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# The enforcement of the sentence of the foreign person and the consequences deriving from the health emergency

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«La cultura dell'integrazione è rendere normale domani
quel che ieri era impossibile»

Cit. M. Paolini

INDEX

**Introduction**.....7

**Chapter I**

**The mutual recognition of criminal decisions between member States**.....14

1. The interpretative debate about art. 27, paragraph 3, of the Constitution.....14

1.2. Judicial cooperation between member States and the principle of mutual recognition, with a view to the re-educational purpose of the penalty.....23

1.3. The idea of the mutual recognition.....28

2. The "Copernican" revolution.....29

3.The fundamental rights.....31

3.1. The "identity principles" as a limit of the European law.....31

3.2.The ne bis in idem principle.....36

3.3. Right to life and right to health.....38

3.3.1. World health organization.....41

3.4. The need for protection of health and security.....42

4. The mutual recognition of the sentences and the decree no. 161/2010.....49

4.1. The active procedure of the transmission.....52

4.2. The passive procedure of transmission.....54

5. The relation between the framework decision 2002/584/JHA and the framework decision 2008/909/JHA.....57

6. Execution of the penalty in the State of execution.....60

6.1. The execution before the framework decision 2008/909/JHA.....60

6.2. The execution of the penalty following the mutual recognition of the judgment.....62

7. The limited power of the judicial authority of the State of implementation and applicability of general pardon.....72

7.1. Applicability of general pardon.....72

7.2. Judicial authority adaptation power.....76

**Chapter II**

**The European arrest warrant and the delivery of the subject**.....83

1.The EAW overpasses the extradition ..... 83
2. Parliamentary work and implementation of the Framework Decision 2002/584 / JHA in Italy ..... 86
3.The purposes of delivery ..... 95
3.1.European arrest warrant for procedural purposes ..... 95
3.1. European arrest warrant for executive purposes ..... 100
4.Issue of the European arrest warrant ..... 101
4.1. Cooperation between member States in issuing the arrest warrant ..... 103
4.2.1. Eurojust, Eppo, Europol and Olaf ..... 108
4.3. The audition of the wanted person ..... 113
4.4. The participation of the wanted person in the hearing ..... 116
5. Refusal to delivery ..... 118
5.1. The decisions in absentia ..... 120
5.2. Prohibition of inhuman or degrading treatments ..... 125
5.3. The foreign person ..... 131
6. The implementation of Framework Decision 2002/584/JHA ..... 137
7.Procedural problems between member States ..... 140
7.1. The Italy-Romania relationship ..... 140
7.1.1. Procedures introduced under the Framework Decision 2008/909/JHA 143
7.1.2. Authorizations and deliveries to Eu Countries from 2014 to 2018 ..... 144
7.2. The position and relation between Switzerland and European Union ..... 148
7.3. The discipline on EAW and the Brexit ..... 151

**Chapter III**

**The execution of the sentence** ..... 155
1. Numbers compared in Europe ..... 155
2. The consequences of migratory flows on prisons ..... 156
3.Penitential treatment in the European Union ..... 159
4. Foreigners in prison ..... 166
4.1. Work and the distress of the foreigner ..... 168
4.2. Cohabitation in prison of the various religions ..... 173
5.Immigration increases prison overcrowding ..... 177

5.1. Tools of re-education to reduce prison overcrowding.....181

**Chapter IV**

**Epidemiological emergency** .....188

1.The consequences of an epidemiological emergency in relation with EAW188

**Conclusion** .....197

## INTRODUCTION

This study analyzes the issue of the execution of the sentence of a foreigner (European citizen) in all its moments (search, capture, delivery/transfer), contextualized in the period of epidemiological emergency we are experiencing.

At the bottom there is the cooperation between the Member States of the European Union, which, on the basis of mutual trust, and in compliance with the principles of European law as well as those of identitary[1] belonging to the Nations themselves, have developed instruments aimed at respecting the fundamental principles of European criminal law, just like the mutual recognition of the decisions of other Countries (instrument introduced with the Framework Decision 2008/909/JHA).

The first chapter focuses on the principle of mutual recognition, that is the cornerstone[2] of European law, aimed at concretizing and making more efficient the re-educational function of the sentence, which has been much debated overtime.

In fact, the latter would no longer have only a retributive function[3], general-preventive function (as a deterrent) or special-preventive function (instrument of re-socialization, intimidation and neutralization), but the re-educational purpose of the sentence would mainly stand out, confirmed by most of the scholars[4].

To his end, expressed by the *Considerandum* n. 9 of Framework Decision 2008/909/JHA, the person who will have to serve the sentence imposed by a conviction by a judicial authority of a Member State (issuing State), may request to execute it in the State in which not only has citizenship, but has residence, or is placed in a context of family, social work relationships. In this way, personalized and individualized penitentiary treatment would certainly be more efficient, on the

[1]Cit. R. E. KOSTORIS, *Manuale di procedura penale europea*, Milan, 2019, 92.
[2]Cit. M. BARGIS, *Mandato di arresto europeo e diritti fondamentali: recenti modi virtuosi della Corte di Giustizia tra compromessi e nodi irrisolti*, 2017, in *https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/bargis_2_17.pdf*
[3]Cit. MARINUCCI-DOLCINI, *Manuale di diritto penale, parte generale*, Milan, 2017, 4 f.
[4]See G. VASSALLI, *Dibattito sulla rieducazione; FLICK, La contraddizione dell'ergastolo tra finalità rieducativa e pena senza fine*, 2010, in *Riv. Dir. Pubbl. it., comun. E comp*.; V. MONGILLO, *La finalità rieducativa della pena nel tempo presente e nelle prospettive future*, in *Rass. Dottr. Giur. Legislaz. E vita giudiz.*, 2009, 173.

basis of the minimum European Rules established on 19.1.1973[5] modified and updated to date; and, at the end of the sentence, the subject will have the concrete possibility of reintroducing himself into society, having maintained social and family relationships and the concrete possibility of carrying out a job according to his abilities.

The new judicial cooperation instrument substantially replaced the conventional one already existing and consacrated in Strasbourg on 21.3.1983 (and the related additional protocol of 18.2.1997), concerning the transfer of sentenced persons, with procedural differences.

Through the procedure, described in the Framework Decision 2008/909/JHA and implemented with Law 161/2010, the judicial authorities of the Member States will be able to carry out a faster and simplified procedure to recognize the sentence of another Country and subsequently agree on the transfer of the subject to the executing State (where the sentence will be served) and to this end they will be able to directly and more easily speak and exchange information on the methods of execution of the sentence.

However, some interpretative doubts remain regarding the executive phase, despite the interpretations given by the Court of Justice, favourable to the application of internal legislation oriented and compliant with European law, although not always accepted by national jurisprudence, by virtue of the so-called Counter-limit theory, which would otherwise seem "outdated[6]".

In fact, although the legislation applicable in the executive phase will be that of the executing State, a prior agreement between the authorities seems to be necessary on the instruments and methods that may be applied in the prison treatment of the subject, and, if they were different or incompatible with the law of the issuing State, the latter would have the possibility to withdraw the certificate and thus deny the subject the possibility of expiating the sentence in the

[5]Inspired by the Minimum Rules for Treatment of Prisoners established by the United Nations Congress, on 30.8.1955; cf. Le regole penitenziarie europee, Allegato alla Raccomandazione R(2006)2 adottata dal Comitato dei Ministri del Consiglio d'Europea l'11 gennaio 2006, in *http://www.rassegnapenitenziaria.it/cop/92.pdf*

[6] Cit. C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento VS diritti fondamentali*? In *https://archiviodpc.dirittopenaleuomo.org/upload/1372847311AMALFITANO%202013a.pdf*

executing State. This solution is widely criticized[7] as in this way an obstacle to the re-socialization and re-education of the subject would be placed. In addition, there would be a violation of the principle of *favor rei*, but even more of the principle of reasonableness and equality, with the possible consequence of the application of a less favourable prison treatment compared to the same in which the citizen had served the sentence in his native Territory. On the other hand, it is also true that, if there we no communication and subsequent agreement between the two Member States, given the diversity of the penitentiary systems of the various States, there would be the risk of a method of expiation of the sentence that does not comply with the limits set by the law of the issuing State in which the subject was sentenced, and in addition, the sentence may not be consistent with the effective execution of the sentence.

Similar problems had already been encountered by the Court of Cassation in cases of pardon application, even before the introduction of Framework Decision 2008/909/JHA, in relation to the Strasbourg Convention '83.

To complement the rules on mutual recognition there is another instrument of European judicial cooperation: the European arrest warrant, (which will be highlighted in the second chapter of this study), introduced by the Framework Decision 2002/584/JHA, based on the same principles underlying mutual recognition. Indeed, both provide for the possibility of equating the decisions adopted by a Member State with those issued by the executing State.

The discipline on the European arrest warrant intervenes in cases in which the surrender of the subject to another Member State takes place for the purpose of the execution of a sentence, or is subject to the condition of the "postponement" of the subject for the purpose of executing any sentence imposed on him in the prerequisite procedure of the European mandate itself;

Therefore it meets with the discipline on mutual recognition, if through the various bodies and institutions provided by the European Union in the field of enhanced judicial cooperation (OLAF, EPPO, Eurojust), a citizen wanted for committing a crime in a State member (issuing State) who was found in another

[7]Cf. C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali* in *Arch. Pen.* 2017; and also E. CALVANESE E G. DE AMICIS, in *Rassegna di giurisprudenza sul mandato di arresto europeo*, 2017, 168.

member State (requested State) to which delivery is requested, has nationality, residence in the latter.

In this case, art. 18 bis lett. C) or art. 19, lett. C) of the implementation Law 69/2006 (depending on the purpose underlying the arrest warrant, executive or procedural), the requested State may deny the surrender, and in application of the procedure provided for by the Framework Decision 2008/909/JHA, it may request the recognition of the sentence that is the subject of the arrest warrant, in order to have the condemned person execute the sentence (always by virtue of the re-educational function of the sentence).

The discipline on the European arrest warrant, seen as a Copernican revolution[8] as it renews the concept of cooperation in the European legal area, it is nothing more than an overcoming[9] of the conventional instrument of extradition, which facilitates the procedure, especially through the elimination of the political filter[10]; in fact the function of the Minister of Justice, according to part of the doctrine[11], would in some way be emptied, and reduced to the function of a mere "pass-through".

The implementation of the Framework Decision 2002/584/JHA, fast in other European Countries, was more complex[12] in Italy as it was held back by strict compliance with the fundamental constitutional principles, not fully compatible with the slenderness desired for its procedure; the aspects that have aroused the most criticism and interest concern the consent of the subject to the delivery, as an expression of self-determination[13] and the reasons by which the judicial authority can refuse the execution of a European arrest warrant, which may be optional or mandatory. Those on which the analysis focuses concern

[8]Cit. A. DAMATO, P. DE PASQUALE, N. PARISI, *Argomenti di diritto penale europeo*, Torin, 2014, 125.
[9]Cit. M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Riv. It. Dir. E proc. Pen*., 2004, file 3, 710; and also L. KALB (edit by), *Mandato di arresto europeo e procedure di consegna*, Milan, 2005, 430.
[10]Cit. BRUTI LIBERATI-PATRONE, *Il mandato di arresto europeo,* in *Quest. Giust*., 2002, file 1, 71.
[11]See A. CHELO, *IL mandato di arresto europeo*, Padova, 2010, 31 ff; also A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 478 ff.
[12]Cit. L. KALB (edit by), *Mandato di arresto europeo e procedure di consegna*, Milan, 2005, 304.
[13] Cf. A. SANTOSUOSSO, *Diritto, scienza, nuove tecnologie*, 2016, 113; also A. CARMINATI, *Affermazione del principio costituzionale di autodeterminazione terapeutica e i suoi possibili risvolti nell'ordinamento italiano*, in *Giur. Pen*., 2019, 5.

judicial decisions in absentia with reference to the Radu [14] and Melloni [15] judgments of the Court of Justice, respect for fundamental rights, with reference to the Aranyosi and Caldararu[16] judgment of the Court of Justice – therefore the judicial authority will have to carry out precise assessments also with regard to the type of life to which the prisoner will be forced and any situations of illegality in prisons (such as a high rate of prison overcrowding, which forces the prisoner to live in inhumane conditions) – and any citizenships/residence of the subject in the executing State (art. 18 bis, lett. C) and 19, par. 1, lett. C) of Law 69/2005).

In all this context, the recognition of the foreign sentence seems to have not only a concrete function of the re-educational purpose of the sentence, but also involves a significant reduction in the prison population.

It seems to be an instrument of collaboration between the Member States, not only aimed at re-socializing and taking an interest in the condemned, but also at satisfying the interests of the States, which, especially in the past years, have been condemned by the European Court of Human Rights in cases where adoption the penitentiary system does not guarantee the fundamental rights provided for by the European Convention on Human Rights; a situation which then translates into the problem of prison overcrowding.

In this regard, an analysis on the relationship between Italy and Romania was proposed; follows the analysis of the particular position of Switzerland, which does not participate in the European Union despite having joined the institution of European Arrest Warrant and mutual recognition.

At last, the position of the United Kingdom following Brexit has led to changes in this regard that are still unclear in the relationships with other Countries.

The third chapter analyzes the execution phase of the foreigner's sentence, the penitentiary treatment of the subject, considering all the foreigner's difficulties in integrating into society and in prison.

In fact, he will have greater difficulties in finding a job (a means that allows prisoners to also access alternative measures to detention), in

[14]See ECJ, 26.1.2013, C-396/11, Radu.
[15]See ECJ, 26.2.2013, C.399/11, Melloni.
[16]See ECJ, 5.4.2016, Aranyosi e Caldararu.

communicating with prison operators and in understanding, at a linguistic level, the rules within the penitentiary institution.

There is talk about marginalization of foreigners[17], also due to the current opinion of some citizens regarding immigration.

The latter, in fact, should have had, from its origins, a temporary nature and should have brought economic and political advantages to the Country, which instead were not reaped from the moment in which foreigners began to settle permanently in the other territories leading to an increase in population and unemployment rate[18].

Furthermore, the phenomenon of immigration has also had effects on the life of prisoners, on the one hand creating a situation of "forces coexistence[19]" with other cultures, religions and traditions, and on the other increasing the rate of prison overcrowding (to which the Countries, including Italy, are gradually putting an end also through the introduction of institutions as alternative measures to detention, or tools that prevent entry into prison from the beginning).

The problem of prison overcrowding will have to be carefully evaluated by the judicial authority that executes a European arrest warrant, especially in this period of health emergency due to Covid-19 – on which the fourth chapter focuses – as it could be a further cause of contagions.

The global emergency has in fact brought effects both with regard to the European arrest warrant and with regard to prison treatment.

In fact, as relations between the Countries were interrupted with the suspension of the Schengen agreement, the fugitives found practical difficulties in being handed over to the requesting Country, so much so that a postponement of the delivery was deemed necessary, invoking force majeure or serious humanitarian reasons.

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[17]Cit. G. CAPUTO, D. DI MASE, (edit by), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013.
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*

[18]Cit. E. SCHLEIN, *Le carceri "nere", Criminalizzazione e sovrarappresentazione dei migranti nelle carceri europee*, in *Diacronie, Studi di Storia Contemporanea, Dossier: Davanti e dietro le sbarre: forme e rappresentazioni della carcerazione,* 2010, n. 2, 2 ff.

[19]Cit. C. CHERCHI, *L'ippocrate incarcerato, Riflessioni su carcere e salute,* in Riv. *Studi alla quest. Crim.*, 2017, file 3, 80 ff

This is followed by a brief analysis of the reactions of some of the European Countries, based on the rate of infections, and the intervention of the World Health Organization, which has provided for some anti-contagion guidelines, also with regard to prisons (where the fear of detainees sparked riots and numerous episodes of violence). The government reacted by introducing art. 123 of the decree-law 17.3.2020, n. 18, which governs provisions on home detention, which has not lacked criticism[20]; in fact, the institute would seem a disguised pardon and in any case ineffective in reducing the problem of prison overcrowding.

We also discussed its nature as an alternative measure to detention or an alternative sentence to detention, also evaluating the hypothesis of a hybrid between the two institutions, justified by the emergency situation and necessity such as not being able to define some aspects.

The health emergency then imposed methods of carrying out the work remotely, which, however, is not always possible or effective; in this sector it has in fact brought practical problems due to the lack of tools that are no yet adequate for such a way of working.

So Covid-19 has caused not only health, economic or political effects but also judicial effects, both in the Country and in the relationship with other States.

[20]Cit. *D. FALCIONI, Coronavirus, ecco lo svuota carceri: domiciliari per le pene lievi*, 16.3.2020, in *https://www.fanpage.it/attualita/coronavirus-ecco-lo-svuota-carceri-domiciliari-per-le-pene-lievi/*

# CHAPTER I
# THE MUTUAL RECOGNITION OF CRIMINAL DECISIONS BETWEEN MEMBER STATES

## 1. The interpretative debate about art. 27, paragraph 3, of the Constitution

«Punishments shall not be inhuman and shall aim at re-educating the convicted» as declared by art. 27 paragraph 3[1] of the Italian Constitution.

This is the landing point of a long debate on the function of punishment.

In fact, as previously stated by the jurist Rudolf Von Jhering «history of punishment is in continuous evolution»: since the Enlightenment era the juridical doctrine that rejected the cruelty and inhumanity of prison and corporal punishments came forward; among the first, Cesare Beccaria, with an Enlightenment spirit, asks questions about the methods of ascertaining crimes and penalties used during that period. He wrote that the penalty should not be «violence against a private citizen» but rather «the minimum of possibilities in the given circumstances proportionate to crimes, dictated by the laws[2]»; he focused on the concept of proportionality of the penalty which should have been proportionally related to the crime committed.

According to Beccaria's thought expressed within the cited work, the penalty should have a deterrent function and guarantee social security, therefore it should be sure rather than intense.

As for capital punishment, in fact, it's less feared than life imprisonment because it would not exercise a more effective intimidating action than a long suffering such as life imprisonment[3].

Following Pietro Verri, taking up his colleague's thoughts, he continued to write the "Observations on torture", dealing with the topic of the uselessness of torture as it inflicts unnecessary suffering and is ineffective to discover the truth; in fact, a tortured subject would be pushed to plead guilty only to avoid such suffering[4].

[1]Reproduced in European legislation in art. 3 of the ECHR «No one shall be subjected to torture or to inhuman or degrading treatment or punishment».
[2] Cf. C. BECCARIA, *Dei delitti e delle pene*, 2° Ed. Verona 2000, cit. 60.
[3]See C. BECCARIA, *Dei delitti e delle pene*, 2° ed. Verona, 2000, 77 f.
[4] See P. VERRI, Osservazioni sulla tortura, 1804.

The thought of an unjust suffering, however ineffective, made its way with the passing of the years until the abolition of the death penalty, in 1786, by the Grand Duchy of Tuscany; but only in 1890 it was also eliminated from the Zanardelli Penal Code.

Following a temporary resumption of its application during the fascist regime, the introduction of art. 27 paragraph 3 of the Constitution no longer allowed its use, except in the cases provided for by the military war code, from which it was later abolished in 1994 with Law n. 589.

The residual provision concerning the death penalty in military law, contained in the Constitution in art. 27, paragraph 3, was definitively eliminated[5] only on October 2, 2007, with constitutional law n.1, when the Italian legislator, following the twin sentences n. 347 and 349 of 2007, conformed to the principles of the European Union and in particular to the art. 2 of the Charter of Fundamental Rights of the Union, where in addition to been guaranteed the right to life, it's also established that «no one can be sentenced to death or executed[6]».

Furthermore, on 18 December 2007, the UN General Assembly approved a moratorium against the death penalty in those Countries where it was still applied. The right not to be subjected to the death penalty is considered by the European Court to be a fundamental right, comparable to the rights referred to in art. 2 and 3 ECHR[7].

A possible violation could occur where a person must be removed to a third Country and exposed to concrete risk for his life; in this regard, it is forbidden for the contracting States of the ECHR to extradite or expel a subject to a Country where there are reasonable reasons to fear the risk that the subject may be submit to capital punishment or inhuman or degrading treatment[8].

If this prohibition is not respected, the same Country will be called to answer for violations of conventionally protected rights.

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[5]Cf. G. M. FLICK, *contraddizione dell'ergastolo tra finalità rieducativa e pena senza fine*, 2010, in the Riv. Dir. Pubbl. It., com. e comp., 3.

[6]See art. 2. Of the Charter of Fundamental Rights of the European Union.

[7]On this point see BARTOLE, DE SENA, *Commentario breve alla convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012, 58 ff.

[8]About this I will talk in the second Chapter, in par. Prohibition of inhuman and degrading treatments;
See the sent. ECHR, Mamatkulov e Askarov c. Turchia, 2005; Al-Saadoon e Mufdhi c. Regno Unito, 2009.

During the continuous evolution of the history of punishment, however, one question remained constant: what legitimates the State's recourse to the weapon of punishment[9]?

The oldest theory is the "retributive" one, originated by the "*lex talionis*".

In fact, the subject who inflicts evil on society or on another citizen is only punished because he violated a legal order, so as to reaffirm the sovereignty of the State, which intervenes to "return" the offense.

There is, however, a second school of thought, which instead affirms the general-preventive theory of punishment as a tool to guide human choices, and according to which the effectiveness of punishment leverages its intimidating effects, thus having a deterrent function.

Lastly, the theory which mostly inspired the Italian legislator is the special-preventive one of punishment as a tool that prevents from committing new crimes, through its function of re-socialization (therefore by re-educating the subject in order to reintegrate him correctly into the society), intimidation and neutralization; thus, when the subject cannot be re-educated or intimidated, the punishment is aimed at making him harmless or at least prevent him from committing new crimes[10].

Art. 27 paragraph 3 of the Italian Constitution, tuning to a secular and democratic State[11] in which the powers derive from the people, takes up the latter theory by consecrating the re-educational purpose of the punishment, which has been the subject of disputes of any kind.

The idea of a re-educational purpose of punishment did not only spread in Italy but was also making its headway in other countries, where the debate and criticism were even more pressing. This was highlighted by the thought of some jurists who participated in the popular conference[12] induced by the international criminal and penitentiary foundation.

Here stands the idea of the General Director of the British prison administration, Mr. Trevelyan, who spoke of "neopragmatism", he underlined the

[9]See MARINUCCI-DOLCINI, Manuale di diritto penale. Parte generale, Milano, 2017, 4 f.
[10]Cf. MARINUCCI-DOLCINI, Manuale di diritto penale. Parte generale, Milano, 2017, 4 f.
[11]Cf. MARINUCCI-DOLCINI, Manuale di diritto penale. Parte generale, Milano, 2017, 4 f.
[12]See the Conference held in Siracusa, 15th -19th February 1982.

impossibility of using pure criteria of justice if these were not practicable, because they should have done only what was possible[13]. He said: «We must give a school education to prisoners who do not have it, but without worrying about the use they will make of it in the future[14]».

In line with Trevelyan's thought, Professor Lejins[15] too, presenting the North American situation, considered penalty as a real punishment for criminals.

However, some Italian interventions instead highlighted the dangers of a repressive criminal policy, rather supporting the possibilities of a rehabilitation not harmful of human rights, taking as an example Japan, where the system was positively developing new measures alternative to prison sentences and penitentiaries with rehabilitation purposes, and also France, thanks to the decision made for the special prevention and reintegration of the convicted[16].

Even so already the following year, in another conference still held in Siracusa, Prof. P. H. Bolle[17] of the University of Neuchatel, believed that it was not necessary to abandon the ideal of resocialization but that this could only remain the main objective of the sanction, as there are discrepancies on how the sentence should be executed[18].

Bettiol's point of view is also worth mentioning: he confirms the remuneration purpose of the penalty, however considering together both general and special prevention. He speaks of re-education as a "myth of the progress", as an idea that «would threaten the human in his inner freedom and would lie in wait to stifle his individuality in the name of political arrogance and totalitarianism[19]».

It is a vision linked to the Christian world of law, which does not reject the idea of correction of the subject but enhances that of punishment. And again, as a

[13] See G. VASSALLI, *Dibattito sulla rieducazione (in margine ad alcuni recenti convegni),* in *Rassegna penitenziaria e criminologica*, 1982, vol. 4, n. 3, 437 ff.
[14] These are the words by the General Director of the British prison administration, Trevelyan, during the Conference held in Siracusa, 15th-19th Frebruary 1982.
[15] He was a sociologist, educator, professor of criminologist at Florida State University. Born in 1909 and died in 2002.
[16] Cf. G. VASSALLI, *Dibattito sulla rieducazione, (in margine ad alcuni recenti convegni),* in *Rassegna penitenziaria e criminologica*, 1982, vol. 4, n. 3, 437 ff.
[17] Professor of the University of Neuchatel.
[18] Cf. G. VASSALLI, *Dibattito sulla rieducazione, (in margine ad alcuni recenti convegni),* in *Rassegna penitenziaria e criminologica*, 1982, vol. 4, n. 3, 437 ff.
[19] Cit. BETTIOL, *Il mito della rieducazione*, vol. Sul problema della rieducazione del condannato, Padova, 1963, 3 ff.

retributive and highly moral idea, it would carry within itself the repentance of the condemned.

Of course, Bettiol's approach concerns a moral rather than social concept of re-education[20], while the term "re-education" to which the Constitutional Charter refers does not concern a dimension of individual conscience but the reintegration of the offender into the social fabric according to the rules of social coexistence[21].

Then the Mathieu's thought will not totally reject the idea of re-education, but states that it is only a reflection of affliction and remuneration, an amending result of the just punishment, which reinserts the offender into the system of freedom and which restores his dignity, and therefore a non-primary but secondary purpose of punishment[22].

In addition, the Foucault's thought (concretized in the early 90's, with the introduction of maximum security prison as an instrument of annihilation of the individual), according to which the penitentiary was born already afflicted by a deadly disease, its story is the story of an impossible therapy, an impossible reform, which does not and cannot exist, a third alternative like the falsely progressive one of a democratic and non-repressive recovery of the punishment depriving of liberty.

Hence the re-educational principle was a mere utopia[23], and the belief spread that re-education was an ideal that greatly contributed to the progress of civilization in sectors full of suffering and whose obscuration would lead to a dangerous and unjust regression[24].

In Italy, because of on one side the Constitution does not provides the re-educational principle of punishment as the only purpose but on the other side it's silent on other principles to be laid as foundation of institutions that would seem

[20]Cf. G. VASSALLI, *Dibattito sulla rieducazione, (in margine ad alcuni recenti convegni)*, in *Rass. Penit. e crim.*,1982, vol. 4, n. 3, 437 ff.
[21]See G.M. FLICK, *La contraddizione dell'ergastolo tra finalità rieducativa e pena senza fine*, in *Riv. Dir. Pubbl. it., com. e comp.*, 2010, 7.
[22]Cf. MATHIEU, *Perché punire? Il collasso della giustizia penale*, Milan, 1978.
[23]See G.VASSALLI, *Dibattito sulla rieducazione, (in margine ad alcuni recenti convegni)*, in *Rass. Penit. e crim.*, 1982, vol. 4, n. 3, 437 ff.
[24]For a better deepening see V. MONGILLO, *La finalità rieducativa della pena nel tempo presente e nelle prospettive future*, in C*ritica del diritto, Rass. dottr. giur. legisl. e vita giudiz.*, 2009, 173 ff.

to collide with it, the multifunctional concept of the penalty reaffirmed itself, in respect of which the Constitutional Court had commented many times[25].

The jurisprudence then, with the sentence n. 282 of 1989, affirmed that it was not possible to create a hierarchy between the multiple purposes of penalty, but the purpose of the prevailing penalty had to be identified from time to time.

It was certain that re-education could not be left aside nor underestimated, otherwise a fundamental constitutional principle would have been unnoticed, and furthermore, re-education experiences had a life still too short to be abandoned[26].

Nevertheless, if the purpose of the sentence was truly oriented towards re-education only, there still would be doubts about the constitutionality of those penalties, like life imprisonment, that once expiated[27] do not allow the subject to reintegrate into society.

In fact, life imprisonment expresses the maximum degree of contradiction in terms in criminal law itself as called to defend the law through the sacrifice of other rights[28].

«A punishment not temporary by definition, fulfils a "rescissory" function between the individual and the circuit of freedom thus precluding any re-socializing connotation[29]»; therefore it also precludes a re-educational purpose of the sentence as it considers the subject non-re-educable.

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[25]One this point, see the well-known sentence n. 179/73 in which the Court considers that «the purpose of re-education must be balanced against the afflictive and intimidating nature of punishment»; and sentence n. 264/74 on life imprisonment, in which the Court believes that «deterrence, prevention, social defence, are at the root of the sentence any less than the hoped amendment».

[26]See G.VASSALLI, *Dibattito sulla rieducazione, (in margine ad alcuni recenti convegni)*, in *Rass. Penit. crim.*, 1982, vol. 4, n. 3, 437 ff.

[27]«the word "expiation" used to denote the character of the acts of the criminal trial subsequent to the conviction has a teleological value since it expresses its purpose, which is to make pious - that is essentially good (*ex-piare*) - who was impious having committed the crime. Therefore the subjection of the condemned to those acts constitutes the sacrifice necessary to convert in *pietas* the *impietas*; not in the ancient superstitious sense, according to which sacrifice would be a divine thirst for revenge, but that, familiar by now to my disciples, that suffering is atonement and therefore, conversion works through the causing repentance more or less effectively».
See F. CARNELUTTI, *Principi del processo penale*, Napoli, 1960, 332.

[28]Cf. G. M. FLICK, *La contraddizione dell'ergastolo tra finalità rieducativa e pena senza fine,* in *Riv. dir. pubbl. it., com. comp.*, 2010, 7.

[29]See G. M. FLICK, *La contraddizione dell'ergastolo tra finalità rieducativa e pena senza fine*, in *Riv. dir. pubbl. it. com. comp.*, 2010, cit. 7.

«Life imprisonment is inhuman because it cannot aim at re-education, and it cannot aim at re-education because it is inhuman, therefore it involves an equal cruelty of the physical death penalty, even if diluted over time[30]».

But the neutral aspect of the Constitution, must be interpreted not in the sense of seeking in the Constitution a principle that excludes the endless punishment, but to question the values and rights that this can involve in the executive phase. So we should not reflect on the abstract lawfulness of the endless punishment, but on the adequacy of the current methods and tools used in the executive phase. In this way, the introduction of methods or institutes aimed at re-education, even punishments apparently incompatible with a re-educational purpose become lawful.

«We are getting more and more used to tolerating the reality of a legitimately imposed punishment, with a fair trial, which turns into a illegitimately executed sentence in an unfair prison[31]».

In fact, in 1983 with judgment n. 274 the jurisprudence clarified the lawfulness of life imprisonment if the sentenced person was able to access conditional release, a penitentiary institution that provides for a reduction in sentence, thus inserting itself into the ultimate goal of the sentence itself[32] (aiming to recover the subject). It is through the possibility of acquiring a reduction in sentence that the convicted has an incentive to adopt a correct behaviour, and only by showing a behaviour that demonstrates a certain repentance can he be admitted to conditional release.

The need for such penalties within the system was clarified by the Constitutional Court in the early 1990s (years characterized by particular criminal and terrorist events), which focused on the expression present in art. 27 paragraph 3 of the Constitution: "striving for re-education[33]".

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[30]Cf. G. M. FLICK, *La contraddizione dell'ergastolo tra finalità rieducativa e pena senza fine*, in, *Riv. dir. pubbl. it. com. comp*., 2010, cit. 6.

[31]See G. M. FLICK, *La contraddizione dell'ergastolo tra finalità rieducativa e pena senza fine,* in *Riv. dir. pubbl. it. com. comp.*, 2010, 12.

[32]Cf. S. MAGNANENSI AND E. RISPOLI*, La finalità rieducativa della pena e l'esecuzione penale*, 2008.

[33]As explained in the Constitutional Court judgment n. 12/66 the term "to strive" expresses "the obligation for the legislator to constantly aim, in the penal system, at the re-educational purpose and to provide all the needed means to achieve it", where possible.

In fact, this would not be a generic trend, referring to treatment, but would indicate one of the essential and general qualities that characterize punishment in its ontological meaning, accompanying it from its birth, until its concrete end[34].

In this regard, the sentence n. 50 of 1980 of the Constitutional Court had also placed the emphasis on the individualization of the punishment, in order to take into account the actual extent and specific needs of each case, implementing the purposes of the constitutional principles which guarantee the essence and a personalized treatment for each citizen, trying to develop his qualities.

In fact, prison system law n. 345/75 resumes in art. 1 the importance of a treatment «in accordance with humanity and must ensure respect for the dignity of the person [...] » and in art. 13 it enhances the personality and attitudes of each convicted through the adoption of personalized treatment, based on scientific observation developed by a team of experts.

Also art. 1 of penitentiary regulation (R.D. n. 431, April 29, 1976) defined the re-educational treatment of convicted and inmates «aimed at promoting a process of modification of behaviours that constitute an obstacle to a constructive social participation».

Therefore, in addition to eliminating punishment considered incompatible with the re-educational purpose, it is also necessary to reduce as much as possible the spaces filled in by the penalties hardly compatible with this purpose[35]. In this regard, the system, also driven by the need to reduce the problem of prison overcrowding, has introduced alternative measures to imprisonment, substitute sanctions for short prison sentences, intra or extramural work activities, the application of institutions that allow recovery for drug addicts and that allow imprisoned mothers to take care of minor children, and other institutions such as conditional release.

Furthermore, in the fundamental judgment n. 12 of 1966, the Constitutional Court explains the "true extent of the re-educational principle[36]",

[34]See V. MONGILLO, *Finalità rieducativa della pena nel tempo presente e nelle prospettive future,* in *Critica del diritto, Rass. Dottr. Giur. Legisl. e vita giudiz.*, 2009, 173 ff.
[35]Cf. G. VASSALLI, *Dibattito sulla rieducazione, (in margine ad alcuni recenti convegni),* in *Rass. penit. crim.*, 1982, vol. 4, n. 3, 437 ff.
[36]See S. MAGNANENSI AND E. RISPOLI, *La finalità rieducativa della pena e l'esecuzione penale*, 2008, 2.

concertedly reading the two parts that form the third paragraph of art. 27 of Italian Constitution, which are at one «clearly unitary, not dissociable [...] rhyme in one while separate and distinct in another».

In fact, as explained by the Constitutional judges, the re-education of the convicted «always remains part of the actual criminal treatment» to which only the legislator could logically refer, with evident implicit reference to prison sentences, providing that «punishments cannot consist of treatments contrary to the sense of humanity». Therefore, «the re-education principle, having to act in conjunction with other punishment functions, cannot be understood in an exclusive and absolute sense, and re-education must be placed within the context of the punishment, humanely understood and applied».

«In fact, the other functions of the punishment,» judges explain, «are essential to the protection of citizens and the legal system against crime, on which the very existence of social life depends».

The need for general prevention, such as security in prisons, must certainly be preserved, maintaining a constant balance[37] between the re-education function with the other functions of the punishment[38].

It is a re-socialization in its narrow meaning, aimed at creating positive commitments for the convicted, helping him to understand the rules of social life and to seek work skills to prevent him from turning to crime again.

By supporting these claims, the jurists who participated in the International Conference for the Social Defense[39], forged the idea of a non-orientative re-socialization, aimed at smoothing out the conflict between the offender and the offended person and therefore at a reconciliation of values as a greater sense of responsibility.

[37] See the Judgement of Constitutional Court n. 313/1990 on the remunerative and general-preventive nature of the sentence. In fact, in the constitutional jurisprudence there are more and more references to the criteria of proportionality and adequacy of the punishment to the fact-crime for a correct balance of its function.

[38] Cf. GIULIANO VASSALLI *Dibattito sulla rieducazione, (in margine ad alcuni recenti convegni)*, in *Rass. Penit. e crim.*,1982, vol. 4, n. 3.

[39] Cf. GIULIANO VASSALLI *Dibattito sulla rieducazione, (in margine ad alcuni recenti convegni)*, in *Rass. Penit. e crim.*,1982, vol. 4, n. 3.

## 1.2. Judicial cooperation between member States and the principle of mutual recognition, with a view to the re-educational purpose of the penalty

With reference to the concept of re-socialization, so far analyzed, judicial cooperation between the Member States of the European Union in the context of the third pillar ("judicial and police cooperation in criminal matters") certainly revolves around it[40].

Member States created a common legal area[41], within the European Union, in which to move on the basis of mutual trust and correspondence of guarantees[42] and principles between the various systems[43].

«Mutual trust between the Member States and their legal systems is the foundation of the Union and the way in which the rule of law is implemented at national level plays an essential role in this context.

The trust of all citizens of the Union and national authorities in the functioning of the rule of law is particularly crucial for the further development of the EU as an area of freedom, security and justice without internal borders. This trust will only be built and confirmed if the rule of law is respected in all the Member States[44]».

Consideration should also be given to the thought of part of the doctrine that, considering the almost absolute presumption[45] that derives from the principle of mutual trust between States, the relation between trust and mutual recognition appears to be subject of a clear "reversal[46]", as European judicial cooperation would be based on the principle of mutual recognition which would require States to trust each other.

[40]The three pillars, established with the Maastricht Treaty in 1992, were subsequently brought together with the 2009 Lisbon Treaty.
[41] It was instituted with the Treaty of Amsterdam, on 2 October, 1997.
[42] In the European judicial area, each criminal justice system will be able to defend the just right to national jurisdictional identity, eve in the event of foreseeable contrast or conflict of assessments or attitude with corresponding judicial authorities of other EU Countries.
[43] The Council of 15 and 16 October 1999 in Tampere.
[44]See Comunicazione della Commissione al Parlamento europeo e al Consiglio, Un nuovo quadro dell'Ue per rafforzare lo Stato di diritto, COM (2014) 158 final, Strasburgo, on 11 March 2014.
[45] I will explain in the par. II, about the Prohibition of inhuman and degrading treatments.
[46]See A. MARTUFI, *La Corte di giustizia al crocevia tra effettività del mandato di arresto e inviolabilità dei diritti fondamental*i. Note of the Court of Justice, C-404/15 e C-659/15 PPU, Aranyosi e Caldararu, in *Riv. Dir. Pen. e proc*., 2016, file 9, cit. 1247.

The Stockholm Programme contributed to outlining EU's priorities on freedom, security and justice. Effective from 2010 to 2014, it intended to define a transnational legal framework for European citizens and to qualify the European Union as "Law-based community", which fights against social exclusion, discrimination but rather promotes justice and social protection, equality and solidarity between generations[47].

The Stockholm Programme takes on an institutional and political significance greater than the foregoing (Tampere and the Hague) due to the entry into force of the Lisbon Treaty; it focuses on developing the principle of solidarity between States and security policies[48].

The new Programme is, in fact, identified with the status of European citizen, guarantees the fundamental rights and the full exercise of rights related to citizenship, it pursues a security strategy in defence of the citizen by protecting the principle of solidarity.

Hence, the EU becomes the space in which citizens and their families can circulate freely[49], racism and xenophobia are fought, participation of the citizens in the democratic life of the Union is promoted through the transparency of decision-making and access to public administration documents, guaranteeing citizens the right to protection also by consular authorities outside the Union and the rights of suspects and accused persons in criminal proceedings are protected.

Thusly, citizens are allowed to assert their rights within the EU by facilitating their access to justice.

On the other hand, cooperation between judicial authorities is also strengthened, facilitating procedures (for example through technology). It is the start, thus, of an internal EU security system which protects citizens, fights against organized crime, terrorism and illegal migration, while still trying to maintain the spirit of solidarity and the integration policy aimed at protecting migrants, which are the basis for a solid union no longer from an economic point of view only but that also embraces other judicial, politic and social fronts. The Stockholm

[47]See M. CHIAVARIO, *Diritto processuale penale,* in *Encicl. dir. Annali XI*, 2016, 282.
[48]See G. CAGGIANO, Il *programma di Stoccolma dello spazio europeo di libertà sicurezza e giustizia*, 2009, in *EU journal "Periodico di informazione sull'Unione europea"*.
[49]See Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997.

Programme is followed by post-Stockholm guidelines - effective from 2015 to 2020 – which mainly deal with criminal matters[50]. In fact, they deal with common policy topics for the management of migration and control of European borders, attributing a fundamental role to collaboration with third countries to avoid especially on the migration front «loss of human lives of migrants undertaking dangerous journeys[51]». Among the most effective tools is the creation of a database between all Member States (the pnr − "passenger name record" reservation code system− ), used to collect and store the data of passengers available to airlines, in order to analyse them in the scope of the fight against terrorism. We are therefore moving towards the creation of organisations such as Europol and Eurojust[52] for a broader collaboration between States, through the improvement of cross-border exchange of information.

The main aspect of criminal justice cooperation is mutual recognition[53] of decisions in criminal matters.

According to the European Council, this should have been the foundation of judicial cooperation in the European Union both from a civil and criminal point of view.

It is an instrument of cooperation between the Member States, functional to the reintegration of the convicted, which differs for this reason from the recognition of the foreign sentence provided for by art. 730 of the Italian Criminal Code, for the purposes of criminal (art. 12 of the Italian Code of Criminal Procedure) or civil law.

In this last case, in fact, the Italian State incorporates the foreign sentence for pre-established purposes without any intent to equate the foreign act with the Italian one, but instead acknowledging it as a prerequisite for another judgment devolved to the Italian judge[54].

It is however necessary that the fact underlying the foreign sentence is foreseen as a crime by Italian law and that there is an extradition treaty with the

[50]See R. E. KOSTORIS, *Manuale di procedura penale europea*, 4° ed. Milano, 2019, 228 ff.
[51] Cit. M. BONINI, *in Riv. It. dir. Pubbl. comunitario*, 2014, file 279, 1122.
[52]On which I will discuss further below.
[53]Discussed for the first time on the 16th June 1998 by the European Council, in Cardiff, regarding the overcoming of traditional forms of judicial cooperation against transactional crime.
[54]See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 225 ff.

foreign state that issued the ruling, or, in the absence of the ruling, that there is a request from the Minister of Justice[55].

Therefore, this is not a functional recognition for the execution of the foreign judgement but it is used only for the internal purposes referred to in art. 12 of the Criminal Code, including establishing repeated infringement, applying accessory penalties, or personal security measures after assessing the actual danger.

The form of mutual recognition[56] (object of the Council Framework Decision 2008/909/JHA of 27 November 2008) is intended instead to recognize, in the European Union, criminal sentences that impose prison sentences or measures depriving of personal freedom, in the scope of executing the foreign decision in the State in which the subject is established[57]. In fact, only by serving his sentence in the country in which the subject has family or social ties can the purpose of the re-education punishment be rationally prosecuted and achievable.

The very same art. 82 TFEU, in fact, establishes that «judicial cooperation in criminal matters within the EU is based on the principle of mutual recognition of judgments and judicial decisions and includes the approximation of provisions laid down by law and regulations of the Member States in the areas referred to in par. 2 art. 83 TFEU».

It seems to be a provision directed only to the judicial authorities, bound by the duties deriving from the principle of mutual recognition, but in reality it also has an effect on the individual natural persons subject to this mechanism,

[55]Judgment of the Constitutional Court n. 73/2001, Baraldini. The Constitutional Court declares that the enforcement of the sentence must refer to the legal regime in force in the state of enforcement.
In this case, the agreements between the American and Italian authorities violated the fundamental principles of our legal system, first and foremost the one expressed by art. 27 of the Constitution, according to which inhuman and degrading treatments are not allowed, and the punishment must be aimed at re-education and reintegration of the subject within the society.
[56]The meaning given to the word "recognition" is to consider a decision, taken by another State by treating the matter in a similar or different way, as equivalent to the decision that the State concerned would have taken, thus attributing to it effects outside the State of origin. It deals with mutual trust, not only in the adequacy of the legislation but also in its correct application.
[57]See A. MARANDOLA (curated by) *Cooperazione giudiziaria penale*, Milan, 2018, 237.

who therefore will not simply be passive subjects[58] who "suffer" the process but also "active" subjects that require the start of this mechanism[59].

It is, therefore, necessary to distinguish between recognition and application of punishment *intra-EU* and *extra-EU.*

With respect to *extra-EU,* the recognition of a foreign judicial decision may take place on the basis of the assessment made by the Minister of Justice, « if he believes that according to an international agreement a criminal sentence pronounced abroad has to be executed in the State, or that other effects shall be attributed to it within the State» (art.731 of the Italian Code of Criminal Procedure), or for the purposed by art. 12 of Italian Criminal Code (art. 730 of the Italian Code of Criminal Procedure).

It will therefore be necessary to verify the provisions of the different treaties between Countries[60].

While as regards the *intra-EU* profile, the EU has integrated the various disciplines (including the Council Framework Decision 2002/584/JHA on the European arrest warrant), providing for – as further and main form of judicial cooperation - the recognition of judicial decisions of other Member States, with a particular simplified procedure which will be further analysed below.

In our country, the provisions contained in the Council Framework Decision 2008/909/JHA have been implemented by legislative decree 161/2010 through which the competent judicial authority can recognize the sentences issued on subjects in countries different than their native ones, allowing to take back ("transfer") the subjects to their countries of origin in order to serve the penalty, in order to[61] increase the efficiency of the principle of re-educational effectiveness of the penalty[62]. In this way, it also gave them access to alternative measures in the same environment in which they grew up, formed a family or found a job, thus

[58]See JANSSENS, CHRISTINE, *The principle of mutual recognition in EU law*, Oxford, 2013, cit. 252.
[59]On this point, see JANSSENS, CHRISTINE, *The principle of mutual recognition in EU law*, Oxford, 2013, 252.
[60]See A. MARANDOLA (curated by) *Cooperazione giudiziaria penale*, Milan, 2018, 225 ff.
[61]See the Considerandum of the frame work decision 2008/909/JHA.
[62]See A. TARANTO, *Esecuzione penale e ordinamento penitenziario*, 2020, 340.

promoting the reintegration in society[63] and therefore realizing the re-educational purpose of the punishment, in view of the term of sentence to serve.

Article 10 of this decree contains, in fact, a clause according to which through the acknowledgment of the sentence, in order to transfer the subject it is necessary to have his consent[64]. He would thus demonstrate his willingness to be reintegrated into the socio-working context of the country in which he will go to serve the sentence (the birthplace or the country where he has built up his social relationships).

The importance of the subject's consent − from which the transfer depends − is also referred to in art. 18 bis lett. c) and art. 19 lett. c) of Law 69/2005 (on European arrest warrant).

Therefore, not only legislative decree n. 161/2010 but also Law 69/2005 pursue the objective of having the subject serve the sentence in the Country where this has woven socio-family or work interests, materialising the guarantees provided for by art. 27 of the Constitution and art. 3 of the ECHR[65].

### 1.3. The idea of the mutual recognition

The European Council in Tampere on 15 and 16 October 1999 discussed on the idea of criminal justice cooperation to be implemented and improved through the recognition of judicial decisions, and subsequently on 29 November 2000, to adopt a program of appropriate measures to implement that system.

Then, when on 27 November 2008, the European Council issued Framework Decision 2008/909/JHA, specifically dealing with that topic, replacing the previous provisions on the transfer of convicted persons contained in the Strasbourg Convention of 21 March 1983 (and in the related protocol on 18 December 1997), with which, on one hand, there were many points in contact but on the other there were many substantial differences [66] : The Strasbourg Convention '83 presupposed the condition of detention of the subject, of which

[63] Cf. A. TARANTO, *Esecuzione penale e ordinamento penitenziario*, 2020, cit. 340.
[64] I will talk about it in the par. Consent and self-determination.
[65]See D. VIGONI, Riconoscimento *della sentenza straniera ed esecuzione all'estero della sentenza italiana*, Bologna, 2013, 75 ff.
Then, art. 3 of frame work decision 2008/909/JHA highlights as the cardinal principle the Re-educational purpose of the penalty, indicated as the purpose of the recognition.
[66] See Minister of Justice circular dated 2nd May 2002, Justice affairs Department.

any transfer was independent of his consent (an element which, in the procedure described by the framework decision 2008/909/JHA allows an alternative procedural *iter* compared to the ordinary one, attributing speed and slenderness[67]).

The idea[68] behind mutual recognition is, parallel to the economic sphere[69], that of creating a free movement of judicial products within the territory of the Union, of the Area of freedom, security and justice.

This idea initially had a negative reaction from the States as they feared the compression of their sovereignty but later the idea about an "equal tool[70]" that did not imply changing the internal rules but rather to implement individual products in other States, based on mutual trust.

The application problem that creates a similar instrument concerns the task of the national judge who will have to use the internal rules for the acts he has carried out and at the same time transpose or execute external acts according to different rules.

Probably the similarity with the free movement of goods is out of place[71] as judicial products respond to internal systems of various origins and based on different logics and visions also according to their history of origin; perhaps we should first think of a homogenization of national laws so as to avoid any friction[72].

## 2. The "Copernican" revolution

It is the first example of application of the principle of mutual recognition[73] of judgements and decisions in the context of criminal judicial cooperation[74].

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[67] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale,* Milan, 2018, 525.

[68] see R. E. KOSTORIS, *Processo penale, diritto europeo e nuovi paradigmi del pluralismo giuridico postmoderno*, in *Riv. It. Dir. E proc. Pen*. 2018, file n. 1, cit. 1198.

[69] On this point, see R. E. KOSTORIS, *Processo penale, diritto europeo e nuovi paradigmi del pluralismo giuridico postmoderno*, in *Riv. It. Dir. E proc. Pen*. 2018, file n.1, 1198, and also JANSSENS, CHRISTINE, *The principle of mutual recognition in EU law*, Oxford, 2013, ibidem.

[70] Cit. R. E. KOSTORIS, Proces*so penale, diritto europeo e nuovi paradigmi del pluralismo giuridico postmoderno*, in *Riv. It. Dir. E proc. Pen*. 2018, file n. 1, 1198.

[71] See R. E. KOSTORIS, *Processo penale, diritto europeo e nuovi paradigmi del pluralismo giuridico postmoderno*, in *Riv. It. Dir. E proc. Pen*. 2018, file n. 1, 1199.

