

The European Arrest Warrant in the Italian legal system Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice

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1. The 'strange case' of Italy

Long-awaited and the final piece in the mosaic of laws adopted by the 25 Member States, the Italian law for transposing¹ the Framework Decision on the European Arrest Warrant² has finally seen the light of day and has entered into full force, albeit some sixteen months later than the appointed date. However, law 69/2005 – a hybrid version of a text presented by the opposition which was subsequently drastically amended to the point of subverting its underlying philosophy – appears to be one which negates the Framework Decision, rather than implementing it. It offers to the defence a myriad of new grounds for refusal, both explicit and implicit. Italian courts will be called upon not only to control the merits of the case, but also to effectively judge the foreign state and its constitutional system by holding it under the magnifying glass of the Italian legal system. Moreover, the principle of double or 'triple' criminality will *de facto* return as the rule, while the Framework Decision had made it the exception.³

All this has taken place in the face of a curious silence on the part of the national and international press, which from the beginning of negotiations did not hesitate to bitterly attack the Italian Government because of its (real) reticence concerning this new instrument of judicial co-operation and its (presumed) anti-Europeanism. But the debate on such essential and delicate innovations – as matters under the 'Third Pillar'⁴ where the basic right of individual liberty is at

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1 Legge no. 69 of 22 April 2005, *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* (hereafter the 'Italian implementation law'), 2005 *Gazzetta Ufficiale*, no. 98, which came into force on 14 May 2005, following the normal term of 15 days of *vacatio legis* from the publication on the *Gazzetta* required by Article 10 of the Preliminary provisions of the Italian Civil Code. See the Addendum by the General Secretariat of the Council 8519/05 ADD 1 of 3 May 2005, http://ue.eu.int/ueDocs/cms_Data/docs/polju/EN/EJN647.pdf, 25 August 2005. We have to point out that the previous Note, no. 8519/05 of 29 April 2005, was erroneous to the extent that it announced that the Italian law would enter into force on 30 May. See http://ue.eu.int/ueDocs/cms_Data/docs/polju/EN/EJN645.pdf, 25 August 2005.

2 Council Framework Decision of 13 June 2002 on the European Arrest Warrant (hereafter the 'EAW') and the surrender procedures between Member States (2002/584/JHA), *OJ L 190*, 18.7.2002 (hereafter the 'Framework Decision'). The text of the Framework Decision, together with the national laws and other relevant information concerning the implementation of the EAW are available on the website of the Council http://ue.eu.int/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=720, 25 August 2005.

3 See Para. 5.3.3, *infra*.

4 The 'Third Pillar' consists of the rules contained in Title VI of the TEU, 'Provisions on police and judicial cooperation in criminal matters', together with the secondary law which has its legal basis in this part of the Treaty. The Third Pillar is distinguished from the First Pillar, which consists of the law of the European Communities *stricto sensu*, and from the Second Pillar, which consists of the rules contained within Title V of the TEU, 'Provisions on a common foreign and security policy'.

stake often are – deserves better than to be contaminated by rhetoric. Italy was the first among the founding members of the EEC to ratify the European Constitution,⁵ and the Italians have traditionally been considered one of the more ‘euro-enthusiast’ nations. According to research carried out in November 2004 and published in March 2005 by Eurobarometer, 72% of Italians – representing the highest percentage among the 25 Member States – would have been in favour of approving the Treaty establishing a Constitution for Europe, as against a European average of 49%.⁶ So, why should this Dr Jekyll of European integration have suddenly transformed into the Mr Hyde of the EAW? The reasons essentially fall into two categories. The first category is political. By conferring upon the judiciary powers that traditionally belong to the executive, the Framework Decision touched upon one of the most sensitive themes within Italian politics where conflict between the political class and the judiciary has been raging for over a decade now. The second category is made up of legal reasons – often underestimated because confused with politics – and this is the category that will be analysed here.

1.1. The national Parliament’s weak decision-making role

A large part of these difficulties derive from a lacuna which hitherto was unique to the Italian legal system, namely the total marginalization of the national Parliament with regard to all Community negotiations. The Chamber of Deputies (*Camera dei Deputati*) and the Senate (*Senato della Repubblica*) were traditionally used to seeing Community norms as simple *faits accomplis*. This wholesale delegation to the executive – which is strikingly paradoxical in view of the fact that Italian government has always been defined as ‘parliamentary’ – to some extent was tolerable in the field of Community law in the strict sense. But this ceased to be the case once the Union began to extend its field of activity to areas habitually reserved to national sovereignty. This was notably the case with the Framework Decision on the EAW, which touched upon rights constitutionally covered by legal reservation (exclusivity of statutes). It is thus easy to understand the reason for the frosty reception which the Italian Parliament gave to this ‘revolution in extradition’. The habitual over-confidence on the part of the Assembly concerning all matters stamped ‘*made in the EU*’ lay – ironically, one could say – at the root of this new form of mistrust. Fortunately, the lesson has served some purpose. After a recent reform of the process of participation by national institutions in the decision-making process of EU law making, the mechanism of parliamentary reservations was introduced. A provision on this mechanism was also included in the implementation law.⁷

1.2. The attitude of the Government throughout the negotiations

However, what the Parliament did was to increase the mistrust which had characterized the attitude of the Government since the very start of the negotiations. This hostility was first expressed in the course of the Justice and Home Affairs Council of 6 and 7 December 2001. The Italian delegation was the only one to adopt a ‘minimalist’ position concerning the list of offences contained in Article 2(2) of the future Framework Decision – *i.e.* the offences which could give rise to surrender without verification of dual criminality. Italy intended to restrict this list to only

5 This was done through the parliamentary route but with a very large majority: see *Legge* no. 57 of 7 April 2005, *Ratifica ed esecuzione del Trattato che adotta una Costituzione per l’Europa*, 2005 *Gazzetta Ufficiale*, no. 92, *Supplemento ordinario*, no. 70.

6 See *The Future Constitutional Treaty – Full Report*, European Commission website, http://europa.eu.int/comm/public_opinion/archives/ebs/ebs_214_en.pdf, 25 August 2005.

7 See Para. 5.1, *infra*.

six offence descriptions, instead of the 32 categories proposed and eventually listed.⁸ The same six descriptions were contained in the Treaty of extradition recently signed by Italy and Spain, namely terrorism, organized crime, drug trafficking, arms smuggling, people trafficking and sexual abuse of minors.⁹ Following enormous public pressure from the press who seemed more willing to provoke polemics than to understand the issues at stake,¹⁰ the Italian position had been amended by the time that the European Council was held in Laeken. Italy declared that it would accept the compromise proposal. However, the Council should have taken account of the ambiguous Italian declaration that: ‘to execute the Framework Decision on the European Arrest Warrant, the Italian Government will have to commence internal legal procedures to render the decision compatible with the supreme principles of the constitutional order in the field of fundamental rights and to bring its judicial and legal system into line with European models (...)’. This declaration was only inserted into the minutes of procedure of the Council. Therefore, its legal value was virtually nil.¹¹ Above all, its meaning was vague. How could Italy bring its judicial and legal system into line with European models, bearing in mind that a *tertium comparationis*, a ‘European model of judicial organization’ did not yet exist? But, curiously, Italy did not think to include its reservations in the text of the Framework Decision, as for example Austria had.¹² The problem of constitutionality was therefore destined to remain unsolved.

1.3. The difficult road to the adoption of Law 69/2005

What survived of this declaration was a latent sense of hostility towards the EAW. Even after having given its final approval, the Italian executive did not display much enthusiasm for the EAW. In fact, it never even got around to presenting a proposal for an implementation law, but left the initiative to Parliament. It is true that by a decree of the Minister of Justice of 19 March 2003¹³ an ad hoc Commission of twelve experts was established which had to present its conclusions by 30 June 2003, but these conclusions were never translated into an official proposal.

Faced with this stalemate, three opposition parties decided to submit their own proposals to Parliament. The first and most important of these was the ‘Kessler’ proposal¹⁴ – so named after its first signatory – which was drafted by the *Democratici di Sinistra*. This proposal placed considerable trust in the principle of mutual recognition. As opposed to the final version of the law, this proposal was completely silent on the possible conditions which an EAW from another country would have to fulfil and no mention was made of the problem of the ‘infamous’ list of crimes in Article 2(2) of the Framework Decision either. The Kessler proposal was profoundly

8 This position was supported by Justice Minister Gianfranco Castelli, but was also denied by the President of the Council. See M. Chiavario ‘Giustizia: il mandato di cattura europeo mette a nudo le contraddizioni italiane’, 22 December 2001 *Guida al Diritto – Il Sole 24 Ore*, p. 11.

9 The bilateral Treaty of extradition signed with Spain in Rome on 28 November 2000 is often considered as the historical antecedent of the EAW. Its logic was already that of the creation of a common legal space based on the principle of mutual recognition, notably with the elimination of the political filter from the procedure, and of control over double incrimination, of refusal to extradite persons found guilty *in absentia*, and with the limitation of the principle of speciality. However, a fundamental difference with the EAW was its scope.

10 E. Selvaggi et al., ‘Questioni reali e non sul mandato europeo d’arresto’, 2002 *Cassazione penale*, no. 2, pp. 445-461, note that before 9 December the Press never even discussed what the arrest warrant actually consisted of.

