



# EUROPEAN ARREST WARRANT: A NEW REFERRAL TO THE ITALIAN CONSTITUTIONAL COURT

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The Italian Constitutional Court has been recently requested to ascertain the compliance of articles 18 and 18bis of the *Law 69/2005* - transposing the *Council Framework Decision 584/2002* (JHA) - with the principles enshrined in articles 2 and 32 of the Italian Constitution.

## THE CASE

The Court of Appeal of Milan, as executing Judge of an European Arrest Warrant (EAW) issued by the Croatian Judicial Authority, ascertained that the requested person - an Italian citizen suspected of illegal possession of drugs (crime committed in Croatia), charged with a pre-trial detention order (house arrest) issued by the Tribunal of Zara (Croatia)- was suffering from mental disease, as proved by several medical reports showed by his defence counsel (Court of Appeal of Milan, 2020).

The psychiatric consultant appointed by the Italian Court of Appeal, concluded that:

- The requested person, affected by a psychiatric disease, didn't have full possession of his faculties at the time of the committed crime, due to a psychological distress;
- At the present time he had sufficient capacity to stand a trial;
- He was still needing mental care and therapies, whose interruption could determine a possible prejudice for his health and for the care pathway which started 4 years ago;
- There was, for him, a real risk of suicide.

## THE APPLICABLE RULES

The Court of Appeal found that there were grounds to recognise and grant execution to the EAW issued by the Croatian Judicial Authority.

As the requested person is an Italian citizen and the EAW was issued for the execution of a pre-trial detention order, the appropriate mechanism was the **conditional surrender**, provided by **art.19 lett.c Law 69/2005**:

for citizens or individuals resident in Italy, the surrender is granted under the condition that the person, after being heard (by the Judicial Authority of the issuing State), shall be transferred back to the executing State to serve the sentence or the detention measure issued by the requesting Member State.

But in this case - the Court of Appeal notes - the transfer of the requested person to Croatia could determine the interruption of his therapies and expose him to a concrete risk of worsening of his mental health conditions as well as to a risk of suicide.

For these reasons, the Court considers the issue relevant and not manifestly ill-founded of non-compliance of articles 18 and 18bis of Law n.69/2005 – respectively providing **grounds for mandatory non-execution and grounds for optional non-execution of an EAW** - with the Constitution.

Then the Court starts a deep analysis of the relevant rules of the *Council Framework Decision 584/2002* (JHA) and recalls the principle affirmed in art.1 §2, pursuant to which Member States shall execute any EAW in accordance with the principle of mutual recognition based on a high level of trust between Member States.

The **10th recital** of the aforementioned Decision Framework [1] evokes the principles enshrined on art.6 Treaty on the Functioning of the European Union 2007 (TFUE); while the **12ve recital**[2] affirms that the Decision respects fundamental rights and observes the principles recognised by art. 6 of the TFUE and by the Charter of Fundamental Rights of the European Union. The reference to art.6 of the TFUE, also mentioned in **art.1 par.3** of the Framework Decision, recalls the rights affirmed by the Convention of Human Rights and Fundamental Freedom, as

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[1] "The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.(...)"

well as those affirmed by the common constitutional traditions of Member States.

In addition to the grounds of optional and mandatory refusal of surrender, **art.23 par. 4** of the Framework Decision provides that the surrender may exceptionally be temporarily **postponed for serious humanitarian reasons**, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health.

Anyway, the execution of the EAW shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

Italian *Law 69/2005* affirms (art.1) that the implementation

of Decision's rules must comply with the fundamental principles of the constitutional legal order, with special regard to the rights to personal liberty and to a fair trial. According with art.2 of the Law, national Judicial Authorities shall give execution to an EAW. in compliance with the rights and principles enshrined in art. 5 and 6 of the European Court of Human Rights and in the Italian Constitution with special regard to the right to a fair trial, the right to personal liberty, the right of defence, the principle of culpability, the principle of equality.