[72] In this way see R. E. KOSTORIS, *Processo penale, diritto europeo e nuovi paradigmi del pluralismo giuridico postmoderno*, in *Riv. It. Dir. E proc. Pen*. 2018, file n. 1, 1199.

[73] The recognition is meant not only as a prerequisite, but also as the aim of the process of transforming the functioning mechanisms of judicial cooperation.

The EAW is considered a «Copernican revolution» because it renews the concept of cooperation in the European Judicial Area [75].

It is an institution governed by Law n.69 of 22.4.2005, which implemented the provisions of the European Council Framework Decision 2002/584/JHA[76] of 13 June 2002 on the European arrest warrant and the surrender procedures between member States.

Framework Decision 2002/584/JHA is the first instrument implementing the principle of mutual recognition as "cornerstone [77]" of criminal judicial cooperation, implemented later on in art. 82, par. 1, TFEU[78].

The decision of the European Council dates back to the proposal of the Council of Justice and Home Affairs Ministers of 6 December 2001, aimed at creating a system of leaner procedures for the Member States.

However, as legislative instrument, the Framework Decision was used which binds the Member States to the «result to be obtained, without prejudice to the competence of the national authorities regarding forms and means. They have no direct effect [79] », unlike the regulation, which would instead have had immediate application within the States.

The framework decision, on the other hand, has an impact similar to that of the directives, but within criminal law, it would probably have been more

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See C. JANSSENS, *The principle of mutual recognition in EU law*, Oxford 2013

[74]Recognition is intended as a fundamental pillar of the Area of freedom, security and justice since the Tampere Council of 15 and 16 October 1999.
See M. LIPANI AND S. MONTALDO, *I motivi ostativi all'esecuzione del mandato di arresto europeo nella legge italiana di recepimento e la Corte di Cassazione: uno sguardo di insieme, alla luce dei principi generali dell'ordinamento UE e della giurisprudenza della Corte di Giustizia. http://lalegislazionepenale.eu/wp-content/uploads/2017/07/approfondimenti_mae_2017.pdf*

[75]See A. DAMATO, P. DE PASQUALE AND N. PARISI, *Argomenti di diritto penale europeo,* Torin, 2014, 125.

[76] See C*onsiderandum* n. 10 of framework decision 2002/584/ JHA takes up the concept of mutual trust described in chap. I, par. 3

[77]Cit. MARTA BARGIS, *Mandato di arresto europeo e diritti fondamentali: recenti itinerari virtuosi della Corte di Giustizia tra compromessi e nodi irrisolti,* 2017, in *Riv. Dir. Pen. Cont.,* 178.

[78] Art. 82, par. 1, TFEU: «Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83».

[79]See Art. 34 TEU.

appropriate to use a more suitable instrument to guarantee the principle of legality that characterizes criminal law[80].

Italy has accepted[81] the proposal approved by the Member States of the Union, however making its application conditional to the implementing of internal law procedures, so as to bring the Italian judicial system closer to European models but always in compliance with constitutional principles.

It is therefore an instrument of judicial cooperation based on custodial measures[82] of a subject and is expressed in the request to another Union State for the subject to be handed over in order to execute the internal measure.

The European arrest warrant may be ordered with a passive or active procedure, depending on whether Italy is the country receiving or issuing the warrant.

The passive procedure is governed by articles 5-27 of Law 69/2005, while the active procedure is governed by articles 28-33 of the same law and establishes the criteria for identifying the judge competent to issue the warrant, on the basis of the provisions that legitimize the use of the warrant.

## 3.The fundamental rights

### 3.1. The "identity principles" as a limit of the European law

[80] See G. MODESTI, *L'istituto del mandato di arresto europeo e la sua applicazione in Italia. Alla luce di una interpretazione flessibile adottata dalle S.U. della Cassazione*, 2005, 4. *https://www.diritto.it/l-istituto-del-mandato-di-arresto-europeo-e-la-sua-applicazione-in-italia-alla-luce-di-una-interpretazione-flessibile-adottata-dalle-s-u-della-cassazione/*

[81] I will focus on implementation problems in chap. II.

[82]The S.C. has established that the Court of Appeal, for the purposes of the decision on surrene relating to an executive European arrest warrant, must obtain "precise knowledge" of the irrevocability of the executive judgment (Section VI, n. 43341/2008 Lacatus, Rv. 241520).
The S.C. deemed the default judgment issued in France by the second instance judge to be enforceable, even if still appealable for the Court of Cassation (Section VI, n. 2745/2012 Pistoia, Rv. 251787). In fact, art. 8, par. 1, lett. c) of frame work decision 2002/584/JHA, intends to give relevance to the enforceability of the sentence, and not to irrevocability, as an essential condition of the new cooperation system aimed at the delivery of wanted persons between EU member States.
«The notion of definitiveness, taken into consideration by European legislation, can only depend on the character that the sentence has on the basis of the law of issuing State, only in this way being able to assume a meaning that can be declined in a homogeneous way in the various member States, legitimated to recognize and execute a sentence that has the declared character of definitiveness» (see Section VI, n. 15452/2016 Danciu; Section VI, n. 29721/2016 Udrea).

The legislative decree 161/2010, and also the law 69/2005, begin with a safeguard clause with the intention of affirming that the Italian legal system complies with the European provisions with the limit of the incompatibility of these latter with the supreme constitutional principles regarding the fundamental rights, of freedom and fair trial, inasmuch however the principles of mutual trust and mutual recognition cannot weaken fundamental rights[83].

The interpretation[84] to be given to this clause is not about a simple closing clause, but rather, it has the protective function of imposing caution and preventing cases of incompatibility.

The art. 4.2 TEU recognizes and guarantees the national "identity[85]" principles which constitute the limit[86] to the lawmaking and application of EU law and consequently to the prevalence of the principle of primacy of European law; the difficulty lies in issuing homogeneous and effective common European rules, to guarantee a solid unity[87], which can form the basis of mutual trust and integration of the Member States, but which is at the same time aware and respectful of the diversity of the legal systems that are part of it[88].

Also within the framework decision 2008/909/JHA the elements and fundamental principles involved are highlighted which must be respect.

*Considerandum* n. 5 of the Framework Decision according to which: «Procedural rights in criminal proceedings are a crucial element in ensuring mutual trust between Member States in the field of judicial cooperation».

Then, the principle of equality, fairness and reasonableness[89] are mentioned in point 6, while points 8[90] and 9 highlight the re-educational purpose of the sentence.

Point 14[91] is also essential: it contains a *summa* of the rights generally recognized by the Constitutions of the individual Member States; and it is

[83] See M. R. MARCHETTI E E. SELVAGGI, *La nuova cooperazione giudiziaria penale,* Milan, 2019, 251, in which a correct appreciation of the principle of mutual recognition cannot be separated from the implementation of competitors' harmonization obligations of National laws. Cit.
[84]Cf. D. VIGONI, *Riconoscimento della sentenza straniera ed esecuzione della sentenza italiana all'estero*, Bologna, 2013, 75.
[85]Cf. R. E. KOSTORIS, *Manuale di procedura penale europea*, Milan, 2019, cit. 92.
[86] This is the theory of counter-limits that will be explained later.
[87] In this way in R. E. KOSTORIS, *Manuale di procedura europea*, Milan, 2019, 92.
[88]See R. E. KOSTORIS, *Manuale di procedura europea*, Milan, 2019, 92.
[89] See art. 3 of Italian Constitution.
[90] See art. 24 of Italian Constitution.

specified that the implementation should not prevent the application of the constitutional rules on fair trial, freedom of association, the press and expression through other means of communication.

The principal of mutual recognition at European level, within the criminal judicial cooperation, is a fundamental element for the construction of the European legal area and has an expansive effectiveness because it extends its propulsive function beyond the decision, absorbing the same procedural rules that led to the mutual recognition decision[92].

However, the mutual recognition of criminal judgments cannot require a simple creation of a uniform *iter*, because it would produce legal effects in a field of law where fundamental aspects such as relations between Member States, the respect for the principles of the different internal systems their criminal and procedural law and also respect for fundamental human rights must necessarily be combined and harmonized[93].

In order to recognize a foreign judgment, or another criminal order issued by a foreign Court, certain conditions are necessary: the irrevocability of the judgment and compliance with the legal principles in our legal system. Respect for constitutional principles responds to a logic of conservation of the sovereignty of States, also expressed by the German Federal Constitutional Court, in the Lissabon judgment [94], which highlights the principles of subsidiarity and proportionality with which the supranational entity has the function of legislating through cooperative decision *iter*, of common and transnational interest, and

[91]«This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other instruments of communication».

[92] See SIRACUSANO, *Reciproco riconoscimento delle decisioni giudiziarie, procedure di consegna e processo in absentia*, in *Riv. it. dir. e proc. Pen.*, 2010, 115.

[93] Some authors say the opposite: «Mutual recognition, as a propellant for an effective one circulation of judicial decisions in the territory of the Union, works without detecting it an effective coincidence of the national regulatory precepts: without, that is, the recognition of the decisions taken by a European judicial authority are preceded by a necessary harmonization of the substantive and procedural rules that constitute its premise. Indeed: they are precisely the objective difficulties encountered by the Member States during the negotiations launched there recent years on draft framework decisions on the approximation of regulatory provisions penalties, both in the substantive and procedural fields, to demonstrate that the way taken so far by the institutions of the European Union, to promote the mutual recognition of jurisdictional measures, is the only prospect capable of producing sensitive results in strengthening the operational dimension of the instruments of criminal judicial cooperation».

[94]See Sentence of the German Federal Constitutional Court (Bundesverfassungsgericht), on June 30, 2009.

through which the maintenance of the national identity of each Member State is guaranteed[95].

First of all, the procedural guarantees must be guaranteed, as provided for *in primis* by art. 6 of the ECHR, by art. 111 of the Italian Constitution, but also within the Italian Code of Criminal Procedure.

It is the case of principles of fair trial[96], including the right to be heard[97], the principle of reasonable duration[98], the right to defence[99], the right to a double degree of jurisdiction[100].

Furthermore, noteworthy is the principle of non-discrimination [101] for which the non-discrimination clause was drawn up, aimed at preventing recognition if the process was conditioned by a racial reason, so as to avoid the so-called Political use of the process[102].

The principle of non-discrimination, in the context of Italian national law, is the essential core [103] of the principle of equality which is resolved in the prohibition of introducing merely subjective distinctions and in a limitation of the State's punitive intervention power.

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[95]See G. STEA, *La cooperazione per la neutralizzazione del crimine transnazionale tra sovranità, ne bis in idem e cittadinanza,* in *Arch. Pen*., 2019, 9 f.

[96] It will be explained later.

[97]See art. 6, paragraph 3, letter d) ECHR "right to be heard"; art. 111, 3rd paragraph of Italian Constitution; art. 111, 4th paragraph of Italian Constitution; then Artt. 190, 495 1st and 2nd paragraph, 498, 499 6th paragraph of Italian Code of Criminal Procedure.

[98]Art. 6, par. 1, ECHR "right to a speedy trial"; Art. 111, 2nd paragraph of Italian Constitution «The law provides for the reasonable duration of trials».
On the criteria for establishing the reasonable duration see ECHR judgment 2007−Application n. 43662/98− Scordino v.Italia; on compensation for the unreasonable duration see Cass. Civ. Un. Sec. 14th January 2014, n. 585.

[99] See Art. 6, par. 3 lett. a), b), c) ECHR "right to defence"; Art. 111, 3rd par. of Italian Constitution, Art. 24 of Italian Constitution.

[100]they are guaranteed within the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[101] See Artt. 2, 6 TEU, Artt. 10, 18, 19, 157 TFEU.
On the matter, see Judgment of the Court (Grand Chamber) of 22 November 2005. Werner Mangold v Rüdiger Helm, C-144/04, Directive 2000/43/EC on Racial Equality.
Art. 14 ECHR «The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status».
And also art. 3 of Italian Constitution.

[102]On the matter, see the judgment C. V. n. 1219/95, Anghessa.

[103] Cit. S. MANACORDA, *Principio comunitario di non discriminazione e diritto penale: primi appunti sulla efficacia neutralizzante,* in *Politica del diritto,* 2017, file. 1, 49.

Conversely, in Community law, the principle of non-discrimination has historically been at the basis of the principle of equality; it was born in the original treaties as a functional tool for the creation of the European common market and therefore initially confined to the economic sphere[104].

Only with the development of Community law, the progressive increase and change of the establishment of the Amsterdam Treaty comes extended also in other areas to become a fundamental principle for coexistence.

The concept of non-discrimination[105] does not imply the non-application of the internal rule and the exclusive recourse to foreign law but rather it must be interpreted inspired by the principle of mutual recognition, aimed at equating foreign goods with domestic goods, avoiding uneven treatment[106].

The principle of non-discrimination highlights among the reasons impeding the surrender of the recipient of a European arrest warrant.

Article 18 of Law 69/2005 begins by establishing the issue of the European arrest warrant for criminal prosecution for racial reasons (sex, language, religion, ethnicity, political opinions, sexual tendencies) resulting from elements or objective conditions, because the attachment of the social alarm related to the seriousness of the facts is not sufficient[107].

*Considerandum* n. 12 of the framework decision by virtue of the principle of non-discrimination established in art. 2 TEU.

The provision falls under art. 1, par. 3, of the framework decision which envisages respect for the fundamental rights guaranteed by the European Union law.

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[104] About the history of the principle of non-discrimination see S. MANACORDA, *Principio comunitario di non discriminazione e diritto penale: primi appunti sulla efficacia neutralizzante,* in *Politica del diritto*, 2017, file. 1, 49 ff., and also L. BURGORGUE-LARSEN, *Il principio di non discriminazione nel diritto dell'Unione. L'articolo 19 del Trattato sul funzionamento dell'Unione europea, ovvero la rivoluzione silenziosa*, in *Ragion Pratica*, 2011, file 1, 55 ff.

[105] Part of doctrine was afraid about inherent dangers in the European arrest warrant resulting from the application of the *Considerandum* 12 of the framework decision 2002/584/GAI towards the rules known by the mechanisms of extradition, bypassing the protections and guarantees given by articles 10, par. 4, and 26, par. 2, Const.
See the comment by S. BUZZELLI, in M. BARGIS and E. SELVAGGI, *Il mandato di arresto europeo dall'estradizione alle procedure di consegna*, Torin, 2005, cit. 97.

[106] See S. MANACORDA, *Principio comunitario di non discriminazione e diritto penale: primi appunti sulla efficacia neutralizzante*, in *Politica del diritto*, 2017, file 1, 50.

[107] Cfr. Cass. fer., n. 333642/05, FI 2005, II, 497, with observations by IUZZOLINO; SELVAGGI, in *Cass. Pen*. 2005, 3766; In doctrine, A. MARANDOLA (edit by) *La cooperazione giudiziaria penale*, Milan, 2018.

However, several times the Court of Cassation has stated that the potential prejudice of respect for the fundamental rights, due to situations of race/sex/ethnic or political affiliation of the interested party, «must result from objective circumstances as it cannot be considered the mere hypothetical and completely unproven allegation of possible discrimination relates to citizenship, or to unspecified prejudices in the application of the law by an order that has joined the Union and therefore, it refers to a common framework of principles of legal civilization within the European area of freedom, security and justice[108]».

### *3.2.The* ne bis in idem *principle*

In international law, it's stated[109] that *ne bis in idem* is neither principle nor custom, the reason why it has always found a certain resistance to be accepted as it is placed as a limit to national sovereignty[110]. This is a setting for which, the rules of domestic law, (art. 6 and 11 of the Italian Criminal Code), through which the Italian jurisdiction can be recognized, can be derogated from the international ones, which provide for *ne bis in idem* hypotheses only on the basis of agreements stipulated between States, which bind only the Contracting Countries and within the limits of the agreements agreed.

On the European level, however, this approach has been exceeded since the *ne bis in idem* principle is also affirmed within the European Convention on Human Rights[111], which qualifies it as a general principle.

When the Schengen Agreement[112] entered into force, it sanctioned the prosecution for the same fact when the offender had already been tried in a contracting country, and the sentence has already been served or otherwise extinguished, or is still in course of execution.

The principle is also guaranteed at European level by art. 50 of European Charter of Fundamental Rights, and at national level by art. 649 of Italian Code of Criminal Procedure.

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[108]Cit. sent. Cass. 26.02.2013 n. 10054, Verticale.
[109]See G. STEA, *La cooperazione per la neutralizzazione del crimine transnazionale tra sovranità, ne bis in idem e cittadinanza,* in *Arch. Pen.,* 2019, 7.
[110]This is also stated in art. 11 of the Constitution, where any exclusionary value is denied to a foreign judge if the offense was committed, even partially, in Italy.
[111]On art. 7 CEDU.
[112]See art. 54 of the Convention implementing the Schengen Agreement.

The ECHR, with regard to interpretative problems, considered that the sanction should be considered of a criminal nature when it is qualified as such by the rule that provides for it and that, in its absence, the nature of the violation or of the nature, purpose and seriousness of the sanction should be taken into account[113].

So there were sanctioned these criteria, which are alternative to each other but which can also be used cumulatively, «if the separate analysis of each of them does not allow to arrive at a clear conclusion regarding the existence of a criminal accusation[114]».

Case law establish also in Italy the validity of the European principle of *ne bis in idem*. This led to the automatic recognition of a sentence issued in a Member State, without the need to repeat the judgment in Italy[115].

The *ne bis in idem* principle has particular relevance among the reasons impeding the European arrest warrant. In fact, the case in which «the wanted person was judged by an irrevocable sentence for the same facts by one of the Member States of the European Union, as long as [...]» is an obstacle to delivery.

Compared to extradition, there is an extension, as in European law, *ne bis in idem* also operates when the sentence has been issued in another State provided that it is a member of the European Union[116].

The sentence by CJEU[117], interpreting art. 3, n.2, of the framework decision 2002/584/JHA, has considered possible the refusal of delivery if through information held by the executing judicial authority shows that the subject has already been tried for the "same facts"; this term refers to an autonomous concept of Union law, which already occurs in art. 54 of the Schengen Agreement, as a mere identity of material facts which includes a set of facts inseparably linked to each other, regardless of the legal classification of the same facts of the protected legal interest.

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[113]On the matter, ECHR judgment C-199/92 Judgment of the Court (Sixth Chamber) of 8 July 1999 Hüls AG v Commission; judgment 8th June 1976 Engel and others v. The Netherlands, series A no 22, par. 82; judgment 21st February 1984 Ozturk v. Germany, series A no 73, par.53; judgment Lutz v. Germany, series A no 123, par. 54.
[114]See Iussila v. Finland n. 73053/2001, judgment Grande Stevens v. Italia.
[115]See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 279 ff.
[116]See M. R. MARCHETTI, *Mandato di arresto europeo,* in *Enc. Dir., Annali II-1,* 2018, cit. 555.
[117] See CGUE, 16.11.2010, Cass. Pen. 2011, 1215.

### 3.3. Right to life and right to health

The protection of human dignity, guaranteed by art. 1 of the Charter of Fundamental Rights of the European Union implies the right of anyone to treated as a man in any type of social relationship[118].

It therefore evokes an "intrinsic value[119]" of the human person, unique and unrepeatable, capable of self-determination.

The entire title I of the Charter of Fundamental Rights of the European Union, which attributes autonomy and independence, is dedicated to human dignity, although not present in the Constitution[120].

In a context in which the jurisprudence, for the purpose of a more just resolution of the case, treats rights as balanceable rights, to the possible question whether dignity can also be treated as a balanceable right or not, it would be appropriate to give a negative answer, in as a supreme norm, above the right to life[121].

The same EU Charter of Fundamental Rights places the right to life, and to physical and mental integrity (within which the protection of health would also appear[122]), within dignity.

Life, from a religious point of view, is a gift of God and therefore sacred; no one can rise above the ruler of life and death therefore no one can autonomously dispose of it[123].

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[118]See A. PACE, *Problematiche delle libertà fondamentali*, 2003, 3° ed. Padova, cit.114.
At this reguard, see the thought of M. OLIVETTI, in *L'Europa dei diritti, Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna, 2001, 38 ff, according to which the protection of dignity has a negative impact (denial of the totalitarianism that marked history) and a positive connection with Christian and secular humanism, manifested by the proclamation of its inviolability; it is the "reflection of Jewish-Christian anthropocentrism in which man is *imago Dei*, endowed with an immortal soul and responsible before his creator». Cit.

[119] See M. OLIVETTI, in *L'Europa dei diritti, Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna, 2001, cit. 41.

[120]«It's a more apparent than real absence».
Cit. A. MASSARO, *La tutela della salute nei luoghi di detenzione: coordinate di un binomio complesso*, Roma, 2017, 32.

[121]See on this point B. MALVESTITI, Criteri di non bilanciabilità della dignità umana, 2012 page 116.
About the dignity as intrinsic value see KANT, Fondazione della metafisica dei costumi, trad. di V. Mathieu, Milano, Rusconi, 1994, 157 and ff.

[122]Cf. A. MASSARO, *La tutela della salute nei luoghi di detenzione: coordinate di un binomio complesso*, Roma, 2017, 34.

[123]See HANS-GEORG ZIEBERTZ E FRANCESCO ZACCARIA, *Euthanasia, Abortion, Death Penalty and Religion – The right to life and its limitations*, 2019, cit. 2.

The right to life is guaranteed primarily by the Universal Declaration of Human Rights of 1948, but also by various conventions, including the American one[124], the Arab Charter of Human Rights[125], the African one[126], by art. 2 of the European Convention on Human Rights.

Following the International movement for the abolition of the death penalty, the need was felt for an autonomous protection of the right to life, implemented within some Constitutions, such as in the Spanish one (art. 15), Portuguese (art. 24), Swiss (art. 10, par. 1).

While in others, (as in the Swedish one, art. 4, or Italian, art. 27 par. 3), the protection implicitly derives from the abolition of the death penalty, and in still others (as in the Slovak one in art. 5) the right to life is explicitly recognized from the conception of the person.

The protection of dignity and respect for the person are then expressed in the right to health, understood first of all as a principle of self-determination[127], but also as the right to access health prevention[128].

The evolution of the nature of the right to health, (from a right of a public nature intended as social well-being, passing through a typically social right[129] to

[124]See the American Convention on Human Rights 1969 (also called Pact of San Josè), Article 4.
[125]See the Arab Charter on Human Rights 2004, anticipated by the Islamic Declaration of Human Rights of 1981, confirms the principles of the universal declaration of human rights including, in Article 5, the right to life.
[126]See the African Charter on Human and Peoples' Rights (also called Banjul Charter) 1987, article 4.
[127]Cit. G. FERRANDO, *Diritto alla salute e autodeterminazione tra diritto europeo e Costituzione*, in *Politica del diritto*, 2012, file n.1.
In this way also M. LUCIANI, *Diritto alla salute, dir. Cost.* in *Encicl. Giur.*, Rome, Vol. 32, 10.
[128]Cfr. G. FERRANDO, *Diritto alla salute e autodeterminazione tra diritto europeo e Costituzione*, in *Politica del diritto*, 2012, file n.1, and also P. CENDON, *I diritti della persona, tutela civile penale amministrativ*a, Torin, 2005, Vol. IV, 20.
See art. 25 Carther of Nizza.
[129]On the nature of the right to health as a social right, see M. LUCIANI, *Diritto alla salute, dir. Cost.* in *Encicl. Giur.*, Rome, vol. 31, 4, according to which the social nature of a right is not significant and instead of distinguishing between social rights and rights of freedom, categories of rights of defence, performance, participation, and rights of having a social profit.
«In the case of "negative" rights of defence (rights of freedom), we speak of self-application of the constitutional guarantee rules, while for performance rights, although not "degraded" to legitimate interests, they can be presented as subjective rights only if the public power learned the material means for their potential enjoyment».
On this point see the thought of A. BALDASSARRE, *Diritti sociali*, in *Encicl. XI*, Rome, 1989.
In addition, in the opinion of A. PACE reported, a fundamental right can manifest itself in a subjective law or legitimate interest and can be distinguished only if it is examined in relation to the concrete case the positive right also of sub-constitutional rank. All fundamental rights oscillate

receive certain services from public bodies[130], to then flow into a real subjective right of the citizen), has introduced a meaning intended no longer only in a positive perspective as a request for active protection for man but also, in a negative perspective[131], a san intangibility of physical integrity[132].

In fact, the protection of health, sanctioned as a "fundamental right" in the Constitution, in a positive and social perspective, obliges the State to promote general and global initiatives for the purpose of maintaining a complete state of psycho-physical and social well-being[133].

But, in the "negative" perspective, art. 32 of Italian Constitution [134] guarantees a real right of individual freedom, which includes, as well as for the right to life, the subject's freedom to choose whether or not to use the tools made available to protect health, freedom of choose whether to heal, live or yet yourself die[135].

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between subjective law and forms of legitimate interest and the equilibrium point of this oscillation can only be identified in the concrete case.
Cit. L. MASSIMO, *Diritto alla salute, dir. Cost*., in *Encicl. Giur*., Rome, vol. 32, 4.
On the contrary, the thought of D. MORANA, in *La salute come diritto costituzionale,* Torin, 2015, 23 ff., also considers the right to receive benefits as a full subject right, as it is recognized to the individual as such and not in view of the pursuit of a greater interest in public health.

[130] Cf. G. MANCINI PALAMONI (edit by), *L'evoluzione del diritto alla salute: riflessi giurisprudenziali ed organizzativi*, 8.
*www.ildirittoamministrativo.it*

[131]On this point see G. MANCINI PALAMONI (edit by), *L'evoluzione del diritto alla salute: riflessi giurisprudenziali ed organizzativi*, 2 ff.
*www.ildirittoamministrativo.it*

[132] Integrity and health talvolta possono sovrapporsi, per esempio nei casi in cui la lesione dell'integrità fisica giunga per intensità o qualità a modificare la normale funzionalità dell'organismo o ad alterare l'equilibrio psicofisico della persona.
Cit. D. MORANA, *La salute come diritto costituzionale*, Torin, 2015, 30 f.

[133]In fact, the right to health must be understood as a value to be guaranteed to increase the full development of the human personality, both referred to mental and physical health.
In this way G. MANCINI PALAMONI, *L'evoluzione del diritto alla salute: riflessi giurisprudenziali ed organizzativi*, 7.
*www.ildirittoamministrativo.it*
Also D. MORANA, *La salute come diritto costituzionale*, Torin, 2015, 12, in which the protection of health is strictly connected with the state of disability.
Furthermore, the first known relevant judgment on this point is sent. 88/1979 of the Constitutional Court, which states that art. 32 protects the right to health not only as an interest of the community but also and above all as a fundamental right of the individual, therefore considering it as a primary and absolute right also between relations between individuals.

[134]The result of constitutional protection is in fact the balance and compromise between the evolution of the rule of law and the liberal one.
See G. MANCINI PALAMONI (edit by), L'evoluzione del diritto alla salute: riflessi giurisprudenziali ed organizzativi, 8.
*www.ildirittoamministrativo.it*

[135]See D. MORANA, La salute come diritto costituzionale, Torin, 2015, 34 ff.

Therefore, the right to health, both insofar as it is protected as a subjective position of freedom and even more if understood as a "social function, a common good", is free from any reference to the status of the citizen but, on the contrary, is recognized as such to all men, citizens or foreigners[136].

In fact, the foreigner is recognized all the fundamental rights that are distinguished by the essentiality of the protected assets and the irreparability of the prejudice that would result from a hypothetical violation. To cite a few examples, it is a question of the right to have a house, social integration measures, assistance, education and all those benefits attributable to the "irreducible core[137]" of the right to health. After the World War II, the development of the concept of health protection was inspired by the cruelties committed in the Nazi concentration camps and therefore began to embrace a variety of situations (relational, social and emotional), with the aim of achieving the "best condition of possible health" therefore not only including a physical but also a psychic condition[138].

This concept is the confirmed by the World Health Organization, which considers man as a whole and not only in his merely physical aspect.

### 3.3.1. World health organization

The establishment of the World Health Organization, in 1948, based in Geneva, pursuing the goal of achieving the highest possible level of health, defined as "state of total physical, mental and social well-being" and not simply

[136]Cf. D. MORANA, La salute come diritto costituzionale, Torin, 2015, 139.

[137]See D. MORANA, La salute come diritto costituzionale, Torin, 2015,144.
On this point note the sentence of Constitutional Court. n. 252 del 2001, which believes that the set of fundamental rights included in the "irreducible nucleus", of jurisprudential creation, including also the protection of health as a fundamental right of the person, must also be recognized to foreigners, both with regular entry and stay in the State, both in an irregular conditional.
According to a reasonable critique of the doctrine, this "essential nucleus" of rights, however, risks appearing to be an illusion, given the broad evaluative power of the constitutional judge and furthermore, the vagueness of a similar expression does not allow attributing a well-defined meaning; an openly metagiuridic concept could be attributed, such as that of value, whose ability to place a legal limit on constitutional revision is criticed.
See A. PACE, *Problematiche delle libertà costituzionali*, Padova, 2003, 49 ff.

[138] Cf. G. MANCINI PALAMONI (curated by), *L'evoluzione del diritto alla salute: riflessi giurisprudenziali ed organizzativi,* 12 ff.
*www.ildirittoamministrativo.it*

"absence of illnesses or infirmities", it consecrated the right to health as a fundamental right[139].

W.H.O. is the culmination of a series of international health conferences that took place as early as 1851, when the Health Conference convened in Paris drafted the international health regulation of 1852, the first concrete instrument of international cooperation regarding maritime quarantine[140].

The concentration was placed on the protection of health from communicable diseases and epidemics and only with the passing of the years and the evolution of society, but above all the increase in the Member States (which caused on the one hand an extension and urgency of the problems typical of those so-called developing Countries and on the other side the union of multiple interests) the concept of health care has also changed its characteristics to include, as mentioned above, the generality of the conditions of peace and development, in full well-being; in this way, the W.H.O. defined as the main social objective that of «allowing all the inhabitants of the world to access a level of health that allows them to lead a socially and economically productive life[141]».

The Organization of 1948 therefore has the aim of directing and coordinating international work in the field of health and therefore mainly uses the collaboration and progress of medical science and pharmacology. In fact, the progressive improvement of society is based on a continuous process, in term of equity between the various Countries, of redistribution of health resources and reorganization of the health system[142].

### 3.4. The need for protection of health and security

The various jurisprudential questions recently asked to the Constitutional Court have addressed a very current problem regarding the health of prisoners and the prohibition of degrading treatments.

[139]See *https://www.who.int/*
On this point cf. also G. MANCINI PALAMONI (edit by*), L'evoluzione del diritto alla salute e riflessi giurisprudenziali ed organizzativi,* 6.
*www.ildirittoamministrativo.it*
[140]See F. CASADIO, *Organizzazione mondiale della sanità,* in *encicl. Giur.*, Rome, vol. 25, 1.
[141]Cit. F. CASADIO, *Organizzazione mondiale della sanità,* in *encicl. Giur.*, Rome, vol. 25, 4.
[142]Cf. F. CASADIO, *Organizzazione mondiale della sanità,* in *encicl. Giur.*, Roma, vol. 25, 4.

In fact, within the prisons, the concept of dignity, health and safety are constantly hanging in the balance[143].

At this point we should use the balancing technique[144], aimed not only at the judges but even before the legislator[145]; some authors[146] have bitterly criticized this technique as balancing does not mean "reconciling" but rather, sacrificing, suppressing. In fact, the result of the operation for which the interpreter considers one right more important than another, is the elimination, the provision of these latter.

Therefore it is not a question of seeing the glass half full or half empty, but rather the glass of one of the two rights is completely empty[147].

If the right to health also plays a role in balancing, the question is more complex; this in fact would have a necessarily unitary face[148], independent of the status[149] of the subject (free or restricted as it is) and, in a perspective of fundamental freedom, it would be difficult to "reconcile" with other rights (in our case, with the need for security, which leaves a large margin of discretion to the administration).

Health should therefore have more of a limit function in situations where personal freedom is restricted[150].

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[143]See A. MASSARO, *La tutela della salute nei luoghi di detenzione: coordinate di un binomio complesso*, 2017, cit. 23.

[144]Technique discussed in other legal cultures, such as in Germany, since "balancing" is an ambiguous formula and it is often difficult to identify what must be weighed because rights are difficult to measure.

However, through this tool, in the absence of a clear and predetermined legal criterion, the case can be resolved by looking at the same situation from different perspectives, all concerning legally valid and relevant interests, mitigating and reasonably balancing, in order to choose the interest which is more relevant in the concrete case.

Cf. G. PINO, Conflitto e bilanciamento tra diritti fondamentali. Una mappa dei problemi, in Ragion Pratica, 2007, vol. 28, file 1, 220.

[145]Cf. A. MASSARO, *La tutela della salute nei luoghi di detenzione: coordinate di un binomio complesso*, Rome, 2017, cit. 27.

[146]See R. GUASTINI, *L'interpretazione dei documenti normativi*, 129, and also A. MASSARO, *La tutela della salute nei luoghi di detenzione, Rome*, 2017, 28 ff.

[147]Cf. G. PINO, *Conflitto e bilanciamento tra diritti fondamentali. Una mappa dei problemi,* in *Ragion Pratica*, 2007, vol. 28, file 1, cit. 253.

[148]See A. MASSARO, *La tutela della salute nei luoghi di detenzione*, Rome, 2017, cit. 28.

[149]The state of detention should not change the rights held by detainees, or in any case, by virtue of the principle of equality, the "fundamental" rights enjoyed by a restricted person with respect to the same right as a holder should not be changed free subject.

On this point, see A. MASSARO, *La tutela della salute nei luoghi di detenzione*, Rome, 2017, 28 ff.

[150]Cf. A. MASSARO, *La tutela della salute nei luoghi di detenzione*, Rome, 2017, 26, in which the combined reading of art. 32 of the Constitution, 27 par. 3, and 3 of the ECHR would attribute the

But this only on the theoretical level. In practice, there are many difficulties of implementation already in relation to a free subject, but event more those related to the state of detention of the subject.

One of the most frequent problems concerns informed consent[151]. If even for the free subject it seems a right that sometimes remains "suspended[152]" both in terms of consent and dissent, it is even more so within the places of detention where care and custody must be constantly balanced[153].

The question of the balance between fundamental rights protected by the Constitution had already been resolved by the Constitutional Court in 2013[154], specifying that all the constitutional fundamental rights are in a relationship of mutual integration and it is not possible to identify the absolute prevalence of one over the other, otherwise the paradoxical result would be the expansion of a "tyrant" right towards other equally protected legal situations.

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function of limit to health. Other orientations, on the other hand, have reduced the "absolute" character of health; with specific reference to the Ilva case (sent. 85/2013) the "fundamental" adjective of the right to health, attributed by art. 32 of the Constitution, does not indicate its pre-eminence over other human rights, as there would be no hierarchy between fundamental rights, but the Constitution requires a continuous balance between the various rights, following the criterion of reasonableness and proportionality, such as not to allow a sacrifice of the essential core of rights. Therefore the meaning of the qualification of this asset as "primary" does not indicate its position at the top of a hierarchy but its not being able to be sacrificed by other interests.
See D. PULITANÒ, *Giudici tarantini e Corte Costituzionale davanti alla prima legge ILVA*, in *Giur. Cost.*, file 3, 2013,1498 ff.

[151]On this point see D. CEVOLI, *Diritto alla salute e consenso informato. Una recente sentenza della Corte Costituzionale* (sent. Court Const. 438/2008).
*http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2008/0041_nota_438_2008_cevoli.pdf*
Informed consent represents the citizen's right, as a patient, to participate in decisions regarding the choice of health treatment (see also B. PEZZINI, *il diritto alla salute: profili costituzionali*, in *Dir. Soc.*, 1983, 87).
It is therefore not only a formal and bureaucratic act but the result of a real relationship between doctor and patient, source of responsibility.
See Cass. Civ., Sez. III, 1994, n. 10014, in which the Cassation affirmed the duty to behave in good faith in carrying out the negotiations).

[152]See A. MASSARO, *La tutela della salute nei luoghi di detenzione*, Rome, 2017, cit. 35.

[153]On this point cf. A. MASSARO, *La tutela della salute nei luoghi di detenzione*, Rome, 2017, 36 ff.

[154]Cf. sent. Const. Court 85/2013, involving the Taranto's plant, that it was cause of a serious pollution that has caused damage to the health of many inhabitants of the city and environmental damage.
In the matter, art. 41 of the Constitution on the free exercise of economic activity, and art. 32 on the right to health, and environmental protection.
These are fundamental rights which the Court still denies the absoluteness but rather affirms the need to balance the prevalence of the law in the concrete situation, with a case-by-case assessment.

Therefore a continuous and reciprocal balance between fundamental principles and rights is required without claims of absoluteness.

In this regard, the AIA[155] also identifies the point of balance between interests as an absolute best point, but reasonable by virtue of the guarantees of the system, following the parameter of the "best available technologies".

The significant criticism of the Constitutional Court's decision concern the impossibility of balancing if health and life are at stake among the rights to be balanced, and it is certain that economic activity can cause serious damage to health and to environment[156] (as it was foreseeable in the Ilva case).

The protection of health towards restricted subject is, as mentioned, difficult to implement; first of all, the judicial authority will have to verify that to stay in prison, in relation to specific case, does not further aggravate the prisoner's health conditions, to the extent that it results in an execution contrary to the sense of humanity referred to in art. 27, par. 3, of Constitution[157].

A lot has been said about this in these days, due to the health emergency we are experiencing.

For example, an order from the Surveillance Court of Sassari which ordered, against a so called "Boss" of Mafia type the deferment of the execution of the sentence for serious physical infirmity, in the home detention regime, with consequent releasing from prison.

Although the decision alarmed citizens, causing a sense of distrust in justice, it was inspired by the need for effective protection of the right to health, which in this case assumes the function of limiting the exercise of justice and security requirement.

Indeed, at the basis of the decision, the Court referred to the jurisprudence according to which an absolute incompatibility between the pathology and the state of detention is not necessary, for the purpose of deferring the execution of

[155] At this regard, see also G.D. COMPORTI ed E. MORLINO, *la difficile convivenza tra azione penale e funzione amministrativa,* in *Riv. Trim. Dir. Pubbl*., 2019, file 1, 170 ff.

[156] See the comment of GIANFRANCO AMENDOLA, *procuratore della Repubblica presso il Tribunale di Civitavecchia, Ilva e il diritto alla salute. La Corte Costituzionale ci ripensa? https://www.questionegiustizia.it/articolo/ilva-e-il-diritto-alla-salute-la-corte-costituzionale-ci-ripensa-_10-04-2018.php*

[157] See V. MANCA, *Umanità della pena, diritto alla salute ed esigenza di sicurezza sociale: l'ordinamento penitenziario a prova di (contro)riforma*, in *Giurisprudenza Penale,* 2020, cit. 4.

the penalty, but rather the infirmity must be such as to entail a serious life threatening or not being able to ensure the provision of adequate medical care in the prison environment, or causing excessive and additional suffering[158].

He then said that, in this wide discretionary assessment area of the magistrate, by balancing operation must be deepened and the danger of the prisoner and the procedural conduct of the same must also be considered; but also in this case, the prevalence of the right to health (in the concrete case, worsen by the risk for the prisoner of contracting the Sars Cov-2 pathology that had precluded the hypothesis of hospitalization) cannot be lost even if the subject is held in a differentiated regime pursuant to art. 41 bis of penitentiary set of rules[159].

Furthermore, precisely in these circumstances the problem of prison overcrowding[160] has re-emerged, which exacerbates the material problems that exist within the penitentiary institutions, with regard to the failure to provide health protection services to restricted subjects, as it compresses most of the rights constitutionally guaranteed, putting at serious risk (in general but especially in this period) the subject's health as a "complex state of well-being both psychic and physical".

It would come to the conclusion that the prison, in its current structure, despite the efforts, is in itself contrary to the dignity of the person[161].

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[158]At this regard see sent. Cass. Section I, 27352/2019.

[159]Cf. G. STAMPANONI BASSI, *Il differimento dell'esecuzione della pena nei confronti di Pasquale Zagaria: spunti in tema di bilanciamento tra diritto alla salute del detenuto e interesse pubblico alla sicurezza sociale,* in *Giurisprudenza Penale Web*, 2020.
*https://www.giurisprudenzapenale.com/2020/04/25/il-differimento-dellesecuzione-della-pena-nei-confronti-di-pasquale-zagaria-spunti-in-tema-di-bilanciamento-tra-diritto-alla-salute-del-detenuto-anche-se-dotato-di-caratura-criminale-e-intere/*
on this point see also G. M. FLICK, *I diritti dei detenuti nel sistema costituzionale, tra speranza e delusione*, 2018, which lack of effective protection of the right to health in prison where the problems resulting from the failure to guarantee for those who cannot be hospitalized for treatment, death in prison (due to medical malpractice, stress… even in a Country in which the death penalty was definitively abolished).
*http://www.antoniocasella.eu/archica/Flick_13dic17.pdf*

[160]Cf. G. M. FLICK, *I diritti dei detenuti nel sistema costituzionale, tra speranza e delusione*, 2018.
*http://www.antoniocasella.eu/archica/Flick_13dic17.pdf*

[161]Cit. G. M. FLICK, *I diritti dei detenuti nel sistema costituzionale, tra speranza e delusione*, 2018.
*http://www.antoniocasella.eu/archica/Flick_13dic17.pdf*
Which promotes even more the application of alternative measures to detention, the abandonment of criminalization and imprisonment policies often used as a symbol of calm of social conscience... At this regard, see also L. CASTELLANO, *Il carcere dei diritti, Il mulino*, 2015, file 6, 1098 ff, which deals with the issue of prison reality, remembering however that dignity is an "innate gift" and as such should be treated; on the other hand, if you consider it as acquired over time, it will be easier to accept losing it.

Considering man as an end in himself and never as an instrument for other purposes, the prohibition of torture pursuant to art. 3 ECHR was a goal[162] of contemporary juridical civilization and therefore, it should be removed from balancing techniques with other interests.

At this point, the Torreggiani judgment[163], with which the ECtHR has ascertained the structural and systemic nature of Italian prison overcrowding, is to be considered as a "pilot".

In this way, opting for the so-called "Pilot-judgment", structural deficiencies were recognized for the Country to which a term was attributed within which it would have had to remedy[164] the violations.

The remedies that followed were not only with temporary, urgent effects, but only with temporary, urgent effects, but long-term measures were introduced that permanently diminished the prison population, thus abandoning the prison-centric vision of the punitive system[165].

And in addition to the "preventive" remedies, the "compensatory[166]" remedies have also been introduced, which would allow those who had suffered such inconveniences to have an economic refreshment.

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[162]See G. DELLA MORTA, *La situazione carceraria italiana viola "struttualmente" gli standard sui diritti umani* (just outside the sentence Torreggiani v. Italia"), in *riv. Dir. Umani e dir. Intern*., 2013, file 1, cit. 148.

[163]See sentence of ECtHR, 08.01.2013, Appeals n. 43517/09, 46882/09, 55400/09, 57875/09, 35315/10, 37818/10, in which the ECtHR has sentenced Italy for violation of art. 3 ECHR.
The Italian penitentiary treatment was in fact inhuman and degrading according to what the applicants affirmed (seven detained for many months in the prisons of Busto Arsizio and Piacenza, in triple cells and with less than 4 meters for everyone available). The Torreggiani sentence is considered a "pilot sentence" in that it addressed the structural problem of the malfunctioning of the Italian penitentiary system both with reference to the problem of prison overcrowding and with reference to the modalities of complaints as mere tools of grievances. In fact, art. 135 bis in the penitentiary set of rules, which provides for the possibility for the prisoner to make judicial complaints, with a typical procedure therefore with jurisdictional guarantees, first of all the right to be heard.
Following the ruling in comment, Italy will adopt new prison emptying plans through the construction of new prisons and new sections, the expansion of the conditions for probation in the social service, home detention especially if it is of detained mothers.

[164]Thus was promoted the decree law "Empty-prison", 21.02.14, which gave way to subsequent legislative interventions both concerning the construction of new penitentiary institutions, and through the introduction of alternative tools to detention.

[165]See L. U. BARRETTA, *Il sovraffollamento carcerario tra protezione dei diritti fondamentali e discrezionalità legislativa* (note of Const. Court. n. 279/2013), in *Ass. It .dei costituzionalisiti*, 2014.

[166]The sentence Torreggiani has the function of "corner-stone" where impose to Italy to introduce an instrument of appeal with preventive effects but also compensative effects that guarantee an effective repair.

It was in fact a situation of "serious overcrowding", that is, the hypothesis in which each prisoner lives in a space of less than 3 meters, which in itself integrates the violation referred to in art. 3 ECHR.

While for the notion of overcrowding the Court intended the hypothesis in which the area of the cell available to each prisoner exceeds this limit and in order for a violation to occur, it is necessary to evaluate other parameters[167], such as for example the available ventilation, the access to light, natural air.

For the purposes of the decision, the Court considered the description of the prison conditions to which the sentenced were subjected.

The violation did not concern only art. 3 of the ECHR but also, in connection, art. 27, par. 3, of the Constitution, as an additional insurmountable limit.

The preceding jurisprudence[168] the conditions of inhumanity can never be re-educative but rather invalid dative of the person and paradoxically they come to the result that they do not feel responsability anymore and they remove the sense of guilt[169].

The phenomenon of overcrowding, being a possible "synergistic" cause of the worsening of the state of health as psycho-physical well-being, also implies violations of the rights to health.

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See F. CAPRIOLI E L. SCOMPARIN, *Sovraffollamento carcerario e diritti dei detenuti*, Torin, 2015, 12.

[167]Cf. F. CAPRIOLI E L. SCOMPARIN, *Sovraffollamento carcerario e diritti dei detenuti*, Torin, 2015, 9 ff. with regard also to the uncertainties that arise from the criterion of the size of the available surface in reference to the calculations to be made. In fac the jurisprudence that follows the sentence Torreggiani is in line in deducting the space occupied by the furnishings from the gross surface, in order to identify the space actually available (so-called walkable space). See sent. Cass. 19.12.2013, n. 257924.

[168]See Sent. Const. Court n. 12 del 1996, according to which art. 27, par. 3, of Constitution, does not only indicate that the penalties must tend towards the re-education of the subject, but also that the penalties cannot consist of treatments contrary to the sense of humanity, implying a non-dissociable and clearly unitary link; it also aims to reiterate the multifunctional conception of the penalty, among which it highlights the re-educational function as the legislator's objective and the implementation of the appropriate means to achieve it.

[169]Cf. C. NARDOCCI, *Il principio rieducativo della pena e la dignità dell'uomo: prime risposte tra Corte Costituzionale e Corte europea dei diritti dell'uomo*, reflections just outside of Const. Court. n. 279 del 2013, in *riv. Ass. It. dei costituzionalisti*, 2014, file 1, 5.

For example, in the Brown case v. Plata [170], it is noted that this phenomenon causes a condition of inhumanity of prisons (even justified by the idea that prisoners are a lower form of citizens[171]), due to the absence of healthy and safe conditions, and the capacity of the medical facilities does not respond to needs, prison staff is less than what is actually required.

This inhuman state of life, instead of re-educating the subject, leads to the development of mental illness, even worsening the state of prisoners[172].

**4. The mutual recognition of the sentences and the decree no. 161/2010**

The European Parliament has pronounced itself in welcoming the initiative of the German and French Federal Republic of 2007[173], aimed at uniforming and gradually harmonizing the substantive criminal orders of the Member States in order to complete the European area of freedom, security and justice.

However, a reference to the Constitutions of the Member States and to the common values and principles of art. 6 TEU at the time in force; it had to be a rule that emphasized the exceptional nature of the refusal by the executing State, the definition of legal and ordinary residence corresponding to the definition given by the European Court of Justice and the hearing of the accused if they were causes that had provoked the revocation of a suspended sentence or the imposition of a condition sentence[174].

Some of the measures contained in the Framework Decision 2008/909/JHA were then modified by the decision 2009/299/JHA which specified

[170]See sent. 23.05.2011, where the Court considers it necessary to impose a population limit to remedy the violation of prisoners' human rights and constitutional rights in violation of the eight amendment.
Judge Kennedy, along with a group of three U.S. District Court judges for California's eastern and northern districts, orders the prison population to drop to 137.5% within two years.
It was a mechanism of protection defined, according to some authors, "extreme".
Cf. D. VICOLI, F. CAPRIOLI E L. SCOMPARIN (a cura di), *Sovraffollamento carcerario e diritti dei detenuti*, , Torin, 2015, 24.
[171]See DR. IAN FRECKELTON, *Cruel and unusual punishment of prisoners with mental illness: from Oates to Plata, 2011,* in *Psychiatry, psychology and law*, cit. 330.
[172] See DR. IAN FRECKELTON, *Cruel and unusual punishment of prisoners with mental illness: from Oates to Plata, 2011,* in *Psychiatry, psychology and law*, 330 ff.
[173]Cf. Adeguamento alla decisione quadro 2008/909/GAI, sul reciproco riconoscimento a sentenza e alle decisioni di sospensione condizionale. Act of Government n. 231, in the documentation of the Services and Offices of the Senate of the Republic and the Chamber of Deputies.
[174]Cf. Adeguamento alla decisione quadro 2008/909/GAI, sul reciproco riconoscimento a sentenza e alle decisioni di sospensione condizionale. Act of Government n. 231, in the documentation of the Services and Offices of the Senate of the Republic and the Chamber of Deputies.

the definition of the reasons for non-recognition of decisions given in absentia of the interested party.

On 5 February 2014, the European Commission published a report on the implementation by Member States of Framework Decisions 2008/909/JHA and 2009/299/JHA requesting EU Countries that have not yet done so to adopt the necessary measures to implement the framework decisions, highlighting in the report that the level of implementation of those legislative instruments was far from satisfactory[175]. In fact, he believed that «partial and incomplete recognition would hinder the application of the principle of mutual recognition in the criminal justice sector, betraying the legitimate expectations of Union citizens[176]»; finally, he noted that «late implementation is regrettable because the framework decisions could lead to a reduction in prison sentences imposed by judges on non-residents which would allow not only a decrease in prison overcrowding (and therefore an improvement in conditions of detention), but also, consequently, a significant saving in the budgets allocated by the Member States to prison structures[177]».