11 E. Bruti Liberati et al., ‘Il mandato d’arresto europeo’, 2002 *Questione giustizia*, no.1, pp. 2297-2316, who cite ECJ 30 January 1985, *Commission v. Denmark*, Case 143/83, ECJ 26 February 1991, *The Queen v. Immigration Appeal tribunal, ex parte Antonissen*, Case C-292/89, and ECJ 19 March 1996, *Commission v. Council*, Case C-25/94. In the same sense E. Selvaggi, ‘Il mandato d’arresto europeo alla prova dei fatti’, 2002 *Cassazione penale*, no. 10, pp. 2978-2985.

12 See Article 33 of the Framework Decision.

13 Available on the website of the Italian Ministry of Justice, at http://www.giustizia.it/commissioni_studio/decreti/comm_viola_istitutiz.htm, 25 August 2005.

14 *Proposta di legge* no. 4246, submitted on 30 July 2003. More intrepid readers can consult all the texts of the proposals together with the preparatory works in their entirety on the websites of the Chamber and of the Senate, <http://www.camera.it> and <http://www.senato.it>.

modified by a parliamentary majority. The new text – now known as the ‘Pecorella’ proposal after the president of the Justice Committee¹⁵ – was submitted to the Assembly on 19 April 2004. It contained the makings of the current law, which then embarked on something of an odyssey through the Parliament. Nonetheless, the long period of its development did have a certain beneficial effect on the quality of the final product, even if it remains very far from being a perfect text.

2. A case of contributory negligence

It should be noted that the Framework Decision itself is open to criticism on the ground of incompatibility with certain fundamental rights protected by the national Constitution. Indeed, it would be unfair to lay all the blame on the shoulders of the Italian lawmakers. The Framework Decision was the outcome of the climate created by the terrorist attacks of 11 September 2001, with emotion and the need to send a strong signal to the public taking the place of measured reflection, and it was signed in record time.¹⁶ However, one crucial aspect that is often overlooked is that this Framework Decision is *not just about terrorism*, it is about *all criminal offences* punishable under the criminal laws of the 25 Member States. As a result, we now have a tool which is perhaps somewhat ahead of its time.¹⁷

The underlying cause of the trouble is that the Framework Decision lacks a constitutional framework. Without a detailed list of guarantees and fundamental liberties, without the possibility of a preliminary ruling on the penal competences within the EU and the establishment of a supreme judicial body charged with the uniform interpretation of JHA law, without any specification as to the nature and the legal effects of the instruments under the Third Pillar, the solitary principle of mutual recognition seems too fragile a foundation to support an edifice which is already imposing.

However, we must distinguish between the flaws which are inherent in the legal instrument *per se* and those which are peculiar to *this* Framework Decision. On this important matter we will have to digress briefly.

2.1. On the controversial nature of framework decisions

Framework Decisions are instruments which are by their very nature problematic. Their main advantage lies in the speed with which they can graft themselves onto national systems. They have all the flexibility of a Directive with the same discretion left to national systems to choose the format and means to arrive at the prescribed goals. But is not this flexibility out of place in a field like criminal law which is traditionally governed by the strict application of the principle of legality? What sanctions are envisaged in case of non-transposition, or incomplete implementation? If the Framework Decision is incapable of having direct effect,¹⁸ what then is its effect, particularly for individuals? How does it fit into the hierarchy of norms, most notably with respect to national constitutions? These important questions and many others will remain open in the absence of an adequate constitutional framework. It goes without saying that the project

¹⁵ *Proposta* no. 4246-A. After the text of the II Commission (Justice) was finally deliberated on 17 March 2004, Mr Kessler proposed an alternative minority text, the 4246-bis.

¹⁶ See A. Megie, ‘Le 11 Septembre: élément accélérateur de la coopération judiciaire européenne? Le cas du mandat d’arrêt’, 2003 *Les Cahiers de la sécurité intérieure*, no. 55, pp. 91-120, and P. Jund, ‘Les origines du mandat d’arrêt européen’, 2003 *ERA-Forum: scripta iuris europaei*, no. 4, pp. 25-33.

¹⁷ See S. Alegre et al., *European Arrest Warrant – A solution ahead of its time?*, 2003.

¹⁸ See Article 34(2)(b) TEU.

for a Constitutional Treaty has raised some interesting points in the framework of our current investigations, especially with regard to the abolition of the pillar structure, the replacement of framework decisions by the general instrument of framework laws, the strengthening of the role of the national parliaments in the law-making process, and the introduction of a new competence of the ECJ along the lines of its competence in the Community field.

2.2. What answers from the Court of Justice?

It thus falls to the ECJ, as usual, to fill in the gaps, insofar as is possible given the Court's restricted competence in the field of JHA. Will it limit itself to passively following the letter of the Treaty? A taste of things to come was offered by the recent case C-105/03, *Criminal Proceedings against Maria Pupino*.¹⁹ In the context of a reference for a preliminary ruling from the *Tribunale di Firenze*, relating to the interpretation of the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings,²⁰ the Court was for the first time called upon to express its views on the legal value of framework decisions. With an opportunity to realize more favourable treatment of child victims of physical injury, the ECJ perhaps felt quite comfortable following a path it had already explored in the context of Directives. According to the Court, the principle of loyalty to the Union resulting from Article 10 TEC also applies to the JHA system; from this principle flows a duty for national courts to bring their interpretation of internal laws as far as possible into conformity with the wording and purpose of the Framework Decision, so as to achieve the result envisaged by it. According to the Advocate General, whose Opinion the Court followed, a Framework Decision would not lead to the introduction of new rules in the internal legal order, as it '(...) presupposes that rules already exist which – within the limits of what is permissible under national law – are amenable to an interpretation in accordance with the Framework Decision'.²¹ Finally, the Advocate General Mrs Kokott notes that '(...) the requirement of unanimity when the Council adopts Framework Decisions ensures that no Member State can become subject to a Framework Decision without its consent'.²²

This decision has many obscure points. Firstly, although the purpose of preliminary rulings is to secure uniformity in the application of European law, a duty to interpret in conformity with JHA law rather increases the disparities between, on the one hand, Member States who completely failed to fulfil their obligations and, on the other hand, those who only did so partially: only the latter can be bound by the obligations which they have assumed, while for the former the legal vacuum cannot be filled. An even greater disparity exists between states which, in applying Article 35(2) TEU, have given the ECJ competence to grant preliminary rulings and states which have not done so; and again, between states which have only given the power to refer questions to the ECJ to courts of last instance (Art. 35(3)(a)) and those which have authorized all of their courts to do so (Art. 35(3)(b))²³. Within the First Pillar, these two problems were 'solved' by granting direct effect to Directives and by conferring upon the ECJ a competence which is the same in all Member States. As regards the EAW, the problems anticipated arise where the Framework Decision provides rights to individuals and these rights are denied by national laws.

19 ECJ 16 June 2005, Case C-105/03, *Maria Pupino*. See also the Opinion of the AG, 11 November 2004.

20 *OJ* 2001 L 82, p. 1.

21 See Opinion of the AG *supra* note 19, Paras. 35 and 36.

22 *Ibid.*, Para. 51.

23 Spain and Hungary opted for the solution proposed by Art. 35(3)(a) TEU; Germany, Austria, Belgium, Greece, Luxemburg, Sweden, Finland, Portugal, France, Italy, the Netherlands and the Czech Republic opted for the solution proposed by Art. 35(3)(b). The other Member States have not yet granted the Court jurisdiction to give preliminary rulings.

Finally, should one really follow the Advocate General in equating Member States with their governments, especially in matters essentially involving sectors which have traditionally been reserved to national parliaments? After all, parliamentary participation in the formation of JHA law is, if not lacking, sporadic at best. The example of Italy demonstrates that these problems cannot just be skimmed over.

2.3. A Framework Decision heedless of fundamental guarantees

This contribution will not dwell too much on the limitations of the Framework Decision from the point of view of compliance with fundamental rights, now that many other writers have already extensively covered this aspect.²⁴ I will only discuss this issue in the context of the analysis of the Italian law to establish how this law and the Framework Decision differ on this point. However, here we can already point to the fact that the focal point of our analysis will be the flaws in the compatibility of the Framework Decision with one of the fundamental guarantees protected by the Italian Constitution and also by the EU legal system – even if we are not yet fully conscious of it – namely the legal principle of the ‘ordinary court pre-established by law’. We will attempt to show that the origin of most of the criticism directed at the Framework Decision and of the general mistrust towards the principle of mutual recognition lies in the lack of internal coherence within the European legal system due to the absence of provisions regulating penal competences.²⁵

3. A conflict of systems on a ‘European’ scale

Many of the difficulties created by the practical execution of the EAW are shared by other Member States. This is no coincidence. On the contrary, this situation is inherent in the structure. The lack of an adequate constitutional framework can only increase the resistance of national legal systems. In the field of the Third Pillar the age-old dilemma of the Community legal system, *i.e.* where to position the ‘concrete’ limits to the principle of primacy – limits which have often been found in the fundamental rights and freedoms guaranteed by the national constitutions²⁶ – will again arise, and on a wider scale. We are only at the beginning of an unprecedented conflict between national legal and political systems with the EU system, from which will arise the Europe of tomorrow.

