscimento vs diritti fondamentali?’ (2013) op cit.

¹⁴² Please, note that this paragraph deals only with EAWs in executivis. The implementing legislation also includes provisos substantiating the refusal of warrants issued for prosecution purposes, but they will not be analysed, since they fall outside the scope of application of the present research.

sometimes a real evaluation of the foreign judgment by the Court of Appeal. Art 18 (1) (d), for instance, obliges the judge to reject the surrender if the sentence on the basis of which the EAW has been issued is in breach of the freedom of association, press or other means of communication, thus requiring the Court to evaluate the specific and objective evidences already assessed by the competent foreign authority.

As far as the respect of procedural guarantees is concerned, together with the *ne bis in idem* clause, the grounds relating to *fair trial* rights have to be considered,¹⁴³ especially article 18 (1) (g), according to which the national authorities must decline the request for cooperation if the final sentence on the basis of which the EAW has been issued does not respect due process rights as envisaged by article 6 ECHR and by its Protocol n. 7. In practice, this provision is often referred to. Despite that, refusals based on this ground are quite rare, partly because possible infringements occurred in the course of the foreign proceeding cannot be easily assessed by the national judge on the basis of the available documents; partly because the Court of Cassation is of the view that within the European judicial space the general respect of the guarantees protected at international level has to be considered sufficient. Overall, national jurisprudence has repeatedly pointed out that the due respect of the relevant Italian provisions - including constitutional ones - is limited to the common principles referred to in article 6 TEU. For this reason, for the purpose of surrender the requested individual, the existence in the issuing Member States of guarantees apparently less satisfying should not be considered an obstacle for cooperation.¹⁴⁴ As an example, the Cassation has ruled out the possibility to refuse a EAW in the case that the proceeding on the substance of the matter is suspected of violating minimum rights covered by article 6 ECHR. If the person concerned can appeal to claim procedural breaches, the above rights are, indeed, satisfied, including those concerning the two-level degree of jurisdiction in criminal matter.¹⁴⁵ On the same basis, the Court of Cassation has also found that that no violation of the constitutional principles referred to in article 2 (1) of the *L 69/2005* occurs if the EAW relies on a sentence issued in the light of blood tests, carried out without the consent of the convicted person,¹⁴⁶ or on probable cause consisting of biological material lifted from the accused person for other purposes and stored in a DNA-database.¹⁴⁷

It is noteworthy that article 18 (1) (g), is often referred to in cases of EAWs based on a sentence *in absentia* (article 19). This issue has been largely debated in the Country, first and foremost by the Legislator during the transposition stage as well as by doctrine, because of the constitutional status attached to the adversarial principle in the domestic legal order.¹⁴⁸ By and large, the Court of Cassation has used to address this matter taking the view that the EAW based on a *sententia in contumacia* respects the right to a fair and public hearing if the condemned has the right to request a new judgement¹⁴⁹ or if the law of the issuing Member State allows opportunity to apply for a retrial within a time limit that starts to run from the moment the person concerned has concrete knowledge of the decision.¹⁵⁰ In a nutshell, although the relevant national rules are much stricter, surrender has been usually

¹⁴³ We refer to both the relevant grounds for refusal laid down by arts 18 and 19 as well as to the positive obligation provided for by art 2 (1) (b) of the *L 69/2005*.

¹⁴⁴ Corte di Cassazione, 27/01/2012, n 4528; Corte di Cassazione, 5/2/2007, n 4614.

¹⁴⁵ Corte di Cassazione, 12/2/2008, n 7812; Corte di Cassazione, 12/2/2008, n7813.

¹⁴⁶ Corte di Cassazione, 28/8/2008-3/9/2008, n 34571; Corte di Cassazione, 26/9/2008- 29/9/2008, n 36995.

¹⁴⁷ Corte di Cassazione, 21/8/2008-27/8/2008, n 34294.

¹⁴⁸ Costituzione, art 111 (1) (2) (3).

¹⁴⁹ Corte di Cassazione, 4/2/2008, n 5400; Corte di Cassazione, 30/1/2008, n 5400; Corte di Cassazione, 30/1/2008, n 5403; Corte di Cassazione, 21/8/2007, n 237077.

¹⁵⁰ Corte di Cassazione, 22/5/2006, n 17574.

allowed on condition that the person transferred is informed, in the issuing State, of the sentence and is allowed to request a new judgement.¹⁵¹

This trend could, however, change in the near future, due to the entry into force of the *FD 2009/299*. Overall, this new piece of legislation has not provoked a heart-quake in the Italian system, since the CPP already ensures the respect the guarantees at stake. In spite of that, a few but important amendments have been made to the *L 69/2005*, with the effect to make explicit more stringent requirements, closer to the domestic ones. Notably, the new wording of article 19 has *de facto* introduced an optional ground of non-execution,¹⁵² as the judge is required to check, case by case, whether the person to be surrendered has consciously choose not to take part in the proceeding or if, conversely, this behaviour resulted from a lack of diligence.

Violations of procedural safeguards

Italy provides for the possibility of non-execute an EAW (or of suspending it) because of violations occurred in the course of the proceeding, whether within the framework of the active or passive procedure. With regard to the former, just a few conditions are prescribed by law; whilst, as far as the passive procedure is concerned, the number and the variety of clauses blocking the surrender is remarkable.

Notably, within the framework of the passive procedure Italian law grants the requested person with procedural safeguards, the infringement of which can give rise to refusal as well as to suspension or adjournment of the procedure. This is the case of the right to appoint a defence lawyer, to have the decision within precise time limits or to be informed without delay about the EAW procedure as well as of the rights attached by law to the person concerned. As to the latter issue, for instance, the Court of Cassation has recently made reference to the *dual defence right*, as laid down by the *Directive 1919/2016*, in order to point out that for the criminal police failing to provide this basic information can result in the decision of the judge not to surrender.¹⁵³

Furthermore, refusal or suspension can also result from other procedural shortcomings that can affect the position of the individual in the proceeding. As an example, the Court of Cassation has made void a previous judgment approving the surrender of the requested person, but failing to decide on the case proceeding in chambers. According to the judge competent for the execution this procedural stage could be skipped because the consent to be surrendered had already been expressed. The Court of Cassation rejected this view, stressing that Italian law expressly requires to take the decision to execute or non-execute under the above procedure, not just to ensure that the consent – where relevant – is expressed or that the person concerned could be duly heard (law clearly states that such a guarantee can be enjoyed only if the person is present). This procedure, although faster, is aimed at assessing the legality of the procedure, the validity of the consent expressed (if any) and the possible applicability of refusal clauses. Moreover, this allows the requested persons and their lawyers to become aware of the Prosecutor's opinion. For that reason, the Cassation has considered the decision at issue totally and irremediably null.¹⁵⁴

Finally, conditions concerning both the content and the features of the EAW must be taken into consideration. The Italian authorities have, indeed, the duty to refuse or suspend the execution of a EAW if the latter does not include the stream of *information* and *attachments*

¹⁵¹ Corte di Cassazione, 21/06/2012, n 25303 and 26/02/2013, n 9151.

¹⁵² The Corte di Cassazione has considered the new provision as a new ground for refusal (Corte di Cassazione, 24-05-2016, n 21773).

¹⁵³ Corte di Cassazione, 27/01/2017, n 4128.