As for Italy, this implemented the framework decision with Legislative Decree 161/2020 within the deadline (2011) and without particular profiles of incompatibility with European legislation.

The Italian State was the first to implement [178] the 2008 framework decision, and in 2012 only eight other states had implemented it (Austria,

[175]Cf. Adeguamento alla decisione quadro 2008/909/GAI, sul reciproco riconoscimento a sentenza e alle decisioni di sospensione condizionale.
Act of Government n. 231, in the documentation of the Services and Offices of the Senate of the Republic and the Chamber of Deputies.

[176] See the Report by European Commission, on 5 February, 2014, (COM(2014) 57), "Sull'attuazione da parte degli Stati membri delle decisioni quadro 2008/909/GAI e 2009/299/GAI relative al reciproco riconoscimento delle sentenze penali che irrogano pene detentive o misure privative della libertà personale, elle decisioni di sospensione condizionale e delle sanzioni sostitutive e delle misure alternative alla detenzione cautelare".

[177] See the Report by European Commission, on 5 February, 2014, (COM(2014) 57), "sull'attuazione da parte degli Stati membri delle decisioni quadro 2008/909/GAI e 2009/299/GAI relative al reciproco riconoscimento delle sentenze penali che irrogano pene detentive o misure privative della libertà personale, elle decisioni di sospensione condizionale e delle sanzioni sostitutive e delle misure alternative alla detenzione cautelare".

[178]The framework decision 2008/909/JHA was implemented in our Country by means of the legislative decree of 07.09.2010 n. 161, with which /2009, where with art. 49, 1st co, lett. C) and 52 specific principles and criteria for the exercise of the delegation have been provided. The matter was then integrated by the provisions of the legislative decree of. 03.10.2017 n. 149, who inserted in book XI the title I bis dedicated to the general principles of mutual recognition, adjusting the criminal procedure code adapting it to the semplified judicial cooperation that was established by

Denmark, Finland, Luxembourg, Malta, Poland, United Kingdom, Slovakia[179]). In 2014, in fact, the European Commission published a Report on the implementation of the Framework Decisions 2008/909/JHA and 2009/829/JHA by Member States, requesting that States that had not yet transposed the supranational text, shall take the necessary measures in order to do so[180].

In this way, the principle of mutual recognition has been "positivised" as a general principle of Union law and implemented in the internal legal systems as the legal basis for a new system of cooperation, with the function, on the one hand, of a regulatory fee for European regulatory acts, and on the other as an interpretative paradigm to guide the different issues between the Member States[181].

The decree 161/2010 begins with some definitions contained in art. 2, including the definition of recognition as «the measure pronounced by the competent authority of the executing State with which it is possible to execute within its territory a sentence pronounced by the judicial authority of the issuing State», recalling (in art. 5, par. 2, lett. a) ) as the purpose of this provision is to encourage the social reintegration of the sentenced person[182] [placing as a general limit the compatibility with the supreme principles of the constitutional order on the subject of fundamental rights as well as on the rights of liberty and due process (art. 1)], the designation of the competent authorities (Ministry of justice and judicial authority) (art.3).

The task of transmitting and receiving sentences is attributed to the Ministry of Justice, which also has duties of information towards the competent authority of the issuing State, without prejudice to the possibility of a direct

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the decisions of the European Union, and by accentuating the boundaries between relations with the authorities of the EU Member States and third States.

[179]See Ministry of Justice circular dated 2nd May 2012.

[180]See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 874 ff.

[181]Cf. M. R. MARCHETTI E E. SELVAGGI, *Nuova cooperazione giudiziaria penale*, Milan, 2019, 245, in which the principle of mutual recognition creates a form of connection between legal systems that does not take place "between watertight compartments but when someone wishes to lend a support to those who share the same principles, values, and commitments, building an institutional structure with its own sources of law but while still binding, which aim to prevent and combat crime, in a common area of freedom, security and justice, facilitating cooperation between the Member States and the harmonization of their criminal laws» cit. 250.

[182]See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 885.

correspondence between judicial authorities, in order to facilitate the transfer procedures.

The process can be divided into two phases:

the phase in which the foreign sentence is received, accompanied by the certificate, part of the Minister of Justice.

The phase of transmission of the sentence to the President of the competent Court of Appeal.

The decision on recognition is up to the Court of Appeal, with a chamber of commerce judgment, within 60 days of receipt of the sentence, with the possibility of an extension of 30 days and can be appealed before the Court of Cassation.

### 4.1. The active procedure of the transmission

The competence of the transmission is up to the P.M. (Public prosecutor) office before the competent Judge for the enforcement, as provided for by art. 665 of Italian Code of Criminal Procedure or by art. 658 of Italian Code of Criminal Procedure in the case enforcing a measure that provides for a detention order.

The competent authority may order the transmission abroad when the execution order is issued pursuant to articles 656 or 659 of Italian Code of Criminal Procedure that is, when the order has already been executed, at any later time, no later than the date on which the remaining penalty or security measure to be served is less than six months.

Before the transfer of the judicial document, there is the need to verify the absence of one of the causes of suspension of execution and the joint existence of the conditions set out in art. 5, including the purpose of social reintegration of the execution of the sentence abroad[183] (therefore considering the attachment of the subject to the executing State, family, linguistic and cultural, social or economic ties etc...), the maximum duration of the sentence inflicted in the sentence of not less than three years, the absence of another criminal proceeding to which the subject is subjected, the presence of the sentenced person in the territory of the State or in the executing State.

[183] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, *Milan* 2018, 885.

Once these conditions have been verified, transmission abroad can be arranged in the cases provided for by the same art. 5, paragraph 3, to the European Union Member State of citizenship of the sentenced person in which the subject lives, or to the European Union Member State of nationality of the sentenced person in which he will be expelled, once released from the execution of the sentence or detention order, due to an expulsion or removal order included in the sentence or in a judicial or administrative decision or in any other measure adopted following the sentence, or to the Member State of the European Union that has consented to the transmission.

Thus, the executing State will be identified on the basis of the place where the person is tied for habitual residence, for familiar, social or professional reasons[184], and if that same State has consented to the sending (art. 5, par. 2, lett. c) ), the consent of the sentenced person to the transfer is required, unless he has fled from there or otherwise returned to it due to criminal proceedings or following a conviction, pursuant to art. 5, paragraph 3.

It could be said that the element of consent to the transmission of the sentence−since dealing with are mandatory and mainly consensual procedures of mutual recognition−should not be the predominant element; in reality, since these are disciplines aimed at and derived from the need for the social reintegration of the sentenced person, they could not exclude his will[185], which in practice is often in fact the root of these procedures[186].

The proceeding, outlined by art. 6 of the decree, provides that the competent judicial authority pursuant to art. 4 before proceeding to the transmission abroad *ex-officio* or at the request of the sentenced person or of the enforcing State, shall speak with the sentenced person to check if he is in the territory of the State, and also consults through the Minister of Justice the competent authority of the State of enforcement to verify the existence of the conditions of issue pursuant to art. 5, paragraph 2, lett. a). The provision with

[184]On this point cf. A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 885.
[185] Without prejudice to art. 3 of the ECHR which prohibits inhuman and degrading treatment and involves an obstacle to the transmission of the sentence in a foreign state for the purpose of its execution, when there is a real danger that the sentenced person may undergo inhuman or degrading treatments.
[186]See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 885.

which the transmission abroad is ordered is communicated to the interested party and is sent, together with the sentence and the completed certificate, to the Ministry of Justice which is in charge of forwarding it to the competent authority of the executing State.

In absence of one of the conditions referred to in art. 5, before the start of the execution abroad, the judicial authority can revoke the measure and withdraw the certificate and the interested party and the Ministry of justice of the State of enforcement will be notified, specifying the reasons for withdrawal.

While in wait for the recognition, art. 8 provides for the competent authority pursuant to art. 4, provided the sentenced person is in fact in the territory if the enforcing State, to request his provisional detention or to adopt suitable measures in order to ensure his permanence on the territory.

After the recognition, the material transfer of the sentenced person to the executing State follows within the non-peremptory period of thirty days following the communication of the acknowledgment to the Ministry of Justice.

The Ministry of Justice is entrusted with the transmission and receiving of the judgments and certificates as well as the official correspondence relating to them, including information to the foreign State about the outcome of the proceeding, without prejudice to the use of direct correspondence between the competent judicial authorities; in this case, the judicial authority will inform the Minister of the transmission or reception of the documents in accordance with the provisions of Art. 3 of the same decree. Furthermore, it concludes agreements with foreign authorities for the execution of the transfer of sentenced persons and expresses the consent, by the Minister of Justice, to the execution in Italy of a sentence issued against subjects who are not Italian citizens in accordance with the provisions of Art. 10 of the same Decree[187].

### 4.2. The passive procedure of transmission

The discipline about the mutual recognition of the foreign sentence, as we will see further below, sometimes intersects with the regulation of the European arrest warrant (in its passive form), or rather, it's the first step toward a European

[187] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 888.

legal integration[188], but not always without problems on its application and interpretation.

The relationships between the two procedures (Legislative Decree 161/2010 and Law 69/2005) are outlined by the jurisprudence which recognizes them as alternative forms of recognition and enforcement of the sentence of a Member State, since, although derived from an act of different procedural impulse that involves an autonomous progression and a different "channeling[189]", both procedures pursue the same re-educational purposes and in part the same regulatory discipline.

In fact, the Court of Appeal that intends to refuse the surrender referred to in art. 18 bis, lett. c) of Law 69/2005, in case the enforcement is ordered in the State of the punishment imposed on the Italian citizen or in any case legitimately residing in Italy, it must necessarily recognize the sentence on which the European arrest warrant is based by applying procedure provided for by legislative decree n. 161/2010[190], and verifying, provided that also the requesting State transposed the Framework Decision 2008/909/JHA, the compatibility of the penalty imposed with the provisions of Italian law[191].

According to case law[192], therefore, this would be the case of a reciprocal relationship and therefore in case of regulatory gaps, reference should still be made to the regulatory framework specific to the surrender[193] (Law 69/2005).

Art. 9 indicates the Court of Appeal of the district of residence of the sentenced person at the time of transmission as the competent authority for the decision on the recognition (for which they are necessary the conditions provided into art. 10) and execution in Italy of the final order issued in another member State.

The recognition of the foreign sentence can either be total or partial. In fact, if the judicial authority believes that some of the conditions necessary for full

[188] See M. PISANI, *Rapporti giurisdizionali con autorità straniere,* in *Riv. It. dir. Proc. Pen.*, 2004, file 3, 771.
[189] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, cit. 883.
[190] See A. MARANDOLA (curated by) *Cooperazione giudiziaria penale*, Milan, 2018, 883, and also *Rass. Giur. sul mandato di arresto europeo*, 149.
[191]See Court Judgement VI, no 53/15; Court Judgement VI, no 38557/14; Court Judgement VI, no 20527/14.
[192] See Court Judgement VI, no 53/15.
[193] See A. MARANDOLA (curated by), *Cooperazione giudiziaria penale*, Milan, 2018, 883.

recognition do not exist, pursuant to art. 10, paragraph 3, it can immediately inform, also through the Ministry of Justice, the competent authority of the issuing State with which it agrees the conditions of partial recognition and execution, provided that these conditions do not entail an increase in the duration of the sentence. In the absence of an agreement, the certificate is intended to be withdrawn and recognition of the sentence cannot take place as it is not compatible with the principles of the national system.

In case a sentence of recognition is pronounced, the sentence is enforced according to Italian law (art. 16) since the foreign sentence is equated to all effects with the national one. So the art. 10, paragraph 5, provides for an adaptation of the penalty by the Court of Appeal if the penalty or the security measure ordered in the issuing State is not compatible with Italian legislation for similar crimes.

However, the adaptation cannot cause for a lower measure of the punishment provided for by Italian law for similar crimes nor more serious than the one issued in the sentencing sentence of the issuing State.

When determining the remaining part of the sentence to be served, it is also necessary to take into account the part already served in the issuing State, or other causes of extinction of the crime such as amnesty or pardon, also for the purposes of granting early release.

A constant exchange of information between the authorities of the States involved is therefore necessary; in fact, the events relating to the executive part will be regulated by Italian law while those relating to the executive title will be regulated by the law of the issuing State[194].

The passive procedure for the recognition of judgments, however, was not without criticism since the non-application of the rules of the criminal code and the establishment of an "execution authorization" procedure substantially similar to that envisaged for judgments issued by States not belonging to the European Union, hide under the missing and apparent objective of speed and slenderness, a more complex procedure, from a practical point of view, than the ordinary one[195].

[194] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 888 ff.
[195] Cit. A. MORGIGNI, in *https://www.magistraturaindipendente.it/pubblicato-il-dlvo-161-2010-sul-reciproco-ric.htm*

## 5. The relation between the framework decision 2002/584/JHA and the framework decision 2008/909/JHA

The discipline provided by the Framework Decision 2008/909/JHA integrates the European arrest warrant system in the part in which it refers to surrender *in executivis* or for procedural purposes[196].

The *Considerandum* n. 12, in accordance with art. 25 of this Framework Decision, provides that «this framework decision should also apply, mutatis mutandis, to the execution of penalties in the cases referred to in art. 4, par. 6, and art. 5, par. 3 of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [...]».

Furthermore, always the *Considerandum* n. 12 provides that the executing State can verify whether there are grounds for refusing recognition and execution pursuant to art. 9 of this decision for the purpose of assessing the surrender of the person or the execution of the sentence in the cases referred to in art. 4, par. 6 of Decision 2002/584/JHA.

As well as art. 25 of the 2008 Framework Decision states that «these provisions apply, insofar as they are compatible with the provisions of Framework Decision 2002/584/JHA, to the execution of penalties in the event that a Member State undertakes to execute the penalty in cases falling under article 4, par. 6, of the said framework decision, or if, pursuant to art. 5, par. 3, of the same framework decision, it has placed the condition that the person must be sent back to serve the sentence in the State member interested, so as to avoid the impunity of the person concerned».

These provisions have been implemented in Italy by art. 24 of Legislative Decree 161/2010, which necessarily[197] meets with the regulation of the European arrest warrant in the cases provided for in art. 18, lett. r) and 19, par. 1, lett. c) of Law 69/2005.

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[196] Cf. G. DE AMICIS, (curated by), *Prime note sul riconoscimento delle condanne penali nell'Unione europea,* 2.
*http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/20110324_DeAmicis.pdf*

[197] To remedy the problems created by the meeting of the discipline of the legislative decree 161/2010 and that of Law 69/2005, the Ministry of Justice issued a circular on May 2, 2012:« Disposizioni per conformare il diritto interno alla Decisione Quadro 2008/909/GAI relativa all'applicazione del principio del reciproco riconoscimento alle sentenze penali che irrogano pene detentive o misure privative della libertà personale, ai fini della loro esecuzione nell'Unione Europea».

This refers to the cases in which the execution of a European arrest warrant for executive purposes against an Italian citizen[198] or the surrender of the subject for the prosecution against him (for procedural purposes) and in the latter case the delivery may be subject to the re-delivery may be subject to the re-delivery in Italy of the sentenced citizen.

In the first case, the Court of Appeal will be able to refuse the delivery if the sentenced person carries out the sentence or the security measure in Italy.

In the second case, the delivery may be conditional on the execution of the sentence or the security measure in Italy, following the process that ended with his sentence[199].

This for the purposes of the provisions of the *Considerandum* n. 9 of the Framework Decision 2008/909/JHA, which states that «in making sure that the execution of the sentence by the executing State has the purpose of promoting the social reintegration of the sentenced person, the competent authority of the State of issuance should take into account elements such as, for example, the attachment of the person to the executing State and the fact that he considers that State the place where he maintains family, linguistic, cultural, social or economic and other ties».

What is certain is that the meeting of the two disciplines (Legislative Decree 161/2020 and Law 69/2005) is not without gaps, which give rise to interpretative uncertainties, some of which have now been resolved by jurisprudence, others still alive.

In 2016, a ruling by the Court of Cassation[200] addressed an appeal regarding the release of a prison order (based on an arrest warrant for executive purposes, originating from Romania) without prior recognition of the conviction sentence issued by the Romanian authority.

The Court of Cassation concludes that «in the event of occurrences, the forms and procedures contained in Legislative Decree 161/2010 must be applied,

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[198] See the sentence of Constitutional Court 227/2010.

[199] Cf. G. DE AMICIS, (a cura di), *Prime note sul riconoscimento delle condanne penali nell'Unione europea*, 2 ff.
*http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/20110324_DeAmicis.pdf*

[200] See the sentence of Court of Cassation, 3713/2016.

thus filling a gap in the legislation forcing significant interpretative problems, since neither the law on the European arrest warrant nor the related framework decision, explicitly regulated the recognition procedure and the adaptation of the foreign sentence in our legal system».

The procedure to be carried out by the judge will not only be an assessment pertaining to the general conditions necessary for the recognition of the sentence, but will also verify compatibility criteria of the penalty and the reasons for refusal contained in the provisions of articles 10, 11, 13 of Legislative Decree 171/2010, insofar as they are compatible, also evaluating the methods of execution subsequent to recognition consequent to the application of the specialty principle (art. 18).

A "rereading" operation will therefore be necessary which will also concern the clarification of the offenses for which will also concern the clarification of the offenses for which recognition will be carried out and the related consequences also with regard to the penitentiary benefits referred to in art. 4 bis Ord. Pen.

If at first sight the fact that a person invested by the request of M.A.E. executive who requested to serve the sentence in Italy would seem an implicit renunciation to subsequently apply the exceptions relating to the irregularity of the process in the requested State, it certainly cannot result from the exclusion of the checks on recognition, which pose downstream of the same request[201].

So before proceeding with the execution of the foreign sentence in Italy, the judge must first recognize it through the procedure provided for in Legislative Decree 161/2010 by carrying out these assessments and checks. In particular, he must first verify that the fact that is the subject of the judgment constitutes a crime in Italian legislation and that it falls within one of the crimes provided for in the catalog contained in the Framework Decision 2008/909/JHA by virtue of the principle of double criminality.

[201] See the sentence of Court of Cassation, 3713/2016, in which the applicant claimed the non-existence of the conditions for the surrender of the Italian citizen to the Romanian judicial authority for a European arrest warrant for executive purposes and requested the cancellation of the prison order issued by the General Prosecutor at the Ancona Court of Appeal without prior recognition of the foreign sentence.

Subsequently, he must also verify that the penalty to which the subject was sentenced in the foreign sentence can be compatible with the provisions of the Italian criminal law, in order to guarantee and not go beyond internal legislation.

At this point, art. 10 of Decree 161/2010, among the conditions under which the sentence of conviction issued in another Member State of the European Union for the purpose of its execution in Italy can be recognized, requires, under letter f) of par. 1, that the duration and nature of the penalty or security measures applied in the issuing State are compatible with Italian law, without prejudice to the possibility of adaptation within the limits established by par. 5.

However, one wonders how and with what powers that judicial authority of the executing State can act, if the provisions of the conviction do not comply with the internal law.

## 6. Execution of the penalty in the State of execution

### 6.1. The execution before the framework decision 2008/909/JHA

Art. 4, point 6, of Framework Decision 2002/584/JHA, (as a reason for refusal to surrender the requested person by the executing State, if the subject has citizenship / residence/ residence there, with consequent execution of the sentence in that State), has posed interpretative doubts about how the sentence was implemented in the State. In fact, some States have then provided for ad hoc provisions for the implementation of art. 4. For example, Austria has provided that the double criminality and consent of the requested person must be ignored, if the delivery request is admissible, while in other cases there will be other reasons for refusal. The Netherlands has instead provided, in art. 6 of the implementing law, that the sentence must be carried out «in accordance with art. 11[202] of the

[202] See art. 1 of Convention of Strasbourg '83: «in case of conversion of the sentence, the procedure provided for by the law of the executing State applies. For the conversion, the competent authority: is bound by the ascertainment of the facts as far as they appear explicitly or implicitly in the sentence pronounced in the sentencing State; it cannot convert a sanction depriving of liberty into a pecuniary sanction; fully deduces the period of deprivation of liberty suffered by the sentenced person; does not aggravate the criminal situation of the sentenced person, and is not bound by the minimum sanction possibly provided for by the law of the executing State for the crime or the crimes committed. When the conversion procedure takes place after the transfer of the sentence person, the executing State keeps the latter in detention or takes other measures to ensure his presence in the executing State until the end of this procedure».

Strasbourg Convention 1983». Poland[203] has stipulated that «the Court defines the legal classification of the fact in accordance with Polish law and is bound by the duration of the sentence imposed».

In the art. 6 of the Belgian implementing law we find written «if the European arrest warrant was issued for the execution of a penalty or security measure, when the person concerned is Belgian or resides in Belgium, the competent Belgian authorities undertake to execute such penalty or security measure in accordance with Belgian law», as well as in France, in articles 695 and ff we read «when the person wanted for the execution of a sentence or security measure depriving of liberty id a French citizen, the competent French authorities will undertake to carry out this execution»; Italy, in art. 18, lett. R), of the implementing law 69/2005 did not depart from the provision of the framework decision which however provided of this reason for refusal as optional[204]; certainly some apparent doubts could emerge regarding the discretion of the competent authority with regard to the delivery, to be considered anchored to the respect of the international rules and convention in force, in compliance with the European arrest warrant[205] legislation, which the jurisprudence[206] clarified referring to the provisions of the Law 334/88 (law ratifying the Strasbourg Convention '83), according to which a specific agreement had to be reached between the States on the transfer of the prisoner.

Art. 8 of Law 69/2005, which provides for mandatory delivery if the requested person is responsible for certain behaviours deemed particularly relevant and alarming at European level. So in this case even if the subject had requested the execution of the sentence in Italy, the judicial authority would have had to order the delivery.

According to this reading, art. 18, lett. R) of the M.A.E. it would not impose the refusal of delivery whenever the citizen has requested to expiate the sentence in

[203] See art. 607 of the implementing law.

[204] Now, the reason for refusal pursuant to art. 18, lett. R) mandatory, has been moved to art. 18 bis lett. C) as an optional reason.

[205] Cf. G. DE AMICIS, *Rapporti giurisdizionali con Autorità straniere -M.A.E.- Legge n. 69 del 2005,* in *Ufficio del massimario e del ruolo, servizio penale, Corte suprema di Cassazione,* 87 ff, par. 5.2.9.4.16.3.

[206] Cf. G. DE AMICIS, *Rapporti giurisdizionali con Autorità straniere -M.A.E.- Legge n. 69 del 2005,* in *Ufficio del massimario e del ruolo, servizio penale, Corte suprema di Cassazione,* 87 ff.

Italy, but would assign the task of assessing the concrete possibility of expiation of the sentence in Italy to the judicial authority.

Subsequently, the jurisprudence changed orientation on the need [207] for the interested party's request to execute the sentence in the executing State; in fact, on the one hand, he reiterated the need for execution in the State to be conditional on consent [208] , but on the other, he considered that the evaluative power, discretionally exercisable by the judicial authority, is apparently in conflict, with the provision of art. 19, par. 1, lett. C) of the same law which instead provides for the unavoidable return of the citizen to Italy, in the case of arrest warrant for procedural purposes[209].

Finally, the Court clarified that the M.A.E. is not conditioned by the existence of a particular international agreement but only by the provisions of the framework decision.

On the other hand, the provisions of art. 735 of the Italian Criminal Code but those of the Strasbourg Convention '83, therefore the "continuation" procedure of the penalty will be applied to the determination of the penalty, as required by art. 9 of the same Convention[210].

### 6.2. THE EXECUTION OF THE PENALTY FOLLOWING THE MUTUAL RECOGNITION OF THE JUDGMENT

The introduction of the Framework Decision 2008/909/JHA has substantially replaced the Strasbourg Convention '83, integrating and filling the gaps in the regulation on the European arrest warrant contained in the Framework Decision 2002/584/JHA[211].

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[207] See the sentence of the Court of Cassation, Sect. VI, n. 17632/2007, Melina.

[208] See also the sentence of the Court of Cassation, Sect. Vi, n. 7813/2018 Finotto, Rv. 238724.

[209] Cf. G. DE AMICIS, *Rapporti giurisdizionali con Autorità straniere -M.A.E.- Legge n. 69 del 2005,* in *Ufficio del massimario e del ruolo, servizio penale, Corte suprema di Cassazione*, 87 ff, par. 5.2.9.4.16.3

[210] See the sentence of Court of Cassation, Sect. VI, n. 22105/2008, Tropea, Rv. 240131-2.
Cfr. G. DE AMICIS, *Rapporti giurisdizionali con Autorità straniere -M.A.E.- Legge n. 69 del 2005,* in *Ufficio del massimario e del ruolo, servizio penale, Corte suprema di Cassazione,* 87 ff, par. 5.2.9.4.16.3.

[211] Framework Decision 2008/909/JHA provides, in art. 26, replacement, without prejudice to the provision of art. 28 of this decision, as of December 5, 2011, of the corresponding provisions of the following conventions applicable in relations between Member States; See the European Convention on the Transfer of sentenced persons, of 21 March 1983, and the related Additional Protocol of 18 December 1997, the European Convention on the International Validity of

So if the judicial authority of the executing State refuses the surrender of the requested person, by virtue of the 2008 framework decision and no longer of the Strasbourg Convention, it should recognize the sentence subject to the European arrest warrant so as to expiate the person's sentence, according to internal legislation.

However, the same framework decision of 2008 still left some room for concern at the stage of the execution of the sentence with regard to the partial recognition and adaptability of the judicial authority.

In 2016, the Court of Justice[212] ruled on the re-determination of the sentence when the law of the executing State is different from that of the issuing State.

In the concrete case, a Bulgarian citizen had been sentenced in Denmark and detained there for one year and 8 months including pre-trial detention.

The citizen had requested the transfer to Bulgaria pursuant to the 2008 framework decision to execute the sentence in his native Country therefore the competent judicial authority, when he should have recognized the sentence, had to redefine the remaining sentence by asking himself about the methods for determining the residual sentence to be applied, considering the sentence served in Denmark, deducting it from that imposed in the sentence, with possible application of benefits.

In fact, the question was precisely about the possible application of early release which, in Bulgarian legislation pursuant to art. 41 of the Nakazatelen kodeks[213] (penal code), considering the time spent by the sentenced person in working activities, would have been applicable for this and indeed, would have been relevant in terms of calculation of remaining sentence.

In fact, the subject had spent eight months and seven days working in the Danish penitentiary institution.

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Repressive Judgments, of 28 Mary 1970, Title III, Chapter 5 of the Convention of 19 June 1990,implementing the Schengen Agreement of 14 June 1985 on the gradual elimination of checks at common borders and the Convention between the Member States of the European Communities on the execution of foreign criminal convictions, of 13 November 1991.

[212] See ECJ, C-554/14 of the Grand Section, on 8 November, 2016 about the criminal judicial cooperation, art. 17 of the framework decision 2008/909/JHA.

[213] Art. 41 of the Nakazatelen kodeks (penal code): «The work done by the sentenced person is deducted for the purpose of reducing the sentence in such a way that two days of work equals three days of deprivation of personal liberty».

To resolve the matter, the Bulgarian judge takes into consideration a judgment of the Bulgarian Court of Cassation according to which the penal code must be interpreted as meaning that the work of general interest carried out in the issuing State by the sentenced person must be considered by the competent authority of the State of execution for the purpose of reducing the sentence accordingly, and compares this ruling with the provisions of the 2008 Framework Decision, within which the aforementioned reduction is not explicitly provided[214].

Therefore, it refers the matter to the Court of Justice[215] by asking whether the framework decision allows the executing State to reduce the length of the custodial sentence imposed in the issuing State during the transfer procedure.

In fact, this reduction would be deducted from art. 17, par. 2, of the Framework Decision, which allows the reduction of a longer period of time than the duration of the detention set according to the law of the issuing State, when in application of the law of the executing State the facts that occurred in the issuing State are re-evaluated[216] (in this specific case, the performance of the work activity).

The Bulgarian Court asks, as a second point, whether, if the provisions on the reduction of punishment were applicable, the issuing State should be informed about it and if it opposed it, the transfer procedure should be terminated.

Finally, as a third point, it is asked if, in case the Court of Justice declares that art. 17, par. 1 and 2, the national decision to apply domestic law does not allow for a reduction of sentence, as it is more favorable than art. 17 of the Framework Decision, however, complies with European law.

The Court of Justice, in the sentence of 2016[217], pronounced considering that art. 17, par. 1 and 2, of the Framework Decision must be interpreted as meaning that it

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[214] As explained by C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali,* in *Arch. Pen.* 2017, *http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[215] In this context, the nomophylactic role of the Court of Justice emerges, and it will have to provide all the elements necessary for a correct interpretation and application of European law, which does not however weaken the fundamental rights guaranteed to the persons concerned.
See M. R. MARCHETTI E E. SELVAGGI, *Nuova cooperazione giudiziaria penale*, Milan, 2019, 255 cit.

[216] Cf. E. CALVANESE E G. DE AMICIS, *in Rassegna di giurisprudenza sul mandato di arresto europeo*, 2017, 168.

[217] See CGUE, C-554/14 of Grand Section, on 8 November 2016, about the criminal judiciary cooperation, art. 17 of the Framework Decision 2008/909/GAI.

«precludes a national rule interpreted in such a way as to authorize the executing State to grant the sentenced person the reduction of the sentence because of the work done during his detention in the State of issue, when the authorities of the latter State, in accordance with its law, have not granted such a reduction».

European law is therefore interpreted as meaning that the national judge will have to consider the rules of domestic law as a whole and interpret them as closely as possible to European law (in this specific case, to the 2008 Framework Decision) in order to achieve the result to be it is pursued and will therefore have to disapply where the rules of domestic law are necessary if they are incompatible with European law[218].

To identify the aim pursued by the framework decision, it is also necessary to refer to the *Consideranda* −provisions with the function of guidelines that identify the ratio of the decision −.

The Court proceeds to identify the fundamental rules in the case in question, starting from art. 3 of the framework decision which identifies the main objective to be pursued by the Member States: to promote social reintegration by increasing its opportunities.

With this we should also read *Considerandum* 9, according to which, in making sure that the executing State has the purpose of promoting the social reintegration of the sentenced person, the competent authority of the issuing State should take into account elements such as the attachment of the subject to the executing State, family, linguistic and cultural ties, etc[219].

However, we must take into account that art. 17 of the decision identifies the law of the executing State as the legislation to be applied, given that all should pursue the goal of reintegration and be based on the moral principle of respect for the rights of the human person[220].

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[218]About the respect of the primacy of the European law, see the sentence CGUE C-112/13, 2014; and sent. C-188/10 e C-189/10, 2010.

[219]Cf. C. SCACCIANOCE, *in Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali,* in *Arch. Pen*. 2017.
*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[220] At this regard, about the execution and the verifications to be carried out by the executing State and on the respect of human rights by the Member States see also M. R. MARCHETTI AND E. SELVAGGI, *La nuova cooperazione giudiziaria penale*, Milan, 2019, 259 ff.

Therefore the issuing State would retain its competence for the execution of the sentence until it starts in the executing State.

There would be a division of jurisdiction to decide on the execution of the sentence, each with regard to the period of detention to which the sentenced person was subjected in his own territory with his own system.

However, this reading deriving from art. 17, would not seem in line[221] with the provisions of art. 13 of the decision «as long as the execution of the sentence in the executing State has not started, the issuing State can withdraw the certificate from that State indicating the reasons. Once withdrawn, the executing State no longer executes the sentence».

From this latter provisions, it would appear that not so much a division of jurisdiction, but rather the possibility that the sentencing State withdraws the certificate before the execution of the sentence begins in the executing State[222].

It is a verifiable situation if there is no agreement between the States involved on the specific aspects of the sentence to be executed, both from a temporal and modal point of view. The need for this agreement can also be seen in art. 10, with reference to the recognition and partial execution of the sentence, for which in the absence of agreement it is possible to withdraw the certificate.

On the other hand also art. 17, par. 3 and 4, harmonize[223] the differences inevitably present in the various penitentiary systems of the various member Countries, inviting them to communicate with each other by inquiring about the penitentiary treatments to be performed.

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[221] The goal of reintegratio of the sentenced person would not be concretely achieved since the issuing State would have the possibility to end the transfer procedure, by withdrawing the certificate, due to the diversity of the internal rules of the system.
Cf. C. SCACCIANOCE, in *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali,* in *Arch. Pen.* 2017.
*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[222] See A. MARANDOLA (curated by), *Cooperazione giudiziaria penale*, Milan, 2018, 327 ff..

[223] The mutual recognition does not contrast at all but rather is complementary to the objective of a growing approximation of rational systems, according to the opinion of M.R. MARCHETTI AND E. SELVAGGi, *La nuova cooperazione giudiziaria penale*, Milan, 2019, 251 ff;
See also G. DE AMICIS, *Il mandato di arresto europeo: prassi e problemi applicativi,* in *www.europeanrights.eu,* 2009, 3, that distinguishes the procedural harmonization from the substantive one, believing that some differences between the various legal systems will however continue to exist and therefore require a prudent discretionary appreciation in the recognition and execution of the foreign decision.

The competent authority of the executing State may in fact communicate, upon request, with the competent authority of the issuing State informing it of the applicability of the provisions on early or conditional liberty and the issuing State will be able to verify its application or withdraw the certified[224].

The importance of communication between States and the exchange of information is at the basis of cooperation between Member States and is in fact repeatedly taken up by the European Commission, for example in the Report on the implementation by Member States of Framework Decision 2008/909/JHA and 2009/829/JHA[225].

The Court of Luxemburg therefore excludes that the executing State may reduce the sentence by virtue of the work carried out by the subject during the period of detention suffered in Denmark, sentencing State, if the latter's authorities have not done so in accordance with their internal law, leaving a trace in the certificate referred to in art. 4 of Framework Decision 2008/909/JHA, sent together with the judgment[226].

In fact, a different interpretation, in addition to allowing a retroactive application[227] of the domestic law to the part of a sentence served in another State with another legislation, effectively reviewing that period of detention, would risk compromising the objectives set out above by European legislation, the foundation of criminal judicial cooperation in the European Union, also compromising the mutual trust of the Member States in their respective legal systems.

However, we could object to the decision of the Luxembourg Court about the questionable consequences that would follow[228].

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[224] Cf. CGUE C-554/14, on 8 November, 2016.

[225] See C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali.* in *Arch. Pen.* 2017.
*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[226] See C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali*. in *Arch. Pen*. 2017.
*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[227] On this point cf. E. CALVANESE E G. DE AMICIS, in *Rassegna di giurisprudenza sul mandato di arresto europeo*, 2017, 168.

[228]Cf. C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali.* in *Arch. Pen*. 2017.

In this way, in fact, the principle of the re-educational purpose of the sentence and the principle of *favor rei* would be compromised.

We should interpret European legislation in a sense of attribution to the authorities of the executing State alone, the competence to decide on the execution of the sentence, without any distinction related to the material transfer of the sentenced person[229].

Moreover, our Court of Cassation, resolving a question regarding the applicability of the general pardon to those sentenced abroad and transferred to Italy for the expiation of the penalty with the procedure established by the Strasbourg Convention of 1983 on the transfer of sentenced persons, he pronounced favorably on the applicability of the general pardon[230].

Furthermore, Framework Decision 2008/909/JHA established a system of continuation[231] of the execution of the sentence (taken from the Strasbourg Convention '83), and not of conversion, therefore the execution of the sentence should refer to the period of continuous detention and only one discipline should apply, not falling under two different legal systems. Indeed, by attributing the competence to the authorities of the executing State only (art. 17, par. 2, of Framework Decision 2008/909/JHA), only these can be competent to determine the residual amount of sentence, applying the internal law, therefore a any

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*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[229] As explained by C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali.* in *Arch. Pen.* 2017, which cites inframural work, the primary element of the convicted person's re-educational treatment, aimed at obtaining bonuses and benefits, although different in the various prison laws, but all aimed at reintegrating the sentenced person and a penalty with a re-educational purpose.

*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[230] Cf. C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali*. in *Arch. Pen*. 2017, in which, unlike the solution of the Court of Cassation, a question of unconstitutionality could have been raised with reference to the law of ratification since the Italian citizen sentenced abroad, transferred to Italy to execute the sentence, would have been subjected to a treatment unreasonably unfavorable compared to other Italian or foreign prisoners who could have benefited, during the execution of the sentence, from the applicability of the benefits provided for by their respective laws.

*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[231] On this point see E. CALVANESE E G. DE AMICIS, in *Rass. Giur. Sul mandato di arresto europeo*, 2017, 152, and also A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 133.

problem of length of sentence would be solved by the States concerned by using the envisaged means of information, including databases.

So it is at this time that States will be able to agree on any deductions. In the absence of this, the executing State will obviously have to apply domestic law.

If the penalty calculation does not satisfy the issuing State, this latter will be able to withdraw the certificate and therefore the transfer procedure would end.

It would seem[232] that the authorities of the executing State are not hindered at all by the application of their own legislation to determine the punishment still to be executed, provided that the information obligations are respected, and in cases of adaptation of the punishment, it is necessary to respect the limits set out in the art. 8, par. 2 and 3 and 4, of the 2008 Framework Decision (therefore the adapted sentence cannot be more serious by nature or duration than the one imposed in the sentencing State and cannot exceed the maximum edictal penalty foreseen for the same done by the executing State).

However, it is to be considered that our Court of Cassation[233] had peremptorily stated, in 2013, in sentence n. 73, that the discipline of articles 9 and 10 of the 1983 Strasbourg Convention was without prejudice to the legal order of the executing State, its principles and constitutional rules, affirming the priority of the fundamental principles of the internal order over European law.

In those terms, the sentencing State should be informed of the salient features of the executing State's execution regime and only afterwards could it deny consent to the transfer of the sentenced person if it considers that the legal regime of execution was not substantially equivalent to ours.

On the other hand, the executing State was bound by the legal nature and duration of the sanction provided for in the sentencing State, but «not beyond the limit beyond which a breakdown of its own order would result[234]».

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[232] Cf. C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali.* in *Arch. Pen*. 2017.
*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[233] See the sentence of Constitutional Court 73/2013.

[234] See the sentence of Constitutional Court 73/2001, about the agreements between States for the transfer of sentenced persons abroad, derogations from the application of institutes to protect fundamental human rights.

On the other hand, in the case resolved by the Court of Justice, the primacy of European law was affirmed between the Bulgarian and Danish authorities, so much so as to justify the non-application of domestic law and thus also causing possible unfavourable consequences for the sentenced person.

The Court of Justice, on the other hand, could have highlighted the extend of the exchange of information between the States involved, clarifying that the executing State would have to communicate with the issuing State in order to reach an agreement[235] on the restatement of the sentence and in case of non-agreement, trigger the procedure for collecting the certificate. The conclusions would have been the same (the non-application of domestic law), but starting from different premises[236].

In this regard, the Court of Cassation[237] pronounced in 2013 in relation to the case in which the Surveillance Court of Rome had declared inadmissible the request for early release with regard to the period of detention abroad (in Spain) suffered by the subject (On 3 June, 2009, and on 23 June, 2009).

In the sentence, the previous ruling[238] of 2010 is reported and this latter identified the watershed moment[239] between the application of the order of the issuing State and that of execution at the time of delivery of the subject.

In fact, according to the appellant, the failure to evaluate the period of sentence suffered abroad, which could not be considered as ultra-activity of the internal legal system as it should be counted as the penalty to be expiated, would constitute a violation of the principle of equal treatment and equality[240].

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[235] In this way, also A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 327 ff.

[236] See C. SCACCIANOCE, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali.* in *Arch. Pen.* 2017.
*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

[237] See the sentence of Court of Cassation, criminal sect. 10724/2013.

[238] See the sentence of Court of Cssation, criminal sect. 33520/2010.

[239] On which I will talk also later.

[240] See A. MARANDOLA (curated by), *Cooperazione giudiziaria penale*, Milan, 2018, 327 ff; see also C. Scaccianoce, *Questioni aperte, in tema di reciproco riconoscimento delle sentenze penali*, in *Arch. pen.* 2017.
*http://www.archiviopenale.it/File/DownloadArticolo?codice=d08815df-a36e-4e83-afe3-ca709d87faae&idarticolo=15038*

In fact, the person who expiated part of the sentence abroad for reasons not attributable to him (such as waiting for the transfer) would be disadvantaged compared to the person who expiated the entire sentence in Italy.

Already the sentence 31012/2012 of the Court of Cassation[241] had established the principle of law according to which «the benefits regulated by art. 54 of the Penitentiary set of rules in *favor* of the prisoner who provides proof of participation in re-education, they are also applicable to periods of detention expiated in a foreign State of the European community for facts judges in that Country, when the atonement is then completed in the Italian State».

In fact, art. 54 of the Penitentiary set of rules, does not distinguish whether it is necessary to consider the detention imposed by the Italian or foreign judge, also by virtue of the principle of "fungibility" (to be replaceable) of detentions served in different States (art. 738 of the Italian Criminal Code), also taken up in the process of legal integration between the States of the European Union[242].

Furthermore, art. 16, par. 1, of Legislative Decree 161/2010, which provides for the execution of the sentence according to Italian law following the recognition sentence, and the calculation of the sentence expiated in the issuing State for the purpose of execution, is directed to the harmonization of executive systems and their substantial fungibility.

And also the principles laid down by the Strasbourg Convention[243], in art. 10, par. 2, refer to the continuation of the execution stating «that if the law requires it, the executing State, by means of a judicial or administrative decision, can adapt the sanction to the penalty or measure provided by its internal law for the same type of crime[244]».

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[241] See the sentence of Court of Cassation 31012/2012.

[242] See the sentence of Court of Cassation 10724/2013.

[243] See art. 10, par. 2, of the Strasbourg Convention '83:«if the nature or duration of the sanction is incompatible with the law of the executing State, or its law requires it, this State may by means of a judicial decision or administrative, adapt the sanction to the penalty or measure provided by its internal law for the same type of crime.
The nature of this penalty or measure must correspond, as far as possible, to that imposed with the sentence to be carried out.
It cannot be more serious, by nature or duration, than the sanction imposed in the sentencing State, nor exceed the maximum established by the law of the executing State».
Cf. The official site of Ministry of Justice, International Acts.

[244] See the sentence of the Court of Cassation, I sect., 10724/2013.

These principles are taken from the ruling of the Court of Cassation[245] in 2013, which goes against the provisions of the Surveillance Court of Rome in the order contested by the appellant, in which the magistrate believed that, on the subject of the execution in Italy of a judgment foreign, early release can only be applied with reference to the period of execution of the sentence in Italy and not with regard to the period of execution suffered in the sentencing State[246].

The principle of fungibility of the penalties expiated indifferent States is affirmed, in the sentence of the Cassation[247] in 2012, also with reference to the foreigner sentenced in Italy but arrested abroad for an international arrest warrant and remained there detained pending extradition; that holding period will be assessed as pre-offered with respect to the sentence to be expiated in Italy.

So returning to the concrete case, also the jurisprudence of the Cassation with the sentence 21373/2012, conforming to the principles mentioned above, considers it appropriate to calculate the period of detention suffered by the subject in the Spanish prison for the purpose of the application of the conditional release, in implementation of the discipline legislation of the executing State and therefore also of the penitentiary benefits that this provides, according to a constitutionally oriented interpretation of these rules[248].

## 7. The limited power of the judicial authority of the State of implementation and applicability of general pardon

### 7.1. Applicability of general pardon

With reference to the general pardon mentioned above, even before the framework decision 2008/909/JHA, the Strasbourg Convention '83 established in art. 12 that «Each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws», and case-law of the

[245] See the sentence of the Court of Cassation, 21373/2013.
[246] I refer to the sentence of the Court of Cassation, I sect., 21373/2013, which canceled the order of the Supervisory Court that declared the request for early release inadmissible with regard to the detention period offered in Spain, pending transfer to Italy.
[247] See the sentence of the Court of Cassation, 7917/2012.
[248] See the sentence of the Court of Cassation, I criminal sect., 21373/2013.

supreme courts has always excluded that Italy, as executing State, can unilaterally apply the internal discipline of general pardon[249].

In support of this orientation there was the 1994 judgment[250], in which the Court held that in the event of the transfer to Italy of a person sentenced abroad, pursuant to the Strasbourg Convention, the grace or amnesty may apply but not the general pardon because no mention is made of it in the same Convention, also recalling the principle of *ubi voluit dixit*, according to which if the signatory States had also intended to understand the applicability of the pardon, they would have included it in the Convention[251].

However, there was also a doctrine which, against the spirit of the Convention, recalled that general pardon is an institution *quid minus* with respect to the amnesty and referring to art. 174, paragraph 1, of the Italian Criminal Code according to which «general pardon, as well as pardon, partially condones the punishment imposed or commutes it into another kind of punishment established by law» considered it equivalent, for legal effects, to pardon, and therefore peacefully applicable [252].

Furthermore, in the Cooperation Treaty for the execution of criminal sentences stipulated between Italy and Thailand on February 28, 1984, art. V, regulating the procedure for the enforcement of the sentence, established that the enforcement of a sentence of a transferred sentenced person is carried out according to the laws and procedures of the receiving State and the latter can also apply its own laws and procedures, as well as those governing the reduction of terms of detention […]. The transferring State also has the power to pardon the sentenced person or to commute the sentence and the receiving State, having received the communication of the pardon or commutation, will execute it[253]».

[249] See Judgement Cass. Criminal section I, 14 March 2007, c. Poma.
[250] See Judgement of the Court of Cassation, Criminal section I, 22 May 1994, c. Pileggi.
[251]Cfr. M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Riv. Dir. Proc. Pen*., 2008 477.
[252] Cfr. M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Riv. Dir. Proc. Pen.*, 2008 477.
[253] Art. V of Cooperation Treaty for the execution of criminal sentences stipulated between Italy and Thailand, stipulated on the 28th February 1994.

Therefore, the general pardon institution would also seem to be included among the procedures that regulate the reduction of the terms of detention, either as pardon-amnesty or as pardon-commutation[254].

According to the 2007 Court[255], instead, the term commutation cannot also mean the general pardon institution as they would be two separate and autonomously regulated legal institutions.

Article. 174 of the Italian Criminal Code regulates general pardon and art. 3 of Law 34/87 the commutation of the sentence.

Only in 1997 this position was exceeded by the Cassation itself[256]; in the specific case, the Austrian judicial authority had sentenced a person to 3 years of imprisonment, with the application of the benefit of the conditional suspension of the last 6 months of detention as a result of the Austrian amnesty measure of 1995. The Italian Court, as receiving State, decided to deny the amnesty since that Austrian provision had the substantial nature of partial pardon, placing a criticism on the exclusion of the institute from art. 12 of the Strasbourg Convention.

It therefore expressed the principle according to which «the adaptation of the penalty imposed with the foreign sentence recognized in Italy must be carried out respecting the foreign sentence with reference to the overall treatment which, by virtue of this title and in the context of the related discipline, is imposed on the subject: so that this treatment cannot be more serious than that provided for by foreign legislation. As a consequence, in Italy the period relating to any benefit granted by the foreign authority must be deducted from the penalty imposed».

Such ruling was not at all conclusive, albeit contrary to the current, and probably because it was not an initiative of the receiving State but an adaptation of the penalty, imposed according to the provisions of the foreign law, only order to conform it to the Italian legal system[257].

The problem of the applicability of the general pardon also arose subsequently, both with regard to art. 13, paragraph 1, of Framework Decision

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[254] Cfr. M. PISANI, *Rapporti giurisdizionali con autorità straniere,* in *Riv. Dir. Proc. Pen*., 2008 477 ff.
[255] See Judgement of the Court of Cssation, Criminal section I, 22 May 1994, c. Pileggi.
[256] See Judgement of the Court of Cassation, Criminal section I, 28 February 1997, ric. Giacon.
[257] Cfr. M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Riv. Dir. e Proc. Pen*., 2008, 478.

2002/584/JHA as a mandatory reason for refusing the execution of a European arrest warrant, and with regard to Decision 2008/909/JHA on the subject of mutual recognition of the sentence and subsequent power of adaptation the competent authority of the executing State.

With regard to the first topic, we report the sentence n. 32963 of 2011.

The applicant had contested the judgement of the Court of Appeal in which the delivery of the Polish citizen to Poland for the execution of the sentence was ordered, believing that there was an incorrect application of art. 18, paragraph 1, lett. l) of Law 69/2005 which provides for the extinction of the crime due to amnesty as a reason for refusing delivery. According to the applicant, in fact, the amnesty is an institution comparable to the general pardon, legally equivalent, due to the difficult comparison of the various European systems, therefore in the concrete case the judicial authority would have had to deny the delivery due to the general pardon that covered the crime.

The Court found this reason unfounded since the application of national legislation must be interpreted in accordance with European law expressed in the framework decision, where there is no trace of general pardon, but in art. 3, point 1, of Framework Decision 2002/584/JHA, there is an explicit reference to amnesty[258].

Furthermore, as also clarified in the previous sentence of 2008, the case of refusal to surrender is subject to the existence of the jurisdiction of the Italian State on the facts of the crime of which the subject is accused, and in this specific case this condition of territorial judgment is not present[259].

In the judgment[260] just reported by the Court, the appellant objected to the constitutional illegitimacy of art. 18, paragraph 1, lett. l) for violation of the principle of equality (art. 3 of the Italian Constitution) where it does not provide for mandatory refusal to delivery even in case pardon was applicable. In fact, amnesty, like general pardon, «does not in any case entail the execution of the penalty imposed», therefore they would have the same *ratio*.

[258] Art. 3, point 1, Framework Decision 2002/584/JHA on the European arrest warrant and the delivery procedures between Member States.
[259] Cit. Judgement of the Court of Cassation, Criminal working section, 32963/11.
[260] See Judgement of the Court of Cassation, Criminal working section, 34957/2008.

The Court instead believed that the exception was manifestly unfounded and also incorrect in the exposure of the legal institutions; in fact, although amnesty and general pardon seem similar since they imply an exclusion of punishment, they actually have different procedural and substantial effects, which cannot be compared to the generic effect of the non-execution of the penalty, as instead alleged by the appellant.