The case of Italy must be viewed in the context of this contrast between Europe, with its impulse towards integration, and the national systems, with their instinct of self-preservation. The first problem is that despite the great progress of recent years, in most countries there is still a significant gap between the productive capacity of the Union, which generates new rules on an almost daily basis, and the capacity for assimilation of national legal systems and cultures. In the criminal field, the centre of gravity is shifting from the national level to the supra-national. The growing menace constituted by terrorism and cross-border criminality demands an appropriate response at EU level. But our national legal systems are the result of multi-layered stratifications, leaving them highly resistant to change coming from outside.

This is even more the case for those countries which possess a ‘Kelsenian’ constitutional structure, like for example Italy. Italy has a rigid constitution which provides a detailed list of

²⁴ See for example M. Lugato, ‘La tutela dei diritti fondamentali rispetto al mandato d’arresto europeo’, 2003 *Rivista di diritto internazionale*, no. 1, pp. 27-54.

²⁵ See Para. 4.2, *infra*.

²⁶ As for Italy, see Para. 4, *infra*.

fundamental procedural guarantees and rules concerning the judiciary and is protected by a Constitutional Court exercising *ex post* control over the legislative.

The angle of the defence is often overlooked in the debate at ‘Brussels level’. Even though the Italian EAW implementation law has attempted to erase any traces of incompatibility between the Framework Decision and the Constitution, the lower courts at the request of the parties will still have to raise the question of constitutional legitimacy each time that they consider that this question is ‘not manifestly unfounded’. A judgment on constitutionality can take on average a year and a half. Every weakness of the new mechanism will be exploited by defence lawyers who will likely adopt Fabian delaying tactics. Thus, the proper functioning of a necessary instrument such as the EAW might be seriously threatened.

The situation outlined above is far from being an Italian peculiarity. We have already witnessed the first manifestations of it in Poland²⁷ and in Germany²⁸ and we predict similar outcomes in other countries, especially in those with a comparable Kelsenian structure. It is no coincidence that, as the recent European Commission’s Report on the implementation of the EAW has underlined,²⁹ several Member States have had to revise their constitutions before transposing the Framework Decision.

4. Possible incompatibilities with the Italian Constitution

In an influential doctrine formulated by the former Presidents of the Constitutional Court, Vincenzo Caianello and Giuliano Vassalli, doubts concerning the EAW were expressed from the start. In a reasoned opinion³⁰ delivered to the Prime Minister on 11 December 2001 the two legal experts agreed that what was then still the proposal of the Framework Decision was incompatible with the Constitution, now that the Framework Decision infringed the principle that rules of criminal law have to be sufficiently certain (*tassatività*) and the principle of the legal prerogative, together with other constitutional safeguards relating to individual freedom.

This gives rise to the problem of conflict between fundamental rules and a source of secondary law such as the Framework Decision. In cases such as these, the Italian Constitutional Court has always adhered to what is known as the ‘dualist’ theory.³¹ According to this theory, internal law on the one hand, and Community law on the other, constitute ‘two autonomous systems, distinct yet coordinated’. The legal basis of this interpretation by the Court is Article 11-2 of the Constitution, according to which ‘Italy (...) agrees, on conditions of equality with other States, to the limitations of sovereignty necessary for an order that ensures peace and justice among

27 In a judgment of 27 April 2005, the Polish Constitutional Court declared unconstitutional Article 607t, Para. 1, of the 1997 Code of Criminal Procedure (which allows Polish citizens to be sent to other Member States by virtue of an EAW) for conflicting with Article 55-1 of the Constitution which prohibits the extradition of Polish nationals. At the same time, the Court suspended the effects of its judgment for a period of 18 months, thus leaving the national legislature enough time to modify the Constitution in consideration of the ‘crucial’ importance of the European Arrest Warrant. An English summary of this judgment is available on the Statewatch website, <http://www.statewatch.org/news/2005/apr/poland.pdf>, 25 August 2005.

28 In its recent judgment 2 BvR 2236/04 of 18 July 2005 – concerning the return to Spain of M. Mamoun Darkazanli, who was accused of being a member of the Al-Qaeda network – the *Bundesverfassungsgericht*, the German Constitutional Court, declared the domestic implementing law incompatible with the German Constitution.

29 See the Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 23 February 2005, COM (2005) 63 def., on the Commission website at http://europa.eu.int/comm/justice_home/doc_centre/criminal/doc/com_2005_063_en.pdf, and its Annex SEC (2005) 267 at http://europa.eu.int/comm/justice_home/doc_centre/criminal/doc/sec_2005_267_en.pdf, 25 August 2005. As for France, see Constitutional Law no. 2003-267 of 25 March 2003 relative to the EAW, *JORF* 26 March 2003, p. 5344.

30 V. Caianello et al., ‘Parere sulla proposta di decisione-quadro sul mandato di arresto europeo’, 2002 *Cassazione penale*, no. 2, pp. 462-467.

31 See G. Tesaro, *Diritto comunitario*, 2003, p. 184.

Nations; it promotes and encourages international organizations aiming to achieve such ends'.³² The Court has already recognized the principle of supremacy of EC law over internal law. Nevertheless, it still maintains a reservation in respect of the protection of fundamental rights guaranteed by the Constitutional Charter. In the *Frontini* case³³ the Court held that the limitations of sovereignty referred to in Article 11-2 can never lead to EC institutions acquiring the power to violate fundamental principles of the internal constitutional legal order or the inalienable rights of individuals. This case law was later confirmed in the *Granital* case.³⁴ It should be underlined that this case law developed in the framework of the First Pillar and is supported by the majority of legal writers who admit that the possibility of Community law violating fundamental rights is rather hypothetical. However, in the framework of the Third Pillar such violations are undoubtedly more likely.

4.1. Incompatibility with the principle of 'sufficient certainty'

Article 13-1 of the Constitution states that 'personal liberty is inviolable' and Article 13-2 of the Constitution states that 'no one may be detained, inspected, or searched nor otherwise restricted in personal liberty except by order of the judiciary stating a reason and only in such cases and in such manner as provided by law'. Legal opinion agrees that in these matters there is an absolute 'legal prerogative'. In other words, restrictions of personal liberty are subject to the exclusive competence of the judiciary, which in turn is subject to the law contained in Acts of Parliament. These must precisely and exhaustively regulate all the phases of any exercise of power limiting personal liberty. As the Framework Decision was transposed into the national legal system by an Act of Parliament no problem as to the principle of legality *per se* arises.

However, in the Italian legal system, one of the corollaries of the principle of legality (*nullum crimen sine lege*) is the principle of 'sufficient certainty' (*tassatività* or *tipicità*). This principle which was formulated in case law and doctrine³⁵ stipulates that offence descriptions have to be worded so as to indicate all the subjective and objective elements of the alleged offence with a degree of accuracy which is such that it allows the court to identify exactly the facts described by the norm.³⁶ This makes it a principle applying to substantive law rather than to procedure, although its wording derives mainly from Article 25 of the Constitution (rights of the defence) interpreted in the light of Articles 24(2) and 112.³⁷

There is a fundamental difference between the principle of legality and the principle of *tassatività*. The former, which concerns the hierarchy of sources of norms, was established to protect individuals from abuse by the executive, while the latter, which concerns the technique of formulating the norm, aims to protect individuals from abuse by the judiciary.³⁸ Notwithstanding its substantive dimension, the field of application of the principle of *tassatività* is thus

32 The new version of Art. 117 of the Italian Constitution, following the federal reforms of the State introduced by Constitutional Law no. 3 of 18 October 2001, 2001 *Gazzetta Ufficiale*, no. 24, added that 'legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

33 Corte cost., 27 December 1973, no. 183, *Frontini e Pozzani*, in *Foro italiano*, 1974, I, p. 314.

34 Corte cost., 8 June 1984, no. 170, *Granital*, in *Foro italiano*, 1984, I, p. 2062.

35 See M. Ronco, *Il principio di tipicità della fattispecie penale nell'ordinamento vigente*, 1979.

36 The principle of *tassatività* is formulated more strictly in national jurisprudence than the principle of foreseeability is in the jurisprudence of ECHR: See *Cantoni v. France*, Rep. 1996-V, 15.11.1996, Paras. 29-35.

37 Article 25 of the Italian Constitution states that 'No one may be moved from the appropriate forum preestablished by law.

No one may be punished except on the basis of a law already in force before the offence was committed.

No one may be subjected to security measures except in those cases provided for by law'.

Article 24(2) states that the right to defence is 'inviolable at every stage and moment of the proceedings', while Article 112 states that the public prosecutor has the duty to carry out criminal proceedings.

38 G. Fiandaca et al., *Diritto penale*, 2002, p. 65.

extended, by way of Article 13 of the Constitution, to the procedural norms touching on personal liberty.

Vassalli and Caianello aimed to identify several aspects of conflict between these constitutional principles and the list of 32 crimes contained in Article 2(2) of the Framework Decision. It is useful to recall here that for these crimes a control on dual criminality will no longer be required, ‘if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State shall (...) give rise to surrender pursuant to an EAW’.