¹⁵⁴ Corte di Cassazione, 10/12/2015, n 48943.

required by the implementing law,¹⁵⁵ if documents have not been duly translated,¹⁵⁶ or if the sentence to be enforced is not *irrevocable*.¹⁵⁷ In applying these provisions the Court of Cassation has adopted a flexible interpretative approach, mitigating significantly the practical application of the above conditions,¹⁵⁸ but only to the extent that such a flexibility does not lead to detrimental effects for the individual concerned.¹⁵⁹ Overall, the Court's attitude turns out to be cooperative, while sensitive to the respect of the safeguards that the Italian legal tradition generally attaches to the individual in the criminal field.¹⁶⁰

Risk of future violations

National courts have developed over years an EU oriented case-law, with a view to counterbalance the close attitude of the Legislator toward the EAW. However, such an activity has not sacrificed the core guarantees protected under the domestic legal tradition. As an example, in a few but significant circumstances, the national authority has even widened the scope of application of certain clauses, limiting the possibility to surrender. This is the case of the jurisprudence of the Court of Cassation on the application of the ground for refusal protecting minors and motherhood.¹⁶¹ In the view of the Court, where the child unquestionably needs of continuous material and emotional assistance, the surrender of the mother can be allowed only if in the requesting State ensures the parent-child relationship can appropriately be maintained while the mother is in prison.¹⁶² Furthermore, it is worth of interest that the same ground has been extended also to fatherhood. In the case the child cannot be entrusted to the care of other relatives, the interest of the minor must have priority, especially if balanced with the low interest to punish resulting from crime, on the basis of which the EAW was issued.¹⁶³ Having said that, in the following subparagraphs, the approach used by Italian courts to address some of the possible fundamental rights violations resulting from the application of EAW procedures will be described.

- Speciality principle

Overall, the Italian implementing legislation foresees the application of the specialty clause within the framework of both the passive (art 26) and the active procedure (art 32), reproducing pretty accurately the *soft version* laid down by article 27 FD EAW. Notably,

¹⁵⁵ L 69/2005, arts 6 (1) and 6 (3).

¹⁵⁶ L 69/2005, art 6 (7).

¹⁵⁷ L 69/2005, art 1 (3). Please, note that “irrevocable” stands for “judgement which has the force of res judicata”. It refers to final judgments delivered at trial, which are not subject to an appellate remedy (CPP, art 648). As a rule, irrevocable judgments are inherently enforceable, unless otherwise provided (CPP, art 650). CPP considers, indeed, enforceable also judgments that are not irrevocable, such as judgments of no ground to proceed, in the case they are not subject to appellate remedies. In this respect, the Court has referred to article 8(1)(c) FD EAW in order to distinguish between irrevocability and enforceability of the sentence and has made clear that to be executed the sentence must be just enforceable (Corte di Cassazione, 19/10/2012, n 2745 and 3/6/2016, n 23277).

¹⁵⁸ Corte di Cassazione, 15/03/2017, n 12409; Corte di Cassazione, 15/10/2015, n 41516; Corte di Cassazione, n 53 del 30/12/2014; Corte di Cassazione, n 27326 del 13/07/2010; Corte di Cassazione, 31/10/2007, n 40412; Corte di Cassazione, 16/12/2008, n 46298; Corte di Cassazione, 23/02/2015, n 8132; 27/02/2014, n 9764; Corte di Cassazione, 19/05/2016, n 21774; Corte di Cassazione, 7/5/2007, n 17306.

¹⁵⁹ Recently, the Corte di Cassazione has annulled a decision approving the request to surrender an individual, who was a minor at the time the offence was committed. The national judge competent for the execution had approved the request even if the copy of the sentence was not attached to the EAW and the available information were not sufficient to assess the imputability of the requested individual. Corte di Cassazione, 19/05/2016, n 21774.

¹⁶⁰ Corte di Cassazione, 3/7/2007, n 25420.

¹⁶¹ See *infra*.

¹⁶² Corte di Cassazione, 7/10/2013, n 42124.

¹⁶³ Corte di Cassazione, 15/04/2013, n 21988. Corte di Cassazione, 25/03/2010, n 11800; Corte di Cassazione, 2/09/2008, n 35286.

unlike the traditional extradition agreements, within the EAW system such a principle amounts to a prerequisite to proceed against the requested person; as a result, it does not just apply to cases where the limitation of the personal freedom is at stake (whether due to prison sentences or security measures), but also to criminal prosecution. Furthermore, in accordance with the FD, a number of exceptions allows the national authorities to waive this general rule. The derogations result from *i*) the nature of crime on the basis of which the warrant has been issued; *ii*) the consent of the person concerned and *iii*) his/her presence in the territory of the requested State following release.¹⁶⁴ As far as the latter condition is concerned, particular problems do not arise, since the so-called “*purgazione della specialità*” is a well-established rule in the extradition field. On the contrary, the other two criteria give rise to some concerns in practice, especially the consent clause, quite difficult to apply in actual cases.

If one take into consideration the passive procedure, potential shortcomings can easily arise. As an example, the consent (or the denial) to waive the specialty rule is generally given during the same hearing when the person concerned is called upon to decide whether or not agree the execution of the EAW. For this reason, there is a risk that such an approval be generic or undetermined and, above all, that this may be confused with the consent to be surrendered. In these circumstances, the competent authority should not consider the approval validly expressed. Even more problematic is the case where the requested person is called upon to express his/her consent after the surrender abroad has taken place. As a rule, the Italian executing authorities should assess very carefully the way in which the approval is expressed in the requesting State; but, it goes without saying that exercising control over actions performed out of the domestic jurisdiction, where a foreign legal order legitimately applies, is anything but realistic.¹⁶⁵ The same can be said in respect to the assessment performed in the executing State, when Italy acts as an issuing Country. In light of the higher level of mutual confidence among States, the domestic court is basically required to trust the foreign one and its deliberations; beyond this, the renunciation of entitlement to the speciality rule expressed in the executing State cannot be easily challenged in the requesting State. The Constitutional jurisprudence has considered such a consent validly expressed, even where the record of the hearing during which the renunciation had been expressed in front of the foreign authority is omitted. In this case, the reference made by the foreign judge to the procedural safeguards provided for by the legal order at issue has been deemed sufficient.¹⁶⁶

With regard to the nature of the offence committed, it is not disputed that in the EU surrender system the specialty clause can be waived if the sentence to be executed or the proceeding to be carried out do not lead to the limitation of the personal liberty of the individual concerned. As a matter of fact, where this requirement is met, the issuing authority can prosecute the requested person, without requesting consent to the executing authority, for crimes committed prior to his/her surrender other than that for which he or she was surrendered.¹⁶⁷ By contrast, the assessment of the constituent elements of the crime have been recently called into question. The Court of Cassation has made clear that with a view to exclude possible violations, the above elements have to be evaluated very carefully. Notably, the authority must check whether the details included in the EAW match those mentioned in the subsequent procedural act. Possible variations in terms of time and place

¹⁶⁴ G De Amicis, G Iuzzolino, ‘Guida al Mandato d’Arresto Europeo’ (2008) 137.

¹⁶⁵ M Caianiello, ‘Il principio di specialità’, in M Bargis and E Selvaggi, ‘Mandato d’Arresto Europeo. Dall’extradizione alle procedure di consegna’ (2005) 213-225.

¹⁶⁶ Corte di Cassazione, 06/05/2010, n 17269.