The Court of Appeal of Milan observes that nor the Framework Decision neither the *Law 69/2005* set out a specific ground for refusal based on the lack of compliance with fundamental rights, in particular with regard to an infringement of the fundamental right to human health and right to be

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[2] "(..) Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. (...)"

given appropriate therapies, particularly in the area of mental diseases [3].

The only applicable provision is **art.23** of *Law 69/2005* that reproduces *verbatim* art.23 of the Framework Decision and allows to postpone the surrender when there are humanitarian reasons or serious grounds for believing that it would endanger the requested person's life or health; in this case, the President of the Court of Appeal may order the suspension of the surrender, which will be postponed, accordingly.

**Grounds** for refusal have been found in a landmark English case (*England and Wales High Court Marian v. Bulgaria*, 2019) concerning an EAW, whereby, after gathering medical evidence, it was held that granting surrender would amount to a **disproportionate effect on his [the requested person's] right to respect for private life**, thus ordering

discharge - just two days ago the same ground applied *mutatis mutandis* to Assange's case by UK judges (Holden, 2021).

The Court of appeal of Milan verifies if this rule grants sufficient protection to human rights, in light of **articles 2 and 32** of the Italian Constitution (stating the right to individual inviolability and the right to health), arguing that the right to personal inviolability and to receive adequate health cares is statutorily affirmed by the European Charter of Fundamental Rights 2000.

Finally, the Court finds that the decision to suspend the surrender according to art.23, is just a **temporary measure** issued by the President of the Court of Appel, without an adversarial judicial procedure and only after the request of surrender has been granted. Furthermore, the decision to postpone or to refuse the

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[3] It should be noted that ECtHR case-law – although the Convention does not include the right to healthcare among the fundamental rights it protects, unlike other instruments – has been considering health issues under other articles; precisely, concerning the instant matter, the Court could recognise a right to health as a part of the right to private life (art.8) and not to be subject to ill treatment (in detention facilities).

postponement of the surrender is not subject to any appeal remedy.

The Court recalls a recent *Judgement 108/2013* (SCC) whereby it is stressed that human health conditions, being inherently unpredictable and suddenly changeable, cannot be relied upon as those at the time of the procedural phase prior to surrender execution, in as much as health conditions that were not previously preclusive of surrender could now have worsened during this last stage and *viceversa*, so that grounds for a suspension of surrender can only be ascertained based upon these last.

## THE FINAL DECISION

Should the Constitutional Court find that *Law 69/2005* does not comply with fundamental human rights and principles because of the lack of a specific ground of non-recognition of the EAW, what shall be the consequences?

The decision of the Constitutional Court will be immediately binding for the Courts of Appeal as executing Judicial Authorities, so that they should refuse the surrender when it could expose the requested person to a concrete risk of worsening of his health conditions.

At that point, the issuing Member State should evoke the *Council Framework Decision 829/2009* (JHA) on the application, between Member States, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, and consequently issue a new request for the application of an alternative measure to the requested person.

**Recital n.8** stresses the aim of the Decision: enhancing the right to liberty and the presumption of innocence in the European Union and ensuring cooperation between Member States when a person is subject to obligations or

supervision pending a court decision; and its objective: the promotion of the use of non-custodial measures as an alternative to provisional detention, even where, according to the law of the Member State concerned, a provisional detention could not be imposed *ab initio*.

**Article 8** enumerates the supervision measures: (a) an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings; (b) an obligation not to enter certain localities, places or defined areas in the issuing or executing State; (c) an obligation to remain at a specified place, where applicable during specified times; (d) an obligation containing limitations on leaving the territory of the executing State; (e) an obligation to report at specified times to a specific authority; (f) an obligation to

avoid contact with specific persons in relation with the offence(s) allegedly committed.

In conclusion, the option of requesting the application of an alternative measure - provided by *Council Framework Decision 829/2009 (JHA)*, transposed in Italy with *Legislative Decree 36/2016*, could firstly allow the knowledge of the criminal proceedings to the suspected person, leaving him/her the choice to be present or not, or to be present through his/her defence counsel. Furthermore, it would assure a smooth control of the suspected person by the police of the executing State, mitigating the risk of recidivism or commission of further criminal conducts.

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