According to Vassalli and Caianello, the list’s lack of precision threatens compliance with the principle of *tassatività*. However, it also threatens to violate the principle according to which the public prosecutor has the duty to initiate criminal proceedings (Article 112 of the Constitution), as it introduces imprecise criteria for verifying compliance with the duty to prosecute, and endangers the right to a defence (Article 24 of the Constitution), now that it may prevent the defendant ‘from being able to confront a precise allegation based on unequivocal facts’.³⁹ However, other legal writers insisted that these objections were exaggerated, as the majority of crimes contained in the list were offences already familiar to the Italian Criminal Code, or were already harmonized, or were in the course of being harmonized at the European or international level.⁴⁰ It has to be remarked, though, that many instruments of harmonization have not yet been transposed and that many relevant conventions have not yet been ratified⁴¹ or even signed by all the Member States of the Union. Thus, even when viewed optimistically, there does for now remain a risk of a breach of the principle of sufficient certainty.

On the topic of harmonized concepts, it is difficult to understand why an explicit reference to legislative instruments of harmonization has not been made. It is inadvisable to transplant into the field of criminal law the legislative logic of the First Pillar, where the legislator has in practice always delegated the definition of the most controversial notions to the ECJ. The problem is that, due to the principles of primacy and mutual recognition, it was undoubtedly too late for only national legislatures to try and remedy this deficiency at the moment of transposition.

Mainly, however – and above all in the absence of common definitions – it is the constitutional principle of ‘the ordinary [*naturale*] court pre-established by law’ which seems to be in danger.

4.2. The ‘ordinary [*naturale*] court pre-established by law’: a cardinal principle in the European legal area?

The Framework Decision does not touch on national rules concerning jurisdiction. This could, at first glance, seem to be respectful of the principle of procedural autonomy. In reality, the possibility that very complex conflicts over competence could arise has perhaps been underestimated. In fact, at the European level, almost nothing has been done to prevent such conflicts, as required by Article 31(d) TEU. On the contrary, recent trends seem to indicate a worrying decrease in awareness of the problem. The Communication from the Commission on mutual

39 Caianello et al., *supra* note 30, p. 465.

40 L. Salazar, ‘Il mandato d’arresto europeo: un primo passo verso il mutuo riconoscimento delle decisioni penali’, 2002 *Diritto penale e processo*, no. 8, pp. 1041-1050, who gives a detailed list of international instruments (common actions, conventions of the Council of Europe, international conventions, etc.) harmonizing in particular the definitions of the first 13 crimes contained in the list.

41 This is the case of the Convention of the Council of Europe on cybercrime (STCE 185), signed in Budapest on 21 November 2001, but, among the 25 Members States of the EU, ratified only by Hungary, Estonia and Lithuania: available on the website of the Council of Europe, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=1&DF=09/04/04&CL=ENG>, 25 August 2005.

recognition of final decisions in criminal matters of 26 July 2000⁴² was still proof of the prevailing consciousness of the problem of allocating competences in the field of criminal law. However, the Commission seemed to be inspired more by a concern for efficacy than by a zeal to protect fundamental rights. Still the Communication represented an effort, if an isolated one. By contrast, the recent Communication on mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States of 19 May 2005⁴³ seems to follow a different route. In this new text the Commission officially announces that in 2005 it will present a Green Paper on conflicts of jurisdiction and the principle of *non bis in idem*, which will propose solutions to settle conflicts of jurisdiction, '(...) on the basis of, among other things, the role of Eurojust (...)'. But, as the Commission underlines, this will be done '(...) without interfering with the national machinery for determining jurisdiction'.

However, the simple appeal to the principle of mutual recognition does not appear to be enough. Some national criminal codes or criminal procedures codes welcome criteria that enable the extension of national jurisdiction well beyond the frontiers of the state. The very notion of territoriality is not immutable: it can vary from one state to another. But it is the principle itself which seems inadequate when we consider offences such as 'cyber-crime' which are by their nature 'a-territorial'. This problem also concerns Italy. Article 25 of the Italian Constitution states that 'no case may be removed from a court pre-established by law'; but it also concerns all the other Member States, even if their constitutions are often silent on this point⁴⁴ now that Article 47(2) of the Charter of Fundamental Rights of the European Union guarantees that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal *previously* established by law'. It cannot be a simple coincidence that in Article 6 ECHR, which is worded quite similarly, the word 'previously' is nevertheless missing. What are the consequences of this? According to the Italian Constitutional Court, 'prior establishment of the court and discretion in its designation appear to be irreconcilable criteria'.⁴⁵ In order for this principle to be respected, competences must be allocated in such a way that when the facts of a given case occur the law already incontrovertibly determines the appropriate forum where it is to be heard without any margin of interpretation left to either the parties or the court so as to prevent forum shopping.

Article 4(7) of the Framework Decision seems to offer a solution by allowing the executing judicial authority to refuse to execute the EAW when it relates to offences which '(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory'. However, this is a mere palliative, because the definition of offences 'committed outside the

42 COM (2000) 495 def., available at EUR-Lex, http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2000/com2000_0495en01.pdf, 25 August 2005.

43 COM (2005) 195 def., available on the Commission website, http://europa.eu.int/comm/justice_home/doc_centre/criminal/doc/com_2005_195_en.pdf, 25 August 2005.

44 As for France, see T. Renoux, *La Justice et la Constitution de 1958, La place de la justice dans la Constitution, La Constitution de 1958 en 20 questions*, published on the website of the Conseil Constitutionnel, <http://www.conseil-constitutionnel.fr>, 1999, 25 August 2005: '(...) in contrast to its forebears and other European Constitutions, the French Constitution (...) is singularly silent on (...) the principle according to which no-one can be deprived of the appropriate forum, a principle covered, for example, by the Italian Constitution (...)'.
45 See Corte cost. no. 88 of 3 July 1962, *Giurisprudenza costituzionale*, 1963, p. 471.

territory' is left to the States and may thus vary.⁴⁶ Without the establishment of a European system governing criminal competences 'forum shopping' is a serious risk.⁴⁷ On the other hand, to create strict rules attributing jurisdiction would be equivalent to building a motorway through the European legal area. These rules would have to be founded essentially on a principle of territoriality. In principle, the substantive criminal systems of the Member States should not be allowed to extend their reach beyond the national frontiers. In this way principles such as individual responsibility, legal certainty, legality, mutual recognition⁴⁸ and – in what seems at first to be something of a paradox – national sovereignty can emerge reinforced. The vehicle of judicial cooperation could thus maintain its speed with less risk of fatal accidents. Only once we know with certainty which is the competent court to judge what, we may begin to consider the existence of a single European penal system, one respectful of the values protected by national penal systems.⁴⁹ This aim could be achieved, (preferably) through the adoption of a European convention or a Framework Decision⁵⁰ on judicial competence in criminal law and the attribution to the ECJ or to Eurojust⁵¹ of an arbitrating role.

4.3. *The judiciary and 'fair trials'*

Vassalli and Caianello concluded that the elimination of all types of preliminary control of the factual basis and the legality of the acts of a foreign judicial authority could lead to a violation of the guarantees of a 'fair trial' as governed by Article 111 of the Constitution. This article was recently amended⁵² so as to make relations between the Constitution and the new Code of Criminal Procedure, which has been inspired by the adversarial model, more harmonious. Caianello and Vassalli were particularly concerned that such acts of a foreign judicial authority might not be sufficiently reasoned as paragraph 6 of Article 111 requires. They showed equal concern for the application of paragraph 7 of Article 111 according to which all court sentences and measures concerning personal liberty are open to appeal before the Court of Cassation. However, these objections were not considered insurmountable. It was deemed sufficient that the implementation law provided for the obligation that warrants be reasoned, whether destined for or originating in Italy,⁵³ and for the possibility of appeal to the Court of Cassation for violations

46 The Communication on mutual recognition of 26 July 2000, *supra* note 42, Para. 13, expressed an awareness of this difficulty: '(...) The problem becomes particularly prominent in cases where universal jurisdiction is applied (...). As a consequence, it is not unusual for several Member States to have competent jurisdiction. There is neither a rule of *lis pendens* nor any ranking between the grounds of jurisdiction, only an incentive sometimes to co-ordinate and, to the extent possible, centralize prosecutions'.

47 See Communication on mutual recognition of 26 July 2000, *supra* note 42, Para. 13.1: '(...) Another argument for a clear set of rules on jurisdiction is the need to prevent 'forum-shopping'. This should be made impossible no matter which party to the procedure tries to do it (...). In most cases, the competent authorities of the Member States (potentially) involved could determine whether the case is for their Member State to take action on or not by interpreting themselves the rules of jurisdiction'.

48 See Communication on mutual recognition of 26 July 2000, *supra* note 42, Para. 13.1 and Para. 13.2: '(...) Where it is clear according to commonly established rules that the authorities of (only) one Member State are competent to pronounce on a certain case, it will be much easier for the other Member States to recognise and thus accept such a decision than in a situation where it might as well have been their own authorities who would have been competent to decide. This holds true both for differences in material criminal law as well as in procedural criminal law: even in cases where dual criminality is not fulfilled, the Member State required to enforce a decision on an act that under its own law is not an offence should find this easier to accept given that it is based on commonly agreed standards regulating who is responsible for a particular case'.