¹⁶⁷ Corte di Cassazione, 23/09/2011, n 39240; Corte di Cassazione, 10/04/2015, n 14880; Corte di Cassazione, 17/01/2017, n 4457.

can be accepted, on condition that these do not result in the alteration of the nature of the crime and do not give rise to the application of the grounds for refusal as provided for by arts 3 and 4 FD. In the case the latter requirements cannot be met, the consent of the executing State must be requested.¹⁶⁸

Having said that, it is worth highlighting that in case of violation of the speciality principle by Italy, when the latter acts as an issuing authority, the interested person can challenge the detention order issued by the domestic judge after the surrender (for an offence committed prior to the one for which s/he was surrendered and of different nature) before the Court (*Tribunale delle libertà*) and afterwards before the Court of Cassation, on points of law. The Italian judge can suspend the detention order, waiting for the supplementary consent to be given by the executing authority. On the contrary, violations occurred abroad, when the renunciation to the above clause is given prior the surrender, can be challenged only in the executing State, following the rules of its legal system.¹⁶⁹

- *Suspension of execution of a EAW to execute the sentence related to another offence.*

Art 24 FD covering the postponed or conditional surrender has been quite literally translated into the national law, making the following options available. First of all, having decided to execute the EAW, the Court of Appeal may postpone the surrender of the requested person so that s/he may be prosecuted in Italy. In the case the person concerned has already been sentenced, s/he may serve a sentence passed for an offence other than that referred to in the EAW. As an alternative to postponement, the competent Court can also temporarily surrender the person concerned to the requesting Member State. In this instance, however, an agreement between the Italian and the issuing authorities is needed, with a view to set the conditions governing the provisional surrender.¹⁷⁰

With regard to the cases of postponement, it has to be stressed that the power of the Court of Appeal to decide on this issue implies an evaluation based on reasons of expediency, that must take into account *inter alia* both the status of the proceeding and the seriousness of the crime;¹⁷¹ for this reason, the Court of Appeal is further entitled to acquire additional documentation, in order to obtain relevant information.¹⁷² The postponement, for instance, has not been granted in case of not imminent execution of the sentence, being the appeal proceeding still pending.¹⁷³ Nor it was granted to allow the participation of the requested person in proceedings other than criminal proceedings.¹⁷⁴ More recently, the Court ruled that, in order to postpone the surrender, a comparative evaluation must be made, considering not only the internal procedural needs, but also the conditions concerning the complexity and the stage of the proceedings, the adoption of a final sentence (*res iudicata*), the entity and the way of execution of the penalty, including the deprivation of liberty.¹⁷⁵

“I cannot remember cases of refusal of a an EAW based on fundamental rights violations This may happen in the case of transfer to non-EU Member States (i.e. Turkey). [...] Something can change after the Aranyosy and Caldararu judgment, since this obliges the judge to wait for information about the detention conditions before taking the final decision. If the issuing State does not send information, the executing authority can refuse the transfer. It is a change: before the Aranyosy and Caldararu judgment in the silence you go ahead with the transfer, now in the silence you wait for. [...] We often use the report

¹⁶⁸ Corte di Cassazione, 16/11/2016, n 53595.

¹⁶⁹ Corte di Cassazione, 27/7/2012, n 30769.

¹⁷⁰ Corte di Cassazione, 10/07/2015, n 29819.

¹⁷¹ Corte di Cassazione, 26/10/2007, n 39772.

¹⁷² Corte di Cassazione, 28/03/2013, n 14764.

¹⁷³ Corte di Cassazione, 15/12/2005, n 45508.

¹⁷⁴ Corte di Cassazione, 21/1/2009, n 2728.

¹⁷⁵ Corte di Cassazione, 31/03/2014, n 14860.

carried out by the NGOs in order to get information about treatment and prisons' conditions" (Lawyer).

- *Refusal or suspension of a EAW due to prison conditions in the issuing country.*

Overall, the ground forbidding to surrender the requested person in the case s/he can liable to the death penalty, torture or other inhuman or degrading treatment¹⁷⁶ has been poorly referred to by national authorities. As a matter of fact, a few cases claiming the violation of such a provision could be found in the official database of the Court of Cassation and even less those of refusal.¹⁷⁷ A new trend emerged only in the aftermath of the ruling of the ECJ in the joined cases *Aranyosy* and *Caldararu*, following which national case-law starting to address prison conditions-related issues carefully. In particular, the Cassation has stressed the importance of the information available to the judicial authority, pointing out that these must be sufficient to ascertain whether any risk of ill treatment can be genuinely avoided. Otherwise, surrender has to be refused.¹⁷⁸ It is worth noting that in the view of the Court general detention conditions in the issuing Country cannot be considered enough, since the individual situation of the person to be surrendered must be determined. On the contrary, details relating to the length of the penalty, the concrete treatment, the space allowed to the convicted person, the heating conditions, the system of lunch/dinner should be duly verified. Where this information missing, the judge competent for the execution has to deny the request of surrender, unless further information is provided within a reasonable time.¹⁷⁹

In a previous stand, the Court also detailed the steps to be taken in order to perform such an evaluation.¹⁸⁰ First and foremost, the issuing Country has to be asked to provide additional details on the prison and the detention conditions in a reasonable time (not exceeding 30 days). This information must include the name of the detention centre, the minimum individual space, the condition of hygiene, the cleanliness of the room, the national or international mechanisms implemented to control the effective detention conditions of the convicted person. Once the Court of Appeal has received the required data, situations violating art 3 ECHR can be excluded *in concreto*. In performing this task, the judge can also refer to judgments issued by international courts as well as by judicial authorities of the requesting Member State. Decisions, reports and other documents drawn up by bodies belonging to the CoE or the United Nations have to be considered as important landmarks too. Notably, the Cassation has recently further stressed that in assessing such a potential risk, the *guidelines* provided for by the ECtHR jurisprudence should be followed. Accordingly, *the extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of art 3*. Nonetheless, this strong presumption should be balanced with other aspects of physical conditions of detention, such as access to natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements.¹⁸¹ If in light of this kind evaluation potential risks of ill treatment can be excluded, the national judge cannot refuse the surrender.¹⁸²

- *Humanitarian clause*

¹⁷⁶ L 69/2005, art 18(1)(h).

¹⁷⁷ So far, similar provisions have been applied in cases concerning extradition to non-EU Countries. Please see, Corte di Cassazione, 11/02/2011, n 15578.

¹⁷⁸ Corte di Cassazione, 31/10/2016, n 45757.

¹⁷⁹ L 69/2005, art 18(1)(h).

¹⁸⁰ Corte di Cassazione, 1/06/2016, n 23277/2016.

¹⁸¹ Corte di Cassazione, Sez VI, 01/02/2017, n 5472.

¹⁸² Corte di Cassazione, 28/10/2016, n 45720; Corte di Cassazione, 07/04/2017, n 17943; 01/02/2017 n 5472; Corte di Cassazione n 23277/2016.