In fact, general pardon (art. 174 of the Italian Criminal Code) presupposes the exercise of the criminal action and the subsequent declaration of criminal responsibility of the subject. On the other hand, amnesty (Art. 151, 157 of the Italian Criminal Code) if applied before the trial, would have a complete abolition efficacy, while if it intervened after the sentencing sentence it would have a partial abolition efficacy as the effects of the crime would be maintained. Amnesty is an extinctive cause of the crime, while pardon is an extinctive cause of the punishment[261].

### 7.2. Judicial authority adaptation power

With regard to the issue of mutual recognition, the issue is more complex as it also concerns the powers of the competent judicial authority of the executing State −as we have mentioned in this chapter, in the par. "Execution of the sentence following mutual recognition"−.

When the competent authority recognizes the sentence, it can adapt the penalty, pursuant to art. 10, paragraph 5, of decree 161/2010, to bring its duration back to the maximum required by national law for that offense subject to conviction, but this power of adaptation is not unilateral as the authority of the issuing State maintains the his competence up to the moment of the actual execution (and therefore up to the moment of the transfer of the subject).

Even in case the authority deems to proceed with the partial recognition of the sentence, it should inform the issuing State pursuant to art. 10, paragraph 3, of Decree 161/2010, in order to agree with it the conditions of recognition and execution provided that these do not lead to an increase in the duration of the sentence provided for in the sentence, otherwise, in the absence of an agreement,

[261] See Judgement of the Court of Cassation, Criminal working section, 34957/2008, on the European arrest warrant and general pardon.

the certificate is considered withdrawn and the subject will have to expiate the sentence in the issuing State[262].

Even recently, on June 19, 2019, the Court of Cassation[263] ruled on the application of general pardon and the power of adaptation of the judicial authority of the executing State.

In the specific case, the grant of the pardon, in application of the Law 241/2006, referred only to the disputed crimes of evasion and misappropriation and not to that of money laundering, with consequent punishment to be carried out for 4 years and 6 months, instead of 5 years and 6 months.

Among the reasons for appeal, in addition to the incorrect application of Law 241/2006 on general pardon, since this can also be applied in the specific case[264] to the crime of money laundering as also considered by the Court of Cassation, the main question concerns the operation carried out[265] by the Court of Appeal, theoretically not allowed, as it consists of a review of the sentence imposed by the Romanian judicial authority without prior agreement with the latter.

In fact, the recognition of the sentence subject to the European arrest warrant must respect the legal nature and duration of the criminal sanction imposed by the judicial authority of the issuing State, except for limited power of adaptation pursuant to art. 10, paragraph 5, of Decree 161/2010.

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[262] See A. MARANDOLA (curated by), *Cooperazione giudiziaria penale*, Milan, 2018, 327 ff.

[263]See Judgement Cass. IV section. 27359/19, in which an Italian citizen, who was subject to a European arrest warrant for executive purposes for a sentence issued by the judicial authority of Romania, concerning a sentence of 5 years and 6 months for the crimes of evasion, embezzlement and money laundering, had appealed to the Court of Cassation against the judgment of the Court of Appeal of Brescia which had refused delivery for the reasons set out in art. 18, paragraph 1, lett. r), had recognized the Romanian sentence and had ordered, following the pardon, the execution of the sentence in Italy.

[264]The Court reports Law n. 241 of 2006 «granted general pardon, for all the crimes committed up to the end of May 2, 2006, to the extent not exceeding three years for prison sentences and not exceeding € 10,000 for single fines or for prison sentences", believing that the same does not apply in particular to the crime referred to in art. 648 bis of the criminal code (money laundering) "limited to the hypothesis that the replacement concerns money, goods or other utilities deriving from the crime of kidnapping for extortion purposes or from crimes concerning the production or trafficking of narcotic or psychotropic substances».

The Court ruled that the money laundering crime for which the appellant was convicted, was excluded from this provision, as it concerns sums deriving from evasion and misappropriation.

[265] First, where necessary, in the presence of a final judgment, in order for the judge to effect the split of the continued crime so as to proceed with the application of the general pardon to some crimes, he must consider the penalties actually imposed for each of them; See the Court of Cassation United Sections n. 21501 of 2009, Astone, RV 243380.

Even the European Court of Justice[266], the previous year, had clarified the mechanism provided for by art. 4, point 6 of Framework Decision 2002/584/JHA, which provides for the refusal of the execution of a European arrest warrant for executive purposes, if the requested person lives, lives or resides in the executing Member State, and then that State will undertake to execute the penalty or security measure in accordance with its domestic law; it believed that any refusal to execute a European arrest warrant of a citizen or resident or resident in the executing State, would in any case presuppose a "real commitment[267]" to execute the penalty imposed by the authority of the issuing State; therefore, before proceeding with the refusal, the judicial authority should verify the possibility of concretely executing the "same" sentence imposed, in accordance with domestic law; in case the authority cannot guarantee the serious commitment to carry out the sentence concretely, it will then have to execute the arrest warrant by delivering the requested person to the issuing State and therefore will not be able to avail itself of the reason for refusal provided for by art. 4, point 6, of the 2002 decision[268].

According to the Court of Justice, the execution of the European arrest warrant would be the general principle while the refusal of delivery would be an exception subject to a restrictive interpretation[269].

As regards the procedure to be applied at the time of execution of the sentence, the regulatory gap left by the 2002 framework decision was filled[270] by the framework decision 2008/909/JHA, which, in art. 25[271] provides for their application, *mutatis mutandis,* where they are compatible[272] with those of the 2002 Framework decision.

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[266] See Judgement ECJ 13 December 2018, SUT C-514/17; and Judgement ECJ 29 June 2017 poplawski, C-579/15.
[267] Cit. ECJ 13 December 2018, SUT C-514/17; and judgement ECJ 29 June 2017 poplawski, C-579/15.
[268] Cfr. *Osservatori, Le condizioni di rifiuto facoltativo del M.A.E. nei reati diversamente sanzionato con pena detentiva nello Stato emittente e pena pecuniaria nello Stato di esecuzione,* in *Cass. Pen*., 2019, file 1, 1290 ff.
[269] See judgement ECJ 19 September 2018, R O, C-327/18.
[270] See *Osservatori, Le condizioni di rifiuto facoltativo del M.A.E. nei reati diversamente sanzionato con pena detentiva nello Stato emittente e pena pecuniaria nello Stato di esecuzione*, in *Cass. Pen*., 2019, file 1, 1290 ff.
[271]See Art. 25 of Framework Decision 2008/909/JHA.
[272]CJEU also clarified that the provisions of the Framework Decision 2008/909/JHA cannot affect the methods of application of the optional reason for non-execution of the arrest warrant, pursuant

Furthermore, also *Considerandum* n. 12 of the 2008 Decision clarifies that

«This Framework Decision should also, mutatis mutandis, apply to the enforcement of sentences in the cases under Articles 4(6) and 5(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States […] the executing State could verify the existence of grounds for non-recognition and non-enforcement […] as a condition for recognising and enforcing the judgment with a view to considering whether to surrender the person or to enforce the sentence in cases pursuant to Article 4 of Framework Decision 2002/584/JHA».

Therefore, once the findings of the Court of Justice and the provisions of the 2008 framework decision have been reported, we deduce that the powers of the executing State are limited[273] to the provisions of art. 8, par. 2[274], of the same decision and by art. 10, paragraph 5, of Legislative Decree 161/2010.

As to the unilaterality of the power of adaptation, it does not seem to be allowed given the art. 13 of the 2008 decision, according to which: «As long as the execution of the sentence in the executing State has not started, the issuing State can withdraw the certificate from that State indicating the reasons. Once the certificate is withdrawn, the executing state no longer executes the sentence».

Some authors[275] have found a violation of the principle of re-education purposes in the latter provision, since by withdrawing the certificate the citizen will not be able to expiate the penalty in the State of citizenship / residence / residence or in the most efficient ways for his re-education.

In order to avoid the aforementioned consequence, the jurisprudence is firm in believing that the executing State, before the transfer of the sentenced

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to art. 4, point 6, of Decision 2002/584/JHA, since these can be applied «only to the extent that they are compatible with the provisions of the latter» Cit. CJEU Judgement SUT, C-514/17, 2018.

[273]Cf. CJEU Judgement 8 November 2016, Ognyanov, C-554/14, in which the Court clarified that art. 8 of Decision 2008/909/JHA establishes strict requirements for the adaptation, by the competent authority of the executing State, of the penalty imposed in the issuing State, which are the only exceptions to the principle obligation to recognize and to execute the sentence whose duration and nature correspond to those provided for in the sentence issued in the issuing State.

[274]See art. 8, par. 2, Framework Decision 2008/909/JHA: «Where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State».

[275] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 327.

person[276], must notify the issuing State of any changes to be made to the penalty to be executed so as to adapt it to the internal legislation of the State where the sentence will be expiated.

Thusly, the issuing State will be able to evaluate the coherence and proportionality of the readapted penalty and in case of negative evaluation, it will be able to withdraw the certificate and not transfer the subject[277].

In conclusion, in the concrete case on which the Court of Cassation has ruled, in light of the interpretation and clarifications provided by the Court of Justice, the executing State should proceed with the communication, before the transfer of the sentenced person, also in relation to the recognition partial sentence or application of general pardon, amnesty or pardon, as the latter institutions would significantly affect the remaining sentence to be expiated[278].

Nevertheless, it is also necessary to consider a previous sentence of the United Sections of 2008[279], on the applicability of the pardon to persons sentenced abroad and transferred to Italy to execute the sentence, by virtue of the 1983 Strasbourg Convention; the Court considered the possibility of proceeding with a finding of unconstitutionality of the law of ratification of the same Convention since the Italian citizen sentenced abroad, transferred to Italy to execute the sentence, would have been subjected to an unreasonably unfavorable treatment compared to the other prisoners, both Italians and foreigners, having carried out the sentence in Italy immediately, could have take advantage of the benefits provided for by the legislation.

[276] Since if the communication took place following the transfer, the issuing State could no longer withdraw the certificate since the material transfer of the subject marks the moment of watershed between the application of the legislation of the issuing State and that of the executing State.
See sentence of Court of Cassation 33520/2010.
[277] See *Osservatori, Le condizioni di rifiuto facoltativo del M.A.E. nei reati diversamente sanzionato con pena detentiva nello Stato emittente e pena pecuniaria nello Stato di esecuzione,* in *Cass. Pen*., 2019, file 1.
[278] See Art. 10, par. 3, Legislative Decree 161/2010: «If the Court of Appeal considers that it can proceed with partial recognition, it immediately informs, also through the Ministry of Justice, the competent authority of the issuing State and agrees with it the conditions for partial recognition and execution, provided that these conditions do not result in an increase in the length of the sentence».
[279] See judgement of the Court of Cassation, S.U. n. 36527/2008, Napoletano, Rv. 240399.

Therefore, the principle of reasonableness and equality would be violated, despite the objective of the transfer being that of a greater and effective possibility of re-socialization of the sentenced person[280].

Furthermore, the Constitutional Court[281] in 2001 had clarified, with regard to the relations between States on the transfer of sentenced persons abroad, that the sentencing State could have given or refused consent to the transfer of the sentenced person if it ascertained, through the requests on the characteristics and methods of treatment, that the legislation of the country of execution was not substantially equivalent.

The Court also clarified that the executing State would be bound by the nature and duration of the sanction provided for in the sentence, but only within a certain limit, beyond which there would be a clear contrast with the fundamental principles of its own system.

Therefore this latter orientation would seem to be in contrast with the above mentioned interpretation given by the Court of Justice as it would seem to exclude that the agreement with the issuing State could lead to the application of a "special" execution regime to the convict, denying him entirely the application of the pardon begins. In addition, pardon is an institution that has been subtracted from the availability of the parties, therefore any agreement on its application would be useless[282].

It is true, as we have just seen, that the obligation to interpret national law in accordance with European law[283] «cannot be the basis for an interpretation of national law *contra legem*», but it is also true that when the competent authority does not obtain consent from the issuing State, if the other conditions are met in application of Law 69/2005, it is required to execute the delivery.

Therefore, the Court of Cassation concludes, believing that, if delivery to the issuing State is refused and is prepared, in accordance with art. 18, paragraph 1, lett. r), Law 60/2005, the execution of the sentence in Italy, the power of adaptation of the Court of Appeal will be limited to the reduction of the same

[280] Cfr. *https://canestrinilex.com/risorse/mae-senza-accordo-dello-stato-emittente-niente-indulto-cass-2735919/*
[281] See Judgement of the Constitutional Court, 73/2001.
[282] See Judgement of the Court of Cassation, section. 3, n. 41875/2008, Poneti, Rv. 241411.
[283] In particular, art. 4, par 6, of framework Decision 2002/584/ JHA.

penalty if higher than the maximum edictal one foreseen by the internal regulations, calculating it according to the of the criminal law principles (proportionality principle), by virtue of the principle of legality which is at the basis of criminal law[284].

If it is then intended to refuse the delivery and order the enforcement of the sentence in Italy, the competent judicial authority must inform the issuing State of the application of the indult benefit, and if it does not obtain the consent of the State involved, it cannot proceed unilaterally, as analysed above, but will instead be required to deliver[285].

[284] Cit. Maximum of the sentence of the Court of Cassation, VI section, 27359/2019.
[285] Cit. Maximum of the sentence of the Court of Cassation, VI section, 27359/2019.

# CHAPTER II
# THE EUROPEAN ARREST WARRANT AND THE DELIVERY OF THE SUBJECT

## 1.The EAW overpasses the extradition

The regulation on the European arrest warrant is part of a context in which the procedure for the delivery of wanted persons in foreign countries was already regulated (so-called extradition).

The regulation on the EAW aims to overcome the institution of extradition, considered difficult to apply, mainly because of the implementation difficulties that lengthened the time of its procedures[286]. The *Considerandum* n. 5, in fact, reminds that «the objective of the Union to become an area of freedom, security and justice involves the suppression of extradition between Member States and its replacement with a surrender system between judicial authorities».

It is in fact an instrument meant to speed up and facilitate the surrender procedure between the authorities of the Member States, as well as its increasingly frequent use, as shown in the table below[287].

| | **2005** | **2006** | **2007** | **2008** | **2009** | **2010** | **2011** | **2012** | **2013** | **2014** | **2015** | **2016** | **2017** |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **AWs Issued** | 894 | 889 | 0 883 | 4 910 | 5 827 | 3 891 | 784 | 0 665 | 3 142 | 4 948 | 6 144 | 6 636 | 7 491 |
| **AWs Executed** | 36 | 223 | 221 | 078 | 431 | 293 | 153 | 652 | 467 | 535 | 304 | 812 | 317 |

Extradition is also an instrument through which a State surrenders (extradition in passive form) a person requested by another State (active extradition) for the purpose of executing the sentence against him or for

[286]See GIOVANNI MODESTI, *L'istituto del mandato di arresto europeo e la sua applicazione in Italia. Alla luce di una interpretazione flessibile adottata dalle S.U. della Cassazione*, 2005, 5.
[287] *https://e-justice.europa.eu/content_european_arrest_warrant-90-it.do.*

establishing a trial against him , but acts in the area of criminal cooperation on an international level.

Indeed, it finds primary sources in international law and in bilateral or multilateral treaties stipulated between countries.

In the Italian system, this instrument is also governed by articles 10, paragraph 4, 26 of the Italian Constitution, and also the fundamental rights guaranteed by the same Constitution must be respected; and like the European arrest warrant, extradition is subject to the international principles of double incrimination and *ne bis in idem* discussed above.

In order to identify the surrender discipline to be followed, it is necessary to consider not the nationality of the subject to be delivered, but the regulatory discipline that exists in the relationship of judicial cooperation between the requesting State and the one receiving the request[288].

In case the regulation on the European arrest warrant is not to be applied, the request for extradition can also be identified in the request for the European arrest warrant, when this has been issued by a competent authority also for the issuance of an extradition request and when there are all the requisites.

Therefore, the EAW is not a very innovative discipline, but an "overcoming[289]" of extradition, which simplifies and accelerates its procedure[290].

The most significant change was the limitation of the role of government authorities to a function of mere bureaucratic assistance[291]; in fact, in the passive extradition procedure, the Minister of Justice decides on the request for surrender by the foreign State, establishing the methods and possibly requesting the application of precautionary measures; therefore he has a preponderant role within the delivery procedure.

In the discipline on EAW, the government authority has mainly the function of transmission and reception of the documentation.

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[288] See Cass. Pen., Sect. VI, n. 40760/2016, Pozdnyakov.

[289] As believed by most of the doctrine, see M. PISANI, Rapporti *giurisdizionali con autorità straniere*, in *Riv. It. Dir. e proc. Pen*., 2004, file 3, 710, and also L. KALB, *Mandato di arresto europeo e procedure di consegna*, Milan, 2005, 430, and also the very same words of G. KESSLER, when implementing Framework Decision 2002/584/JHA.

[290] Cit. L. KALB, *Mandato di arresto europeo e procedure di consegna, sintesi dei lavori parlamentari*, Milan, 2005, 430.

[291] Cfr. art. 7 Framework Decision 2002/584/JHA.

Thus, the main function is carried out by the judicial authority, and this also to allow greater uniformity between the Member States and direct collaboration between the competent judicial authorities, which is based on the principle of mutual trust [292], in implementation of which some European magistrates, as early as 1996 in Geneva, they highlighted the need for a direct relationship between the judges without political filters[293].

Paragraph 2 of art. 28 of Law 69/2005 provides for the transmission of the arrest warrant to the Minister of Justice, who will translate the text in the language of the Member State of execution of the warrant and transmit it to the competent authority[294].

The function of the Minister of Justice is therefore purely administrative and consists in receiving the arrest warrants to be executed in Italy and in transmitting the mandates issued by the Italian judges and prosecutors providing for the translation of the documents[295].

The doctrine is divided on the relevance of the role played by the Minister of Justice: according to some authors[296], it would be a marginal role, emptied as its functions are reduced to a mere communication and transmission of documents as if it could be redefined as a "paper pass[297]".

Despite the great difference[298] between the central role of the Minister in the extradition procedure and the "marginal" role of the same in the European surrender procedure, according to other authors[299] we could instead speak of the Minister of Justice as "central authority" as he does not only have functions technical and legal assistance but also to solve problems related, for example, to authenticity or the transmission of documents.

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[292] See L. KALB, *Mandato arresto europeo e procedure di consegna, sintesi dei lavori parlamentari*, Milan, 2005, 141.
[293] See BRUTI LIBERATI-PATRONE, *Il mandato di arresto europeo*, in *Quest. Giust*., 2002, file 1, 71.
[294] Cf. A. MARANDOLA (curated by), *Cooperazione giudiziaria penale*, Milan, 2018, 617 ff.
[295] See Vademecum per l'emissione del mandato di arresto europeo, Ministero della giustizia, Direzione generale della giustizia penale.
*https://www.giustizia.it/resources/cms/documents/Vademecum_mandato_arresto_europeo.pdf*
[296] Cf. A. CHELO, *Il mandato di arresto europeo*, Padova, 2010, 31 ff; see also A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 478 ff.
[297] See A. CHELO, *Il mandato di arresto europeo*, Padova, 2010, 32 cit.
[298] On which it will explain later.
[299] See the opinion of CALVANESE-DE AMICIS reported in A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 620.

However, it's right the elimination of the politic filter that made the proceeding faster than before[300].

## 2. Parliamentary work and implementation of the Framework Decision 2002/584 / JHA in Italy

Italy implemented the framework decision only in 2005, distinguishing itself from the other member countries for the failure to comply with the deadlines agreed with them and for the total lack of timeliness in applying the instruments of judicial cooperation[301].

The matter of the implementation of the system as envisaged at European level in the internal law was discussed on numerous occasions, especially in doctrine; some authors [302] considered it incompatible with the Italian Constitution[303], since it would be an instrument for creating a common European legal space, where the word "common" would be too vague and also the catalogue of crimes referred to in art. 2 of the decision does not provide a precise list but it only delineates the outlines.

Others[304], instead, provided an "attenuated" reading according to which this system would be only a simplification of the extraditional delivery system already envisaged; therefore it should not change the assumptions or extent of the state's punitive authority but only simplify the slow and complicated procedure,

[300] At this regard, cd. M. BARGIS and E. SELVAGGI, *Il mandato di arresto europeo dall'estradizione alle procedure di consegna*, Torin, 2005, 394 ff.
In doctrine, see also M. CHIAVARIO, G. DE FRANCESCO, D. MANZIONE, E. MARZADURI, *Il mandato di arresto europeo, commento alla legge 22 aprile 2005 n. 69*, Milan, 2006, 121 ff, according to which the figure of Minister of Justice requires times that are not compatible with that provided in the discipline of the European arrest warrant.
[301] See L. KALB, *Mandato di arresto europeo e procedure di consegna*, Milan, 2005, 304.
[302] See VASSALLI and CAIANIELLO, *Cass. Pen.* 2002, 462 ff.
[303] See G. PALLADINO, *Il mandato d'arresto europeo, tra appiattimento e preservazione della tutela personale*, 2007.
*https://www.diritto.it/il-mandato-d-arresto-europeo-tra-appiattimento-e-preservazione-della-tutela-personale/#_ftn10*
[304] See also M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Rivista di diritto e procedura penale* 2004, file 3, pag. 707, in which the need for such an instrument would be justified in the need to overcome the long and complex extradition procedure deemed by now inadequate to an area without borders, characterized by a high level of trust and mutual cooperation between the States of the Union.

eliminating interference of political power and jurisdictionalizing the procedure so as to guarantee fundamental rights[305].

Indeed, the delay in implementation was due to the necessary balance between compliance with the framework decision on the one hand and respect for the constitutional principles on the other, ensuring, in the matter of the European arrest warrant, the implementation of the fundamental constitutional guarantees[306].

In fact, the Italian legislator would have implemented the European decision, explaining however the limits constituted by the supreme principles of the internal system incompatible with what is foreseen in the European headquarters, so that the realization of the new delivery system would involve an increase in values and guarantees and not a loss of these[307].

This is the theory of counter-limits, which the Constitutional Court[308] made itself its bearer, placing a limit on the supremacy of European law (and the consequent limit of national sovereignty referred to in art. 11 of the Constitution, if this is incompatible with the fundamental constitutional principle, which would not constitute a *numerus clausus*[309], but should be identified from time to time, through an accurate balance of interests judgment, elaborated by the Constitutional Court.

However, according to some authors[310], the explicit reference to the supremacy of the constitutional principles contained in art. 1 of the transposition law would be meaningless since these are principles which, as they are of constitutional rank and guarantee the accused, are inherently intangible; this

[305] This is also the interpretation given by the Grand Chamber of the Court of Justice, with judgement C/303/05 of 3 May 2007.
Also in G. PALLADINO, *Il mandato d'arresto europeo, tra appiattimento e preservazione della tutela personale*, 2007.
*https://www.diritto.it/il-mandato-d-arresto-europeo-tra-appiattimento-e-preservazione-della-tutela-personale/#_ftn10*

[306] On this point, see the comment of S. BUZZELLI reported in M. BARGIS e E. SELVAGGI, *Il mandato di arresto europeo dall'estradizione alle procedure di consegna*, Torin, 2005, 74 ff, in which the European arrest warrant could be seen, at first glance, as a monster capable of upsetting the balance and wiping out consolidated guarantees and constitutionally protected rights, rather than an arrow in the bow of national authorities in the fight against crime.

[307] Cf. M. PISANI, *Rapporti giurisdizionali con autorità straniere,* in *Rivista italiana di diritto e procedura penale*, 2004, file 3, 709.

[308] See the sentence of the Constitutional Court n. 238 of 2014.

[309] See G. COLAIACOVO, G. DE AMICIS, G. IUZZOLINO (edit by), *Parte Speciale sul Mandato di arresto europeo,* nella *Rassegna di giurisprudenza e di dottrina*, di G. LATTANZI e E. LUPO, Milan, 2013, 10.

[310] Cf. A. CHELO, *Il mandato di arresto europeo,* Padova, 2010, 12 ff.

provision therefore, rather than recalling the necessary prudence in accepting a possible judicial decision issued by a Member State, and avoiding any type of automatism (in fact it speaks about implementation under condition), would instead have a reconnaissance and reassuring purpose[311].

The solution of the jurisprudence of the United Sections that followed one another revolved around the concept of "compliant interpretation[312]", thus finding a fair balance between the application of national legislation and European law.

In this way, despite the mutual trust between the States of the Union (the basis of cooperation between them), and the consequent suppression of political control[313], any type of automatism would have been avoided and "sufficient control" would have been guaranteed; in fact, the judge would be required to verify whether the rule in question can be interpreted in accordance with the result pursued by the framework decision, setting an interpretation *contra legem* of domestic law[314] as the limit of applicability.

In particular, the parliamentary committee discussed, for a long time on the request for the consent of the requested person to be handed over to the requesting State.

The internal regulation should in fact have given rise to a real simplified procedure, guranteeing in any case the expression of a free and autonomous determination, with awareness of the effects consequent to its declaration.

Therefore the subject should have been placed in the ideal conditions for example through information, also with the help of interpreter, if there were linguistic difficulties, and of a legal assistant, so as to guarantee the principles of due process and more, since what was declared should have been acknowledged in the minutes, so as to also guarantee the principle of transparency, the basis of our system[315].

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[311]Cf. A. CHELO, *Il mandato di arresto europeo,* Padova, 2010, 13.
[312]See G. COLAIACOVO, G. DE AMICIS, G. IUZZOLINO (edit by), *Parte Speciale sul Mandato di arresto europeo,* nella *Rassegna di giurisprudenza e di dottrina*, di G. LATTANZI e E. LUPO, Milan, 2013, 12.
[313]M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Rivista italiana di diritto e procedura penale*, 2004, file 3, 708.
[314] See G. COLAIACOVO, G. DE AMICIS, G. IUZZOLINO (edit by), *Parte Speciale sul Mandato di arresto europeo,* nella *Rassegna di giurisprudenza e di dottrina*, di G. LATTANZI e E. LUPO, Milan, 2013, 10.
[315] See L. KALB, *Mandato di arresto europeo e procedure di consegna*, Milan, 2005, 312.

Problems also arose with regard to the content of the European arrest warrant.

In fact, the *Considerandum* n. 8 of the Framework Decision requires sufficient control[316] by the judicial authority of the requested State regarding the assessment on delivery.

But on the basis of what should the check be carried out?

Article 9 of the same Framework Decision indeed provides sufficient formal requirements as the content of the European arrest warrant, and its translation into the official language of the Member State in order to allow the aforementioned control.

However, this provision must be coordinated with art. 15, par. 2, of the framework decision which attributes to the judicial authority of the requested State the possibility of requesting the additional information necessary for the acceptance of the application if it considers that the content of the arrest warrant is not sufficient for the evaluation.

The Italian Parliament, in implementing these provisions, therefore questioned the evidentiary powers that can be used by the judge for the purposes of the decision, avoiding the potential violations of articles 13, 24, and 111 of the Constitution which could materialize if the description of the circumstances of commission of the crime referred to in art. 8, par. 1, lett. e) of this decision and therefore the judge could not have correctly verified the existence of the conditions[317] for the application of any precautionary measure pursuant to art. 273 of the Italian Criminal Code, nor provide adequate motivation.

Therefore, a situation of unequal treatment could have occurred with regard to those who are instead subjected to a precautionary measure within an Italian proceeding[318].

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[316] This control is the essence of the institution, it symbolizes the transition from purely cooperation between States to complete judicial cooperation, where the intervention of central bodies actually becomes ancillary, limited to practical-administrative assistance.
On this point, see S. BUZZELLI reported in M. BARGIS e E. SELVAGGI, *Il mandato di arresto europeo dall'estradizione alle procedure di consegna*, Torin, 2005, 77 cit.

[317] Including the seriousness of the crime, the possible presence of a reason for justification or non-punishment or extinction of the crime or penalty (art. 272, par. 2, of the Code of Criminal Procedure.

[318] See L. KALB, *Mandato di arresto europeo e procedure di consegna*, Milan, 2005, 255.

Parliament was divided between those[319] who considered the review of the Italian judge excessively superficial compared to what is required by internal legislation, and those[320] who argued that such review should have been the responsibility of the judicial authority of the requesting State.

The result of the debate is art. 6 of the implementing law, which provides not only the content of the application for the purposes of the main decision on delivery, but also the elements to be attached, necessary (provided for in paragraph 4 of the same article) for the purposes of the accessory decision on the application of a any precautionary measure.

For the purpose of effective control, paragraph 5 provides that, if the issuing judicial authority does not provide the elements described in the aforementioned article, the president of the Court of Appeal requests the Minister of Justice to acquire the authority's provision. Judicial basis of the arrest warrant and the documentation referred to in paragraph 4; if the issuing judicial authority does not process it, the delivery request will be rejected. Although this solution is not provided for in the framework decision, the issuing authority would therefore have a real burden of allegation in order to ensure sufficient control by the Italian judicial authority.

What is certain is that such a strict rule might seem to conflict with the principle of free conviction of the judge who should have the possibility to decide in a different direction from the rejection even if he has requested additional information that was not received[321]. Overall, it would seem a weighting of the forms that does not highlight substantial novelties with respect to the provisions of the conventions[322].

As for jurisdiction and judicial control, the framework decision provides, as already mentioned in par. "The EAW overpasses the extradition", the

[319] See L. KALB, *Mandato di arresto europeo e procedure di consegna*, Sintesi dei lavori parlamentari, 2005, in particular the intervention of PISAPIA and ROSSI in the session of 13 November, 591.
[320] See L. KALB, *Mandato di arresto europeo e procedure di consegna*, Sintesi dei lavori parlamentari, 2005, in particular the intervention of PISAPIA and ROSSI in the session of 13 November, 591.

[321] Cf. L. KALB, *Mandato di arresto europeo e procedure di consegna*, Milan, 2005, 283.
[322] See L. KALB, *Mandato di arresto europeo e procedure di consegna*, Milan, 2005, 283.

jurisdiction of the judicial authority to assess the surrender of the requested person.

In implementing the decision, Italy has identified the Court of Appeal as the competent body; if there is direct collaboration between the judicial authorities of the States, the Court must in any case inform the Minister of Justice (designated as central authority) of the receipt or issue of the arrest warrant; as a result, differentiating from the procedure envisaged with regard to extradition, the competence to issue precautionary measures was also attributed to the Court of Appeal.

In fact, while in the extradition procedure there is a division of functions in relation to the surrender (of which the competence is attributed to the Minister of Justice) and the exercise of the precautionary power (by the Court of Appeal, which has a limited power to verify the existence and validity of the conditions for granting extradition and following this verification, even at the request of the Minister, can order precautionary measures) the European arrest warrant is a measure that in itself is suitable for activating the exercise of the precautionary power and the surrender decision by the Court of Appeal.

The attribution of competence to the aforementioned body is justified by the will of the Italian legislator, when implementing the framework decision, to guarantee the entire jurisdiction of the delivery procedure by excluding the interventions of the governmental authority[323], so as to obtain full judicial control over the respect for constitutional rights and principles and due process. It is one of the major

and significant innovations[324] of the delivery discipline, which affirms the need and value of a judicial ruling on the delivery of the individual.

Part of the doctrine [325], revealed inconsistencies with regard to the identification of jurisdiction by territory in the executing State, art. 6, n.2, of the framework decision identifies as competent the judicial authority of the executing member State which, according to the law of the State, is competent to execute the arrest warrant.

[323] Cf. A. CHELO, *Il mandato di arresto europeo,* Padova, 2010, 39.
[324] See A. CHELO, *Il mandato di arresto europeo,* Padova, 2010, 39.
[325]Cf. A. CHELO, *Il mandato di arresto europeo,* Padova, 2010, 41.

The Italian transposition law, in art. 5, identifies the competence to execute a European arrest warrant, in order, to the Court of Appeal in whose district the accused or sentenced person has his/her residence, residence or domicile at the time when the order is received by the judicial authority.

While in the extradition procedure the jurisdiction is rooted in the moment in which the Minister of Justice receives the delivery request, in the EAW jurisdiction takes root at a later time: when the judicial authority receives the mandate.

We have already focused on the role of the Minister of Justice in the Europe surrender procedure, which, as specified in article 9 of the transposition law, has the task of receiving the Euromandate and «transmitting it without delay to the President of the Court of Appeal, competent pursuant to art. 5».

If someone would then ask how can the Minister transmit the arrest warrant to the previously competent judicial authority if the jurisdiction takes root, pursuant to art. 5, paragraph 2, when the provision is received?

The problem in particular could arise if the recipient of the arrest warrant changes residence or domicile following the receipt of the documents by the Minister of Justice and therefore the criterion referred to in art. 5, paragraph 2[326].

The solution can be found in the need for speed, expressed in art. 9, par. 3, of the same law, which attributes to the President of the Court of Appeal who (erroneously) received the documents the duty to promptly transmit these to the competent Court of Appeal, identified through a reference to par. 3, 4 and 5 of art. 5.

However, it seems to be an apparent solution[327], which leaves perplexities persisting, as the paragraphs mentioned are exclusively 3, 4 and 5 of art. 5 therefore an obligation of direct transmission to the different competent authority could not be determined in order to re-determine the correct application of art. 5, par. 2, of the implementing law.

With regard instead to the principle of double criminality, as a general rule, Framework Decision 2002/584/JHA provides for an exception to this principle, which applies in an international context and for which, in order to

[326] Cf. A. CHELO, *Il mandato di arresto europeo,* Padova, 2010, 42.
[327] See A. CHELO, *Il mandato di arresto europeo,* Padova, 2010, 43.

subject a person to a criminal trial or execute the penalty afflicted by the judicial authority of another member State it's necessary to verify that that fact constitutes a crime in both States involved.

It is the first step towards the simplification of the extradition procedure which has found the compromise in the criminal relevance at European level of those cases contained in the catalog[328].

An investigation into the double criminality would instead be necessary for those offenses not listed[329]. Although it does not find an explicit foundation in the Constitution, but rather in art. 13, par. 2, of the Criminal Code[330], its ratio can be found today in the principle of legality[331].

The issue of double criminality within the discipline on EAW was defined a "*vexata quaestio*[332]" because of the difficult implementation of its derogation under art. 2 of the Framework Decision as it is dubious compatibility with the constitutional principles.

The framework decision provides for a list of 32 crimes for which the requirement of double criminality is not necessary; moreover, the delivery may take place if it is a crime for which the maximum edictal penalty provided for in the issuing State is equal to or greater than 3 years of imprisonment.

For crimes other than those contained in the catalog (which can be extended by a unanimous resolution of the European Council and after consulting the European Parliament), compliance with the principle of double criminality is necessary, regardless of the classification of the crime but also of the elements constituent. Although the supranational legislator has deemed it appropriate to remove the double criminality criterion, which is the basis of the international surrender procedures, due to its negative impact on the concession of the

[328]Cf. G. PALLADINO, *Il mandato d'arresto europeo, tra appiattimento e preservazione della tutela personale*, 2007.
*https://www.diritto.it/il-mandato-d-arresto-europeo-tra-appiattimento-e-preservazione-della-tutela-personale/#_ftn10*
[329] it is a list of thirty-two European crimes identified as major crimes or offenses of great political-social alarm, on which national criminal legislation has already been practiced convulsively.
[330] See art. 13, par. 2, of the Criminal Code.
[331] See art. 25 of the Constitution and also art. 1 of the Criminal Code.
[332] At this regard, see M. R. MARCHETTI, *Mandato di arresto europeo*, in *Enciclopedia del diritto, Annali II*-1, 2008, 544 cit.

extradition, as it caused inevitable slowdowns deriving from its verification[333], at national level there was no shortage of criticism[334] which, on the one hand focused on the possible risk that an "open" list could be the greatest obstacle in terms of respect for constitutional principles as it would be violated that of the mandatory nature and the reserve of the law for criminal law[335] and on the other hand the irrelevance of any investigation into the awareness of the worthlessness of the actions committed in the issuing State; therefore the subject should be delivered on the basis of a mere presumed commission on the fact to nothing, nothing any justifications on the part of the subject[336], and to this should be added the dubious compatibility of the exemption from double criminality with the principles of taxation and the right of defence[337].

The automatic consequence, for the Italian judicial authority that will have to execute the arrest warrant, would in fact be that of deviating from constitutional principles not being able to dwell on the possible unavoidable ignorance[338].

This explains[339] art. 7 of the implementing law which opens by establishing that the European arrest warrant can be executed «only if the fact is also foreseen as a crime by national law».

Among the exceptions of the aforementioned provision, the Italian legislator provides for the exception for the facts[340] falling under the subject of

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[333] See M. R. MARCHETTI, *Mandato di arresto europeo*, in *Enciclopedia del diritto, Annali II*-1, 2008, 545.

[334] Cf. M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Rivista italiana di diritto e procedura penale*, 2004, file 3, 718.

[335] Cit. ANNA FINOCCHIARO, in session of implementation of the framework decision 2002/584/JHA, as explained by M. PISANI, *Rapporti giurisdizionali con autorità straniere* in *Rivista italiana di diritto e procedura penale*, 2004, file 3, 709.

[336] Similar situation existed in Italy before the Constitutional Court sentence 364/&1988 which sanctioned the constitutional illegitimacy of art. 5 of the Criminal Code where did not exclude unavoidable ignorance from the inexcusability of ignorance of the criminal law, for the violation of articles 27, par. 1 and 3, 25, par. 2, 73, par. 3, of the Constitution.

[337] See M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Rivista italiana di diritto e procedura penale*, 2004, file 3, 718 cit.

[338] See M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Rivista italiana di diritto e procedura penale*, 2004, file 3, 718 cit.

[339] Cf. M. R. MARCHETTI, *Mandato di arresto europeo*, in *Enciclopedia del diritto, Annali II*-1, 2008, 544.

[340] These are tax crimes, without any reference to the nature, instead present in the second additional protocol to the European extradition Convention signed in Strasbourg on March 17, 1978, in relation to which the doctrine spoke of a double special indictment.
Cit. M. R. MARCHETTI, *Mandato di arresto europeo*, in *Enciclopedia del diritto, Annali II*-1, 2008, 544.

taxes and duties, customs and exchange, if similar to those for which the Italian legal system imposes a penalty of imprisonment of not less than the maximum three years and the exception in the cases of mandatory delivery provided for in art. 8 of the same law.

### 3.The purposes of delivery

The purposes for which a European arrest warrant can be issued are two: to receive a person to be placed in pre-trial detention or to execute a sentence or detention measure[341].

Case-law considers as not executable a warrant issued exclusively for investigative purposes, that is, to subject the convicted to acts such as interrogations with the commitment to take him back[342].

Instead it's different when a warrant is issued in order to prevent the process from being celebrated in the absence of the person against whom it takes place[343].

The European arrest warrant can be issued for procedural or executive purposes.

### 3.1.European arrest warrant for procedural purposes

The arrest warrant has procedural purposes if the surrender is conditional to the prosecution of a citizen or subject residing in the executing State.

The original version, contains the following sentence: «after being heard, is returned to the executing State».

The term "heard" raised some interpretative issues, which Italian jurisprudence has resolved by interpreting it as a reference to the exhaustion of the judgment against the subject and not to his simple hearing. In fact also in other legal systems (of Belgium, France or Finland) we find the same meaning.

Hence, the warrant for procedural purposes has the function of concretizing the subject's right to defence and participation to the proceedings; it is therefore aimed at satisfying procedural needs[344].

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[341] On this point, see A. CHELO, *Il mandato di arresto europeo*, Padova, 2010, 10 ff.
[342] Cit. A. CHELO, *Il mandato di arresto europeo*, Padova, 2010, 11.
[343] See Sect. VI, n. 15970/2007 Piras, Rv. 236378

Doubts[345] have arisen regarding the authority competent to issue the European arrest warrant for procedural purposes, both in Italy and in other Countries.

The problem that affected Italy concerns the interpretation to be given to art. 28, paragraph 1, lett. a) of Law n. 69/2005, regarding the competence to issue a European arrest warrant.

The arrest warrant for procedural purposes, is issued following the application of a precautionary measure therefore, pursuant to art. 28, the judge who issued the precautionary measure will be competent (therefore the investigating judge or the court that issued the measure in the appeal filed pursuant to art. 330 of the Italian Code of Criminal Procedure). But what happens if the need to proceed with an arrest warrant occurs at a later time than the one in which the measure was adopted[346] (for example, if the judicial authority has news of the presence of the requested person in the foreign State only after time from the issuing of the measure and the judgement may already be at an advanced stage such as hearing or appeal)?

A first orientation of the jurisprudence of legitimacy believes that, through a logical-systematic interpretation, the literal content of the legislative data must be coordinated with the provisions of the code on the subject of precautionary measures (artt. 279 Italian Code of Criminal Procedure and art 91 of the Implementing Provisions of the Italian Code of Criminal Procedure) therefore the issue of the arrest warrant would follow the evolution of the process and therefore the materially holder judge would have jurisdiction[347].

A second orientation, using a strictly literal interpretation, speaks of an "ultractive" competence of the judge who issued the precautionary measure, since

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[344]See Cass. Pen., Sect. VI, n.20282/2013 Radosavljevic, Rv. 252867 and Sect. VI, n. 40760/2016, Pozdnyakov and Sect. VI, n. 51511/2013 Lampugnani.

[345] Cfr. F. MANFREDINI, *La giurisprudenza sul mandato di arresto europeo*, 59, in https://air.unimi.it/retrieve/handle/2434/617644/1167704/la%20giurisprudenza%20sul%20mandato%20d%27arresto%20europeo.pdf

[346]Cit. A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 616.

[347] Cfr. F. MANFREDINI, *la giurisprudenza sul mandato d'arresto europeo*, 60 f, in *https://air.unimi.it/retrieve/handle/2434/617644/1167704/la%20giurisprudenza%20sul%20mandato%20d%27arresto%20europeo.pdf*

the activity of issuing of the arrest warrant is considered to have a bureaucratic-administrative nature that does not require thorough evaluations[348].

The Joined Chambers of the Court of Cassation resolved the debate[349] approving the first orientation and stating that the competence lies with the judge who proceeds; in fact, they exclude any possible automatism and therefore it cannot be said that the issuance of an arrest warrant does not require thorough evaluations, given the effect of projecting beyond the country the restrictive measure against the subject, given the duty of the issuing competent body of filling in the request for judicial cooperation, aware and conscious of the actuality of the restrictive title, of the evolution of the proceeding, of the evaluation of cooperation opportunities in compliance with the general limits of reasonableness and proportionality and of the information also from a formal point of view to be correlated to the issue of the arrest warrant. It is therefore necessary to have a knowledge of the case that the judge that previously issued the precautionary measure may no longer have.

Therefore, if the judgement shall progresses and the "judge who issued the measure" no longer corresponds with the "judge who proceeds", according to a logical-systematic interpretation, the criterion of "ultractive" competence would attribute the competence to issue the European warrant to the latter judge[350].

Similar issues arise also in an international context, where the Court of Justice has been called several times to provide a clearer interpretation of art. 6, par. 1 of Framework Decision 2002/584/JHA on the jurisdiction to issue a European arrest warrant. This provision attributes the jurisdiction to the judicial authority, for which we mean the judicial authority of the issuing Member State, which, according to the law of that State, is competent to issue a European arrest warrant.

It is a jurisdictionalized judicial system in which decisions are made by judicial authorities and the role of government bodies ("central authorities") is

[348]Cf. A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 616 ff and also F. MANFREDINI, *la giurisprudenza sul mandato d'arresto europeo*, II cap., 60 f. *https://air.unimi.it/retrieve/handle/2434/617644/1167704/la%20giurisprudenza%20sul%20mandato%20d%27arresto%20europeo.pdf*

[349]See Judgement Joined Chambers of the Court of Cassation, n. 2850/14, in Cass. Pen. 2015, n. 11, 3990.

[350] See A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 616.

limited to administrative assistance, as is observed in the extraditional discipline, attributing to the governmental authority the power to issue restrictive and incisive decisions on fundamental rights entails delays[351] in procedures on the one hand and failure to respect constitutional guarantees on the other[352]; however, the Framework Decision does not provide a definition of the term "judicial authority", leaving the interpretation to the individual Member States and thus creating procedural differences[353], since the body identified may not necessarily be a judge but also the prosecution body (in the systems in which this belongs to the Court). In fact, the Framework Decision leaves the Member States the task of identifying the subject *ad hoc* competent to issue the European arrest warrant; similar doubts[354] arise with reference to the central authority, which assists the judicial authority, as it is also not specifically designated; it could be in fact identified in the political authority, in this case interweaving between judicial and administrative authorities.

Nevertheless, since the European arrest warrant is a suitable measure to restrict the right to freedom[355] of the subject concerned, it must be issued by a body that is autonomous and independent, not subject to external orders or instructions (in particular from the executive power), and this is therefore not the case of an administrative authority[356].

The Court of Justice[357], called upon to clarify a question posed by the Amsterdam district (Poltorak) Court competent to execute the EAW under Dutch laws, spoke of European law as an autonomous concept, which extends to the authorities necessary to participate in the management of justice. Thus, criminal courts and judges of a Member State are included among these, but not the police

[351] As we will see later on.
[352] Cf. ANNE PIETER VAN DER MEI, *The European Arrest Warrant System: Recent developments in the case law of the Court of Justice*, in *Maastricht Journal of European and Comparative Law*, 2017, vol. 24, 886.
[353]Cit. ANNE PIETER VAN DER MEI, *The European Arrest Warrant System: Recent developments in the case law of the Court of Justice*, in *Maastricht Journal of European and Comparative Law*, 2017, vol. 24, 886.
[354]Cfr. M. PISANI, *Rapporti giurisdizionali con autorità straniere*, in *Riv. It. dir. e proc. Pen.*, 2004, pamphlet n. 3, 708.
[355]Art .6 of EU Charter of Fundamental Rights.
[356]See MAURIZIO ARENA, *Mandato di arresto europeo e Procura sottoposta all'esecutivo,* 2019. *https://www.filodiritto.com/mandato-darresto-europeo-e-procura-sottoposta-allesecutivo*
[357]See CJEU, 2016, C-452/16 PPU Openbaar Ministerie, Krzysztof Marek Poltorak.

services (as requested by the Dutch court) nor executive bodies such as ministries. In fact, the term "judiciary" expresses a distinct and autonomous concept by virtue of the principle of separation of powers[358].

The term, according to what the Court said, would also include the figure of the public prosecutor.

Hence, another question arose with regard to the prosecutor's operations in Germany. In that case, the German prosecutors on the one hand ensure what is stated by the framework decision 2002/584/JHA, in fact they have a duty to investigate the elements against and also in favour, but on the other hand they are not independent bodies as they carry out the instructions given by an "external" power of the Minister of Justice.

In this way, the Minister would directly influence the decision of a prosecutor to issue or not a European arrest warrant, although, given the principle of legality that applies to the action of the Prosecutor's Office, the instructions that the latter could receive cannot however exceed the limits of the law and must also be written and communicated to the President of the Parliament of the *Land* involved[359].

The Court of Justice[360], acknowledged the guarantees presented by the German government, still believes that they cannot be truly effective in guaranteeing the impartiality and independence necessary for the body issuing the European arrest warrant and therefore the German system would violate the regulation in art. 6, par. 1 of the 2002 Framework Decision.

The Court itself therefore provides an interpretation of the aforementioned article in the sense that "judicial authority" does not also include prosecutors who are exposed to the risk of being subject - directly or indirectly - to individual

[358]Cf. ANNE PIETER VAN DER MEI, *The European Arrest Warrant System: Recent developments in the case law of the Court of Justice*, in *Maastricht Journal of European and Comparative Law*, 2017, vol. 24, 886.

[359] See section by MAURIZIO ARENA, *Mandato di arresto europeo e Procura sottoposta all'esecutivo*, 2019.
*https://www.filodiritto.com/mandato-darresto-europeo-e-procura-sottoposta-allesecutivo*

[360] Judgment of the Court (Grand Chamber) of 27 May 2019, on European arrest warrant.
The issue was raised in Ireland, regarding two European arrest warrants for procedural purposes issued in Case C-508/18 of 2016 by the Prosecutor at the Land Court, Luebeck, Germany and in Case C-82/19 PPU of 2018 by the Prosecutor's office in Zwickau, Germany.

orders or instructions by the executive power, such as a Minister of justice, in the context of the adoption of a decision on the issue of a European arrest warrant[361].

### 3.1. European arrest warrant for executive purposes

With regard to the European arrest warrant for executive purposes, there have not been such issues since art. 6, par. 2, of the 2002 Framework Decision, considers as competent «the judicial authority of the executing Member State which, according to the law of that State, is competent to execute the European arrest warrant». The concept, taken from art. 28, paragraph 1, letter b), of the Law on the EAW, expresses the intent to maintain, in identifying the competence, the same criteria operating in internal law for the execution of the provision that affects personal freedom[362] being, however, the judge's order to execute at the basis of the issuance of the warrant.

Thus, pursuant to art. 28, paragraph 1, lett. b) of the law in question, the competence lies with the public prosecutor, who must verify that the punishment imposed with the executive sentence is not less than one year and that the enforcement is not suspended.

If the warrant is prior to the enforcement of a custodial sentence, competence will be of the Public Prosecutor at the judge's Office indicated in art. 665 of the Italian Code of Criminal Procedure; however, if the warrant is in execution of a detention order, competence will be of the Public Prosecutor appointed pursuant to art. 658 of the Italian Code of Criminal Procedure.

The executive arrest warrant, unlike the procedural one, has the function of obtaining the surrender of the subject so that the detention order can be enforced in the requesting State[363], and derives from the need to implement a definitive judicial order.

For the purposes of accepting the surrender request, the lack of motivation in relation to the precautionary needs of the precautionary measure subject to the

[361] Cit. section by MAURIZIO ARENA, *Mandato di arresto europeo e Procura sottoposta all'esecutivo,* 2019.
*https://www.filodiritto.com/mandato-darresto-europeo-e-procura-sottoposta-allesecutivo*
[362] Cf. ANDREA CHELO, *Il mandato di arresto europeo*, Padova, 2010, 337.
[363] The issuing judicial authority must have given reason for the arrest warrant, «also through the timely attachment of the factual evidence against the person whose surrender is requested» in sent. Joined Section of Court of Cassation, n. 4616/07, Ramoci.