49 For one of the first examples of a refusal of an EAW see the case where France refused a warrant delivered by Spain on the ground of territorial incompetence, as the acts of terrorism and of participation in a criminal organization '(...) were committed in part on French territory', Cass. crim. 8 July 2004, no. 4350, *Aritza x*.

50 However, the approach followed by the Commission in its last Communication of 19 May 2005, *supra* note 43, is to propose a framework decision. We believe that this would offer a faster solution, but one less apt for adapting to variable criteria.

51 Which seems to be the choice made by the Commission in its last Communication of 19 May 2005: see also Art. III-273(2)(b) of the Treaty establishing a Constitution for Europe.

52 Art. 1(1) of Constitutional Law no. 2 of 23 November 1999, 1999 *Gazzetta Ufficiale*, no. 300.

53 As has happened, see Section 5, *infra*.

of the law, for which it created a ‘priority lane’ so as to be able to meet the strict procedural time-limits imposed by the Framework Decision.⁵⁴

4.4. The constitutional principles concerning extradition

According to Article 26(1) of the Italian Constitution, ‘the extradition of a citizen is permitted only in cases expressly provided for in international conventions’. The second paragraph makes clear that ‘in no case may it be permitted for political offences’. This same principle applies for foreigners: Article 10(4), states that ‘(...) The extradition of a foreigner for political offences is not permitted’. The question of the constitutionality of the exclusion of political offences from the grounds for refusing an EAW was raised in Italy, but not with the same vigour as in France, where it led to an amendment of the Constitution. Rome, on the other hand ‘solved’ the matter by calmly reintroducing the exception in Article 18(f).

By contrast, serious concern has been above all expressed over the choice of legal instrument to establish the EAW, as a Framework Decision is not at all comparable to an international convention.⁵⁵ Some considered that the solution here lies in the fact that extradition in the classic sense differs from that introduced by the Framework Decision, while others argued that the Framework Decision is rooted in the TEU (Articles 31 and 34), which *is* an international convention.⁵⁶ However, it remains possible to contend that if the EAW makes the surrender of a person from one state to another easier, then the level of protection, as a counterbalance, would have to be raised. It should not be possible to evade a constitutional guarantee whereby a legal instrument which is hierarchically superior to the law is required – not one that is qualitatively very different – so as to offer protection to the person to be surrendered.

Other writers rely on the concept of European citizenship.⁵⁷ This, however, seems inappropriate. In the first place, as is said in Article 17 TEC, ‘citizenship of the Union shall complement and not replace national citizenship’. Furthermore, if this notion is not even sufficient to guarantee the freedom of establishment of ‘inactive persons’,⁵⁸ *a fortiori* it cannot justify extradition.

However, once again Italy failed to either make a reservation on this point or to adapt its Constitution. Instead, the implementation law opted for an original solution, but unfortunately one that conflicts with the Framework Decision, as we will see in the next few sections.

5. Law 69/2005 in detail; matters of principle

The first Title of the law (‘Principles’) lays down the principles according to which the EAW will be implemented, taking account of the limits imposed by the Constitution and by the fundamental principles of the Italian legal order.

Article 1(1) states that the law ‘executes’ the provisions of the Framework Decision, ‘(...) to the extent that these provisions are not incompatible with the supreme principles of the constitutional order in the field of fundamental rights, and in the field of the right to liberty and a fair trial’.

54 In this sense, Selvaggi, *supra* note 11. The solution applied by the Italian legislator which allows quashing on the basis of the facts of the case, has however gone somewhat beyond these requirements: see Section 5.3.11, *infra*.

55 See Constitutional Law no. 2003/267 of 25 March 2003, *supra* note 29, followed by implementation law no. 2004-204 of 9 March 2004, known as the Perben Law II, adapting the justice system to the evolution of crime, *JORF* of 10 March 2004, p. 4567.

56 See V. Grevi, ‘Il “mandato d’arresto europeo” tra ambiguità politiche e attuazione legislativa’, 2002 *Il Mulino*, no. 399, pp. 119-130.

57 *Ibid.*, p. 119.

58 See Directive 2004/38/CE of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ L* 158, 30.4.2004, p. 77.

The third paragraph introduces some surprising conditions. An EAW will be executed in Italy ‘(...) on condition that the preventive measure which constitutes the basis for the warrant is signed by a judge, that it is provided with reasons, or that the sentence to execute is irrevocable’. In the case of preventive measures, it could therefore be asked what will happen to arrest warrants based on a measure not signed by a judge, but, for example, by a prosecutor.⁵⁹

In the case of verdicts of guilty, the executive force of the arrest warrant is linked to the fact that the verdict has become irrevocable.⁶⁰ It must therefore again be asked what will happen to warrants based on a sentence that is not irrevocable but which does have executive force, coming for example from a country where judgments in the first instance may be executed immediately. Article 2 establishes that the fundamental rights and freedoms guaranteed by the ECHR⁶¹ and the principles and rules contained in the Constitution ‘(...) concerning fair trials, including those relative to protection of personal liberty, even in relation to the right to a defence and the principle of equality, as well as those relative to criminal responsibility and the quality of criminal sanctions’ shall be respected.

The second paragraph of Article 2 allows the Italian authorities to demand ‘appropriate guarantees’ linked to the respect of the principles indicated in the first paragraph, while the third paragraph introduces an obligation to refuse the execution of an arrest warrant if the issuing state is guilty of grave and persistent violations of these principles, determined by the Council of the Union as provided in recital 10 of the preamble to the Framework Decision.

5.1. The new mechanism of parliamentary reservation

We have already noted that the Italian Parliament’s lack of faith in this Framework Decision was largely due to the absence in the domestic legal system of a mechanism which would allow for the Assembly’s involvement in Council negotiations. To remedy this defect, Article 3 introduced an interesting solution concerning proposals for modification of the list of offences provided for in Article 2(2) of the Framework Decision, namely by including an obligation for the Government to submit them to parliamentary approval. For this purpose, the President of the Council in future has to submit all proposed amendments to both Chambers accompanied by an explanation. According to Article 3(3), a veto from ‘the Chamber of Deputies or the Senate’ is binding and prevents Italy from complying with the proposed modifications. This mechanism could *pro futuro* limit the problems of constitutionality which have been raised with regard to the list. However, it remains to be seen how this provision may be reconciled with the provisions of the recent Law 11/2005, which introduced ‘General Norms on the participation of Italy in the normative process of the European Union and on the procedures for carrying out Community obligations’.⁶² This Law, although establishing a general mechanism for making parliamentary reservations, in Article 4 also provides that after 20 days from the date on which the Government has informed both Chambers that it has communicated to the EU Council that the Italian Assembly will examine the proposal with a view to possible parliamentary reservations, the Government is free

59 According to the Annex to the Report of the Commission, *supra* note 29, in Denmark, for example, judicial involvement at this stage is described as merely ‘potential’. The Commission does not fail to note this anomaly in the Danish legislation.

60 This principle is confirmed by Article 17(4) of the Italian implementation law. See Section 5.3.8, *infra*.

61 In its Report, *supra* note 29, Para. 2.2.3, the Commission assumes that, although the Framework Decision did not intend to make the general condition of respect for fundamental rights an explicit reason for refusal, ‘(...) A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States (...)’. However, it goes on to state that ‘(...) in a system based on mutual trust, such a situation should remain exceptional’.

62 Law no. 11 of 4 February 2004, 2005 *Gazzetta Ufficiale*, no. 37, concerning the reform of Law no. 86 of 9 March 1989, known as ‘La Pergola’, establishing the process of adapting the domestic legal order to obligations imposed by Community Law.

to proceed with negotiations if the Assembly within that time fails to make a decision. Problems of interpretation could arise from the lack of coordination between these two provisions, especially given that Article 3 of the implementation law does not provide for this mechanism of ‘tacit approval’ (*silenzio-assenso*) or impose time-limits on Parliament. If we apply to this dilemma two classic methods of interpretation, the rule that *lex specialis derogat generali* and the rule that *lex posterior derogat priori*, it could be maintained that in the case of the list of crimes provided by Article 2(2) of the Framework Decision, scrutiny by the Italian Parliament is not subject to any time-limit. However, if we applied the method of systematic interpretation, we should compare this mechanism to the general rule of the obligation of loyalty and inter-institutional cooperation provided for by Article 10 TEC. The whole issue could easily have been avoided by simply referring to Law 11/2005. However, at the moment of approval of Article 3 as it now stands,⁶³ this Law was not in force yet and further modifications would have resulted in yet another postponement of the entry in force of the implementation law.