Finally, it has to be mentioned that the implementing legislation provides for a suspension clause based on humanitarian grounds that can be also applied to prevent surrender if there are substantial reasons for believing this would endanger the requested person's life or health".¹⁸³ However, no case of refusal to surrender based on such a legal basis is hitherto available on this topic in the official data base of the Court of Cassation.¹⁸⁴ This provision has been recently referred to in a couple of cases appealing against the decision of the national courts to surrender, irrespective of the possible risks for the health conditions of the requested persons, but in none of these cases the request has been accepted. With regard to this issue, the Cassation seems to have adopted a restrictive approach, by rejecting the existence of an actual ground for refusal based on health concerns. In the view of the Court, personal health status is subject to evolving conditions, even rapid changes; thus, these should be taken in due consideration only during the final stages of the EAW procedure. For this reason, the Legislator has not included this issue in article 18 of the *L 69/2005*, but it was intended to conceive it as a suspension clause. It follows that the surrender of the requested person cannot be refused because of the possible impairment of the health status of the individual concerned. On the basis of *rebus sic stantibus* evaluations, these conditions may otherwise result in the suspension of the execution of the EAW.¹⁸⁵

3.2. FD 2008/909

a) Safeguards for the convicted person

Access to lawyer

Although Italian law attaches great importance to the procedural and defence rights of the person involved in some way in the criminal process, in transposing the *FD 909/2008* the Legislator has not expressly mentioned the right of the convicted person to have access to a lawyer, maybe because it deemed this choice redundant or just because the EU provisions lack specific indications. *D.lgs 161/2010* only marks the main steps during which the role played by the defence is considered necessary. Notably, this is highlighted just within the passive procedure, *i)* after the Court of Appeal¹⁸⁶ receives the request to recognize and execute the foreign judgment. Overall, in order to decide whether recognise and execute a foreign judgment, the Court proceeds in chambers, having duly heard all the parties concerned, including the convicted person (if present) and his/her lawyer.¹⁸⁷ In this occasion the presence of the defence is necessary, because the individual concerned can eventually express or deny the consent to the transfer, where not previously given.¹⁸⁸ Against such a decision, appeal can be lodged to the Court of Cassation and the enforcement of the order can be suspended.

Special emphasis is given to the role played by the defence where the issuing State requests the application of coercive measures on the sentenced person, with an eye to avoid absconding attempts while waiting for the recognition of the judgment. These measures can be applied only with reasoned order of the Court of Appeal, failing which these are void, and only in the case there are no reasons to assume that any ground impeding the recognition could be raised. In this case, the person concerned has to be heard by the Court and informed that a request to recognize and execute a prison sentence in Italy has been forwarded by the issuing State. For this reason, if a retained lawyer is not designated, a court-appointed participate in the hearing.¹⁸⁹ Finally, defence is referred to in respect of the

¹⁸³ L 69/2005, art 23 (3).

¹⁸⁴ See www.italgiure.giustizia.it

¹⁸⁵ Corte di Cassazione, Sez VI, 15/02/2017, n 7489; Corte di Cassazione, Sez VI, 30/12/2013, n 108.

¹⁸⁶ D.lgs 161/2010, art 9.

¹⁸⁷ According to art 12 (10) D.lgs 161/2010, on this matter art 22 of the L 69/2005 applies. The latter expressly refers to art 127 CPP providing for the procedure to be followed to proceed in chambers.

¹⁸⁸ D.lgs 161/2010, art 12 (5).

¹⁸⁹ D.lgs 161/2010, art 14 (4), states that art 717 (2) of the CPP applies on this issue.

procedures arising from arrest by criminal police in case of urgency, pending the decision to recognize the foreign judgment. In this case, the defending counsel has to be promptly notified of the arrest and attend the hearing, where necessary.

Respondents have strongly stressed the link between the genuine enjoyment of the information rights and the effective respect of the fair trial rights. They also highlighted the pivotal role of the defence lawyers in obtaining the necessary details to fully exercise fair trial rights.

“I think that what is really missing is networking between defence lawyers. We should have the chance to be in contact with our colleagues abroad. For example, we do not know about the prison conditions and sanctions in the issuing state, how the proceedings go ahead and end when the convicted person is transferred, etc. These are all precious information which could have an impact in actual cases, especially as to the exercise of the consent right and the right to express an opinion on the case” (Lawyer).

Access to documents, translation and the right to information and opinion of the convicted person to the transfer

As already pointed out in the previous paragraphs, in Italy the right to be informed within the framework of the criminal proceeding is recognised at a Constitutional level, being this guarantee strongly connected to the effective enjoyment of the defence and fair trial rights. Having said this, it has to be stressed that, however, the *D.lgs* is silent as to the right of the person concerned to be informed of the possibility to be transferred to another Member State with a view to serve a prison sentence abroad. The sole (indirect) reference to this prerogative can be found reading between the lines of the soft law instruments issued by the MoJ, that introduce the *ex ante* assessment mechanism mentioned afore to be used to identify the foreign prisoners, which are likely to meet the requirements to be transferred.¹⁹⁰

As already explained, in order to carry out such an evaluation, the prison staff has to question the foreign prisoners in order to ask for personal information as well as for their opinion about the transfer.¹⁹¹ This seems to suggest that details concerning the transfer procedure should be given to the person concerned, in order to make him/her able to express an informed opinion. Anyway, at present no detail is available on this issue.

Within the framework of the *passive procedure*, not a word about this issue, if not with reference to the information and notification duties of the Court of Appeal concerning the proceeding to be celebrated in chambers to be duly complied with. On this point, it could be pointed out that, in light of article 12 (5) the Court decides about the recognition of the foreign judgment only after hearing the person concerned (where relevant). As a consequence, it could be assumed that basic information have to be supplied, with a view to allow the prisoner to exercise his/her consent right effectively. In spite of that, information duties do not arise for the national authority on account of the implementing legislation; therefore, there is a reason to believe that this burden is *de facto* up to the defence lawyers.

As regards the translation rights, it has to be stressed that the implementing legislation addresses this issue only in respect of the documents to be submitted to the executing authorities - whether within the active or the passive procedure, so as to enable them to

¹⁹⁰ Please, see par. 2.3, a) ii) of the present report.

¹⁹¹ Such an opinion can be also collected in writing. Please, see the Ministero Della Giustizia - Direzione Generale Per La Giustizia Penale, Circolare: trasferimento dei detenuti in attuazione della Decisione Quadro 2008/909/GAI, 28 aprile 2014. See also Dipartimento Amministrazione Penitenziaria, Circolare: trasferimento dei detenuti verso il loro Paese d'origine in attuazione della Decisione Quadro 2008/909/GAI, 18 aprile 2014.

decide on the request for cooperation.¹⁹² However, any provision concerning translation seems to be aimed at complementing the information rights of the person concerned; likewise, any soft law rule or guideline is keen to fill such a gap in actual cases.

Almost all the respondents contributing to the empirical analysis (i.e. Lawyers and NGOs representatives) placed emphasis on this point since, as already mentioned in the previous paragraphs, the full enjoyment of the prerogatives described above is of overriding importance for the person concerned to actually understand the proceeding in which s/he is involved and act properly within this framework. Even if the transfer process laid down by the EU legislation doesn't leave much room for the participation of the sentenced persons, it still provides them for some possibilities (although very limited) to have their say. For this reason, for the person concerned to be well aware of the consequences deriving from the transfer is an essential part of the proceeding's fairness. Notably, the provisions concerning the early or conditional release into force in the executing State are a good example of the information to be provided to the sentenced person, in order to allow s/he to form an opinion. It goes without saying that over and above the correctness and completeness of the information provided, having these information translated in an understandable language can be crucial to avoid that a number of prerogatives, including the consent right as well as the right to express an opinion could be deprived of their effectiveness.