European arrest warrant issued by the foreign judicial authority, is not relevant; in fact, there is no specific provision in Law 69/2005 which requires an indication of the precautionary needs within the European arrest warrant or in the precautionary measure on which this is based[364].

**4.Issue of the European arrest warrant**

The European arrest warrant must be issued following a template [365] attached to the 2002 framework decision to be completed in all its fields, inserting all the necessary information to allow the assessment on the delivery.

Among the assumptions that legitimize the issuance of the arrest warrant for executive purposes, in addition to the final application sentence of a custodial sentence or prison sentence, it highlights the need for the accused or sentenced person to be resident or domiciled or in residence within the territory of a Member State.

Art. 29[366] paragraph 1, in this regard, establishes that the subject must "prove" to be resident [...] in that State; the use of the term "prove" shows the insufficiency of mere suspicions but rather the necessary acquisition of concrete demonstrative elements, such as for example a specific police report regarding the presence abroad of the wanted person[367].

When the residence [...] in that State is "possible" but not known, a specific warning can be issued, upon judicial authority order, through the Schengen Information System (SIS), and it will be equivalent to a European arrest warrant including all necessary information.

[364] Cf. ANTONELLA MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 617.
[365] In fact, through the use of the form it is possible to guarantee rapidity and certainty to the inspections made by the executing judicial authorities and not only, but also greater uniformity and the reduction of the risk of lengthening the procedures through requests for additional information. G. DE AMICIS E G. IUZZOLINO, *Guida al mandato di arresto europeo*, 2008, 2116.
[366] The competent judicial authority pursuant to Article 28 issues the European arrest warrant when it is evident that the accused or sentenced person is resident, domiciled or residing in the territory of a Member State of the European Union.
[367] In this regard, see the Circular of the Public Prosecutor at the Court of Appeal in Florence, Cit. in M. BARGIS E E. SELVAGGI, *Mandato di arresto europeo, dall'estradizione alle procedure di consegna*, Torino, 2005, 653.

The use of the term "possible" shows the cognoscibility of objective elements that lead to believe the possibility not as a mere hypothesis[368].

Further assessments that the competent judicial authority must carry out when issuing the Euromandate concern the fees of reasonableness and proportionality. In fact, from an internal point of view, he will have to evaluate the seriousness of the crime, the entity of the sentence imposed, the duration of the precautionary measure and the expiry of its phase terms. From an international perspective, he will have to look at the concrete appreciation of the opportunity to resort to the surrender instrument; in fact, this entails complex and expensive procedures, therefore an evaluation in terms of costs/benefits must be made, based on the actual need of recurring to it. The failure to issue the arrest warrant does not amount to impunity, as the executive order will remain valid and executable within the national territory[369].

In the case of a procedural arrest warrant, the assessment that the competent judicial authority must carry out will instead be more constrained; in fact, a European arrest warrant cannot be issued if the subject had been ordered a non-custodial coercive measure, since the subject, in order to be surrendered, would have to be arrested, and after the surrender he should be immediately released. For the same reasons, the issue of a European arrest warrant upstream of the precautionary measure of house arrest also remains problematic, as even in this case a more burdensome measure should be applied to the subject (in this case pre-trial detention in prison) with the effect of an aggravation of the form of caution, contrary to the provisions of art. 299, paragraph 4, of the Italian Code of Criminal Procedure[370].

The judicial authority competent to issue an arrest warrant can also insert a report into this system, joint to others information requested by the art. 30 of the law 69/2005.

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[368] Cf. M. BARGIS E E. SELVAGGI, *Mandato di arresto europeo, dall'estradizione alle procedure di consegna*, Torin, 2005.

[369] See Circular of 15th November 2005 of the Public Prosecutor at the Court of Appeal in Rome, and also M. BARGIS E E. SELVAGGI, *Mandato di arresto europeo, dall'estradizione alle procedure di consegna*, Torin, 2005, pag. 646.

[370] See G. IUZZOLINO, *L'emissione del mandato di arresto europeo tra ermeneutica e prassi*, 2122 .

This report, that must will be in accordance with what is established by the art. 95 of the Schengen Convention, will apply to a provisional arrest request.

S.I.S. is a large-scale information system that allows the authorities of the Schengen States to exchange data on the identity of certain categories of people and property, therefore the police and judicial authorities can thereby carry out and consult reports about missing or unauthorized persons entering or staying in the Schengen area.

The judicial authority can, in fact, order the inclusion of a specific report in the S.I.S. in accordance with the provisions of the Schengen agreement on the gradual elimination of controls at common borders, enforced by law 388/1993.

The searches for localization, within in the S.I.S., can subsequently continue through the S.I.R.E.N.E. (for the Schengen area) or the Interpol Service[371](for other Countries).

In this regard, there has been no lack of clashes by the doctrine[372] on the legitimacy of this instrument which affects the right to privacy and the protection of personal data and involves practical difficulties that risk reflecting on the configuration of the European arrest warrant going to damage individual rights but also causing a decrease in the effectiveness of operational cooperation.

### 4.1. Cooperation between member States in issuing the arrest warrant

When the EAW is issued, it usually precedes the diffusion of searches for the arrest of the person with the help of the International Cooperation Services: S.I.re.NE, for the Schengen area, and INTERPOL, from an international and non-international point of view only in so far as its help is expressly provided for in art. 10, par. 3, of the Framework Decision, in all cases where it is not possible to use the Schengen Information System[373].

In particular, when the person is unknown, or uncertain, or there is a risk that he may change his domicile, (art. 29, par. 2, of the law 69/2005), these search

[371] See A. CHELO, *Il mandato di arresto europeo*, Padova, 2010, 350.
[372] See the comment of S. BUZZELLI in M. BARGIS and E. SELVAGGI, *Il mandato di arresto europeo dall'estradizione alle procedure di consegna,* Torino, 2005, 99 ff.
[373] See Vademecum for the issuance of the European arrest warrant, Ministry of Justice, Directorate General for Criminal Justice,
*https://www.giustizia.it/resources/cms/documents/Vademecum_mandato_arresto_europeo.pdf*

procedures come into play through the use of the S.I.S. but even if the subject has already been located, reporting can be ordered within the SIS, for example if it is a person detained for another cause in a Member State, as it cannot be exclude that, during the delivery, the person can be freed or in any case can escape the execution of the EAW.

So, in this case, as regards the Schengen area, the issuing judicial authority will directly dispose of the report referred to in art. 95 of the 1990 Convention[374] on the application of the Schengen Agreement, within the S.I.S. and this report will be made by the S.I.re.N.E. of the Central Directorate of Criminal Police[375] (Service for International Police Cooperation of the Ministry of the Interior).

In addition, when reporting to the S.I.S., it is also necessary to ensure that the competent police offices have entered the data concerning the requested subject also in the Computerized Police Interforce System, which acts on a national level, so as to allow the S.I.re.N.E. Division and the INTERPOL Division, at the time of the dissemination of research abroad, to compare the data[376].

So the S.I.S. it constitutes an instrument of control and maximum extension of research on the European common area, in which citizens can freely move and move from one Country to another

Without any frontier, even without changing or colliding with the traditional system for the capture of fugitives, through INTERPOL[377] (which remains the natural recipient of international research and related documentation).

As regards police cooperation between member States, the general principle was already established in the Schengen agreements whereby the Contracting States must commit themselves to assisting their respective police services in order to prevent or investigate the crime-facts.

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[374] See the Convention of June 19, 1990, for the application of the Schengen Agreement of June 14, 1985, made executive in Italy with the Law of September 30 1993, n. 388, referred to both in art. 9, par. 3, of the framework decision, both in art. 29, par. 2, of the Law 69/2005.

[375] See Vademecum for the issuance of the European arrest warrant, Ministry of Justice, Directorate General for Criminal Justice,
*https://www.giustizia.it/resources/cms/documents/Vademecum_mandato_arresto_europeo.pdf*

[376] See the circular of the Ministry of Justice, n. VV-1842-95 / DUE of 15 May 2000, in *https://www.giustizia.it/giustizia/it/homepage.page*

[377] Cf. Vademecum for the issuance of the European arrest warrant, Ministry of Justice, Directorate General for Criminal Justice,
*https://www.giustizia.it/resources/cms/documents/Vademecum_mandato_arresto_europeo.pdf*

The information that was acquired by the police, (of which the exchange was managed by a central body or in particular cases directly by the police authorities concerned), could be used by the requesting State only to provide evidence of the facts under investigation, by agreement the competent judicial authorities of the requested State[378].

On 17 September 1987, the Committee of Ministers, also considering on one hand the provisions of the Convention for the protection of individuals with regard to the automated processing of personal data of 28 January 1981, and on the other purpose and spirit of the provisions of which art. 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms, issued a recommendation addressed to the Member States with reference to the use of personal data in the police sector, with the aim of achieving an even closer union between the member States.

The provision of these rules has taken into account the growing use of personal data[379], subject to automated processing by the police, the possible abuses in the automated processing that could endanger individual privacy, and also the advantages that could derive from use of computers or other technical means available thanks to the rapid development of technology.

Account was also taken of the necessary balance of the company's interest in preventing and suppressing criminal offenses while maintaining public order with the interests of individuals and respect for their private life.

Principles have been established, according to which Member States will have to provide for a controlling authority, independent and external to the police in charge of verifying the compliance with this recommendation, and with reference to permanent automated files, these will have to be declared to the controlling authority, specifying their nature, processing and the scope for personal data protection purposes.

Among the personal data, only those necessary for the prevention of effective danger or to suppress certain criminal offenses will be collected; any

[378]Cf. A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 803.
[379] See Application and definitions of the annex to Recommendation n. R (87) 15 OF THE Committee of Ministers to member States aimed at regulating the use of personal data in the Police sector, in *http://www.privacy.it/archivio/CER-87-15.html*

communication of these to foreign authorities will be limited to police services only in the cases provided for by art. 5.4 and in compliance with the guarantees provided for by art. 5.5.

Thus, the Committee of Ministers recommended that Member States draw inspiration from these principles for their internal legislation and disclose the attached provisions and the rights that the application of the same recommendation would confer to individuals[380].

However, Framework Decision 2006/960/JHA modified the rules on the exchange of information for cases in which investigations or operations concern crimes for which a European arrest warrant may be ordered (art. 2, par. 2, Framework Decision 2002/584/JHA), therefore in such cases the data will be able to circulate "freely" in the European territory without national or legal system limits, and the exchange of information will take place through S.I.S., Europol or Interpol.

In fact, Art. 3 of the Decision established a general obligation to share information and common procedural rules in order to standardize their profiles; therefore, the request for information is binding but the competent authority may refuse to share it if there are reasons why national security may be compromised, or in the other cases of refusal provided for by art. 6, lett. d) of the same Framework Decision.

Another entity set up for operational assistance was JIT (joint investigation teams), already discussed during the Tampere European Council on 15-16 October 1999.

The JIT tool has been introduced by art. 13 of the Brussels Convention on 29 May 2000, regarding mutual assistance in criminal

[380]At the time of the adoption of this Recommendation, in application of Article 10.2.c of the Rules of Procedure of the Meeting of the Delegates of Ministers, the Delegate of Ireland raised a reservation regarding the right of his Government to comply or not with this Recommendation; the UK Delegate has a reservation concerning the right of his Government to comply or not with paragraphs 2.2 and 2.4 of the Recommendation; the Delegate of the Federal Republic of Germany has raised a reservation regarding the right of his Government to comply or not with paragraph 2.1 of the Recommendation; and, in application of article 10.2.c of the Internal Regulations of the meeting of the Delegates of Ministers, the Delegate of Switzerland abstained entirely, specifying that he raised reservations about the right of his Government to comply or not with this Recommendation and that his abstention should not be interpreted as an expression of disapproval of the Recommendation as a whole.

matters, with the subsequent Framework Decision 2002/465/JHA of 13th June 2002[381].

In this way cooperation is assured in the detection and repression of organized crime involving several States, as the public officials of foreign States would be involved in joint investigations carried out outside the territory of the States to which they belong[382].

Actual teams are set up in the Member State in which the investigations are carried out, made up of "subsidiary" members as belonging to a different State [383].

In the activities of a joint investigation team, Member States may also decide to avail themselves of the help of representatives of Europol or OLAF.

The need[384] for greater coordination between the Member States and an even faster and more efficient exchange of information has had great weight in this last period of health emergency that we are experiencing and which has also had effects in terms of transfer and delivery of wanted persons and for which all agencies had to take necessary measures to ensure business continuity and uninterrupted operational support[385].

To this end, the Commission has set up an EAW coordination group, in collaboration with Eurojust, aimed at ensuring the proper functioning of the EAW also in this moment of difficulty, practical above all, which also affect the procedural rights of the suspects and

[381] Cfr. Draft Law on: "Istituzione di squadre investigative comuni sovranazionali", DDL-istituzione di squadre investigative comuni sovranazionali – Report, Ministry of Justice. *https://www.giustizia.it/giustizia/it/mg_1_2_1.wp?facetNode_3=1_8(200612)&facetNode_2=4_59&contentId=SAN30981*.

[382] See A. MARANDOLA, (edit by), *Cooperazione giudiziaria penale*, 2018, 819.

[383] Cf. *http://sicurezzapubblica.wikidot.com/squadre-investigative-comuni*.

[384] Cf. *https://e-justice.europa.eu/content_impact_of_covid19_on_the_justice_field-37147-it.do?init=true* And also Stronger together: EU Agencies join forces to respond to COVID-19 *http://eurojust.europa.eu/press/News/News/Pages/2020/2020-07-15_JHAAN-response-to-Covid-19.aspx*

[385] See Stronger together: EU Agencies join forces to respond to COVID-19 *http://eurojust.europa.eu/press/News/News/Pages/2020/2020-07-15_JHAAN-response-to-Covid-19.aspx*

defendants[386] (communication with the lawyer, with the interpreter or third parties, whose problem has been solved with the use of audio and video conferences and other remote means[387]).

### 4.2.1. Eurojust, Eppo, Europol and Olaf

Building a relationship of trust between States is not a sudden process, but instead requires a progressive creation of networks, structures and supranational bodies[388] that act as an intermediary between the various countries, creating that common legal space, through a continuous balance between the European dimension of cooperation and investigative coordination, the resistance of the sovereignty of the States that continue to guard their "forbidden garden[389]" and the continuous expansion of the protection of the fundamental rights of the European citizen.

The objective of criminal judicial cooperation[390] is pursued, at the operational level through some agencies including Eurojust, Europol, and Eppo.

The Eurojust agency[391], based in The Hague, it is an institutional and functional innovation and takes up the operational scheme tested with Europol, *mutatis mutandis* [392] . It was established with decision 2002/187/JHA, which Italy implemented with Law n. 41, in order to strengthen the fight against serious forms of crime, facilitate good coordination between the national authorities responsible for prosecution, assist in investigations into cases of organized crime[393] (based on studies carried out by Europol).

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[386] See Impact of the COVID-19 emergency on justice, European e-Justice Portal. *https://e-justice.europa.eu/content_impact_of_covid19_on_the_justice_field-37147-it.do?init=true*

[387] On the issue"remote working", SEE M. BARGIS, LA COOPERAZIONE GIUDIZIARIA PENALE ALLA PROVA DELL'EMERGENZA COVID-10, 2020 *https://sistemapenale.it/it/scheda/bargis-cooperazione-giudiziaria-emergenza-covid#_ftn9*

[388] As in G. DE AMICIS, *Organismi europei di cooperazione e coordinamento investigativo*, in *Cass. Pen*., 2016, file 12, 4587.

[389] Cit. G. DE AMICIS, *Organismi europei di cooperazione e coordinamento investigativo*, in *Cass. Pen.*, 2016, file 12, 4587.

[390] See artt. 82-86 TFEU.

[391] See art. 86 TFEU.

[392] Cit. E. ROZO ACUNA (by), *Il mandato di arresto europeo e l'estradizione*, Padova, 2005, p. 19.

[393] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 1147.

To strengthen cooperation, the *Eurojust National Coordination System*, which links together and leads to an organic system the operations of the various subjects that have, at national level, functions in the field of judicial cooperation, connecting them with the member national team of Eurojust.

The European regulation 2018/1727 of November 14, 2018 modernized the structure of Eurojust in implementation of art. 85 TFEU[394], in order to stimulate and improve coordination between the competent judicial authorities of the Member States, especially with regard to organized crime[395].

With regard to research and acquisition of evidence, in relations between Member States, with Directive 2014/41 EU, the aim was to create a global horizontal system applicable to any criminal investigation, except for the material collected by the joint investigations teams.

Its functioning, based on the principle of mutual recognition, recalls that of the European arrest warrant. In fact, it consists of a judicial decision issued or validated by a competent authority of a Member State ("issuing" so that specific investigative acts are carried out in another Member State ("executive") for the purpose of obtaining evidence.

In order to efficiently carry out its functions, Eurojust can access judicial information contained within the S.I.S., upon request to the competent central authority[396].

Regulation 2017/1939/EU[397] established, on the basis of an express legal provision[398], the European Prosecutor Office ("EPPO")[399], based in Luxembourg. Authority founded on the concept of judicial cooperation and mutual recognition, assuming first of all the diversity of national legal

[394] See art. 85 TFEU on Eurojust framework.
[395] See L. CAMALDO, *La metamorfosi di Eurojust nell'agenzia dell'Unione europea per la cooperazione giudiziaria, in Cass. Pen., 2019, n. 7,* 2079 ff.
[396] In Italy, the central competent authority is the S.I.re.N.E. division (Supplementary Information Request at the National Entries), established at the central criminal police department of the Ministry of the Interior.
On the issue, see G. DE AMICIS, *Organismi europei di cooperazione e coordinamento investigativo,* in *Cass. Pen*., 2016, file 12, 4587.
[397] Published in the Official Journal of the European Union of 31.10.2017, L. 283.
[398] See art. 86, par. 1, TFEU.
[399] Art. 85 TFEU.

systems and pushing towards overcoming this, trying to achieve the goal that was present in the Commission's 2013 regulation proposal in art. 25, ie the creation of a "single legal area"[400], introducing for the first time the concept of "common legal area."

The 2013 proposal, regarding a "light structure", decentralized, consisting of a central office of the European Public Prosecutor and the Delegated Prosecutors located throughout the territory, aroused negative reactions from those Member States which - given the obligation of the Delegated Prosecutors to operate according to the directives and orders given by the European Public Prosecutor, highlighting a clear priority of the European function over the national one - feared losing sovereignty in criminal repression within their borders[401].

The 2017 regulation, while maintaining a structure on two levels (central and peripheral), introduced a plurality of both single and collegial bodies, providing that all Member States are represented within the college, according to an almost intergovernmental logic[402], so as to allow Member States to keep European criminal law enforcement under control.

As for its functions, particular criticism is placed on the investigations, carried out in a different way from the previous proposal of 2013 (in a single European area by creating that common space) but in the territory of each Member State of the Union. The wording would seem to abandon the unitary vision of European investigations, instead approaching in a fragmented, inhomogeneous way.

The problems[403] that will arise will be mainly in contexts of different national rules as the measures that can be adopted will have to take into account the law of the Member State of the delegated attorney in charge of the case, but if a judicial authorization is required according to

[400] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 1149.
[401] Cfr. R. E. KOSTORIS, *Manuale di procedura penale europea*, G*li organismi centralizzati della cooperazione giudiziaria: la procura europea*, 2019, Sect. 3, 277.
[402] Cit. R. E. KOSTORIS, *Manuale di procedura penale europea*, *Gli organismi centralizzati della cooperazione giudiziaria: la procura europea*, 2019, Sect. 3, 280.
[403] Cfr. R. E. KOSTORIS, *Manuale di procedura penale europea*, *Gli organismi centralizzati della cooperazione giudiziaria: la procura europea*, 2019, Sect. 3, 284.

the law of the Member State of the delegated attorney in charge of providing assistance, it will be given following the rules of the latter[404].

Regarding the relations between the EPPO and the other agencies, it will first have to coordinate with Eurojust as they address issues of common interest[405]. In order to avoid unnecessary overlap[406] between Eurojust and EPPO, the latter has been given the possibility of indirect access to Eurojust's files and the possibility of using its administrative resources[407].

It is worth mentioning that the creation of the EPPO took place on the basis of enhanced cooperation (with the participation of only some of the Member States), therefore, it will be essential not only to coordinate EPPO with non-EU countries, but also to coordinate Eurojust both in relation to the "EPPO States" and to the "non-EPPO States [408]".

The institution outlined presents strong perplexities due to its clumsiness and its strong dependence on national authorities, so much so as to risk a marginal role in the fight against transnational crimes; this is also due to the lack of common rules for carrying out investigative activities. However, these perplexities seem to be a starting point rather than a point of arrival[409].

Another agency aimed at making the European territory safer is Europol (European police office), based in The Hague, which became operational on 1 July 1999.

Its functions include facilitating the exchange of information between member states, analyzing it, communicating it to the competent services of the member states and thus facilitating investigations in the member states.

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[404] See art. 31, par. 3, regulation 2017/1939/EU and also art. 32 of the same.
[405] See art. 100 and 50 reg. 2019/1727/EU.
[406] Thus, L. CAMALDO, *la metamorfosi di Eurojust nell'agenzia dell'Unione per la cooperazione giudiziaria penale,* in *Cass. Pen.*, 2019, n. 07, 2079.
[407] Cfr. A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 1148.
[408] See A. MARANDOLA (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 1148.
[409] Cit. R. E. KOSTORIS, *Manuale di procedura penale europea*, *Gli organismi centralizzati della cooperazione giudiziaria: la procura europea*, 2019, 290.

To this date, Europol does not act as if it were a regional version of Interpol, respecting the sovereign competences of the States in the matter, but acts as an operational tool of the Union, as if it were a core of a common police force among the Member States[410].

During the Covid-19 [411] times, Europol also had to take the necessary measures to continue the police cooperation activity, through the use of videoconferencing. During the first one, held on 10 June 2020, Italy, represented by the prefect V. Rizzi (deputy director general of Public Security) and by the General of the Carabinieri Army corps G. Spina (director of the Service for International Police Cooperation), they exposed the new monitoring and analysis body, established following the outbreak of the pandemic; it is a control room in which the Italian police forces cooperate, which will have to intercept any signal that manifests illegitimacy on the part of organized crime, especially in the economic market and the conditioning of public decision-making processes functional to the assignment of tenders.

Crime has had great space especially in the area of imports of false masks, medical devices and sanitation products, even harmful to health, in which OLAF[412](European Anti-Fraud Office), intervened promptly, with assistance tasks judicial or administrative investigations, in collaboration with the national investigative services, through which it collects all the necessary information on illicit trafficking[413].

OLAF is in fact a service of the European Commission that investigates fraud cases affecting the Union budget and cases of corruption and serious breach of professional obligations within the European institutions;

[410]On the issue, E. ROZO ACUNA, *Il mandato di arresto europeo e l'estradizione,* Padova, 2005.
[411] See *https://ilquotidianoditalia.it/europol-litalia-presenta-lorganismo-di-monitoraggio-ed-analisi-della-criminalita*
[412] Established with Decision 352/1999.
[413] See Olaf launches enquiry into fake COVID-19 related products, in OLAF, European anti-fraud office, file 7, 2020
*https://ec.europa.eu/anti-fraud/media-corner/news/20-03-2020/olaf-launches-enquiry-fake-covid-19-related-products_en*

it differs from Eurojust, which mainly deals with criminal cooperation, since OLAF conducts investigations of an administrative and non-criminal nature, but there is still the possibility of transferring the evidence acquired in them into national criminal proceedings , and furthermore its powers are limited in matter to investigations into facts that harm the financial interests of the European Union.

### 4.3. The audition of the wanted person

Pursuant to art. 14 (and articles 10, 1st par. And 13, 1st par.) of the mentioned law, the judicial authority (president of the Court of Appeal or a delegated magistrate), proceeds to hear the person sought by informing him, in a language known to it[414], the content of the European arrest warrant and the execution procedure, as well as the right to consent to surrender to the requesting judicial authority.

Therefore, the wanted person must be heard in an audition that has a dual function; on the one hand the informative function[415] on the content of the warrant, and on the other hand the possibility of consenting to be surrendered to the foreign judicial authority and therefore renouncing the benefit of specialties.

During the audition, a subject consenting to the surrender expresses in this way his approval to be surrender to the requesting country, thus allowing the beginning of an alternative procedure that is faster and leaner than the ordinary one[416].

Consent is the expression of self-determination, it is a fundamental element for the protection of art. 2 of the Constitution and especially relevant in the medical field, where self-determination indicates a general disposition power of own body[417].

[414]However, the provision does not indicate the need that the interpreter is there but just that the audition takes place in a language known to the wanted person. On this point see A. CHELO, Il *mandato di arresto europeo*, Padova, 2010, 158.
[415]Cit. A. CHELO, *Il mandato di arresto europeo*, Padova, 2010,159, on the merely informative-reconnaissance function of the hearing, unlike that of the guarantee questioning which has a function necessary to guarantee the subject's personal freedom to expose his reasons.
[416] Cf. A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 617 ff.
[417]There are different opinions on the freedom to dispose of one's body, but what is certain is that the limit of this freedom is justified when it causes damage to third parties.

The constitutional protection of the right to express consent, although not explicitly, is also found in art. 32 of the Constitution, where the right to health is negatively protected as a prohibition to suffer health treatments against one's will[418]. The consent shows the freedom of the subject to freely and voluntarily choose whether or not to undergo a health treatment, and for it to be expressed correctly it must be informed[419]; on the other hand, this also indicated the doctor's obligation to inform the patient, so as to develop and evolve the doctor-patient relationship.

As in the medical field, the subject has the right to express his self-determination also in other fields.

In the extradition procedure, the consent of the interested party has always been considered relevant as long as it does not imply a weakening of his fundamental rights.

Thus, also the framework decision on the European arrest warrant included art. 13 dedicated to consent. The subject's consent must be obtained voluntarily and in full awareness of the consequences, therefore it highlights the right to assistance of a technical defender and, if necessary, of an interpreter[420].

Shall the subject not give his consent, art. 14 of the framework decision provides for his right to be heard before the judicial authority but this provision does not preclude the national legislator from providing greater guarantees for the subject to be surrendered, provided that these guarantees do not compromise the overall speed of the procedure.

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See A. SANTOSUOSSO, *diritto, scienza, nuove tecnologie*, 2016, 113, and also A. CARMINATI, *Affermazione del principio costituzionale di autodeterminazione terapeutica e i suoi possibili risvolti nell'ordinamento italiano*, in *giurispr. Pen*., 2019, 5.

[418]To have further information on the subject's claim to stop therapies already in place or the right to refuse treatment, see A. CARMINATI, *Affermazione del principio costituzionale di autodeterminazione terapeutica e i suoi possibili risvolti nell'ordinamento italiano*, in *giurispr. Pen*., 2019, 8 ff.

[419]Cf.
*https://www.iusinitinere.it/consenso-informato-il-diritto-allautodeterminazione-del-paziente-e-la-responsabilita-civile-del-medico-28464;*
Informed consent began to spread as early as 1914 in the Schloendorff v. Society of N.Y. Hospital in which the U.S. judge recognized the patient's right to decide which treatment to carry out on his body and consequently, the possible liability for the doctor if he had carried out treatments without the patient's consent.

[420] Cf. L. KALB, il *consenso alla consegna*, Milan, 2005, 311, in which the consent is expression of a free and independent determination.

The consent can also be granted later in time [421], therefore the jurisprudence[422] considers that the omission of the request for consent to the interested party does not integrate an intermediate nullity pursuant to art. 178, lett. c) of the Italian Code of Criminal Procedure. It could certainly be objected, however, that since consent is a form of intervention of the interested party, the omission of his request would reveal a violation of the right of defence.

Consent will therefore be given in the presence of the defender and, if necessary, also of the interpreter, on record and once given will be irrevocable, since it is considered cross-reference and unilateral, unsustainable of revocation, neither explicit or implicit[423].

In this regard, it must be said that, even if the implementing law did not accept the idea of the revocable consent, in reality the 2002 framework decision allowed its revocability, in art. 13, par. 4, as well as the judicial cooperation[424] for which the general principle of irrevocability of consent was not applicable in cases in which the interested subject ignored the factual circumstances relevant for the purposes of his decision or that had subsequently been modified. During the implementation of the 2002 framework decision, this "reasonable[425]" exception has not been included, so as to determine problems[426] deriving from this diversity in contrast with art. 3 of Italian Constitution.

The act of granting the consent is in fact a fundamental element of the discipline since, despite the judicial authority will take into account the consent given by the wanted subject although not bound by it for the purposes of the decision, a different[427] (almost atypical) *iter*, procedure may be established from that moment, more quick and lean compared to the ordinary procedure,

[421] For example, through a declaration addressed to the director of the prison and by him immediately forwarded to the president of the Court of Appeal, or even by fax; that is, the declaration can be made during the hearing set for the decision, up to the moment of the conclusion of the discussion.
[422] Therefore, the jurisprudence considers that the omission of the request for consent to the interested party does not integrate a nullity at intermediate regime pursuant to art. 178, lett. C) of Italian Code of criminal procedure.
[423]See judgement Cass. Pen., Sect. VI, n. 4864/16;Sect. VI, n. 45055/10.
[424] See art. 205-bis of the guidelines for the implementation of Italian Code of Criminal Procedure
[425] Cit. M. R. MARCHETTI, *Mandato di arresto europeo,* in *Encicl. del dir., annali II-1*, 2008, 549.
[426]See M. R. MARCHETTI, *Mandato di arresto europeo,* in *Encicl. del dir., annali II-1*, 2008, 549.
[427] Cf. A MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018 and also A. CHELO, Il *mandato di arresto europeo*, 2010, 164.

characterized by a contraction of the deadlines for the decision[428] (to be taken within ten days).

### 4.4. The participation of the wanted person in the hearing

Once the consent has been granted, the Court of Appeal will have to rule[429] on the absence of impeding reasons to the surrender pursuant to art. 18 and 18 bis of the same law, without necessary evaluation on the existence of serious indications of guilt, (which seems to be foreseen only in the case of procedure in the absence of consent).

If necessary, art. 6, par. 2, provides the possibility for the Court of Appeal to acquire additional information by requesting it from the issuing Member State, directly or through the Minister of Justice, not being able to use other channels, for example Interpol[430].

From the moment the request to the foreign authority is received, the thirty-day deadline begins within which the supplementary documentation referred to in art. 16, par 1[431].

The Court of Appeal[432] take under advisement whether to surrender the subject only after having carried out a formal assessment on the existence of

[428] Non-mandatory term, thought it can have affect the *statu libertatis*. In fact, if the subject against whom the decision must be made is subject to a precautionary measure, the latter would lose effectiveness, given the provision in art. 21.
If the person who gave the consent was not subject to a precautionary measure but was a free person, and the decision did not take place within the prescribed period, there will be an unsanctioned violation of the transposition law and upstream of the framework decision 2002/584/JHA.

[429] Unlike the extradition procedure, where following the consent of the subject follows the omission of the judicial phase, pursuant to art. 708, paragraph 1, of Italian Code of Criminal Procedure and the Minister will take his decisions within forty-five days from the receipt of the report attesting his consent.

[430] See Sez. VI, n. 27717/2008 Nalbaru.

[431] See Sez. VI, n. 7310/2014 Remenyi, Rv. 258814.

[432] The jurisdiction of the Court of Appeal is intended to comply with jurisdictional guarantees, including the need for the assessment on delivery to be made by a body that exercises jurisdiction. See *considerandum* n.8 of the 2002 Framework Decision, and art. 6 of the same Framework Decision, quoting, respectively: "Decisions on the execution of the European arrest warrant must be subject to sufficient controls […]" and "The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State […]".
Furthermore, this legislative choice is aimed at safeguarding the principle of the natural judge pre-established by law, according to art. 25 of the Italian Constitution.
Instead, the competence, in the discipline of extradition, is attributed to the minister of justice, administrative body, thus assuming a political and non-judicial assessment.

serious indications of guilt or an irrevocable sentence and after excluding the impeding reasons referred to in art. 18 of Law 69/2005.

The hearing in which the Court decides on the request for execution of the arrest warrant, except as provided for in art. 14, paragraph 4[433], will be held in chambers pursuant to art. 127 of Italian Code of Criminal Procedure within the twenty-day regulatory period established by art. 10, paragraph 4.

The explicit reference to art. 127 of Italian Code of Criminal Procedure raises interpretative doubts regarding the presence of the requested person at the hearing.

In fact, despite the reference to the discipline provided for by art. 127, which could erroneously lead to thinking to his presence as necessary, we should instead consider that the appearing of the wanted person at the hearing is only a possibility, without prejudice to the necessity of proper notification of the date of celebration of the hearing, for the purpose of his knowledge.

Application problems could arise in case the subject wants to participate in the hearing but is not able do so for reasons of unforeseeable circumstances, force majeure or other legitimate impediment[434].

In those cases, the case-law of the supreme courts considers that if the willingness to participate is manifested but there is an impediment, the hearing for the decision on the request to execute the arrest warrant must be postponed, otherwise it would be resolved in a case of nullity,[435] as in art. 127 of Italian Code of Criminal Procedure, as the right of participation in the hearing and therefore his right of self-defence would have been denied[436].

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The diversity is justified by the different moment in which competence takes root. In fact, in the extradition it detects the moment in which the request reaches the minister (moment in which there is no competent judicial authority), while in the Euromandate discipline it detects the moment right after, that is the one in which the authority receives the forwarded mandate by the minister, who is responsible for the transmission and reception of European arrest warrants.

[433] Art. 14, par. 4, Law 69/2005: « In the event that the consent has been validly expressed, the Court of Appeal will make a decision on the request for execution with an order issued without delay and, in any case, no later than ten days, after having heard the procurator general, the defender and, if appeared , the person requested for surrender».

[434] See A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 540.

[435] See C. S.U., n. 9/98, D'Abramo.

[436] Art. 24 Cost., as well as strongly defended by the Constitutional Court also in extraditional matters, with judgment of Constitutional Court, n. 280/85.

So, to solve the problem, in an interpretative way, it is necessary to make a distinction, according to the subject's *status libertatis*[437].

In fact, if the wanted person is subject to pre-trial detention in a different place than the one in which the competent Court of Appeal is based, the competent surveillance magistrate, pursuant to art. 127, paragraph 3, of Italian Code of Criminal Procedure, may hear him.

Instead, if the wanted person subject to coercive measure is not restricted to a different place but, even in case he wanted it, he shall not be able to participate, in order to exclude the loss of effectiveness of the measure, it would be possible to apply art. 17, paragraph 2 of the law on EAW, which, however, considers as the reason for impediment the only "cause of force majeure"; the doctrine[438] believes that the expression "cause of force majeure" may also include other grounds for impediment, stating in this case, if the impediment cannot be eliminated, the possibility for the Court to defer the decision pursuant to this provision, without consequent changes on the *status libertatis* of the wanted person.

If the impediment does not appear eliminable within the aforementioned term, the doctrine suggests resorting to the discipline of art. 304, paragraph 1, lett. a) of Italian Code of Criminal Procedure (suspension of the terms of maximum duration of pre-trial detention), so as to harmonize the discipline on EAW with the inspiring principles of our system[439].

If, on the other hand, a free subject does not have the opportunity to participate in the hearing by cause of force majeure or other legitimate impediment, the application of art. 17 should be excluded because the terms provided refer to cases in which the subject is affected by a restrictive measure; therefore, as seen above, the hearing will be postponed to guarantee the right of self-defence.

## 5. Refusal to delivery

[437] See A. MARANDOLA, (edit by),*Cooperazione giudiziaria penale*, Milan, 2018, 540.
[438] Cf. on this point A. MARANDOLA, (curated by), *Cooperazione giudiziaria penale*, Milan, 2018, 541.
[439] See A. MARANDOLA, (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 541.

The value of the judicial act of the European arrest warrant is extra-national and therefore acquires direct efficacy in the legal system of the requested State, obliging the judicial authority to apply it by virtue of the principle of mutual recognition.

Notwithstanding, there are cases provided for by law (articles 18 and 18 bis of Law no. 69/2005) in which the authority has the obligation or the right not to execute the mandate.

The framework decision distinguishes the grounds for mandatory non-execution under art. 3[440] and optional non-execution pursuant to art. 4[441], depending on whether the judicial authority has the obligation or the right not to apply the arrest warrant.

In particular, art. 4 of the framework decision 2002/584 / JHA concerns the hypotheses of absence of double incrimination[442], for the only crimes excluded from the list of thirty-two example cases pursuant to art. 2[443].

With reference to the hypothesis of discretionary refusal, there has been a long debate, as it would have resulted in the optional concrete application or even the optional implementation of the same impedimental reasons by the national legislator.

The Court of Justice has repeatedly stressed, however, that the non-mandatory does not concern legislative choices but the activity of the judicial authorities[444]. Hence, the transposition rules must list all the hypotheses envisaged by the framework decision, but it will be up to the judicial authority to assess whether it is appropriate or not to refuse execution.

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[440] Reasons concerning the need to safeguard the *ne bis in idem* principle.

[441] Also art. 4 bis of the Framework Decision 2009/299/JHA (which amends the provisions of the Framework Decision 2002/584/JHA by strengthening procedural rights especially in the case of decisions pronounced in the absence of the interested party in the process) on the possibility of a ruling issued *in absentia.*

[442]See judgment Advocaten voor de Wereld.
In doctrine: J. KOMAREK, *European constitutionalism and the European arrest warrant: in search of the limits of contrapunctual principles.*

[443] However, it is specified that, in the case of tax offenses, «the execution of the European arrest warrant cannot be refused on the basis that the law of the executing Member State does not impose the same type of taxes or duties».

[444] See judgement Wolzenburg and Kozlowski, par. 62 e 45. In doctrine, M. LIPANI AND S. MONTALDO, *I motivi ostativi all'esecuzione del mandato di arresto europeo nella legge italiana di recepimento e la Corte di Cassazione: uno sguardo di insieme, alla luce dei principi generali dell'ordinamento UE della giurisprudenza della Corte di giustizia,* Torin, 2017.

The cases of non-execution of the arrest warrant, in order to avoid the risk of unreasonable differences in its application, had been regulated by the Italian transposition Law n. 69/2005 in art. 18, strictly as cases of compulsory refusal and had been supplemented by other cases envisaged by the internal legislator, even if not expressly indicated by articles 3 and 4 of the framework decision, given in any way the possibility to trace them back to fundamental principles[445] and responding to both the central concerns of the national legislator to protect minors and the traditional reasons for refusing extradition[446]. The critical approach of the national legislator is therefore evident, with respect to European legislation[447], in the introduction of very strict control mechanisms[448] (considered by a large part of the doctrine[449] inconsistent with the logic of mutual recognition and more incisive than those present in the European Convention of extradition of 13 December 1957) and of refusal of surrender.

### 5.1. The decisions *in absentia*

In compliance with the guarantees for the due process, provided for by art. 6 of the ECHR and art. 111 of the Constitution, the Court of Appeal refuses delivery if the provision underlying the European arrest warrant was issued in violation of these guarantees and «a fair trial conducted in the minimum rights of the accused».

So the European institutions occurred in the matter in a vision of balancing between the efficient of judiciary cooperation and the protection of the defensive warranties[450].

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[445] Reforming Law n. 117/2019, modifying art. 18 (mandatory refusal) and introducing art. 18 bis (optional refusal), intervened on the compulsory/optional refusal regulation, thus adjusting and adapting internal law to the Framework Decision 2002/582/JHA.

[446] See M. LIPANI AND S. MONTALDO, *I motivi ostativi all'esecuzione del mandato di arresto europeo nella legge italiana di recepimento e la Corte di Cassazione: uno sguardo di insieme, alla luce dei principi generali dell'ordinamento UE della giurisprudenza della Corte di giustizia,* Torin, 2017, 6.

[447] See M. LIPANI AND S. MONTALDO, *I motivi ostativi all'esecuzione del mandato di arresto europeo nella legge italiana di recepimento e la Corte di Cassazione: uno sguardo di insieme, alla luce dei principi generali dell'ordinamento UE della giurisprudenza della Corte di giustizia*, Torin, 2017, 6 ff.

[448] Which will be approached in Chapter II.

[449] Cfr. A. CHELO, *Il mandato di arresto europeo*, 2010, p.220 and ff; G. DE AMICIS, *Mutuo riconoscimento solo nelle intenzioni,* in *Guida dir*., 2005, 75 ff.

[450] Cfr. F. MANFREDINI, *la giurisprudenza sul mandato d'arresto europeo,* II cap., 72 f.

The interested party must concretely highlight the violation of fundamental rights (in particular articles 5 and 6 of the ECHR and related additional Protocols) and not only in generic terms [451].

In particular, the jurisprudence[452] deemed refusal as not necessary if the mandate concerns a conviction sentence pronounced *in absentia* (in violation of the adversarial principle and of the right of defence), if the issuing State guarantees the convicted the possibility of requesting a new judgment in respect of these rights, by means of opposition (in this case, the French legal system); in the same way in the event that the process was carried out *in absentia*, in case the system provides for the review of the process[453].

In this regard, both Radu and Melloni judgments, examining the issues of fair trial and right of defence[454], reflected on the delicate balance between the needs for judicial cooperation and respect for guarantees in the criminal justice system.

In particular, in the Melloni judgment[455], the Spanish Constitutional Court asks the Court of Justice if higher national constitutional standards can be applied than those foreseen by the EAW discipline, thus exceeding the "minimum standards" provided for by the ECHR and the Charter of fundamental rights.

Therefore, the issue of personal participation of the accused in the criminal trial is addressed, in order to harmonize the procedures between all the Member States by providing for the cases in which the execution of a European arrest warrant is required and it is thereupon possible to proceed even in the absence of the wanted person[456].

Nevertheless, it is necessary to consider art. 6 of the Convention for the Protection of Human Rights and the ECHR, according to which the accused must appear personally at the trial.

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*https://air.unimi.it/retrieve/handle/2434/617644/1167704/la%20giurisprudenza%20sul%20mandato%20d%27arresto%20europeo.pdf*

[451] Cf. A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 556.

[452] See C. VI, n.3927/08, CP 2009, 1632; C. VI, n. 5400/08.

[453] In this case, Hungarian legal system C. VI, n. 5909/07, and judgment Cass. 21.6.2012 n. 25303, Mitrea.

[454] See Art. 6 ECHR and art. 47 of Charter of Fundamental Rights of the European Union.

[455]See judgement CJEU C-399/11 of 2013.

[456] Cf. F. MANFREDINI, *la giurisprudenza sul mandato d'arresto europeo,* 72 f. *https://air.unimi.it/retrieve/handle/2434/617644/1167704/la%20giurisprudenza%20sul%20mandato%20d%27arresto%20europeo.pdf*

Furthermore, art. 1 of Framework Decision 299/2009 (which amended Framework Decision 2002/584/JHA by inserting art. 4 bis relating to proceedings carried out *in absentia*[457]) provided for a strengthening of procedural rights, a facilitation of judicial cooperation in criminal matters, an improvement in mutual recognition of the decisions made in the absence of the interested party in the process; the main reason was not so much in order to harmonize the various legal systems but rather to clarify the common reasons for non-recognition of the decisions pronounced *in absentia* so as to reduce the cases of refusal to execute the decision, which hinders the principle of mutual recognition and slows down the execution times of the measures[458].

Thusly, the provisions of the last framework decision of 2009 allow the judicial authority that receives the request for recognition and execution of a default judgment, to refuse when the issuing authority does not provide a series of elements that certify the respect of the guarantees of information and reintegration.

The *ante iudicium* information guarantees include the citation of the defendant informed of the date and place set for the hearing. The defendant shall also be informed that the decision can be issued also in the event of absence from trial[459].

In fact, the lack of presence does not prevent recognition of the judicial decision.

Among the *post iudicium* information guarantees, the framework decision makes the execution of the sentence subject to the condition that the request contains precise indications on the knowledge of the accused, also informed of his right to appeal and to take on new evidence, but this last or has not filed appeals within the terms, or has expressly expressed that he does not want to oppose the

[457] See MARTA BARGIS, *Il mandato di arresto europeo dalla decisione quadro del 2002 alle odierne prospettive,* 2015.
[458] See Grana, Barbara Maria, *Il mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit,* Milan, 2019, 61ff.
[459] See Grana, Barbara Maria, I*l mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit,* Milan, 2019, 61 ff.

sentence or that he does not want to request a new judgment to re-evaluate the elements on the matter[460].

Therefore, each state must comply with the requirements of the ECHR, guaranteeing these rights even if "in accordance with their respective domestic law".

In the judgement[461], the Spanish Court questions the possibility of refusing the execution of an arrest warrant from Italy following a trial *in absentia*, as the instrument for reviewing the same trial is not provided and therefore lacking adequate protection of the rights of defence and fair trial. He therefore raised doubts about the interpretation of art. 4 bis [462] of Framework Decision 299/2009/JHA on the surrender procedure *in absentia*.

The European Court of Justice believed that discipline about the EAW must be compatible with articles 47 and 48 of the ECHR and prevailing over national provisions also of constitutional rank (in the specific case art.24, paragraph 2 of the Spanish constitution on the right to a fair trial), therefore the refusal of the EAW would not be justified.

However, the Spanish Constitutional Court found a violation of art. 53[463] of the Charter of Fundamental Rights.

Also worth mentioning, is the theory of counter limits[464], deriving from the need to protect as much as possible the national rights that would result in conflict with European law, interpreted in an authoritarian way by the Court of Justice.

The Melloni case, concerning the affirmation of the principle of mutual recognition, ends with the execution of the European arrest warrant, as the subject was aware of the proceedings against him (in fact he himself had appointed a

[460] See GRANA, BARBARA MARIA, *Il mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit*, Milan, 2019, 61 ff.
[461] In the specific case, it was an Italian citizen residing in Spain, investigated for fraudulent bankruptcy. He was the recipient of an arrest warrant from Italy following a trial carried out in absentia in 2004.
[462] The Article substituted art. 5 of framework decision 2002/584/ JHA.
[463] See Art. 53 of the European Charter of Fundamental Rights «Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions».
[464] See also V. MAIELLO in *Riv. It. Dir. e Proc. Pen.*, 2011, file n. 1, 130 ff., and A. MARANDOLA, (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 26 ff.

defender of trust) and had voluntarily withdrawn from its development by fleeing to Spain; since knowledge of the procedure had taken place, in this case the procedure for the execution of the arrest warrant would not have violated any right of defence or of fair trial, but rather its execution would have strengthened the idea of mutual trust between the States guaranteeing, except in exceptional circumstances[465], the reciprocal application of EU laws[466], a solution negatively commented by the doctrine[467] as it would seem an overcoming of the theory of counter-limits (which the Court has never fully endorsed), nulling its relevance.

The starting point for clarity of speech is the Radu judgment[468] in 2013, in which the Court of Justice was called to verify whether the right of defence (art. 47-48 ECHR) was respected even in the event that the subject of the EAW for procedural purposes (issued by Germany in this case) had not been heard before its issue[469].

The Court of Luxembourg specified that compliance with Articles 47 and 48 of the ECHR does not require the refusal of the execution of the EAW for procedural purposes in case the subject could not be heard before the issuance of the warrant, as this circumstance is not among the reasons for non-execution of the European arrest warrant foreseen by the decision framework 2002/584 / JHA, and furthermore such an obligation to refuse «would inevitably nullify the surrender system itself foreseen by the framework decision and, therefore, the creation of the area of freedom, security and justice, since, in particular in order to avoid the escape of the person concerned, such an arrest warrant must be able to benefit from a certain surprise effect[470]».

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[465] The term does not find a specific explanation in the judgement, therefore allowing the judicial authority to develop new interpretative paths between the surrender procedure and respect for fundamental rights.
Cit. A. MARANDOLA, (edit by), *Cooperazione giudiziaria penale*, Milan, 2018, 29.
[466] See A. MARANDOLA, (edit by), Cooperazione giudiziaria penale, Milan, 2018, 28.
[467] Cit. C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento VS diritti fondamentali*? 15.
*https://archiviodpc.dirittopenaleuomo.org/upload/1372847311AMALFITANO%202013a.pdf* 15.
[468] See judgement CJEU C-396/11.
[469] See C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento VS diritti fondamentali?* 5.
*https://archiviodpc.dirittopenaleuomo.org/upload/1372847311AMALFITANO%202013a.pdf*
[470] Cit. C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento VS diritti fondamentali?* 5,

In any case, for the guarantee of the rights of defence, to be counterbalanced with the application of the discipline on the EAW, the European legislator guaranteed the right to be heard in the executing Member State before proceeding with the surrender of the subject therefore a possible refusal of a surrender warrant for procedural purposes would not be allowed, due to the fact that the subject was not heard by the issuing State even before the warrant was issued[471]. As well as in the case in which the law of the issuing State allows the subject to appeal the sentence underlying the European arrest warrant, even only for the defects of legitimacy[472], by virtue of the right to the double degree of judgment (Art. 2 Protocol N. 7 ECHR).

One could certainly wonder whether other violations of the fair trial could still be suitable for limiting an "almost automatic" delivery[473].

Hence, referring to the Aranyosi and Caldararu judgment of the Court of Justice, it can be deemed that the Court's approach should extend to all the other violations of a right enshrined in the ECHR, regardless of its absolute scope[474], and in this case, the restrictions to the unsecured procedural rights established *tout court* an impediment to surrender.

### 5.2. Prohibition of inhuman or degrading treatments

It's provided the refusal of delivery, by the Court of Appeal, is envisaged in case of «great risk» that the subject may be subjected to inhuman or degrading treatment or punishment, or even death penalty. For the purposes of the decision, a mere prospect of the existence of a prison overcrowding condition or lack of medical assistance is not sufficient, if this is not accompanied by the

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*https://archiviodpc.dirittopenaleuomo.org/upload/1372847311AMALFITANO%202013a.pdf* and also A. MARANDOLA, *Cooperazione giudiziaria penale*, Milano, 2018, 27 ff.

[471] Cit. C. AMALFITANO, *Mandato d'arresto europeo: reciproco riconoscimento VS diritti fondamentali*? 5. *https://archiviodpc.dirittopenaleuomo.org/upload/1372847311AMALFITANO%202013a.pdf*

[472] See judgement Cass. 12.2.2008, n.434 Tanaro.