5.2. The Minister of Justice as central authority

Article 4 designates the Minister of Justice as the central authority for the transmission and reception of EAWs and of any official correspondence concerning the warrants. The Italian legislator thus chose to make use of the option created by Article 7 of the Framework Decision, which allows that Member States make its central authorities responsible for the administrative transmission and reception of EAWs. This provision was the subject of bitter parliamentary debate, which first saw it introduced, then rejected by the Chamber⁶⁴ and finally reintroduced in the Senate in its modified version. It is thus that paragraph 4 of Article 4, which was added at the last moment, in slightly obscure wording now provides for the possibility of limited direct correspondence between judicial authorities ‘within the limits and with the methods provided for by international agreements’ and ‘on condition of reciprocity’. Worded thus, the condition of reciprocity is apparently not fulfilled when, for example, the implementation law of one of the other 24 Member States directly authorizes direct correspondence, instead of referring to ‘international agreements’, of which no further definition is given. Article 4, final sentence, provides that this provision is without prejudice to the competence of the Minister of Justice in the field of the surrender of persons under Article 23(1), which assigns to the Minister the task of making the necessary arrangements to surrender the person. This ministerial competence seems to go beyond the mere administrative assistance that the Framework Decision wished to grant to central authorities, as appears from recital 9 of the Framework decision.⁶⁵

5.3. Surrendering persons from Italy; jurisdiction

The forum which pronounces on extradition is the Court of Appeal, whose jurisdiction is fixed according to classic territorial criteria (fixed residence, domicile, temporary residence, place of arrest). The Court of Appeal of Rome has a residual competence.

63 The amendment in question had been approved by the Chamber of Deputies, by a very large majority, on 11 May 2004 and by the Senate on 26 January 2005.

64 During the session of the *Camera* of 17 February 2005, when by the combined votes of the opposition and of the *Lega Nord* the Chamber defeated the Government on this controversial point.

65 See Para. 4 of the Annex to the Report from the Commission, *supra* note 29. According to the Commission, 13 Member States have designated the Minister of Justice as their central authority, but this role sometimes seems to go beyond the spirit of the Framework Decision, more specifically in the case of Denmark, Lithuania and Estonia.

5.3.1. *Refusal of the EAW due to insufficiency of its content and attachments*

Article 6(1) reproduces exactly Article 8 of the Framework Decision as to content of the EAW. If the warrant – which must come to Italy translated in the Italian language – does not contain the required information,⁶⁶ the Italian judge, in application of Article 16 – directly or through the intermediary of the Minister of Justice – can request the issuing authority to provide, as a matter of urgency, the necessary information. This latter provision follows Article 15(2) of the Framework Decision, except for its (explicit) consequences. If the issuing authority does not comply within a time-limit fixed by an Italian court and which in any event cannot be greater than 30 days, the court must refuse the request. The procedure is the same if the Italian court deems it necessary to obtain further information for the purpose of verifying whether one of the numerous (and highly original)⁶⁷ grounds for refusal provided by Article 18 exists. It is also the same for the grounds of refusal provided by Article 19, which are however limited to making obligatory the guarantees available under Article 5 of the Framework Decision (concerning decisions rendered *in absentia*, custodial life sentences or life-time detention orders, and the carrying out of the sentence in the state where the person is a national or a resident). Paragraphs 3 and 4 of Article 6 of the implementation law require the issuing authority to attach to the EAW a copy of the decision on which its warrant is based, a ‘report of the facts attributed to the person whose extradition is requested, with an indication of the sources of evidence, the time and place of the commission of the offence and its legal classification’, the text of applicable legislative provisions, indicating the type and length of the punishment and the personal details and all other information apt to determine the identity and the nationality of the person who is the subject of the request. If the issuing state fails to fulfil this obligation imposed by Italian law, the President of the Court of Appeal or a magistrate to which this task has been delegated shall request the Minister of Justice to acquire these documents. To comply with this request, the Minister of Justice shall inform the issuing authority ‘that the receipt of the decision and of the documentation is a necessary condition for examination of the request’. If the issuing authority does not satisfy the Minister’s request, ‘the Court of Appeal refuses the request’ (that is to say, the EAW). It is worth recalling here that such provisions concerning the items to be attached to the warrant, and above all provisions relative to the consequences of the absence of such items are not mentioned anywhere in the Framework Decision.

5.3.2. *Cases of dual criminality*

Article 7 makes dual criminality a general condition for the execution of an EAW. Article 2(4) of the Framework Decision left it to the Member States to decide whether they wished to impose this condition for offences other than those covered by Article 2(2).

The Italian law specifies that aggravating circumstances shall not be taken into account in the calculation of the maximum period of the custodial sentence or detention order referred to in Article 2(1) of the Framework Decision which defines the scope of the EAW. This is a good example of a clarification that from the point of view of the principle of legality would have been very welcome within a Framework Decision completely silent on the matter, but which is perhaps outside the competence of national legislators to make given the principle of mutual recognition.

⁶⁶ Except the information required by Art. 8(1)(b) of the Framework Decision: name, address, telephone and fax numbers and the electronic address of the issuing judicial authority.

⁶⁷ See Section 5.3.9, *infra*.

5.3.3. The list of offences and the re-emergence of double (or triple) criminality

Article 8 is a crucial provision of the Italian law. Through this Article, the Italian legislator sought to pre-empt likely threats to the constitutional principle of *tassatività* caused by the lack of definition of the list in Article 2(2) of the Framework Decision. However, its belated intervention seems to go well beyond this objective. On the one hand, the principle according to which dual criminality does not apply to the offences listed is confirmed in Article 8(1). On the other hand, extremely detailed definitions have been given for each offence, in some cases even more detailed than the definitions contained in the Criminal Code. In asking the executing judge to verify whether the charges under the law of the issuing state correspond to the definition given by Article 8, the Italian legislator seems to have reintroduced a *de facto* control over dual criminality which at times may be even stricter than usual. To name but a few examples: the offence referred to Article 2(2)(e) of the Framework Decision ('illicit trafficking in narcotic drugs and psychotropic substances') has been translated thus: 'selling, offering, transferring, distributing, marketing, buying, transporting, exporting, importing, or providing other people with substances which, according to the laws of the European countries, are considered narcotic and psychotropic'.⁶⁸

Such a detailed list of acts can only be intended to be exhaustive, excluding as a consequence any other activity which by chance would not be included in it.

Another example: the notion of 'computer-related crime' has been defined in the following manner:⁶⁹ 'committing, with the purpose of procuring a profit for himself or others, or of causing damage to third parties, an act aiming to penetrate or abusively retain access to a computing or telematic system protected by security measures or aiming to damage or destroy computing or telematic systems, data, information or programmes contained in or relating to those systems'. This definition is full of objective and subjective elements which could be lacking in the definition of the issuing country.

A third example: with respect to the 'facilitation of unauthorized entry and residence', the Italian law adds an aim of profit which is not necessarily required by the description of the offence in the Framework Decision, and the same is true for trafficking in human organs, so that an EAW shall not be executed against a person trafficking in organs without aiming to make a profit.

And as a final example, the notions of 'racism and xenophobia', which were strongly criticized by the parliamentary majority because of their possible 'interpretation in a sense of abolition of civil liberties', have been limited to public incitement to violence as 'a manifestation of racial hate' and to the exhortation of crimes against humanity.

In all of these cases, Italian judges will have to compare⁷⁰ national and foreign definitions. The fact that the Italian definition is provided by Law 69/2005 rather than by the Criminal Code does not alter things in any way. The principle of mutual recognition is seriously breached by this Law, and we may even speak of a new 'triple criminality requirement'.⁷¹ A simpler solution, capable of putting powerful brakes on possible abuses, would have consisted of obliging the issuing state to give evidence that the offence for which the EAW was issued is effectively prosecuted under national laws, in order to show that the restriction of the personal freedom of

68 Art. 8(1)(e).

69 Art. 8(1)(m).

70 See Art. 8(2).

71 See the address to the *Camera* of deputy Giannicola Sinisi during hearing no. 585 on 14 February 2005.

the suspect is not arbitrary.⁷² This is in fact the rationale behind the obligation to attach to the EAW the text of the applicable laws as provided by Article 6(4)(b) mentioned above.

5.3.4. *Ignorantia legis excusat*

Under Article 8(3), the Italian courts shall refuse the surrender of an ‘Italian citizen’ if the EAW was issued for acts which are not punishable under Italian law, and if it is clear that the requested person ‘did not know, without negligence, the penal law of the issuing country’. This is the codification of the principle of excusable ignorance of the penal law, recognized by the Constitutional Court in its famous Decision no. 364/1988⁷³ and based on the principle of personal criminal responsibility established by Article 27(1) of the Italian Constitution. Nevertheless, by this provision the Italian law again introduced a ground for refusal whose aim is to protect a fundamental principle of the domestic constitutional order and which was not provided for in the Framework Decision. Moreover, this discrimination in favour of Italian citizens does not seem to be justified, giving rise not only to problems of compliance with the general principles of EU law, but also with the Italian Constitution itself, as Article 27 applies not only to citizens, but to all persons standing trial. This is made clear by Article 24(1) of the Constitution, which states that ‘*everyone* can take judicial action to protect individual rights and legitimate interests’.

5.3.5. *Rules of procedure*

The Ministry of Justice forwards the EAW to the Court of Appeal which is territorially competent. By an order, which must be reasoned ‘on pain of nullity’, the President of the Court then decides whether to apply preventive measures, taking into account in particular the need to prevent the suspect from absconding, as required by Article 12 of the Framework Decision. Article 9(6) of the implementation law states that measures restricting personal freedom cannot be ordered if there is sufficient reason to believe that grounds exist for a refusal to surrender. The requested person, his/her lawyer and the Public Prosecutor are all permitted to appeal against the order of the President of the Court of Appeal to the Court of Cassation on grounds of violation of the law.⁷⁴

In case preventive measures are ordered, the requested person shall be heard by the President of the Court within 5 days after their execution. The President on this occasion informs the requested person in accordance with Article 11(1) of the Framework Decision. The hearing at which the request is decided upon shall take place in camera within a period of 20 days after the execution of the preventive measures.