As regard the latter, it has to be stressed that in line with the *FD 2008/909*, its legal effects cannot amount to those resulting from the exercise of the consent right. This is to be rather considered as a necessary procedural step in the event that the sentenced person is in the Italian territory.¹⁹³ Guidance is not provided by the *D.lgs* as to value to be attached to the view expressed by individual concerned, nor the above soft law instruments can offer clear indications on this issue. In the view of the Ministry, the opinion of the person concerned can provide fundamental indications to assess if s/he has established social and family roots in Italy. In this regard, the case-files reviewed have showed that prisoners' claims receive a positive response only if they are supported by strong evidences concerning their personal situation, in particular the length, nature and conditions of their presence in Italy and the family and economic connections they have in the Country.

Right to be heard

The right for a convicted person to be heard is equally referred to both when the Italian authority has the intention to forward a judgment to another Member State, with a view to having a prison sentence recognized and executed abroad, as well as in the event that Italy receives an equivalent request for cooperation. As to the former situation, the right of the convicted person to be heard is implicitly enshrined by arts 5 (4) and 6 (1), covering the right to consent and the right to express an opinion on the transfer. Notably, when the implementing law entitles the person concerned to consent or refuse the surrender, such an approval (or denial) must be given both personally and in writing. Following the same approach, where the opinion of the sentenced person is considered as a compulsory procedural step to be performed, the national authority in charge for the decision to forward the judgment abroad has the duty to hear the individual concerned in person.

With regard to the passive procedure, the same guarantee is provided for within the framework of a number of procedural stages, that is: *i*) when the Court of Appeal decides in chambers whether the conditions required to accept the request for cooperation have been

¹⁹² D.lgs 161/2010, arts 6 (7) and 12. Accordingly, the certificate has to be translated before the forwarding takes place, while the judgment can be forwarded in the original language. The same approach applies with regard to the transit cases (article 19).

¹⁹³ D.lgs 161/2010, arts 6 (1).

met,¹⁹⁴ (this applies also when the person concerned is detained in a place outside the district of the competent Court);¹⁹⁵ *ii*) in the event that, upon request of the issuing State, coercive measures are applied; *iii*) in case of arrest. In the latter event, a rigorous proceeding of arrest validation is foreseen.

b) Consent of the executing state

In the case the judgment to be recognised and executed is forwarded to the Member State other than the Member State of nationality of the sentenced person in which s/he lives, the prior consent of the requested State is necessary. The same applies when the requested Country is the Member State of nationality, to which, while not being the State where the sentenced person lives, s/he will be deported once released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure taken consequential to the judgment. It is worth mentioning that the official act through which the forwarding abroad is ordered must indicate the prior approval of the executing State. Furthermore, this must be notified to the sentenced person too. If the sentenced person is already in the territory of the executing State, such an act is forwarded to the competent foreign authority, so that the latter can notify it to the interested individual.¹⁹⁶

c) Interplay with the FD on the EAW

Art 24 of the *D.lgs 161/2010* implements the legal basis establishing the connection between the EAW and the recognition of foreign sentences under the *FD 2008/909*.¹⁹⁷ It uses a more concise wording compared to the latter, but it is substantially consistent with the European scheme, recalling both arts 18 (1) (r) and 19 (1) (c) of the *L 69/2005* applicable to *in executivis* EAWs and EAWs for prosecution purposes respectively.¹⁹⁸ The main aim of this rule is avoiding impunity, while serving reintegration purposes; nevertheless, the question has been recently raised as to whether such a goal¹⁹⁹ is in any circumstances genuinely in the best interest of the persons concerned, given that a variety of reasons could be raised by them with a view to prevent return to their home countries.²⁰⁰ At any rate, within the Italian landscape the adoption of this provision is certainly welcome, since it complements the surrender system put in place with the EAW, laying down both the procedure to be applied and the detailed conditions to comply with to have the foreign judgment recognized and adapted within the national legal order. Italian jurisprudence clearly stresses that the Court of Appeal opting for the refusal is required to recognize and execute the foreign judgment upon which the EAW relies within the Italian territory, in compliance with the arrangements set by article 25 of the *FD 2008/909*.²⁰¹ These arrangements basically pertain to *i*) the general criteria to be met for having the foreign judgment recognised; *ii*) the assessment of the sentence in terms of compatibility with the domestic legal order and *iii*) the possible application of the grounds for refusal established by law. In this respect, it is worth of

¹⁹⁴ On this issue, please see par. 2.3, a), iii) of the present report. See also the CPP, art 127 (5). In this respect, it is worth to remember that within the framework of this faster procedure, participation in the hearing is not compulsory. The sentenced person is heard only if s/he appears in Court. In any case, if an explicit request to this end is made, the individual concerned must be heard personally under penalty of nullity.

¹⁹⁵ CPP, art 127 (3) (4). In this case the person concerned is heard by the Supervisory Penitentiary Magistrate.

¹⁹⁶ D.lgs 161/2010, art 6 (4).

¹⁹⁷ FD 2008/909/JHA, art 25.

¹⁹⁸ So far such a connection clause has been poorly applied with reference to circumstances covered by article 19 (1)(c), while it has been largely referred to in cases covered by arts 18 (1) (r).

¹⁹⁹ FD 2002/584/JHA, art 5.

²⁰⁰ Europris, Working group report of the expert group on Framework Decision 909 (2013) 15, available at http://www.europris.org/wp-content/uploads/EP_FrameworkDecisions_Report.pdf

²⁰¹ Please, see eg Corte di Cassazione, 1/12/2016, n 3713; Corte di Cassazione, (ud. 17-02-2016) 19-02-2016, n. 6771; Corte di Cassazione, 30/12/2014, n 53, dep. 2015; Corte di Cassazione, 27/05/2014, n 21912; Corte di Cassazione, 17/04/2014, n 33557.

interest the recent judgment of the Court of Cassation, that has annulled a previous decision providing for the recognition of a foreign sentence, because of the failure to comply with the above requirements. Notably, in the case at issue, the competent judge deemed these evaluations not necessary, because the individual concerned (covered by art 18(1)(r) of the *L 69/2005*), accepted to have the sentence executed in Italy. The Court of Cassation (predictably) dismissed these arguments, stressing that the above approval cannot be considered as a basis to waive the obligations arising from the legislation into force.²⁰²

d) Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a convicted person)

By and large, the grounds for refusal defined by the *D.lgs 161/2010* are consistent with the indications provided at EU level; nevertheless, as in the case of the EAW, they all are mandatory in nature, having decided the Italian Legislator not to establish optional ones (art 13). First and foremost, the Court of Appeal has to decline the request for cooperation if the conditions set forth by law to having the foreign judgment recognised are not met jointly.²⁰³

This includes also the respect of the double criminality principle, unless derogations apply and the maximum penalties applicable in the issuing State is not less than three years of imprisonment. Refusal can be justified even in the case the certificate is incomplete or manifestly does not correspond to the judgment and has not been completed/corrected within the deadline set by the national authority. Recognition can also be refused if:

- upon the requested person, final judgement has passed in one of the EU Member States, in respect of the same actions, in so far as, in case of conviction the sentence has already been executed or the execution is under way or the sentence can no longer be carried out according to the law into force in the sentencing State;
- the acts for which the transfer has been requested can be judged in Italy and if the enforcement of the sentence is statute-barred;
- a decision not to prosecute has been issued in Italy, with the exception of the conditions set forth the CPP providing for the revocation of the judgment;²⁰⁴
- according to Italian law the enforcement of the sentence is statute-barred;
- under the Italian law there is immunity, which makes it impossible to enforce the sentence;
- the sentence has been imposed on a person who, under the Italian law, owing to his or her age, could not have been held criminally liable for the acts in respect of which the judgment was issued;
- at the time the judgment was received by the Ministry of Justice, less than six months of the sentence remain to be served;
- the issuing State, before a decision to recognise the judgment is taken, refused the request of the Italian judicial authority to prosecute, sentence or otherwise deprived of his or her

²⁰² Corte di Cassazione, 01/12/2016, n 3713.