[473] See M. LIPANI AND S. MONTALDO, *I motivi ostativi all'esecuzione del mandato di arresto europeo nella legge italiana di recepimento e la Corte di Cassazione: uno sguardo di insieme, alla luce dei principi generali dell'ordinamento UE della giurisprudenza della Corte di giustizia,* Torin, 2017, 19.

[474] Cf. S. MONTALDO, *Mutual recognition, mutual trust and fundamental rights protection in the recent case law of the Court of Justice*, in *European Papers*, 2016, 965.

demonstration of the level of danger deriving from what is represented, nor by concrete elements on the real situation in the prisons of that State.

In the 2016 Aranyosi and Caldararu judgment[475], the Court of Appeal referred the matter to the Court of Justice for the correct interpretation of art. 1, par. 3, of the framework decision, asking specifically if this was a reason for refusing delivery in the presence of serious elements proving the incompatibility with art. 4 of the Charter of conditions of detention in the requesting State or if the execution judge had to ascertain the above-mentioned elements subjecting the delivery of the subject.

Therefore, uncertainties about how to act should be resolved if there are alleged violations of fundamental rights; we must ask ourselves how far, not so much the instrument of recognition, but first of all, mutual trust[476]? Indeed the trust between Member State and respect for fundamental rights go hand in hand and are inextricably linked.

But what would happen in the face of proof of a lack of equivalence? Is the duty of trust broken or not[477]?

Anticipating what I will say later, the European Court of Justice has always maintained a strategy, initially implicit and already with the explicit Melloni case, of the primacy of European law.

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[475]In the present case, two subjects, recipients of two European arrest warrants, one from Romania and the other from Hungary, were found by the German authorities, who were unable to surrender them as the two countries had been subject to sentences of condemnation by the European Court of Human Rights for the prison system present, characterized by the problem of overcrowding, in violation of art. 3 ECHR.
The Court of Luxembourg has specified that the implementation of EU secondary law cannot lead to manifest violations of fundamental rights, above all with reference to the Charter of Fundamental Rights of the European Union, which has absolute scope, as in the case of the safeguard of human dignity and the prohibition of torture and inhuman and degrading treatment, pursuant to art. 3 ECHR (See also judgement of the Court of Justice 12.06.2003, C-112/00, Schmidberger. Cfr. A. TANCREDI, L'emersione dei diritti fondamentali assoluti nella giurisprudenza comunitaria, in Rivista di diritto internazionale 2006, page 664.

[476]Cit. P. M. RODRIGUEZ, *La emergencia de los lÍmites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Caldararu,* in *Riv. De Derecho Comunitario Europeo*, 2016, file 20, n. 55, 863.

[477]Cf. P. M. RODRIGUEZ, *La emergencia de los lÍmites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Caldararu,* in *Riv.* And also N. LAZZERINI, *Obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: the sentence "Aranyosi e Caldararu",* in *Riv. Diritti umani e diritto internazionale*, 2016, file 2, 446, according to which the essential prerequisite for mutual recognition is mutual trust between Member States that their respective national legal systems are capable of providing equivalent and effective protection of fundamental rights recognized at European level. Cit.

What is certain is that European instruments lack weakness and sometimes ambiguity therefore, in addition to a lack of preventive harmonization, they create problems of "regulatory imbalances[478]" (for example in the case in which it was uncertain whether the distinction between mandatory or optional refusal was up to the judicial or State).

In the specific case, the Court of Justice clarified the scope of art. 1, par. 3, of the framework decision, which is aimed at basing any aspect of the European arrest warrant procedure on the protection of fundamental rights[479].

It also clarified that only in the presence of a well-founded risk of serious violation of fundamental rights pursuant to art. 3 ECHR the execution of the warrant can be postponed and therefore the requested subject can be released (obviously subjecting him to the application of precautionary measures in order to avoid the danger of escape) and only if the surrender cannot be completed within a reasonable time then the procedure can be abandoned.

Therefore, the judicial authority must have reliable and precise objective elements, suitably updated and proving the presence of systemic deficiencies on detention centers and their conditions[480].

The violation of human rights guaranteed by the Union also includes an overcrowding situation that violates art. 3 and 4 of the ECHR on the prohibition of torture and inhuman or degrading treatments.

Therefore, the Court of Justice has given an interpretation of art. 1, par. 3, of the framework decision, according to which the latter, rather than containing a cause of refusal of surrender, seems to contain a reason for its postponement, which only in cases of *extrema ratio* can lead to the non-execution of the European arrest warrant[481].

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[478] Cit. P. M. RODRIGUEZ, *La emergencia de los lÍmites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Caldararu*, in *Riv. De Derecho Comunitario Europeo*, 2016, file 20, n. 55, 869.

[479] On the issue, see also judgement of the Court of Justice 10.11.2016, C-452/16 PPU, Poltorak.

[480] Cf. N. LAZZERINI, *Obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: la sentenza "Aranyosi e Caldararu",* in *riv. Dir. Umani e dir. Internaz*., 2016, file 2, 448.

[481] See M. LIPANI AND S. MONTALDO *I motivi ostativi all'esecuzione del mandato di arresto europeo nella legge italiana di recepimento e la Corte di Cassazione: uno sguardo di insieme, alla luce dei principi generali dell'ordinamento UE della giurisprudenza della Corte di giustizia,* Torin, 2017, 17.

However, Member States cannot demand from[482] another State a higher level of national protection than that guaranteed by the Union and moreover, except in exceptional cases[483], they can not check if the other State has truly respected the fundamental rights guaranteed by the Union in the specific case; it would therefore be substantiated in a sort of almost absolute presumption[484] of respect for fundamental rights.

As regards the death penalty, one could also speak of an "out of work[485]" provision as such is a now inconceivable sanction for all States participating in the ECHR and its protocols.

With the regard to inhuman and degrading treatments, however, some authors [486] have understood it as necessary to reiterate compliance with the guarantee, especially in relation to terrorist offenses.

One of the most recent impediments to surrender listed in letter h) of art. 18 is prison overcrowding[487], considered as an inhuman or degrading treatment pursuant to art. 3 of ECHR.

The criterion outlined by the Court of Human Rights, which considered that the minimum individual space must be 3 square meters of walkable area, would not be definitive in any case to ascertain the damage to the prisoner's rights, but instead the judicial authority, before deliver the subject, must carefully inquire about the prison conditions in the requesting State, taking into account the overall

[482] On this point see the Melloni case, GCUE n. C-399/11.

[483] These are the cases in which the space of judicial control is expanded, when there are distorting factors whose relevance makes a deviation from the "binary" of mutual recognition.
Cit. A. MARTUFI, *La Corte di giustizia al crocevia tra effettività del mandato di arresto e inviolabilità dei diritti fondamentali. Note of the Court of Justice, causes C-404/15 e C.659/15 PPU, Aranyosi e Caldararu*, in Riv. *Dir. Pen. e proc.*, 2016, file 9, 1247.

[484] Cfr. N. LAZZERINI, *Obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: the sentence "Aranyosi e Caldararu",* in *Riv. Dir. Um. e dir. Intern.*, 2016, file 2, 447, and also A. MARTUFI, L*a Corte di giustizia al crocevia tra effettività del mandato di arresto e inviolabilità dei diritti fondamentali. Note of the Court of Justice, C-404/15 e C.659/15 PPU, Aranyosi e Caldararu*, in *Riv. Dir. Pen. e proc.*, 2016, fasc. 9, ibidem, about the mutual trust that led judicial authority to validate the fungibility of the procedural guarantees granted by the interested legal systems.

[485] Cit. A. CHELO, *Il mandato di arresto europeo,* Padova, 2010, 239.

[486] Cf. A. CHELO, *Il mandato di arresto europeo*, Padova, 2010, 239.

[487] The problem of prison overcrowding has in fact led to a deterioration in the living conditions of prisoners, both in relation to the spaces and the availability of services, such as medical-health or educational services.
See art. 5 ECHR « No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law».

conditions of the prison institution and the hygiene conditions and other services provided[488].

For the purposes of the decision, in fact, a mere prospect of the existence of a prison overcrowding condition or lack of medical assistance is not sufficient[489] unless it is accompanied by the demonstration of the level of danger deriving from what is represented, nor by concrete elements on the real situation in the prisons of that State[490].

In conclusion, this is a fundamental judgement since it highlights an opening towards the protection of fundamental rights, in terms of a limit to mutual trust [491].

Later on, in the Terziyski judgment of 2016[492], the Court of Cassation stated that after having ascertained with reliable documents the general risk of

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[488] Cf. G. PECORELLA *Leggi di recepimento del mandato di arresto europeo da parte dei 27 paesi UE: commentate con la giurisprudenza delle Corti Italiane*, Milan, 2008.

[489] Sometimes referred to as "double check" as a compromise between the application of European law and respect for fundamental rights.
Cit. A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 30.

[490] See C. VI, n. 43537/14, EDC 260448.
On the matter, it is relevant the sentence of the Grand Section of the CJEU of 5.4.2016, Aranyosi and Caldararu.
The Court of Luxembourg has specified that the implementation of EU secondary legislation cannot lead to manifest violations of fundamental rights, above all with reference to the Charter of Fundamental Rights of the European Union, which has absolute scope, as in the case of the safeguard of human dignity and the prohibition of torture and inhuman and degrading treatment, pursuant to art. 3 ECHR (See also judgement of the Court of Justice 12.06.2003, C-112/00, Schmidberger.
Cf. A. TANCREDI, *L'emersione dei diritti fondamentali assoluti nella giurisprudenza comunitaria* in *Riv. Dir. Inter.*, 2006, 664.

[491] Cit. A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 29.

[492] Cass. 3.6.2016 n. 23563, Terziyski, in which the Court of Cassation, in implementation of the provisions of Framework Decision 2002/584/JHA, outlined in detail the procedure that the Court of Appeal will have to carry out if the conditions are met. The latter, in fact, «will have to forward the request for additional information to the Bulgarian judicial authority, pursuant to art. 16 L. n. 69 of 2005, concerning the following data: if the person requested for surrender will be detained at a prison facility; in the positive case, the conditions of detention that will be reserved to the interested party, in order to specifically exclude the risk of treatment contrary to art. 3 ECHR (i.e. the name of the facility in which it will be held, the minimum individual intramural space reserved for it, the hygiene and health conditions of the accommodation; the national or international mechanisms for checking the actual conditions of detention of the delivery). The act of forwarding through the central authority will favour both a homogeneous tendency to deal with similar cases and the involvement of political authorities. In submitting the request for additional information, the Territorial Court will also have to set an adequate term which, pursuant to art. 16 cit., however, cannot be longer than thirty days. Once the requested information has been received, the Court of Appeal must assess whether the actual risk of a treatment contrary to art. 3 ECHR. In order to determine the individual intramural space compliant with European standards, the Territorial Court will take into account the principles developed by the jurisprudence of legitimacy, which

inhuman treatment, it will be necessary to ascertain, also through the request for additional information necessary to the issuing State, that there is actually the possibility that the requested subject may be subjected to such inhuman treatment[493].

Thus, considering the judgment of the Luxembourg Court analysed above, we can interpret the letter h) of Article 18 as follows: the delivery of the requested subject can only be arranged when the executing judicial authority can exclude a concrete risk of inhuman or degrading treatment; otherwise, the execution must not be refused but only postponed, within a reasonable time, until additional information is received which allows the exclusion of the risk of infringement[494].

For ascertaining the concreteness of the risk of being subjected to treatments in violation of art. 3 ECHR, the same Court has identified parameters, including:

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established how the same should be identified in a space at least equal to three square meters of walkable floor space (Sect. 1, sent. n. 5728 del 19/12/2013, dep. 2014, Berni, Rv. 257924). […] Furthermore, if sufficient information is received to exclude the risk of treatment contrary to Article 3 ECHR within the above terms, delivery will be allowed. Otherwise, based on the same information, the persistence of this risk cannot be ruled out, the Court of Appeal is required to refuse the delivery of the documents in relation to art. 18, paragraph 1, lett. h) L. n. 69 of 2005.
The decision at that stage is justified on the basis of the indications coming from the Court of Justice, with the prospect that, within a reasonable time, the issuing State can take, in relation to the person subject to the request, the necessary measures to ensure favourable conditions to surrender, that is, respect for the inviolable rights of the human person, enshrined in the fundamental Charter of the European Union. This implies that, in the event that the judicial authority of the issuing State sends the aforementioned information, in the light of the parameters indicated above, subsequently and in any case within a reasonable period, the *res judicata* in the state of the acts formed on the refusal, if it renders the other issues already decided cannot be negotiated, it does not prevent the delivery of a subsequent ruling in favour of the delivery, in relation to the new elements that have arisen regarding the conditions of future detention».

[493] If the prisons of the issuing State of the arrest warrant are overcrowded, unhealthy, and with poor light and ventilation, the actual and concrete risk that the subject may be exposed to inhuman practices must not be demonstrated, as those conditions are considered objective elements but the judicial authority may in any case request additional information that could exclude the risk of inhuman treatment.
Cfr. M. LIPANI AND S. MONTALDO, *I motivi ostativi all'esecuzione del mandato di arresto europeo nella legge italiana di recepimento e la Corte di Cassazione: uno sguardo di insieme, alla luce dei principi generali dell'ordinamento UE della giurisprudenza della Corte di giustizia*, Torin, 2017, 16 ff.

[494] See M. LIPANI AND S. MONTALDO, *I motivi ostativi all'esecuzione del mandato di arresto europeo nella legge italiana di recepimento e la Corte di Cassazione: uno sguardo di insieme, alla luce dei principi generali dell'ordinamento UE della giurisprudenza della Corte di giustizia*, Torin, 2017, 17, and also A. MARANDOLA, *Cooperazione giudiziaria penale,* Milan, 2018, 31.

−the peculiarity of certain detention centres − the existence of systematic or generalized deficiencies - the risk for certain groups of prisoners[495].

Also in 2016, the Court of Cassation[496] focused on the investigations to be carried out by the judge of the executing Member State with regard to the concrete prison path of the person requested for surrender.

If from the information received at that stage, objective, reliable, precise and updated elements shall emerge, of a high risk that the wanted person may be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, the judicial authority will refuse delivery[497].

### 5.3. The foreign person

Until 2009, the Court of Cassation had repeatedly held that the notion of residence could also concern the foreigner who lives or resides on Italian territory according to the discretion left by the framework decision to the national legislator[498].

Latterly, with three orders[499], the Court clarified that the discretion left to the national legislator aimed to built a guarantees' regime for the citizen and the resident but did not allow different treatments between the two, with the consequence of recognizing a privilege only in favour of the citizen[500]. But what if the purpose of the provision really had been to maintain the subject's family and social ties as much as possible to encourage correct reintegration at the end of the execution, why does art. 19, paragraph 1, lett. c) of the law in question, inserted in

[495] See GAETANO PECORELLA, *Leggi di recepimento del mandato di arresto europeo da parte dei 27 paesi UE: commentate con la giurisprudenza delle Corti Italiane*, Milan, 2008.
[496] See judgement Cass., sect. VI, n. 23277/2016.
[497] Also see judgement. Cass. 47893/17, in which the requested delivery (in the specific case from Romania), can only be arranged following the receipt of specific information on the basis of which the risk of an inhuman or degrading treatment can be excluded against the delivery.
According to the Cassation, the Court of Appeal will be able to reject the request, in the state of the proceedings, if the information does not arrive within a reasonable time.
[498] See A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 567 ff.
[499] See Sect. VI, n. 33511/2009, Sect fer., n. 34213/2009, Sect. VI, n. 42868/2009.
[500] Cf. E. CALVANESE AND G. DE AMICIS, *Rapporti giurisdizionali con autorità straniere, mandato di arresto europeo legge n. 69/2005* in *Cass. Pen., Rassegna di giurisprudenza sul mandato di arresto europeo, supplement to volume LVII,* n. 09 of 2017, 2625.

a similar context, instead provide for a different discipline where the citizen's position is equal to that of the mere resident[501]?

From supranational sources, art. 17 EC: «Every person holding the nationality of a Member State shall be a citizen of the Union», together with art. 18 EC «Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States […]».

With reference to the definition of "resident", the Supreme Court [502] included the foreigner who demonstrates the existence of a "real and non-extemporaneous grounding" in the national territory and therefore that with temporal continuity and sufficient territorial stability has established there the centre of his professional, economic or affective interests[503].

Nonetheless, there are several cases in which the same Court ruled out the hypothesis of a resident, for example, against a Romanian citizen without a residency permit or in the case of a Romanian citizen without a permanent job[504].

All because, in order to fall within the notion of resident, it is necessary to demonstrate an habitual residence in Italy, not in absolute continuity, but as a "habitual dwelling" (therefore compatible also with frequent departures), and the intention of permanently remain in Italian territory for an appreciable period of time[505].

The deal was the sentence of the Constitutional Court 227/2010, which declared the constitutional illegitimacy of art. 18, paragraph 1, lett. r) in the part in which it did not provide for the refusal of surrender also of the citizen of another member country of the European Union, who legitimately and effectively has residence or abode in the Italian territory, for the purpose of the execution of the prison sentence in Italy in accordance with the internal laws.

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[501] Cit. E. CALVANESE AND G. DE AMICIS, *Rapporti giurisdizionali con autorità straniere, mandato di arresto europeo legge n. 69/2005*, in *Cass. Pen., Rassegna di giurisprudenza sul mandato di arresto europeo, supplement to volume LVII*, n. 09 of 2017, 2625.
[502] See C. VI, n. 12665/08, CP 2008, 3746.
[503] Cf. A. MARANDOLA, *Cooperazione giudiziaria penale*, Milan, 2018, 567.
[504] See Sect. fer., n. 36322/2009, Grosu, Rv. 245117. Sect, VI, n. 2950/2010, Lazurca, Rv. 245791.
[505] See C. VI, n. 17643/08, Chalonne, Rv. 239651 in which the Court ruled out the occurrence of the aforementioned condition against a French citizen who was found homeless and without documents, believing that the mere certificate of residence is not suitable on its own to demonstrate the existence of the legal requirement, against significant results in opposition to that.

It is thereby explained how the provision would otherwise have violated Articles 11 and 117 of the Constitution through the interposed parameters constituted by articles 4, point 6, of the Framework Decision, and 18 TFEU[506] (formerly Article 12 EC Treaty), and the principle of non-discrimination on the basis of nationality; in fact, in that case the discrimination would not have been reasonably and proportionately justified.

In this way, the ruling of the Constitutional Court integrated into our system the principles previously elaborated [507] by the Court of Justice [508], according to which it is the task of the Court of Appeal to assess the resident or abode *status* of the European citizen whose surrender is requested[509].

The framework decision included the possibility of refusing delivery among the optional grounds for refusal while the Italian legislator, during the

[506] Art. 18 TFUE, paragraph 1 «Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited».

[507] See judgement Kozlowski CJEU C-66/08 in which the Court defined the notions of «residence» and «dwelling» as «autonomous notions of EU law» as the provision does not contain an explicit reference to the law of the Member States, therefore the latter are not required to confer a wider scope than that resulting from the Court's interpretation.
Therefore, a wanted person resides in the executing Member State if he «has established his actual residence there», while he dwells there when «following a permanent stay of a certain duration in the same, he has acquired liaisons with that State of intensity similar to that of the links established in case of residence». The executing judicial authority must therefore carry out an «overall assessment» of the objective elements that characterize the person's situation, including, in particular, «the duration, nature and circumstances of his stay, as well as family ties and economic» the person has with the executing Member State.
Cit. M. BARGIS, *Il mandato d'arresto europeo dalla decisione quadro del 2002 alle odierne prospettive*, 2015, 62 in
*https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/bargis_4_15.pdf*
See also judgement Wolzemburg, CJEU C-123/08, in which the Court of Justice has specified that it is compatible with art. 18 TFEU a national regulation which makes the refusal to execute the EAW for executive purposes against a citizen of another Member State – who has a right of residence (art. 21 TFEU) - subject to the condition that he has legally resided continuously for a certain period in the executing Member State.

[508] The Court of Justice has in fact been repeatedly called upon to settle many preliminary issues on the Framework Decision on the EAW, both with regard to the mandatory and optional nature of the grounds for refusal, and with regard to the principle of specialty and its exceptions etc.
See M. BARGIS, *Il mandato d'arresto europeo dalla decisione quadro del 2002 alle odierne prospettive*, 2015, 62 ff in
*https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/bargis_4_15.pdf*

[509] The Court of Cassation will eventually only be able to set aside if the appeal judge has failed to fulfill its prerogatives. See judgement Cass. 10.10.2013 n. 41910: «The aforementioned deductions regarding the stable and non-extemporaneous rooting in Italy and the documentation subsequently produced, require a specific and in-depth assessment regarding the applicability or not of the aforementioned art. 18, lett. r, which cannot be done here, but due to the peculiarity of the factual context, requires specific decisions and possible preliminary investigations, which do not belong to this Court of legitimacy».

implementation[510], added this cause of refusal among the mandatory grounds, generating a position of disparity between those who were EU citizens and citizens Italian residents.

The Constitutional Court in 2010 thus outlines the new balances in terms of safeguarding the fundamental rights of the European citizen, also starting from the twin judgments[511] of 2007 according to which the effect of the international obligations pursuant to art. 117, paragraph 1, of the Constitution would affect globally and univocally on ordinary law, through provisions that achieve this purpose, defined as "interposed" as of subordinated rank in regard to the Constitution but intermediate between this and the ordinary law[512].

The judgement of the Constitutional Court appears to comply with what the Court of Justice[513] will deem in 2012, clarifying the scope of art. 4, point 6, of the framework decision, on the grounds for refusal: pursuant to art. 18 TFEU on the principle of non-discrimination, although national law simply provides for the refusal of delivery if it is a citizen, art. 4, point 6, of the framework decision cannot be interpreted excluding from the concept of "citizen" the person residing or dwelling or having the citizenship of another Member State[514].

Recently, the Sixth Criminal Section of the Cassation[515] considered as not manifestly unfounded the issue on constitutional legitimacy of art. 18 bis, introduced by art. 6, paragraph 5, lett. b) of Law 177/2019, with reference to articles. 3, 11, 27 paragraph 3, and 117 paragraph 1, of the Italian Constitution, where it does not provide for the optional refusal to surrender the citizen of a State, even if not a member of the European Union, who legitimately and effectively has residence or abode in Italian territory, provided that the Court of

[510] For the issues that caused a delay in the implementation of the framework decision, see V. CAIANELLO AND G. VASSALLI, *Parere sulla proposta di decisione quadro sul mandato di arresto europeo*, in *Cass. Pen*., 2002, 462.
[511] V. Sent. Corte Cost. n. 347 e 349 del 2007.
[512] Cit. E. CALVANESE E G. DE AMICIS, *Rapporti giurisdizionali con autorità straniere, mandato di arresto europeo legge n. 69/2005*, in *Cass. Pen., Rassegna di giurisprudenza sul mandato di arresto europeo, supplement to volume LVII*, n. 09 del 2017, 2631.
[513] V. Sent. CGUE 2012, C-42/11.
[514]Cf. E. CALVANESE E G. DE AMICIS, Rapporti giurisdizionali, con autorità straniere, in *Cass. Pen., Rassegna di giurisprudenza sul mandato di arresto europeo, 2017, supplement to volume LVII, n. 09*
[515] See Cass. Pen., Ord. 04/02/2020, n.10371.

Appeal orders the penalty or security measure against the subject to be carried out in Italy, according to domestic law.

In the case in analysis, the Court of Appeal of Genova, having recognized the conviction sentence, had refused the surrender of the Albanian citizen in execution of a European arrest warrant issued in 2018 by the General Prosecutor at the Thessaloniki Court of Appeal, regarding the final sentence of life imprisonment with the addition of a financial penalty for the crime of drugs trafficking.

A contrast was raised between internal and European legislation, in terms of the difference in treatment between citizens of European nationality with reference to the right of free establishment within the territory of the member countries. In fact, the refusal of surrender pursuant to art. 18 bis lett. c) should also apply to a resident who, although of non-euro-nationality, is stable in one of the Member States, within the borders of the Common Area of freedom, security and justice promoted by the European Union, in order not to incurring unjustified unequal treatment, by virtue of the principle of equality and non-discrimination (art.18 TFEU).

The guarantee in art. 27 paragraph 3 of the Constitution, higlights the purpose and of reintegration, independent of the nationality of the sentenced person. And also in regards to articles 11 and 117 of the Constitution, in this case it would be a failure to comply with the Euro-unit protection obligations in the field of criminal judicial cooperation.

The Cassation, accepting the appeal and remitting the matter to the Constitutional Court, notes that for this case reference should be made at art. 696-ter of Italian Code of Criminal Procedure concerning the protection of the fundamental rights of the person in mutual recognition procedures, in order to verify compliance with these rights. According to this provision: «the judicial authority will recognize and execute if there are no justified reasons to believe that the accused or sentenced person will be subjected to acts that constitute a serious violation of the fundamental principles of the legal order of the State, of the fundamental human rights recognized by art. 6 of the Treaty on European Union

or the rights, freedoms and principles enshrined in the Charter of Fundamental Rights of the European Union».

Another reference to the need to guarantee human rights is provided in the first place by art. 1, par. 3, of the Framework Decision 2002/584 / JHA which specifies that the same cannot change the obligation to respect fundamental rights and the legal principles enshrined in art. 6, par.1, TEU.

And again, in the *considerandum* n. 10 of the same framework decision, fundamental rights are recalled and the possibility of suspension of the procedure on the European arrest warrant is specified in the event of serious and persistent violation by the Member States of the principles referred to in art. 6, par.1, TEU, in application of art. 7, par. 1, TEU and with the consequences provided for in par. 2 of the same provision.

In particular, in *considerandum* n. 12 the need to guarantee these fundamental rights is highlighted by referring to the rights guaranteed by the ECHR and the resulting constitutional traditions common to the Member States.

However, it is true that art. 52, par. 1 of the Charter of Fundamental Rights, establishes that «Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others».

Therefore, the restriction on the exercise of these fundamental rights would therefore be allowed if, however, it responds to purposes of general interest and does not result in a «disproportionate and unreasonable interference undermining the very substance of those rights».[516]

Even the ECHR, in art. 8, par 2, states that «There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

[516] See judgement CJEU Kjell Karsson and others, C-292/97, paragraph 45.

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

The negative commitment by States must be balanced with the addition of positive obligations to adopt suitable measures to guarantee effective respect for «family and private life», in particular, through the principle of proportionality between the (disputed) measure and the aim pursued[517].

Having considered the foregoing, the Court of Cassation concludes that: «with regard to the real and non-extemporaneous rooting on the Italian territory of the person requested for surrender and of the entire family community to which he belongs, excluding *a priori* the possibility that the resident citizen of a third State will discount the imposed on him by another EU Member State constitutes a concrete risk of jeopardizing the preservation of family ties during the phase of prison sentence execution, precluding his access and permanence in that community of affections and mutual solidarity and collaboration that could facilitate his social reintegration[518]».

Concluding, the last reform[519] in the matter transferred this instrument in the art. 18 bis lett. C).

## 6. The implementation of Framework Decision 2002/584/JHA

[517] See ECHR, 8 April 2014, Dhahbi v. Italy.

[518] Cit. order VI Criminal Section of the Court of Cassation, n. 10371/2020.

[519] The Sixth Criminal Section of the Cassation raised the question of constitutional legitimacy of art. 18 bis, introduced by art. 6, paragraph 5, lett. b) of Law 177/2019, with reference to articles 3, 11, 27 paragraph 3, and 117 paragraph 1, of the Constitution, where it does not provide for the optional refusal to surrender the citizen of a State, even if not a member of the European Union, who legitimately and effectively has residence or abode in Italian territory, provided that the Court of Appeal orders that the penalty or security measure ordered against the subject be carried out in Italy, according to domestic law.
See referral order n.10371, hearing of 04/02/2020.
In the case in analysis, the Court of Appeal of Genova refuses the surrender of the Albanian citizen in execution of a European arrest warrant issued in 2018 by the Prosecutor General at the Thessaloniki Court of Appeal, in relation to the final judgement of life sentence with addition of pecuniary punishment, for the crime of drug trafficking.
A contrast was raised between internal and European legislation, in terms of the difference in treatment between citizens of European nationality with reference to the right of free establishment within the territory of the member countries. In fact, the refusal of surrender pursuant to art. 18 bis lett. c) should also apply to a resident who, although of non-euro-nationality, is stable in one of the Member States, within the borders of the Common Area of freedom, security and justice promoted by the European Union, in order not to incurring unjustified unequal treatment, by virtue of the principle of equality.

For some Countries, the goal of speedy of the new discipline has been achieved in a more concrete and effective way[520]; Countries such as Spain, Sweden, France and others were certainly quicker than Italy in implementing the framework decision.

For example, Spain succeeded in enacting implementing laws n. 2 and 3 in 2003, providing for the surrender procedure to take place before the *Juzgado Central de Instruction* (JCI) *de la Audiencia Nacional*, in application of the rules of the criminal procedure code on arrest[521].

If the requested person does not consent to the surrender (which must be evaluated by the public prosecutor), a second phase will open before the Criminal Section of the *Audiencia Nacional* of Madrid which could adopt measures relating to the personal freedom of the wanted person.

The right of the arrested person to express consent to surrender and renounce the benefit of the specialty principle was provided for in all the laws of the Contracting States, although each State has then adopted its own specifications, as in France and Slovakia, in which the waiver can only occur when the subject has given consent to the delivery[522].

The UK also took a short time to implement the framework decision through the *Extradition Act* of 2003[523].

The peculiarity is that, the competent authority to receive the arrest warrant, the *National Criminal Intelligence Service* (N.C.I.S.) in England and the *Crown Office* in Scotland, will verify that the arrest warrant is issued by a judicial authority recognized as competent to the issue and, in the case of an arrest warrant for enforcement purposes, it must contain the

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[520] On the issue, cf. M. BARGIS AND E. SELVAGGI*, Il mandato di arresto europeo, dall'estradizione alle procedure di consegna,* Torin, 2005, 501 ff.
In the opinion of G. DE AMICIS reported here, the new delivery system certainly had positive aspects, compared to the extradition procedure, at least with regard to the speed of the procedures and the general framework of defensive guarantees, thanks to the elimination of the political figure and the definitive jurisdictionalization of the procedure.

[521] See L. KALB, (edit by), *Il mandato di arresto europeo e le procedure di consegna*, Milan, 2005, 527.

[522] For further information on procedural differences between the various states, see M. BARGIS and E. SELVAGGI, (edit by), *Il mandato di arresto europeo dall'estradizione alle procedure di consegna,* Torin, 2005, 491 ff.

[523] See L. KALB, (edit by), *Il mandato di arresto europeo e le procedure di consegna*, 2005, 528.

certification that the wanted person has been declared a fugitive. At that point, after being provisionally arrested by police officers, in the initial hearing the wanted person can bail out to obtain freedom.

It is possible to appeal to the *High Court* to the decision of surrender and subsequently also to *House of Lords*[524].

Germany, with the federal implementation law of 21 July 2004, had attributed jurisdiction to the ministries of federal justice and the *Länder*, which would have to forward the documentation to the prosecutor's office at the Higher Regional Courts[525].

In addition to the admissibility of the arrest warrant, the imputability of the person at the time of the fact and compliance with the principle of *ne bis in idem* are required.

In the case of a German citizen, his consent will be required for the purpose of delivery which, in the case of an arrest warrant for trial purposes, will be admissible only if the requesting State provides guarantees on the return of the subject for the enforcement of the sentence.

The provision that decides on the delivery cannot be subject to appeal, unlike the United Kingdom law.

In addition, the arrest warrant can also be transmitted without translation, if the requesting State has declared to recognize the arrest warrants issued in German by the German judicial authorities[526].

As regards France, the implementing law n. 204 was enacted in 2004.

The delivery procedure takes place before the Attorney General and the *Chambre de l'instruction* at the Court of Appeal; the prosecutor verifies the receipt of the arrest warrant to the information of the existence and content of the measure restricting freedom by adopting the precautionary measure[527].

[524] See L. KALB, (edit by), *Il mandato di arresto europeo e le procedure di consegna*, 2005, 528.
[525] See L. KALB, (edit by), *Il mandato di arresto europeo e le procedure di consegna*, 2005, 529.
[526] See L. KALB (edit by), *Il mandato di arresto europeo e le procedure di consegna*, 2005, 529.
[527] See L. KALB (edit by), *Il mandato di arresto europeo e le procedure di consegna*, 2005, 527 .

*La Chambre de l'instruction*, subsequently, has the function of deciding on the execution, in a public hearing, with the necessary participation of the arrested person and the prosecutor.

The arrested person can give his consent to the delivery or, otherwise, he can appeal in cassation against the decision on delivery.

The several difficulties related to the translation and interpretation of the framework decision lead to differences in implementation and possible discrepancies between Countries. For example, some Member States have chosen not to include in the list referred to in art. 2, par. 2, of the framework decision, some types of crime, thus creating inequities; I refer to the exclusion of the case of fraud in Slovenia, or the exclusion of the case of racketeering in France and Greece, while Slovenia has included it only in the case of insolvency.

Although the verification of double incrimination, as regards crimes not included in art. 2, par. 4, of the Framework Decision, is only provided as optional, the fact remains that double incrimination is itself a precondition for delivery in all Member States[528].

Another procedural inadequacy[529] of the new discipline, from an overall perspective, concerns the help that Eurojust could provide in relation to Articles 16, par. 2, and 17, par.7, of the framework decision since, with reference to cases of information and consultation, the enormous value of this supranational body would not be fully exploited, probably due to the incomplete and ineffective transposition of the decision by the States.

## 7.Procedural problems between member States

### 7.1. The Italy-Romania relationship

[528] On the matter, cf. G. DE AMICIS, comment *in* M. BARGIS and E. SELVAGGI, (edit by), *Mandato di arresto europeo dall'estradizione alle procedure di consegna*, Torin, 2005, 479.
[529] Cf. M. BARGIS and E. SELVAGGI, (edit by), *Mandato di arresto europeo dall'estradizione alle procedure di consegna*, Torin, 2005, 503.

It has already been said how the new instrument of judicial cooperation has substantially replaced [530] the existing conventional one, consecrated in Strasbourg on 21st March 1983, and the related additional protocol of 18th December 1997, concerning the transfer of sentenced persons.

In this regard, for example, in 2003, on the 13th September, the need arose to reach a bilateral agreement in order to simplify the frequent procedures between Italy and Romania, promulgated in our country with the ratification law no. 281 of 30 December 2005. The was meant to simply the transfer of prisoners' procedure, excluding the need to collect the consent of the subject − however to be necessarily heard − in the cases in which the sentence pronounced against him or an administrative measure defined further to it, would entail a measure of expulsion or accompanying to the border or any other measure in application of which the sentenced person−after being released from prison − would no longer be able to stay in the territory of the sentencing State; and in all cases where the measure of expulsion or accompaniment at the border are adopted with a definitive administrative measure against the convicted person for an offense punishable by a custodial sentence exceeding a maximum of two years according to the order of the sentencing State[531].

As also emerging from the European project *Repers – Mutual trust and social rehabilitation into practice*[532], which deepened the debate between Italy, Spain and Romania [533], with reference to the functioning of the framework decision and the transposition laws within those States, there is a significant and majority presence of Romanian prisoners both in Italy and Spain.

As also revealed by the statistics of the Department of Prison Administration, updated to 17 February 2016, Romanian citizens detained in Italy are second in a ranking of nationalities represented in the framework of foreign

[530] Replacement provided for by Art. 26 of the Framework Decision 2008/909/JHA.
[531] On the matter, see A. SALDARELLI, *Trasferimento delle persone detenute all'estero*, 2005, in *http://www.altrodiritto.unifi.it/sportell/trasfest.htm*
[532] See V. FERRARIS, *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019, in *http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*
[533] Which transposed the Framework Decision 2008/909/JHA only in 2013 with Law n.300.

population detained in Italy (2822 foreigners), among of which 1652 Romanian citizens definitively sentenced[534].

The problems arising between Italy and Romania, raised in the circular of 19th September 2016 by the Ministry of Justice, concern various aspects both on the implementation of the discipline provided for in the Framework Decision 2008/909/JHA and on driving problems for the judicial authority on how to proceed in the future.

In the general framework, in fact, there are shortcomings including the failure of the judicial authority to promptly establish the procedure, the absence of connection with the European arrest warrant procedures, the inaccuracies and deficiencies in the completion of the certificate by the judicial authority, and the non-timely communication of changes in the legal position of the sentenced person to the Ministry's international cooperation office[535].

The analysis of some files located at the international cooperation office[536] shows a picture in which Romania is the predominant State in the cooperation mechanism; the number of files involving Romania is around 72%[537] and in fact the number of Romanian prisoners[538] revolves around 70% of the prisoners present in Italian detention facilities[539].

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[534] MINISTRY OF JUSTICE, DEPARTMENT FOR JUSTICE AFFAIRS, CIRCULAR OF 19TH SEPTEMBER 2016 - TRASFERIMENTO DEI DETENUTI AI SENSI DELLA DQ 909/2008/GAI - RAPPORTI CON LA REPUBBLICA DI ROMANIA.

[535] See V. FERRARIS, *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019, in *http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*

[536] In-depth analysis prepared by V. FERRARIS on the dossiers related to transfers also with regard to the framework decision 2009/947/JHA and 2008/829/JHA, implemented by Italy only in 2016. See V. FERRARIS, *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019, in *http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*

[537] Percentage started at 85% in 2014

[538] According to the data analysis of the Ministry of JUstice, Department of General Affairs Office II, elaborated in the text of V. FERRARIS, *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019, *http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*

[539] See chart n. 2, Permits / Deliveries abroad (Framework Decision 2008/909/JHA), on the processing of data of the Ministry of Justice, General Affairs Department Office II, in V. FERRARIS, *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019, in

In conclusion, it could be agreed that Framework Decision 2008/909/JHA would not only have a purpose of concretising the function of re-socialization of the sentence, but above all it would have the function of accelerating the mechanism of transfer of prisoners by reducing the problem of overcrowding; it would therefore be aimed at reducing the population inside the prison and therefore to satisfy the interests of the State rather than those of the condemned[540].

### 7.1.1. Procedures introduced under the Framework Decision 2008/909/JHA

| | 2014 | 2015 | 2016 | 2017 | 2018 |
|---|---|---|---|---|---|
| Pending dossiers at the beginning of the period | N.D. | 397 | 594 | 793 | 1008 |
| Dossiers opened in the period | 498 | 318 | 393 | 324 | 150 |
| Dossiers relating to Romania opened in the period | 424 | 217 | 243 | 216 | 109 |
| Dossiers opened in the period for other Member States | 74 | 101 | 150 | 108 | 41 |
| Permits / Deliveries | 48 | 121 | 121 | 101 | 49 |
| Filed for release or negative decision by the foreign State | 53 | N.D. | 73 | 2 | 2 |

*http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*

[540]Cf. V. FERRARIS, *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019, in *http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*

### 7.1.2. Authorizations and deliveries to Eu Countries from 2014 to 2018


From the analysis of the above dossiers, some difficulties emerge on the operability of the principle of mutual recognition, in particular on the principle of double incrimination (rejected by nine Member States) and on the postponement of the operability of the discipline[541].

For example, in many cases the transfer is *de facto* absent from the defender, in fact many requests addressed to the different authorities were handwritten by the transfer inmates. In this way, the prisoner risks not being able to carry out the procedure correctly, therefore there is an evident absence of

[541]For example, Poland, in accordance with art. 28, paragraph 2, of the framework decision and the various recognition procedures in the other member States, established that all the measures issued in the 3 years following the entry into force of the framework decision remain governed by the 1983 Strasbourg Convention.
See V. FERRARIS, *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento, 2019.*
*http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*

assistance and the right to be assisted by the defender seems to be compromised[542].

Each State adopts, in fact, procedures which may be of a judicial nature (for example Romania has also provided for the right of appeal of the transfer), or of an administrative nature, for example through a confirmation sent by e-mail with attached the opinion of an authority, not necessarily judicial (such as the Penitentiary Administrative Department office).

From the survey of the 31st August 2016[543], there is evidence of a clear rigidity[544] in the total number of deliveries of prisoners to the countries of origin (237) with respect to the transfer procedures activated (860); the interruption originates in the late establishment of the procedure and in the shortcomings in the filling of certified forms[545].

For example, some states - including Romania[546] - in case of multiple conviction sentences, require for a single certificate to be filled in by the prosecutor, without which the authority cannot proceed and return the papers.

In order to maximize the potential of cooperation between States referred to in the Framework Decision 2008/909 / JHA, some ministerial initiatives[547] have been addressed to the prosecuting offices responsible for the issuing of such certificate. Among these initiatives, stands out the action of the Prison Administration at the start of the preliminary screening activity of prisoners eligible for the transfer to the country of origin, accompanied by the preparation

[542] As can be noted from the analysis of the files elaborated in the text by V. FERRARIS *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019.

[543] Cf. Chamber of Deputies, Report on the state of implementation of the regulatory impact analysis. Sent to the Presidency on May 15th, 2017
*http://presidenza.governo.it/DAGL/uff_studi/Relazione_2017.pdf*

[544] Cf. Chamber of Deputies, Report on the state of implementation of the regulatory impact analysis. Sent to the Presidency on May 15, 2017
*http://presidenza.governo.it/DAGL/uff_studi/Relazione_2017.pdf*

[545] See Article 5 of the d. lgs. 161/2010 in fact does not establish a peremptory deadline for transmission, although the necessary speed of the procedure for effective effectiveness is evident.

[546] The Romanian system implemented the framework decision on December 26th, 2013 with L. 300 therefore only since 2014 has the regulatory instrument worked in inter-jurisdictional relations between the authorities of Italy and Romania.
On the matter, see Chamber of Deputies, Report on the state of implementation of the regulatory impact analysis. Sent to the Presidency on May 15th, 2017
*http://presidenza.governo.it/DAGL/uff_studi/Relazione_2017.pdf*

[547] Including also the Circular of April 18, 2014, addressed to all the Public Prosecutors at the Courts of Appeal, on the instructions given to the prison institutions, so as to collect the data necessary to start the transfer procedures.

of the forms necessary for the collection of consent of the convicted and other relevant information[548].

On this point it is worth considering the Circular of the Ministry of Justice of the 19th September 2016, which spotted an organizational deficit due to some of the managerial and organizational difficulties (due to omissions or defects of form in relation to the certificate) which end up jeopardizing and compromising the whole procedure.

In fact, the certificate is fundamental in the system of mutual recognition of the sentence of imprisonment because it is the standardized form of the European transfer order[549].

Indeed, unlike the European arrest warrant which replaces the national arrest warrant, the framework decision required the transmission of the sentence together with the certificate.

The certificate is the only act of translation in the original language of the country of issue and if it is incomplete, the executing State is given the opportunity to request the translation of the sentence.

It is therefore necessary, in order to reduce the time and costs of the procedures, to fill in the certificate scrupulously, having collected all the required information[550].

The same circular of 2016 identified among the main deficiencies of the certificate, like information concerning the person against whom the sentence was imposed, information related to the identification of the place where the sentenced person "lives" (lett. a), information on the sentence imposing the punishment; information related to conditional or early release and opinion of the convicted.

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[548] See Circular of the Ministry of Justice, 19th September 2016, on the internal selective procedure for the transition to the professional profile of judicial officer - area III F1 - reserved to the clerks of the judicial administration as well as to the professional profile of Unep official. *https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC1274787*

[549] See Circular of the Ministry of Justice, 19th September 2016, on the internal selective procedure for the transition to the professional profile of judicial officer - area III F1 - reserved to the clerks of the judicial administration as well as to the professional profile of Unep official. *https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC1274787*

[550] See Circular of the Ministry of Justice, 19th September 2016, on the internal selective procedure for the transition to the professional profile of judicial officer - area III F1 - reserved to the clerks of the judicial administration as well as to the professional profile of Unep official. *https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC1274787*

Nevertheless, according to the report[551] on the impact of the Framework Decision 2008/909/JHA, «there are no measures being studied by this Administration aimed at the correction of the regulatory act subject of this report given that the problems identified pertain to profiles of a substantially technical and organizational nature, in relation to which the competent departments are taking administrative steps to encourage an increase in the deliveries of sentenced prisoners to Countries that have transposed Framework Decision 2008/909/JHA[552]» In fact, they are technical-organizational profiles that do not seem to be relegated to the need for simple technical corrections, but rather concern the difficulties of acting that affect the administration[553]. Indeed, if the administration had not ennobled, among the tools that help to reduce the problem of prison overcrowding, the transfer of community prisoners, the transposition of European legislation would have been more difficult and slower, there would have been no intense regulatory activity and probably the matter would have been formally abandoned and substantially not implemented. In conclusion, since the transfer procedures concentrated in a few procedures with a good outcome are scarce, there is no link between the administration and the jurisdiction of the executive phase, and knowledge of international cooperation matters is scarce, as is also poor inmate's defensive assistance, it appears to be a «double failure[554],» since there is no protection for the convict and prison overcrowding is not reduced.

[551] Chamber of Deputies, Report on the state of implementation of the regulatory impact analysis. Sent to the Presidency on May 15, 2017.
*http://presidenza.governo.it/DAGL/uff_studi/Relazione_2017.pdf*
[552] Chamber of Deputies, Report on the state of implementation of the regulatory impact analysis. Sent to the Presidency on May 15, 2017, 479
*http://presidenza.governo.it/DAGL/uff_studi/Relazione_2017.pdf*
[553]See V. FERRARIS, *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019.
*http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*
[554] V. FERRARIS *L'implementazione del d. lgs. 161/2010 sul reciproco riconoscimento delle sentenze di condanna a pena detentiva: un caso di doppio fallimento*, 2019.
*http://www.lalegislazionepenale.eu/wp-content/uploads/2019/04/Ferraris_approfondimenti_5_04.pdf*

Thus, despite the attempt at solving those critical issues[555], it is a discipline that has a positive impact as it is more streamlined and effective with regard to the transfer of sentenced persons abroad, also improving relations with the authorities of other States.

The State of emergency from Coronavirus has complicated Italy-Romania relations above all from a practical point of view, as the anti-contagion rules prohibit entry into the Country for foreign citizens (which limited exceptions, concerning imperative, health or family needs, or professional reasons), and reasonably also the transfer of prisoners, calling into play the balance between the right to health (through the provision of anti-contagion provisions) and the need to guarantee the safety of citizens[556].

In fact, on April 16, 2020, the European Commission established a series of rules on asylum, return and resettlement procedures, in order to guarantee the continuity of the procedures (which have suffered temporary interruptions as a result of the pandemic[557]) and at the same time protect health and the fundamental rights of people[558].

However, the situation becomes more complicated in the last summer period, when the number of infections rises to 17902[559], updated to 26 July, and Italy[560] is "forced" to treat Romania as an "extra-Schengen" Country, providing for a 14-day mandatory quarantine for all those arriving in Italy from Romania[561].

### 7.2. The position and relation between Switzerland and European Union

[555] See Chamber of Deputies, Report on the state of implementation of the regulatory impact analysis. Sent to the Presidency on May 15, 2017,
*http://presidenza.governo.it/DAGL/uff_studi/Relazione_2017.pdf*
[556] Cf. *https://roma.mae.ro/it/local-news/2936*
[557] Just as the extradition procedures were interrupted, as in the case of the eight fugitives wanted from Italy, found in Santo Domingo, for which the extradition scheduled for March was suspended for 3 months. All police forces collaborated to resume the procedures to ensure isolation.
Cf. G. GALEAZZI, *Estradizione rinviata per Covid, rimpatriati 8 latitanti da Santo Domingo*, 2020, *https://www.lastampa.it/cronaca/2020/06/03/news/estradizione-rinviata-per-covid-rimpatriati-stamattina-8-latitanti-1.38922385*
[558] Cf. *https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/travel-and-transportation-during-coronavirus-pandemic_it*
[559] See the statistics about Coronavirus in Romania
*https://statistichecoronavirus.it/statistiche-coronavirus-romania/*
[560] The Minister of Health, Speranza, signed the ordinance of 24/07/2020 in order to counter and contain the spread of Covid towards who enter into the national territory and in the previous 14 days stayed or passed through Romania, with the modalities of DPCM 30/06/2020.
[561] Cf. *https://www.agi.it/cronaca/news/2020-07-24/speranza-romania-bulgaria-9247951/*

A particular position is taken by Switzerland, located in the center of Europe and the European Union and, although extraneous to the latter, it shares with it many of the cultural historical and linguistic values[562].

Switzerland's foreign policy is based on bilateral sectoral agreements (Bilateral Agreements I, concerning the free movement of persons, transport and scientific research, and Bilateral Agreements II, concerning cooperation in the field of justice, security, asylum and migration with the EU, the fight against fraud, the environment, the education and training of youth etc.), especially with regard to trade and circulation, which despite the popular initiative "against mass immigration" accepted on 9 February 2014, which questioned the Agreement about the free movement of persons, the desire to maintain and develop bilateral relation between it and the member Countries has been reaffirmed several times[563].

The relationship between Switzerland and the European Union was born already in 1972 with the free trade agreement through which trade industrial products is liberalized and duties and quantitative restrictions are abolished.

In 1992, when the majority of the Swiss cantons rejected membership of the European Economic Area (EEA) which would allow them a complete integration at economic level and beyond, the Federal Council began to regulate bilateral agreements with the European Union, so as to establish and maintain relations with the great economic and social power that is the Union but also to guarantee and protect their National interests[564].

In 2004, Switzerland and EU signed Bilateral Agreements II, which also includes the association Agreements with Schengen, in order to facilitate cross-border traffic.

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[562] Three of the four Swiss National languages are spoken in the EU member States.
See Switzerland and European Union, federal department of foreign affairs.
*https://www.eda.admin.ch/dam/eda/it/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU_it.pdf.*

[563] Cf. Switzerland and European Union, federal department of foreign affairs.
*https://www.eda.admin.ch/dam/eda/it/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU_it.pdf.*

[564]See Switzerland and European Union, federal department of foreign affairs.
*https://www.eda.admin.ch/dam/eda/it/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU_it.pdf.*

Furthermore, Switzerland closely collaborates with the EU in the fight against crime, participating in the Schengen Information System (SIS) so as to speed up the search and reports of wanted persons in the various member Countries.