Special rules apply for the event that the *polizia giudiziaria* (judiciary police) performs the arrest on its own initiative (Articles 11-13), for consent to surrender, which is irrevocable⁷⁵ (Article 14), for provisional measures pending the decision (Article 15), and for the request of additional information about the substantive file (Article 16). These rules do not seem to raise any problems in particular.

72 See the reasoned opinion of the French *Conseil d'État*, no. 368-282 of 26 September 2002, available on the website of the French Senate, <http://www.senat.fr/rap/102-126/102-12610.html>, 25 August 2005.

73 Corte cost. of 23 March 1988, 1988 *Foro italiano*, no. 1, p. 1385. In this decision the Italian Court declared the unconstitutionality of Art. 5 of the Italian Criminal Code to the extent that it did not provide for the ‘inevitable’ ignorance of the criminal law as an exception to the general principle *ignorantia legis non excusat*.

74 Art. 9(7) of the Italian implementation law, which makes a general reference to the provisions of the Code of Criminal Procedure in accordance with Art. 12 of the Framework Decision.

75 Thus Italy opted for the irrevocability of consent, without making use of the possibility left open by Article 13(4) of the Framework Decision.

5.3.6. The decision 'on the request'

Under Article 17 of Law 69/2005, the decision on the request must normally be made within 60 days after the execution of the order restricting personal freedom, which corresponds to the time-limits defined by Article 17(3) of the Framework Decision. If a decision within this period is impossible due to force majeure, the President of the Court of Appeal shall inform the Minister of Justice, who in turn shall inform the issuing authority 'also through Eurojust'. This provision seems to go beyond what is provided for in Article 17 of the Framework Decision, which imposes on the executing authority a duty to inform directly the issuing authority and *contemporaneously* Eurojust. In other words, it does not seem that the executing authority may delegate to Eurojust this task, which falls within the exclusive competence of domestic authorities. However, it is worth noting that nine other Member States have not even mentioned the possibility of informing Eurojust in their implementation laws.⁷⁶

5.3.7. Consequences of breached time-limits

Here we come to one of the most original features of the Italian implementation law, which on this point may be incompatible with the Framework Decision, but is perhaps also less contradictory. The Framework Decision essentially establishes three time-limits governing the procedure. The first and second time-limits, which relate to the decision, are provided for in Article 17 (2) and (3). Article 17(2) applies when the requested person consents to his/her surrender. In that event, the final decision on the execution should be taken within a period of 10 days after consent has been given. Article 17(3), which applies to 'other cases', states that the final decision should be taken within a period of 60 days after the arrest of the requested person. By virtue of Article 17(4) this time limit can be extended by another 30 days in 'specific cases'.

The third time limit relates to the surrender of the requested person, which under Article 23 must occur 'no later than 10 days after the final decision on the execution'. If compliance with this time limit is 'prevented by circumstances beyond the control of any of the Member States', the two judicial authorities shall immediately contact each other and agree on a new date. In that case, 'the surrender shall take place within 10 days of the new date thus agreed'. A similar rule applies if 'serious humanitarian reasons' occur. In this case, the surrender 'may exceptionally be temporarily postponed' until these grounds have ceased to exist, and the two authorities shall immediately agree on a new date. In that event, the surrender shall take place within 10 days of the new date thus agreed.⁷⁷

Under the Framework Decision there are no particular consequences in case of breach of the first two time-limits, except, as we have seen, a duty to inform Eurojust, as if the Member State which failed to comply with the time limits deserves some kind of 'bad publicity'. The consequences are much more serious if the time-limits provided for in Article 23 are not fulfilled. Under Article 24(5) of the Framework Decision, if the person in question is still being held in custody upon expiry of these time-limits, he/she must be released. The Framework Decision thus lays down a slightly contradictory system. In theory the procedure may last *ad infinitum* until the final decision, but the person being held in custody will be left in the deepest uncertainty as to his/her fate with no right to his/her release. By contrast, once the decision has been taken – that is to say, once a first tiny measure of legal certainty has entered the procedure – the Framework Decision imposes particularly short, peremptory time-limits, threatening to render in vain the investiga-

⁷⁶ See Para. 4 of the Annex to the Report from the Commission, *supra*. note 29.

⁷⁷ Art. 23(4) of the Framework Decision.

tions which may have been long and tricky. In the first case, the principles of the inviolability of personal liberty and – if the person is requested for the purposes of conducting a criminal prosecution – of the presumption of innocence are severely breached. In the second case, conversely, prosecutors and investigating officers may be forced to ‘return the fish to the water’, after finally having caught it. ‘Fortunately’, however, the notion of *force majeure* – defined as a *vis cui resisti non potest* – is flexible enough to justify the extension of the prescribed time-limits without making anyone feel too uncomfortable. By contrast, the Italian implementation law can best be compared to Solomon’s judgment on this point: under Articles 21 and 23, the result of a breached time-limit will in all three cases be the release of the requested person, which makes the law extremely respectful of individual freedom and even of aquatic fauna, but much less respectful of the Framework Decision.

5.3.8. *Serious indications as to guilt*

Article 17(4) is also very original: the Court of Appeal ‘orders the surrender of the requested person if serious indications of his/her guilt are found or if an irrevocable verdict of guilty exists’. We have already described the problems arising from the fact that the enforceability of EAWs has been linked to the irrevocability of the judgment on which it is based.⁷⁸ However, the true novelty here is the conferment of the duty upon the executing judges to verify the existence of serious indications of guilt.⁷⁹ Under the principle of mutual recognition verifying guilt should be the exclusive competence of the issuing authority. Here, the Italian legislator again aims to respect a fundamental right protected under the domestic legal system.⁸⁰ In the normal course of the Italian penal system, the public prosecutor requests a custodial measure and the court decides upon the request. However, this arrangement cannot apply under the procedural system of the EAW as in this scenario, the issuing judicial authority cannot be compared to the Italian prosecutor: the issuing judicial authority submits an act, rather than a request; it submits an EAW which was fully accomplished within the legal order of the issuing state. Even if Article 19(1) of the Framework Decision speaks of ‘requesting court’, this is purely coincidental, as in all other cases the phrase used is ‘issuing judicial authority’ or ‘issuing Member State’.

5.3.9. *The new grounds for refusal*

During our description we have already encountered several of the grounds for refusal, with which the implementation law is so liberally peppered. Nevertheless, Article 18 adds some 20 more express grounds for refusal, some of which were already included in the Framework Decision, namely the grounds for non-optional execution provided for in Article 4 of the Decision, which the Italian law makes compulsory. In addition to these grounds, many new grounds for justification or exculpation have been directly imported from the Italian Criminal Code.

The first one under Article 18(b) is the consent of the person whose right has been infringed. This is a ground for justification of the offence described in Article 50 of the Criminal Code: if the victim could dispose of his/her right *under Italian law*, the executing judge will have to refuse

⁷⁸ See Section 5, *supra*.

⁷⁹ A similar restriction is provided for in Art. 28(2) of the Dutch implementation law: ‘If the court finds (...) that there can be no suspicion that the requested person is guilty of the acts for which his surrender is requested, its verdict shall be to refuse surrender’. According to the Commission, this would be ‘contrary to the Framework Decision, since it requires an examination of the substantive case, and also contrary to the principle of mutual trust (...)’: *a fortiori* then, the same could be said of the Italian law. See Annex to the Report, *supra* note 29.

⁸⁰ See Article 273(1) of the Italian Criminal Code: ‘nobody shall be subject to provisional measures [restrictive of individual freedom] if there are no serious indications as to his guilt’.

the execution of the EAW. Article 51 of the Criminal Code has produced the exception under Article 18(c): persons shall not be punishable if *under Italian law* the offence was committed to exercise a right or to fulfil a duty. Article 45 of the Criminal Code has yielded the ground of justification applying to acts committed under circumstances beyond one's control. Under Article 18(e), the court *ad quem* shall also refuse execution of the warrant 'if the laws of the issuing Member State do not provide any maximum time-limits for preventive custody'. The refusal to surrender in case of political offences has been reintroduced⁸¹ through Article 18(f) and thus sets aside one of the main innovations brought by the Framework Decision.⁸² Article 18(g) further obliges the court to refuse to execute an EAW if it appears from the case file that the decision '(...) is not the outcome of a fair trial, conducted respecting the minimum rights of the defendant' as protected under Article 6 ECHR and under Article 2 of Protocol 7 which grants the right to appeal in criminal matters. Article 18(s) provides for an exception applying to pregnant women or mothers of children under six years of age, except in case of 'exigencies of an extraordinary gravity'. Under Article 18(t) execution shall be denied if the detention order which forms the basis of the EAW lacks reasoning. This is a general principle which not only applies in the domestic legal system by virtue of Article 13(2) of the Italian Constitution,⁸³ but also abroad in the framework of the ECHR.⁸⁴ In fact, the Framework Decision seems to unduly frustrate it, now that Article 17(6) only provides a duty to reason refusals to execute. Finally the general provision of Article 18(v) expressly provides for refusal to execute an EAW in the event that surrender is requested for the purpose of executing a criminal sentence of which there is reason to believe that it goes against fundamental principles of the Italian legal order.