²⁰³ The conditions laid down in art 10 are the following; i) The interested person is an Italian national; ii) The interested person has his/her habitual residence or domicile in Italy; iii) Italy is the Member State to which the sentenced person will be deported, once s/he is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure taken consequential to the judgment; iv) The interested person is in the Italian territory or in the territory of the Member State that has issued the judgment; v) The interested person has given his/her consent; vi) The judgment relates to acts which constitute an offence under the Italian law, irrespective of the constitutive elements of the offence and the national legal classification of the offence (derogations are provided by art 11); vii) The duration and the nature of the sentence (or alternatively of the security measure) issued by the issuing State are compatible with the Italian legislation.

²⁰⁴ CPP, art 434: "if after delivery of a judgment of no grounds to proceed, new sources of evidence arise or are discovered that, either alone or in addition to the evidence already gathered, may determine the request for committal to trial, the preliminary investigation judge, upon request of the Public Prosecutor, shall order the revocation of the judgment".

liberty in the Italian territory, for an offence committed prior to the transfer other than that for which the person was transferred;

- the sentence imposed includes a measure of psychiatric or health care or another measure involving deprivation of liberty, which cannot be executed in accordance with the Italian legal and health care system, with the exception of cases covered by art 10 (5),²⁰⁵

- the judgment refers to offence that, according to Italian legislation, have been committed partly or totally within the Italian territory or in a place equivalent to its territory.

The execution of a foreign judgment must be refused also in the cases of decision given *in absentia*. Notably, the request must be dismissed if the individual concerned has not participated in the proceeding resulted in the decision to execute the foreign judgment, unless the certificate can show that defence rights have been fully respected. The national authority, indeed, has to assess whether the information provided is sufficient to ensure the person's awareness of the trial. For this reason, attention must be paid to the diligence exercised by the person concerned in order to receive information addressed to him/ her.

e) What role do (possible) fundamental rights violations have in the in the FD 2008/909?

The national provisions transposing the *FD* do not expressly provide for a specific ground for refusal based on fundamental rights violations. Art 1 states that the *D.lgs* has been issued with a view to favour the proper implementation of the principle of mutual recognition in the judicial cooperation field, making faster and more straightforward administratively the procedures aimed at executing both prison sentences and decisions imposing other forms of deprivation of liberty in the territory of other EU member States. Nevertheless, in line with the *controlimiti doctrine* developed by the Constitutional Court, the same provision enshrines such a goal, while making very clear that this objective is to be pursued without prejudice to the fundamental principles of the constitutional system, especially those concerning the respect of fundamental rights and freedoms as well as the due process. Even if this kind of violations is supposed to be very rare within the EU context, the Italian Legislator clarified this issue anyway, also considering this approach to be consistent with the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 TEU,²⁰⁶ and with *Recital* n. 14, according to which Member States should not be prevented from applying their constitutional rules relating to due process.²⁰⁷

Past violations

Some of the grounds for refusal provided for by the *D.lgs 161/2010* are somehow connected with the violation of fundamental rights in the issuing State. As an example, Italy has the duty to refuse the recognition of a sentence in the case this is contrary to *ne bis in idem* principle.²⁰⁸ The same applies when the sentence has been pronounced *in absentia*, unless one of the following conditions is met: 1) the person concerned was summoned in person or was otherwise informed of the proceeding; 2) s/he was informed of the proceeding and was represented by a defence lawyer; 3) he/she was informed of the decision and of the possibility to request a new judgement or a review on the full merits and s/he expressly renounced such possibility.²⁰⁹ Having said that, it has to be stressed that refusals to transfer based on those grounds have not been found in the case-files analysed. Nor interviewed reported cases of this kind.

²⁰⁵ Art 10 (5) of the *D.lgs161/2010* deals with the adaptation of the sentence.

²⁰⁶ *FD 2008/909/JHA*, art 3 (4).

²⁰⁷ Please see, the Schema di *D.Lgs.* – Disposizioni per conformare il diritto interno alla Decisione Quadro 2008/909/GAI relative al reciproco riconoscimento alle sentenze penali, ai fini della loro esecuzione nell'Unione Europea – Relazione.

²⁰⁸ *D.lgs 161/2010*, art 13(1)(c).

²⁰⁹ *D.lgs 161/2010*, art 13(1)(i), as amended by the *D.lgs n 3115/02/2016*, implementing the *FD 2002/299/JHA*.

“I have never found a transfer refusal based on fundamental rights violations in my experience” (NGO representative)

Violations of procedural safeguards

Italy can refuse to execute foreign judgments, if the certificate attached to them is incomplete or does not correspond to the sentence to be recognised. At any rate, before to decline cooperation requests, the issuing authority has to be consulted, in order to require any useful information. In the case that the issuing authority does not provide a new certificate or the necessary additional information within the fixed time limit the request can be dismissed.²¹⁰

Risk of future violations

The Italian implementing legislation only prescribes that “the execution of the penalty or security measure aims at fostering the rehabilitation of the sentenced person”,²¹¹ but the Legislator has not defined criteria to ascertain if the executing State is the most suited place for the convicted person social reintegration. Likewise, indications concerning the assessment of the prison conditions in the executing Country have not been laid down. This gap has been filled, although in part, by *soft law* instruments recently adopted by the MoJ.²¹²

3.3. FD 2008/947

a) Safeguards of the convicted person

Access to lawyer

The *D.lgs* does not make explicit the right of the person concerned to have access to a lawyer; despite this, there is a reason to affirm that the general guarantees provided for by the Italian legislation, especially those protected at a Constitutional level, have to be applied. Being the passive proceeding to be celebrated in chambers, the defence rights of the individuals concerned must be fully respected and all the procedural guarantees generally foreseen within the framework of such a procedure apply. Furthermore, it has to be considered that within the Italian legal order, defence is an inviolable right at every stage and instance of legal proceedings and that this guarantee is equally granted to citizens as well as foreigners and stateless persons, which are all enabled of proper means for action or defence in all courts where necessary.²¹³

Access to documents, translation and the right to information

Access to documents and the right to information - including the right to translation – are not explicitly mentioned by the implementing legislation and, where referred to, they are dealt with in a minimal way. As an example, both within the framework of the active and passive procedure, the translation of documents is only for the certificate and the copy of the judgment/decision providing for the conditional release.²¹⁴ Likewise, the *D.lgs* does not even mention the right of the person concerned to be informed of the possibility to be transferred to another Member State. This is implicitly foreseen, however, within the passive procedure. Being such a proceeding to be celebrated in chambers, the information and notification duties of the Court of Appeal have to be duly complied with as well as the defence rights of the individuals concerned.

Right to be heard

²¹⁰ D.lgs 161/2010, art 13(1)(b) and art 12(3).

²¹¹ D.lgs 161/2010, art 5(2)(a).

²¹² Please, see *infra*.

²¹³ Please see para. 3.1, a), i) and 3.2, a), i) of the present report.