Given its central geographic position, its importance as a financial centre and non-EU membership[565], Switzerland is sometimes used as a platform for illegal activities; therefore, in order to reduce this risk, and to fight infringements about taxes and duties, it signed the Agreements with EU to fight fraud, so as to fight smuggling, forms of crime relating to indirect taxation and public procurement etc.

The agreement requires administrative and judicial assistance from contractors, therefore the administrative and judicial authorities of Switzerland and of the other contracting State have the same legal instruments available in National procedures.

Bilateral Agreements II also contain provisions in the field which was considered the third pillar of European Union (Police and Judicial Cooperation in criminal matters), regarding the relation between Switzerland and the agents of Europol, Eurojust and others.

As for Europol, the collaboration facilitates the work of the police forces and a rapid Exchange of information and advice during the investigation procedures. So at the Europol Headquarters, Switzerland has an available liaison office with two police officers that guarantee their cooperation.

But also with regard to Eurojust, judicial cooperation in the fight against International crime was institutionalized in 2008 through the support of this organ that coordinates the National criminal justice authorities.

And then, on 10 June 2014, Switzerland signs an agreement with the EU on participation in EASO (European Asylum Support Office), a Union agency based in Malta, which supports asylum and reception systems Member States by organizing them and coordinating their Exchange of information[566].

[565] Cit. Switzerland and European Union, federal department of foreign affairs. *https://www.eda.admin.ch/dam/eda/it/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU_it.pdf.*

[566] See Switzerland and European Union, federal department of foreign affairs.

As for Switzerland's historically neutral position, in the period of health emergency, this too was "forced" to close its borders with other States to avoid a greater spread of infections.

In fact, the number of infections had reached its peak on March 31 with 14349 infected[567], while in June, it had dropped to a few hundred, the reopening of the borders, on June 12, to Italy, the United Kingdom and States EU/Aels, considering the current trend of the epidemiological situation in other Countries[568].

### 7.3. The discipline on EAW and the Brexit

On March 29, 2017, the United Kingdom declared its intention to withdraw from the European Union pursuant to art. 50 TEU[569] proving itself once again as a non "Euro-enthusiastic[570]" Country.

On the 25th of November 2018, the European Council began the negotiation of the Agreement on the withdrawal for leaving the European Union by approving the political declaration on future relations, so as to make the understanding neat and clear.

The same Council then stated that in case the United Kingdom shall definitively exit the European Union, it will obviously no longer be able to enjoy the same rights and enjoy the same advantages as another Member State but rather it will have to prepare for a new reality that will see it as a third country; therefore, instruments of criminal and police judicial cooperation or other

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*https://www.eda.admin.ch/dam/eda/it/documents/publications/EuropaeischeAngelegenheiten/Schweiz-und-EU_it.pdf.*

[567] See statistics about Coronavirus in Switzerland, in https://statistichecoronavirus.it/statistiche-coronavirus-svizzera/

[568] *https://www.adnkronos.com/fatti/esteri/2020/06/12/covid-svizzera-riapre-confini-anche-all-italia_dJ0m43G5e1E9LKl5rIXcQM.html*

[569] See Art. 50 of TEU states: « Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union […].The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period […]».

[570] See L. SALAZAR, *La cooperazione giudiziaria penale nell'Unione ai tempi della Brexit,* in *Sist. Pen*., file 3, 2020, 187, in which the British approach to the area of European freedom, security and justice has always been oriented more towards security rather than regulatory harmonization.

instruments of European law will no longer be applicable, starting from the date of withdrawal. From that date the British authorities will therefore no longer be able to access the networks of computer systems and databases relating to criminal and police judicial cooperation and also the relationship with Europol and Eurojust will change, towards which the United Kingdom will be in all respects a third country, with the application of the relative procedures that regulate its relations[571].

In the so-called "Brexit chaos[572]", the courts wondered about the procedures to be carried out with reference to the provisions of the Framework Decision 2002/584/JHA[573].

In fact, the Court of Justice[574] has addressed the question of a preliminary reference pursuant to art. 267 TFEU by the Irish High Court which wondered if, under Brexit, it should execute the request[575] for a European arrest warrant issued by Great Britain.

The appeal concerned a possible violation of art. 3 ECJ following the exit from the European Union of the United Kingdom, with the risk of being subjected to inhuman and degrading treatments if he was detained in the Maghaberry prison in Northern Ireland.

However, the Luxembourg Court addresses the issue considering that the mere notification by a Member State communicating its intention to withdraw from the European Union, pursuant to art. 50 TEU, is not able to justify the refusal of the execution of a European arrest warrant as the mere notification does not have the effect of suspending the application of European law fully in force until the effective withdrawal from the Union.

[571] See GRANA, BARBARA MARIA, *Il mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit*, 2019, 102.
[572] See GRANA, BARBARA MARIA, *Il mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit*, 2019, 107.
[573] See GRANA, BARBARA MARIA, *Il mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit*, 2019, 102 ff.
[574] See Judgement CJEU, C-327-18 PPU.
[575] In the specific case, it was an arrest warrant for murder and arson and another arrest warrant for sexual assault; for both disputes the maximum edictal sentence of life imprisonment would be provided.

In any case[576], the competent national judge must verify the presence of serious and proven reasons that after the withdrawal from the Union of the issuing State the sentenced person risks being deprived of his fundamental rights.

Therefore the judge will have to verify the circumstances of the specific case and if it can be assumed that the requesting State can guarantee the fundamental rights, regardless of the withdrawal, it can deliver the requested subject; if, however, there are elements demonstrating otherwise, the judicial authority of the executing State may refuse the delivery[577].

As regards relations between Italy and the United Kingdom following the Brexit[578], the Ministry of Justice has published two prospectuses, one for the civil judicial area and the other for the criminal area, containing the applicable legal rules and the procedures for managing both the pending cases and the ones registered after Brexit. They have the purpose of guiding the judicial offices in the event that the exit of the Member State takes place "*no deal*", without agreement and therefore the application of the European laws in force up to that moment is no longer applicable.

With reference to the criminal area, the United Kingdom already had the intention of enacting a law according to which for all proceedings pending on the withdrawal date, the instruments of European criminal judicial cooperation continued to be applied, but this law would apply only to active procedures (in which Italy has the role of requesting State), while in the case of passive procedures[579] instructions must still be given by the Ministry[580].

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[576]On the matter, see also L. SALAZAR, *La cooperazione giudiziaria penale nell'Unione ai tempi della Brexit*, in *sist. Pen*., file 3, 2020, 192 ff.

[577] See GRANA, BARBARA MARIA, *Il mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit*, 2019, 102 ff.

[578] The date of the 29th March 2019 had been chosen for the notification by England to the European Council of the intention to withdraw; the procedure would have ended with the entry into force of the withdrawal agreement or in the absence of this, within two years following the notification unless the Council, in agreement with the State concerned, unanimously decides to extend this term.
Cf. GRANA, BARBARA MARIA, *Il mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit*, 2019, 111 ff.

[579] The prospectuses are updated to the 8th of April 2019. They will be updated subsequently by the Department of Justice Affairs, taking into account the evolution of the negotiations.

[580] See GRANA, BARBARA MARIA, *Il mandato di arresto europeo: dalla decisione quadro 2002/584/GAI alla Brexit*, 2019, 111 ff.

From the 1st of February 2020 - date of exit of the United Kingdom from the European Union – until the 31st of December 2020 there will a transitional period, during which the United Kingdom will still be bound by European law but without being able to participate in the institutions and decision-making processes of the Union.

This transitional period will be necessary to grant the next relationship between the United Kingdom and the European Union, including on the European arrest warrant [581].

The issue becomes more complicated in this Covid-19 emergency period as, if there is no extension to the transition period, risks to the security aspects of future EU-UK relations will likely arise, with the consequence of the permanent loss of its cooperation[582], on security, which we have benefited from for a long time.

The pandemic has in fact increased the pressure on resources and the risk that even the no-deal emergency plans may not be implemented even by 2021[583].

In the United Kingdom, the spread of the virus, until the end of February, was caused by the entry into the State of other subjects from other Countries and was advancing so rapidly that the government promptly published the Health Protection Regulation 2020, on initial strategies (to be modified according to the course of the infections) to contain the virus.

Yet to date, July 26, the United Kingdom is in third place among the most infected Countries (present day 253734), after the United States and Brazil[584].

[581] Ministry of Foreign Affairs and International Cooperation.
*https://www.esteri.it/mae/it/politica_estera/politica_europea/dossier/brexit.html*
[582]In particular, access to cooperation platforms such as Europol, Eurojust could be lost without an alternative and this would cause serious damage to the conduct of police and prosecutors and treatment towards the United Kingdom as if it were a "Third State".
See Coronavirus: the case for extending the Brexit transition period
*https://www.gov.scot/publications/covid-19-case-extending-brexit-transition-period/pages/9/*
[583] Cf. Coronavirus: the case for extending the Brexit transition period *https://www.gov.scot/publications/covid-19-case-extending-brexit-transition-period/pages/9/*
[584] See the statistics about Coronavirus in Grain Britain
*https://statistichecoronavirus.it/statistiche-coronavirus-regno_unito/*

# CHAPTER III

## THE EXECUTION OF THE SENTENCE

### 1. Numbers compared in Europe

«The degree of civilization of a country's prisons reveals the degree of civilization of the country itself [1]».

The International Center for Penitentiary Studies of the Council of Europe has found about 600,000 prisoners in prisons in EU Countries.

The largest number of detainees for every 100 places available (147.5%) is in Cyprus. The highest percentage of prisoners awaiting trial (41.6%) is in Luxembourg while the lowest (8.4%) in Poland, in a background of a European average of 23.5%.

The number of detainees in the European Union, according to a survey conducted jointly by Eurostat and the United Nations Office on Drugs and Crime[2], has gradually increased year after year between 2008 and 2012 and then decreased by 3.6% in 2013, 3.5% in 2014, and 2.9% in 2015. In fact, in 2015 there was a 6.4% lower number of prisoners compared to 2008.

The phenomenon of immigration also plays a major role in the number of inmates present in each Country. The presence of immigrants in European prisons in 2015 alone was 21%[3].

Switzerland has a high percentage of foreigners present in prisons, equal to 74.3%; while the traditionally emigrating countries such as Romania and Albania have a very low percentage of foreigners detained, respectively equal to 0.6% and 1.8%[4].

The management of prisons is also important; not all are in fact entrusted to public management, but indeed many respond to the American privatization model such as those in the United Kingdom and Germany.

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[1] Cit. C. BAFFI, *Carceri Europa: dati a confronto*, 2018.

[2] Survey updated to 2015, in *https://www.affarinternazionali.it/blogpost/carceri-europa-prigioni-dati/*

[3] Cf. C. Baffi, *Carceri Europa: dati a confronto*, 2018, in *https://www.affarinternazionali.it/blogpost/carceri-europa-prigioni-dati/*

[4] Survey updated to 23rd November 2018, in *https://www.affarinternazionali.it/blogpost/carceri-europa-prigioni-dati/*

France, on the other hand, has adopted a system mixed between public and private, thus enhancing the production of benefits in terms of quality and the existence of alternative solutions to those adopted by other States[5].

## 2. The consequences of migratory flows on prisons

When Countries began to enter into bilateral agreements to meet their own needs [such as the bilateral agreement between Italy (which was giving up its labour to place the large number of unemployed people) and Belgium (selling raw materials, such as coal, which Italy needed)], the phenomenon of immigration, of political, economic and temporary origin, began to spread. When that fundamental characteristic of temporariness slowly faded away, immigrants began to settle in various countries causing, among the various sociological consequences, on the one hand an increase in the population and on the other an increase in the unemployment rate[6]; citizens were no longer able to take economic or cultural advantages and foreigners had more and more difficulty in integrating into society in terms of parity and equality[7].

Thus the European Union began to formulate programs and initiatives in support of integration, to increasingly support that European Common Area free from customs barriers, taxes and charges to the circulation of people, goods and services, also guaranteeing citizens of other European countries the same fundamental rights by virtue of the principle of non-discrimination[8].

Europe acquires its central position in the global migration geography but still has many difficulties in matching the migratory reality with structural needs and this will be its biggest challenge[9].

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[5]Cf. C. BAFFI, *Carceri Europa: dati a confronto*, 2018, in *https://www.affarinternazionali.it/blogpost/carceri-europa-prigioni-dati/*

[6] Phrases such as "these people come here to take away our jobs" heard among citizens, highlight a (in my opinion "apparently justified") distancing from the migratory phenomenon.
Cf. on the matter E. SCHLEIN, *Le carceri "nere", Criminalizzazione e sovrarappresentazione dei migranti nelle carceri europee*, in *Diacronie, Studi di Storia Contemporanea, Dossier: Davanti e dietro le sbarre: forme e rappresentazioni della carcerazione*, 2010, n.2, 2 ff.

[7]Cf. S. SANGALLI, La strada giusta, L'equità come pratica, Roma, 2017, 50 ff.

[8]Cf. A. TOMASELLI, Sicur*ezza e immigrazione nell'Ue: Profili di Diritto Europeo e Riflessioni Critiche,* in *Cross-Border Journal for International Studies*, 2017, vol. 2, 85 ff.

[9] Cf. F. PASTORE, *L'Europa di fronte alle migrazioni. Divergenze strutturali, convergenze strutturali,* in *Quaderni di sociologia*, 2006, vol. 40, 7-24.

But the continuous migratory flows and the inevitable repercussions in crime[10] led to an increase in the high number of foreigners even in prisons, and the endemic phenomenon[11] of overcrowding.

In fact, since the 1970s there has been a notable involvement of foreigners in criminal activity, which has provoked responses of social alarmism and stiffening of migration policies; the stranger is thus marginalized and considered a villain[12].

Hence, the phenomenon of immigration was not considered as a resource but rather required the presence of strong security policies resulting in a system of social exclusion[13].

Also in prison, the foreign prisoner encounters considerable difficulties. He enters as a weak subject, who lives in precarious and marginalized conditions[14].

Prison is a microcosm that could re-propose facts and problems present in society, amplifying them.

In this context, prison police has a fundamental role in dealing with institutional problems − after the 1990 reform of the Penitentiary Police Corps[15] −.

The major problems − causes of marginalisation − which the foreigner could encounter relate to linguistic and cultural differences and the lack of stable points of reference in the external environment which, in a subsequent period,

[10]Cf. G. CAPUTO, D. DI MASE, (curated by), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*
The European Union, in 2014, adopted various acts on internal and external security, respect for fundamental rights with regard to European policies on internal security and irregular immigration. See at this regard A. TOMASELLI, *Sicurezza e immigrazione nell'Ue: Profili di Diritto Europeo e Riflessioni Critiche*, in *Cross-Border Journal for International Studies*, vol. 2, 2017, 88.
[11]Cit. MARINUCCI-DOLCINI-GATTA, *Manuale di diritto penale parte generale*, VII ed, 2018, 661.
[12]Cf. E. SCHLEIN, *Le carceri "nere", Criminalizzazione e sovrarappresentazione dei migranti nelle carceri europee*, in *Diacronie, Studi di Storia Contemporanea, Dossier: Davanti e dietro le sbarre: forme e rappresentazioni della carcerazione*, 2010, n.2, 2 ff.
[13]Cit. G. CAPUTO, D. DI MASE, (editby), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*
[14]V. G. CAPUTO, D. DI MASE, (edit by), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*
[15]See Law 395/1990 establishing the Penitentiary Police Corps, assigning it treatment functions, in addition to the traditional tasks of ensuring safety inside prisons.

once the sentence is served, concretely render more difficult to implement prison treatment and its objectives.

Thinking of the generic word "foreigner" in which many different nationalities converge, with different languages, habits and values[16]. The forced coexistence of the various customs and religions implies a managerial and organizational difficulty, with consequences also in terms of work-related stress of the prison staff[17], resulting in a general compression of a series of effective rights of the foreign prisoner which should be the basis of the re-educational treatment , such as the integration between individual prisoners and groups of various ethnicities.

The same penitentiary Law 354/75 protects the fundamental rights of the prisoner and the guiding principles of penitentiary treatment, also taking into account art. 3 of the Italian Constitution for the protection of the national, cultural and religious identity of the foreign citizen and art. 2 of the Italian Constitution on the recognition of the inviolable rights of the individual, worthy of protection.

The first obstacle that the foreigner who enters the prison encounters is linguistic barrier[18]; in fact, he may find it difficult to understand the formal and informal rules of the prison and the enrolment procedure. Secondly, the interview with the psychologist and with the doctor, in front of which the subject could be uncomfortable without having the ability to communicate it or to understand the operations or medical tools that will have to be used.

Even with regard to mental health, the immigrant is in a particular condition of pain, often due to separation, travel and arrival, almost always in clandestine state[19].

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[16]Cf. G. CAPUTO, D. DI MASE, (edit by), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, 7 ff, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*

[17]Cf. G. CAPUTO, D. DI MASE, (edit by), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, 7 ff, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*

[18] Cit. G. CAPUTO, D. DI MASE, (edit by) *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, 9, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*

[19]See G. CAPUTO, D. DI MASE, (edit by), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, 12, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*

Therefore he must redefine his life plan, elaborate the separation from the bonds of childhood.

«Prison is a world in the world, in turn made up of a mosaic of small separate worlds[20]» that find themselves forced to coexist following the same rules.

Even the moment of release is a particular difficulty for the foreigner, as he is deprived of emotional and economic resources, but full of questions.

«Unfortunately, it was not uncommon to witness the release of individuals who, having nowhere to go, remained seated for a long time on the bench in front of the institute's door. In such cases, the prison police took care of involving voluntary associations and educators for appropriate assistance interventions outside the penitentiary[21]».

Therefore, although we act in a system free of discrimination of any kind, and based on parity and equality between individuals, some of the physiological differences cannot be easily overcome.

**3.Penitential treatment in the European Union**

Simultaneously with the evolution of the immigration phenomenon, the United Nations Congress for the Prevention of Crime and the Treatment of Offenders on 30 August 1955 established the Minimum Rules for the Treatment of Prisoners, which inspired the Minimum Rules of the Council of Europe for the treatment of prisoners, established on 19 January 1973 with the resolution of the Committee of Ministers of the Council of Europe[22].

The minimum rules are based on the criteria of humanity, including the protection of dignity, the rights of the person, the principle of non-discrimination, also considering the principle of the re-educational purpose of the sentence for which every State should work to prevent crime.

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[20]Cit. G. CAPUTO, D. DI MASE, (edit by), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*

[21]Cit. G. CAPUTO, D. DI MASE, (edit by), *Essere stranieri in carcere: profili di gestione e linee di intervento*, 2013, in
*http://www.ristretti.it/commenti/2013/ottobre/pdf2/issp_dispensa2.pdf*

[22]See G. CAPOCCIA, *Le regole penitenziarie europee, Allegato alla Raccomandazione R(2006)2* adopted by the Committee of Ministers of the Council of Europe on 11 January 2006,
in Minister of Justice, Department of penitential administration, 2007, 7, in
*http://www.rassegnapenitenziaria.it/cop/92.pdf*

On February 12, 1987, on the basis of the new concept of treatment established in Europe[23], the Committee of Ministers of the European Community issued a Recommendation directed to the Member States with reference to the minimum rules for the treatment of prisoners.

These rules, included in the 1987 Recommendation were updated several times, as a consequence of the changes in the need for security, the spread of alternative measures to detention, the comparison of prison systems, the prison rate and the consequent problem of overcrowding.

Also in the 2006 Recommendation, the concept is maintained that the rules must reflect the desire to reserve fair and equitable treatment to prisoners.

The first attempt had already been implemented in 1973 by adapting the set of United Nations minimum rules drawn up since 1955 to the European situation. In 1987 the European prison rules were completely revised with a systematic approach to management and positive, realistic treatment and in compliance with current standards.

Subsequent revisions pursue the same objectives.

During the opening speech of the *ad hoc* Conference held in Rome from 25 November to 27 November 2004, by the Directors of the Penitentiary Administrations and of the Services for Alternative Measures of the various States adhering to the Council of Europe, the Director General of Legal Affairs of the Council of Europe, Guy De Vel, expressed his thoughts with the following words: «The European prison rules are, in my opinion, one of the major achievements of the Council of Europe, as they have a direct and daily impact on the life of a (unfortunately) large number of citizens, and represent the protection of human rights and dignity of action "in the field".

*In past years, the European Penitentiary Rules have become the guidelines for all the Penitentiary Administrations of Europe.*

[23] Cf. G. CAPOCCIA, *Le regole penitenziarie europee, Annex to Recommendation R (2006) 2* adopted by the Committee of Ministers of the Council of Europe on 11 January 2006, in Minister of Justice, Department of penitential administration, 2007, 7, in *http://www.rassegnapenitenziaria.it/cop/92.pdf*

Their location is indisputable and their importance should not only be preserved but valued [24]».

In issuing the 1987 Recommendation, emphasis was placed on the notion of human dignity and the will of the prison administration to provide positive and humane treatment and on the fundamental role of the modern and personal approach to administration management.

These rules serve as a parameter, guide and encouragement to the work of prison administrations, and their flexibility is justified by the search for a most realistic level of application[25].

However, given their flexibility, they could not constitute a system model as in practice the European penitentiary administrations have already acted and formed by departing from these rules[26].

The Committee had acted by pursuing the aim of establishing minimum rules on all aspects of the prison administration, necessary to guarantee humane conditions of detention and treatment, but also to enable prison staff to adopt a coherent behaviour in accordance with the moral and social importance of the their work, and to stimulate administrations to develop a policy and management based on these fundamental principles, expressed in the first part of the Recommendation, including the principle of non-discrimination, protection of health and dignity and respect for the freedom of any restrictions may occur in the moral and material conditions that respect human dignity and finally to stimulate and increase a sense of responsibility in the prisoner and encourage him to live within the rule of law[27].

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[24] Cit. G. CAPOCCIA, *Le regole penitenziarie europee, Annex to Recommendation R (2006) 2* adopted by the Committee of Ministers of the Council of Europe on 11 January 2006, in Minister of Justice, Department of penitential administration, 2007, 11, in *http://www.rassegnapenitenziaria.it/cop/92.pdf*

[25] Cit. G. CAPOCCIA, *Le regole penitenziarie europee, Annex to Recommendation R (2006) 2* adopted by the Committee of Ministers of the Council of Europe on 11 January 2006, in Minister of Justice, Department of penitential administration, 2007, 11, in *http://www.rassegnapenitenziaria.it/cop/92.pdf*

[26] See European Prison Rules, minimum rules for the treatment of prisoners, Recommendation Rec(2006)12 of the Committee of EU Ministers 12 February 1987, in *http://www.ristretti.it/areestudio/giuridici/europa/trattamento.htm*

[27] See European Prison Rules, minimum rules for the treatment of prisoners, Recommendation Rec(2006)12 of the Committee of EU Ministers 12 February 1987, in *http://www.ristretti.it/areestudio/giuridici/europa/trattamento.htm*

The management of prisons is regulated in the second part by providing rules regarding the registration of the subject, the detention rooms and the internal management of personal hygiene, clothing and bedding, health services, contacts between prisoners and the outside world, religious and moral assistance etc.

For example, with regard to housing conditions for prisoners, the evolution of European legislation on human rights has required a necessary strengthening of rules of this type. In fact, the inhumane housing conditions and overcrowding can be an aggravation of punishment or inhuman or degrading treatment, contrary to art. 3 ECHR[28] and it is also necessary to take into account specific individual needs, such as[29] the provision of additional equipment for severely handicapped people[30].

The accommodation conditions also concern the cell surface, lighting and ventilation.

Hygiene is also among the fundamental principles to be taken into account. The CPT also clarified that detainees must have access to adequate health services at all times and that maintaining good conditions of hygiene are essential elements of a human environment.[31].

With regard to contacts with the outside, prisoners have the right to maintain such contacts in the best possible way, through letters, telephone calls or visits[32].

By virtue of the provisions of art. 8.2 ECHR[33], the limitations of communications must be reduced to a minimum therefore the balance between the interest of the State in guaranteeing safety for citizens and the right of the individual to maintain contact with his family and with the outside world is fundamental, which can also be useful in view of the expiation of the sentence, for

[28]For example, see case of Kalashnikov v. Russia, Application no. 47095/99 of 2002.
[29]For example, see case of Price v. Regno Unito, Application no. 33394/96 of 2001.
[30]Cit. G. CAPOCCIA, *Le regole penitenziarie europee, Annex to Recommendation R (2006) 2* adopted by the Committee of Ministers of the Council of Europe on 11 January 2006, in Minister of Justice, Department of penitential administration, 2007, 66, in *http://www.rassegnapenitenziaria.it/cop/92.pdf*2007
[31]See Standard del CPT, essential and general findingd of the General Reports of CPT, 2° General relation, par. 49, CPT/Inf (92).
*http://www.antoniocasella.eu/archica/COE_standard_Cpt_2002-6.pdf*
[32]See art. 8 ECHR guarantees the right of every individual to respect for his private and family life and his correspondence.
[33]For example, see case Labita v. Italy, Application n.26772/95 of 2000.

a concrete re-socialization so that this is also stimulated to reintroduce social and working life as soon as possible.

The fourth part[34] mentions the objectives pursued by the treatment and the prison regime.

Detention, in fact, being a deprivation of liberty itself, is a punishment as such, therefore the prison regime must not aggravate the suffering inherent to it, except for specific requirements of the discipline[35].

On the contrary, attempts are made to improve attitudes and prospects for reintegration into society after liberation.

Therefore, spiritual assistance, educational and moral resources, the possibility of work and education, of practicing physical exercises also with the help of experts, recreational activities for the development of the subject's artistic skills will be established.

Rules on respect for freedom of thought, conscience and religion[36] are also derived from the phenomenon of immigration which involves the insertion of different cultures within the Country.

The increase of foreign prisoners in some Countries has been significant to the point of requiring the adoption of a more solid approach in the principles and actions by the prison administration in favour of religious practice and respect for the beliefs of all prisoners.

Respect must also be guaranteed in relation to food and the needs connected to religious beliefs must be taken into consideration, places of worship and meeting places for the various confessions and private interviews with the designated qualified representative of each religion must be made available.

As for work, it is a fundamental and positive element of the treatment and training of the prisoner[37].

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[34] See IV part of Recommendation of the Committee of Ministers of 12 February 1987 on minimum rules for the treatment of prisoners.
*http://www.ristretti.it/areestudio/giuridici/europa/trattamento.htm*

[35] See point 1 IV part of Recommendation of the Committee of Ministers of 12 February 1987 on minimum rules for the treatment of prisoners.
*http://www.ristretti.it/areestudio/giuridici/europa/trattamento.htm*

[36] Also guaranteed by art. 9 ECHR.

[37] See IV part of Recommendation of the Committee of Ministers of 12 February 1987 on minimum rules for the treatment of prisoners.
*http://www.ristretti.it/areestudio/giuridici/europa/trattamento.htm*

The Recommendation even provides for the possibility of an obligation to work or other socially useful activities.

«The organisation and methods of work in the institutions shall resemble as closely as possible those of similar work in the community so as to prepare prisoners for the conditions of normal occupational life. Although the pursuit of financial profit from industries in the institutions can be valuable in raising standards and improving the quality and relevance of training, the interests of the prisoners and of their treatment must not be subordinated to that purpose[38]».

The maximum number of daily and weekly working hours for prisoners will be set in accordance with local rules concerning free work, as well as the system of remuneration for prisoners' work.

The 2006 Recommendation introduced rule no. 37 on foreign citizens, which took into account the growing importance of issues relating to foreigners in European prisons.

It is inspired by Rule n. 38 of the United Nations Minimum Rules for the Treatment of Prisoners, in accordance with the Vienna Convention on Consular Relations.

In fact, this Rule is based on the possibility that foreign citizens may need specific aids when they are detained in a State different than their own, and will therefore be assisted by representatives of their own Country. Each Member State will specifically organize the needs and necessary aid for foreign citizens, also regarding management and treating; for example, language courses may be provided within the prison[39].

«The cultural, religious and communication linguistic differences make it difficult for foreign prisoners to enter a community of complex coexistence such as prison[40]».

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[38] See point 9 of Recommendation of the Committee of Ministers of 12 February 1987 on minimum rules for the treatment of prisoners.
*http://www.ristretti.it/areestudio/giuridici/europa/trattamento.htm*

[39] Cit. G. CAPOCCIA, *Le regole penitenziarie europee, Annex to Recommendation R (2006) 2* adopted by the Committee of Ministers of the Council of Europe on 11 January 2006, in Minister of Justice, Department of penitential administration, 2007, 11, in
*http://www.rassegnapenitenziaria.it/cop/92.pdf*2007

[40] See R. PALMISANO, *Stranieri, fenomeni di radicalizzazione e libertà religiosa – Tema per Stati Generali dell'Esecuzione Penale* – Tavolo 7, July 2015, Minister of Justice, studies, research, legislation and international relations office, in

An Italian inmate manages to react and understand the state of detention better than a foreign immigrant with large migration projects[41].

This is why the principles on penitentiary treatment are based on the construction of a path of rehabilitation and social reintegration and in most cases, foreign prisoners, once the sentence is completed, will not have the opportunity to reside permanently in the territory of the State.

In accordance with Recommendation Rec(2012)12 of the Committee of Ministers of the Council of Europe and with Recommendation no. 46 of the Human Rights Council of the United Nations, the Conference of the Directors of the Prison Administrations of the 47 member States of the European Council, held in Rome in November 2012, was concluded in urging the political leaders of the Administrations of Justice to deal specifically with the treatment of foreign prisoners, not only from the point of view of devolution of sufficient human and material resources but also with regard to adequate professional training of personnel. For example, by facilitating the relationship of inmates with their relatives or with the external environment and also maintaining contacts with the appropriate entities in their Countries of origin, foreign prisoners are able to improve their preparation for reintegration into society[42].

From an internal point of view within the penitentiary institution, the need to properly inform prisoners of their rights and duties in the prison environment was repeated, in a language they understand.

This was also fully achieved through the decree of the President of the Italian Republic of 5 June 2012, n. 136, which provided for the obligation to hand out to prisoners, upon entering the prison, the Charter of rights and duties of prisoners and internees, which explains the regime to which the prisoner is

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*https://www.giustizia.it/giustizia/it/mg_1_12_1.page?facetNode_1=0_2&facetNode_2=0_2_10&contentId=SPS1181698&previsiousPage=mg_1_12*

[41]A culturalization of hardships seems to emerge, a profound condition of social exclusion and discrimination on which health workers should focus, given the changes in the prison population. Cit. C. CHERCHI, *L'Ippocrate incarcerato. Riflessioni su carcere e salute*, in *Periodical Studi sulla questione criminale*, 2017, file 3, 96.

[42]See R. PALMISANO, *Stranieri, fenomeni di radicalizzazione e libertà religiosa – Tema per Stati Generali dell'Esecuzione Penale* – Tavolo 7, July 2015, Minister of Justice, studies, research, legislation and international relations office, in
*https://www.giustizia.it/giustizia/it/mg_1_12_1.page?facetNode_1=0_2&facetNode_2=0_2_10&contentId=SPS1181698&previsiousPage=mg_1_12*

subjected and his rights and duties, explained in ten different languages and widespread in all the institutes of the national territory.

With regard to Italians detained in other Countries, the *Italian Prisoners Abroad*[43] project as carried out, with the collaboration of the DPA, the preparation of an informative booklet with information on their rights and the possibility of requesting the execution of the sentence in their native Country.

**4. Foreigners in prison**

Since the 1990s, the coexistence of foreigners in prison resulted in episodes of aggression, even unjustified, up to suicide attempts and self-injury, unsolvable with mere vigilance or repression, but rather, understanding behaviours should be adopted, intuition, not only on the part of individual operators but on the part of the entire administration[44].

The true understanding of the causes of these attacks (often sign of serious personal distress, even physical self-denials), presupposes a communication with the prisoner, which is difficult for the foreigner, albeit assisted by the interpreter, who, however, does not deal fully and completely their problems and therefore does not perform an exhaustive function[45].

Not only does the linguistic barrier make it difficult for the foreigner to understand, but it will also be hard for the prison workers to communicate effectively with the inmate for the purpose of developing adequate scientific observation[46].

[43]See R. PALMISANO, *Stranieri, fenomeni di radicalizzazione e libertà religiosa – Tema per Stati Generali dell'Esecuzione Penale* – Tavolo 7, July 2015, Minister of Justice, studies, research, legislation and international relations office, in *https://www.giustizia.it/giustizia/it/mg_1_12_1.page?facetNode_1=0_2&facetNode_2=0_2_10&contentId=SPS1181698&previsiousPage=mg_1_12*

[44]Difficulty affecting the same managers of the institute as it requires adequate knowledge by the operators not only of all the rules but also of the complex and problematic prison reality.
See AUTONOMIE LOCALI E SERVIZI SOCIALI, *Un servizio informativo per gli stranieri in carcere*, in *Il Mulino*, 2002, file 3, 419.

[45]See AUTONOMIE LOCALI E SERVIZI SOCIALI, Un *servizio informativo per gli stranieri in carcere*, in *Il Mulino*, 2002, file 3, 417 ff.

[46]S. CIAPPI, *Vuoti a perdere, ovvero sulla condizione giuridica e sociale dello straniero in carcere*, in *Quaderni di sociologia*, vol. 40, 2006, 43-63.

Undoubtedly, among the various projects in order to further reduce this difficulty[47], the Project of the University for Foreigners of Siena in 2008, "Strengthening communication between foreign prisoners and prison workers" was innovative. It had the aim of seeking the acquisition of Italian in prison, improve linguistic and cultural communication, build tools for self-promotion of the individual and identify possible obstacles to learning[48].

Most foreigners find themselves deprived of the social, work and family reference points required by penitentiary practice.

The lack of human and social capital has isolated them, made them unable to meet new people or have support networks[49].

Also in terms of the lack of a residence permit, affective and family references in the area that preclude them from granting alternative measures to detention or other benefits.

Measures that then even avoid the so-called Taste of prison[50], such as probation, semi-liberty, require a job or in any case an activity useful for social reintegration, the availability of a home, and are therefore out of reach for many foreigners who do not have these availabilities[51].

More than discrimination, the issue is the ineffectiveness of the law for most foreign prisoners[52].

Detention institutions become identitary *topoi*[53] in which new criteria for the exclusion or inclusion of migrant populations are determined.

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[47] The same Penitentiary Regulations (DPR 30.06.2000 n. 230), in art. 35 states that «in the execution of deprivation of liberty measures against foreign citizens, their linguistic difficulties and cultural differences must be taken into account and the possibility of contact with the consular authorities of their country must be favoured».

[48] Cf. projects of the University for Foreigners of Siena in *https://www.unistrasi.it/cerca.htm?ricerca=deport*

[49] A. MACULAN, *la criminalizzazione non è uguale per tutti: percorsi biografici di detenuti stranieri in Italia,* in periodical *Etnografia e ricerca qualitativa*, 2014, n. 1, 71 ff.

[50] Cit. S. CIAPPI, *Vuoti a perdere, ovvero sulla condizione giuridica e sociale dello straniero in carcere,* in *Quaderni di sociologia*, vol. 40, 2006, 43-63.

[51] Cf. S. CIAPPI, *Vuoti a perdere, ovvero sulla condizione giuridica e sociale dello straniero in carcere,* in *Quaderni di sociologia*, vol. 40, 2006, 43-63.

[52] S. CIAPPI, *Vuoti a perdere, ovvero sulla condizione giuridica e sociale dello straniero in carcere,* in *Quaderni di sociologia*, vol. 40, 2006, 43-63.

[53] Cit. E SCHLEIN, *le carceri nere, criminalizzazione e sovrarappresentazione dei migranti nelle carceri europee,* in *Diacronie Studi di Storia contemporanea, dossier: davanti e dietro le sbarre: forme di rappresentazioni della carcerazione,* 2010, n. 2.
*www.studistorici.com*

### 4.1. Work and the distress of the foreigner

In 1700, work in prison had above all a religious *ratio*, since fatigue and physical suffering were considered as a form of expiation and purification[54].

Howard began to talk, in his paper "The State of the Prisons" of the concept of work as a "tool for training and re-socialization[55]".

At the same time, the Industrial Revolution began to exalt the professional roles of prisoners, emerging from an unlawful situation of irrational torture and segregation replaced with the performance of work activities.

In Italy, with the introduction of the Zanardelli code, the concept of punishment already begins to evolve and the prison regulations within which work in the prison is conceived as an integral part of the sentence[56] starts to change, albeit maintaining its essence as a mere modality of expiation of the sentence[57].

Only in the penitentiary system of 1975, also in the light of the cross-border issues posed on the re-educational purpose of the sentence, was the performance of work in prison attributed a different value, necessary for the development and evolution of personality, to educate the prisoner to a life that revolves around social rules, and to prepare the prisoner for his life after prison, in full regularity and legality. The Italian regulatory provisions were not new, but rather followed what was already provided at a supranational level by the minimum rules for the treatment of detainees adopted by both the UN and the Council of Europe[58].

However, in reality, one of the problems most encountered when a foreigner has to atone for his sentence in another Country is precisely the

[54]See BAIGUERA ALTIERI, *Fondamenti di diritto penitenziario svizzero*, 2017, in *https://www.diritto.it/fondamenti-di-diritto-penitenziario-svizzero*

[55] See HOWARD, The *state of the Prisons in England and Wale*s, 1777.

[56]Cf. A. MARCIANÒ, *Il lavoro dei detenuti: profili interdisciplinari e prospettive di riforma*, 2014. *https://moodle.adaptland.it/pluginfile.php/20800/mod_resource/content/1/wp_2014_167.pdf*

[57]See M. BORTOLATO, *Lavorare…che pena? Note sul lavoro in carcere fra vecchie certezze e nuove provocazioni*, 2015.
*https://www.giustizia.it/resources/cms/documents/bortolato1_sgep_2015.pdf*

[58]See rule n. 67 of Recommendation R (1992) 16 on the European rules on sanctions and measures applied in the criminal area, according to which the tasks that are entrusted to the offender who carries out public utility work must not be without interest but rather socially useful and significant, allowing him to develop his aptitudes as much as possible; also see art. 71 UN Standard Minimum Rules and art. 26.1 European Prison Rules.

concretization of the function of the sentence as re-education of the subject for the purpose of reintegration into society. This function had already been endorsed in the Regulation on the treatment of prisoners adopted by the Council of Europe in 1973 and recognized by the other Member States, which upheld that penalties must not harm humanity and human dignity but rather be aimed at re-education for an effective social reintegration.

The term "re-education" is meant on a socio-psychological level, in a cultural, professional or working sense and no longer only as a form of relearning the linguistic and cultural bases of a Country[59], therefore the prisoner in a Country other than his native one or where he had solid family, social or work contacts, as we said earlier, will certainly have great difficulty in being reintegrated into a completely new society for him, to start over and redirect his life.

Each State has regulated the work activity following its own parameters. The interpretative difficulties can be found above all in the obligatory nature of work. In fact, from a treatment and rehabilitation perspective, the idea of forced labor could not be conceivable[60].

There are in fact several jurisprudential interpretations; as regards the penitentiary treatment adopted by Italy, art. 15 of the Penitentiary Law establishes that «for the purposes of re-educational treatment, except in cases of impossibility, the offender and the inmate are guaranteed work». Prisoners are therefore allowed to carry out work activities in order to be reintegrated into society[61] and it would seem that the only obligation[62] lies with the prison administration to guarantee the prisoner the right to work[63] (articles 2 and 4 of Italian Constitution), making available the adequate tools to offer a career choice

[59]See P. BALBO, *Diritto penitenziario internazionale comparato,* Rome, 2005, 202.
[60]See M. BORTOLATO, *Lavorare…che pena? Note sul lavoro in carcere fra vecchie certezze e nuove provocazioni*, 2015.
*https://www.giustizia.it/resources/cms/documents/bortolato1_sgep_2015.pdf*
[61]See art. 15 of Law 354/1975, par. 2 and 3 «For the purposes of re-educational treatment, except in cases of impossibility, the offender and the inmate are guaranteed work. The accused are allowed, at their request, to participate in educational, cultural and recreational activities and, except for justified reasons or contrary provisions of the judicial authority, to carry out work or professional training, possibly of their choice and, in any case, under conditions appropriate to their legal position».
[62]Cf. P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 142 ff.
[63]In fact, work is seen as the main element of the Italian Republic, through which every citizen can develop and evolve his personality; see articles. 2 e 4 of Italian Const.

based on his inclinations; it would not be a duty on the part of the detainee to carry out the activity, as he could also refuse to do so.

However, according to a more consolidated interpretation [64], constitutionally oriented, work is conceived as a right but also substantially as a duty, considering the sanctions that could follow in case of refusal of the prisoner[65], which would prejudice a positive evaluation for the subject's re-education process.

The penitentiary system (Law n.354/1975) provides for an organization of the work activity, both internal to the penitentiary institution and external to it, managed by the direction of the institutions according to the programmatic lines that are identified by the supervisory authorities, or managed by public or private enterprises[66] (especially social solidarity cooperatives).

The Department of Penitentiary Administration establishes a link and collaboration between the management of the penitentiary institutions and the provincial labor offices so as to be able to assign the prisoners or inmates to work outside[67].

Also in France[68], after the war, the "right to work" was established for prisoners, so work was no longer considered as a punishment, but rather as the destiny of free men; it is a means of reintegration, which preserves his dignity and pride, making himself part of the sustenance of the family, but on the other hand, it is also a means that contributes to the compensation of the victim.

The work that the prisoner will carry out, must therefore be chosen based on his physical and intellectual abilities, also taking into account the family situation and any civil parties to be compensated.

On the other hand, the obligation to work persists in countries such as Finland, where prisoners are forced to work, study, or participate in other activities organized by the institution, so as to increase the possibilities, even for a foreign prisoner, to support life after release.

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[64]Cf. P. BALBO, *Diritto penitenziario internazionale comparato*, Roma, 2005, 140 ff.
[65]See art. 77 of Penitentiary regulation provides for a disciplinary offense if the prisoner refuses to carry out the work activity.
[66] See art. 20 of prison justice system; see P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 142 ff.
[67]See art. 21, par. 1 of prison justice system.
[68]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 200, 145 ff.

The Finnish system of open prisons (thanks to which Finland has managed to reduce the recidivism rate by 20% in a few years) is not only a more effective system from the point of view of re-socialising the prisoner, but also cheaper, as in this way the costs of security systems and personnel are also eliminated[69].

«It is quite relaxing to live here, we also take care of animals such as bunnies» tells an inmate in the open prison of Kerava[70].

It is an open prison, without gates, and because of its tranquillity, it is submerse by requests for transfers from other prisoners. It can easily be possible to go shopping in the city and as an alternative to work another choose is to attend university.

One might wonder whether this freedom left to inmates does not lead to escape; but they actually know that if they escape they would immediately go back to jail[71].

Also coexistence with citizens or tourists is peaceful, thanks to the useful activities carried out by prisoners, such as the restoration of historic homes or the cleaning of public spaces.

The goal is not to lock people in prison for the rest of their lives because this would require huge investments and the certainty of a real possibility of rehabilitation[72].

Even in Switzerland, since the original version of the Swiss StGB, prisoners are required to carry out a work activity[73], (always provided that this

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[69]In the interview with ESA VESTERBACKA, head of the Criminal Sanctions Agency.
See RAe ELLEN BICHELL, article "*Le carceri aperte della Finlandia, dove i detenuti hanno le chiavi"*, published on PRI.org on the 15.04.2015.
*https://*it.globalvoices.org/2015/04/in-finlands-open-prisons-inmates-have-the-keys/

[70] In the interview with HANNU KALLIO, drug dealer, detained in Kerava.
See RAE ELLEN BICHELL, article "*Le carceri aperte della Finlandia, dove i detenuti hanno le chiavi*", published on PRI.org on the 15.04.2015.
*https://it.globalvoices.org/2015/04/in-finlands-open-prisons-inmates-have-the-keys/*

[71]Cit. HANNU KALLIO, whose interview is reported in the article by RAE ELLEN BICHELL' s article, "*Le carceri aperte della Finlandia, dove i detenuti hanno le chiavi*", published on PRI.org on the 15.04.2015
*https://it.globalvoices.org/2015/04/in-finlands-open-prisons-inmates-have-the-keys*/

[72]See interview to Tapio Lappi-Seppala, head of the Institute of Criminology of the University of Helsinki, in the article by RAE ELLEN BICHELL, "*Le carceri aperte della Finlandia, dove i detenuti hanno le chiavi",* on PRI.org on the 15.04.2015.
*https://it.globalvoices.org/2015/04/in-finlands-open-prisons-inmates-have-the-keys/*

[73]See Art. 81 StGB: «The prison inmate is obliged to work. Wherever possible, the work should be appropriate to his skills, education and training and his interests. If he consents to do so, the prison inmate may work for a private employer».

does not turn into a semi-torture and unnecessarily retribution for forced labor[74], as work is considered as education to self-discipline, in which the day has timetables and rules valid for the whole community. Education can take place through study or even through the performance of a profession, including a cultural one[75]. Prison work is useful for managing order and discipline in prison. Many studies demonstrate how inmates employed in internal laboratories are better adapted to prison life than inmates kept idle[76]. A negative concept of forced labor can be found in art. 4, par. 3, lett. A) ECHR[77], according to which: «any work required to be done in the ordinary course of detention imposed according to the provisions of art. 5 of this Convention or during conditional release from such detention»; the UN also takes up the concept of unforced labor as «Any work or service, normally required of a person who is under detention in consequence of a lawful order of a court. No one shall be required to perform forced or compulsory labour[78]».

Therefore, many criticism emerge in the doctrine on the mandatory nature of work in Switzerland, which, in practice and in concrete management, seems to have a more punitive function, far from the provisions of both national and especially European regulations.

In fact, Switzerland would lack an actualization of federal constitutional law with regard to penitentiary execution[79].

The penitentiary system in this regard would be left to the rhetoric and abstractness of the legislative provisions as in reality there is an excessive detachment from work as a truly rehabilitative tool as envisaged in the theory and

[74]See A. BAIGUERA ALTIERI, *Fondamenti di diritto penitenziario svizzero*, 2017, in *https://www.diritto.it/fondamenti-di-diritto-penitenziario-svizzero/*

[75]On the issue, see art. 82 StGB: «Where he shows the required aptitude and the possibility exists, the prison inmate is given the opportunity to undergo basic and advanced training appropriate to his skills.».

[76]See VALLOTTON, VIREDAZ, Art. 81 CPS, in ROBERT, LAURENT, *Code penal I, Commentaire romand*, Bale 2009, reported in A. BAIGUERA ALTIERI, *Fondamenti di diritto penitenziario svizzero*, 15.02.2017

[77] In force in Switzerland since 4 November 1950.

[78]See art. 8, par. 3, UN Covenant, in effect in Switzerland since 16 December 1996.

[79]See Borghi and Previtali contest the empirical inconsistency surrounding the entire art. 41 BV and in particular par. 1, lett. d), referable to the prison context, in BAIGUERA ALTIERI, *Fondamenti di diritto penitenziario svizzero*, 2017, in *https://www.diritto.it/fondamenti-di-diritto-penitenziario-svizzero/*

the work concretely conceived in the prison reality, where the concept of work mandatory would respond more to a sense of "occupation of the day, to avoid idleness[80]".

The gap between regulations and reality can be seen above all with regard to short prison sentences, for which there seems to be no material time to implement authoentic professional training, not just aimed as pure contrast to total idleness[81].

Although there is sufficient prison construction in the Swiss legal system, the costs to implement the envisaged regulatory scheme remain very high; there seem to be no trade union controls from outside, which are supposed to verify the regularity of the activities carried out[82].

Therefore, although Swiss legislation is not far from the provisions of the European Penitentiary Rules, and although there are no serious ifringements, in the management reality it is still not fully compliant with the human rights guaranteed by the ECHR and by the European Rules themselves.

Work is both a right and a duty, with very specific parameters[83], even for a foreign prisoner, just as for a regular citizen.

### 4.2. Cohabitation in prison of the various religions

The idea of the individual as the centre of personalized and individualized penitentiary treatment has also led to major changes in terms of religious freedom professed within the prison.

Since the penitentiary system of 1975, art. 26 which sanctioned the freedom for prisoners to profess their religious faith (or not to profess any) and to educate themselves under such religion, also practicing its cult.

[80]See RAMBAUD, *Le travail en prison, Enquete sur le business carcera*, Autrement éditions, Paris, 2010, in BAIGUERA ALTIERI, *Fondamenti di diritto penitenziario svizzero*, 2017, in *https://www.diritto.it/fondamenti-di-diritto-penitenziario-svizzero/*
[81]See BAIGUERA ALTIERI, *Fondamenti di diritto penitenziario svizzero*, 2017, in *https://www.diritto.it/fondamenti-di-diritto-penitenziario-svizzero/*
[82]See A. BAIGUERA ALTIERI, *Fondamenti di diritto penitenziario svizzero*, 2017. *https://www.diritto.it/fondamenti-di-diritto-penitenziario-svizzero/*
[83]Identified by the R.D. 1201/95, art. 182 and ff.

The modern approach abandons the concept of mandatory Catholic religious practices (characterizing the Fascist era) which were considered as the tool of moral re-education and discipline of the prisoner[84].

In 1975 began the freedom of practicing a cult, reflecting art. 8 and 19 of the Italian Constitution but even more so the supranational principles (art.6 UN Standard Minimum Rules, Art.9 ECHR and art.29 European Prison Rules).

In recent years, a new light has been shed on the subject due to the increase in terrorist attacks and the consequent prevention measures related to them. Among the criteria for monitoring the phenomena of radicalization and proselytism, the "indicators on radicalization" were introduced by the D.A.P. (DPA - Department of Prison Administration), among which, particularly noteworthy is the attitude of those who profess a religious faith in an extremist way; according to some authors, some of these indicators would be in contrast with the rights guaranteed by the penitentiary system, but it must also be considered that the right to profess one's faith finds the limit in the contrast between the display of the symbols of one's creed and the public order, it being contrary to the law or offensive to the religion of others[85].