5.3.10. Guarantees to be given by the issuing state and multiple requests

Under Article 19, the execution of an EAW is subject to all three of the conditions laid down in Article 5 of the Framework Decision (concerning decisions rendered *in absentia*, life-time detention orders, and persons who are either nationals or residents of the executing Member State).

As for multiple requests, Article 20 of Law 69/2005 respects faithfully Article 16 of the Framework Decision in listing the criteria that the executing court must take into account, namely, the seriousness and place of the offences, the respective dates of the EAW and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or a detention order.

5.3.11. Appeal to the Court of Cassation

Article 22 provides for the right of appeal to the Court of Cassation, which may also review the merits of the case, within 10 days from the date of the notice of service of the judgment. This seems a bit excessive if compared to the right of appeal in cases involving domestic law, as Article 111 of the Constitution only speaks of 'appeal for violation of the law', without mentioning any possibility of a review on the merits by the Court of Cassation.⁸⁵

81 Except the exclusions provided for in Art. 11 of the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997, in Art. 1 of the European Convention on the Suppression of Terrorism of 27 January 1977, and in the single Article of Constitutional Law no. 1 of 21 June 1967 concerning extradition for the crime of genocide.

82 See Section 4.4, *supra*.

83 See Section 4.4, *supra*.

84 See Art. 45(1) ECHR which states, allowing no exceptions, that: 'reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible'.

85 See Section 4.3, *supra*.

The appeal stays the execution of the decision. The Court of Cassation must decide within a period of 15 days from receipt of the file, but no consequences are stipulated for the event that it fails to fulfil this time-limit.

5.3.12. *Other rules of procedure*

The remaining provisions regulating deduction of the period of detention served in the executing Member State, postponed or conditional surrender, the surrender or subsequent extradition, the speciality rule and transit, do not seem to raise any serious concerns, as they either repeat almost verbatim, or simply refer to, the corresponding provisions of the Framework Decision.

5.4. *Italy as issuing state*

The mistrust towards the principle of mutual recognition which inspired this law is reflected in the imbalance between the imposing mass of the part relative to surrenders from Italy and the exiguity of the provisions aimed at regulating the role of Italy as issuing state. Law 69/2005 devotes just a few laconic provisions to the EAW issued by Italy. One would search this part of the law in vain for any of the anomalies we encountered so far. Psychologically, this is easy to explain: Italians trust the product stamped ‘Made in Italy’...

5.4.1. *Jurisdiction*

The warrant is issued by the judge who executed the provisional measure⁸⁶ or by the public prosecutor of the court which took the final decision.⁸⁷ It is then transmitted to the Minister of Justice, who sees to its translation and forwards it to the competent authority of the executing country.⁸⁸

5.4.2. *Content of the EAW*

Article 30 determines the content of the EAW. The information to be provided is almost identical to that required by Article 6 which determines the content of EAWs received by Italy, even if the wording differs slightly. However, the true difference is that in the framework of the procedure for the execution of an EAW, this information is required on pain of nullity, whereas no procedural sanctions apply if some of the information is lacking in an EAW issued by Italy. Moreover, the law does not require that EAWs issued by Italy be accompanied by the panoply of documents and reports required for foreign warrants.

6. Conclusion

From many points of view, the Italian implementation law fails to comply with the Framework Decision. However, the Framework Decision seems incompatible with certain fundamental principles of the Italian legal system. On the one hand, we have observed the *de facto* frustration of the principles of mutual trust and recognition, most notably through the surreptitious reintroduction of dual criminality, the provision of several new grounds for refusal – among which the re-establishment of the refusal to extradite for political offences – and a bureaucratic overload which annuls many of the *raisons d’être* of the EAW, even if in some cases Parliament during the discussion of the law managed to eliminate some of the worst examples. On the other hand,

⁸⁶ Art. 28(1)(a).

⁸⁷ Art. 28(1)(b) and (c).

⁸⁸ Art. 28(2).

we have also observed the ambiguous nature of the Framework Decision and the democratic deficit which characterized its approval, the lack of a constitutional framework capable of avoiding, among other things, the phenomenon of *forum shopping* – and at this point of our contribution we urged that a coherent system of judicial criminal competences should be established at the European level shortly – and have generally remarked that the structure by being geared towards the efficacy of execution, rather than respect of such precious commodities as individual freedom and the presumption of innocence, increases fear and resistance from national legal systems. However, all efforts made by domestic legislators to remedy unilaterally and *a posteriori* the imperfections of an instrument which is the product of an intergovernmental decision-making process seem belated. In Italy, the issue is expected to be submitted to the Constitutional Court and to the ECJ shortly. Only practical implementation over time will show whether the execution of an EAW will become a ‘run-of-the-mill’ affair or rather something highly unpredictable.

In some instances, the implementation law has managed to solve the problems of incompatibility with the Constitution. In others, however, amendment of the Constitution itself would have been preferable. This is true in particular for Articles 10(4) and 26, which allow extradition of citizens only in cases provided for in international conventions, and which forbid it for both citizens and foreigners for political offences. This was the course followed by, for instance, France,⁸⁹ whose example encourages us to consider also establishing constitutional control *ex ante* in Italy, at least in respect of Third Pillar legislation in which individual freedoms are at stake. Such a tool would likely have enabled us to avoid much of the polemics which failed to help us understand the real issues at stake during the negotiations, among which the fact that the EAW – as should be recalled here – is not only about terrorism, but potentially about all kinds of criminal offences. However, one thing to be pleased about is the reinforcement of the role of the national Parliament in the decision-making process. Undoubtedly this will solve many problems, if not all of them.

6.1. Two last issues

To complete the picture, we still need to analyse briefly two more important issues. The first relates to breaches of Third Pillar law by Member States. National ‘secondary’ law cannot unilaterally depart from a norm of European secondary law – such as a framework decision. But what sanctions are currently in place if this occurs? The answer is surprising. Under the current Treaty, there are almost no effective sanctions. One of the weaknesses inherent in Third Pillar laws is that they are what Roman jurists would have described as *leges imperfectae*: rules lacking concrete consequences in case of violation, taking into account the powers of the Commission and of the ECJ in this field. Lacking – due to the express decision of the Treaty’s legislators not to include it – an initiative for the Commission to open an infringement procedure, we also know that European *etiquette* will discourage Member States from making use of the possibility laid down in Article 35(7) TEU, which grants jurisdiction to the ECJ ‘(...) to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members (...)’. Italy could delay the implementation of the EAW for one year and a half without any consequences, especially at a time when Europe is not at the zenith of its popularity.

⁸⁹ See note 55, *supra*.

The second issue regards violations of national constitutions by EU secondary law. The issue of supremacy is again at stake, and everything leads us to believe that this time EU law will have to give up. The problem is that national courts have the last say concerning the application of European law: the ‘religion’ of primacy has meaning only if it is devoutly practised by domestic courts. If this were different, it would be impossible to explain why Member States which amended their constitution before implementing the EAW claimed that they ‘had’ to: real primacy would imply the contrary. In the meantime, judges and prosecutors who come across an EAW would do better to respect certain practical rules than complain about them if they do not wish for their work to have been in vain.

6.2. EAW: troubleshooting

Until at least a minimum of harmonization of substantive and procedural criminal law has been realized, it is necessary that EAWs comply with four paradigms if the free movement of judicial decisions is to be effective.

The first paradigm is compliance with the Framework Decision, although by definition it should not entail direct effect. However, an EAW which is not in conformity with the Framework Decision will hardly survive, but perish under the attack of defence lawyers.

The second paradigm is made up of the legal constraints under the legal system of the issuing country: the issuing judicial authority is primarily subject to its original source of legitimacy.

The third paradigm consists of the requirements under the law of the executing country. If this country is Italy, for example, it will undoubtedly be more ‘convenient’ for an issuing authority seeking swiftness of execution to send all the information and additional documents required by the Italian implementation law, in order to make its warrant unassailable, even if from a rigorously ‘positive law’ point of view one could argue that this obligation is not legally valid.

Finally, the fourth paradigm is provided by the supranational system of human rights and fundamental principles, above all by the rights and principles provided under the European Treaties and the ECHR and by the case law of the Courts in Luxembourg and Strasbourg.

Responsibility for fulfilling the requirements under these four paradigms is squarely upon the shoulders of the issuing authority, which each time will be forced to calculate all the possible outcomes depending especially on the variable ‘Member State of execution’. And there is no doubt that sometimes, like in the case of Italy, this calculation will be extremely hard. Furthermore, we are not entirely convinced that all that is needed is a period of adjustment after which everything will run smoothly. Indeed, it is not only the courts who have to adjust to all the possible implications of the system, but defence lawyers also still have to discover all of its flaws. The variables seem so unstable and the weak points so numerous that the greatest care will be required: at stake is the realization of our area of Freedom, Security and Justice.