²¹⁴ D.lgs 161/2010, art 7.

The right of the person concerned to be heard at any stage of the proceeding is not mentioned in the implementing legislation, nor the consent requirement. Overall, procedures aimed at ensuring the participation of the sentenced person in the proceeding has not been designed. This can be basically considered to be in line with the *FD 947/2008*, that is silent on the same issues. However, on a closer inspection the *D.lgs 38/2016* does not appear to be in full respect of the spirit and the letter of the EU cooperation scheme. According to the *FD*, the issuing State may forward a judgment and, where applicable, a probation decision to the Member State in which the sentenced person is lawfully and ordinarily residing, in cases where the latter *has returned or wants to return to that State*.²¹⁵ Likewise, the prior request of the person concerned is necessary when the Member State of destination is other than his/her Country of residence. It is this background that allows to assume that the opinion of the sentenced person about the transfer, and in certain cases his/her initiative, is the necessary condition to comply with to trigger the forwarding procedure. Italian law does not follow this pattern inasmuch as this does not take into account the attitude of the sentenced person in respect to the transfer to the Member State of residence. The initiative of the person concerned is considered a requirement to be met only where the judgment/decision is forwarded to the Member State other than the Country of residence. So essentially, what *FD 947* lacks in terms of participation in the proceeding is made up in granting to the person concerned a key role, whereas in the *D.lgs 38/2016* a balance between the two aspects is not foreseen. The right of the individual to adopt a position on the transfer procedure is provided for, but to a limited extent. Furthermore, the comment released by the EU Commission in 2014 within the framework of its Report on the implementation of the *FDs 2008/909, 2008/947 and 2009/829* should not be disregarded.²¹⁶ In the view of the Commission, the *FD* cannot be applied against the will of the sentenced person. As a consequence, having due regard to the aim of the EU provisions at issue, that is to enhance the chances of social rehabilitation of the individual concerned, the consent of the latter must be always requested; this can be deemed not necessary only in the case s/he is already in the executing State, since in this event it can be taken for granted.

At present, however, the sole reference to a kind of participation of the person concerned in the proceeding pending against him/her, can be found in art 12 governing the passive procedure, according to which the Court of Appeal decides in chambers whether the conditions required to accept the request for cooperation have been met. Therefore, in the case the persons concerned explicitly request to be heard, they can enjoy such a right under penalty of nullity.²¹⁷ This can be helpful for the national authority when assessing whether the recognition of the foreign judgment/decision can enhance the prospects of the sentenced person's being better reintegrated into society. Nonetheless, the opinion given in this framework cannot prevent the decision of the Italian authority to cooperate.

b) Double incrimination, exceptions to mutual recognition and other limitations concerning the decision to recognize

As has already mentioned, the approach taken by Italy to the automatic recognition of foreign decisions in the criminal field has often resulted in the adoption of rules that remarkably divert from the spirit and the letter of the basic acts from which these measures derive. Notably, such a reluctant attitude can be seen rather more in the national provisions transposing the derogation to the double criminality principle as well as those

²¹⁵ *FD 2008/947/JHA*, art 5 (1). Italics added.

²¹⁶ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the *FDs 2008/909, 2008/947 and 2009/829* on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM(2014) 57 final.

²¹⁷ *CPP*, art 127 (5).

concerning the grounds for refusal. Against this background, quite surprisingly, in implementing the *FD 2008/947* the legislator has taken a different line, certainly much more coherent with the rationale underlying the EU cooperation system at issue. The first symptom of this U-turn can be found in article 11, dealing with the derogations to double criminality principle, since it fully reflects the 32 categories of offences the double criminality of which is no longer to be verified, that are integrated into the national legal order borrowing the vague and broad European wording.²¹⁸ As a result, Italy can make the recognition of a foreign judgment or decision conditional to the verification of the double criminality only in respect of the offences other than those covered by that list.²¹⁹ This point is all the more worth noting because, the *FD 2008/947* allows Member States not to apply the derogations to double criminality.²²⁰ Consequently, in this case maintaining the previous position would have been totally legitimate. The same can be said in respect of the grounds to be relied on in order to refuse a request for cooperation, given that in contrast with both the *L 69/2005* and the *D.lgs 161/2010*, mandatory grounds for refusal have not been introduced. Notably, according to art 13 the foreign judgment/decision can be refused in the following cases:

- the acts on which the foreign judgment/decision rely on do not constitute an offence under Italian Law, with the exception of the cases, in respect of which the verification of the double criminality is no longer required;
- the certificate forwarded together with the judgment or the decision is incomplete or does not manifestly correspond to the judgment or the decision providing for the conditional release and it has not duly amended within the deadline set for by the Court of Appeal;
- the recognition of the judgment and assumption of responsibility for supervising probation measures or alternative sanctions would be contrary to the principle of *ne bis in idem*
- the enforcement of the sentence is statute-barred according to Italian law and relates to an act which falls within its competence according to that law;
- there is immunity under Italian law which makes it impossible to supervise probation measures or alternative sanctions;
- under Italian law, the sentenced person cannot, owing to his or her age, be held criminally liable for the acts in respect of which the judgment was issued;
- at the time the judgment or the decision providing for the conditional release was received by the MoJ, the obligations to comply with are of less than six months' duration;
- If the judgment or, where applicable, the decision providing for the conditional release order the application of a medical/therapeutic treatment which is not compatible with the Italian penal law or health-care system, with the exception of the possibility for adjustment;
- If the judgment relates to criminal offences which under the Italian law are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory;

As in the case of the *FD 909/2008*, a ground for refusal can be opposed in the event of judgments/decisions given *in absentia*, if the judicial authority deems that fair trial rights of the person concerned have not been fully respected.

Having said that, it has to be stressed that this flexible attitude is counterbalanced by a number of additional requirements that the national authority competent for the execution has to assess in order to accept or decline the request. As a matter of fact, in tune with the other FDs under consideration, the Legislator has laid down a few but significant conditions to be met jointly in order to recognize the foreign judgment or decision, that is: *a)* the sentenced person is habitually and legally residing in Italy or has expressed the will to move

²¹⁸ D.lgs 38/2016, art 11.

²¹⁹ D.lgs 38/2016, art 13 (1).

²²⁰ FD 2008/947/JHA, art 10 (4).

in Italy with a view to reside habitually and legally in the Country; *b*) the fact on the basis of which the person has been sentenced is considered a crime by the Italian legislation, irrespective of both the name and the constituent elements of the offence, with the exception of the derogations to the double criminality principle as envisaged by the *D.lgs*; *c*) the nature and duration of the obligations imposed on the sentenced person are compatible with the Italian Legislation, without prejudice to the possibilities of adaptation.

- *Possibility to adapt the probation measure*

The possibility to adapt the probation measure, alternative sanction or probation periods is expressly provided for by article 10(2)(3). The Court of Appeal deals with the necessary adaptations and informs the issuing authority, departing as little as possible from what is provided by the issuing State. The adaptation cannot result in more serious obligations and measures, as far as duration and nature are concerned. If the duration of the probation measure, alternative sanction or probation period exceeds the maximum duration provided for by the Italian law, the maximum time limit provided by Italian law for equivalent crimes will apply.