Also in England[86], the chaplaincy services have the task of reporting prisoners who show signs of radicalization; moreover, for the greater coexistence between the different faiths, the government involves religious associations - present in prisons - in actions to fight against the radicalization of prisoners, as they have the task of promoting a reconciliation between Islamic and Western values, in opposition to the jihadist narration.

The constant increase, in particular, of Islamic prisoners has led to the establishment of a "community chaplaincy" (which is sought, even if sometimes in vain, for the purpose of a more adequate response to the pluralism of religions, personal not only of the Christian religion), with the purpose of guiding prisoners

[84]On the issue, see P. BALDUCCI, A. MACRILLÒ, *Esecuzione penale e ordinamento penitenziario*, 2020, 732.
[85]See F. FLORENTIN, F. SIRACUSANO (edit by), *Esecuzione penale ordinamento penitenziario e leggi complementari*, edit. Giuffrè, 2019, 378.
[86]Cfr. J. PAFFARINI, *Libertà di culto e diversità religiosa nelle carceri inglesi*, in riv. *Stato, Chiese e pluralismo confessionale*, n. 25, 2018, 1-19.

even after their release, thus integrating the work of spiritual assistance and supporting the path of a new integration of the subject within society[87].

The increase in the different religious faiths has entailed performance obligations on the penitentiary administration[88], which had to ensure not only the best coexistence between them but also to assign more adequate spaces to the specific needs of the cult, to guarantee a diet differentiated on the basis of religious canons, access to books of worship, and respect for clothing[89].

In 2010, the European Court of Human Rights[90], had to assess the question of the appeal of a Polish convict of Buddhist religion who was guaranteed a vegetarian diet in order to avoid the dermatological problems that eating meat would cause him. But when the disease ceased, the vegetarian diet also did and the condemned, forced to go on hunger strike, was subject to disciplinary sanctions.

The Court recognized the violation of art. 9 ECHR which protects freedom of religion as the request of the condemned person did not even involve further economic expenses to be borne by the State or implied a disproportionate commitment on the part of the prison administration, therefore there was no reasonable reason to deny him the freedom of expression of the his religion.

To this end, Italy introduced art. 9, par. 1 of Prison Laws which guarantees the prisoner and inmate a healthy and sufficient diet, suitable for age, sex, state of health, work, religion, and where possible upon request, a diet respectful of their religious beliefs[91].

The practice of religious cult also makes use of Catholic ministers[92], different than chaplains, and those indicated in art. 55 of the Prison Laws, that can

[87]See J. PAFFARINI, *Libertà di culto e diversità religiosa nelle carceri inglesi*, in riv. Telematica *Stato, Chiese e pluralismo confessionale*, n. 25, 2018, 1-19.
[88]In England, to this end, Sense was issued in 2010 minimum standards for the treatment of religious diversity, by the National offender management service and the Ministry of Justice..
[89]See J. PAFFARINI, *Libertà di culto e diversità religiosa nelle carceri inglesi,* in riv. Telematica *Stato, Chiese e pluralismo confessionale*, n. 25, 2018, 1-19.
[90]With Judgement Cassation IV section, 07 December 2010, n. 18429.
[91]See F. FLORENTIN, F. SIRACUSANO (edit by), *Esecuzione penale ordinamento penitenziario e leggi complementari*, 2019, 378 f.
[92]See art. 58, par. 6, Prison Laws.

access the institution at the request of the inmates and with the authorization of the director to carry out their activities[93].

In fact, rules are also provided for the penitentiary administration to allow the subject to fully practice his religion[94].

In fact, it is a personalized treatment, which involves the acquisition of biological, psychological and social data for a subjective evaluation developed by a team of experts in psychology (so-called Scientific observation)[95].

In Spain (as well as in Portugal), religious freedom is guaranteed without limits or obligations to follow certain cults. Prisoners will be able to exercise religious activity in a room specially equipped for the celebrations carried out by each minister of the cults identified[96].

The classification to determine how the prisoner is treated, is based not only on the extent and nature of the sentence to be expiated, but also on an assessment of personality, individual, social and criminal history. The evaluation developed by the team of experts is aimed at treatment progress, which will determine new classifications for the subject.

In Holland the prisoner will be able to practice his faith either alone or together with other prisoners. It is the responsibility of the director to provide sufficient spiritual assistance, in line with the beliefs of the subject, and to authorize the spiritual counsellors of the various religions[97].

In Belgium, religious matters are more controlled[98], as prisoners who have asked to follow a cult will be reported to the corresponding minister of religion from the moment they enter the prison. The same Minister will then appoint, from a list of candidates, moral advisers for those who do not follow any religious confession.

Even in England[99] the minister in the prison assumes new functions as religious activity no longer manifests itself as proselytism, and this has led to the

[93]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 183.
[94]See artt 5, par. 2, 9, comma 1, 15, par.1, of Prison Laws, L. 354/1975.
[95]See art. 1, par. 1, L. 354/1975, as well as art. 13.
[96]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 184.
[97]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 186.
[98]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 187.
[99]See J. PAFFARINI, *Libertà di culto e diversità religiosa nelle carceri inglesi*, in riv. Telematica *Stato, Chiese e pluralismo confessionale*, n. 25, 2018, 1-19.

reorganization of chaplaincy services, although some formal and organizational aspects remain which reveal a preponderance of the Anglican Church.

Religious organizations are actively present in the re-education of the subject, with the task of integrating the activities of the officials of the penitentiary administration.

The institution of the chaplain, chosen by the Minister of Justice from among the clerics belonging to the Church of England, considered [100] a penitentiary officer like the director and the doctor of the prison, is mandatory, but the presence of other ministers of the cult is however foreseen, who they will visit the prisoner within 24 hours, once their religion has been communicated.

As for those who have not communicated any religion, their refusal is sometimes seen as self-isolation, therefore, even if the same legislation allows the right to refrain from any religious practice, the Administration always tries to encourage the dialogue of non-believing prisoners. Therefore chaplaincy is not only a function of religious practice, but also a benefit for the entire community, also intervening on personal or disciplinary issues[101].

**5.Immigration increases prison overcrowding**

As anticipated in the previous chapter, the judicial authority competent to enforce a European arrest warrant will have to verify (through objective, reliable, precise and appropriately updated elements) the conditions of detention in the executing State to avoid the real risk of inhuman and degrading treatment of the subject[102].

Such control, which should be as precise and concrete as possible, could act as a sort of limit to the mutual trust[103] rule, even if it is necessary to verify any

[100] See Prison Act, issued in 1952.
[101] On the matter, cf. J. PAFFARINI, *Libertà di culto e diversità religiosa nelle carceri inglesi*, in riv. Telematica *Stato, Chiese e pluralismo confessionale*, 2018, n. 25, 1-19.
[102] See ECJ Judgement, 5.4.2016, Aranyosi and Caldararu.
[103] Which implies a relationship between the dynamic aspect of the operating mechanisms of the European arrest warrant and the general need for respect for fundamental rights.
Cfr. A. CORRERA, *Mutual trust e rispetto dei diritti fondamentali: l'intensità del controllo dell'autorità giudiziaria di esecuzione del MAE sulle condizioni di detenzione nello Stato membro emittente*, in *DoGi*, 2020, file .3, 871 ff, as well as M. BARGIS, *Mandato di arresto europeo e diritti fondamentali: recenti itinerari "virtuosi della Corte di giustizia tra compromessi e nodi irrisolti*, in *Contemporary Criminal Law*, 2017, file 2, 178 ff.

violations that constitute grounds for refusing to execute the European arrest warrant (Art. 4 and 4 bis of Framework Decision 2002/585/JHA).

After giving it some thought, one could instead observ[104] that this solution is consistent with the *ratio* of the new simplification discipline and the principle of mutual trust between the States, as the requested State will have to carry out the control simply through the information provided to it by the issuing State. In this way, the relationship of mutual trust would not be bypassed but would rather be functional to the celerity of the discipline.

A different solution, consequently, would call into question the entire system of cooperation.

The risk of inhuman and degrading treatment, also caused by a situation of prison overcrowding[105], can relate to an inadequate quantity of light[106] or air, the persistence of bad smells… in this sense, human dignity is a fundamental right, a constitutional principle and an integral part of public order[107].

Prison should encourage the subject to develop a positive identity[108], a greater self-awareness, a reflection on moral aspects and attitudes in the future, therefore within the institutions, sports and recreational activities are constantly promoted through which inmates should be oriented, compare and find themselves; all this, however, seems to be a utopia, since if the subject lived in inhuman conditions as described above, he would not appreciate the act of - nor would he be encouraged to - reflecting and rediscovering himself[109].

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[104] Cit. A. CORRERA, *Mutual trust e rispetto dei diritti fondamentali: l'intensità del controllo dell'autorità giudiziaria di esecuzione del MAE sulle condizioni di detenzione nello Stato membro emittente*, in *DoGi*, 2020, file.3, 872.

[105] See ECHR Judgement, II sect, 16.7.2009, Sulejmanovic v. Italy, n. 22635/03; Judgement 8.1.2013, Torreggiani and others v. Italy, n.43517/09, at the end of which the Court established the maximum floor area of 3 square meters for each prisoner.

[106] Some of the interviewed inmates told of how sensory perceptions are also affected, for example, by the delimitation of spaces or the low light that make the inmate's gaze constantly cut off; the constant feeling of cold, even during the hottest months, probably due to the reinforced concrete walls and the poor heating of the environment. Cit. C. CHERCHI, L'Ippocrate incarcerato. Riflessioni su carcere e salute, in periodical, Studi sulla questione criminale, 2017, pamphl. 3, 87 and ff.

[107] Cfr. P. PASSAGLIA (edit by), *Il sovraffollamento carcerario*. *https://www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_sovraffollamento_2014.pdf*

[108] Cfr. T. DE VITA AND A. D'ANDRIA, *Salute, life skills e carcere*, in periodical *Giornale italiano di ed. alla salute, sport e didattica inclusiva*, 2019, file 3, 100 ff.

[109] Cfr. C. CHERCHI, *L'Ippocrate incarcerato. Riflessioni su carcere e salute, in periodical Studi sulla questione criminale,* 2017, file. 3, 84, in which the prisoner's state of health is strongly

To this date, thanks to the interventions of the ECHR, overcrowding is a problem that the various European states are slowly trying to solve, but which unfortunately emerges especially in this moment of global health emergency.

In fact, prison overcrowding, in addition to posing a problematic way towards human dignity, and the right to health, as it causes an increase in the possibility of Coronavirus contagion[110], is even more problematic towards the right to care of the prisoner[111], as a number of prisoners higher than sustainable, presupposes the demand for nurses, doctors and treatments certainly higher than the available resources.

Therefore, if a collapsed health situation occurred in reality outside the prison, we can imagine the chaotic situation that could arise in an overcrowded prison.

In fact, within the prison[112] there is a high concern for infectious diseases - first of all HIV and hepatitis - among both professionals and prisoners.

Nurses would undoubtedly not have suitable prevention tools and this concern causes inmates both tensions and prejudices, all leading to a greater state of discrimination and exclusion, and sometimes even violence.

In times of Covid, the fear of being infected increases conflicting relationships, caused by the inconvenience caused by the narrowness of spaces, inadequate services and sanitation deficiencies and by the inadequate number of prison police personnel, which reduces the possibility of carrying out the activities daily scheduled inside the prison[113].

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affected by overcrowding. Physical and mental immobility causes a progressive regression of the personality, until it implodes resulting in acts of self-harm, dictated by psychosis or prison neurosis.

[110]On the issue, also see C. CHERCHI, *L'Ippocrate incarcerato. Riflessioni su carcere e salute*, in periodical *Studi sulla questione criminale*, 2017, file 3, 84 ff., in which forced coexistence between inmates is a suitable factor to exacerbate the unhealthiness of the prison environment, facilitating the contagion of infectious diseases, cit. 84.

[111]Cfr. C. CHERCHI, *L'Ippocrate incarcerato. Riflessioni su carcere e salute*, in periodical *Studi sulla questione criminale*, 2017, file 3, 80 ff, in which talking about health in prison is in itself problematic, both in emergency terms - as a cure in a moment of need - and as a right concretely exercisable by the owners.

[112]As emerges from some interviews reported by O. BIGNAMI, D. ARGIROPOULOS, *Percezione della salute e bisogni relazionali in carcere*, in periodical *Autonomie locali e servizi sociali*, 2016, file 1, 119 ff.

[113]Cf. M. V. AMBROSONE, *Emergenza sanitaria e sistema carcerario*, in Periodical *Criminal and Procedural Law*, 2020, file 1.

The Supervisory Judiciary, in this emergency context, tried to mitigate these difficulties by evaluating[114] even a possible deferral of the sentence, or the hypothesis of home detention for health reasons[115].

However, this type of solution has aroused feelings of sensation and distrust on the part of citizens towards justice.

Even the magistrate of the Superior Council of the Judiciary, Di Matteo, gave an interview[116] in which he shows his disagreement with the release[117] of major Mafia bosses[118] detained under the Criminal Law Art.41-bis regime, and the fear that this could be interpreted as a sign of surrender by the State towards the Mafia.

However, the position of the Attorney General of the Court of Cassation[119] is noteworthy, since it raises the question whether this would be possible in cases of actual and concrete risk to the health of the person concerned, even the Legislative Decree 18/2020 does not expressly provide for the suspension of the issue of the detention order pursuant to art. 656 of the Criminal Code.

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[114]The evaluation is carried out through a scrupulous assessment of the appropriateness of re-entry into society of prisoners convicted of serious offenses of organized crime, since in any case the execution of the sentence cannot "override the fundamental rights of the detainees, otherwise it will never able to return them to society as better, or at least not worse than when they committed the crimes", as released by F. Gianfilippi, Surveillance Magistrate of Spoleto, reported in M. V. AMBROSONE, *Emergenza sanitaria e sistema carcerario*, Periodical *Criminal and Procedural Law*, 2020, file 1.

[115]As we will see in chap. IV.

[116]See *https://www.ilfattoquotidiano.it/2020/04/22/coronavirus-di-matteo-boss-scarcerati-segnale-tremendo-trattativa-stato-mafia-non-va-dimenticata-lintervento-a-sono-le-venti-nove/5779195/*

[117]Although the "Cura Italia" decree of 17 March 2020 provided for home detention for prisoners who had less than 18 months of sentence to serve, with the exclusion of subjects falling within the category of the Criminal Law Art.41-bis regime, the Supervisory Court of Milan announced that the house arrest granted to Mafia bosses under Criminal Law Art.41-bis regime, found reason not in the "Cura Italia" decree but in ordinary legislation, to protect the constitutional rights to health and humanity of the punishment.
*https://www.ilgiornale.it/news/cronache/i-boss-scarcerati-che-tornano-casa-e-lettura-distorta-1857397.html*

[118] Including F. Bonura, godfather of Cosa Nostra, who was allowed to leave the Criminal Law Art.41-bis regime to serve the sentence in house arrest, and also G. Sansone was allowed to serve the sentence in house arrest.
In any case, the lawyers G. di Benedetto and F. Sinatra believe that we cannot properly speak of "release" for Mr. Bonura, as the provision of the Court of Surveillance of Milan that grants the expiation of the sentence to home arrest, considered the worsening of his tumor disease and the impossibility for them to escape or repeat the crime.
*https://www.ilgiornale.it/news/cronache/i-boss-scarcerati-che-tornano-casa-e-lettura-distorta-1857397.html*

[119] As emerges from the provision of the Attorney General of the Court of Cassation, 1.4.2020
*https://penaledp.it/app/uploads/2020/04/Procura-Generale-della-Corte-di-Cassazione-prot-n.-2855-20-1-aprile-2020.pdf*

This assessment must be strictly individual concerning the compatibility with the *status detentionis* of the subject's health conditions, also considering the ability of the structure itself to ensure the necessary assistance and care in respect of dignity and a sense of humanity[120] (in the current reference to possible contact with people positive to COVID 19, for example, fiduciary isolation and subjecting to health control could be taken into consideration).

### 5.1. Tools of re-education to reduce prison overcrowding

The concept of an alternative measure to detention has now been conceived by all modern legal systems[121], although on the one hand it is considered as a benefit, on the other as a failure to criminalize conduct[122].

It would be aimed at realizing the rehabilitative function of the sentence [123], promoting the idea that prison is not the only possible nor useful criminal experience[124].

To this date, when we talk about re-education we should no longer speak only of a mere re-learning of the linguistic and cultural bases of a Country, but rather understand it on different social, psychological and sociological levels.[125].

In fact, if on the one hand there could be European citizens with a medium-high cultural level, whose crimes are often motivated by economic purposes[126] on the other hand they could find foreigners who have no interest in living in a different State and which crimes constitute their style of life. It is clear

[120] See the provision of the Attorney General of the Court of Cassation, 1.4.2020 *https://penaledp.it/app/uploads/2020/04/Procura-Generale-della-Corte-di-Cassazione-prot-n.-2855-20-1-aprile-2020.pdf*

[121]On the matter, see L. SCOMPARIN, *Note critiche sul progetto di istituzione di un corpo di giustizia dello Stato,* in *Criminal Cassation*, 2016, file,. 12, 4328.

[122]For example in France as we will see further on.
See M. VENTUROLI, *Le sorti alterne del principio di individualizzazione della pena nell'attuale sistema sanzionatorio francese,* in *Italian Journal of Criminal Law and Procedure*, 2019, pamphl. 2, 1555 ff.

[123]Cit. A. CONCAS, *Le misure alternative alla detenzione, caratteristiche e disciplina giuridica*, 2017, 1.

[124]Cit. A. PREDRINAZZI, *Sovraffollamento carcerario e misure alternative alla detenzione: ruolo dell'esecuzione penale esterna*, Milan, 2010.
*http://www.ristretti.it/commenti/2010/luglio/pdf7/uepe_milano.pdf*

[125]See P. BALBO, *Diritto penitenziario internazionale comparato*, Roma, 2005, 202.

[126]See White collar crimes.

that the application and methods of the rehabilitation tools will have to be assessed on a case by case basis[127].

We also deduce this purpose in the provision contained in the UN Minimum Rules for the treatment of prisoners[128], which attributes the control of compliance with the measure not to the police but to a social worker, so as to enhance the purpose of recovery, reintegration and experimentation. of freedom in more or less extensive forms[129].

As also highlighted by art. 30 of Recommendation [130] n. R16 f the Committee of Ministers to the Member States, relating to the European rules on sanctions and alternative measures to detention, its purpose would be to develop, in those who have committed a crime, their responsibilities towards society, and in particular in towards the victims[131].

The application of these measures, as written in the Preamble of the rules, must aim at the preservation of the necessary balance and the defence needs of the society which protects on the one hand public order and the application of the rules and on the other the need of the offender to be reintegrated into society[132].

In England up to 1991 *community sentences* were already provided as alternative sanctions to the prison sentence including community service. C*ommon law* Countries were in fact among the first to introduce the institution of *probation*[133].

Some studies[134] carried out in the Netherlands in the 90s, compared people subjected to an unconditional prison sentence, on which heavy judicial burdens weighed on their shoulders, with other people inserted instead in the *community service* as an alternative sanction of the sentence, noting a positive outcome deriving from the latter as a reduction in recidivism cases was obtained.

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[127]Cit. P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 202.
[128]See Art. 60, par. 2 UN Minimum Rules for the treatment of prisoners. 30 August 1955.
[129]On the matter, see L. SCOMPARIN, *Note critiche sul progetto di istituzione di un corpo di giustizia dello Stato*, in *Criminal Cassation*,, 2016, file 12, 4328.
[130]Adopted in 1992 at the 482nd meeting of the Ministers' Deputies.
[131]See N. 30 of Recommendation R (1992) 16 on the European rules on sanctions and measures applied in the criminal area.
[132]Also see N. 23 of Recommendation R (1992)16 on the European rules on sanctions and measures applied in the criminal area.
[133]On the matter, see L. SCOMPARIN, *Note critiche sul progetto di istituzione di un corpo di giustizia dello Stat*o, in *Criminal Cassation*, 2016, file 12, 4328 ff.
[134]Cf. P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 255.

Further to that, a study[135] on the comparison between the Member States of what at the time was the European Community (EC) highlighted some common problems: prison overcrowding, the growth of crime, and stricter justice. Therefore, the Member States have moved towards the development of institutions that prevent the prisoner from entering prison, including compensation for damages, fines, community service, electronic bracelet, criminal mediation through reconciliation projects between the victim and the offender[136].

However, the difficulty in solving those problems derives from the necessary balance between the various sanctions to be applied and the available budgets.

Each State has introduced various institutions that allow the convicted person to access alternative ways of expiation of the sentence in prison (alternative measures to detention), or to the accused to be subjected to the precautionary measure in prison only as *extrema ratio*, or to avoid the sentence to imprisonment thanks to alternative systems of definition of the procedure ("probation").

However, within the Union, not all states are in favour of the application of alternative measures to detention as they involve the risk of an abuse, by the offender, of the freedom granted[137].

For example, the Dutch prison system allows for the adoption of non-custodial measures which are however of little application. In fact, the judges preferred to apply and have the prison sentence carried out, delegating to the prison directors, the *probation* centre and the heads of the treatment units the treatment program inside or outside the prison. In fact, Dutch society seems to have little faith in the expiation of the outside prison sentence, which does not seem to make the convict aware of the responsibilities and consequences of his actions[138].

However, in 1995 the *probation*, service was established, with various tasks both in the trial phase, as assistance to the guilty during the trial, and in the

[135]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 256.
[136]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 256.
[137]Cf. P. BALBO, *Diritto penitenziario internazionale comparato*, Rome 2005, 256 ff.
[138]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005.

executive phase, as assistance after release from prison in seeking home, work or support services.

It will be the judge - should he authorize the subject to carry out a penitentiary program - to include in the same program the *probation* service, in which the penitentiary program will be implemented, taking into account the nature and seriousness of the crime committed, the behaviour of the prisoner, the risk of recidivism[139].

In Italy, instead, in order to remedy the problem of prison overcrowding for which it has been condemned several times by the European Court of Human Rights, there is a frequent application of alternative measures to detention, governed in detail by Prison Laws[140].

In order for measures such as probation to be granted to the social service, or even more so the semi-liberty, it is necessary to carry out a work activity, which shows the will to reintegrate the subject into society.

It is clear that a foreigner who will have to serve his sentence in Italy will have greater difficulties in obtaining a job that will allow him to access the alternative measure to detention. It would therefore seem a problematic situation both in regards to the national problem of prison overcrowding, and as regards compliance with the principle of equality, since the foreign subject does not have the same possibilities and therefore cannot enjoy the same benefits as an Italian citizen[141].

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[139]See P. BALBO, *Diritto penitenziario internazionale comparato*, Rome, 2005, 237.

[140]See Article. 47 of the system governs the assignment on probation to the social service, through which the offender can atone for the imposed/residual punishment under controlled freedom, however establishing a collaborative relationship with the external criminal execution office.
The subject must comply with the individual treatment program which includes the activities, commitments, obligations and controls to which he will be subjected.
At the end of the trial, the positive outcome will extinguish the sentence and any other criminal effect.
Presidential Decree n. 309/90 introduced a form of therapeutic probation, with peculiarities, for those drug and alcohol addicted subjects following a rehabilitation program.
Art. 47 ter regulates home detention, through which the offender can atone for the sentence in his own home, or private residence or in a public place of care or assistance if the requisites provided for by the same article are present.
Article 49 regulates the measure of semi-liberty, which provides for the possibility for the convicted or inmate to spend part of the day outside the penitentiary, for the sole purpose of carrying out work, educational or useful activities for social reintegration, when eligibility conditions pursuant to art. 50 of Prison Law exist.

[141]On the issue, Cassation judgement n. 54508/17 against a person convicted of aggravated smuggling who had requested a probationary assignment to the social service in Bulgaria, however

In France, the 1994 *code pénal* introduced a wide range of alternative measures [142] to prison by extending and replacing the numerous alternative sentences established by the previous laws of 1975 and 1983, such as the *Travail d'Intéret Général*[143], which allowed the subject to carry out an unpaid work activity, in favour of a legal person or an association authorized to carry out public utility works. It is an alternative measure to the custodial sentence but sometimes also the main penalty[144] for less serious crimes, and is applicable to every crime, but subject to the consent of the condemned[145]; or the *jours amende*, also introduced in 1983, with the nature of a monetary penalty "at daily rates", with the aim of allowing the amount of the penalty to be adapted to the subjective economic conditions of the subject, so as to avoid any doubts on the incompatibility with the principle of equality[146].

It is similar to the pecuniary penalty provided for by the German law, in fact, like the latter, the determination of the *quantum* is based on the identification

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without an investigation into the relevant conditions (domicile, work, etc.), invoking two framework decisions on the subject of recognition of decisions judicial between European countries. In fact, jurisprudence deems it possible to expiate a sentence imposed in Italy abroad if a self-report on the progress of the measure is compiled and sent to the office for External Criminal Enforcement (UEPE).

The Cassation deems that «the actual availability on Italian territory is essential for the purposes of applying the probationary assignment to the social service, since this alternative measure requires direct contact between the interested party and the social service, which is responsible for controlling the behaviour of the subject and helping him to overcome the difficulties of adapting to social life. Therefore, an offender who is not in the territory does not allow the social service to carry out its task nor does it even make it possible for the judicial police to verify compliance with the requirements. In fact, according to consolidated jurisprudence, the execution of the alternative measure of probationary assignment to the social service implies the necessary performance of the same in Italy, since the social service centres for adults are delegated to carry out their normal activity only at national level which - due to its peculiarities and its specific nature - it is not included among the state functions exercisable abroad by the consular offices».

See also Cass., Sect 1, 27 March 2007, n. 18862, Magnani, Rv. 237363; Sect. 1, 28 April 1999, n. 3278, Di Tarante, Rv. 213724; Sect. 1, 26 October 1999, n. 5895, Ceniti, Rv. 215027; Sect. 7, ord. N. 34747 of 11/12/2014, Rv. 264445.

*https://canestrinilex.com/risorse/misura-alternativa-allestero-impossibile-cass-5450817/*

[142] "alternative measure to detention" in the French meaning means any criminal measure whose execution takes place without recourse to incarceration, unlike the meaning attributed to it by the Council of Europe, which does not include among the alternative measures to detention also those of an economic or suspension of the custodial sentence.

[143] Measure introduced on 10 June 1983 with Law no. 83-466.

[144] See M. VENTUROLI, *Le sorti alterne del principio di individualizzazione della pena nell'attuale sistema sanzionatorio francese* in *Italian Journal of Criminal Law and Procedure*, 2019, file 2, 1555.

[145] In accordance with the provisions of art. 4 of the ECHR.

[146] See M. VENTUROLI, *Le sorti alterne del principio di individualizzazione della pena nell'attuale sistema sanzionatorio francese* in *Italian Journal of Criminal Law and Procedure*, 2019, file 2, 1555.

of the number of daily rates based on the seriousness of the crime and the setting of the amount of each rate depends on the conditions economic penalty of the subject, but unlike the sentence of German origin, it cannot be executed immediately after its imposition but only when the term corresponding to the established *jours amende* expires, in order to preserve the intimidating effect of the sentence, forcing the subject to save the necessary money every day[147].

The *loi* n. 896/2014 was meant to introduce changes aimed at reducing the use of the prison sanction, applying more and more correctional penalties and resorting to the custodial sanction only as an *extrema ratio*.

Another example of an alternative sanction is the *sursis* (which frees the subject from the execution of all or part of the sentence imposed if in a given period he respects the obligations and measures provided), and other restorative sanctions.

Also the *semi-libertè*, granted *ab initio*[148] for sentences not exceeding two years if the convicted demonstrates that he is working or is participating in a professional training course. Therefore, it is notable that even in France access to the alternative measure of semi-liberty is subject to the presence of certain requirements such as carrying out a professional activity, following a teaching or vocational training or an internship or temporary employment in view of future reintegration.

The system implemented in France (and in part also in Italy) is based on the discretionary-suspensive model (which in Italy is more limited in the enforcement phase of the sentence); in fact, the French system would seem to be of little effectiveness[149], since if on the one hand the principle of individualization of the penalty is a complementary principle to the canon of legality[150], n the other it ends up obfuscating it, causing a "de-legalization" of the criminal sanction and

[147]On the issue, see M. VENTUROLI, *Le sorti alterne del principio di individualizzazione della pena nell'attuale sistema sanzionatorio francese,* in *Italian Journal of Criminal Law and Procedure*, 2019, file 2, 1555.
[148]Pursuant to art. 132-25 Code Pénal.
[149]See M. VENTUROLI, *Le sorti alterne del principio di individualizzazione della pena nell'attuale sistema sanzionatorio francese,* in *Italian Journal of Criminal Law and Procedure*, 2019, file 2, 1590 ff.
[150]Cit. M. VENTUROLI, *Le sorti alterne del principio di individualizzazione della pena nell'attuale sistema sanzionatorio francese,* in *Italian Journal of Criminal Law and Procedure*, 2019, file 2, 1590 ff.

consequently, since the criminal code itself solicits the non-application of the custodial sentence in prison, the *nulla poena sine lege* would translates into the generic threat of a criminal sanction and the ineffectiveness of the criminal sanction provided for by the law[151].

One solution would be to re-establish the rule of the prison sentence, but at that point the principle of certainty of the sentence would lose its guarantee function and would be resolved into a mere parameter of evaluation of the effectiveness of the sanction system[152].

[151]Cit. M. VENTUROLI, *Le sorti alterne del principio di individualizzazione della pena nell'attuale sistema sanzionatorio francese,* in *Italian Journal of Criminal Law and Procedure*, 2019, file 2, 1590 ff.

[152]On the issue, see M. VENTUROLI, *Le sorti alterne del principio di individualizzazione della pena nell'attuale sistema sanzionatorio francese,* in *Italian Journal of Criminal Law and Procedure*, 2019, file 2, 1591.

# CHAPTER IV

## EPIDEMIOLOGICAL EMERGENCY

### 1.The consequences of an epidemiological emergency in relation with EAW

The global epidemiological emergency we are facing, due to the rapid spread of Covid19 ("Coronavirus"), also had some effects on the European arrest warrant (in the issuing phase and also in the executive phase[1]) and prison treatment.

The member countries of the European Union, on 17 March 2020, unanimously declared the ban on the entry, for 30 days, of people from non-EU countries[2], and suspended the movement of citizens on European territory, except in situations of necessity, thus placing a limitation on the Schengen Agreements, except for the movement of goods, especially for « essential goods that must travel quickly, to make the internal market work[3]».

Yet on the one hand the States continued to issue Eaw (although some only limited them to urgent cases, following the guidelines issued by the public prosecutor's offices), and on the other hand, the containment measures (travel limitations, cancellation of flights...) against Coronavirus made it difficult (less if the delivery were to take place by land, between neighboring Countries) the delivery phase of the requested person[4].

As declared by the President of the European Council, Charles Michel:

«To limit the spread of the virus globally, we agreed to reinforce our external borders by applying a coordinated temporary restriction of non-essential travel to the EU for a period of 30 days, based on the approach proposed by the Commission[5]» followed by the statement of the President of the European

[1]Cit. M. BARGIS, *Cooperazione giudiziaria in materia penale alla prova dell'emergenza da Covid-19*, in *https://www.sistemapenale.it/it/scheda/bargis-cooperazione-giudiziaria-emergenza-covid*
[2]Cf. A. BAROLINI, *Coronavirus, l'Europa chiude le frontiere esterne*, article published on Lifegate on the 17th March 2020.
[3] Cit. Ursula Von Der Leyen, President of the European Commission, in M. CUPERSITO, *Coronavirus e area Schengen: l'Europa chiude le frontiere esterne per salvare quelle interne*, article published on Dailynews24 on the 18th March 2020.
[4]Cf. M. BARGIS, *Cooperazione giudiziaria in materia penale alla prova dell'emergenza da Covid-19*, in *https://www.sistemapenale.it/it/scheda/bargis-cooperazione-giudiziaria-emergenza-covid*
[5] Cit. M. CUPERSITO, *Coronavirus e area Schengen: l'Europa chiude le frontiere esterne per salvare quelle interne*, article published on Dailynews24 on the 18th March 2020.

Commission, Ursula Von Der Leyen: «A big topic today was, of course, the internal borders, and consequently the blockages there. And here it is absolutely crucial that we unblock the situation because we know that too many people are stranded within the European Union[6]».

Once the subject has been transferred, this should be placed in quarantine after arrival and in many States the negative test for Covid-19 is also required.

Therefore, due to the various difficulties, the executing judicial authorities of some States prefer to postpone the delivery (pursuant to art. 23, par. 3, of the Framework Decision 2002/584/JHA), invoking the "causes of force majeure" while others "serious humanitarian reasons" (ex art. 23, par. 4, of the same framework decision).

However, practical differences emerge from the application of one or the other provision.

In fact, in the first case the judicial authorities contact each other immediately agreeing a new date for delivery, while in the second case the judicial authorities do not have the obligation to contact each other immediately as the execution of the EAW will take place as soon as the serious humanitarian reasons have ceased[7].

The Schengen agreement (which takes its name from the Luxembourg town in which it was signed), ratified on 14 October 1985, is followed by the Schengen Convention, signed on 19 June 1990 which clarified the conditions and guarantees regarding space of free movement. o date, there are 26 signatory states, 4 of which do not belong to the European Union: Norway, Switzerland, Iceland, Liechtenstein. While the United Kingdom and Ireland have partially joined, based on an *opt-out* clause whereby they have maintained controls at their borders. The agreement provided for enhanced cooperation between the participating States with regard to the free movement within their territory; as a result, the internal borders were substantially abolished and those external to the only Schengen area created were strengthened.

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[6] Cit. M. CUPERSITO, *Coronavirus e area Schengen: l'Europa chiude le frontiere esterne per salvare quelle interne,* article published on Dailynews24 on the 18th March 2020.

[7] Cf. M. BARGIS, *Cooperazione giudiziaria in materia penale alla prova dell'emergenza da Covid-19*, in *https://www.sistemapenale.it/it/scheda/bargis-cooperazione-giudiziaria-emergenza-covid*

Therefore common rules on visas, asylum rights and also with regard to the cooperation of the police forces of the signatory countries have been adopted; in fact, these collaborate to fight any arising risks for the Schengen area[8].

In 2006 the Schengen Borders Code[9] was issued aimed at regulating the matter and relations between States, also subsequently updated and modified.

However, the agreement has been temporarily suspended several times for specific reasons, restoring controls at internal entry and exit borders. The decision on the suspension of the agreement cannot be arbitrary but must be imposed by a serious threat to the public order or internal security of a Member State or serious deficiencies related to the control of the external borders, which could endanger the general functioning of the Schengen area.

The maximum duration of the suspension is thirty days if exceptional circumstances do not require an extension, for a maximum of two years.

Some suspensions of the Schengen agreement took place, for example, in Italy during the G8 summit in Genoa in 2001, in France for the attacks in Paris in 2015, in Germany for the migrant emergency in 2016[10].

Following the epidemiological emergency due to Covid19, the Member States had to limit the Schengen agreement, each adopting its different provisions.

With reference to the relationship with non-acceding countries, external borders to the Schengen area have been closed. But it was not the only closure since some of the Schengen countries (Austria, Hungary, Poland, Denmark, Czech Republic, Lithuania, Estonia, Germany, Switzerland and Norway) have again envisaged checks at internal borders, such as the measuring of body temperature, or even putting a total ban on entry for non-residents[11].

[8]The regulation on the Hot pursuit, which allows the national police to cross borders between Member States to pursue a suspect in serious crime.
See A. PARODI, *Coronavirus, l'Europa si chiude: che cos'è l'area Schengen e cosa cambia ora*, article published on the 17th March 2020.
[9]See the Regulation n. 562/2006.
[10] *See https://www.agi.it/estero/news/2020-02-22/coronavirus-trattato-schengen-sospensione-7166660/*
[11] Cfr. A. PARODI, *Coronavirus, l'Europa si chiude: che cos'è l'area Schengen e cosa cambia ora,* on 17 th March 2020.
*https://www.open.online/2020/03/17/coronavirus-che-cosa-e-l-area-schengen-e-cosa-cambia-ora/*

In particular, Spain has prohibited unnecessary travel, Norway has closed its ports and airports, Greece has blocked all flights to Italy[12].

France has kept the intra-EU and intra-Schengen borders open albeit with strict limitations and controls to verify the legitimacy of the movements.

With reference to Italy, in addition to the containment measures ordered by the Ministry of Interior and Health, contained in the decree of 22/03/20, any movement has been prohibited except for work, health or strictly urgent reasons. Those who shall return to Italy, also as clarified by the Ministry of Foreign Affairs[13], must comply with the basic rules (1 meter distance between passengers, temperature measurement ...) and upon returning to the country they will be obliged to self-isolation for the next 14 days.

It would seem that Covid-19 is sinking[14] Schengen, making Europe regress over decades, rebuilding those political and social barriers that had slowly been demolished.

In a situation of such emergency, two questions need to be asked:

Will these rules for the containment of the virus also be applied within penitentiaries?

How will the surrender and transfer procedures of wanted persons or prisoners be managed?

With regard to the first question, the World Health Organization, on 15 March 2020, published the guidelines Preparedness, prevention and control of COVID-19 in prisons and other places of detention[15], which includes the interventions for the management of the epidemiological emergency in prison in respect of human rights and health, amongst which the document United Nations

[12] Cfr. *Coronavirus, l'Europea si blinda*, article published on Leggo.it, on the 14th March2020. *https://www.leggo.it/esteri/news/coronavirus_europa_blinda_francia_spagna-5111427.html*

[13] See *Cittadini Italiani in rientro dall'estero e cittadini stranieri in Italia*, on Ministry of Foreign Affairs and International Cooperation, in *https://www.esteri.it/mae/it/ministero/normativaonline/decreto-iorestoacasa-domande-frequenti/focus-cittadini-italiani-in-rientro-dall-estero-e-cittadini-stranieri-in-italia.html*

[14] See MARANGONI, *Frontiere e quarantene, così il Covid-19 affonda Schengen*, in *https://www.agi.it/estero/news/2020-03-14/coronavirus-europa-frontiere-7502060/*
In fact, the fear of being infected by those coming from other Countries increases the marginalization and vulnerability of people, even more, Cf. FERRUCCIO PASTORE, *L'integrazione ai tempi del contagio*, in *https://www.neodemos.info/articoli/lintegrazione-ai-tempi-del-contagio/.*

[15] See IPC: international documents as reference. *https://www.epicentro.iss.it/coronavirus/sars-cov-2-ipc-documentazione-internazionale*

Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), United Nations Standar Minimum Rules for Non-custodial Measures (the Tokyo Rules) and other international protocols on the prohibition of torture and degrading treatments[16].

The document published by the WHO opens with the assumption of taking preventive measures for those deprived of their liberty (detained or restricted to other places of confinement), as they are more vulnerable to Covid19 than the general population; in fact, being forced to live promiscuously for long periods, they could represent a source of infections and spread the disease inside and outside the prison. Therefore, a global approach is required from the institutions that will have to guarantee effective preventive action, control measures, tests, treatments and cures even inside the prison[17].

In this context, the WHO reiterated the fundamental principles to be respected in response to Covid 19 in prisons and other places of detention, clarifying first of all that the provision of health care for people in prisons is a responsibility of the State and that, despite the adoption of these preventive measures, convicts should not feel excluded from the outside world[18].

For example, in Italy, Carlo Lio, Guarantor of prisoners or deprived of the freedom of Lombardy, explains[19] that the decree-law of March 2, 2020 provided for suitable support for the containment of the spread of the infection from Coronavirus; with regard to prisons, tents are set up in front of the Lombard

[16] See *Coronavirus e carcere, le indicazioni dell'OMS*, on 27th March 2020. *https://www.fuoriluogo.it/speciali/coronavirus/coronavirus-e-carcere-le-indicazioni-delloms/#.XptoAMgzbIU*

[17]Cf. Planning principles and human rights considerations of the document:
«[…] The human rights framework provides guiding principles in determining the response to the outbreak of COVID-19. The rights of all affected people must be upheld, and all public health measures must be carried out without discrimination of any kind. People in prisons and other places of detention are not only likely to be more vulnerable to infection with COVID-19, they are also especially vulnerable to human rights violations. For this reason, WHO reiterates important principles that must be respected in the response to COVID-19 in prisons and other places of detention, which are firmly grounded in human rights law as well as the international standards and norms in crime prevention and criminal justice».

[18]Cf. Planning principles and human rights considerations of the document:
«Prisons and other detention authorities need to ensure that the human rights of those in their custody are respected, that people are not cut off from the outside world, and – most importantly – that they have access to information and adequate healthcare provision».

[19]See L. CEREDA, *Coronavirus, in caso di contagio tra i detenuti le carceri rischiano il collasso*, on the 9th of March 2020.

penitentiary institutions, where the "new arrivals" that should enter the prison, are checked.

Inmates inside the prison cannot have interviews with relatives but can maintain contacts only by phone or video call, where possible.

There is an obvious restriction on prisoners' rights which entails a sort of "isolation of the isolated[20]".

"So the measures to be taken in prison, however understandable, must be applied with the utmost care to the specificity of the individual implementations, so as not to risk going beyond what is strictly necessary, isolating from the outside even more those who already live in a restricted way[21]".

As some riots occurred in the penal institutions, deaths of some inmates inside prisons (for example nine in Modena, three in Rieti) and numerous episodes of violence also against the officers of the Penitentiary Police, in order to better protect the prisoner and reduce the problem of prison overcrowding[22] that could favour the infection of the virus, art. 123 of the Decree-Law n. 18 of 17/03/20 has been published, which governs provisions relating to home detention, according to which the prisoner for a sentence not exceeding eighteen months, even if constituting a residual part of the greater penalty, on application, will carry out the prison sentence, at his home or in another public or private place of care, assistance, and reception, with some exceptions (whether it be one of the crimes referred to in art. 4 bis of Law 354/75, which is a habitual professional offender or by tendency, that is subject to the special surveillance regime referred to in 14bis of Law 354/75, which is without an effective and suitable domicile according to the needs of protection of persons offended by the crime).

The measure will be adopted by the supervisory magistrate unless serious impediments are identified[23].

[20]See L. CEREDA, *Coronavirus, in caso di contagio tra i detenuti le carceri rischiano il collasso*, on the 9th of March 2020.
[21]Explains Carlo Lio, Guarantor of prisoners or deprived of the freedom of Lombardy.
See L. CEREDA, *Coronavirus, in caso di contagio tra i detenuti le carceri rischiano il collasso*, on the 9th of March 2020.
[22] Cf. D. FALCIONI, *Coronavirus, ecco lo svuota carceri: domiciliari per le pene lievi*, on the 16th of March 2020.
[23] See *https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg*

The Decree thusly introduced has been strongly criticized[24] as it could seem a disguised pardon and in any case it would not be effective enough to reduce the problem of prison overcrowding, since for this purpose the prison population should be reduced by at least half.

One could also reflect on the nature of this institution: an alternative measure to detention or an alternative sentence to detention?

It could not be an alternative measure to detention since the supervisory magistrate, in granting this measure, will not have to evaluate the evolution of the sentenced person's personality and his progress in prison treatment, but rather, if there was a request, the magistrate will have "automatically" grant it unless there are impediments worth mentioning.

However, it could not even be an alternative sentence to detention as it is not applied by the cognition judge but by the surveillance magistrate and also it is not an institution that allows the sentenced person not to enter the prison but that allows the one who is already in prison to exit from prison (should he serve a sentence of no more than eighteen months), so as to reduce the prison population, increase the spaces of freedom within the prison, and comply with the WHO guidelines for the protection needs required by the situation of emergency. It would therefore be a hybrid between the two institutes, born in a situation of necessity and emergency such as to fail to define some of its aspects.

With regard to the second question raised above, in the relationship between the States, on the subject of the European arrest warrant, the material surrender of the subject to the authorities of the requesting State could be problematic, in compliance with the internal security and border closure provisions of the individual countries.

For example, the Italian citizen detained under the regime provided for by art. 41 bis in the prison of Spoleto, claimed by the Spanish authorities for the crime of money laundering, participated in the process by videoconference, in implementation of the containment measures laid down by the Decree of the President of the Council of Ministers of the 8th of March 2020.

[24]See D. FALCIONI, *Coronavirus, ecco lo svuota carceri: domiciliari per le pene lievi*, a criticism from Valter Mazzetti, the secretary general of the Fsp State Police (*Polizia di Stato*), on the 16th of March 2020.

In fact, on the 10th March 2020 the Court of Appeal of Perugia had been notified of the provision of the precautionary measure against the prisoner in Spoleto prison, who was subjected to custodial interrogation by videoconference by the judge of the Court of Spoleto[25]. During the interrogation, the prisoner agreed to surrender to the Spanish authorities and is currently awaiting the decision of the judge, who will have to make more assessments, considering the difficulties resulting from the Coronavirus emergency, not only from a practical point of view (such as the availability of means of transportation and entry into the requesting country) but also with regard to the protection of the subject's health.

In fact, one could wonder if the judicial authority, in assessing whether to deliver the requested person to the authorities of the requesting country, in addition to carrying out the normal assessments provided for by the regulation on the EAW, should also verify that the country involved has adopted the same containment measures or at least suitable measures to predict the infection with Coronavirus.

In the absence of a provision in this regard, we could specifically consider Article 23, paragraph 3, of Law 69/2005, which among the reasons for suspension of delivery also provides for the existence of «humanitarian reasons or serious reasons to believe that the delivery would endanger the person's life».

Therefore if, for example, the judicial authority finds itself evaluating the delivery of a subject to a state convicted by the ECHR for overcrowding, it can deny the surrender not only as it would violate the provisions of the ECHR with regard to the availability of 3 square meters available for each prisoner, but also because it would be a situation that does not comply with the indications given by the World Health Organization on virus prevention measures, which would seriously harm the subject's health.

Strict and frequent checks by law enforcement agencies also contribute to compliance with the provisions contained in the Prime Minister's Decree of March 8th, 2020, which can also cause effects beyond the mere verification of the rules of the Prime Minister's Decree; for example the detection, through one of these

[25] See *https://www.umbria24.it/cronaca/coronavirus-mandato-darresto-europeo-per-un-41bis-ma-il-trasferimento-resta-in-sospeso*

checks carried out in the locality of Viserba, in the province of Rimini, on the 20th March 2020, of the existence of a European arrest warrant against a citizen of the Czech Republic, wanted for the crime of theft committed in his country of origin[26].

We are therefore, at this moment, in a globally particular situation under several aspects: health, economic, political but also judicial, which has provoked and will cause consequences and problems not only within the nation but also in the relationship between the authorities of the various States.

[26]See *https://www.ilrestodelcarlino.it/rimini/cronaca/coronavirus-denunce-1.5075092*

## CONCLUSION

The analysis of this study aims to focus on the results achieved over time by the Member States of the European Union, which, unlike other States in the world, which still use traditional instruments of judicial criminal cooperation, have laid instead solid foundations for the creation of a common legal space, a space for sharing interests and similar cultures, for integrating and affirming the rights of the person.

The first effective step towards the creation of this common area was reached with the Schengen Treaty, abolishing borders and customs duties, first for economic reasons, the for political and judicial reasons.

Once the borders are abolished, only an imaginary line remains between the States. It can be overcome at anytime, as the person acquires a pre-eminent value before yet the value as a citizen of the Nation.

The person as in fact seen as a subject who has innate rights not attributed by the State, and as natural, claimable in any space and time.

Article 27 of the Italian Constitution, affirming the re-educational purpose of the sentence, presupposes the institution of adequate tools for its concretization, and in an international and inter-relational context, attempts have been made to overcome the practical difficulties, (due to the natural cultural differences of the various Countries), by elaborating the instrument of mutual recognition of criminal sentences, which in addition to favouring the re-socialization and re-education of the prisoner, cooperates in the reduction of the prison population.

Given these premises, this study analyzes the point of view of a foreigner, towards whom Member Countries have made great strides, first of all establishing European citizenship.

In fact, if at first, article 18, lett. R), of L. 69/2005, provided the Italian citizenship of the subject as a compulsory reason for refusing the delivery of the requested person, in a process of jurisprudential elaboration on the subject, the sentence[1] 227/2010 of the Constitutional Court declared its illegitimacy in the part in which the same provision did not also provide for the mandatory refusal of a

[1] See the sentence of Constitutional Court, 21.6.2010, n. 227.

citizen of another Member State of the European Union, that legitimately and effectively resided in the Italian territory.

The declaration of illegitimacy of the aforementioned provision, by virtue of the principle of non- discrimination based on nationality[2], and by virtue of the principle of equality[3], also aims to integrate the foreigner who has an effective residence[4] or stay in the Country, in application of article 27, par. 3, of the Italian Constitution, so as to guarantee him too the re-socialization of the offender, through the preservation of his family and social ties.

Otherwise, the foreign prisoner would face serious practical difficulties in executing the sentence in another State, related to linguistic understanding, and forced coexistence with an environment different from his religious but also social culture. The steps taken by Countries both internally and at European level aim to guarantee effective integration and maintain a position of equality and equal opportunities among all men as such, without prejudice to the practical difficulties of integrating a foreigner into society.

However, in a moment of epidemiological emergency, such as the one we are currently experiencing, judicial cooperation between States must be placed in the background, in order to guarantee the fundamental rights of the person (first of all the right to health, also of prisoners, which however, in a possible balancing of rights, seems at times to be subordinated to other needs of citizens, such as the need to obtain security, so as to restrict the right to health of prisoners).

The Coronavirus emergency has caused a regression in terms of integration and cooperation, due on the one hand to the fear of citizens of their near subject and even more of their near subject coming from other Countries, and on the other to the necessary suspension of the Schengen Treaty and of other cooperation institutions such as that of the European arrest warrant, and not without procedural doubts, especially with regard to the terms of delivery provided for by the ordinary discipline.

[2]See art. 18 TFEU.

[3]Otherwise it would be unreasonable to differ in the rules provided for in the case of a European arrest warrant for trial purposes, which equates the citizen and the resident. See art. 3 of Italian Constitution; article 19 of the L. 69/2005.

[4]The definitions of residence or abode, as community notions, require an autonomous and uniform interpretation, in application of Framework Decision 2002/584/JHA.

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