- *Supervision*

According to art 14, after recognition the supervision is governed by the Italian law and amnesty, pardon, mercy may apply. The General Prosecutor attached to the Court of Appeal is entrusted with the supervision. The Court of Appeal has jurisdiction to take the subsequent decisions relating to a suspended sentence, conditional release and alternative measures, in particular in case of non-compliance with the obligations or instructions imposed or if the sentenced person commits a new crime. The Court shall inform, without delay, the competent authority in the issuing State. However, if the sentenced person eludes the obligations and instructions or s/he is not resident in Italy, the General Prosecutor attached to the Court of Appeal informs the competent authority in the issuing State that the supervision is over (art 15). Moreover, if a new criminal proceeding has been initiated against the sentenced person in the issuing State, and upon request of such a State, the Court of Appeal may decide, after the request of the General Prosecutor, to transfer jurisdiction back to the competent authority in the issuing State.

c) What role do (possible) fundamental rights violations have in the FD 2008/947?

As in the case of the legislation implementing both the *EAW* and the *FD 2008/909*, a protection clause safeguarding the supreme principles of the national constitutional order in matter of fundamental rights, freedom and fair trial has been provided for.²²¹ However, with the exception of the grounds for refusal concerning the judgments or decisions given *in absentia* (explicitly provided for by the relevant EU legislation),²²² the Italian implementing legislation does not establish grounds for refusal other than those provided by the FD.

Past violations

According to art 1, the application of the principle of mutual recognition to judgments and probation decisions must be disposed with due respect of the fundamental principles of the Constitutional system, especially those regarding fundamental rights, personal freedom and fair trial. In addition, the recognition of a sentence or a probation decision can be refused on the basis of the specific grounds listed in article 13; some of them are somehow connected with the violation of a fundamental right in the issuing State. This is the case of the judgments/decisions violating the *ne bis in idem* principle and sentences pronounced *in absentia*. In both cases, however, before the refusal the Court of Appeal consults the issuing authority, requiring any useful information.

Violations of procedural safeguards

²²¹ FD 2008/947, art 1 (4).

²²² FD 2008/947 as amended by the FD 2009/299.

Italy can refuse the recognition of a sentence or a probation decision if the certificate attached to the sentence/decision is incomplete or it does not correspond to the sentence, and the issuing authority does not provide a new certificate or the necessary additional information within the fixed time limit (art 13(1)(b) and art 12(2)). Also in this case, before to decline cooperation the Court of Appeal consults the issuing authority, requiring any useful information.

4. In sum: how legal reality relates to the empirical conclusions

As far as Italy is concerned, it does not seem possible to draw general conclusions, applicable to the three procedures at issue without distinctions. With a view to determine if mutual trust actually is (or isn't) the general guiding principle of the Italian action in the field of judicial cooperation, it is firstly necessary to sort out these instruments on the basis of the main goal they pursue. Member States essentially use the EAW as an answer to justice needs, whilst in the FDs 2008/909 and 2008/947 this retributive function gives way to the rehabilitative ideal. This difference plays a role in this respect and seems affecting the interplay between mutual recognition and the fundamental rights of the individual concerned in practice. Addressing the problem from the different angles taken into consideration in the present research (legal perspective, judicial action and the practitioners experience) supports this view.

From a **legal viewpoint**, the Italian version of the EAW can be considered a remarkable example of mistrust. The adoption of conditions even stricter than those operating under the CPP or other international agreement in which our Country participate is revealing, so are the provisions dealing with the adoption of the grounds for refusal as well as those concerning the double criminality principle. All they show that Italy is of the view that a blind trust among States is a notion just too hard to take.

The **interviews** conducted with practitioners and NGO representatives seems to endorse this vision, since in almost all cases, concern has been expressed about the differences in the level of protection offered by Member States and the effect this has on the legal position of the person concerned.

Despite this, **quantitative analysis** cannot confirm this scenario. Looking at the current practice, the attitude of the judicial authorities is highly co-operative instead, since in response to the requests made by foreign States, the number of refusal to surrender is low and limited to a few types of grounds for non-execution. This does not mean, however, that judicial actors are keen to consider mutual trust as a dogma before which fundamental rights violations can be justified. **Qualitative analysis** shows that where the specific case touches certain core guarantees protected under the domestic legal tradition (e.g. the protection of the child and of family ties), an extensive interpretation of certain *Italian grounds for refusal* is surprisingly given. For this reason, the above trend can be rather ascribed to the need for the national courts to mitigate the distance between the implementing legislation and the EU one and avoiding hindering transnational cooperation. Regarding the recognition of foreign decisions – whether imposing prison sentences or probation/alternative sanctions - other points can be raised. Here, at the heart of the problem is understanding if the automatism characterizing the EU procedures at issue can be properly balanced with their rehabilitation goal, within a legal framework in which the possibilities to evaluate the cooperative attitude of the person concerned have been drastically compressed.

Legal analysis highlights that although a precautionary approach is surely a shared FDs hallmark, the general structure of these two pieces of legislation is much more coherent with the EU provisions from which they stem. Some (significant) deviations can be detected, but a less strict reception can be observed. The Legislator' sensitivity seems to be

softened (especially in respect of the provisions transposing the FD 2008/947) and steps have been also taken to favour the better application of these instruments (especially the FD 2008/909) through soft law arrangements.

In this respect, there is actually cause for misgiving as to the real underlying reasons of this different approach. Considering the research findings, one can hypothesize that beyond the genuine will to favour the resocialisation of the convicted person, other factors play a role, such as the structural problems affecting the national prison system. But, in this case **empirical analysis** cannot help in defining a clearer picture. From one hand, the number of available cases is modest in the selected period. The FD 2008/947 entered into force only in the early 2016 and the FD 2008/909 became operational just in 2014. From the other hand, practitioners and NGO representatives are not familiar with these procedures yet. What can be said is that on the basis of the dossiers analysed problems related to possible violation of fundamental rights have been rarely raised. At any rate, the growing use of the FD 2008/909 in the aftermath of the earthquake provoked by the ECtHR ruling in the case *Torreggiani* is a factor that should not be disregarded.

Beyond the differences highlighted above, a number of cross-cutting issues are worth of attention. Among these, within the domestic landscape the questions related to the genuine exercise of the right to understand and to be understood have an important impact on the actual ability of the persons concerned to enjoy the procedural guarantees the law attaches to them. From a **legal perspective**, the level of protection ensured in Italy is very satisfactory and the developments occurred at EU level in this field have played a limited but significant role. Nevertheless, the **interviews** conducted with NGO representatives and lawyers have revealed that the mere existence of higher standards of protection cannot be deemed sufficient, especially when transnational cases are at a stake. Legal doctrine stresses the same issues too.

Strongly related to this issue is the one of the access to information. In that regard, interestingly, some of the professionals interviewed admitted that often the mistrust guiding defensive strategies has its roots in the lack of knowledge of other legal systems as well as of the procedure giving rise to the request issued by a foreign authority (in particular in EAW cases), and this does not necessarily result in the best interest of the convicted person. Italy started to pay greater attention on this matter, encouraging national authorities in foster transnational dialogue. Special arrangements have been also designed for that purpose, involving States having closer relations with our Country.

This, however, covers just dialogue between judicial authorities and does not include any form of interaction between other stakeholders. Progress in this direction, however, may possibly have a positive impact from two different angles. From one hand, this could help the convicted person in fully enjoying his/her rights and to participate in the proceeding expressing and informed opinion or consent (where relevant). From the other hand, a smoother functioning of the procedure may be favoured, avoiding non-necessary objections, that could also have a detrimental effect on the individual position of the person concerned.